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Claims for Pure Economic Loss Not Covered by Insurance. An Insuring Clause and the Definitions Do Matter

Liability insurance provides cover for an insured's liability to pay compensation for personal injury and property damage arising from an occurrence in connection with the insured's business. However sometimes claims brought against an insured are for economic loss rather than property damage. Economic loss can arise as a consequence of damage to property owned by persons other than a third party claimant and in that situation the claim is for "pure economic loss".

Questions can arise as to whether the liability policy responds to pure economic loss claims or only claims for property damage.

As is often the case the cover provided by a policy turns on a close examination of the insuring clause and where insuring clauses contain words and phrases that are defined in the policy, a close examination of the definitions. The use of phrases such as "in respect of" and "for" when referring to "compensation" and "property damage" can also have a profound effect on the cover available.

The issues which can arise for an insured who is pursued by a third party for pure economic loss were on display in the Supreme Court proceedings before Stevenson J in Downer EDI Rail ("Downer") and EDI Rail PPP Maintenance v John Holland, KBR and Atlantis Corporation (and its insurer QBE).

The Auburn Maintenance Centre is located on land owned by Rail Corporation of New South Wales ("RailCorp") and provides maintenance services to the Waratah fleet of trains on the Sydney rail network.

The Maintenance Centre is 2 km in length and between 100 m and 200 m wide consisting of 7 rail lines with a capacity for 1,000 rail cars. Within the Maintenance Centre is a maintenance building that is some 200 m long and 80 m wide.

RailCorp contracted the design and construction of the Maintenance Centre to Reliance Rail Pty Ltd, which now has a licence from RailCorp to operate the

Maintenance Centre. Reliance Rail owns the fixtures and most of the equipment associated with the Maintenance Centre.

Reliance Rail sub-contracted design and construction of the Maintenance Centre to Downer and the provision of the maintenance of the Maintenance Centre for 30 years to EDI Rail PPP Maintenance, a wholly owned subsidiary of Downer.

Downer sub-subcontracted the design and construction of the Maintenance Centre to John Holland.

The Detention System was to comprise a large detention tank under a carpark at the western end of the site with drainage in the rail area to be provided by slotted concrete pipes.

Auburn City Council required that there be incorporated into the Maintenance Centre a stormwater detention system to accommodate a 1 in 50 year storm event.

Ultimately, an alternative detention tank system was adopted. The alternative system used a series of arrays of plastic cells made from panels made from recycled polypropylene. The panels were to be connected to each other horizontally and vertically, covered with geofabric, and buried at specified depths beneath the rail area and a carpark at the western end of the site.

John Holland sub-contracted the design of this alternative system to the second defendant, Kellogg Brown & Root Pty Ltd ("KBR") and the manufacture of the plastic cells to Atlantis Corporation.

The detention system incorporated 2 cell systems, one with 33,000 cells under the carpark and the other with 45,000 cells under the rail area.

The large tank underneath the carpark was exhumed and replaced with a concrete tank after the collapse of the carpark in early 2013. The collapse coincided with the timing of excavations on adjoining land by Laing O'Rourke. After the collapse Downer contended that the cells under the carpark would not have lasted their design life (said to be 100, or alternatively, 50 years) had they not been replaced following the carpark collapse.

The tanks under the rail area are still in place however after the carpark collapse Downer contended that depressions were observed in the rail which demonstrated systemic failure of the Detention System in the rail area and that the Detention System will not last its design life and required replacement.

Downer commenced proceedings against John Holland, KBR and Atlantis claiming damages of more than $50 million alleging the deficiencies in the Detention System were the result of poor construction and design, particularly the use of the Atlantis cells.

Atlantis is now in administration and QBE its public and product liability insurer was joined in the proceedings in place of Atlantis in the event QBE was liable to cover Atlantis for its liability arising from negligence or misleading and deceptive conduct or breach of the supply contract.

Downer claimed it suffered loss under the contract between it and Reliance Rail as it is obliged to replace the Detention System, using slotted concrete pipes, as was originally planned, at a cost of some $28.6 million.

Downer also claimed that under its contract with John Holland, and by reason of John Holland's allegedly misleading or deceptive conduct, John Holland must indemnify it for the $28.6m but also for $4 million it expended investigating problems in the rail area and $4 million it incurred concerning works in the rail area, and some $10.6 million it incurred remediating the carpark following the cell collapse.

EDI Rail alleged that, if it has any obligation to rectify the Detention System, the loss it would suffer is also caused by the misleading or deceptive conduct of John Holland, KBR or Atlantis.

John Holland contended that if it had any liability to Downer (or EDI Rail) it was entitled, on various bases, to pass this liability on to KBR and Atlantis (and thus QBE).

KBR made a similar claim against Atlantis (and thus QBE), assuming it was liable to either Downer or John Holland.

Downer also alleged that each of John Holland, KBR and Atlantis owed it a duty of care and that it suffered loss as a result of a breach of those duties however the claim was abandoned during the course of the hearing as Downer and EDI Rail accepted the claims were for "pure economic loss" as neither had suffered damage to property it owned as any property damaged belonged to others.

The case involved a myriad of issues and Downer ultimately failed in the claim.

The Court found Downer had not proved on the probabilities that the carpark collapse was the result of the design of the Detention System, the Detention System under the rail area will not last its design life, or the Detention System under the carpark would not have lasted its design life had it not collapse. Those findings led to the conclusion there was no relevant consequence to whatever shortcomings there may have been in the design of the Detention System.

Stevenson J found that Atlantis had represented that the cells had a "strength" of 263 kPa and they did not. However, Stevenson J also found that neither Downer or EDI Rail suffered any loss by reason of that misrepresentation.

Stevenson J also found that a deficiency in KBR's design of the Detention System was that it took no account of reduction in long term strength caused by

creep in plastics and evidently, this was because KBR was not aware of that phenomenon. However as Stevenson found it was not proven there was a need to rectify or repair the Detention System there was no loss that was proved.

Whilst the case went against Downer and EDI Rail on the liability issues there was another nail in the coffin for the claim against Atlantis as it was in administration and QBE was resiting the proceedings on the basis the insurance policy did not respond to the claim for pure economic loss.

The insuring clause in QBE's policy became yet another hurdle for Downer and EDI Rail.

Insurance policies often contain definitions which prescribe meanings for words and phrases.

An insuring clause will usually refer to the terms "Compensation", "Occurrence", "Personal Injury" and "Property Damage" and these may well be defined to have special meanings. In Atlantis' policy they were defined.

The insuring clause was in standard terms as follows:

> *"We agree…to pay to You…all amounts which You shall become legally liable to pay as Compensation in respect of...Property Damage…happening during the Period of Cover…and caused by or arising out of an Occurrence in connection with Your Business."*

So the policy provided cover in respect of Property Damage.

QBE argued "in respect of" property damage in a liability policy is equivalent to "for" property damage with the result that the policies were construed to be limited to a liability to the owner or lessee of the property alleged to be damaged.

Stevenson J noted whilst there was legal precedent in the UK for that argument the Full Court of the Federal Court in *Siegwerk Australia Pty Ltd (in liq) v Nuplex Industries (Aust) Pty Ltd* accepted that a claim for economic loss under a similar insuring clause could be a claim "in respect of" property damage where the economic loss was sufficiently causally connected to property damage. Stevenson J was inclined to follow the reasoning in *Siegwerk* as he considered it more persuasive. The phrase "in respect of" was given wide import and would have covered a claim for pure economic loss where there was causal connection to some property damage, even damage to property that was not owned by the claimant.

But there were definitions in the insuring clause and that created a further issue.

"Compensation" was defined, relevantly, to mean "monies paid or…to be paid by judgment…for…Property Damage" (emphasis added).

Stevenson J observed that incorporation of the definition of "Compensation" into the insuring clause (leaving the other defined terms in place for simplicity) had a somewhat awkward result with the clause providing:

> *"We agree…to pay to You…all amounts which You shall become legally liable to pay as [monies paid or…to be paid by judgment for Property Damage] in respect of…Property Damage…happening during the Period of Cover…and caused by or arising out of an [event neither intended or expected causing that Property Damage] in connection with your business"*

The insuring clause expanded used the expressions "for", "in respect of" and "caused by or arising out of" property damage.

Stevenson J observed:

> *".. the effect of the insuring clause appears to me to be that QBE agreed, relevantly, to indemnify Atlantis for any legal liability Atlantis may have:*
>
> *(1) by reason of a judgment "for" property damage;*
>
> *(2) which judgment is "in respect of" property damage which;*
>
> *(a) happened during the relevant Period of Cover; and*
>
> *(b) was "caused by or aris[es] out of" an unintended and unexpected event.*
>
> *Thus, the effect of the insuring clause is that it is only enlivened if, relevantly, a judgment is entered against Atlantis "for" property damage. The judgment must also be "in respect of" property damage "caused by or arising from" an unintended and unexpected event.*
>
> *It was common ground before me that, .. the claims made by Downer, John Holland and KBR against Atlantis are not claims "for" property damage suffered by any one of those parties*."

Stevenson J found the claims made by Downer, John Holland and KBR against Atlantis were not claims "for" property damage and that, accordingly, the QBE policy would not have responded to them.

