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The Cost of Labour Hire

Labour hire exposes employees to work sites and work practices managed by host employers. When a labour hire employee is injured the Courts are called on to apportion responsibility for the injuries between the host and the labour hirer who is the actual employer.

There has been a developing trend in the apportionment of liability with host employers struggling to sheet home any responsibility to the labour hirer.

We started off with the decision of *TNT v Christie* (2003), where a labour hire employer was found to have a liability in a personal injury claim of 25%.

As time has passed the NSW Court of Appeal has taken a more restrictive approach to the interpretation of the responsibilities of the hirer and far less favourable to the host employer. In decisions such as *Shoalhaven City Council v Humphries* (2013) and *Jurox Pty Limited v Fullick* (2016), labour hire employers have been found to have no liability. The Court of Appeal in both of those decisions determined it was not the system of work that was the issue, rather, a casual act of negligence by an employee of the host employer, and in those circumstances no liability should attach to the labour hire employer.

However even in a claim which involved a system of work due to a failure to rotate duties the labour hire employer was only found to have a liability of 10% (*Donald v Rail Corporation NSW;* 2016 Supreme Court).

This trend has continued with the recent decision of the Supreme Court in *Kabic v Workers Compensation Nominal Insurer (No. 3)*.

Milan Kabic was working on a construction site where the Redfern RSL was being redeveloped. On 26 May 2011 he sustained injury when he fell from a raised platform. At the time of the accident Kabic was employed by Caringbah Formwork Pty Limited, a labour hire company.

Kabic was lent on hire to Calcono Pty Limited who subcontracted to Deicorp Pty Ltd the principal contractor. Calcono was engaged as the formwork contractor to Deicorp and the subcontract agreement between Deicorp and Calcono provided that *"handrails, guards and/or barricades are to be erected where any step or drop exceeds one metre"*. The obligation was on Calcono to provide these.

Caringbah Formwork was run by the brother of a director of Calcono.

Prior to the hearing Calcono and Deicorp had come to a resolution of the issues between them and so the apportionment of liability between them did not need to be considered.

It was however necessary for the trial judge to consider their liability to Kabic and the potential of his employer as well as contributory negligence.

There was a significant dispute as to the factual circumstances of the fall.

Kabic contended that when he fell the area was wet and he slipped on a piece of wet plywood that was very slippery. The plywood was on a raised platform. There were no metal frames surrounding the raised platform and Kabic also contended although there were cross braces on the lower part of the metal frames, there were no cross braces at the upper level where Kabic was working. This meant that after Kabic slipped there was nothing to stop his fall.

Kabic's version of events was disputed by Deicorp and Calcono, who contended it was not raining and in fact the area where Kabic was working was dry. Deicorp and Calcono alleged the building was more advanced than Kabic contended and the area had a temporary roof. Deicorp and Calcono also contended there were cross braces on the upper levels.

In his evidence, Kabic indicated on the day of the fall the material supporting the concrete pour had been stripped and Kabic and his co-worker, Mr Vujatovic, were removing it from the platform to the ground. Kabic's co-worker, Vujatovic, also gave evidence the area was wet and there were no diagonal cross braces on the top level. The platform on which Kabic was standing was around 2.1 metres above the floor and there was no fencing around the platform.

Deicorp and Calcono called Nicholas Reeves as a witness. His evidence was to the effect that although he agreed the plaintiff was on the second level when the fall occurred, around 11 to 13 floors had been constructed at the time of the fall, not three. Further, Reeves' evidence was that the weather was fine at the time of the accident. Reeves also contended there were diagonal braces in place to keep metal frames in proper alignment.

The trial judge, Justice Button, was of the opinion the evidence of Vujatovic was important as he was an unbiased witness who generally corroborated Kabic's version of events. Further, Reeves did not actually see the fall occur. His Honour Justice Button was also of the opinion the fact that the Calcono foreman, Mr Calautti, was not called by Deicorp and Calcono created a *Jones v Dunkel* inference (that is, an inference that his evidence would not have assisted Deicorp and Calcono if he was called as a witness).

The trial judge therefore determined that Kabic was working on the second floor as he contended and as such, the ceiling above him was exposed to the elements. In addition, the trial judge determined the metal framework did not have cross braces at the upper level and it had been raining on the day of the fall.

The trial judge accepted that Kabic slipped as he was standing on wet formply.

His Honour Justice Button then went on to consider the various liabilities of the parties.

In relation to the labour hire employer, the trial judge noted that Caringbah owed Kabic a non delegable duty of care. However, Caringbah was a labour hire company and did not have anything to do with the actual working conditions on the building site and there was nothing to suggest the employer was aware of unsafe work practices.

His Honour Justice Button stated that:

> *"As a matter of practical reality, Caringbah was in no position to control the state of the building site, either generally or on the particular day and at the particular location where the fall occurred. Although Caringbah was the de jure employer of the plaintiff, Calcono was unquestionably his de-facto employer, in terms of actually and directly controlling the conditions in which the plaintiff worked. To give but one example, it was a foreman employed by Calcono who directed the plaintiff and Mr Vujatovic to work at the particular location where the fall occurred; Caringbah had absolutely nothing to do with that decision.*
>
> *As well as that, there was nothing to suggest that Caringbah was aware that it was sending workers to a building site that was unsafe, either generally or in a particular way.*
>
> *Nor was there anything to suggest that Caringbah conducted its business in some other way that played some, albeit highly indirect, role in the fall suffered by the plaintiff.*
>
> *In short, I accept the proposition that, although Caringbah undoubtedly had a duty as employer to its employee, it did not breach that duty."*

The trial judge was of the opinion that even if Caringbah had enquired of Kabic once a week as to safety at the building site, this would have made no difference, as Kabic had given evidence he had no difficulties at the site before the day of the fall on 26 May 2011. Further, even if a representative of

Caringbah had travelled to the building site, there was nothing to suggest this particular problem on the day would have been identified.

His Honour was therefore of the opinion that although the employer owed a non delegable duty, negligence had not been established. If the trial judge had to apportion liability of the employer he would apportion this liability at 0%.

In relation to the claim against Deicorp, the trial judge noted it was an employee of Calcono that directed Kabic to work at the location of the fall. The trial judge was of the opinion that given the contractual terms between Deicorp and Calcono and the general lack of control of Deicorp over Kabic's activities, then there would be no liability on the part of Deicorp.

In relation to the host employer, Calcono, there was a breach of duty.

His Honour noted that:

> *"To recap yet again, I am satisfied that the plaintiff was standing on wet, slippery formply when he slipped and fell. I believe that the combination of factors of him being in an elevated position; that position not being enclosed by any structure; him standing on a piece of smooth, chemically treated wood that was wet; and him having been directed to fulfil that task by a foreman who saw the general wetness of the area, caused him to fall a distance of two metres."*

His Honour did however assess contributory negligence at one third so the liability was not entirely that of the host employer.

The Supreme Court has therefore continued the theme of finding no liability on the part of a labour hire employer. A non delegable duty is not to be confused with strict liability. If the negligent act is a casual act of negligence by an employee of the host or a labour hire employer would not have, on attendance at a site, detected an unsafe system or an unsafe site, there is a reasonable chance on the current state of the law that the labour hire employer will escape liability altogether.

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Class Action damages for dud cruises

An innovative use of some of the consumer guarantees in the Australian Consumer Law (ACL) has resulted in a successful class action claim in the Supreme Court of New South Wales – *Moore v Scenic Tours Pty Ltd (No 2) [2017] NSWSC 733.*

The plaintiff, a school teacher, brought a representative claim (class action) for compensation and damages, arising out of a series of European river cruises provided by the defendant (Scenic) during periods of unusual rainfall and high water levels which occurred in Europe during May and June 2013.

His tour was booked 18 months prior to departure and paid for in full well before the cruise commenced. The cruise was intended to depart from Amsterdam, travel along the Rhine River, the Main River, the Main/Danube Canal and the Danube River to Budapest.

As things turned out, the plaintiff's experience was one of being shuffled around Europe, largely by coach, for a great part of the trip and changing ships on two occasions so that by the time he disembarked in Budapest, he had experienced three different Scenic ships and that far from his cruise being one where he was immersed in all-inclusive luxury, he experienced something entirely different.

