INTRODUCTION

"Out on the patio we’d sit,
And the humidity we’d breathe,
We’d watch the lightning crack over canefields,
Laugh and think that this is Australia.

Sounds of Then, This is Australia, Ganggajang, 1985


This is the 50th year for Barry.Nilsson. We are pleased to celebrate the continuing of our longstanding relationship with the insurance industry.

The casebook makes reference to all the major insurance related judgements throughout Australia in the 2013 financial year. It traverses a collection of interesting, challenging and educational cases. Close to home the liability of state and local authorities came into focus in Kelly v State of Queensland [2013] QSC 106. The Queensland Supreme Court found for the catastrophically injured plaintiff following him running down a sand dune at Fraser Island. Arguments relating to the obvious risk and dangerous recreational activity were canvassed by the court. Given the issues at stake, it is not surprising that the matter will go on appeal.

Occupiers liability and sporting and recreational type claims have also featured prominently. Whether there was a duty imposed on a landlord to make alterations to a stairway was considered in Sheehy v Hobbs [2012] QSC 333 and in New South Wales the Court of Appeal considered the liability of a ski operator for injuries sustained by an inexperienced student in Perisher Blue Pty Ltd v Harris [2013] NSWCA 38.

Causation loomed large in the medical negligence case of Wallace v Kam [2013] HCA 19 where allegations were made that a medical practitioner failed to warn a patient of 2 distinct material risks inherent in a surgical procedure and only 1 (less obvious) risk eventuated. Professional negligence claims against solicitors are also prevalent with the Hancock family under the microscope in The Hancock Family Memorial Foundation Limited v Fieldhouse (No 5) [2013] WASC 121, a case relating to the professional negligence of a solicitor in regards to a conflict of interest and recovery from an excess insurer pursuant to section 51 of the Insurance Contracts Act.

Section 54 of the Insurance Contracts Act was again in focus in Matthew Maxwell v Highway Hauliers Pty Ltd [2013] WASCA 115. That court decision sent a clear message that section 54 ought to be given a wide ambit in favour of an insured, particularly in circumstances where the insured’s breach of the policy is not causative of the relevant loss. Difficulty remains in reconciling that court’s decision with the decision of the Queensland Court of Appeal in Johnson v Triple C Furniture & Electrical Pty Ltd [2010] QCA 282.

Pleasingly the High Court, in a very important decision, delivered its first judgment on proportionate liability. The judgment in Hunt & Hunt v Mitchell Morgan Nominees Pty Ltd & Ors [2013] HCA 10 was generally good news for insurers as it takes a broad view of when defendants will be “concurrent wrongdoers” who have caused the same loss to a plaintiff.

Apart from the long list of cases in our casebook the industry of course has taken huge strides with amendments to the Insurance Contracts Act. After 10 years in the making notices will be able to be sent under the Act electronically, ASIC will be able to take action against insurers for breach of the duty of utmost good faith by making it a breach of the Act, the duty of utmost good faith will extend to third party beneficiaries and ASIC will have the power to vary, suspend or cancel an insurer’s license for breach of the duty of utmost good faith. There are also changes in relation to the duty of disclosure when eligible contracts of insurance are entered into and renewed, the rights of third party beneficiaries are extended and there are new rules governing the distribution of funds recovered by way of subrogation.

I hope you enjoy our casebook for 2013.

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Barry.Nilsson. Lawyers is a Brisbane-based law firm with a national reputation for our leadership in the areas of insurance & health law, property & commercial law, and family law.

We specialise in selected areas of law, continually refining our expertise in ever-changing legal landscapes. While maintaining our skills at the highest level is essential to our ongoing success as a leading Australian firm, we know it takes more to deliver the best outcome for you.

The real advantage we deliver is based on our ability to focus on your unique circumstances and objectives. We deliver the best outcome through a thorough understanding of your needs, and tailor our advice and actions with this in mind. With our leading practitioners and a strategy focused on you, we deliver a connected advantage.

Our team of 50 insurance and health specialists can confidently claim our place as a market leader. Many years of experience have enabled our team, ably led by experienced partners, to develop a level of industry innovation and strategic leadership on all aspects of insurance and health law that sets us apart from other firms.

We understand the complexity and high-stakes nature of insurance and health matters and recognise that responsibility to act in your best interest is one we take seriously.

To find out more information about Barry.Nilsson. Lawyers please use the links below.

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15. **State of Queensland v Nudd** [2012] QCA 281
   Consideration of the adequacy of an inspection system for spillages in a state prison.

   Liability of a local authority acting as trustee for a slip and fall on stairs within a park.

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The Facts

On 20 August 2004 Debbie Paterson was driving on Kingsvale Road, a rural highway in NSW, when she skidded and lost control of her vehicle. She struck a tree and suffered head injuries, from which she later died. The accident occurred on a stretch of road where the previous day, the defendant Council had been carrying out resurfacing roadworks. Excess gravel was still on the road surface at the time of the accident as it was due to be swept in the final phase of the resurfacing process on the afternoon on the day of the accident. The designated speed limited on Kingsvale Road was 100 km/hr and it was common ground that Ms Paterson was driving slightly under this speed limit at the time of the accident.

The resurfacing roadworks were governed by a Traffic Control Plan. There was no provision in the Traffic Control Plan for any signage advising that the road had been resurfaced or imposing any reduction in speed in those circumstances, or any pictorial signage warning of the risk of slippage due to the presence of loose gravel. The signage which the Traffic Control Plan did provide for, and which was in place on Kingsvale Road at the time of the accident, included a sign advising of the presence of "roadworks", erected approximately 1 km before the start of the roadworks. Within about 60m of the commencement of the roadworks and at various intervals thereafter, there were signs advising that there were no centre lines marked and that vehicles should not overtake, and pictorial signs indicating the potential for windscreen damage from the presence of stones or gravel ("chip hazard" signs).

The plaintiff, Ms Paterson’s partner, brought proceedings against the Council, claiming that the Council had breached its duty to exercise reasonable care to avoid the risk of foreseeable injury to users of Kingsvale Road by failing to erect signage warning of the fact that the road had recently been resurfaced and specifically of the risk of slippage due to the presence of loose gravel on the road; and failing to erect signage limiting or reducing speed from the signposted speed of 100 km/hr in those circumstances.

The Decision

The court held that a speed reduction sign in combination with a pictorial “slippery road” sign should have been put in place in advance of the commencement of the resurfacing roadworks and at appropriate intervals thereafter, to alert road users to the potentially hazardous condition of the road, and that the failure to provide for the signage created a significant and foreseeable risk of harm. The court was satisfied that it was neither burdensome nor onerous for the council to have taken precautions of that kind. As such the Council breached its duty of care to Ms Paterson.

The court then considered whether the special statutory power defence under s43A of the CLA (NSW) applied. The court was satisfied that the Council was exercising the special statutory power of the Council in undertaking resurfacing roadworks may have reasonably made no provision for a “slippery road” sign and speed reduction sign. As such, the defence under s43A applied and the council was not liable.

In the event that the court was in error as to the application of s43A, it then considered whether causation had been established. The court was not satisfied that the precipitating cause of Ms Paterson’s accident was her losing control of her vehicle in the first resurfaced section of road due to the presence of gravel and her unchecked speed. The Court was not persuaded that, but for the failure to provide for and position appropriate signage, the accident would not have occurred.

IN ISSUE

• Whether a local Council breached its duty of care by failing to erect certain signage at roadworks
• Whether a special statutory power defence applied

DELIVERED ON 9 July 2012

READ MORE  click here
The Facts

On 11 October 2008 the respondent, Mr Rodgers, fell in a darkened car park in Crookwell, NSW. The car park was owned and operated by the appellant Council. Prior to the accident, the respondent and his wife had dinner at a hotel across the road. The respondent had parked his car in the north-eastern corner of the car park earlier that evening around dusk. Visible at that time was a wooden log lying horizontally a few feet from a brick wall, in front of where the respondent had parked his car. The log was just below knee level.

From where the respondent parked his car there were two ways of exiting the car park. One was to walk in a direct line from the car to the footpath, which meant crossing the area where the log was situated. The other way was to exit via the vehicular access to the car park which involved walking a few extra metres from the car. When the respondent and his wife had arrived at the car park there was adequate light which meant each route was safe to take. As such, they took the shorter route past the log.

When they returned at 8pm, the car park was in total darkness. The respondent started walking towards the car by the same route he had used when leaving the car earlier. He walked into the log, and fell over, injuring his right knee and shoulder.

The Decision at Trial

The District Court held that the Council was liable for creating a situation where a log was positioned at a height which made it a substantial obstacle and then left the area in complete darkness at a time when members of the public might be expected to park immediately adjacent to the log. The court found that the respondent was not guilty of any contributory negligence and awarded him $422,140 in damages, including $42,000 for past gratuitous care.

The Issues on Appeal

The Council submitted that the District Court had erred by concluding that the Council breached its duty of care; by concluding the respondent was not guilty of contributory negligence; and in awarding damages for past gratuitous care given the requirements of s15(3) of the CLA (NSW).

The Decision on Appeal

The Court of Appeal upheld the District Court’s finding that the Council had breached its duty of care. The risk of someone falling or tripping over the log in complete darkness was plainly foreseeable; the risk was not insignificant; a reasonable person would have taken precautions of either lighting the area or blocking access to where the log was; and the burden of taking precaution by adding lighting was not great.

The Court of Appeal also upheld the District Court’s finding of no contributory negligence on the part of the respondent. The route taken by the respondent was the one that was plainly available and more convenient and it was readily foreseeable that people would use that route to get to their cars. In taking the route he did, the respondent displayed the standard of care of a reasonable person in his position.

The Council submitted that the amount of gratuitous care provided by the respondent’s wife did not meet the statutory threshold of six hours per week. The Court of Appeal accepted the respondent’s evidence that he received approximately two hours care per day and upheld the District Court’s award of $42,000 for past gratuitous care.

IN ISSUE
- Whether a local Council breached its duty of care by failing to light a car park
- Whether the respondent was guilty of contributory negligence
- Damages for gratuitous care

DELIVERED ON 23 August 2012
READ MORE
The Facts

The respondent, Mr Nudd, was a prisoner at the Sir David Longland Correctional Centre. As a result of a pre-existing ankle injury, the respondent mobilised using crutches. Whilst in the prison common room, the respondent’s crutch allegedly slipped on some water causing him to fall and suffer personal injury. He sued the State of Queensland (the appellant) for damages for negligence.

The Decision at Trial

The respondent was successful at first instance. The trial judge found that the respondent fell because a small quantity of water on the floor caused his right crutch to slip from under him.

The court held that the appellant owed the respondent an obligation to have periodic inspections of the floor in common areas. Whilst the probability that harm would occur if the floor was not checked was relatively low, the likely seriousness of the harm, if someone on crutches slipped and fell, was significant and the burden of taking precautions to avoid that risk was low. Therefore the court found that a reasonable person in the appellant’s position would have put in place inspections at least every two hours specifically of the floor in the area where the respondent commonly moved about. The appellant breached its duty of care because it did not conduct any such inspections.

Issues on Appeal

The appellant argued that in finding that it had breached its duty of care to the respondent, the trial judge unduly focussed on the circumstances of the incident in which the respondent slipped and fell, rather than the response of a reasonable person. Having found that the slip and fall of the respondent occurred because of the presence of a small inconspicuous quantity of water the trial judge erred in further finding that the water had been on the floor of the unit for long enough to have allowed a reasonable system of inspection to have detected and removed it.

The Decision on Appeal

The appellant argued that the decision at trial would have a tremendous impact upon the way in which it managed prisons. It would require a very taxing regime of inspections of the floors in the common areas of prisons throughout the State. The respondent contended that the decision applied only in relation to a prisoner who, like the respondent, used crutches, and the evidence suggested that this was relatively rare.

The Court of Appeal concluded that the trial judge’s approach was unduly liberal to the respondent and set an inappropriate precedent.

The Court of Appeal observed that neither the respondent, nor the 2 prison guards in attendance, saw any water before the accident. Neither prison guard saw any after the accident. Only the respondent saw a “fine spray” or a “tiny puddle”. If he did see that water, he saw it only from his peculiar vantage point on the floor after his fall. This evidence was contrary to an inference that the relevant “inconspicuous” water should have been visible upon a reasonable inspection by prison staff.

The Court of Appeal found that, on the evidence as a whole, the respondent failed to prove that a reasonable system of inspections would have detected the presence of that water before the accident.

The appeal was allowed and judgment was entered for the appellant.

IN ISSUE

• Whether the State of Queensland owes a duty to take special steps to inspect common areas used by prisoners with crutches

• Whether a heightened inspection regime would have been able to identify any contamination on the floor prior to the incident

DELIVERED ON 19 October 2012

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The Facts

The respondent visited Machiatte Park in which was located a Victorian era rotunda. The floor of the rotunda was raised and had entrances which comprised a number of steps. As the respondent left the rotunda deck, he placed his foot on the top step. The front half of his foot was overhanging the step. As he carried his other foot forward to step down, his left foot also moved involuntarily forward and he was unable to maintain his footing and fell down the stairs, seriously fracturing his left tibia and the neck of the fibula.

The park was the property of Bathurst City Council Crown Reserves Reserve Trust. The case was conducted on the basis that the Bathurst Regional Council was the trustee.

Expert evidence was to the effect that the top step was not as wide as the other 3 steps, the treads of the landing and steps were worn, cracked and with pieces missing, the nosings of the steps were rounded and worn, the top going was shortened by modification works and was not of sufficient width to provide stability when descending, there were no anti-slip strips at the nosings, there was no handrail and the steps were perceived as being uniform.

The Decision at Trial

The trial judge found that the placing of warning signs would not be overly burdensome on the appellant and would have been sufficient and would have been heeded. Whilst the cost of repairing the stair would be more significant, the trial judge was satisfied that there were remedial actions available to the appellant.

The Issues on Appeal

The appellant appealed on a number of grounds. The appellant argued that the trial judge erred in finding that the occupier of the park was the Bathurst City Council Reserves Trust and should have been the Bathurst City Council or Bathurst City Council as trustee for the Bathurst City Council Reserves Trust. The appellant then alleged that the trial judge erred in applying the provisions of s42 CLA (NSW) with respect to the application of the resources of the appellant.

The appellant alleged that the trial judge erred in applying s5B CLA (NSW) to find that the appellant was negligent.

The Decision on Appeal

In respect of who was the occupier of the park, the proceedings were conducted on the basis that the Bathurst Regional Council was the trustee. Had the proceedings been conducted on the basis that the reserve trust was a separate legal entity and responsible for the care, control and management of the park, it would have been necessary, when addressing s42 CLA (NSW), to consider whether the reserve trust fell within the meaning of the ‘Crown’ or a ‘public or other authority’ within the meaning of s41 CLA (NSW). The Court of Appeal stated that it was unnecessary to consider the appellant’s argument that s42 CLA NSW was capable of applying to it, notwithstanding that the Council was acting in a capacity as trustee because the appellant led no evidence so as to engage the application of s42 CLA (NSW).

In respect of the application of s5B CLA (NSW), the appellant accepted that there was always a foreseeable risk of injury when a person descended stairs, but it did not concede that there was any
basis for a finding that it knew, or ought to have known, about the particular risk of harm which this step gave rise to, i.e. the risk of falling because of the inadequacy in its width. The appellant particularly relied on a submission that there was no evidence of complaint or previous injury and therefore it would have been necessary for the appellant to examine and measure every step within its area of responsibility in order to identify a potential risk. This was an unreasonable requirement, given the apparently heavy use of the rotunda and the absence of any previous injury or complaint.

The Court of Appeal rejected this argument. As noted by the trial judge, in this case there was no evidence of complaints of previous injuries. This is contrasted with the position that there is evidence that there had been no complaints or previous injuries. The lack of evidence put forward by the appellant allowed the court to draw an adverse inference. The appellant was the party in the best position to provide evidence as to whether there had been previous complaints or injuries but it declined to do so.

The appellant argued that the trial judge erred in finding that there had been modifications to the step in the past, creating the risk of the narrower top step, and knowledge of the risk. The Court of Appeal rejected this argument. The appellant had admitted that it had been ‘at all material times’ the trustee and occupier of the park. The trial judge accepting the evidence of modification, was able to find that the creation of the problem with the top step could only have occurred with the knowledge and consent of the appellant. It would have been authorised by the appellant.

The appeal was dismissed with respect to liability.
The Facts

Reece Hodder was born with cerebral palsy and an intellectual disability. Since birth he was profoundly deaf, practically blind, virtually unable to speak and suffered from spastic diplegia.

On 15 January 2006 he attended the Aquatic Centre in South Hedland. He was then nearly 23 years of age. He was in the company of family but was left unattended. He mounted a diving block placed on the edge of the shallow end of the swimming pool. He entered the water head first, striking his head on the bottom of the pool and fracturing his cervical spine, rendering him quadriplegic.

The pool was owned by the Town of Port Hedland (the Town) and managed by the Young Men’s Christian Association of Perth (YMCA) pursuant to an agreement. Hodder commenced proceedings against the Town and the YMCA for personal injuries.

The Decision at Trial

The trial judge found that the Town had breached its duty to Hodder by failing to remove the diving blocks from the shallow end of the pool, as they were known to pose a danger to recreational users of the pool. The trial judge found that the Town’s breach of duty caused the injuries as Hodder would not have dived into the pool but for the presence of the diving blocks.

The trial judge found that the YMCA had breached its duty by failing to have a lifeguard supervising on the deck of the main pool and in failing to provide adequate signs indicating the dangers arising from use of the shallow end of the pool. However, the trial judge found that neither of those breaches made any material contribution to Hodder’s injuries.

The trial judge concluded that he was required to assess whether Hodder was contributorily negligent by failing to take adequate care for his own safety on an entirely objective basis without regard to his various disabilities. The trial judge found that responsibility for his injuries should be apportioned 90% to the Town and 10% to Hodder.

Damages were assessed at $6.5million.

The Issues on Appeal

The Town appealed the decision of the trial judge that it was liable, and also that the YMCA was not liable to Hodder. The Town also alleged that the YMCA was liable to indemnify the Town pursuant to the agreement. The Town also appealed the finding for contributory negligence.

Hodder appealed on the basis that the trial judge was wrong to dismiss his claim against the YMCA and also with respect to contributory negligence.

The Decision on Appeal

On various audits of the pool the removal of the blocks from the shallow end was a matter that required ‘immediate attention’. In 2003 the Town sought funding from the Ministry of Sport and Recreation for various matters including the removal of the blocks and was listed as the second item that the funding would be applied to. The funding was not received. In 2004 a further application for funding was made including for an upgrade to the pool. Funding was provided but the grant was not used to remove the blocks. The YMCA prepared a maintenance/capital works plan for the pool which included an allowance for the removal of the blocks in the 2005 – 2006 period.
In 2005 another funding application was made by the Town for works to the pool. The Town at that time was said to have $40,000 ‘cash at the bank’ which could be applied to the project. The cost of removing the blocks was probably less than $4,000. No reason for the failure to carry out the work was given.

The Court of Appeal held that the fact that the risk was obvious to a reasonable adult of full faculties and normal intelligence, with swimming and diving experience, does not mean that the Town did not have to mitigate the risk. The Town was under a duty to take reasonable care to provide premises which were safe for use by the range of visitors reasonably expected to use the pool, including children and the disabled.

Whilst the Town could expect that children would be supervised generally, the Town was not entitled to expect that all children at all times would be supervised.

Whilst the risk may have been low (one incident in 27 years) the consequences of the risk were catastrophic. The risk which the presence of the blocks posed to an inexperienced, disabled or immature user of the pool was cheaply and effectively able to be removed. The failure to do so by the Town was a breach of its duty and causative of the incident.

The Town argued that it had discharged its duty of care by the appointment of the YMCA. However, the YMCA did not under the agreement have the power to remove the diving blocks. Although the Town may have delegated its duties with respect to supervision of swimmers and the placement of signage at the pool to the YMCA, the Town was not found liable for breach of those duties.

The Court of Appeal upheld the trial judge’s findings that the YMCA had breached its duty, particularly with regard to supervision, however that this was not causative of the incident. If there had been the required lifeguard supervising, in the middle of the pool, on one side of the pool, there would not have been sufficient time to intervene to prevent the incident.

Hodder alleged that the YMCA’s knowledge of the risk posed by the blocks and its knowledge of Hodder’s disabilities, gave rise to a duty of close supervision such that a lifeguard would have been closer and prevented the incident. The Court of Appeal rejected this argument and the evidence fell short of either actual or constructive knowledge by the YMCA of such a degree of vulnerability on the part of Hodder that would have justified the imposition of such a duty.

The Court of Appeal was asked to consider the appropriate manner of assessing contributory negligence, and in particular the extent to which Hodder’s disabilities should have been taken into account. The Court of Appeal considered the wording of s5K CLA (WA) and determined that the phrase ‘reasonable person in the position of the person’ had the meaning adopted in Wyong Shire Council v Shirt (1980) 146 CLR 40. In the absence of any contrary judicial precedent, the Court of Appeal was unable to find that the standard of care in contributory negligence is subjective or that there is an attenuated standard of care for any class other than children.

However, in the circumstances of this case, the Court of Appeal was unable to conclude that all classes of users of the pool would know, or ought to have known, that it was unsafe to accept the invitation presented by the diving blocks to dive into the shallow end. Therefore, the trial judge’s finding with respect to contributory negligence was set aside.

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**Town of Port Hedland v Reece William Hodder by next friend Elaine Georgina Hodder [No 2]**

[2012] WASCA 212
The Facts

In February 2001, Dansar Pty Ltd (Dansar) lodged a development application with Byron Shire Council (Council) for the construction of 18 residential apartments. At this time, the West Byron Sewage Treatment Plant was operating at near capacity. Council engineers assessed spare sewage capacity in the order of 92.7ET (standing for Equivalent Tenement, being a unit of measurement estimating sewage effluent per tenement or standard household). Dansar’s proposed development was assessed as requiring 11.6ET.

Dansar’s initial application was rejected on the basis that, inter alia, the conditions of clause 45(1) of the Byron Local Environment Plan 1988 were not met; namely, prior adequate arrangements had not been made for the provision of sewerage, draining and water services to the relevant land. Council informed Dansar that, after considering existing development applications, the remaining ET available from the spare 92.7 previously quantified was less than the 11.6ET required for Dansar’s proposal.

Whilst an amended application was subsequently accepted by Council, Dansar issued proceedings in the New South Wales Supreme Court alleging that Council had negligently overestimated the degree of spare sewage capacity and had underestimated the extent to which sewage capacity was already allocated to existing properties or other approved developments. Dansar claimed that it suffered loss as a result of the delay in having the amended application approved.

The Decision

Dansar’s claim was dismissed. The court held that, in assessing Dansar’s development application, Council did not owe a duty of care to Dansar to accurately assess and allocate sewage capacity. In reaching this decision, the court made the following key observations:

1: there is no recognised class of duty of care owed by a public authority to a developer in assessing a development application;

2: in the absence of a recognised class of duty, determining the existence of a duty of care requires consideration of the salient features of the relationship between plaintiff and alleged tortfeasor – in this case, emphasis was placed on the statutory regime for Council to determine development applications;

3: under the relevant statutory regime, Council had the dual function of development consent authority and water and sewerage authority for the local government area;

4: the relevant legislative provisions required Council to subordinate the interests of individual applicants to the public interest (especially in relation to protecting the environment and public health) in considering applications;

5: the existence of a private right to recover relational interest damages in respect of a failure to assess and/or allocate sewage treatment capacity to an individual property developer is plainly inimical to the unimpeded exercise of a public function which places primacy on the public interest; and

6: an allegation that Council must apply its sewage capacity allocation system “correctly” and must form a “correct view” as to available capacity entails two misconceptions: firstly, it erroneously focuses on the financial interests of the developer as if that were the only interest required to be served by the exercise of Council’s functions and; secondly, it treats sewage treatment capacity as if it were a fixed, measurable resource which Council has an obligation to quantify correctly and allocate exhaustively. No such obligation exists.

Accordingly, the alleged duty of care was held not to exist in this case. The court found it was unnecessary to consider the issue of breach and causation where a duty of care was held not to exist.
The Facts

The plaintiff was a 22 year old Irish tourist. On 27 September 2007 he became a partial tetraplegic after running down a sand dune and entering the waters of Lake Wabby on Fraser Island.

It was undisputed that Lake Wabby was under the management of the State of Queensland (the defendant) and the trial was limited to the issue of its liability.

The plaintiff and his friends visited Lake Wabby with a licensed commercial operator after having watched a video prepared by the Queensland National Parks and Wildlife Service warning of certain dangers on the island, including the danger of diving into shallow water. Commercial operators licensed to take patrons onto the island were required to show this video to visitors as a condition of their licence. No reference was made to the dangers of running down steep sand dunes.

The plaintiff asserted that the defendant was in breach of duty of care in a number of ways including by failing to change the wording of the warning sign to include a prohibition on running down the dunes in to the lake and listing the numbers of people previously rendered paraplegic and quadriplegic as a result of doing so.

The Decision

The plaintiff admitted that on the trail to the lake he walked past a warning sign but was unable to recall the specific contents of that warning. The defendant submitted that it was not required to warn of an obvious risk pursuant to s13 of the CLA (QLD) from recovering his damages as he had engaged in a dangerous recreational activity.

The court found that the plaintiff tripped as he ran down the dune and fell into the lake. This was crucial to its subsequent finding that this was not an obvious risk. The court specifically noted that the plaintiff and upwards of 50 other people had run down the dunes and jumped into the water without injury that day. The court found that this, measured against the likelihood and magnitude of risk of injury, meant that the risk of catastrophic injury was not an obvious one, but rather a trap. Having held that the risk was not an obvious one, the court did not need to go on to consider whether the plaintiff was engaged in a “dangerous recreational activity”.

The court then had to consider whether the defendant breached its duty of care. It was noted that in 1993 one of the defendant’s managers had specifically raised the risks of catastrophic injury at the lake. He had noted in a memorandum that 2 spinal injuries resulting in quadriplegia had occurred over a 2 year period. In 2002 the defendant conducted a “Risk Assessment on Diving Injuries at Lake Wabby” which found the risk of catastrophic injury was “High”.

The court found that despite the ambiguously worded warning signs at the entrance to the lake, there had been 18 instances of serious injury in a 17 year period - 13 of which involved serious spinal injuries akin to those suffered by the plaintiff. That fact together with the plaintiff’s inexperience and lack of knowledge of the area and the fact that no other areas on Fraser Island had anything like the number of injury incidents as Lake Wabby required the defendant to take steps to limit the harm likely to result from running down the dunes.

Although it rejected the plaintiff’s arguments that the defendant should have employed a ranger to supervise activities or should have closed off access to the lake, the court held that the existing signs were inadequate to convey the real danger of injury at the lake. It also held that the defendant could have easily and effectively incorporated specific warnings into the video that licensees were required to show to visitors, such as the plaintiff. It was held that these were relatively simple and inexpensive measures when weighed against the magnitude of the risk. In failing to modify the signs and video the defendant breached its duty.

Had the plaintiff been shown the video, the court considered that the plaintiff would have heeded its warning – hence causation was made out and the plaintiff was awarded 85% of his damages to be assessed.

IN ISSUE
• Scope of duty to warn
• Meaning of “obvious” within s13 of the CLA (QLD)

DELIVERED ON 30 April 2013
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**The Facts**

The plaintiff was injured during the course of his employment with Capital Weed Control Pty Ltd (CWC). At the time of the incident, the plaintiff was a member of a team engaged in weed control along Ginninderra Creek in the Palmerville Heritage Park. CWC carried out this work pursuant to a contract with the Australian Capital Territory (ACT).

A pest and weeds officer with the ACT, Ms Conolly, was the field supervisor and contract manager for the contract between CWC and the ACT. Ms Conolly was informed by Mr Watters of CWC that some trees in the area in which his team were to work appeared to have been vandalised and were leaning over. Ms Conolly inspected the area and declared it safe for the weed control work to proceed. On 21 May 2008, the plaintiff was struck by a falling tree in the same area, causing him injury.

The plaintiff brought an action in negligence against CWC who in turn brought a third party claim in negligence against the ACT. Settlement was reached between the plaintiff and CWC. Therefore, the only issue for determination was whether the incident was caused by Ms Conolly’s negligence for which the ACT was vicariously liable.

**The Decision**

The court found that CWC had not established the ACT owed a duty of care to the plaintiff or that the plaintiff could have succeeded against the ACT other than as vicariously liable for any negligence by Ms Conolly.

Mr Watters did not make clear to Ms Conolly that CWC was relying on her decision as to whether it was safe for its employees to resume weed control work in the area. The evidence indicated that Ms Conolly was a relatively junior public servant and her responsibility was to manage the contract between the ACT and CWC and to make sure CWC carried out the work it had contracted to do. The court was not satisfied that this placed Ms Conolly in a position where she had a duty of care to take precautions to avoid the risk of injury to the plaintiff which eventuated.

On this basis, CWC’s third party claim against the ACT failed.
The Facts

The plaintiff commenced proceedings for damages for personal injury suffered in the course of a criminal assault on 4 February 2008. The assault occurred at the plaintiff’s apartment which was part of a public housing complex administered by the defendant (the lessor to the plaintiff tenant). From 2004, other tenants in the complex (Mr Ralph, Ms Utiger and her son), moved in and were aggressive confrontational neighbours to the plaintiff and other tenants.

The defendant was aware from its own dealings with Mr Ralph and Ms Utiger and also from written complaints made by other tenants in the complex that Mr Ralph & Ms Utiger were violent, threatening and aggressive.

On 2 separate occasions on 4 February 2008, Mr Ralph entered the plaintiff’s apartment and assaulted the plaintiff who suffered serious head and psychological injuries and was taken to hospital by ambulance. The police were called and Mr Ralph was arrested and ultimately convicted and sent to prison.

The plaintiff sued the defendant for breach of the tenancy agreement and for negligence for failure to provide safe and secure housing.

The Decision

The court held that there was ample evidence that Mr Ralph threatened to assault and even to kill the plaintiff and that much of this was known to the defendant through its employees. However, the court was not satisfied that any of the actions the defendant allegedly should have taken would have protected the plaintiff from the assault which occurred. The court found as a fact that all of the plaintiff’s injuries were sustained in the first assault on 4 February. The second assault occurred after a forced entry to the premises by Mr Ralph but this invasion did not cause the plaintiff any further physical injury. This assault occurred when Mr Ralph entered the plaintiff’s apartment through an unlocked door. On those factual findings it was not strictly necessary to make any findings on duty, breach or causation. The court nevertheless stated that it would have found that it was a breach of duty to fail to install an adequate security lock on the door to the apartment without a screen door. Despite this the court would not have been satisfied that such a lock would have necessarily been enough to keep Mr Ralph out of the apartment. He was determined and on an aggressive criminal course of conduct and could probably have forced the door open. The door was not of sufficient robustness to keep out a determined criminal invader but there was no obligation on the defendant to provide a door of such robustness. The court was not satisfied that the reasonable measures the plaintiff alleged the defendant should have taken (failing to provide adequate and secure locks) would have prevented the assault.

As the cause of action in contract was based on the same facts, the court was not satisfied the defendant breached any term of the tenancy agreement or that any breach relevantly caused the invasion or the plaintiff’s injuries.

Judgment was entered for the defendant.
The Facts

On 3 November 2007, the plaintiff was riding his bicycle along Sinbad Street, Shorncliffe in Brisbane. Prior to that date, the defendant undertook repairs to the road surface of Sinbad Street. On the date of the incident, the plaintiff rode his bicycle over the repairs and lost control of his bicycle. He was subsequently thrown onto the roadway and sustained personal injuries.

The plaintiff claimed that the repairs undertaken by the defendant were such that the road surface was scoured, resulting in grooves in the bitumen of around 2.5 to 5 centimetres in depth and that there was a general uneven road surface over the entire area of road work which was uneven, broken and dangerous. In addition, he claimed the existence and condition of the repairs was not known to him, was not apparent to him, was obscured from his view due to the curve of the road and was not signed as uneven surface or road works.

The Decision

The court held that the defendant breached its duty of care owed to the plaintiff. The court found that the defendant should have sent a crew to remove the hazard, erected signs so that users of the road would go around the repairs or alternatively, had some traffic control in place. The expense to do so would have been extremely modest and in those circumstances, it would have been reasonable to expect the defendant to take those steps to remove the hazard or remove the risk of the hazard.

The court did not accept that bike riding was a dangerous recreational activity as it did not involve a significant degree of risk of physical harm to the plaintiff. Further, the risk was not an obvious risk and the plaintiff did not cause or contribute to his injury. The court concluded that the defendant was not afforded protection under s19 CLA (QLD).

The court also held that the defendant was not absolved from liability by reason of s35 and s36 CLA (QLD) because no evidence was led by it as to its resources or funding limits and no evidence was led as to its policies in terms of funding of works. The court also held that s37 CLA (QLD) did not assist the defendant as it only provides relief for liability from nonfeasance and what occurred in this case was misfeasance because the defendant created a hazard when it undertook the road works.
The Facts

On 15 May 2007 the plaintiff was learning how to fly a light aircraft. It was his second lesson with the defendant, who was his instructor. About 45 minutes into the lesson, while the plaintiff had control of the aircraft, the engine began to vibrate. The defendant instructed the plaintiff to increase the aircraft revolutions, which the plaintiff did, and the vibrations disappeared and the engine ran normally.

Approximately 5 minutes later, the defendant instructed the plaintiff to fly at 70 knots. The plaintiff did so and almost immediately the faint vibrations returned.

The defendant took control of the aircraft and continued to direct it towards Katoomba, which was 10 nautical miles away. As the defendant took control of the aircraft, he applied full power, carburettor heat and switched the fuel pump on. The engine revolutions increased for a short period then the engine shuddered quite violently and stopped dead. The defendant navigated the aircraft in gliding mode, put in a Mayday call and unsuccessfully attempted to restart the engine. By that stage the aircraft was close to the ground so the defendant executed an emergency landing into a bush gully. The aircraft struck the ground fairly heavily and noisily. The plaintiff was injured during the landing.

The plaintiff claimed damages against the defendant for negligence. He alleged that the defendant was negligent in failing to abort the flight as soon as any engine roughness appeared, attempting to land the aircraft at an excessive speed and flying over rough terrain with no suitable landing sites.

The defendant resisted the claim on the basis that the plaintiff’s injuries resulted from the materialisation of an obvious risk of a dangerous recreational activity pursuant to s5L of the CLA (NSW). The defendant relied upon documentary evidence, including media articles and statistics, which shed light on the number of aviation incidents involving light aircrafts.

The Decision

The court was satisfied that the defendant failed to exercise reasonable care for the safety of the plaintiff in not ensuring that the aircraft was flown towards an appropriate landing strip immediately after the second set of vibrations started; and in continuing to fly towards Katoomba.

The question as to whether or not the plaintiff was engaged in a recreational activity was not contentious. The issues were whether or not the recreational activity was dangerous and/or whether the harm materialised as a result of an obvious risk in accordance with the CLA (NSW).

Section 5K of the CLA (NSW) defines a dangerous recreational activity as one that involves a significant risk of physical harm. The court noted that consideration of that question requires that it take account of all the relevant circumstances that bear on the activity in which the plaintiff was engaged at the time he suffered his injuries.

In the present case, those circumstances were that the plaintiff was flying with an experienced pilot in a single engine light aircraft, and that aircraft was flying above ground and needed to be landed safely to avoid any risk of harm.

The court noted that there is a risk of something going wrong in the operation of any aircraft caused by a number of different factors including: pilot incapacity, pilot error, engine failure, other mechanical problems, electrical faults, hydraulic faults, fuel leak, impact with other objects and weather conditions. All of those matters impact not only on the operation of the aircraft, but also on the ability to land it safely.
without causing harm to the occupants. The court noted that was a matter of logic, common sense and a general understanding likely to be shared in the public domain.

Having regard to the evidence adduced by the defendant regarding the frequency of incidents affecting light aircraft and the range and extent of those matters which may cause or contribute to something “going wrong”, the court was of the opinion that the risk involved in the operation of an aircraft and in safely landing it could not be described as trivial. Although the court’s impression was that the risk occurred only infrequently, it remained a real risk.

As common sense dictated, if something does “go wrong” with the operation of the aircraft, there is a significant risk of physical harm. That was so when bearing in mind the height and speed at which light aircraft operate. As such, the court was satisfied that the recreational activity of engaging in flying lessons in a light aircraft was dangerous.

The court further noted that it was a matter of common knowledge and common sense that:

(a) There was a risk that the defendant might be negligent in the manner in which he operated the aircraft after the second set of vibrations occurred;

(b) The aircraft engine might fail in flight; and

(c) The defendant would be compelled to conduct a forced landing.

The court held that was sufficient to result in the risks being characterised as obvious for the purpose of s5F, despite there being a low probability of them occurring.

It followed that the plaintiff’s injuries flowed from the materialisation of an obvious risk of a dangerous recreational activity and the claim was dismissed.
The Facts

On 29 July 2006, Mr Harris (the respondent) was at the Perisher Ski Resort in the Snowy Mountains which was operated by Perisher Blue Pty Limited (the appellant). The respondent was present at the ski resort as part of a 3 day school excursion. While participating in a beginner skiing lesson, the respondent lost control, travelled over a mound and ran into a ditch located towards the bottom of a beginners’ ski slope. The collision with the ditch caused the respondent to somersault forward and land heavily on his back, resulting in crush fractures to his lumbar spine.

The respondent sought damages for his injuries and filed proceedings against the appellant and his school for negligence. The respondent alleged that the appellant breached its duty of care by failing to take adequate precautions to prevent injury to beginner skiers by reason of the difficulty they would confront in negotiating the ditch. The respondent alleged that the school breached its non-delegable duty of care to ensure that care was taken to protect his safety during skiing lessons. The school cross claimed against the appellant seeking an indemnity and/or contribution.

The Decision at Trial

The trial judge accepted that the appellant had been negligent by allowing a beginner ski class to be conducted in an area where there was a dangerous obstacle. To that end the trial judge found that the ditch, upon which the respondent was injured, must have been of some substance to have caused the respondent to fall as he did.

The trial judge held that the risk posed by a ditch on a beginners’ ski slope created a risk of injury that was foreseeable and not insignificant. That was particularly when bearing in mind that a person falling while skiing was always prone to serious injury.

Although the trial judge was satisfied that the ditch was a natural feature of the ground, he found that had the appellant undertaken a daily inspection it would (or should) have identified the ditch as a risk.

The trial judge noted that it was open to the appellant to take precautions including placing a barrier around the ditch, filling it with snow and/or simply not conducting lessons in an area proximate to the obstacle.

The trial judge was satisfied that had the appellant taken any of those precautions, the accident would not have occurred.

The trial judge accepted that skiing was a dangerous recreational activity. However, he did not accept that the risk of skiing into a ditch on a beginners’ ski slope was obvious. Therefore, the appellant’s defence in reliance upon s5L of the CLA (NSW) failed.

The respondent was awarded damages of $308,764.94.

The Issues on Appeal

The appeal focused on the issues of breach of duty and causation. The appellant contended that the primary judge fell into error by failing to have regard to the general principles of negligence contained in s5B of the CLA (NSW) and that he reasoned backwards from the event to the cause.

The Decision on Appeal

The Court of Appeal held that, while the trial judge did not expressly refer to s5B of the CLA (NSW), he did have proper regard to it in coming to the conclusion that the appellant was negligent.

The Court of Appeal did not accept the appellant’s contention that the trial judge had reasoned “backwards”. In that regard it noted that the trial judge necessarily commenced with a finding of fact in relation to the existence of a ditch. He subsequently made findings regarding the ditch being a hazard.
which a reasonable person would foresee could cause not insubstantial injuries. The Court of Appeal further noted that the problem for the appellant was that it put a novice skier in an area where there was a ditch and it either failed to conduct a proper pre-ski inspection or failed to take note of the findings of the inspection team by taking precautions to manage the risk (ie. by placing a barrier around the ditch, filling it with snow or not conducting lessons in an area proximate to the obstacle). In either case, the appellant failed to do what a reasonable person would have done in the circumstances.

The appeal was dismissed.
The Facts

On 16 February 2008 the respondent was at the appellant's premises to play laser tag for her brother's birthday party. The area used for the game included two bunkers (one for use by each laser tag team) and an area of bushland. Participants would run through the bushland and attempt to ‘tag’ members of the other team whilst avoiding being tagged themselves. Shortly after the game started, the (almost) 10 year old respondent tripped over a tree root and broke her elbow.

She sued the appellant in negligence.

The Decision at Trial

The trial judge found in favour of the respondent, awarding her damages of just over $280,000. Despite the respondent’s acknowledgement that she was aware of the general risks of running through bushland, the trial judge held that the risk of someone falling and tripping over a root at the premises was foreseeable and that the appellant should have warned the respondent or removed the tree root.

The Issues on Appeal

The appeal was limited to the issue of liability and included numerous grounds including the content of the duty of care, and the nature of the alleged breach.

The Decision on Appeal

The Court of Appeal held that s5M CLA (NSW) required that the appeal be allowed and the findings of the trial judge be overturned as no duty of care is owed in respect of a risk of an activity if the risk were the subject of a risk warning. The Court of Appeal rejected the argument that the specific hazard of tree roots should have been the subject of the warning and held that an adequate warning can be given, at least in some circumstances, by reference to the general risk involved without precise delineation of each separate obstacle or hazard which may be encountered.

The Court of Appeal also rejected the argument that because of her age the respondent was an “incapable person” so that the appellant could only rely on the warning if it was given to a parent because her father was present when the warning was given and also because the Court of Appeal was satisfied the respondent had the capacity to understand the warning which was given.

The Court of Appeal was therefore satisfied that no duty of care was owed but indicated nevertheless that a reasonable exercise of any duty of care would not have obliged the appellant to remove the offending tree root.

The appeal was upheld.
The Facts

The plaintiff was a member of the Southern Tablelands Gliding Club (the defendant). He was injured on 16 July 2008 when his glider collided with power lines as he was coming in to land at the airstrip used by the defendant.

The plaintiff had joined the defendant in May 2005 and completed his first solo flight on 5 December 2006. On the day of the incident he had undertaken 4 flights prior to the incident. His evidence was that he was instructed to perform a “hangar landing” – a landing where a plane was landed at a point close to the hangar because it was the final flight that day for that plane. He initially crossed the power lines towards the east and then turned south and west for the final approach, crossing the power lines for the second time.

It was just after 3.30pm when the plaintiff approached the airstrip and he was flying in a westerly direction with the sun low in the sky and therefore affecting his vision. When he thought he had flown over the powerlines he braked to increase the descent rate. However, within a second or two the glider collided with the powerlines and fell approximately 100 feet to the ground.

The plaintiff commenced proceedings against the defendant alleging negligence in a number of respects including failing to instruct the plaintiff as to the risk of collision with electricity wires and for instructing the plaintiff to perform a “hangar landing” when he was not sufficiently experienced.

Only liability was in issue at trial. The defendant relied on ss61 and 3C CLA (NSW) in relation to the protection of volunteers, (the flying instructor), and s5L CLA (NSW) in relation to dangerous recreational activities.

The Decision

The court held that there was no breach of duty of care by the defendant with reference to the evidence provided by joint experts. The plaintiff had been provided with appropriate instruction, was qualified to fly solo and sufficiently experienced to undertake hangar landings. The court accepted the evidence of the defendant’s instructor that the plaintiff was properly and adequately trained in how to deal with the obstruction created by the power lines and that he was a competent and safe pilot who was sufficiently experienced to perform a hangar landing. The court specifically rejected the plaintiff’s arguments that, because the log books showed he made errors in earlier flights, he was too inexperienced to have been allowed by the defendant to carry out a hangar landing while flying solo. The court held that the mere fact that the plaintiff made errors from time to time did not establish that he was not competent to fly solo. The court commented that even the most highly qualified instructor is likely to make errors from time to time and it was unreasonable to infer that the errors referred to demonstrated that the plaintiff was not capable of flying solo.

Although it was not necessary to do so, the court also addressed relevant defences submitted by the defendant. The court noted the lack of control the defendant had over the instructors/trainers and did not believe the defendant had any vicarious liability for the acts and/or omissions of instructors/trainers. If there was vicarious liability on the part of the defendant, this was excluded and/or limited by s3C of the CLA (NSW).

The defendant also argued that it was not liable as gliding was a dangerous recreational activity resulting in the materialisation of an obvious risk. The court agreed that gliding involved significant risk of physical harm, accepting the experts’ evidence that this...
Echin v Southern Tablelands Gliding Club
[2013] NSWSC 516

particular activity contained dangers, some avoidable but some unexpected. Accordingly, it was held that gliding was a dangerous recreational activity. If this was not the case, the act of landing over powerlines was a dangerous recreational activity and the risk of striking the powerlines was obvious.

Judgment was entered for the defendant.
The Facts

The plaintiff was an experienced skier who was injured on 18 July 2003 at the defendant’s ski fields. She claimed that she was waiting at the loading point to board a triple chair lift with 2 friends when they realised that the safety bar on the chair approaching them had not been raised. She claimed that the attendant “lunged” to the chair and pulled it back at an angle, “flipping” up the safety bar. As the attendant released the chair it then came towards the plaintiff and her friends faster than normal at an angle and the armrest struck the plaintiff in the groin.

The plaintiff claimed that she damaged the ligaments in the sacroiliac joints or sustained significant soft tissue injury in the lumbo-sacral spine, as well as a psychiatric condition. The defendant was alleged to have been negligent and to have breached an implied term of the contract with the plaintiff under s74(1) of the TPA.

The defendant defended the claim, arguing that the plaintiff and her friends unnecessarily panicked, causing misalignment with the designated loading point. It further argued that the attendant raised the safety bar in a safe and timely manner and the implied term alleged was excluded by the terms of the lift ticket, nor was any liability for breach or negligence by the defendant. The court noted that because the accident occurred more than a year before the enactment of certain legislation, it was arguable that, by operation of s109 of the Constitution, the claim did not have to be determined with reference to the provisions of the CLA (NSW). That issue was not dealt with by the court, who addressed the questions of breach and quantum on the basis that the CLA (NSW) did apply.

The court confirmed there was a duty owed to the plaintiff by the defendant on the basis of occupation and control of the resort and chair lift. The court accepted there was a risk of harm resulting from a chair arriving at the loading point in a state not suitable for boarding and the not insignificant risk of injury to a skier from a chair with its safety bar down was foreseen and foreseeable by the defendant. An appropriate precaution was to position the lift attendant at or near the loading point to see the chair as it came around the “bull wheel”. This was in fact the usual procedure of the defendant and the burden of taking such a precaution was not significant. The court was satisfied that the negligence of the defendant was causative of the plaintiff’s injuries.

The court rejected the defendant’s arguments in relation to inherent risk (because the risk could have been avoided by the exercise of reasonable skill and care), dangerous recreational activity (the activity was not skiing but boarding the chairlift), obvious risk and risk warning (because no warning of the specific risk was given). The court also held that the defendant failed to discharge its onus of proving contributory negligence.

IN ISSUE

• Whether ski lift operator breached its duty of care to chair lift passenger
• Whether defences of inherent risk, dangerous recreational activity and risk warnings were applicable

DELIVERED ON 7 June 2013

READ MORE click here
The Facts
On 14 January 2009, the plaintiff was injured at the defendant’s premises. He sustained a fracture to his right ankle after losing his footing, slipping and falling whilst descending a set of stairs. At that time, he was wearing ice skating boots. He was descending the stairs in order to access an ice skating rink on the premises.

The plaintiff claimed the fall, and his resultant injury, was due to negligence on the part of the defendant in a number of ways, including failure to ensure that the steps were adequately slip resistant.

The Decision
The defendant was unable to establish its claimed defences of materialisation of an obvious risk, or any defence based on s5F, s5G or s5L of the CLA (NSW). The court held that the activity of descending the stairs was merely preparatory to engaging in the recreational activity of ice skating. That preparatory activity was not in itself a dangerous recreational activity. The court was not satisfied that the sign requiring “no skates beyond this point” was in fact present and available to be seen by the plaintiff on the day in question before he commenced his descent of the stairs.

The court also held that the defendant had not established a defence based on materialisation of an inherent risk pursuant to s5I of the CLA (NSW). Absent a specific warning about the uneven state of the dimensions of the treads, goings and risers on the stairs, and absent any knowledge on the part of the plaintiff as to the presence of moisture on the stairs, the defendant had not demonstrated that the plaintiff had undertaken an activity that involved inherent risk that could not have been avoided by the exercise of reasonable skill and care.

The court held that the defendant was negligent as alleged, and that such negligence was the cause of the plaintiff’s injury. There was a high probability that harm would occur if patrons walked down the stairs irrespective of the presence of non slip edge nosing being in place. Such edge nosing would not have provided much of a slip retarding grip surface between the smooth surface of ice skating blades and the wet edge of the underlying step.

The court held that the burden of the defendant taking suitable precautions to avoid the risk of injury to patrons was not unduly great, especially in the context of a commercial enterprise where the cost of such precautions would have been an unremarkable business overhead. Further there is a high social utility in the provision of recreational activities to members of the public. Where, for example, such activities or facilities are provided by public authorities, the cost and practicability of taking precautions is a relevant consideration.

The defence of contributory negligence also failed. The court noted that the plaintiff had succeeded in descending the stairs to the last step without difficulty which suggested that there was something about the step that influenced the fall rather than fault on the part of the plaintiff.
The Facts

The appellant and the respondent were next door neighbours. The appellant often left his and other related children alone in his house while he was away at work. The respondent, a 60 year old widow, had agreed to “keep an eye open for the children” during these times and often went to the house at night and sometimes stayed the night to supervise the children and perform some domestic duties. At about 7.30pm on 8 May 2007 the respondent went to the appellant’s house to check on the children. She injured herself when, barefooted and in the dark, she tripped and fell over some welded wire mesh that was lying on the front lawn of the appellant’s home. The respondent was aware from previous visits to her neighbour’s property that there was wire mesh on the lawn. There was an exterior light at the front of the house but it was not on at the time of the accident.

The respondent commenced proceedings against the appellant for damages for personal injuries she sustained to her shoulder and back.

The Decision at Trial

The trial judge held that the respondent’s injuries were caused by the negligence of the appellant. The trial judge held that the mesh constituted an unusual trap or danger and that a reasonable person in the position of the appellant would have taken precautions against the risk of harm by removing the mesh or illuminating it at night.

The Decision on Appeal

There was no issue that the risk of someone injuring themselves by tripping on the mesh was foreseeable. The issue was whether or not the risk was insignificant.

The appellant argued that it was an insignificant risk because the respondent was familiar with the area and knew that the mesh was on the lawn from prior visits and also because it was reasonable to expect that anyone attending the premises at night would have had the benefit of external lighting. The Court of Appeal did not accept these arguments. It was held that the “risk” referred to in s5B(1)(b) is not to be identified solely by reference to the risk that the respondent might harm herself, but with reference to the definition of “harm” found in s5 which, in the circumstances of this case, referred to “personal injury or death”. This was to be contrasted with the “particular harm” referred to in s5D (1) which is the harm that the particular plaintiff has suffered. The Court of Appeal noted that s5B requires the risk to be assessed prospectively- the risk of harm to which s5B refers is a risk of harm that might be suffered by anyone to whom the appellant owes a duty of care as a consequence of the failure to take the precautions referred to in s5B(1).

The Court of Appeal noted that whether the risk of leaving the mesh on the lawn was “not insignificant” was to be judged at the time it was left there and therefore the respondent’s knowledge of the presence of the mesh prior to the accident did not mean that the risk was “not insignificant”. It was also noted that the standard for a risk being “not insignificant” is not particularly high – it is sufficient if risk is not far-fetched or fanciful or real and therefore foreseeable.

Applying these principles, the Court of Appeal found that it was foreseeable that a visitor might encounter the mesh, might trip on it and as a result there was a risk that injuries that were more than insignificant might result.
Although the Court of Appeal agreed with the trial judge that the risk of injury was “not insignificant” it did not agree with the trial judge’s finding that a reasonable person in the position of the appellant would have taken precautions against the risk of harm. The Court of Appeal considered the line of authority concerning what is required for a householder to take reasonable care to avoid injury to someone attending his/her premises and noted that in all cases the duty is essentially one of reasonableness. An occupier cannot be expected to eliminate all possible hazards or remove defects which exist in the most fastidiously maintained premises.

In considering whether a reasonable person would have taken precautions against the risk of tripping on the mesh, the Court of Appeal took into account that the incident occurred on private property; it was not the only means of access to the front door; the sequence of events was highly unusual and even at night there was a fairly low risk of harm resulting from the presence of the mesh. The injuries suffered by the respondent were serious but it was unlikely that anyone who suffered injury as a result of the mesh would be injured as seriously. The burden of taking precautions to avoid the risk of harm was considered to be slight as was the social utility of the activity creating the risk of harm – it was not non-existent because aesthetic factors such as presenting a well maintained lawn to the street are not to be ignored when assessing negligence.

Even when these factors and any other relevant factors were taken into account, the Court of Appeal held that it was still required to weigh up the relevant factors to decide whether in the circumstances, a reasonable person in the appellant’s position would have taken precautions against a risk of harm that he in fact failed to take.

The Court of Appeal held that such a reasonable person would not have taken any such precautions because it is not uncommon for householders to leave lying on their lawn objects such as hoses, gardening tools or children’s toys. The Court of Appeal noted that it would be quite a surprise to many householders to be told that reasonable behaviour requires them to clear all obstacles from their lawns before nightfall. On that basis, the Court of Appeal determined that the appellant did not fail to take reasonable care.

The appeal was allowed. 

[2012] NSWCA 328

Sibraa v Brown

[2012] NSWCA 328
**The Facts**

The respondent, Mrs Welch, was the 76 year old aunt of the female appellant. While visiting the appellants’ home, she slipped on a gumnut which had fallen from an overhanging tree onto the front external stairs of the appellants’ property.

The appellants had lived at the property for about two months. The respondent had helped the appellants move into the house and was a regular visitor to the property. Evidence was led to show that the steps were regularly swept as part of the routine maintenance of the property. Gumnuts frequently fell from the flowering gum tree in the garden, often moments after the steps had been swept. No one had ever experienced a problem traversing the steps, either during the brief period when the appellants had owned the property, or during the 12 years of occupation by its previous owners.

The respondent commenced proceedings against the appellants alleging negligence on their part for failure to warn of the presence of the gumnuts and for failure to clean the stairs.

