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A Supermarket's Liability When Visitors Are Performing Promotional Activities

Supermarkets who conduct their business either wholly or partially within the retail food industry will generally employ workers to carry out its ordinary daily operations.

In addition, it is common practice for supermarkets to permit promotional activities to be run in store and generally employees of other businesses will conduct the promotional activities within the supermarket on behalf of the business promoting a product.

Typically, these non-supermarket employees may carry out duties as merchandisers who will work in allocated aisles within the supermarket to organise or place particular products for sale or in locations to provide samples of a product.

In the event of an accident occurring within the supermarket which results in the non-supermarket worker sustaining personal injuries, a cause of action in negligence may arise against the supermarket, as occupier that owed the injured person a duty of care, and the actual employer, who owes a non-delegable duty of care to its injured worker by reason of the employment relationship.

In a recent decision of the NSW Court of Appeal both the occupier and employer escaped liability altogether.

In *Vincent v Woolworths Ltd*, Christine Vincent claimed damages from Woolworths as host employer and Counterpoint Marketing & Sales Pty Limited ("Counterpoint") as her actual employer.

Vincent was employed by Counterpoint as a merchandiser and was directed by her employer to attend relevant supermarkets including the Woolworths store in Kings Langley NSW to check and adjust product presentations to ensure they conformed with agreed marketing strategies.

To assist her in the performance of those duties, Woolworths supplied Vincent with a safety step of about 50 cm in height.

Her injury occurred when she stepped back off the step and collided with a trolley that was being pushed by a Woolworths customer.

Vincent's claim for damages proceeded to a hearing before His Honour Justice Campbell at the Supreme Court Sydney. CCTV evidence tendered at the hearing confirmed that Vincent did not step in front of the moving trolley but into the rear part of it as it was passing behind her.

Justice Campbell dismissed the claim and entered a judgment in favour of Woolworths and Counterpoint.

The determination of liability in the case against Woolworths required His Honour to consider and apply the relevant provisions of the *Civil Liability Act 2002* (NSW) ("CLA") whereas the case against Counterpoint was governed by the common law of Australia.

The evidence established that Counterpoint had given careful attention to the practices its employees were to adopt when working in supermarkets by preparing an occupational health and safety manual which included specific consideration of risks associated with the use of safety steps.

Further, Justice Campbell accepted the submission made on behalf Woolworths that, as occupier, it was entitled to expect that Vincent would exercise reasonable care for her own safety when using the safety step.

It was also held that the use of the safety step in these circumstances was nothing more than a commonplace occurrence adopted by Counterpoint employees throughout other supermarkets and involved merely stepping up and stepping down from it.

His Honour found that the risk of appreciable personal injury due to a collision between a merchandiser and a customer's trolley enjoyed a very low probability of occurrence such that Vincent failed to establish that the risk of harm against which Woolworths ought to have taken precautions was a not insignificant risk.

In conclusion, Justice Campbell held that Vincent's injury had occurred by reason of her own inadvertence by failing to look to her right in the direction of the oncoming trolley as she stepped off the safety step. Indeed, the CCTV footage depicted Vincent looking to her left.

Vincent appealed to the NSW Court of Appeal in which it was contended that Justice Campbell's findings on breach of duty and causation were erroneous.

In the leading judgment delivered by His Honour Justice Macfarlan (with which Their Honours Justices McColl and Ward agreed), the appeal court unanimously dismissed Vincent's appeal by upholding the primary judge's conclusions.

Justice Macfarlan held that no error was demonstrated by the primary judge's use of the term "appreciable risk of harm" when determining whether or not the risk was not insignificant.

Nor was Justice Campbell wrong to characterise the use of the safety step as a commonplace occurrence that frequently took place in supermarket practices.

This decision is important to illustrate that content of a duty of care owed by a defendant whose liability is governed by the CLA, is limited to those risks which are not insignificant and can be prevented by the CLA defendant exercising reasonable care.

The duty of care does not include those risks which are more likely to materialise if a plaintiff fails to exercise reasonable care for his/her own safety.

Personal responsibility was the cornerstone of the rationale behind the enactment of the CLA nearly 15 years ago. More and more frequently, the decisions of the NSW Court of Appeal in particular are emphasising that this rationale remains alive and well.

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Negligent Homeowners - Pre-purchase report not a defects list that must be followed

In previous editions of GD News we have discussed claims involving accidents at residential premises. What happens if a friend or family member is injured whilst visiting you at your home? What legal liability do you have for their accident?

The NSW Court of Appeal has again considered this issue in *Swift v Wearing-Smith*.

Anthony and Kim Swift were the owners of residential premises. Peter Wearing-Smith, the injured party, was the stepfather of Kim Swift. Wearing-Smith sustained injury when he fell from the balcony at the rear of the Swifts' house in Turramurra. The house was built in 1952 and the Swifts moved into the premises in February 2003. The relevant balcony was about three metres above the ground and surrounded by glass panels. The balcony had been constructed prior to 1992. Wearing-Smith fell to the ground when a glass panel gave way. As a consequence Wearing-Smith sustained injuries to the chest and thoracic spine.

The damages to which Wearing-Smith was entitled if successful in his claim were agreed at $425,000.

Wearing-Smith's claim in the District Court before His Honour Judge Levy was successful.

When the Wearing-Smith's purchased the property in early 2003 they commissioned a pre-purchase report in late 2002. A number of "issues" and "safety concerns" were listed. The report also contained some

recommendations in relation to the balcony and handrails. In that report it was noted "the glass handrails have no safety glass stickers on the glass panels, have a glazier inspect the glass and upgrade as required. The metal lugs and posts have some corrosion. We recommend rust proofing and repainting or simply replacing."

At trial Judge Levy found it more probable than not the securing bolts were affected by rust and there had been a progressive rusting process that had set in. Judge Levy determined that a reasonable person in Swift's position would have taken action to ensure that the balustrade was structurally sound before allowing guests to go onto the balcony. The trial judge was of the view the Swifts had notice of an underlying problem of rust in the balustrade as it had been identified in the pre-purchase inspection report.

The Swifts appealed.

The Swifts were successful in overturning the finding of the trial judge.

Hoeben JA who delivered the leading judgment, with which Justice Meagher agreed, was of the view the trial judge had erred in his articulation of the duty of care and breach of that duty.

Hoeben JA noted that the premises were residential and the purpose of the pre-purchase report was to let the Swifts know of any defects in the premises so they would be aware of any increased expenditure, not to place the Swifts on notice of any defects in the property.

