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It's not over until the Court says it's over

As part of the process of pursuing or defending court proceedings, it has been a longstanding principle that the parties' lawyers and barristers are immune from any liability for negligence in their work during the conduct of the case.

The reason for this immunity was examined at length in *Giannarelli v Wraith* (1988) 165 LCR 543; [1988] HCA 52. In that case the High Court held that of the various factors that would justify the immunity, the determinative factor was the adverse consequences for the administration of justice which would flow if the issues determined in the principal proceedings were permitted to be re-litigated in collateral proceedings.

This principle has again been tested in a recent case in the High Court: *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16.

Mr Attwells had been one of two guarantors of a company's repayment of loans from a bank. The company had defaulted on its repayments and the bank had commenced proceedings against the company and the guarantors.

While the total amount owed by the company was $3.4 million, the guarantors' liability under the guarantee was limited to $1.5 million. On the opening day of the trial the total amount owing under the guarantee, including interest and enforcement costs, was calculated at $1,856,122.00.

During the trial counsel for the guarantors informed the Supreme Court that the proceedings had been settled. The terms of settlement were that judgment would be entered against the guarantors and the company for the full amount of the company's indebtedness to the bank (being $3.4 million) but the bank would not seek to enforce the order for payment of that amount if the guarantors paid to the bank the sum of $1.75 million on or before 19 November 2010 (a date approximately five months after the settlement).

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The Court formally entered orders to the effect of the terms of the settlement.

The guarantors failed to meet their obligation to pay the sum of $1.75 million on or before 19 November 2010. As a consequence of that default and the Court's earlier orders, the guarantors became liable for the full amount owed by the company to the bank.

Mr Attwells issued proceedings in the Supreme Court of New South Wales against his lawyer, Jackson Lalic Lawyers Pty Limited, alleging they were negligent in advising the guarantors to consent to a judgment being entered against them in the terms of the Consent Orders and in failing to advise them as to the effect of the Consent Orders.

It transpired that during the course of discussing the potential terms of settlement, the relevant lawyer from Jackson Lalic Lawyers had advised the guarantors that if the guarantors defaulted in paying the sum of $1.75 million by 19 November 2010, it would not make any difference if the judgment in favour of the bank was for $3.4 million or any other sum. It was agreed between the parties that this advice had been negligent.

The Full Bench of the High Court of Australia was called upon to decide the matter. In a joint majority judgment of French CJ, Kiefel, Bell, Gageler and Keane JJ, the Court held that the advocate's immunity did not extend to protect a lawyer in respect of negligent advice that had contributed to the making of a voluntary agreement between the parties, merely because litigation was on foot at the time the agreement was made. This conclusion was not altered by the circumstances that, in the present case, the parties' agreement had been embodied in consent orders.

Importantly, the Court drew a distinction between where a court makes a judgment and therefore brings an end to the proceedings (and the dispute) and the situation where the parties independently agree a settlement of their dispute.

The Court looked at the analogous situation where the accused in a criminal case may agree to plead guilty in order to put an end to the prosecution and take advantage of the sentencing discount allowed for early guilty pleas. But the Court noted that such a guilty plea is formally entered in the proceedings, and this still affects the determination of the case by the court since it cannot proceed to conclude its function until a conviction is recorded.

In the present case, it was important, as a matter of public policy, that the authority of the justice system was the final determiner of disputes. Where that authority had not been exercised in order to end the dispute, then the immunity did not protect the legal practitioner from the consequences of their negligent advice.

The High Court stated:

> "*Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that the 'intimate connection' between the advocate's work and 'the conduct of the case in Court' must be such that the work affects the way the case is to be conducted so as to affect its outcome by a judicial decision. The notion of an 'intimate connection' between the work the subject of the claim by the disappointed client and the conduct of the case does not encompass any plausible historical connection between the advocate's work and the client's loss; rather it is concerned only with work by the advocate that bears upon the judge's determination of the case*".

Nettle and Gordon JJ gave separate dissenting judgments.

Nettle J noted that when a matter is settled wholly out of court, the settlement does not move the litigation towards a determination by the court and consequently the advice to enter into such a settlement would not attract the immunity. But he drew the distinction that in the present case the settlement terms required the court to make an order by consent – in his view such a settlement plainly did move the litigation towards a determination by the court. His Honour noted that even where the parties are agreed on the orders which should be made for the determination of their rights and liabilities, it remained for the Court to be satisfied that it was appropriate to make orders to that effect.

Justice Gordon examined the structure of the orders that had been made by the Supreme Court. These orders had comprised two sections: one containing orders made by the court and the other noting an agreement between the parties. The agreement had recorded that the enforcement of the court's verdict and judgment would be delayed if payment was made in a timely manner. In her Honour's view, the relevant aspect of the orders was that the court gave verdict and judgment for the bank against the guarantors, and that was an order of the court that took effect through the authority of the court. As a consequence the rights of the parties merged in that final judgment.

As a matter of public policy, any court's judgment should be the final disposition of any proceedings (subject to any right of appeal as part of the overall court process). In this case the majority decision had taken pains to draw a distinction between a judgment which is requested by the parties and a judgment which is delivered by the court after examination of all of the issues.

Legal practitioners need to be aware that just because public policy does not allow the examination and re-litigation of issues after a court process has concluded, this does not mean negligent advice can be given with impunity. It is still extremely important to get that

advice right and for the practitioner's client to know that the lawyer is accountable for their advice.

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Section 151Z and other complications

The New South Wales Court of Appeal has recently considered a novel argument in relation to the entitlement to recovery of worker's compensation payments (*John King v State of NSW and ISS Facility Services (NSW) Limited; ISS Facility Services (NSW) Limited v John King and State of NSW*).

In New South Wales, if an employee is injured at work then they are entitled to receive compensation payments pursuant to the *Workers Compensation Act* 1987. Section 151Z of that legislation provides that if the accident occurred as a consequence of someone else's negligence then the employer has the right to recover compensation payments from that negligent party, subject to an assessment of their own liability.

That assessment is not necessarily a simple exercise. In order for the injured employee to bring a claim against their employer they must have sustained at least 15% whole person impairment and complied with a number of procedural requirements. If that threshold is met and another party is involved it is necessary to apportion liability between the parties, and also calculate damages under the different regimes.

An employee is only entitled to recover work injury damages (economic loss) against their employer, but against another negligent party they can recover non economic loss, medical expenses and domestic assistance in addition to economic loss. If there is another negligent party then the employer is entitled to credit for all compensation payments excluding legal and investigation costs. The employer is therefore entitled to recover compensation payments over and above their liability for damages and regulated costs. Interest on payments can also be awarded.

This approach has however been challenged in the recent *ISS* decision.

John King was employed by ISS as a cleaner and was working at Forster Public School. He sustained injury on 28 January 2009 when he was struck on the head by a roller door at the school. King sued both ISS also the State of NSW (the liable entity for the school) alleging that each had breached their duty of care. Both ISS and the State denied that they were negligent.

The matter proceeded to hearing before His Honour Judge Sorby in the District Court who determined that the State was 75% liable and ISS 25% liable.

The judgment was complicated by the fact that the trial judge made two different findings of contributory negligence; 30% the claim against the State and 20% in the claim against the employer. This in itself was an issue as section 10 of the *Law Reform Miscellaneous Provisions Act* 1965 provides that if a claimant is liable to repay compensation to his or her employer under section 151Z, then the amount of compensation to be repaid is also to be reduced for contributory negligence – so what percentage reduction would apply in this case? His Honour Judge Sorby applied the 30% reduction and the payback of $312,392.79 was therefore reduced to $218,674.95. His Honour also dismissed the claim for interest and did not award ISS costs of their cross claim.

ISS appealed on all issues.

Cross appeals were also filed by King, who argued there should have been no deduction for contributory negligence. The State argued that they ought not to have had any liability to King, and if they did, the apportionment was too high.