As can be seen the use of the phrase "in respect of" instead of "for" when referring to Property Damage would have had a wider application and have triggered QBE's policy but when the definition of Compensation was incorporated into the insuring clause that definition called for the liability to pay compensation to be for property damage and not some other loss such as pure economic loss.

As a consequence of the definition of Compensation in the policy QBE was not liable to indemnify Atlantis for any claim for pure economic loss made against Atlantis.

The case serves as a reminder to insurers, insurance brokers and businesses that words in a policy that have special meanings and are defined in a policy can and do impact on the cover which an insurer provides and claims for pure economic loss are not claims for

property damage and will not be covered where the policy only covers liability "for" property damage. The words, phrases and definitions in an insurance policy are critical when it comes to examining the cover the policy provides.

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Employment Practices Liability Insurance– You Cannot Seek Cover for Pecuniary Penalties Where There is A Personal Payment Order

Management liability insurance and employment practices liability insurance provide cover for compensation and awards of damages and costs payable to employees arising from an act or omission committed by an employer with respect to any employment, prospective employment or dismissal from employment. The cover often extends to pecuniary penalties imposed under a law or regulation.

The *Fair Work Act 2009* provides protection of certain rights including workplace rights, the right to engage in industrial activities, the right to be free from unlawful discrimination and the right to be free from undue influence or pressure in negotiating individual employment arrangements. These rights are protected from certain unlawful actions including adverse actions.

Adverse actions include:

- an employer dismissing an employee, injuring them in their employment, altering their position to their detriment or discriminating between them and other employees;
- an employer refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers;
- an employee taking industrial action against an employer.

The *Fair Work Act 2009* prohibits persons taking adverse action against another person because they have a workplace right, has or has not used a workplace right or proposes not to use a workplace right.

Pecuniary penalties of up to $12,600 for an individual and $63,000 for a corporation can be imposed for a contravention of the general protection provisions in the *Fair Work Act 2009* including those provisions that prohibit adverse actions.

One of the purposes of a pecuniary penalty order is to discourage and deter future breaches of the *Fair Work Act 2009* by an employer. However, where an employer is entitled to insurance and is indemnified for a pecuniary penalty, the pecuniary penalty may not have the same deterrence effect.

The question has recently arisen as to whether or not the Federal Court can make an order which effectively prevents persons from seeking indemnification from others in respect to pecuniary penalty orders.

That case did not involve an insurance policy, rather it involved the potential indemnification of a union official by the CFMEU after pecuniary penalties totalling $18,000 were imposed on the official.

Myles, the vice president of the CFMEU, had organised and participated in blockades of a construction site and made threats with the intention of coercing construction companies to comply with requests of the CFMEU. Each of Myles and the CFMEU admitted that by that conduct they had engaged in contravened Section 348 of the *Fair Work Act 2009* which is a civil remedy provision under that Act.

The Fair Work Building Industry Inspectorate (ABCC) pursued a civil penalty order and the proceedings were heard before Mortimer J as a plea in relation to penalty. Mortimer J made declarations of contraventions of the *Fair Work Act 2009* and imposed pecuniary penalties on Myles totalling $18,000 and penalties totalling $60,000 on the CFMEU.

An order was sought by the ABCC that the CFMEU not directly or indirectly howsoever indemnify Myles against the penalties imposed upon him. In essence, a non indemnification order was sought. It was thought that such an order might cause Myles to think more carefully about his actions in the future.

The trial judge acceded to the request for that order and not surprisingly Myles and the CFMEU challenged the Court's power to make a non indemnification order.

The challenge was heard by the Full Court of the Federal Court who determined that Section 545(1) of the *Fair Work Act 2009* did not give the trial judge the power to make a non indemnification order and that the trial judge had denied Myles and the CFMEU procedural fairness by deciding that penalties might or would be paid by funds that came from the public purse.

However, that was not the end of the matter. The case went on to the High Court and in February 2018 the High Court determined that when it came to pecuniary penalty orders there were provisions in the *Fair Work Act 2009* that permitted orders to be made which could have the effect of preventing those who have pecuniary penalties imposed on them for contravening the *Fair Work Act 2009* from seeking payment of the pecuniary penalty by others.

The High Court concluded Section 546 of the *Fair Work Act 2009* permits a judge to make a personal payment order in terms that a person not seek or accept indemnity from another however the Court does not have the power to order a party not to indemnify a person.

A personal payment order falls naturally within the ambit of the implied power of the legislation and is incidental to the express power to impose the pecuniary penalty however an order against a party other than the party subjected to the pecuniary penalty could not be an order regarded as an exercise of powers incidental to the imposition of the penalty.

The High Court concluded that there was power to make a personal payment order where Myles would be obliged to pay the penalty personally and not seek indemnification from the CFMEU however no order could be made against the CFMEU.

This decision could have a significant impact on management liability insurance and employment practices liability if Courts become inclined to the view employers should meet pecuniary penalties out of their own funds rather than through insurance.

In light of the High Court's decision, Courts considering adverse action claims and pecuniary penalties which might be imposed have the power to make a personal payment order which would prevent an employer from seeking cover from its management liability/employment practices liability insurer for the pecuniary penalty.

Contravening a civil penalty order in the *Fair Work Act 2009* is not a criminal offence. Section 549 of the Act makes that fact plain. Accordingly there is no legal impediment to offering insurance which covers a pecuniary penalty. However, that does not mean there is no risk that the insurance which can be taken out will not be available. Will we see personal payment orders considered by the Courts as an option where there is adverse action taken by an employer and a pecuniary penalty to impose.

Interesting times are ahead.

There is little doubt personal penalty orders will become more common where pecuniary penalties are imposed on employees of Unions for contraventions of the Fair Work Act. However we will wait and see whether or not personal payment orders against employers become a problem for employers that will restrict access to insurance cover. There would be even greater concerns for businesses if personal payment orders were considered as an option and within the power of the Courts in prosecutions of businesses for breaches of work health and safety legislation.

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AFCA The New One Stop Shop to Deal with Financial System Complaints

The Government's new one stop shop to deal with financial system complaints is a few steps closer with the passing of the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018 in February, the commencement of that legislation on 5 March 2018 and the announcement that Helen Coonan a past Minister of Revenue and Assistant Treasurer, as the Chair of the Australian Financial Complaints Authority ("AFCA").

AFCA will replace the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT). Members of those dispute services will stay on for 12 months to deal with disputes lodged during the transition period as AFCA sets up readies itself to receive its first disputes from 1 November 2018.

Under the new legislative framework, AFCA's operating rules — known as its terms of reference — will set out the way in which AFCA will govern its operations.

AFCA will deal with financial service disputes with the following monetary limits:

- a monetary limit of $1 million and a compensation cap of $500,000 for most non-superannuation disputes;
- unlimited monetary jurisdiction for superannuation disputes;
- no monetary limits and compensation caps for disputes about whether a guarantee should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence; and
- a monetary limit of $5 million and a compensation cap of $1 million for small business credit facility disputes.

When FOS deals with an insurance dispute it currently has power to order compensation up to $309,000 and in a claim against a General Insurance Broker it can award up to $166,000.

AFCA is yet to publish its Terms of Reference and we will need to wait and see if the are specific limits for different types of disputes and whether the insurance broking industry will find itself facing professional indemnity claims managed by AFCA with potential compensation awards of up to $500,000.

Australia now has a new external dispute resolution (EDR) framework and an enhanced internal dispute resolution (IDR) framework for the financial system.

The enhanced IDR framework will require AFSL holders to report their IDR activities to ASIC requirements and allow ASIC to publish the information it receives. This change will improve transparency about the performance of financial firms in relation to their IDR activities.

Australian financial services licensees (AFS licensees), unlicensed product issuers, unlicensed secondary

sellers, Australian credit licensees and credit representatives, regulated superannuation funds (other than self-managed superannuation funds), approved deposit funds, retirement savings account (RSA) providers, annuity providers, and life policy funds and insurers (Financial Firms)will all be required to be members of AFCA.

Consumers and small businesses will be able to access AFCA which will provide an EDR scheme that will determine financial complaints with their decisions being binding on Financial Firms.

AFCA will be based on an ombudsman model and will be established by industry as a company limited by guarantee. Financial Firms will be required to be members of AFCA and fund the company. AFCA's members will be contractually bound to comply with AFCA's operating rules, which will be included in AFCA's terms of reference.

The scheme will be cost free for consumers.

To ensure AFCA maintains an effective scheme an independent assessor will have oversight over the entire scheme.

ASIC will also have power to increase the limits on the value of claims or remedies that can be made under the AFCA scheme and require AFCA to comply with legislative or regulatory requirements that apply in relation to the AFCA scheme.

With 7 months to go before AFCA accepts its first dispute AFSL holders need to begin preparations for Australia's new EDR system.

Financial Service Licensees will need to amend financial services guides and product disclosure statements to incorporate details of the new EDR scheme. That will create some challenges. Documents issued during the transition period which will apply to financial services that extend beyond the transition period may need to reference both the current and future dispute regimes.

Internal Dispute Resolution processes will need to be reviewed.

Compliance procedures will need to be implemented to capture and report details required by ASIC about the performance of IDR activities.

Processes for managing AFCA complaints will also come to the fore.

The next 6 months will see a lot of activity from AFCA and we will bring to you further information as it is published. Publication of the Terms of reference of AFCA will be the next piece on the puzzle to deliver clarity on Australia's new one stop shop for financial services disputes for consumers and small businesses.