The disruptions to the planned itineraries were caused by decisions made by Scenic when confronted with the flooding in Europe. Locks along the rivers were either damaged or inoperative. Ships were unable to pass under bridges crossing the rivers and some docking facilities could not be used and had been washed away.

The claims against Scenic were that, with respect to 13 cruises, it knew at the time of booking that the guests wished to experience and enjoy a luxury five-star experience of a river cruise, in accordance with the selected itinerary which would include highlighted events and destinations. The services in fact supplied, it was claimed, did not fulfil this purpose, and did not provide the desired result.

As would be expected, Scenic defended the claims partly on the basis that its brochure, ticketing and other contractual documentation contained terms which had the effect of excluding any liability for events like those which occurred.

To outflank such reliance, the plaintiff did not sue in tort or for breach of conduct or for misleading and deceptive conduct; rather, he carefully framed his case as solely relying on a breach of one or more of the statutory guarantees provided in ss 60, 61(1) and 61(2) of the ACL.

There was no dispute that the plaintiff and group members were "consumers" within the meaning of the ACL and acquired "services" from Scenic in that capacity, so that the guarantees applied.

Section 60 of the ACL provides for a guarantee that services will be rendered with due care and skill ("the due care and skill guarantee"), which the plaintiff said was breached by Scenic in:

- failing to make any or any adequate enquiry about the nature and extent of flooding and rising river levels and thus failing to determine that it was "… inconceivable that the scheduled river cruises

could proceed otherwise than without substantial disruption or delay";

- failing to cancel or delay the tours without receiving information that would lead a reasonable tour operator to conclude that it was likely that the river cruises could proceed in a way that the plaintiff and group members would substantially enjoy the benefit of travelling on the tour;
- failing prior to the embarkation of the plaintiff and some of the group members to unilaterally cancel their tours and offer them an alternative either by way of the closest available tour or departure; or
- failing to offer to passengers on those cruises the opportunity to cancel their tours, either prior to embarkation or after embarkation, when it became obvious that the tours would not be completed as programmed.

Section 61(1) of the ACL provides that where services are provided in circumstances, as here, the plaintiff and group members acquired them, and the purpose for which the services are required is made known, there is a guarantee that the services supplied would be reasonably fit for that purpose.

Section 61(2) of the ACL provides that where a desired result is made known (whether expressly or impliedly) to a provider of services prior to their acquisition, then the provider of the services guarantees that the services are such as might reasonably be expected to achieve the desired result.

The plaintiff alleged that both the purpose guarantee and the result guarantee were breached because the services provided did not satisfy either or both of the guarantees.

By reason of being a representative proceeding, this initial judgment of the Court dealt with the whole of the plaintiff's claim, and the determination of a number of questions likely to arise with respect to the claims of the group members.

In large measure, the Court found that Scenic had acted in ways which breached one or more of the ACL guarantees. It found that the plaintiff had suffered loss, and awarded him damages, equivalent to the cost of his cruise.

The claims of the other group members now fall for determination. Given the findings on the common questions, however, it is likely that those claims will settle.

So, extensive limitations on liability and exclusion clauses in contracts will not always prevent liability. The *Australian Consumer Law* is extremely powerful.

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Home and Contents Insurance - The basis of settlement

Home and contents insurance policies provide cover for loss and damage to property for defined perils. A homeowner will be indemnified for their loss.

Each home and contents policy will have provisions that detail the basis for settlement of claims. Those provisions usually provide an insurer with the option to elect to repair the damage or pay a sum which equates to the cost of repairs. Usually the policies also stipulate the maximum sum payable for damage.

A claim under a home and contents policy where there is a total loss can give rise to disputes as was seen in the recent decision of Russell J in *Starr v Insurance Australia Limited*.

The Starrs owned a rural property. The dwelling on the property was totally destroyed by fire. A swimming pool near the dwelling was also damaged.

The Starrs had a home and contents policy with IAL. IAL offered to pay the Starrs $494,414 which it assessed was the reasonable cost of rebuilding the home and fixing the pool. It was not disputed the home could not be repaired.

The Starrs eventually accepted the payment offered by IAL but without prejudice to their right to claim more under the policy. The Starrs claimed they were entitled to be paid $854,437 being the sum insured instead of the amount IAL had determined as the cost of rebuilding.

The relevant policy was an NRMA home plus building and contents policy. Fire was a covered peril. The building sum insured was $854,337.

The policy insured *"your home"* and the policy defined "your home" to include any domestic residential building and home improvements which included an inground pool.

The basis of settlement provisions in the policy provided:

> *"If we agree to cover your claim under building insurance, then we will:*
>
> - *pay the cost to repair or rebuild the part of your home that was damaged (whichever is lower);*
> - *pay for any extra costs we cover under "other costs – see below;*
>
> *The most we pay for your home is the building's sum insured.*
>
> *How we Settle your Building Claim*
>
> *We will choose to settle your claim for loss or damage to your home or "other cover" in one of the following ways:*

1. *Arrange for repairers, builders or suppliers to repair or rebuild your home. If you agree, we can arrange for our preferred repairers, suppliers or builders to repair or rebuild your home.*
2. *Pay you the reasonable costs to repair or rebuild your home. We can choose to:*
    - *pay you;*
    - *pay your nominated repairer, supplier or builder; or*
    - *provide you with store credits from one of our nominated suppliers.*

    For example we may pay you directly when:

    - *you decide not to repair or rebuild your home; or*
    - *you don't start repairing or rebuilding your home within six months from when the damage takes place, or within any longer period we agree to in writing.*
3. *Pay you the building sum insured.*

    We may do this when we consider your home to be a total loss or when we choose to do so."

The Court noted the evidence demonstrated the cost of repairing the house and pool was significantly less than $854,437.

The question was whether or not the insurer was obliged to pay the reasonable costs of rebuilding or the sum insured.

The Court noted the policy was an indemnity policy, not an agreed value policy and Russell J quoted the well known decision of Justice Stevensen in *Mobis Parts Australia Pty Limited v Excel Insurance Co SE (7)*, as follows:

"*The general principle was stated in D Kelly and M Ball, Kelly and Ball Principles of Insurance Law, (2nd ed, 2001, LexisNexis) at [12.0120.25] as follows:*

"…while an insured who has been paid on the basis of the replacement value is not normally under an obligation to expend the money on reinstatement of the property, a court may decline to assess the insured's loss on the basis of replacement value if it believes that the insured may not intend to reinstate the insured property, or where reinstatement is impossible…".

The learned authors referred to the decision of the Court of Appeal in Leppard v Excess Insurance Co Ltd [1979] 2 All ER 668; 1 WLR 512. The issue in that case was whether the insured was entitled to indemnity on the basis of the costs of reinstatement or market value. The Court concluded that the insured was entitled to recover his real loss, but not exceeding the cost of replacement, and that the real loss was the market value of the insured property.

The Court referred to the general principle enunciated in Castellain v Preston (1883) 11 QBD 380 in which Brett LJ said (at 386):

"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely that the contract of insurance…is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified."

The question was also considered by the High Court in British Traders' Insurance Co Ltd v Monson (1964) 111 CLR 86. The issue in that case was whether the insured could recover the full insured value of property destroyed by fire or merely a loss of their interest (as lessee) of the property.

The plurality (Kitto, Taylor and Owen JJ) said (at 94):

"…no approach can be valid which fails to accept as its first step that a policy showing, as the policy here shows unmistakably, that it is intended as a policy of fire insurance must be construed as a contract for indemnification only. The celebrated judgments in Castellain v Preston…show that that is the fixed and central point to which all else in the policy is subordinate. It could not be otherwise, for as Lord Cockburn CJ said in charging the jury in Chapman v Pole [(1870) 22 LT 306 at 307], the law will not allow of gambling in the form of insurance""

The Starrs argued there was an ambiguity in the policy which should be construed against the insurer. Russell J did not agree.

Russell J confirmed the policy gave the insurer a clear choice to settle a building claim and it could elect to take the approach specified in one of three paragraphs in the basis of settlement provisions. The insurer had offered to meet its obligations by arranging for one of its preferred builders to rebuild the home. However the Starrs did not agree. That option was therefore closed off and the insurer then selected Option 2 by paying the reasonable costs to rebuild the home.