The State also raised a novel argument that had not been run at trial. The State argued that in the circumstances of this case, ISS did not have an entitlement to claim indemnity under section 151Z(1)(d) of the Act.

ISS had sought indemnity from the State pursuant to Section 151Z(1)(d) in relation to compensation payments made to, for and on behalf of King. That section provides that if a worker has recovered compensation then the person by whom the compensation was paid is entitled to be indemnified by a third person that is liable to pay damages. The extent of indemnity is limited to the amount of those damages.

The Court of Appeal did not make a final determination on this issue. However Justice Leeming did not dismiss the argument and noted that:

> *"In support of its contention as to the correct construction of Section 151Z(1)(d), the State points to Section 151Z(2). Section 151Z(2) relevantly provides that, if, in respect of an injury to a worker for which compensation is payable under the Compensation Act, the worker takes or is entitled to take proceedings independently of the Compensation Act to recover damages from a third person, and the worker also takes or is entitled to take proceedings independently of the Compensation Act to recover damages from that employer, Section 151Z(2)(e) has effect. Under Section 151Z(2)(e), if the worker does not take proceedings against the employer but does not accept satisfaction of the judgment against the employer, Section 151Z(1) applies as if the worker had not been entitled to recover damages from that employer. However, if the compensation paid by that employer exceeds the amount of contribution that could be recovered from that employer, as a joint*

tortfeasor or otherwise, the indemnity referred to in Section 151Z(1)(d) is for the amount of the excess only. Further, if the compensation paid by that employer does not exceed the amount of that contribution, Section 151Z(1)(d) does not apply and the employer has, to the extent of the compensation so paid, a defence to an action for such a contribution."

Justice Leeming continued:

"In light of the regime that I have briefly described, the State contends that Section 151Z(1)(d) should be construed as excluding any right of indemnity for the employer where the employer's negligence contributes to the occurrence out of which the right to compensation arose. It contends that the object of Section 151Z is to provide an indemnity for an employer who was paid compensation by the third person, who is responsible in law for the occurrence that has caused the employer to be liable to pay compensation. It contends that the provision is entitled to cover the case where the only liability of the employer to the worker is the statutory liability to pay compensation.

On the true construction of Section 151Z(1)(d), the State says, the right to an indemnity is given only to an employer who has no liability to the worker in relation to the compensable injury, other than the statutory liability to pay compensation under the Compensation Act. If Section 151Z(1)(d) applied where the employer had been guilty of negligence causing injury, the result would be to give to a negligent employer a right to a complete indemnity from the third person, even though the employer's share in the responsibility for the injury was much greater than that of the third person. Further, the State says Section 151Z(2)(e) would have no work to do.

There is considerable substance in the contentions advanced on behalf of the State. However, having regard to the conclusions that I have reached above, it is not necessary to express any view."

The appeals by ISS and cross appeals by King and the State were allowed. The Court of Appeal did not however reach any final conclusions. The matter was remitted to the District Court for determination of various issues including the liability of the State, King's contributory negligence, breach of duty of ISS, the extent of breach of duty on the part of the State and the extent to which ISS is entitled to contribution from the State.

No doubt if there is no resolution of the matter, the State will run the same argument in relation to 151Z again at trial and in all likelihood in round 2 in the Court of Appeal, unless another party gets there first.

The door is now open for a party to argue that if there is liability on the part of the employer, then Section 151Z(1)(d) does not create an entitlement to indemnity.

This would be a game changer for workers compensation insurers where for years there has been relatively settled law as to the how the section operates in practice.

The Court of Appeal also confirmed that it is not inappropriate to make different findings of contributory negligence against different defendants as the culpability of a plaintiff's conduct in causing their injury demise must be balanced against the relevant conduct of each defendant.

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Criteria for leave to appeal where a judgment is less than $100,000

In NSW, pursuant to *Supreme Court Act 1970* (NSW), s101(2)(r), an appeal to the NSW Court of Appeal is available without leave of the Court if the amount in issue is at least $100,000. Leave to appeal is however required where the amount in issue is less than $100,000.

So what criteria must be established for a party to be granted leave to appeal?

A common misconception is that leave to appeal will be granted by the Court of Appeal if the applicant for leave is able to demonstrate that the judgment from which an appeal is sought contains errors or that the trial judge erred in arriving at his or her decision.

In *Coffs Harbour City Council v McLeod* the NSW Court of Appeal corrected this misconception. In the leading judgment delivered by Gleeson JA (with whom Simpson JA and Sackville AJA agreed) restated the general principle as follows:

"Ordinarily, leave to appeal is granted only when the matter involves an issue of principle or question of general public importance, or where it is reasonably clear that there has been an injustice which, in the circumstances, should be addressed. That may be the case if on an application for leave to appeal something more is shown than that the primary judge was arguably wrong."

Matthew McLeod was injured when he slipped and feel on a patch of water on a concrete footpath in Coffs Harbour.

McLeod instituted proceedings in the District Court in which he claimed damages for personal injury from Coffs Harbour City Council.

The Council denied liability for the claim. The matter proceeded to trial before his Honour Acting Judge

Williams who found in favour of the plaintiff and entered Judgment in the amount of $96,439.25.

As the amount in issue was less than $100,000, the Council applied to the Court of Appeal for leave to appeal from the Judgment with respect to liability and quantum.

The application for leave and the appeal were listed to be heard concurrently but the Court invited the parties to address the question of leave first.

At the conclusion of oral argument, the Court unanimously refused leave to appeal.

Gleeson JA delivered the leading judgment with which Simpson JA and Sackville AJA agreed. His Honour highlighted several deficiencies in the submissions for the Council which targeted asserted errors by the trial judge.

Firstly, the Council complained that the trial judge failed to consider the financial and other resources reasonably available to the Council for the purpose of exercising its functions or the broad range of the Council's activities. Here, the Council relied upon the *Civil Liability Act 2002* (NSW) ("CLA"), s42.

This ground was dismissed on the basis that the Council had positively stated at trial that it did not rely upon that section. Accordingly, it could not then be relied upon in the application for leave to appeal.

Secondly, the Council sought to argue that his Honour erred in finding that the risk of harm could have easily and cheaply been obviated by the presence of barriers and, at night, appropriate warning lights.

This ground was dismissed on the basis that it ignored the expert evidence which included references to the Council's failure to take preventative measures, including the installation of barricades and warning lights at night.

Thirdly, the Council relied upon the CLA, s43 which provides that any act or omission involving the exercise of or failure to exercise a special statutory power does not give rise to civil liability unless the act or omission was so unreasonable in the circumstances that no authority having such power could properly consider the act or omission to be a reasonable exercise or failure to exercise its power.

This ground was dismissed on the basis that the special statutory power identified in the Defence at trial was one for which no complaint was made in the application for leave to appeal. Further, the Council sought, in the leave application, to raise new statutory powers that it contended gave rise to the application of the section. However, as they had not been raised at trial by the Council the Court of Appeal did not permit the Council to rely upon them in the application for leave to appeal.

Fourthly, the Council criticised the trial judge's description of the Council's duty of care being a duty to "ensure" the safety of pedestrians.

The Court held that although this was an *"infelicitous expression of the Council's duty…"* it did not, on a fair reading of the judge's reasons as a whole, demonstrate error.

Fifthly, the Council complained that the trial judge's description of the risk of harm assumed the wet patch was a slip hazard.

The Court dismissed this ground as being untenable as it was inconsistent with lay evidence from an independent witness who lived nearby who witnessed at least three previous slip and falls at the same spot on the footpath because it was wet and the photographic evidence taken by McLeod himself the day after the incident showed the footpath with a green slimy substance and a dark, wet stain.