**The Decision at Trial**

The trial judge found that because the gumnuts were small, cylindrical and hard, they were clearly a significant hazard on the stairs. The stairs were the designated means of access to the front door of the house. The gumnut tree was directly above the stairs and constantly dropped gumnuts on them.

Although the duty owed by the appellants was not as high as that owed by the occupiers of commercial premises, they nevertheless breached their duty in failing to provide safe access to the house by adequately pruning or removing the gumnut tree.

**The Issues on Appeal**

The appellants argued that the trial judge was in error in finding that the risk of slipping on gumnuts was significant and in finding that a reasonable response to the risk required the removal of the tree.

**The Decision on Appeal**

The Court of Appeal noted that the evidence showed that the respondent was familiar with the steps and aware of the gumnuts as she had visited the property many times before her accident. The Court of Appeal held that as a result, the risk that she would suffer injury of the type that eventuated was remote.

The Court of Appeal held that the trial judge’s finding that the tree should have been trimmed or removed to avoid the possibility of gumnuts falling on the stairs was contrary to principle. The Court of Appeal observed that trees and bushes are common and desirable attributes of residential areas and it is not reasonable for courts to require the removal of trees if an entrant to a property slips on a readily apparent natural hazard.

The appeal was allowed.
The Facts

This matter was heard in conjunction with the case of Hourani v Insurance Australia Limited t/as NRMA [2012] NSWDC 202, and the background facts are outlined in that matter.

In these proceedings, the plaintiff sued NRMA’s delegated builders, inspectors and subcontractors, Siemsen Group Pty Ltd, Censeo Pty Ltd and Censeo’s subsidiary, Nidus Inspection Services Pty Ltd, claiming that in addition to the alleged liability of NRMA, these entities were also responsible for her losses.

The issues for determination in this matter included whether the plaintiff was precluded from maintaining her proceedings pursuant to a limitation bar raised under s50C of the Limitation Act 1969, whether the risk of injury to the plaintiff was inherent or obvious in the circumstances within the meaning of the provisions of the CLA (NSW), whether Siemsen, Censeo or Nidus should be found liable to the plaintiff in negligence arising from inspection of the plaintiff’s damaged home and the extent of contribution between the defendants on the cross-claim.

The Decision

The issue of the limitation defence was dealt with briefly and the plaintiff was not precluded from maintaining her proceedings pursuant to a limitation bar raised under s50C of the Limitation Act 1969, whether the risk of injury to the plaintiff was inherent or obvious in the circumstances within the meaning of the provisions of the CLA (NSW), whether Siemsen, Censeo or Nidus should be found liable to the plaintiff in negligence arising from inspection of the plaintiff’s damaged home and the extent of contribution between the defendants on the cross-claim.

On the issue of inherent or obvious risk, the court noted that the plaintiff chose to remain in the premises following the initial storm damage two months prior to the incident, and there was no evidence that water had leaked onto the floor of the plaintiff’s living room until the ceiling became waterlogged and collapsed on the day before the plaintiff sustained her injury. In those circumstances, the court held that the plaintiff knew or ought to have known of the slippery condition of the floor in question and neither sought nor needed advice on the subject matter. The court found that the plaintiff’s injury did in fact arise as a result of the materialisation of an inherent risk.

The court went on to consider the scope of the duty of care and determined that Siemsen was only required to identify the nature of the damage with a view to determining what should be done next and the initial assessment was sufficient. The court considered that a reasonable contractor in the position of the defendants was entitled to consider that, in the absence of evidence of internal water penetration into the premises, the premises would very likely remain free from water penetration. The court found that the plaintiff failed to establish liability in negligence on the part of Siemsen.

In relation to Censeo and Nidus, the court held that there was no evidence to suggest that the internal damage to the house or waterproofing structures indicated a need for urgent repairs at that time. The court also found that the ultimate decision on whether the work should proceed and time for completion was not something that either Censeo or Nidus had any relevant degree of control over. The court also found that there were no contractual relationships between the plaintiff and either Censeo or Nidus.

The court ultimately held that the plaintiff did not satisfy the salient features of Caltex Refineries (Queensland) Pty Ltd v Stavar and, as a consequence, concluded that no novel duty of care could be implied. The question of breach of duty of care therefore did not arise for consideration.
The Facts

Shortly after midnight on 14 March 2007 the plaintiff fell down a flight of internal stairs in the unit where she resided and was rendered a partial paraplegic as a result. The incident occurred as the plaintiff began to descend the internal staircase in her unit. The staircase was carpeted. She had ascended the stairs and realised she had forgotten something and turned and began to descend when she slipped and fell.

The plaintiff brought proceedings claiming damages against the owners of her unit, Mr & Mrs Hobbs, who were her then landlords, alleging a breach of duties owed to her pursuant to the Residential Tenancies Act 1994 (Qld) under a tenancy agreement and at common law.

The Decision

The plaintiff called an engineer, Mr Kahler, while the defendants called evidence from Mr Casey, regarding the slip resistant characteristics of carpet, and Mr Catchpole, a building inspector.

The court noted that while much of the expert evidence was concerned with the meaning of Building Code requirements and Australian Standards, the meaning of such Codes and Standards does not determine whether the defendants have met the duties imposed on them under common law, statute or their tenancy agreement.

Mr Kahler gave evidence for the plaintiff that the stairway had been built to the limit of the allowable design under the Building Code but the stairs minimally fell short with regard to the width of the treads. While they had additional undesirable features, these were not featured in the Building Code. Mr Kahler gave evidence that the nosings on the stairs in question did not give a true indication of the edge of the step, but rather promoted a false edge leaving a person descending the stairs to place their foot too far forward on the step. It was accepted that the stairs could have been made safer including an appropriate handrail, improved nosing on the stairs by installation of non-skid stripping and improvement of the lighting which were all simple and inexpensive measures.

However, it was held that the duty owed by a landlord involves no more than taking reasonable steps to discover and deal with the risk of injury in question. The court did not accept that the action that the landlord here would have had to undertake to discover and meet the risk could have been considered reasonable (i.e. measuring the stairs and comparing them to the Building Code) - not only was the defect complained of not known to the landlords, it was also not obvious to a lay person. While there may be cases where it is reasonable to expect that an expert be retained by a landlord, the court held this was not the case for the obvious reason that the engagement of experts without notice of a particular problem is not usually done and the cost of doing so may be substantial.

The court therefore found that in the absence of any evidence of actual or constructive notice of a defect in the stairs, there could be no breach of duty, whether contractual, statutory or at common law.

Accordingly, the court entered judgment in favour of the defendants.

Sheehy v Hobbs
[2012] QSC 333

PUBLIC LIABILITY
Residential Premises

IN ISSUE

• Whether there was an imposed duty on a landlord to make alterations to a staircase to reduce risk of injury to users

DELIVERED ON 7 November 2012
READ MORE click here
The Facts

On 26 September 2008, the plaintiff was attending an 18th birthday party at the defendant’s premises. A bonfire was constructed in the backyard which was lit early in the evening. At approximately 11.30pm the plaintiff fell into the fire and sustained very severe injuries, particularly to his left hand and forearm. The plaintiff alleged that as he moved towards the bonfire to sit on the logs surrounding it, he tripped on a hole in the ground and fell forward into the fire. Witnesses called on behalf of the defendant gave evidence that the plaintiff tripped over his own feet as he was singing and running around the fire.

The plaintiff claimed damages for negligence against the defendant. The defendant denied liability and raised the defence of intoxication. The plaintiff conceded that he was intoxicated but argued that his capacity to exercise care and skill was not compromised and as a result the accident would have occurred in any event.

The Decision

The plaintiff argued that the presence of the bonfire, the lack of lighting in the area and the presence of trip hazards in the form of holes or divots in the lawn meant that there was a real probability that the harm would occur if precautions were not taken. However, the court did not accept that the accident occurred in the manner alleged by the plaintiff and accepted the defendant’s evidence that the plaintiff tripped and fell over his own feet as he was singing and dancing around the fire.

In any event, the court found that it was not foreseeable that a person attending the party would fall into the bonfire. In coming to this conclusion, the court noted the decision in Parissis & Ors v Bourke [2004] NSWCA 373 to the effect that barbeque parties with liquor are attended by young adults all over Australia every evening and the perception that such an activity involves an foreseeable risk of personal injury is entirely wrong.

Further, notwithstanding the likely seriousness of severe injury such as burns, the risk of harm was not “not insignificant” given the very low probability that such injury would occur if care were not taken.

The burden of taking precautions to avoid the risk of harm was high and there was a social utility in the activity which created the risk of harm, being the holding of an 18th birthday party.

The court therefore held that the defendant did not breach its duty of care to the plaintiff.

The court also found that even if the defendant had breached its duty of care to the plaintiff, the breach was not a necessary condition of the occurrence of the harm to the plaintiff as he was not taking care for his own safety.

As to the defence of intoxication, the court was not satisfied that the plaintiff’s injury was likely to occur even if he was not intoxicated. The extent of the plaintiff’s intoxication was indicated by the plaintiff’s risky behaviour in jumping through the fire and running around the fire while unsteady on his feet. The court found the plaintiff was aware of the placement of the fire and not taking reasonable care for his own safety, therefore the defence of intoxication was made out.

The court entered a verdict in favour of the defendant.

IN ISSUE

• Whether the defendant occupier breached its duty of care to the plaintiff who fell into a bonfire on its property
• Whether the defence of intoxication was made out

DELIVERED ON 14 December 2012

READ MORE  click here
The Facts

The plaintiff was unable to open a driveway gate at an apartment complex so he scaled the back fence to exit the property. In doing so, he fell and sustained an injury to his foot. The fence was a typical suburban fence about 2 metres high and did not present any unusual features. The driveway gate had been disabled due to power failure. There was evidence that the defendants knew that tenants had previously scaled the driveway gate when they were unable to open it.

The plaintiff’s claim proceeded by way of a trial before a jury in the Supreme Court of Victoria. After the plaintiff had closed his case, the defendants submitted that the court should rule on whether a duty of care was owed to the plaintiff. The defendants argued that the conduct of the plaintiff in choosing to resolve his dilemma by climbing a high fence was far-fetched and fanciful and, not being reasonably foreseeable, no duty of care was owed.

The Decision

The court held that the relevant enquiry was whether it was reasonably foreseeable by the defendants that failing to provide a safe form of emergency egress from the property involved a risk of injury to persons on the premises who attempt to exit from the property by climbing the fence. The court noted that the enquiry involved an objective assessment of whether there was a risk that persons on the property in those circumstances might attempt to exit from the property by climbing the rear fence.

The court had no hesitation in finding that the plaintiff’s response to his inability to open the driveway gate was reasonably foreseeable. The court found that it was reasonably foreseeable that a person on the property in that predicament would not simply wait for assistance and might scale the back fence. The court held that scaling the driveway gate was, on any objective assessment, a more difficult physical challenge for a person of average physical ability than scaling the back fence. It was therefore not fanciful or far-fetched to expect that younger and fitter persons, who may well be lawfully on the property, could scale over the fence without injury but, at the same time, it was clearly an activity that carried an appreciable risk of injury, even for young, fit climbers. The court also found that it was not far-fetched or fanciful that persons with similar or lesser physical ability than the plaintiff may lawfully come onto the property.

The court directed the jury that the defendants’ duty of care extended to taking reasonable care to ensure that ingress and egress from the property could be safely achieved in all reasonably foreseeable conditions in which visitors might enter or leave the apartments, including, in particular, that the driveway gate could not be opened in the usual way. That duty was to take reasonable care to guard against reasonably foreseeable risk of physical injury resulting from the state or condition of the property or those activities.
The Facts

The appellant leased an apartment in Bonapartes Serviced Apartments in Spring Hill, Brisbane. The apartments were managed by the respondent. The appellant found the apartment to be in an unsatisfactory state of cleanliness in that, among other things, mould was present in a number of areas and there was a considerable build up of fluff and hair and other rubbish. The appellant complained to the respondent but ultimately decided to clean the apartment herself. In doing so, she suffered a needle stick injury to her hand which caused a psychiatric impairment. She sued the respondent for breach of contract, negligence and breach of a contractual term implied by s 74 of the TPA.

The Decision at Trial

The trial judge found in favour of the respondent on the basis that the risk of harm was not foreseeable because it was a risk of which the respondent did not know or ought reasonably to have known. Even if the risk had been foreseeable, a reasonable person would not have taken any more precautions than those which were taken by engaging cleaners.

The Issues on Appeal

The issues on appeal were whether the trial judge erred in finding that the risk of a needle stick injury was not foreseeable and that the standard cleaning procedure would not have led to its discovery.

The Decision on Appeal

The Court of Appeal endorsed the trial judge’s acceptance of the appellant’s evidence about the unclean state of the apartments. However, the Court of Appeal was unable to accept the trial judge’s finding that the cleaners followed standard procedure when cleaning the apartment. If the correct procedure had been followed the apartment could not have been in the filthy state in which it was found by the appellant and her family. The trial judge’s findings in respect of the cleaning by the contract cleaners were unsustainable and the Court of Appeal was required to make its own findings on the facts.

The Court of Appeal found that the respondent’s conduct in not ensuring the apartment was properly cleaned resulted in the apartment being left in a filthy condition. As a direct result of that condition, it was probable that the needle was obscured from the appellant’s vision when she was cleaning the step where it was located. The stairs not only had a build up of dust and hair and fluff where the riser met the tread, they were also sticky and dirty and this prevented the appellant from seeing the needle. In the Court of Appeal’s view, there was a foreseeable risk of injury to the appellant of which the respondent knew or ought to have known. The build up of filth increased the risk that items such as glass fragments, safety pins and pins and needles would lie unobserved until stood on or touched by an occupier. The general state of the apartment also gave rise to broader health issues and it was therefore foreseeable that a person injured physically might suffer psychiatric injury as a result.

The appeal was allowed.

IN ISSUE

• Whether standard cleaning procedure was followed
• Whether standard cleaning procedure would have led to discovery of needle
• Whether the risk of harm from a needle stick injury was foreseeable

DELIVERED ON 2 April 2013
READ MORE click here
**PUBLIC LIABILITY**

Occupiers' Liability

**Jones Lang LaSalle (NSW) Pty Ltd v Taouk**

[2012] NSWCA 342

**The Facts**

Late in the evening of Saturday 5 March 2005, the respondent, Mr Taouk sustained serious injuries to his left knee when he slipped and fell on grease and oil on the concrete floor of a carpark at Australia Square Tower in Sydney. The grease and oil had escaped from a container inside a grease trap room.

The first appellant, Jones Lang LaSalle (JLL) provided property management services to the owners of that building. The second appellant, Wilson Parking (Wilson), managed and operated the 3 level carpark in the centre.

**The Decision at Trial**

Mr Taouk succeeded in his claims against Wilson and JLL. The trial judge found that JLL was or should have been aware of an irregularity in the grease trap alarm system designed to warn when the grease trap was at a particular level, and as a result should have carried out hourly inspections of the car park for hazards. Whilst JLL had to take reasonable precautions directed to preventing or being aware of escapes of liquid from the grease trap, Wilson also had to take reasonable precautions directed to keeping the carpark surface clean and free from any form of spillage, whether caused by patrons or their cars or from any other source. The Court of Appeal held that the trial judge was correct to observe that Wilson was in a “better position” than JLL to deal with the risk of oil and grease on the carpark surface. Wilson had an employee working on that level of the carpark who was able to walk around and undertake a physical inspection at hourly intervals (rather than 30 minute intervals). Although the grease escaped and its escape remained undetected because of JLL’s negligence, the probability was that its presence would have been seen and Mr Taouk’s injury avoided if Wilson had exercised reasonable care.

Judgment was entered for Mr Taouk for $219,327 and liability was apportioned so as to require JLL to contribute 30% and Wilson to contribute 70%.

**The Issues on Appeal**

Both JLL and Wilson appealed the findings as to the frequency with which inspections were required and Wilson appealed the finding on apportionment of liability.

**The Decision on Appeal**

The Court of Appeal upheld the trial judge’s decision on liability and apportionment.

The Court of Appeal found that JLL was or should have been aware of an irregularity in the alarm system designed to warn when the grease trap was at a particular level, and as a result should have carried out hourly inspections of the car park area for hazards. The Court of Appeal held that the trial judge’s apportionment of 70% responsibility to Wilson was not manifestly excessive or otherwise in error. The apportionment reflected the fact that Wilson as occupier of the carpark, was primarily responsible for the safety of those who used it and was best placed to deal with dangers and risks of the kind which occurred.

**IN ISSUE**

- Whether the trial judge erred in finding the building manager breached its duty by failing to implement a system of inspection
- Whether the trial judge erred in finding the car park operator had a duty to inspect the car park every 30 minutes

**DELIVERED ON** 24 October 2012

**READ MORE** [click here]
The Facts

The appellant was a supplier of gas cylinders. In 2005, it supplied hydrogen chloride gas in cylinders to the respondent. The cylinders were delivered in a cage. One side of the cage operated as a ramp to assist with the unloading of the cylinders. In October 2005, an employee of the respondent was injured when he was unloading a gas cylinder from such a cage.

There were no known prior incidents in the preceding 5 years of persons slipping on a ramp whilst unloading gas cylinders. The respondent had observed that in recent times the cages the supplier delivered had no ramps installed.

Proceedings were brought against the respondent in negligence. The proceedings were settled between the respondent and the employee and $469,641.27 was paid to the employee in June 2008. The respondent brought proceedings against the appellant for contribution and/or indemnity in respect of monies paid to the employee.

The Decision at Trial

The trial judge apportioned liability equally between the respondent and the appellant for the employee’s injuries and entered judgment in favour of the respondent for 50% of the amount it paid to the employee.

The Issues on Appeal

The appellant appealed against the judgment that it was responsible for paying 50% of the employee’s damages. The appellant denied that it owed a duty of care to the employee as it merely supplied gas cylinders to the respondent under a contract and had no responsibility to design a safe system of work for employees of the respondent. The appellant submitted that this case fell outside a recognised relationship giving rise to a duty of care.

The Decision on Appeal

The Court of Appeal agreed with the trial judge that the appellant owed the employee a duty of care to take reasonable steps to supply a cage and ramp for its gas cylinders, which would not subject users to an unreasonable risk of injury whilst moving the gas cylinders. Contrary to the appellant’s submissions, the decision of Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 was held to be analogous to the facts of this case, despite the fact that the appellant did not supply any workers.

The Court of Appeal held that it was reasonably foreseeable that the gas cylinders would be unloaded by a single worker using a ramp in an awkward position, with a limited horizontal area to stand on. The Court of Appeal was satisfied that the appellant played an active role in positioning the cages in an outside area of the respondent’s premises and knew or ought to have known that the cage and ramp would be subject to weather conditions. It was reasonably foreseeable that a worker could slip and injure themselves because of the weight (125kg) and awkward shape of the gas cylinders and the slope and wet condition of the ramp.

The Court of Appeal held that the appellant did not merely supply a product or plant and...
equipment. Rather, the cage was designed to enable the gas cylinders to be unloaded in the manner utilised and that was the most likely method that the respondent and its employees would use to unload the cylinders from the cage. The appellant owed a duty to provide a cage and ramp which did not subject the respondent’s employees to an unreasonable risk of slipping on the ramp while unloading the cylinders.

The Court of Appeal accepted the evidence of the experts that the unloading procedure used by the employee was inherently unsafe and held that the very construction of the cage invited the method of unloading that was used by the employee. Further, the fact that the respondent owed a duty of care to the employee did not necessarily exclude the appellant from also owing a duty. The manner in which the appellant chose to deliver its goods created a direct relationship between the appellant and whoever attempted to unload the cage by using the integrated ramp. The Court of Appeal held that it did not matter whether the appellant owned the cages as it was the mechanism by which it chose to supply the gas cylinders.

The appeal was allowed in part. The respondent was entitled to a contribution of 25% of the amount it paid to the employee (rather than 50%). The respondent had primary responsibility for the safety of its employees and could have taken a number of steps to provide its employee with a safer system of work (such as providing items to make the ramp flat, providing anti-slip matting and possibly providing a machine to enable the gas cylinders to be lifted directly from the cage).
The Facts
The plaintiff, Mr Boulton, was employed by the first defendant, (Hy-Line), at a chicken breeding farm. He was injured on 9 April 2009 when a chicken shed in which he was working caught fire as a result of welding work which was being carried out on behalf of the second defendant (Adept). Mr Boulton settled his claims against both defendants. Hy-Line and Adept claimed contribution from each other.

There was also an issue as to whether Adept should be held vicariously liable for the negligence of the boilermaker (McKinnon) who was performing the welding work which caused the fire. Adept argued that the boilermaker was an independent contractor. Adept conceded that it was liable for the acts of two of its employees working in a team with the boilermaker at the time of the incident.

The Decision
As to the vicarious liability issue, the court noted that traditionally, control of work is an indicator of an employment relationship. However, whilst the degree of control to be exercised by a principal over work performed remains an important consideration in the identification of employment for vicarious liability purposes, courts now look more broadly at the totality of the relationship between the parties. Relevant factors may include the method of payment for the services or work; the permanency of the arrangement; the level of skill required; the wearing of identifying clothing; the supply of tools or equipment and the ability to provide services or work for others.

The court held that Adept should be regarded as McKinnon’s employer notwithstanding that another entity invoiced Adept for his services, that his work as a boilermaker was specialised and that he did some other work requiring his own different tools and equipment. In reaching this conclusion, the court noted that much of McKinnon’s work was for Adept, McKinnon had no employees of his own to assist him with the work and to perform the requisite “spreading” activity when he was welding, Adept had supplied the welding equipment he used, at least some of the tools and equipment he used were marked “Adept”, Adept also supplied him with fire safety equipment, including fire blankets and extinguishers, a director of Adept directed McKinnon how to perform the work (at least by directing him where it was to be performed and that he should take his employee as his assistant and spotter) and both McKinnon and the Adept employee “signed on” at the farm as workers for Adept.

The court also found Hy-Line liable to the plaintiff. Indeed, it found that Hy-Line breached its duty of care more significantly than Adept. Whilst Adept employees caused the fire, and whilst Hy-Line was entitled to rely upon Adept to a considerable extent to supervise the way in which it was done, Hy-Line had overall control of the site. In addition, deficiencies in the design and layout of the shed and the Hy-Line system of work and equipment clearly contributed substantially to the eventual outcome. The court was critical of the fact that there was no evidence of any Hy-Line occupational health and safety measures relating to fire at the site generally or to “hot work” and in particular, such activity in the vicinity of the sheds which contained flammable material. It noted that Hy-Line permitted the unsupervised “hot work” to be done outside the only exit point from a shed containing highly flammable material whilst the plaintiff was working inside it.

Liability was apportioned 60% to Hy-Line with 40% to Adept.
The Facts

The plaintiff was employed by Blue Star Painting Solutions Pty Ltd (Blue Star) as a painter at a residential complex being constructed in New South Wales. The builder, Parkview Constructions Pty Limited (Parkview) was the principal of the project as well as the occupier of the building site. The scaffolding at the building site was erected by Erect Safe Scaffolding (Australia) Pty Limited (Erect Safe).

On 2 April 2007, the plaintiff suffered serious injuries when a scaffolding board gave way underneath him and he fell 3 levels to the ground. The plaintiff brought proceedings against Blue Star, Erect Safe and Parkview.

There was overwhelming evidence that tradespersons on building sites in general, and at this particular building site, removed sections of scaffolding where it was necessary or convenient to do so to enable them to undertake their work. Parkview’s system of inspection of the scaffolding involved a monthly inspection of the whole site, including a monthly inspection of the scaffolding by Erect Safe in accordance with the scope of works.

The Decision

The court found there was a substantial, obvious and manifestly foreseeable risk that sections of the scaffolding would need to be removed to complete certain works at the building site and might well be removed by a tradesperson. The court held that Erect Safe’s duty was to construct the scaffolding with the risk of removal of certain sections in mind. However, Parkview was entitled to rely on the expertise and skill of Erect Safe, and its duty in relation to the construction of the scaffolding was satisfied by its engagement of Erect Safe. The court held that the construction of the scaffolding was negligent and that Erect Safe was in breach of its duty of care to the plaintiff as it failed to take an obvious and easily undertaken step of securing the scaffolding to avoid the risk that removal would present. The court determined that where the plaintiff’s injury occurred because the scaffolding was foreseeably rendered unsafe by likely events, even though by the act of third persons, it was appropriate that the scope of Erect Safe’s liability should extend to the plaintiff’s injuries.

In terms of causation, the court found that Erect Safe’s failure to construct the scaffolding with the risk of removal of certain sections in mind was a necessary condition of the occurrence of the harm to the plaintiff. Once constructed, the court also held that it was necessary to ensure that the scaffolding remained safe, and the risk that it would probably be compromised by the common practice of tradespersons to remove certain sections meant that a system of frequent and regular inspection was essential.

The court determined that it was clear that more than monthly inspections were necessary in order to ensure the integrity of the scaffolding and that Parkview accepted this as its responsibility. Parkview breached its duty of care by not ensuring that regular and frequent inspections were undertaken by a person of appropriate skill directed to checking the safety of scaffolding where it had been tampered with, especially where it knew that tradespersons needed to remove sections of the scaffolding to complete their works in the vicinity of where the plaintiff was working. The court found that Parkview’s failure to inspect was directly linked to the fact that the scaffolding was unsafe when the plaintiff moved on to it and was a necessary condition of his fall and his injuries.

The court found that Blue Star was not negligent and the plaintiff was not guilty of contributory negligence. The court ordered judgment in favour of the plaintiff against Parkview and Erect Safe, with respective contributions to be determined, and judgment for Blue Star against the plaintiff.

Abrahim v Parkview Constructions Pty Limited
[2012] NSWSC 1379

IN ISSUE

- Whether a builder (and principal and occupier of a building site) and a scaffolder breached their duties of care to a worker on the site

DELIVERED ON 23 November 2012

READ MORE click here
The Facts

The plaintiff claimed damages from the first and second defendants for personal injuries he sustained during an incident that occurred on 6 November 2003 at the Vision Valley Conference and Recreation Centre (the Centre) during the course of his employment with the second defendant. The Centre was operated at that time by the first defendant.

At the time of the incident, the plaintiff and other employees of the second defendant were attending the Centre for a retreat for their personal development. Attendance at the retreat was required by the second defendant. The retreat involved participation in challenging physical exercises for the purpose of enhancing self-confidence and group bonding.

The plaintiff indicated that the day before the retreat he injured his left hand in a minor accident at the Domino’s store where he was employed by the second defendant. The plaintiff claimed that his hand was still quite painful with restricted movement on the day of the retreat.

Despite this, the plaintiff participated in an exercise known as the “Leap of Faith”, which involved jumping from a platform attached to a tree 7 or 8 metres from the ground whilst wearing a harness. The object of the exercise was to jump off the platform and seize a trapeze bar located about a metre out from the platform. Two instructors employed by the first defendant were responsible for gradually lowering participants to the ground during the exercise.

The plaintiff alleged that he was reluctant to undertake this exercise and informed a senior staff member of the second defendant that his left hand hurt and he did not think that he could perform the exercise. That staff member and representatives of the first defendant encouraged the plaintiff to complete the exercise. The plaintiff did so but the impact hurt his hand and he fell. The plaintiff claimed that he fell in an uncontrolled manner, came to a sudden stop and was then gradually lowered to the ground. The plaintiff injured his lower back in the process.

The plaintiff claimed against the defendants for negligence, and alternatively breach of the warranty that was implied by s74(1) TPA (an implied warranty that services will be rendered with due care and skill and any materials supplied in connection with those services will be reasonably fit for their intended purpose).

The Decision

The court accepted that whilst the plaintiff was encouraged to undertake the exercises at the retreat, the plaintiff and his fellow employees were under no obligation to do so. The plaintiff agreed that although he was reluctant to complete the “Leap of Faith” exercise, he chose to accept the challenge.

The court accepted evidence that the plaintiff should have been lowered safely to the ground whether or not he succeeded in grabbing hold of the trapeze bar. The court rejected any assertion that the plaintiff had been contributorily negligent in participating in the exercise with a sore hand as the injury to the plaintiff’s hand was irrelevant.

Expert evidence was provided by 2 qualified scientists, Mr Richard Delaney and Dr Andrew Short. Mr Delaney concluded that the incident occurred as a result of poor belaying. The court also accepted that the medical evidence established the probability of a free fall such as the plaintiff’s as causing some type of back injury. The court held that the plaintiff’s fall and abrupt stop were the result of human error, i.e. faulty belaying. The court also accepted that the cause of the plaintiff’s back pain was the abrupt stop of the plaintiff’s free fall.

IN ISSUE

- Whether the operator of a conference centre and the plaintiff’s employer were liable for spinal injuries the plaintiff sustained during a challenging physical exercise that took place during the course of an employment retreat
- What was the cause of the plaintiff’s spinal injury

DELIVERED ON 13 December 2012

READ MORE [click here]
The court found that the first defendant’s services were not rendered with due care and skill as a result of faulty belaying and the plaintiff’s claim under s74 TPA was successful. The court held that as inadequate belaying led to the plaintiff’s injury and the belayers were employed by the first defendant, the plaintiff’s claim against the second defendant failed.
The Facts

On 22 December 2007, the appellant was working at a shopping centre as Santa Claus. At the conclusion of his shift, the appellant set out for the management office at the shopping centre where he was to change into his street clothes. Although he was often escorted by a security guard to the management office, on this occasion he was by himself. During this journey, the appellant was verbally abused and kicked in his left knee by a youth.

The Decision at Trial

The trial judge found in favour of the appellant against his employers and awarded damages in his favour. The trial judge determined that the provision of a safe system of work in all the circumstances involved the provision of a security guard, and the failure to provide a security guard on the day of the incident constituted a breach of the employer’s duty of care to the appellant. The trial judge dismissed the claim against the shopping centre’s owner/manager.

The Issues on Appeal

The appellant sought to overturn the dismissal of his claim against the shopping centre’s owner. The appellant also contended that the damages he was awarded against his employers were inadequate. The owner of the shopping centre in turn filed a notice of contention, and the employers, by way of cross-appeal, appealed against the finding that they were liable to the appellant for damage sustained as a result of the incident.

The Decision on Appeal

The Court of Appeal disagreed with the trial judge’s conclusion that the provision of a safe system of work involved the provision of a security guard to escort the appellant. The Court of Appeal considered that the imposition of such a duty on those who engage others to play the role of Santa Claus in similar circumstances would impose a burden which would be quite unnecessary. The Court of Appeal noted that it would possibly have the consequence that Santa Claus would become a rarity at shopping centres and many children would be deprived of this innocent pleasure.

The Court of Appeal also considered that the imposition of such an indeterminate duty on an indeterminate class was unacceptable, and that the risk that the appellant would be assaulted while performing his role or moving between his “throne” and the rooms in which he changed his clothes, was far-fetched and fanciful. The Court of Appeal considered the assault upon him could not have been foreseen as anything more than the possibility that any person in a public place during times when the public is present might be assaulted, and the use of the security guards as an escort was merely a useful tool to assist Santa Claus through the shopping centre and past children.

The Court of Appeal noted that the shopping centre owner did not employ the appellant nor did it have control over the appellant’s employer. The mere fact that the owner had the capacity or ability to provide a security guard to the appellant did not give rise to a duty to do so.

IN ISSUE

- Criminal assault by third party on employee at shopping centre – scope of duty of care owed by employer and owner of the shopping centre

DELIVERED ON 1 February 2013

READ MORE click here
The Facts

On 17 September 2008 the respondent approached the entrance to the Harvey Norman Store in Blacktown. At the same time, a member of staff within the electrical department of Harvey Norman had detained 2 men suspected of fraud and locked the front doors to the store. As the respondent was standing outside, an employee in the furniture department released the locking device so that the respondent could enter. Seeing their opportunity to flee, the 2 men detained in the electrical department fled, and in the process one of them knocked the respondent over causing him personal injuries.

The Decision at Trial

The trial judge found for the respondent and awarded damages in the sum of $42,500. The trial judge held that the appellant owed the respondent a duty of care because the respondent stood in a “special relationship” to the appellant. The special relationship is derived from the general law.

The Issues on Appeal

The issues on appeal concerned whether there was the “special relationship” between the occupier and the plaintiff who was injured by the criminal actions of a third party.

The Decision on Appeal

The Court of Appeal overturned the trial judge’s decision and delivered two leading judgments. Basten JA found that the trial judge’s consideration of duty miscarried for 3 reasons. Firstly, the trial judge focused too precisely on the facts of the case when evaluating the existence of a duty of care owed to the respondent.

Secondly, the enquiry as to the existence of a duty needed to be considered bearing in mind its scope, and scope may only be usefully assessed by considering the harm suffered and the alleged breach.

Thirdly, there were no criteria identified which would have warranted the conclusion that there was a special relationship between the respondent and the occupier. The Court of Appeal noted that all the trial judge found in this respect was a conclusory statement that “there was a special relationship between the applicant and members of the public, including customers inside and outside the store”. Basten JA noted that this conclusion would contradict the underlying assumption of the common law referred to in Modbury Triangle.

Meagher JA found that the trial judge did not attempt to identify any features or factors which justified the imposition of a duty of care.

It was noted that the harm itself was the direct consequence of the subsequent conduct of the fleeing suspect rather than the action of the occupier in locking the door. Taken together, these two matters did no more than assert the existence of a risk of harm of the kind suffered and identify one of the circumstances necessary to the existence of that risk. The fact that that risk of harm to the respondent was foreseeable was not sufficient to give rise to a duty of care on the part of the occupier to prevent harm to the respondent.
The Facts
The plaintiff attended the first defendant’s premises, a football and social club, to have dinner with her family. As the plaintiff stood at the reception counter, her 6 year old daughter was standing to her right side at the counter such that the child’s head was below the level of the counter. The plaintiff’s daughter raised her arm and placed it under the counter and the plaintiff heard a loud electrical noise and smelled burning flesh and hair as the child screamed. The plaintiff then turned and touched either her child or the counter and she herself felt a blow to her hip. The plaintiff observed her daughter to be stiff and unmoving and she herself felt a blow to her hip. The plaintiff observed her daughter to be stiff and unmoving and she pushed herself and her daughter off the counter and they fell to the ground. A visible burn was evident on the daughter’s wrist and arm. It was admitted that the plaintiff and her daughter suffered electric shocks due to the wiring of neon lighting installed beneath the reception counter being defective. The second defendant, Focus Signage Pty Ltd, had performed electrical work on the lighting.

The Decision
Judgment was given for the plaintiff against both defendants. The first defendant had resisted any finding of liability against it on the basis that it had retained an appropriately qualified contractor to install and maintain the lighting. It argued there was no vicarious liability because of the independent contractor relationship. The second defendant did not dispute findings that its electrical work was non-compliant. The court found that the first defendant was not to be held responsible for the defective workmanship of a contractor, however other evidence indicated that the first defendant had knowledge of the potential hazard of unguarded neon lighting under the counter.

There was evidence of a prior incident where a child had put their hand into the area of the signage prior to the subject incident, causing damage to the signage which required repair. This was found to establish that the first defendant was aware that the area in which the lighting was installed was accessible and presented a hazard to children. It was therefore found that the first defendant ought to have recognised the foreseeable risk of injury to children and that steps should have been taken to guard against this foreseeable risk by enclosing the area housing the lights to prevent inadvertent access to the area. It was said that this would have avoided the incident causing injury. Liability was apportioned 70% to the second defendant contractor and 30% to the first defendant.

There was significant dispute as to the quantum of the claim. The plaintiff claimed to be suffering a significant post-traumatic stress disorder. The evidence of 2 independent psychiatrists was in direct conflict as to whether any psychiatric injury was present. The court found that the consistency of the plaintiff’s complaints, the corresponding diagnoses of her treating practitioners and the absence of any suggestion that she had lied or overstated her position in evidence persuaded the court that the plaintiff did suffer a psychiatric injury. A significant award of $150,000 for general damages was given. The plaintiff was awarded $512,781.09 in total.
The Facts

The plaintiff went to the Woden Plaza Shopping Centre (shopping centre) where she noticed some spilt liquid on the floor near the entrance to Woolworths. She attempted to avoid the spilt liquid but stepped in it, slipped and fell suffering personal injuries.

The plaintiff brought proceedings against Lend Lease Funds Management Ltd t/as Woden Plaza (LLFM) as owner of the shopping centre. Pursuant to an agreement between LLFM and Lend Lease Property Management (Australia) Pty Ltd (LLP), LLP was to manage the shopping centre for a fee. The agreement provided that LLFM took almost no active role in the running of the shopping centre, with LLP having almost complete control over its management and day-to-day operations. LLP entered into a specialist services agreement with SSL Facilities Management Pty Ltd (Spotless) under which Spotless was responsible for the cleaning and presentation of the shopping centre. LLFM joined Spotless as a third party to the proceedings asserting that Spotless had negligently failed to keep the area of the spillage clean, failed to signpost it or clean it up, and failed to maintain an adequate cleaning system. LLFM further asserted that Spotless would have been liable if sued by the plaintiff. The agreement between LLP and Spotless required any spillage to be attended to promptly, with damp mopping of the spillage area followed by a dry mopping and finally a dry cloth to ensure all damp patches were eliminated. “Slippery When Wet” signs were to be displayed immediately. The agreement also required that during business hours, any spillage in the common areas of the shopping centre were to be rectified within 15 minutes.

The Decision

The court accepted that a cleaner employed by Spotless was walking past the area where liquid had been spilt every 15 minutes, and signposting and cleaning up spillages as they were detected. The court was therefore satisfied that the liquid had been spilt since the cleaner’s previous loop, that is, less than 15 minutes before the plaintiff slipped.

The court held that LLFM, whilst owner of the shopping centre, was not an occupier of the shopping centre. The court was satisfied that LLFM had fully delegated the management, administration and operation of the shopping centre to LLP. The court found that the occupier of the shopping centre was LLP.

The court held that even if LLP had been sued as an occupier, it would escape liability for breach of duty of care to the plaintiff as an entrant. The court found that LLP exercised reasonable skill and care in selecting Spotless and in arranging the terms of engagement. The court also found that the obligations imposed by the contract between LLP and Spotless were sufficiently detailed and thorough to enable the court to conclude that LLP successfully delegated to Spotless its duty of care to protect the plaintiff from injury by reason of a spillage. The court was also satisfied that the contractual arrangements between LLP and Spotless in relation to cleaning of floors in common areas were reasonable and satisfactory.

The court further found that the plaintiff would not have succeeded in a claim against Spotless. The court noted that no evidence was called that was capable of establishing any negligence on the part of Spotless. The court held that it is almost inevitable in a shopping centre that there will be spillages of liquid caused by customers of shops over whom the occupier has little or no control. The court found that when such a spillage occurs, there will be a period of time before it is detected by staff and made safe and there have been many cases in which 15 minute...
Bailey v Lend Lease Funds Management Limited t/as Woden Plaza & Anor
[2013] ACTSC 56

Loops for inspection by cleaners have been accepted as satisfactory. The plaintiff did not provide any evidence that the system required by the contract with Spotless, for 15 minute loops, was other than reasonable, satisfactory and in accordance with industry standards.

Judgment was entered for the defendant and for the third party.
The Facts
At about 8.30p.m on 21 December 2001, the applicant stumbled and fell through a glass wall forming part of the ground floor façade of an office building in Albert Street, Brisbane. She was heavily intoxicated at the time. She suffered severe lacerations to her face, neck, arms and upper body. She sued the respondent occupier alleging that her injuries were caused by its negligence in failing to conduct a safety audit of the glass panel. The applicant alleged that a safety audit would have revealed that the glass did not comply with current Australian standards and that it should be replaced. The applicant asserted that the respondent would have acted on that advice and her injury would not have occurred.

The Decision at Trial
The trial judge dismissed the applicant’s claim on the basis that the respondent was not negligent for failing to arrange an inspection of the glass doors and walls to investigate whether they complied with the applicable Australian standards.

The Issues on Appeal
The applicant argued that the trial judge erred in finding there was no obligation to arrange a safety audit because he failed to take into account a breach by the respondent of one of its admitted statutory obligations under the WHSA (QLD) (the Act) as evidence of negligence.

The Decision on Appeal
The Court of Appeal held that, subject to the argument about the Act, the trial judge was correct to dismiss the applicant’s claim in negligence. This was because extraordinarily large numbers of people had uneventfully entered and exited the foyer of the building for over 30 years; there was no evidence that the respondent knew or should have known that the glass in the side panels of the foyer had a propensity to break when sufficient force was applied to it; and the cost of investigating and removing that and other unlikely risks was potentially enormous.

As to the application of the Act, the respondent admitted that even though it was not the applicant’s employer, the foyer where the accident occurred was a workplace under the Act and it was therefore obliged under s30(1) of the Act “to ensure there is appropriate, safe access to and from the workplace for persons” including the applicant who worked in the building. Under s26(3) of the Act, the respondent could only discharge its duty under s30 by complying with the Workplace Health and Safety Risk Management Advisory Standard 2000 (the Advisory Standard). The Advisory Standard required the respondent to manage exposure to risks through 5 steps the first of which was to identify workplace hazards by looking for things in the workplace with the potential to cause harm.

The applicant argued that since the respondent admitted it did not conduct a safety audit, it had not complied with the Advisory Standard and was therefore in breach of its statutory obligations under s30 of the Act. The respondent argued it was only required to conduct a safety audit by an ordinary person and such an audit would not have detected that the glass did not comply with the current standards. The applicant asserted that the Advisory Standard required the respondent to engage an expert to conduct the audit and this would have revealed the need for the glass to be replaced. The Court of Appeal noted that the expression “safety audit” was not defined but that it seemed to suggest an investigation by someone appropriately qualified to conduct it so as to fulfil the regulatory purpose of ensuring...
safety. However, it was noteworthy that the Act and the Advisory Standard could have, but did not express any obligation to engage experts. Ultimately the Court of Appeal came to the view that the respondent was not required to engage an expert to audit the glass because there was no reason to suspect that the glass panels were not safe or were less safe than they previously had been and the extent and cost of expert audits would be very considerable if every feature of the building common area was to undergo expert examination even where there was no reason to believe it was unsafe. The Court of Appeal held that even if there was such an obligation, it did not follow that breach of it justified a conclusion that the respondent was negligent. The failure to engage an expert would only amount to some evidence of negligence but it would not be conclusive.

The applicant failed to prove breach of statutory duty and also failed to prove breach of common law duty. The Court of Appeal declined to make a specific finding about the appropriate apportionment of contributory negligence other than to hold that in light of the applicant’s high level of intoxication (0.26 per cent blood alcohol reading) she should bear some responsibility for her injuries.

The appeal was dismissed.
The Facts

The plaintiff commenced proceedings in negligence against the defendant (Boral) as occupier of a concrete batching plant. He claimed damages for physical and psychological injuries and economic loss suffered after part of the plant collapsed onto the truck he was driving in December 2007. On the day of the collapse, the plaintiff reversed his truck under the plant where it was to be loaded with raw concrete materials stored in large overhead bins. It was the bins, carrying hundreds of tonnes of raw material, which collapsed. The plant was a steel structure, built some 50 years prior to its collapse and had been owned and operated by Boral for about 25 years. The plant operated in a corrosive environment making it vulnerable to deterioration from constant impact and rust. Boral had a maintenance regime in place to deal with the effects of this environment but admitted that during the entire time of its ownership of the plant, Boral had no knowledge of how the bins which collapsed were supported in the structure and it never maintained any supports which might have existed. After the accident, the plant was demolished.

Boral admitted that it owed the plaintiff a duty of care but denied that the risk of the plant collapsing was foreseeable.

The Decision

The court was satisfied that the risk of harm was foreseeable and one which ought to have been known to a reasonable person in Boral’s position. The evidence as to the configuration of the plant showed that the bins were located high above the ground, carrying up to 450 tonnes of material, which were gravity fed into trucks parked below. The bins were not supported from below and their means of support was neither visible to nor known to Boral before the collapse. Whilst Boral had safety and maintenance systems in operation at the plant, it never investigated how the bins were supported and never maintained the supports.

The experts agreed that in a plant such as this, every structural element was at risk of failing and therefore required monitoring, inspection and repair. Boral failed in this regard. The bin support system was not understood, inspected or repaired as it ought to have been given the plant’s age when it collapsed.

The experts also agreed that given the nature of the loads in the bins which the structure had to support, a reasonably prudent operator would have known that inspections of the support structure were necessary and ought to include consideration of matters such as corrosion, distortion, deflection, deterioration and excessive vibration. Boral also failed in this regard as the evidence established that no such inspection was ever undertaken.

The court had no hesitation in finding that the evidence established that the likely seriousness of the harm which could result (the collapse of the bin support structure, the bins and their load falling some 13 metres to the ground onto trucks and people working below), was significant. The burden of taking available precautions to avoid the risk of harm materialising was not substantial and, given that the plant was a commercial enterprise operated for profit, a reasonable person in Boral’s position would have taken those precautions. The court was satisfied that causation was made out under s5D CLA (NSW) and entered judgment for the plaintiff.

IN ISSUE

• The scope of the occupier’s duty of care
• Whether the risk of harm arising from the collapse of a 50 year old concrete batching plant was foreseeable

DELIVERED ON 17 May 2013

READ MORE click here
The Facts

The case involved two properties located in central New South Wales, Kilbirnie (which was owned and operated by the plaintiffs, Mr and Mrs Barclay), and Bonna. The first defendant, Mr Bootle, was the leasehold proprietor of Bonna. The second defendant, Bootle Bros Management Pty Ltd (BMM), was the occupier and operator of Bonna.

The third defendant to the proceedings was Macquarie Valley Agricultural Services Pty Ltd (MVAS), which operated an aerial spraying business. The fourth defendant, Mr Shapley, was the pilot of the aircraft used by MVAS.

The plaintiffs sued the defendants for damage to their crops as a result of aerial spraying of glyphosate on the first defendant’s property. The damage was caused by spray drifting from its intended destination onto the plaintiffs’ emerging crops. The properties had a number of common boundaries. The first defendant had used aerial spraying as an economic and time saving measure due to late sowing of crops as a result of drought.

The plaintiffs’ claim related only to aerial spraying carried out on Bonna. This meant that if any of Kilbirnie’s crops suffered damage from either the first defendant’s or the plaintiffs’ own ground spraying, then the plaintiffs were not entitled to any damages.

The Decision at Trial

The court was satisfied on the balance of probabilities that aerial spraying on Bonna caused damage to crops on Kilbirnie. The court was not satisfied that the damage to the crops was caused wholly or partly by any ground spraying undertaken by the plaintiffs, specifically on the basis of the prevailing wind direction.

The court held that the damage was prima facie preventable by either the first defendant, second defendant or third defendant informing the fourth defendant not to spray on the particular day because the weather was unsuitable for spraying due to wind speed and direction. The court also held that the fourth defendant could have made the same decision. The negligence was not in the methodology of the spraying but in the decision to carry out the aerial spraying on the day in question. The court noted that aerial herbicide is a hazardous substance that is virtually uncontrollable once released into the atmosphere.

The Issues on Appeal

The issues on appeal were whether the trial judge was correct in finding that aerial spraying was an inherently dangerous activity such as to attract a non delegable duty of care and a finding that allowing the spraying to proceed was a breach of that duty.

The Decision on Appeal

The Court of Appeal held that the trial judge was in error in finding that the Bootles owed a non delegable duty of care because aerial spraying was an inherently dangerous activity and that they were in breach of that duty by allowing the spraying to occur. Even if this was correct, the non delegable duty required the Bootles to ensure that reasonable care was exercised in the use of aerial spray to avoid causing damage to susceptible crops. They could not discharge that duty simply by engaging apparently competent contractors. If the contractors failed to exercise reasonable care then the Bootles would be liable.

The Court of Appeal noted that finding that an activity conducted on land is so dangerous as to attract a non delegable duty of care does not mean that the occupier is liable without proof of fault. The dangerous nature of the activity may require a reasonably prudent person to exercise a higher, perhaps much higher.
higher, degree of care but a plaintiff claiming damages
must still prove the occupier has breached the non
delegable duty of care. After reviewing the evidence
about the wind and weather conditions, the Court
of Appeal found no evidence of want of reasonable
care by either the Bootles, the pilot or the aircraft
operator. The only basis for the finding of negligence
was the unsuitability of the weather conditions but the
evidence did not establish that the weather conditions
were unsuitable.

The pilot and aircraft operator also appealed the
findings of liability based on breaches of the Damage
by Aircraft Act 1999 (Cth). The pilot was successful in
avoiding liability (contrary to the trial judge’s finding he
was found to be an employee) but the aircraft operator
was unsuccessful.
Hoffmann v Boland
[2013] NSWCA 158

The Facts

The plaintiff, aged just under 6 months, was seriously injured when her maternal grandmother fell down a set of internal household stairs whilst carrying her. The stairs were in an area which formed part of an extension to the property, the extension being built in or about 2004. The stairs included winders - kite shaped stairs which changed the direction of the stairway.

The plaintiff’s grandmother had used the stairs numerous times previously and had never experienced any difficulties. She stated in evidence that the winders provided adequate room for her feet.

On the morning in question, the grandmother had taken the plaintiff to the mother to provide her with a feed. She failed to settle and the grandmother then offered to take the plaintiff downstairs so as not to wake the rest of the household. The mother agreed to this. The grandmother did not turn on lighting above the stairs when proceeding down the stairs, as she did not wish to disturb the rest of the family, however there was ambient lighting over the stairs which revealed their outline. The grandmother stated she simply lost her footing on the stairs due to the shape of the winders.

A claim was initially brought only against the grandmother, however a number of additional claims were subsequently brought against those who had or might have had some involvement in the design and construction of the stairs.

The Decision at Trial

The trial judge was persuaded that all stairwells are potentially dangerous but the inclusion of a staircase with winders in a dwelling does not make the dwelling inherently dangerous or its designer or builder negligent. He stated that winders are “inherently obvious to anyone who takes even a modicum of care when negotiating them”. In this case, they also met both the BCA and Australian Standards.

However, the trial judge found against the plaintiff’s grandmother on the basis that she breached her duty of care owed to the plaintiff by failing to turn on the lights in the middle of the night before attempting to negotiate the stairs.

No liability was found on the part of any of the other parties.

The Decision on Appeal

The Court of Appeal first addressed whether the grandmother actually owed the infant a duty of care (an issue not adequately considered by the trial judge). The Court of Appeal was divided on the issue.

Basten JA noted that a mother owed no duty enforceable in tort in the circumstances of this case.

In contrast, Sackville AJA held that a parent or carer may owe a child a duty of care in a particular case. He found that the grandmother owed the plaintiff a duty of care, not because she was a grandparent, but because she undertook responsibility to protect the plaintiff from the foreseeable risk of harm by taking “physical custody and control” of her and, knowing of the risks associated with traversing the winding staircase in the dark, embarked on a course that required the plaintiff to be entirely dependent on her for protection against injury. He found that the...
duty included taking reasonable care not to trip and fall on the staircase so as to create a risk of injury to the plaintiff.

It was not necessary to determine whether a duty of care was owed in the circumstances because the Court of Appeal unanimously agreed that the grandmother had not breached any such duty of care. She acted reasonably and took appropriate precautions. Her fall was caused by an unfortunate accident for which she was not found to be negligent. The Court of Appeal found that the trial judge was in error in failing to consider, as required by s5B (2)(d) CLA (NSW), the social utility of the grandmother providing assistance to the plaintiff’s mother. The Court of Appeal held that this type of assistance has a very high social utility as it goes to the very heart of what family members do for each other. In the circumstances, no breach of duty of care was established.

The Court of Appeal otherwise upheld the primary judge’s findings concluding that there was no negligence on the part of the designer or builder of the stairs.
The Facts
An independent contractor subcontracted the appellant to carry out a mail delivery run. On 5 June 2008, the appellant suffered an injury to her back whilst lifting a parcel on the respondent’s premises in order to place it in her van. She claimed that the respondent was negligent.

The appellant did not work for the respondent, nor was she directly contracted by the respondent to deliver parcels.

The Decision at Trial
The appellant contended that the respondent owed her a duty of care “akin to” that owed by an employer to an employee. The trial judge rejected this submission and found that the appellant had failed to show that the respondent owed a duty of care to her. The trial judge further found that even if the respondent had owed the appellant a duty of care, it was not required to take any precautions against a risk of harm of the kind which materialised, beyond the steps which it did in fact take.

The Issues on Appeal
The appellant challenged the finding that the respondent owed her a duty of care “akin to” that owed by an employer to an employee. The trial judge rejected this submission and found that the appellant had failed to show that the respondent owed a duty of care to her. The trial judge further found that even if the respondent had owed the appellant a duty of care, it was not required to take any precautions against a risk of harm of the kind which materialised, beyond the steps which it did in fact take.

The Decision on Appeal
The Court of Appeal agreed with the trial judge that where the relationship between the parties is not that of an employee and employer, it is unhelpful to identify the scope of duty as “akin” to a relationship that does not exist. The Court of Appeal found that there were 2 general factors of relevance in considering the relationship between the appellant and respondent. Firstly, the appellant contracted to work solely for the respondent and secondly she was not exercising any particular skill or specialist expertise or training in carrying out her functions at the delivery centre. In this respect, her role was in contrast to that of a qualified trade person.

The appellant had been injured in the course of her work which was part of a system that had been devised by the respondent. The respondent placed the parcels to be delivered in cages from which contractors would collect them to be sorted and delivered. Before the parcels were placed in the cages, the parcels were weighed by the respondent and thus the respondent knew of the precise risk which materialised, namely the risk that a contractor could suffer an injury through lifting a parcel unassisted if it was of a certain weight.

The Court of Appeal held that the respondent did owe a duty of care to contractors. The Court of Appeal held that the appellant would specifically fall under the definition of “personnel” in the mail contract and that the provisions of the mail contract recognised at least the possibility that the respondent would owe a duty of care to “personnel”, including subcontractors, coming onto its premises for the purposes of providing mail delivery services. In these circumstances, it was erroneous to conclude that the respondent did not owe a duty of care to the appellant and the real issue involved the identification of the precautions which a reasonable person in the position of the respondent would have taken in response to the risk.

The Court of Appeal held that there was no doubt that the respondent foresaw the risk of injury if individual contractors lifted more than 14kg – 15kg. This was demonstrated by a decision to place on such a parcel a sticker warning that it was heavy and that a 2 person lift was required.

