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IN THIS EDITION

Vicarious Liability For Sex Crimes – the High Court has spoken

It has long been settled law that an employer is vicariously liable for the actions of their employee, where those actions arise during the course of their employment. Vicarious liability is a liability imposed upon an employer despite the employer itself not being at fault.

But what happens when an employee has engaged in criminal conduct? Will an employer still be vicariously liable for that employee's actions?

The High Court has recently considered this issue in *Prince Alfred College Incorporated v ADC*.

The plaintiff (who was not named in the proceedings) was sexually abused by Dean Bain, a housemaster at Prince Alfred College in Adelaide. At the time of the abuse the plaintiff was 12 years old and a boarder. There were at least twenty instances of abuse, including one incident where the plaintiff was taken by Bain to a house and molested. Shortly after the College became aware of the abuse Bain was dismissed from employment. The boarders at the school were told not to discuss the issues outside school.

The plaintiff suffered psychological injury as a consequence of the abuse and in the early 1980s he was suffering anxiety and drinking heavily. The plaintiff was however able to cope. However, in 1996 his son began attending the College and as a consequence of attending events at the school the plaintiff began to suffer flashbacks. He also heard Bain's voice on the radio in 1997. He began to see a psychologist and then in 1997 sought legal advice.

The plaintiff commenced proceedings in December 2008 against Prince Alfred College in the Supreme Court of South Australia (we discuss in a following article the limitation issues that arose in the case.)

The plaintiff alleged that Prince Alfred College was negligent as it had breached the non delegable duty of care it owed him, that the College was negligent and

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had breached its duty of care and even if the College itself was not negligent, it was vicariously liable for the acts of its employee, Bain.

Bain had been convicted in 2007 of two counts of indecent assault against both the plaintiff and also offences involving two other boarders at Prince Alfred College. The abuse itself was therefore not in dispute.

The High Court had previously considered similar issues in *NSW v Lepore* which also involved the sexual abuse of a child by a teacher. In *Lepore* the High Court held by a majority that the non delegable duty of care that the school owed to a pupil did not extend to intentional criminal conduct of a teacher. In that decision the vicarious liability of the school was also considered however there was no definitive conclusion reached.

At trial before Vanstone J the plaintiff was unsuccessful. Her Honour was of the view that there was no liability on the part of Prince Alfred College. The plaintiff appealed.

The Full Court of the Supreme Court of South Australia allowed the appeal and found that Prince Alfred College was vicariously liable for Bain's actions, despite the nature of the actions.

Prince Alfred College appealed to the High Court and was successful on that appeal essentially due to a limitation issue however the lay of the land on the vicarious liability of schools has been clarified and there are significant issues for all schools to consider moving forward.

The majority judgment was handed down by Chief Justice French, Kiefel, Bell, Keane and Nettle JJ. The High Court noted that vicarious liability has always been a difficult concept for the Courts to consider and although this claim was found to be statute barred the concept ought to be considered given the need for guidance from the Court.

The majority in their judgment stated that:

> *"Even so, as Gleeson CJ identified in New South Wales v Lepore and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.*
>
> *Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable."*

In this case however the lack of evidence given the passage of time meant that no definitive conclusion could be drawn as to the role of Bain within the College.

The High Court noted that as there was not an extension of the limitation period, contested questions such as that in relation to vicarious liability could not be finalised.

Gageler and Gordon JJ in their judgment concluded that:

> *"We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.*
>
> *The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer was liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case."*

So what is the end result?

The High Court has confirmed that each claim involving vicarious liability must be carefully considered on its own facts. Even if an employee engages in criminal conduct which one would expect to be outside the course of employment that may not in itself be enough for an employer to escape vicarious liability for their actions. The approach requires consideration of any special role that an employer has assigned to the employee and the position of the employee in relation to the victim. The High Court has however made it clear that there may be circumstances where there will be vicarious liability for criminal conduct of an employee.

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Limitation Periods, Strike out Applications & the Court's Approach

Both the High Court of Australia and the NSW Court of Appeal have recently considered claims which were commenced well outside the limitation periods.

We have discussed the decision of *Prince Alfred College Incorporated v ADC* above. That case also involved consideration of the *Limitation of Actions* Act, 1936 (South Australia).

As we have discussed in our article relating to vicarious liability, the plaintiff sustained injury in 1962 when he was sexually abused by Dean Bain. The plaintiff ultimately commenced proceedings in the Supreme Court of South Australia in December 2008. Prince Alfred College, as well as denying liability, argued that the proceedings could not be maintained as they were brought in breach of the limitation period.

The High Court noted that pursuant to the Limitation Act in South Australia the plaintiff would have had to have brought his action by 17 July 1973, which was three years after his 21st birthday.

The Limitation Act in South Australia however permits a Court to extend the time for commencing proceedings, if it is satisfied that the facts material to the plaintiff's action were not ascertained until after that time, and the action is instituted within 12 months after the facts were ascertained.