Sixthly, the Council relied upon the CLA, s45 which provides an immunity for roads authorities who fail, absent actual knowledge of a risk of harm, to rectify a hazard.

The Court dismissed this ground on the basis that the definition of "road work" in the *Roads Act* did not include a "traffic control facility" and the Council did not contend that the precautions, which the trial judge held the Council ought to have taken, fell within that definition.

Further, the Council had actual knowledge of the risk of harm by reason of the resident who had witnessed three earlier slip and falls and reported each of them to the Council.

Submissions were also presented by the Council in relation to damages however these were also dismissed.

Having rejected all of the asserted appeal grounds, the Court of Appeal held that the Council had failed to demonstrate, on the application for leave, something more than simply that the trial judge may have been in error.

In any event, the Court found that the trial judge had not erred.

Nevertheless, Gleeson JA highlighted that as no injustice had been made out by the Council nor did any of the grounds of appeal raise any question of principle or general public importance, there was no basis for the Court to exercise its discretion to grant leave to appeal.

Accordingly, the Court unanimously refused to grant leave.

This decision highlights the risk in seeking to from a relatively modest Judgment even if the amount is very close to the $100,000 threshold.

The Court of Appeal will not exercise its discretion to grant leave to appeal even if there are numerous grounds of appeal that seek to challenge the correctness of the decision at first instance.

What must be shown is more than just an error by the trial judge. There must be an injustice that requires the Court of Appeal to intervene, or that the appeal would involve a matter of public importance or principle.

None of these criteria were established by the Council in this case. The decision to refuse leave was therefore inevitable.

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Duty to assist the trial judge arrive at the correct result

In previous editions of GD News we have discussed decisions of the NSW Court of Appeal where the Court has been critical of the application of the law by trial judges. The Court of Appeal has recently handed down a judgment that reminds parties of their obligation to assist trial judges grapple with the issues in a case including te application of the Civil Liability Act.

In *Australia and New Zealand Banking Group Ltd v Haq* the NSW Court of Appeal was critical of the manner in which a District Court trial proceeded before his Honour Judge Maiden SC in a personal injury claim, and the failure by counsel for both parties to discharge their duty to assist the Court.

Nur Haq was injured on 10 March 2011 when she caught her foot on a bunch of wires under a desk on which she was working at a computer in the public area of premises occupied by the Five Dock branch of the ANZ Bank.

At the time of her injury, Haq was working as a trainee. Her actual employer was a recruiting agency.

Haq sustained personal injuries for which she instituted proceedings against ANZ which proceeded to hearing at first instance before Judge Maiden SC.

ANZ denied liability for the claim and alleged that the plaintiff's injuries were caused by her own contributory negligence.

The District Court trial proceeded before Judge Maiden SC over two days with his Honour delivering judgment the following day in which he found in favour of the plaintiff without any discount for contributory negligence.

His Honour entered Judgment for Haq in the amount of $713,532 and ordered ANZ to pay her costs.

ANZ appealed. The Appeal Court, comprising Basten & Simpson JJA and Sackville AJA, arrived at a unanimous decision to dismiss the appeal with respect to primary negligence with Justice Simpson and Acting Justice Sackville in the majority dismissing the appeal as to contributory negligence. Justice Basten delivered a minority judgment in which his Honour assessed contributory negligence at 25%.

In relation to damages, all three judges delivered separate judgments in which there was a unanimous finding that the primary judge's assessment of damages should be overturned but each of the judges arrived at a different figure.

The result was a majority decision by Basten JA and Sackville AJA in which their Honours agreed to set aside the Judgment entered by the primary judge and substitute a Judgment in favour of the plaintiff in the amount of $582,000.

The key areas in which the Court reduced the plaintiff's Judgment involved what were held to be erroneous assessments for past economic loss, past superannuation loss and future domestic assistance.

The reasons for these erroneous assessments were, in large part, the result of the manner in which the trial was conducted by counsel for both parties before Maiden SC DCJ. On this issue, each of the appeal judges was highly critical, not of the trial judge, but of counsel who appeared before his Honour.

In relation to the appeal concerning liability, Basten JA made the following observations:

- Although ANZ was not the employer of Haq it did not seek in its own defence to rely upon the reduction commonly available under s151Z *Workers Compensation Act 1987* (NSW)
- Apart from tendering an undated photograph of the workstation, taken long after the event and revealing nothing of significance, ANZ neither called evidence nor tendered any documents relevant to liability.

Her Honour, Justice Simpson also noted the following:

- During the course of senior counsel's address (for ANZ), no mention was made of any provision of the *Civil Liability Act 2002 (NSW)* ("CLA") including ss5F and 5G which had been specifically pleaded in the Defence.
- Notwithstanding the absence of any reference to the CLA in the submissions on behalf of ANZ or any invitation for the trial judge to consider any of its provisions, or the identification of any disputed issue under the CLA, the grounds of appeal with respect to primary liability are almost exclusively directed to that subject.
- While only ss5F and 5G of the CLA featured in the pleaded Defence, those sections did not feature in the complaints made in the Notice of Appeal by ANZ. Those provisions of the CLA that did

feature in the grounds of appeal did not appear in the Defence and were not the subject of any submissions to the primary judge.

- The submissions on behalf of ANZ focused on an asserted failure by the primary judge to address the various provisions of the CLA. Nowhere did they propose that, had any of those provisions been addressed, a different result would have eventuated.

Simpson JA then made the following remarks:

"It is not an error for a trial judge to fail to address potential issues that do not materialise and are not presented for determination. The primary judge was entitled to proceed on the basis that, while the [CLA] governed [Haq's] claim, [ANZ] perceived no contentious issues arising therefrom. A trial judge determining a claim governed by the [CLA] must always have in mind the provisions of that Act, and it is probably desirable that some express acknowledgement is made of that fact. However, when both parties are represented by senior counsel, and no mention is made of any specific provision of the [CLA] and no contested issue arising therefrom is identified, an omission on the part of the judge to refer to it is not indicative of error."

Further, her Honour observed:

"Identification of the issues in any trial is the role of counsel; it is the role of the trial judge to determine those issues…It is quite inappropriate now to seek to challenge the findings of the primary judge by reference to statutory provisions to which counsel for [ANZ] addressed no argument and, accordingly, counsel for [Haq] addressed no counter argument."

On the issues affecting the appeal with respect to damages, Justice Simpson was equally critical, making the following remarks:

"The outcome of this appeal depends, to a very large extent, upon the manner in which the proceedings were conducted by the parties at trial, which can fairly be described as haphazard."

Further, her Honour observed:

"The manner in which the medical evidence was presented was also not conducive to [a] proper resolution of the issues."

In this regard, Justice Simpson was critical of both parties having each tendered a substantial bundle of medical reports, the large majority of which was not relevant to the issues as confined by counsel during their submissions to the trial judge. As Simpson JA noted:

"By the time this bundle was put together, and certainly by the time it was tendered at the conclusion of the evidence, it must have been plain to all concerned that, to the extent that there was any medical issue in the proceedings, it was narrowly confined. No attempt was made by the legal representatives of either of the parties to identify the issues and to select medical evidence material to those issues. Instead, every medical record and document was photocopied and presented, in two bundles, to the trial judge."

And further:

"What was the trial judge to do with this material? Buried in the morass were a small number of relevant reports to which reference was made during the course of addresses. The vast bulk of the material was simply irrelevant and, accordingly, no reference was made to it."

Her Honour then gave the following important and timely reminder:

"Yet again, it is necessary to observe that counsel are under a duty to present cases in such a way as will assist the trial judge to arrive at the correct result. Bombardment with hundreds of pages of irrelevant material does not achieve that."

Simpson JA went on to be critical of the state of the evidence with respect to the claim for past and future economic loss, which her Honour described to be in a "highly unsatisfactory state."

