Gillis Delaney Lawyers

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## IN THIS EDITION




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## Indemnity and other issues - can the Insurer be sued direct?

It is a not uncommon problem in legal proceedings that a corporation against whom a party seeks damages will no longer be a registered entity. So what happens in circumstances where the corporation had a policy of insurance that may respond to the claim but indemnity has been denied by the insurer? Can the insurer be joined to the proceedings?

The High Court has recently considered this issue in the decision of *CGU Insurance Limited v Blakeley*.

In April 2013 the liquidators of Akron Roads Pty Limited (in liq) commenced proceedings in the Supreme Court of Victoria against three former directors of the company, including Trevor Crewe. Crewe Sharp Pty Limited (in liq) was also named as a defendant. Crewe was a director of that company and the company also provided consultancy services to Akron. It was alleged by the liquidators that Crewe Sharp was a director of Akron within the extended definition in the *Corporations Act 2001*. The order sought by the liquidator was pursuant to Section 588M(2) of the *Corporations Act 2001,* that the directors and the company, Crewe Sharp pay to them the loss or damage suffered by the creditors of Akron as a consequence of debts owed by Akron due to its insolvency.

Section 588G of the *Corporations Act* 2001 is intended to operate to prevent a company incurring debts when insolvent or there are reasonable grounds for suspecting the company is or would become insolvent. It was alleged by the liquidators that Crewe and Crewe Sharp had breached that duty as they did not prevent Akron incurring debts when it was insolvent.

The damages claimed totalled $14.6 million.

In December 2013 Crewe Sharp made a claim on the professional indemnity policy it held with CGU Insurance Limited ("CGU"). Crewe Sharp was also insured under the policy as a director. CGU denied that the policy responded to the claim brought by Akron. CGU argued that the claims against Crewe and

Crewe Sharp were as a consequence of breach of director's duties and as a consequence CGU relied on an exclusion in the policy for liability of directors *"arising from any act, error or omission of a director or officer of that incorporated body while acting in that capacity".*

CGU also relied on an exclusion clause that excluded claims *"[a] arising from a liability to pay trading debts, trade debts, or the repayment of any loan".*

Crewe Sharp entered into a creditor's voluntary liquidation on 20 June 2014. The reality for the liquidators was that if the CGU policy did not respond then even if the claim was successful the liquidators would not be able to recover the judgment. Crewe consented to the joinder of CGU.

Justice Judd in the Supreme Court of Victoria granted the orders sought and allowed for the joinder of CGU.

CGU sought leave to appeal against those orders.

The matter proceeded to hearing before the Victorian Court of Appeal and that Court granted leave to appeal but ordered that the appeal be dismissed.

CGU subsequently applied for special leave to the High Court. CGU argued that the Supreme Court did not have jurisdiction to consider the claim that was brought by the liquidators for declaratory relief against CGU. In their application the liquidators relied on Section 562 of the *Corporations Act 2001* and Section 117 of the *Bankruptcy Act*.

Section 562 of the *Corporations Act 2001* provides that where a company in liquidation holds an insurance policy that covers liability to third parties and payment is received pursuant to that insurance then the liquidator of the company must pay that money to the third party to the extent necessary to discharge that liability in priority to other payments. Section 117 of the *Bankruptcy Act* contains a similar provision however relates to individuals rather than corporations.

CGU argued that in order for the policy to respond it would be necessary for the liquidators to succeed in their claim and until liability was established any interest in the policy would be "hypothetical".

The High Court found in favour of the liquidators. The High Court was of the view it was irrelevant the liquidators were not a party to the contract of insurance.

The determination of CGU's liability to indemnify the directors will therefore be decided at the same time as the director's liability to the liquidators in that claim.

The decision is a win for the liquidators who will not now need to run two cases and are able to deal with all issues in one set of proceedings.

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## Recovering the Costs Of A Hire Vehicle After A Motor Accident- The Supreme Court Has Spoken.

When your motor vehicle is damaged in a collision that was not your fault can you hire a replacement vehicle and recover the hire costs and if so, is there a limitation on the types of vehicles you can hire?

The Supreme Court of NSW has recently considered this issue in *Droga v Cannon*.

Lisa Droga's car, a BMW X5 Sports Utility, was damaged in a collision with a bus driven by Duncan Cannon. In addition to the damage to her vehicle, Droga claimed damages of approximately $20,000.00 for the cost of hiring a replacement BMW sedan for 33 days. That portion of the claim was disputed by Cannon.

Droga commenced proceedings in the Local Court.

Damages were awarded to Droga for repair costs, however the Magistrate was not satisfied that Droga had established the need for the hire car.

There is no issue that damage to property which deprives a person of a thing is compensable. However, it is the plaintiff's need that establishes the requisite damages, not the actual financial loss suffered.

In the Local Court proceedings, Droga had closed her case without leading any evidence as to her need for a replacement vehicle. The only evidence that Droga had in relation to this need was a sentence in an affidavit where Droga stated that she "needed" a vehicle. That sentence was objected to and struck out by the Magistrate – and so there was no evidence at all.

Cannon therefore argued that Droga was not entitled to any damages for the cost of hiring a vehicle.

Droga then attempted to reopen her case, arguing that only a very limited amount of evidence would be required to correct her failure to prove the need for a hire car.

The Magistate did not allow the case to be re-opened. The Magistrate noted although Droga bore the onus of proof in relation to proving need, no evidence had been led on that issue. The Magistrate rejected Droga's argument that need in a general sense could be inferred because cars were a common daily requirement.

Droga appealed to the Supreme Court where the matter was heard before Justice Harrison.

On appeal to the Supreme Court, Droga argued that at no time in the initial proceedings had Cannon raised the question of need. Droga also argued the late raising of a matter which could have easily been dealt with (by Droga herself giving evidence of need)

amounted to "ambush." The approach of the Magistrate therefore amounted to procedural unfairness.

Although Justice Harrison stated that the situation could have been entirely avoided by the Magistrate allowing Droga to give evidence in relation to her need for a hire car, His Honour also noted it was clear that each party was entitled to conduct the litigation with a view to obtaining the best outcome for their client. Cannon was not bound or obliged to draw to Droga's attention that she had failed to prove one of the critical elements of her case.

His Honour was satisfied that Cannon's defence did not admit the question of need of the replacement vehicle. In any event, Droga had not sought any particulars clarifying the pleadings, so it was difficult for her to now argue the defence was "misleading".

Although Cannon admitted Droga suffered a compensable loss, His Honour found that that concession did not amount to an admission that Droga was entitled to recover compensation in any particular amount, or that she was entitled to have her damages calculated by reference to the cost of hiring a replacement vehicle.

On the question of a denial of procedural fairness, Justice Harrison found that Droga could not point to any wrong direction of law or error of principle on the part of the Magistrate. The Magistrate's decision not to adjourn the matter so that Droga could give evidence on another day was one that was reasonably open to him.