In 1996 the plaintiff had been diagnosed with post traumatic stress disorder. Until that time he had been able to cope however in 1996 his son began attending Prince Alfred College and attendance at school events resulted in flashbacks and dissociation. The plaintiff also began drinking heavily. In 1997 his condition was made worse when he heard Bain's voice on the radio.

In March/April 1997 the plaintiff obtained legal advice in which the prospects of success in a claim against Prince Alfred College, including an extension of the limitation period, was discussed. The plaintiff was advised that his chances were less than 50% and he determined not to sue the school. He did however have a meeting with representatives of the College in May 1997 at which time he advised the College that he was seeking their acceptance of what had occurred, along with financial assistance. The College offered to pay his medical and legal fees to date, and also his son's school fees, that were about $10,000.00 per year, for the following three years. The plaintiff accepted that offer. The claim was not however finalised by way of Deed of Release.

In 1997 the plaintiff commenced proceedings against Bain which settled.

The plaintiff did not however commence proceedings against the College until 2008.

The plaintiff argued before the trial judge that he had not commenced proceedings within the limitation period due to the conduct of Prince Alfred College. The trial judge however found that the College did not cause the delay. A considerable amount of time had passed since the disclosure of abuse by the plaintiff and his diagnosis in 1996 and when he commenced proceedings in 2008. The trial judge also found that in 1997 the plaintiff had made a decision not to sue the College.

In contrast, the Full Court of the Supreme Court of South Australia held that the plaintiff should be granted an extension of time to commence proceedings. Justice Gray was of the view that the delay had resulted from the College's conduct and it was therefore just to grant an extension of time due to the nature and extend of harm that the plaintiff suffered, in addition to the fact that the College had had the opportunity to undertake an investigation and maintain proper records.

Prince Alfred College appealed to the High Court and that appeal was successful. The High Court noted that in order to exercise the discretion under Section 48(3) of the *Limitation Act 1969* the onus is on the applicant for an extension of time. In this case there was actual prejudice which would affect the opportunity for a fair trial.

As the High Court stated:

> *"These problems with respect to the PAC's evidence were necessary to be taken into account in the exercise of the discretion conferred by Section 48 of the Limitation Act. They could not be ignored by saying that the damages to be awarded to the respondent, should his claims ultimately succeed, may be reduced to reflect the delay during which the evidence has been lost. To say that is simply to acknowledge that a fair trial on the merits of the case in order to do justice according to law is no longer possible.*
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> *The lengthy delay, rightly described as "extraordinary" by the primary judge, weighed little with Kourakis CJ and Gray J and not at all with Peek J. Where a trial is conducted long after the events which gave rise to the dispute, the risk that the trial will be a mere simulacrum of the process of doing justice becomes greater with the passage of time. The onus is upon the party claiming an extension of time to show that a fair trial may be had now, notwithstanding that passage of time. That onus is not discharged by saying that the putative defendant should have been more astute to converse its own interests by anticipating litigation that did not eventuate until many years after the expiration of the limitation period. Kourakis CJ's view, that the PAC could and should have protected its position, fails to recognise that it was reasonable for the school to consider that, after its assistance to the respondent in*

the late 1990s, the respondent's decision to pursue Bain and not the school would be adhered to.
It is an error principle not to regard the arrangements made by the respondent with the school as significant. Where an injured party makes a deliberate decision not to commence proceedings, there must be strong reasons to permit proceedings to be brought against the defendant who reasonably considered that the dispute has been laid to rest. It has been recognised there is an element of oppression involved in bringing an action so long after the circumstances which gave rise to it have passed.

That oppression is aggravated where a party that he or she will not bring proceedings on certain terms and then, when the terms are met, changes his or her mind. The Courts are unlikely to count these changes of mind where the other party has acted to its detriment. While the PAC did not bargain with the respondent for a release from any claim against it, there can be little doubt that both sides understood that the arrangements made in September 1997 were to bring any issue between them to an end. In addition, the view that the respondent's failure to commence proceedings earlier than he did was explicable by reluctance to litigate on the part of the respondent which was "symptomatic of the very injury caused by the wrong alleged against [the PAC] cannot be reconciled with the indisputable fact that the respondent did bring proceedings against Bain in 1997."

The plaintiff was therefore unsuccessful in his application to extend the limitation period.

In New South Wales a limitation defence may ultimately succeed, however the recent judgment of *Smith v Young* suggests that the Court is unlikely to be prepared to summarily dismiss a claim before the final hearing.

In New South Wales claims (apart from specific types of claims such as those involving work injuries or motor vehicle accidents) are subject to the provisions of the *Limitation Act* 1969. That legislation provides a six year limitation period, apart from claims for personal injury which are subject to a three year limitation period from the date of discovery.

The NSW Court of Appeal has recently allowed an appeal where Judge Olsen in the District Court had allowed a Notice of Motion seeking an order that the claim be struck out on the basis that the claim was commenced a significant period out of time.