Her Honour also expressed the following criticism in relation to the expert medical evidence relied upon in support of the claims for past and future domestic assistance:

"It is a matter of some puzzlement that medical practitioners express (and are asked to express) views as to the extent to which an injured person needs domestic assistance. Once a medical practitioner has identified the nature and cause of an injury or disability, the impact of that injury or disability will depend upon a range of factors outside the ordinary expertise of medical practitioners."

Her Honour held that the lay evidence of Haq and her daughter far outweighed the contrary opinions expressed by some of the doctors regarding Haq's domestic assistance needs.

Sackville AJA also expressed criticisms concerning the state of the evidence regarding economic loss.

These criticisms emanating from the NSW Court of Appeal concerning the manner in which the trial was conducted in this case serve as a timely reminder of the duty by legal representatives for parties to assist the trial judge in arriving at the correct result.

Importantly, the Court held that a trial judge is not in error by failing to address the provisions of the CLA in his or her judgment if counsel for the parties do not refer to those provisions during addresses at the conclusion of the trial.

This extends a theme which has been developing in recent years where the Court of Appeal has criticised

trial judges for failing to give due regard to the CLA provisions in the reasons for judgment. The Court of Appeal has now firmly put that responsibility onto the shoulders of counsel appearing for the parties at the trial.

In other respects, the remarks made by Justice Simpson concerning the manner in which the trial was conducted before Maiden SC DCJ in this case remind us that the function of the trial judge is to determine the issues in dispute that are presented to the Court by counsel for the parties.

This requires counsel to ensure that all issues in the pleadings have been identified, that the oral and documentary evidence tendered at trial has some relevance to those issues and that the trial judge is not bombarded by material that is simply irrelevant or not referred to during submissions.

The Court has also continued a developing trend to criticise the reliance placed on expert medical opinions concerning an injured party's need for domestic assistance, by giving more weight to the lay evidence of family members where such evidence is accepted as a reliable and credible by the trial judge.

The judgment of the Court of Appeal in *ANZ v Haq* reminds practitioners that our paramount duty to the Court includes a duty to assist the trial judge in arriving at the correct result. This should be at the forefront of the mind of both counsel and instructing solicitor when presenting that party's evidence and the submissions at the conclusion of a trial.

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Strata Scheme Defects Reform – A Building Bond Awakens

The Strata Scheme Management Act 2015 ("the 2015 Act") has been drafted to replace the Strata Schemes Management Act 1996. While the 2015 Act was expected to come into effect on 1 July 2016, it is now anticipated that these major reforms will be briefly postponed to later in the year.

In the meantime, whilst we await its enactment and for the Regulations to be gazetted, developers in particular should prepare for the upcoming reform to the strata building defects regime.

The 2015 Act aims to bring the strata laws into the 21st century by creating a modern framework for the increasing number of NSW residents living in strata schemes today.

- The key reforms include:
- Strata renewal reforms;
- Building management reforms;
- Scheme management reforms;
- New model by-laws;
- Dispute resolution; and
- Collective sale and renewal reforms.

The 2015 Act addresses the difficulties faced by strata residents in having defects rectified in a timely manner or where the developer goes into liquidation shortly after completion of the building. Part 11 of the 2015 Act introduces a regime for dealing with defects in residential strata schemes and mixed use, where the residential portion does not have the benefit of statutory insurance required by the Home Building Act 1989 ("HBA").

Part 11 of the 2015 Act introduces a 'building bond' to protect the owners. The developer will be required to lodge with the Secretary of the Department of Finance, Services and Innovation a bond equating to 2% of the contract price for the building work. This bond will function as a form of security for the costs of repairing defective work for two years after completion of the work. Importantly, an occupation certificate will not be issued under the Environmental Planning and Assessment Act 1979 for any part of the building work until the building bond has been lodged.

As well as temporarily parting with 2% of the contract price, developers are required to engage an independent building inspector to carry out a defect inspection report, at the cost of the developer, between 12 and 18 months after the completion of the building. This is when the appointment of the 'inspector' can get a little delicate.

The inspector cannot be 'connected' with the developer. An inspector is said to be 'connected' with the developer if it is involved the design or any aspect of the construction or certification of the building work, connected with any person involved or has a pecuniary interest in any aspect of the building work. Once the developer has jumped this hurdle, the Owners Corporation comes into play.

The Owners Corporation must agree to the appointment of the inspector. If the Owners Corporation cannot agree on who should be appointed, the Secretary may arrange the appointment of the inspector and no subsequent approval by the Owners Corporation will be necessary. If the Secretary fails to appoint an inspector or the developer is no longer trading, NSW Fair Trading is required to step in and arrange the inspector. The costs of the inspector are to be borne by the developer. However, given the Regulations are still to be gazetted, there is potential for the amount of the inspector's fees to be scheduled.

The inspector carries out a final inspection of the work and prepares a final report no earlier than 21 months and not later than 2 years after the completion of the building work.

If there are no defects or the defects have been rectified, the bond will be returned to the developer. Otherwise, the bond will be used to carry out the repairs.

For developments where a building bond is required, the 2015 Act amends the HBA. The 2015 Act has interestingly stayed silent on the warranty period for major defects. However, where the warranty period is two years, the time limit for commencing proceedings is extended to 90 days after the end of the period within which a final inspection report is required. This coincides with the inspector's final report.

And what about the Home Owners Warranty Scheme? In December 2015, NSW Fair Trading released a discussion paper suggesting five broad reform models in an attempt to make the scheme more efficient and cost effective. Three of those models remove insurance cover for low-rise multi units. This is with a view that these properties will be protected by the building bond required by the new strata defects regime. Consultation on these changes is still on foot.

Owners should keep in mind that this will not affect any action that may be taken, or remedy that may be sought, in respect of building work under any other law. Owners will need to be prepared to commence an action under section 18E of the HBA, while at the same time pursuing the process set out in the 2015 Act.

The changes to the strata defects regime are paramount, though there are a number of other notable changes that also will impact developers and owners corporations. While the commencement date of the 2015 Act remains uncertain, it is looming. Watch this space.

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Experts and lawyers – a complex relationship

The amount of interference that a legal practitioner can exert in preparation of expert reports has long been an issue of contention for the Courts. The 1981 English case of Whitehouse v Jordan & Anor is a shining example of the lengths lawyers should not go to when commissioning expert reports. In that case the expert's report was settled by counsel and doctored to the point that lines within the report had been blacked out. On this point Lord Wilberforce stated:

> *"While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."*

Expert opinions are required to be based upon the specialised knowledge of the witness: *Dasreef Pty Limited v Hawchar [2011] HCA21;* and demonstrate the process of reasoning showing how such specialised knowledge when applied to the assumed facts leads to the ultimate opinion expressed: *Makita (Australia) Pty Limited v Sprowles [2001] NSWCA305*.

Without these two elements being achieved either the admissibility or at least the weight of the expert opinion comes into question. How then can expert witnesses, who are likely not cognisant of the requirements of admissibility, prepare reports that withstand the scrutiny of the court when examined through the prism that is the Evidence Act 1995, the UCPR and the common law referred to above?