Ultimately, Justice Harrison described Droga and her legal representatives as the "authors of their own misfortune", as they had failed to prove a key element of their case.

As an aside, Justice Harrison noted that in bringing the Supreme Court proceedings, little attention appeared to have been paid by Droga to the distinction between her need for a car and her desire to hire a particular luxury vehicle.

After brief consideration of the uses Droga had for a vehicle (which included driving a short distance to work and dropping her children to school) His Honour noted it appeared likely a far less expensive replacement vehicle would have fulfilled Ms Droga's needs.

If Droga had proven need, the issue would have become what compensation was required to meet that need, not what was required to compensate Droga for her choice. Accordingly, the sum for compensation for the cost of a hire vehicle would have been closer to $2,000.00 than the $20,000.00 claimed.

Justice Harrison stated:

> *"It should not go unremarked that the sum required to compensate Ms Droga for the cost of hiring a replacement vehicle with which to conduct the activities she has specified, is not necessarily or automatically co-extensive with the cost of providing a comparable vehicle to the one that was damaged. The defendants would only ever be liable to compensate Ms Droga to the extent necessary to put her in the position she would have been but for the defendants' tortuous act. A far less sophisticated vehicle could have adequately coped with the activities identified by Ms Droga at what may well have been a considerably reduced tariff. The issue would have been a question of what was reasonable to meet Ms Droga's needs, not what was necessary to compensate her for her choice*."

In this case however Droga failed to establish the need for any hire car at all.

The decision provides some relief to insurers who are faced with subrogated recovery actions from hire car companies seeking to recoup the costs of hiring out luxury replacement vehicles. Insurers will be able to argue in demurrage claims that a plaintiff has not mitigated their loss even when they hire a "like for like" vehicle where there is no evidence as to why such a vehicle is required.

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## Like musical chairs – who is left with the right to sue under a building contract?

In our recent newsletters we have discussed the need for careful drafting of documents to properly record transactions. While most of the cases we have looked at involved a lack of adequate documentation, even detailed contracts can lead to divergent interpretations.

In the recent case of *Tzaneros Investments Pty Limited v Walker Group Constructions Pty Limited* [2016] NSWSC 50, the Court was required to consider whether a party's rights in a building contract had been effectively assigned to an ultimate purchaser of a leasehold interest in the relevant land following a complicated series of transactions. The Court also looked at the measure of loss suffered by that purchaser and the nature of the duty of care owed by a design engineer to each of the key parties.

This case had its genesis in the construction of a container terminal at Port Botany during 2003 and 2004. While the land is owned by Sydney Ports, the leasehold interest in the land had been transferred through a series of complicated transactions over the period to 2015.

In 2002 the leaseholder was P&O Trans Australia Holdings Limited. P&O engaged Walker Group Constructions Pty Limited to construct the terminal under a design and construct contract which included a specification that the pavement for the terminal would

have a 20 year design life and be capable of withstanding the stress of a significant number of truck and forklift movements throughout that period. Walker Group engaged AMT Engineers Pty Limited to design that pavement. Following disagreements between AMT and P&O over the adequacy of AMT's proposed design, an independent expert was engaged to assist in the design development and construction of the pavement was completed.

In 2004 the leasehold was transferred to a subsidiary of P&O, Smith Bros Trade & Transport Pty Limited and again transferred in 2005 to Tzaneros. By this stage the pavement had shown signs of failing and repairs were being carried out on a regular basis.

As part of the transfer of the leasehold to Tzaneros, P&O, Smith Bros and Tzaneros entered into a deed under which P&O *"assigns to the Assignee absolutely all of the benefit of the Building Warranties with effect from the Effective Date".*

"The Building Warranties" was defined to mean *"The Building Warranties provided by or imposed by law upon [Walker Group]"* in relation to the pavement and the remainder of the construction. At the same time Walker Group confirmed in writing that it consented to the assignment of the warranties.

In 2015 the leasehold was transferred again to the Trust Company (Australia) Pty Limited under a contract for sale. Under this contract, Tzaneros was required to carry out the necessary repair works to the pavement.

Tzaneros sued Walker Group for approximately $15 million, being the cost of replacing the whole of the pavement, relying on its assigned rights under the warranties.

Walker Group argued that the assignment was not effective to give Tzaneros rights under the warranties and also contended that Tzaneros' claim was an apportionable one, that its design engineer AMT was a concurrent wrongdoer and therefore Walker Group's liability should be reduced under Section 35 of the *Civil Liability Act 2005* (NSW) having regard to AMT's responsibility for the loss.

Justice Ball considered the specific wording of the assignment and Walker Group's argument that the assignment was only effective to assign the contractual right of performance under the design and construct contract but was not effective to assign any cause of action that had already accrued in respect of the contract at the time the assignment took place. Justice Ball noted that a cause of action for breach of warranty arises at the time of the breach, not at the time when the damage is actually suffered. In this case the assignment of the warranties had occurred in a context where P&O and Tzaneros both knew there had been cracking in the pavement and they must have contemplated the possibility that would give rise to a claim for breach of warranty against Walker Group. In Justice Ball's opinion, the ordinary and nature meaning of the words "all the benefit of the Building Warranties" included the right to sue in respect of breaches that had already occurred. If the assignment was intended to be ineffective to assign any rights in respect of cracks in the pavement that had already occurred, it would have been expected that the parties would have said so specifically.

Walker Group had submitted it did not consent to an assignment in such broad terms. However Justice Ball noted that the consent given by Walker Group could not affect the scope of the assignment. Either they consented to the assignment or they did not, and the clear intention of their letter was to operate as a consent. Accordingly the rights that P&O had under the building contract, including the cause of action that had already accrued for the failure of the pavement, had been effectively assigned to Tzaneros.

The Court also considered whether Tzaneros had suffered any loss as a consequence of the breaches of the warranties. Walker Group had submitted Tzaneros had not suffered any loss, relying on the decision of the Court of Appeal in *Allianz Australia Insurance Limited v Waterbrook at Yowie Bay Pty Limited* [2009] NSWCA 224, In this case it had been held that a successor in title who acquired a building in full knowledge of its defects suffered no loss from the existence of those defects.

However, Justice Ball held that this principle did not apply in the present case. In *Allianz* the majority had held that Waterbrook had suffered no loss in respect of defects of which it had full knowledge at the time it bought the property because it must have been taken to have agreed a price for the property based on that knowledge. However, in the present case it had to be inferred that the price that was agreed reflected the fact that the warranties were being assigned at the same time as the interest in the land was being transferred.

