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Victory for Councils - Section 45 Defence Prevails

Since the Civil Liability Act was introduced in 2002 Local Councils have had the benefit of the nonfeasance defence in Section 45 of the Act. Section 45 provides that a roads authority is not liable for any failure to conduct repairs or other road works unless at the time of the accident the roads authority had actual knowledge of the particular risk, the materialisation of which resulted in harm. The leading authority in relation to the section is *North Sydney Council v Roman* in which the NSW Court of Appeal determined that the actual knowledge must be that of an officer that had the authority to carry out necessary repairs.

That interpretation was recently subject to challenge before the NSW Court of Appeal in the decision of *Nightingale v Blacktown City Council*.

Jason Nightingale was walking along Balmoral Street in Blacktown on 27 February 2011 when he stepped into a depression in the footpath where two concrete slabs met and twisted his ankle. The drop was approximately 70-100mm.

The matter proceeded to hearing before his Honour Judge Curtis in the District Court and his Honour determined that Nightingale's claim must fail as he had not proved the Council had "actual knowledge of the particular risk, the materialisation of which resulted in the harm."

Nightingale appealed and in his appeal sought to overturn the previous decision of the NSW Court of Appeal in *Roman*. The matter therefore proceeded to hearing before five judges in the NSW Court of Appeal. Ordinarily the Court of Appeal will be comprised of three judges.

Nightingale argued that the approach of Her Honour Justice McColl, who was in dissent in the decision of *Roman*, should be preferred.

Nightingale also argued on appeal that the Council had failed to exercise reasonable care when carrying out inspections.

Justice Basten in his judgment noted that in order to establish liability Nightingale must prove not only that the Council was aware there was unevenness in the pavement, but also that unevenness was a risk to a pedestrian who was exercising reasonable care for their own safety.

Justice Basten concluded in his judgment that this case was not an appropriate case to reformulate the findings in *Roman*. His Honour stated that:

> *"Undertaking that exercise, the relevant state of mind must relate to a feature of a road work which would constitute a hazard to a person (relevantly for present purposes, a pedestrian) exercising reasonable care for his or her own safety. The nature of the exercise required to identify such a hazard is material to the identification of officers whose knowledge should be treated as that of the roads authority for the purposes of Section 45. That issue was not addressed on the facts of the present case."*

Justice Macfarlan also delivered a lengthy judgment. Justice Macfarlan noted that a witness on behalf of the Council, Tony Brancato, gave evidence that his system of inspection was that he would drive past in a car as slowly as possible although he had to inspect 120km of roads and footpaths per month. Every area would be inspected three to four times per year. Brancato conceded that he may not have noticed a defect in the footpath. Brancato also denied that he had any knowledge of the actual defect. In relation to the evidence of Brancato, Justice Macfarlan noted that his role was to identify and report defects but not order their repair and the trial judge was correct in determining that Brancato's knowledge was not relevant for the purposes of determining whether there was actual knowledge. Further, there was no evidence that Brancato had knowledge of the actual defect.

In relation to the argument of negligent inspections Justice Macfarlan noted that:

> *"The appellant pointed out that the definition of "carry out roadwork" in Section 45(3) of the Act includes the carrying out of any activity in connection with the inspection of a road work and submitted that the present case concerned negligent inspections, which constituted malfeasance, rather than a failure to undertake inspections or other road work which would have amounted to nonfeasance. He submitted that Section 45(1) did not therefore afford the Council immunity because that sub-section was concerned only with nonfeasance.*
>
> *The answer to this submission is that, whilst in one sense the appellant's injuries were caused by the Council employee's allegedly negligent inspections of the footpath and failure to report the defect in question to Council officers with the authority to repair it, they also, and more immediately, were caused by the Council's failure to repair the footpath. This cause was clearly within the ambit of Section 45(1) of the Act, thus attracting the immunity, in the absence of proof of any actual knowledge of the defect in a relevant Council employee. It does not matter that there might have been other causes which fell outside the ambit of Section 45(1) because the falling within it of the immediate cause of the appellant's injury is sufficient to attract the immunity."*

Justice Simpson was in dissent.

Justice Simpson was of the view that *Roman* was wrongly decided and stated that:

> *"What I do not accept is that the "actual knowledge" test can never be satisfied by proof of knowledge of any person who does not come within that category. My departure from the decision in Roman lies in the requirement of knowledge in such a person as a necessary, or minimum, condition of proof of actual knowledge in the roads authority."*

Despite the judgment of Her Honour Justice Simpson the Council prevailed with a 4:1 majority. The decision in *Roman* therefore prevails.

In order to succeed in a claim against a roads authority an injured person must be able to prove that the relevant person within the roads authority had actual knowledge of the risk which caused the accident.

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Discharging a duty of care can involve doing nothing at all

In 2003, Justice McHugh made the following statement in the High Court decision of *Dovuro Pty Ltd v Wilkins*:

> *"A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course. If inaction is a course reasonably open to the defendant, the plaintiff fails to prove negligence even if there were alternatives open to the defendant that would have eliminated the risk."*

Although this statement was made by McHugh J in a case which predated the *Civil Liability Act 2002 (NSW)*, the general proposition in the authority emanating from His Honour's statement has carried forward into the

provisions governing the negligent conduct of a defendant which are found in Section 5B of the Act.

The hallmark of the law of negligence is reasonableness. A defendant must exercise reasonable care to prevent a risk of harm. However, as was made clear by McHugh J in Dovuro, inaction by a defendant may well be a sufficient response to a risk of harm. In other words, doing nothing at all may well discharge a defendant's duty to exercise reasonable care.

The NSW Court of Appeal recently considered this issue in *Lee v Woolworths Limited [2015] NSWSC 1789* in which his Honour Justice Harrison entered a judgment for the defendant following a five day hearing in the Supreme Court of NSW.