Hoeben JA stated:

> *"The focus of the primary judge was on what the pre-purchase report said about the handrails. That recommendation, however, was one of many contained in the 20 pages of the report devoted to the premises. There was nothing to separate the recommendations made in respect of the handrails from other recommendations. Most particularly, the recommendations relating to the handrails did not appear under the heading "Issues" or "Safety Concerns" in the pre-purchase report and to which reference has been made ... To impose a duty of care based on the pre-purchase report on the appellants in the way in which His Honour stated would involve an obligation to implement all the recommendations in the report which foreseeably might cause harm to a visitor. ... it follows that the appellants did not owe a duty to the respondent with the content and scope implicitly found by His Honour, ie not to allow visitors to enter upon the rear balcony until expert opinion had been obtained in relation to its integrity or until an inspection of the fixtures had taken place so as to ensure the absence of corrosion of the bolts. If the pre-purchase report had the effect sought to be given to it by the primary judge, the scope of the duty would have required the appellants to have refused to allow visitors onto the premises until every recommendation in the pre-purchase report, which might foreseeably cause injury, had been complied with. That is an unreasonable requirement. The duty owed by the appellants was to exercise reasonable care. The duty implicitly found to exist by the primary judge went well beyond that. A duty which focused only on the handrails invited a finding of breach.*
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> *For similar reasons, breach of duty has not been established. When reasoning to that conclusion I have, contrary to my finding on factual causation, accepted that the glass panel on the balustrade failed because of the corrosion of a bolt. By reference to Section 5B CLA, the "risk of harm" would be that the failure of a bolt would occur. I am, however, not satisfied that the risk of such an event was reasonably foreseeable. There was no evidence that the appellants had actual knowledge concerning a corroded bolt, nor on the evidence should they have known."*

Wearing-Smith therefore failed in establishing liability on the party of the Swifts.

The decision is a relief to home buyers and owners. It is expensive enough to have to purchase a home without having to attend to rectifying every defect identified in the pre-purchase report for fear of a liability claim if rectifications are not undertaken.

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Building Disputes. If you want to go to war, be prepared to pay for it

The NSW Civil and Administrative Tribunal is intended to provide a forum where the resolution of certain disputes can be "just, quick and cheap" with as little formality as possible. However this does not mean that the parties to NCAT proceedings will be any less adversarial than seasoned litigants in the Supreme and High Courts.

In the recent case of *Symes v Mick Fabar Constructions Pty Limited No. 2* [2016] NSWSC 69, the Supreme Court was asked to make an order for costs in circumstances where the parties had had a long running dispute over the construction of a house at Orange.

The home owners had engaged the builder to construct their house in 2008. The original NCAT proceedings were commenced in 2010 with the homeowner alleging numerous defects in the work. A conclave of the parties' experts resulted in the agreement of a number of the items claimed to be defective; however three items were left with the Tribunal member for his decision. Senior Member David Goldstein delivered his decision on those three

items in November 2014. The builder appealed from that decision on the basis that Senior Member Goldstein had declined to issue a formal work order in relation to the Tribunal's decision on the rectification work required.

The NCAT Appeal Panel dismissed the appeal noting that Senior Member Goldstein had provided sufficient reasons for his decision and had properly exercised his discretion under the *Home Building Act 1989*. The Appeal Panel held that each party was to pay their own costs of the appeal unless either party made an application for a different order.

The homeowners applied to the Appeal Panel for an order as to costs under Section 60(5) of the *Civil & Administrative Tribunal Act 2013 No. 2* (NCAT Act). However pursuant to Section 60(2) of the NCAT Act the Tribunal will only award costs if it is satisfied that there were special circumstances.

The Appeal Panel emphasised that there was no presumption in NCAT's jurisdiction that costs "*follow the event*" (that is, that the successful party is to receive a costs order in his favour). Rather, Section 60(1) provides that generally each party is to pay its own costs in NCAT matters. The Appeal Panel noted that despite making an application for costs, the homeowners had failed to demonstrate any of the factors that under the Act may be considered special circumstances. Instead, they based their application on the length of time that the parties had been involved in the litigation, evidentiary matters arising at the hearing and the abandonment of certain claims at the hearing. The Appeal Panel therefore rejected the costs application and held that the parties were to bear their own costs.

The builder made an application to the Supreme Court of New South Wales for an order that its costs of the homeowner's application to the Appeal Panel for costs be paid. Justice Wilson heard the matter on 11 December 2015 and refused leave to appeal. He held that each party was to bear their own costs of the appeal before the Supreme Court unless an application was made to the Court within 14 days. The builder persisted with his application for an order for costs in the unsuccessful action in the Supreme Court.

Justice Wilson stated that it was relevant that the decision of the NCAT Appeal Panel was that each party was to bear their own costs, in keeping with the overall objectives of NCAT and the relatively low cost for each party participating in the appeal, in contrast with the claimed amount. He also noted that in the Supreme Court the usual rule is that costs follow the event unless there are some circumstances that would potentially disentitle the successful party to an order that his costs be paid.

Justice Wilson commented that in proceedings of the nature of this case it was desirable, without any special circumstances, or some malfeasance by a particular party that the costs be borne by the litigants themselves, rather than becoming an issue which of itself increases the costs of the litigation.

There had been evidence led (and considered by the earlier NCAT members and panels) that the parties had engaged in highly adversarial and protracted litigation with a low likelihood of any future co-operation. Any order for costs in favour of one of the parties was likely to extend and exacerbate the litigation.

Accordingly Justice Wilson made an order that each party to the Supreme Court proceedings should bear their own costs.

In any building dispute, the costs of proving or defending a claim can easily become out of proportion to the amount of the claim. While NCAT has a discretion to make orders as to costs, it is relevant that the purpose of a tribunal such as NCAT is to keep the costs of such proceedings as low as possible. In this case the re-agitation of issues and the escalation of the proceedings to superior courts had the effect of significantly increasing the cost burden on the parties. Overall, it could be said that (probably due to their particularly adversarial approach) despite utilising the NCAT process neither of the parties had a successful outcome.

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Payment Claims in the Building Industry. The whole truth, and nothing but the truth

Construction contracts often require as a precondition to a progress payment that the contractor provide a statutory declaration that it has paid all its subcontractors, suppliers and employees.

But who should swear this document? Should it be the accounts department employee who organises payments on behalf of the contractor? Or should it be a senior manager on the basis of his supervision of the company's administrative affairs?

This question became even more complicated with the 2014 amendments to the *Building & Construction Industry Security of Payment Act 1999.* Under these amendments, a payment claim submitted by a head contractor will not be valid unless it includes a sworn supporting statement that all subcontractors have been paid.

In the recent decision of *J Hutchinson Pty Limited v Glavcom Pty Limited* [2016] NSWSC 126 the Supreme Court of NSW provided some interesting insight into the interplay between a contractor's right to payment under the Act and a principal's right to payment of liquidated damages under the contract.

Glavcom had been engaged by Hutchinson as a joinery subcontractor for the construction of the new Bondi Pacific Apartments at Bondi Beach. Under the terms of the subcontract, Hutchinson was required to give Glavcom access to the site by 14 August 2014 and practical completion was required by 21 April 2015. However, access was not made available to Glavcom before March 2015, leaving a very short time to carry out the work before the date for practical completion. Glavcom failed to submit proper claims for extensions of time under the subcontract and, despite being in fundamental breach of its contractual obligations, Hutchinson did not unilaterally allow any extension of time.