Russell J concluded the sum insured was the maximum payable under the policy, rather than an agreed sum which would be payable in the event of a total loss. As this was an indemnity policy paying the sum insured would provide a windfall to the Starrs' rather than indemnity for their loss.

The policy was similar to one considered in a decision of *Raso v NRMA Insurance* which noted that:

"Because an insurance contract is a contract of indemnity, the amount recoverable under the policy could not exceed the sum necessary to indemnify the insured against the loss actually sustained by them in consequence of the fire. An insured is not entitled to recover the amount specified in the policy unless it

represents his actual loss. The amount specified fixes only the maximum liability of the insurer under the policy."

Russell J found on the proper construction of the contract of insurance and in the events which transpired the insurer was not obliged to pay the maximum sum and was entitled to pay a sum which represented the reasonable costs of replacing the home and repairing damage to the pool.

The basis of settlement provision in the policy gave the insurer an option. It had the option to pay the cost of repair or carry out repairs.

In this claim it was not in dispute the property could not be repaired. Where there property is repairable a different type of dispute may arise with negotiation between an insurer and an insured as to the extent and cost of repairs before the insurer elects to repair. However insurers need to tread carefully in that type of dispute.

The Queensland Supreme Court in *Cape York Airlines Pty Limited v QBE Insurance (Australia) Limited* confirmed there needs to be a clear election to repair to avoid the consequences that would flow where repairs are not undertaken and negotiations on a cash settlement ensue.

In Cape York Airlines an aircraft was damaged. QBE formed the view the aircraft could be repaired. Cape York Airlines considered the aircraft could not be effectively repaired. Cape York Airlines was not prepared to accept QBE's proposal for repair of the aircraft. Cape York Airlines ultimately commenced proceedings alleging that under the policy QBE had three options but it had not exercised its options within a reasonable time. Its options were to:

- pay for replacement,
- repair, or
- pay for the repair of accidental loss or damage.

The Court held the policy required QBE to make a clear and unequivocal election between different contractual rights within a reasonable time of the claim having been made and where QBE made no election within a reasonable time or at all the claim should be treated as a total loss.

QBE argued that it had elected to repair and by that election the policy became a contract to repair the aircraft. QBE argued that this required Cape York Airlines to make the aircraft available to be repaired and as Cape York Airlines had refused, it had repudiated the contract.

Daubney J after considering all the evidence held that there was no election to repair and none made within a reasonable time.

Daubney J concluded that:

"The words or conduct ordinarily required to constitute an election must be:

(a) unequivocal;

(b) an election must be communicated to the other party although an election can be imputed by an act of the electing party;

(c) an election must be communicated within a reasonable time."

Daubney J noted that a party purporting to make an election can only choose between the options available under the relevant contract. Often there will be negotiations on a claim to cash out a claim which if they extend on for a period of time will demonstrate that an insurer has not elected to repair.

The repair option in that case ceased to be available.

Daubney J confirmed that if an insurer elects to repair it does not need to go through the process of providing an insured with estimates, it merely has to affect the repairs.

As can be seen from the decision in Cape York there can be challenges for insurers in determining a claim where property is repairable and the insured and the insurer have different view on the extent of repair required. Where the insurer has options under its basis of settlement provisions it must make a clear election from the options rather than prevaricate between two options to negotiate a better deal.

At the end of the day most property policies are indemnity policies and provide an insurer with the option to elect to cash out a claim or repair or replace damaged property but a clear election must be made by the insurer or they may lose their right to elect to repair.

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TPD Claims - ASIC Review (2016) and beyond

Twenty five years ago the Commonwealth Parliament enacted the *Superannuation Guarantee (Administration) Act 1992* ("SGA") which commenced on 1 July 1992. The SGA introduced a compulsory employer contribution scheme which required all employers (not including Commonwealth Departments and Commonwealth Authorities) to contribute 3% of an employee's income towards a superannuation fund and the compulsory employer contributions were unable to be accessed by employees until they were 55 years of age.

After a quarter of a century since the introduction of the SGA, the superannuation guarantee now stands at 9.5% of an employee's ordinary earnings and the preservation age at which an employee can access superannuation funds is now 60 years of age.

The SGA revolutionised the superannuation industry. A large proportion of the Australian workforce, who otherwise would not have been in a position financially to invest in retirement funds, entered the superannuation marketplace.

Figures published by the Association of Superannuation Funds of Australia as at 1 August 2017 confirms total superannuation assets in excess of $2 trillion, making Australia the fourth largest holder of pension fund assets in the world.

In Australia, superannuation funds operate as trusts. The trustees manage the superannuation fund pursuant to a trust deed for the benefit of its members who are the workers entitled to those superannuation funds upon obtaining the preservation age.

In addition to managing superannuation funds, superannuation trustees will also enter into a contract of insurance with a life insurer under which the insurer will provide cover in various forms including a death benefit and a benefit for total and permanent disablement ("TPD") for the benefit of the members of the superannuation fund.

With the advent of the compulsory superannuation scheme twenty five years ago, more and more people now have access to life insurance benefits under their superannuation policy that otherwise may not have been available to a large proportion of the Australian workforce prior to July 1992.

The result has been a growth in TPD claims by persons claiming a lump sum benefit if the superannuation member becomes seriously injured or ill and is unable to work again, either in their own occupation or in any occupation, depending on the cover.

Such policies are often issued to superannuation trustees by a life insurer in the form of "group life insurance". A superannuation fund member will be provided with a default level of TPD cover through their fund.

As such, a feature of life insurance cover in the form of a TPD benefit involves a contract of insurance which is entered into between the life insurer and the superannuation trustees, not the individual member of the superannuation fund.

TPD benefits paid under a group life policy are paid by the life insurer to the superannuation trustees who then distribute those funds to the member entitled to the TPD benefit.

This feature of life insurance in the superannuation industry results in TPD claims being made by the superannuation fund member to the superannuation trustees who then submit a claim with the relevant life insurer who has issued the policy of insurance to the trustees.

Unlike other insurance claims involving an insured and insurer as contracting parties, a TPD claim will invariably involve three parties, namely:

- the life insurer;
- the superannuation trustees;
- the member or claimant who claims the TPD benefit.

In a series of articles to be published in forthcoming editions of GD News, we will focus on aspects of TPD claims including the following:

- the legislative framework;
- the duties of superannuation trustees;
- the duties of life insurers;
- the role of the Courts and the Superannuation Complaints Tribunal;
- judicial interpretation of policy wording affecting TPD claims;
- a review of recent case law regarding TPD claims for physical injuries and mental illness;
- a review of recent case law regarding fraudulent claims.

In this article, we consider the results of the industry review conducted by ASIC with respect to TPD claims, as published in its October 2016 report entitled *"Life Insurance Claims: An Industry Review"*.

In March 2016, the ABC Four Corners program and Fairfax Media Publications jointly reported on a number of concerns about life insurance claims handling practices of a particular life insurer. Following the publication of those concerns, ASIC initiated a review of claims handling practices across the life insurance industry which culminated in ASIC publishing its report entitled *"Life Insurance Claims: An Industry Review" in October 2016*.

The ASIC review examined claims handling practices and claims outcomes in the life insurance sector. As part of this work, ASIC examined the incidences and extent of claims being declined, including where claims were being improperly or unfairly declined.

ASIC also required life insurers to undertake reviews of their claims handling systems with independent oversight to identify whether there were any issues those insurers needed to address in relation to declined claims and claims handling procedures.

In conducting its review, ASIC did not find evidence of cross industry misconduct across the life insurance sector in relation to life insurance claims payments and procedures. However, ASIC did identify issues of concern in relation to declined claim rates and claims handling procedures associated with particular types of policies, notably TPD.