In evaluating the measure of Tzaneros' loss, Justice Ball referred to the principles laid down by the High Court in *Belgrove v Eldridge* (1954) 90CLR613, to the effect that an innocent party is entitled to recover as damages the cost of rectifying the defects and not simply the difference in value of the relevant property with and without the defects. Once it had been accepted that the assignment of the warranties to Tzaneros was effective to assign the accrued causes of action, it was difficult to see how the assignment to Tzaneros could affect the application of the principle in *Belgrove*. This was not a case in which P&O, having sold the terminal, was nonetheless seeking to recover damages for breach of warranties originally given to it. Rather, it was a case where, as a result of the assignment, Tzaneros was placed in the shoes of P&O and was seeking to recover damages from Walker Group as if it were P&O. All Tzaneros was seeking to recover was the cost of replacing a pavement which did not meet the contractual specification. There could

be little doubt that if there had been no assignment and that claim had been brought by P&O, P&O would have been entitled to recover damages on the basis. In this regard, the nature of the assignment in this case was that Tzaneros was to be put in the shoes of P&O and was to recover the amount that P&O would have recovered if the terminal still belonged to it and the warranties had not been assigned. The price that Tzaneros paid for the terminal was irrelevant to the determination of that amount.

In considering whether it was reasonable to replace the whole of the pavement, the Court held that it was reasonable to replace any part of the pavement that has been or might be the subject of the loads specified in the design and construct contract, since it was clear that the current pavement was not designed to bear those loads.

In answer to a submission by Walker Group that by replacing the whole of the pavement Tzaneros was gaining a better product, the Court held that since the parties had accepted that the pavement must be replaced in a way that allowed the terminal to continue to operate and the Court had accepted that a reinforced pavement that could be laid in a piecemeal fashion without undermining the strength and stresses of the pavement, the cost of that replacement work came about not as a consequence of any choice by Tzaneros but as a result of Walker Group's own breach and the need to rectify that breach in a way that permitted the terminal to remain open.

The Court also considered the question of whether the claim against Walker Group was an apportionable one since the claim did not depend on a failure by Walker Group to take reasonable care but rather a failure of the pavement to meet the contractual specifications. Justice Ball referred to the decisions of *Woolcock Street Investments Pty Limited v CDG Pty Limited* [2004] HCA 16 and *Brookfield Multiplex Limited v Owners - Strata Plan No 61288* [2014] HCA 36. In *Woolcock*, a majority of the High Court have held that an engineering firm owed no duty of care to the subsequent purchaser of a commercial property to avoid pure economic loss arising from a defect in the foundations of the property because it was open to that subsequent purchaser to seek a warranty in the contract for purchase that the building was free from defects or to take an assignment of any rights the vendor may have had against third parties in respect of any claim for defects in the building. Consequently the purchaser was not in any relevant sense vulnerable to the economic consequences of any negligence of ht engineers in the design of the foundations of the building. Without vulnerability, there could be no duty of care.

In Justice Ball's opinion the position of Tzaneros was no different to that of the purchaser in *Woolcock*. It protected itself by taking an assignment of P&O's rights. It was in no sense in a position of vulnerability from any failure by AMT to take reasonable care. As a result, AMT did not owe it a duty of care and consequently was not a concurrent wrongdoer for the purposes of Section 34(2) of the *Civil Liability Act 2002*.

The Court however noted that AMT owed a duty of care to its employer, Walker Group notwithstanding the attempt by AMT to disclaim any responsibility or liability for the design of the pavement as a consequence of the participation of the joint expert in that design process. In this regard the Court noted it was important that AMT had given advice in relation to the design of the pavement to the entity responsible for its construction on the basis that the advice would be relied upon. Various disclaimers that AMT had included in its drawings issued for construction did not undermine the existence of that duty of care.

The parties to this court action had all had the benefit of substantial legal advice and protracted negotiations, together with complicated contractual documentation. While the nature of the failure of the design of the pavement and the measure of the loss was a contest between the parties' experts, the ability of Tzaneros to sue for the cost of replacing of the pavement in the first place was based on the precise words of the Deed of Warranty. This case illustrates why it is important to carefully draft such a provision to ensure that the parties' intentions are properly reflected in the document so that the stakeholders have clarity in their rights and obligations moving forward.

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## Expert or Factual Witness – That is the Question

When a party is preparing its case for court, it often needs to include a report from an independent expert in support of, or in defence of, the complaints that have been made.

An appropriate expert will be a person who has credentials or experience which indicates a superior knowledge of the matters at issue, along with the necessary impartiality to give their report weight with the Court.

It is for this reason that an expert must agree to be bound by the Expert Witness Code of Conduct and not act as an advocate for the party on whose behalf he is providing a report.

But what if your expert also had a part to play in the events leading up to the litigation?

In the recent case of *Sprayworx Pty Limited v Homag Australia Pty Limited* [2016] NSWSC 51, the Supreme Court was asked to assess whether the impartiality of

two “experts” was tainted by their personal history in the matter.

Sprayworx had purchased a wide belt industrial sander from Homag Australia in 2006. In the Court proceedings, Sprayworx had alleged that the machine was defective, unfit for its purpose, and not of merchantable quality. It further alleged that it had purchased the machine upon the basis of either negligent or false and misleading misrepresentations.

As part of its evidence in defence, Homag served affidavits from Mr Ludger Duwentäster and Mr Ingemar Bauersfeld. Sprayworx objected to the whole of those affidavits on the basis that both gentlemen had been so closely involved with the initial complaints of Sprayworx about the machine that they lacked impartiality. In particular, Mr Bauersfeld had included in his affidavit various emails in which he referred to one of Sprayworx’s witnesses as “schizophrenic or schizo” and said “he has not understood or does not want to understand, or is simply schizophrenic”.

Justice Harrison noted that both gentlemen had agreed to be bound by the Expert Witness Code of Conduct. He also commented that he had not yet had the benefit of seeing or hearing either of the two experts in the witness box.

A key issue in the proceedings was whether Sprayworx had oversprayed some of the machine’s panels. Justice Harrison noted that any comment on this issue involved necessarily or at least potentially a combination of lay observation and expert opinion. The circumstances of the timing of the emergence of that issue in the scheme of the proceedings would undoubtedly figure prominently in the ultimate resolution of the case.

The Judge stated that a distinction needed to be drawn between Mr Duwentäster’s evidence of the events in which he was actively and practically involved as a lay observer and the opinion about the operation of the machine that he offered as an expert. To the extent that the former may have arguably have affected the latter, his evidence would in due course be exposed to cross examination in the usual way.

Justice Harrison referred to the leading decisions of *Australian Security and Investment Commission v Rich and Another* [2005] NSWSC 149 and *Wood v The Queen* [2012] NSWCCA 21 in which the independence and impartiality of experts was considered. Justice Harrison held that the present case could be distinguished from *Wood*.

Firstly, there was no jury in the present case so the prospect of Sprayworx’s arguments not being understood by a tribunal of fact could be readily reviewed in due course if necessary. Secondly, the suggestion or suspicion that Mr Duwentäster was the author of the excessive overspray theory could be addressed in the course of proceedings and not merely after the case had been determined.