The Court of Appeal held that further, the respondent had placed the parcels in cages from which they
could not readily be removed without manual lifting, provided no system for the lifting of heavy parcels, knew that most contractors were individuals, and placed significant time pressure on the contractors to sort parcels, load the vans and leave the delivery centre. Further, the system of sorting the parcels and placing them into the cages fell within the sole control of the respondent. The appellant relied on expert evidence as to the various modifications to the work system that could have been taken to address the risk. There was no evidence to suggest that taking any of these steps would have involved a commercial burden that was unreasonable to the respondent, and therefore, the Court of Appeal held that the respondent was in breach of its duty in failing to take such steps.
The Facts

Mikhael brought a claim in negligence against the State of New South Wales in relation to injuries he sustained when assaulted at school by a fellow student (T) on 5 December 2008. Mikhael sustained a serious injury resulting in brain damage.

T had been involved in a previous assault approximately 6 weeks prior to the subject assault.

Mikhael alleged the school had breached its duty of care by failing to provide teachers with information about T’s propensity to violence, even if provoked by a minor event.

The Decision at Trial

The trial judge held the school had breached its duty of care to Mikhael in that it failed to take adequate precautions to prevent harm to him. Mikhael was awarded $318,288 in damages.

The Issues on Appeal

The State of NSW appealed on the grounds that the trial judge had erred in finding the school breached its duty of care to the student plaintiff by failing to warn teachers of prior violent incident involving offending student.

The Court of Appeal confirmed that in order to establish causation, Mikhael was required to demonstrate that the school’s negligence in failing to provide its teacher with the full details of the earlier assault (including the minor provocation that had caused it) was a necessary condition of the occurrence of the harm.

The Court of Appeal noted that Mikhael’s teacher was the appropriate person to give evidence as to the hypothetical circumstance of her actions had she been informed of T’s anger management problems.

The Court of Appeal noted that it is not entitled to speculate as to what the teacher’s evidence may have been and concluded that Mikhael did not establish factual causation.

The State of NSW was therefore successful in its appeal.

IN ISSUE

• Whether the trial judge erred in finding that the school breached its duty of care to the student plaintiff by failing to warn teachers of prior violent incident involving offending student
• Whether the trial judge failed to make a finding as to causation and if so, whether factual causation was established

DELIVERED ON 22 October 2012
READ MORE [click here]
The Facts

The plaintiff was a student at the Carenne Public School in Bathurst, a school for pupils with special needs. The first defendant was the school. The second defendant was a teacher at the school. The plaintiff alleged that he and the second defendant had a passionate sexual liaison lasting about 6 months and that the termination of the relationship by the second defendant led to the plaintiff’s depression, drug abuse and criminal activity.

The second defendant denied any sexual activity. She said there was a friendship with the plaintiff that grew from her desire to help him with his learning problems but his descriptions of sex and romance were fanciful.

The plaintiff alleged the first defendant was liable because of the first defendant’s own acts of negligence and also vicariously liable for the acts of the second defendant.

The Decision at Trial

The trial judge held that the evidence established the existence of a sexual relationship between the plaintiff and the second defendant. The second defendant acted in what the court described as a “moment of madness”. As such, there was a breach of the duty owed to the plaintiff by the second defendant.

The trial judge found that the first defendant was not in breach of its duty to the plaintiff because it was not reasonably foreseeable that there would be a risk of a sexual relationship prompted by the second defendant.

Further, the trial judge found that the first defendant was not vicariously liable because the second defendant’s actions were outside the scope of her employment. This was not a situation where the teacher’s responsibilities involved a relationship of power and intimacy such that sexual abuse may properly be regarded as sufficiently connected with their duties to give rise to vicarious liability in their employers.

The Issues on Appeal

The plaintiff appealed the trial judge’s dismissal of the proceedings against the first defendant. The second defendant appealed the findings made against her.

The Decision on Appeal

The Court of Appeal held that as the second defendant’s acts were an intentional tort, the CLA (NSW) did not apply and the claim was to be assessed at common law.

The Court of Appeal held that there was no basis for the first defendant to be criticised for failing to perceive the developing confluence of emotions in the second defendant. It was not reasonably foreseeable. As such, the first defendant was not negligent.

Further, the Court of Appeal upheld the finding of the trial judge that the first defendant was not vicariously liable. The Court of Appeal noted that although it may be accepted that children at the school were more emotionally vulnerable than ordinary school students, the enterprise of teaching and guiding the young did not create a new ambit of risk of sexual activity. The connection was not sufficient to justify imposition on the first defendant for the second defendant’s misconduct. The first defendant did not create or enhance the risk of sexual misconduct and so was not vicariously liable for her actions.

The second defendant’s appeal failed on all grounds except the ground relating to the trial judge’s treatment of a limitation argument. This issue related to the requirement of the plaintiff to obtain the court’s leave to commence proceedings under the Felons (Civil Proceedings) Act 1981 (NSW) (the FA) because he was imprisoned and had committed an indictable offence. Under the FA, leave can only be granted if the proceedings are not an abuse of process. They would be an abuse of process if they were statute.

IN ISSUE
• Whether the State breached its duty of care to a student when teacher embarked on sexual relationship with a pupil, including whether State vicariously liable

DELIVERED ON 11 February 2013

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click here
barred under the Limitation Act 1969 (NSW). The plaintiff commenced proceedings 5 years after the sexual relationship ended and as a consequence there was an issue as to whether the proceedings were validly commenced. The trial judge had treated the limitation issue as having been disposed of by an earlier interlocutory application but the Court of Appeal held that was not the correct approach and it had not been finally determined. The Court of Appeal found that the trial judge had erred on the limitation point argument and set aside the judgment against the second defendant and remitted the matter for consideration by the trial judge to determine the limitation point. BN.
The Facts

Jazmine Oysten (the appellant) was a student at St Patrick’s College (the College) from 2002 to February 2005. She commenced a claim in negligence against the College alleging that she suffered psychological harm after being bullied by fellow students.

The central issue in the proceedings was the adequacy of the College’s policies in relation to bullying and the effectiveness of their implementation. The College also contested whether the appellant suffered a psychological illness and if she did whether it was caused by the alleged bullying. Contributory negligence was also alleged.

The Decision at Trial

The trial judge found that the College’s response to the bullying of the appellant and the implementation of its policies were inadequate.

The trial judge acknowledged that the College was active in attempting to deal with bullying on a more general level, but found that in the appellant’s case, the reaction was ad hoc and not in compliance with established policies.

The trial judge found that the College ought to have been aware of the bullying by early 2004 and that it failed to implement the systems necessary to bring the bullying under control. Therefore the College was in breach of its duty owed to the appellant. Damages of $116,296.60 plus interest were awarded.

The Issues on Appeal

The appellant appealed against the damages award and the College cross-appealed on liability. It was agreed between the parties that the issue of breach of duty would be dealt with at an independent hearing, prior to the other issues on appeal, which included causation and damages.

The Decision on Appeal

The Court of Appeal found no reason to depart from the trial judge’s finding that the College was aware of the bullying from early 2004 and that the appellant was particularly vulnerable, in that she suffered from anxiety and panic attacks and therefore was likely to be susceptible to psychological harm.

The steps taken by the College and its staff in 2004 did not provide a reasonable response to the not insignificant risk of harm to students such as the appellant. Merely ‘keeping an eye out for bullying’ was insufficient, as acknowledged by the College’s own anti-bullying policies.

The Court of Appeal upheld the trial judge’s finding that the College breached its duty of care. It was found that there was ample evidence to support the submission that the appellant was subjected to ongoing bullying in 2004, that the College was aware of such bullying and that it failed to take reasonable steps to bring the bullying to an end.

As breach had been established, an order was made for the matter to be referred to the registrar for the purpose of fixing a date for hearing the outstanding issues.
The Facts

The plaintiff was seriously injured at about 4.50am on 25 November 2007 when he was assaulted outside the licensed premises of the first defendant’s hotel (the hotel). The assailant, Mr Paseka, was employed by the first defendant as a glass attendant. The plaintiff also brought proceedings against Mr Paseka, the licensee of the hotel (Mr Keough), and the insurer of the hotel’s security provider.

Prior to the assault, the plaintiff was asked to leave the hotel, and whilst waiting for his friend on the corner of the street across the road from the hotel, Mr Paseka assaulted him.

The issues at trial were whether or not the hotel, Mr Keough, and/or the insurer of the security company were responsible for the consequences of the assault which occurred beyond the boundaries of the hotel. It was also in issue whether or not Mr Paseka was employed by the hotel and still performing duties for it at the time of his assault upon the plaintiff, even though the hotel and Mr Keough submitted that he ceased work a few hours prior to the assault.

The Decision

The court held that the hotel and Mr Keough owed a duty to the plaintiff to take reasonable care to prevent injury to him from violent, quarrelsome or disorderly conduct of other persons on the premises of the hotel, and that this duty was consistent with the duty imposed by statute upon Mr Keough as the licensee. It was also held that, depending upon the particular facts of the case, the duty may extend to circumstances where the wrongdoings causing injury occurred in a public street. The element of control, together with the statutory obligations imposed upon the licensee and occupation of the site, was the foundation of the duty.

Although the court was satisfied that Mr Paseka was still performing his duties for the hotel at the time of the assault, his actions had nothing to do with his duties as a glass collector, and his actions were not done in furtherance of the interests of the hotel or Mr Keough. Therefore, the court held that neither the hotel nor Mr Keough were vicariously liable for Mr Paseka’s actions. The court did however find that the hotel was liable for failing to take any or reasonable steps to prevent the assault on the plaintiff.

The court found in favour of the plaintiff against all 4 defendants. Apportionment of the plaintiff’s damages was attributed 70% to the hotel and Mr Keough (as they designed and implemented the system of security and gave undertakings to the Liquor Board that patrons would depart in a quiet and orderly manner) and 30% to the insurer of the hotel’s security providers (as security guards were specifically engaged to patrol the area outside of the hotel). Mr Paseka did not take any active part in the proceedings.

An appeal against this decision is expected to be heard in 2013.

IN ISSUE

• Whether a duty of care is owed by an occupier and security guards of licensed premises to patrons beyond the licensed premises, and to what extent

DELIVERED ON 12 September 2012

READ MORE [click here]
The Facts

The plaintiff claimed damages from the first and second defendants for injuries sustained to his right knee when he slipped and fell at The Arthouse Hotel on a Friday night in February 2010. The plaintiff had attended the premises with 2 workmates for a drink. The first defendant was the occupier of the premises. The second defendant was the licensee.

The defendants disputed that they had breached the duty that they owed as occupiers of the premises to take reasonable care that the premises were safe. Alternatively, the defendants alleged that if they had breached their duty of care, the plaintiff was guilty of contributory negligence. The plaintiff disputed the allegation of contributory negligence.

The crucial factual issue between the parties was whether or not the highly polished wooden floor of the bar where the plaintiff fell was wet immediately prior to the incident. If it was in fact clean and dry, the parties agreed that the condition of the floor did not materially contribute to the plaintiff’s slip and fall. If wet, the parties agreed that the condition of the floor materially contributed to the plaintiff’s slip and fall.

The evidence of the first defendant was that the floor was stripped and repolished every 6 to 12 months, and buffed and polished weekly by a commercial cleaning contractor (who also attended to cleaning the floor each morning when patrons were not present). If liquid was detected on the floor during opening hours, it was dealt with by floor staff (glassies). The glassies were responsible for collecting glasses, cleaning tables, monitoring the general cleanliness of the floor, dry mopping and wiping up spills with a cloth which they always carried with them.

The evidence was that there were 5 or more glassies on duty in the bar on Friday nights and they all carried two-way radios to communicate with each other. The cleaning system was that if a spill was noticed, a staff member was to stand at the spill and radio for assistance from a colleague, who would then use a dry mop and/or a towel to clean up the spill. Wet floor signs were available to warn patrons about the condition of the floor if it was not completely dried. It was accepted that there was no wet floor sign in the area when the plaintiff fell.

The Decision

The court was satisfied that the plaintiff established on the balance of probabilities that the floor was wet when he slipped and fell because it was not completely mopped dry. The court held that reasonable care required that the spill be dried completely by using a sufficiently dry mop and/or cloth, or putting out a warning sign. The court held that the first defendant failed to exercise reasonable skill and care in drying the spill completely or putting out a warning sign.

The court also emphasised that as a matter of common sense an area immediately adjacent to a serving bar is an area of the bar where drinks might be spilt and need to be attended to. The court accepted that CCTV footage of the plaintiff’s incident demonstrated that given the way the plaintiff slipped and fell, it was apparent that he must have slipped on something else on the floor which he had not
stepped on beforehand. The court also held it was likely that the CCTV footage demonstrated that the bar manager on duty was wiping an inadequately mopped floor after the plaintiff left with his friends. The documents created contemporaneous to the incident by the first defendant also supported that the floor was wet at the time of the plaintiff’s fall.

The court rejected the defendants’ allegations that the plaintiff’s fall could have been caused by the thongs that he was wearing or his prior knee injury. However, the court made a small allowance of 8% for contributory negligence on the part of the plaintiff for not keeping a proper lookout as to where he was walking in the bar.
Public Liability

Aerial Spraying

Meandarra Aerial Spraying Pty Ltd & Anor v GEJ Geldard Pty Ltd

[2012] QCA 315

The Facts

The first appellant (Meandarra) conducted a business which included aerial spraying of herbicide. The second appellant (Hill) was the managing director and chief pilot of Meandarra. In December 2005, Hill operated one of Meandarra’s aircraft to aerially spray herbicide to control regrowth of wattle trees on 2 cattle properties (Sherwood and Wallumba) in the Condamine district. Four days after the spraying, yellowing and damage was observed on the respondent’s cotton crops on 2 properties about 20 kilometres south of where the spraying occurred. The respondent alleged that the damage and resulting loss of cotton yield were caused by the herbicide. The respondent claimed damages from the appellants, the managers and owners of Sherwood and Wallumba, and the supplier of the herbicide. Before the trial the respondent settled its claims against all defendants other than the appellants.

The Decision at Trial

The trial judge found that the appellants had breached the duty of care they owed to the respondent by spraying the quantities and combination of chemicals they sprayed in the prevailing weather conditions, and that the damage to the respondent’s cotton crops was caused by that spraying. Judgment was entered for the respondent against the appellants for $559,540.38 plus costs.

The Issues on Appeal

There were 5 grounds of appeal. The appellants argued that the trial judge erred in stating that the appellants owed a strict duty to avoid damaging the respondent’s cotton crop and consequently erred in finding negligence was established; that the trial judge erred in finding that the duty was breached because she failed to apply s9 CLA (QLD); that the trial judge erred in finding that the herbicide caused the damage when the expert evidence was that it was not practicable to quantify the amount of the herbicide that reached the respondent’s crops; that the trial judge erred in finding that the respondent suffered a total quantifiable loss and should have found that no loss was proven and that the trial judge erred in finding that the appellant carried the onus of proof for existence of concurrent wrongdoers and erred in finding that there were no concurrent wrongdoers.

The Decision on Appeal

The appellants submitted that in the reasons for judgment the trial judge misdirected herself that the appellants owed the respondents a strict duty to avoid damaging the respondent’s cotton crops and that this contributed to error in her conclusion that the appellants were negligent. The Court of Appeal rejected this argument, holding that the reasons as a whole demonstrated that the mistaken expression of the duty did not influence her Honour’s conclusions that the appellants owed a duty to the respondent to take reasonable care that their aerial spraying did not damage the respondent’s cotton crops.

The appellants argued that the trial judge failed to apply the provisions of s9 (1)(a) CLA (QLD) to determine whether there was a breach of duty. The Court of Appeal held that although the trial judge did not quote s9 CLA (QLD), nothing in her reasons suggested that having acknowledged the applicability of it, she then failed to apply it. The Court of Appeal then considered the factual challenge to the trial judge’s finding that risk of damage to the respondent’s crops was foreseeable. The critical question was whether the evidence supported the conclusion that
damage to the respondent’s crops was foreseeable as a not insignificant risk. The Court of Appeal held that it did. It was specifically noted that the CLA (QLD) does not exclude the common law principle that damage is foreseeable if the kind of damage is foreseeable even if the extent of the damage is greater than expected.

The appellants then challenged the trial judge’s finding on causation. The appellants argued that the respondent failed to prove causation because the expert evidence was to the effect that it was not practicable to quantify the amount of herbicide that reached the respondent’s crops and that, below a certain level, it would not cause damage to those crops. The Court of Appeal rejected that argument and held that it is not the law that the absence of scientific proof of a causal relationship precludes a finding that it was more probable than not that the appellants’ spraying operation caused the damage. The Court of Appeal held that the experts’ inability to make a reliable determination of the quantity of the herbicide which reached the cotton crops did not justify overturning the trial judge’s finding on causation. The evidence amply justified the trial judge’s conclusion that the herbicide drifted to and caused the damage to the respondent’s crops.

The appellants also challenged the trial judge’s finding that the onus was on the appellants to prove the facts necessary to establish that the other defendants were concurrent wrongdoers within the meaning of s31 CLA (QLD) and that the appellants’ liability to the respondent was therefore limited. The Court of Appeal ruled that both case law and the CLA (QLD) established that the onus lay on the appellants to prove the facts necessary for the application of the apportionment provisions of the CLA (QLD). A plaintiff’s claim is complete without any evidence that there is a concurrent wrongdoer. The plaintiff is entitled to recover its proved loss in full from a defendant who is proved to be legally liable for that loss. If a defendant wishes to achieve a different result, the onus is on the defendant to prove the necessary facts. In this case, the appellants were unable to prove the necessary facts.

All grounds of appeal were unsuccessful and the appeal was dismissed.
McDonald v Shoalhaven City Council  
[2013] NSWCA 81

The Facts

The appellant was injured whilst assisting an employee of the respondent out of a trench which had collapsed. The appellant was not an employee of the respondent.

The Decision at Trial

The trial judge found that the respondent owed the appellant a duty of care, but dismissed the appellant’s claim for damages on the basis that he had not established a breach of the duty of care pursuant to s5B(1) of the CLA (NSW).

The Issues on Appeal

The Court of Appeal was required to consider whether: the appellant’s claim was governed by the CLA (NSW); the trial judge erred in failing to consider that the duty of care owed to the appellant was in the nature of the duty owed by an employer to an employee; whether the trial judge failed to consider all of the evidence relating to the collapse of the trench; and finally, whether the trial judge erred in applying the term “not insignificant” under s5B(1)(b) CLA (NSW) as if it bore the same meaning as the word “significant”.

The Decision on Appeal

As to the first ground of appeal, the Court of Appeal agreed with the trial judge that the claim was governed by the provisions of the CLA (NSW). The Court of Appeal maintained that the claim did not fall within the WorkCover exemption under s3B(1)(f) CLA (NSW) because there was no relationship of worker and employer between the appellant and the respondent.

As to the second ground of appeal, the Court of Appeal did not accept the appellant’s submission that the respondent owed him a duty akin to that owed to an employee by an employer. The Court of Appeal accepted the trial judge’s formulation of the duty of care as follows:

“...whether, the [respondent] might foresee, as a consequence of its alleged failure to exercise reasonable care to its employees, the assistance which might be rendered at some risk to [themselves] of a volunteer nearby, fulfilling a moral and social duty to help the men who were in a position of danger brought about by the alleged negligence.”

As to the third ground of appeal, the Court of Appeal found that the trial judge did not properly consider the appellant’s eyewitness evidence.

The Court of Appeal concluded that the trial judge should have expressly addressed the appellant’s evidence as to what he observed at the time the trench collapsed, determined whether or not he accepted the appellant’s evidence and then considered the respondent’s evidence having regard to that determination.

As to the fourth ground of appeal, the Court of Appeal considered it likely that the trial judge misinterpreted the meaning of “not insignificant” under s5B(1)(b) CLA (NSW), but did not make a determination on the issue given its finding with respect to the previous ground of appeal.

The appeal was allowed and the matter was remitted to the District Court for a retrial.
PRODUCT LIABILITY
Fulton Hogan Construction Pty Ltd v Grenadier Manufacturing Pty Ltd (in liq) & Ors [2012] VSC 358

Whether failure of coating was caused or contributed to by poor application practice or by defective product.
The Facts

In April 2008, the plaintiff was contracted to construct, supply and install a footbridge at Vermont South in Victoria. The first defendant was then contracted by the plaintiff to undertake this work, including applying protective coating to the trusses and handrails of the footbridge. The first defendant sub-contracted the coating works of the trusses to the second defendant. This work was undertaken between December 2008 and January 2009 using products manufactured by the third defendant.

The coating showed signs of failure shortly after application.

The central issue in the proceedings was whether the failure of the coating system was caused by defective products manufactured by the third defendant or by poor application of it by the second defendant. The parties relied extensively on expert evidence. The third defendant challenged the evidence relied upon by the plaintiff.

The Decision

The court rejected the challenges to the plaintiff’s expert evidence by the third defendant.

The court considered that the failure of the paint had occurred within a single layer (cohesive failure) and on the balance of probabilities the primer used on the trusses and handrails was defective. It was unable to determine the reason for the failure. However, contributing factors may have been delay of approximately 2 years between manufacture and supply, the third defendant’s unsatisfactory warehouse conditions, mistake in manufacturing or inferior quality ingredients.

With respect to application, the court broadly accepted that on the trusses the coating system had not been applied in accordance with product specifications. It was not possible to make an informed assessment of the correct application on the handrails as numerous contractors had applied the coating.

The proportionate liability provisions in Part IVAA of the Wrongs Act 1958 (VIC) applied to the claim. The first defendant did not cause or contribute to the loss/damage and was not a concurrent wrongdoer. The second defendant was found liable to the extent of 5% and the third defendant was found liable to the extent of 95%.

The plaintiff claimed loss and damage of $1,896,887.92 (inclusive of GST). It was held that proven loss and damage amounted to $1,593,805.83 with no GST allowed on the basis that the plaintiff had the benefit of input tax credit received.
WORKERS’ COMPENSATION

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Claim for damages for psychiatric injury as a result of workplace bullying and harassment.
The Facts

The defendant carried on business as Centacare. It provided a support program for children with behavioural and intellectual disabilities. The plaintiff, a 53 year old woman, was employed by the defendant as a disability support worker.

The incident occurred at a recreational camp held by the defendant. The plaintiff was standing on the sidelines following the completion of a game of soccer. One of the children (referred to as “JR” in the judgment) continued to play with the soccer ball after the game. JR kicked the ball with the result that it struck the plaintiff on the left side of her head. The plaintiff suffered facial and neck injuries, and developed an adjustment disorder.

The evidence indicated that JR was a very troubled 13 year old boy. He had been diagnosed with a variety of behaviour disorders including severe conduct disorder, oppositional defiance disorder, and ADHD. He had a history of violent and uncontrollable behaviour which made it necessary for the defendant to call the police for assistance on a number of occasions in the past.

The Decision

The parties accepted that the defendant owed the plaintiff a duty to take all reasonable precautions for her safety.

The plaintiff alleged that JR deliberately kicked the ball at her, and the defendant breached its duty by failing to ensure that JR was supervised at all times.

The court accepted that JR was not being supervised at the time of the incident, and that by failing to do so the defendant breached the duty of care it owed to the plaintiff.

The court was then required to determine whether the defendant’s breach of duty was causative of the incident. As the CLA (QLD) had no application, the court had regard to the test for causation formulated by the High Court in March v Stramare. In that case the High Court held that causation is to be determined by applying common sense to the facts. The court also noted that the onus of proof resides with the plaintiff to establish causation. Consequently, the plaintiff was required to demonstrate on the balance of probabilities that the failure to supervise JR was the cause of her being struck in the head.

After reviewing the evidence, the court concluded that there was no evidence of any antisocial behaviour or an escalation in misbehaviour at the time JR kicked the ball. In fact, there was no evidence that JR deliberately kicked the ball at the plaintiff. In light of this, the court found that the plaintiff had failed to demonstrate on the balance of probabilities that a causal link existed between the defendant’s failure to supervise JR and her injuries. On this basis, the claim was dismissed.
The Facts

The plaintiff was injured in two accidents that occurred in the course of his employment as an apprentice electrician. On both occasions, he was employed by, respectively, a partnership operated by his father or a company owned by his father. In the first accident, the plaintiff suffered pelvic fractures when an electrical board fell on him. Liability was admitted in respect of this accident.

In the second accident, the plaintiff fractured his right foot and ankle while walking over electrical conduit that had been left outside the rear entry to the worksite as he was leaving at 2am. The plaintiff claimed against the first defendant as his employer and against the second defendant as occupier of the premises. The first defendant did not dispute primary liability but it alleged contributory negligence on the part of the plaintiff. The court also accepted the plaintiff’s evidence that the debris in the passageway contained materials that were not part of the first defendant’s work. The second defendant led no evidence to support any claim that the first defendant was responsible for the removal of waste or demolition materials created by its work or by any other contractor.

The second defendant then argued that the cause of the plaintiff’s accident was the plaintiff’s decision to turn off the exterior lights and continue walking in an area where he could not see and for failing to use a torch. The court held that this conduct might amount to contributory negligence but it did not relieve the second defendant of responsibility.

The court did not accept that a reasonable person in the second defendant’s position would do nothing to guard against the risk presented by waste materials in the exit passageway. The court noted that neither the plaintiff nor the first defendant had any control over the means of locking or exiting the worksite. As a result, the court found that there was negligence on the part of the second defendant, regardless of any separate acts of neglect on the part of the plaintiff or the first defendant.

The court determined that the first defendant should bear 60% of the liability for the plaintiff’s injuries on the basis that as the plaintiff’s employer, the first defendant was responsible for failing to check the condition of and the lighting in the service area before directing the plaintiff to carry out the lock up procedure prescribed by the second defendant’s manager. The first defendant also failed to ensure that the plaintiff was provided with a torch to use after he had turned off the external light before he left. The court held that the second defendant was negligent in allowing waste materials to be placed in the service area; for directing the plaintiff to exit through an area which was obstructed by waste materials; for storing gym equipment in the area so that it obstructed the illumination provided by street lighting and for placing or leaving the building materials that caused the plaintiff to fall. The court found that the plaintiff’s evidence satisfied this evidentiary burden. The plaintiff consistently denied that the materials he fell on were placed in the area by any of the first defendant’s employees. The court also accepted the plaintiff’s evidence that the debris in the passageway contained materials that were not part of the first defendant’s work. The second defendant led no evidence to support any claim that the first defendant was responsible for the removal of waste or demolition materials created by its work or by any other contractor.

The second defendant claimed that it was not liable for the negligence of the first defendant, its contractor. The court agreed that in principle this was correct unless the injuries were caused by the second defendant’s separate acts of negligence.

The second defendant argued that the onus was on the plaintiff or the first defendant (who had control of the work site for 6 hours before the plaintiff’s accident) to establish that they were not responsible

IN ISSUE

- Apportionment between employer and occupier for second workplace accident
- Extent of plaintiff’s contributory negligence and assessment of damages for injury

DELIVERED ON 10 September 2012

READ MORE  click here
failing to ensure that the security light operated on detection of movement. The second defendant’s contribution to the plaintiff’s injuries was assessed at 40%.

The plaintiff’s damages were reduced by 10% for contributory negligence in failing to appreciate that he should have obtained and used a torch as he was exiting the worksite.
The Facts

On or about 2.00 am on 14 March 2004, Ms Kathryn Hills (Ms Hills) was walking from level five to level four at the premises of her employer, Pioneer Studios Pty Ltd (Pioneer) when she lost her balance and fell over the railing and suffered serious head and brain injuries. She was attending a social function at the time.

Pioneer rented studios and photographic equipment to a range of clients. Its main clients were photographers and companies in the fashion industry. Ms Hills was the manager of the equipment rental department.

Pioneer’s managing director, Richard Ludbrook, gave permission for Pioneer’s premises to be used for a social function. The function had been organised by Alistair Buchanan, a photographer with Pioneer, and his two flatmates, Peter Fleming and Jordan Cvetanovski, neither of whom worked with Pioneer.

The party was to celebrate the three men's birthdays and to farewell Mr Buchanan, who was leaving Pioneer to start work as a freelance photographer.

The contest before the Workers Compensation Commission (WCC) was whether Ms Hill's injuries occurred within the course of employment.

The Issues on Appeal

Pioneer appealed on the grounds that there was no evidence supporting the critical findings that Pioneer encouraged or induced Ms Hills to attend the party on Saturday 13th March 2004; or that Ms Hill's injury arose out of the course of her employment with Pioneer; or that Ms Hill's employment with Pioneer was a material contributing factor to her injury.

The Decision on Appeal

The Court of Appeal unanimously held that the question of what constitutes the course of employment is determined by the employer and by a person in authority. It depends on what was actually required of an employee by the employer, and what an employee does, and not on the employee’s subjective impression of what was required of them.

The Court of Appeal specifically noted that generally the core element of a worker’s course of employment is attendance at a workplace carrying out work functions during business hours. Over time, the boundaries have eroded and now it is well accepted that social events and recreational activities can be part of the course of employment. However, the Court of Appeal cautioned that the further the activity from the core element, the greater the scrutiny of the circumstances is required.

The determination of any claim on the issue of whether an activity and an injury occurred in the course of employment requires evidence on all of those matters. There was no such evidence before the WCC and the Court of Appeal was therefore entitled to intervene and remit the matter for reconsideration and application of the correct law.

IN ISSUE

• Was a worker’s employment the substantial contributing factor to an injury which occurred at a social function held on work premises?

• Was there sufficient connection between injury and employment?

DELIVERED ON 26 September 2012

READ MORE  

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The Facts

The plaintiff, Ms Wolters, was employed by the defendant (the University) as a security officer. Mr Mark Bradley was an employee of the University, and held the position of Director, Capital Programs and Operations. In that role he had management responsibility for a variety of services, including security.

On Friday, 14 March 2008 at around 8.25 am there was a power outage on the campus. During that episode Mr Bradley confronted Ms Wolters. He walked quickly towards her, yelled at her and waved his arms at her. He accused her of having abandoned her duties. His accusation was incorrect.

During the confrontation Ms Wolters attempted to explain what she had been doing, but to no avail. Mr Bradley did not discuss matters with her. He ordered her to get on with her work, and stormed off.

Mr Bradley’s aggressive behaviour and his unfair accusation caused her considerable distress. She struggled to work her rostered shift the next night, and after that she did not work another shift.

On 19 December 2007 Ms Carney lodged a formal complaint of workplace harassment and bullying against Mr Bradley. This was never properly investigated by the University. On the same day she also lodged an application for workers’ compensation which was ultimately successful.

The Decision

The court accepted that Ms Wolters felt frightened by the manner in which Mr Bradley conducted himself. Mr Bradley’s erratic arm movements and verbal abuse of Ms Wolters were frightening and would have frightened someone in her circumstances. Ms Wolters was being verbally abused in public by a senior manager. His accusations were without justification. His hand gestures and the manner in which he conducted himself were aggressive. Ms Wolters was entitled to feel aggrieved and upset by Mr Bradley’s aggressive behaviour. A reasonable person in the position of the University would have foreseen that her work exposed her to the risk of being distressed by traumatic events.

By February 2008, and well prior to Mr Bradley’s confrontation with Ms Wolters on 14 March 2008, the University knew that Mr Bradley had verbally abused Ms Carney, behaved in a threatening manner and threatened her job. It knew that the incident on 13 December 2007 caused Ms Carney a workplace injury. By February 2008 the University knew that the injury was a serious one and Ms Carney was suffering debilitating depression. Her psychiatric injury was the result of Mr Bradley’s aggressive behaviour on 13 December 2007.
December 2007. That behaviour had caused fear and distress to its victim and had left her with a psychiatric injury.

By failing to investigate Ms Carney’s complaint and in failing to take appropriate action to reprimand and counsel Mr Bradley after such an investigation, the University breached its common law duty of care to Ms Wolters and breached its contract with her.

The issue, however, was whether, on the balance of probabilities, undertaking a formal investigation and providing Mr Bradley with a more formal reprimand would have avoided the incident with Ms Wolters. The court was not persuaded, on balance that it would have. The incident that occurred was not a normal office situation, and Mr Bradley might have expected a security officer to accept robust criticism and emphatic directions. The incident did not evolve in the course of Mr Bradley’s normal duties in an office.
He was reacting to what he perceived to be a crisis. He perceived Ms Wolters to have abandoned her duties during such a crisis. He reacted to the situation impulsively.

A reprimand and proper counselling was apt to reduce the risk that he would be aggressive towards and verbally abuse employees. However, it probably would not have prevented the confrontation that occurred on 14 March 2008.

Ms Wolters failed to prove that a reprimand and proper counselling probably would have avoided the incident and its aftermath and as a result her claim was dismissed.
The Facts

The matter arose out of a decision of Qantas Airways Limited (Qantas) as a self-insurer to reject an application for compensation made by Mr Kennerley under the WCRA.

Mr Kennerley appealed to Q-Comp who decided the application was one that should be accepted by Qantas under the WCRA. Qantas initiated an appeal in the Queensland Industrial Relations Commission and the appeal was successful. Q-Comp then appealed to the Industrial Court of Queensland naming Mr Kennerley and Qantas as respondents. Mr Kennerley also appealed to the Industrial Court of Queensland naming Q-Comp and Qantas as respondents. Both appeals were heard together.

The claim arose out of a traffic accident on 10 March 2010 which occurred 500m from Mr Kennerley’s residence on the Gold Coast. As he attempted to turn right at the traffic lights at an intersection, his motorbike collided with a motor vehicle causing him to suffer personal injuries.

The critical issue was whether the injuries “arose out of, or in the course of, Mr Kennerley’s employment” and whether Mr Kennerley’s employment was “a significant contributing factor” to the injuries.

At the time of the collision, Mr Kennerley was employed by Qantas as a long haul flight attendant. To operate in a USA airport, he required a current passport and visa. At the time of the incident, Mr Kennerley was riding his motorbike to stay at a friend’s house in Brisbane to make it easier to catch a morning flight to Sydney to renew his US visa.

The Decision

The court found that the incident did arise out of Mr Kennerley’s employment, despite the fact that Mr Kennerley was not performing any tasks for Qantas on 10 March 2010 and even if not injured, would not have performed tasks for Qantas on 11 March 2010.

The court specifically noted that Mr Kennerley could not perform his duties for Qantas at all without a current US visa and the terms of his engagement required him to maintain this. Qantas monitored the currency of his US visa and compensated him for time spent at the US Consulate obtaining this visa and provided for his flights to Sydney.

The court held that the starting point in determining whether the injuries arose out of or in the course of employment was the decision of the High Court in Humphrey Earl Ltd v Speechley (1951) 84 CLR 126, where it was was held that whatever is incidental to the performance of the work is covered by the course of the employment and that where an accident occurs in intervals between work, if the worker is doing something which he was reasonably required, expected or authorised to do in order to carry out his duties, it will have occurred in the course of employment. Applying those principles, the court had no hesitation in overturning the Commission’s decision and finding that the injuries occurred in the course of Mr Kennerley’s employment.

IN ISSUE

• Whether the claimant’s injuries arose out of, or in the course of, the plaintiff’s employment
• Whether the plaintiff’s employment was a significant contributing factor to his injuries

DELIVERED ON 18 October 2012
READ MORE
The Facts

Debra Jones died on 24 April 2012 as a result of contracting mesothelioma. The source of the asbestos, which resulted in her contracting this disease, was dust from the work clothes of her husband, Peter Jones.

Before Mrs Jones died, she settled her claim against James Hardie, the manufacturer of the asbestos cement pipes that her husband worked with during the mid-1980s. Judgment was entered against James Hardie for $900,000 plus costs.

In these proceedings, James Hardie sought contribution from Mr Jones’ employer at the material time, the Shire of Dundas (the Shire), under Pt IV of the Wrongs Act 1959 (Vic).

The Decision

Ultimately, the court determined that the appropriate apportionment was 65% against James Hardie and 35% against the Shire.

The court found that James Hardie was the manufacturer and distributor of the products which produced asbestos dust and fibres inhaled by Mrs Jones. James Hardie was in a unique position, perhaps only matched by other global large scale asbestos manufacturers, to have a real understanding of the health risks posed by exposure to asbestos, particularly its relationship to mesothelioma. The court was satisfied that James Hardie was aware, prior to 1985, of the risk of serious if not fatal injury to persons exposed to asbestos dust and fibres in a domestic setting in the course of handling the clothing of workers. Whilst it was accepted that James Hardie published brochures which alerted users of asbestos cement products to the need to minimise exposure to asbestos dust, the court was not satisfied that the Shire received any of these brochures or warnings. There was no satisfactory evidence that any warnings as to health risks or the necessity to reduce exposure to dust either accompanied or were stencilled on the pipes supplied to the Shire. There were no warnings given to the Shire or Mr Jones concerning Mrs Jones’ potential exposure, notwithstanding James Hardie’s knowledge of the risks. It would have been well within James Hardie’s means to provide its customers with a comprehensive health bulletin dealing not only with the risks posed to those who worked on asbestos cement products but also those exposed to dust in a non-occupational sense such as Mrs Jones.

The court was satisfied that the Shire had no actual knowledge of the risks posed to Mrs Jones as a result of washing her husband’s clothes. Before 1987, the Shire had virtually no knowledge of the risks posed by asbestos exposure. By 1985, the Shire should have been aware of the risks associated with Mrs Jones’ exposure to the asbestos on her husband’s work clothes. Had the Shire been diligent enough to investigate the risks of asbestos exposure, advice and instructions to Mr Jones as to techniques to minimise exposure both at work and to members of his family could have been given. Apart from providing Mr Jones with a paper mask, which he had to use at his own discretion and which had no effect on the amount of dust on his clothing, no steps were taken by the Shire to minimise Mr Jones’ exposure to dust, and accordingly the amount of dust that accumulated on his work clothes. It was found that the provision of disposable overalls, apparently instituted in 1987 for some workers, was an obvious precaution that could have been taken by the Shire from 1985.

Ultimately, it was held that James Hardie should bear the greater proportion of responsibility, notwithstanding the Shire’s ability to control the level of dust that contaminated Mr Jones’ clothes, as the repository of knowledge concerning the dangers of asbestos lay with the manufacturer and distributor of the product.

IN ISSUE

- Apportionment of liability between employer of deceased’s husband and manufacturer/distributor of asbestos products

DELIVERED ON 24 October 2012

READ MORE [click here]
The Facts

The plaintiff was employed as a cleaner at a backpacker hostel business in Cairns owned by the defendant. When she commenced employment in 1999 she had 12 years experience as a cleaner. She was given no organised induction, training or written explanation of her duties on commencement. On 6 November 2005, the plaintiff was brushing the ceilings and walls of one of the corridors in the building. While doing so, she felt something land in her eye. It stung and her eye started watering. She rinsed her eye and then finished the cleaning and went home. She returned to work the next day but her eye became sore and swollen and she consulted her doctor. She was given cortisone drops but the injury worsened and she was hospitalised for further treatment. The plaintiff had suffered an abrasion to the eye from the penetrating effect of the foreign particle which had broken the outer surface of her left cornea. She developed an infection and a corneal ulcer which resulted in the loss of about 85% of her normal vision in her left eye.

She commenced proceedings against the defendant claiming damages for personal injury relying on a breach of statutory duty or breach of the common law in negligence or contract.

The Decision

The court had no hesitation in relying on the Court of Appeal decision in Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) (2001) 1 Qd R 518 to hold that s 28(1) WHSA (QLD) did impose civil liability. The defendant attempted to argue that the slightly different wording of s28(1) since Schiliro was decided meant that the court should construe the WHSA as no longer imposing civil liability, but the court held that there was no logical reason to do so. The court found that at the time of the plaintiff’s injury, s28(1) still imposed civil liability for breach in respect of a worker.

The court then had to consider whether the defendant breached the statutory duty in s28(1). The defendant accepted that (in the circumstances of this case) in order to establish that it had discharged its statutory obligations it had to comply with s27 WHSA.

After analysing the evidence, the court determined that the defendant failed at the outset. The defendant’s manager did not even have knowledge of the WHSA. The defendant did not identify the hazard, which was particles dislodged by cleaning, falling onto the cleaner beneath. The defendant also did not identify the associated risk of particles falling into a cleaner’s eyes and causing injury. The defendant did not even know of the activity. It was content that the premises were kept clean but took no proactive action relevant to the activity to ensure they were being cleaned safely. If the defendant did not even identify the hazard, it could not be said to have adopted a way to discharge its workplace health and safety obligation for exposure to risk as required by s27 WHSA.

The court specifically noted that the WHSA imposed much more stringent obligations on the defendant than the common law. Although the plaintiff was successful in establishing breach of statutory duty, the court addressed the plaintiff’s common law claim.

The court held that the probability of the admittedly foreseeable risk of eye injury was so low in the circumstances (the wall was cleaned regularly without incident by an experienced cleaner) that, even allowing for the relative ease with which some response might have been taken, an employer acting reasonably was unlikely to have taken any action by way of response to the risk. The claims based on negligence and breach of contract failed.

As the plaintiff succeeded on the breach of statutory duty claim, judgment was entered for the plaintiff in the agreed amount of $200,000.
The Facts

Jennifer Anne Winbank (the plaintiff) originally brought 2 claims against her employer, Casino Canberra Ltd (the defendant) in connection with incidents which occurred in the course of her employment as a croupier. She claimed damages for pure mental harm.

The first claim arose out of an incident on 21 March 2008 when a patron stole betting chips from the table at which she was working as a croupier. As a result of this incident, the plaintiff allegedly suffered post traumatic stress disorder, chronic anxiety and depression. She had 3 unsuccessful attempts at a graduated return to work. At the commencement of the hearing, the plaintiff withdrew the claim in relation to the first incident.

The second incident occurred on 23 June 2008 (on one of the plaintiff's attempts to return to work) which allegedly contributed to the plaintiff’s overall psychological injury. On this occasion, the plaintiff was in the position of an inspector and she was subjected to abuse from a patron who directed personal and aggressive verbal attacks towards her. It was alleged that the defendant owed a duty to the plaintiff to take reasonable care to protect her from drunken, violent, quarrelsome or disorderly patrons and from patrons using bad language. It was further alleged that the defendant required or permitted the plaintiff to return to work knowing that she was suffering from a psychological injury, knowing that she was on a graduated return to work rehabilitation program and requiring her to work as an inspector which was inappropriate.

The plaintiff had a pre-existing psychological condition and in the past, had been treated for depression and a bipolar disorder but had been coping well and had not needed any time off work.

The Decision

The court noted that in relation to claims for damages for pure psychiatric injury, the issue of breach of duty requires consideration of the foreseeability of the risk of injury and the reasonable response to that risk (Wyong Shire Council v Shirt [1980] HCA 12).

Section 34 of the Civil Law (Wrongs) Act 2002 (ACT) (the Act) provides that “a defendant does not owe a duty to a plaintiff to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant’s position would have foreseen that a person of normal fortitude in the plaintiff’s position might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken ... the court must have regard ... to any pre-existing relationship between the plaintiff and the defendant ... the section does not affect the duty of care a defendant has to a plaintiff if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude”.

The court suggested this was the reason the plaintiff elected not to pursue her claim in relation to the first incident, there being no evidence that the defendant was on notice of the plaintiff’s bipolar disorder, or of any psychiatric vulnerability on her part at the time of that incident. However, the position was very different by the time of the second incident. By June, the defendant knew that the plaintiff was a person of less than normal fortitude so the s34 defence was not available to it.

The court found that the risk that the plaintiff might be involved in a confrontation with an intoxicated, aggressive and unpleasant customer on the night in question was reasonably foreseeable and not insignificant. There were precautions readily available to the defendant. A “reasonable person” in the position of the defendant would have taken such precautions. The probability of the plaintiff being involved in an incident likely to cause her mental harm would have been negligible if such precautions had been taken.
The precautions could have been taken without any particular burden on the defendant or its other staff. Accordingly, on the night of the second incident, the defendant committed a breach of its duty of care to the plaintiff as an employee.

Although the court found the defendant liable for the second incident, it did take into account her pre-existing condition and the effect of the first incident in calculating an award of damages.
The Facts

The plaintiff was injured on 10 September 2008 during the course of his employment as a fitter and turner at a coal mine operated by the first defendant (Centennial). The plaintiff was employed by the second defendant (Labourforce) and his services were provided to Centennial by an arrangement between Labourforce and the third defendant (Advantage).

The plaintiff was crushed as he was attempting to manoeuvre a chock into position to provide protection against material falling on or near the area where coal is extracted from the coalface. At the time, there were no powered facilities available to move the chock and the only equipment available was a chain block. The plaintiff had never been given directions as to how he should move the chock. There were no written procedures as to how to perform the work. The plaintiff was not specifically instructed to move the chock but took it upon himself to do so as part of his general duties. An expert gave evidence on behalf of the plaintiff that the equipment provided was unsuitable for the task and that a proper lifting aid and assistance from another employee was required.

The Decision

The court had no hesitation in finding that each of the three defendants owed and breached their duty of care to the plaintiff. The central issue to be determined was the apportionment of liability between the defendants.

Centennial argued that it was entitled to contribution from Advantage or Labourforce pursuant to s5 LR (MP). The court rejected that argument because the circumstances in which the plaintiff was working at the time of the incident were wholly created by and under the control of Centennial. The work was allocated to the plaintiff by Centennial only, he was supervised only by Centennial employees; the system of work, the equipment provided was solely created by Centennial and Centennial undertook all of the safety discussions with the plaintiff. Labourforce and Advantage had no involvement in the operation of the mine. In those circumstances, the court could see no justification for determining that there should be any contribution by any of the defendants other than Centennial.

Centennial attempted to argue that Advantage should contribute on the basis that it breached the labour supply contract with it (for example by failing to conduct risk assessments and site inspections) and that these breaches caused or contributed to the plaintiff’s injury. The court rejected this argument and held that the labour supply contract should be construed so as to be consistent with the fact that its provisions clearly covered and anticipated a variety of activities and circumstances. The clauses relied upon by Centennial as having been breached by Advantage, were held not to apply. Even if the court was wrong in that interpretation of the labour supply contract and the provisions were applicable in the circumstances, the court was not satisfied that there was any causal nexus between the breach and the liability to pay damages to the plaintiff.

Centennial also relied upon 2 indemnity clauses in the Standard Conditions of Contract in an attempt to claim contribution from Advantage. The claim under the first indemnity provision was unsuccessful because the plaintiff’s claim did not arise out of any breach by Advantage (or its employees) under the Contract. Centennial then sought to rely on clause 43 of the Contract which required Advantage to effect certain insurances. Advantage took out a policy of insurance with GIO. GIO resisted the claim brought by Centennial under that policy on the basis that the insurance cover provided was limited to indemnify a “Principal” of Advantage only to the extent required by any...
contract which Advantage had with Centennial. GIO argued that the requirement for insurance did not apply to the direct liability of Centennial to damages to the plaintiff arising out of its negligent acts or omissions. The court rejected this argument and held that there was nothing in the policy cover to suggest that indemnity should be limited or restricted in the way suggested by GIO. The court found that Advantage was a named insured under the policy, and that Labourforce was a named insured because it was a subsidiary and/or controlled corporation of Advantage. The court also found that Centennial was an insured under the policy because the definition of an insured person included a principal in respect of the liability of the principal arising out of the performance by or on behalf of Advantage of a contract for the performance of work for such principal.

The court entered judgment for the plaintiff for $550,000 with the full amount to be paid by Centennial. The court also ordered GIO to indemnify Centennial for that amount. **(1)**
The Facts

The respondent was employed by a Commonwealth agency and was required to travel to a town in New South Wales to perform work. The employer booked a motel for the respondent to stay in during her trip. One evening in November 2007 the respondent arranged to have dinner with a male friend who lived in the area and they later returned to the motel room where they engaged in sexual intercourse. During this activity the respondent sustained injuries to her nose and mouth (with secondary psychological injury) when a glass light fitting above the bed was pulled from its mount and fell on her.

The Decision at Trial

Comcare accepted the statutory compensation claim under the Safety, Rehabilitation and Compensation Act 1988 (Cth) (the Act) but later revoked that acceptance. The respondent appealed to the Administrative Appeals Tribunal (AAT) where Comcare’s decision was confirmed. The AAT determined that the injuries were not suffered in the course of employment because the employer had not expressly or impliedly induced or encouraged the activity which caused the injury. It was agreed that the respondent was within an interval or interlude between periods of work while at the motel, and that the employer had induced her to spend her time at the motel by paying for the motel. This satisfied part of the relevant test, set out in Hatzimanolis, to determine whether an injury occurring between periods of actual work is within the course of employment.

The AAT then went on to apply a second limb of the test and found that the respondent had engaged in a private activity not induced by the employer, which interrupted the interval so as to take the activity outside the course of employment. The respondent appealed to the Federal Court where the trial judge found there was an entitlement to compensation. The trial judge found that the AAT had applied the wrong test as there was no requirement for the respondent to show that the employer induced or encouraged the particular activity. Once the threshold issue of the employer inducing the respondent to spend her time at the motel was established, only serious and wilful misconduct on the part of the respondent or a self inflicted injury could take the activity outside the course of employment.

The Issues on Appeal

Comcare appealed to the Full Court of the Federal Court disputing the trial judge’s finding that the employer did not have to expressly or impliedly induce a specific activity for an injury arising out of the activity to occur within an overall period of work.

The Decision on Appeal

The Full Court held that the injury did occur in the course of employment. The trial judge was correct in finding that the AAT had applied the wrong test. The Full Court described the test in Hatzimanolis v ANI Corporation Limited (1992) 173 CLR 473 as a single test which might be satisfied in either of two ways. Once a worker establishes that their employer has induced or encouraged the worker to spend their time between actual periods of work at a particular place, it is not necessary for the worker to show that the particular activity which causes injury was expressly or impliedly induced or encouraged by the employer. Alternatively the worker might satisfy the test by showing not that they were at a particular place at the inducement of the employer, but that they had been induced or encouraged to spend their time in a particular way. It was wrong to superimpose the ‘activity’ test on the ‘place’ test. The Federal Court therefore confirmed broad application of the ‘course of employment’ for workers’ compensation purposes.

Comcare has sought and been granted special leave to appeal to the High Court.

IN ISSUE

- Injury during interval/interlude in overall period of employment.
- Whether injuries sustained in the course of employment for the purposes of workers’ compensation entitlements

DELIVERED ON 13 December 2012

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The Facts

The respondent was employed by the appellant as a nurse at the emergency department of the Wodonga Hospital. On 20 June 2006, the respondent suffered a disc prolapse when she went to the aid of a patient who was believed to be suffering a fit. The respondent was in the medication room when a receptionist called out to her that there was ‘something wrong’ with the patient. The respondent stated that as she moved towards the patient’s cubicle she called out twice for assistance but in the interim noticed the patient exhibiting symptoms which suggested he quickly required oxygen. The respondent therefore lowered the patient’s bed, leaned over the rails and pulled the patient towards her. The respondent felt pain in her mid back during this action.

The Decision at Trial

A jury trial was held in the Victorian Supreme Court and judgment was given for the respondent. The jury found the respondent liable both in negligence and for breach of statutory duty with no reduction for contributory negligence. The appellant applied to the trial judge on the ground that the respondent had failed to prove that there was an alternative system of work which was practical and reasonable which would have prevented her injury. The trial judge refused the application and gave judgment for the respondent.

The Issues on Appeal

The appellant challenged both the jury’s verdict and the trial judge’s ruling. The appellant’s case was that the jury could not have been satisfied that the presence of additional staff would have prevented the injury. The directions given by the trial judge to the jury on causation and findings on contributory negligence were also challenged as defective.

The Decision on Appeal

The Court of Appeal held that the trial judge’s directions to the jury on causation were sufficient. Review of the transcript of the trial revealed there could have been no doubt in the jury’s mind that the respondent had to prove, on the balance of probabilities, that the presence of additional staff would have prevented her injury. As this was a workplace injury, causation was to be dealt with under common law principles. The Court of Appeal found that in answering the question of causation a plaintiff must identify what the defendant would have done had reasonable care been exercised and how that action would have averted the loss or damage. The Court of Appeal agreed that the exercise of reasonable care required additional staffing and that this would have averted the injury because the respondent’s evidence was that her first step was to call for other staff. The jury was entitled to conclude that had additional staff been present, one of them probably would have been available to respond, and would have responded. The Court of Appeal confirmed that causation is a question addressed in light of common experience or common sense. As to contributory negligence, the Court of Appeal was satisfied that in the situation of a threat to the life of the patient the respondent had not failed to do what was reasonably necessary to provide for her own safety by ignoring the no lift policy or failing to issue the “Code Blue” signal.

IN ISSUE

- Injury to nurse assisting patient in life threatening situation
- Liability of employer hospital for injury to emergency department nurse
- Causation in circumstances where employer’s procedures not followed
- Contributory negligence

DELIVERED ON 20 December 2012

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The Facts

The plaintiff commenced a claim for damages for personal injury against his employer and WorkCover on 31 January 2012 which was 61 days after a compulsory conference failed to resolve his claim. The defendants argued that as a result, the plaintiff was in breach of s302(2) WCRA which provides that proceedings for damages for personal injury which are outside the limitation period may be brought if they are commenced within 60 days after a compulsory conference. The defendants sought an order that the claim be struck out.

The plaintiff argued that since only part of his claim was outside the limitation period under the LAA, therefore s302(2) did not apply to his claim.

The Decision

The court agreed that there was nothing in the WCRA to indicate that the plaintiff’s claim in so far as it related to the non statute barred elements, was invalid. The court also noted that it was open to the plaintiff to serve multiple notices of claim in identical terms to the original one to extend the time period for commencement of proceedings. The court noted that there was nothing in the WCRA legislation to preclude further s75 notices or claims being given by a claimant and the legislation could have precluded such a course of action if there was an intention to prevent such a course of action being taken. The court noted that applicants are typically free to try again unless doing so is adjudged an abuse of process or there is an issue estoppel.

The court declined to strike out the statute barred elements of the claim on the basis that it was not practical or convenient to do so.

The defendants’ application was dismissed.
The Facts

On 23 January 2003, the plaintiff was injured when the ladder he was descending from some scaffolding slipped and he fell approximately two metres to the ground. He suffered injury to his right knee and left shoulder.

The ladder was moved by an unidentified person on the site at the time of a concrete pour and was subsequently not securely fastened to the scaffolding and at the base.

The plaintiff claimed damages for negligence and breach of statutory duty against his employer, Belconnen Concrete Pty Ltd (Belconnen Concrete); the principal contractor for the construction project, CCB (ACT) Pty Ltd (CCB); the supplier of the scaffolding, Rovera Scaffolding Pty Ltd (Rovera); and subcontractor to Rovera for the erection of the scaffolding, Ironbat Pty Ltd (Ironbat).