The ASIC report highlighted the following findings:

- some claims were declined on technical or contractual grounds that were not in accordance with the spirit or the intent of the policy;
- declined claim rates were highest for TPD claims with an average of 16%, with three of those insurers having declined claim rates of 37%, 25% and 24%;
- two insurers had a level of disputes substantially disproportionate to their share of claims;
- over 50% of all disputes about policy definitions related to TPD;
- the amount of evidence sought is a major source of dispute between insurers and policy holders and there is a tension between insurers seeking relevant information and policy holders' perceptions that insurers may be delaying the payment of claims;
- some practices observed by ASIC included the tightening of terms and conditions including circumstances where higher levels of cover may be obtained without full underwriting (particularly in group cover), reducing the size of lump sum TPD benefits, replacing lump sum benefits with income replacement benefits, and using more restrictive TPD definitions;
- TPD was the second most common type of cover disputed at 29% of all disputed claims reviewed;
- an increasing number of policies now require that the policy holder is "unable" to work again with further requirements added for reasonable rehabilitation and re-skilling. Some industry experts expressed the view to ASIC this undermines the main purpose of TPD, which is payment to cover the inability of people to work again;
- instances of insurers cherry picking doctors favourable to the insurer thus defeating the purpose of TPD cover;
- in some instances, a waiting period of six months was considered to be excessive for certain TPD claims;
- instances of performance based criteria linked to decline rate measurements creating a conflict of interest;
- lack of involvement by superannuation trustees in the claims process.

In respect of TPD claims, ASIC has indicated it will:

- undertake targeted surveillance work to examine the reasons for insurers with substantially higher than average declined claim rates and consider regulatory options where these reasons cannot be justified; and
- undertake further review across the industry on TPD claim files and systems, focusing on claims procedural issues (such as timeframes and evidence) and also any additional findings from ASIC's targeted surveillance work.

ASIC has therefore confirmed its intention to monitor and review claim handling practices by life insurers into the future.

ASIC has also required life insurers to conduct their own independent reviews.

The regulator is therefore having an ever increasing presence in the marketplace with respect to ongoing monitoring and review of claims handling practices by life insurers, which includes TPD claims.

In this article, we have identified several issues with respect to TPD claims that were raised by ASIC in its report published 12 months ago.

In our next edition of GD News, we will consider the role of the TPD claimant, the superannuation trustees, the life insurer and the Courts regarding the various duties and obligations upon each party with respect to a TPD claim.

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CONSTRUCTION ROUNDUP

Preparation of contracts for a construction project

In 2014 the NSW Parliament amended the statutory regime for making payment claims under the *Building and Construction Industry Security of Payment Act 1999* for construction work. As a consequence of these amendments it is now required that a payment claim that is submitted by a head contractor on a project includes a supporting statement in the form of a statutory declaration that confirms that all subcontractors and suppliers to whom payment is due as at the date of that statutory declaration have been paid.

In the recent case of *Mt Lewis Estate Pty Limited v Metricon Homes Pty Limited* [2017] NSWSC 1121, the date upon which such a statutory declaration was sworn affect

Construction projects are notorious for the disputes that arise out of them. During a construction project the parties are faced with the sometimes political quagmire of development consents and financing, excavations into unknown ground, adverse weather conditions, industrial tensions, and difficulties from third parties in sourcing materials and labour for the project. It is important that each party is fully aware (before it becomes deeply involved in the project) what its rights and obligations will be. For this reason, it is

imperative that the parties carefully document the project in one or more formal contracts.

The first consideration must always be the structure of the intended project. For instance, does the financier require that it be involved in decisions that may affect the ultimate cost of the project? Is it desirable in the circumstances of the project to incorporate a separate entity solely to build (and perhaps also to later manage) the development?

There are many different structures that can be applied. The most common is where a developer engages a contractor either to design and construct the project, or to construct from a design that the developer has separately procured. This contractor then engages several subcontractors to actually carry out the work. The project is overseen on behalf of the developer by a superintendent or contract administrator, who is engaged under a consultancy agreement with the developer.

Other more complex options include:

- Construction management -where the head contractor merely manages the various subcontractors but does not take on any actual construction obligations
- "Build, own, operate and transfer" (BOOT) - where the contractor assumes an initial obligation of ownership and operation of the project before handing it back to the developer
- Public private partnerships – where a government department passes on to a private entity (often a derivative of a consortium of companies) the obligations of building and operating infrastructure in return for a fee.

Once the structure of the project has been decided, it is then necessary to consider who is to take the risk of something not going as planned. In this regard, it is appropriate to allocate risk to the party who is best able to manage (and perhaps reduce) the risk. For instance, the risk of a project running late due to the contractor's method of work should be solely borne by the contractor, while a change to the design required by the developer should not penalise the contractor. Other more neutral risks are often shared by the parties – eg adverse weather may entitle the contractor to more time to complete the project, but without any entitlement to recover its additional costs caused by the delay.

There are many standard forms of construction contracts that have been published over the years by bodies such as Australian Standards. These contracts provide for an allocation of risk that is widely accepted by the industry, along with processes for administering the project that are well understood and thus are less likely to lead to disputes.

An alternative is to draft a bespoke contract (often provided by the developer). The danger, however, is that the draftsperson is often tempted to include more draconian provisions that change the usual and accepted allocation of risk. While this may seem at first glance to provide added protection to the developer, the reality is that a contractor pricing the work against such a draconian contract is going to increase the amount of its tender to protect itself from loss.

Another important consideration is the provision in the contract for security to be provided by the parties to ensure that they properly perform their obligations. It is often agreed that a contractor will provide a bank guarantee to an agreed percentage of the contract price, or a proportion of the contract price will be retained by the developer until the contractor has completed all its obligations under the contract. Similarly, if a developer may have difficulty in obtaining the finance to pay the contractor for its work, the contractor may wish to have the protection of being given an equitable interest in the land being developed.

Equally important is that the contract clearly set out the consequences of the project running late or at increased cost. It is likely that a delay to the completion of the project will cause both parties to incur some loss – for the developer that loss may be the period of time that it is prevented from leasing out (or using for itself) the completed building, as well as increased financing costs. For the contractor, it may be the increased cost of maintaining the site for a longer period, as well as the extra overheads it will incur. It is always prudent to calculate in advance what these losses will be, and to specify in the contract the circumstances that will entitle a party to recover these losses, as well as a set rate of compensation per day.

While each party embarks on the project with optimism of a successful (and mutually profitable) outcome, the reality is that disputes can (and often do) arise. Therefore, the parties should consider how they would like any disputes to be resolved, and clearly set out in the contract the agreed dispute resolution process. One step may be a requirement for the senior representatives of each party to meet to try to negotiate a resolution of the dispute. Another course may be to refer the dispute to an independent expert to providing a binding determination of the matter.

Finally, in the course of preparing and finalising the project documentation, it is always useful to check the following points:

Are the parties legally able to enter into the contract? For instance, a trust is not a legal entity and therefore the appropriate contracting party should be the trustee.

Are the parties properly and fully identified, including applicable ABNs and ACNs?

Have the requirements of the Home Building Act 1989 (NSW) been included in the contract (if applicable)?

From what date are the parties to be bound by the contract?

Are the proposed forms of attestation (execution of the contract) appropriate for the relevant entities? For instance, is a person exercising a power of attorney to execute the contract on behalf of one of the parties?

It is most common in the construction industry for losses (and disputes) to arise where the contracts have been poorly drafted or prepared, and particularly where there are no contracts at all. When appropriate care has been given to the documenting of the project before it commences, the parties will be properly aware of their rights and obligations and thus more prepared to deal with the challenges that the project will provide.

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Is there an obligation to pay for work done by an unlicensed builder?

Pursuant to section 4 of the *Home Building Act 1989 (NSW),* it is illegal for an unlicensed contractor to carry out residential building work or to fail to arrange home warranty insurance in relation to that work. Section 94 of the Act provides that if a contractor does carry out uninsured work, then the contractor is not entitled to damages (or to enforce any other remedy) under the building contract. The contractor is not even entitled to recover any payment on a quantum meruit basis, unless a court or tribunal considers it just and equitable in the circumstances. But what circumstances would a court or tribunal consider is just and equitable?

This issue was recently examined in a decision of the NCAT Appeal Panel (*Pollak v Masterglass Façades Pty Limited [2017] NSWCATAP 203*).

Dr Pollak was the owner of a penthouse apartment with an extensive view of Sydney Harbour that was being renovated by Metrick Construction Group. He had separately engaged Masterglass Façades to install sliding doors to the apartment. These doors were required to be installed on a hob (previously installed by Metrick Construction Group), and the tracks along which the doors would slide would allow water to drain to a sill and a further subsill below. Dr Pollak paid a deposit of $11,326 and the work was duly carried out.

Shortly after the installation (but before the balance of payment was made to Masterglass Façades) there was a severe storm in Sydney and water entered the apartment from the outside balcony. Masterglass Façades denied that there was a defect in their work, on the basis that Metrick Construction Group had laid tiles on the outside balcony that had raised its level and had affected the drainage of water.