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$120m and Rising in Refunds For Add-On Insurance Customers

ASIC has announced that refunds of over $120 million will be paid to customers who were sold add on insurance products by 4 insurers and one warranty provider following ASIC's investigation into the sale of add-on insurance by motor dealers, and, there may be more refund programs to come.

In 2013 the Government introduced a ban on conflicted remuneration in the Corporations Act 2001 as part of its Future of Financial Advice (FOFA) reforms.

The FOFA reforms prohibited an AFS licensee paying conflicted remuneration, defined as benefits that can be reasonably expected to either influence the choice of financial product recommended to a customer or the advice given to customers.

In late 2016 ASIC published its report on the add-on insurance market and sales of add-on insurance through motor dealers determining the market was failing consumers.

ASIC found that between 2013 and 2015 consumers paid $1.6 billion in premiums and received only $144 million in successful insurance claims (or 9 cents in the dollar), and that car dealers earned $602 million in commissions - over four times more than consumers received in claims.

ASIC identified unfair conduct by a number of insurers offering add-on insurance. Some of the extended warranties offered by car dealers or finance brokers and insurers were seen to be of limited value.

There were various types of add-on insurance investigated including insurance or warranties that covered:

- for loan repayments on finance for your car if you die, suffer a traumatic illness or become disabled or unemployed (CCI Insurance);
- the difference between what your comprehensive car insurance pays out, and what you paid for the car (GAP Insurance);
- damage to the tyres and rims of your vehicle's wheels(tyre and rim insurance);
- for repairing or replacing parts of the car when they fail(mechanical breakdown insurance).

ASIC was concerned that in some cases where add-on insurance product was sold:

- there was no gap to cover when you bought the car;
- the GAP policy duplicated existing cover from comprehensive insurance policies;
- you were sold more GAP cover than you needed;
- you could have claimed a replacement vehicle under your comprehensive insurance policy if your

car was a total write-off so there was no gap to cover(especially in the first year after purchase);

- you paid a large deposit for your car and you were unlikely to need GAP insurance as the GAP following a payout from comprehensive insurance would be less that the payout figure for your loan;
- you paid off your loan early and did not need gap cover and you did not receive a rebate under a GAP policy when you paid off your loan early;
- if you were sold the policy when you were self-employed or not in full-time permanent employment, you could not claim for the 'involuntary unemployment' element of the cover;
- if you had modified tyres and rims when you bought the tyre and rim insurance policy you could not make a claim
- lengthy manufacturer's warranties sold provided excessive cover where consumers were likely to trade their car in within the manufacturer's warranty period.

ASIC also found instances where warranty insurance sales staff had the discretion to set the price for the warranty, which was directly linked to their sales commission. The more expensive the warranty, the larger the sales commission.

A number of Insurers and warranty providers have announced they will be providing refunds to some customers who purchased add-on insurance. There are differences in the products each sold and the reasons for insurer providing refunds.

Allianz is refunding up to $45.6 million to 68,000 customers.

MTA Insurance owned by Suncorp is refunding up to $17.2 million to approximately 41,000 customers

National Warranty Company (NWC) is refunding $4.9 million to 6,367 customers who were sold warranties to cover repairs when they bought a car.

QBE Insurance is refunding up to $16 million to over 36,000 customers.

Swann Insurance is refunding $39 million to 67,960 customers.

With the Banking Royal Commission underway Commonwealth Bank has also announced $16m of refunds for 140,0000 people that bought add on insurance providing credit card and loan protection cover in the event of illness.

ASIC's concerns are that "Add-on insurance and warranties are typically sold through car dealerships, when consumers are focused on buying a car. They've probably put a lot of time and effort into researching the car, but may not have considered or even heard of all the 'extra' insurance offered by the dealer."

ASIC has worked with lenders, insurers, car dealers and consumer groups to address the problems in the add-on insurance market and are encouraging consumers who were unfairly sold an add-on insurance policy when they bought a car or motorbike to complain.

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Property Damage & Recovering the Cost of Employee Time Managing Repairs

When property damage occurs it is not uncommon for time to be spent by the management of a business dealing with rectification of the damage. Often the time expended is substantial and businesses will seek to recoup its management costs from those that caused the damage. However management costs will not always be recoverable, as was seen in the decision of the NSW Court of Appeal in *PND Civil Group Pty Limited v Bastow Civil Constructions Pty Limited*.

Bastow was contracted by Energy Australia to undertake work that involved the construction of trenches in public roads, installing cable ducts in those trenches and backfilling and sealing the trenches.

Bastow subcontracted some of that work to PND.

When the work was almost complete Energy Australia asserted some of the work was defective because the backfilling did not comply with specifications and the Local Council became involved and rectification work was identified.

To recoup the costs of the rectification work Bastow commenced proceedings in Court claiming damages. The proceedings were listed for hearing and settled on the day of the hearing with PND agreeing to carry out works. Council approval was required for the works. Unfortunately Council approval could not be procured and Bastow reactivated and amended its claim in the proceedings to allege a breach of the settlement agreement.

When the claim was finally determined the trial judge awarded Bastow $269,355.15. In reaching that figure the judge excluded an amount of $43,669.00 claimed by Bastow for the time its employees spent in connection with the defects and their rectification.

The trial judge noted:

> *"There is no evidence that the allocation of this time resulted in any additional costs to Bastow."*

Not content with that determination Bastow appealed.

There were various issues on appeal with one of those being the determination that cost management time should be disallowed.

Bastow argued it was entitled to recover as an element of damages, the cost management time spent by its employees in dealing with the defective work. Bastow

sought to rely on the decision of the Queensland Court of Appeal in *Orlit Pty Limited v JF & P Consulting Engineers*, where management time had been included in damages allowed. In that case an engineer had utilised "floating' slabs not 'stiffened rafts' in moderately reactive clay for a townhouse development which was not appropriate and the engineer was found liable to pay the developer damages including $44,663.00 for management time. Compensation for management costs was allowed as the Court determined:

> *"Each of the relevant executives ... gave evidence of the time spent and steps taken by him in respect of or associated with rectification work. It was this time which formed the basis of the calculations upon which the damages were assessed. Their evidence in this respect was uncontradicted and (the trial judge) plainly accepted it.*
>
> *It is irrelevant that (the developer) did not prove that any other activities of theirs which would have profited the developer were curtailed by the need to spend time in relation to the rectification works. It is sufficient and reasonable to infer that they would otherwise have been engaged in the developer's business ..."*

So what happened in Bastow's case?

The Court of Appeal concluded there was no evidence that Bastow had incurred any additional expense.

McDougall J, with home McColl JA and Gleeson JA agreed, concluded:

> *"It does not seem that Mr Bastow caused himself or the other staff member involved (who were both employees of Bastow) to be paid overtime or any other compensation or additional remuneration. Nor does it seem that any additional staff or contractor were employed, either to deal with PND's defective work and its consequences or attend to tasks from which Mr Bastow had been distracted because of his attention to those matters.*
>
> *I can understand that where existing staff are paid more or additional staff are employed to manage a breach of contract and its consequences, the damages recoverable may include the amount so paid. I can understand, also, that if no additional staff were employed, but the diversion of management time the breach of contract meant that the employer lost other valuable business opportunities, then damages might be allowed, although their quantification could be a matter of some difficulty. But there was no evidence in the case that Bastow had been prevented from seeking or taking up any valuable business opportunity because Mr Bastow's attention was focused on PND's breach of contract and its consequences."*

Bastow's challenge to the determination that it was not entitled to management expenses failed.

The reasoning of McDougall J makes it plain that there must be clear, cogent evidence of additional expenditure or loss of opportunity on the part of a business that utilises its employees to manage the rectification of property damage in order for the employee's costs to be recoverable.

Claims for damages for property damage need to be properly framed when employees of the business that have suffered the property damage are involved in the management of the rectification of damage. Provided there are additional costs incurred or opportunities lost the opportunity cost of lost employee time can be recovered however there needs to be evidence of those lost opportunities.

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TPD: Fraudulent Claims

In this article we continue our series regarding claims for total and permanent disablement and disablement benefits with particular focus on fraudulent claims.

Life insurers, like general insurers, enjoy rights under the *Insurance Contracts Act 1984* (Cth) ("ICA") to either avoid the policy due to fraudulent non-disclosure by an insured (ICA, s29) or refuse payment of a fraudulent claim (ICA, s56).

Under the ICA, s21 an insured has a duty to disclose to the insurer, before entering into the insurance contract, every matter known to the insured being a matter:

- the insured knows is relevant to decision of the insurer whether to accept the risk and, if so, on what terms; or
- a reasonable person in the circumstances could be expected to know to be a matter so relevant.

In a life insurance context, issues concerning disclosure and non-disclosure before entering into a life insurance contract will generally arise only where the life insurance policy is taken out directly by the insured person who later claims an entitlement to benefits under the life policy.

In relation to group life policies such as those issued to superannuation trustees, the "insured" in that scenario is the trustee and the insurer is the life insurer. The person claiming a TPD benefit under a group policy is a beneficiary who is not a contracting party to the insurance contract.

Nevertheless, there have been examples of the "direct" life policy scenario involving allegations of fraudulent non-disclosure which have led to a life insurer successfully avoiding the policy.