The Decision

The court found the plaintiff’s injuries were the result of breaches of a statutory duty owed to him by each of the defendants.

Belconnen Concrete breached its statutory duty because it owed a personal, non-delegable duty to all its employees to take all reasonable care to institute and carry out a safe system of work so that its employees will not be exposed to unnecessary risk.

CCB breached its statutory duty because it was the principal contractor and had a duty to ensure that the site was safe.

Rovera and Ironbat both breached their statutory duties because it was reasonably foreseeable that the failure to take care would result in injury to those using the scaffolding.

The breach of statutory duty did not depend on negligence by any of the defendants. However, the court found that Belconnen Concrete was not negligent because it could not reasonably have known of the need to move a ladder nor of the failure to have it correctly tied.

Rovera was not negligent itself, however the court did indicate it may be responsible for the negligence of Ironbat because it subcontracted the labour involved in erecting the scaffolding.

The court found Ironbat was negligent because its employee left the site before the end of his shift in circumstances where he knew that there was a concrete pour on, that it started before his shift ended and that it was to be done with one ladder that had to be moved and should have been moved by a certificated scaffolder. This was the case even though he delegated his responsibilities to two employees of CCB.

CCB was found to be negligent because it had overall responsibility for the project site and the safety on it.

Rovera and Ironbat both breached their statutory duties because it was reasonably foreseeable that people using the scaffolding as it was erected may be injured as a result of their failure to take care.

The breach of statutory duty did not depend on negligence by any of the defendants. However, the court found that Belconnen Concrete was not negligent because it could not reasonably have known of the need to move a ladder nor of the failure to have it correctly tied.

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CCB was found to be negligent because it had overall responsibility for the pouring of the concrete and its foreman had a duty to see that there was someone on hand to secure the ladder, especially in circumstances where he had not objected to being delegated responsibility for this task by Ironbat’s employee.

Damages were agreed at $750,000 and liability was apportioned to Belconnen Concrete at 15%, CCB at 35%, Rovera at 15% and Ironbat at 35%.
The Facts

Kevin Phelps (the plaintiff) was employed by Workpac Newcastle Pty Ltd (Workpac), a labour hire company. The plaintiff’s services were provided by Workpac to Transpacific Industrial Solutions Pty Ltd (Transpacific) which, in turn, assigned him to a job at the premises of OneSteel Ltd.

The plaintiff, an experienced furniture removalist, and 2 other workers were engaged to move certain items of office furniture from one building to another at the OneSteel site. The furniture had to be taken up a staircase consisting of 2 flights with a landing and right angled turn halfway up. There were handrails on both sides of the staircase and a sloping ceiling over the lower flight of stairs.

One of the items to be moved was a large steel cabinet with concertina doors. The cabinet was loaded onto a stair climbing trolley and was held in place by a strap. The construction of the cabinet was such that it could not be conveniently dismantled and had to be moved as a single unit.

To manoeuvre the trolley up the stairs, the plaintiff was in front of and above the trolley walking backwards to support and guide the load. His co-worker lifted and pushed from below. The co-worker took most of the weight from the bottom. The handles of the trolley were under the cabinet so the plaintiff could not reach them. His only grip was on the smooth sides and corners of the cabinet itself. His task was basically to provide stability and direction by controlling the sides of the cabinet.

The plaintiff injured his back when, after the trolley had negotiated the turn in the staircase and its wheels were on the landing, he lost his footing and the cabinet came down on top of him. He immediately complained of pain in his back. He later sued Workpac and Transpacific (the defendants) alleging breach of a duty of care in negligence.

The Decision at Trial

The trial judge found the defendants negligent on the basis that once it was discovered that the cabinet could not be dismantled, the workers should not have been required to move it in the manner which they did. He found that trying to manoeuvre a cabinet of this size in the cramped confines of the stairway was dangerous. The position in which the plaintiff found himself, despite his training, did not allow him to lift correctly. Ergonomically, the plaintiff was forced into a dangerous position.

The trial judge found that the duty of Transpacific, as the plaintiff’s host employer, was breached as it failed to properly consider the situation, devise a suitable system and instruct the employees what they must do, and to provide appropriate equipment. Liability was apportioned 75% to Transpacific and 25% to Workpac with no reduction for contributory negligence on the part of the plaintiff.

The Decision on Appeal

The Court of Appeal noted that Transpacific owed the plaintiff a duty of care analogous to that of an employer. Any obligation on Transpacific to warn the plaintiff could not have required more than warning of unusual or unexpected risks and any obligation to instruct could not have required more than such instruction as might reasonably be thought to be required to secure the plaintiff from danger of injury.

The risk of harm to which the plaintiff succumbed was that of slipping or tripping while ascending stairs. The foreseeability and significance of the risk is greater when a person is moving upstairs backwards while supporting and guiding an awkward load on a trolley and someone else is pushing and lifting from below which might cause the load to move forward before the person has a secure foot hold on the next step.

Whether a reasonable person in Transpacific’s position would have taken particular precautions against that risk of slipping or tripping in such circumstances was in issue.

IN ISSUE

- Extent of host employer’s duty of care to labour hire employee

DELIVERED ON 26 February 2013

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The staircase was a normal staircase. There was no suggestion that the particular stairs presented any special or unusual risk of tripping and slipping. The activity of moving furniture is a common place activity likely to be encountered just as frequently, if not more frequently, in the course of ordinary domestic life than in the workplace.

The Court of Appeal found that a reasonable employer would ordinarily regard it as quite unnecessary to give warnings or take other steps in relation to such common place activities. In coming to this decision it was noted that virtually every able bodied adult has, at some time, had the experience of cooperating with another person while transporting a bulky item, with one person walking forwards and the other backwards and with one or more steps having to be negotiated as part of the process.

It was not established by the plaintiff that there were any precautions that a reasonable person in Transpacific’s position would have taken against the risk of harm to which the plaintiff succumbed. Accordingly, Transpacific’s appeal on the issue of liability was allowed.

The duty of care owed by Workpac was either equal to or only slightly more onerous than that to which Transpacific was subject. The considerations leading to the conclusion of lack of breach of duty on Transpacific’s part produced the same conclusion in relation to Workpac.

The plaintiff’s claim against both defendants was therefore ultimately unsuccessful.
CSR Timber Products Pty Limited v Weathertex Pty Limited
[2013] NSWCA 49

The Facts

The worker was employed by CSR (the applicant) at a masonite factory from 15 March 1965 to 31 October 1998, when Weathertex (the respondent) purchased the factory and retained his employment.

The applicant was diagnosed with an adenocarcinoma in February 2004 after significant exposure to hardwood dust. He served a notice of a claim for compensation against the respondent. The respondent disputed the notice, including on the basis that the applicant was liable to pay compensation.

The Workers Compensation Commission (the Commission) determined this dispute finding that the respondent, as the employer that last employed the worker, was liable to pay compensation. The respondent commenced proceedings pursuant to s151Z(1)(d) of the WCA seeking an indemnity from CSR on the basis that the applicant's injury resulted from his employment with CSR prior to 31 October 1998.

CSR denied that it was a “person other than the worker’s employer” who could be subject to such an indemnity and claimed that it had the benefit of issue estoppel by reason of the Commission’s decision.

The Decision at Trial

Two questions were formulated for decision at trial. Firstly, was the respondent estopped by the Commission’s decision from pursuing its s151Z claim against the applicant? Secondly, could the respondent make its claim pursuant to s151Z against the applicant?

The trial judge found there was no such estoppel in response to the first issue and then answered the second question in the affirmative. CSR appealed against both findings.

The Decision on Appeal

The appeal was dismissed with costs. In relation to the first question, the Court of Appeal noted that it was not in issue that the Commission’s decision was a final decision that gave rise to issue estoppel. However, the Commission did not find that the disease had not developed while the applicant was employed by CSR and the Commission was under no legal duty to make such a determination. On this basis, CSR could not rely on any issue estoppel in relation to the claim by the respondent.

In relation to the second issue, the Court of Appeal was required to consider whether CSR was a person “other than the worker’s employer” in order for the respondent to pursue a s151Z(1)(d) indemnity claim. The respondent argued that “the worker’s employer” is a reference to the employer liable to pay compensation pursuant to s9(1) and the Court of Appeal accepted this argument. It further agreed that the circumstances of the applicant’s injury were such that it created a liability in negligence in CSR pursuant to s151Z(1)(d).

IN ISSUE

- Whether previous employer liable to indemnify last employer
- Whether issue estoppel created by decision of Commission
- Meaning of “other than the worker’s employer”

DELIVERED ON 11 March 2013

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The Facts

The plaintiff was employed as an apprentice electrician with the defendant. He claimed that he injured his elbow when he descended from a ladder and bumped his elbow upon the sharp edge of some U-shaped framing.

The U-shaped framing was being used in accordance with a system of work devised by the defendant employer to create a barrier for live cables, protecting against the risk of electrocution.

The mechanism of injury was not in dispute. The plaintiff placed the U-shaped framing upon his toolbox while he was working on the ladder. When he descended the ladder he took a step backwards and punctured his elbow on the sharp edge of the U-shaped framing.

The plaintiff claimed that the defendant’s system of work failed to make adequate provision for mere inattention or mere inadvertence on the part of an inexperienced worker. The plaintiff also claimed that the defendant had failed to consider alternative safer methods of protecting the live cables. The plaintiff led expert evidence as to alternative methods of protecting the cabling. The defendant led expert evidence to the effect that the plaintiff’s alternative methods would not have complied with the Electrical Safety Act 2002 or the relevant standards, while the method in fact devised by the defendant did so comply.

The Decision

The court accepted the evidence of the defendant’s expert and found that the method used by the defendant to protect the live cables was appropriate.

In terms of whether the risk of injury was reasonably foreseeable, the court emphasised that this is a question which should be determined by looking forward and considering what a reasonable employer would have done, rather than looking at what actually occurred through the prism of hindsight. The court held that the plaintiff always knew that he was handling a sharp object and that he created the hazard himself by placing a sharp object on the toolbox closest to the ladder. The court held that it is not an employer’s obligation to safeguard an employee from all perils, and that here the defendant did not breach its duty to the plaintiff.

Although as a result of the finding on liability it was not necessary to do so, the court nevertheless assessed the plaintiff’s damages noting that the plaintiff was 28 years of age. The plaintiff had been assessed with a 19% whole person impairment and this assessment was not challenged. The plaintiff advanced a claim for future economic loss on the basis that he had an intention to work as an electrician in the mining industry. The court noted that this was problematic given that the evidence about the work available for electricians in the mining industry was limited. The court allowed a global award of $150,000 for future economic loss. Damages were assessed at a total of $295,720, including $50,000 for general damages.
The Facts

The applicant worked as a butcher in the respondent's store in Ayr from December 2008 to 1 February 2011. The respondent was the applicant's employer and a self insurer under the WCRA. On 4 January 2011 the applicant was carrying out normal duties slicing meat when he began to feel pins & needles down his left arm and into his left hand. At the end of his shift he consulted his general practitioner. He worked the following 2 days and then went on holidays during which time he still experienced pins & needles. He returned to work on 31 January 2011 and began normal duties but after a couple of hours he noticed pain and swelling in the back of his neck, extending down his left arm and behind his left shoulder blade as well as the pins and needles. He informed his supervisor and ceased work on 1 February 2011 and consulted a general practitioner who prescribed pain relief and referred the applicant for a CT scan.

On 16 February 2011, the applicant signed an application for compensation in which he stated that he strained his cervical spine causing injury to his neck, left shoulder, arm & hand on 4 January 2011. On 16 December 2011, the respondent issued a notice of assessment, attributing 0% impairment as a result of the exacerbation of pre existing degeneration of the cervical spine injury on 4 January 2011 in accordance with a report obtained from an orthopaedic surgeon. However, there was a controversy between the applicant and respondent as to which “injury” was assessed. This was precipitated by the applicant serving on the respondent on 12 December 2011 (4 days before the notice of assessment) a further notice of claim for damages, this time in respect of musculo-ligamentous and disc injuries to the cervical spine suffered over the whole period of employment.

The Decision

The respondent argued that the notice of claim introduced a separate injury arising from a separate event and that as a result, the applicant was not entitled to make a claim for damages on the injury in the notice of claim. The court rejected that argument and held that the injury in the WorkCover claim was the same injury as that in the notice of claim. The court noted that there was no evidence that the applicant understood the significance of identifying an “event” for the purposes of the legislation or that he had received medical advice about the injury occurring over a period of time. In contrast, the evidence did show that the respondent was aware from expert orthopaedic evidence that the applicant’s symptoms were not solely attributable to the activity on 4 January 2011 and that it was also aware (from correspondence with the applicant’s solicitors) that the applicant’s contention was that his injury was attributable to occurrences before 4 January 2011.

The court noted that any dispute about whether the injury was caused or contributed to by workplace practices over the years he worked as a butcher for the respondent was a matter for resolution at trial.

The court declared that the applicant was entitled to seek damages pursuant to s237(1)(a)(i) for the neck injury specified in the notice of claim for damages.
The Facts

The applicant was employed as a delivery driver by Reece Pty Ltd. His duties involved delivering products to areas extending to Beenleigh (in the north), Beaudesert, Jimboomba and Springfield Lakes (in the west), to Casino and Lismore in New South Wales (in the south). His evidence was that 70% to 80% of his deliveries were in Queensland.

On 5 May 2010, the applicant was undertaking 6 deliveries, 3 in Queensland and 3 in New South Wales. When making a delivery on the outskirts of Lismore, New South Wales, the applicant suffered significant injury.

A workers’ compensation claim was lodged with WorkCover Queensland, however this was rejected on the basis that the applicant worked in New South Wales. The applicant also lodged a claim under the New South Wales workers’ compensation scheme, which was accepted and payments made to the claimant.

The applicant attempted to bring a workers’ compensation common law claim in Queensland. WorkCover informed the applicant that he was not entitled to seek damages in Queensland pursuant to s10(2)(b) of the WCRA. This section excluded cover for claims made where an employer is obliged to hold a policy in another state.

The applicant applied to the court for declarations that his employment was connected with Queensland pursuant to s113 of the WCRA and that s10(2)(b) of the WCRA did not apply.

Section 113 of the WCRA states that a worker’s employment is connected with the state in which he/she “usually works” in that employment. If there is no state or no one state identified, then it is the state in which he/she is “usually based” for employment. Section 9AA of the WCA is in similar terms to s113 of the WCRA.

It was submitted by the applicant that he usually worked in Queensland or alternatively he was usually based in Queensland. WorkCover submitted that despite carrying out significant work in Queensland and that the applicant usually worked there, he also usually worked in New South Wales. Further Workcover argued that the applicant was usually based in New South Wales.

The Decision

The trial judge reviewed and interpreted the meaning of “usually works” and “usually based” through statute and common law and found that the applicant usually worked in both Queensland and New South Wales. Whilst he made the majority of deliveries in Queensland, he also attended at the warehouse in Tweed Heads every day to receive instructions, plan deliveries, load and ultimately return the truck. Deliveries in New South Wales were also common. The court noted that the authorities demonstrate that whether there is a state in which the worker “usually works” depends on the circumstances of the particular employment. In this case, as the worker habitually or customarily worked in more than one state, no one state was able to be identified as the “state in which the worker usually works in that employment”.

It was then necessary to consider where the applicant was “usually based” for the purpose of his employment. The court noted that this may not be the same place in which a majority of the worker’s time is spent each day. It was noted that the Tweed Heads warehouse was part of the Queensland operation, the majority of the applicant’s employment was administered and costed to the Queensland branch and the applicant took Queensland public holidays. These factors were relevant but not conclusive evidence of where the worker usually worked or was usually based. The trial judge found that the Tweed Heads warehouse was the applicant’s “usual base” as this was where he went to work every morning, loaded his truck and returned to at the end of the day.

Ultimately the trial judge declined to declare that Queensland was the state to which the applicant’s employment was connected and found that the applicant’s employment was connected with New South Wales.

The application was dismissed.
The Facts

The plaintiff was employed by the defendant as a block layer at a construction site for the Barracks development at Petrie Terrace in Brisbane. On 20 June 2008, the plaintiff had finished laying blocks and stepped off the platform he was using onto a ladder. When he placed his weight on a rung of the ladder it gave way and, in attempting to return to the platform, he injured his left knee.

The plaintiff commenced proceedings against the defendant alleging that the defendant was in breach of its duty of care in a number of ways including because the ladder had a defective brace and the defendant failed to carry out regular inspections of the ladder.

The Decision

The trial judge held that the plaintiff failed to demonstrate that the employer had caused or contributed to the injury, or that the employer was otherwise negligent.

Whilst the trial judge accepted that there was a defective brace on the ladder, he accepted evidence that both the employee who set up the ladder and the plaintiff had performed a visual inspection of the ladder prior to its use. Those inspections did not reveal any defect.

The trial judge accepted that visual inspection was a practically useful means of identifying defects in the ladder. Having regard to the inspections completed prior to the use of the ladder, the trial judge did not accept that a system of regular inspections would have identified the fault in the ladder.

The trial judge rejected the plaintiff’s submission that a conventional ladder should have been used as there was nothing to suggest that the type of ladder used was dangerous.

While the trial judge accepted that the plaintiff’s left knee was twisted as he attempted to return to the platform, he did not accept that the plaintiff’s foot was caught against the edge of the plank next to the plank closest to the ladder. Given the trial judge’s findings regarding the mechanism of injury, it was unnecessary to deal in detail with the argument about the possible use of plank clamps. However, the trial judge noted that there was no requirement in any Australian Standard or relevant legislation to use the clamps, nor was there any practice for clamps to be affixed to scaffolds used by block layers in Brisbane.

The claim was dismissed.
The Facts

The plaintiff was employed by the defendant as a senior support worker. She sustained a lumbar spine injury (and secondary psychological injury) on 1 May 2008 in Rockhampton when she was facilitating a Professional Assault Response Training (PART) course. One technique taught during the training was known as the “Back Steps” manoeuvre. The manoeuvre was intended to be adopted when a worker is confronted by an aggressive client and must retreat. The trainee was expected to walk backwards on the balls of the feet in a slightly crouched position while keeping his/her attention towards the approaching aggressor. The plaintiff was demonstrating the “Back Steps” manoeuvre when she fell onto her buttocks on a carpeted surface.

At the time of the incident the plaintiff was 49 years of age, 152cm tall and weighed around 96kg.

The Decision

The trial judge held that directing a middle aged, overweight woman to walk backwards on the balls of her feet while keeping her attention directed not to where she was going but to an “aggressor” in front of her, from whom she was retreating, involved a real and obvious risk of injury that she might fall over. The trial judge accepted the plaintiff’s submission that the risk could easily have been avoided by the defendant directing the plaintiff to carry out the manoeuvre at a slow or moderate pace.

The trial judge noted that PART training is an important safety measure. Had it not been for the direction that the manoeuvre be performed at speed, then the trial judge would have accepted that it was worth running the risk of injury in order to prepare an employee for a possible assault. The court held that there was no countervailing consideration, either expense, difficulty or inconvenience, to excuse the defendant from having given an instruction to proceed quickly or prevent a finding that an instruction to proceed more slowly was reasonable.

Judgment was entered in the sum of $369,000.00 for the plaintiff.
Brown v Maurice Blackburn Cashman  
[2013] VSCA 122

The Facts

The appellant (Ms Brown) was a salaried partner and the head of the Family Law department at the respondent law firm, Maurice Blackburn Cashman (MBC).

Ms Brown alleged that, following her return from maternity leave in January 2003 and up until November 2003 she was bullied, harassed and undermined by her colleague and later, partner, Ms Formica. It was alleged that this occurred despite complaints and requests for intervention by Ms Brown to MBC’s managing partner. It was alleged that MBC was vicariously liable for the acts of Ms Formica and also directly liable for an unsafe system of work.

The Decision at Trial

The trial judge found in favour of MBC on the basis that it was not established that Ms Brown had been bullied, it was not reasonably foreseeable that she might suffer psychiatric injury and that MBC did not breach its duty of care.

The Issues on Appeal

Ms Brown submitted that the trial judge erred in that he misdirected himself as to the nature of the duty of care owed by MBC. Further it was alleged that the trial judge erred in finding that psychiatric injury was not reasonably foreseeable and that Ms Brown was not subjected to systematic harassment and that her psychiatric condition was not caused by MBC’s negligence.

The Decision on Appeal

The Court of Appeal rejected all grounds of appeal and upheld all of the trial judge’s findings.

In relation to whether MBC owed a duty of care to Ms Brown, the Court of Appeal noted that the fact that Ms Brown agreed to act as the head of the Family Law Department ran contrary to the contention that MBC ought to have appreciated that performance of her duties posed risk to her psychiatric health.

The Court of Appeal held that although it is now a matter of general knowledge that some psychiatric illnesses may be precipitated by work stress, this does not mean that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work. The duty which an employer owes is to each employee. The relevant duty of care is engaged if psychiatric injury to the particular employee is reasonably foreseeable. This requires consideration of the nature and type of work being done and any indications given by the employee involved. In this case, the Court of Appeal determined that it was relevant that Ms Brown was a salaried partner and in a position of supervision and control over the person allegedly bullying her and therefore there was not an obvious risk of vulnerability on Ms Brown’s part. It was also noted that at all relevant times, Ms Brown was the head of the Family Law Department and as such, it was inevitable that people such as Ms Formica would raise workload issues and stress and conflict might result. As a consequence, the Court of Appeal found that it was not reasonably foreseeable that Ms Brown might suffer psychiatric injury.

The Court of Appeal also noted that no duty of care arose until after allegations of bullying and health concerns were raised. The Court of Appeal was satisfied that the managing partner’s actions in holding a meeting and a mediation between Ms Brown and Ms Formica were reasonable responses in the circumstances.

The appeal was dismissed.
The Facts

In November 2002, the plaintiff was operating a modified crane at Darling Harbour, Sydney. Shortly after commencing operation, the upper deck of the crane toppled off the base and the plaintiff was thrown to the ground, suffering significant injuries. The plaintiff was unaware that to drive the modified crane safely, required release of a “slew lock”, which held together the crane base and superstructure.

The plaintiff alleged negligence against his former employer, the third defendant, Gillespies Cranes Nominees Pty Ltd (Gillespies), and against the former owner and operator of the crane, the first defendant, Brambles Australia Ltd (Brambles), who sold the crane to Gillespies and who employed the plaintiff before he worked for Gillespies, and against the second defendant, Baden Cranes Pty Ltd, (“Baden”), who modified the crane pursuant to a contract with Brambles, while it owned the crane.

The manufacturer of the crane, Liebherr-Werk Ehingen GMBH (Liebherr), was not a party to the proceedings, even though it was Baden’s case that the modifications it had made to the crane for Brambles, which had caused the collapse, had been undertaken in accordance with Liebherr’s specifications.

The Decision on Trial

The trial judge found against all 3 defendants and apportioned liability against Baden (45%), Brambles (35%) and Gillespies (20%).

The Issues on Appeal

Baden and Brambles appealed the orders of the trial judge, and the issues for determination on appeal were:

(a) Whether each of Brambles and Baden breached a duty owed to the plaintiff;

(b) Whether factual causation was established in circumstances where there were 3 consecutive negligent acts by 3 different parties;

(c) Whether the causal link was broken by intervening tortious conduct of another party;

(d) Whether there was any contributory negligence by the plaintiff; and

(e) How damages should be apportioned between the parties.

The Decision on Appeal

In relation to (a), the Court of Appeal held that Baden’s negligence should be upheld. However, this was on the basis of its failure to provide a mechanical system which would either have precluded the crane being driven without the slew lock being released, or have provided a means for indentifying any damage which resulted from inadvertent failure to release the slew lock, rather than its failure to provide a warning to the plaintiff. Although Brambles did not itself modify the crane, as a crane operator, it had sufficient understanding of the way in which the crane would be driven to realise that inadvertent failure to release the slew lock would significantly stress the crane’s structure. Therefore, the Court of Appeal held that Brambles owed the plaintiff a duty of care, which flowed from a failure of the crane due to the lack of a relevant safety device after it had sold the crane.

In relation to (b), the Court of Appeal held that although the breach of any one of the defendants would not have caused the plaintiff’s injury without intervening tortious failures by each of the other defendants, each act of negligence was a necessary element in a set of conditions, which, together, were sufficient to cause the harm.
In relation to (c), as to whether the causal link was broken by intervening tortious conduct of another party, the Court of Appeal held that each subsequent tortfeasor in a chain should not escape liability for the sole reason that others before or after it were negligent. Where subsequent negligence is a reasonably foreseeable consequence of earlier negligence, it will not break the causal chain. In this regard, the Court of Appeal held that Baden had no reason to believe that the risk that it created would be obviated by the owner of the crane, and therefore, there was no reason not to treat its negligence as causative of the harm. It was also held that although Brambles did not have control over the crane when the incident occurred, its failure to ensure that safety mechanisms were implemented, and to train or warn future operators, remained a significant cause of the incident.

In relation to (d), the plaintiff did not know of the risk. The Court of Appeal held that as the plaintiff was not told that failure to release the slew lock created a risk of the crane failing, operating the crane after such a failure did not constitute contributory negligence.

In relation to (e), the Court of Appeal held that apportionment as between Baden, Brambles and Gillespies was 40:20:40. Brambles was the party which proposed and instructed Baden to undertake the modifications. Brambles operated the crane for some months after the modifications were made and with full knowledge of the nature of the modifications, but it no longer had control of the crane or the operators at the time of the incident. The Court of Appeal held that it was appropriate that Brambles bear only 20% of the responsibility for the harm. With respect to the apportionment of liability between Baden and Gillespies, the Court of Appeal held that given the experience of the crane in operation and the knowledge available to Gillespies from the operator and a mechanic who had experience of the crane when owned by Brambles, the appropriate apportionment between Baden and Gillespies was 50:50.

It was also established that in order to determine causation in circumstances where there are three consecutive and related sets of negligent conduct by three different parties, s5D of the CLA (NSW) must be applied separately to each.
The Facts

The plaintiff was employed as a part time assistant at the defendant’s specialist law book co-operative at Monash University in Victoria between 2002 and 2008. She alleged that during that time she was subjected to bullying, harassment and intimidating conduct from the manager of the book shop (Mr Cowell). She claimed damages for the psychiatric injury she sustained as a result of that conduct. She alleged that the injury was caused by the defendant’s negligence in exposing her to an unsafe workplace.

The Decision

The court had no hesitation in finding that Mr Cowell’s conduct, which included verbal and physical assaults, abusive language, threats of transfer or dismissal, and hiding, deleting or destroying information or equipment needed to perform her job, constituted bullying within the meaning of the Worksafe Victoria Guidance Note. The court was satisfied that Mr Cowell’s conduct in the workplace threatened to, and it did, damage the mental health and well being of the plaintiff throughout the course of her employment by the defendant.

The court then had to consider whether the defendant was in breach of its duty of care as employer. The court noted that the plaintiff made a telephone complaint to the Chairman of the Board of Directors (Mr Somers) following a book and calculator being thrown at her by Mr Cowell in March 2003. Mr Somers convened a meeting of the Board at which the plaintiff’s concerns were specifically raised and discussed. It was noted in the minutes of that meeting that Mr Cowell’s behaviour could cause damage to the plaintiff. At the Board’s invitation, the plaintiff wrote a letter addressing her concerns about Mr Cowell’s behaviour. The Board subsequently resolved to take certain action including settling position descriptions, implementing workplace behaviour policies and undertaking a formal investigation or inquiry, but no steps were ever taken.

The court held that in those circumstances, the risk of injury was apparent – the defendant recognised in 2003 what it needed to do about the situation. There was no need to consider whether what it thought it needed to do was sufficient because it did nothing at all. The expert opinion before the court reinforced the culpability of the defendant’s failures to act promptly and decisively in 2003 and to have done in 2003 what it recognised as an appropriate response in 2007. The court was satisfied that the behaviour of the defendant from 2003 to 2007 fell short of the standard expected of an employer in 14 identified areas including that it failed to properly define the relations between it and its employees, and between its employees inter se; it failed to articulate its expectations concerning conduct in the workplace between employees; it repeatedly misrepresented to the plaintiff that employment contracts, written job descriptions and workplace behaviour policies were imminent, and it did not introduce defined procedures for complaints of inappropriate behaviour in the workplace or train its employees how to deal with such behaviour and complaints when they were occurring.

The plaintiff was awarded $300,000.00 damages for pain and suffering and loss of enjoyment of life.

IN ISSUE

• Whether the employer failed to take reasonable care for the plaintiff’s safety in her employment
• Liability of employer for bullying

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The Facts
In 2006 the plaintiff underwent a medical procedure (coiling) to treat a berry aneurysm in her right anterior cerebral artery. During the procedure the aneurysm ruptured, resulting in the plaintiff suffering a stroke and sustaining injuries leaving her permanently disabled. This was a risk of the procedure.

The defendant, Dr Cooke (radiologist), was not involved in the 2006 procedure, but 2 and a half years earlier had reviewed and reported on an angiogram performed on the plaintiff and negligently failed to detect and report on the presence of the aneurysm.

The plaintiff sought to recover damages (agreed at $1 million) from Dr Cooke for the injuries sustained in 2006, alleging that his negligence in 2003 was a cause of the injuries that she suffered in 2006.

Dr Cooke admitted breach of duty but denied liability on a number of grounds including that the loss and damage suffered by the plaintiff was not caused by his breach of duty.

The Decision
Factual causation was established. The court compared what would have happened had Dr Cooke correctly diagnosed the aneurysm in 2003 with what in fact happened in 2006. The court found that in 2003 the plaintiff would have followed the doctors’ recommendations as she did in 2006 and had the aneurysm treated by a different procedure known as clipping (which was the preferred method in 2003). Clipping had low risk of causing a rupture or stroke. On the balance of probabilities but for the negligence of Dr Cooke, the aneurysm would have been obliterated by clipping in 2003 even though the coiling procedure was available at that time and had lower risks than the clipping procedure.

Legal causation was not established, however, in view of s5D(1)(b) and 5D(4) of the CLA (NSW). This was because the treatment that diagnosis would enable (either clipping or coiling) carried risks, including intra-procedural rupture. The treatment of the aneurysm was a consequence of diagnosis, not of a failure to diagnose and the treatment was the immediate cause of the rupture. The exposure to the risk of intra-procedural rupture had nothing to do with Dr Cooke’s failure to diagnose. Therefore, Dr Cooke’s negligence did not create the risk. That risk was one associated with the necessity for treatment once the aneurysm was diagnosed, whenever it was diagnosed.

Accordingly, the delay in diagnosis neither created nor materially increased the risks of intra-procedural rupture. If the aneurysm had spontaneously ruptured during the period in which it remained undiagnosed, causing harm, the court indicated that Dr Cooke would have been responsible as the delay in diagnosis would have made a real contribution to the harm. As the rupture occurred during treatment, Dr Cooke’s admitted negligence was not causative of the harm to the plaintiff who was consequently denied relief by the court.
The Facts

The principal proceedings related to a claim for damages by Mr Stephen Grinham, the plaintiff, against his former employer, Tabro Meats Pty Ltd (Tabro), as a result of contracting the Q fever virus while working at its abattoir. Q fever is a highly infectious organism that persons working in the livestock industry, particularly meat workers, are at a higher risk than normal of contracting.

The plaintiff settled his claim against Tabro in the course of the trial. Tabro’s third party proceedings against Dr Catherine Murray, the plaintiff’s general practitioner, however, continued. In related proceedings, the Victorian WorkCover Authority sought recovery of payments from Dr Murray for compensation paid to the plaintiff. These two separate proceedings against Dr Murray were heard together because the allegations of negligence were the same.

On 2 May 2002, the plaintiff attended upon Dr Murray at the Wonthaggi Medical Clinic for a Q fever skin and serology test after he heard other abattoir workers discussing Q fever. While vaccination for Q fever is very effective, if a skin and serology test shows a positive result the vaccination cannot be performed because it would cause a serious risk to the patient’s health. On 8 May 2002, the results of the test were received by the clinic and the result was described as a “low positive”.

On 9 May 2002, the plaintiff re-attended the clinic. Dr Murray advised the plaintiff of his low positive results and stated that at this stage he was unable to get the vaccination because of his positive result, but that he should return in a month’s time so that a second skin test could be performed. She provided him with a pathology slip. In providing this advice to the plaintiff Dr Murray consulted with her supervisor at the clinic and an expert in Q fever from the Department of Health. The plaintiff never returned. In 2006, the plaintiff developed symptoms of dizziness and nausea and was subsequently hospitalised and diagnosed with acute Q fever virus. He continued to suffer from post-Q fever syndrome.

The court was required to consider whether Dr Murray breached her duty of care to the plaintiff in her provision of advice as to the seriousness of continuing to work at the abattoir and for failing to recall the plaintiff when he failed to re-attend the clinic for further testing.

The Decision

The court held that Dr Murray did not breach her duty of care to the plaintiff. Dr Murray’s advice was adequate and the court considered that two expert witnesses in the area of Q fever took no exception with the advice provided by Dr Murray. The opinion evidence of other practitioners was that they would have simply relied upon the positive result and not have undertaken further testing.

The court held that Dr Murray was not obliged to tell the plaintiff that he remained at risk for Q fever infection while he continued to work at the abattoir. He obviously knew he was at risk because that was why he attended at the clinic in the first instance. It was sufficient that Dr Murray had given the plaintiff a pathology slip, explained the purpose of retesting and advised that he return for a skin test because the results were inconclusive.

Dr Murray did not breach her duty of care in failing to call the plaintiff (by telephone or letter) to re-attend the clinic and undergo the pathology test. The court held that the legal test was one of what was reasonable in the circumstances, not what might be the perfect medical practice. The court made reference to Dr Murray’s busy rural practice. There was nothing to suggest to Dr Murray that the plaintiff would not

IN ISSUE

• Whether duty of care was breached by doctor for failing to recall a patient, despite asking the patient to return

• Whether duty of care was breached in provision of advice as to seriousness of patient’s situation

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re-attend the practice or undergo the further pathology test. She fully expected that he would return to the clinic, as requested. The court also considered the issue of personal autonomy, namely, that the plaintiff was capable of understanding what he was told by Dr Murray. It was his decision not to make another appointment to undergo further testing. For these reasons, it was reasonable for Dr Murray not to follow up the plaintiff.

The plaintiff’s proceeding against Dr Murray as a third party was dismissed. The Victorian WorkCover Authority’s recovery proceeding was also dismissed. Dr Murray was neither negligent for her advice to the plaintiff on 9 May 2002 nor for failing to call him after he did not re-attend pursuant to her advice to undergo a pathology test.
The Facts

The principal proceedings were in relation to a claim by CS who was the partner of LB and contracted HIV. LB had been a patient at the Bondi Junction Medical Centre (medical centre) that was managed by the appellant Idameneo (No 123) Pty Ltd. LB had attended upon Dr Biedrzycka at the medical centre to request an STD screen on 30 March 2004. She had previously been a patient in 1999. Her contact details had changed but she did not tell the medical centre, nor did they confirm her details at the time of her visit.

LB's results were sent away for analysis and on 5 April 2004 the pathology laboratory told Dr Johnson, at the medical centre, that LB's results were “equivocal with respect to the HIV test” and that LB “needed retesting”. Dr Johnson advised a staff member to write to LB to request that she return for a repeat of her blood tests. LB never received the letter but returned to the medical centre of her own accord on 22 April 2004 and was seen by Dr Colin Gross. Dr Gross did not examine LB’s clinical records (although they were available to him) and told her that her blood tests were clear.

Not long after the consultation with Dr Gross, LB and CS had one episode of unprotected sexual intercourse which resulted in CS contracting HIV. CS commenced a claim for damages against the three doctors who saw LB at the medical centre as well as the medical centre, on the basis that the “salient features” taken into account by the trial judge gave rise to such a duty. The novel issues considered by the trial judge included: provisions of the Public Health Act 1999 (NSW) that emphasised the importance of updating patient contact details.

The Decision at Trial

The doctors each brought cross-claims against the medical centre for statutory contribution under s5 of the LR (MP) and for breach of their contracts with the medical centre. The medical centre cross-claimed against the doctors seeking statutory contribution, damages, and/or an indemnity.

The trial judge held that the medical centre breached the duty of care which it owed to CS and that the doctors were also negligent, with their negligence also having caused the injury to CS.

The medical centre was not entitled to an indemnity under the respective contracts with the doctors. The medical centre was liable to contribute 40% of the damages paid to CS by the doctors. The doctors breached their contracts with the medical centre thereby entitling the medical centre to damages. The medical centre breached its contract with Dr Johnson entitling Dr Johnson to contractual damages which “cancelled out” the medical centre’s successful contractual claim. Dr Gross did not have a relevant contract, so his claim had to fail.

The Decision on Appeal

The Court of Appeal upheld the trial judge’s findings in relation to the existence of a duty of care owed by the medical centre to CS on the basis that the “salient features” taken into account by the trial judge gave rise to such a duty. The novel issues considered by the trial judge included: provisions of the Public Health Act 1999 (NSW) that emphasised the importance of updating patient contact details. The medical centre was liable to contribute 40% of the damages paid to CS by the doctors. The doctors breached their contracts with the medical centre thereby entitling the medical centre to damages. The medical centre breached its contract with Dr Johnson entitling Dr Johnson to contractual damages which “cancelled out” the medical centre’s successful contractual claim. Dr Gross did not have a relevant contract, so his claim had to fail.
of reporting diseases; the medical centre’s own
documentation in relation to reception training and
policies and procedures emphasising the importance
of maintaining patient records; and the medical
centre’s full ownership and control of patient records.

In relation to causation, the Court of Appeal agreed
with the trial judge that had up to date medical
records been kept, LB would have been notified of
her need to attend the medical centre and would have
become aware of her pathology results in respect of
HIV.

On the issue of apportionment raised by the medical
centre, the Court of Appeal rejected the argument that
the doctors were not entitled to bring a contribution
claim because they had not established the extent of
the liability against which they claimed contribution.
The Court of Appeal took the view that the liability of
the doctors for the amount paid to CS was joint and
several.

Concerning whether the practitioner contracts
provided an indemnity to the medical centre against
claims for contribution, the Court of Appeal held that
the indemnity clauses only extended to liability arising
from the doctors’ own negligence and not that of the
medical centre, which in this case was its failure to
maintain up to date records.

In respect of the argument in relation to breach
of contract between the doctors and the medical
centre (both arguing that each breached their
contract), the Court of Appeal disagreed with the
trial judge’s findings, and held that because of circuity
of action, namely that the claims were for the same
amount of damages, the actions were defeated.
The result was that the respective claims for breach
of contract cancelled each other out. However, the
medical centre’s submission for an equitable right
of contribution was dismissed on the basis that the
doctors and medical centre were considered joint
tortfeasors at common law.

The effect of the judgment was that the appeal by the
medical centre was dismissed and the cross-appeal by
Dr Johnson and Dr Gross allowed.
The Facts

The respondent sought treatment from the appellant, a general practitioner, between 13 August 1997 and 9 February 2011 for various health problems including abnormal liver function and morbid obesity. The respondent alleged that the appellant was liable in negligence for the progression of his pre-existing liver disease to cirrhosis, liver failure and eventually terminal liver cancer.

The respondent claimed that the appellant should have been more proactive in treating his liver disease by emphatically addressing the problem of his morbid obesity. The respondent also claimed that the appellant represented to him that his health problems were caused by exposure to toxins in the workplace and that the appropriate treatment was to undergo a series of detoxifications. The respondent alleged that this advice caused him to form the belief that conventional modalities of treating obesity, such as bariatric surgery, would not assist him.

The appellant contested these allegations on the basis that the respondent had a history of not complying with prescriptive treatment and weight loss advice relating to reducing his obesity; he did not recommend bariatric surgery to address obesity because it was not a widely accepted procedure at the time; and also the respondent was not a good candidate for bariatric surgery so he would never have received this treatment in any case.

The Decision at Trial

The trial judge found that it was not enough for the appellant to merely point out the risks of obesity and counsel weight loss. A reasonable doctor in the appellant’s position would have referred the respondent to a specialist in obesity management and he was therefore negligent in not doing so. The trial judge also found on the balance of probabilities that had the respondent been offered bariatric surgery, he would have undergone the procedure and it would have been a success and a healthy weight would have been achieved by the respondent following surgery. The trial judge was satisfied that the failure to refer the respondent for bariatric surgery caused the progression of the respondent’s liver disease to cirrhosis, then liver failure and cancer.

The Issues on Appeal

The issues on appeal were whether the appellant breached his duty to the respondent by failing to refer him to an obesity clinic or endocrinologist; whether referral to a bariatric surgeon was necessary in the exercise of a general practitioner’s duty of care in 1997-1998; whether the respondent would have lost the necessary weight had the appellant properly advised him about the cause of his liver disease and other health problems; and whether the respondent would have lost sufficient weight had he been referred to an obesity clinic or hepatologist.

The Decision on Appeal

The appeal was allowed and the decision of the trial judge set aside on the basis that there had been no breach of duty by the appellant in failing to refer the respondent to an obesity clinic. This was due to the respondent’s failure to act on previous referrals by other doctors, indicating that the appellant’s failure to refer was not causative of the harm suffered by the respondent. The duty owed by the appellant stopped short of requiring an exercise in futility.

In relation to the appellant’s failure to refer the respondent for bariatric surgery, the Court of Appeal found that expert evidence did not support the conclusion that a reasonable practitioner would have made such a referral in 1998.
While it was accepted that the appellant should have disabused the respondent of the notion that his illnesses were related to toxic exposure, there was no causal link between the respondent’s unfounded belief and his failure to lose weight and resulting health complications.
The Facts

The plaintiffs are the parents of Keeden Waller, who was conceived by invitro fertilisation (IVF) carried out by the defendant, a gynaecologist with a sub-speciality in infertility and IVF. Keeden was born on 10 August 2000. On 14/15 August 2000, he suffered an extensive cerebral sinovenous thrombosis (CSVT) or stroke, as a result of which he is, and will remain, profoundly disabled.

The plaintiffs alleged that a contributing factor to the CSVT was that Keeden had anti thrombin deficiency (ATD) (a disorder of blood clotting) which he inherited genetically from his father, the second plaintiff. The defendant was aware from the initial referral letter that the second plaintiff had ATD. He advised the plaintiffs to see a genetic counsellor but they did not do so and he did not follow up on that issue.

The plaintiffs alleged that the defendant was in breach of his contractual obligations and his common law duty of care to the plaintiffs in failing to inform, or cause the plaintiffs to be informed, of the hereditary aspects of ATD. The plaintiffs alleged that if properly informed, they would not have conceived a child using the second plaintiff’s sperm and would have therefore avoided the harm which has befallen them.

The plaintiffs alleged that the defendant was in breach of his contractual obligations and his common law duty of care to the plaintiffs in failing to inform, or cause the plaintiffs to be informed, of the hereditary aspects of ATD. The plaintiffs alleged that if properly informed, they would not have conceived a child using the second plaintiff’s sperm and would have therefore avoided the harm which has befallen them.

The plaintiffs claimed damages for their involvement in the IVF procedure and the pregnancy and damages for psychiatric and physical injury resulting from Keeden’s injuries and disabilities. The plaintiffs also sought to recover the cost of having, raising and caring for Keeden.

The Decision

The plaintiffs were successful in establishing a breach of duty on the part of the defendant for failing to inform them of the possibility that their child might inherit ATD. The court found that had the plaintiffs been properly informed that Keeden could have suffered from ATD, they would have elected not to have him. In reaching this conclusion, the court noted that the second plaintiff had previously been hospitalised because of his ATD and the prompt steps taken by the plaintiffs to obtain medical advice as to the effect of ATD on their children once the decision to have children was made, suggested that the plaintiffs had greater concerns than the ordinary reasonable person in relation to ATD.

Despite finding that the plaintiffs would have elected not to have Keeden had they been properly informed, the court held that the plaintiffs failed to establish that the CSVT was caused or materially contributed to by the ATD. Although it was foreseeable that Keeden might inherit ATD and it may become symptomatic at some stage during his lifetime, the harm for which recovery was sought, namely the consequences of CSVT, was not reasonably foreseeable. The evidence indicated that thousands of children were born with ATD in Australia and countless worldwide every year but since 1966 only 4 cases had resulted in the occurrence of thrombosis.

Judgment was therefore entered for the defendant.
The Facts

In November 2004, the appellant, Ian Wallace (Wallace), sought medical treatment from the respondent, Dr Kam, in relation to a condition of his lumbar spine. Wallace subsequently underwent surgery for an intervertebral disc protrusion in his lumbar spine.

The surgical procedure had inherent risks. One risk was of temporary local damage to nerves within Wallace’s thighs known as “bilateral femoral neurapraxia”. This condition can occur as a result of lying face down on the operating table for an extended period. The other distinct risk was a one-in-twenty chance of permanent and catastrophic paralysis resulting from damage to Wallace’s spinal nerves.

The procedure performed by Dr Kam was unsuccessful and the first risk of bilateral femoral neurapraxia materialised leaving Wallace in severe pain for some time. The second risk did not eventuate.

Wallace commenced proceedings against Dr Kam claiming damages for breach of duty for failing to warn him of the risks of the operation. Wallace’s claim against Dr Kam was that had Dr Kam negligently failed to warn Wallace of the risk of neurapraxia he would not have chosen to undergo the surgical procedure and would therefore not have sustained the neurapraxia.

The Decision at Trial

The trial judge found that Dr Kam negligently failed to warn Wallace of the risk of neurapraxia. However, on the question of causation, the trial judge held that Wallace would have chosen to undergo the surgical procedure even if warned of the risk of neurapraxia.

The Decision on Appeal

On appeal Wallace argued that the trial judge erred in holding that the legal cause of the neurapraxia could not be the failure to warn of the risk of paralysis.

The High Court Decision

The High Court unanimously dismissed Wallace’s appeal and confirmed the Court of Appeal’s ruling that Wallace was not to be compensated for the occurrence of a physical injury the risk of which he was prepared to accept.
The High Court noted that the policy behind the duty of a medical practitioner to warn of risks in a proposed treatment is not simply to facilitate the patients’ right to choose or to protect the patient from exposure to all unacceptable risks. The underlying policy is to protect the patient from the occurrence of physical injury the risk of which is unacceptable to the patient. The scope of liability for breach of duty should reflect that policy. On that basis, the High Court held that the liability of a medical practitioner who has failed to warn the patient of material risks inherent in the proposed treatment should not extend to harm from risks the patient was willing to accept either by express consent or, as found, had disclosure been made.
The Facts

Early in the second trimester of her pregnancy with the appellant, the appellant’s mother came into contact with the chicken pox virus through the appellant’s older sister. As soon as the parents realised that the sister may have chicken pox, the appellant’s mother sought advice from a doctor at Blacktown Hospital. The mother advised the doctor that she had not previously suffered from chicken pox and was therefore unlikely to have the necessary immunity. In accordance with standard medical practice at that time (2002), she should have been offered a dose of varicella-zoster immunoglobulin (VZIG) to boost her defences to the virus. She was not offered the treatment and she contracted chicken pox. The appellant was later born with foetal varicella syndrome (FVS) which resulted in severe physical and intellectual disability.

The appellant sued the respondent as the entity responsible for the Blacktown Hospital and its staff in negligence.

The Decision at Trial

The trial judge found that the duty of care owed by the hospital extended to offering the mother the VZIG treatment. He found that it was not offered and therefore the duty of care was breached. However, he also found that the appellant had not established that if the treatment had been administered, the mother would probably have avoided developing chicken pox. Judgment was entered for the respondent.

The Issues on Appeal

The issue on appeal was whether the trial judge was correct to conclude that the evidence established only a possibility of prevention of infection and therefore that causation was not made out.

The Decision on Appeal

The majority of the Court of Appeal dismissed the appeal on the basis that the trial judge was correct in holding that to establish causation the appellant had to prove that had VZIG been administered on the day of attendance at the hospital, the appellant’s mother would not have contracted chicken pox.

The appellant attempted to prove this by expert evidence. However, there was a conflict between the appellant’s and the respondent’s expert evidence. The Court of Appeal agreed that the trial judge was correct to reject the appellant’s expert evidence because it was based on overseas statistical evidence which only included a small number of subjects, with a significant dosage difference and with a different objective (attenuation of illness not prevention of illness).

The appellant also argued that the trial judge did not apply the correct legal test of causation. The appellant relied on a statement of principle by McHugh J in Chappel v Hart (1998) HCA 55 to argue that causation was satisfied because the respondent’s conduct in not offering to administer VZIG increased the risk of injury. She did in fact develop chicken pox and so causation was established. The Court of Appeal noted that there are real difficulties in applying the ‘but for’ test to the concept of ‘increase in risk’. Where the negligence on the part of the respondent was one of omission in failing to offer a particular therapeutic substance, proof of the causal link between an omission and an occurrence required consideration of the probable course of events had the omission not occurred. In this case, the risk to which the appellant was exposed existed regardless of any conduct of the respondent – the appellant’s mother had already been exposed to the virus. It was therefore incorrect to say that the respondent had ‘increased the risk of injury’.

The appellant failed to establish that the respondent’s breach of duty caused or materially contributed to the harm which occurred.
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PROFESSIONAL NEGLIGENCE

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The Facts

Andrew Marshall (the client) sued his former legal representatives, Stacks/Goudcamp Pty Ltd (the respondent) for professional negligence alleging negligence in failing to require him to attend upon a psychiatrist before settling his nervous shock claim following the death of his son in a motor vehicle accident (the professional negligence claim).

Keddies Solicitors (the appellant) acted on behalf of the client in the professional negligence claim. At the hearing of the professional negligence claim, the client’s counsel withdrew his services because he considered the claim had no reasonable prospects of success. The appellant consequently sought and was granted leave to cease acting in the professional negligence claim. The professional negligence claim was later dismissed and the client was ordered to pay the respondent law firm’s costs.

The respondent applied by way of motion for an indemnity costs order against the appellant for the costs the client had been ordered to pay pursuant to s348 of the Legal Profession Act 2004 (LPA), which provides that where a practice provides legal services to a client without reasonable prospects of success, a court may make an order for the practice to indemnify or pay costs payable by the client. Alternatively, the respondent sought the orders pursuant to s99 of the Civil Procedure Act 2005 (CPA), which provides that if a legal practitioner is responsible for costs incurred improperly or without reasonable cause, a court may order the legal practitioner to indemnify or pay costs payable by that party.

The Decision at Trial

The trial judge made an order in favour of the respondent pursuant to s348 of the LPA and ordered that the appellant pay two-thirds of the respondent’s costs of the notice of motion. The trial judge rejected the respondent’s alternative application for an order pursuant to s99 of the CPA.

The Issues on Appeal

The appellant appealed against the costs order on the basis that the trial judge erred in the exercise of his discretion in making the costs order.

The respondent cross-appealed against the trial judge’s refusal of a cost order pursuant to s99 of the CPA.

The Decision on Appeal

The central issue on appeal was whether the professional negligence claim against the respondent had reasonable prospects of success within the meaning of the LPA. The Court of Appeal noted that s345 of the LPA stipulates that a solicitor is not to provide legal services in respect of a claim unless he or she has a reasonable belief based on provable facts and a reasonably arguable view of the law that the claim has reasonable prospects of success. The Court of Appeal held that in accordance with established case law, the phrase “without reasonable prospects of success” means “not fairly arguable”.

The Court of Appeal had no hesitation in finding that on the material available to the appellant at the time they filed the statement of claim, there were no reasonable prospects of establishing that the
respondent owed or was in breach of a duty of care to the client. The evidence was clear that the client had instructed the respondent to settle his nervous shock claim despite the respondent’s advice that it was premature to do so without more psychiatric evidence. The evidence was clear that the client would not have agreed to attend a psychiatrist to obtain further evidence in support of the claim. The respondent was entitled to rely on the client’s clear and firm instructions to settle the nervous shock claim because they had no right to compel the client to undergo a psychiatric assessment.

The Court of Appeal further held that the trial judge had erred in his conclusion that the manner in which the appellant conducted the client’s litigation did not fall within s99 of the CPA. The appellant’s appeal was dismissed. The respondent’s cross-appeal was upheld. The Court of Appeal ordered the appellant to pay the whole of the respondent’s costs of the notice of motion on an indemnity basis.  \[kek\]
The Facts

The defendant, Peedoms Lawyers Pty Ltd (Peedoms) acted for the plaintiffs, Wollongong City Council (the Council) who managed the affairs of Stuart Park Reserve Trust (the Trust). The Trust was the land holder of Crown Land on which a building used as a restaurant was located.

There was a lease over the restaurant with a certain lessee.

The restaurant was destroyed by fire. It was agreed between the Council and the lessee that the lessee would contribute more than the insurance funds from the fire to build more substantial premises than there had previously been.

Negotiations as to the terms of a new lease progressed. The new lease had to factor in that the lessee had built the improvements on the land.

The Council gave instructions to Peedoms that it was intended that, for the purposes of the valuation on which the rent would be calculated under the lease, only the landlord’s fixtures would be factored in. Mr Peedom amended the lease as a result of these instructions. The amendment, however, excluded both the landlord’s and the lessee’s fixtures (the mistake).

This meant the base rental over the 20 year term of the lease was a lesser amount (circa $50,000) arising from the mistake, rather than market rent on the improved property, which Council anticipated to be above $200,000.

Once the Council became aware of the mistake it obtained legal advice from a different lawyer and consequently instituted proceedings against the lessee to rectify the lease on the basis of mutual mistake. The case was dismissed because the court found the Council could not prove that the lessee laboured under the same mistake. The loss incurred in relation to these proceedings was circa $2,000,000.

The Council then claimed negligence against Peedoms and sought recovery of, amongst other things:

(a) The loss in rent;
(b) The loss in relation to the proceedings against the lessee.

The Decision

The court found that Peedoms was negligent for failing to carry out instructions from the Council. This was despite Peedom’s request for the Council to, before the lease was signed, confirm that the form of the amended lease was acceptable.

The Council’s failure to check the document amounted to contributory negligence to the extent of 25%.

With respect to the loss relating to the proceedings against the lessee, the court held that these were not reasonable mitigation costs because insufficient enquiries had been made by the Council prior to embarking on the litigation. Accordingly, this loss was not recoverable.

Loss of rental income was recoverable. Establishing the extent of that loss, however, was not straightforward. The court found that had the mistaken term not been incorporated into the lease, the lessee would not have agreed to the amount of rent the Council alleged would have been payable.