Glavcom submitted a payment claim for $2,948,510 along with a statutory declaration sworn by a director of Glavcom, Mr Pasqualie Callipari. One of the declarations made by Mr Callipari in this document was that all workers compensation insurance premiums had been paid.

Hutchinson served a payment schedule claiming an entitlement to offset $6,322,578.00 in liquidated damages due to Glavcom's failure to complete the work by the contractual date for practical completion. Glavcom applied for an adjudication of its claim under the provisions of the Act.

The adjudicator delivered a determination that Glavcom was entitled to payment of $1,263,399.00 plus GST and rejected Hutchinson's claim for liquidated damages.

Hutchinson commenced proceedings in the Supreme Court requesting a declaration that the adjudicator's determination was void. Hutchinson had become aware that shortly after the date of the adjudicator's determination a statutory demand had been issued against Glavcom in relation to its failure to pay its workers compensation insurance premiums since June 2015. Hutchinson submitted that Mr Callipari had therefore made a false declaration, and since Glavcom had relied on this payment claim in making an application for adjudication, the adjudicator's determination had been procured by fraud.

Justice Ball looked at the circumstances of the swearing of the statutory declaration. He noted that Mr Callipari was a director of a company of over 100 employees and there were three potential employees with financial responsibilities who could have prepared the statutory declaration for him to swear. He said that it was not reasonable to expect Mr Callipari to have personal knowledge of whether the insurance premiums had been paid but rather he was entitled to rely upon his employees as having given him the correct information. Justice Ball also held that nothing should be inferred from the absence of evidence from those three employees; giving evidence about providing Mr Callipari with wrong facts to swear in his statutory declaration would potentially require a witness to incriminate himself.

Justice Ball held that what was relevant was what Mr Callipari actually knew at the time of swearing the declaration, not whether the facts stated in the statutory declaration were true. At the relevant time Mr Callipari had believed the workers compensation insurance premiums to have been paid; accordingly the statutory declaration was not false.

Justice Ball also noted that the payment provisions of the subcontract offended Section 34 of the Act. This section provides that any contractual provision that excludes, modifies or restricts the Act is void. By attempting to make the arising of a reference date conditional on the provision of such a statutory declaration, clause 37.0 of the subcontract was attempting to restrict the statutory right to payment provided by the Act.

In this regard, Justice Ball confirmed that whether a reference date had arisen (thus entitling a contractor to submit a payment claim under the Act) is not a jurisdictional fact – an adjudicator is entitled to make his own determination in this regard. However if an adjudicator takes into account a contractual requirement which Section 34 of the Act renders void and is therefore irrelevant, then the adjudicator would be committing a jurisdictional error.

Further, in examining whether Hutchinson was entitled to offset an amount for liquidated damages, Justice Ball confirmed that there is a distinction between the well known "prevention principle" in *Peak Construction (Liverpool) Limited v McKinney Foundations Limited* (1970) 1 BLR 111 and the principle espoused by the late John Dorter in "*The Effect of Contract Clauses on Claims for Delay and Disruption*" (2002) 19 International Construction Law Review 319 that "*a party in default under a contract will not be entitled to take advantage of its own wrong*".

In its adjudication application, Glavcom had included submissions why Hutchinson should not be entitled to liquidated damages. However it had not specifically stated that Hutchinson did not have a right to set off liquidated damages against the amount of any progress payment. But importantly Section 9 of the Act does not allow any set off against the amount of a progress payment to which a contractor is entitled. Therefore, in the absence of any express entitlement in the contract, Hutchinson did not have any right of set off against a payment claim under the Act. However since it had failed to include in its submissions any comment on whether Hutchison had a right to set off, Glavcom was ultimately unsuccessful on this point.

While it is more common nowadays for increased paperwork in the form of statutory declarations etc, it is important to remember that a statutory declaration is a legal document with potentially serious consequences.

The making of a false declaration may not only lead to a change in the parties' rights under legislation and/or the contract, but will also potentially be perjury at law.

Any company required to submit such statutory declarations should have processes in place to ensure that the correct person is swearing the declarations, and that they are given full and accurate information about the matters being sworn to.

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CCTV footage in personal injury claims: accurate or flawed?

The importance of CCTV footage in personal injury claims cannot be overstated.

In times not so long ago, the availability of such evidence did not exist.

Trial judges who determined whether or not a defendant was negligent were victims of their time, hampered by the unreliable memory of several witnesses regarding what they saw or heard at the accident scene, and often recounting several different and at times inconsistent versions of the same event.

Since the advent of modern video recording devices and the technological advancements which have made CCTV systems almost ubiquitous throughout retail and commercial premises, the images provided by CCTV footage has become a common form of evidence tendered at the trial of personal injury claims.

Unlike their predecessors in years gone by, trial judges now enjoy the benefit of being taken back to the scene of the accident and becoming in effect a direct witness to the circumstances giving rise to the injury.

The images recorded by CCTV systems are often clear and unequivocal depending on how well the cameras are placed throughout the premises.

Not only can CCTV footage provide the Court with actual direct evidence of what occurred, the images are captured and recorded in real time. Accordingly, the evidence can be used to assist the Court on issues not only concerning what were the precise circumstances leading to the injury, but critical factual issues involving time can be accurately determined by reference to CCTV footage.

A classic example of this is the personal injury claim where, for instance, coffee has been spilt on the floor of a busy food court area and within what appears to be a matter of a few minutes, a patron to the premises slips on it and falls, sustaining injury.

An issue for a trial judge determining liability in that scenario is to ascertain how much time elapsed between the moment the coffee was spilt and the fall by the injured person.

Without CCTV footage, the best available evidence might come from any witnesses who were at or near the scene. The same issues that haunted judges of yesteryear would plague today's trial judge for the same inescapable reason that stems from the flawed nature of human memory and our capacity to reconstruct the circumstances even if ever so slightly but significantly to fit into a scenario we believe to be true.

In contrast, CCTV footage, if it captures the coffee spill and the slip and fall, is able to provide evidence in precise terms regarding the time of the spill and the time of the fall so that a trial judge can have confidence in the accuracy of that evidence in deciding how much time elapsed between those two events and whether there was a failure by the relevant party to regularly inspect the floor of the food court area.

Like any advancement in modern technology that becomes a part of everyday life, or in the case of personal injury claims, everyday litigation, there can be a tendency to take for granted that the technology and what it provides is paramount.

What if the evidence provided by CCTV footage is flawed in some way? What if the footage only showed the aftermath but not the lead up to an injury? What if the evidence reveals that in fact only some of the CCTV evidence has been produce, with critical parts of it having been omitted or missing from production?