Accordingly, the Judge could see no legitimate forensic reason why the witnesses should not at least be heard.

This case reminds us that when we are selecting consultants or advisors who may potentially be required to give an independent expert report in due course, it is very important to ensure that the expert’s involvement in the matter does not affect (or be seen to affect) his impartiality. While an affidavit by a lay witness is effective for putting facts into evidence, the weight given by a Court to a report provided by an accredited independent expert is often the factor that leads to a successful outcome.

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## Go outside your employment duties at your own risk

A claimant has recently failed to establish liability where he was performing a task that was outside the scope of his employment duties (*South Sydney Junior Rugby League Club Pty Limited v Gazis*).

Following a robbery, South Sydney Junior Rugby League Club decided to engage security guards and contracted with Sermacs to provide security on the premises. Sermacs then subcontracted with MPS Security. Ross Gazis was employed by MPS as a security guard.

The Club’s new security measures following the robbery included stationing an armed guard on the premises to monitor the transportation of money by Club staff on trolleys from the poker machines to the counting room.

On 19 May 2006 Gazis injured his back when he was moving one of the Club’s trolleys and lost his grip and fell.

Gazis commenced proceedings in the Supreme Court against Sermacs and the Club. He also made a claim for work injury damages against his employer MPS.

The issue was whether the transportation of the Club’s trolley was within the scope of Gazis’ employment duties.

At trial Rothman J entered judgment for Gazis against the Club and MPS, apportioning liability 75%/25% between the two. Sermacs was found to have no liability.

The Club and MPS appealed.

The Club and MPS both argued that they ought not to have been found liable and there ought to have been liability on the part of Sermacs.

The appeal was successful.

In relation to the Club, the Court held that the Club owed a duty of care to Gazis as the occupier of the premises at which he worked. However, Gazis' employment duties did not extend to transporting the Club's trolleys.

The evidence established that the supervisors did not know that Gazis would transport the trolleys. The Club's evidence was that Gazis' function as a security guard was to walk with the members of staff watching and protecting them should anything arise. The guard was not required to handle the money tins or push or pull the trolleys. This would have been contrary to the role of acting as a security guard. There were three members of staff employed by the Club to perform that task.

Gazis' evidence was that he was never told by either MPS, the Club, or Sermacs not to provide physical assistance to members of staff regarding the transfer of trolleys. There was however no evidence to support the proposition that the moving of a trolley constituted part of Gazis' employment duties.

The Court held that in the absence of knowledge that Gazis was in the habit of moving trolleys, there should have been a finding that the duty of care owed to the Gazis by the Club did not extend to giving a direction not to use the trolley. Accordingly, the finding of negligence on the part of the Club was set aside.

In relation to MPS' liability, the Court found that MPS owed a non-delegable duty of care to its employees to take reasonable care to avoid exposing him to unnecessary risks of injury. The scope of this duty depended on the nature of Gazis working environment which was not under the control of MPS.

A statement was obtained from the director of MPS which stated that Gazis's duties included static security and escorting work. Gazis was not required to manhandle trolleys at the Club or any other place. This was not included in his job description.

MPS had supplied Gazis with a gun and a uniform and understood that Gazis was to only perform duties as an armed guard at the Club. However MPS had not conducted any site inspections of the premises which Gazis worked.

The Court of Appeal agreed with the trial judge that MPS had breached their duty of care.

Nevertheless any breach of duty by MPS was not causative of Gazis' injury and so MPS were successful in the defence of the claim.

Justice Basten stated:

> *"This reasoning starts from a false premise, namely that there was a duty to provide a safe system of work: the duty was to take reasonable steps to ensure that the plaintiff was not exposed to unnecessary risks of injury. Implicitly, the third paragraph in this reasoning identified an inspection of the Club as the appropriate step required, but concluded that such an inspection would probably not have identified the particular risk which materialised. The proper conclusion in these circumstances was that, whilst MPS owed a duty and was in breach of it, because it took no reasonable steps to investigate the working environment in which its employee was placed on a semi-permanent basis, the breach was nevertheless not causative of the harm which eventuated because the risk would not have been identified on any reasonable inspection."*

The end result for Gazis was that he was unsuccessful against all parties. His decision to undertake a task that was not part of his duties at the Club, and of which neither the Club nor his employer was aware he was performing, has proved a costly one for him.

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## When can a Court draw an adverse inference from a party's failure to adduce evidence?

Since 1959 when the High Court of Australia handed down its decision in *Jones v Dunkel*, it has been a well established rule of evidence that, where a party fails to adduce particular evidence one would have expected that party to adduce, and where the failure to do so is not satisfactorily explained, a Court may draw an adverse inference that such evidence would not have assisted that party's case.

The NSW Court of Appeal was recently asked to consider these principles again in an appeal from a District Court judgment involving a personal injury claim that was dismissed at first instance.

In *Stambolziovski v Nestorovic & Anor* [2015] NSWCA 332 Mrs Stambolziovski had claimed damages for personal injuries arising from an alleged slip and fall on the floor surface of an outdoor laundry and toilet which she said was covered with water leaking from the toilet.

Central to the determination of her case at first instance was the evidence upon which the Court could make findings of fact regarding the circumstances of her alleged accident.

Mrs Stambolziovski sued the landlord of the residential premises at which she was a tenant in addition to the managing agent appointed by the landlord.

Mrs Stambolziovski alleged that she was discovered by a Telstra technician who was at the premises installing a new telephone line on the date of accident. He did not directly witness her fall.

The Telstra technician was called to give evidence on behalf of the landlord and was cross examined by counsel for Mrs Stambolziovski. He was not asked any questions by either party's counsel regarding the state of the floor of the external laundry when he discovered Mrs Stambolziovski.

At first instance, Judge Taylor rejected the plaintiff's contention that she slipped and fell on water which had pooled on the surface of the external toilet as a result of a leakage from the toilet.

Instead, His Honour found that her accident was more likely to have been caused by a slip and fall from water which had pooled as a result of her mopping the floor surface prior to her fall.

In that regard, there was evidence presented to Judge Taylor of a prior statement of another witness in the context of an insurance claim arising from the same accident. The witness stated that he had been told by Mrs Stambolziovski's husband that her fall had occurred whilst she was mopping the floor.

Other credibility findings made by Judge Taylor unfavourable to the case presented by Mrs Stambolziovski resulted in her claim being dismissed.

Mrs Stambolziovski appealed to the NSW Court of Appeal.

In a unanimous judgment, the Court of Appeal dismissed the appeal with costs.

The leading judgment was delivered by her Honour Justice Ward (with whom Beazley P and Emmett AJA agreed).

One of the grounds of appeal was that Judge Taylor erred in refusing to draw an inference adverse to the landlord's case arising from the fact that the Telstra technician was not asked any questions going to the mechanics of Mrs Stambolziovski's fall.