The Council’s valuation evidence was found not to be reliable.

The Stuart Park (D580060) Reserve Trust v Peedoms Lawyers Pty Limited
[2012] NSWSC 1133

IN ISSUE

• Whether incorporating a term of a lease inconsistent with instructions is negligent where a request to check the document has been made
• The extent to which failure to check the lease is contributorily negligent
• Whether the costs of pursuing a case against the lessee for rectification of the “mistake” are recoverable as reasonable mitigation costs

DELIVERED ON 21 September 2012
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The fact that the Council could not prove its loss to a degree of precision did not mean it could not recover anything. The court found that it had to “do its best” in the circumstances to assess the loss. On that basis, it reached a figure for the base rental somewhere between the lessee’s expectation of rental ($49,000) and the Council’s expectation of rental ($200,000) adopting a figure of $100,000 per annum. When factored into the terms of the lease over a 20 year period, the total rental loss was $1.56 million.

As Peedoms was successful in defending the Council’s attempt to recover the loss relating to its legal proceedings against the lessee, and there was a finding that the Council’s valuation evidence was not reliable, Peedoms was only ordered to pay 80% of the Council’s costs.
The Facts

Eric McCall was a shareholder and director of the plaintiff, Fiuggi Holdings Pty Ltd. In 2006, the plaintiff Fiuggi purchased a property in Penrith with the intention of constructing a three or four storey building on the site. To minimise its risk and assist in obtaining finance, the plaintiff wanted to pre-sell three of the four floors.

The defendant, Lamrocks, agreed to purchase two of the floors and prior to construction entered into a put and call option with the plaintiff. The defendant entered into this arrangement via a private trust called Lamlaw Property Investment Trust. The partners of Lamrocks were the beneficiaries of this trust and its trustee was Lamlaw Nominees Ltd (Lamlaw).

The bank ultimately lent to the plaintiff an amount of $4.97 million required for development.

The plaintiff claimed that as the defendant acted for both the plaintiff and Lamlaw and also had a personal interest in Lamlaw, it had created a conflict of interest and subsequently breached the fiduciary duty owed to the plaintiff.

In March 2008, Lamlaw informed the plaintiff that it would not be proceeding with the purchase stating that the put and call option was executed without proper authority.

The plaintiff attempted to market the properties in 2008, however due to the onset of the global financial crisis, buyers were scarce. The plaintiff’s bank pressured it into selling the entire property, which it did in August 2010 for $6.05 million, $1,744,758 of which was attributable to the two floors formerly reserved by Lamlaw.

The Decision

In its drafting of the put and call options and in failing to advise the plaintiff to obtain independent advice, the court found that the defendant had favoured its own interests ahead of the plaintiff’s. In doing so, the defendant was in breach of the fiduciary duty it owed to the plaintiff as its client.

The court found that what the plaintiff lost by reason of the defendant’s conduct, was the chance to sell levels three and four to a third party in late 2006 early 2007, either off the plan or by means of a put option or put call option.

The court found that the plaintiff’s loss resulting from the defendant’s breach was $4.5 million (being the amount the plaintiff would have otherwise pre-sold the properties for in 2006) less the eventual sale price of $1,744,758.

The plaintiff also claimed damages for the rent it would have received from the other levels of the complex had it not been forced to sell the entire building prematurely. The court however was not satisfied that lost rent could be claimed in the absence of evidence indicating the market value at that time as well as proof of ongoing rental agreements and deferred ruling on the issue. The court allowed the parties to make further submissions at a later date should they wish to do so in relation to this aspect of this claim.

IN ISSUE

- Whether law firm breached fiduciary duty and was therefore liable for the lost opportunity to sell property

DELIVERED ON 30 October 2012

READ MORE  

Fiuggi Holdings Pty Ltd v Lamrocks Legal Pty Ltd (t/as Lamrocks Solicitors and Attorneys) [2012] NSWSC 1388
The Facts

In January 2000 the plaintiff’s father (Mr Maestrale) was diagnosed with chronic myeloid leukaemia. He had several hospital admissions for management of his condition before his final admission on 3 June 2002. The plaintiff left his full time employment in September 2001 to undertake the role of full time carer for his father. He lived in the family home with his father from that date.

On 8 July 2002 Mr Maestrale left the hospital on a day pass with the plaintiff to attend a social function. After the function he met the first defendant, a solicitor, (who acted for the plaintiff on other matters) at a local cafe where he gave instructions for the preparation of a new will in substitution for an earlier will which had been drawn up when his 4 children were infants and his wife was still alive. The earlier will provided that upon his wife’s death his children were to receive equal shares in his estate. The plaintiff was aware that under the intended will, he was to receive a greater share of his father’s estate because of the commitment and care he provided to his father during his illness. The plaintiff’s three siblings were each to receive $150,000 (with one sister to receive an additional legacy of $10,000) and the plaintiff was to receive the residue of the estate including the unencumbered family home.

The plaintiff commenced proceedings alleging that the first defendant was negligent in failing to act promptly to obtain instructions for the preparation of a new will and in failing to respond to urgent calls for advice in the days immediately before Mr Maestrale’s death. There was a factual dispute about whether and when the first defendant became aware that Mr Maestrale had a terminal medical condition and that his death was imminent.

The Decision

The court accepted that at the meeting on 8 July 2002, the first defendant was unaware that there was a risk of Mr Maestrale dying before a formal will was prepared. The court did accept that the plaintiff made several urgent calls to the first defendant on 12 & 13 July. The first defendant did not deny receiving the messages and that, together with the objective evidence of the hospital of Mr Maestrale’s rapidly deteriorating health, led the court to accept that the plaintiff did make several requests for urgent action by the first defendant to have the intended will drawn up and executed.

The court then had to consider whether the first defendant owed the plaintiff a duty of care. The court had no hesitation in finding that although the first defendant’s primary duty was to take reasonable care to carry out Mr Maestrale’s instructions in accordance with his retainer, he also assumed a responsibility to the plaintiff as the beneficiary his client intended to benefit by his instructions given within a week of his death. The court held that it may be accepted that whenever a solicitor takes instructions to make a will, there is a potential for a duty to arise in favour of third parties who may suffer loss if the solicitor fails to discharge the retainer with due care. Whether a duty actually arises depends on a number of factors which may include foreseeability of loss to the third party, control of the situation by the solicitor, proximity between the solicitor and the third party, general public reliance on satisfactory performance by solicitors, assumption of responsibility to discharge the retainer properly, the powerlessness of the third party to do anything to protect himself or herself, and whether or not there is any conflict between the duty owed to the client and the alleged duty to the third.
party. In particular circumstances, other matters may also be relevant. The court noted that there is currently no consensus as to which matters are dominant or of any formula to apply to determine if a duty is owed to a third party.

In this case, Mr Maestrale had given clear and unambiguous instructions to the first defendant to prepare a will under which he intended that the plaintiff would benefit differently, to a material degree, from his other children. By accepting those instructions, the first defendant had a coexistent duty to the plaintiff to ensure that in the event of any change in his father’s health or capacity he would make prompt arrangements to attend with a formal will or, if time did not permit, with an informal will. The breach of duty did not lie in the delay of one week before the will was prepared but in the failure to respond to the plaintiff’s urgent calls for advice and attention in the interim.

The court awarded damages by reference to the difference between what the plaintiff in fact had to pay out to retain the family home and what he would have had to pay out but for the breach. A discount of 20% was applied to allow for the possibility that one of the plaintiff’s sisters may have brought an action under the Family Provision Act 1982 because of her circumstances as a single mother of two children.
The Facts

On 3 July 2001, Mr Loiero, the plaintiff’s principal, retained the first defendant Mr Maley to act on the plaintiff’s behalf on the sale of a commercial property (the property) for $5.3M and the purchase of an adjoining property which was to form part of the sale. Mr Maley subsequently drafted several contracts and special conditions in relation to the sale in accordance with Mr Loiero’s instructions. On 3 August 2001, Mr Loiero executed the contract for sale on behalf of the plaintiff in preparation for exchange of contracts later that day. Unbeknown to Mr Maley, Mr Loiero was engaged in side dealings with the purchaser’s representative (Mr Palasty) to the effect that the $1.25m deposit cheque would be given direct to Mr Loiero who would not present it. Essentially the purpose of the contract was to provide false comfort to Mr Loiero’s bank to facilitate other property transactions.

Mr Maley subsequently attended to exchange contracts and learned that no deposit was to be handed over. He phoned Mr Loiero and advised him to proceed to exchange contracts. Several days later, Mr Loiero rang Mr Maley and asked him to forward a copy of the contract to a Westpac bank representative. Mr Maley refused because the contract stipulated that a deposit of $1.25M had been paid when in fact it had not. Mr Maley formed a dim view of Mr Loiero who would not present it. Essentially the purpose of the contract was to provide false comfort to Mr Loiero’s bank to facilitate other property transactions.

The plaintiff retained other solicitors to act on the real estate transaction but the purchaser terminated the contract for sale and the plaintiff was unable to complete the purchase of other properties. It went into administration and the administrator sold the property for about half of the original contract price.

The plaintiff sought damages from Mr Maley and the other partners in his firm (Maclarens). The plaintiff alleged that Maclarens acted negligently and in breach of retainer in failing to advise that the prospective purchasers were recently incorporated companies and that personal guarantees should be obtained from its representatives, and also in failing to ensure that the agent received the deposit in accordance with the contract.

Maclarens admitted that it was retained by the plaintiff to act but disputed the extent of the retainer and denied any breach.

The plaintiff’s case was based on its having given, through its principal, Mr Loiero, certain instructions to Maclarens, including by way of written correspondence. Maclarens asserted that some of this correspondence was fabricated by the plaintiff.

The Decision

After analysing the lay and expert evidence the court concluded that after he obtained his file from Mr Maley, Mr Loiero set about fabricating documents in an attempt to construct a case against him. Not only did he fabricate correspondence, he also applied a “received” stamp to documents in an effort to lend truth to his version of events (the stamp was different to the one used by Maclarens) and also inserted pink paper to the file in the mistaken belief that would lend authenticity to it. The court accepted the evidence of Mr Maley that the firm did not use pink paper. On the basis of these factual findings, the court accepted that Mr Maley’s version of events in relation to the retainer was correct and that the contract for sale was not a bona fide document but a document prepared for the purpose of misleading others including financial institutions into believing the plaintiff’s property had a certain value and that certain funds would be realised from its imminent sale.

The court found that Mr Maley’s retainer was limited to documenting the contractual relationship between the plaintiff and the purchaser of the property in
accordance with his instructions and arranging for and effecting exchange of contracts. The court held that the retainer was to be viewed in light of the surrounding circumstances including that Mr Loiero not only reserved the right to conduct negotiations in the absence of Mr Maley but also negotiated a side deal which was at odds with the documents which he had instructed Mr Maley to draft and exchange. The court also held that the commercial experience of the client is of significance in determining whether the solicitor was negligent or in breach of retainer. In this case, Mr Loiero was an experienced property developer who well knew the value of a contract which had apparently been exchanged and which recorded a deposit had been paid. He was also attuned to the need to conceal from the solicitor matters which were at odds with a written agreement in order to avoid the solicitor disclosing that pursuant to his or her professional obligations.

The court determined that the plaintiff had not established that Mr Maley was negligent or in breach of the contract or retainer. In the court’s view, Mr Maley took all reasonable precautions to protect the plaintiff from the foreseeable risk of harm that a reasonable solicitor in his position would have taken.

Judgment was entered for the defendants.
The Facts

The plaintiff was the owner of land situated at 2 Panorama Parade, Seaforth. The plaintiff obtained conditional Development Approval from Manly Council to subdivide that land. Some of the conditions related to drainage. The plaintiff sought to meet those conditions by obtaining an easement over adjacent land owned by the Council but the Council refused to grant such an easement.

The plaintiff engaged the defendant, a solicitor, who gave advice and then, in early 2000 on behalf of the plaintiff, commenced proceedings against the Council seeking that the court grant such an easement. There were settlement offers from the Council but the defendant advised against accepting them. The proceedings went to hearing. The plaintiff was unsuccessful. He had to pay his own costs and was ordered to pay the Council's costs including some indemnity costs.

In December 2007 he commenced proceedings against the defendant alleging that in and from December 2001, the defendant was negligent, in breach of a term of his retainer to exercise reasonable care and skill, and guilty of misleading and deceptive conduct under the Fair Trading Act 1987 (NSW).

The defendant denied the allegations and also relied on the doctrine of advocates' immunity.

The Decision at Trial

The court found that the defendant was negligent in advising the plaintiff that his case for the granting of the easement was strong and in failing to advise that there was a real or substantial risk that the easement would not be granted. The defendant was also negligent in not advising the plaintiff that there was a probability that, even if the easement was granted, he would be ordered to pay the Council's costs and that there was risk that those costs might be awarded on an indemnity basis.

The Issues on Appeal

Five issues arose for determination upon appeal. Firstly, did the trial judge err in finding the defendant had breached his duty of care? Secondly, did the trial judge err in his finding on causation? Thirdly, did the trial judge err in not finding that the defendant was immune from suit in accordance with the principle of advocates' immunity? Fourthly, did the trial judge err in not assessing damages on the basis of a loss of chance? Finally, did the trial judge err in respect of the costs orders he made on the claim?

The Decision on Appeal

The Court of Appeal found that the defendant did not breach the duty of care owed to his client as the advice was not clearly wrong as a matter of law. There was also insufficient evidence to support the trial judge’s finding on causation as there was no proof indicating the Council’s terms of settlement.

In relation to professional immunity, the Court of Appeal determined that had negligence been found, the immunity would have applied. The Court of Appeal reviewed the law on advocates’ immunity and held that it justified a finding that the defendant was immune from suit because the advice he gave to reject the Council’s offers of settlement was work done out of court but which led to a decision affecting the conduct of the case in court. Accordingly, the court found that even if the defendant had been negligent, he would have been entitled to immunity from suit.
The Facts

On 17 September 2003 the Andersons exchanged contracts for the purchase of land and a chiropractic business. Mr D’Agostino, a solicitor, acted for the Andersons in relation to the purchase.

Settlement occurred on 12 November 2003 but the relevant consent for the use of the dwelling as a chiropractic clinic had lapsed in or about March 2003. The Andersons were unaware of this until receiving notice to this effect from the local Council on 12 July 2004. The Council subsequently indicated that an application for development consent would be unsuccessful unless the clinic was substantially downsized. The business was ultimately relocated and failed and the Andersons sold the property in March 2006 for considerably less than the price for which they had purchased it.

The Andersons issued proceedings against D’Agostino alleging he breached his duty of care to advise them that the development consent had lapsed prior to purchase.

The Decision at Trial

The trial judge found against D’Agostino in relation to breach of duty, causation and damage and also rejected a Limitation Act 1969 (NSW) defence. D’Agostino had submitted that the cause of action arose on the date of exchange of contracts being 17 September 2003. The Andersons had commenced proceedings on 10 November 2009, more than 6 years after this date. However, the trial judge found that the cause of action arose when the Andersons were made aware there was no operative consent permitting the use of the premises as a chiropractic clinic.

The Issues on Appeal

The issue for consideration was whether the Andersons suffered actual loss on exchange of contracts or when the lack of development consent was discovered.

The Decision on Appeal

The Court of Appeal noted that the trial judge had held that the case was similar to a case involving a latent defect or a contingent loss and that loss was only suffered (and time began to run) from the date the defect became apparent or the contingency materialised.

However, the Court of Appeal disagreed with that view on the basis that the lack of development consent was readily discoverable following ordinary conveyancing procedures. On purchase, the Andersons acquired a package of rights that was different to what they understood they were acquiring. They acquired premises and a business being unlawfully run rather than lawfully run. The Andersons were not exposed to a contingent loss. They suffered a financial loss when they entered into the contract.

The Court of Appeal held the only question for determination was whether the rights held by the Andersons after the exchange, being a property and business without development consent, were worth substantially less than what they understood they were acquiring, being a property and business with the development consent for use as a chiropractic clinic. If they were, actual loss was suffered and time began to run. The Court of Appeal found that the property was worth substantially less without the development consent. Accordingly, the action was statute barred and the appeal was allowed.

IN ISSUE

• Whether loss is suffered, and time begins to run, on exchange of contracts or when lack of development consent discovered

DELIVERED ON 21 December 2012

READ MORE click here
The Facts

The plaintiff was represented by the defendants (senior and junior counsel and their instructing solicitors) at his criminal trial over a nine week period between August and October 2007.

Between 28 September 2007 and 4 October 2007, the trial judge undertook his charge to the jury. On 28 September 2007, the plaintiff’s instructing solicitor appeared at the trial with senior counsel, as junior counsel was on route to a legal education conference for the duration of the long weekend commencing 29 September 2007. Senior counsel joined junior counsel at the conference on 29 September 2007. Both were booked to return on 1 October 2007 but their flight was delayed. Consequently, the plaintiff’s instructing solicitor appeared as counsel for the plaintiff at the trial between 2 and 4 October 2007. On 4 October 2007, the plaintiff was acquitted of six offences and convicted of fifteen. On 11 October 2007, the plaintiff was sentenced to three years imprisonment.

The plaintiff subsequently filed an appeal against his convictions and sentences, which were quashed on the basis that acquittal by reason of the hypothetical presence of the plaintiff’s counsel at court over the three days (particularly over the course of a lengthy trial where the plaintiff’s senior counsel had already completed his closing address to the jury) was an unverifiable hope or speculation, incapable of ever being viably proven to a reasonable standard.

The plaintiff alleged that the absence of his senior and junior counsel at his trial resulted in the trial judge’s errors and subsequently the convictions that led to his incarceration for several months.

The Decision

The plaintiff claimed damages against senior and junior counsel for breaches of duty owed to him, including a duty to take all reasonable steps to attend his trial.

The plaintiff also claimed damages for breach of retainer against his instructing solicitor for failure to seek the plaintiff’s approval to authorise counsel’s absence from the trial. The plaintiff also claimed that his instructing solicitor ought to have requested an adjournment of the trial until counsel was able to attend court.

The defendants applied to have the plaintiff’s action against them summarily dismissed on the basis that advocates’ immunity rendered the plaintiff’s claim wholly untenable. Alternatively, the defendants sought an order to strike out all or part of the plaintiff’s claim on the basis that his pleadings failed to disclose a reasonable cause of action.

The court determined that even without the protection of advocates’ immunity, the plaintiff’s claim against his counsel must fail on the basis that acquittal by reason of the hypothetical presence of the plaintiff’s counsel at court over the three days (particularly over the course of a lengthy trial where the plaintiff’s senior counsel had already completed his closing address to the jury) was an unverifiable hope or speculation, incapable of ever being viably proven to a reasonable standard.

The court also dismissed the plaintiff’s claim against his instructing solicitor on the basis that decisions regarding who would represent the plaintiff at the trial were considered tactical decisions regarding the court proceeding, and therefore fully protected under advocates’ immunity.
**The Facts**

The appellants were the children of Patricia Vagg. The respondents were the partners of the law firm who prepared Patricia Vagg’s will.

Patricia Vagg owned a house at Winmalee (Winmalee property) as joint tenant with her ex-husband, Mr Vagg. She gave instructions to her solicitor (employed by the respondents), to include in her will a request that the Winmalee property be sold and “the money received from that sale be given to our children for their education, to enable them to pay any HECS debts that they may have and incur”. This was drafted into her will at clause 11.

Mr Vagg did not comply with the request and instead he sold the Winmalee property and used the funds to buy another property in which he resided.

The appellants in their capacity as beneficiaries of Mrs Vagg’s will, brought proceedings against the respondents. They alleged the respondents breached their duty to Mrs Vagg by failing to advise Mrs Vagg that she could unilaterally sever the joint tenancy of the property; and by failing to seek instructions from Mrs Vagg to do so.

**The Decision at Trial**

The trial judge found there were no instructions by Mrs Vagg that there should be any testamentary disposition of her half interest in the Winmalee property to be inherited by the children. Accordingly, there was no duty to advise about or take steps to sever the joint tenancy.

**The Decision on Appeal**

The Court of Appeal upheld the trial judge’s decision. It was noted that the instructions that Mrs Vagg gave were that she wished for her children to receive the whole of the proceeds from the sale of the house. She never gave instructions for her half share to be left to her children. The evidence given by her children at trial supported this finding. The Court of Appeal also noted that the evidence was that Mrs Vagg had been advised at the time of her divorce, that if she did not sever the joint tenancy the property would vest in her husband on her death.

On appeal, the credit of the solicitor was in issue regarding what she informed Mrs Vagg about the ability to sever the joint tenancy. The appellants submitted that her evidence lacked supporting contemporaneous documentary material and ought not to have been accepted by the trial judge. The Court of Appeal rejected this argument and held that Mrs Vagg was aware of the ability to take steps to sever the joint tenancy but never took any steps to do so.

Accordingly, it was held that the respondents owed no duty to the beneficiaries. In addition, the Court of Appeal noted that the appellants as beneficiaries had no standing to bring the proceedings as particularised because the conduct complained of was the failure to advise Mrs Vagg of the ability to sever the joint tenancy. Any relevant duty of care was therefore only owed to Mrs Vagg and any proceedings for alleged breach of that duty could only be brought by the executrix of the estate.

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**IN ISSUE**

- Solicitor’s duty to a beneficiary of a will
- Whether solicitor failed to explain possibility of severance of joint tenancy

**DELIVERED ON** 22 February 2013

**READ MORE** [click here](#)
The Facts

Mrs Papa (the borrower) entered into a loan agreement with Provident Capital Ltd (the lender), under which two advances totalling $825,000 were made. This was a “low doc” loan. The lender, however, required the borrower to sign a declaration that she was able to repay the loan “without hardship” and that she had obtained independent legal advice.

The borrower sought the loan to help her son buy equipment for a gym owned by a company he was involved with. The gym had previously been in administration and the son had other financial problems. The son, however, had not told the borrower about these problems. He had told her that the gym was “going well”.

The borrower sought independent legal advice from George Caramanlis (the solicitor), so that she could sign the declaration that she had sought independent legal advice.

The solicitor knew that the borrower was a mature lady who owned property where she resided and from which she conducted a small business; that her only other asset was a car; that she was proposing to assist her son to purchase a gym and repay an earlier debt; that she did not have any involvement in the gym; that her son would be making repayments out of income from the gym; that the business needed extended time to pay rental bond; and finally that the loan was a “low doc” loan and did not require identification or verification of the means of repayment of the loan and payment of interest.

The loan was made to the borrower. Within a year, the loan was in default and the lender instituted recovery proceedings.

The Decision at Trial

The borrower sought to have the loan set aside under the unfair contracts provisions in the Contracts Review Act 1980 (NSW). She also claimed against the solicitor alleging that he had provided no advice and had accordingly breached his duty.

The trial judge set aside the loan agreement as an unfair contract.

While the trial judge was not satisfied that either the solicitor or the borrower gave truthful accounts of their dealings, he was unable to come to any final view about the precise content of the legal advice given and on that basis found that the borrower failed to discharge the onus of establishing that the advice provided to her fell short of the standard of care required by a solicitor.

It was also found that she did not discharge the onus of proving causation.

The Decision on Appeal

The lender appealed the finding that it was an unfair contract and the borrower appealed the finding that the solicitor was not negligent.

The Decision regarding the contract as unfair was overturned. The Court of Appeal held that if a financier is satisfied that a borrower is able to make the decision for himself or herself or has received appropriate advice on the viability of a loan transaction, it is in the public interest to allow them to lend on a “low doc” basis.

The borrower was, however, successful on appeal against the solicitor. The Court of Appeal found that the solicitor did not advise the borrower to seek independent financial advice. It considered that given the solicitor’s knowledge of the borrower’s circumstances, a reasonable solicitor giving independent legal advice in relation to the transaction would not have failed to draw her attention, in strong terms, to the fact that her home and livelihood would be dependent upon the viability and prospects of the gym and the ability and willingness of her son to make loan repayments out of income of the business; and also to recommend in strong terms that she obtain...
financial advice independent of her son concerning the capacity of the business to service the loan.

The failure to advise her to seek independent financial advice amounted to a breach of duty.

The Court of Appeal found that on the balance of probabilities, if the solicitor had so advised the borrower, she would have obtained financial advice which, based on the information available at the time, would have been that the business was a highly speculative business endeavour; and that in the circumstances she was facing a high risk of disaster by entering into the transactions.

The probability was that based on such financial advice she would have been deterred from entering the transaction or at least would have had a considerable loss of confidence in her son that the gym was going well. She would have followed the financial advice and not entered into the loan agreement and for that reason she proved causation.
The Facts
The plaintiff’s son was expelled from school in March 2007, after he had earlier been warned that if he engaged in any further misbehaviour, he would be expelled. The plaintiff sought the retraction of her son’s expulsion, complaining that her son had not been afforded procedural fairness before the decision to expel him was made. Discussions with the principal and others in relevant authority did not achieve the reversal of the decision, even when the plaintiff threatened court action.

The plaintiff subsequently instructed the defendant to act on her behalf in relation to the dispute with the school.

The plaintiff had rejected the school’s offer to allow her son to re-enrol at the school in 2008. Notwithstanding advice given by both the defendant and counsel that proceedings should not be pursued, the plaintiff subsequently commenced proceedings against the school and its former principal. Judicial review of the expulsion decision was sought; as well as a declaration that it was invalid; an order setting aside the decision; and an order requiring the school to re-admit the plaintiff’s son. Those proceedings against the school and former principal were dismissed.

The plaintiff brought a claim against the defendant in negligence even though, in August 2007, the school offered to re-enrol the plaintiff’s son in 2008.

The plaintiff argued that the defendant’s warnings against litigation did not go far enough. The plaintiff claimed that the defendant should have earlier advised her that she had no case; that the court had no jurisdiction to entertain any application that the plaintiff could bring; and that the proceedings against the school and former principal were misconceived. The plaintiff argued that had that advice been given, the proceedings which she brought against the school and the former principal would not have been taken; the case would not have received publicity; the plaintiff would not have suffered psychiatric injury; and the plaintiff would not have suffered the economic loss which was now pursued against the defendant.

The Decision
Judgment was given for the defendant. The court was satisfied that the defendant repeatedly advised the plaintiff to settle the proceedings against the school and former principal.

The plaintiff did not have a lack of understanding of the defendant’s advice but rather the plaintiff had refused to accept the defendant’s advice. The plaintiff had commenced proceedings against the school and former principal, despite the defendant’s advice as to the risks of litigation. The defendant had not breached his duty of care to the plaintiff.
The Facts
Mr Angelo Caradonna and Mr Alessio Vella were business partners. Without Mr Vella’s knowledge, Mr Caradonna gained possession of the certificates of title to 3 properties owned by Mr Vella.

By forging Mr Vella’s name and using one of the properties as security, Mr Caradonna obtained a loan from Mitchell Morgan Nominees Pty Ltd (the respondent). The loan agreement was drawn up by Hunt & Hunt Lawyers (the appellant). Upon discovery of the fraud, it was found that Mr Caradonna and his accomplice, Mr Lorenzo Flammia (the fraudsters) were bankrupt. The respondent was unable to recover the loan funds because there was no valid loan agreement and it was unable to execute on the mortgage because of the way it had been drafted by the appellant. The respondent claimed the full loss from the appellant who denied liability and in the alternative sought to limit its liability under s4 CLA (NSW) on the basis that the fraudsters were concurrent wrongdoers.

The Decision at Trial
The trial judge found that the appellant was negligent in drafting the mortgage. However, the trial judge also held that the conduct of the fraudsters was a major cause of the loss suffered. In relation to the question of the same loss or damage, the trial judge held that the fraudsters and the appellant had independently caused the same loss and damage. As a result, the loss was apportioned between the 3 wrongdoers. The appellant’s negligence was assessed at 12.5% of the total loss, pursuant to s35(1) of the CLA (NSW). The respondent appealed the decision.

The Issues on Appeal
The issue on appeal was whether the appellant was a concurrent wrongdoer.

The Decision on Appeal
The Court of Appeal overturned the trial judge’s decision on the basis that the loss suffered by the respondent due to the appellant’s negligence was not associated with the loss caused by the fraudsters. The Court of Appeal determined that the appellant was not liable for the same damage and, consequently, was not a concurrent wrongdoer with the fraudsters.

The Court of Appeal held that the respondent had been fraudulently induced to pay money out and that this was different from not having the benefit of security for the money paid out. Consequently, the respondent could recover its entire loss from the appellant. The appellant appealed.

The Issues on Appeal to the High Court
The issues on appeal to the High Court were: the proper identification of “loss or damage” and whether another concurrent wrongdoer caused the loss.

The Decision of the High Court
The High Court held that the loss suffered by the respondent was the result of its inability to recover the money advanced, pursuant to the mortgage documentation. Although the appellant’s negligent drafting of the documentation was the cause of that loss, the respondent had first been induced to enter into the transaction by the fraudsters.

Although the respondent’s claims against the fraudsters were different, they were nevertheless founded on the same basis (i.e. their inability to recover the monies advanced) and the acts and omissions of all 3 wrongdoers materially contributed to that same loss.

The High Court considered that the Court of Appeal’s analysis had concentrated on the immediate effects of the fraudsters’ conduct (i.e paying out money) and the negligence of the appellant (i.e. not having the benefit of the security) without identifying the actual harm.
PROFESSIONAL NEGLIGENCE
Solicitors & Barristers

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd
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to the respondent’s economic interest (i.e. the inability to recover the monies advanced). The High Court was of the view that, insofar as the question of the “same loss or damage” was concerned, the Court of Appeal had not paid sufficient regard to the statutory language and policy of the proportionate liability provisions.

In identifying the “loss and damage”, rather than the damages, it was necessary to identify the nature of the interest infringed and the nature of the interference to which that interest was subjected. The High Court held that the nature of the respondent’s economic interest that was infringed (i.e. its loss or damage) was its inability to recover the sums advanced and that it is the proper identification of the “loss and damage” which is critical, as this usually points the way to the acts or omissions which were its cause.

The High Court reinstated the trial judge’s decision on apportionment.
The Facts

In January 2002, the plaintiff married Claudia Dieziger (Ms Dieziger). Later that year, he consulted Andrew Corish (Mr Corish), a solicitor in the employ of the defendant law firm, for the purpose of preparing a financial agreement. Mr Corish drafted a financial agreement (first agreement) which was executed by the plaintiff and Ms Dieziger on 15 April 2002. Relevantly, the first agreement contained a clause providing that any asset acquired in the sole name of either party throughout the marriage, would remain the asset of that party upon the demise of the relationship.

In early 2003, the plaintiff and Ms Dieziger purchased a property, solely in the plaintiff’s name. The plaintiff consulted Mr Corish again, who drafted a deed (second agreement) which recited the first agreement, proposing its variation and allowing Ms Dieziger a 15% interest in the newly acquired property.

In 2006, the marriage between the plaintiff and Ms Dieziger broke down and they separated. After divorcing in February 2007, proceedings were commenced by Ms Dieziger, who sought to set aside the first agreement on the basis of non-compliance with s90 Family Law Act 1975 (Cth).

Ms Dieziger was successful and the parties entered into an alternative agreement, which was considerably less favourable to the plaintiff than the original.

The plaintiff commenced proceedings against the defendant law firm alleging professional negligence on the part of Mr Corish for breach of duty of care owed in drafting both the first and second agreements.

The Decision

The defendant admitted a breach of duty in relation to the first agreement, which had already been ruled as non-compliant with relevant legislation. However, despite this admission, the defendant denied liability for damages, as the plaintiff’s pleadings only sought damages resulting from a breach in relation to the second agreement.

The court found that the retainers concerning the two agreements clearly overlapped. Therefore, damage flowed from the admitted breach and the plaintiff was not required to prove anything further in terms of the second agreement.

As to the duty owed in respect of the second agreement, the court held that a solicitor fulfilling his/her duty would have reviewed the first agreement, identified its defects and advised the plaintiff to enter into an entirely new agreement.

In terms of damages awarded, the parties agreed that the amount should be calculated as the difference between what was payable under the first agreement, had it been enforceable and the eventual settlement figure. The defendants, however, claimed a discount of 50% for loss of chance, to account for the possibility that Ms Dieziger would not have entered into a new financial agreement, had that advice been provided by Mr Corish.

The court dismissed this argument on the evidence that the plaintiff was obviously eager to alter the first agreement in favour of Ms Dieziger and it would have been highly unlikely for Ms Dieziger to refuse this offer.

IN ISSUE

- Whether a retainer to draft a financial agreement adequately overlapped with subsequent retainer to amend the agreement
- Whether solicitor negligent in failing to advise of prior error
- Whether loss of chance was relevant in determining damages.

DELIVERED ON 10 April 2013

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The Facts

The plaintiff was the son of the late Marie Fischer (the deceased), who died in April 2010 at the age of 94. It was alleged that Graham Howe (the defendant) was negligent, as the deceased’s solicitor, in failing to adequately record the deceased’s testamentary intentions before her death.

At the time of her death, the deceased had formalised at least 9 separate wills between 1982 and 2009. In around March 2010, the deceased mentioned to her general physician (Dr Zwi) that she had lost faith in her then solicitor. Dr Zwi contacted the defendant, who arranged a consultation with the deceased, at her home, to discuss potential changes to the deceased’s will.

At the consultation, the current will was not available to the defendant. However, he was informed by the deceased that she wished to replace her two executors and make a number of changes to the dispositions. One of these changes included an increase from 25% to 50% of the residual estate, to be left to the plaintiff.

The defendant did not know the precise age of the deceased at the time of the consultation, however he appreciated that she was elderly and was told that her children were aged in their 70s.

At the conclusion of the consultation, the defendant undertook to formalise the will, after he had returned from a 2 week interstate Easter holiday. By his own admission, the defendant did not contemplate drawing an informal will at this time. Before the defendant returned to formalise the will, the deceased fell ill and passed away.

The Decision

The court dismissed the defendant’s argument that his retainer was to prepare a formal will and arrange for its execution. Instead, the court found that the retainer was to give legal effect to the deceased’s testamentary intentions. Therefore the duty owed to the deceased, and by extension to the plaintiff as intended beneficiary, required the defendant to procure an informal will at the time of the consultation with the deceased.

The court also rejected the defendant’s argument that the removal of an executor was “no big deal”. Although the defendant was not aware of the extent of change envisioned under the new will, he had made no enquiry. Therefore, the court found that he should have presumed that the changes were of some importance.

The defendant was found to have been negligent in failing to procure an informal will at the time of the consultation. By the defendant’s own admission, there was no impediment to doing so. In light of this and the deceased’s age, lack of mobility and need for care, the defendant should have protected the interests of the beneficiaries, by way of an interim informal will.

Finally, the court addressed s5O CLA (NSW) which provides a defence against negligence where a professional acts in accordance with widely accepted competent professional practice. Since the experts agreed that every competent solicitor would have considered making an informal will in the same circumstances, and the defendant agreed that he did not do so, he was not entitled to claim the benefit of the defence.
The Facts

Victor Zakka (Mr Zakka) brought proceedings in the District Court against Georges Elias (Mr Elias), a solicitor operating as a sole practitioner, and Delilah Rahe (Ms Rahe) a solicitor employed by Mr Elias, and distantly related to Mr Zakka.

In June 2003, without the knowledge of Mr Elias, Ms Rahe assisted Mr Zakka in obtaining a $50,000 loan from Permanent Trustee Australia Limited (Permanent Loan). The proceeds of the Permanent Loan were transferred directly to Ms Rahe’s brother (Mr Rahe) by way of an undocumented and unsecured loan between Mr Zakka and Mr Rahe (Rahe Loan).

A second loan of $304,000 was obtained by Mr Zakka from First Mortgage Company Home Loans Pty Ltd (First Mortgage Loan) in October 2003. The proceeds of the First Mortgage Loan were used to pay out the Permanent Loan and then provide a further loan of $250,000 in favour of Alispur Pty Ltd (Alispur Loan). Alispur was a company associated with Mr Louis Allem (Mr Allem) who had been involved in arranging the original Permanent Loan.

The subsequent Alispur Loan was secured through an unregistered second mortgage, protected by caveat, over a property in Northmead.

Mr Zakka defaulted on the loan repayments and the lender took possession of his home and sold it. A shortfall of $150,000 was left owing on that loan. Mr Zakka commenced proceedings against Mr Elias for damages.

The Decision at Trial

Ms Rahe was found liable for the loss suffered by Mr Zakka as a consequence of the Rahe Loan. The trial judge held that a competent solicitor in Ms Rahe’s position, once she became aware of her brother’s involvement, would have realised the potential for a conflict of interest and advised Mr Zakka to seek independent advice.

Although it was accepted that all of the loans were somewhat interrelated, the trial judge found that Ms Rahe’s retainer did not extend to the Alispur Loan as Mr Zakka had already executed the Alispur Loan agreement prior to consulting Ms Rahe.

The trial judge also found that Mr Elias owed no duty to Mr Zakka in the circumstance where he had no knowledge of Ms Rahe’s actions.

The Issues on Appeal

On appeal, Mr Zakka placed emphasis on a penumbral duty beyond that of the relevant retainer, which arose once Ms Rahe became aware of the obvious risk to her client and his home if he proceeded with the Alispur Loan.

Mr Zakka also argued that despite Mr Elias not owing him a personal duty, Mr Elias was vicariously liable for the actions of Ms Rahe.

The Decision on Appeal

The Court of Appeal found that Ms Rahe did owe and subsequently breach a penumbral duty of care to advise Mr Zakka to seek further advice as to the adequacy of the security of the Alispur Loan. However, the Court of Appeal further found that the breach was not causative of the loss suffered by Mr Zakka. On consideration of the surrounding circumstances, the Court of Appeal was not satisfied that Mr Zakka would have withdrawn from the Alispur Loan arrangement, had Ms Rahe fulfilled her duty.

In terms of Mr Elias’ vicarious liability, the Court of Appeal accepted that Mr Zakka had approached Ms Rahe in the context of a family relationship and that the advice provided by Ms Rahe was done so personally, without charge and with no connection to Mr Elias or his firm. The Court of Appeal found that Ms Rahe was engaging in a “frolic” of her own and accordingly, Mr Elias was not vicariously liable.
The Facts

The plaintiff was injured during the course of her employment as a nurse at a geriatric hospital in Melbourne. Prior to dealing with a particular male patient with dementia, she was advised that he was ‘a bit punchy’. Having not dealt with the patient previously, the plaintiff asked what strategy she should use. She was advised to ‘duck’. When kneeling to put the patient’s shoes on, the plaintiff was kicked in the side of the neck by the patient, resulting in a fractured vertebra in her neck and a prolapsed disc. Since the incident, the plaintiff had not worked in any form of employment.

The plaintiff consulted the defendant law firm, seeking advice about claiming common law damages for her injuries. On the basis of their advice, the plaintiff applied for a certificate to enable her to pursue a claim against her employer for damages for pain and suffering and loss of earning capacity. The defendant later abandoned the plaintiff’s claim for loss of earning capacity. Shortly after the employer granted the plaintiff a certificate to proceed with the claim for damages for pain and suffering, the defendant settled the claim out of court for $100,000.

The plaintiff commenced proceedings against the defendant for negligently causing her to abandon a claim for loss of earning capacity, and to settle her claim for pain and suffering, the defendant settled the claim out of court for $100,000.

The plaintiff commenced proceedings against the defendant for negligently causing her to abandon a claim for loss of earning capacity, and to settle her claim for pain and suffering for only $100,000. The defendant admitted negligence and thus the ultimate questions for determination were whether the plaintiff suffered any loss as a result of the admitted negligence and, if so, what was the value of the loss.

The Decision at Trial

The court assessed the plaintiff’s overall prospects of success were 82.5%.

The court then considered whether the plaintiff would have recovered more than $100,000 for pain and suffering, had the claim proceeded in court. The court found that the likely range of damages the plaintiff would have received was between $180,000 and $200,000.

The court also considered whether an award of damages for loss of earning capacity would have exceeded the plaintiff’s past and future entitlements to statutory weekly payments and found that it would not have.

A further issue for determination was whether the plaintiff would have pursued the common law claims for pain and suffering if properly advised. The court concluded that a reasonable and prudent solicitor would have advised the plaintiff to pursue the claim for pain and suffering and abandon the claim for loss of earning capacity.

The plaintiff was awarded $56,750 in damages for loss of a chance to pursue the common law claim for pain and suffering, being 82.5% (overall prospects of success against her employer) of $190,000 (the mid-point between the likely range of damages of $180,000 and $200,000), less the sum of $100,000 received by way of settlement.

The Issues on Appeal

On appeal the plaintiff challenged the 17.5% discount as being unwarranted and she challenged other aspects of the loss of earnings findings. She contended that the trial judge should have found that she would otherwise have worked to a more advanced age (to 69 rather than 62).

The solicitors cross appealed contending that the trial judge had failed to deduct the solicitor/client costs that the plaintiff would have incurred in the underlying claim, said to be $35,000.

The Decision on Appeal

In relation to the discount, the Court of Appeal found that the adoption of a precise reduction of 17.5%.
called for adequate justification as to how it was arrived at. The trial judge failed to identify particular difficulties the plaintiff would have faced in establishing her claim, and therefore a middle ground compromise figure of 17.5% (halfway between the defendant’s submission of 35% and the plaintiff’s submission of none) was arbitrary and inconsistent with the findings that the plaintiff’s claim was one which had a “substantial likelihood” of success and where contributory negligence was “most unlikely”.

In relation to other aspects of the economic loss claim, it was found that the trial judge misconstrued expert evidence which, combined with the evidence at trial in relation to the plaintiff’s alternative skills and retraining in the welfare area, led the Court of Appeal to find that the trial judge’s assessment of the plaintiff’s remaining working life until 62 was arbitrary. The Court of Appeal found that economic loss should have been assessed until a retirement age of 69.

The Court of Appeal found that factoring in the erroneously deducted 17.5% had the consequence that prudent advice on the loss of income claim was, that it ought not to have been settled, particularly given the likely retirement age of 69.

In relation to the cross appeal, the Court of Appeal found that it was appropriate to make no deduction for the solicitor/client costs of the underlying claim because of the operation of the compensatory principle. The plaintiff had incurred solicitor/client costs in these proceedings which, but for the negligence complained of in these proceedings, she would never have incurred and therefore no deduction was necessary from the notional damages assessment.

The Court of Appeal did not make a final assessment of damages at the time of delivering the reasons for judgment, but instead asked the parties for further submissions in respect of damages consistent with the reasons given by the Court of Appeal.
**The Facts**

In July 2004, Sydney Water Corporation (SWC) entered into a “Design and Construct” agreement (the head contract) with Barclay Mowlem Construction Limited (BM) and CH2M Hill Australia Pty Limited (CH2M) in a joint venture known as CHBM Water. Under the project, CHBM was required to design and construct an upgrade of SWC’s sewerage treatment plant (STP) at West Camden.

In March 2005, CHBM contracted with what was then the Department of Commerce of the State of New South Wales (DOC) that DOC would supply design services in relation to three earthen lagoons that formed part of the sewerage plant upgrade. DOC provided a design for the lagoons which included a geosynthetic clay liner overlaid for protection by reinforced concrete panels.

In February 2007, following heavy rains, the lagoons suffered significant damage. In December 2009, BM assigned to CH2M all its rights in claims against DOC arising under the design contract. CH2M (on behalf of the joint venture) sued the State of New South Wales (NSW) on the basis that the damage was a result of deficiencies in the design supplied by DOC and claimed damages for breach of contract, breach of duty of care and misleading and deceptive conduct.

**The Decision**

The court dismissed CH2M’s claims, finding that DOC’s design of the lagoons had not been deficient in any way. Instead, the court found that the failure of the lagoons was caused by various deficiencies in CHBM’s construction processes namely, the unjustified omission of an anchor trench to secure the clay liner. Interestingly DOC’s design did not include an anchor trench, however it was common ground between the parties that its inclusion was a manufacturer’s requirement of the clay lining. The court also found that poor compaction of the embankments and prolonged exposure of the geosynthetic clay to the elements prior to the installation of concrete panels played some part in the subsequent damage.

CH2M also alleged that DOC breached its duty of care by not including underdrainage as part of the design. This claim was also dismissed by the court on the basis that the exclusion of the underdrainage could be justified as the harm that may have resulted was so remote as not to be a form that DOC’s design was required to prevent.

Although it was unnecessary for the court to consider the validity of BM’s assignment of rights to CH2M, the court did opine that the assignment was valid and that even assuming that the breaches of the head contract by BM and CH2M flowed at least in part from breaches by DOC of its obligations under the design contract, joint and several liability would be enough to give CH2M a sufficient interest to support the assignment.
The Facts

The plaintiff, a firm of financial advisers, was sued for negligent advice it gave clients relating to unsecured promissory notes issued in respect of specific real estate developments undertaken by the Westpoint Group. After the plaintiff provided that advice the Westpoint Group collapsed and 160 clients collectively lost approximately $17 million.

The plaintiff notified its professional indemnity insurer, QBE, of the claims and potential claims. Due to the differences in the manner in which the plaintiff’s clients advanced their claims against the plaintiff, QBE formed the view that the aggregation clause in the policy did not apply to aggregate the vast majority of the claims that were made or threatened and that, as a result, a separate deductible applied in respect of most of the claims.

As the investment advice was specifically tailored and provided to each client individually in accordance with their specific investment profile, QBE argued that it could not be said that the advice arose from a single act or that it was causally connected or interrelated. Therefore a $40,000 deductible applied to each investor’s claim, totalling approximately $2.5 million in deductibles. The plaintiff settled its claim for indemnity with QBE at a discount with both the plaintiff and QBE contributing towards a “settlement pool” for investors. The plaintiff’s contribution on account of the deductible was agreed at $800,000.

The plaintiff claimed that it had purchased the specific policy relying on the fact that it was assured by its broker that multiple claims arising from a single failed investment recommended by the plaintiff could be aggregated and treated as one claim with a single $40,000 deductible.

The plaintiff accordingly instituted proceedings against its broker (the defendant) alleging negligence; breach of contract and breach of s52 of the TPA for misleading and deceptive conduct. In the alternative, the plaintiff alleged that it had lost the opportunity to obtain alternative insurance cover and should be compensated for that loss.

The plaintiff sought to recover the money paid into the settlement pool on the basis that but for the broker’s advice, it would have obtained a different professional indemnity policy for the same premium that would have aggregated the claims and applied a single deductible.

The Decision at Trial

While each of the causes of action were established, the proceedings were dismissed because it was found that the plaintiff had not suffered any loss as a consequence of the broker’s breaches.

The plaintiff could not show that an alternative professional indemnity policy was available in the market at the time for the same premium that would have resulted in the claims being aggregated as a single claim with a single deductible. The plaintiff was unable to show a substantial prospect of acquiring a policy of the requisite type. The court held that the possibility of the plaintiff finding the cover was merely speculative and therefore the plaintiff could not show it had suffered any loss.

The Issues on Appeal

The plaintiff appealed against the trial judge’s dismissal and the order that it pay the defendant’s costs on an indemnity basis.

The plaintiff submitted that the trial judge had failed to identify the opportunity lost by the plaintiff to instruct the broker to re-enter the market to negotiate with underwriters so as to obtain the wording for the aggregation clause it sought.

Further submissions were made that even if the trial judge had correctly identified the relevant
lost opportunity, and applied the correct test to ascertain the value of that lost chance, he erred in: firstly concluding that the chances of the plaintiff entering into the desired policy with any relevant insurer was speculative; secondly making a number of factual errors which led to the erroneous conclusion that the plaintiff did not have a substantial prospect of acquiring a policy with the requisite protection.

The Decision on Appeal

By unanimous judgment the appeal was dismissed with costs as it was found that there was no error by the trial judge.

There was sufficient evidence to warrant the trial judge’s conclusion that the possibility of the plaintiff obtaining the cover it sought was so low as to be no more than speculative.

The trial judge was entitled to take another insurer’s inability to assist, due to the high percentage of investment advice, at face value and conclude that the plaintiff’s chance of being offered cover by that other insurer with the aggregation clause it required was “merely speculative”.

There was insufficient evidence as to what the plaintiff would have done had it been aware that the policy did not provide the cover it originally sought. The plaintiff was found to have been as concerned about the cost of the premium as it was about the quality of the cover.

The Court of Appeal also upheld the indemnity costs order on the basis that the defendant’s offer of $10,000 was a genuine offer of compromise.
The Facts

The first plaintiff, Strategic Property Holdings No. 3 Pty Ltd (Strategic), was the owner of land and buildings at Western Creek in the Australian Capital Territory known as the Australian Defence Academy (the ADA site). The second plaintiff, Eclipse Property Group Limited (Eclipse), was the property and investment manager for Strategic. The first defendant, Austbrokers RWA Pty Ltd (the broker), was the insurance broker for Strategic and Eclipse.

In 2005, the broker recommended that for the period of insurance 1 July 2005 to 22 May 2006, Strategic and Eclipse obtain a renewed Industrial Special Risks (ISR) policy of insurance (the policy) issued by Suncorp Metway Insurance Limited (Suncorp). The policy declared the value of the ADA site was $22 million. The policy contained a sub-limit of indemnity for “Accidental Damage” of $200,000.

On 30 January 2006 the roof at the ADA site collapsed causing significant damage to the property. Strategic made a claim under the policy and Suncorp admitted liability to indemnify Strategic under the policy, but invoked the sub-limit and paid only $200,000 in respect of the damage caused by the roof collapse. The cost to reinstate the roof was significantly more than $200,000.

Strategic and Eclipse brought proceedings against the broker for breach of its retainer and duty of care by arranging the policy with an accidental damage sub-limit which was inadequate, failing to advise of coverage limitations so that the plaintiffs could obtain appropriate coverage and failing to follow the plaintiffs’ instructions to obtain the broadest possible coverage.

The Decision

The court held that the broker breached both its retainer and duty of care by not advising the plaintiffs of the nature and effect of the sub-limit. The court was satisfied that the implied terms of the retainer were that the broker would give advice to Strategic in relation to the availability of different types of cover, the nature of the exclusions and limitations, and the material risks associated with the level of cover proposed by the broker having regard to the declared value of the properties insured.

The court considered how a reasonable broker in that position would have acted. Expert evidence was given which confirmed that a skilled insurance broker should provide assistance to clients to determine policy requirements appropriate for the client’s needs, undertake continuous education, explain to clients the need for insurance cover, the areas of exposure and uninsurable exposure, discuss major exclusions and cover restrictions, and explain sub-limits. A reasonably careful and skilled insurance broker would not simply accept the sub-limits contained in the policy they inherited when they took over the account, but would consider those sub-limits personally. This expert evidence persuaded the court that the broker breached the implied terms of the retainer as well as the duty of care to Strategic.

In relation to the duty of care, the court held that it would have been easy for the broker to have procured a policy with a much higher accidental damage sub-limit and had the broker given the plaintiffs this advice, the plaintiffs would have requested the broker to obtain alternative quotes with higher sub-limits for accidental damage.

Damages were considered in separate proceedings where the court was required to determine how much more Suncorp would have paid on Strategic’s claim had the policy had a sub-limit of $2 million. The court held in those proceedings that Strategic could recover the insurance gap amount which represented the replacement of the roof (less those amounts that represented the incorrectly installed roof trusses). The financing costs involved in securing a loan to pay for rectification costs of the roof were also recoverable.

IN ISSUE

- Duty of care owed by a broker
- Breach of implied terms in broker’s retainer

DELIVERED ON 14 December 2013

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The Facts

TJC Financial Planning Pty Ltd and its authorised representative, Mr Edmund Brailey were the defendants. Their clients, Richard Kenneth Hull, Lainie Hull and R & L Superannuation Fund were the plaintiffs.

The plaintiffs sought tax planning advice from the defendants as a result of an anticipated bonus Mr Hull was to receive in the 2003/2004 financial year of approximately $1,000,000. The plaintiffs did not require advice about their other investments including property investments and share trading.

The defendants provided advice about a number of different agribusiness Managed Investment Schemes (MIS). The plaintiffs invested in a number of these MIS. Some of the MIS failed. The plaintiffs sought to recover their loss from the defendants.

The plaintiffs claimed damages for breach of contract, negligence and breach of statutory duty. The plaintiffs did not claim any specific shortcoming in the eventual performance of the MIS as having been the result of matters which the defendant knew or ought to have known at the time the advice as provided. The plaintiffs’ case was that, had they been prudently advised by the defendants, they would have received advice to spread their investments and would not have concentrated investments in agribusiness and would thus have ameliorated their losses.

The Decision

The court found that the plaintiffs, at least with respect to Lainie Hull, were very sophisticated investors. Allegations made by the plaintiffs to describe themselves as naive and inexperienced were intentionally deceptive.

The court held that risks attaching to agriculture in Australia are such that the plaintiffs could not be ignorant of them even in the absence of any farming experience.

The defendants were retained to provide advice and were not retained to manage the plaintiffs’ investments. The plaintiffs were aware of this. It was the plaintiffs who decided whether to invest. In some instances they had decided not to invest despite recommendations by the defendants.

The court found that evidence from the plaintiffs’ expert acknowledged that as a result of a tax ruling enabling upfront tax deductions for the investment, MIS were popular with advisors of reasonable competence. It also found that there was a high level of investment in agricultural MIS in Australia. For these reasons it was not imprudent for the defendants to recommend investment in MIS.

The taxation advice was sought and given for the purpose of limiting an imminent tax liability arising from the large bonus Mr Hull was to receive. As the defendants were not advising about all investment affairs, the advice to invest in the MIS was reasonable because of the immediate taxation benefit and because it was a long term investment that was suitable for goals communicated by the plaintiffs to the defendants.

The advice was not in breach of the defendants’ duty. The plaintiffs’ statutory claims were unsuccessful.

IN ISSUE

- Whether advice regarding Agribusiness Managed Investments Schemes was negligent
- Whether the financial planner’s retainer was limited to providing taxation limitation advice
- Whether the plaintiffs were sophisticated and experienced investment clients

DELIVERED ON 4 September 2012

READ MORE [click here]
The Facts

The plaintiff was the executive director and major shareholder of Techontap International Limited (Techontap), an unlisted public company which was wound up on 14 December 2005. The plaintiff sued Techontap’s accountants (the defendant), for damages in negligence.

Firstly, the plaintiff alleged that the defendant ought not to have lodged a Form 484 which notified ASIC that two individuals had been appointed directors when they had not signed consent forms to be directors. While ASIC requires there to be a minimum of 3 directors for public companies, Techontap only had one registered director which prompted the plaintiff to instruct the defendant to lodge the Form 484. The Form 484 requires the directors to have signed consent forms.