His Honour Judge Mahony SC of the District Court recently grappled with such a situation in *Margaret Hill v Coles Supermarkets Australia Pty Limited.*

Margaret Hill is a 50 year old female who sustained injury when she slipped and fell in a Coles supermarket in Kings Langley when she was 47 years of age.

She alleged that she slipped and fell on water which had spilled on the floor, adjacent to a refrigerated fruit and vegetable display cabinet. It was contended on her behalf that Coles was negligent and the case ultimately turned on whether or not a mat that was usually placed on the floor to minimise the risk of slipping on the floor surface, had been replaced after a routine cleaning shift.

Ultimately, His Honour accepted Hill's allegations and found that Coles was negligent. Accordingly, the Court entered a verdict in her favour.

An interesting part of the evidence that was recounted in His Honour's judgment concerned the CCTV footage which had been tendered on behalf of Hill at the District Court hearing.

His Honour observed that the footage did not come from the cameras above the cash register area but from a camera at the other end of the aisle in which Hill's fall occurred.

The total footage was less than two minutes and had been produced to Court by Coles in answer to a subpoena which requested relevant footage covering the period one hour before and one hour after the accident which on the evidence had occurred at 7.15am.

The two minutes of footage was between 7.13am and 7.15am.

Judge Mahony noted that 27 seconds of the film were missing for a time period that would have showed Hill's fall. Instead, the images exposed by the footage showed the plaintiff lying on the floor after the event.

The missing footage was subject to a submission by Hill's counsel that the Court should draw an adverse inference that the CCTV footage had been tampered with and that the evidence would not have assisted Coles' case.

Coles adduced oral evidence from the relevant person who extracted the footage and produced it to Court. With respect to the two hour period sought in the subpoena schedule, the witness denied any knowledge of that specific request. Instead, he believed that what he had extracted was sufficient to condense the time to depict the accident.

When cross examined about the missing 27 seconds, the witness said that he had never watched the footage and that in accordance with common practice, the CCTV footage was destroyed.

He denied any knowledge of how the missing footage was omitted or who may have been involved in doing so.

In any event, Judge Mahony held that it was unnecessary for His Honour to make a determination as to the missing section of the CCTV footage because the remaining evidence provided a sufficient basis for the Court to enter a verdict in favour of Hill.

However, this District Court decision highlights that whilst the evidence from technology is capable of being far more accurate than the observations made by the ordinary male or female, one must be vigilant when considering evidence such as CCTV footage to ensure that it has been correctly extracted from the relevant cameras, that the footage from all available cameras has been provided, and that there are no missing parts of the footage.

Evidence from CCTV still requires someone to extract it and burn it to disc or USB for viewing purposes, thus introducing a human element to the manner in which such evidence is compiled or collaged which necessarily involves the possibility of error or mistake.

EMPLOYMENT ROUNDUP

Does termination automatically follow disqualification?

A specially constituted 5 member Full Bench of the Fair Work Commission has handed down a decision dealing with an important point concerning the proper construction of the Child Protection (Working with Children) Act 2012 (NSW)(the CP Act) - O'Connell v Catholic Education Office, Archdiocese of Sydney T/A Catholic Education Office, Sydney [2016] FWCFB 1752.

A teacher was employed by the Executive Director of Catholic Schools in the Roman Catholic Archdiocese of Sydney (the Respondent). His job involved 'child-related work' within the meaning of section.6 of the CP Act, consisting of classroom teaching at a secondary school for girls.

In early 2015 the teacher was charged with one count of indecent assault on a person under the age of 16 years (the offence). As soon as he was charged with the offence the teacher automatically became a 'disqualified person' for the purpose of section 18 of the CP Act.

Section 9 of the CP Act provides that an employer must not commence employing, or continue to employ, a worker 'in child-related work' in certain circumstances. Being charged with the offence was one of those circumstances. By virtue of being charged, the teacher was then a "disqualified person".

On the basis that that it was prohibited from continuing to employ the Applicant teacher in 'child-related work' from the time the Applicant became a disqualified person, the Respondent terminated the Applicant's employment on 20 February 2015.

The teacher brought an unfair dismissal claim against the Respondent in the Fair Work Commission.

A preliminary point arose – was the teacher dismissed at the initiative of the employer, so as to fall within the meaning of section 386(1) of the Fair Work Act 2009 (Cth)? If not, then the teacher was unable to maintain his unfair dismissal claim.

The Respondent submitted that the teacher was employed as a teacher, and so was required to perform 'child-related work' and that once he was charged with a proscribed offence the Respondent could no longer 'continue to employ' him as a teacher. It argued that the Applicant's dismissal was not a dismissal at the initiative of the employer, but rather the Respondent had no lawful choice but to terminate his employment

The Full Bench disagreed. In doing so it overruled an earlier Full Bench decision which reached a contrary conclusion.

According to the Full Bench, section 9(1) provides that an employer must not commence employing, or continue to employ, a worker 'in' child-related work. The ordinary meaning of those words does not suggest an absolute bar on the continuation of employment. The section does not provide that an employer must not continue to employ a worker at all. If an employer continues to employ a worker other than 'in' child-related work, no contravention of the section would arise.

In the context of section 9(1) the word 'employ' means to make use of or to utilise. It follows that the prohibition in section 9(1) operates to prohibit an employer from utilising a worker in 'child-related work' – it does not require the employer to terminate the employment of such a worker.

On its proper construction, the CP Act does not prevent an employer continuing to employ a person provided that the person is not employed 'in child-related work'. An employer could, for example, continue to employ the person on suspension, on leave or assigned to duties not involving child-related work.

The Child Protection Act requires only that a person who becomes a disqualified person by reason of pending proceedings not be utilised to perform 'child-related work'.

Section 9, the Full bench said, does not require that such a person be immediately dismissed. An employer may decide to dismiss an employee in such circumstances, but is not required to do so. Any such dismissal would be a termination of employment on the employer's initiative, within the meaning of section 386(1) of the Fair Work Act.

Accordingly, the teacher was able to maintain his unfair dismissal claim.

One can imagine the frustration for the employer in the circumstances. Although being disqualified for the work he was hired to perform, moving to terminate the teacher's employment risks exposure to an unfair dismissal claim. The alternatives suggested by the Full Bench – like suspension or leave – are economically unattractive.

Many roles require the holding of certain qualifications or licenses. Where an employee becomes disqualified, this Full Bench decision makes the employer's decision making even more difficult.

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WORKERS COMPENSATION ROUNDUP

Battle of the Statutes – 151Z claim v CTP Insurer - Blameless accidents

In New South Wales when the *Workers Compensation Act 1987* came into effect it included the often talked about Section 151Z(1)(d) which creates a statutory cause of action whereby a workers compensation insurer can recover compensation payments they have made to, for and on behalf of an injured worker from another party in whom there is a liability.