During this process Dr Pollak learned that Masterglass Façades did not have a licence to carry out residential building work and had not taken out home warranty insurance. He refused to pay the balance of the contract sum claimed by Masterglass Façades ($25,662) or to allow them to return to the property to rectify some minor defects. Masterglass Façades commenced proceedings in NCAT seeking payment of the balance of the contract sum. NCAT Senior Member Ian Bailey AM SC held that, after adjustment for some minor defect rectification, Masterglass Façades was entitled to the amount that it had sought. Dr Pollak appealed from this decision to the NCAT Appeal Panel.

The Appeal Panel noted that Senior Member Bailey had rejected a report prepared by Dr Pollak's expert on the basis that he had failed to take into account the application of the relevant Australian Standard, and instead the Senior Member had preferred the common sense approach of Masterglass Façades' expert about the effect of the raised height of the balcony tiles – even though this latter expert report had not strictly complied with NCAT's requirements for expert evidence.

In the appeal proceedings, Dr Pollak complained that Senior Member Bailey had in reality relied on his own evidence arising from an inspection of the apartment. However, Senior Member Bailey had held that the cause of the erroneous drainage of water was a matter of common sense. The Appeal Panel confirmed that Senior Member Bailey was entitled to come to his decision based not only on the evidence before him but also on matters of common knowledge, including the application of common sense.

Dr Pollak had submitted that even if Masterglass Façades' work had not caused the water ingress, they were not entitled to any further payment since they had not complied with the Act's requirements for a licence and home warranty insurance, and he should be entitled to recover the deposit that he had paid. Senior Member Bailey had noted that Masterglass Façades had provided evidence that it did not ordinarily carry out any residential building work, and had only done so on this occasion as a personal favour to Dr Pollak. Accordingly, Senior Member Bailey had held that it was appropriate that Masterglass Façades should be entitled to recovery payment for its work on a quantum meruit basis – which would be quantified by reference to the agreed contract sum.

In the appeal proceedings, Dr Pollak complained that he had not been aware that Senior Member Bailey had been considering awarding payment on a quantum meruit basis, and thus Dr Pollak had been denied procedural fairness. However, the Appeal Panel held that it was quite appropriate for the Senior Member to give consideration to a remedy provided by the Act, particularly where that approach dealt with the real issue between the parties (thus avoiding becoming

embroiled in inappropriate and irrelevant arguments) and was clearly based on considerations of equity and good conscience within established legal principles.

The Appeal Panel also noted that despite having been specifically afforded the opportunity to introduce evidence of any prejudice that may have been suffered by him as a consequence of Masterglass Façades' unlicensed work, Dr Pollak had not done so. In the circumstances, it had been held by the Senior Member (and was confirmed by the Appeal Panel) that there was no such prejudice to Dr Pollak.

The Appeal Panel also noted that it would be grossly unfair for Dr Pollak to retain the benefit of Masterglass Façades' work without having to pay for it. Accordingly, the Senior Member's decision that Masterglass Façades was entitled to payment of the balance of the contract sum (less an adjustment for minor defect rectification) was upheld.

This case provides an interesting demonstration of how NCAT operates to not only apply the requirements of the Act to residential building work, but also to promote the resolution of disputes in a common sense and equitable manner.

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EMPLOYMENT ROUNDUP

Probation

A probation or trial period is a common feature of many employment relationships. But what does it actually mean? And what is its effect?

Purpose of probation

Probation is generally taken to mean the testing or trial of a person's conduct character or qualifications. In the employment context, it serves a dual purpose:

> "On the one hand the purpose of a probation period is to test the employee's fitness and suitability for the position held. On the other, the employee can make an assessment of whether the position is really what was expected and, if not, conveniently resign." *Creedon v Clarvon Ltd t/as Footrest Shoes*, (unreported, Sams DP, Matter IRC98/5227, 16 June 1999)

As has been said, the usefulness of a probation period goes beyond practical aspects like observing how competent an applicant actually is in a position to other matters such as seeing how the employee measures up in the workplace as to interaction with other people. A probation period offers the utility of finding out whether, for instance, "paper" qualifications are a true indicator of the effectiveness of the employee in the actual job.

When does a probation period apply?

There is no automatic probationary period.

Like all terms of an employment contract, for a probation period to apply it must be agreed between the parties. It should be discussed at interview, and recorded in writing in the employment contract.

Theoretically, an employer and employee can agree to any length of probation period, but the generally accepted maximum is 6 months. The length of the probation will generally be proportionate to the seniority of the position – the more senior the role, the more sensible it is to have a longer period.

It is usual for a probation period to allow either party to terminate the contract on very short notice – one week – and without it being necessary to have any basis for doing so. If a longer than usual probation period applies, any provision regarding notice will be subject to the terms of the National Employment Standards, which may dictate a longer notice period.

Can a probation period be extended?

Yes, if both parties agree. If an employee does not agree, the period will not be extended.

Again, any extension should be recorded in writing.

Does the probation period count as service?

Yes. Entitlements to leave – annual, long service, sick leave etc – all accrue during a probationary period.

In addition, and importantly, service under probation counts towards the necessary minimum periods of service for protection under the Unfair Dismissal regime in the Fair Work Act 2009 (Cth).

For small business employers (fewer than 15 employees) this is 12 months, and for other employers 6 months. The Unfair Dismissal rules do not apply to employee earning over the current threshold of $142,000 per annum.

In other words, even if an employee is on probation, if they have served the requisite minimum employment period they may be able to bring an unfair dismissal claim if their dismissal was harsh, unjust or unreasonable.

Why have a probation period?

The usefulness of imposing a probationary period is less than it once was.

Formerly, probation did not count towards service for unfair dismissal purposes, and the period of notice required to terminate was not subject to the minimums set out in the National Employment Standards.

The fact, however, that an employee is on probation can be a useful management tool in securing maximum effort in the workplace, and also a sensible arrangement when attempting to determine a particular applicant's "fit" for a role.

From an employer's point of view, the most beneficial effect of utilising probation is that - where there is a mismatch between job and employee – there is usually acceptance by the employee that employment is not to be continued beyond the probationary period.

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Failure to comply with lawful direction to attend a meeting justified summary termination

Employers are sometimes required to deal with issues of poor performance or unacceptable behaviour by employees who may be in breach of Codes of Conduct or bullying policies of the employer. Such conduct or performance may necessitate an employer to undertake an investigation into the behaviour of an employee. Where an investigation into an employee's performance or behaviour is warranted or required, an employer may be faced with decisions as to whether to suspend an employee during the investigation and/or require an employee to attend a meeting for the purposes of the investigation.

The Federal Court of Australia in a recent decision determined that an employee who failed to comply with a reasonable and lawful direction to attend a meeting was validly dismissed for misconduct.

The employee had sold his own business to the employer and subsequently became an employee of the employer. Within a short period of time, there were complaints from other employees that the employee's conduct was unacceptable in that he was alleged to have been rude, abusive and had made derogatory comments to his fellow employees. As a result of these complaints reaching the employer, the employer's HR department determined the employee should be suspended pending an investigation.

The employee received a letter of suspension stating an investigation was taking place into his conduct which may lead to his termination. The employee was notified in the suspension letter that he would be suspended on full pay.

Whilst there was a dispute in the evidence as to what was said at the meeting when the suspension letter was handed to the employee, the Court accepted the evidence of the HR person, who had made a contemporaneous file note of the conversation at the meeting. The Court accepted the employee was told the suspension letter was only the start of the process of investigating complaints against the employee and did not mean he would be terminated, although termination was mentioned as a possible outcome of the investigation.

The Court determined that even though the contract of employment did not contain an express right to suspend the employee, the Court found there was an implied term to make a direction not to attend work to enable the employer to investigate allegations of inappropriate behaviour where such behaviour could constitute a risk the health and safety of the employer's staff or the fulfilment of the employer's duty to provide a safe place of work for its staff. In other words the Court found the direction to suspend was a reasonable and lawful direction which the employee was bound to comply with.

Subsequently the employee received a further letter a few days later requiring him to attend the employer's headquarters in another state as part of the investigation. The employee's solicitors wrote to the employer demanding particulars of the claims made against the employee and stating the employee would not attend the meeting until those particulars had been provided.

