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Insurance Policies & Reasonable Precautions Conditions – The Court's Approach

Most policies of insurance that provide cover for loss and damage to property include a condition which requires the insured take reasonable precautions to prevent damage to the insured property.

Australian courts have considered various forms of the "reasonable precautions" clause since the early 1940's. Non-compliance with the clause enables an insurer to refuse to indemnify the insured for damage to the insured property.

However, as most policies of insurance provide cover to an insured in respect of carelessness or inadvertence, mere negligence by an insured is insufficient to establish an insurer's entitlement to decline indemnity for non-compliance with such a clause.

The general principle governing the operation of a reasonable precautions clause is that an insured must have had actual knowledge of a risk of damage to the insured property and, having such knowledge, either deliberately courted that risk or recklessly disregarded it.

This principle underlying the reasonable precautions clause has been the accepted authority of Australian courts in every jurisdiction since at least the 1980's and, in particular in NSW since 1986 when the NSW Court of Appeal handed down its decision in *Legal and General Insurance Australia Ltd v Eather* in which the Court adopted the above principles that were enunciated by Lord Diplock in a 1967 English case of *Fraser v BN Furman*.

It has frequently been held that policy conditions such as the reasonable precautions clause are a condition precedent to liability under the policy such that, if the condition is not satisfied, the question of an insurer's liability to indemnify its insured does not arise.

It followed that the question of which party bears the onus of proof in respect of the reasonable precautions clause has often been held to be the insured, not the

insurer. This was the case in earlier decisions of the NSW Supreme Court and Court of Appeal in *Eather*, *Kodak (Australasia) Pty Ltd v Retail Traders Mutual Indemnity Insurance Association* and *Vero Insurance Ltd v Power Technologies Pty Ltd*.

Another general principle that usually applies to a reasonable precautions clause is that proof of "actual knowledge" of the risk must involve the knowledge of the insured. Therefore, if the insured is a corporation, the knowledge must be that of a directing mind and will of the company, usually a director, and not an employee.

The NSW Court of Appeal was recently asked to consider these general principles with respect to a commercial motor vehicle policy of insurance.

In *Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd* the Court of Appeal by a unanimous judgment overturned the primary judge's finding that the insurer was entitled to refuse indemnity by reason of the insured's failure to comply with the reasonable precautions clause.

Barrie Toepfer Earthmoving and Land Management Pty Ltd ("Toepfer") conducted an earthmoving and heavy vehicle transport business in the Newcastle and Central Coast areas from premises in Wyee.

On the morning of the accident causing damage, a 16 tonne excavator was loaded onto a low loader with its boom, arm and bucket facing towards and tucked down such that the arm and bucket were not resting on the raised section at the front of the low loader.

After being driven to a location for use, an employee of Toepfer who was driving the low loader stopped at the RTA weighing station approximately 40km north of the Hexham Bridge. The RTA inspector determined that, due to weight restrictions, the excavator needed to be repositioned which involved moving it forward so that the bucket rested on the raised section of the low loader.

This increased the highest point of the excavator's boom by almost one metre to just under 5.5m.

The maximum permissible height on NSW roads at the relevant time was 4.3m without a special permit. With a permit, that height was 4.8m.

The height for vehicles using the Hexham Bridge as indicated by a sign on its northern approach was *Low Clearance 4.8m".*

In due course, the Toepfer employee drove the low loader across the Hexham Bridge travelling at approximately 60kph. The boom of the excavator struck the overhead transverse beams of the spans. The Toepfer driver and another employee who was with him inside the prime mover both heard a series of noises which became louder as they crossed the bridge and they were jolted around insider the cabin. The driver brought the vehicles to a stop.

The driver of another vehicle which drove past indicated they had "demolished" the bridge. Both Toepfer employees checked the vehicles and the load and found little sign of damage.

It was later discovered that the bridge was significantly damaged for which the RTA paid out in excess of $12.8 million to make good that damage.

The RTA sued Toepfer claiming damages representing those make good costs.

Toepfer claimed indemnity from CGU under the terms and conditions of its commercial vehicle policy of insurance but CGU declined indemnity on two bases.

First, in relation to an exclusion clause which denied cover for loss or damage or liability caused by a wilful act or connivance by the insured or any person acting for the insured or on its behalf, or by the recklessness of the insured or such other person acting on the insured's behalf.

Second, by reason of the insured's breach of the policy condition which required the insured or any person acting on behalf of the insured, to exercise reasonable care and precautions to prevent loss or damage to the motor vehicle where such breach caused or contributed to any loss, damage or liability.

At first instance, Justice Price of the NSW Supreme Court held that CGU was entitled to refuse to indemnify Toepfer. His Honour found that the Toepfer employee driving the prime mover acted recklessly when he drove the vehicle onto the Hexham Bridge, knowing that the height of the bucket of the excavator exceeded the maximum height restriction.

Toepfer's appeal to the NSW Court of Appeal was successful. The leading judgment was delivered by His Honour Justice Meagher with which Ward JA and Sackville AJA agreed.

The interesting parts of Meagher JA's judgment relate to onus of proof, and the actions of the Toepfer employee as to whether or not they constituted recklessness by the insured to justify a finding that the reasonable precautions condition had been breached.

On the issue of onus, despite the earlier authorities outlined above, Meagher JA reviewed those decisions and concluded that there was in fact no authority for the principle that the insured bears the onus of proving satisfaction of the reasonable precautions condition. His Honour held that the accepted legal principle regarding onus is that it is a matter of construction of each individual policy.

Meagher JA relied on a High Court decision of *Wallaby Grip Limited v QBE Insurance (Australia) Limited* to find that as the indemnity arose subject to satisfaction of the condition, the onus therefore rested with the insurer to establish a breach of the condition that caused the liability in the insured to pay the damage to the bridge claimed by the RTA.

On the question of whether or not the Toepfer employee's conduct was sufficient to establish actual knowledge and recklessness by the insured, Meagher JA focused on the policy wording which included the words "or a person acting on your behalf" with respect to the reasonable precautions clause.

His Honour found that this did not require the person to be a director or a directing mind and will of the company and the driver of a prime mover who owed a duty to exercise reasonable care for the safety of the vehicle as part of his employment conditions, which was held to be the case here, was sufficient for the purpose of the policy condition.

Nevertheless, on the evidence before the Court, Meagher JA held that the conduct of the Toepfer employee in these circumstances did not amount to a breach of the reasonable precautions clause as his conduct was not found to be reckless within the meaning of the condition.

Pivotal to His Honour's conclusion was that there was no consideration by the primary judge of why the Toepfer employee would have driven the vehicle onto the bridge at approximately 60kph without slowing if he had believed there was a realistic risk the boom could strike the bridge. It was much more likely that he would have slowed and stopped the vehicle, had he been armed with the knowledge of such a risk, given the very serious risk of harm to himself and his fellow employee had he proceeded with that knowledge to drive the vehicle across the bridge at such a speed.

Accordingly, the appeal by Toepfer was upheld and CGU was ordered to indemnify Toepfer in respect of the claim for damage brought by the RTA.

The case is a very interesting illustration of the NSW Court of Appeal being prepared to clarify legal principles regarding the interpretation and application of policy conditions in a way that is consistent with the trend which has developed more recently in the High Court namely to give the policy condition an interpretation consistent with the overall commercial purpose of the insurance contract.

The earlier decisions of the NSW Courts to which insurers seeking to rely upon a reasonable precautions clause were mostly decided in the pre-Insurance Contracts Act era and before the advent of a purposive construction approach adopted by the High Court in recent times.

Insurers relying on a reasonable precautions clause to refuse indemnity will bear the onus of proving the breach.

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Common Sense Doesn't Equal Causation

The NSW Court of Appeal has recently revisited the issue of causation in the context of an injury sustained on a worksite.

In the matter of *Murray v Sheldon Commercial Interiors Pty Limited* [2016] NSWCA 77 the Court of Appeal unanimously dismissed an appeal brought by an injured plaintiff from a judgment of the District Court.