Guidance as to the lengths to which lawyers may now be involved in the preparation of expert reports has been provided in the recent case of *Thiess Pty Limited v Dobbins Contracting Pty Limited [2016] NSWSC 265.*

This matter involved allegations of both negligence and breach of contract and required the provision of expert evidence as to liability and quantum. When turning his mind to the liability evidence that contained, to a large extent 'speculative statements, not involving the application of specialised knowledge', Justice McDougall provided a concise statement as to the lengths that legal practitioners should involve themselves in the preparation of expert reports. His Honour stated:

> *"Lawyers must play an active, and important part in the preparation of statements of expert evidence. First of all, the lawyers for a party who proposes to rely on expert evidence must inform the expert of the assumed facts on which his or her opinion is to be based. To enable the opinions to have any value, the statement of assumed facts (and of course those facts include documents) must be comprehensive.*
>
> *Next, the lawyers should do what they can to ensure that the expert expresses his opinions in a way that demonstrates clearly the application of specialised knowledge to those assumed facts and the reasoning process that leads to the opinions expressed."*

His Honour's judgement arguably differs as to the opinion of Wilberforce LJ as to the form of the evidence in Jordan. His Honour stated:

> *"…Of course, it is a matter for the expert, and only the expert, to formulate these opinions, and to employ an appropriate reasoning process in doing so. However, if the expert's statement of evidence is to be of any real utility, the lawyers who have retained the expert must do what they can to ensure that the reasoning process is adequately displayed."*

Hence it can arguably no longer be said that expert evidence is to be uninfluenced (at least as to form) by the exigencies of litigation. Clearly in order for a report to be admissible and carry any weight it must at least be reviewed by the lawyers who commissioned it to ensure that not only it complies with the UCPR for the admissibility but also that it complies with Makita and

Dasreef. To not do so would likely result in a significant expense for very little gain for the client.

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EMPLOYMENT ROUNDUP

Inadvertent dismissal of employee?

The remedies available to employees under the Fair Work Act 2009 (Cth) (FWA) for unfair dismissal have a number of jurisdictional thresholds which must be met.

Critically among these is the requirement that there has been a "dismissal". If there is no dismissal, then no application under the FWA can be made.

What constitutes "dismissal" for the purposes of the relevant part of the FWA is extremely wide, extending to constructive dismissal, repudiation by the employer and more. It can be easy for an employer to have "dismissed" an employee without realising it. The recent Fair Work Commission decision of *Dore v Motorcycle Holdings TCO Pty Ltd [2016] FWC 2838* is a classic example.

The employee had performed various duties with the employer since 2012. The employer's business concerned motorcycle sales, repairs and other related services. At the time his employment came to an end, Mr Dore was the permanent Business Manager at the employer's Newstead dealership.

The employer held concerns regarding Mr Dore's performance because, amongst other matters, he was not meeting the required sales benchmarks. The evidence showed that Mr Dore was aware of the difficulties he was experiencing in his sales performance, and that he had only met the sales benchmark at the Newstead site twice in 15 months, whilst he had regularly met the benchmarks whilst performing as a Relief Manager at other sites.

Previous performance processes had been undertaken. Notes from April and August 2015 Business Manager Reviews recorded concerns as:

"Performance – poor – late – trust – actions – lost focus…falling behind standards… appearance […].

By mid-October 2015, the employer had also become concerned that Mr Dore was entering the dealership at particularly unusual hours, often late at night or very early in the morning, for in some cases very short periods of time.

Subsequently at a meeting with the employee in November 2015, the employer communicated that a decision had been arrived at to relocate Mr Dore to other dealerships, which (it was hoped), would assist him in reaching the required benchmarks.

The employer contended that Mr Dore had initially accepted the change, and had understood that it would provide him with an opportunity to gain confidence and meet the required benchmarks.

However, clause 6 of the contract of employment provided as follows:

> *Location*
>
> *Your role will be based at the location set out in item 7 of schedule 1 [Newstead] and you agree to work from other locations as directed by the company from time to time, in order to meet business requirements.*

The proposed new contract of employment essentially sought to change the location of Mr Dore's employment to "as required". Furthermore, Mr Dore's position title was to change from "Business Manager" to "Relief Business Manager".

In addition, other changes were proposed such as an increase of $5000.00 per annum to Mr Dore's base wage (by way of a car allowance); the provision of a fuel card, and the provision of a $45.00 monthly mobile phone allowance.

The new contract also purported to impose a 6 month probationary period.

Some days after having been given the new contract, the employee indicated that he had decided not to accept it, mainly because it would "halve my pay". In response the employer said:

> *"You are advised that if you did not sign and return your pay structure for the new role …that you would not be paid without a signed pay structure. I also advised you that there is no other role for you so if you do not accept the new position then we do not have a job for you."*

Thereafter, the employee did not report for or perform any further work for the employer.

The Commission held that all this constituted a repudiation of the original employment contract by the employer. The conduct by the employer was sufficient to demonstrate to a reasonable person that the employer had renounced the contract of employment and no longer wished Mr Dore to be an employee under the (now previously) contracted terms as Mr Dore had failed to maintain what his employer considered to be a mandatory condition of his continuing employment (which was to enter into a new contract of employment).

The new contract of employment necessitated Mr Dore ceasing to be based at Newstead, and instead to be available for re-assignment at any location depending on the employer's business requirements. There was

no base in the new contract of employment. This was a substantial change in the condition of employment.

This change also had wider ramifications, including a risk that the employee's earnings might drop under a modified pay structure.

There was no abandonment of employment by the employee, but rather clear repudiatory behaviour by the employer, entitling the other party to treat the contract as at an end.

Thus, Mr Dore's employment came to an end at the initiative of the employer for the purposes of s.385(a) of the FWA.

Mr Dore had therefore been "dismissed", and was entitled to bring an unfair dismissal application under the FWA.

So, a well intentioned performance management process backfires and ends up involving the employer in an unfair dismissal action. Workplace relations is indeed a minefield!

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Not fit for the inherent duties of your position?

Employees bargain with their employer to be paid for work they undertake as part of their position. However events may cause an employee not to be able to complete their side of the bargain where they are unable to perform the inherent duties of their position.

The Fair Work Commission has recently determined an employee's dismissal was not unfair when he was dismissed for being unable to perform the inherent requirements of his position.

In *Mwakichako v BHP Billiton WAIO Pty Limited* [2015] FWC 3160, Commissioner Cloghan determined that Mwakichako was validly dismissed as he was unable to carry out the inherent requirements of his substantive position.

Mwakichako was employed as a full time trainee dump truck operator in June 2010. An inherent requirement of his job was the operation of haul trucks and other surface mine equipment.

In or around July 2012 Mwakichako was exposed to hydrocarbon exhaust fume at works. He sustained a work related respiratory illness in December 2012 as a result of further hydrocarbon exposure. He brought a worker's compensation claim and was off work from 24 December 2012 until 29 January 2014.

Mwakichako accepted a temporary work placement as a mine controller from 24 January 2014. He was told the mine controller position was to continue for a "yet to be determined period of time". It was explained to Mwakichako at a meeting on 20 January 2014 that the mine controller position was for a temporary period of time and he needed to secure a permanent position within the organisation. It was confirmed in correspondence to Mwakichako by BHP that his occupational physician had stated that he needed to avoid work with a high risk of further hydrocarbon exposure and as such he was unable to return to his position as a dump truck operator.

Mwakichako was also advised his position as a dump truck operator was a "critical position" within the Production Department. It was verbally made clear to Mwakichako on at least 2 occasions by BHP that they were unable to keep his position as a dump truck operator open indefinitely while he attempted to secure alternate employment.

On 29 September 2014 Mwakichako's employment was terminated on the basis of his inability to return to perform the inherent requirements of his role. BHP had provided Mwakichako with an extension to the initial three month redeployment timeframe and as such he had had over 20 weeks to find a suitable alternative role within BHP that he could safely perform.

The Commissioner determined there was a valid reason for Mwakichako's dismissal. The Commissioner noted a reason which is "capricious, fanciful, spiteful or prejudice" could never be a valid reason for dismissal (*Selvachandran v Petersen Plastic Pty Limited* (1995) 62IR 671).

At the same time the reason/s for dismissal must be valid in the context of the employee's capacity or based on the operational requirements of the employer's business.

Having regard to the medical evidence available that Mwakichako should not have "any further hydrocarbon exposure", the Commission determined that was a valid reason for BHP not allowing Mwakichako to return to his substantive role as a dump truck operator. Consequently the Commissioner found there was a valid reason for the dismissal.