Mark Lee sustained significant injuries to his back whilst attempting to re-load Coca Cola products which had become strewn throughout a trailer that was attached to a prime mover Lee had driven to a depot in the Sydney suburb of Yennora during the course of his employment with Williams Bulk Haulage Pty Ltd ("Williams").

The depot was owned by Combined Distribution Management Pty Ltd ("CDM").

The trailer had been loaded in Wickham, Queensland and driven to Sydney by another Williams driver when Lee took over the driving for the final part of the journey to Yennora.

Upon entering the CDM distribution centre, Lee drove the vehicles into an area for the purpose of unloading the goods in the trailer to another trailer for re-delivery to retail outlets. When he opened the trailer he discovered that the Coca Cola products had dislodged from their packaging and were strewn all over the trailer floor.

Evidence given by Lee suggested that he sought assistance from forklift workers at the CDM distribution centre for the purpose of re-stacking the strewn products.

Lee stated that no assistance was forthcoming and he was left to attend to this task himself. His injury occurred during this process.

The case against Wickham was in negligence on the basis that Wickham owed Lee a duty of care by reason of Wickham allegedly being either an occupier of the CDM distribution centre or by reason of its employees, some of whom carried out duties at the CDM distribution centre, were somehow responsible for providing assistance to drivers such as Lee, but had failed to do so in this instance.

Harrison J found that no such duty of care arose. In fact, Wickham had entered into a contract with Williams for Williams to provide drivers including Lee and that agreement specifically required the driver to engage in the tasks associated with unloading and re-loading at the CDM distribution centre.

Further, Wickham had no responsibility for directing and supervising Lee's duties - it being found by his Honour that this remained within the purview of Williams' non-delegable duty of care as Lee's employer.

In addition, his Honour found that the occupier of the distribution centre was CDM, not Wickham, despite some Wickham employees carrying out full time duties at the centre. Critically, his Honour held that the Wickham employees were under no obligation to provide assistance to Lee and as such no duty of care arose.

However, his Honour went further and considered the issue of whether or not Wickham was negligent, if a duty of care in fact arose. It was on this issue that his Honour applied the earlier authority enunciated by McHugh J in Dovuro and found, in these circumstances, that it was an entirely appropriate response to the risk of harm to Lee for Wickham to do absolutely nothing at all.

His Honour arrived at this conclusion by relying upon the same circumstances that caused him to find that Wickham did not owe a duty of care to Lee. Primarily, the obligation was upon the driver to carry out the tasks of loading and unloading at the CDM distribution centre. Questions of how a driver such as Lee ought to be instructed or directed in this regard could only be matters for his employer, Williams, not Wickham.

This case reminds us that the law of negligence does not impose "moralistic" obligations upon defendants to generally provide assistance to others.

A plaintiff must establish the existence of a duty of care arising from circumstances requiring a consideration of the relationship between a plaintiff and defendant.

A duty cannot be imposed on a defendant merely by reason of some theoretical or assumed obligation to provide assistance, merely because it ought to have done so.

Harrison J expressly relied upon the following statement made by Gleeson CJ in the High Court decision of *Swain v Municipal Council* in which the then Chief Justice confirmed that:

> *"In legal formulations of the duty and standard of care, the central concept is reasonableness…People do not expect, and are not entitled to expect, to live in*

a risk-free environment. The measure of careful behaviour is reasonableness, not elimination of the risk. Where people are subject to a duty of care, they are to some extent their neighbours' keepers, but they are not their neighbours' insurer."

As Lee was not in any relationship with Wickham, it was entirely appropriate for Wickham to do nothing in response to the risk of harm to Lee during the unloading process at the CDM distribution centre.

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Vicissitude reductions on damages awarded for future losses based on life expectancy

For several decades, a Court has applied a discount in personal injury claims for damages awarded in respect of future economic losses including loss of earning capacity by reason of vicissitudes.

Generally speaking, the vicissitudes of life are the future possibilities of events occurring in the claimant's life that might affect the head of damages to which the reduction or discount is applied, regardless of the injury sustained in the accident the subject of a claim.

Classic examples of this are ordinary age related illnesses that affect the general population and the chance of a traumatic event or early death which cannot be calculated precisely.

To deal with this situation, the Courts have historically applied a standard percentage reduction after calculating the future loss award to which the reduction is then applied.

Throughout the different jurisdictions within Australia, the States and Territories have their own rule of thumb reduction for vicissitudes. In New South Wales for instance, it has long been the practice of the Courts to reduce awards for future loss of earning capacity by 15% on account of vicissitudes.

However, when future loss awards are made by the Court in respect of damages for future out of pocket expenses or future domestic assistance where the award is calculated on a weekly basis for the remainder of a claimant's life, the life expectancy tables are adopted to calculate the present day value of that ongoing future loss.

Traditionally, the Courts did not apply an additional reduction on those awards in respect of vicissitudes. The rationale behind this principle is that the life expectancy tables already factor into the calculation future uncertainties like those described above which cannot be accurately assessed.

In more recent times, a trend has developed in New South Wales in particular for the Courts to make an additional reduction for vicissitudes on awards of future domestic assistance and future treatment expenses notwithstanding the use of the life expectancy tables which form the basis of the award.

This was recently illustrated in a single justice decision of the New South Wales Supreme Court in *Norris v Routley* in which his Honour Justice Harrison not only applied a discount rate for vicissitudes in the circumstances but at a different rate of 7.5% instead of the usual 15% reduction.

In an earlier judgment delivered by Justice Harrison in the same case in July 2015, His Honour made findings in the claim which was a claim for damages pursuant to the *Compensation to Relatives Act 1897* (NSW) brought by Dr Mary Norris who was widowed by the death of her husband.

Mr Norris had suffered from liver disease secondary to a Hepatitis C infection from which he died at just 52 years of age.