Murray was seriously injured when he fell at work at a construction site on 13 December 2011. Murray and his co-worker were subcontracted to install large sheets of glass into aluminium frames in a building that was being refurbished. The precise mechanism and cause of the accident were hotly contested at trial and on appeal; however there was no doubt that the plaintiff sustained an injury. Murray contended that it occurred whilst he was working from a stepladder and he slipped as a result of dust that had accumulated on the ladder. There was a dispute between the parties as to exactly how much dust was present at the worksite let alone whether Murray slipped.

Murray relied upon an expert report however the expert had not been provided with any picture or specifications of the ladder from which the plaintiff fell. The expert concluded however that the surface from which Murray fell was smooth and dust on the surface "would reduce the coefficient of friction to a level where the risk of slipping would be very high".

The Court noted there was no reasoning in the report to support these conclusions nor was there a quantitative assessment of the reduction of coefficient of friction. There was no analysis of how much dust on any surface would be required in order to achieve a "very high" risk of slipping. Moreover there was no explanation as to what was meant by a "very high" risk of slipping.

The expert was instructed that Murray fell from the top level of the ladder whereas the plaintiff's evidence was that he fell from the first step down from the top. Despite objection being taken to its admission, the report was allowed into evidence with the primary judge stating that it was "very much a question of weight". The expert did not give oral evidence.

The trial judge dismissed Murray's claim on the basis that whilst he accepted that there was dust on the ladder the plaintiff had not fulfilled his obligations pursuant to Section 5D of the *Civil Liability Act 2002* to satisfy causation. His Honour noted that the expert report did not deal with the factual situation of the Murray stepping down to the first rung of the ladder but rather incorrectly dealt with Murray falling from the top.

His Honour stated:

"There is no satisfactory evidence as to the amount of dust on the first rung down. Further there is no expert evidence as to the effect of dust and/or the amount of dust on that step. Indeed, the plaintiff's evidence in regard to slipping was not clear. He says he did not slip from the plastic platform and his expert's report does not deal with a slip from the first rung down."

On this basis the trial judge dismissed Murray's claim.

Murray appealed.

Among the many arguments and contentions was the fact that it was common sense that dust on a surface would make it slippery. To this end the Court noted that the onus was on Murray to prove on the balance of probabilities that the dustiness of the ladder was a necessary condition of his fall. The starting point was some admissible evidence as about the two surfaces which interacted: the sole of Murray's shoe and the surface of the step.

The Court of Appeal agreed that Murray's expert's report held no weight and went further in saying that it should not have been admitted at all. In the absence of Murray's expert opinion commenting as to the above factual circumstances there was no evidence of causation whatsoever.

On appeal Murray's counsel submitted that it was simply necessary for Murray to disprove any other explanation for the accident.

The Court of Appeal disagreed and stated that:

"Questions of the amount of dust were important if Mr Murray were to discharge his burden of proving that the quantity of dust on the ladder was causally connected with his accident.

We do not accept Mr Murray's submissions based on common sense. Common sense cannot, in a case such as this, discharge the onus borne by Mr Murray."

Their Honours referred to *Jackson v McDonalds Australia* [2014] NSWCA 162 and noted that the factual situation and the absence of evidence were sufficiently similar. The Court stated:

"It cannot be said that "common knowledge provides an answer to the question of whether a person wearing work boots is more likely to slip on the step of a ladder if there is an (unidentified) amount of dust on the step than if there is not. Workers on building sites, including painters patching walls, who constantly have to use dusty ladders in the course of their work, do so without slipping."

The above comments are significant as the plaintiff always bears the onus of proving factual causation. In the absence of evidence supporting causation a plaintiff should not succeed in their clam. Evidence, and in particular expert evidence, should be scrutinised to ensure that it is firstly admissible but also that it bridges the causation gap which must be forded by the plaintiff. Common sense or common knowledge is not expert evidence.

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Limitation of Actions – What You Ought To Know

It is generally thought that there are three years after an accident for a claimant to bring a claim for personal injury. But is this really the case?

Section 50C of the *Limitation Act 1969* (NSW) provides a personal injury action is not maintainable if brought after the expiration of the period of three years running from and including the date on which the cause of action is discoverable by the plaintiff. This is referred to in the Act as the "3 year post discoverability limitation period".

Section 50D(1) provides a cause of action is "discoverable" by a person on the first date that the person knows or ought to know of each of the following facts:

(a) *the fact that the injury or death concerned has occurred,*
(b) *the fact that the injury or death was caused by the failure of the defendant,*
(c) *in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of the action.*

Consideration of what a person "ought to know" has recently been considered by her Honour Justice Adamson in the Supreme Court decision of *Smith v Hunter New England Local Health District*.

Mrs Smith brought a claim for compensation under the *Compensation to Relatives Act* resulting from the death of her husband and the father of their two daughters after he committed suicide on 9 February 2004.

On 1 February 2004 the deceased's brother found him at home attempting to commit suicide with a noose around his neck. He was admitted to James Fletcher Psychiatric Hospital (for which Hunter New England Local Health District was responsible) and diagnosed as suffering from depression with psychosis and at a high risk of suicide. Before any proper psychiatric assessment had been undertaken and the therapeutic benefit of medication prescribed could be adequately assessed, Mr Smith was discharged from hospital. Mrs Smith alleged the defendant in permitting the deceased to be discharged was in breach of its non-delegable duty of care owed to him and but for the

defendant's negligence the deceased would not have committed suicide.

Mrs Smith's Statement of Claim was not filed until 5 December 2013, some nine years and ten months after Mr Smith's death. In its defence, the defendant relied upon Section 50C and Section 50D of the *Limitation Act 1969* stating the proceedings were not maintainable as they were commenced more than three years after the date on which the cause of action was discoverable.

Mrs Smith filed a Notice of Motion seeking a declaration the proceedings were commenced within the limitation period.

The Judge accepted the evidence of Mrs Smith that she was not aware that there was a time limit for bringing proceedings.

The evidence established that on the day after the deceased was discharged from hospital, Mrs Smith spoke with Guy Baker, a nurse at the hospital who had been involved in the deceased's care. She told him of her concern that her husband was not well enough to be out of hospital. Mr Baker advised the consensus of the members of the nursing staff was that Mr Smith had been discharged from the hospital too early and was on the wrong medication.

Mrs Smith was so concerned about her husband who refused to return to hospital that she arranged for him to see a general practitioner, Dr Saltis, who expressed the view Mr Smith was on the wrong medication.

When the deceased committed suicide on 9 February 2004 Mrs Smith believed that if the hospital had managed his treatment, medication and discharge properly he would not have killed himself.

In late February 2004 Mrs Smith's mother-in-law asked her to attend a conference with a friend of the family, Ms Hansen, who was a solicitor at the University of Newcastle Legal Centre to discuss with other members of the deceased's family the possibility of requesting a Coronial Inquest into the deceased's death. The conference took place on 4 March 2004.

In late February 2004 Mrs Smith requested the hospital arrange meetings with the doctor and the psychologist who was involved in her late husband's treatment. This meeting took place with no real information being provided and Mrs Smith's let them know how disappointed she was that she had been given no answers. Mr Parker advised her on the way out that they were very sorry for her children and the fact the hospital had "stuffed up".

Between March and November 2004 Mrs Smith met with Ms Hansen again on two or three further occasions. Ms Hansen helped Mrs Smith obtain documents from the Police.

On 28 April 2004 Mrs Smith attended another meeting at the hospital where Mr Parker and Mr Baker were present as well as the treating psychiatrist, Dr Balakrishnan. Mrs Smith formed the view the doctor was poorly prepared and unable to answer questions as he did not have access to his clinical notes.

Mrs Smith then requested a meeting with Ms Robson whom she believed to be the psychologist who treated her late husband in hospital. She was surprised Ms Robson refused to meet her because she was traumatised by the circumstances of the deceased's death.