The employer gave evidence it held discussions with Mwakichako every four weeks whilst he attempted to find an alternative position. There was also evidence the Commissioner accepted as being important that BHP explained to Mwakichako his continuing employment was subject to him securing a permanent position. The regular communication with Mwakichako that he needed to secure alternative obligation satisfied the obligation of an employer to give an employee the opportunity to respond prior to the termination.

Importantly for employers considering terminating employees who are not fit for the inherent duties of their position, the Commissioner determined BHP had made it clear to Mwakichako the role BHP had found

for him when he returned to work was temporary in nature only and he needed to secure a permanent position having regard to his restrictions. The Commissioner noted BHP had been in constant contact with him reminding him of this and that he needed to secure an alternative position.

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WORKERS COMPENSATION ROUNDUP

Striking out a PFS

In a number of our newsletters we have reviewed decisions highlighting the difficulty striking out a Pre Filing Statement in a work injury damages claim. The Pre Filing Statement is the document served by the parties that should annex all of their evidence in what is a front end loaded system. The consequences of striking out a Pre Filing Statement obviously has significant ramifications for a claimant and on that basis the jurisdiction to strike out a Pre Filing Statement rests solely with the President of the Workers Compensation Commission.

Recently in *Kurt's Plumbing Services Pty Limited v Shahin* (2015) NSWWCCPD 24 President Keating of the Workers Compensation Commission was again requested to determine whether a Pre Filing Statement could be struck out for want of prosecution.

Mr Shahin was a working director of Kurt's Plumbing and carried out plumbing work. On 4 March 2009 Mr Shahin suffered an injury to his back whilst lifting and carrying a 15-20kg toolbox. At the time he was installing a water service at a client's premises. As a result of the incident Mr Shahin suffered a disc prolapse at L4/5. He ceased work in May 2009 and has not returned to duties. Mr Shahin underwent back surgery on 30 June 2009.

On 1 June 2010 an agreement was entered into with Mr Shahin by the workers compensation Scheme Agent to make payment for a 15% whole person impairment. This assessment was sufficient for Mr Shahin to reach the threshold in order to bringa work injury damages claim. Mr Shahin did not commence proceedings at that time and subsequently claimed his condition deteriorated although he did not make a further claim for permanent impairment.

On 18 February 2014 Mr Shahin finally served his notice of claim for work injury damages. Following a denial of liability by the Scheme Agent, a Pre Filing Statement was served on 17 September 2014. In reply a Pre Filing Defence was served on 15 October 2014.

The matter was referred for mediation however the employer declined to participate in the mediation on the grounds that liability was wholly disputed. A Certificate of Mediation was then issued certifying the mediation process was complete. Mr Shahin was then free to file proceedings in the District Court.

On 7 July 2015 the Scheme Agent's legal representative enquired whether Mr Shahin intended to pursue his claim for work injury damages through Mr Shahin's solicitors. There was no reply. On 27 August 2015 a similar enquiry was made with Mr Shahin's solicitors and again there was no reply.

On 15 October 2015 the scheme agent's solicitors wrote to Mr Shahin's solicitors indicating that if a response was not received within 14 days an Application to Strike out a Pre Filing Statement would be filed. Following no reply the Application was filed on 15 January 2016.

Despite a Direction issued by the Commission for Mr Shahin to lodge and serve a Notice of Opposition this Direction was not complied with. The President eventually arranged for the matter to be listed for a telephone conference on 14 April 2016. A request by Mr Shahin's solicitors for an extension of time to comply with the Direction to lodge a Notice of Opposition was granted by the President but this was again not complied with.

Although the application was ultimately not opposed the President was required to determine if it was appropriate to strike out the Pre Filing Statement.

President Keating determined all the pre-litigation steps had been completed including Mr Shahin demonstrating he had reached 15% whole person impairment. Nevertheless, it had been more than seven years since the injury and over 18 months since the Pre Filing Statement had been filed and served. With the benefit of legal advice Mr Shahin had elected to offer no resistance to the Application and this was a powerful factor in granting the Application to Strike out the Pre Filing Statement. Accordingly, the Pre Filing Statement was struck out.

Although this decision reinforces the Commission's desire to afford claimants every opportunity to pursue their claim for work injury damages including granting significant latitude with regards to compliance with Directions issued by the Commission, it does demonstrate it is possible for a Pre Filing Statement to be struck out if there is a significant delay in prosecuting the claim after the pre-litigation phase has been concluded.

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Contemporaneous records are vital in Workers Compensation Commission proceedings

In last month's newsletter we considered a disputed injury in the context of a liability claim in the matter of *Small v K&R Fabrications (Wollongong) Pty Limited*. This month we report on another case in which it was determined the worker did not sustain an injury albeit for different reasons from those in *Small*. In *Zemira Pehlic v Spotlight Pty Limited* the determination centred around whether or not Ms Pehlic was in fact at work on the date of the alleged injury and the decision demonstrates the importance of contemporaneous records in defending a claim.

Ms Pehlic alleged that she sustained an injury on 3 May 2009 when she was pinned against a handrail by a table. Her employer, Spotlight, through its scheme agent had issued a number of Section 74 Notices disputing injury on the basis that there had been no injury and employment was not a substantial contributing factor.

In order to be successful, Ms Pehlic was required to demonstrate to Arbitrator Josephine Snell that on the balance of probabilities that she had worked on Sunday 3 May 2009 which was the date of the alleged injury.

On reviewing the evidence the Arbitrator made findings that there were discrepancies in Ms Pehlic's statements. An example of this was Ms Pehlic's evidence that she went to work the day after the alleged injury whereas her husband's statement indicated Ms Pehlic was taken to hospital by ambulance.

Ms Pehlic's contracted hours involved an alternating roster where she would work Saturday and Sunday one week and then Tuesday and Wednesday the following week. Ms Pehlic's evidence was that she worked the day after the alleged injury. This was a Monday which was not one of the days she was normally rostered to work.

Spotlight relied upon evidence which demonstrated that Ms Pehlic did not receive penalty rates in the relevant pay period and submitted this was evidence that Ms Pehlic she did not work on the Sunday 3 May 2009.

Arbitrator Snell indicated there were a myriad of options available to Ms Pehlic to provide an explanation and to adduce evidence disputing the submissions made on behalf of Spotlight. Ms Pehlic had failed to do so.

Arbitrator Snell considered the clinical records of Dr Lombardo, Ms Pehlic's nominated treating doctor, which recorded the work injury when Ms Pehlic consulted the doctor on the day after the alleged injury. Whilst Arbitrator Snell acknowledged the doctor's note was a powerful piece of evidence to support Pehlic's case due to its contemporaneous nature, it was not proof that Ms Pehlic had worked on 3 May 2009. Furthermore, in view of other contradictory evidence the doctor's notes had to be considered carefully.

The Bankstown Hospital records for 4 May 2009 expressly stated "*no specific precipitating factors*". The Arbitrator considered that if Ms Pehlic had told the hospital staff of the work accident it would have been recorded in the discharge summary as such. Arbitrator Snell specifically commented that given the injury history was recorded as "*no specific precipitating factors*" which demonstrated that the author of the discharge summary had in fact turned their mind to causation.

Arbitrator Snell noted that Ms Pehlic's treating surgeon, Dr Abraszko, did not comment on causation and the remaining medical experts assumed that Pehlic was working on 3 May 2009 and therefore their opinions were based on an incorrect history. On that basis Arbitrator Snell commented that she could not give weight to the medico-legal opinions with regards to causation.

Ultimately Arbitrator Snell was not persuaded Ms Pehlic worked on 3 May 2009. The appropriate order was an award in favour of Spotlight with regards to the alleged injury to the lumbar spine on 3 May 2009 and the claimed consequential injury to the digestive tract.