In 2006 the *Motor Accidents Compensation Act 1999* ("MACA") was amended to include the concept of "blameless" accidents. Blameless accidents create a statutory entitlement to damages pursuant to section 7B of that legislation where there is an accident for which no one is at fault. Blameless accidents have included situations where drivers have suffered a heart attack or a stroke, or where there is an unexplained problem such as brake failure.

The District Court of New South Wales has recently considered a claim for indemnity pursuant to section 151Z where the liability was created by virtue of the fact that the accident was a blameless accident (*State of NSW v Wenham*).

Jennifer Goddard sustained injury in a motor vehicle accident on 19 March 2010 during the course of her employment with the NSW Police. She was travelling behind a B-double truck that was driven by Timothy Wenham and owned by Phillip Whitton. As Goddard was driving behind the truck a wheel assembly became disconnected and travelled into her path resulting in the collision.

Goddard received payments of compensation however did not bring a CTP claim.

The workers compensation insurer commenced proceedings against the owner and driver of the vehicle contending that the accident was a blameless accident and section 151Z created a right to recover workers compensation payments where there was a liability to pay damages even though no party was at fault.

Judge Elkaim in the District Court was therefore asked to consider the question of whether a workers compensation insurer seeking recovery of payments pursuant to Section 151Z(1)(d) of the *Workers Compensation Act 1987* (NSW) can rely upon the blameless accident provisions in the MACA to obtain the indemnity sought.

The workers compensation insurer argued that the blameless accident provisions create a mechanism for

a worker to recover damages from another person even though there was no fault, and therefore that person would be liable to indemnify the workers compensation insurer. In support of this argument the worker's compensation insurer referred to the fact that section 151Z claims could also be brought against the Nominal Defendant (*Hi-Light Industries v Nominal Defendant*) and the Nominal Defendant is also an "artificial" body created by statute.

The CTP insurer however argued that a phrase in Section 151Z "circumstances creating the liability" have always been interpreted to involve circumstances where there is a wrongdoer, and where there is a blameless accident there is no wrongdoer.

Judge Elkaim agreed with the CTP insurer.

His Honour Judge Elkaim noted:

> *"I think I can put my conclusion, in summary form, in this way: the cause of action relied upon by the plaintiff is provided by Section 151Z. That cause of action requires there to be a wrongdoer. The deeming provision concerning fault in Section 7B of the MACA is a deeming provision only for the purposes of a claim for damages. It is there to assist the victim of a blameless accident. It does not extend, absent specific reference, to the cause of action provided by Section 151Z.*
>
> *I think this conclusion resolves the question before me. However I think I should add some comments arising from the plaintiff's reliance on Hi-Light. The plaintiff submitted that the decision allowed the Court "to impose liability on an artificial person created by MACA". If the Court of Appeal countenance this approach then it would no doubt countenance, according to the plaintiff, the even smaller step of imposing liability on the defendants where that liability is a product of the plain terms of the blameless accident provisions. The problem here is however, extending that liability to create a wrongdoing on the defendants' part beyond the deeming provision in Section 7B. As I have said that deeming provision is for "the purposes of and in connection with any claim for damages ..." A cause of action created by Section 151Z(1) is not a claim for damages, it is a claim for indemnity. I therefore do not think that decision assists the plaintiff."*

It should be noted that in this case Jennifer Goddard who was injured in the motor vehicle accident did not commence proceedings herself.

Had Goddard commenced her own proceedings the result would have been different as the claim would have been a claim for damages by Goddard, rather than a claim for indemnity. The workers compensation insurer should be reimbursed its payments by the plaintiff from the damages awarded which include compensation for the amounts paid by the workers compensation insurer. If the workers compensation insurer was not entitled to recover their payments in that situation the principles of double compensation come into play. That was not an issue for Judge Elkaim in this case.

This is the first decision on this issue, almost ten years after the MACA was amended to include blameless accidents.

It will be interesting to see if an appeal results and even more interesting if this case leads to plaintiffs arguing they are not obliged to reimburse the workers compensation insurer from damages recovered in a blameless accident.

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NSW WCC - Late Documents and Notices for Production – New Rules

Although there has been a significant decrease in the amount of disputes filed in the NSW Workers Compensation Commission following the 2012 Amendments, a number of changes have been made to the Workers Compensation Commission Rules to further streamline disputes in the Commission.

It is now a mandatory requirement for a worker to lodge with the dispute application a signed statement setting out the evidence to be relied upon by the worker. Where proceedings also include a claim for weekly payments, it is also mandatory to lodge with the application a schedule of all weekly compensation paid including the weekly amounts and the period. Scheme Agents should take note of this requirement as it is now likely a request for a List of Payments will made prior to a dispute being lodged in order to satisfy this new requirement.

In our experience it has been a common complaint of Arbitrators of the large number of documents filed in proceedings under an Application to Admit Late Documents. The workers compensation dispute system was intended to be a "front end loaded" process wherein all the documents the parties intend to rely upon were supposed to be lodged at the commencement of proceedings. The Commission will now limit the number of occasions where a party can file late documents. Unlike the past where unlimited applications to admit late documents could be made the Rules now limit the lodgement of late documents to one occasion only prior to the initial teleconference. Furthermore, the documents must be lodged five working days prior to the teleconference or, in the case of permanent impairment claims, where injury is not in dispute and a teleconference is not required, five days prior to any medical assessment. An exception to this one lodgement rule is a further opportunity for any party to lodge additional late documents on one subsequent occasion prior to the final

Conciliation/Arbitration. If leave is granted by the Arbitrator, a party can lodge one further set of documents at any stage. It should be noted that Arbitrators are already resistant to the granting of leave to admit late documents.

Another important limitation that has been introduced is that a direction for production of documents must not be issued where the party requesting the direction is entitled to be provided with the documents by other means. This includes an entitlement to source the production of pursuant to any authority a worker has provided to the employer or Scheme Agent to obtain documents from a third party. An exception to this rule is if there has been a failure to comply with a request by a third party to produce documents or special reasons prevented the employer or a Scheme Agent from acting on that authority.

Consequently, evidence will need to be adduced in the Commission demonstrating that despite authorities being provided (including an authority contained on a claim form or medical certificate) the doctor or third party has failed to comply with the request for documents under that authority.

Overall the changes should result in an increased amount of claims resolving at the initial teleconference as all documents that will ultimately be relied upon will be available. The changes will help to remove the current common practice of parties to a dispute seeking to adduce evidence through a direction for production or an Application to Admit Late Documents after the teleconference but prior to a Conciliation/Arbitration.

The restrictions make it clear that Scheme Agents must obtain evidence to be relied on in a dispute in the Commission through the use of the authority provided on a claim form, medical certificate or simply requesting an authority directly from a worker to release relevant documents before seeking to access the documents through a direction for production.

Our experience since the introduction of the changes has been positive with all parties now having a reasonable period of time to consider the evidence and obtain instructions for meaningful settlement discussions at the initial teleconference.