The defendant, Dr Routley, admitted for the purpose of the proceedings that the deceased was a suitable candidate for liver transplant surgery that would have saved and prolonged his life such that his death was in effect caused by Dr Routley's negligent failure in a proper or timely way to arrange the transplant surgery.

Justice Harrison observed that the surviving widow, Dr Norris, was the primary breadwinner earning a high income which would be a significant factor in assessing any entitlement to damages by Dr Norris and her family members for the loss of services provided by the deceased.

His Honour stated that the method of calculating an entitlement to damages involved a process of setting off losses against gains which usually occur when assessing the loss of a deceased's income. This process generally involves a calculation of the deceased's income after deducting tax and work related expenses which is then set off against the amount that the deceased would have consumed such as amounts that would have been spent on the deceased's food, clothing, general living and personal expenses and medical treatment.

Due to the deceased's liver condition, Justice Harrison identified three issues for which a calculation of future costs was necessary in determining the total "consumption" costs that the deceased would have enjoyed from the household income.

This, His Honour noted, also involved a determination of the following questions:

- whether anything, and if so what, ought to be allowed by way of discount for the vicissitudes of life upon the deceased's income and domestic services provided by him;
- whether anything, and if so what, ought to be allowed by way of discount for the vicissitudes of life upon Dr Norris' income.

On the first point, his Honour found in his earlier judgment that the deceased would have survived until the date of Dr Norris' retirement at the age of 65 in 2026 and that the deceased would have continued to work as his wife's practice manager until that time.

His Honour also found that the deceased would have provided domestic services until at least the date of his wife's retirement in 2026.

The question that his Honour identified was whether the deceased's income and the value of his domestic services should be discounted for vicissitudes over the assumed 17 years of life that he would have enjoyed and if so at what rate.

Unsurprisingly, it was contended on behalf of Dr Norris that there should be no reduction for vicissitudes and Dr Routley argued for a reduction on the basis that the deceased might not have survived more than a few years after his transplant, notwithstanding the finding made by Justice Harrison in his earlier judgment that the deceased would have enjoyed a life expectancy of 17 years had the transplant occurred.

His Honour decided this issue by applying a vicissitudes discount of 15% with respect to the value of domestic services that would have been provided by the deceased but in respect of the deceased's income that he would have earned, a vicissitudes reduction of 7.5% was applied.

On the second issue regarding the vicissitudes of Dr Norris' own income, it was contended on behalf of Dr Norris that a 50% reduction should be applied whereas Dr Routley contended for a 15% reduction. On this issue, Justice Harrison accepted the arguments on behalf of Dr Routley and ordered a 15% reduction for vicissitudes of life upon Dr Norris' income.

Whilst this decision presented with somewhat unique circumstances in terms of the level of income derived by the surviving widow and the medical issue which culminated in the early death of the deceased, the Court was nevertheless called upon to provide assessments regarding the ultimate entitlement to damages under the *Compensation to Relatives Act* which involves the application of life expectancy tables and future loss calculations.

What the case illustrates is that, despite the traditional view to make no reduction for vicissitudes when adopting the life expectancy tables, it is clear that this traditionally held view is not a rigid practice from which the Courts will not depart.

More and more examples of the Courts applying a vicissitudes discount on future loss calculations when assessing damages using the life expectancy tables are becoming commonplace.

Accordingly, insurers should factor into their reserving practices the prospect of additional vicissitudes discounts in the circumstances where claims involving significant pre-existing medical conditions, unrelated to the negligently caused injury, are in play.

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A small mistake can have big consequences

The recent New South Wales Supreme Court case of *LM Investment Management Limited (In Liquidation) (Receivers Appointed) v BMT & Assoc Pty Limited* [2015] NSWSC 1902 illustrates the importance of consultants providing accurate advice on building projects particularly in view of the potential for significant costs or liabilities to be incurred.

The plaintiff, LMI, had lent money to a development company called Greystanes Projects Pty Limited to fund the purchase of land and the construction of warehouses at a property at Greystanes. The loan agreement provided that the amount borrowed by Greystanes was at no time to exceed 66.67% of the estimated value of the completed project. At the time of execution of the loan agreement in 2007 the completed project was estimated to be worth $35 million; accordingly the amount to be lent to Greystanes was $23,335,000.

Greystanes entered into a building contract with Toro Construction Pty Limited for a contract price of $11,990,000 plus GST and all three parties entered into a side deed. Under the terms of the documentation between the parties, Toro would submit monthly claims for progress payments which, subject to LMI being satisfied that the work had been carried out to the claimed value, would be paid by means of drawdown from the loan facility.

In accordance with this process, LMI engaged BMT, a firm of expert quantity surveyors, to provide an independent assessment of each of Toro's payment claims.

By late 2008 approximately two-thirds of the construction work had been completed and BMT had certified that Toro's work had a total value of $8,630,430 excluding GST. After taking into account a retention fund as allowed by the contract, BMT had recommended that LMI advance a total of $8,567,000 in progress payments.

However by that time the global financial crisis had had a significant impact on property values. A new valuation of the property was obtained and it was estimated that the completed project would be worth only $31,414,152. Accordingly at that point Greystanes had already been advanced in excess of 66.67% of the completed value of the project and LMI was not obliged to advance any more funds.

Being unable to independently pay Toro the amount of its progress payments, Greystanes was forced to direct Toro to cease construction work and the project floundered.

When LMI was considering its options to try to recover the debt owed by Greystanes under the loan agreement, it was discovered BMT had over-valued the work carried out by Toro Construction by a total of $2,136,149.

LMI sued BMT alleging that BMT had breached the duty of care it owed to LMI when assessing the value of Toro's work and recommending payments.