In *Kenan Berk v Westpac Securities Administration Ltd & Anor* (2010), Berk applied for and obtained a life insurance policy with Westpac Securities who was the trustee of the Westpac Personal Superannuation Fund ("Westpac Super").

The life policy contained a TPD benefit in the sum of $500,000.

After injuring his back in 2005, Berk made a claim for TPD under the Westpac policy. Westpac Securities and Westpac Super both declined the claim, alleging Berk had failed to disclose an extensive pre-injury medical history and that such non-disclosures were fraudulent.

The process of Berk obtaining the life policy issued to him by Westpac Super involved the completion of an application form which contained a series of questions concerning his medical history and insurance claims.

Berk was assisted by a Westpac employee who recorded Berk's answers over several meetings with him before having Berk sign the application form.

Berk alleged he gave a full account of previous medical conditions including significant injuries sustained in an explosion while working in a blast furnace for BHP, psychiatric illness arising from the explosion incident, a subsequent back injury and ongoing medical treatment for which he had successfully claimed and received a TPD benefit under another policy.

Despite this, no information was recorded in the application form submitted to Westpac.

Berk commenced proceedings against Westpac Securities and Westpac Super at the NSW Supreme Court. The matter proceeded to hearing before Nicholas J who rejected Berk's evidence and accepted the evidence of witnesses called by Westpac that Berk never provided information to them, when they assisted him in completing the application form, regarding his extensive medical history and prior TPD claim with BHP.

Further, Justice Nicholas accepted the evidence of Westpac underwriters that, had these disclosures been made, the life policy would not have been issued to Berk as he was considered to be an unacceptable risk in accordance with Westpac's underwriting guidelines.

Accordingly, Nicholas J held Westpac was entitled to avoid the policy in accordance with the ICA, s29 by reason of Berk's fraudulent non-disclosure.

In relation to "fraud in the claim", a recent decision of the Federal Court of Australia illustrated the relevant principles.

In *AIA Australia Ltd v Richards (No 3)* (2017), Vincent Richards entered into a life insurance contract with AIA in November 2002 which included disability income cover, a claims escalation benefit and a TPD benefit.

However, the TPD benefit was a monthly payment not a lump sum payment, to which Richards was entitled if he were to establish to AIA's satisfaction that he had suffered "Total Disablement" within the meaning of the life policy which provided:

"TOTAL DISABLEMENT means that, due to Injury or Sickness, the Life Insured:

- *is unable to perform one or more of the important duties of His or Her occupation that He or She must be able to perform to earn income; and*
- *is following the advice of a Medical Practitioner; and*
- *is not working."*

The monthly TPD benefit formed part of the "Disability Income Cover" which was to terminate under the life policy in certain circumstances including Richards' permanent retirement from the workforce, his 65th birthday or death, but did not include termination for fraud.

Richards had worked as an anaesthetic nurse which involved provide care for peri-operative patients.

Between March 2013 and January 2016, Richards made 112 claims for the monthly TPD benefit under the policy. These were referred to as "First Stage Claims" for which AIA took no issue.

Richards then made a further eight claims between February and October 2016 which AIA described as "Second Stage Claims" which were the subject of the dispute.

AIA paid moneys to Richards in respect of the Second Stage Claims totalling $37,629.92.

In the last monthly application form, Richards disclosed he was living in Latvia. On several prior forms he had recorded addresses in the United Kingdom and in Sweden. In his final form, Richards recorded that he would not be returning to work.

Richards also confirmed in each Second Stage Claim application form that he was unable to perform any of his duties in his usual occupation.

He then signed each form, declaring their contents to be true and acknowledging that any fraudulent statements may result in the claim being refused by AIA.

By the end of 2015, AIA had become suspicious of Richards in respect of the First Stage Claims. Investigations began in November 2015 and were concluded in January 2016.

Those investigations showed a facebook page belonging to a "Vinny Richards" which gave information regarding "Medics Direct Training" which was posted from a location in Latvia.

The investigations also revealed a business card on the same facebook page regarding "Holistic Health Riga" which had its own website which referred to the business also trading in Latvia.

Further investigations obtained by AIA confirmed Richards was indeed practising acupuncture and other cosmetic treatments in both Latvia and Sweden during the period of the Second Stage Claims.

AIA engaged surveillance operatives who attended both premises and underwent treatment by Richards. Each incident was covertly filmed without the knowledge of Richards.

In October 2016, AIA wrote to Richards declining his October 2016 claim. The letter expressly stated AIA's contention that the claim was fraudulently by Richards and that all prior claims since February 2016 were also made fraudulently.

AIA gave notice to Richards it had cancelled the life policy.

Richards responded in writing by confirming he had been performing acupuncture treatments but he sought to downplay the extent of his work and his future capability of sustaining it.

AIA brought proceedings at the Federal Court claiming damages from Richards comprising the total Second Stage Claim payments and investigation costs. AIA also sought an order that its costs be paid on an indemnity basis in the sum of $110,000.

Orders were made for the service of the proceedings upon Richards in Sweden pursuant to the Hague Convention for the service of court process in foreign jurisdictions.

In a letter to the Federal Court, Richards conceded he did not disclose his work in Latvia and Sweden to AIA because he believed, had he done so, it might cause him problems such that his benefits would no longer be paid.

Allsop CJ held this was clear evidence of an intention by Richards to consciously and deliberately make false representations to AIA and thus all of the Second Stage Claims were fraudulent.

His Honour awarded damages to AIA for the total amount claimed in respect of the payments made for the Second Stage Claims and the investigations costs together with interest.

The Chief Justice also ordered Richards to pay AIA's costs on an indemnity and lump sum basis in the sum of $110,000.

In our next edition in our TPD series we will consider specific medical injuries/conditions in TPD claims.

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No Double Up on Vicarious Liability

In NSW, an employer is vicariously liable for the actions of their employees, as long as those actions occur during the course of the employee's employment.

But what is the situation if, at the time of an incident, an employee's actions are being directed by a third party? Can both entities be liable for that employee's actions?

On 29 September 2017 Her Honour Associate Justice Harrison delivered judgment in the matter of *Villanti v Coles Group Supply Chain Pty Limited; Villanti v All Staff Australia NSW Pty Limited t/as All Staff Australia*. Her Honour recently handed down a further judgment in relation to costs and in the costs judgment Her Honour again touches on issues of vicarious liability.

The circumstances of the accident are relatively straightforward. On 24 April 2009 Villanti sustained injury to his right leg when a pallet mover struck him in a warehouse owned by Coles Group Supply Chain, to whom Villanti was lent on hire. Villanti commenced proceedings against both Coles and his employer All Staff. The driver of the pallet mover, Mark Douglas, was also employed by All Staff. Villanti and Douglas were placed by All Staff at the warehouse pursuant to a labour hire contract however All Staff remained responsible for training and instruction of employees involved in the safe operation of pallet mover machines. Coles was the owner of the pallet mover.

Villanti contended that Coles were not only liable in failing to ensure a safe system of work but also that they were vicariously liable for the actions of Mark Douglas as the driver of the forklift. All Staff also alleged Coles were vicariously liable for Douglas' conduct, despite the fact that All Staff had admitted in their defence that they were vicariously liable for Douglas' actions as his employer.

The problem facing the plaintiff and All Staff was that the law in New South Wales is that there is no dual vicarious liability.

In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (2013) the plaintiff was injured when a security guard attempted to remove her from the bar when she was intoxicated by pulling a stool from under her. The trial judge found that the security guard had committed an assault and battery for which his employer, Checkmate, was vicariously liable. The difficulty for the plaintiff was that Checkmate had ceased to exist and had no insurance. The plaintiff therefore sought to argue that the hotel was vicariously liable for the security guard's actions. The Court of Appeal found that the security guard was not the hotel's agent, and

further, previous authority from the Courts prohibited a finding of dual vicarious liability.

In this case, both the plaintiff and All Staff attempted to argue that Coles was liable for Douglas' negligence as a consequence of the interaction between the *Motor Accidents Compensation Act* 1999 and the *Workers Compensation Act* 1987, and could therefore be distinguished from the decision in *Day*. It was argued that section 112 of the *Motor Accidents Compensation Act* 1999 creates a presumption of agency.

The argument was unsuccessful.

Her Honour in the costs judgment noted that:

> *"All Staff also actively ran a case that raised a legal argument (with which the plaintiff agreed) that, by virtue of the interaction between the Motor Accidents Compensation Act and the Workers Compensation Act Coles as a statutory agent is liable for the negligence of Mr Douglas. My conclusion in Villanti was that the failure to satisfy Section 3B of the Motor Accidents Compensation Act necessarily meant that Section 112 of the Motor Accidents Act did not operate to impose a relationship of statutory agency between the plaintiff and Coles. I also stated that even if I am wrong, Section 112 cannot be read so as to remove the longstanding principle in Australia against dual vicarious liability as set out in Laugher v Pointer and adopted in Day v The Ocean Beach Hotel Shellharbour Pty Limited. It follows that Mr Douglas was a servant of one or the other, but not the servant of one and the other. The law does not recognise a several liability in two principals who are unconnected. Hence, Coles is not a presumed agent of All Staff."*

Therefore, where All Staff were vicariously liable for Douglas' actions, Coles could not be.