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Changes to Guidelines for Permanent Impairment

The level of whole person impairment (WPI) is the key trigger in the NSW workers compensation system for both the range and duration of benefits available to injured workers. It is vital that Scheme Agents have a solid understanding of the guidelines used in assessing WPI when assessing quality of reports from an independent medical examiner (IME) or Approved Medical Specialist (AMS). A difference of 1% in an assessment could determine whether a worker receives a limited period of weekly compensation as well as the length of time an insurer is required to meet the cost of medical expenses, not to mention that 15% WPI assessment is the trigger for a claim for work injury damages.

The State Insurance Regulatory Authority (SIRA) has recently introduced a Fourth edition of the Guidelines for the Evaluation of Permanent Impairment. These guidelines are to be used for all assessments of WPI conducted on or after 1 April 2016.

The revised guidelines are more stringent and focus on the importance of obtaining contemporaneous records, particularly records dealing with the onset of the claimed injury /condition and the provision of those records to medical assessors.

As also discussed in this newsletter, the Workers Compensation Commission (WCC) has also adopted new rules which prohibit directions for production to be issued once proceedings have been commenced in the WCC except in very limited circumstances. The limitations on using this mechanism to obtain contemporaneous injury records highlights the importance of using the authority incorporated in the claim form or medical certificate to obtain all medical records pertinent to causation at the beginning of a claim. Obtaining such records also assists in assessing claims where additional body parts are added to a claim at a later stage.

There are a number of changes with regards to assessing the upper and lower limbs. For example, when assessing impairment due to cartilage loss of the knee joint which has three compartments, the compartment with the most significant loss is to be used in the assessment and not a combination of all three compartments. Radiological evidence, whilst a guide, is not the sole determinative factor in assessing the presence or severity of a pre-existing arthritis or other degenerative condition.

In relation to the spine the Diagnosis Related Estimates (DRE) model remains the method of choice in assessing WPI. In considering the impact of impairment on the worker's activities of daily living (ADL), the medical assessor is not required to only rely on self reporting, but can now take into account an assessment based on clinical findings and other reports such as that of an occupational therapist.

Sexual impairment can still be only assessed where there is appropriate objective evidence of spinal cord, cauda equine syndrome (swelling of the nerves at the end of spinal cord) or bilateral nerve root dysfunction. Cauda equina syndrome or neurological signs in the

lower limbs and sacral region must now also be supported by a radiological study, preferably an MRI, demonstrating a lesion in the spinal canal causing the compression of multiple nerve roots. In relation to sexual function, the Guidelines note that sexual function may be impaired by severe traumatic brain injury and in this case the relevant American Medical Association (AMA) 5th edition guidelines should be used to assess WPI.

Scarring as a result of surgery no longer attracts a separate impairment rating unless there has been a problem with healing.

Significant changes have been made to the Guidelines relating to permanent impairment of the digestive system so that it is now more objective, rather being symptom based as previously was the case. There is a requirement the symptoms must have persisted for 12 months before impairment may be assessed.

With respect to the effect of analgesics on the digestive tract, the Guidelines now require that both a symptom and a sign of digestive tract disease be present (symptoms and signs are detailed in AMA5) otherwise the assessment is 0%WPI. The Guidelines clarify that constipation is a symptom and not a sign and is generally reversible and attracts 0% WPI. Further, irritable bowel syndrome without objective evidence will be assessed as 0% whole person impairment.

A diagnosis of hernia cannot sustain an assessment of WPI, purely on the basis of an ultrasound alone. There must be a palpable lump in the supporting structures of the abdominal wall to allow an assessment.

Chronic regional pain syndrome (CRPS) has been added to Chapter 17. Whereas AMA5 requires at least eight objective diagnostic criteria to be present to confirm the diagnosis, the Guidelines require only one report of symptom in four categories and the presence of at least one sign in each of those categories at the time of evaluation. Nevertheless, there must be no other diagnosis to better explain the signs and symptoms exhibited by the worker.

Once the diagnosis of CRPS is made, the extremity impairments resulting from the loss of motion of each individual joint is rated and then combined with the extremity impairment resulting from sensory deficits and pain.

The changes to the guidelines are significant and in some cases will benefit workers (such as assessments of CRPS) whilst other changes such as restrictions on WPI relating to the digestive tract and scarring will reduce entitlements.

We expect there will be a period of adjustment to the new guidelines by all stakeholders in the Workers Compensation scheme and it is likely there will be an increase in disputes as to the level of WPI in the short term as there will be no doubt arguments as to the application of the guidelines. It should be noted that the only mechanism for the resolution of these disputes is an AMS appointed by the WCC.

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CTP ROUNDUP

Future Economic Loss – Buffer or not?

In a motor accidents claim, awards of damage for future economic loss are governed by Section 126 of the *Motor Accidents Compensation Act 1999* ("MACA"). That section provides that a Court cannot make an award of damages for future economic loss unless a claimant first satisfies the Court or a CARS assessor that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.

An assessment of future economic loss is commonly expressed in one of two ways. The first method is to calculate the likely future loss on the basis of a weekly figure which is then capitalised and discounted to reflect the present value of the future earnings. The second method, used when there are uncertainties, is to adopt a rounded figure, commonly referred to as a "buffer".

Which approach is appropriate depends on the circumstances of the claim and the rationale for adopting one approach over another was recently examined by Justice Adamson in the Supreme Court in the decision of *Allianz Australia Insurance Limited v Zein*.

Allianz filed a summons in the Supreme Court seeking an administrative review of an assessment in CARS by Assessor Quickenden. The total assessment was $1.4 million but Allianz only sought a review of the assessment of future economic loss which comprised $685,025.

Although there were a number of grounds relied upon by Allianz first and foremost Allianz asserted the assessor erred in assessing damages for future economic loss by reference to a weekly figure rather than awarding a buffer.

Mr Zein, prior to the accident in 2012, was a self employed dental technician. He owned and operated

his own dental laboratory. Following the motor vehicle accident Mr Zein suffered a number of physical and mental injuries. The assessor made findings that the injuries and disabilities severely impacted Mr Zein.

As a result of the injuries and disabilities, Mr Zein had been unable to work since the accident and at the time of the assessment remained unable to work, including his pre-accident work as a self employed dental technician. It was agreed between the parties that but for the accident Mr Zein would have been earning $1,150 nett per week at the time of the assessment and would be unable to work again as a dental technician.

The assessor determined that Mr Zein was a skilled and conscientious worker and it was not disputed that Mr Zein had owned and operated his own dental laboratory in Perth from 2007 and 2010.

Mr Zein provided evidence his goal had been to open a similar business in Sydney in 2013 however this had been delayed following a less than anticipated profit on the sale of his property in Perth. The intervening motor vehicle accident resulted in Mr Zein abandoning both his business in Perth and the planned expansion to Sydney. On that basis Mr Zein had made a claim of $2,060 nett per week. This claim was rejected by the assessor on the grounds that for most of his career Mr Zein had worked as an employed dental technician (rather than running a business) and that Mr Zein had been committed to his family which adversely impacted his ability to work long hours in his own business. The assessor considered it appropriate to allow a reduced vicissitudes (12% rather than the usual 15%) to take into account the possibility the claimant may have been successful in his own business and lost that opportunity.