In the proceedings, BMT submitted that because LMI had not specifically pleaded that it was in a position of vulnerability, no duty of care had arisen. In this regard, BMT relied on the decision in *Woolcock Street Investments Pty Limited v CDG Pty Limited* in which the High Court had noted that the vulnerability of the plaintiff was relevant in cases where there is a duty of care to avoid economic loss.

However in the current case the judge held that in circumstances where BMT had clearly been put on notice as part of its engagement that LMI was relying on BMT's assessments in order to decide how much should be drawn down every month, a duty of care clearly arose. Further, the judge noted that on the evidence there was no question that LMI's employees had completely relied on BMT's advice in this regard.

Having been unsuccessful in avoiding liability for LMI's loss, BMT challenged the amount of damages claimed by LMI to have been suffered. BMT argued that when the retention of 5% had been taken into account, the difference between the amount advanced by LMI and later agreed by the experts as the true value of the work was only $1,419,408.00, and this represented the amount of LMI's loss.

The judge disagreed with this assessment. He stated the true measure of LMI's loss was the difference between what it had actually paid to Toro and the amount it would have paid to Toro if BMT's advice had been accurate. In this regard any amounts withheld as retention moneys were irrelevant. The relevant difference between the amount paid and the amount that should have been paid was $2,044,162.00 and this represented the amount of LMI's loss.

As a third point, BMT sought to reduce the amount of its liability by pleading that Greystanes was a concurrent wrongdoer and therefore BMT's liability to LMI should be reduced pursuant to Section 34 of the *Civil Liability Act 2002* (NSW) and Section 87CB(1) of the *Trade Practices Act 1974* (Cth). On BMT's argument, by Greystanes failing to pay the amount owed under its loan agreement with LMI, Greystanes caused or contributed to the loss sustained by LMI.

However, again the judge disagreed with BMT's submissions. His Honour held that the concept of a concurrent wrongdoer necessarily requires the loss to have been sustained by reason of a failure to exercise reasonable care, not by the failure to repay a debt; this was consistent with the legislation's requirement that the parties' relative "responsibility" for the loss be assessed by the Court.

In this case the quantity surveyors had been engaged to carry out a specific task on a monthly basis with a commensurate fee. However their failure to provide accurate advice led to their employer sustaining losses significantly higher than their fees.

This case demonstrates that on building projects in particular, an act of negligence by any one of the parties can have a significant monetary impact – even when the negligence is by a consultant with a relatively peripheral role. To minimise the risk of this occurring, internal processes should be set up and constantly reviewed to monitor and check the quality and accuracy of consultants' advice.

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The danger of attempting to retrospectively imply terms into a contract

In our December Newsletter we discussed the importance of preparing formal documentation for a transaction particularly to ensure that all parties have a consistent understanding of their obligations and rights going forward.

This was again illustrated in the recent New South Wales Court of Appeal decision of *Hussain v Haynoum*

Developments Pty Limited [2015] NSWCA 420. The outcome of this project would likely have been very different if the parties had turned their minds to key considerations at the commencement of the project, rather than trying to establish their positions retrospectively.

The appellants, Emad Hussain and Buthania Said, wanted to develop land they owned at Telopea by constructing seven townhouses on it. They engaged an engineer, Mr Haykal, under a verbal agreement to provide structural engineering services for the project. This included undertaking the structural design, inspecting the work at various stages to ensure it accorded with the structural design and at the completion of the works providing a certificate of compliance. A company associated with Mr Haykal, Haynoum Developments Pty Limited advanced a total of $309,000.00 to the appellants to assist them with the development. The remainder of the financing for the project was obtained from Arab Bank Australia Limited.

Towards the completion of the development, Mr Haykal issued an invoice for his fees in excess of $97,000. Because he had issued his invoice in accordance with the *Building & Construction Industry Security of Payment Act 1999* (NSW) and the appellants did not provide a payment schedule as required by the Act, Mr Haykal became entitled to the full amount of his fees. At the same time, Haynoum Developments pressed for the payment of the $309,000 that had been lent by it to the appellants along with interest of 15% per annum.

Mr Haykal also refused to issue a certificate of compliance in relation to the structural work in the development while these moneys remained outstanding. Without the certificate, the principal certifying authority was unable to issue a final occupation certificate for the development, and the appellants were not able to complete the sale of the townhouses.

After a series of negotiations, the parties entered into a deed under which the appellants agreed to pay and the respondents agreed to accept a total of $431,000 in satisfaction of all of the claims that had been made by Mr Haykal and Haynoum Developments.

The appellants challenged the deed, submitting to the Court that by withholding a certificate of compliance, Mr Haykal's conduct was in breach of an implied term of his retainer that he issue certificates promptly. The Court rejected this argument, applying the classic test set out by the Privy Council in *BP Refinery (Western Port) Pty Limited v Hastings Shire Council* (1977) 180 CLR 266 at 283. Under this test, five things must be shown before a term can be implied into a contract, namely:

- it must be reasonable and equitable;
- it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- it must be so obvious that "it goes without saying";
- it must be capable of clear expression; and
- it must not contradict any express term of the contract.

The Court noted that the implied term for which the appellants argued was not necessary to give business efficacy to the contract; nor was it so obvious that it "goes without saying". Further, the Court held that the contract between the appellants and Mr Haykal could work perfectly well without such an implied term.

The Court commented that in this case the argument as to "business efficacy" really meant "business efficacy from the perspective of the appellants", and the appellants were not asking the Court to imply a term to make their contract with Mr Haykal work, but were instead asking the Court to include a term which they could have negotiated but failed to do so – a term to make the contract work in their favour in the events that have occurred. In this regard, the appellants were seeking to have the Court renegotiate the contract so that it would have the effect that they now desired.

The Court also considered the requirements of the environmental legislation in relation to certification and concluded that Mr Haykal's conduct in withholding the certificate was not in contravention of the regulations.