The Court is often challenged to apportion responsibility between various parties who played a role in the direction of the ultimate person that was at fault however the law is clear, two entities cannot be vicariously liable for an individual's actions.

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CONSTRUCTION ROUNDUP

Defective Works – Rectification Costs or Diminution in Value That Is The Question

Construction works create challenges for owners and builders.

When buildings are completed owners are often unhappy with the final product and sometimes the final outcome departs in a minor way from the specifications in the contract. Nevertheless the owner has not received what they bargained for. There has been a breach of contract. The building is defective. The owner is entitled to damages.

But how are those damages measured?

What if the rectification costs would require the building to be demolished and replaced as it is simply impractical to repair the damage?

What if the repair costs are so much that they are totally out of proportion with the loss of amenity suffered by the owner?

An assessment of damages will usually turn to consideration of the costs of rectification and what needs to be done to address the shortcomings in a building.

Rectification costs will not always be the measure of damages. In some circumstances loss of amenities will be the measure of damages However the road to the correct assessment is not always easy to navigate however guidance on the approach to take can be found in the decision of the Full Court of the Supreme Court of South Australia in *Stone v Chapel* where the Court was called on to decide between compensating an owner for the cost of rectifying defective building works and loss of amenity when ceilings of an apartment were built lower than required.

Stone engaged Chapel to construct the shell of an apartment in a retirement village. Stone intended to carry out the fitout of the apartment himself. Stone paid $1,853,254 for the apartment. The building contract provided for a ceiling height of 2700mm. The ceiling height constructed was on average 48mm less than the required height.

Stone sought damages of $331,188 for the cost to rectify the defect.

The proceedings came on for trial with the trial judge ultimately rejecting the claim for damages being assessed in this way as:

- Stone had not elected to seek rectification damages;
- the ceiling as constructed was substantially in accordance with the contract;
- it would be unreasonable to carry out the rectification work contemplated.

The trial judge awarded Stone the sum of $30,000 which he determined to reflect the loss of amenity suffered by Stone on account of the departure from the contractual specification.

There were other issues in the building including issues concerning door frames and window seals however we do not need to trouble ourselves about those issues here.

Stone, who was not satisfied with the judgment and appealed. Stone wanted the apartment he had bargained for.

The High Court in *Bellgrove v Eldridge* laid down the rule that the primary measure of damages in the case of defective building work is the amount required to rectify the defects complained of and so give a person the equivalent of a building on land which is substantially in accordance with the contract.

A building owner is entitled to the reasonable costs of rectification work necessary to produce conformity with the contract if the builder fails to carryout the work properly.

However it is necessary for rectification to be a reasonable course to adopt. The High Court in *Bellgrove v Eldridge* noted:

> *"The qualification, however, to which this rule is subject is that not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second hand bricks, the builder has constructed the walls of new bricks of first quality, the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second hand bricks."*

When it came to what was necessary and reasonable in *Bellgrove*, the High Court noted:

> *"As to what remedial work is both necessary and reasonable in any particular case is a question of fact. But the question whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course."*

The High Court confirmed the nature of the defect is a determining factor.

The decision in *Bellgrove* set the battle lines for determining whether or not rectification costs or loss of amenity would be the measure of damages for defective building works provided to Stone.

But there are other Court decisions that helped to guide the Court in this case.

In *Ruxley Electronics & Construction Pty Limited v Forsyth*, the Court declined to allow rectification costs in a claim for defective building works when a pool was built with a maximum depth of six foot, nine inches, rather than seven foot, six inches. In that case rectification costs were between £5,000 to £10,000 and the judge awarded general damages of £2,500 for loss of amenities.

In one of South Australia's own decisions in *Decesare v Deluxe Motors Pty Limited* the Court determined developers of residential units were entitled to recover the cost of significant rectification works when they had already sold the units as a primary measure of damage, and the appropriateness to allow rectification cost was not displaced merely because the developer did not intend to expend the money to carry out rectifications.

The NSW Court of Appeal in *Westpoint Management Limited v Chocolate Factory Partners Limited* confirmed that neither the sale of property nor the absence of an intention to carry out rectification work was determinative in allowing damages assessed on the basis of rectification costs.

Finally the High Court in *Tabcorp Holdings Limited v Bowen Investments Pty Limited* confirmed that as a general rule rectification costs are the measure of damages for breach of contract. In that case the landlord of a building recovered the cost of rectifying a foyer after the tenant significantly altered it without consent.

The approach was clear. When assessing damages for a failure to deliver a building that corresponds with the specifications set out in a contract, rectification must be a reasonable course to adopt, where rectification costs are to be used to calculate damages.

The Court confirmed that rectification damages will be awarded for a breach of a building contract unless there is a good reason to adopt another measure because the award of damages would be manifestly disproportionate to the obtaining of the contractual benefits.

So what is the formula. In determining whether to depart from rectification costs the following are relevant considerations:

- "the degree of departure from the contractual stipulation;
- the adverse effect of the departure on the functional utility, amenity and aesthetic appearance of the building;
- the reasons, objectively ascertained and commonly known, for which the innocent party made the stipulation which was breached;
- the practical feasibility of rectifying the work including the effects on third parties of attempting to do so, whether or not the innocent party intends to carry out the rectification works, the absolute cost of the rectification work and the disproportion between that cost;
- the value of the building and contract price, the diminution in commercial value of the building, the effect of the departure on the functional utility of the amenity and aesthetic appearance of the building;
- the nature of the wrongdoer's fault for the defect, and the public interest in reducing economic waste."

In this case the Full Court agreed with the trial judge that rectification costs were not reasonable and damages assessed on the basis of rectification costs were not appropriate.

However the Full Court made it plain that there is no hard and fast rule that rectification costs are not available where there has been substantial compliance with the contract. Substantial compliance with the contract is a factor relevant when determining whether rectification damages or compensation for loss of amenity should be awarded but is not a trigger to determine rectification costs should not be allowed.

For Stone, the limited benefit of raising a ceiling by 48mm would be all out of proportion with the costs of approximately $330,000 and consequently the appeal was dismissed.

The determination of damages for defective work always turns on the facts of a case, the extent of the damage, the loss of amenity and the rectification costs that will be incurred. Whether rectification works are reasonable and warranted will always be a question of fact in each case.

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Crooked Builder Finally Behind Bars

Pursuant to section 4 of the Home Building Act 1989 NSW, a person or company is not permitted to enter into a contract to carry out residential building work unless they hold a licence issued by the NSW Fair Trading. The penalties prescribed by the Act for contravening this requirement can be severe: a fine of up to $110,000 for a corporation and up to $22,000 for an individual.

"Residential building work" includes the construction of a dwelling, alterations or additions to a dwelling, and the repair, renovation, decoration or protective treatment of a dwelling. The definition in the Act includes roof plumbing work and the installation of any fixture or apparatus in a dwelling (including the repair of such an installation).

People who wish to engage a builder to either construct a new home or to make alterations to their existing home are encouraged by NSW Fair Trading to first check that their intended contractor has a valid and current licence. However, there are some unscrupulous contractors in the marketplace who rely on the lack of sophistication or the trusting nature of homeowners to profit from them – often by carrying out dodgy or downright dangerous work, or simply by demanding a deposit and not carrying out any work or finishing the job.

But what happens if an unlicensed contractor continues to flout the law? What can be done to protect the public from these characters?

Mr Matthew Rixon recently learned the answer to this question the hard way. Mr Rixon has never held a building licence, but has had a history in NSW, the ACT and Queensland of advertising various types of construction work, demanding deposits from his clients and then carrying out defective work (or no work at all).

Following numerous complaints from his customers, he came to the attention of the media and NSW Fair Trading and the public was warned about him. He was also prosecuted by the Commissioner of Fair Trading for breaching section 4 of the Act. As a consequence of that prosecution, he consented to the court making various orders banning him from offering, agreeing to or undertaking construction work and also banning him from representing that he (or any other company over which he had control) held a valid licence.

However, his consent to these orders did not stop Mr Rixon from continuing with his scams, and he was against prosecuted – this time for contempt of court.

On 9 May 2014 Justice Garling in the NSW Supreme Court held that Mr Rixon was guilty of contempt. He noted that the evidence before the court suggested that, after the orders had come into effect, Mr Rixon had set about creating a network of companies to undertake residential building work, in circumstances where unless proper investigation was undertaken, his connection with those companies would not be obvious. He used a number of false names to deal with customers on behalf of these companies. Generally the work was not done and the deposit which was given was lost.

Justice Garling sentenced him to 18 months imprisonment, with the sentence to be suspended on the condition that during this 18 month period Mr Rixon complied with the orders previously made by the court, carried out 300 hours of community service and was otherwise of good behaviour.

However, even the risk of imprisonment in NSW did not deter Mr Rixon. Over the next few months he continued to advertise under yet another name, quoted for and carried out construction work for consumers under the company name "Affordable Home Services Pty Limited". This construction work included the replacement of a fence and the installation of a driveway at a property in a southern suburb of Sydney.

Following the homeowner's complaint to NSW Fair Trading about the quality of Mr Rixon's work, the Fair Trading Commissioner once again sought an order that Mr Rixon was guilty of contempt of court for breaching the earlier orders.