At further meetings on 24 May 2004 and 5 July 2004 with the Deputy Director of Hunter Mental Health and Professor Carr whom Mrs Smith understood to be in charge of the hospital, Mrs Smith was informed the deceased was fit to be discharged as he had good "community support" which Mrs Smith understood to be a reference to such support that she and other members of the family were able to provide to him.

By the end of August 2004 Mrs Smith was upset and frustrated by the response from hospital staff who continued to maintain there was nothing wrong with the way the hospital had treated her late husband.

Eventually on 15 November 2004 with the assistance of Ms Hansen, Mrs Smith wrote to the Coroner seeking an inquest to ascertain that if her husband had stayed in hospital until his medication was sorted out and had reached the appropriate therapeutic level, he would still be alive. The letter expressed her concern to ensure that no other family had to suffer as they had.

After hearing very little from the Coroner, on 21 September 2005 Mrs Smith sent a letter of complaint to the Health Care Complaints Commission.

Under cover of a letter dated 23 November 2005 from the Assistant Coroner, Mrs Smith received a copy of the report the defendant had submitted to the Coroner as well as other reports in the Police Brief. She was too distressed to read these documents in full. The documents included a report of Dr William Barclay provided to the Coroner in May 2005. His report was critical of the hospital's treatment of the deceased. It included his opinion that any patient with a depressive illness who represented a moderate to high suicidal risk should be treated in hospital until the effects of treatment were clearly evident. Discharge to family care would then depend on the degree of social support available and the extent to which medical care was accessible in an emergency. In Dr Barclay's opinion when the deceased was discharged it was well before the medication could have had any significant therapeutic effect on his illness and was without the prescription of an anti-psychotic.

Justice Adamson accepted Mrs Smith's evidence that she did not read the report of Dr Barclay or the defendant's response until she received the report of Dr Phillips dated 11 March 2013 which was commissioned by her solicitor.

A response to Dr Barclay's report was provided by the defendant signed by Dr Andrew Llewellyn and Professor Carr in September 2005.

Around 28 December 2005 Mrs Smith received a response from the defendant concerning the complaint she had made to the HCCC.

On 9 January 2006 Ms Hansen wrote to Mrs Smith and advised that due to reduction in staff at the Legal Centre, legal representation would not be available at any inquest into the deceased's death although Ms Hansen could accompany her as a support person. On no occasion during the course of Ms Hansen's association with Mrs Smith did Ms Hansen inform or advise her she could bring proceedings against the hospital for damages.

In March 2006 Mrs Smith received a letter from the HCCC informing her that her complaint had been referred to a voluntary conciliation process which would involve further meetings with hospital staff. Having regard to her experience at such meetings, Mrs Smith did not consider there was anything to be gained by continuing the process.

On about 4 March 2006 Mrs Smith was advised by the Coroner that he had dispensed with the holding of an inquest although he had made a recommendation that hospitals follow in treating or admitting persons thought to be suffering a mental illness.

Mrs Smith received a bundle of documents from the Coroner which she found too upsetting to read and put them away in a box. She was very disappointed with the Coroner's decision not to hold an inquest and she believed the Coroner had not found any significant cause for concern in the hospital's treatment and discharge of her late husband.

On 20 June 2006 an Investigations Officer with the HCCC attended Mrs Smith's home and took detailed notes and prepared a draft statement and forwarded it to Mrs Smith which referred to the documents that had been provided to her.

Adamson J found that Mrs Smith had received the letter with the enclosures but accepted her evidence that she did not recall receiving them.

On 26 February 2007 Mrs Smith received a letter from the HCCC informing her no further action would be taken against Dr Balakrishnan as he was not registered with the Medical Board and was unable to be located. Mrs Smith was informed the HCCC was terminating the investigation into Ms Robson as the curtailed evidence did not support a finding of a departure from professional standards.

By early 2007 Mrs Smith considered she had exhausted all available options and decided to return to work.

Although Mrs Smith encountered Mr Baker on several occasions following the deceased's death, they had not broached the subject of the death as they were often in the company of others. In late 2010 Mrs Smith encountered Mr Baker again and he repeated his earlier comment that the hospital had not done enough. For the first time Mr Baker also advised Mrs Smith that she had seven years to take action against the hospital. Justice Adamson accepted Mrs Smith's evidence that before that exchange she had not been aware that suing the hospital was an option.

Shortly after this Mrs Smith contacted Mr Wilson who became her solicitor. Their first conference was on 17 December 2010. He advised Mrs Smith the limitation period was three years not seven, indicating that it was certainly worth investigating the prospects of the matter.

Mr Wilson filed an affidavit deposing to the conferences he had with Mrs Smith and the steps he took on her behalf from the time she first contacted him until filing of the Statement of Claim on 5 December 2013.

Justice Adamson indicated the issue was whether the cause of action was discoverable before 5 December 2010 and the defendant bore the onus of proving that matter.

The defendant contended the cause of action was discoverable no later than November 2005 or early 2006 when Mrs Smith received Dr Barclay's report from the Coroner. The defendant relied on the fact Mrs Smith herself considered the hospital to be responsible for her husband's death and knew even before he died that the nursing staff and Dr Saltis thought he had been discharged too early and was on the wrong medication. This was fortified by Mr Parker's apology to her at the first meeting at the hospital on 15 March 2004.

Adamson J considered it was common ground the matters in Section 50D(1)(a) and (c) were discoverable prior to 5 December 2010. The issue was whether Mrs Smith knew or ought to have known of the fact that her late husband's death was caused by the fault of the defendant before that date as required by Section 50D(1)(b).

Adamson J found the "fact" in Section 50D(1)(b) is one in respect of which a "legal evaluative judgment appears to be required". Accordingly the "fault" in the subsection is legally actionable fault as distinct from moral culpability. Section 50D must be read in a broader context which includes Section 347 of the *Legal Profession Act 2004* which requires a solicitor to certify as to the reasonable prospects of success of a claim for damages.

Justice Adamson was satisfied that until Mrs Smith received advice from Mr Wilson on 17 December 2010, she did not know that she had a claim under the *Compensation to Relatives Act* as a dependent of a person who had died allegedly as a consequence of

another's negligence. She held that for the purposes of "fault" in Section 50D(1)(b) a defendant must establish that the plaintiff knew that the matter was legally actionable.

That was not however sufficient to end the matter as the fact was discoverable if Mrs Smith ought to have known of it. She ought to have known of it at a particular time if she would have ascertained the fact if she had taken all reasonable steps to ascertain the fact. The defendant submitted Mrs Smith could have spoken to Mr Baker about the death at any time between the death and late 2010, as they came across each other on occasions over the years at school functions and the like. Her Honour found Mrs Smith did not appreciate she had a claim arising from the death of her husband. It was Mr Baker who raised the possibility of a claim with her. Her purpose in consulting Ms Hansen was to obtain assistance in requesting an inquest and not to obtain advice about whether she had a claim. Whilst it was surprising that Ms Hansen had failed to mention the possibility of a claim, her omission did not give any support to an argument Mrs Smith had failed to take all reasonable steps which if taken would have alerted her to the possibility of a claim.

Her Honour was satisfied Mrs Smith's desire for an inquest and investigation of the cause of her husband's death by the HCCC were not preliminary steps to making a claim against the hospital as they not infrequently are. She accepted the purposes in seeking an inquest and an investigation by the HCCC were unrelated to the bringing of a claim as she wanted to bring to account the medical staff who in her view had discharged Mr Smith too early, and thus prevent others from having to suffer the same that she had suffered.

Her Honour considered the claim sought to be brought by Mrs Smith was more sophisticated than one in which an injured person sues a wrongdoer for damages where legal liability and moral culpability can be seen to be more closely aligned. Mrs Smith needed to know there was a cause of action for the dependents of a deceased and secondly that the defendant was liable for the negligence by the hospital which in turn owed a duty to its patients which being non-delegable could not be delegated to its medical staff.