The employee's solicitors wrote letters to the employer which the Court determined contained excessive requests for particulars and was unhelpful. The concern of the employee as conveyed in the letter from his solicitors was that he did not have sufficient time to seek proper and informed representation and meet the allegations being raised against him for the meeting.

The second letter the employee received did contain details of some of the allegations that had been made against the employee.

The employee was provided with 3 letters requiring him to attend that meeting.

He then received a Show Cause letter which noted he had been given reasonable and lawful directions to attend meetings arranged by his employer on 3 occasions and had failed to attend those meetings in breach of his contract of employment.

The Court determined that after the employee had been provided with examples of his behaviour that was to be investigated, he had sufficient details to enable him to participate and respond in a meeting. As such the Court found the direction to attend the later meeting, after the examples had been given to the employee's solicitors, was a reasonable and lawful direction.

The employee's contract of employment contained an express provision that the contract could be terminated summarily if the employee failed to perform or observe any lawful and reasonable direction. As the Court had found the direction of the employer to attend the later meeting was a lawful and reasonable direction, to which the employee filed to comply, the employer did have the right to summarily terminate his employment.

WORKERS COMPENSATION ROUNDUP

Is a Cardiac Arrest Work Related?

In New South Wales the *Workers Compensation Act* 1987 provides that compensation will be payable under that legislation if employment was a substantial contributing factor to the injury or death of a worker.

Section 25 of that legislation provides if that injury results in death then the deceased's dependants are also entitled to a lump sum payment as a consequence of that death.

The cause of death, and whether or not it is related to employment, can sometimes be a very difficult question.

The Court of Appeal has recently considered an example of a difficult scenario in the decision of *Tudor Capital Australia Pty Limited v Christensen*.

The claimant made a claim for compensation on behalf of herself and her children pursuant to Section 9 and Section 25 of the *Workers Compensation Act* 1987 (pre the June 2012 amendments to the legislation) in respect of her late husband's death. Her husband was employed as a Portfolio Manager with the employer, having recently commenced working in Sydney after relocating from the London office. When he initially moved to Sydney the deceased encountered a number of difficulties including technical difficulties due to slow internet connection which resulted in a nine week delay. This meant that the deceased's trading results and earnings were much less than expected. The time difference between Sydney, Europe and the US was also problematic for him and the deceased would work between 10.00 pm and 2.00 am to watch the US market. On 1 July 2008 the deceased was placed on a "watch list" by the employer which meant his performance would be subject to review.

The deceased contracted the flu in early September 2008 and consulted his general practitioner on 4 September. He was off work from 5 to 8 September and his general practitioner also prescribed antibiotics by way of treatment.

On 8 September 2008 whilst walking to his car the claimant was observed by a co-worker to be short of breath. That evening he was sitting on the couch with his wife when he suddenly lost consciousness. An Ambulance was called however sadly the deceased was unable to be revived. An autopsy report indicated the cause of death was not ascertained although there was circumstantial evidence which suggested myocardial infarction. The cause of death was described as most likely to be cardiac arrhythmia.

Following receipt of the claim for compensation the employer declined liability, relying on sections 9A and 11A of the legislation in place at that time.

As the employer declined liability, the claimant subsequently commenced proceedings in the Workers Compensation Commission seeking compensation in respect to the deceased's death.

The cause of death was described in the Amended Application to Resolve a Dispute as follows:

> *"Stress caused by employment (including by rendering [the deceased] susceptible to a viral illness) which caused or aggravated ventricular fibrillation, cardiac arrest and death."*

The description of the injury was as follows:

> *"Stress caused by the nature and conditions of employment including the employer's failure to provide adequate support to the worker in terms of the necessary infrastructure, equipment and technology systems, and the manner in which worker was managed by the employer in the months leading up to his death."*

The employer in their Reply denied that the deceased's employment in any way caused his death and denied that his death resulted from an injury arising out of or in the course of his employment. The employer also contended that the deceased did not suffer a psychological injury and if he did, it was not an injury which arose out of or in the course of his employment. The employer also disputed the death resulted from an injury to which the deceased's death was a substantial contributing factor.

It was agreed the deceased had suffered ventricular fibrillation which led to cardiac arrest which caused his death, however the cause of that ventricular fibrillation was in issue.

The claimant argued the death had arisen as a consequence of stress associated with the deceased's employment which made the claimant susceptible to a viral illness which subsequently either caused or aggravated his ventricular fibrillation, causing cardiac arrest and subsequent death.

Expert evidence was relied on by the claimant and the employer.

Associate Professor David Richards provided a report on behalf of the claimant according to which ventricular fibrillation was caused by viral myocarditis. Although in this particular case there was no cell analysis or autopsy indicating myocarditis, Associate Professor Richards was of the view it was possible this evidence was missed due to the relatively short time between the onset of inflammation and the death.

The employer argued the deceased suffered from hypertrophic cardiac myopathy, where a portion of the heart muscle wall will become thickened with scar tissue. The employer relied on expert evidence from

Professor Keogh and Dr Rainer, who also examined autopsy slides of tissue samples. The slides were not considered by the claimant's medical expert, as he conceded he did not have the appropriate expertise to do so. The employer's experts gave oral evidence in the Workers Compensation Commission according to which the slides demonstrated extensive fibrosis in the deceased's heart which was consistent with long standing hypertrophic cardiomyopathy.

There was therefore conflicting expert evidence.

At first instance Arbitrator Wynyard found in favour of the claimant and determined the deceased's death had been caused by an injury within the meaning of the *Workers Compensation Act* 1987, that is, the entry of T cell lymphocytes into the myocardium was due to the viral illness the deceased had acquired which was due to stress and frustration from his employment.

The Arbitrator was not satisfied the deceased's pre-existing condition contributed to his death.

The employer appealed to the Deputy President in the Workers Compensation Commission. The Deputy President confirmed the findings of the Arbitrator.

The employer appealed to the Court of Appeal.

Judgment was handed down by the Court of Appeal on 17 October 2017.

The appeal was allowed, however the matter has been remitted to the Workers Compensation Commission for redetermination.

In allowing the appeal, the Court of Appeal identified a number of issues with the decision of the Deputy President. Further, when the Arbitrator had initially examined the medical evidence there was an error of law that was not identified by the Deputy President.

On appeal, then employer submitted the Deputy President had erred by:

- finding that stress and emotional upset satisfied the statutory definition of "injury" within Section 4 of the Workers Compensation Act 1987;
- having identified an error in the Arbitrator's conclusion the deceased's pre-injury condition was not relevant to the deceased's death, making his own findings in relation to cause or contribution and relying on an inference favourable to the claimant, that Associate Professor Richard's opinion would have been unchanged despite new evidence as to the severity of the pre-existing hypertrophic cardiomyopathy;
- failing to correct the Arbitrator's findings in relation to injury where the Arbitrator had found that injury was caused by T cell infiltration where there was no evidence this had occurred;
- failing to consider and misdirecting himself as to the need to consider the employer's defence pursuant to Section 11A of the legislation, that is whether the deceased had suffered a psychological or psychiatric disorder due to performance appraisal;
- making a finding of fact that the deceased's employment caused injury which led to his death when there was insufficient evidence to make such a finding;
- exceeding or avoiding his statutory task;
- failing to provide sufficient reasons dealing with matters in dispute.

In considering the arguments, Justice McColl in her Honour's judgment stated:

"In my view, applying that test, it is apparent that the Deputy President erred when he found that the "injury" was the deceased's experience of stress ... [making] him susceptible to the contraction of an infective virus.

It is manifest that, in so finding, the Deputy President made a finding of "injury" which differed from the "injury" the Arbitrator identified. As the employer submitted, the Deputy President's findings did not align with the Arbitrator's findings and reasons, nor, in particular, with the injury the Arbitrator had identified, being the "entry into the myocardium of the virus" or the "entry of the T cell lymphocytes into the myocardium.