Mr Rixon submitted to the court that his contempt was not deliberate in that he had had not actually carried out any construction work himself but had only acted in a supervisory role or as a go-between the consumer

and Affordable Home Services. However, Justice Davies noted that the evidence clearly demonstrated that the only person with whom the consumer dealt on the telephone, by email and in person was Mr Rixon himself.

His Honour also noted that Mr Rixon did not own the corporate entity Affordable Home Services Pty Limited (which had been deregistered in 2014) and his advertisements had "borrowed" another company's ABN and ACN (the criminality of which was being dealt with under a separate charge). This again showed a deliberate attempt to deceive the authorities.

The court held that the seriousness of Mr Rixon's offending was aggravated by the element of deliberate planning and deception, along with the fact that Mr Rixon had carried out the same type of actions that were the subject of his previous offending, within months of being given a suspended sentence for these offences.

Accordingly, Justice Davies considered that the prospects of Mr Rixon's rehabilitation were poor and the likelihood of reoffending was high.

In the circumstances, the court sentenced Mr Rixon to 18 months imprisonment with a non-parole period of 12 months.

Postscript: Despite having been earlier advised of the date that his sentence would be imposed, Mr Rixon failed to appear in court, and a warrant was issued for his apprehension. He was finally arrested in Queensland and extradited back to New South Wales to serve his sentence.

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The Importance Of Separate Payment Claims

When a party carrying out construction work makes a claim for a progress payment, it is important that they identify precisely the contract under which the claim is being made. Further, where there are two or more contracts in existence, it is imperative that claims under each of the contracts be made separately if the contractor wishes to enforce rights under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

In *Trinco (NSW) Pty Limited v. Alpha A Group Pty Limited* [2018] NSWSC 239, Trinco had engaged Alpha in March 2017 to carry out some tiling and silicone work at a project at Mascot. This contract provided for payment claims under the Act to be made on or after the 25th of each month. Alpha commenced work and duly submitted a payment claim under the Act on 25 May 2017.

On 6 June 2017, Mr Saleh of Trinco sent an email to Mr Alizada of Alpha instructing them to finish off some of the existing work and continued "[*P]lease email an acceptance for [sic] your end to terminate the contract*".

The next day (7 June), Mr Alizada replied with "[*Y]es I accept to terminate the contract* …". However, on the following day (8 June) Mr Saleh sent a further email to Mr Alizada saying "*Trinco reject and dispute your termination request for the executed contract* …". His email attached an "Amended Contract Agreement" that set out details of the work already done and to be done by Alpha, and the amounts to be paid for that work (including backcharges applicable to the work already completed).

Alpha continued to carry out work at the project and in the meantime on 26 June 2017 submitted a second payment claim under the Act. The details of this claim and the amount scheduled or paid were not before the court.

Alpha made a third payment claim on 7 September 2017 for work to the value of $65,875, plus "extra work" to the value of $25,711, plus loss of profit of $120,697.50.

Trinco served a payment schedule denying that Alpha was entitled to any of the amount claimed. Alpha referred its claim to adjudication under the Act and in doing so withdrew its claim for loss of profit.

Trinco disputed that the adjudicator had the requisite jurisdiction to make a determination of Alpha's claim, on the basis that there was no reference date to support the making of the payment claim.

The adjudicator determined that notwithstanding the purported termination of the contract on 7 June 2017, the work which was the subject of payment claim 3 was done pursuant to that written subcontract, and consequently upheld the claim for the work that was done. The adjudicator, however, did not allow Alpha's claim for additional work.

Tinco commenced proceedings in the Supreme Court of NSW requesting an order in the nature of certiorari that the adjudicator's determination was void for lack of jurisdiction.

McDougall J noted that despite the ambiguous evidence about the purported termination of the written subcontract it was common ground between the parties that it had been duly terminated. His Honour held that in those circumstances the work carried out on and from 8 June 2017 was under a new subcontract that incorporated the terms of the prior contract.

McDougall J also noted that as a consequence of the termination of the original subcontract, and on the basis of the rationale of the High Court in *South Han Breakfast Point Pty Limited v. Lewence Construction Pty Limited* [2016] HCA 52, Alpha's right to make a payment claim under the Act with respect to work

carried out under the terminated subcontract was limited to those rights that had accrued as at the date of termination and no further reference dates had arisen (or would arise in the future) under that old subcontract.

McDougall J held that reference dates had arisen under the new subcontract on 25 June, 25 July and 25 August 2017, and the first of those dates could have been used to support Alpha's second payment claim on 26 June 2017. Accordingly, Alpha had available to it a further two reference dates that could have supported the payment claim it made on 7 September 2017.

However, the payment claim that had been made on 7 September 2017 had included a claim for work to the value of $65,875 – this work having been carried out under the old terminated subcontract. Since there was no reference date to support a claim for payment for this component of work, it followed that Alpha was not entitled to submit a claim under the Act for payment for this work and as such the adjudicator did not have the jurisdiction to make a determination of Alpha's claim.

Although not strictly necessary in view of its finding that the payment claim was invalid, the court also dealt with Trinco's alternative argument that under the Act a payment claim could not be made with respect to work performed under more than one construction contract – ie a separate payment claim needed to be made with respect to each contract. McDougall J referred to the decision of the Queensland Supreme Court in *Matrix Projects (Qld) Pty Limited v. Luscombe* [2013] QSC 4 (which had in turn referred to an earlier decision of McDougall J in *Rail Corporation of NSW v. Nebax Constructions* [2012] NSWSC 6 on slightly different facts). In *Matrix Projects* Douglas J had held that a payment claim comprising work under two or more construction contracts was invalid.

McDougall J noted that the facts in *Matrix Projects* were almost identical to those in front of him, and neither party had challenged the correctness of either *Matrix Projects* or *Nebax*. Accordingly, on the application of *Matrix Projects*, the court held that since Alpha's payment claim included work from the earlier terminated subcontract as well as the new subcontract that payment claim was not valid.

This case provides a good illustration of why it is important to understand whether a contract has technically come to an end (and the ramifications of this). It also highlights the need to properly prepare payment claims made under the Act.

On a practical note, most project managers and administrators are unlikely to have sufficient knowledge of the fine distinctions in the law that were in this case the deciding factors of Alpha's entitlement to pursue payment under the Act, or to appreciate how radically the parties' entitlements can be affected by their everyday communications. In *Trinco v. Alpha* both parties no doubt would have been able to avoid the substantial costs of the court case if they had sought legal advice at the early stage of discussing terminating the original subcontract, and Alpha would have been better placed to make claims under the statutory regime for payment for its work.

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EMPLOYMENT ROUNDUP

Unfairly Dismissed – But I Don't Want My Job Back!

Usually, an employee who claims to have been unfairly dismissed seeks remedies from the Fair Work Commission including an order for reinstatement.

In addition, ordinarily employers oppose such an order on the basis that the relationship necessary in an employment context has irretrievably broken down.

A recent case contains the exact opposite – an employer accepting that reinstatement was appropriate, and an employee not wanting his reinstatement order once he got it. How did this come about?

In *Seitz v Ironbay Pty Ltd t/a City Beach IGA [2018] FWCFB 1341*, the employee was employed as a full-time butcher by a franchised supermarket. In January 2017 he was involved in a verbal altercation with a recently-dismissed employee. He was unhappy with the way in which his employer dealt with this incident and consequently tendered a written resignation on 25 January 2017.

Notwithstanding this, the employment continued, and the conduct of the parties was consistent with the resignation having been withdrawn or revoked.

On 17 April 2017 the employee went off work because of illness. On 5 May 2017 he sent a text message to the employer indicating that he would be fit to return to work on Monday 8 May 2017. Later that day and on the following Saturday and Sunday there were a number of text messages exchanged between the parties.

Some of these subsequent text messages could be construed as a resignation; but others indicated a willingness to return to work. Eventually, the employer sent a text purporting to accept resignation. The employee then denied that he had resigned and stated that he regarded himself as having been dismissed. The employment did not continue beyond that point.

In finding that the employee had been dismissed, and that the dismissal was unfair, the FWC made these findings:

- the employee was absent from work on sick leave, supported by medical certificates at the relevant time;
- between Friday 5 May 2017 and Sunday 7 May 2017 (including on Saturday evening and in the early hours of Sunday morning), the employer sent 33 text messages, which at best could be characterised as nuisance texts;
- some of these texts included a repeated message that "friends" were waiting for him upon his return to work - taken by the employee as a veiled threat;
- although the employer alleged in the proceedings that the employee had been stealing from the business, it did not produce evidence which supported this, and did not raise this allegation until the claim was filed;
- the employer did not believe on reasonable grounds that the employee had engaged in conduct sufficiently serious to justify summary dismissal, nor that there was any other valid reason for dismissal;
- the employer was a small business employer within the meaning of s 23 of the FW Act, and had no dedicated human resources function.
- the employee had obtained a new job as a butcher on 18 July 2017.

In the determination of what would be the appropriate remedy, the employee argued that reinstatement was not appropriate because of the allegations made by the employer that he was "lazy", "argumentative" and "a thief".

The employer submitted that reinstatement was appropriate provided the employee did not bully other employees, did his job properly and did not steal.