So far as Dr Barclay's report was concerned, her Honour noted it failed to persuade the Coroner to conduct an inquest. Whilst Mrs Smith had forwarded it to the HCCC with a view to persuading it to conduct an investigation into Dr Balakrishnan and Ms Robson, Mrs Smith advised she could not bring herself to read it. Since she did not know she had a potential claim, there was no reason for he r to read it.

Her Honour accepted the requirement to take "all reasonable steps" could not include consulting with a nurse such as Mr Baker who would have incidentally alerted her to the possibility of a legal claim of which she had to seek legal advice.

Furthermore, Mrs Smith could not be criticised for not seeing a solicitor as she saw Ms Hansen for the purpose of obtaining an inquest and was not told that she might have a cause of action.

Overall, her Honour was satisfied the steps actually taken by Mrs Smith constituted "all reasonable steps in the circumstances of the case". She did not accept the defendant's submission that "reasonable steps" included consulting a further solicitor other than Ms Hansen or speaking to Mr Baker earlier.

The decision is interesting from the perspective that whilst Mrs Smith had in her possession from late 2005 evidence from Dr Barclay which was critical of the hospital's treatment of her husband, she did not read it. Similarly she did not read the bundle of documents provided to her by the Coroner. Likewise the draft statement provided by the HCC investigator which referred to the documents was not read. In the circumstances being possessed of the means to inform one of these matters was insufficient to establish Mrs Smith ought to have known the fact was discoverable.

The fact the claim was somewhat more sophisticated to a layperson than a normal liability claim was clearly a factor Justice Adamson took into account.

Nevertheless, the decision is consistent with the approach in previous decisions of the NSW Court of Appeal where there has been a beneficial interpretation of the legislation.

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MVA and Medical Negligence - Double Compensation ?

The Supreme Court has rejected an application for summary dismissal of medical negligence proceedings where it was argued the plaintiff had already been compensated for the same injuries in previous MVA proceedings.

Jener Daluz suffered injuries in an MVA on 12 December 2008 and brought proceedings claiming damages for the injuries she received. She sued the driver and the owner of the vehicle, the Health Administration Corporation.

In the MVA proceedings, the pleadings referred to injuries to the left leg including left leg compartment syndrome and neurological damage to the left leg.

The MVA claim was ultimately settled in 2014 and consent orders were filed and Daluz settled her claim for $350,000 plus costs "without admission of liability".

In the MVA proceedings Daluz was assessed pursuant to Pt 3.4 of the *Motor Accidents Compensation Act 1999* by Assessor Marsh who found the left leg injury was not caused by the accident due to lack of contemporaneous evidence, noting the first complaint was made some 18 months after the accident. The Assessor did not consider there was a link between the left leg condition and the injury to the right leg in the accident.

After Assessor Marsh's assessment (but before the MVA settlement) Daluz's solicitors obtained medico-legal reports which indicated the left leg condition was the result of Daluz favouring that leg as a result of the injury to the right leg.

Before the MVA claim was settled, Daluz commenced proceedings against Dr John McMahon and the South Western Sydney Local Health District alleging misdiagnosis of his left leg condition. Daluz claimed he suffered an injury to his right leg in the MVA which caused him to favour his left leg. Before he was correctly diagnosed as having a tear of the calf muscle, he was treated for deep vein thrombosis which led to extensive bleeding and required fasciotomy surgery.

The injuries to the left leg were particularised in the same terms as the MVA proceedings.

South Western Sydney Local Health District argued that the same injury and disability was determined in the MVA proceedings when the consent judgment was entered. It was argued that Daluz could not claim the same damages twice because there was also privity between the defendants in the two proceedings as coincidentally the owner of the motor vehicle was the Health Administration Corporation who was responsible for the actions of the Hospital.

The Court rejected this argument, observing that the Health Administration Act 1982 "represents a clear expression of a legislative intention that area health services are not servants or agents of the crown".

Further, the Court found the nature and extent of the harm suffered with respect to the left leg injury was not necessarily outlined by the consent judgment. It was noted the left leg condition was not the only injury particularised in the MVA proceedings. While the consent judgment concluded issues of duty, breach and damages, it did not determine the quantification of those damages.

Having failed in the first argument, South Western Sydney Local Health District submitted that the medical negligence claim was an abuse of process. It was argued that loss which flowed from the left leg condition had already been attributed to the defendants in the MVA proceedings.

This argument was also rejected by the Court. Although the medical evidence indicated the MVA may be an indirect cause of the left leg condition, the consent judgment did not specifically determine this issue. Even if the judgment determined there was a link, the extent to which the injuries and disabilities suffered by Deluz arose from the alleged clinical negligence was not determined in the MVA proceedings.

Therefore, the consent judgment could not be read as recoupment for the whole of Daluz's loss or damage arising from the left leg condition and the Court was satisfied that it would not be unconscientious for Daluz to pursue the medical negligence claim.

Leaving aside questions of liability, the issue of whether the actual loss or damage incurred by Deluz from the alleged clinical negligence exceeded the compensation already recovered will be an issue at the trial in any event.

This is an interesting case where, although the injuries to the left leg were particularised in almost identical terms in both proceedings, the Court was satisfied the plaintiff was not pursuing "double compensation" at this stage of the proceedings and declined to summarily dismiss the claim.

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No Proof -You Lose – A Failure To Establish Breach of Duty

The New South Wales Court of Appeal has recently found in favour of a defendant where the claimant failed to prove the circumstances of the injury.

The decision of *Small v K & R Fabrications (Wollongong) Pty Limited* demonstrates the it is incumbent on defendants and claimants to properly investigate claims from the very beginning and to ensure that information is gathered whilst it is still "fresh" and available.

Raymond Small was employed by Allmen Industrial Recruiting Pty Ltd and attended a BlueScope Steel site as part of a team of labour hire employees. K & R Fabrications had a contract to undertake maintenance works at the Port Kembla steelworks. Small alleged that he was injured whilst assisting a boilermaker who was using an oxy torch to cut through a steel beam. Small was asked to hold the beam and the boilermaker started cutting the beam approximately two feet from where Small was holding it. The boilermaker allegedly cut clean through the steel beam and Small took the full weight of the beam and sustained injury to his back.

Small commenced proceedings in the Supreme Court against K & R Fabrications.

K & R Fabrications argued at trial that the boilermaker should not have been positioned in the position that

Small described. Further, Small would have been aware of the manner in which the beams were cut and the drop would not have been unexpected.

At first instance, Fullerton J determined that the evidence did not substantiate Small's version of how the injury occurred. Her Honour considered the extensive medical material, statements made by Small and evidence given by employees of K & R Fabrications and found that the incident could not have occurred as described by Small. There were also issues which arose in relation to reporting of the injury. Small therefore failed in his claim.

Small appealed.

On appeal Small argued that Her Honour erred in failing to accept the plausible account given by him and that the judge's findings were contrary to compelling inferences that could be drawn from the evidence. Small also argued there was a failure by her Honour to provide adequate reasons.

Small's appeal was unsuccessful.

The Court of Appeal determined that there was a question whether Small had reported the event in the course of his shift as he claimed and this issue was relevant given an absence of evidence to support Small's assertion that he made an immediate report of the injury to his site supervisor. The Court of Appeal held that Fullerton J was correct in her assessment that *"the probabilities favour the plaintiff having sustained an injury that was not of the severity described by him in his evidence, whatever its mechanism."*

The Court of Appeal noted that neither the incident report nor notes taken by treatment providers supported the description given by Small of immediate and severe pain in his back. It was accepted that based on the evidence available Small did not report the injury in the course of his shift.

Small's description that the boilermaker was inside the structure was critical as he failed to describe how the boilermaker got inside the structure.

In contrast, the "vivid" evidence given by K & R Fabrications was accepted by the Court of Appeal as how the work was undertaken on a regular basis. The Court of Appeal indicated that there was no lack of clarity or error in her Honour's reasoning at first instance and that her conclusion was not only warranted but no other conclusion would have been available on the evidence.

The Court of Appeal noted that it was clear her Honour did not accept Small's evidence in critical respects and this rendered his account implausible. Her Honour's reasoning and her determination was not in error.