A further finding was made by the assessor that it would be approximately five years before Mr Zein obtained further remunerative employment. This was on the basis of the chronic psychiatric and physical injuries would prevent him from undertaking any form of employment as he continued to recover. The loss was assessed at $1,150 nett per week for an initial five year period.

After the five year period the assessor determined the claimant would be employed in some capacity. The assessor determined the residual earning capacity after five years would be approximately 25% of his pre accident employment as a dental technician. An assessment of future economic loss was made on the basis of a loss of earning capacity of $862.50 per week (75% of his pre accident income) until the age of 67, deferred for five years.

Allianz submitted the assessor's assessment of damages for future economic loss was irrational, illogical and lacked any intelligible justification. Allianz argued it would have been more appropriate for Mr Zein to have been assessed on the basis of a buffer.

Justice Adamson commented that the benefit of calculating future economic loss with reference to a weekly economic loss is that it would appear to give greater transparency. In order to be successful in its application for review of the assessor's determination, Allianz would need to establish that it was not open to the assessor, as a matter of an evaluative judgment, to assess damages in that way.

Justice Adamson determined it was open to the assessor to assess damages for future economic loss by way of a capitalised weekly sum rather than a buffer. The first integer of the comparison (what Mr Zein would have been earning but for the accident) was substantially agreed and it appeared to be accepted that Mr Zein's most likely circumstances but for the accident would have been to continue in pre-accident employment.

The second integer of the comparison (what his future circumstances would be) was more difficult. Nevertheless, the assessor identified each of the matters considered and his findings fulfilled the requirements of Section 126 of MACA. Justice Adamson further commented had the assessor taken the approach of awarding a buffer he may well have given less detail about how the buffer was calculated. The approach adopted by the assessor provided detailed reasons which were both comprehensive and sufficient. On that basis the review sought for a failure to award a buffer was not made out. Similarly, the second ground relied upon in that there was a failure to give reasons was also not made out.

It is worth noting most of the judicial reviews previously sought in the Supreme Court were a failure to give reasons for the use of a buffer. Nevertheless, provided an assessor gives adequate reasons for the assumptions made, either on the basis of a buffer or a weekly loss, it is unlikely the decision will be disturbed. The assessment of future economic loss is an evaluative judgment. It is worth remembering that in order to challenge an assessment certificate insurers will need to demonstrate one of the following:

- there is no evidence for a particular finding;
- the assessor has failed to give proper genuine or realistic consideration to material;
- the wrong issue has been identified by the assessor;
- the assessor has reached a mistaken conclusion;
- the assessor has incorrectly applied the law; and
- there has been a failure to provide reasons or adequate reasons where reasons were required.

The grounds on which to challenge a CARS assessment are varied but the choice of a CARS

assessor not to award a buffer when adequate reasons are provided does not in itself provide the grounds to base a challenge to the decision.

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Difficulties Defending Nominal Defendant Claims – *Cordin v The Nominal Defendant*

When an aggrieved plaintiff claims injury as a result of impact by a vehicle that leaves the scene of the accident and cannot subsequently be identified, the Courts have shown that they are often willing to take the word of the plaintiff, subject to due search and enquiry obligations having been satisfied. Of course this will depend on the facts. Time and time again NSW judges have been content to draw inferences in favour of plaintiffs resulting in a verdict against the Nominal Defendant.

The recent decision by His Honour Judge Levy in *Cordin v The Nominal Defendant* [2016] NSWDC 12 highlights some of the problems to overcome for the Nominal Defendant to establish that a plaintiff has invented the presence of the unidentified vehicle in order to claim compensation.

Expert opinion on the nature of the plaintiff's injuries and the pattern of damage to the vehicle in which the plaintiff was travelling at the time is usually central to the determination of liability in such cases, particularly in the absence of any eye witness to the accident. In Mr Cordin's case, this was not an easy task for the experts, as not only were there no eye witnesses, but Mr Cordin was riding a mountain bike at the time of the accident. The pattern of damage to work with was therefore much more limited than had Mr Corbin been in a motor vehicle at the time of the claimed impact.

The accident occurred in a semi-rural area on a road covered in a considerable amount of potholes. Mr Cordin claimed an unidentified vehicle struck him from behind when he braked to steer his bike around the potholes, throwing him off his bike onto the road, face first and rendering him unconscious. As a result of the accident, he sustained a laceration to the left side of his forehead, a head injury with associated neurological complications and a short period of retrograde amnesia, compression fractures to his thoracic spine and injuries to the hands, wrists and knees.

At trial in the District Court before Levy DCJ, it was not in issue between the parties as to whether the plaintiff had conducted due search and enquiry in order to establish the identity of the unidentified vehicle. The Nominal Defendant's defence to the claim was that Mr Cordin had made up his account of the accident.

The defence was based on Mr Cordin's consistent description of the accident to ambulance personnel and hospital staff as *"…fall off bike post hitting a pothole"*, with no mention of an impact with a vehicle.

The accident occurred on 2 September 2012. Mr Cordin's wife gave evidence that she did not talk to her husband until the day after the accident when she saw him in hospital. She claimed Mr Cordin told her at that time he had been hit from behind by a vehicle. However, she made no mention of the conversation when she made a statement to police on 23 October 2012, although she did say that due to her husband's injuries she thought he had been in a car accident. Nor did she make any mention of the involvement of a vehicle when she rang Lismore Council on 6 September 2012 to report that the road needed maintenance. The Council records detailed the call as *"..She advises that her husband was involved in a serious accident on the weekend on that road. He was riding a pushbike and was found face down in a pothole."*

On 10 September 2012, after having consulted a solicitor, Mr and Mrs Cordin attended the local police station and reported the accident. The narrative of the police report includes the description of the accident as "*The rider applied his brakes in order to slow down, and avoid the pot holes. Without warning, the rider was struck from behind by an unknown vehicle. The rider was thrown from his pushbike, sustaining multiple injuries.*"

Mr Cordin's own evidence to the Court was that he had not actually seen or heard an impact with his bike but rather *"felt a force applied from behind"* before the accident.

The Nominal Defendant argued Mr Cordin's evidence that he had been struck from behind by an unidentified vehicle was based on a belief or assumption rather than fact. It was suggested Mr Cordin had given evidence that was a recent invention and *"convenient construction"* purely to obtain compensation for otherwise non-compensable injuries.

His Honour however was prepared to accept Mr Cordin's memory of the events as reliable. There was a finding that although Mr Cordin had experienced a short period of retrograde amnesia after the accident and was found by a passerby *"semi-conscious, disorientated and incoherent of speech, mumbling, and not making a great deal of conversational sense"*, his recollection of what had transpired immediately pre-accident could not be said to be *"glaringly improbable or inherently wrong"*.