The FWC was of the view that, having been vindicated of the allegations made against him, and in light of the evidence of the employer that it would welcome him back, reinstatement was appropriate. The Deputy President said:

> *"Assuming a positive approach on both sides, I am satisfied that there is a reasonable chance that the employment relationship can be restored with the necessary level of mutual trust between [the employee] and his employer."*

The employee sought to appeal this outcome. Having found alternate employment he clearly did not want his old job back, and wanted compensation for lost pay.

The Full Bench of the FWC upheld the appeal. The reinstatement order was overturned, and the claim sent back to the Deputy President to determine appropriate orders (for compensation).

In relation to reinstatement, the Full Bench set out the following guiding principles:

- Whether to order a remedy where a dismissal has been found to be unfair is a discretionary one, and it may be exercised by not ordering any remedy at all.
- The Act underscores the primacy of reinstatement as a remedy.
- The relevant question in determining whether to grant the remedy of reinstatement is whether reinstatement is appropriate in the particular case.
- This involves the assessment of a broader range of factors than merely the issue of practicability.
- Reinstatement might be inappropriate in a whole range of circumstances, such as where it would almost certainly lead to a further dismissal because a post-termination discovery of serious misconduct, or where the employer no longer conducts a business into which the employee may be re-appointed.
- The fact that the employer has filled the position previously occupied would rarely, of itself, justify a conclusion that reinstatement was not appropriate.
- In relation to the impact a loss of trust and confidence may have on the question of whether reinstatement is appropriate, the following applies:
  - Whether there has been a loss of trust and confidence is a relevant consideration, but not the sole criterion.
  - Each case must be decided on its own facts, including the nature of the employment concerned. Sometimes a ripple on the surface of the employment relationship will destroy its viability but in most cases the employment relationship is capable of withstanding some friction and doubts.
  - An allegation that there has been a loss of trust and confidence must be soundly and rationally based. The onus of establishing a loss of trust and confidence rests on the party making the assertion.
  - The reluctance of an employer to shift from a view, despite a tribunal's assessment that the employee was not guilty of serious wrongdoing, does not provide a sound basis to conclude that the relationship of trust and confidence is irreparably destroyed.
  - The fact that it may be difficult or embarrassing for an employer to be required to re-employ an employee is not necessarily indicative of a loss of trust and confidence so as to make restoring the employment relationship inappropriate.

Here, the Full Bench found that the employer's behaviour meant that there was no reasonable possibility that they could work productively together in the future. Also, the fact that the employee had found alternate employment was critical. The Full Bench said:

"Where that new employment is satisfactory to the employee, it will be no remedy at all to reinstate the employee to the pre-dismissal employment to which the employee, for well-founded reasons, has no desire to return."

So, reinstatement will always be on the cards for unfair dismissal, but can play out in surprising ways.

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The National Employment Standards

In previous editions of GD News we have looked at the interaction between contracts of employment, Modern Awards and Enterprise Agreements. Underlying all of those, and forming the minimum conditions of employment, are the National Employment Standards under the Fair Work Act 2009 (Cth).

What are the National Employment Standards?

The National Employment Standards (NES) are the 10 minimum standards of employment which cover the following:

- Maximum weekly hours of work – 38 hours per week, plus reasonable additional hours.
- Requests for flexible working arrangements – certain employees can ask to change their working arrangement.
- Parental leave and related entitlements – up to 12 months unpaid leave and the right to ask for an extra 12 months unpaid leave. Also includes adoption related leave.
- Annual leave – four weeks paid leave per year, plus an additional week for some shift workers.
- Personal/carer's leave and compassionate leave – 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave as required.
- Community service leave – unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.
- Long service leave – paid leave for employees who have been with the same employer for a long time.
- Public holidays – a paid day off on a public holiday (unpaid for casuals), except where reasonably requested to work.
- Notice of termination and redundancy pay – up to 5 weeks notice of termination and up to 16 weeks redundancy pay, both based on length of service.
- Provision of a Fair Work Information Statement – must be provided by employers to all new employees.

Who do the NES apply to?

The NES apply to all employees covered by the national workplace relations system.

The national workplace relations system covers:

- all employees in Victoria (with limited exceptions for State public sector employees), the Northern Territory and the ACT
- all employees on Norfolk Island, Christmas Island and the Cocos (Keeling) Islands
- private enterprise employees in New South Wales, Queensland, South Australia and Tasmania
- local government employees in Tasmania
- those employed by a constitutional corporation in Western Australia (including Pty Ltd companies)—including some local governments
- those employed by the Commonwealth or a Commonwealth authority
- waterside employees, maritime employees or flight crew officers in interstate or overseas trade or commerce.

Only some entitlements, however, apply to casual employees. These are:

- maximum weekly hours
- two days unpaid carer's leave and two days unpaid compassionate leave per occasion
- community service leave (except paid jury service)
- public holidays
- provision of the Fair Work Information Statement.

In addition, casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment are entitled to:

- make requests for flexible working arrangements
- parental leave and related entitlements.

There are also two NES that apply to all full-time and part-time employees, whether they are covered by the national workplace relations system or not. These are:

- parental leave and related entitlements
- notice of termination.

How do the NES apply?

Terms in awards, registered agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and those that do have no effect.

However terms in such industrial instruments can affect the operation of the NES in certain ways.

For example, they may specify terms that deal with:

- averaging an employee's ordinary hours of work
- the cashing out and taking of paid annual leave
- the cashing out of paid personal/carer's leave
- extra personal/carer's leave or annual leave in exchange for foregoing an equivalent amount of pay
- the substitution of public holidays
- situations in which redundancy entitlements do not apply.

They may also supplement the NES by providing entitlements that are more favourable for employees.

A contravention of the NES may result in penalties of up to $12,600 for an individual and $63,000 for a corporation.

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WORKERS COMPENSATION ROUNDUP

Are Work Injury Damages and Reinstatement Mutually Exclusive Remedies for Injured Workers

Compensation for injured workers in NSW is governed by the *Workers Compensation Act 1987* (the "Act") and employers must pay statutory benefits as well as damages where the employer is negligent. In addition the Act provides that injured workers terminated as a result of their injuries may seek reinstatement to employment within two years of their termination if they have become fit for work. They do not need to become fit for the inherent duties of their pre-injury position, just fit for work.

A damages assessment takes into account the likely future employment of a worker but often there is no reinstatement application on the table when the damages claim settles or is determined. Sometimes when the worker's damages are assessed they are still employees but not working. When the damages claim comes to an end, workers may find that at some time later so does their employment. So what are an injured worker's rights to reinstatement?

The Courts have confirmed that an entitlement to damages is not mutually exclusive to the right of reinstatement and the rights exist together. A worker is entitled to pursue both rights and secure damages and reinstatement at a later time. This was confirmed by the Court of Appeal in *Public Service Association & Professional Officers' Association Amalgamated Union of NSW v Industrial Relations Secretary on Behalf of the Department of Justice [2015] NSWCA 386*.

Pursuant to Section 241 of the Act:

> *"(1). If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application. ...*
>
> *(3). The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement."*

Pursuant to Section 242 of the Act:

> *"(1) If an employer does not reinstate the worker immediately to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), the worker may apply to the Industrial Relations Commission for a reinstatement order….*
>
> *(3) The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement."*

In proceedings for reinstatement it is presumed that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received and the employer bears the onus of establishing that the injury was not a substantial and operative cause of the dismissal of the worker if they were dismissed for other reasons.

An employer who, within 2 years after dismissing an injured worker, employs a person to replace the dismissed worker must inform the replacement worker that the dismissed worker may be entitled to be reinstated to carry out the work for which the person is to be employed

These obligations dovetail with the obligation imposed by the Workplace Injury Management and Workers Compensation Act 1998 ("WIM Act") that require employers to make suitable duties available to injured workers during their employment.

If a worker who has been totally or partially incapacitated for work as a result of an injury or illness is able to return to work and the worker requests suitable work, the employer must provide suitable work for the worker. Suitable work may require the employer to reduce their hours, modify their duties, give them a different job or provide training so they can do the different job.

Under section 49 of the WIM Act the employer is obliged to provide suitable employment so far as is reasonably practicable.

Workers with injuries that give rise to work injury damages claims will often contend that as their employment has been terminated and they are injured they will not find work as future employers will shy away from employing them.

Those workers employed at the time their work injury damages claim is dealt with are often fearful that their employment will come to an end after settlement of their work injury damages claim. But if they are terminated because of their injury they have a right to seek reinstatement.

So what happens when rights of reinstatement and entitlements to work injury damages collide?

In the *Public Service* case a worker suffered an injury to his left knee and back during the course of his employment with the NSW Corrective Service (the "Department"). He lodged a workers compensation claim and after undergoing a surgical procedure was unable to perform his pre-injury duties and was medically retired.

He then pursued a claim for work injury damages incorporating claims for past and future economic loss. The work injury damages claim settled bringing an end to his rights to payments under the Workers Compensation Act 1987.

The injured worker subsequently applied to the Department for reinstatement to his employment as a correctional officer. The application was rejected and proceedings were subsequently commenced by his Union in the Industrial Relations Commission.

It was common ground the injured worker was medically retired on 25 October 2011 and his medical retirement constituted a dismissal on the grounds of unfitness for work.

It was also agreed the injured worker was fit to perform his pre-injury duties as a correctional officer following the resolution of his work injury damages claim as he had produced a medical certificate complying with Section 241(3) of the Act.