Ms Smith commenced proceedings in the District Court in relation to recovery of money that she alleges she lent to Ms Young from 2000 to 2004 pursuant to an oral agreement that was entered into on about 1 November 2000. Smith alleged in the proceedings that Young acknowledged the debt by confirming that she would repay the loan. However, Young filed a Defence which not only denied the loan agreement but also contended that the claim was statute barred. Subsequent to that Defence being filed Smith amended the Statement of Claim to allege there had been two oral agreements to vary the terms of the loan agreement such that repayment by Young of all advances made under the loan agreement was extended initially to December 2007 and then December 2010. Young however maintained the Defence pursuant to the *Limitation Act* 1969.

Young filed a Notice of Motion on 6 May 2016 seeking an order that the proceedings be dismissed on the basis that they were out of time pursuant to the provisions of the *Limitation Act* 1969. The Notice of Motion was heard before Her Honour Judge Olsen in the District Court who concluded that the claim was "so obviously untenable" in relation to the limitation issue that it could not succeed and dismissed the proceedings.

Smith appealed.

The Court of Appeal allowed the appeal.

It was argued by Smith on appeal that in her Honour's judgment she did not take into account the range of possibilities, including the variation of the contract.

Justice Ward who delivered the leading judgment, stated that:

"In my view it cannot be said that the limitation defence was bound to succeed such that the claim by Ms Smith was so obviously untenable as to warrant summary dismissal. Whether Ms Smith can make out the facts necessary to make good her pleaded case is a matter which cannot be determined on this occasion."

It can therefore be seen that although limitation defences can succeed, careful consideration should be given to making applications in NSW to summarily dismiss claims for a breach of the Limitation Act given the Court's approach. Unfortunately for defendants this means that they will need to incur preparation costs, even where a limitation argument may ultimately succeed.

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The Man who Would not Accept "No" for an Answer

The purpose of our Court system is to resolve disputes that arise between two or more parties. The judgment handed down by a Court is to be final and determinative with limited rights of review by the Higher Courts of Appeal. However, occasionally one of the litigants will have difficulty in accepting the Court's decision.

Dr Vito Zepinic is no stranger to the Court system. He has previously been prosecuted in both Australia and the UK for passing himself off as a qualified and registered psychiatrist.

Dr Zepinic and his wife owned a property in Turramurra in New South Wales. In 2006 they engaged Chateau Constructions (Aust) Limited to build a house on the property. Within months of the project commencing the relationship between the Zepinics and Chateau had deteriorated. Chateau commenced proceedings against Dr and Mrs Zepinic in the Consumer Trade & Tenancy Tribunal for unpaid progress payments and Dr and Mrs Zepinic cross claimed for defective works. The CTTT rejected the Zepenics' claims, found in favour of Chateau and ordered Dr and Mrs Zepinic to pay Chateau $223,000.00.

However, Dr Zepinic would not accept the CTTT's decision. He initiated no less than 10 separate appeal proceedings, including two special leave applications to the High Court. Every single one of Dr Zepinic's appeals failed, and on the last occasion the Court of Appeal had warned Dr Zepinic if any further proceedings were commenced by him in the matter he may be declared a vexatious litigant under the *Vexatious Proceedings Act 2008* (NSW). Meanwhile the parties incurred significant costs – Chateau's costs alone were in excess of $417,000.00.

Eventually the case came before Justice Pembroke in the Supreme Court of NSW. The Court ordered the sale of Dr and Mrs Zepinic's home in order to pay the outstanding progress payments and Chateau's costs of the unsuccessful appeals. The sale of the property went ahead and the purchaser was registered as the new owner.

However Dr Zepinic was still not beaten. He commenced a further action against Chateau alleging that his daughter had been the true owner of the house (holding it on trust for Dr and Mrs Zepinic) and that she should be allowed to regain ownership of the property.

The Court again dismissed Dr Zepinic's argument. Justice Pembroke pointed out this argument had not been raised previously despite the numerous opportunities to do so and all of the documentary and testamentary evidence was adverse to this hypothesis. In any event the house had already been sold to a third party and the sale could not be reversed, as sought by Dr Zepinic.

Justice Pembroke was fairly scathing in his judgment against Dr Zepinic. He described the proceedings as a "scandalous waste of public resources and private money" and the arguments of Dr Zepinic as "indulgent and irrational". Justice Pembroke described the proceedings as "the latest in a farrago of unnecessary and wasteful litigation that derives from Dr Zepinic's dissatisfaction with the adverse result that he achieved in the CTTT".

The Court noted that at various stages Dr and Mrs Zepinic had at least seven different firms of lawyers representing them. In the last proceedings however Dr Zepinic represented himself.

The Court (predictably) held that Dr Zepinic's application failed. Justice Pembroke closed his judgment with an invitation to Chateau to apply for such an order declaring Dr Zepinic to be a vexatious litigant. Assuming such an application was made and the Court made such an order, this would appear to be the final instalment of this long running saga.