Rather, the focus of the Deputy President's findings contrasted starkly with the Arbitrator's. Whereas the "injury" the Arbitrator identified focused on the penultimate point of the process the claimant relied upon as constituting "injury" in the amended ARD, the Deputy President's finding looked to an earlier and vaguer concatenation of work related events purely subjective to the deceased. ... Further, in making his finding of "injury" the Deputy President failed to undertake the precise consideration on a fact by fact basis of the evidence as explained in Kennedy Cleaning & May to determine whether the deceased's "experience of stress" or susceptibility to the contraction of an infective virus, could constitute an "injury" within the meaning of that term and Section 4 of the WCA. Thus the Deputy President failed to identify any "physiological change or disturbance of the deceased's normal physiological state" which caused the experience of "stress" he identified as "the relevant injury". Such an inquiry would have been necessary whether or not the stress was said to constitute a "psychological injury" within the meaning of Section 11A(3), as the definition of the latter requires identification of an "injury" (as defined in Section 4) that is, a psychological or psychiatric disorder. ...

No doubt the Deputy President's admission in this respect was because neither party ... pointed to any evidence that the psychological stress the deceased

was found to have experienced was a function of any physiological change."

According to Justice McColl, once the Deputy President had identified "the relevant injury" as the deceased's "experience of stress", the Deputy President ought to have determined the "experience of stress" was a "psychological injury" within the meaning of Section 11A(3) of the legislation. Further, as the Arbitrator had not isolated the relevant injury the evaluative process that Section 9A requires could not be properly undertaken in determining whether the employment was a substantial contributing factor to the injury.

Justice McColl was of the opinion that any connection between psychological stress and a consequential increase of susceptibility to viral illness was not proven. Her Honour was of the opinion the differences in the expert evidence could have been resolved by analysis however that exercise had not been undertaken.

However, the Court of Appeal was not in a position to substitute their own decision and in those circumstances it was necessary for the matter to be remitted to the Commission.

Section 107 of the Supreme Court Act sets out when the Court of Appeal can substitute their own judgment in place of the decision below however that was not appropriate in this case. No doubt the Court of Appeal would have been keen to do so if possible.

Her Honour Justice McColl stated:

"Contrary to the claimant's submission, the hypertrophic cardiac myopathy case was not weakened, in my view, by the evidence of other consulting medical practitioners who considered the question of hypertrophic cardiomyopathy, but dismissed it. None of the other experts considered the autopsy slides. As I have said, the claimant had the opportunity, once Associate Professor Richards advised that he was not qualified to comment on them, to retain an expert who could, but did not do so. It was her case in resisting the hypertrophic cardiomyopathy case which was weakened by the absence of such evidence.

Although I accept that Professor Keogh and Dr Rainer's evidence cast considerable doubt on the viral myocarditis theory, I do not think it is open to this Court to conclude that the claimant's case should have been dismissed. Rather, in my view, having identified the errors to which I have referred, the Deputy President should have remitted the matter back to another Arbitrator for determination in accordance with the decision correctly identifying the errors into which the Arbitrator had fallen."

Therefore, the end result is that the claim has been remitted to the Workers Compensation Commission for another hearing before an Arbitrator.

We will have to wait and see as to the final outcome of this difficult case.

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Accrual of Annual Leave whilst on Workers Compensation

Do injured workers accrue annual leave whilst on workers compensation? The short answer in NSW is yes.

Section 49 of the *Workers Compensation Act,* 1987 ("WCA") provides that worker's compensation is payable in respect of any period of incapacity, even though the worker has received, or is entitled to receive, in respect of the period of payment, an allowance or benefit for annual holidays or long service leave. There is however no express provision within Section 49 as to whether or not annual leave continues to accrue whilst a worker is receiving payments of compensation. The general approach taken was that annual leave did accrue whilst an injured worker was in receipt of worker's compensation.

Uncertainty followed after the *Fair Work Act* 2009 ("FWA") came into effect.

Section 130 of that legislation provides that:

"(1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a compensation period) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a compensation law) of the Commonwealth, a State or a Territory that is about workers' compensation.

(2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.

(3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period."

The interaction of the WCA and FWA was considered in *NSW Nurses & Midwives Association ("NSWNMA") v Anglican Care* (2014). In that case NSWNMA brought an application on behalf of Ms Copas, arguing that she was entitled to payment of around $3,000.00 for 18 months unpaid annual leave she had accrued whilst on worker's compensation following an injury in December 2009. The Association argued that section 49 of the WCA is a law that permits taking or accrual of

leave during a compensation period for the purpose of section 130 (2) of the FWA.

Anglican Care submitted to the contrary that section 49 does not create any entitlement for the accrual of leave, and therefore section 130(2) of the FWA applies so as to extinguish any claim for leave.

At first instance, her Honour Judge Emmett in the Federal Circuit Court determined that an injured worker can accrue annual leave whilst receiving payments of compensation. Her Honour was of the opinion that Section 49 expressly provided for an opportunity for an injured worker to receive workers compensation and accrue annual leave at the same time. Her Honour was therefore satisfied that Section 49 did not prevent an injured worker from receiving compensation and accruing annual leave.

Anglican Care appealed to the Full Bench of the Federal Court.

The Full Bench concluded the purpose of Section 130(2) was to enable injured workers who were absent from work and in receipt of compensation to retain their entitlements to leave over the same period, as long as that course is sanctioned, condoned or countenanced by the relevant compensation laws.

A key component of the decision was an examination of what was meant by "*permitted*" or more precisely "*permitted by*" Section 130(2) of the FWA. The Full Bench determined that "*permitted"* should be constructed as "*allowed*".

Justices Bromberg and Katzmann in a joint judgment stated:

> *"It would be odd if Parliament's intention were to confine the operation of s 130(2) to compensation laws which actually created or conferred entitlements to leave. After all, compensation laws create or confer rights to compensation."*
>
> *Their Honours continued:*
>
> *"As Anglican Care argued, s 49 of the WC Act did not create an entitlement to accrue leave. But s 130 of the FW Act does not require that the source of the entitlement be found in the compensation law in order for an employee to be able to enjoy the benefit of both compensation and leave over the same period. The purpose and effect of s 130 is to remove the entitlement to take or accrue leave for employees in receipt of workers compensation unless there is a law relating to compensation in the relevant jurisdiction which countenances the simultaneous receipt of workers compensation while the employee is absent from work. Section 49 of the WC Act is such a law."*

In 2015 the Fair Work Amendment Act was passed. The initial draft of that Bill contained a provision whereby annual leave entitlements were not to accrue whilst an employee was absent from their employment and in receipt of worker's compensation. That provision was ultimately abandoned.

The situation therefore remains that injured workers will accrue leave whilst on workers compensation, which has an obvious effect on employers. The entitlements of long term injured workers may need to be closely looked at, especially those who have not been in the workplace for a number of years.

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Calculating PIAWE Where there are 2 Jobs -Woolworths v Salam

The 2012 amendments to the *Workers Compensation Act 1987* changed the way in which the rate of weekly payments payable to an injured worker was calculated by reference to a worker's pre-injury average weekly earnings. Section 44C was introduced which defines the meaning of pre-injury average weekly earnings and how they calculated. The pre-injury average weekly earnings of certain classes of workers are set out in Schedule 3, including workers employed by two or more employers. Depending on the manner in which a worker's pre-injury earnings were calculated there are seven different classes identified in the Schedule.

The application of those provisions was recently the subject of a determination by Deputy President Michael Snell in *Woolworths Limited v Salam* [2017] NSWWCCPD 35.

The worker sustained an injury to his shoulders in the course of his employment with Woolworths. At the time the worker also had a job with Access Group Solutions (Access) as a cleaner. The worker claimed he resigned from the cleaning role as a result of his shoulder injury. The worker was placed on restricted duties with Woolworths from 31 March 2015 and he eventually made a claim for compensation in July 2015. Voluntary payments of weekly compensation were made until March 2016 when liability was declined by the insurer.

The dispute was determined by an arbitrator in the Workers Compensation Commission who found the worker injured both of his shoulders on 4 December 2014 and the injuries were aggravated, accelerated, exacerbated or deteriorated due to the worker's work tasks thereafter until he ceased work in December 2015.

The arbitrator determined the injury resulted in partial incapacity for both roles. By reference to Item 7 in Schedule 3 the arbitrator concluded it was necessary that PIAWE be calculated based on the worker's earnings with both Woolworths and Access which were respectively agreed at $939.46 and $911.00 totalling

$1,850.46. The arbitrator considered the worker had a capacity to work in suitable employment such as the education and accountancy industries for 15 to 20 hours per week with an ability to earn $600.00 per week. After applying the formula in Section 37(3)(a) the arbitrator entered a weekly award of $880.36 on 12 December 2015 to date and continuing.