The Department sought to challenge the right to bring a reinstatement application after the settlement of the work injury damages claim and asserted the worker was no longer an injured worker as he was no longer entitled to receive compensation under the Act.

A single Member of the Industrial Relations Commission found the injured worker was able to apply for reinstatement. The Department appealed the finding and the Full Bench of the Industrial Relations Commission considered it did not have jurisdiction to order the reinstatement. The Union then appealed.

The appeal was eventually heard by the NSW Court of Appeal and the Court determined that even though the injured worker was no longer entitled to receive compensation, he would still have an entitlement to reinstatement otherwise the purpose of the workers compensation legislation would be undermined.

Therefore the settlement of a work injury damages claim has no bearing on the entitlement to reinstatement. Employers need to be mindful of that fact when they terminate an injured worker.

Further, employees do not need to be reinstated to their original position.

In *Chau v Visy Board* an injured worker was reinstated to a position different to his pre-injury role.

In that case the worker sought reinstatement after he produced a medical certificate demonstrating he was fit for work The Commission determined it was appropriate for Visy to reinstate the worker subject to the proviso that the employer provide a direction that the worker avoid repetitive and awkward lifting and he not lift more than 20kg in a static lift or 16kg in a dynamic lift. The Court directed that the worker shall at all times comply with the direction.

The worker injured his back at work. Prior to his termination Visy had procured an independent medical assessment which noted the worker was fit for his pre-injury duties status but was at risk of aggravating his underlying degenerative condition and he should avoid heavy manual handling and repetitive awkward lifting. It was noted unrestricted pre-injury duties did have a risk of aggravating the worker's spinal condition which would worsen over the years. Visy determined to terminate the worker on the basis that he was unsuitable for the inherent physical requirements of his former role. Three months after his termination he sought reinstatement but the employer declined to reinstate him. The worker then sought an order for reinstatement from the Industrial Relations Commission.

The Commission noted that to resist a Reinstatement Application the onus was on the employer to satisfy the Commission that the roles of machine operator and assistant machine operator were either not available or that it was not reasonable for the employer to make them available. It was noted that "available" does not mean "a pre-existing specified position designated by the employer which is vacant". The term "available" is taken to mean "another position was of avail, to, capable of being used by, or at the disposal or within reach of, the employer – whether or not it was vacant at the time."

The Industrial Relations Commission found the employer was liable to reinstate the worker to a position other than his pre-injury employment and was required to provide modified duties. In addition the employer was ordered to pay compensation to the worker being his ordinary weekly rate of pay less any workers compensation payments received from the

date he applied for reinstatement to the date of his reinstatement pursuant to the Commission's order.

The obligation to reinstatement can also give rise to an obligation to reinstate to a part time role.

In *Narelle Hillman v NSW Trains [2017] NSW IRComm 1056* the employer was ordered to reinstate a worker as a part time employee in a customer service or administrative role.

The worker was employed fulltime in a PSS role which was similar to the role of a train guard with the added responsibility of being the on-board supervisor of the train crew as well as the "face to face" representative with customers throughout the train service. She suffered a hip injury at work and the employer determined she was "permanently unable to carry out demands" of the PSS position "with a good prognosis for a continued capacity to work".

The applicant subsequently applied for and worker in a number of positions consistent with her work-related injuries and was employed in a part-time customer service role when she was terminated as she was not fit for the inherent physical requirements of her employment.

Fifteen months after the termination the worker sought reinstatement to a part time customer service role but her application was declined as there were better applicants for the job she sought according to the employer.

The purpose of the reinstatement provisions is to "provide a mechanism to assist an injured worker to return to work either in his or her previous position or such other position for which he or she is fit".

However a worker cannot seek reinstatement to a role that is more advantageous than the worker's primary employment roles at the time that they first became unfit for employment due to injury.

The Industrial Relations Commission in this case ordered reinstatement to a part time customer service role together with the payment of compensation in an amount equivalent to what she would have earnt but for being dismissed from the date of her application for reinstatement to her reinstatement less any workers compensation payments received. The Commission also declared that the period of employment with the employer shall be taken not to have been broken by the dismissal. This order restored entitlements to annual leave and long service leave.

The Commission found the worker was fit for a kind of employment being part-time in nature and she had sought reinstatement to a part time role.

The right to reinstatement is not removed for injured workers who receive work injury damages.

Injured workers that are terminated by reason of their injuries can seek reinstatement within 2 years of their termination if they become fit for any form of employment. They can be reinstated to the same position, a different position or part time positions and employers may need to modify the workplace.

Any refusal to reinstate an injured worker can result in compensation orders and orders restoring continuity of employment to deliver annual holiday pay and long service leave benefits.

Employers must be mindful that if they have terminated an injured worker due to their injuries they may receive an application for reinstatement once the worker becomes fit for some form of employment. If the employer has a position of the type that the worker seeks and the medical evidence on work capacity stacks up the employer will be obliged to reinstate the worker to the kind of employment sought. Workers have 2 years from their termination due to injury to seek reinstatement.

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CTP ROUNDUP

Infants and PTSD Following Motor Accidents. Not In This Case !

Claims for damages for injuries sustained by children of very tender years became a prevailing trend in the NSW CTP Scheme before its reform on 1 December 2017.

There was a proliferation of infant claims for post traumatic stress disorder for children who as a consequence of their age would have little or no perception they had been involved in a motor accident.

Often CTP insurers would take a commercial approach to a claim having regard to the significant legal costs that would be incurred defending claims brought on behalf of infants, choosing to settle rather than dispute the claims. Arguably many of these claims were of a spurious nature.

As the number of infant claims grew CTP insurers began to closely examine infant claims and challenge the medical diagnosis of some doctors who would diagnose children as young as six months of age as suffering from post-traumatic stress order and other psychological injuries.

The challenging of infant claims by insurers has led to withdrawal of many of those claims. However, some infant claims make their way to the Courts and when those claims proceed to hearing judges are often called to decide on competing views of medical practitioners.

The recent decision of Wilson DCJ in *Atiligan Uluc by his tutor Tayfun Uluc v Ahu Cakir [2018] NSWDC 3*

provides useful guidance on the approach of the Courts in the assessment of psychological injuries in infant claims.

Atiligan was aged three and a half months when he was in a motor vehicle accident in May 2014. At that time, his mother was the driver of the vehicle he was in and he was wrapped in a blanket and restrained in a car capsule.

A motor accidents compensation claim was made on his behalf claiming he had suffered injuries to his neck, right eye, left eye and psychological sequelae. In a claim form signed by his father it was alleged he suffered from nightmares, crying bouts and disturbed sleep patterns.

Ultimately the claim came on for hearing before the Court as an assessment of damages.

In relation to the psychological injury, provisions of the Civil Liability Act 2002 (CLA) were relevant and the issues for the Court were:

- whether Atiligan suffered an impairment of his mental condition ("mental harm", s27, Civil Liability Act 2002 (CLA));
- if so, whether Atiligan suffered consequential or pure mental harm (s27 CLA);
- if pure mental harm, whether the statutory limitations on recovery for pure mental harm arising from shock means that the Atiligan's claim fails (s30 CLA);
- if pure mental harm, whether the harm suffered by Atiligan consists of a recognised psychiatric illness (s31 CLA);
- if mental harm was suffered, whether that injury was caused by the fault of the defendant in the use or operation of the vehicle (Motor Accidents Compensation Act 1999);
- if so, whether the mental harm is a result of and is caused during the driving of the vehicle (s3A MACA);
- whether the negligence was a necessary condition of the occurrence of the harm (s5D CLA).

Atiligan's mum attended a GP the day after the accident and the examination of Atilgan was noted as –normal physical finding today.

Two and a half years later Atiligan was referred to a Psychologist Maria Tzoumacas, who diagnosed a post traumatic stress injury.

Mr Glancey who was a medico legal expert engaged by Atiglan's lawyers and Dr Rikard-Bell qualified by the insurer noted that the plaintiff would not remember the accident, and Wilson DCJ noted in light of that it is difficult to understand how a diagnosis for PTSD can be made out.

After weighing the medical evidence Wilson DCJ concluded:

> *"The fundamental flaw this diagnosis is that, as a matter of common sense and according to the experts on both sides, the plaintiff would not be affected by the trauma or stress of an event of which he had no recollection."*

Wilson DCJ rejected the opinion of Ms Tzoumacas as she did not even attempt to identify the criteria which are met in order to reach her diagnosis.

Wilson DCJ found that Atiligan did not suffer from a recognised psychiatric illness which is a requirement of any claim for psychological injury under Section 31 of the CLA.

Wilson DCJ concluded Atiligan was simply too young to recall the accident or its effects.

Atiligan could not recover compensation for his alleged psychological injury and Wilson DCJ found the only possible injury suffered in the motor vehicle accident was a small cut above an eyelid which healed without difficulty and 2 GP consultations. The cost of that treatment was met by Medicare and totalled $84.60 and that was what Atiligan was awarded. Wilson DCJ reserved the question of costs for another time and left the parties to try to agree costs.

The assessment of damages in infants claims calls for common sense and a careful examination of the expert medical evidence.

Children of tender years who are unlikely to have any recollection of an accident are unlikely to establish they suffer from PTSD.

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Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any Court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.