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Latest news – Construction update

The significant reforms to the strata laws that were enacted in 2015 will take effect on 30 November 2016. However, the building defect bond scheme will not begin until 1 July 2017. These reforms were discussed in our June 2106 newsletter. The key points are:

- changes in who is eligible to be elected on to a strata committee and the length of appointment of strata management agents
- reforms in how a strata building is to be managed and how repairs and maintenance are to be carried out
- allowing 75% of the lot owners to decide whether to sell or redevelop a strata scheme
- a new building defect inspection regime
- new model bylaws.

Family First Senator Bob Day's Home Australia Group has gone into liquidation, with debts of nearly $31 million. Senator Day has blamed losses and problems associated with one member the group, Huxley Homes, for the collapse of his building empire. Senator Day has resigned his seat in the Senate reportedly to focus on paying back his companies' debts.

The NSW government has announced that it will overhaul the regulation of building certifiers by rewriting the Building Professionals Act 2005. A report released following a review by Mr Michael Lambert found that the current scheme involves overly complex legislation, ineffectual regulation, and a lack of clarity about the roles, responsibilities, functions and accountability of certifiers. The NSW government says its reforms will include:

- the overhaul of the regulation of certifiers
- the clarification of Ministerial responsibility for the administration of building laws

- the implementation of a package of fire safety reforms for both new and existing buildings
- the immediate establishment of a Building Regulators Committee to improve co-ordination across government.

The Infrastructure Coalition of Western Australia is pushing for the creation of an independent statutory body in Western Australia to provide independent advice to the government and facilitate public infrastructure projects. Similar bodies already exist in New South Wales, Victoria and Queensland. The Coalition's efforts are being supported by various national industry bodies, including the Society of Construction Law Australia and Engineers Australia.

Also from Western Australia, the WA Government has released its Construction Contracts Amendment Bill 2016. The Bill aims to improve the position of subcontractors under the Construction Contracts Act 2004 (WA), which provides a security of payment regime for construction contracts which is loosely similar to the scheme in NSW. The Bill's amendments include changing some of the time periods under the Act, allowing adjudication of previously rejected or disputed claims, and providing a faster and more efficient enforcement process.

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EMPLOYMENT ROUNDUP

Casual employee or independent contractor?

The Fair Work Commission recently considered the question of whether the services provided by Christopher Cole to Endless Solar Operations Pty Limited before a contract of employment was signed was a period of casual employment, or the provision by Cole of services as an independent contractor.

It was not in dispute that Cole commenced under a contract of employment with Endless Solar Operations on a full time basis in the position of IT & Operations Manager on 13 July 2015. His employment was terminated on 27 May 2016.

Cole bought an unfair dismissal application before the Fair Work Commission claiming he had been an employee who had completed the minimum period of employment with Endless Solar Operations and as such was entitled to bring a claim for unfair dismissal. Sections 382 and 383 of the Fair Work Act, 2009 provide that a person is protected from unfair dismissal if they have been employed for 12 months.

If the person is a casual employee and is employed on a regular and systematic basis and the employee has a reasonable expectation of continued employment, that period of employment will count towards the person's period of employment.

Cole commenced unfair dismissal proceedings at the FWC. Endless Solar Operations argued Cole had only been employed for less than 12 months and sought to have a jurisdictional point determined as to whether Cole could maintain the unfair dismissal proceedings.

It was not in issue Cole performed services for Endless Solar Operations as the IT & Operations Manager from 30 March 2015. The issue to be determined was whether the period between 30 March 2015 and the commencement of his employment contract on 13 July 2015 he was a casual employee or an independent contractor.

Cole gave evidence that on or about 12 March 2015 he performed an IT service for Endless Solar Operations as an independent contractor. He rendered an invoice for his work. He charged $120.00 per hour for his work during that period.

Shortly after that time he had a conversation with Ms Lin of Endless Solar Operations about full time employment. At the same time Cole was working with the Australian Bureau of Statistics as a part time employee. As such he could not take up full time employment.

Cole claimed he commenced as a casual employee on 30 March 2015 and continued in that capacity until he commenced full time employment with Endless Solar Operations on 13 July 2015.

Cole was paid $28.00 an hour for his work from 30 March 2015.

Deputy President Gostencnik concluded the pay rate of $28.00 per hour was consistent with employment as a casual employee and the rate of $120.00 an hour appeared to be consistent with charges of an independent contractor performing IT contract work.

The Deputy President was satisfied that Cole attended the premises after 30 March 2015 on a regular basis. In a two week period he performed a total of 34 hours work. In the following month he attended on 14 occasions and did 97 hours work. Over the next month he attended on 14 occasions and performed a total of 88 hours work.

Payments were made by Endless Solar Operations into Cole's bank account. The receipts were entered by Endless Solar Operations into his account as "Deposit Endless Solar Wages". It appeared tax had been withheld by Endless Solar Operations.