It was submitted on behalf of Mrs Stambolziovski that Judge Taylor ought to have drawn a *Ferrcom* inference (being a reference to a 1991 decision of the NSW Court of Appeal in *Commercial Union Insurance Company of Australia Limited v Ferrcom Pty Limited* which relates to a situation where a party fails to ask questions of a witness in chief.)

It was also submitted that a deliberate forensic decision had been made by the landlord's legal team not to adduce that evidence in chief from one of its witnesses.

However, Counsel for the landlord submitted that since neither party questioned the Telstra technician as to what he saw in the external laundry, any inference which could be drawn from the failure to do so was bound to be equivocal. Accordingly, Judge Taylor was correct in refusing to draw a *Ferrcom* inference.

The Court of Appeal accepted the landlord's submission on this issue. In doing so, Her Honour Justice Ward made clear that the availability of drawing such an inference as was stated by the Court in *Ferrcom* was merely an application of principles long established following the High Court's decision in *Jones v Dunkel*.

Her Honour stated:

> *"It is an inference that may be drawn where a party fails to adduce particular evidence that one would have expected that party to adduce and where the failure to do so is not satisfactorily explained. One might expect relevant evidence to be adduced by the landlord from a witness who was, colloquially speaking, in her camp. However the fact that the Telstra technician was called to give evidence by her does not make him in some way in the landlord's camp. The Telstra technician was an independent witness who could have been called by either party".*

Her Honour also clarified the principle in *Jones v Dunkel* by stating the rule does not permit an inference to be drawn that the uncalled or untendered evidence would in fact been damaging to the party not tendering it. As her Honour stated:

> *"It cannot be used to fill gaps in the evidence or to convert conjecture and suspicion into inference".*

Accordingly, the Court of Appeal unanimously held that the judge was correct in refusing to draw a *Ferrcom* inference in the circumstances and by reason of that and other issues relating to credibility which was considered by the Court, the appeal was dismissed.

The decision in *Stambolziovski* reminds us that a *Jones v Dunkel* inference is not only available by reason of a failure to call a witness who would otherwise have been expected to give evidence on behalf of a party, but such an inference may also be drawn unfavourably to a party who fails to adduce evidence from a witness in chief.

This so called *Ferrcom* inference will nevertheless be drawn only in circumstances where the fundamental principles enunciated by the High Court in *Jones v Dunkel* have been established.

In that past 10 to 15 years the NSW Court of Appeal has maintained the position it adopted in earlier decisions about the application of the rule in *Jones v Dunkel*.

In circumstances where the evidence of a witness is of itself unsatisfactory or if a cross examiner fails to adduce evidence under cross examination about matters that were not raised during a witnesses' evidence in chief, a Court is unlikely to draw an adverse inference on critical matters.

The decision also provides a timely reminder that even if such an inference is drawn, the precise nature of the inference is that the uncalled or untendered evidence would not have assisted the party who failed to call or tender the evidence, not that such evidence would have been damaging to that party's case.

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## WORKERS COMPENSATION ROUNDUP

### No more 74 – Work Capacity is the way to go

A work capacity decision issued by a Scheme Agent is a determination as to a worker's entitlement to weekly compensation. It can be the subject of an internal review by the insurer and then a review by iCare then WIRO. The dispute process for a work capacity decision does not incorporate referral to the Workers Compensation Commission. However Scheme Agents have been disputing entitlements to weekly payments based on the contention the injury has resolved or there is no longer any incapacity and workers have been challenging the decisions in the Commission.

The practice of Scheme Agents determining liability with the issue of a Section 74 notice disputing liability on the basis of recovered capacity (Section 33) and injury (Section 4) in circumstances where there has been an earlier inconsistent work capacity decision, has been the focus of Presidential consideration in *Sabanayagam v St George Bank Limited* [2016] and the door seems to be closing on weekly payments disputes in the WCC.

Ms Sabanayagam sustained injury to her left knee on 3 October 2006 during the course of her employment with St George Bank. She was subsequently made redundant by St George Bank but returned to employment with a number of other employers, the most recent being Lloyds International. On 4 March 2013 that position was also made redundant and Sabanayagam did not return to employment.

A work capacity decision was made by the Scheme Agent on 25 November 2013 at which time it was determined that Sabanayagam had no entitlement to weekly payments of compensation. An internal review was sought and the decision was overturned by letter dated 31 December 2013 and her weekly payments were reinstated.

On 24 September 2014 the Scheme Agent issued a work capacity decision at which time it was indicated that Sabanayagam had no current work capacity.

On 20 March 2015 the Scheme Agent issued a notice pursuant to section 74 of the Act which disputed that Sabanayagam had any incapacity resulting from her injury, relying on Section 33 of the Act. The Section 74 Notice also relied on Section 4, disputing ongoing injury. A further declinature was issued on 26 March 2015 following a review pursuant to Section 287A of the *Workers Compensation Act 1987.*

Sabanayagam subsequently commenced proceedings in the Workers Compensation Commission.

The Scheme Agent argued that the Commission did not have jurisdiction to resolve the dispute. Sabanayagam contended that the section 74 notice was not a work capacity decision and so the Commission could determine the dispute.

At first instance the Senior Arbitrator determined the dispute on the basis that the Commission had no jurisdiction after the second entitlement period (130 weeks) as defined in Section 32A of the *1987 Act* and therefore she declined to make any order.

Sabanayagam's entitlement was to be determined in accordance with Section 38 of the *Workers Compensation Act 1987*. A number of decisions of the Commission including *Rawson* which we discussed in our Newsletter of February 2015 have held that the Commission does not have jurisdiction to determine a worker's entitlement to weekly compensation under Section 38.

Sabanayagam appealed.

The appeal proceeded before Deputy President O'Grady.

On appeal there were three issues to be determined:

- whether the Senior Arbitrator was in error in determining that the section 74 notices issued by the Scheme Agent in 2015 were work capacity decisions;
- whether the Senior Arbitrator was correct in determining the Commission had no jurisdiction;
- whether the Senior Arbitrator erred in determining the Commission had no jurisdiction to determine a dispute as to a work capacity decision.

In dealing with the appeal Deputy President O'Grady first considered the submission that the Senior Arbitrator had made an error when she found the

Section 74 Notices of 20 March 2015, 26 March 2015 and 9 April 2015 were work capacity decisions.

The Deputy President noted the reference to "*suspend, discontinue or reduce the amount of the weekly payments of compensation payable"* in Section 43(1)(f) of the *1987 Act* and found that read together with subclauses (a) – (e) this had the consequence on the facts that the decision to discontinue payments was a work capacity decision and the insurer had made a work capacity decision in March 2015. As such the Deputy President found the Commission could not make a decision inconsistent with that work capacity decision.