Secondly, the plaintiff alleged that the defendant ought to have warned him that Techontap might have been trading while insolvent.

The plaintiff contended that the defendant’s negligence caused him to be disqualified from managing a corporation for a period. The plaintiff alleged that the disqualification had damaged his reputation and that his income had been adversely affected and claimed such loss as damages from the defendant.

The defendant denied liability on the basis that it was specifically instructed by the plaintiff to lodge the Form 484 and was otherwise not engaged to advise Techontap regarding its financial position.

The Decision

The court found that the defendant owed the plaintiff a duty to exercise reasonable care in the performance of its retainer which was limited to company secretarial work, reviewing accounts for tax purposes and lodging tax returns. The plaintiff, however, failed to establish any breach associated with the lodgement of the Form 484. It was not unreasonable for the defendant to ask the plaintiff to sign the Form 484 in circumstances where it had specifically explained its purpose to him and to lodge the form when specifically instructed to do so by the plaintiff. As the defendant did not owe a fiduciary duty to the plaintiff, the court did not consider that an obligation was imposed on the defendant to protect the plaintiff from risks which he was prepared to take in circumstances where he knew of the potential consequences.

The court did not consider that the defendant was negligent by neither informing nor warning the plaintiff that Techontap was at risk of trading while insolvent. The plaintiff himself was in the best position to judge whether Techontap was solvent. The court did not consider that, in all the circumstances, the defendant had any duty to monitor Techontap’s solvency, but if it did, it would have needed more information than that to which it was privy to perform that assessment. Further, the plaintiff had failed to establish what, if any, difference it would have made had the defendant warned him at any time that Techontap was either insolvent or at risk of being insolvent.

In making its findings, the court held that the plaintiff’s evidence was contradicted on a number of occasions by contemporaneous documents. The court found him to continually reconstruct the past to arrive at a version that portrayed him in the best light in the hope that it would improve his case. The plaintiff himself conceded at trial that some of his evidence was false. As such, the court was not prepared to accept the plaintiff’s evidence unless it was corroborated or against his interest.

Accordingly, the plaintiff had failed to establish breach of any relevant duty and causation, and the court ordered judgment for the defendant with costs.
The Facts

The first appellant (Mr Tomasetti) and the second appellant (Ms Cordony) as husband and wife, engaged the respondent, Mr Brailey, as their tax agent, accountant and financial adviser. The respondent subsequently recommended nine investments in managed investment schemes relating to timber and almond plantations. For a variety of reasons, the schemes were unsuccessful and resulted in a loss to the appellants exceeding $4,000,000.

The appellants alleged that the respondent breached the duty of care owed to them as clients and also engaged in misleading and deceptive conduct in contravention of s42 of the Fair Trading Act 1987 (NSW) (the Act).

The Decision at Trial

The trial judge rejected the appellants’ claims and directed judgment for the respondent. In essence, the court found that the respondent was not liable because he had apprised the appellants of the risks associated with the investments by providing them with relevant prospectuses or product disclosure statements.

The Decision on Appeal

On appeal it was found that Mr Tomasetti did not prove that the respondent engaged in misleading and deceptive conduct, nor did he act negligently. However, Ms Cordony proved that the respondent was both negligent in his advice and also engaged in misleading and deceptive conduct in contravention of the Act.

The issue of causation relating to Ms Cordony’s claims was not decided on this appeal and was remitted to the trial judge for determination.

The distinction between the two scenarios was that the recommendations made to Ms Cordony were inherently unsuitable to her personal circumstances, irrespective of her knowledge of the risks involved.

When issuing the advice, the respondent had no regard for Ms Cordony’s health and age despite the long term nature of the investments. The assumption that Ms Cordony and Mr Tomasetti were one financial unit and therefore entitled to the same advice was unwarranted and without basis.

IN ISSUE

- Whether financial advisor was negligent in recommending particular investment schemes.
- Whether the same advice constituted misleading and deceptive conduct under the Fair Trading Act

DELIVERED ON 11 December 2012

READ MORE click here
The Facts
The plaintiff (Dymocks) was a long-term lessee of land, located on the north coast of NSW. In around 1989, the second defendant (Dalton) was engaged by Dymocks to design an expansive complex on the property (the complex). The first defendant (Capral) was the supplier of the coated aluminium corrugated sheets (sheeting), used as the roofing for the complex.

At some stage during construction it was found that the sheeting being used was defective in that an anti-corrosion coating had not been adequately applied to both sides as per the building specifications. The dispute was resolved by execution of a deed signed by all relevant parties which provided among other things that Capral would grant Dymocks a warranty that the sheeting would be free from ‘perforation due to corrosion’ for a period of 40 years (the warranty).

In or about September 2003, Dymocks discovered signs of corrosion and subsequently alleged that the entire roof required replacement. It claimed damages from Dalton on the basis of negligence in relation to the preparation of the roof specifications, and damages from Capral under the warranty.

The Decision
The court heard argument as to the meaning of “perforation due to corrosion” within the warranty. The issue was that the majority of the damage had occurred by way of enlargement of pre-existing perforations, created during installation. The court dismissed the distinction between new perforations and the enlargement of pre-existing perforations. As a consequence of this finding, Capral accepted liability under the warranty it had provided.

In relation to Dalton’s duty of care, the court found that despite the absence of a physical contract of retainer, factors of assumption of responsibility and known reliance existed at the relevant time. This gave rise to a common law duty of care on the part of Dalton to perform its duties in a proper and professional manner.

It was common ground that the project was to be completed in a salt laden marine environment and corrosion was therefore an obvious risk. In this context, the court focused upon the fastening system of the roof, selected by Dalton.

A number of expert witnesses agreed that the fastening system was inappropriate given the environmental factors and high probability of corrosion. Dalton contended that it had relied upon a corrosion expert in selecting the fastening system. However, the court dismissed this assertion on the basis that no reasonable expert would have let the system pass without some comment as to its questionable suitability. Therefore Dalton was found to have breached its duty of care in providing inadequate specifications.

In terms of damage, Dalton disputed the plaintiff’s claim that the entire roof required replacement. Expert evidence suggested that it would be possible to repair the damage. However, the court considered that this remedy was inappropriate given the “first class” requirement of the plaintiff, which Dalton accepted had formed part of the original retainer.

The court concluded that both the defendants were separately liable for the cost of replacing the roofing, however, reserved its decision as to contribution between the two to allow for negotiation.
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Whether exclusion clause excluded liability for loss only and not defence costs.
The Facts

The appellant, Timtech Chemicals Limited, supplied chemicals for treating timber. In 2007, the appellant agreed with Carter Holt Harvey (CHH) to treat CHH’s timber using new technology known as a “Uniplant”. Critical to the Uniplant technology were 3 computer operated set points which controlled the pressures and vacuums during the treatment process. The appellant began treating CHH’s timber in 2007.

In October 2007, CHH complained of patchiness in the distribution of dye (i.e. the preservative liquid) in the treated timber. Again, in February 2008, CHH complained to the appellant but this time about the dimensions and moisture content of the treated timber. Both issues were the result of the set points being incorrect. After both complaints, the appellant made adjustments to the set points. After the second re-adjustment of the set points, there were no further problems with the quality of the timber treatment.

As a result of the incorrect operational settings on the Uniplant, CHH sold a substantial quantity of the wrongly treated timber at a loss. CHH made a claim against the appellant which was settled by the appellant paying a total of $1,462,500 (inclusive of GST) to CHH.

The respondent declined the claim for indemnity.

The Decision at Trial

At first instance, the appellant’s claim was dismissed. The court held that the appellant did not have a valid claim for the $1,462,500 as its liability did not arise from giving incorrect advice to CHH but instead arose from the appellant’s breach of contract in failing to treat CHH’s timber to specification. The policy did not cover the appellant’s claim.

The appellant appealed the decision.

The Issues on Appeal

The issue on appeal was whether the appellant’s claim was within scope of cover provided by the QBE policy.

The Decision on Appeal

The appeal was also dismissed. It was found that the appellant did not have a valid claim under the QBE policy as the liability did not occur during the course of its Professional Business Practice, as defined in the QBE policy. The liability was incurred due to the incorrect fixing of the set points, which resulted in the timber not being treated to the agreed specifications. This was a breach of contract and not the result of the appellant giving technical advice. The appellant’s liability was too remote from its Professional Business Practice to be “in connection with” that practice. The Court of Appeal also held that the appellant’s fixing of the set points on the Uniplant was faulty workmanship and not design capable of constituting “technical advice”.

IN ISSUE

• Whether the appellant’s claim was covered by their professional indemnity insurance policy
• Whether the insured’s liability arose in connection with its Professional Business Practice

DELIVERED ON 28 June 2012
READ MORE  click here
INSURANCE ISSUES

Timtech Chemicals Limited v QBE Insurance (International) Limited  
[2012] NZCA 274

The Court of Appeal held that when a customer contracts with a manufacturer or supplier to design and build a product, the provision of the resulting product to the customer is the embodiment of the manufacturer’s design and therefore is a species of advice. However, in this case, the appellant did not communicate the fixing of the set points to CHH and therefore the advice was merely an internalised opinion. The advice could not result in liability as it was not communicated to CHH.
The Facts
On 1 June 2011 a helicopter owned by Helicopter Services Cairns Pty Ltd (HSC) was destroyed by accident. At the time of the accident, the helicopter was operated by GBRH Holdings Pty Ltd (GBRH) under a Put and Call and Cross Hire Agreement (the hire agreement). Relevantly the hire agreement provided that title to the helicopter did not pass to GBRH until a put or call option was exercised. Further the hire agreement required GBRH to take out insurance to cover risks arising from the operation of the helicopter for its benefit and the benefit of HSC. GBRH obtained insurance cover for the helicopter for an agreed value of $650,000 (the policy). The policy was a composite policy as it was in general terms and did not specify which risks were covered in respect of which insured party. Following the destruction of the helicopter a claim was made against the policy. There was a dispute between GBRH and HSC as to their entitlement to the insurance proceeds.

At the time the helicopter was destroyed, neither the put nor call options had been exercised and therefore title to the helicopter remained with HSC.

HSC filed an originating application in the District Court seeking a declaration that it was entitled to indemnity under the policy in respect of the destruction of the helicopter and an order in its favour for the proceeds of the policy.

The Decision at Trial
The trial judge noted that it was clear that, prior to exercising its right to purchase the helicopter, GBRH could look to the policy for indemnity in respect of things such as injury to third parties and damage to their property in the course of using the helicopter for its commercial purposes. However, the trial judge found that GBRH did not suffer an indemnifiable loss pursuant to the terms of the policy in respect of the loss of the helicopter itself where it was not the owner of it at the relevant time.

The Issues on Appeal
GBRH appealed on the basis that it sustained pecuniary or economic loss by reason of the destruction of the helicopter.

GBRH argued that the trial judge had erred in treating the policy as only insuring the interest of the owner of the helicopter (HSC) for the loss of the helicopter as the policy also insured GBRH’s interest as the operator. In that regard GBRH relied upon s17 of the ICA.

Section 17 of the ICA operates to permit an insured to recover under an insurance policy if the damage to the insured subject matter causes the insured to suffer pecuniary or economic loss in circumstances where the insured does not have an equitable or legal interest in the subject matter at the relevant time.

The Decision on Appeal
The Court of Appeal dismissed the appeal and upheld the decision of the trial judge.

The Court of Appeal did not accept the appellant's contention that the trial judge erred in failing to deal with s17 of the ICA. It noted that it was not necessary for the trial judge to deal with that issue as there was no relevant controversy about whether or not GBRH held an insurable interest under the policy. It was clear that GBRH had an insurable interest.

The Court of Appeal referred to the terms of the hire agreement. While that approach differed from that adopted by the trial judge (who referred to the terms of the policy) the Court of Appeal noted that the same conclusion was reached such that HSC was entitled to the net proceeds of the policy. The Court of Appeal noted that the express terms of the hire agreement excluded the accrual of any interest to GBRH in the helicopter until the exercise of either a put or call option. Although the Court of Appeal accepted that, in practical terms GBRH lost the financial advantage that it would have gained had it completed the purchase of the helicopter, it held that there was no right...
under the hire agreement that gave GBRH the benefit of that practical financial advantage in preference to HSC’s claim to the net proceeds of the policy.

Appeal to the High Court for Special Leave

GBRH sought special leave of the High Court to appeal the decision of the Court of Appeal. Special leave was refused on the basis that the resolution of the dispute turned upon the commercial agreement between the parties.
The Facts

A child sustained severe injuries when hit by a truck owned by the first respondent, Wickham Freight Lines and driven by the second respondent, in 2008.

The truck was covered by a CTP policy of insurance issued by the applicant.

The child sued the respondents in New South Wales. He alleged that the incident was caused by the respondents’ negligence. He also alleged, in the alternative, that he was entitled to remedies in accordance with s7J of the MACA (NSW). Section 7J provides that where a child is injured, but a driver was not negligent, the MACA will ‘deem’ the driver to be at fault so that the child is able to recover some damages such as hospital, medical, pharmaceutical, rehabilitation and certain other expenses.

The applicant accepted that the CTP policy issued by it in respect of the truck responded to the child’s claim in negligence. However, it disputed that the CTP policy responded to the s7J entitlement because s5(1) of the MAIA (QLD), under which the CTP policy was issued, applies to injuries caused by a “wrongful act or omission”. The applicant disputed that any injury which is “deemed to have been caused by the fault” of the respondents in the use or operation of the truck was caused by a “wrongful act or omission” within the meaning of the MAIA.

The Decision

The applicant sought a declaration that upon the proper construction of the MAIA, its CTP policy responded to proven fault on the part of an insured and did not respond to “deemed fault” by a driver in New South Wales pursuant to s7J of the MACA.

In dismissing the application, the trial judge held that the MACA created the category of legal liability that fell within the ordinary meaning of the phrase “wrongful act or omission” in the MAIA. The definition of “wrongful act or omission” was not exhaustive so as to limit it to negligence or deliberate wrongdoing.

The trial judge held that the objectives of the MAIA would not be advanced by interpreting the language of “wrongful act or omission” as being limited to civil wrong in the character of a common law cause of action. This would have the effect of depriving parties of insurance cover for civil liabilities created and defined by statute.

The application was dismissed.
The Facts

Gordon Hill was a lawyer and director of Firepower Holdings Ltd. Mr Hill held professional indemnity insurance with the appellant and, after ceasing to practice in 2006, maintained a “run off” policy.

In 2009, Mr Hill notified the appellant of a claim by former clients, Lois Nominees Pty Ltd (the respondent). The respondent alleged that in 2004 and 2005, Mr Hill misused trust fund monies totalling $3.4 million that were entrusted to purchase shares in Firepower Holdings Ltd. Mr Hill used the funds to purchase shares in Firepower Holdings Group Ltd.

In February 2010, Mr Hill declared bankruptcy and trustees were appointed. The appellant declined Mr Hill’s claim for indemnity under the run off policy in April 2010. The bankruptcy trustees were without the financial means to dispute the denial of indemnity. The respondent commenced proceedings against the appellant insurer seeking a declaration that it was liable to indemnify Mr Hill with respect to their claim.

The Issues on Appeal

The appellant argued that the respondent had no standing to seek a declaration as they were not a party to the insurance contract. Secondly, it was contended that any declaration would have no benefit as it would not bind the bankruptcy trustees in any subsequent indemnity claim. Finally, the appellant insurer argued that the proceedings put it at a procedural disadvantage.

The Decision on Appeal

The majority of the Court of Appeal held that the respondent’s proceedings against the appellant could continue. In doing so, the Court of Appeal found that the respondent had standing because while the right to cover remained with the bankruptcy trustees, the respondent had a sufficient interest in the proceedings as s117 of the Bankruptcy Act 1966 provided for the value of that indemnity to be paid to them.

The declaration would be binding on the appellant in that any attempt to defend proceedings brought by the bankruptcy trustees at a later stage could constitute an abuse of process. Following the decision of the trial judge, there was no disadvantage assessed to the appellant by having the insurance issue determined with the primary proceedings.

IN ISSUE

• Whether client of insured had arguable claim for declaration of indemnity by insurer
• Whether declaration had any utility

DELIVERED ON 29 September 2012

READ MORE  

[2012] WASCA 186  
QBE Insurance (Aust) Ltd v Lois Nominees Pty Ltd
INSURANCE ISSUES

The Owners- Strata Plan 62658 v Mestrez Pty Limited & Ors
[2012] NSWSC 1259

The Facts
The plaintiff owned the common areas in the Macquarie Apartments in Sydney. In June 2002 the fire control system in the apartments discharged resulting in flooding to the common areas. The plaintiff commenced proceedings against five defendants seeking recovery of the loss.

The third and fifth defendants (the insureds) were involved in the design and installation of the hydraulics and fire systems for the building. They were both insolvent.

The plaintiff joined as a sixth defendant the insurer of the third and fifth defendants (the insurer). The basis for this joinder was the application of a line of cases known as the Anjin cases, whereby subject to the court’s discretion, a plaintiff may seek a declaration against an insurer of a defendant party in circumstances where the interests of justice support such a claim.

The insurer denied that it was liable to indemnify the insureds under the policy, on the basis that the prior known circumstance exclusion operated. Indemnity under the policy was accordingly in dispute.

This judgment concerned an application by the insurer for leave to amend its defence to plead the proportionate liability provisions of the CLA (NSW).

The plaintiff opposed the application, arguing that if the insurer asserted rights under the policies, the insured should be taken to have elected to treat the policies as applicable to those claims.

The Decision
The court considered the nature of subrogation in some detail. It was particularly interested in whether an insurer’s right of subrogation exists, inherent of the policy of insurance from the time the policy is entered into or, alternatively, whether the right of subrogation only exists once a loss has occurred and the insurer has indemnified the insured.

While the court indicated that it favoured the former, it was not ultimately necessary to decide this question.

The court noted that equity does not operate in a vacuum and that in this instance it occurred in the context of a contractual relationship covered by the policy of insurance. Relevantly, the policy contained a litigation clause giving the insurer the right to take over conduct of the claim and defend proceedings in the names of the insureds. The contractual right under the litigation clause did not depend upon the insurer having first indemnified the insureds. Accordingly, unless the insurer was constrained by the doctrine of election, it should be able to defend the claim on behalf of, and in the names of, the insureds without prejudice to its denial of indemnity.

The court then considered the plaintiff’s election argument, noting that there would be no choice between inconsistent rights if the insurer were to file defences in the insureds’ names and plead the proportionate liability argument in those defences. The insurer could then continue to maintain a denial of indemnity under the policy in its own defence.

The effect of the judgment is that the court allowed the insurer to protect its equitable right of subrogation notwithstanding its denial of indemnity.

IN ISSUE
• Whether a defendant insurer is entitled to claim the benefit of proportionate liability provisions while maintaining a denial of indemnity under the policy
• Whether doctrine of election prevents insurer from denying liability to indemnify the insured under the policy

DELIVERED ON 18 October 2012
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INSURANCE ISSUES

Hourani v Insurance Australia Limited t/as NRMA [2012] NSWDC 202

The Facts

On 6 February 2008, the plaintiff, Mrs Angela Hourani, fell on a wet slippery floor in her home after rainwater entered her house in a storm on the day before. Damage had been sustained to roof tiles at the house during a separate storm that occurred 2 months earlier. As a result of the slip and fall, the plaintiff sustained injuries to her back and leg.

The defendant, NRMA, was the home and contents insurer for the plaintiff’s premises. The plaintiff claimed that her injuries were occasioned due to a breach of the contract of insurance and also due to the alleged negligence of NRMA as a result of delay in inspecting and repairing the premises following the initial storm event two months prior to the incident.

The plaintiff also brought separate proceedings against the appointed building inspector and approved subcontracted builder in which she claimed breach of duty of care and negligence resulting in her injuries. See the matter of Hourani v Siemens Group Pty Ltd, Censeo Pty Ltd & Nidus Inspection Services Pty Ltd [2012] NSWDC 203. The matter was governed by the provisions of the CLA (NSW).

The Decision

The court determined that NRMA had a duty to honour the terms of the policy if the preconditions were relevantly met, but any other duty on the part of the insurer, as claimed by the plaintiff, could only exist as a legal obligation in light of the circumstances of the case. The court found that although a facet of the duty owed by NRMA included the duty to make the premises safe following an inspection, this did not necessarily mean the premises had to be made safe from all sources of possible danger to persons present within the premises. The duty of the insurer to make the premises safe must be read in light of the concurrent obligation of the plaintiff not to unreasonably expose herself to foreseeable sources of injury.

In the context of breach of any duty of care, the plaintiff claimed that the duty extended to making the required repairs to the roof as soon as possible and if repairs could not be completed urgently, informing or advising her that for reasons of her safety, she should have moved to alternative premises to avoid injury.

The court found that the plaintiff’s submissions in this regard sought to impose obligations on the insurer that were framed with the benefit of hindsight and which were too onerous when compared to the factual circumstances.

The court considered that the insurer acted reasonably in arranging an initial assessment of the nature of the damage which then set in motion the steps necessary to effect repairs. Further, the plaintiff should have recognised the need to take special care of her own safety when walking within the premises, especially when she knew the floors were wet. The court ultimately determined that there was no breach of the relevant duty by NRMA.
The Facts

The plaintiff was the owner of a Western Star prime mover and an A-trailer, which were part of a combination known as a “B-double”.

On 16 June 2008 at approximately 3.04pm, the B-double was being driven by Mr Brett Murray in an easterly direction near Yumali, South Australia. At the same time, a Jaguar vehicle was being driven by Mr Allan McFarlane in a westerly direction. The 2 vehicles collided head on resulting in Mr McFarlane’s death and extensive damage to both vehicles. Mr Murray was not injured.

It was common ground that the collision arose as a consequence of Mr McFarlane driving on the incorrect side of the road.

The plaintiff made a claim against Mr McFarlane’s comprehensive motor vehicle insurer (the defendant) pursuant to s51 of the ICA, which allows a third party to recover directly from an insurer where the insured has died. The defendant denied liability on the basis of an exclusion clause in the policy for loss, damage or liability deliberately caused. The defendant alleged that Mr McFarlane intended to commit suicide because of financial difficulties.

The Decision

Adopting the test proposed by Thomas J in Clark v NZI Life Ltd (1991) 2 QR 11, the court held that the onus was on the defendant to prove on the balance of probabilities “at the top end of the range” that the loss was caused deliberately. The court held that if the defendant proved to the requisite degree that Mr McFarlane deliberately drove his vehicle into the path of the B-double then the appropriate conclusion was that he intentionally caused the damage to the B-double, in the sense that the act causing the damage (ie. driving), was intentional.

The defendant pointed to the following factors in favour of its case that the actions of Mr McFarlane were deliberate:

(a) The position of the Jaguar on the road when Mr Murray first saw it, its continuing in that position for 50 to 100 metres and its further movement into the incorrect lane;

(b) Mr McFarlane took no evasive action prior to the collision;

(c) Had Mr Murray not taken evasive action, the collision would have been more severe than it was;

(d) Mr McFarlane’s financial and legal position provided a motive to commit suicide.

The plaintiff argued that there were several other explanations for what happened such as an acute heart event or sun glare. The plaintiff also pointed out that there was no positive evidence of suicide such as a note, suicidal ideation, removal of the seat belt or expert psychiatric opinion to suggest that Mr McFarlane was suicidal.

The court held that on the balance of probabilities the evidence supported “at the top end of the range” that Mr McFarlane drove as he did with the intention of committing suicide and that the damage to the B-double was caused deliberately by Mr McFarlane. Accordingly, the defendant’s liability could be excluded under the policy which meant that clause 51 of the ICA was not satisfied.

The claim by the plaintiff was dismissed.

IN ISSUE

• Whether a motor vehicle driver intended to commit suicide when he drove into the path of the plaintiff’s motor vehicle
• Whether the plaintiff’s loss was caused deliberately by the motor vehicle driver
• Whether the plaintiff was entitled to make a claim against the motor vehicle driver’s insurer for loss and damage pursuant to s51 of the ICA

DELIVERED ON 7 December 2012

READ MORE
The Facts
Standard Publishing House (Aust) Pty Ltd (the lessee) leased commercial premises from Zhan Yuan Chen and Hong Yaa Cai (the lessor) for conducting its printing business. On three separate occasions in February, June and December 2008, rainwater entered the premises causing damage to printing machinery and stock. It was agreed between the parties that each of these inundations resulted from a breach by the lessor of its obligations under various provisions of the lease.

The lessee’s insurer was Allianz and the lessor’s insurer was GIO. Allianz paid the lessee in respect of damage caused by incidents in February and December 2008. GIO paid the lessee compensation in respect of the incident in June 2008.

Clause 8.1 of the lease required that the lessee maintain certain insurance in connection with the premises and clause 15.2 of the lease imposed various obligations on the lessor relating to repair and insurance. The “Business Pack” insurance policy between the lessee and Allianz contained a provision (section 8) which appeared to provide cover to entities other than the lessee. Further, exclusions 1 and 13 of the policy provided that cover was excluded for liability in respect of “property owned by you” and for “damage to property owned by, leased or rented to you” and “not belonging to you but in your physical and legal control”. The policy also contained a waiver of subrogation rights clause in which Allianz waived its rights and remedies to relief entitled by subrogation against any co-insured.

There were two proceedings commenced in relation to the flooding events. The first commenced by Allianz in the name of the lessee against GIO for recovery of the damages paid in respect of the first and third incidents. The second commenced by GIO against Allianz for contribution to the amount paid to the lessee in relation to the second incident.

The Issues
The court was required to decide firstly whether the lessee was obliged under the lease to maintain, in its name and in the name of the lessor, an insurance policy that covered the lessor for the consequences of each of the three incidents; secondly, whether the waiver of subrogation clause in the Allianz policy afforded an answer to the subrogated claim brought by Allianz in the name of the lessee against the lessor; and finally, whether Allianz was liable to contribute to the amount paid by GIO to the lessee.

The Decision
The court answered “yes” to each of the issues above. The effect was that judgment was entered for Allianz in the first proceeding and for GIO in the second proceeding.

In relation to the first issue, the court held that clause 8.1 should be given its ordinary meaning which was that the lease required the lessee to maintain insurance cover both in the name of the lessee and lessor. The insurance was only of a kind that could benefit the lessors if they had some liability for the loss against which such insurance was required to be effected.

In relation to the second issue, the court held that as matter of construction of the policy, the lessors fell into the category of a “co-insured” and that Allianz had waived its rights for subrogation under the general policy conditions in which Allianz had agreed to waive “rights and remedies or relief...by subrogation...against any co-insured.”

Here, the liability was provided for in clause 15.2. That was the bargain the parties struck and the court was unable to remake it, although it might appear “capricious or unreasonable”.

IN ISSUE
• Whether the lessee was obliged to maintain an insurance policy that covered the lessor for damage to property
• Whether the waiver of subrogation applied in respect of the lessor
• Whether the lessor could be indemnified and seek contribution

DELIVERED ON 14 December 2012
READ MORE click here
In relation to the final issue, the court held that the lessors were indemnified under section 8 of the “Business Pack” insurance policy for monies they paid in relation to the June 2008 flooding. GIO was therefore entitled to contribution from Allianz on the basis that “you” in the insuring clause referred to not only the named insured, but to other parties who might be entitled to indemnity.
The Facts

The appellant was a director of Bridgecorp Ltd and Bridgecorp Management Services Ltd (both in receivership and liquidation), which were part of the Bridgecorp Group of Companies (Bridgecorp) that collapsed in 2006. Following the collapse, the appellant and several of his fellow directors were convicted of offences under the Securities Act 1978 (NZ). They faced claims brought against them by the respondent (the receivers and liquidators of Bridgecorp), on the basis that they breached duties which they owed to the companies as directors. The claims were for damages of around $450 million.

Bridgecorp held 2 relevant insurance policies with QBE. The first was a directors and officers (D&O) liability policy subject to a limit of indemnity of $20 million. The second was a statutory liability (SL) policy with a limit of liability of $2 million. The moneys available under the SL policy were exhausted by the directors in the course of defending the proceedings under the Securities Act.

The appellant and his fellow directors made claims under the D&O policy for reimbursement of their defence costs in the civil and criminal proceedings against them. On 12 June 2009, the respondent gave QBE notice of a charge under s9(1) of the Law Reform Act 1936 (NZ) (the Act) over the proceeds of the D&O policy in respect of their claims against the directors. Section 9(1) of the Act creates a statutory charge over ‘all insurance moneys’ that may be payable under a liability policy. QBE refused to make any payments on account of defence costs until agreement was reached with the respondent about the allocation of funds under the D&O policy.

No agreement was reached and the appellant and two of his fellow directors applied to the NZ High Court for a declaration that s9(1) did not prevent QBE from meeting its obligation under the D&O policy of reimbursing them for their defence costs.

The Decision at Trial

The High Court held that the charge created by s9(1) applied to the whole of the amount available under the policy at the date the charge was created (assuming notification) and accordingly, the charge prevented the directors from having access to the insurance money to meet their defence costs. The appellant appealed to the NZ Court of Appeal.

The Decision on Appeal

The Court of Appeal allowed the appeal on two interrelated grounds. Firstly, s9 does not by its terms apply to insurance moneys payable in respect of defence costs, even where such cover is combined with third party liability cover and made subject to a single limit of liability. Secondly, s9 has limited effect and is not intended to rewrite or interfere with contractual rights as to cover and reimbursement.

The Court of Appeal found that the statutory charge did not prevent QBE from meeting its obligation under the policy to reimburse defence costs. The only reason that the contrary could be argued was that there was a single, aggregated limit of liability in the policy. That factor could not operate to deprive the appellant of the right to obtain reimbursement for his defence costs as that would render his defence costs cover, in practical terms, useless. The Court of Appeal found that is not what s9 was intended to achieve. It held that s9 was simply a legal mechanism to divert to a third party funds that would otherwise be available to settle a contractual obligation to indemnify the insured for liability to that third party.
The Facts

The respondents owned land which contained a chemical manufacturing plant. In August 2005 the plant building and contents were destroyed by fire. Queensland Fire & Rescue Services fought the fire. In the course of the fire fighting, large quantities of contaminated water overflowed bunds and dams on the land and escaped to surrounding State owned properties, severely contaminating them.

The Environment Protection Agency (EPA) issued a notice requiring the respondents to remediate the contaminated land. The EPA further obtained orders in the Planning & Environment Court requiring the respondents to remove contaminated substances and clean affected structures.

The clean up and remediation works cost the respondents over $10,000,000. These costs were not covered by any of the policies of insurance held by the respondents. The respondents issued proceedings against the State of Queensland alleging negligence in fighting the fire and also against the applicant insurance brokers alleging a breach of the duty of care owed in arranging and advising upon appropriate insurance cover. The respondents alleged that they should have been named as an insured or an interested party in primary and excess liability policies and also an ISR policy.

The applicants applied to the court seeking determination of the separate question of whether the remediation costs were capable of being the subject of indemnity under the specified policies of insurance that the respondents claimed ought to have been arranged.

The Decision

The court noted that a policy of insurance is a commercial contract and that its construction must have regard to the language used by the parties, the commercial circumstances which the policy addresses and the objects which it is intended to secure. Each policy must be construed as a whole document rather than individual parts and the terms must be read having regard not only to the operative clause, but also to the exclusion provisions.

The applicants argued that the costs of the remedial work did not fall within the operative clauses of the primary and excess layer policies because those policies only provided cover where there was a liability to pay damages to a third party claimant having a cause of action for damages. The court agreed with the applicants’ submissions that under those policies, liability must be in respect of “claims... made against the insured”. The court noted that the policy exclusion against claims arising out of damage to property owned by the insured was consistent with that interpretation. The court held that the costs incurred by the respondents in complying with the EPA remediation notices and court orders were costs met in respect of their own property. They did not constitute compensation in respect of a claim made against the respondents as the liability to pay compensation was conceptually distinct from “damages”. As a consequence, the costs were not capable of being the subject of indemnity under those policies.

The court also agreed with the applicants that the remediation costs were not capable of indemnity under the ISR policy because of a policy exclusion that insurance did not extend to any liability incurred as a result of pollution of any kind.

The court determined that even if the respondents had been named in the specified policies, they would not have been entitled to indemnity in respect of the remediation costs.
The Facts

Crown Equipment Pty Ltd (Crown) conducted a business supplying, maintaining and repairing electric lift trucks. An employee mechanic, (Talbot) was injured at Crown’s premises on 10 October 2005 when he slipped on a piece of cardboard covering an oil spill during the course of his employment. The cardboard had been placed over the oil spill by an employee (Towner) of RPM Contracting Pty Ltd (RPM) who had supplied Towner’s labour as a trade assistant to Crown.

Talbot served a Notice of Claim pursuant to the WCRA in June 2007 claiming damages in respect of his injuries. In August 2008, Workcover Queensland (Workcover) issued a Contribution Notice pursuant to s278A of the WCRA on RPM. In September 2008, Workcover settled this claim on behalf of itself and Crown for $546,295.46 ($400,000 settlement, plus $138,700.46 in workers’ compensation payments plus $7,595.00 in statutory costs).

In September 2009, Crown filed a Statement of Claim in the Supreme Court against RPM pursuant to s6(c) of the Law Reform Act 1995 (Qld) seeking damages in the amount of $546,295.46 for negligence, breach of statutory duty and breach of contract.

RPM had been placed in liquidation in September 2006 and was deregistered in or around December 2009 by the Australian Securities and Investment Commission (ASIC). RPM was reinstated to the Company Register in March 2010 by ASIC. RPM was completely wound up and had no assets to satisfy any judgment other than the benefit of a policy of insurance which it held with a Lloyds Syndicate (the policy). The second defendant QBE Underwriting Limited (QBE) was the managing agent of that Lloyds Syndicate.

QBE claimed that it was entitled to impose a deductible of $50,000 on any payment made in respect of claims for: a) injury to an employee of Crown; and b) recovery of payments made under Queensland Workers Compensation Legislation pursuant to the policy. These proceedings were an application for a separate determination of those issues pursuant to r.483 of the UCPR (QLD).

The Decision

QBE argued that it was entitled to impose a deductible of $50,000 in respect of the payment to RPM for liability for the personal injury of Talbot.

QBE then argued it was entitled to impose an additional deductible of $50,000 in relation to the claim by Crown for indemnity or damages from RPM in respect of the $546,295.46 payment to Talbot. QBE argued that Crown’s claim was effectively a claim for recovery of monies paid under the Qld Workers’ Compensation regime and therefore satisfied the wording of Endorsement 18(b) and allowed QBE to impose a $50,000 deductible in respect of it.

The court disagreed and held that it was not accurate to refer to Crown’s claim against RPM as a claim for recovery of workers’ compensation payments. The claim was properly characterised as a claim for damages for breach of contract for the economic loss to which RPM exposed Crown or alternatively for statutory contribution pursuant to s6(c) of the Law Reform Act. QBE was not entitled to rely on Endorsement 18(b) to impose a deductible against RPM.

IN ISSUE

• Whether an insurer was entitled to one or two deductibles in respect of an injury to an employee of the insured’s principal

DELIVERED ON 21 February 2013

READ MORE click here
The Facts

In June 2006, the applicant Alstom Limited entered into a contract with an Indian company, Crompton Greaves Ltd (Crompton), for the manufacture and supply of two generator step up transformers (each weighing approximately 132 tonnes) which were to be factory tested and packed in a seaworthy condition before being shipped to Henderson Wharf, Fremantle.

The applicant was the named insured under a marine project cargo insurance policy (the Policy) in respect of the transport of the transformers to Western Australia. Each of the respondents were Insurers under the Policy.

The transformers’ core coil assemblies suffered significant damage during the sea voyage from Mumbai to Henderson Wharf. The applicant claimed an indemnity under the Policy for the loss and damage it incurred in respect of the damaged transformers. The respondents denied the claim, principally, on the basis that the damage arose through an inherent vice in the transformers, which was an excluded risk under the Policy.

The court held that the proximate cause of the damage to the transformers was movement of the core coil assembly units which occurred as a result of insufficient internal wooden bracing within the casing of the transformers, which had been installed to prevent movement during the voyage.

The respondents argued that insufficient internal bracing constituted an inherent vice in the transformers. The court dismissed this contention, finding that even if the contract for the design and manufacture of the transformers did provide for a design which required permanent clamping of the core coil assembly, the parties’ experts determined that the transformers could have been safely transported from Mumbai to Fremantle by the application of temporary internal bracing. Thus, if an inherent defect was present, it was in respect of packing rather than the design and/or manufacture.

The court held that the applicant was not responsible for packing and/or preparing the transformers for travel. The applicant was unaware of the fact that Crompton had failed to install internal bracing sufficient to stabilise the core coil assembly units during the voyage. The respondents argued that the applicant should not be afforded the benefit of the unsuitability of packing clause because Crompton was deemed an insured under the policy and even if Crompton was not an insured under the Policy, the applicant had not demonstrated that the insufficiency of packing had not arisen through its fault or with its knowledge and consent.

The court held that the policy was a “composite policy” and therefore, a contractual intention existed to indemnify each of the parties in respect of that party’s individual loss. Further, it was held subparagraph (b) of the unsuitability of packaging clause referred to the “fault” and the “knowledge and consent” of the applicant individually, and not Crompton Greaves. The court stated that in this context, the words “knowledge and consent” required actual knowledge by the applicant that the packing of the core coil assemblies was insufficient or unsuitable to secure the core coil assemblies, and that the applicant gave its consent to the transformers being shipped in that state. The applicant did not have this degree of knowledge on the facts. Thus it could not be shown that insufficiency of packing arose due to its own fault and, consequently, it could rely on the unsuitability of packing clause. Accordingly, the court ordered that the applicant was entitled to indemnity under the policy.

IN ISSUE

• Whether damage to two generator transformers was excluded under the Marine Project Cargo Insurance Policy on the grounds that insufficient packing represented an “inherent vice” of the transformers

• Whether the insured was responsible for the insufficient packaging

DELIVERED ON 22 February 2013

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The Facts
Mattress Innovations Pty Ltd (Mattress) was the owner of commercial premises. It leased the premises to a tenant. The building on the premises was covered by a policy of insurance with Suncorp. The policy covered, amongst other things, property damage and business interruption.

The building was destroyed by a fire. The loss was greater than the total of the various sums insured.

The policy permitted Suncorp to either pay Mattress the insured value of the damaged property or to reinstate the property. Suncorp elected to do the former. Clause 16 of the policy dealt with the calculation of the claim. Clause 16.2 provided, in effect, that any payments made by Suncorp in respect of the acquisition of goods or services will be calculated on the GST inclusive cost of the claim. However, the clause went on to stipulate that in calculating the payment, Suncorp was entitled to reduce the payment by any input tax credit to which the insured is or would be entitled.

Consistent with clause 16.2, Suncorp paid Mattress an amount equivalent to 10/11ths of the amount to which it was entitled under the policy for building reinstatement, replacement of contents, removal of debris and business interruption. Mattress used the money to reinstate the building and, in doing so, received income tax credits in the amount of the 1/11th deduction.

After reinstating the property, Mattress proceeded to argue that in circumstances where the loss exceeded the sum insured, clause 16.2 did not entitle Suncorp to deduct the input tax credit component. In support of its argument, Mattress contended that clause 16.2 only entitled Suncorp to reduce the total amount of the loss by the input tax credit component (that is, by 1/11th) and if that sum was more than the total sums insured, Mattress was entitled to the total of the sums insured. Against this background, Mattress claimed the amount that had been deducted by Suncorp on account of input tax credits.

The Decision
The court dismissed Mattress’ claim. After examining a variety of hypothetical examples, the court concluded that in circumstances where an insurer elects to make a payment and the insured uses that payment to reinstate the premises:

(a) If the claim is less than the sums insured, the insured is entitled to 10/11th of the amount of the loss plus the benefit of the input tax credit, and is left in a neutral financial position; but

(b) If the claim is more than the sum insured, the insured is entitled to 10/11th of the sum insured, plus the benefit of any input tax credits.

The court observed that it would be anomalous to construe the policy in such a way that would see an insured whose claim is for more than the total of the sums insured (or, in other words, is underinsured) end up in a relatively better financial position than an insured whose claim is within the policy limits.
The Facts

Visy Packaging Pty Ltd (Visy) manufactured cans with “easy open ends”. The ends allowed a can to be opened by pulling a ring-pull device attached to the can. Visy supplied these cans to canners of tuna, who subsequently reported that some corroded shortly after being filled with fish. A recall of damaged and undamaged cans was made.

Visy claimed that the corrosion was due to the lacquer supplied to it by Siegwerk Australia Pty Ltd (Siegwerk) which Visy had applied to the can ends to seal the cans. Siegwerk paid Visy a lump sum of $2,250,000 inclusive of interest and costs to settle Visy’s claim. It then sued Nuplex Industries (Aust) Pty Ltd (Nuplex) who was the supplier of resin used by Siegwerk in the lacquer. Siegwerk claimed Nuplex had substituted an ‘inferior’ epoxy resin (known as Epikote 1009) for the resin specified to be used under their contract.

Nuplex sought indemnity under its broadform liability policy with QBE Insurance (Australia) Ltd (QBE) in respect of any liability or expenses it incurred in defence of this claim. QBE had denied indemnity on a number of bases. Primarily, it argued there had been no “occurrence” or “property damage” as the loss resulting from the recall of the cans had been purely economic loss.

The Decision

Siegwerk failed to establish that Nuplex’s substitution of the epoxy resin caused the corrosion of the can ends.

The court emphasised that the party making the claim (Siegwerk) must lead evidence to demonstrate it was more probable than not that the substitution, whether or not in conjunction with other causative elements, led to the damage. The court was presented with two conflicting opinions from two experts. While the opinion of Siegwerk’s expert was plausible, so was that of the competing expert. The court therefore found that Siegwerk fell short of establishing that its opinion was more likely than not a causal factor.

Despite the failure of the primary claim against it, the court recognised that Nuplex was entitled to indemnity under the QBE policy with respect to its costs and expenses. QBE had denied indemnity on a number of bases. Primarily, it argued there had been no “occurrence” or “property damage” as the loss resulting from the recall of the cans had been purely economic loss.

The court disagreed. It found that the damage was the corrosion of the cans, resulting from the contents coming into contact with the metal can ends, with the consequent corrosion of the cans and deterioration of the products within them. Between Nuplex supplying the resin and the corrosion of the cans there lay a number of events, each of which could have amounted to a relevant “occurrence” for the purpose of the policy. As each of those events lay along a chain of causation, they were to be construed under the policy terms as a single occurrence.

It also found that the corrosion of some cans, and the consequent deterioration of their contents “clearly amounted to” physical damage to tangible property (the first limb of the property damage definition in the policy). The undamaged cans that were withdrawn from sale were recalled because of that physical damage. This was enough to satisfy the second limb of the definition.

The court also rejected QBE’s reliance on its policy exclusions, including the loss of use, product recall.
INSURANCE ISSUES

Visy Packaging Pty Ltd v Siegwerk Australia Pty Ltd
[2013] FCA 231

and “active malfunctioning” exclusions. For the loss of use exclusion to apply, the court held that QBE would need to demonstrate that the proviso (which provided cover where the loss of use resulted from “sudden and accidental physical damage”) had not been triggered. It found the focus of the words “sudden” and “accidental” was that the damage was unintended and unexpected. The damage to Nuplex’s resin, after it had been used by others, was clearly covered by that expression.

QBE argued its recall exclusion operated to exclude the entire claim because the vast majority of the cans had been removed from the market only because of a “suspected” defect. However the court determined that the exclusion did not exclude claims for loss of use of Nuplex’s products or any property of which they formed a part. The exclusion related to claims “arising out of or resulting from any loss, cost or expenses incurred by [Nuplex] for the loss of use” etc of the product. The exclusion was therefore directed to the expenses of the recall process and not the loss of use of the property itself.

Finally, QBE’s reliance on its endorsement which excluded property damage except where there was “active malfunctioning” of the insured’s product also failed. While the court found the endorsement “a difficult provision to construe”, it applied the ordinary meaning of the words and concluded the claim against Nuplex depended upon the allegation that its resin failed to function in the normal manner for which it was designed. This brought the claim within the exception to the exclusion and cover under the policy.
The Facts

On 30 April 2009 a motor vehicle driven by James Boot along the Princess Highway at Mount Moriac collided head on with a prime mover and trailer owned by Elmore Haulage Pty Ltd (Elmore). Boot died as a result of the collision, with the prime mover extensively damaged.

At the time of his death, Boot was 19 years of age. Earlier that evening he had spent time with friends who said later he had displayed no signs of depression. However, twenty minutes prior to the collision he made this entry on his Facebook page: “James Boot loves everyone forever. And is very sorry for everything :(."

Boot’s vehicle was insured by Australian Associated Motor Insurers Ltd (the insurer). Elmore commenced proceedings against the insurer seeking damages on the basis that its insured (Boot) was liable in negligence for the collision and damage caused to the truck. In its defence, the insurer alleged that the loss was excluded under its policy because Boot had intentionally caused the collision. The policy excluded “loss or damage caused intentionally by you...”.

The court was asked to determine whether the evidence was sufficient to establish that Boot had intentionally collided with the truck and whether the insurer was entitled to rely on its policy exclusion.

The Decision at Trial

The trial judge found there was insufficient evidence indicating he was depressed, suffering a mental illness or contemplating suicide on that day, or in the weeks leading up to it. There was also evidence that indicated Boot changed the course of his vehicle just moments before the impact, manoeuvring it back to the correct side of the highway to avoid the collision. The reason for this last-minute manoeuvre may have included panic, instinctive reaction, awakening from dozing or an eleventh hour change of intention and would never be known, and the court was persuaded that Boot did not intend to commit suicide.

With respect to the policy exclusion, the court found it significant that the provision excluded “loss or damage caused intentionally” by the insured, in contrast to more traditional exclusions that exclude loss or damage caused by “deliberate or intentional acts” of an insured.

The unchallenged expert evidence was that a hypothetical person, in the position of Boot, intending to commit suicide would have been totally focused on bringing about his own death to the exclusion of all other considerations. The court therefore concluded that even if it were found that Boot had intended to commit suicide, the exclusion would not apply as there was no evidence of any intention by Boot to cause the damage suffered by Elmore.

The Decision on Appeal

The Court of Appeal agreed with the trial judge and found that on the balance of probabilities there was insufficient evidence to indicate that Boot committed suicide. It also agreed that that even if that intention was established, the policy exclusion did not apply.

On its plain terms, the exclusion was directed to an intended result (i.e. “loss or damage”) and not to the action of the insured which produced that result. The focus of the clause was therefore not on whether the particular event which resulted in the loss was intended by Boot, but whether the loss was intentionally caused by him.

Given the undisputed expert evidence that Boot’s “total preoccupation” would have been with putting himself in the position in which death would inevitably have taken place, the insurer could not establish that Boot had any awareness of the probability, or even possibility, that his actions might cause the damage that was suffered.

The appeal was dismissed.
The Facts

Mr Angelo Caradonna and Mr Alessio Vella were business partners. Without Mr Vella’s knowledge, Mr Caradonna gained possession of the certificates of title to 3 properties owned by Mr Vella. By forging Mr Vella’s name and using one of the properties as security, Mr Caradonna obtained a loan from Mitchell Morgan Nominees Pty Ltd (the respondent). The loan agreement was drawn up by Hunt & Hunt Lawyers (the appellant). Upon discovery of the fraud, it was found that Mr Caradonna and his accomplice, Mr Lorenzo Flammia (the fraudsters) were bankrupt. The respondent was unable to recover the loan funds because there was no valid loan agreement and it was unable to execute on the mortgage because of the way it had been drafted by the appellant. The respondent claimed the full loss from the appellant who denied liability and in the alternative sought to limit its liability under s4 CLA (NSW) on the basis that the fraudsters were concurrent wrongdoers.

The Decision at Trial

The trial judge found that the appellant was negligent in drafting the mortgage. However, the trial judge also held that the conduct of the fraudsters was a major cause of the loss suffered. In relation to the question of the same loss or damage, the trial judge held that the fraudsters and the appellant had independently caused the same loss and damage. Consequently, the respondent could recover its entire loss from the appellant. The appellant appealed.

The Issues on Appeal

The issue on appeal was whether the appellant was a concurrent wrongdoer.

The Decision on Appeal

The Court of Appeal overturned the trial judge’s decision on the basis that the loss suffered by the respondent due to the appellant’s negligence was not associated with the loss caused by the fraudsters. The Court of Appeal determined that the appellant was not liable for the same damage and, consequently, was not a concurrent wrongdoer with the fraudsters. The Court of Appeal held that the respondent had been fraudulently induced to pay money out and that this was different from not having the benefit of security for the money paid out. Consequently, the respondent could recover its entire loss from the appellant. The appellant appealed.

The Issues on Appeal to the High Court

The issues on appeal to the High Court were: the proper identification of the loss and damage suffered by the respondent; and whether another concurrent wrongdoer caused the loss.

The Decision of the High Court

The High Court held that the loss suffered by the respondent was the result of its inability to recover the money advanced, pursuant to the mortgage documentation. Although the appellant’s negligent drafting of the documentation was the cause of that loss, the respondent had first been induced to enter into the transaction by the fraudsters.

Although the respondent’s claims against the fraudsters were different, they were nevertheless founded on the same basis (i.e. their inability to recover the monies advanced) and the acts and omissions of all 3 wrongdoers materially contributed to that same loss.

The High Court considered that the Court of Appeal’s analysis had concentrated on the immediate effects of the fraudsters’ conduct (i.e paying out money) and the negligence of the appellant (i.e. not having the benefit of the security) without identifying the actual harm.
INSURANCE ISSUES

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd
[2013] HCA 10

to the respondent’s economic interest (i.e. the inability to recover the monies advanced). The High Court was of the view that, insofar as the question of the “same loss or damage” was concerned, the Court of Appeal had not paid sufficient regard to the statutory language and policy of the proportionate liability provisions.

In identifying the “loss and damage”, rather than the damages, it was necessary to identify the nature of the interest infringed and the nature of the interference to which that interest was subjected. The High Court held that the nature of the respondent’s economic interest that was infringed (i.e. its loss or damage) was its inability to recover the sums advanced and that it is the proper identification of the “loss and damage” which is critical, as this usually points the way to the acts or omissions which were its cause.

The High Court reinstated the trial judge’s decision on apportionment.
The Facts

The plaintiff company, ISS Property Services Pty Ltd, conducted a cleaning services business. The defendant insured the plaintiff under two consecutive broadform liability insurance policies (the policies). The two relevant policies were identical, with each relating to separate consecutive insurance periods. The plaintiff made a claim under each of the insurance policies.

The first claim for indemnity related to an event in 2002, in which an employee (Ms Mustac) of a company that had engaged the plaintiff to provide cleaning services injured herself. Ms Mustac alleged that the plaintiff was negligent in failing to strip and reseal a particular area of flooring. While Ms Mustac could have sued the plaintiff for damages at common law, she instead made her claim against WorkCover South Australia (WorkCover). After settling the matter with Ms Mustac, WorkCover recovered $20,000 from the plaintiff.

The second claim for indemnity made by the plaintiff related to an event which occurred in 2003 to an employee of a catering company (Ms Lynch). Ms Lynch sustained injuries after slipping in a cool room which the plaintiff had been engaged to clean. WorkCover settled the matter with Ms Lynch and then sought to recover $67,500 from the plaintiff.

The plaintiff duly notified the defendant of both of the above claims. The defendant declined indemnity.

The defendant argued that the insuring clause of the policies did not respond, as the amounts sought by WorkCover were not “compensation for personal injury”. Rather, they were amounts payable to WorkCover in accordance with its enforcement of a statutory right of recovery.

The insuring clause provided cover for sums “which the Insured shall become legally liable to pay as compensation for... personal injury...”

The Decision

When interpreting the relevant clauses the court found it necessary to consider the policies as a whole. Once the policies were analysed in such a manner, the court found that the defendant’s interpretation would run contrary to the commercial intent of the parties to the policies.

In particular, the court found that if the defendant’s interpretation were to be accepted, indemnity would rely upon the injury sufferer’s decision as to which avenue of compensation they pursued. If compensation were sought directly from an insured, via common law damages, the policy would respond. However, if compensation were sought through WorkCover, indemnity for the amount eventually sought to be covered from an insured by WorkCover, would be denied. The court agreed with the plaintiff’s argument that such an interpretation would expose the plaintiff to an untenable level of risk.

The court found that the claims made by WorkCover against the plaintiff were consequent upon injuries suffered by Ms Mustac and Ms Lynch, which fell within the insuring clause of the policies.
The Facts

The facts surrounding this dispute involved the late Langley Hancock (Lang) who controlled a number of companies. These companies included Hancock Prospecting Pty Ltd (Hancock Prospecting) as well as The Hancock Family Memorial Foundation Ltd (the Foundation), the plaintiff in these proceedings.

A dispute arose surrounding the sale of Lang’s Life Governor’s Share Number 1 (the Share) in Hancock Prospecting, to the Foundation. When in Lang’s possession, the Share carried significant operating rights in regard to Hancock Prospecting. It was sold to the Foundation for $20 million. After the sale, it was discovered by the parties that the significant rights originally attached to the Share did not transfer upon its sale.

The late and intestate Mr Fieldhouse was the solicitor for Lang in respect of the sale of the Share. It was argued by the Foundation that Mr Fieldhouse also acted for it in respect of the sale and he was therefore liable for the damages incurred as a result of acquiring the grossly overvalued share.

At the relevant time, Mr Fieldhouse held professional indemnity insurance as required by NSW legislation. The Solicitors’ Mutual Indemnity Fund (the Fund), managed by the NSW Law Society (the Society), received contributions from all NSW solicitors. The Fund covered claims, on a discretionary basis, up to an aggregate of $58 million a year, for all solicitors in NSW. The Society contracted with insurers (First Layer Insurers) to provide cover of up to $1.1 million on each claim, once the annual $58 million cap of the Fund had been exhausted. Mr Fieldhouse contracted with the defendants in these proceedings (Lloyd’s), to provide a top-up policy (Second Policy), above that provided by the Fund and First Layer Insurers.

The difficulty in this matter arose from the fact that the $58 million cap for the Fund was not exhausted in the relevant year. Therefore, the First Layer Insurers were not required to respond. Further to this, in earlier related proceedings, the Fund was excluded as a defendant by the WA Supreme Court, who found that due to the discretionary nature of the fund, no insurance contract existed between the Society and Mr Fieldhouse.