Payslips prepared by Endless Solar Operations for the period prior to Cole's employment contract revealed the hours Cole had worked, his hourly rate of pay,

gross wages, the tax deducted and the superannuation contributions that were made.

Cole did not render invoices for his work after 30 March 2015. Cole claimed he filled in a timesheet. This was denied by Endless Solar Operations. However the evidence of Endless Solar Operations' employees was not accepted by the Deputy President.

Cole gave evidence which was accepted by the Deputy President that he was introduced to other employees of Endless Solar Operations as the "IT person". He was given a desk, a phone and an email account which had Cole's signature at the bottom of the email where he was described as "Manager of IT & Operations". His landline and email address was Chris.Cole@endless-solar.com.au.

The Deputy President was satisfied the evidence revealed:

- there was a degree of control exercised by Endless Solar Operations over the work performed by Cole;
- Cole appears to have been integrated into Endless Solar Operations' organisation;
- the rate of hourly pay was consistent with that of casual employment where tax was deducted from wages;
- superannuation contributions were made or at least recorded as such;
- timesheets were completed by Cole;
- payslips for Cole's work after 30 march 2015 were produced by Endless Solar Operations;
- deposits were made into Cole's bank account by Endless Solar Operations described as wages;
- there was no evidence Cole was required to be responsible for any risk or loss to Endless Solar Operations which may have occurred as a result of the work he performed;
- his internal email address identified him holding the title of "Manager of IT & Operations". This title carried over to his full time role.

The Deputy President was satisfied Cole was a casual employee after 30 March 2015.

He was also found Cole's casual employment period with Endless Solar Operations was on a regular and consistent basis and Cole had a reasonable expectation of continued employment, such that that period of casual employment counted towards the minimum period.

The Deputy President dismissed the jurisdictional objection of Endless Solar Operations.

Employers should be aware of the issues facing casual employment counting towards period of employment for the purposes of unfair dismissal applications if the casual employees are employed on a regular and consistent basis and there is a reasonable expectation of continued employment.

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Early Birth an Unexpected Emergency for Dad

A recent decision of the Federal Court of Australia (*Trustee for The MTGI Trust v Johnston [2016] FCAFC 140*) should go some way to dispelling some of the myths surrounding entitlements to personal/carer's leave.

In November 2013 the employee's wife gave birth to their fifth child. The baby was born 10 weeks premature. Consequently, the employee was required to look after the other children, three of whom were under five years of age, while his wife was hospitalised. Initially he took annual leave for that purpose with the agreement of his employer. Later he applied for "personal/carer's leave" for the balance of the time that might be required to deal with this "unexpected emergency".

At the time he had more than 270 hours of accrued personal leave. His request for leave was never answered and when his annual leave ran out in early January 2014 he did not then resume work, instead returning to duties about two weeks later.

On the day he returned after he queried the pay he had received during his absence he was told he had abandoned his employment. He denied the claim and after obtaining legal advice brought an action in the Fair Work Commission ("FWC") for unfair dismissal.

In the FWC Senior Deputy President Boulton found in the employee's favour and awarded him compensation equivalent to 20 weeks' pay. In a separate decision, he also awarded costs in the fixed sum of $8,470.

The employer applied to a Full Bench of the Commission for permission to appeal both decisions but permission was denied in each case. Undaunted by this the employer sought further review of the decision by the Federal Court.

The entitlement to "personal/carer's leave" is found in section 97 of the Fair Work Act 2009 (the "Act").

Taking Paid Personal/Carer's Leave

An employee may take paid personal/carer's leave if the leave is taken:

- because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
- to provide care or support to a member of the employee's immediate family or a member of the

employee's household who requires care or support because of:

- a personal illness or personal injury affecting the member; or
- an unexpected emergency affecting the member.

The entitlement to take leave is not contingent upon obtaining the employer's consent, either in advance of taking the leave or at all. It is, however, contingent on the employee complying with Section 107. Section 107 imposes obligations on an employee to give his or her employer notice as soon as practicable (which may be a time after the leave has started) and to advise the employer of the period or expected period of the leave.

If required to do so by the employer the employee must also give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in Section 97

So there were two issues:

- Was the employee providing care or support because of an unexpected emergency affecting a family member?
- Did the employee give notice to his employer as soon as practicable?

Unexpected Emergency

The employee said he took his leave because his four older children required his care or support as a result of the unexpected emergency occasioned by the prolonged hospitalisation and convalescence of his wife following the premature birth of their baby.

The circumstances of the birth of the baby were that on 7 November, following an ultrasound, the mother was told to immediately attend Shoalhaven Hospital. Mr Johnston drove her to the hospital. After she was examined the mother was rushed by Ambulance to the Royal Hospital for Women in Randwick in the Eastern Suburbs of Sydney. Mr Johnston followed in his car and the baby was born shortly thereafter, 10 weeks premature.