The appellants had also argued that Mr Haykal's conduct was unlawful because their agreement to the deed was under duress or alternatively was due to unconscionability.

The Court commented that while the case had been pursued on the basis that the defences of duress and unconscionable conduct were interchangeable, this was not correct. The common law of defence of duress looked to the quality of the consent of the weaker party; the focus of the statutory prescription against unconscionable conduct looks to the conduct of the stronger party.

In this case the Court noted that the negotiations leading up to the making of the deed had been drawn out over a month or more and that each side had had the benefit of legal advice. No doubt the appellants had been under pressure to come to terms with Mr Haykal and Haynoum Developments, who had the superior bargaining position because the principal certifying authority needed Mr Haykal's certificate. But, the exploitation of that superior position involved no unlawful conduct – it was just a consequence of everyday negotiation in which the party in the stronger

position is usually able to get at least most of what it wants.

As a consequence, the appellants were held to the promises they had made in the deed and were unsuccessful in their appeal.

This case once again illustrates the desirability of considering key issues and setting down on paper each party's expectations in relation to a transaction before events arise which can lead to the parties being more adversarial.

A failure to properly negotiate and record a transaction may lead to the position where you are later in an inferior bargaining position and come off second best in any dispute.

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EMPLOYMENT ROUNDUP

High Court extends reach of "sham contracting" prohibitions

The "worker" versus "independent contractor" battle is played out in many ways in Australia's industrial system. The distinction can have very significant financial and commercial implications for employers and workers alike.

By and large, the Fair Work Act 2009 (FWA) and predecessor legislation contain a number of provisions which seek to preserve the status and rights of employees even for those who operate under independent contractor arrangements. The clear legislative intent is that the National Employment Standards and other workplace rights should apply to those who, in reality, are workers, regardless of the structure utilised to secure their work.

The perceived economic disadvantage of having an employee workforce, however, continues to drive employer organisations into sometimes elaborate schemes designed to overcome the legislative provisions.

A key legislative provision is found in section 357 of the FWA. It is headed "Sham Contracting" and provides:

> *"(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contractor services under which the individual performs, or would perform, work as an independent contractor."*

Section 357 is a civil penalty provision. Contravention can give rise to proceedings for pecuniary penalty orders brought by the Fair Work Ombudsman or an industrial association (union). Maximum pecuniary penalties are severe.

The High Court recently was required to determine if the section prohibited an employer from misrepresenting to an employee that the employee performs work as an independent contractor under a contract for services with a third party (rather than under a contract with the employer). It held that the answer to that question is in the affirmative - Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45

The facts on which the Court reached that conclusion were these: Quest operated a business of providing serviced apartments, in the course of which Quest had for some years employed Margaret Best and Carol Roden as housekeepers. Contracting Solutions Pty Ltd operated a labour hire business.

Quest and Contracting Solutions purported to enter into a "triangular contracting" arrangement. The arrangement had two components. First, Contracting Solutions purported to engage Ms Best and Ms Roden as independent contractors under contracts for services between them and Contracting Solutions. Next, Contracting Solutions purported to provide the services of Ms Best and Ms Roden as housekeepers to Quest under a labour hire agreement between Contracting Solutions and Quest.

Quest, by its conduct, then represented to Ms Best and Ms Roden that they were performing work for Quest as independent contractors of Contracting Solutions.

In fact, Ms Best and Ms Roden continued to perform precisely the same work for Quest in precisely the same manner as they had always done. In law, they never became independent contractors. At the time Quest represented that they were performing work for Quest as independent contractors of Contracting Solutions, they remained employees of Quest under implied contracts of employment.

The Fair Work Ombudsman brought a proceeding in the Federal Court claiming, amongst other things, pecuniary penalty orders against Quest for contraventions of s 357(1) of the FWA. The judge at first instance dismissed that part of the claim, and an appeal from his decision was also dismissed.

The Full Court of the Federal Court gave the sham contracting section a confined operation. It held that, to contravene the provision, a representation by an employer to an employee must mischaracterise the contract of employment that exists between the employer and the employee "as a contract for services made between the employee and the employer".

Because the arrangement Quest had entered into involved a contract with a third party, on this reasoning, there had been no breach of section 357.

By its unanimous decision, the High Court held that this approach is wrong. It said:

> *"To confine the prohibition to a representation that the contract under which the employee performs or would perform work as an independent contractor is a contract for services with the employer would result in s 357(1) doing little to achieve its evident purpose within the scheme of Pt 3-1. That purpose is to protect an individual who is in truth an employee from being misled by his or her employer about his or her employment status. It is the status of an employee which attracts the existence of workplace rights."*

In other words, dressing up an "independent contractor" arrangement by using a third party labour hire provider will not work.

No doubt there will be other attempts to disguise the true employment relationship. The benefits, however, are often more perceived than real - especially when the arrangement falls foul of the ever expanding net of the FWA, leading to the risk of substantial fines.

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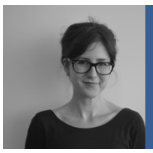
WORKERS COMPENSATION ROUNDUP



WIRO – the First Review of a Work Capacity Decision

For the first time the Supreme Court has reviewed the provisions governing the powers of WIRO to set aside a Work Capacity Decision (WCD) made by a Scheme Agent. Essentially, the Court determined WRIO had made an error of law and had taken into account irrelevant considerations. The Court considered it was unreasonable to set aside a valid WCD due a failure to comply with incidental procedural requirements where that failure did not impact on the substance of the decision.

Lucy Simpson was a carer and assistant at a nursing home. She had been paid more than 130 weeks of weekly benefits and sought a merit review of a WCD which determined she was capable of working 20 hours per week in suitable employment, earning $459.20 per week. Simpson was also not employed for 15 hours or more per week and so did not meet the criteria for continuation of weekly payments. Her payments were therefore reduced to nil. The WCD issued relied on certificates of capacity, a surveillance report and a functional capacity evaluation report

WorkCover (as it then was) confirmed Simpson was not entitled to weekly benefits after the second entitlement period.