Importantly the Court of Appeal highlighted the fact that the trial judge did not make a finding that the incident did not occur, rather the judge declined to make a finding that the incident occurred as advanced by Small.

The decision is an important reminder that just the mechanism of injury, circumstances of the accident and breach of duty must be established and damages do not simply follow on from a workplace injury. A claimant has to prove that the manner in which they were injured was as a consequence of the defendant's negligence.

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Construction Law- "The Truth Is Rarely Pure And Never Simple."

Section 13 of the *Building and Construction Industry Security of Payment Act 1999* requires head contractors to include with any payment claim submitted under that Act a supporting statement in the form of a statutory declaration that all its subcontractors have been paid for the work that is the subject of the payment claim.

In our last edition of this newsletter we looked at the argument that if the statutory declaration includes a statement which the person swearing the declaration knows to be untrue, the payment claim has not been validly served.

This issue arose once again in the recent decision of the Supreme Court of New South Wales in *Kyle Bay Removals Pty Limited v Dynabuild Project Services Pty Limited*.

Kyle Bay had engaged Dynabuild to construct a warehouse at its property at Punchbowl, New South Wales. The contract provided that claims for progress payments were to be made on or after the 22nd of each month and they were to be for the value of all the work carried out up to the date of the claim. There was no requirement for the relevant work to have been actually carried out in the preceding month.

It was common ground between the parties that the works reached practical completion by 24 September 2015 and the defects liability period expired on 24 December 2015. Shortly after practical completion had been achieved, Dynabuild submitted a payment claim for all the contract work and variations, claiming they were 100% complete. Kyle Bay did not issue any payment schedule in response to this claim and did not pay the amount of the claim. Accordingly, Dynabuild commenced proceedings in the District Court seeking summary judgment for the full amount of its payment claim. However, once it was pointed out by Kyle Bay that Dynabuild had failed to include with its payment claim the supporting statement required by the Act, the Court proceedings were discontinued with the consent of both parties.

In November 2015 Dynabuild submitted a new payment claim for the same amount of money. This time, Kyle Bay issued a payment schedule that disputed that the work had been completed and that Dynabuild was entitled to the variations it claimed. Dynabuild applied for an adjudication of this payment claim in accordance with the processes of the Act and the adjudicator delivered a determination that Dynabuild was entitled to its progress payment. Dynabuild again commenced proceedings in the District Court to enforce this determination.

Kyle Bay sought to set aside the adjudicator's determination on the basis that Dynabuild had, by discontinuing the September Court proceedings, "elected" to seek to press its payment claim by means of court proceedings rather than adjudication, and was therefore not entitled to apply for adjudication in relation to the same work at a later date.

Meagher JA (sitting in the Supreme Court) held that since the September payment claim had not been accompanied by a supporting statement as required by the Act, it had not been validly made, and was therefore irrelevant to the November claim. He also noted that while the proceedings had been dismissed, the payment claim itself had not been withdrawn. Accordingly the Judge held that Dynabuild had not made any such "election".

Kyle Bay also argued that both the September and November payment claims were in relation to the same reference date, which is prohibited under the provisions of the Act. The Judge noted that since the September payment claim had not been validly made, Dynabuild was entitled to submit a new payment claim in relation to the same reference date. The Judge also noted that in any event some minor electrical work that had been carried out on 17 November 2015 meant Dynabuild was entitled to submit a new payment claim following 22 November 2015 with that later date being the relevant reference date.

Kyle Bay had also submitted that in his statutory declaration supporting the November payment claim, the managing director of Dynabuild had made statements that were knowingly false. Kyle Bay noted at the time that that statement was sworn, two subcontractors had in fact not been fully paid for their work.

The Judge examined the circumstances in which the supporting statement had been prepared and sworn. His Honour noted in relation to one of the subcontractors that at the time Dynabuild's employee had prepared the declaration, Dynabuild's accounting system indicated that all invoices had been fully paid, even though it later turned out there were outstanding moneys. Accordingly that employee had believed that that subcontractor had been paid all the money that was due to it.

In relation to the second subcontractor, the evidence showed that the managing director of Dynabuild and that subcontractor had agreed a payment plan. Since no moneys were owed under that payment plan at the time of the swearing of the supporting statement, it was true in fact (although not necessarily true in law) that no money was due to be paid to the subcontractor at the relevant time. Accordingly the statements in the supporting statement were not, to the managing director's knowledge, false.

In this regard what was pertinent was the state of affairs believed by the person swearing the statement at the time the statement is made – not the actual state of affairs that existed.

Under the law a director of a company is obliged to make due enquiries to ensure that he or she is kept fully apprised of the company's affairs. However, a director is still usually entitled to rely on the information provided to him or her by the employees who are tasked with the day to day management of the company's accounts.

This case provides even more latitude for directors. As long as the person swearing the statutory declaration (usually a director of the company) believes the truth of the statement at the time of swearing the statutory declaration, he or she will not be held to have made a false statement and the payment claim that the declaration supports will be valid. This is of some comfort to those directors given that the maximum penalty for serving a supporting statement knowing that the statement is false or misleading is a fine of $22,000.00 or three months in prison, or both.

However, it is arguable that a company that later learns that a statement sworn to in the statutory declaration was actually untrue may be under a positive obligation to withdraw (or at least not rely on) the payment claim.

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EMPLOYMENT ROUNDUP

New Baby but no job? Parental Leave and Redundancy

Business circumstances often change rapidly and employers often need to make difficult decisions with regards to the ongoing employment of their staff when economic conditions are unfavourable. This includes the decision to make positions redundant, even where staff in those positions may be on parental leave. Although it is not unlawful to make a position redundant whilst an employee in that position is on

parental leave, it is important that employers carefully manage any workplace restructure when balancing their obligations to an employee who is on parental leave.

An example of this is demonstrated by The Federal Circuit Court decision of *Heraud v Roy Morgan Research Limited* (2016) FCCA 185. The Court determined that Roy Morgan was found to have engaged in adverse action when they made Ms Heraud's position redundant whilst she was on parental leave.

Ms Heraud was a director at Roy Morgan. She commenced her employment with Roy Morgan on 10 September 2012 and went on maternity leave on 27 September 2013. The maternity leave period was due to end on 2 July 2014.

At the end of 2013, Roy Morgan was confronted with a loss of a number of major clients which resulted in a significant decrease in its revenue. This lead to a restructure of the business which included reducing staff numbers with some positions being made redundant.

Ms Heraud received correspondence from Roy Morgan in February 2014 advising that her role including her reporting lines and her team were to be changed. In early May 2014 Ms Heraud went to work to be briefed on proposed changes to the company structure and it was indicated to her that her role would be made redundant. Ms Heraud sought a flexible working arrangement by seeking to temporarily vary her full time hours to 20 hours per week. This request was provided to Roy Morgan following the meeting. She was subsequently provided with correspondence on 11 June 2014 that her role was to be made redundant on 27 June 2014.

The employee who had temporarily been carrying out Ms Heraud's role whilst she was on leave, continued in the acting capacity and despite the redundancy of Ms Heraud on 27 June 2014, the replacement employee continued to work until 31 August 2014 in Ms Heraud's previous role. The replacement employee subsequently secured other employment in another role within Roy Morgan.

Ms Heraud's claim was grounded in a number of breaches of the *Fair Work Act* 2009 ("FWA"). This included an allegation Roy Morgan had engaged in adverse action by failing to consult with her, not returning her to her role and terminating her employment. Ms Heraud also alleged that Roy Morgan had used prohibited reasons such as family responsibilities and pregnancy to end her employment. The claim was also made on the basis that she was terminated from her employment as she exercised a workplace right to take parental leave and apply for flexible working arrangements.

The onus rested with Roy Morgan to prove that adverse action was not taken or for reasons which included a prohibited reason. Roy Morgan argued that:

- they proposed to make Ms Heraud's role redundant at the end of July 2014 in any event.
- they did not consider it a sensible option for Ms Heraud to return to her pre-parental leave position for such a short period.
- it would be appropriate for the temporary employee acting in Ms Heraud's maternity leave position to continue until the role was abolished, particularly in circumstances where the acting employee was in the process of completing a long term project.