Although the ambulance patient record included the note *"…fall off bike post hitting a pothole"*, His Honour did not regard that Mr Cordin's explanation could be excluded as being improbable. In fact, His Honour went further and made a finding that Mr Cordin's

rationalisation of what must have occurred when he felt the force applied from behind his bike was the most likely explanation for the cause of the accident. This was despite the fact that the only evidence pointing to this was Mr Cordin's version of events, which had evidently been reconstructed in the accident after a period of retrograde amnesia.

It is clear Mr Cordin made a good impression on Judge Levy, who accepted Mr Cordin as a witness of truth. His Honour explained the discrepancy in the initial and later versions of the accident mechanics given by Mr Cordin by reasoning that Mr Cordin was less distracted by his pain by the time he spoke to his wife at the hospital the day following the accident, than he was when initially assessed by ambulance and hospital staff. This allowed Mr Cordin to provide to his wife a more accurate and detailed account of what had happened, including the fact an unidentified vehicle was involved in the accident.

The decision illustrates how suspicious circumstances, such as an apparent failure to mention the involvement of an unidentified vehicle in initial accident reports, alone are not enough to defeat a claim of this type. It is also worth noting that his Honour's view was that an allegation of invention for the purpose of obtaining compensation was in effect an allegation of fraud. His Honour noted that fraud had not been pleaded in the defence and seems to have taken this as an indication that the Nominal Defendant did not have sufficient evidence to make that allegation.

A further problem that confronted His Honour was the fact that the expert evidence was completely opposed. Mr Cordin's expert found the bike's rear wheel would not turn freely as a result of the damage said to be from impact, and that the respective positions of Mr Cordin and the bike on the road post- accident was consistent with Mr Cordin having been thrown forward as a result of impact from behind. In contrast, the Nominal Defendant's expert found the rear wheel of the bike would turn freely when he examined it, that the damage to the wheel was consistent with being caused by the fall of the bike in a pothole and that impact from the rear would have caused Mr Cordin to fall backwards, not forwards.

His Honour preferred Mr Cordin's expert, citing as an overriding consideration a finding that the Nominal Defendant's expert had made selective use of available evidence and made incorrect assumptions. As a result, his Honour said there must be some doubt as to the validity of the whole approach and methodology of the Nominal Defendant's expert.

Arguably his Honour took a harsh view in his assessment of the Nominal Defendant's expert's reports, but the decision serves an important reminder that the assumptions underpinning an expert's report have to be proven if the expert report is to be accepted. His Honour was also critical of both parties failing to take up his Honour's invitation to have a joint expert conference for the experts to confer, identify matters that were not in dispute in their respective opinions and narrow the remaining areas of dispute. It is interesting to note this is now a requirement in the District Court as a consequence of recently introduced standard directions made in all proceedings when matters are listed for hearing.

Ultimately, His Honour concluded that it was more probable than not that an unidentified vehicle had struck Mr Cordin's bike and propelled him forward and onto the roadway. As may be expected, the Court did not then have any trouble concluding the driver of the unidentified vehicle had been negligent by failing to take precautions to avoid colliding with Mr Cordin's bike.

The decision demonstrates that in a case of an accident said to be caused by an unidentified vehicle, without an eye witness account those acting for the Nominal Defendant will have to work hard to gather corroborative evidence to establish an alternate explanation for how the accident occurred to defeat a claim.

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The Difficulty Of Establishing Contributory Negligence By A Minor

In a recent District Court decision His Honour Judge Elkaim considered that the defendant failed to prove contributory negligence in a claim involving an 11 year old plaintiff, Dale Ragg. Dale was not wearing his seatbelt when his mother's vehicle was hit by the defendant's vehicle. He was ejected from the vehicle and sustained a serious injury to his left leg. However, Dale's mother insisted that her son had been wearing his seatbelt and this was not challenged by the defendant.

There is sometimes reluctance for insurers to make an allegation of contributory negligence against a young plaintiff, particularly in circumstances where a parent was driving the vehicle in which the child was a passenger, as was the case for Dale. The rationale is that the parent ought to have ensured their child was safely restrained and as a matter of public policy the child's damages should not be reduced by reason of a parent's failure in this regard.

However, there is no suggestion in his Honour's judgment that it was inappropriate for the insurer to make the allegation of contributory negligence against Dale. The reason the contributory negligence case failed was for lack of evidence and the decision serves

as a useful checklist for the preparation of any future such cases.

The onus is on the defendant to establish contributory negligence and His Honour took issue with a number of aspects of the defendant's case. Firstly, Dale was not asked any questions about his understanding of the need to wear a seat belt and the consequences if a seat belt was not worn. The defendant's counsel argued that this was an objective test and that therefore this was not necessary. His Honour's view was that even though it was an objective test, the effect of Section 5R of the *Civil Liability Act* 2002 is that the application of the test to an 11 year old boy requires some evidence as to what might be expected to be the extent of this understanding in a person of that age.

Specifically, Section 5R 2(b) provides that the determination of whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm is to be determined on the basis of what the person knew or ought to have known at the time. His Honour's complaint was that there was no evidence before him on this point and his Honour was himself unable to state what an 11 year old person in the position of Dale ought to have known. This complaint was made in the context of Dale being described by His Honour as "*obviously a very unsophisticated child*".

His Honour also noted there was no evidence of whether anything occurred immediately prior to the impact that may have provided justification for Dale not wearing a seatbelt, how long Dale had been in the vehicle and whether there was any reason why he might have undone his seatbelt.

His Honour was also not persuaded that the defendant established causation of injury. The defendant relied on an expert opinion that Dale's leg injuries were caused by him hitting a fence when he was ejected from the vehicle. What troubled his Honour was that the expert opinion was based solely on the deduction of the investigating police officer as to what may have occurred.

There was no other evidence that established the path of Dale's body after he was ejected from the vehicle. His Honour did not think the expert opinion based on a policeman's deduction was enough to satisfy the obligation of the defendant to prove Dale's leg injury was caused by his hitting the fence.

As a result, his Honour held the defendant had not made out the allegation of contributory negligence. It had not been established that Dale's failure to wear a seatbelt caused the leg injury and there was no evidence of what Dale knew or ought to have known of the consequences of not wearing a seatbelt.

Insurers may be more inclined to consider making an allegation of contributory negligence against a young plaintiff in the absence of any comment as to it being inappropriate to do so in His Honour's judgment. It is clear that to succeed on the allegation that expert evidence will be required both as to the expected extent of the child's appreciation of the consequences of not wearing a seatbelt and on the precise mechanism of injury so as to establish causation.

Evidence will also need to be put before the Court of the child's actual knowledge of those consequences and that there were no extenuating circumstances which may have explained or justified the child's failure to wear a seatbelt at the relevant time.

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