Simpson then applied to WIRO for a procedural review under Section 44(1)(c) of the Act.

WIRO found the Scheme Agent failed to comply with the guidelines and the WCD was set aside for the following reasons:

- The Scheme Agent failed to explain how the figure of $459.20 was calculated.
- The Scheme Agent failed to explain the effect of Section 59A(3).

WIRO therefore reinstated Simpson's weekly payments.

The Scheme Agent sought judicial review in the Administrative Division of the Supreme Court.

Justice Davies found the Scheme Agent's decision should not have been set aside where the effect of an incidental procedural breach did not invalidate the decision.

His Honour accepted that the Scheme Agent did not explain how the figure was derived but this was irrelevant. What was required was that the Scheme Agent assess whether Simpson had current work capacity as defined in Section 32A and in accordance with the requirements of Section 38(3)(b). The amount Simpson could earn in suitable employment was irrelevant to the determination of current work capacity. The decision was unfavourable to Simpson because she had not met the requirement to return to work for at least 15 hours per week and be in receipt of at least $155 per week. Justice Davies found it was not necessary for the Scheme Agent to calculate or estimate what the worker could earn in suitable employment. There is nothing in the Guidelines which requires it.

WIRO determined that the Scheme Agent merely reproduced Section 59A and failed to properly explain to Simpson that she may again become entitled to payment of medical and treatment expenses should she again be entitled to weekly payments. Justice Davies found there was nothing in the Guidelines suggesting the need for any further explanation. Rather, the Guidelines only require the Scheme Agent to reference the relevant legislation.

Justice Davies concluded that the Scheme Agent had not breached its obligations under the Guidelines and, even if it did, such failure would not result in the setting aside of the decision. Such a result would be legally unreasonable. His Honour noted:

> *"Procedural error which amounts to procedural unfairness will amount to an error of law and would ordinarily justify the setting aside of a decision. However, other procedural breaches may not have the same effect."*

His Honour commented that it was difficult to accept the Act and Guidelines contemplate that any breach of the Guidelines would necessarily result in the invalidity of that decision, especially where the legislation provides for a merit review before a procedural review. Provided that the Scheme Agent has asked the correct questions when formulating the WCD and provided that reasons for the decision are provided in a way that explains the matters set out in the Guidelines, the decision should stand.

His Honour determined that procedural rules are frequently broken but ultimately, procedure is "the servant of substance". Breach of procedure can be overlooked where it does not invalidate the final outcome. WIRO can only set aside a Work Capacity Decision on procedural grounds if such a breach impacts the substance of the decision. This is a good outcome for Scheme Agents. The decision also provides some clarity and paves the way for a more pragmatic approach to future procedural reviews.

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Limitations to Reconsideration Applications of Medical Assessment Certificates

In recent newsletter articles we have commented on numerous avenues explored by workers' solicitors endeavouring to overcome the "one claim" restriction introduced by the 2012 amendments. In particular our November 2015 newsletter reported the decision of *Iredale v State of NSW* where the claimant had relied upon the reconsideration power under Section 350(3) WIM Act 1988 as a means of avoiding the "one claim" restriction for whole person impairment (WPI).

Despite the success of the claimant in *Iredale* the recent decision of Acting President Bill Roche in *O'Callaghan v Energy World Corporation Limited* [2016] NSWWCCPD 1 indicates there are however limits on the powers of reconsideration.

Ms O'Callaghan suffered various injuries in January 2011 to her cervical and thoracic spine, left wrist and hand and sacral area. Claims were made for compensation pursuant to Section 66 in August 2012 which ultimately proceeded for assessment by an AMS who allowed 5% WPI for injury to the lumbar spine and 5% WPI for the injury to the coccyx. The AMS was not asked to assess and did not assess Ms O'Callaghan's cervical spine. The respondent agreed to pay Ms O'Callaghan compensation pursuant to Section 66 in respect of 10% WPI.

After Ms O'Callaghan's cervical spine deteriorated, her solicitors made a further claim for 5% WPI of the cervical spine and an additional 2% WPI for interference with activities of daily living, to total 16% WPI. Ms O'Callaghan's solicitors sought the Scheme Agents concession that the threshold for the purposes of a work injury damages claim (15%) had been met.

The Scheme Agent disputed Ms O'Callaghan had a WPI of 15% or greater and thus her entitlement to bring a work injury damages claim.

Ms O'Callaghan's solicitors then filed an application for assessment by an AMS for determination of a threshold dispute. The Scheme Agent relied upon Section 322A to assert that Ms O'Callaghan was not entitled to a further assessment of WPI by an AMS.

Ultimately, Ms O'Callaghan's solicitors withdrew the application and subsequently proceeded to file an appeal against the earlier Medical Assessment Certificate under Section 327 relying on deterioration in Ms O'Callaghan's condition that resulted in an increase in WPI and availability of further relevant medical evidence that was not available before the initial medical assessment.

The Registrar's Delegate dismissed the appeal on the ground there was no appeal available against a medical assessment once a dispute had been the subject of a determination by the Commission by way of a consent certificate of determination following the initial Medical Assessment Certificate.

Ms O'Callaghan's solicitor then sought to rely on the reconsideration power in Section 350(3) seeking to have the consent orders set aside to allow her to pursue her appeal. The reconsideration application was opposed on the basis of Section 66(1A) which

provides that only one claim can be made under the 1987 Act for WPI.

The matter proceeded on the basis of written submissions before an arbitrator who determined the deterioration referred to in Section 327(3)(a) must relate to the assessment of permanent impairment that was the subject of the referral to the AMS under Section 325(1), being the lumbar spine. As there had been no challenge to the AMS's assessment of the degree of permanent impairment as a result of injury to the lumbar spine, the arbitrator determined there was no appeal in respect of the deterioration of the cervical spine which had not previously been referred to or assessed by the AMS.