Sabanayagam's argument that a decision to discontinue payments cannot be construed as a work capacity decision was rejected by the Deputy President on the basis that:

> *"A decision "about a worker's current work capacity" should be taken to include a decision as to the existence, or otherwise, of such current work capacity as defined."*

The Deputy President took this approach noting the reference to "*suspend, discontinue or reduce the amount of the weekly payments of compensation payable"* in Section 43(1)(f) of the *Workers Compensation Act 1987* and on this basis found that the decision to discontinue payments was a work capacity decision which had been made in March 2015.

The Deputy President next dealt with the submission that the Senior Arbitrator erred in finding the Commission did not have jurisdiction after the second entitlement period where the requirements of Section 38 had been met and the insurer had assessed the worker as having no work capacity. Reference was made to the decision of President Judge Keating in *Lee v Bunnings Group Limited* [2013], where he noted that:

> *"It is clear from the unambiguous terms of s 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission."*

Deputy President O'Grady accepted the reasoning and conclusion in *Lee* and therefore confirmed that the Commission had no power to rule on, or determine, any such dispute.

Deputy President O'Grady indicated that the question for the Scheme Agent to determine was whether Sabanayagam had a right or claim to weekly benefits and where there was disagreement between the Scheme Agent and Sabanayagam, the Act contained mechanisms for review as prescribed in Section 44BB, that is, review by WIRO or by judicial review by the Supreme Court in Section 43(1). The President confirmed the Commission had no power to rule on, or determine, any such dispute.

The final ground dealt with by Deputy President O'Grady was the submission that the Senior Arbitrator erred when she considered the Commission had no jurisdiction to determine a dispute whether a work capacity decision was binding.

The Deputy President indicated that disputes concerning entitlement to weekly compensation following the expiration of the first two entitlement periods require assessment of a threshold question as to the existence of a work capacity decision. As such questions were not "about" a work capacity decision within the meaning of Section 43(3) the Commission was bound by the decision once made and the Commission cannot make an inconsistent decision. He indicated further that if the decision in March 2015 had not been made, the Commission may have had jurisdiction to determine the medical dispute, that is, whether Sabanayagam had recovered from the effects of the injury.

In concluding remarks Deputy President O'Grady indicated that it was clear despite the March 2015 decision being implied from the facts to be a work capacity decision, the Scheme Agent had not complied with the WorkCover Guidelines which specify the content that is required in a work capacity decision.

Following publication of the decision, WIRO issued a wire advising it will not fund applications to dispute a Section 74 Notice from which it may be inferred that a work capacity decision has been made. WIRO has advised that workers are required to seek a review of the decision in such matters consistent with the process set out in Section 44BB of the *1987 Act.* WIRO has further advised workers should be confident of succeeding on any such review.

This decision confirms there can be no reliance placed on Section 33 in Section 74 Notices where liability has been accepted by an insurer and payments of weekly compensation made. In these circumstances a work capacity decision is the correct form for an insurer to convey a determination a worker has recovered from the effects of an injury. The decision is merely a reminder that any decision concerning capacity should be conveyed by way of a work capacity decision rather than as a liability dispute by way of a Section 74 notice.

Icare has directed Scheme Agents not to issue Section 54 or 74 notices resulting in cessation of weekly payments of compensation where liability has been accepted for an injury.

The decision is subject of an Application for leave to appeal to the Court of Appeal and there have been two arbitral decisions delivered more recently declining to follow the determination that Section 74 notices relying on Sections 4 and 33 constitute work capacity decisions because they do not comply with the requirements of the Guidelines and do not purport to be work capacity decisions.

Nonetheless, the icare directive continues to bind Scheme Agents who will now be required to make reasoned work capacity decisions rather than raise disputes in section 74 notices regarding a worker's continuing incapacity and injury based on medical evidence.

Furthermore Scheme Agents are likely to be subject to a flood of applications for review of Section 74 notices based on Sections 4 and 33 following the WIRO decision not to fund disputes in the WCC.

The outcome of the appeal is eagerly anticipated.

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## Can a suicide result in compensation?

In NSW the workers compensation legislation provides for payment of a lump sum benefit for the dependants of a deceased on their death. However, if the death arises as a consequence of an intentional, self-inflicted injury then this lump sum benefit is not payable.

The Workers Compensation Commission has recently determined that a suicide was not caused by an intentional self-inflicted injury, rather, by a secondary psychological condition arising from physical injuries (*Geremia v Hilton Hotels and Myer*).

Selma Geremia was employed by the Hilton hotel from 1990 until 2002 when the hotel closed for renovations. She then obtained employment with Myer and that employment continued until 12 November 2007. At that time suitable duties were no longer available for Mrs Geremia, who had suffered injury during the course of her employment with both the Hilton and Myer.

Sadly, Mrs Geremia committed suicide on 26 February 2009.

Her husband Salvatore Geremia brought a claim in the Workers Compensation Commission for a lump sum benefit pursuant to Section 25 of the Workers Compensation Act 1987 as a result of the death of his wife. He claimed his wife's suicide on 26 February 2009 was as a result of psychological injury caused by her inability to cope with the consequences of her physical injuries sustained in the course of her employment. These physical injuries included carpal tunnel syndrome that she sustained working at the Hilton. At Myer she suffered an aggravation of that injury and also injury to her left arm and neck.

Both the Hilton and Myer were respondents to the claim.

The claim was complicated even further by the fact that Myer was self insured after 1 October 2007 and so the date of injury was in issue. Myer as self insurer argued that the neck and arm injuries did not cause a secondary psychological injury and in any event no physical or psychological injury occurred after 1 October 2007.

Myer also argued that the suicide was self inflicted and relied on Section 14(3) of the Act in arguing that compensation was not payable.

Myer contended that Mrs Geremia's suicide was a conscious, intentional and deliberate act. There was also evidence that Mrs Geremia's mental state was affected by a number of non-work related stressors including the death of an Aunt. Myer also referred to Mrs Geremia's suicide note in support of the argument that her suicide was a conscious decision. Mrs Geremia had also acquired a pen gun which was determined to be the weapon with which Mrs Geremia killed herself. Myer argued this suggested the suicide was pre-meditated.

Arbitrator Batchelor did not accept Myer's argument that the suicide was an intentional self inflicted injury.

The arbitrator noted Myer had advised Mrs Geremia on 12 November 2007 that it was unable to provide suitable duties. On 16 November 2007 Mrs Geremia attended a psychologist who she saw regularly up to the day before her suicide. There was no evidence that Mrs Geremia's employment was terminated prior to her death. Arbitrator Batchelor accepted Mrs Geremia and her family suffered grave financial hardship as a result of Myer's decision to decline ongoing liability. Following Mrs Geremia's suicide, the police took a history from Mr Geremia that Mrs Geremia had became increasingly angry and depressed about the ongoing legal process and was seeing a clinical psychologist as well as a GP and specialist for her injuries.