Ultimately it was determined that there was no question that Roy Morgan faced profitability and viability challenges and that it had to restructure. Despite these challenges Roy Morgan had engaged in adverse action by:

- not returning Ms Heraud to her pre-parental leave position, even if it was for only two months;
- deciding not to make any research positions available after creating an expectation that she would be redeployed. No evidence had been led to explain why a previous offer of redeployment was withdrawn and as to Roy Morgan's efforts to locate other roles for Ms Heraud;
- terminating her employment for the reason (or reasons including) that she had requested flexible working arrangements.

The matter has now been listed for further hearing to determine the appropriate penalty faced. Currently, the adverse action provisions in the *Fair Work Act* include a maximum penalty of $54,000.00 per breach for a body corporate. The compensation payable to Ms Heraud will also be assessed at that time.

The outcome provides a salient lesson to employers that they must carefully consider the rights of an employee whilst on parental leave if the business is undergoing a restructure. Section 83 of the FWA requires an employer to take all reasonable steps to consult with an employee where a decision has been made which will have an effect on the status, pay or location of an employee. If Roy Morgan had been transparent and genuine in its efforts to consult with Ms Heraud the claim may have been avoided. The consultation process would have been an opportunity to inform Ms Heraud that the decisions taken by Roy Morgan where for reasonable business grounds and did not include any of the prohibited reasons for terminating her employment.

Consistency in an employer's decisions and communications are also a key to avoiding adverse action claims. Roy Morgan had failed in this regard. It had changed its approach to Ms Heraud on receipt of the flexible work request and did not need to do so. The temporary employee was already covering Ms Heraud's position whilst she was on maternity leave and there was no reason why Ms Heraud could not return to her role, even if the position was to be made redundant shortly after she returned.

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WORKERS COMPENSATION ROUNDUP

Sabanayagam revisited and overruled – will the Court of Appeal follow?

In our March 2016 newsletter we discussed the important decision of *Sabanayagam v St George Bank Limited* which resulted in a subsequent icare directive preventing insurers from issuing a Section 74 Notice disputing liability on the basis of recovered capacity (Section 33) and injury (Section 4).

The issue determined in Sabanayam was that a Section 74 Notice declining liability on the basis that the effects of any work related injury had ceased constituted a work capacity decision. That issue has now been the subject of a Presidential review by His Honour Judge Keating in *Saglimbeni v Only One Trading Pty Limited* (15 April 2016).

Mr Saglimbeni sustained a number of injuries to his neck, back, left ankle and right shoulder during 2011 in three separate incidents. He ceased work in August 2011 and received payments of weekly compensation in respect of the accepted injuries to the lumbar spine, left ankle and right shoulder. He underwent surgery to the right shoulder in October 2012.

On 14 October 2013 the insurer issued a notice under Section 74 disputing liability for a special payment of compensation pursuant to Section 41(5) for incapacity arising from shoulder surgery. The Section 74 determination disputed liability on the basis that Mr Saglimbeni had received more than 130 weeks of weekly compensation and he had no entitlement to weekly compensation during the incapacity arising from the injury related surgery pursuant to Section 41(5) as he had not returned to work in suitable employment for at least 15 hours per week.

On 11 September 2014 the insurer issued two Section 74 notices, the first disputing further liability in respect to the right shoulder on the basis of medical evidence that the effect of any work related injury would have ceased within six weeks following the surgery to the right shoulder. In the second Section 74 notice it was disputed that the injury to the cervical spine arose out of or in the course of employment and it was asserted that any workplace injury to the lumbar spine had resolved.

Mr Saglimbeni then commenced proceedings in the Workers Compensation Commission seeking weekly compensation, medical expenses and lump sum compensation for all his injuries. In its Reply, the employer's solicitor relied upon the reasons identified in the Section 74 notices and it was also alleged Mr Saglimbeni did not sustain any injury to the cervical spine. One final ground of defence was that the Commission had no jurisdiction to determine the claim for weekly benefits compensation on the basis that the initial Section 74 notice from October 2013 constituted a work capacity decision.

The matter proceeded before an arbitrator who was not satisfied Mr Saglimbeni had discharged the evidentiary onus to establish he suffered injury to his neck. The arbitrator was also satisfied the employer had made a work capacity decision pursuant to Section 43 in the Section 74 notice and therefore found the Commission had no jurisdiction to determine the worker's claim with respect to weekly compensation.

Mr Saglimbeni lodged an appeal from the decision, in particular the finding that the Section 74 notice was a work capacity decision. The appeal also sought to dispute Mr Saglimbeni had made a concession during the course of the arbitration he would not be entitled to an award of weekly payments of compensation in the event that the Section 74 notice was found to be a work capacity decision.

Contrary to the approach by the employer's counsel at the initial hearing, in the appeal Senior Counsel for the employer conceded that the arbitrator had erred in finding that the notice of 14 October 2013 constituted a work capacity decision. President Keating agreed with Senior Counsel's submission that the letter was merely informing Mr Saglimbeni that his claim for a special benefit had been declined and did not constitute a work capacity decision within the meaning of Section 43 of the 1987 Act. Consequently President Keating agreed the arbitrator had erred in finding the insurer's notice to Mr Saglimbeni of 14 October 2013 was a work capacity decision.

The Court of Appeal has reserved its decision in the appeal from the decision of Deputy President O'Grady in *Sabanayagam v St George Bank Limited*. It will be interesting to see whether the Court of Appeal follows the approach adopted by President Keating in *Saglimbeni* as well as the arbitral decisions of Senior Arbitrator Snell in *Gonclaves* and Arbitrator Harris in *Go*, both of which were also determined contrary to the decision of Deputy President O'Grady in *Sabanayagam*.

Nonetheless, as pointed out in our earlier discussion the icare directive continues to bind Scheme Agents who are now 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. Similarly, from a worker's perspective, there has been no reversal of WIRO's refusal to fund proceedings seeking to overturn disputes arising from Section 74 notices that proceed on the basis of recovered capacity or injury where liability was initially accepted.

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Section 67 – The Final Death Knell

In our March 2016 newsletter we considered the decision in *Frick* which made it clear that the entitlement to compensation for pain and suffering under Section 67 continues only 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.

Further clarification of a worker's entitlement to compensation under Section 67 for pain and suffering in those circumstances was again provided by Deputy President Bill Roche in *Kemp v Geoffrey L Steinmetz t/as Crescent Head Bottle Shop* [2016] NSWWCCPD 18.

Ms Kemp received injuries in the course of her employment on 25 October 1999. Liability was accepted. In 2003 the parties reached an agreement that provided for payment of permanent impairment compensation for the back and right leg together with compensation for pain and suffering under Section 67.

After the commencement of the 2012 Amending Act, Ms Kemp claimed additional permanent impairment compensation under Section 66 and Section 67 because of deterioration in her condition. Ultimately the claim proceeded to an approved medical specialist for assessment and it was agreed Ms Kemp had an additional entitlement to compensation for permanent impairment of her back and loss of use of each leg.

The dispute regarding Ms Kemp's entitlement to additional compensation under Section 67 was unresolved and it proceeded before an arbitrator in the Commission who determined Ms Kemp was precluded from receiving any further compensation under Section 67 for pain and suffering.

On appeal Deputy President Roche determined that as Ms Kemp had made a claim for compensation before 19 June 2012, the amendments introduced by Schedule 2 of the 2012 Amending Act applied to her claim for additional compensation under Section 67, regardless of when she received her injury. The critical amendment was that the repeal of Section 67 applied at the time Ms Kemp made her claim for further compensation on 18 October 2012. Therefore Ms Kemp was not entitled to further compensation under Section 67 for pain and suffering

Thus, it would appear the amending legislation has abolished a worker's entitlement to compensation for pain and suffering except in circumstances where a worker has made a claim for compensation pursuant to Section 66 and Section 67 prior to the commencement of the amendments on 19 June 2012 and there has been no subsequent determination of the worker's entitlement to compensation under Section 67. Such claims are now very few and far between.