Ms O'Callaghan appealed the decision. In his judgment Acting President Roche was of the preliminary view that as the monetary threshold in Section 352(3)(a) had not been met (as Ms O'Callaghan had claimed no compensation in the proceedings) there was no right of appeal.

In the event that he was wrong on this issue, he proceeded to determine the substantive issue agreeing with the arbitrator that the appeal available in Section 327 is an appeal against the medical assessment made by the AMS. As the AMS had not been required to make an assessment of WPI as a result of injury to the cervical spine, it was not open to Ms O'Callaghan to use Section 327(3)(a) to appeal against an assessment the AMS did not make.

The Acting President agreed with the Scheme Agent's submission that Section 327 does not contemplate a situation where a worker can continue to bring claims, under the guise of an appeal, for a deterioration in respect of parts of the body that were not previously the subject of a dispute or an assessment by an AMS. The critical point is that a Section 327(3)(a) appeal is an appeal against the AMS's medical assessment and is thus confined to the body parts the AMS assessed.

Whilst the reconsideration provisions provide an avenue for a worker to effectively make more than one claim for compensation for permanent impairment, the decision makes it clear that the reconsideration power is limited to those body parts that are the subject of the earlier assessment only and cannot be relied upon to allow continuing claims for "top-up" compensation in respect to injuries to other parts of the body. Hence a degree of caution will need to be exhibited by workers' solicitors to ensure all relevant body parts that are the subject of an injury are referred for AMS assessment in the initial claim.

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CTP ROUNDUP

A single vehicle – can it be a Blameless Accident?

In the recent case of *Melenewycz v Whitfield* [2015] NSWSC 1482, the Supreme Court of NSW considered whether the blameless accident provisions of the Motor Accident Compensation Act 1999 ("MACA") could ever apply to a driver, or a driver involved in a single vehicle accident.

As His Honour Justice Hamill noted, the circumstances of the case could only have arisen in Australia. On 12 August 2011 Anthony Melenewycz was riding a friend's motorcycle on a red dirt road between Hungerford in Queensland and Bourke in NSW. After stopping on the way for lunch, Melenewycz continued on his journey and not long after, was struck by a kangaroo, causing him to fall heavily off the bike. The road on which the accident occurred was straight and wide with a clearing to either side. The speed limit was 100km/h.

Melenewycz brought an action against the owner of the motorcycle and the third party insurer under the blameless accident provisions of the MACA.

The defendants denied the accident was blameless and asserted the plaintiff was negligent by failing to keep a proper lookout and riding at an excessive speed.

The defendants relied on Section 7E which provides, in part, that a driver cannot recover damages under the division where the collision "was caused by an act or omission of that driver". The defendants relied on a series of what were described as "cascading" submissions.

His Honour reviewed the relevant case law and found nothing to support the proposition that a driver could never rely on the blameless accident provisions. His Honour referred to a number of authorities and formed the view that previous cases were either not binding on the Court or were not directly on point.

His Honour also noted that both parties purported to rely on the Minister's second reading speech to make precisely the opposite point.

The defendants submitted that section 7E excluded all claims by drivers of motor vehicles, or at least all claims of by drivers in single vehicle accidents.

His Honour concluded that these submissions by the defendants relied on a construction of 7E which meant that the very act of driving itself is a (but not necessarily the only) cause of injury.

However His Honour found such a construction did not accord with accepted principles of statutory interpretation which require giving meaning to every word of a provision. If the defendant's construction was to be accepted, the part of Section 7E which required an enquiry as to whether the accident was caused by the driver would be obsolete.

His Honour concluded that while there was little doubt that Section 7E was intended to place significant limitations on the circumstances where a driver in a blameless accident may recover (for example, there will be no recovery where the driver's act or omission was the cause of the accident, even if the act or omission was voluntary), it did not mean that such a driver would never be able to recover.

For the same reasons, his Honour rejected the defendant's further submission that the provisions can never apply to a driver in a single vehicle accident.

His Honour went on to consider the defendant's alternative submission that at the very least, Section 7E excludes a blameless accident claim by a driver except where the manner of driving "is completely irrelevant to the occurrence of the accident".

His Honour noted that for a plaintiff driver to be excluded from the operation of the blameless accident provisions, their act or omission must have been the cause of the accident in the expansive sense contemplated by Section 7E. Ordinary principles of causation do not apply.

Ultimately, His Honour concluded that the act or omission must be something more than an act of driving that was merely a background fact explaining why the driver was in the position they were. In other words, the mere fact that the driver was driving was not enough to establish causation which would disentitle a person to damages pursuant to Section 7E.

Having considered whether, theoretically, Melenewycz could actually be entitled to damages, His Honour went on to consider the particular circumstances of the case; namely, whether an act or omission on the part of Melenewycz caused the collision with the kangaroo.

Ultimately, His Honour examined a variety of evidence, and determined that in the circumstances, the failure of Melenewycz to observe the kangaroo earlier and take evasive action was not an omission which "caused" the accident for the purposes of Section 7E.

Likewise, His Honour accepted the evidence of Melenewycz that the speed at which he was travelling at the time of the collision (approximately 90-100km/h) "was unexceptional in the prevailing conditions".

In this regard His Honour noted that while as a matter of logic and common sense, slower speed enables a greater reaction time, the evidence did not indicate that a slower speed would have meant the accident did not occur.

His Honour was therefore satisfied that there was no act or omission of Melenewycz that caused the collision or his injuries. Rather, Melenewycz's actions leading up to the collision did "no more than provide a background narrative by which he came to be riding at the same time when, and place where, the kangaroo crossed the Hungerford Road and, in doing so, knocked the plaintiff from his motorbike causing him injury".