Arbitrator Batchelor considered that Mr Geremia's evidence along with the medical evidence demonstrated Mrs Geremia's psychological injury resulted from her physical injuries, her inability to continue working to support her family, the inability of Myer to provide suitable duties and the increasing pain and disability suffered as a result of her physical injuries. The arbitrator referred to comments by Mrs Geremia's treating psychologist indicating that at the very last consultation, the day before her suicide, she displayed: *"no inclination towards taking her life except to express occasional suicidal ideation without intent."*

Arbitrator Bachelor concluded that when Mrs Geremia took her own life, although it was a deliberate act of suicide, the evidence showed:

> *".. it was the product of a will so overborne or influenced by her circumstances that it should not be regarded as an intentional act."*

Accordingly, Myer's defence based on Section 14(3) of the *Workers Compensation Act 1987* failed. The arbitrator determined that the date of injury was the date of death, for which Myer as self insurer was liable.

The decision is a reminder that death by suicide will not automatically preclude a dependant from payment of the lump sum benefit. The circumstances of the death must be closely considered and suicide will not automatically be regarded as self harm.

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## The End of the Road for pain and suffering?

In 2012 the amendments to the workers compensation legislation repealed a worker's entitlement under Section 67 to receive compensation for pain and suffering resulting from permanent impairment. The amendments were subject to certain specific exceptions and the application of the relevant savings and transitional provisions.

Following a number of appeal decisions clarifying application of the amendments, the recent decision of Deputy President Bill Roche in *Frick v Commonwealth Bank of Australia* [2016] NSWWCCPD 6 has resolved a further issue. That decision dealt with the scenario where an injury was sustained prior to 1 January 2002 but no claim specifically seeking compensation under Section 66 or 67 was made until after the commencement of the amendments on 19 June 2012.

Mr Frick injured his back and legs in the course of his employment on 10 August 1997. The Bank's insurer accepted liability and paid weekly compensation and compensation for medical expenses.

In October 2014 Frick claimed lump sum compensation in respect of various impairments and losses said to have resulted from the 1997 injury. The insurer accepted Frick had various losses on the Table of Disabilities and the claim for compensation under Section 66 was settled by agreement.

Subsequently Frick claimed $25,000 compensation for pain and suffering under Section 67. The insurer asserted that as the claim was made after 19 June 2012, Frick had no entitlement to compensation for pain and suffering as Section 67 was repealed by the 2012 Amendments.

The dispute proceeded before an arbitrator in the Commission who determined it was abundantly clear the legislature intended to remove entitlement to lump sum compensation for pain and suffering except in very specific circumstances which did not apply to Frick's claim.

The primary argument on appeal made by Frick's Counsel was that the decision in *BP Australia Limited v Greene* established the 2012 amendments to Section 66 do not apply to injuries received before 1 January 2002 and it follows that none of the amendments apply to claims under Section 67. This was supported by three separate references to an entitlement pursuant to Section 67 for injuries sustained prior to 1 January 2002 in Sections 65(3), 65B(1) and 67A(4).

Deputy President Roche did not accept this submission. The critical amendment was the repeal of Section 67 which resulted in the effect that by the time Frick made his claim for that compensation the section had been repealed and he did not come with any of the applicable exemptions. This follows from the clear and unambiguous language used in the transitional provisions which provides that the amendments made by Schedule 2 to the 2012 Amending Act extend to a claim for compensation made before 19 June 2012 but not to a claim that specifically sought compensation under Section 66 or 67 of the 1987 Act.

Counsel's reliance on *Greene* was found to be misguided as that case concerned the application of the amendments to a pre-2002 industrial deafness injury and the operation of Clause 13 of Part 18C of Schedule 6 of the 1987 Act. *Greene* was concerned with the effect of the 2012 Amendments on Section 66 and held there was no clear intention to abolish "entirely" the pre-2002 Scheme.

The Deputy President made it clear that an entitlement to compensation for pain and suffering under Section 67 continues where there is an exception made such as in Clause 11 of Schedule 8. That exception only applies where a claim was made before 19 June 2012 that specifically sought compensation under Section 66 or Section 67. The decision in *Cram Fluid Power* makes it clear the exception does not extend to claims for compensation under Section 67 made after 19 June 2012.

The decision affirms that the effect of the amending legislation is to abolish a worker's entitlement to compensation for pain and suffering in relation to all claims, irrespective of when the injury occurred. The only exception is claims which specifically sought compensation under Section 66 and 67 prior to the commencement of the amendments. Those claims are now few and far between.

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## CTP ROUNDUP

### Intoxication and Contributory Negligence – Lessons from South Australia

NSW Courts over the years have time and time again revisited the question of whether to make a finding of contributory negligence on the part of an injured passenger, where that passenger knew or should have known that the driver was intoxicated in the context of the *Civil Liability Act 2002* (NSW) ("the NSW Act"). We have examined several such cases in GD news, most recently the case of *Solomons v Pallier* in the October 2015 edition.

But what is the position in other Australian States?

The High Court recently handed down the decision of *Allen v Chadwick*, which examined the applicable law in South Australia relating to contributory negligence and intoxication.

Ms Chadwick and Mr Allen were in what was described by the High Court as in an "on again, off again" relationship for several years. At the time of the accident on 11 March 2007, the couple and Ms Chadwick's young daughter along with several families spent a day at Kadina, with the adults drinking substantial amounts of alcohol. The group then returned to Port Victoria in the evening. As Ms Chadwick was supervising three of the children playing in the playground of the Port Victoria Hotel, Mr Allen fell off a seesaw, attributing his ungainly state to intoxication.

As Ms Chadwick put the children to bed, Mr Allen and a friend continued drinking spirits throughout the evening until last call at the hotel bar. At some point between 1.00 am and 2.00 am, a decision was made for Ms Chadwick to drive Mr Allen and his friend to get some cigarettes. Ms Chadwick drove the men around for 10 to 15 minutes in what was described by her during the trial as a "chaotic" state, during which time loud music was played and the two men continually shouted directions at her. Ms Chadwick exited the vehicle to relieve herself, and upon her return discovered Mr Allen was in the driver's seat. Ms Chadwick stated she was disoriented, and had no idea where she was as it was "completely dark".

Despite endeavouring to tell Mr Allen he was in no fit state to drive, when Mr Allen directed her to "get the f…k in the car" Ms Chadwick eventually relented and got in the right sided rear passenger seat. Mr Allen took off quickly and began driving aggressively, so that Ms Chadwick allegedly did not have a chance to put on her seatbelt.

The vehicle crashed shortly thereafter and Ms Chadwick was violently ejected from the vehicle, suffering catastrophic injuries to her spine.

The relevant statute in South Australia is the *South Australian Civil Liability Act 1936* (SA) ("SA Act"). Section 47 of the SA Act provides that a finding of contributory negligence is to be presumed where an injured person has relied on the care and skill of an intoxicated person. That presumption acts to reduce damages by a compulsory 50%, however it can be rebutted pursuant to Section 47(2)(b) if the person can establish that they could not "reasonably be expected to have avoided the risk".