Both parties lodged appeals regarding quantification of the weekly entitlement. The employer's appeal dealt with Schedule 3 of the 1987 Act and the identification of the appropriate quantification of PIAWE whilst the worker's appeal dealt with assessment of his ability to earn.

Item 7 of Schedule 3 provides as follows:

5	Worker employed by 2 or more employers who works for one of those employers for at least the ordinary hours fixed in applicable affiliate instrument and works for another of those employers for at least the prescribed number of hours each week	The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work which yields the higher weekly ordinary earnings
7	Worker employed by 2 or more employers who sustains an injury that results in an incapacity to work for one or more of those employers but all those employers	The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to earnings from work with all the employers
8	Worker employed by 2 or more employers in circumstances other than those described in the preceding provisions of this Schedule	The worker's pre-injury average weekly earnings are the worker's average ordinary earnings expressed as an amount per hour for all work carried out by the worker for all employers multiplied by:(a) the prescribed number of hours per week, or(b) the total of the worker's ordinary hours per week, whichever is the lesser.

The arbitrator found the injury with Woolworths resulted in "partial incapacity to work for it and Access".

The employer submitted having found the worker was incapacitated for work with both it and Access, the arbitrator should have excluded Item 7 as the basis of calculating weekly entitlements. The employer asserted the applicable item was Item 5 of Schedule 3.

The employer proposed the arbitrator should have applied either Item 5 or Item 8.

In determining whether the arbitrator had made the correct approach, the Deputy President noted the descriptor in Column 2 at Item 7 has the following elements:

(a) the worker employed by 2 or more employers;
(b) the injury resulting in incapacity for work for one or more of the employers, and
(c) the injury not resulting in an incapacity for work for all of the employers.

Based on the arbitrator's findings the first two events were satisfied but the third element was not as there was a finding of partial incapacity to work for both Woolworths and Access.

After considering statutory construction, the Deputy President found the clear meaning of the text in Column 2 of Item 7 was that application of the Item required as an element that the injury did not result in incapacity to work for all of the employers. Therefore the third of the elements required for Item 7 to have application could not be established and therefore it was necessary for the arbitrator's decision regarding quantification of the weekly entitlement to be revoked.

The evidence established the worker was employed by Woolworths for at least the ordinary hours fixed in an applicable fair work instrument. He was employed by Access pursuant to an award. The only available categorisations that could apply were those in Items 2, 5 and 8. The arbitrator considered Item 8 was a "capture" that applied if a worker was employed by two or more employers in circumstances other than those described in the preceding provisions of the Schedule.

The arbitrator found the descriptors in Column 2 applying to Items 2 and 5 had the following elements:

(a) the worker was employed by 2 or more employers;
(b) the worker works for one of those employers for at least the ordinary hours fixed in an applicable fair work instrument; and
(c) the worker works for another of those employers for at least the prescribed number of hours per week.

If the worker worked for Access for at least 38 hours per week his PIAWE failed to be calculated pursuant to Item 5 whereas if he worked for Access for less than 38 hours per week his PIAWE failed to be calculated pursuant to Item 2.

As correspondence from Access stated the worker was employed as a full time cleaner, Item 5 applied with the

effect that PIAWE was to be calculated by reference to the work which yielded the higher weekly ordinary earnings which was the work with Woolworths of $939.46 per week.

Even if one concluded the worker's work with Access was not at least 38 hours per week, Item 2 would apply and PIAWE would be calculated by reference to the work for the employer for whom the worker worked for at least the ordinary hours fixed in the fair work instrument, ie Woolworths. The appropriate PIAWE figure was the same as if Item 5 applied.

In concluding the Deputy President indicated that identification of the "class of worker at the time of injury" for the purposes of Items 2, 3, 4, 5 and 6 involves reference to the worker's hours of employment, having regard to whether s/he worked for at least the prescribed number of hours and/or at least the applicable hours fixed in the applicable fair work instrument, in one or more of the employments.

Whether there is any applicable fair work instrument, and the hours worked pursuant to that instrument or otherwise, are fundamental to identifying an appropriate item in Schedule 2. The Deputy President indicated it was important that parties specifically address the issues raised by Schedule 3 in evidence lodged in matters where there are two or more employers.

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CTP ROUNDUP

Emergency Vehicles & Intersection Accidents

The NSW Court of Appeal has recently considered the duty owed by an emergency response officer operating an Ambulance as they pass through an intersection.

Emergency responders are often faced with a decision in the agony of the moment to get to an emergency whilst they attempt to navigate the safest route through intersections. These actions can create dangers and result in accidents. So how does a Court determine whether or not the emergency responder has exercised reasonable care?

In *Logar v Ambulance Service of NSW Sydney Region*, the Court of Appeal was called on to determine a claim by Mrs Logar who was injured when her car and an Ambulance driven by Ms Riches collided at the intersection of Castlereagh Road and High Street, Penrith.

Riches was responding to a nearby emergency. Logar was driving on Castlereagh Road. The vehicles collided after Riches entered the intersection against a red traffic light and Logar failed to stop to allow the Ambulance to finish traversing the intersection.

The matter proceeded to hearing before Judge Taylor, who determined Riches was not negligent. The trial judge determined that if Riches had been negligent, the contributory negligence of Logar should be assessed at 60%.

An appeal followed.

Riches was responding to an emergency where a patient was unconscious and had questionable breathing.

It was common ground that Riches owed other drivers a duty of care and she had a duty to keep a proper look out.

There was also no issue that under the Road Rules Logar was not permitted to move into the path of the Ambulance and had to give way to the ambulance if its lights and sirens were on.

Logar argued that Riches could have taken a different or more southerly route through the intersection and she could have waited until the lights had changed before entering the lane Logar was driving in.

Logar contended that by inadvertence she was unaware of the siren and had no visual cue as to the presence of the Ambulance.

The question turned on whether or not it was appropriate for the Ambulance driver to stick its nose out into a lane of traffic when the driver could not see cars within that lane. The evidence demonstrated the sirens could be heard 20 seconds prior to impact. The evidence was also that Riches stopped before entering Logar's lane.

Schmidt J in the leading judgment, noted the risk of collision occurring as a result of entering the intersection was foreseeable however that was not the end of the inquiry. The probability of a vehicle speeding through the intersection in the only vacant lane when the rest of the intersection was frozen despite green lights when the siren was sounding was low.

Schmidt J noted the fact that a risk of harm could have been avoided by doing something in a different way does not in itself give rise to or effect liability for the way in which the thing was done.

Schmidt J noted it was necessary to determine what a reasonable person would have done in the circumstances, given the admitted risk of collision where the Ambulance crossed the intersection against a red light.

Schmidt J confirmed Logar had an obligation to stop and give way to the Ambulance as a consequence of

the Road Rules and that was a matter relevant to the determination of whether Riches breached her duty of care.

Riches was responding to an emergency, appropriately using lights and sirens and the emergency had a high priority.

Riches understood that not all drivers obeyed their obligations to stop and give way to Ambulances.

Riches had moved into the intersection after traffic had stopped to let her pass and it was only her decision to enter into the lane in which Logar was travelling which was argued to have involved any negligence.

Schmidt J noted Riches needed to have reasonable attention to all that was happening on and near the roadway that may present a source of danger as necessary.

Riches was called on to weigh the risks of entering a lane against the risk of waiting until the lights changed and had to take into account the emergency she was responding to.

The social utility of the activity which created the risk of harm also needed to be taken into account pursuant to the *Civil Liability Act 2002*.

The Court of Appeal held by a majority decision that the trial judge was correct in determining Riches had not been negligent.

The social utility of the activity undertaken by Riches was a matter relevant to the trial judge's consideration of whether a person should have taken particular precautions against a risk of harm.

The Court of Appeal held that a finding by the trial judge that the Ambulance driven slowly and carefully through the intersection was open on the evidence and it was open to the trial judge to conclude Riches had not breached the duty of care she owed Logar even though she could not see vehicles in the lane as she entered the lane.

At the end of the day an emergency situation created an additional unfortunate outcome. Emergency responders owe road users a duty of care however the fact they are responding to an emergency will weigh on the determination of the duty of care that emergency responders owe.

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