This decision highlights the need to gather all of the contemporaneous records in order to clearly establish whether or not the injury or incident occurred as alleged.

It must be remembered the onus in proving an injury rests with the worker. This onus is not discharged until the Arbitrator can be satisfied on the balance of probabilities that the injury occurred, both on the date and in the manner alleged by the worker.

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CTP ROUNDUP

Zeait – the Good, the Bad and the Ugly

In a recent decision of Harrison AsJ Her Honour has allowed an appeal from a Local Court Magistrate because of a failure to give adequate reasons (*Zeait v Insurance Australia Limited t/as NRMA Insurance* [2016] NSWSC 587).

The Magistrate in question had delivered a judgment for the defendant as a result of IAL refusing to

indemnify Zeait on the basis Zeait had deliberately caused the motor vehicle accident in respect of which he claimed.

The accident occurred at about 8.30 pm in a suburban roundabout at Merrylands. Unfortunately for Zeait, an independent witness happened to be looking out the window of her home at the roundabout at the relevant time. She saw a dark car stop in the roundabout for a couple of seconds. She then saw a second car collide with the stationary dark car, pushing the dark car up onto the kerb. The dark car then reversed back towards the roundabout.

The other car that had caused the collision also reversed a short distance and then drove at the dark car in the roundabout again. The second collision happened two or three minutes after the first collision. The impact from the collision was to the passenger side of the vehicle in the roundabout.

It was not in dispute between Zeait and IAL that there was a second impact but there was dispute as to how the second impact occurred. The Magistrate accepted the evidence of the independent witness, who was not shaken in cross examination. Her evidence was described as clear and simply put, compared to the evidence of the plaintiff's witnesses, which the Magistrate described as "in all instances vague, inconsistent both internally and relatively" and in the Magistrate's view, not credible.

As a result the Magistrate gave judgment for the defendant.

Zeait appealed from the whole of the decision of the Local Court Magistrate essentially on the basis that the Magistrate failed to give any or adequate reasons for his decision. A second ground of appeal was that the decision of the Magistrate was contrary to the evidence before him.

Her Honour referred to Stein JA's decision in *Jun v Son* [1998] NSWCA 120 in which Justice Stein stated that whilst a judge does not have to give every reason for every aspect of a case, his or her reasons have to be sufficient to allow an Appeal Court to understand the basis of the judgment. Failure to do so is an error of law.

In this instance Her Honour identified the issue in the Local Court proceedings was whether or not Zeait had breached the terms of the policy of insurance so as to justify IAL refusing to indemnify the plaintiff. IAL's case was that Zeait caused deliberate damage to the vehicle, that the claim was not covered by the policy and Zeait had failed to prove an accidental collision took place that was claimable under the policy.

This meant the Magistrate's task was to determine if the claim was one falling in the policy of insurance and the onus was on Zeait to demonstrate the damage was caused accidentally, not intentionally.

It was not in dispute that there was a second impact but the accounts as to how the second impact occurred differed. The Magistrate accepted the independent witness' evidence and found the Zeait's witnesses not credible.

Her Honour found the Magistrate had not set out why the plaintiff was not entitled to be indemnified by reference to the terms of the insurance policy, which the Magistrate was obliged to do. Because of his failure to give reasons on this topic the Appellant Court was not able to understand the basis for the judgment in favour of the defendant and as a result Her Honour held the Magistrate had made an error of law and the decision was set aside.

The ugly reality is that whilst Blind Freddy could see the accident had been caused by deliberate actions on the part of the plaintiff once the independent witness' evidence was accepted, Her Honour was bound to set aside a judgment on the basis of error of law.

Ironically, in this issue of GD News there is a decision reported of a Judicial Review application in which Justice Rothman concentrates on the importance of the expeditious resolution of MAS assessments and that attention should be paid to the persuasiveness of an application and insurers should not seek to dwell upon a failure by an assessor not to spell out every reason for every aspect of his decision.

We have doubtless all had occasions when our learned counsel has recommended full written submissions be made in the case, so that the insurer can effectively provide the reasoning for the judgment for the presiding judge. Insurers with both a motor vehicle property damage claim and CTP claim to defend arising out of the same accident would in particular be well advised to take this step in property proceedings before the Local Court where liability is in issue or fraud alleged, as the property damage claim is so often litigated first. This may help to increase the chances of avoiding an adverse finding on liability impacting on the later CTP claim, directly or indirectly. It should also reduce the potential for a judgment in favour of an insurer being set aside for error of law as in *Zeait*, before a Local Court Magistrate, when the Magistrate may otherwise be wishing to deliver a decision expeditiously and perhaps orally at the conclusion of evidence.

In this case, the decision of Harrison AsJ was to allow the appeal, the case is to be remitted to the Local Court to be determined according to law. Additional salt in the wound for IAL was the fact that costs usually follow the event and the defendant was ordered to pay the plaintiff's costs of the appeal.

We will track the progress of the further Local Court proceedings to see whether the defendant ultimately succeeds.

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Blameless Accidents under the MACA & Escaping Liability – Syed v Crumpton

The blameless accident provisions of the *Motor Accidents Compensation Act 1999* (NSW) ("the Act") have again come under scrutiny in a recent decision of the Supreme Court.

The context was a single vehicle accident. Ruman Syed was riding his motorcycle along Lady Game Drive at Lindfield behind a vehicle driven by the first defendant, Lee Crumpton. At some point during the drive, Crumpton collided with a wallaby. Syed then collided with the wallaby as it lay on the road. He was thrown from his motorbike and suffered severe injuries.

Syed commenced proceedings against Crumpton. In the alternative, if Crumpton was found not to be negligent, Mr Syed alleged the accident was a blameless accident. Insurance Australia Limited t/as NRMA ("IAL") was the CTP insurer of Syed's motorcycle and therefore the second defendant to the proceedings.

IAL filed a Notice of Motion seeking to have the claim against it dismissed. IAL alleged Syed had no reasonable cause of action against IAL. The basis for the application was that there was no liability on the part of IAL to indemnify Syed pursuant to Section 10 of the Act if the accident was found to be a blameless accident, because Syed was both the owner and the driver of the vehicle.

Section 10 of the Act provides:

> *"(1) A third-party policy under this Act is a policy that is in the following terms:*
> *…*
> *The insurer insures the owner of the motor vehicle and any other person who at any time drives the vehicle (whether or not with the consent of the owner) against liability in respect of the death of or injury to a person caused by the fault of the owner or driver of the vehicle."*

The insurer's argument was essentially that because Section 10 provided that the liability insured is in respect of the death or injury to "a person caused by the fault of the owner or driver of the vehicle ", that in the circumstances where an accident was caused by a claimant who was both the owner and driver then the claimant cannot claim in respect of his own injuries under the blameless accident provisions.

Her Honour Justice Schmidt did not accept this argument.

Her Honour struggled to see the basis for this distinction, particularly as it was accepted that if Syed had been just the rider and not also the owner of the motorcycle he was riding at the time of the accident then he would be able to claim in respect of his own injuries under the blameless accident provisions.

However, IAL also sought to argue the decision of the Supreme Court of New South Wales in *Melenewycz v Whitfield* [2015] NSW SC1482 had been wrongly determined. That also involved a single vehicle accident in which a plaintiff was found to have been keeping a proper lookout and unexpectedly collided with a kangaroo that hopped out in front of his motocycle.

In *Melenewycz* Justice Hammill had to determine whether a driver involved in a single vehicle accident could ever come within the blameless accident provisions, and also, the operation of section 7E of the Act.

Section 7E provides:

> *"No coverage for* driver *who caused accident*
>
> *(1) There is no entitlement to recover damages under this Division in respect of the death of or* injury *to the* driver *of a* motor vehicle *if the* motor accident *concerned was caused by an act or omission of that* driver*."*

His Honour determined in that case that there was no fault on the part of the driver and so he was not precluded from relying on the blameless accident provisions.