Under Section 49 of the SA Act the Court is also required to reduce damages by 25% where the injured person is not wearing a seatbelt. In the circumstances, Ms Chadwick stood to have a finding of 75% contributory negligence applied to any verdict.

At trial in the District Court of South Australia, Judge Tilmouth found that the presumption of contributory negligence in Section 47 had been displaced as the plaintiff did not know her location after relieving herself, and had no alternative but to re-enter the vehicle. His Honour, however, was not prepared to accept that the plaintiff had no opportunity to put her seatbelt on due to the accelerated force and speed at which the vehicle was travelling. Damages were therefore reduced by 25%.

Both Ms Chadwick and Mr Allen appealed.

The Full Court of the Supreme Court of South Australia, comprised of Kourakis CJ and Gray and Nicholson JJ overturned the District Court decision on appeal, finding 0% contributory negligence. Although His Honour Kourakis dissented on the finding made by Gray and Nicholson JJ that Ms Chadwick's damages should not be reduced pursuant to Section 47 owing to her inevitable "feelings of helplessness and panic" which justified her returning to the car rather than walking back to the hotel, the Full Court agreed that the "act of a stranger" defence excused Ms Chadwick's failure to fasten her seatbelt.

On the basis that Mr Ellis was to pay the costs of Ms Chadwick in the High Court, he was granted special leave to appeal the Supreme Court's findings.

On appeal the High Court made reference to the well known case of *Joslyn v Berryman* (2003) HCA34, which dealt with very similar factual circumstances. Their Honours French CJ, and Kiefel, Bell, Keane and Gordon JJ noted that as with provisions of the NSW Act, Section 47(2)(b) of the SA Act requires an objective evaluation of relative risk in a given situation by the exercise of reasonable powers of observation and appreciation of one's environment, as well as the exercise of reasonable judgment of the relative risk of alternative responses to the environment as observed and understood.

This would accordingly not involve making any allowance for a passenger's subjective circumstances, such as a passenger's relative state of mind including panic, anxiety, and reduced decision making.

That said, the Court decided that it was not unreasonable for Ms Chadwick to have returned to the vehicle driven by Mr Allen. Their Honours found that a reasonable person would not have necessarily appreciated they were in fact a short walk from the hotel, even if they had taken further time to consider their situation upon being told to get back into the car than Ms Chadwick had. If there were no cars on the road at the time the Court concluded that a reasonable person would have perceived the risk of allowing Mr Allen to drive as being at an acceptable level.

It was therefore concluded by Their Honours that Ms Chadwick could not reasonably be expected to have avoided the risk of travelling with Mr Allen. The finding of contributory negligence pursuant to Section 47 was therefore reduced to 0%.

However, Their Honours found that after a detailed consideration of Section 49 of the SA Act, the relevant question was not whether it had been reasonable for Ms Chadwick to have not fastened her seatbelt, but whether she had been prevented from doing so. This was not supported by the evidence. The Court therefore applied a 25% reduction to Ms Chadwick's damages.

The High Court has provided some further clarification as to how to evaluate contributory negligence of a passenger in relation to an intoxicated driver across all jurisdictions. Similar to the position in New South Wales it will always be the objective analysis, rather than subjective consideration of a person's emotional and cognitive state that is relevant to ascertaining whether a passenger has acted appropriately to ensure their own safety.

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## Neither negligent nor blameless

In our previous edition of GD News we discussed the Supreme Court decision of *Melenewycz v Whitfield* in which Justice Hamill determined that a single vehicle accident could be a blameless accident.

The blameless accident provisions in the Motor Accidents Compensation Act 1999 have again been considered, this time by the District Court, in the decision of *J Alexander Bramstedt v The Nominal Defendant*.

Bramstedt commenced proceedings in the District Court following a motor vehicle accident on Yellow Brick Road in Tullimbar. The accident involved Bramstedt's vehicle which he alleged skidded on gravel or a similar material. The vehicle then slid to the other side of the road and collided with another vehicle. Bramstedt could not identify the vehicle that dropped the gravel on the road and so commenced proceedings against the Nominal Defendant.

Bramstedt alleged in the alternative that the accident was a blameless accident.

The matter proceeded to hearing in the District Court before Her Honour Acting Judge Sidis.

Bramstedt was unsuccessful in his claim against the Nominal Defendant and also in relation to his contention that the accident was a blameless accident.

Expert engineers and the police officers who attended the scene of the accident gave evidence. Both of the police officers, Sergeant Park and Senior Constable Haywood, considered the debris or "gravel" did not impact on the collision in any way. Sergeant Park noted that the gravel was not present anywhere near where the skid marks on the road commenced. Similarly, Senior Constable Haywood considered the debris was of such insignificance that he did not record it in his records while at the scene. The Senior Constable indicated that if there was any significant debris on the roadway that could have caused a loss of traction then he would have made a note of this. Senior Constable Haywood considered the gravel on the roadway was *"no greater significance than a small puddle of water"*.

The expert engineers were also of the view that the debris did not cause Bramstedt to lose control of his vehicle prior to the accident. They agreed Bramstedt lost control of his vehicle as a consequence of applying his brakes with such force that the front wheels locked.

Nor were the experts satisfied that the gravel fell from an unidentified vehicle. The debris was spread in an unusual way and it was inconsistent with the theory that it fell from a travelling vehicle.

Her Honour indicated none of the evidence was firm enough for her draw an inference and comfortably conclude that the debris was such a significant hazard warranting Bramstedt to apply emergency braking. In addition, there was no compelling explanation provided by anyone as to where the debris came from and how it came to be on the roadway.

Her Honour ultimately was not satisfied that the driver of an unidentified motor vehicle breached his or her duty of care to other drivers such as Bramstedt.

Not only did Bramstedt fail in his claim against the Nominal Defendant, he also failed to establish that the accident was a blameless accident. Her Honour determined that Bramstedt's error in applying the emergency braking was the major contributor to the accident. Bramstedt's basis in pleading blameless accident was that even if he incorrectly applied

emergency braking then this did not mean he was at fault.

Her Honour disagreed and stated:

> *"The plaintiff conceded that any fault on his part would deny him the advantage of these provisions.*
>
> *He maintained that, even if it was considered that he made the wrong decision in applying emergency braking in response to the presence of material on the road, it did not put him at fault. He contended that this was a matter to be taken into account in assessing contributory negligence and relied on prior authority that he maintained led to the conclusion that there was no fault on his part.*
>
> *These submissions do not accord with judicial approaches to date to the interpretation of the blameless accident provisions of the Act, particularly those that relate to claims by drivers who suffer injury in single vehicle accidents."*

The case is a reminder that each claim brought as a blameless accident must be considered on its facts. In this case there was fault on the part of Branstedt and so he could not establish that the accident was blameless.

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