On 23 December the baby was discharged from the Royal Hospital for Women and transferred to Shoalhaven Hospital but Mrs Johnston remained with him and Mr Johnston continued to look after their four other children in Bomaderry.

The baby was discharged from Shoalhaven Hospital on 4 January but Mr Johnston had to take him back to hospital a number of times over the next week for blood tests and checkups, attending the outpatients clinic with his wife in connection with their baby son on 6 January, 15 January and 25 February 2014.

Unsurprisingly, this was considered by all to be an unexpected emergency.

Notice of Taking Leave

Mr Johnston rang his employer from his car whilst following the Ambulance to Sydney, explaining there were complications with the baby.

Within a few days he made contact with the employer's CFO/accountant and told him he was taking annual leave so that he could be with his wife and son in hospital. His pay slip issued at that time recorded he had 151.21 hours of accrued annual leave. It also showed he had 270.22 hours of personal leave available to him.

In early December Mr Johnston sent his employer an email attaching a letter of the same date from a senior clinical social worker at the Royal Hospital for Women, co-signed by a neonatologist and the director for newborn care at the hospital. The letter said that:

> *"Due to this unexpected emergency David now has to take care of 4 dependent children. His additional family/carer responsibilities are likely to be needed until 29.1.2014"*

Both the FWC and the Federal Court had no hesitation in finding Mr Johnston had given notice to in accordance with Section 107 and provided evidence that the leave was taken for a reason specified in Section 97. His notice was ignored.

What are the lessons from all of this? First, the taking of personal/ carer's leave does not require consent of the employer if the leave is within the terms of Section 97 of the Act and the employee gives proper notice.

Second, whilst there is no paid paternity leave entitlement generally available, the individual circumstances surrounding birth may produce an "unexpected emergency" for which paid personal/carer's leave for a Dad is available.

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WORKERS COMPENSATION ROUNDUP

Reasonable Actions by an Employer

The President of the Workers Compensation Commission in *Reichardt v Aurrum Pty Limited (2016) NSWWCCPD 39* was required to determine whether the actions by an employer following an accusation of serious misconduct made against a worker were reasonable.

On 1 May 2015 Ms Reichardt received a phone call from the employer's clinical services manager informing her that an allegation had been made by a co-worker that Ms Reichardt behaved in a sexually inappropriate manner whilst bathing a resident at the employer's nursing care facility. The alleged incident was referred to the NSW Police Force for investigation.

An internal investigation was initiated by the employer. The Police investigation was discontinued on 5 May 2015 and the internal investigation was concluded by the employer on 3 June 2015. Ms Reichardt was cleared of any wrongdoing in respect of the allegation of misconduct. However, following the phone call at home on 1 May 2015 Ms Reichardt stopped work and alleged a psychological injury. The employer was successful at first instance on the basis that the Arbitrator determined that the actions of the employer were reasonable with regards to discipline.

Ms Reichardt challenged the Arbitrator's findings that the employer's actions were reasonable and that the employer was not entitled to rely upon a complete defence under Section 11A of the *Workers Compensation Act 1987 ("WCA").*

Two key issues in dispute on appeal were whether the arbitrator erred in:

- finding that the employer's actions in respect of the making of the afterhours phone call were reasonable;
- failing to find that the worker was a vulnerable person prior to the injury.

The President confirmed the Arbitrator's determination. The President noted the allegations made against Ms Reichardt were extremely serious. The events were observed and reported by an independent witness. It was open to the Arbitrator to conclude that the employer's actions in informing the worker of the allegations, including an out of hour's telephone call and conducting an internal investigation at the earliest opportunity was reasonable. Those actions struck a fair balance when dealing with the employer's competing duties.

With regards to the worker's alleged vulnerability, Ms Reichardt alleged she was in a vulnerable state at the time of the afterhours phone call as she had been allegedly bullied at work that day and had notified the employer of the incident. However, the evidence ultimately revealed that Ms Reichardt may have made an attempt to report an allegation of bullying but no such report was ever made. Therefore, if Ms Reichardt was in a vulnerable state, the employer could not have known about it at the time of the afterhours phone call.

The President also rejected a submission by Ms Reichardt that it was unreasonable for the employer not to consider the inherent implausibility of the allegations before proceeding with an investigation. Without a transparent process of investigation the employer was in no position to make any determination on the plausibility of the allegations. Having been in receipt of a direct eye witness account of the alleged misconduct it would have been impossible for the employer to conclude as at 1 May 2015 that the allegations were inherently implausible.

The employer correctly followed their reporting and investigation procedures. Despite the possibility that Ms Reichardt may have been alarmed or may have suffered some form of psychological response following being informed of the allegation, the actions of the employer with regard to discipline were reasonable and on that basis the defence succeeded.

The determination in this matter is a timely reminder for employers of the need for comprehensive policies and procedures with regard to misconduct allegations and investigations. Providing an employer adheres to the clearly defined investigation and discipline procedures, it is likely a complete defence of a claim can be achieved on the basis that the actions of an employer will be determined to be reasonable pursuant to Section 11A of the WCA.