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CTP ROUNDUP

Failure to Give Proper Reasons and Judicial Reviews

The Motor *Accidents Compensation Act 1999* (the "Act") provides in sections 92 and 94 of the Act that a claimant is not entitled to commence Court proceedings in respect of a claim unless an exemption certificate has been issued by the Claims Assessment & Resolution Service ("CARS"). The effect of these provisions is that the majority of claims are assessed at CARS.

The decision of the CARS assessor is not binding on claimants as they have an entitlement to commence Court proceedings following the issuing of a CARS Certificate if they are dissatisfied with the result. However, the decision of a CARS assessor is binding on the CTP insurer pursuant to Section 94 of the Act if liability has been admitted. The insurer cannot bring a merits challenge to the assessment however an insurer can seek to set aside the assessment where there has been a denial of natural justice or lack of procedural fairness. The challenge is by way of Judicial Review in the Supreme Court.

In *IAG Limited t/as NRMA Insurance v Zahed*, at first instance the insurer was successful in an application for Judicial Review on the basis of a denial of

procedural fairness and a failure to give adequate reasons.

An application for Judicial Review was filed in the Supreme Court which focused on findings in relation to the domestic assistance claim.

His Honour Justice Hulme found that Assessor Stern did not comply with the requirements of Section 94(5) of the Act or Guideline 18 and accordingly there was an error of law on the face of the record and the assessment was set aside.

Section 94(5) of the Act provides that a claims assessor is to attach a brief statement to the certificate setting out the assessor's reasons for the assessment.

Clause 18(4) of the Guidelines issued under the Act provides:

"18.4 A Certificate under Section 94 is to have attached to it a statement of the reasons for the assessment. The Statement of Reasons is to set out as briefly as the circumstances of the assessment permit:

18.4.1 the findings on material questions of fact;

18.4.2 the assessor's understanding of the applicable law if relevant;

18.4.3 the reasoning processes that lead the assessor to the conclusions made; and

18.4.4 in the case of an Assessment Certificate pursuant to Section 94, the assessor must specify an amount of damages and the manner of determining that amount."

During the course of the CARS process, Zahed was referred to the Medical Assessment Service where she was assessed by Assessor Davidson who dealt with a number of questions in relation to her alleged requirement for care. Assessor Davidson concluded the care that was reasonable and necessary was:

- 6.76 hours per week from 27 October 2010 to 18 November 2011;
- 3 hours per week from 8 November 2011 to 28 June 2013;
- 3 hours per week from the date of the assessment for two years;
- 1 hour per week for two years from the date following the assessment for a maximum of a further three years.

In addition to other heads of damage, Assessor Stern determined that Zahed required 6.76 hours per week of gratuitous care from the date of the accident to the date of assessment. $50,000.00 was awarded as a buffer for future care.

Assessor Stern was not bound by Assessor Davidson's conclusions however he did not provide any reasoning as to why he determined Zahed required the care that he had assessed.

An assessor's decision will be set aside where there is jurisdictional error, a constructive failure to exercise jurisdiction or legal unreasonableness. An assessor must provide reasons and a failure to provide reasons constitutes an error.

His Honour Justice Hulme determined the Judicial Review in favour of the insurer on the basis the decision did not comply with the requirements of Section 94(5) or Guideline 18 and accordingly there was an error on the face of the record and the assessment was set aside with the claim being remitted to CARS to be reassessed.

Rather than have the claim reassessed Zahed challenged the decision of Hulme J and filed proceedings in the Court of Appeal.

Their Honours Justice Meagher, Leeming and Emmett heard the appeal and unanimously dismissed the proceedings.

Essentially the Court of Appeal agreed with the findings of Justice Hulme. A CARS assessor's failure to provide reasons consistent with the requirements in the Guidelines constitutes jurisdictional error.

The Court of Appeal noted the Statement of Reasons annexed to a CARS Decision must explain the actual path of reasoning by which a decision may in fact arise or the opinion formed on the question referred to the decision maker. In this instance, Assessor Stern had not revealed his reasoning process and provided no reasoning as to why he selected a figure of 6.76 hours per week as an ongoing requirement for past care. The Court of Appeal noted it was possible to infer Assessor Stern simply adopted Assessor Davidson's assessment of the level of care in the initial period and applied it to the entire period without providing a reason as to why he did so.

Justice Emmett in his judgement concluded:

> *"A fine line is sometimes to be drawn between the grant of relief under* s 69 *of the* Supreme Court Act *by reason of inadequate reasons (as in this case), and what is ultimately, in substance, merits review. The grant of relief in a case such as this should not be taken as an encouragement to challenge administrative decisions of the nature of that made by the Assessor in this case. As the Primary Judge observed, quite correctly, the*

reasons of a claims assessor should not be scrutinised over zealously. While the reasons required are not necessarily those which may be expected of a judge, the reasons must demonstrate the path of reasoning that leads the claims assessor to a conclusion as to the amount of damages that a court would be likely to award. In order to make an assessment of the amount of damages that a court would be likely to award, a claims assessor must have regard to the reasoning process that the court would be required to adopt in awarding damages. Again, a fine line is to be drawn between the reasons that might be given by a court for making an award and the reasons of a claims assessor for making an assessment for the amount of damages that a court might be likely to award. The former is a more burdensome task than the latter. However, the Assessor did not in this case, satisfy the latter burden. That is the conclusion reached by the Primary Judge."

The Court of Appeal agreed with the conclusion reached by His Honour Justice Hulme and dismissed the appeal with costs.

The matter has now been referred back to CARS before another assessor to assess the claim.

Judicial reviews are becoming more prevalent as a means by which to challenge CARS assessments where the reasoning process of the assessor is found to be inadequate.

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Can Claimants be Compelled to Attend an LTCS Assessment?

CTP insurers are no doubt aware of Section 86 of the *Motor Accidents Compensation Act 1999* (NSW), which compels a claimant to attend medical assessments arranged by insurers where the requested assessment is not "unreasonable, unnecessarily repetitious or dangerous". But can this legislation also be used to compel a claimant to attend an assessment for the purpose of determining eligibility for admission into the Lifetime Care & Support Scheme?

Typically, an application under the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) for participation in the Scheme is made by or on behalf of a seriously and permanently injured claimant for the purpose of securing lifetime care, support and treatment for the claimant. That said, since the introduction of the Scheme in 2006, CTP insurers have also been quick to make, or encourage an application to be made for a claimant when recognising a potentially eligible claimant where the claimant's own solicitors have not.

The recent case of *Adilzada v The Nominal Defendant* [2016] NSWDC 24 has provided some clarification of the respective rights of insurer and claimant in those delicate situations where the insurer has made the application to the Scheme without the consent of the claimant, for the purpose of escaping any ongoing liability for the claimant's treatment care needs.

Mr Adilzada suffered a traumatic brain injury following an accident on 18 October 2007 in Griffith, NSW. Following a Functional Independence Measure ("FIM") assessment by Professor Ian Cameron the CTP insurer made an application to the Scheme for the admission of Mr Adizada as an interim participant.

As the two year period of interim participation drew to a close, the CTP insurer wrote to Mr Adilzada advising him that he would be required to attend a further assessment to become a permanent lifetime participant in the Scheme.

Mr Adilzada refused and was subsequently discharged from the Scheme.

The CTP insurer applied by way of Notice of Motion to the District Court at Sydney, seeking an order for the claimant to attend for a medical examination by Professor Cameron to assess his eligibility for lifetime participation in the Scheme. The insurer relied on Rule 23.4 of the Uniform Civil Procedure Rules 2005 (NSW);

- To attend a medical examination with Professor Cameron pursuant to Section 86(1) of the *Motor Accidents Compensation Act 1999* (NSW).