Accordingly, Melenewycz was not disentitled to damages. Further, it was agreed by the parties that contributory negligence did not arise, as the effect of Section 7E was that a negligent driver whose actions were at least partially the cause of their injuries would not be entitled to compensation.

The decision is consistent with the District Court Judgment in Connaughton where a driver of a single vehicle was also allowed to recover damages due to the blameless accident provisions and provides further clarity on the issue.

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Where plaintiffs are just as – if not more – liable: causation in motor vehicle accidents

Where plaintiffs engage in risky or dangerous behaviour on the roads, the courts generally are reluctant to attribute sole responsibility to defendant drivers. But how about when a plaintiff puts themself in a position where the risk of a collision is nearly unavoidable? How do the Courts then deal with the question of responsibility on the part of the defendant?

The Court of Appeal recently considered this question in the matter of *Huebner v the Nominal Defendant* [2015] NSWCA 333.

Ms Huebner had been riding her motor scooter in a northerly direction along King Street at Newtown behind a white vehicle whose driver was talking on a mobile phone and driving erratically. The driver of the

white vehicle was frequently and randomly veering between the two northbound lanes without activating his indicators.

After having come to a stop at the lights at Enmore Road and telling off that driver at a traffic light, Ms Heubner then alleged that as she continued in a northerly direction along King Street, the white vehicle then proceeded to deliberately block her path on several occasions by veering and then braking in front of her. Ms Heubner's evidence was that she then activated her left indicator and attempted to merge into the lane on her left to avoid a stationary black Ford in the right hand lane.

At that point, Ms Huebner stated there was a large gap in traffic that was available for her to merge into the adjacent lane that had been left by the white vehicle. As she began to merge, Ms Heubner alleges that the white vehicle deliberately sped up and veered into her scooter, pushing it into the black Ford. Ms Heubner lost control of her scooter and collided with both vehicles.

However, the evidence of an independent witness, Louie Ralevski, told a very different story.

Ralevski had been travelling behind Ms Heubner and the white vehicle for the duration of the entire encounter. In contrast to Ms Heubner's recollection of how the accident occurred, Ralevski maintained that Ms Heubner's scooter was behind the white vehicle at the point when the white vehicle drew level with the black Ford. He gave evidence that Ms Heubner appeared to be trying to get in front of the white vehicle by deliberately driving her scooter in between it and the black Ford. He was unequivocal that there had been a collision between Ms Heubner's scooter and the black ford first. He did not agree that Ms Heubner had been pushed into the black Ford by the white vehicle.

Another independent witness, Ms Kara Rozema, had been walking down King Street. She recalled hearing the collision and then turning around and seeing the Ms Heubner *"getting pushed along by a white station wagon"*.. She recalled that there was less than *"a foot"* of space in between the white vehicle and the black ford through which Ms Huebner tried to ride her scooter.

At first instance before Olsson DCJ, in the District Court her Honour had rejected Ms Heubner's account and preferred the evidence of the independent witnesses as to the circumstances of the accident. Her Honour found that both Ms Huebner and the driver of the white vehicle had been *"engaged in erratic and dangerous driving"*. Significantly, there was a finding that Ms Huebner had been located behind the white vehicle, not in front, and had gone to merge into the adjacent lane and misjudged the distance available. The white car did not swerve nor did it speed up in a deliberate attempt to push Ms Heubner into the black ford.

Her Honour found that whilst the driver of the white vehicle had been driving in an erratic and dangerous manner, the sole cause of the accident was Ms Huebner's unsuccessful attempt to ride between the white car and the black Ford. Even though this may have been a result of Ms Heubner being *"disturbed"* by the white car's conduct, she nevertheless made *"an error of judgment"* when she tried to change lanes. Her Honour concluded that the defendant's actions had not caused the accident and it was in fact Ms Heubner who had caused the accident. Her Honour accordingly entered a judgment in favour of the defendant.

Heubner appealed.

The Court of Appeal were asked to revisit Section 5D of the *Civil Liability Act 2002* (NSW) on the question of causation, which reads in part as follows:

> *"(1) A determination that* negligence *caused particular* harm *comprises the following elements:*
>
> *(a) that the* negligence *was a necessary condition of the occurrence of the* harm *("factual causation"), and*
>
> *(b) that it is appropriate for the scope of the negligent person's liability to extend to the* harm *so caused ("scope of liability"). "*

It was submitted for Ms Heubner that she had been so intimidated by the driving of the white car prior to the accident that *"she had no alternative but to try to get in front of the white car and thereby avoid the intimidatory behaviour of the driver"*.

The Court of Appeal rejected this argument on the basis of the factual findings of Ollson DCJ, who concluded that once the white car had drawn level with the black Ford, it was up to Ms Heubner to decide where to go next on her scooter. Ms Heubner had the options to slow down, stop her scooter, or simply remain behind the black Ford. Ultimately it was her decision to ride her scooter between the white vehicle and the black Ford, particularly *"when there was insufficient space to do so. There was no compulsion upon [Ms Heubner] to act in this way"*.

In essence, it was concluded by the Court of Appeal there were no actions on the part of the driver of the white car which contributed to the accident. It was certainly not open to the Court to find that the intimidating behaviour of the driver of the white car was such that Ms Heubner was incapable of controlling her

motor scooter at all. Their Honours were not interested in going any further once they had considered the factual findings made by Ollson DCJ after rejecting Ms Heubner's recollection of how the accident occurred.

Accordingly, Olsson DCJ's decision was upheld.

The Court of Appeal have made it clear that Section 5D is not a kind of "fall-back" provision that allows plaintiffs to point the finger at defendant drivers. Whether or not a driver had been driving erratically and dangerously prior to an accident, a Court will look at the cause of the accident itself.

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