Therefore the Foundation sought to rely upon the Second Policy, which only responded once the ‘underlying insurers’ had paid, admitted liability, or been held liable for the full amount of their indemnity.

The parties were in dispute as to whether the Fund could be regarded as an ‘underlying insurer’ under the Second Policy. If the Fund was found to be an underlying insurer, the parties were further in dispute as to whether a letter from the Fund, granting indemnity to Mr Fieldhouse, could not be characterised as an ‘admitted liability’ under the Second Policy. The court interpreted a clause in the Second Policy as requiring an ‘underlying insurer’ to admit liability to pay the full amount of their indemnity. In this regard, a distinction was made between a grant of indemnity (which was made with express reservations) and an admission of liability to meet a plaintiff’s claim.

While it was not expressly necessary, given the above findings, the court also considered that s51(1)(a) of the ICA, which deals with deceased insured persons, does not require a third party to determine liability against the insured before instituting proceedings against the insurer.

The Decision

The court found that, for the purposes of the Second Policy at least, the Fund was considered an ‘underlying insurer’. In making this decision, the court relied heavily upon the commercial intention of the parties to the policy.

The Foundation was, however, ultimately unsuccessful. The court found that the letter by the Fund, granting indemnity to Mr Fieldhouse, could not be characterised as an ‘admitted liability’ under the Second Policy. The court interpreted a clause in the Second Policy as requiring an ‘underlying insurer’ to admit liability to pay the full amount of their indemnity. In this regard, a distinction was made between a grant of indemnity (which was made with express reservations) and an admission of liability to meet a plaintiff’s claim.
INSURANCE ISSUES

Bon McArthur Transport Pty Ltd (in Liq) v Caruana
[2013] NSWCA 101

The Facts

Mr Caruana was seriously injured on 22 June 2006 when struck by a forklift driven by Mr Brazel. Both Mr Caruana and Mr Brazel worked at premises occupied by Bon McArthur Transport Pty Ltd (BMT) but were employed by a labour hire company. Mr Caruana obtained a judgment against his employer on the basis of its vicarious liability for the negligent driving of the forklift. He also claimed against BMT on the basis it was an owner of the forklift for the purposes of the MACA.

However, BMT was in liquidation and to recover any sum awarded in relation to that claim, the plaintiff needed to identify an insurer of the business. QBE had at the relevant time issued a policy that identified as insureds “Bon McArthur Pty Ltd; McArthur Corporation Pty Ltd and/or Australian Subsidiary Corporations”. Bon McArthur Pty Ltd had prior to the policy period licensed BMT to carry on its business. BMT was not identified as an insured and was not a subsidiary of a named insured. It was however referred to in a number of coverage summaries from the broker and the surrounding circumstances suggested that the intention of the parties was that all the businesses in the group would be covered.

The Decision at Trial

The trial judge found that BMT was insured under the policy. It also found that both BMT and Bon McArthur Pty Ltd had been entitled to immediate possession of the forklift at the relevant time and were accordingly owners for the purposes of the MACA. This made each of them liable for the negligence of the driver of the forklift.

The Decision on Appeal

The Court of Appeal noted that the broker’s coverage summaries referred to BMT. The trial judge had accepted that on the evidence, there was an ambiguity and it was therefore permissible to look at the surrounding circumstances to assist in the interpretation of the contract. One of those circumstances included the fact that the business in question was primarily conducted by BMT and that if the full facts were known, it would have been commercially absurd to issue a policy to Bon McArthur Pty Ltd and not BMT.

However, the Court of Appeal noted that the formation of a contract requires an offer capable of acceptance and an acceptance of that offer. The Court of Appeal concluded that a binding contract of insurance was made on the terms of QBE’s quotation when the broker’s unqualified acceptance of that offer was communicated to QBE on 29 November 2005. The description of the insureds in QBE’s offer was unambiguous, and although the broker’s subsequent coverage summaries inaccurately reflected the contract, they did not function as offers or counter-offers.

The Court of Appeal noted that from the insureds’ perspectives, it was necessary that BMT be insured. However, there was nothing to indicate that QBE became aware before the contract was made that BMT was conducting the business or intended to be an insured under the policy. The construction of the offer and acceptance must be determined by what reasonable persons in the position of QBE and the broker would have understood them to mean. That requires consideration of a context, but does not permit regard to uncommunicated subjective intentions. The Court of Appeal accordingly found that BMT was not entitled to cover under the policy and that Mr Caruana could not recover damages from its insurer.

The Court of Appeal also disagreed that BMT and Bon McArthur Pty Ltd were each entitled to immediate possession of the forklift and therefore liable as owners because the licence agreement by which Bon McArthur Pty Ltd provided forklifts to BMT was subject to a 30 day notice provision.

IN ISSUE

• Interpretation of insurance contact and whether it covered Bon McArthur Transport Pty Ltd where that entity was not specifically named

• Ownership of forklift involved in the incident

DELIVERED ON 3 May 2013

READ MORE click here
The Facts

National Mutual Life Association of Australia (the insurer) issued a life insurance policy to Galaxy Homes Pty Ltd (the plaintiff) insuring the life of Mr Peter Eden (the insured). The policy of life insurance provided a benefit payable in advance of death where an insured had a “terminal illness”, defined as an illness which would result in the death of a person within 12 months regardless of the treatment undertaken.

The life insurance policy was cancelled pursuant to a contractual right to “end the plan”. The insured was first diagnosed with terminal cancer about two months after the life insurance policy was cancelled. The insured’s surgeon identified tumours in his abdominal cavity which contributed to his terminal diagnosis which he considered would have been present for at least six months before detection, and therefore existed at a time when the life insurance policy was in effect. As a consequence, the plaintiff made a claim on behalf of the insured for payment of the terminal illness benefit in the amount of $4 million.

The insurer rejected the plaintiff’s claim based on the policy’s definition of “terminal illness” as an illness which would result in death within 12 months. The insurer also placed reliance on the paragraph entitled “Ending the Plan” in the life insurance policy which provided that “when the plan ends, you can no longer make a claim under the plan and we do not have to pay you any benefits”.

The Decision at Trial

An order was sought for the urgent determination of the proceedings. At first instance, the plaintiff’s interpretation of the insuring clause was preferred. The trial judge concluded that the question provoked by the insuring clause was whether the insured had, at any time during the policy period, a terminal illness. It was not necessary for the insured’s diagnosis to have been made during the policy period because the policy was silent about when the terminal illness needed to have been ascertained. The trial judge held that the “Ending the Plan” paragraph in the life insurance policy meant that the cover provided by the insurer ceases after the plan has ended, save for any accrued claim.

The trial judge also determined that the failure of the insurer to consider the insured’s claim was a breach of the policy. During the course of the proceedings, the insurer was granted leave to amend its defence to allege that it was entitled to avoid the policy, because of fraudulent non-disclosure by the insured regarding the removal of a malignant melanoma, and that cover could be excluded on the basis that the insured had a medical condition or sickness before the policy commenced (the exclusion clause). The trial judge was not satisfied that the insured had a medical condition or sickness before the policy commenced (the exclusion clause). The trial judge was not satisfied that the insured had a medical condition or sickness before the commencement of the policy of a sufficient character to trigger the exclusion clause.

However, based upon the medical evidence provided at the trial, the trial judge was not satisfied that during the currency of the policy, the insured’s illness was of a character that would result in the death of the insured within 12 months. The plaintiff’s claim was dismissed.

The Issues on Appeal

The insured appealed the decision of the trial judge, arguing that the phrase “will result in death... within 12 months” did not relate to a degree of certainty but was simply used as a matter of grammar to denote future tense.

IN ISSUE

• Whether, during the currency of the life insurance policy, the insured had an “illness which will result in death within 12 months”
• Whether the insured had an illness of a sufficient character prior to the inception of the policy to trigger an exclusion
• Whether the insured was entitled to cover notwithstanding that the policy was terminated before the claim was made

DELIVERED ON 3 May 2013

READ MORE click here
The Decision on Appeal

The Court of Appeal determined that the terms of the policy were very strict and intended to raise the required degree of certainty above likely or even highly likely. The use of the word “will” in the policy definition of terminal illness indicated that a requirement of very high probability, almost certainty was intended. The medical opinions provided at the trial fell short of proving on the balance of probabilities that the insured would die within 12 months.

The Court of Appeal dismissed the insured’s appeal and upheld the insurer’s refusal of the claim.

An appeal by the insured to the Full Court was also unsuccessful. The Full court accepted that the insured was still covered by the policy at the time the claim was made because a claimable event had occurred during the currency of the policy. However, it was also held that the insured had a pre-existing illness which was excluded from cover and s47 ICA did not operate to preclude the application of the exclusion clause.
The Facts
Highway Hauliers (the respondent) operated a trucking business for which a fleet of trucks and trailers transported freight from Perth to the eastern States (east-west runs). The fleet of vehicles was insured with certain underwriters at Lloyds (the appellants). Two of the respondent’s trucks were damaged in two separate incidents on east-west runs. Highway Hauliers claimed under its policy for the cost of repairing or replacing the damaged vehicles.

The policy contained an endorsement that required drivers of trucks on east-west runs to have achieved a minimum score on a driver test known as the PAQS Test. Neither of the drivers of the damaged trucks had undertaken the PAQS Test. In addition, neither of the drivers were approved drivers for the purposes of an exclusion contained in the policy. Indemnity was declined by the appellants. The respondents commenced proceedings against the appellants on the basis that s54 of the ICA obliged the appellants to indemnify the respondent in respect of the claim.

The Decision at Trial
The trial judge held that the appellants were obliged to indemnify the respondent for the cost of repairing the damage to the trucks and trailers by reason of s54 of the ICA. The failure of the non declared truck drivers to attain a minimum PAQS test score was a failure which could be remedied by s54 and therefore the appellants were obliged to provide indemnity in respect of the loss claimed. The appellants were also ordered to pay the respondent’s consequential losses.

The Issues on Appeal
The appellants argued that if a matter defines the scope of cover in an insurance contract, s54 of the ICA has no application. The appellants argued that in this case the scope of the cover was the operation of road trains on east-west runs by drivers who had satisfactorily completed a PAQS test. The appellants asserted that satisfactory completion of the PAQS test was a condition of cover. The appellants also argued that there was no “act” as defined in s54(6) and therefore s54 had no application. The respondent contended that s54 must be construed in accordance with its text, which draws no distinction between the scope of cover and other contractual terms and that in any event completion of the PAQS test was not an element of the scope of cover.

The Decision on Appeal
The Court of Appeal rejected the appellants’ arguments holding that the requirement for drivers to satisfactorily complete a PAQS test was not a condition of cover and did not define the scope of the cover under the insurance policy. In any event, the Court of Appeal was satisfied, having examined the relevant case law, that s54 of the ICA can apply even if, on the proper construction of the insurance contract, satisfactory completion of the PAQS test was a condition of cover. This conclusion was consistent with the text, purpose and legislative history of s54 and with decided cases.

Although it was not necessary to do so, the Court of Appeal determined the construction issue. It held that the PAQS endorsement did not, in form or in substance, define the scope of cover of the policy because it conditioned the appellants’ obligation to meet a particular claim that otherwise fell within the scope of cover but it did not form part of the way in which the scope of the policy was defined. The scope of cover was defined by reference to the respondent’s vehicles, the benefits conferred by the policy and the period of insurance. It was not defined by reference to attributes of the driver at the time of an occurrence.

The Court of Appeal also rejected the appellants’ argument that the failure of the drivers to satisfy the PAQS test was a “state of affairs” and not an “omission”, and that therefore s54 did not apply to excuse it. This argument was based on the decision in Johnson v Triple C Furniture & Electrical Pty Ltd [2010] QCA 282 where it was held that s54 did not apply to remedy an insured’s breach of a requirement that a pilot must have satisfactorily completed a PAQS test.

IN ISSUE
- The proper construction of s54 of the ICA

DELIVERED ON 6 May 2013

READ MORE click here
mandatory flight review within 2 years prior to a flight. It was held that cover was never engaged and s54 did not apply. The Court of Appeal distinguished Johnson and declined to follow the same approach of narrowing the scope and application of s54.

The Court of Appeal also upheld the trial judge's decision in respect of consequential loss on the basis that it was open for the reasons given to find that the claim for loss of profits was not too remote.

The appeal was dismissed.
INSURANCE ISSUES

Mutual Community General Insurance Pty Ltd v Khatchmanian
[2013] VSCA 144

The Facts

The respondent insured owned a house at Endeavour Hills in Victoria where he lived with his wife and children. The house was insured with the appellant against fire. On 27 March 2010, the house was destroyed while the insured and his family were away for the weekend. The insured subsequently made a claim for indemnity under the policy which was rejected by the insurer on a number of bases including that the insured had connived in starting the fire in order to relieve himself of the parlous financial position into which he had fallen.

The Decision at Trial

The trial judge did not accept that the insured was so financially constrained that he resorted to lighting the fire. The trial judge rejected the evidence of the insurer’s expert, accepting police evidence that there were 3 access points to the home that showed damage consistent with forced entry. The trial judge found for the insured, awarding him damages plus interest and costs from a date 6 months after the fire pursuant to s57 of the ICA.

The Issues on Appeal

The insurer appealed against the trial judge’s rejection of the allegation that the insured deliberately caused the fire. The insured cross appealed the amount of interest and costs awarded.

The Decision on Appeal

The Court of Appeal held that the trial judge’s findings on all issues were ‘far from glaringly improbable or contrary to compelling inferences’.

The Court of Appeal held that the insured did not have to establish that he did not have any financial motive or that there had been no forced entry by an unrelated third party intruder. It was up to the insurer to adduce sufficient evidence to persuade the court, which it failed to do. The Court of Appeal was particularly critical of the insurer’s failure to call the relevant witnesses from the fire brigade who could have attested as to what damage and/or forced entry had been made by them, as opposed to the unknown party who had lit the fire.

The Court of Appeal held that the insurer should not have the benefit of delay caused by inadequate legal advice or an unsatisfactory loss adjusting report with respect to the date on which interest commenced to accrue under s57 of the ICA. The insurer should have investigated the claim and reached a conclusion about liability within 3 months of the date of the fire.

The Court of Appeal held that the insured’s Calderbank offer of $575,000 inclusive of interest plus costs was clear, made at an appropriate time, had foreshadowed an indemnity costs application and gave the insurer reasonable time to consider it. Although the insurer’s case was not hopeless, it was not particularly strong and therefore it should have accepted the Calderbank offer. The court awarded the insured’s costs of the case below on an indemnity basis.

IN ISSUE

- Whether claim for house fire fraudulent
- When interest accrues pursuant to s57 ICA

DELIVERED ON 14 June 2013

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Barry Nilsson, Lawyers 2013 Casebook | 188
The Facts

The insured (ARTC) managed the New South Wales country rail network pursuant to an agreement between ARTC, State Rail Authority of NSW (SRA) and Country Rail Infrastructure Authority (CRIA).

The insured claimed on a policy of insurance issued by QBE Insurance (Europe) Ltd (the insurer) with respect to two incidents that occurred in January 2008. The first related to an injury to a Mr Asiumus while undertaking re-sleepering works on behalf of the insured (the Asimus claim) and the second to a derailment of a train resulting in damage to the track, rolling stock and the cargo. There were a number of anticipated claims from various entities arising from the derailment (the Breeza claim).

The insurer alleged that a self-insured excess of $2.5m applied to each of the claims.

Item 6 of the policy’s schedule specified the self insured excess applicable to each and every occurrence and claim. The excesses applicable varied depending on whether they were “in respect of” either i) Rail Corporation NSW; ii) CRIA; iii) SRA or iv) Constructions Clearways. There were no excesses specified to be “in respect of” ARTC, the insured.

The insured alleged that the excesses were only applicable to the named entities SRA, CRIA, Rail Corporation of NSW and Construction Clearways. As the insured was not specifically named, the excess did not apply to it.

The Decision at Trial

The trial judge held that the words of the policy clearly intended an excess to apply, an excess applied to any claim to indemnity and that the amount of the excess was to be determined by reference to the relevant occurrence and whether it was ‘in respect of’ one of the entities named in the policy.

The trial judge held that each of the Asimus and Breeza claims resulted from occurrences ‘in respect of’ CRIA as each happened on track owned and operated by CRIA. It therefore followed that an excess of $2.5 million was applicable to the insured’s entitlement to indemnity in respect of each incident.

The Issues on Appeal

The same issues were agitated on appeal. The insured argued that the claims were “in respect of” the insured and that no excess was therefore applicable. The insurer argued that the excesses applied per occurrence and that the occurrence was in respect of CRIA. Therefore a $2.5 million excess applied.

The Decision on Appeal

The Court of Appeal unanimously upheld the trial judge’s findings.

The Court of Appeal held that the excess in Item 6 which was applicable to the occurrence was the one for the entity or activity in respect of which it happened. The Court of Appeal upheld the trial judge’s decision that the occurrence in each of the claims was in respect of CRIA as CRIA owned and operated the tracks.

The appeal was dismissed.
INSURANCE ISSUES

Kyriackou v ACE Insurance Ltd
[2013] VSCA 150

The Facts

The appellant insured held a policy of professional indemnity insurance with the respondent insurer for operations described as 'Finance Originators, Finance Intermediaries, Finance Brokers, Finance Consultants, Mortgage Aggregators'. The insured claimed on the policy for payment of defence costs incurred in defending an action brought by ASIC. ASIC alleged the insured had operated an unregistered managed investment scheme and sought relief pursuant to the CA to restrain the insured from further operating the scheme and for the winding up of the scheme.

The insured defended the action, which was ultimately discontinued. The insurer declined indemnity on the basis that the costs were not the result of a 'claim' under the policy wording and alternatively that exclusions applied. The insured sought an order that the insurer was liable to indemnify him.

The Decision at Trial

The trial judge confirmed the insurer was not required to indemnify the insured. The ASIC proceeding did not amount to a claim within the insuring clause of the policy. The insuring clause provided indemnity for loss arising from a claim in respect of civil liability for breach of a duty owed in a professional capacity. Importantly the definitions of both 'loss' and 'claim' under the policy included reference to liability in respect of civil compensation or civil damages sought as defined under the policy, even where part of the relevant provisions in the CA relied on by ASIC allowed the court power to award damages. Further, the insured’s claim failed on a second ground - that the ASIC proceedings did not relate to civil liability for breach of duty owed in a professional capacity. The trial judge described ASIC’s allegations as relating to the insured’s capacity as an entrepreneur in the management of the scheme, rather than in any professional capacity. The nature of the activity was commercial, not professional.

It was also relevant that the ASIC proceedings referred to allegations against the insured in his capacity as a company director. This triggered an exclusion under the policy in respect of directors and officers’ liability.

The Issues on Appeal

The Court of Appeal considered 3 questions of law, being whether the claim should have been construed as civil compensation or civil damages, whether the policy in fact responded and whether the insured had engaged in acts that arose from a breach owed in a professional capacity under the policy.

The Decision on Appeal

The Court of Appeal confirmed the trial judge’s decision. The Court of Appeal agreed that ASIC had not pursued a claim for damages or even shown an intention to later claim damages against the insured. While not needing to decide the issue on appeal following its finding that there was no relevant ‘claim’, the Court of Appeal found that the insured was acting in a professional capacity when undertaking the relevant actions to which the ASIC proceeding related. Any breach would have occurred in the context of the overall activity in the group’s business and when engaged in this business, the insured was acting in a professional capacity. The Court of Appeal also agreed that a number of exclusion clauses would have applied to exclude the claim under the policy, although again no finding was required in this respect.

IN ISSUE

- Whether proceedings by ASIC amounted to a claim for civil damages or compensation
- Whether proceedings against director fell within the definition of claim under policy of professional indemnity insurance

DELIVERED ON 20 June 2013

READ MORE [click here]
The Facts

The appellant insurer insured the respondents under a contract works and public liability insurance policy (the policy). The works involved the reconstruction of a culvert at parklands which required the construction of an earthen wall or cofferdam to hold back water. In May 2003, a substantial rainfall event occurred which caused water levels in the area to rise. This allegedly required the insured to take urgent steps to prevent the wall from failing. The work was undertaken by pumping and diverting water from a pond so as to prevent the wall from being breached. The wall itself was also ‘shored up’. The insured made a claim under the policy for coverage of costs incurred for the work. The insurer accepted liability for the costs involved in shoring up the wall but rejected the remainder on the basis that a dewatering exclusion applied.

The Decision at Trial

The trial judge entered judgment for the insured in the amount of $361,608.75. The general insuring clause under section 1 of the policy provided coverage “...against Loss, Destruction of or Damage to Property Insured...” The trial judge found that the insured was entitled to indemnity pursuant to section 1 as the costs were incurred in successfully preventing loss, destruction of, or damage to, property on the general principle that costs reasonably incurred by an insured in averting an imminent loss are recoverable. The trial judge found no ‘dewatering’ in the actions undertaken by the insured therefore the exclusion did not apply. The actions were properly described as water diversion or flood mitigation.

The Issues on Appeal

The Court of Appeal was required to decide whether the costs fell within the dewatering exclusion, whether the claim fell within the insuring clause in section 1 and 2 of the policy and whether there was a relevant liability limit and specific excess under the policy.

The Decision on Appeal

The Court of Appeal allowed the appeal in part. The Court of Appeal found that the expenses could not be recovered under the general insuring clause because that clause related only to physical loss or destruction or damage to the wall. It found that any principle that costs reasonably incurred by an insured in averting an imminent loss are recoverable under a policy, must be construed having regard to the language of the relevant policy. The Court of Appeal found that a temporary protection extension of the policy did however apply. That extension applied to the temporary protection of the insured property that was both deemed necessary by the insured to avoid further loss and damage consequent upon any loss or damage to property. The costs in diverting the water were therefore consequent upon the existing damage. The Court of Appeal agreed that the dewatering exclusion did not apply. The temporary protection extension had a liability limit of $250,000 hence the original judgment was restricted. The applicable excess would also have been raised to $50,000 in the event that the occurrence was a result of storm or tempest. However, the rain event was found not to fall within either definition and a standard excess applied.

The Court of Appeal rejected the implication of a term that where the exercise of reasonable care by the insured has avoided loss, damage or liability, then those costs and expenditure were to be indemnified. The insured pointed to an obligation imposed by a condition of the policy that the insured was to, ‘at its expense’, take action to minimise the extent of property damage for which the insured may be liable. The Court of Appeal found that because the condition referred to action being taken at the insured’s expense, an implied term requiring indemnity for those expenses was inconsistent with that express term.
The Facts
The appellant insured and respondent insurer were parties to a contract of professional indemnity insurance (the policy). The insured was involved in Federal Court proceedings brought by the Australian Securities and Investments Commission (ASIC) and certain customers following the collapse of Storm Financial Limited (Storm). In the Federal Court proceedings ASIC sought declaratory relief of a number of forms against the insured, alleging that it engaged in unconscionable conduct and that it was jointly and severally liable in relation to the liability of Storm for its misrepresentations or breaches of contract as the insured was a linked credit provider under the TPA.

The insured claimed indemnity under the policy in respect of the allegations made against it in the Federal Court proceedings. The insurer denied that the insured was entitled to indemnity due to the operation of an exclusion for lender’s liability. The insured disputed the application of the exclusion and claimed that, in any event, it was entitled to indemnity for defence costs because the exclusion clause only related to the insurer’s liability to pay in respect of loss (as opposed to defence costs). There was textual inconsistency in the clauses of the policy directed to loss and the obligation to make advances for defence costs.

The insured sought declarations that the insurer was obliged to indemnify it under the policy and, in the alternative, that the insurer was obliged to pay its defence costs.

The Decision at Trial
The trial judge found that if the exclusion clause applied and the insurer denied indemnity for the claim, the insurer was not obliged to pay defence costs either. The trial judge noted the conflicting texts in the policy and considered that it was appropriate to examine relevant contextual factors, including the language of the insuring clause and the commercial result, in order to determine the proper construction of the policy. The trial judge found that the insurer was entitled in a proper case to deny indemnity for a claim including liability for defence costs in reliance upon an exclusion clause and, in those circumstances, the insurer was not obliged to advance defence costs until the insurer’s denial of indemnity was determined to be wrong as between the insurer and the insured.

The Issues on Appeal
The issue on appeal was the proper construction of the exclusion clause and whether it excluded the insurer’s liability to pay defence costs as well as damages, judgment or settlement.

The Decision on Appeal
The appeal was dismissed. After restating the general principles of construction of insurance policies, the Court of Appeal noted the absurd consequence of interpreting the exclusion clause literally – providing cover for the costs of defending a claim which fell outside the terms of the policy. The Court of Appeal concluded that such an interpretation was inconsistent with business common sense unless the policy specifically stipulated that it was intended to provide legal costs insurance and it did not do so.
MOTOR VEHICLES
MOTOR VEHICLES

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Appeal against finding of no liability for driver who collided with pedestrians crossing dual carriage roadway and another driver for failure to warn of danger.
The Facts
On 15 August 2008 the appellant (then aged 83), was struck by a car driven by the respondent as she attempted to cross a road leading to the Rockdale Plaza. The appellant alighted from a bus at a stop and instead of taking one of two designated safe and convenient routes to the Plaza, she took a “shortcut” across the access road leading to the Plaza.

The respondent had been driving along the access road at approximately 10 km/hour but did not see the appellant until he was approximately 4-5m away from her. The respondent braked but was unable to avoid colliding with the appellant.

The Decision at Trial
The trial judge held that the respondent’s speed was appropriate in the circumstances however a reasonable person in his position would have observed the appellant earlier. Further, the court held that it was reasonably foreseeable that pedestrians would take the “obvious” shortcut taken by the appellant and therefore, the respondent was negligent for failing to keep a proper lookout.

The trial judge found that the appellant demonstrated an almost total disregard for her own safety in electing to take an inherently dangerous path which took her across the access road. The trial judge found that the appellant probably stepped out onto the road without seeing the respondent’s vehicle (either because of her poor eyesight and/or because she was so stooped she faced the ground) and assessed her contributory negligence at 75%.

The Issues on Appeal
The only issue on appeal was whether the assessment of contributory negligence should be reduced.

The Decision on Appeal
The appellant’s counsel argued that the trial judge failed to take into account the relative risk of harm in a car versus pedestrian collision and therefore, failed to take into account the principle established in Pennington v Norris (1956) 96 CLR 10 (in which the High Court held that although a pedestrian’s conduct may be contributorily negligent, it does not endanger the driver of the vehicle or anybody else).

All of the judges of the Court of Appeal agreed that as the trial judge did not refer to Pennington in her judgment, she omitted to consider a significant factor when apportioning liability between the appellant and respondent. However, there was not a unanimous judgment on the extent of the appellant’s contributory negligence.

Macfarlan JA assessed the appellant’s contributory negligence at 35%. Meagher JA (with Tobias AJA agreeing) held that although the respondent could injure pedestrians by failing to keep a proper lookout, it was significant that he was only travelling 10 km/hour at the time of the collision and the only way in which he was negligent was failing to see the appellant as she walked across the access road. The appellant chose to cross the road where there was no pedestrian crossing and her “reasonable best” required her to stop before she stepped onto the access road so as to give a visual warning of her presence. On that basis, the appellant was found to be more responsible for the collision than the respondent and contributory negligence was assessed at 60%. The appeal was allowed.
The Facts

The plaintiff was a rear seat passenger in a motor vehicle driven by her former partner, the defendant, which collided with trees in the early hours of the morning in March 2007. At the time, the plaintiff was 21 years old and approximately 10 weeks pregnant with her second child. The plaintiff was thrown through the rear door and fractured her spine resulting in paraplegia and permanently confining her to a wheelchair. Her pregnancy had to be terminated. She subsequently commenced proceedings against the defendant for damages. Liability was denied on the basis that the plaintiff knew the defendant was heavily intoxicated when she chose to become a passenger in the car. The plaintiff also failed to wear a seatbelt.

The Decision

The court held that given the defendant’s state of intoxication, the accident was plainly caused by his negligent driving. The central issue in the proceedings was whether the plaintiff’s damages should be reduced for contributory negligence. The parties agreed that the CLA (SA) applied. The defendant argued that s47 CLA (SA) operated to impose a presumption of contributory negligence because the plaintiff knew that the defendant was intoxicated at the time she got into the car. The court found that as the defendant’s partner for the previous 3 years, the plaintiff must have had the capacity to sense when the defendant was inebriated. However, the evidence of the other passenger in the vehicle and the barmaid at the hotel did not suggest that the defendant was obviously affected by alcohol. The court noted that there was a complete lack of evidence about the defendant’s drinking pattern and his appearance and demeanour in the 2 hour period immediately before the accident. On the basis of that lack of evidence, the court held that the defendant failed to establish that the plaintiff was actually aware that he was intoxicated when she got into the vehicle as a passenger and consequently the fixed statutory reduction of 50% of the damages prescribed in s47(1) CLA (SA) did not apply.

In any event, the plaintiff argued that the fixed statutory reduction of damages under s47 CLA did not apply to her because she fell within exception s47(2)(b) “that she could not reasonably be expected to have avoided the risk”. The court agreed because the plaintiff was a 21 year old pregnant woman, with 2 older men at 2am in the morning in a strange place, stranded on the outskirts of town not knowing exactly where she was or how she would be able to return to her child in a motel room in town, she had no choice but to get into the car with the defendant. As a result, the defendant was not entitled to claim the fixed statutory reduction on account of contributory negligence on the part of the plaintiff.

The defendant asserted that the CLA (SA) did not override the common law that no duty of care was owed to the plaintiff in the circumstance that the plaintiff was aware that she was getting into a car with a driver who had been drinking. The court noted that for such an argument to succeed, the defendant must establish that the passenger actually knows and accepts an invitation to travel with an inebriated driver. The court pointed out the evidence did not establish that the plaintiff actually knew that the defendant was drunk and therefore this argument failed. The court held that it was not clear whether the CLA (SA) was intended to be a complete Code for tortious liability in the area of personal injury for motor vehicle accidents. The circumstances of this case were far from those which might invoke the ‘no liability’ defence and so it was not necessary for the court to decide whether it was available.

The court found that the plaintiff’s failure to wear a seat belt was a decision made impetuously and out of annoyance and not, as alleged by her, as a result of a malfunction of the seatbelt. A reduction of 25% for contributory negligence was made.

IN ISSUE

- Liability in negligence of heavily intoxicated driver to passenger
- Whether the plaintiff was contributorily negligent for being a passenger in a vehicle being driven by an intoxicated person and not wearing a seatbelt

DELIVERED ON 28 August 2012

READ MORE
The Facts
On 16 June 2008, the first appellant (then 14) and her sister (then 12), the second appellant, alighted from a bus on their way home from school. The appellants walked to the rear of the bus in order to cross the road. A vehicle driven by the respondent was approaching from the opposite direction. The first appellant ran across the road and attempted to cross in front of the respondent. The respondent observed the first appellant but was unable to apply his brakes in time. The respondent struck the first appellant and she suffered horrific injuries.

The Decision at Trial
The first appellant, through her tutor, alleged the incident was a “blameless motor accident” pursuant to s7A of the MACA (the Act). There was no issue that the accident was not caused by the fault of the respondent. The issue at trial was whether the motor accident was caused by “the fault of any other person”. The term “fault” is defined in s3 of the Act as “negligence or any other tort”. The respondent argued the first appellant caused the incident by failing to take reasonable care for her own safety (by running across the road without first checking it was clear). That is, the first appellant was guilty of contributory negligence and her conduct was the sole cause of the accident. The trial judge accepted this argument and the first appellant’s claim failed in its entirety. It therefore followed that the second appellant’s nervous shock claim also failed.

The Issues on Appeal
Whether the word “negligence” in the definition of “fault” for the purpose of s7A included non-tortious negligence such as contributory negligence.

The Decision on Appeal
The Court of Appeal held that the phrase “fault of any other person” refers only to the tortious conduct of that person. Therefore, the “person” referred to cannot include the injured person whose “fault” (that is, non-tortious contributory negligence) is excluded from the definition of “blameless motor accident” in s7A.

In relation to the issue of contributory negligence, the Court of Appeal noted that one of the purposes of the no fault provisions is to cater for the unsatisfactory situation “when children are penalised for behaving as children do”. The Court of Appeal held that the first appellant behaved as a 14 year old might do. Just because the first appellant departed from the standard of care for her own safety which the law imposed upon her did not automatically lead to a finding of contributory negligence of 100%.

However, taking into account all of the circumstances of the case, the Court of Appeal held that the first appellant’s damages should be reduced by 50% due to her contributory negligence. The second appellant also succeeded subject to the same reduction. The appeal was allowed.
The Facts

The plaintiff was struck by a vehicle driven by the defendant at 12:40am on 21 September 2007. At the time she was a pedestrian, wearing dark clothing, crossing from south to north on Gunnedah Road, Tamworth. The plaintiff was with 2 other people. They all had consumed a number of illicit drugs intravenously during the day and were well affected by those drugs at the time of the accident.

As the defendant approached the area where the accident occurred, he was travelling up an incline and approaching a round-a-bout that was well lit. He looked down at his dashboard to check whether his driving lights were off and did not see the plaintiff prior to colliding with her. Following the impact, he did not stop but continued into Tamworth and then he reported the matter to the police. The plaintiff sustained very serious injuries.

The Decision

The plaintiff had no recollection of the circumstances of the accident. She relied on expert evidence to establish that had the defendant had his lights on high beam he would have been able to detect her on the roadway and to stop before colliding with her. The plaintiff also argued that had the defendant been looking at the roadway he would have seen the plaintiff and he could have swerved to avoid a collision with her.

The court rejected the plaintiff’s expert evidence and held that the issue for determination was whether the defendant breached his duty of care by diverting his gaze from the roadway to check whether his driving lights were on, when there were 2 other ways to check (by the switch on the lever or by looking at the road in front of the car), the defendant drove in a manner which meant he did not know what was happening in the vicinity of the vehicle in time to take reasonable steps to react to those events. The defendant breached his duty of care by failing to keep a proper lookout. The court did not find it was a breach of duty by failing to use the high beam lights because the area was well lit and it was unlikely that having the high beam lights on would have enabled the defendant to see the plaintiff in time in any event.

The defendant argued that the breach of duty was not causative of the plaintiff’s injuries. The court agreed and determined that the plaintiff had a clear view of the defendant’s vehicle for a considerable distance. By entering the roadway the plaintiff created the hazard or the risk of harm. The defendant was travelling within the speed limit and had no reason to expect any pedestrian activity on the road at the point of impact. He would not have had the opportunity to see the plaintiff until she was well onto the roadway and would have had less than 3 seconds to react. The court was therefore not persuaded that the defendant’s negligence caused the plaintiff’s injuries. The plaintiff failed to establish factual causation and a verdict was entered for the defendant. The court would have assessed contributory negligence at 75% and awarded damages of over $800,000 if the plaintiff had succeeded.
The Facts

On 10 August 2009, the plaintiff suffered severe spinal injuries when he was trapped under a Toyota Hilux utility on a farm near Coffs Harbour in northern NSW. The utility was not registered or insured.

The plaintiff alleged that the utility had a defective handbrake, footbrake and tyres. The owner of the vehicle (the first defendant) and the Nominal Defendant asserted that the accident occurred because the plaintiff failed to apply the handbrake before he alighted from the vehicle and as a result it rolled onto the plaintiff carrying him down a slope to an area several metres below.

A core issue in the proceedings was whether the accident occurred on a “road” within the meaning of the MACA because even if the plaintiff was unsuccessful in establishing negligence against the defendants, he would be admitted into the Lifetime Care & Support Scheme (and consequently recover past and future loss of earnings) if the accident occurred on a “road”.

The Decision

The court was not satisfied on the balance of probabilities that the plaintiff applied the handbrake before he got out of the vehicle. The court was also not satisfied that the handbrake or footbrakes or tyres on the utility were defective. As a result, the plaintiff’s action was unsuccessful against both the first defendant and the Nominal Defendant. The plaintiff failed to establish that his injury was caused by the fault of the first defendant or that the first defendant was negligent and breached his duty of care. The plaintiff’s injury was caused by the plaintiff’s own failure to apply the handbrake and to leave the vehicle in gear before alighting from it.

Although the claim was unsuccessful, the court noted that the plaintiff would be admitted to the Lifetime Care and Support Scheme if the accident occurred on a “road”.

The court noted that the word “road” is defined in the MACA and the Road Transport (Vehicle Registration Act) 1997 as “an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles”.

After reviewing the evidence, the court noted that the accident occurred on a gravel track that led to a flat area of land. The gravel track was wholly within the farm privately owned by the first defendant. There were no fences, gates, grids, cowcatcher or signs that restricted or forbade entry to the farm. There was no invitation to the members of the public to purchase farm produce from the farm or to enter the farm for any other reason. Members of the public did not enter the farm as trespassers and did not use the sealed access road within the farm’s boundary. They also did not walk along, drive along or use in any way the gravel track. As a result, the court found that the gravel track was not “open to or used by the public” so as to constitute a road within the MACA.

A verdict and judgment was entered for the first and second defendant against the plaintiff.
The Facts

On 13 July 2007, whilst the applicant was under the influence of alcohol she accidentally reversed her motor vehicle into the respondent causing permanent damage to the respondent’s right foot and lower leg. Both parties were international university students from South Korea studying in New South Wales. Ostensibly to protect the applicant from possible criminal charges or deportation, the parties reported that the respondent had fallen down a flight of stairs. The respondent made a claim for medical expenses under her student health insurance policy for injuries resulting from falling down stairs. It was agreed between the parties that the balance of the respondent’s medical expenses would be paid by the applicant; however, the applicant failed to meet those payments. The respondent sought legal advice after she was advised by the applicant that a motor vehicle insurance claim could not be made due to the earlier fabrication put forward by the parties as to how the accident occurred.

Section 72(1) of the MACA provides that notice of a motor accident claim must be given within 6 months of an accident having taken place. Section 109(1) of MACA further provides that proceedings must be commenced within 3 years after the date of the accident, except with leave of the court. Leave may only be granted where, inter alia, a “full and satisfactory explanation” of the delay is given. A claim was eventually notified to the applicant’s motor vehicle insurer on 9 December 2009 and on 7 July 2011, the respondent sought leave to commence proceedings on the basis that she provided a full and satisfactory explanation for the delay.

The Decision at Trial

The trial judge was satisfied that the respondent provided a full and satisfactory explanation such that she was granted leave to commence proceedings out of time. It was held that a reasonable young woman living in a foreign country would be justified in agreeing to protect a close friend from potential criminal conviction.

The Issues on Appeal

The applicant sought leave to appeal on the basis that the respondent had not provided a satisfactory explanation for her delay in commencing proceedings.

The Decision on Appeal

The appeal was allowed. The Court of Appeal held that at an early stage the respondent was aware that there was likely to be an insurer to whom the accident should be reported. The respondent deliberately deceived her health insurer and received payments on the basis of that deceit. The failure to make a motor accident claim was not based on the belief that there was no claim to pursue, but rather because the respondent believed that by doing so she would cause adverse consequences to the applicant. The Court of Appeal concluded that although the respondent may have remained concerned for the welfare of the applicant, a reasonable person would have notified the insurer or taken advice from a solicitor.

Further, even though the respondent was living in a foreign country and unfamiliar with local motor accident laws, she nevertheless appreciated that there was an insurer to whom a claim could be made. The Court of Appeal ultimately decided that the explanation given by the respondent was not satisfactory, principally on the basis that reasonable behaviour cannot be based on conduct known to involve falsehood or calculated to mislead.
The Facts

The defendant, Busways North Coast Pty Ltd, owned and operated a school bus route near Kendall in rural New South Wales. On 11 May 2006, the bus dropped three school children at an undesignated bus stop on Lorne Road which was a narrow and undulating road with several blind corners. As the children crossed the road, they were struck by the plaintiff’s vehicle as it proceeded around a blind corner. One child suffered fatal injuries and the other two children were severely injured as a result of the collision. Multiple claims brought against the plaintiff by the families of the injured children were settled based on admissions made by the plaintiff that she had breached her duty of care owed to the children in each case.

In these proceedings the plaintiff sought contribution from the defendant on the basis that it had also breached a duty of care owed to the children. Her argument was essentially two-fold. Firstly, she alleged that the placement of the bus drop off location was unsafe due to the absence of warning signs and limited sight lines on the road. Secondly, she alleged that the actions or omissions of the bus driver in failing to warn the children of the danger and ensuring their safety in crossing the road also contributed to a breach of duty of care.

The Issues

The primary issue for determination was whether the defendant owed a duty of care to the children and if so, the apportionment of loss between the parties. Lastly, the court was required to determine whether the MACA applied, giving rise to an obligation on the part of the defendant’s insurer to provide indemnity pursuant to a Compulsory Third Party policy.

The Decision

The court held that the defendant owed a duty of care to the children to provide a safe drop off location and the use of an inherently dangerous location for a school bus stop constituted a breach of that duty. The court concluded that the defendant should have taken reasonable precautions to prevent the injuries and this included the use of an alternative site for the bus drop off. The defendant’s submission that there was no other practical location for the bus stop was strongly rejected and the court held that the children should have been dropped off where it was safe to do so, irrespective of the distance from their homes. Had an audit of the bus route been conducted, it would have indicated that the bus stop location was dangerous and should be suspended. Consequently, the children’s injuries were foreseeable and could have been prevented or minimised by taking these precautions. The defendant was therefore held liable for 20% of the damages paid by the plaintiff to the children’s families.

However, the court held that liability did not extend to the bus driver for failing to warn the children of the dangers of crossing Lorne Road as he had no way of apprehending the risk to the children on that particular day.

A restrictive interpretation of the MACA was adopted and it was held that liability did not arise by virtue of any fault on the part of the defendant or the driver in the use or operation of the bus. The MACA therefore did not apply and the defendant remained personally liable for the children’s injuries that were, in part, a consequence of its failure to provide a safe school bus route.
The Facts

On 30 April 2009 a motor vehicle driven by James Boot along the Princess Highway at Mount Moriac collided head on with a prime mover and trailer owned by Elmore Haulage Pty Ltd (Elmore). Boot died as a result of the collision, with the prime mover extensively damaged.

At the time of his death, Boot was 19 years of age. Earlier that evening he had spent time with friends who said later he had displayed no signs of depression. However, twenty minutes prior to the collision he made this entry on his Facebook page: “James Boot loves everyone forever. And is very sorry for everything :(

Boot’s vehicle was insured by Australian Associated Motor Insurers Ltd (the insurer). Elmore commenced proceedings against the insurer seeking damages on the basis that its insured (Boot) was liable in negligence for the collision and damage caused to the truck. In its defence, the insurer alleged that the loss was excluded under its policy because Boot had intentionally caused the collision. The policy excluded “loss or damage caused intentionally by you...”.

The court was asked to determine whether the evidence was sufficient to establish that Boot had intentionally collided with the truck and whether the insurer was entitled to rely on its policy exclusion.

The Decision at Trial

Despite the Facebook post, there was no evidence indicating he was depressed, suffering a mental illness or contemplating suicide on that day, or in the weeks leading up to it. There was also evidence that indicated Boot changed the course of his vehicle just moments before the impact, maneuvering it back to the correct side of the highway to avoid the collision. The reason for this last-minute manoeuvre may have included panic, instinctive reaction, awakening from dozing or an eleventh hour change of intention and would never be known, and the court was persuaded that Boot did not intend to commit suicide.

With respect to the policy exclusion, the court found it significant that the provision excluded “loss or damage caused intentionally” by the insured, in contrast to more traditional exclusions that exclude loss or damage caused by “deliberate or intentional acts” of an insured.

The unchallenged expert evidence was that a hypothetical person, in the position of Boot, intending to commit suicide would have been totally focused on bringing about his own death to the exclusion of all other considerations. The court therefore concluded that even if it were found that Boot had intended to commit suicide, the exclusion would not apply as there was no evidence of any intention by Boot to cause the damage suffered by Elmore.

The Decision on Appeal

The Court of Appeal agreed with the trial judge and found that on the balance of probabilities there was insufficient evidence to indicate that Boot committed suicide.

It also agreed that that even if that intention was established, the policy exclusion did not apply.

On its plain terms, the exclusion was directed to an intended result (i.e. “loss or damage”) and not to the action of the insured which produced that result. The focus of the clause was therefore not on whether the particular event which resulted in the loss was intended by Boot, but whether the loss was intentionally caused by him.

Given the undisputed expert evidence that Boot’s “total preoccupation” would have been with putting himself in the position in which death would inevitably have taken place, the insurer could not establish that Boot had any awareness of the probability, or even possibility, that his actions might cause the damage that was suffered.

The appeal was dismissed.
The Facts
On 6 December 2007 the respondent was injured when a metal discharge chute (which formed part of, but had separated from, a wood chipper machine) struck him as he was standing on the machine, causing him to fall and sustain serious injuries. At the time of the incident, Mr Whitehead, the director of the appellant, was operating a front end loader and attempting to position the chute so that it formed a complete connection with an out-feed sleeve attached to the chipper. Mr Whitehead instructed the respondent to stand on the machine and to use a sledgehammer to tap the chute into place.

The respondent brought a claim pursuant to s3A of the MACA.

The Decision at Trial
The front end loader was unregistered and uninsured for the purpose of the MACA. It was also a “vehicle” within the definition of that expression in s3. The trial judge accepted that the respondent’s injuries were caused by the fault of Mr Whitehead as the driver of the loader in its use or operation and that the respondent’s injuries were the result of the driving of the loader.

The Issues on Appeal
The appellant submitted that the respondent’s injuries were caused by a workplace accident not a motor vehicle accident. The issues on appeal were therefore whether the respondent’s injuries were caused “in the use or operation of the vehicle” and by “the driving of the vehicle” to satisfy s3A of the MACA.

The Decision on Appeal
The Court of Appeal held that there was no doubt Mr Whitehead was negligent in requiring the respondent to mount the machine for the purpose of attempting to tap the chute into position. Further, Mr Whitehead was negligent in manoeuvring the chute whilst the respondent was standing close by (with the not insignificant risk that any manoeuvring may separate the chute from the sleeve, allowing it to swing free and strike the respondent). As any such manoeuvring involved the ‘use or operation’ of the relevant portion of the loader, the respondent’s injuries were caused ‘in the use or operation of the vehicle’.

The more complicated question was whether the respondent’s injuries were as the result of the driving of the loader. The respondent’s evidence was that the loader was moving forwards when he was standing on the chipper.

The oral evidence given by Mr Whitehead at trial was that at the time the respondent hit the chute with the hammer, the loader was stationary. This was in contradiction to a written statement provided 3 years earlier. Although the trial judge did not reject Mr Whitehead’s evidence that the loader was in fact stationary with the brake on when he manoeuvred the chute over the chipper. Therefore, although the loader was being operated at the relevant time, it was not being driven in any relevant sense if it was otherwise stationary.

The Court of Appeal held that on this point, the trial judge was incorrect. The Court of Appeal noted that the movement of the front wheels referred to the turning of the wheels on their axis. Therefore, the Court of Appeal concluded that the trial judge did not reject Mr Whitehead’s evidence that the loader was in fact stationary with the brake on when he manoeuvred the chute over the chipper. Therefore, although the loader was being operated at the relevant time, it was not being driven in any relevant sense if it was otherwise stationary.

The Court of Appeal held that the requirements of s3A were not fulfilled and the appeal was allowed.
The Facts

At approximately 1.30am on 10 February 2008, the appellants attempted to cross a roadway to board a mini bus operated by the second respondent, Pastega. The minibus was parked in the emergency lane on the far side of the roadway with its hazard lights on. There were no other cars on the roadway. The road was a dual carriageway with 2 lanes in each direction separated by a wide median strip. Shrubs were planted down the centre of the median strip and it was separated from the roadway by a chain fence 60cm high.

As the appellants stepped onto the roadway after moving through the foliage in the median strip, they were struck by the first respondent’s vehicle. The appellants commenced proceedings to recover damages for the serious injuries they sustained.

The Decision at Trial

The presence of the minibus on the side of the road was not sufficient to have caused the first respondent to slow down before he did. Further, even if the first respondent had observed the appellants stepping over the fence, he would not have expected them to then step onto the road. The appellants commenced proceedings to recover damages for the serious injuries they sustained.

The Issues on Appeal

The central issue on appeal was whether the first respondent should have observed the appellants on the median strip in sufficient time to stop, and whether the second respondent created a dangerous situation by parking the mini bus in the emergency lane and whether he had a duty to warn of oncoming traffic.

The Decision on Appeal

The Court of Appeal held that the second respondent did not create a dangerous situation and therefore, he was in the position of a bystander. The Court of Appeal therefore held that the second respondent did not owe a duty of care to the appellants at all nor did he owe a duty to warn of the obvious danger of crossing the road. Even if the second respondent owed such a duty, it was not breached.

The appeal against the first respondent was allowed in part. The appeal against the second respondent was dismissed.
## PRIVILEGE

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The Facts

The plaintiff made an application for production of reports from the defendants, together with an order that the reports were not the subject of client legal privilege. The report was prepared by a firm of private investigators who were retained by lawyers for the defendants to investigate the plaintiff’s claims. The defendants were prepared to release part of the material sought by the plaintiff, but claimed client legal privilege with respect to the witness statements that formed part of the material. The plaintiff submitted that she was entitled to the entirety of the material by virtue of the provisions of s68 of the CLWA (Wrongs Act). That section is in substantially the same form as s27 of the PIPA.

The Decision

The court considered the following factors suggest that a witness statement forms part of an investigator’s report - whether the statement was taken by the same person/s who prepared the report; whether the statement taken at the time led to the creation of the report; whether the statement was used in preparation of the report; and whether the statement was attached to the report. The court noted that these circumstances are relevant in determining whether a witness statement forms part of an investigator’s report but are not necessarily the only relevant matters.

The court was satisfied that the witness statements were physically attached by staples to the report. The statements were obtained at the same time as the report was prepared and by the same person who prepared the report. The information in the statements formed the basis of the investigator’s report and was referred to in that report.

The court held that the witness statements formed part of the investigator’s report and as such, were liable to production to the plaintiff by virtue of s72(2) of the Wrongs Act.

IN ISSUE

• Whether witness statements form part of an investigator’s report

DELIVERED ON 27 July 2012

READ MORE
The Facts

In 2009, the ACCC (the applicant), commenced proceedings against Cathay Pacific (the respondent) and other airlines who provided air freight services to and from Australia, alleging that the airlines engaged in ‘price-fixing’.

During the course of discovery in February 2011, four copies of an email chain dated 22 September 2006 and two copies of a partially redacted email dated 20 September 2006, were inadvertently produced to the applicant by the respondent’s solicitors, DLA Piper. Both sets of documents contained privileged communications. Their production was inadvertent and DLA Piper had no instructions to waive privilege over the documents.

In June 2012, the applicant asked DLA Piper to confirm whether the respondent claimed privilege in respect of the emails. The respondent confirmed that it did. The applicant subsequently refused to return the privileged documents and asserted that privilege either did not exist or had been waived.

The Decision

The court upheld the respondent’s claim for privilege and made permanent orders for confidentiality.

In reaching its decision, the court considered the principles applicable to waiver of legal professional privilege set down in Mann v Carnell (1999) 201 CLR 1. In that case, the High Court held that disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client’s actions, or for some other purpose, will only waive privilege if the disclosure is inconsistent with the confidentiality which the privilege serves to protect.

The court found the disclosure of the emails should not be seen in this instance as the result of deliberate conduct by the respondent or its solicitors, because although the actions of DLA Piper were to be treated as the conduct of the respondent, it was accepted by the applicant that the disclosure by the respondent’s solicitors was inadvertent. The disclosure was therefore not deliberate and took the case out of the usual class of such cases where the conduct in question is deliberate.

The court also considered what conduct would waive privilege and held that waiver can occur in situations where either the privilege-holder brings a case which is in some way about the confidential communication or where they bring a case which lays open the confidential communication to scrutiny. In this case the latter had occurred.

The court held that there was not enough in this case for the ACCC to turn the disclosed information into some forensic advantage. The communications were privileged and their disclosure was inadvertent. The respondent did not otherwise by its conduct reveal the nature of those communications nor did they rely on them in pleading their case.

The court ordered the applicant to return or destroy the documents with 10 business days.
The Facts
The principal proceeding of this matter concerned the infringement and validity of an Australian Patent for a drug (including the production process) used to treat schizophrenia. During the course of preparing for the hearing of the matter, the parties, through their experts, conducted various experiments.

Apotex Pty Ltd (the respondent) filed an interlocutory application seeking the production of notes made by Professor Easton, an expert retained by the applicants, during the course of an experiment conducted by Associate Professor McGeary, an expert retained by the respondent.

The applicants provided a redacted version of Professor Easton's notes to the respondent's solicitors. The applicants resisted the production of all of Professor Easton's notes on the ground of legal professional privilege.

Professor Easton had sworn an affidavit in the principal proceeding that referred to the experiment conducted by Associate Professor McGeary and was based on the notes he had made at the time he observed the experiment. This affidavit was served on the respondent. The applicants also proposed to call Professor Easton as a witness at the trial of the matter.

The issue was whether privilege in the notes had been waived in circumstances where the notes had been relied upon by Professor Easton in preparation of his affidavit.

The Decision
The court was satisfied that Professor Easton's notes attracted legal professional privilege, or more specifically, litigation privilege, upon their creation. The court found that although there was no evidence that the applicants' solicitors had instructed Professor Easton to make notes of his observations, there was no doubt that the notes were made to enable Professor Easton to communicate his advice and opinions to the applicants' solicitors.

However, because Professor Easton relied upon his notes to prepare his affidavit commenting on the experiment, the applicants could not selectively disclose parts of the notes and maintain legal professional privilege over the balance. The notes represented a single subject matter: Professor Easton's observations of the experiment. Where a document deals with a single subject matter, a party cannot waive privilege over part of the document and assert a claim for privilege over the remainder.

The court held that while the notes were protected by legal professional privilege, there was an imputed waiver of privilege through their use in the preparation of Professor Easton's affidavit. The applicants were ordered to provide copies of all notes made by Professor Easton during his observation of the experiment conducted by Associate Professor McGeary to the respondent.

IN ISSUE
• Whether notes made by an expert while observing an experiment were subject to legal professional privilege in circumstances where the notes were used to make an affidavit filed in the proceedings

DELIVERED ON 23 November 2012
READ MORE  

The Facts

The principal proceeding of this matter concerned an alleged breach of fiduciary duty by a chairperson of the Owners Corporation of a large residential tower building arising out of his role in causing the Owners Corporation (the applicant) to enter into a particular agreement.