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CTP ROUNDUP

Singh v Cooper – ACT Court of Appeal dismisses challenge to "buffer" assessment

In *Singh v Cooper* [2016] ACTCA55, a decision that took 5 months to deliver, the ACT Court of Appeal has dismissed a challenge to the use of a buffer to assess future economic loss.

While CTP insurers often struggle to contain buffer assessments of damages at CARS, in this instance it was the plaintiff Aneeta Singh who appealed against the use of a buffer by the trial judge to determine economic loss.

The judge at first instance, Mossop AsJ found that Ms Singh suffered from cervical and thoracic pain syndromes as a result of an aggravation of underlying degenerative changes caused by a motor vehicle accident in March 2013. The aggravation was generating chronic pain at the time of the hearing in 2015. His Honour awarded a buffer of $85,000.00 for future economic loss and a buffer for future care of $50,000.00.

Allegedly as a result of the pain, Ms Singh was only in part time employment at the time of the trial, earning $300.00 per week at the time of the trial. She was 39 years old and argued her entitlement to economic loss

was $300.00 per week for the remainder of her working life. The insurer had argued that a buffer of approximately 2 years loss of earnings was appropriate.

Ms Singh had a mixed employment history. Early in her career she had been in continual employment mainly in the credit control field from 1998 – 2012, albeit with a number of employers. She took maternity leave in 2012 and unfortunately suffered from postnatal depression following the birth of her son in October 2012. The child suffered from various medical problems and the plaintiff's mental heath subsequently deteriorated requiring several periods of hospitalisation.

In early 2013 Ms Singh attempted a return to work for the sake of her mental health. She obtained a position in March 2013 and on her first day at work was involved in the motor vehicle accident which gave rise to these proceedings.

After the accident, Ms Singh suffered from neck and back pain and her psychological condition continued to require treatment. Her son's health remained problematic causing her further stress.

Ms Singh eventually returned to work on a part time basis, progressing to fulltime work in August 2014. She did not manage well in full time work due to her neck and back problems and within weeks was again certified fit for on part time work.

The medical evidence was varied. Rheumatologist Dr Champion thought the plaintiff was unfit for work but may eventually return to part time work. Occupational physician Dr Paul reported the plaintiff was fit for fulltime work. Psychiatrist Dr Saboisky, spinal surgeon Dr Khurana and general surgeon Dr Patrick all reported the plaintiff was fit for part time work.

His Honour concluded there was potential for the aggravation to continue to cause neck and back pain. However, elsewhere in the decision and inconsistent with this conclusion, his Honour stated that it was not possible to determine on the evidence before his Honour whether the conditions giving rise to the pain would improve or deteriorate over time. In the context of the economic loss claim, his Honour reasoned that it was therefore appropriate to use a buffer in this circumstance to take account of the prospect that from time to time in her future working life that Ms Singh would need to take time off by reason of the aggravation.

Ms Singh appealed Mossop AsJ's judgment on a number of grounds, including the use of a buffer to assess the economic loss claim.

Ms Singh complained that there were inconsistencies in his Honour's findings and that his Honour was wrong to reject Ms Singh's submission that future economic loss should be determined arithmetically. In support of the appeal, Ms Singh's counsel relied on the decisions of *Suffolk v Meere* [2002] ACTCA and *Malcolm Ecob and Marilyn Ecob trading as The Black Swan Coffee Lounge v Deborah Wentworth-Shields* [2001]ACTCA2.

In *Suffolk*, the Court at first instance had awarded what it termed as a buffer for economic loss of $340,000.00. The basis for the buffer was full loss of earnings for the full working life of the plaintiff, reduced by 50% "to take account of his significant residual capacity". The plaintiff appealed on the basis the decision was not a reasoned assessment of the damages. The majority judgment of Crispin P and Higgins J in the ACTCA was that the Master's approach was not purely intuitive but that the Master had fallen into error in his reasoning as to the size of discount to be applied.

In *Ecob,* the plaintiff was awarded a single sum of $100 per week for 25 years to represent past and future economic losses. The defendant Ms Wentworth-Shields appealed the decision, on the basis there was no evidence that a loss of that amount had been suffered, or that the loss would be suffered for 25 years. In support of the appeal, Ms Wentworth-Shields relied on *Gamser v Nominal Defendant* (1977) 136 CLR 145, which is the case that established the principle that an award of damages is not to be made by intuition but by a process of reasoning.

In *Gamser,* the trial judge had awarded a single sum for the totality of the damages without any breakdown at all into individual heads of damage. The High Court stressed the importance of the trial judge allowing his or her reasoning to be apparent from the judgment as to how the amount of each head of damage was determined.