In Syed Justice Schmidt agreed with the approach taken in *Melenewycz.* Her Honour made the point that if it had been intended that plaintiffs would be excluded from recovering damages where they were the only driver in single vehicle blameless accidents, Section 7E would have been legislated along the lines of *"a driver involved in a blameless accident has no entitlement to damages for death or injury which he or she suffers"* (per Schmidt J at 40).

As this involved an application for summary judgment, Justice Schmidt was not required to definitively determine whether Syed would be able to take advantage of the blameless accident provisions. The outcome of the substantive proceedings will not be known for some time.

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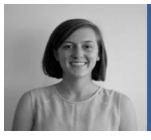

The elusive nature of the further MAS Assessment

In the recent decision of *Insurance Australia Limited t/a NRMA Insurance v Melkonyants* the Supreme Court of NSW considered a challenge to the certificate of a MAS assessor and a CARS Assessor.

Ms Melkonyants alleged she suffered urinary incontinence as a result of a motor vehicle accident which occurred on 21 November 2011.

In a certificate dated 4 April 2014 Ms Melkonyants was assessed by a MAS Medical Assessor as suffering 15% whole person impairment in relation to urinary incontinence as a consequence of the accident.

The insurer subsequently applied to MAS for a further medical assessment pursuant to s 62(1)(a) of the *Motor Accidents Compensation Act 1999* ("MACA"). The insurer relied on a further report of Dr Kobel, urologist, dated 6 November 2014. Dr Korbel had to prepare his report on the papers, as Ms Melkonyants failed to attend the appointment with Dr Korbel.

This application was rejected by the proper officer and subsequently the insurer applied to the CARS Assessor for a referral back to MAS for a further medical assessment pursuant to s 62(1)(b) of the MACA. This application was also rejected.

The insurer then filed judicial review proceedings in the Supreme Court, challenging the original decision of the Medical Assessor as well as the decision of the CARS Assessor not to refer the matter for a further assessment.

The insurer argued that the Medical Assessor had failed to consider the issue of causation adequately or at all, failed to comply with the Guidelines relating to causation and failed to give sufficient reasons.

In the certificate dated 4 April 2014 the Medical Assessor recorded Ms Melkonyants' history of giving birth to two children by caesarean section and of having a period of urinary incontinence after a previous motor vehicle accident in June 2011 which had resolved prior to the accident on 21 November 2011.

He also noted Ms Melkonyants complaints of increased frequency of urination and incontinence associated with sneezing, laughing and coughing after the November 2011 accident and her subsequent treatment by a gynaecologist.

Only a partial clinical examination could be completed by the MAS Assessor as a result of some symptoms. The Medical Assessor determined Ms Melkonyants' incontinence arose as a result of the accident.

Justice Rothman noted that there was no doubt the Medical Assessor had expressly determined that the medical condition with which he was concerned arose as a result of the accident. His Honour noted the Assessor was a urologist appointed for his medical expertise and he had available to him Ms Melkonyants' GP records dating back to 2009.

His Honour stated that since the inception of the MACA, the court had been at pains to point out that "minute and detailed textual criticism in the hope of finding something on which to base an argument should be avoided". Further, in circumstances where a medical specialist expressed a professional judgment reasons need not be extensive or provide a detailed explanation of the criteria applied.

In this case, where there was immediate onset of symptoms of urinary incontinence that continued up to the date of assessment, the Medical Assessor did not need to provide further explanation. Any pre-existing injury had resolved and the clinical examination revealed the bona fide nature of the complaint.

His Honour considered that as nothing of substance was missing from the decision, in essence the insurer was asking the Medical Assessor to be formulaic in providing a "connecting" sentence which simply stated that having regard to the symptoms and timing of onset, the condition was caused by the accident. His Honour held that where obvious expertise is being relied on such statements are not required.

For these reasons the insurer's challenge to the MAS certificate failed.

His Honour then considered the challenge to the decision of the CARS Assessor to refuse a further medical assessment.

No complaint was made by the insurer regarding the criteria used by the Assessor to deal with the application. The insurer did however contend that when considering the additional evidence of Dr Korbel, the Assessor took into account the fact that Dr Korbel had not in fact examined Ms Melkonyants and had not in fact been provided with the certificate of the Medical Assessor in compiling his report.

It was argued that the Assessor's consideration of the fact that Dr Korbel had not examined Ms Melkonyants was an irrelevant consideration and denied the insurer procedural fairness because the Assessor did not allow the insurer the opportunity to be heard on why Dr Korbel had not assessed Ms Melkonyants. Had the Assesor done so, he would have been told about Ms Melkonyant's failure to attend.

The CARS Assessor had noted that since Dr Korbel sought to cast doubt on the question of causation concerning the Ms Melkonyants' injuries, he should have examined and questioned her. The Assessor also considered Dr Korbel had not provided apportionment for the different causes he proposed for Ms Melkonyants' incontinence, and that Dr Korbel's report in fact ultimately supported the contention that the November 2011 accident had caused or at least contributed significantly to Ms Melkonyants' incontinence.

His Honour noted that the power to refer back to MAS in s 62(1)(b) of the MACA does not import a discretion for a CARS Assessor to do what they think is most desirable; regard must still be had to the objectives and purpose of the legislation. In particular, the resolution of medical issues is required to be done expeditiously and without the formality of court

proceedings. Instead, medical experts must use their expertise to determine the extent of injury and issues of causation.

Noting another medical assessment would cause further delay, His Honour concluded it was appropriate for the CARS Assessor to take into account the persuasiveness of Dr Korbel's report. To this end the CARS Assessor had considered a number of relevant factors including the fact that both Dr Korbel and the Medical Assessor were urologists, that the Medical Assessor had examined the claimant and taken a comprehensive history, while Dr Korbel had not and that the report of Dr Korbel had only raised other possibilities regarding causation and had not reached any firm conclusions.

Accordingly, the fact that Dr Korbel did not examine Ms Melkonyants was relevant as it affected a fact in issue, being the persuasiveness and weight of the doctor's report, which in turn was relevant to the application for a further medical assessment.

Further, the CARS Assessor had not failed to afford the insurer procedural fairness as the insurer had specifically relied on the "persuasiveness" of Dr Korbel's report to argue for a referral back to MAS. Rothman J reasoned that the insurer would have been aware at the time of making the application for a further assessment that Dr Korbel not having assessed the claimant in person would have affected the persuasiveness of Dr Korbel's report. The reason for the non-attendance at the appointment arranged with Dr Korbel was not a relevant issue when considering whether or not the report was persuasive enough to cause the CARS Assessor to agree to a further referral to MAS.

The case demonstrates that in challenging a certificate of a MAS Assessor consideration should be given to whether the arguments relied on constitute a "minute and detailed" criticism of the reasons of the Assessor or essentially require the Assessor to insert "formulaic" sentences regarding causation. If this is the case, the challenge is more likely to be unsuccessful if there is not also some complaint as to the substance of the decision. It is significant Rothman J put weight on the fact that the insurer had not made a submission that there was no evidence available to the MAS Assessor to find as he did.

In terms of making an application under section 62(1)(b) of the MACA, following this judgment insurers ought to anticipate Rothman J's emphasis on the importance of scrutiny by the CARS Assessor of the persuasiveness of evidence relied on by the party seeking the referral will inevitably become a focus point in similar applications over the coming months.

Accordingly, insurers should as ever ensure that any evidence relied on in support of such an application is comprehensive and addresses specific areas of weakness in the original MAS assessment. In the context of a causation argument, the persuasive nature of the expert evidence will almost certainly be undermined if the expert does not firstly, assess the claimant in person issue and secondly, provide an apportionment as to causation if it is contended by the expert that there are alternative or additional causes of the injury under assessment.

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