The Motion at that time was resolved by consent, with the parties agreeing that the Court would enter an order that Mr Adilzada was to attend medical appointments arranged by the insurer with Professor Cameron and Professor Spira.

The CTP insurer thereafter sought to rely on the report of Professor Cameron for the purpose of having Mr Adilzada admitted to the Scheme as a permanent participant.

Mr Adilzada's solicitors filed a further Notice of Motion seeking to restrict the use of Professor Cameron's report. They argued that the agreement formulated in the Consent Orders with respect to the previous Motion had merely been for Mr Adilzada to attend an assessment by Professor Cameron for the purpose of the damages proceedings, and not for the purpose of an FIM assessment being conducted to ascertain the extent of Mr Adilzada's eligibility into the Scheme.

In response, the insurer's solicitors pointed to the fact that both the *Motor Accidents Compensation Act 1999* (NSW) and the *Motor Accidents (Lifetime Care and Support) Act 2006* were interwoven and

interdependent schemes designed *to "work together ... to meet the needs of persons injured in motor accidents in New South Wales".* It was argued that Section 86 of the *Motor Accidents Compensation Act 1999* (NSW) necessarily authorised the compulsion of the claimant to attend examinations for the purpose of assessing eligibility into the Scheme.

Judge Elkaim's view was that an application to have a claimant examined under Section 86 by a doctor of the insurer's choosing was perfectly reasonable, the section did not authorise insurers to oblige the claimant to attend an examination for the purpose of the Scheme.

His Honour examined the location of the section in the Act in Part 4.3 under "Duties with Respect to Claims". As claims are defined in the *Motor Accidents Compensation Act 1999* (NSW) as "a claim for damages..." in Section 3, it was concluded by His Honour that Part 4.3 was relevant to claims for damages which did not incorporate matters such as admission to the Scheme. His Honour also noted there are clear duties of the claimant which are enumerated in Section 86 which refer to the claimant's duties to a medical assessor and a State Insurance Regulatory Authority (previously the Motor Accidents Authority), but not to the Scheme. This indicated that there was no inherent link between the Scheme and Section 86 as contended by the insurer.

Similarly, His Honour found that Mr Adilzada could not be compelled to attend such an examination pursuant to Rule 23.4 of the *Uniform Civil Procedure Rules 2005 (NSW)* as those rules relate to proceedings in respect of damages. As the insurer's application to the Scheme did not constitute part of their case when responding to the claim for damages, Rule 23.4 did not empower the Court to direct an examination of this nature.

It is expected this decision will be subject to further consideration at the substantive hearing of the matter. It is possible the Court will seek to revisit the question in greater detail at a later date given the potential for further such applications by insurers.

For now the Court has determined an insurer does not have the right to compel a claimant to be medically assessed for eligibility as a lifetime participant in the Lifetime Care and Support Scheme.

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The Importance Of Getting The Facts Right

This NSW Court of Appeal decision of *Serrao by his Tutor Serrao v Cornelius* is an illustration of how a straightforward case can unravel on appeal when findings of fact by a trial judge are not fully supported by the evidence.

The accident in question occurred in the early hours of 14 August 2010. Mr Serrao and a friend had left a 21st birthday party and begun walking along a very dark road in a semi-rural area of western Sydney in the hope of finding a taxi. The road was quite narrow and was bordered by a gravel verge. A car driven by Ms Cornelius struck Mr Serrao from behind, as a result of which Mr Serrao sustained serious head injuries.

In the District Court of NSW, his Honour Judge Hatzistergos found Ms Cornelius negligent and awarded significant damages to Mr Serrao as a consequence of severe brain damage. This was despite finding that none of the particulars of negligence pleaded against the defendant were made out, and instead finding Ms Cornelius negligent by reason of a negligent act not pleaded by the plaintiff. The negligent act by Ms Cornelius was the driving of her vehicle off the bituminous road surface and onto the gravel verge, which meant she had insufficient opportunity to avoid the plaintiff walking ahead of her in the same direction, dressed in black clothing.

His Honour reduced damages by 40% as a result of Mr Serrao's contributory negligence in walking too close to the roadway and being affected by alcohol. Interestingly, His Honour found that although Ms Cornelius also had a high blood alcohol reading, her intoxication was not causally related to her failure to stop her vehicle in time to prevent the accident. Even if sober, there was insufficient time available to her to stop her vehicle and avoid the collision.

The physical evidence clearly demonstrated that Mr Serrao had attempted to move to his right just prior to the impact. This resulted in him being hit by the front of the vehicle on the right hand side.

A key issue determined in the case was whether Mr Serrao had been walking on the road itself or the gravel verge just prior to impact. His Honour accepted evidence of police who attended the scene that tyre tread marks had been found in the gravel by the side of the road. His Honour determined that these were from Ms Cornelius's vehicle and that but for the conduct of Ms Cornelius in driving off the roadway, the collision would not have occurred.

Mr Serrao lodged an appeal against the finding of contributory negligence, arguing there was no causal connection between his intoxication and the accident. Ms Cornelius lodged a cross-appeal challenging the finding that she breached her duty of care to Mr Serrao.

While not all of Ms Cornelius's criticisms of the primary judgment were warranted, the Court of Appeal found significant flaws in his Honour's reasoning on a number of points. On closer examination, the evidence relied on by his Honour to support the findings was in

fact inconsistent with His Honour's findings. This included his Honour's finding that the vehicle driven by Ms Cornelius veered to the left and the right as she attempted to brake.

However, the most problematic part of his Honour's judgment was the finding that Mr Serrao was on the gravel verge of the road and not the roadway itself when first seen by occupants of the vehicle driven by Ms Cornelius. This finding was critical to his Honour's conclusion that the breach of duty of care by Ms Cornelius caused the collision and Mr Serrao's subsequent injuries.

His Honour based this finding on the evidence of both Mr Gallagher, a passenger in the vehicle, and Mr Schneider, who had been walking near Mr Serrao at the time of the accident. However, on careful examination the Court of Appeal concluded that in fact neither witness clearly placed Mr Serrao on the gravel verge, and not the roadway, in the moments before the accident.

In fact, in his original signed statement Mr Gallagher indicated that Mr Serrao was "walking maybe just onto the tar road portion" when he saw him. Later he stated Mr Serrao was "towards" or "on" the edge of the road.

Mr Schneider stated that at no time did he see Mr Serrao on the road. However Mr Schneider was unable to describe exactly where he and Mr Serrao did walk. Further Mr Schneider was forced to concede in cross-examination that he could not be sure where Mr Serrao had walked, because Mr Schneider was in fact walking in front of Mr Serrao just prior to the impact.

The Court of Appeal could find no other evidence to support a finding that Mr Serrao was walking on the gravel and not the road. In fact the eye witness evidence of Ms Cornelius and Ms Newton, another passenger, placed Mr Serrao on the road just prior to the accident.

Although his Honour was entitled to prefer the evidence of Mr Gallagher and Mr Schneider, factually this went no further than indicating Mr Serrao was likely to have been on the roadway, close to the gravel verge.

As his Honour's conclusion that Ms Cornelius breached her duty of care was wholly dependant on the finding that Mr Serrao was on the gravel verge, Ms Cornelius' cross appeal was upheld.

It was not necessary therefore for the Court of Appeal to deal with the appeal by Mr Serrao in relation to contributory negligence.

Interestingly, however, the matter did not finish with the Court of Appeal's decision. A blameless accident pleading by Mr Serrao had not been dealt with when the matter was heard in the District Court. Submissions regarding the application of the blameless accident provisions in the matter are yet to be made by the parties. It will be interesting to see how the contributory negligence issue will be determined in the context of a blameless accident, assuming blameless accident is established. By comparison, the test for contributory negligence in a blameless accident is of course how far the injured person has departed from the standard of care that a reasonable person in the position of the plaintiff would have exercised to protect his or her self.

The decision also serves as a reminder that intoxication is not everything in establishing liability. A causative link must still be made between the effects of intoxication and the occurrence of an accident.

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