However, the ACTCA took the view in Ms Singh's appeal that *Gamser* was not to be considered as authority for a mandatory arithmetical assessment of damages. Reliance was also placed by the ACTCA on its own decision in the appeal in *Fry v McGufficke* [1998] ACTSC, later upheld by the Full Federal Court judgments:

> *"..this case in particular was one in which any assessment of economic loss was beset by so many imponderables that an arithmetic approach could only have given a false appearance of accuracy.. in our view it was open to the Master to make a global assessment of the losses in question without express reference to mathematical calculation. " .*

Returning to Ms Singh's appeal, the ACTCA concluded that the medical evidence before Mossop AsJ was varied as to her capacity for fulltime employment in the future, but consistent in that Ms Singh continued to suffer pain as a result of the injuries she sustained in the accident. The majority of medical opinion was that Ms Singh now had a reduced earning capacity.

In the circumstances of this case, the ACTCA held that Mossop AsJ's approach to determining the extent to which the reduction in earning capacity would result in future economic loss could not be criticised. His

Honour had accepted that Ms Singh would continue to have ongoing neck and back pain, and her ability to cope with the pain and continue in employment was uncertain.

His Honour was held to be correct in rejecting the arithmetical approach of calculating damages to age 67 at $300 per week discounted by 15% for vicissitudes. This approach required an assumption that Ms Singh would continue to work only part time and at the same rate until retirement, which can only be viewed as speculation in light of the medical evidence. The same view was taken in respect of the amount of reduction for vicissitudes, as this could be greater or smaller depending on Ms Singh's ability to cope with pain in the future which cannot be predicted at this time.

The ACTCA found there was no error by Mossop AsJ in assessing future economic loss as a buffer, quoting Adamson J in *Palma v Nominal Defendant* (2016) 74 MVR 411:

> *"...assessment of future economic loss may involve...predictions as to the effect of an injury which may manifest itself over time and in the future. In such situations, a buffer is sometimes the best way of assessing fair compensation".*

Ironically, Ms Singh's failure to mount a successful argument against the use of a buffer for an award of future economic loss will doubtless be used by plaintiffs in the future to support submissions based on buffer assessments.

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NSW Court of Appeal Reverses the Position – Nominal Defendant v Adilzada

In the May 2016 edition of GD News we reported on the District Court case of *Adilzada v The Nominal Defendant* [2016] NSWDC 24, where His Honour Judge Elkaim 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. That decision was appealed, and insurers will be happy to note that the Court of Appeal has now changed the position substantially.

In the first instance in the District Court Judge Elkaim considered whether Section 86 of the *Motor Accidents Compensation Act 1999* (NSW) compelled a claimant to attend a medical assessment if that assessment was for the purpose of determining eligibility for admission into the Lifetime Care & Support Scheme (the "Scheme"). Under that section a claimant is compelled to abide by all the enumerated duties or be unable to pursue their claim in CARS or the Courts.

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 Adilzada 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 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 a medical examination with 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 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 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 a FIM assessment being conducted to ascertain the extent of Mr Adilzada's eligibility into the Scheme.

His Honour found that whilst Section 86 provided a claimant had to attend assessments arranged by insurers where the requested assessment was not "unreasonable, unnecessarily repetitious or dangerous", a claimant was not bound by a duty to attend an assessment for the purpose of admission into the Scheme.

This was because the duties under that part of the Act related to claims for damages and more specifically, the duties in Section 86 all referred to the claimant's duties to the State Insurance and Regulatory Authority or the Medical Assessment Service and not the Scheme.

His Honour, in essence, concluded there was no link between the Scheme and the duties outlined in Section 86.

This approach has now been rejected by the Court of Appeal.

His Honour Meagher JA, with McColl and Gleeson JJA agreeing, held that a claimant was duty bound by Section 86 to attend a medical assessment that is for the purpose of ascertaining suitability for admission in to the Scheme.

Their Honours noted sufficient regard had not been paid in the first instance to the operation of the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) which expressly provides that an insurer may make an application to the Scheme on behalf of a claimant and without the claimant's consent. This was noted by Their Honours to be consistent with the view expressed by Garling J of the High Court in *Thiering v Daly* (2011) 83 NSWLR 498.

Justice Meagher noted that:

> *"In making a request under s86(1) for the purpose of determining a claimant's eligibility for participation in the Scheme, the insurer is responding to the claim in a way expressly provided for by s130A and the LCS Act. It's doing so is within the purpose for which the entitlement in s86(1) is conferred."*
> *It would appear the position with respect to* applications made for admission to the Scheme by insurers can continue for the time being.

As was argued in the first instance by the insurer, both the *Motor Accidents Compensation Act 1999* (NSW) and the *Motor Accidents (Lifetime Care and Support) Act 2006* are interwoven and interdependent schemes designed *to "work together ... to meet the needs of persons injured in motor accidents in New South Wales".*

Whilst we do not know whether or not the decision will be appealed, the views expressed by the High Court in *Thiering v Daly* would certainly appear to be entirely consistent with this approach.

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