The respondent was the registered proprietor of several lots in the strata plan of the building. The respondent’s solicitors issued a subpoena to the applicant’s solicitors to produce various categories of documents. The solicitors produced the documents and by the consent of the parties, the court ordered that there would be no access to the documents until it made further orders on the issue.

The applicant filed a notice of motion seeking an order that general access to inspect the documents produced pursuant to the subpoena should be restricted. The applicant claimed that some of the documents were brought into existence for the dominant purpose of giving or obtaining legal advice, and as such, were subject to a claim for privilege either in whole or in part, depending on the document.

The respondent disputed the claim for privilege on the basis that the documents lacked the critical element of confidentiality, as they were obtained by the Owners Corporation for the benefit of the owners. The respondent also alleged that the documents were not privileged because the applicant and respondent shared a joint interest in the subject matter of the documents, as they related to the agreement which was the subject of the principal proceeding.

The Decision

The court held that in circumstances where the Owners Corporation was purporting to act on behalf of the lot owners in obtaining legal advice regarding it entering into an agreement that affected the interests of all lot owners, that advice was not confidential as between the lot owners and the Owners Corporation when it was obtained. Consequently, the applicant could not assert legal privilege over those documents as against the respondent.

The court went on to conclude that even if that view was incorrect, the applicant and the respondent had a common interest. At the time the advice on the agreement was given, the applicant was in a formal legal relationship with the lot owners and it was communicating with its solicitors about a matter in which the lot owners (including the respondent) shared an interest. Therefore, even if the claim for privilege was successful, the respondent was able to rely on the common interest privilege to have access to the documents provided to the applicant by its solicitors regarding the agreement.

IN ISSUE

• Whether certain documents produced pursuant to a subpoena were subject to a claim for privilege

DELIVERED ON 3 December 2012

READ MORE click here
The Facts

Ensham Resources Pty Ltd (Ensham) owned and operated an open cut coal mine. In January 2008, heavy rain resulted in inundation of the coal pits by water causing significant loss and destruction of Ensham’s property and interruption of its business.

On 22 January 2008 Ensham gave notice to its insurers Aioi Insurance Company Limited (Aioi) of a potential claim under an Industrial Special Risks Policy. The claim was investigated by Aioi and declined in September 2010 on the grounds of material non-disclosure. Shortly afterwards Ensham commenced proceedings against Aioi. Aioi instructed solicitors who retained a loss adjuster who in turn reported to the solicitors.

During the course of the proceedings, Aioi were ordered to discover loss adjuster’s reports prepared in 2008. Aioi claimed privilege on the basis that the reports were prepared in anticipation of litigation. Ensham argued that litigation could not have been anticipated in 2008 (more than 2 years before litigation was actually commenced), and also that the reports served a number of purposes and it could not be established that the dominant purpose of the reports was to assist or advise in relation to any anticipated litigation.

The Decision at Trial

The court at first instance determined that the reports were privileged. Ensham sought leave to appeal against this decision. The application for leave to appeal was referred to the Full Court of the Federal Court.

The Decision on Appeal

The Full Court reviewed the relevant principles governing disclosure and legal professional privilege. The majority noted that privilege will apply where a communication is created for the dominant purpose of use in existing or reasonably anticipated judicial or quasi-judicial proceedings. They concluded that reasonable anticipation of proceedings requires a real prospect of litigation, as distinct from a mere possibility. Litigation does not, however, have to be more likely than not.

The Full Court agreed that the purpose stated by those involved in the creation of the document is not necessarily conclusive and that relevant surrounding facts and circumstances must be considered. However, it considered that the evidence supported the trial judge’s finding that the relevant purpose was that of Mr Stockdale, the solicitor who had taken over the instruction of the loss adjusters.

The Full Court also agreed with the trial judge that the obligation of utmost good faith arising from the insurance contract was irrelevant to the question of whether the documents in question were privileged.

The Full Court also discussed when it is appropriate to grant leave to appeal against an interlocutory decision. The court confirmed that an applicant must establish that the decision in question is attended with sufficient doubt to warrant it being reconsidered and that substantial injustice would result if leave was refused supposing the decision at first instance to be wrong. The court found that the applicant had satisfied neither limb of that test.

Buchanan J in the minority did consider that the trial judge had made an error of principle by finding that the purpose of the insurer was irrelevant, but accepted that it was open to the trial judge to conclude that (having examined them) the loss adjusters’ reports were brought into existence for the dominant purpose of reasonably anticipated litigation. He would have granted leave to appeal but dismissed the appeal.
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Appeal against allegedly excessive damages award to female locomotive driver.
The Facts

On 19 December 2001, the appellant, Mr Todd Dean, was injured when a piece of timber struck him on the chin causing minor damage to a small number of his front teeth. The appellant consulted the respondent, Mr Mark Phung, a dental surgeon. Over a period of a little more than 12 months, the respondent carried out root canal therapy and fitted crowns on all of the appellant’s teeth. The treatment was undertaken during 53 consultations at a cost of $73,640.

The appellant commenced proceedings against the respondent for negligence and trespass to the person. The appellant alleged that the treatment was unnecessary and ineffective and that the CLA (NSW) did not apply because s3B(1)(a) provides that the CLA (NSW) does not apply to or in respect of the civil liability of a person “in respect of an intentional act that is done by the person with intent to cause injury”. On that basis, the appellant sought exemplary damages against the respondent.

The respondent admitted liability in negligence but, in relation to trespass to the person, relied on a defence of consent.

The Decision at Trial

Judgment was handed down for the appellant in the amount of $1,388,615.20.

The trial judge held that while the respondent’s treatment was incompetent, it had not been established, on the balance of probability, that the respondent’s involvement was dishonest and fraudulent. It was not established that s3B(1)(a) of the CLA (NSW) precluded application of the CLA (NSW) and therefore, damages were assessed under the CLA (NSW). Exemplary damages were therefore not available.

The Issues on Appeal

The issues for determination on appeal were whether the CLA (NSW) applied to the appellant’s claim; whether a defence of consent was available to the respondent; and whether the appellant was entitled to exemplary damages.

The Decision on Appeal

The Court of Appeal held that s3B of the CLA (NSW) applied to exclude the operation of the CLA (NSW). The Court of Appeal determined that it was sufficient to show that the respondent knew at the time of giving advice that the treatment was not reasonably necessary. The Court of Appeal held that the evidence supported a conclusion that the purpose of the respondent’s actions was to obtain a financial gain and not to provide reasonable treatment. On that basis, the claim did not fall within the scope of the CLA (NSW) and exemplary damages were available.

The Court of Appeal then had to consider whether the defence of consent was available in answer to the action in trespass. Although the appellant accepted that he had consented to the treatment, he claimed that the consent was dishonestly & fraudulently obtained. The Court of Appeal noted that where an issue of consent arises, the defendant bears the onus of establishing valid consent. The Court of Appeal held that if it could be objectively shown that a procedure carried out was not capable of therapeutically responding to the appellant’s condition, there was no valid consent.

In relation to exemplary damages, the Court of Appeal noted the authorities establish that exemplary damages may be awarded where the conduct in question is reprehensible, high-handed, outrageous or insulting. The Court of Appeal was satisfied that exemplary damages were warranted and re-assessed damages in the amount of $1,743,000, including $150,000 for exemplary damages.
The Facts

The plaintiff injured her back on 20 March 1999 (the incident) while lifting a carton of crockery in the course of her employment with the defendant. The defendant admitted liability for the incident but disputed the extent of the plaintiff’s injuries and consequent disabilities. The plaintiff was 24 years old at the time of the incident and had commenced working for the defendant as a home wares assistant in 1995.

The plaintiff had previously sustained injuries to her back in 1997 and 1998. Her evidence was that on those occasions her pain lasted no longer than a day. Following the incident the plaintiff sought treatment and returned on restricted duties. On 11 February 2000, again in the course of her employment, she suffered a further back injury while moving pre-packaged Venetian blinds. She sustained a further similar injury on 11 August 2000 when lifting a chair.

The plaintiff commenced her own interior design business in 2001 while still working for the defendant. In May 2002 she suffered an aggravation of her injury while lifting pot plants, although this was minor with no continuing effects.

In April 2003 the plaintiff ceased employment with the defendant and commenced her first graduate architecture job. While her duties were primarily desk based, she experienced pain and reduced her hours. In July 2003 she resigned due to the amount of sitting required. The plaintiff obtained a Bachelor of Architecture on 31 July 2003. She commenced another job with a firm of architects on 24 November 2003 and received annual salary increases.

The plaintiff underwent an anterior decompression and total disc replacement in October 2007. Her pain improved and she returned to reduced hours a month later. She then moved to Queensland and obtained a higher paying position. However, she left this position in mid 2008 due to increasing pain. She continued to take strong pain killers, underwent several nerve block and CT guided facet joint injections and began experiencing panic attacks.

In June 2008 the plaintiff commenced part time lecturing at QUT. She also obtained new employment with Hassell Architects but resigned in October 2009. She then began working for herself as an architect, which she was continuing with at the time of trial.

Evidence as to the plaintiff’s earning capacity was provided by a director of CCJ, which employed the plaintiff from November 2003 to January 2008. As a director of that firm, the plaintiff would have earned $100,000 per year with annual bonuses of about $30,000.

The plaintiff and the defendant both obtained reports from various medical specialists. The evidence presented on behalf of the plaintiff was that her condition was substantially due to the injury she sustained in the incident and did compromise her ability to work full time as an architect. The evidence obtained by the defendant indicated that the incident was only a minor contributing factor to the plaintiff’s condition and that her ongoing symptoms were due to degenerative disease of her lumbosacral spine. There was also a risk of her suffering a similar injury or requiring surgery even if the incident had not occurred.

The Decision

The plaintiff impressed the court as a credible witness. It accepted that there was a continuity of symptoms from the incident date to the time of surgery and held that the plaintiff’s continuing pain after surgery was the result of either accelerated facet joint degeneration caused by the prosthetic disc or a change in the intervertebral space caused by the insertion of the prosthetic disc.

The court preferred the evidence of the plaintiff’s medical experts as to the cause of her condition.
symptoms. Their evidence accorded with the plaintiff’s own account of her symptoms, including in relation to the previous incidents. The plaintiff’s experts’ opinions also explained the continuity of symptoms. The court was not convinced by the defendant’s expert evidence on this point.

The court held that the plaintiff had endured years of discomfort and pain, as well as emotional and psychological harm. At the time of the incident she was at the beginning of her professional life and had to relinquish employment positions that she loved. The court found it improbable that the plaintiff would work until age 67. Common sense indicated that the continuing pain and disability would weigh more heavily on her as she aged and a retirement age of around 58 was probable.

The court calculated the plaintiff’s future economic loss on the basis of a residual earning capacity of $94,825 gross. It accepted CCJ’s evidence in relation to her potential remuneration. The court also applied a 15% discount for vicissitudes but did not allow a further reduction for the probability that the plaintiff’s back was likely to cause her problems even if the incident had not occurred, or on the basis that she would not have excelled in her profession. It held that the evidence in relation to the former was speculative and the probability was that she would not have suffered a similar injury. The evidence of the plaintiff’s ability as an architect was very strong and the court had no doubt that she would have achieved an income at least equal to that of a partner at CCJ.

The plaintiff was awarded total damages of $1,314,881.75, which included $170,000 for general damages.
The Facts
In 2003, a plane crash killed 2 passengers and injured the pilot and remaining 3 passengers. The passengers were all employed by Nautronix and were experts testing marine detection equipment intended at the time of the accident to be sold to the Australian navy.

The incident was caused by the negligent navigation of Mr Penberthy, the pilot and the deficient design of a plane part by Mr Barclay, an engineer. Mr Penberthy was employed by Fugro Spatial Solutions Pty Ltd (Fugro).

Nautronix, the 3 injured passengers and the spouses of the deceased passengers commenced proceedings against Mr Penberthy, Fugro and Mr Barclay.

The Decision at Trial
The trial judge found that the pilot and his employer Fugro were liable to Nautronix, the injured passengers and the spouses. However, whilst the claims against Mr Barclay by the 3 injured passengers and the spouses of the deceased succeeded, the claim by Nautronix did not. The court found that while Mr Penberthy knew of the special purpose and work being undertaken by the passengers with respect to considering Mr Penberthy's breach of duty.

Mr Barclay and Mr Penberthy appealed and Nautronix cross-appealed.

The Issue on Appeal to the High Court
The High Court had 3 primary issues to consider. Firstly, did Mr Penberthy (and Fugro vicariously) owe a duty to avoid pure economic loss flowing from the loss of services of the 3 injured employees? Secondly, should the rule in Baker v Bolton (1808) 170 ER 1033 that a person cannot recover damages for the death of another.

Mr Barclay and Mr Penberthy appealed and Nautronix cross-appealed.

The Decision on Appeal to the High Court
In relation to its pure economic loss claim arising from injuries to its key personnel in the incident, Nautronix had to establish that the relevant party owed a duty of care and further that Nautronix was vulnerable in that it could not protect itself from the foreseeable harm of their negligence.

The High Court found that both Mr Penberthy and his employer Fugro were liable to Nautronix in negligence and under the action per quod servitium amisit, which had not been argued until the High Court hearing. The High Court had regard to the knowledge of Mr Penberthy of the special purpose and work being undertaken by the passengers with respect to considering Mr Penberthy’s breach of duty.

Mr Barclay was also found liable under the action per quod servitium amisit.

The High Court reaffirmed the Court of Appeal finding that the rule in Baker v Bolton prevented any claim by Nautronix with respect to its loss suffered due to the death of 2 employees.

IN ISSUE
• Whether damages are recoverable for pure economic loss suffered by an employer due to injury to employees
• Whether an action in per quod servitium amisit exists in Australian common law
• Whether an employer can recover damages for the death of an employee

DELIVERED ON 2 October 2012
READ MORE
The High Court held that the action of *per quod* still forms part of the common law of Australia. An action *per quod* provides a remedy where there is a wrongful invasion of the employer’s quasi proprietary right held with respect to the services his servant is obliged to provide to him. An infringement of that right entitles the employer to recover damages. The High Court declined to subsume the principle into the general law of negligence and stated that the measure of damages was the cost of replacing the employees, less the wages that would have been paid to the injured employees, not the loss of profits.

*Barclay v Penberthy*  
[2012] HCA 40
The Facts

The appellant claimed damages from the respondent for trespass to the person arising out of a sexual assault that occurred in January 2002. The respondent was convicted on a single count of unlawfully and indecently dealing with the appellant.

The Decision at Trial

Liability was not in issue at trial. Quantum was required to be assessed. The appellant was awarded damages of $146,027.83 (including interest) plus costs.

The Issues on Appeal

The appellant’s grounds of appeal related to the District Court’s findings with respect to her psychiatric condition and the effect these findings had upon its assessment of damages, as well as the failure to award aggravated and exemplary damages. The appellant sought an order for her damages to be re-assessed in the District Court.

The Decision on Appeal

The Court of Appeal held that it was evident from the trial judge’s reasoning that damages were assessed on the basis that the appellant had suffered some psychiatric injury as a result of the respondent’s conduct. However, the appellant’s damages award also took into account the trial judge’s finding that the appellant would probably have had significant psychiatric problems notwithstanding the respondent’s conduct due to her family history and a past relationship.

The Court of Appeal also held that the trial judge was not constrained as to the use that he was entitled to make of the appellant’s documentary evidence tendered at trial for deciding whether or not to accept her evidence on factual matters or for assessing the credibility of her evidence generally.

The Court of Appeal agreed with the trial judge’s findings that the appellant was not entitled to an award for aggravated or exemplary damages.

For aggravated damages to be awarded, it must be established that the manner or circumstances in which the respondent’s wrongful conduct was carried out increased the appellant’s suffering. The appellant did not identify evidence which established that there was actual increased suffering. Further, the trial judge had already made an allowance for a number of the features that the appellant highlighted in support of her claim for aggravated damages (the appellant’s youth, the respondent’s age in comparison to the appellant’s at the time of the incident, the respondent’s position of authority as an employer and his persisting in his conduct despite protest from the appellant) under general damages.

The appellant challenged whether the “if, but only if” test for awarding exemplary damages applies in Queensland. This test is that if a compensation award is inadequate to punish a person for outrageous conduct, then a court can award some larger sum to indicate disapproval of the conduct. The trial judge concluded that he ought to apply that test and in doing so he determined not to award exemplary damages to the appellant. The Court of Appeal held that the trial judge was correct to apply the test. Of particular significance to the Court of Appeal was that the test has been applied by other Australian and intermediate courts of appeal. The Court of Appeal dismissed the appellant’s appeal.

IN ISSUE

- Whether at trial the District Court failed to take into account the appellant’s psychiatric condition and what effect this had upon the assessment of the appellant’s damages
- Whether the District Court erred in not awarding the appellant aggravated and exemplary damages.

DELIVERED ON 19 October 2012

READ MORE click here
**The Facts**

In November 2008, the plaintiff was working as a teacher’s aide at a high school assisting children with mental illness. As part of her occupational education, the plaintiff attended a Youth Conference at the Coolangatta Estate Winery which was owned by the defendant. The conference took place on 6 and 7 November 2008. In the early hours of 7 November 2008, the plaintiff fell backwards over a wall and suffered a right shoulder injury and consequent depression. She sued the defendant for damages for those injuries.

**The Decision**

The defendant did not make any submissions to resist a finding of breach of duty and the court was satisfied that the absence of lighting and a rail on the wall constituted a foreseeable risk which was not insignificant and which a reasonable person in the defendant’s position would have guarded against. The court was also satisfied that the plaintiff’s injury would not have occurred but for the breach of duty.

The central issue in the proceedings was whether the plaintiff was intoxicated when the accident occurred and whether s50 CLA (NSW) operated to relieve the defendant of liability.

The plaintiff argued that she was not intoxicated at the time she fell but the court did not accept her evidence on the amount of alcohol she had consumed during the course of the evening and found that she was intoxicated and under the influence of alcohol at the time she fell over the wall.

The question for the court to decide was whether, within the meaning of the section, the plaintiff was intoxicated to such an extent that her capacity to exercise reasonable care and skill was impaired. The court held that the answer depended on the circumstances – specifically on what the plaintiff was doing at the time. In this case, the plaintiff was merely straightening up after bending down – she was not, for example, operating machinery, driving a car or flying a plane. The court was not convinced, given that there was no evidence of slurred speech, staggering gait and glazed eyes, that the plaintiff’s capacity to exercise reasonable care and skill was impaired.

The court therefore held the defendant did not establish the requisite degree of impairment and also that the accident was likely to have occurred even if the plaintiff had not been intoxicated.

Nevertheless, the court’s finding of intoxication triggered the application of s50(3) CLA (NSW) to the effect that there is a presumption of at least 25% contributory negligence unless the court is satisfied that the intoxication did not contribute in any way to the cause of the injury. The court was not so satisfied. The court determined that had the plaintiff not been intoxicated she may well have been able to better control her movements and been able to recover from the loss of balance.

Contributory negligence was assessed at 40%.

**IN ISSUE**

- Whether the absence of lighting and a rail on a wall was a breach of duty
- Whether the plaintiff’s intoxication was a complete defence to the claim

**DELIVERED ON** 9 November 2012

**READ MORE** [click here]
The Facts

In 2006, the New South Wales Department of Education and Training (the Department) conducted an investigation into certain complaints that had been made against the respondent. The respondent was dissatisfied with their findings and in April 2007, she commenced proceedings in the New South Wales Supreme Court seeking orders to set aside their decision.

The Supreme Court proceedings were settled by the execution of a deed between the Department and respondent dated 28 March 2008. Pursuant to the deed, the Department was required to set aside their findings within 14 days. The Department failed to do this and in August 2010, the respondent commenced District Court proceedings against the Department pursuant to the Crown Proceedings Act 1988. The respondent alleged that she suffered an exacerbation of a psychological injury and injury to her personal reputation as a result of the Department’s failure to comply with the terms of the deed. She claimed damages under the CLA (NSW) for her injuries, pain and suffering, humiliation, distress and injury to her reputation.

The Decision at Trial

The Department admitted that it had breached the terms of the deed. However, the trial judge found that the respondent had failed to establish that the breach of the deed had caused her any loss. The trial judge held that the respondent had not established that she had suffered damage which surmounted the statutory threshold prescribed by s16 of the CLA (NSW) which states that no damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of the most extreme case.

Despite this, the trial judge awarded the respondent the sum of $10,000 for “nominal damages” in respect of the Department’s breach of the deed. The Department appealed the decision.

The Issues on Appeal

The Department argued that the respondent was not entitled to nominal damages because her claim was for personal injury damages within the meaning of that term in the CLA (NSW). The Department submitted in the alternative that the award of the trial judge was excessive and did not reflect the token nature of nominal damages.

The Decision on Appeal

The Court of Appeal allowed the appeal and substituted the amount of $100 for the previous award of $10,000.

The Court of Appeal considered that the respondent was entitled to nominal damages on the basis that they were not “monetary compensation” and therefore not within the meaning of an “award of personal injury damages” in the CLA (NSW). The Court of Appeal specifically noted that nominal damages were vindictory not compensatory and, as a consequence, a token sum is awarded. The Court of Appeal held that the amount of $10,000 awarded by the trial judge was clearly not a token amount and warranted appellate intervention. After reviewing other cases where nominal damages were awarded, the Court of Appeal determined that the appropriate amount to award as a token of the breach of contract was $100.
The Facts

The plaintiff attended the first defendant’s premises, a football and social club, to have dinner with her family. As the plaintiff stood at the reception counter, her 6 year old daughter was standing to her right side at the counter such that the child’s head was below the level of the counter. The plaintiff’s daughter raised her arm and placed it under the counter and the plaintiff heard a loud electrical noise and smelled burning flesh and hair as the child screamed. The plaintiff then turned and touched either her child or the counter and she herself felt a blow to her hip. The plaintiff observed her daughter to be stiff and unmoving and she pushed herself and her daughter off the counter and they fell to the ground. A visible burn was evident on the daughter’s wrist and arm. It was admitted that the plaintiff and her daughter suffered electric shocks due to the wiring of neon lighting installed beneath the reception counter being defective. The second defendant, Focus Signage Pty Ltd, had performed electrical work on the lighting.

The Decision

Judgment was given for the plaintiff against both defendants. The first defendant had resisted any finding of liability against it on the basis that it had retained an appropriately qualified contractor to install and maintain the lighting. It argued there was no vicarious liability because of the independent contractor relationship. The second defendant did not dispute findings that its electrical work was non-compliant. The court found that the first defendant was not to be held responsible for the defective workmanship of a contractor however, other evidence indicated that the first defendant had knowledge of the potential hazard of unguarded neon lighting under the counter.

There was evidence of a prior incident where a child had put their hand into the area of the signage prior to the subject incident, causing damage to the signage which required repair. This was sufficient to establish that the first defendant was aware that the area in which the lighting was installed was accessible and presented a hazard to children. It was therefore found that the first defendant ought to have recognised the foreseeable risk of injury to children and that steps should have been taken to guard against this foreseeable risk by enclosing the area housing the lights to prevent inadvertent access to the area. It was held that this would have avoided the incident causing injury. Liability was apportioned 70% to the second defendant contractor and 30% to the first defendant.

There was significant dispute on the evidence on the quantum of the claim. The plaintiff claimed to be suffering a significant post-traumatic stress disorder. The evidence of 2 independent psychiatrists was in direct conflict as to whether any psychiatric injury was present. The court found that the consistency of the plaintiff’s complaints, the corresponding diagnoses of her treating practitioners and the absence of any suggestion that she had lied or overstated her position in evidence persuaded the court that the plaintiff did suffer a psychiatric injury. A significant award of $150,000 for general damages was given. The plaintiff was awarded $512,781.09 in total.
The Facts
On 8 June 2005 Benat Larrasquet and Julien Brettes sustained personal injuries when the van in which they were travelling was involved in a head-on collision with a vehicle being driven in the opposite direction by the appellant. Both completed a Notice of Accident Claim Form which was served on the respondent insurer (the insurer). The insurer settled the claims at compulsory conference paying Mr Larrasquet (the driver) $42,539.60 and Mr Brettes (the passenger) $1,221,567.26.

The insurer brought proceedings to recover those amounts from the appellant pursuant to s58 of the MAIA. This provision entitles an insurer to have recourse against its insured in respect of any costs reasonably incurred if, relevantly, the insured at the time of the accident was “unable to exercise effective control of the motor vehicle because of the consumption of alcohol”.

The Decision at Trial
The trial judge concluded that the appellant had been unable to control his vehicle at the time of the collision because of his consumption of alcohol. The trial judge also concluded that the amount paid by the insurer to Mr Larrasquet was within the range that could have been achieved had the matter gone to trial. He gave judgment for $721,567.22 for Mr Brettes claim after deducting an amount of $500,000.00 for future economic loss.

The Issues on Appeal
The appellant challenged the settlement sum paid to Mr Brettes arguing that the insurer had not demonstrated that it had reasonably incurred those costs. In particular, three components were identified as being unreasonable – future impairment of earning capacity, future out of pocket expenses and future care.

The Decision on Appeal
The Court of Appeal concluded that the trial judge ought to have considered it reasonable of the insurer to have allowed a sum to represent loss of future earning capacity. At trial, mention was made of $200,000 on behalf of the appellant. No figure was submitted by the insurer. The insurer had been content to accept the total figure as reduced by the trial judge. The trial judge was correct to have found that the insurer reasonably incurred the amounts representing future out of pocket expenses and for future care. Any weaknesses in these heads of damage which had not been reduced by the trial judge were amply covered by the exclusion of any amount for loss of future earning capacity.

The appellant had sought to identify error on the basis that if one part of the amount paid was not “reasonably incurred”, none could be recovered pursuant to section 8 of the MAIA. The Court of Appeal held that although in the past a global sum to compensate for personal injury was used or practised, it was now well established that indication must be given of how much of the total award has been allocated to recognised heads of damage. This allows errors to be readily identified and separate out the parts of the judgment that attract interest.

The appeal was dismissed.
The Facts

The respondents owned and conducted a tomato farming business near Bundaberg. A fault in the air conditioning unit on top of a Winnebago motor home located on the business premises caused a fire which destroyed the respondents’ packing shed and contents.

The Decision at Trial

The manufacturer and importer of the air conditioning unit (first and third appellants respectively) and the dealer who sold the Winnebago (the second appellant) were all found liable at first instance and were ordered to pay damages to the plaintiff in the amount of $14,757,601.34.

The Issues on Appeal

The issues on appeal were whether the loss of profits from the business after the sale of the land was caused by the fire and whether by failing to recommence the tomato farming business, the second respondent failed to mitigate its loss.

The appellants argued that had the respondents immediately had the shed rebuilt, the ability to pack and distribute tomatoes would only have been lost from the 2004 autumn and spring crops. The sale of the land by the second respondents precluded the first respondent from resuming the tomato farming business. Accordingly, the appellants would only be liable for loss of profits from 2 crops in 2004 while the packing shed was being rebuilt.

The appellants also argued that the second respondent had received a windfall in selling the farm and had, through the company, also been awarded net profits from operating the business.

The Decision on Appeal

The Court of Appeal looked at the evidence at first instance, including that the farm would have taken approximately 18 months to become fully operational and approximately 2 years before any monetary returns were likely. A large sum of money would need to have been borrowed to restore the business and it would have taken time for the company to re-establish a client base and workers. Mrs Fulcher’s ability to return to her position in the company was in question as a result of her distress and emotional difficulties since the fire.

It was accepted by the Court of Appeal that any decision by the respondents to re-commence the tomato farming business required an acknowledgment that the business may not regain its profitability and/or production volume for an indeterminate period and employing a manager to “cover” for Mrs Fulcher would increase overheads as well as a risk of failure. It was held that the company acted reasonably in all the circumstances and there was no error in the trial judge’s finding that a failure to mitigate loss was not established.

With respect to the “windfall” of $4,000,000 from the sale of the land, the Court of Appeal noted that the company had no interest in the proceeds of sale as the land was owned privately by the first respondents personally. The Court of Appeal found no error in the trial judge’s treatment of the benefits from the sale of the land.

However, the Court of Appeal did find that the trial judge erroneously included in the award of damages the sum of $541,772 for loss of sugar cane revenue. This business was not destroyed by the fire and this loss was caused by the sale of the land.

The Court of Appeal varied the orders made by the trial judge by reducing the award for economic loss to $9,060,178 (deducting the loss of sugar cane revenue) and adjusting interest accordingly. The appellants were ordered to pay for 50% of the respondents’ costs of the appeal.

IN ISSUE

- Appeal – damages awarded for loss of profits after sale of land and whether respondent failed to mitigate loss

DELIVERED ON 2 April 2013

READ MORE click here
The Facts

The plaintiff’s four day old son passed away as a result of the negligence of the defendant. The plaintiff commenced proceedings against the defendant for damages for nervous shock arising from the loss of her newborn son. The defendant admitted liability and that the plaintiff had suffered a recognisable psychiatric injury as a consequence of its negligence.

The only issue for the court’s determination was the quantum of damages to be awarded.

The Decision

The court accepted that the death of the plaintiff’s son changed her substantially. She was formerly optimistic, ambitious and willing to accept responsibilities. However, following her son’s death she avoided social activities and became very anxious. The court noted a number of areas in the plaintiff’s life that demonstrated her capacity to function well in the future but recognised that the plaintiff remained vulnerable to stressors and prone to anxiety. The plaintiff was awarded non-economic loss damages of $214,000 by reference to 40% of the most extreme case.

The court did not accept that the plaintiff definitely would have returned to full-time work if her son had survived, as they thought it was likely that the plaintiff would have worked part-time following the birth of her other children. However, the court was prepared to accept that, but for her son’s death, she would have been in a better position to apply for a promotion and achieve a higher level position at ANZ. The court awarded the plaintiff the base figure of $47,044 as a fair indication of her likely past loss of wages (plus interest and superannuation).

In respect of future economic loss, the court was unable to take a mathematical approach to its assessment because of the difficulty in assessing whether the plaintiff would have returned to full-time work. The court considered the event was traumatic and they should account for a diminution of the plaintiff’s earning capacity in that she would be more susceptible to life’s adverse vicissitudes. The court allowed a “buffer” of $70,000 for future economic loss. The plaintiff’s award for past and future treatment was uncontroversial. The court allowed six hours of care per week for six months for the period immediately after the incident, but made no allowance for future care on the basis that many couples would like paid help but in this case the plaintiff had not showed that her need for paid care was as a result of the defendant’s negligence. The plaintiff was awarded total damages of $366,903.60.
The Facts

The respondent, aged 32 years, was injured by a motor vehicle as she crossed a marked pedestrian crossing in Mackay on 14 April 2009. As a result of the accident the respondent suffered injuries to her neck, shoulder, hip and head as well as a significant psychiatric condition. The respondent was unable to return to her employment as a locomotive driver at the Proserpine Sugar Mill until late June 2009. During the 2011 to 2012 year the respondent earned, on average, $800 per week in that employment.

Prior to the accident the respondent professed an ambition to work as a locomotive driver at large infrastructure and mining organisations where a substantially higher income could be earned. In her claim for damages the respondent produced evidence that her former co-workers earned between $1,800 and $3,600 per week in locomotive positions at those organisations.

The Decision at Trial

On the basis of a 15 to 20 per cent whole person impairment, the trial judge awarded damages to the respondent in the sum of $528,925.56. The amount for future economic loss accounted for $411,000 of the total damages which was calculated on the basis of a loss of $500 per week over the respondent’s remaining working life. It was held that as a result of her residual disabilities the respondent was unlikely to realise her ambition to pursue and carry out the types of work to which she aspired.

The Issues on Appeal

The applicant sought leave to appeal on the basis that the damages awarded by the trial judge were manifestly excessive. The applicant also disputed the trial judge’s attribution of the respondent’s shoulder impairment to the accident contending that it was not reasonably open on the evidence. The applicant submitted that the respondent’s failure to seek higher paying work prior to the accident and the absence of any disability caused by the accident meant that future economic losses should be reduced to $100,000.

The Decision on Appeal

The Court of Appeal unanimously dismissed the appeal on the basis that the award of damages was neither erroneous nor excessive. The Court of Appeal held that the trial judge logically compared the respondent’s financial situation with those of her former co-workers who had successfully sought and received higher remuneration for their skills. Adjustments were properly made to reflect the chance of obtaining the type of work that the respondent aspired to undertake and the assessment was appropriate in inherently uncertain circumstances. Any attempt to use greater precision in order to calculate the loss would have been inappropriate and artificial.

The Court of Appeal held that the trial judge did not fail to provide reasons for his reliance on the medical evidence provided by one orthopaedic surgeon over another. The trial judge reasonably rejected the applicant’s submission that the respondent’s shoulder injury was not attributable to the accident on the basis that the respondent gave consistent oral evidence of experiencing shoulder pain from the time of the accident.

IN ISSUE

- Whether damages awarded for future economic loss resulting from a motor vehicle accident were manifestly excessive
- Whether the trial judge incorrectly attributed a shoulder injury to the damage suffered by the respondent

DELIVERED ON 14 June 2013

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Whether identity of defendant was a material fact of a decisive character.

PIPA

243  Coles Supermarkets Australia Pty Ltd v Sharon May Mead & Ors [2013] QSC 37
Whether an injury was an injury in relation to which the MAIA and/or the PIPA applied.
The Facts

Jeffrey Ryan (the first plaintiff) was a director of Reliance Pools International Pty Ltd (the second plaintiff).

The second plaintiff had been engaged to construct a swimming pool on the roof of a 7 storey construction site. The contract required that the principal provide concrete pumps to get the concrete up to level 7. The principal contracted AF Concrete Pumping Pty Ltd (the first defendant) to supply the pump and pump the concrete to the 7th storey.

C & J Concrete Sprayers Pty Ltd (C & J) was engaged to assist with the construction of the pool. C & J supplied a second pump and was responsible for the concrete spraying.

The first plaintiff was injured when concrete was blown or pushed through a hose pipe directly into his face and head. He sustained a closed head injury, post concussion symptoms, a shoulder injury, facial burns, a broken tooth and shrapnel injuries with fragments embedded in his face and eyes. He also was diagnosed with cognitive problems and intense fatigue.

As C & J had gone into liquidation, the claim was brought directly against its insurer, GIO General Limited (the second defendant).

Both defendants denied liability.

The first plaintiff brought an application pursuant to s82 of the Civil Procedure Act 2005 (NSW) (CPA) seeking an order that the defendants make payment to him of part of the damages sought to be recovered in the proceedings.

The Decision

The court noted that s82 CPA allows a court to make interim payments in certain circumstances which include where a court is satisfied that if the proceeding went to trial, the plaintiff would obtain judgment for substantial damages against the defendants. This section provides that the court is not to make such an order if the defendant is not insured with respect to the risk or if the defendant would, having regards to its means and resources, suffer undue hardship if such payment were to be made. The section also provides that the court can order a defendant to make payment in an amount it thinks fit but not exceeding a reasonable proportion of the likely damages.

The court found that the section required the plaintiff to do no more than show that it was more probable than not that he would succeed at trial in obtaining judgment for substantial damages. This determination was to be made on the basis of the evidence put before the court as to the substantive issues and not on the basis of any speculation as to what might or might not be the evidentiary position at the final hearing.

The Workplace Health & Safety investigation was also critical of both the first defendant and C & J for failing to develop a safe work method statement for the particular task which would have identified the need for the line to be cleared in accordance with a detailed code of practice and more importantly, for the line to be secured.

There was expert evidence on behalf of the plaintiffs that the first defendant was entirely responsible for the operation of the pump and supply of concrete to the pool area where it was to be sprayed by C & J. Further, the first plaintiff had informed a representative of the first defendant that the line was left unsecured and despite this, the first defendant proceeded to blow concrete through the pump line.
Ryan v AF Concrete Pumping Pty Ltd
[2012] NSWSC 723

The court therefore found that there was no basis in this case on which the first defendant could avoid liability.

Although there are allegations made against C & J, and criticisms of its conduct by Workplace Health & Safety, the judge found that the liability position of C & J was less clear.

Accordingly, the court ordered that the first defendant (but not the insurer for C & J) make an interim payment to the first plaintiff.

The court found that the likely damages to be obtained by the first plaintiff would be substantial and therefore it was ordered that the first defendant pay to the first plaintiff the sum of $100,000 by way of an interim advance payment.
Energize Fitness Pty Ltd v Vero Insurance Limited  
[2012] NSWCA 213

The Facts

A gym member was rendered a paraplegic when a bar-bell fell heavily onto his back while he was using gymnasium equipment at the applicant’s premises. He sued the applicant. The applicant issued third party proceedings against two entities it considered may have manufactured the machine involved in the incident (‘Manufacturing’ and ‘Equipment’). By the time of the application both entities had been deregistered.

The applicant sought leave to join the third parties’ insurer directly in accordance with the LR (MP) s6.

The Decision at Trial

The trial judge proceeded on the basis that before leave is given to join an insurer under s6 of the LR (MP) there must be: an arguable case against that other person (the insured); an arguable case that the policy responds; and a real possibility that if judgment is obtained, that other person would not be able to meet it.

The trial judge held that the evidence before him was insufficient to demonstrate an arguable case against Manufacturing which was the manufacturer of the machine and refused leave to join Vero as the insurer of Manufacturing.

The trial judge held that the evidence before him was insufficient to demonstrate an arguable case that the equipment was manufactured before the manufacturer was incorporated. There was no arguable case that Vero insured Equipment.

With respect to the claim against Equipment, the trial judge was not satisfied there was an arguable case that the policy responded because there was no evidence that Equipment was a subsidiary of Manufacturing or that Vero insured Equipment.

The Decision on Appeal

The applicant argued that the trial judge was in error in not following the test for summary dismissal of an action set out in General Steel Industries Inc v Commissioner of Railways (NSW) (1964) 112CLR 125. However, the Court of Appeal held that was not the appropriate test to apply as that case related to summary dismissal, where the evidentiary and persuasive onus is on the defendant and not on the applicant for leave.

The applicant claimed that the court should determine whether there was an arguable case to join an insurer with reference to the pleadings alone. The Court of Appeal rejected this argument and held that the applicant must produce evidence in support of the facts it relies upon.

The Court of Appeal held that it is justifiable to join an insurer if there is an arguable case but there will only be an arguable case when there is both an arguable case that certain facts exist and an arguable case that those facts provide a basis for legal relief.

As the applicant was unable to provide evidence that the equipment was manufactured before the manufacturer was incorporated, there was no arguable case. The Court of Appeal held that the trial judge correctly exercised his discretion to refuse leave. The appeal was dismissed.
**The Facts**

The plaintiff, a labour hire worker, was seriously injured in the course of his employment. His injuries were sufficient to give rise to a legal disability.

The plaintiff settled his claim for $1,391,325. Due to the plaintiff’s legal disability, the settlement was required to be sanctioned.

The settlement was sanctioned by the court on 12 July 2011. The order took into account the need to attend to payment of statutory refunds. The court ordered that the balance of the settlement monies be paid to the plaintiff’s trustees within 21 days of receipt of the final statutory clearance.

There was almost an eight month delay in obtaining the Centrelink clearance. Consequently, the settlement monies were not paid until 15 March 2012.

The plaintiff applied for an order that the defendants pay interest on the settlement monies from the date of the sanction order to the date the settlement monies were paid.

**The Decision**

The decision turned on the application of s48 of the Supreme Court Act 1995. Section 48 provides that unless otherwise ordered, if a judgment for damages is not paid within 21 days of judgment, interest shall be payable on unpaid damages from the date of judgment.

The defendants argued that the obligation to pay the settlement monies did not arise until receipt of the final statutory clearance, and that therefore the settlement monies could not be considered “unpaid” until that had occurred.

After considering the arguments, the court held that the obligation to pay the settlement monies arose on the date the settlement was sanctioned even though the monies were not payable until such time as the last of the statutory clearances had been obtained. During the intervening period, the settlement monies remained “unpaid” and attracted the application of s48.

The court ordered that the defendants pay the plaintiff interest totalling $64,062 on the settlement monies from the date of the sanction. The finding could have been avoided if the defendants had incorporated into the sanction specific orders stating that the interest was not to accrue until 21 days after the last statutory clearance had been obtained.
The Facts

Applications for costs were made against the plaintiff and Mr Sam Mondous (the plaintiff’s sole director) by the defendants and the Cardinia Shire Council (the Council) following the plaintiff’s unsuccessful prosecution of the defendants arising from the sale of land owned by it to the then Minister for Planning.

The defendants sought their costs of the proceeding on an indemnity basis and the Council sought its costs of complying with subpoenas and orders for non-party discovery pursuant to the Supreme Court (General Civil Procedure) Rules 2005.

The court ordered the plaintiff to pay both the defendants’ and the Council’s costs. The applications against Mr Mondous were dismissed.

Mr Mondous subsequently sought his costs of resisting those applications on the basis that costs should follow the event.

The Decision

The court rejected the application by Mr Mondous for payment of his costs of resisting the non party costs application against him by the defendants and the Council.

The court held that the Council would not have made any application had the plaintiff simply compensated it for the costs that it incurred complying with the plaintiff’s requests. The court determined that the plaintiff should have paid the Council’s costs in accordance with the rules without further ado. Instead the plaintiff delayed, obfuscated and launched counter attacks against the Council in order to avoid paying costs.

Having reference to Mr Mondous’ conduct during the course of the trial, the court held it was clear that Mr Mondous had no intention of putting the plaintiff in a financial position to meet its obligations to the Council. It therefore found that it would be perverse to order the Council to pay Mr Mondous’ costs in these circumstances and refused to do so.

The court also refused to order the defendants to pay Mr Mondous’ costs on the basis that the time taken by Mr Mondous’ counsel to resist the applications against him was unprecedented and unnecessary. In the court’s view the arguments made on Mr Mondous’ behalf could have been made succinctly. The court believed that the form of argument, the amount of written material produced and the length of the oral submissions could not be justified and as a result Mr Mondous’ costs should lie where they fell.

IN ISSUE

• Whether Mr Mondous (a non-party) was entitled to his costs of successfully resisting applications against him

• Circumstances justifying a departure from the general rule that costs follow the event

DELIVERED ON 10 December 2012

READ MORE click here
The Facts

The respondents in these four appeals (all heard together) suffered personal injuries when they were assaulted by hotel security staff employed by AVS Services Pty Ltd (AVS). They sued AVS for trespass to the person and damages for personal injuries. When AVS went into liquidation, its insurer (the appellants) defended the claims.

Following a trial that lasted 22 days, judgment was given in favour of the respondents along with orders that the appellants pay their costs.

The damages awarded in each case were for amounts less than $100,000.

In New South Wales, the Legal Profession Act 1987 (NSW) (the LPA) imposes a restriction or ‘cap’ on the maximum legal costs one party may recover from another in connection with a personal injury claim where the amount recovered is less than $100,000. Section 198D(i)(a) provides that the maximum costs for legal services provided to a plaintiff in those circumstances are fixed at “20% of the amount recovered or $10,000, whichever is greater.”

This cost restriction scheme legislation was introduced in NSW in a Schedule to the CLA (NSW) and applies the costs restrictions to claims for “personal injury damages”.

The meaning of “personal injury damages”, for the purpose of the cap expressed in the LPA is to have the same meaning given to that expression in Part 2 of the CLA (NSW). Part 2 of the CLA (NSW) defined that expression to mean “damages that relate to the death of or injury to a person”. However, the CLA (NSW) also provides more generally that its provisions do not apply to or in respect of civil liability for “an intentional act done by a person with intent to cause injury or death…”

At issue was whether the respondents’ damages awards, which were for claims concerning the intentional tort of assault, fell within the cost restriction scheme of the LPA. To decide that issue, the court needed to consider whether the definition of “personal injury damages” was confined to the definition in Part 2 of the CLA (NSW) (thereby restricting the costs recoverable) or limited by the additional CLA (NSW) exclusions relating to intentional acts (thereby taking the recoverable costs outside of the LPA scheme).

The Decision at Trial

The New South Wales District Court found that the respondents’ claims were for “personal injury damages” as defined in Part 2 of the CLA and were not affected by the general CLA exclusions concerning intentional acts.

The Decision on Appeal

The New South Wales Court of Appeal reversed the trial decision. It held that the Part 2 of the CLA (NSW) definition should be interpreted as part of a statutory scheme formed by the two pieces of legislation. As a result, the definition must be read to exclude claims concerning intentional acts as the CLA (NSW) also excludes them.

The High Court Decision

In a 3:2 majority, the High Court found that the claims made by the respondents were claims for “personal injury damages” and the costs limitation applied. In reaching its decision, the High Court rejected the statutory scheme construction favoured by the Court of Appeal and agreed with the appellants’ submission that the cost limiting provisions of the LPA extended to every and any form of damages that relate to the death of or personal or bodily injury to a person caused by the fault of another. The definition of “personal injury damages”, on its own terms and given its natural meaning, neither required nor permitted any different application according to whether the “fault” founding the claim was intentional or not. While the LPA stated the expression has the same meaning as in the CLA (NSW), it did not, on its terms, refer to the restricted operation or application of the CLA (NSW). It simply directed attention to the definition of that expression, as found in Part 2 of the CLA (NSW).
The Facts

Perpetual entered into a mortgage origination deed (the deed) with CTC. Pursuant to the deed, CTC was obliged to identify, interview and introduce prospective loan applicants to Perpetual. The deed also included a clause pursuant to which CTC agreed to indemnify Perpetual against any loss resulting from its failure to exercise reasonable care.

CTC interviewed a person purporting to be David El-Bayeh and introduced that person to Perpetual. Perpetual subsequently loaned $290,000 to Mr El-Bayeh for investment purposes.

Mr El-Bayeh defaulted on his loan with the result that Perpetual commenced recovery proceedings against him. The loan had been obtained by the fraudulent conduct of Mr El-Bayeh’s brother, Youssef, who had forged David El-Bayeh’s signatures on the loan agreements and the mortgages. David El-Bayeh defended Perpetual’s claim on this basis.

Perpetual subsequently joined Youssef El-Bayeh and CTC to the recovery proceedings. Perpetual alleged that CTC had breached the terms of the deed by failing to properly identify the loan applicant, and claimed the benefit of the contractual indemnity.

The Decision at Trial

The trial judge held that Youssef El-Bayeh had forged his brother’s signature on the loan documents with the result that Perpetual commenced recovery proceedings against him. The loan had been obtained by the fraudulent conduct of Mr El-Bayeh’s brother, Youssef, who had forged David El-Bayeh’s signatures on the loan agreements and the mortgages. David El-Bayeh defended Perpetual’s claim on this basis.

Perpetual was unable to prove that CTC had failed to exercise reasonable care in the process of identifying David El-Bayeh (the CTC finding).

The Decision on Appeal

On appeal, Perpetual sought to overturn the CTC finding. In response, CTC, amongst other things, argued that any liability that it might have to Perpetual should be reduced to take into account the actions of concurrent wrongdoers, including Youssef and the justice of the peace who witnessed Youssef’s signature. Perpetual sought to counter this argument by arguing that CTC’s liability was not apportionable due to the fact that, in accordance with the deed, CTC had agreed to indemnify Perpetual for such losses, and that the agreement fell within the scope of s3A CLA (NSW) which expressly provides that the proportionate liability provisions do not limit or otherwise affect the operation of an express provision in a contract providing for rights, obligations and liabilities under the contract. In other words, Perpetual argued that the parties had effectively contracted out of the proportionate liability regime.

The Court of Appeal accepted Perpetual’s argument. In finding that CTC had failed to exercise reasonable care in identifying David Youssef, the Court of Appeal held that the proportionate liability provisions did not apply meaning that CTC was not entitled to rely on them in order to reduce its liability to Perpetual.

It should be noted that the CLA (Qld) does not contain a provision equivalent to s3A of the NSW legislation.
The Facts

On 19 April 2004 the plaintiff was injured at work when a crane rolled forward pinning his left hip, knee and ankle against a large excavator base on which he had been performing some welding work.

He sought and obtained workers’ compensation for his injuries but did not commence any civil proceeding claiming damages for those injuries until 10 August 2010.

The plaintiff brought an application for a direction that he had at all times since the date of his injury been under a disability for the purposes of s29 of the LAA, or alternatively, that the limitation period be extended to 16 December 2009 under s31(2) of the LAA, being the date that he was considered to have given a compliant notice of claim for damages to WorkCover.

The defendant’s medical expert was of the opinion that the plaintiff had, except for periods of extreme distress and disability, the capacity to instruct solicitors properly, to exercise reasonable judgment upon a possible settlement and to appreciate the nature and extent of any available claim.

The plaintiff’s treating psychiatrist gave evidence to the effect that the plaintiff had been suffering from post traumatic stress disorder since the accident, that the condition had not been in remission for any significant period and that the plaintiff was not capable of managing his own affairs in relation to the accident until December 2009.

The Decision

The court considered the meaning of “unsoundness of mind” in the context of establishing a disability under s29 of the LAA. Consideration of the decision of State of Queensland v RAE [2010] QCA 332 led to the conclusion that, to establish unsoundness of mind “there must exist a mental illness which produces an incapacity by a person to manage his or her affairs in relation to the accident, and not in relation to life generally, in the manner of a reasonable person…”

The court held that there was a significant body of evidence leading to the conclusion that the plaintiff had some learning difficulties, limited literacy, an unwillingness to read documents sent to him and a reduced capacity to manage his own affairs as well as post traumatic stress disorder. The court also recognised that the plaintiff had retained the capacity to handle many of life’s challenges and to appreciate some of the consequences for him of his decreased ability to work.

Having regard to the history of the claim, the expert evidence and its own observations of the plaintiff, the court concluded that the plaintiff was not incapable of managing his affairs in relation to the subject accident during the relevant period since the accident. Further, the persistence in the workers’ compensation claim and the other evidence indicating that the plaintiff continued to work and changed work over a considerable period after the incident, did not satisfy the court that the plaintiff had shown on the balance of probabilities that he lacked the relevant capacity over the whole of the period to manage his affairs in relation to the accident.

Accordingly, the court refused to grant the application pursuant to s29 of the LAA.

Insofar as the application pursuant to s31(2) of the LAA was concerned, the court concluded that the material facts of a decisive character relating to the plaintiff’s right of action were known to the plaintiff before the relevant date, 16 December 2009. In arriving at this conclusion, the court placed great emphasis on the fact that on 14 January 2005 the plaintiff advised a claims manager that “he fears he won’t be employed by anyone else as he has had too many...”
**PROCEDURE**
Limitation of Actions

*Bergemann v Tilly’s Administrative Services Pty Ltd*

[2012] QSC 266

WC claims” and asked what would happen from there. The court was satisfied that the material fact of a decisive character (lack of capacity to work) was within his means of knowledge well before 2009. The court also refused to grant the application for an extension of time under s31(2) LAA.
The Facts

On 27 March 2007, the plaintiff was admitted to the psychiatric unit at Frankston Hospital (the hospital). The defendant is responsible for the conduct of the hospital. At the time of her admission, the plaintiff was suffering from a borderline personality disorder and was considered to be at risk of self-harm.

The plaintiff alleged that while at hospital, a male patient (AB) in the psychiatric unit sexually assaulted her on 3 separate occasions. She claimed that the assaults occurred by reason of the defendant’s negligence in the detention and supervision of the plaintiff in a safe and secure environment. The plaintiff alleged that by reason of the defendant’s negligence, she had suffered injury in the form of aggravation of pre-existing psychiatric conditions and major depressive disorder, special damage (which was to be particularised), loss of earnings and loss of earning capacity.

The defendant denied liability and alleged that any physical interaction between the plaintiff and AB was consensual and did not constitute an assault. Further, the defendant claimed that the plaintiff was, among other things, statute-barred by reason of the provisions of Part IIA of the LAA (Vic) (the Act).

The final assault was alleged to have occurred on 2 April 2007. The plaintiff contacted solicitors and had several consultations from 2008 through to 2010. The limitation period applicable to the plaintiff’s claim expired on 2 April 2010. In October 2010, the plaintiff had her final consultation with her solicitors, who explained that the limitation period had expired and that they could no longer act for her. On 8 November 2010, the plaintiff consulted new solicitors who issued proceedings on 11 November 2010. AB died on 20 November 2011.

The plaintiff applied to the court to extend the limitation period submitting that the failure to issue proceedings against the defendant within the limitation period was not hers but that of her previous solicitors. She further contended that even if proceedings were instituted in a timely way, there was a real chance that AB would have died before the trial and the defendant would have lost the opportunity to call him as a witness in any event. Further, the plaintiff stated that the other relevant evidence (including her medical records), the police file and a tape recorded interview with AB were still available to the defendant.

The Decision

In determining the application the court considered, as required by the relevant provisions of the Act, the length and reason for delay; the promptness of the plaintiff’s actions and steps taken by the plaintiff to obtain advice; any prejudice to the plaintiff; and any prejudice to the defendant.

The court accepted that the fault for the delay lay largely with the plaintiff’s previous solicitors and considered it likely that the plaintiff would have an action available against them. While emphasising that the relevant provisions required a balancing act, the court held that the prejudice to the defendant could not be overcome. AB’s death on 20 November 2011 meant that the defendant had been significantly prejudiced by the delay.

Whilst there was some evidence that supported the defendant’s assertion that there was no assault and that the plaintiff consented to AB’s conduct, the fact remained that only one of two participants survived and the other died nearly 21 months after the expiry of the limitation period. If the matter was to proceed to trial, the court considered that the absence of AB would prejudice the defendant in an incurable way.

Accordingly, the court held that the limitation period ought not to be extended in the circumstances and the application was refused.

IN ISSUE

• Extension of limitation period against solicitors for failure to issue proceedings
• Prejudice to defendant as a result of death of witness

DELIVERED ON 23 November 2012

READ MORE  

click here
The Facts

On 17 September 2003 the Andersons exchanged contracts for the sale of land and a business relating to the purchase of a chiropractic clinic. Mr D’Agostino, a solicitor, acted for the Andersons in relation to the purchase.

Settlement occurred on 12 November 2003 but the relevant consent for the use of the dwelling as a chiropractic clinic had lapsed in or about March 2003. The Andersons were unaware of this until receiving notice to this effect from the local Council on 12 July 2004. The Council subsequently indicated that an application for development consent would be unsuccessful unless the clinic was substantially downsized. The business was ultimately relocated and failed and the Andersons sold the property in March 2006 for considerably less than the price for which they had purchased it.

The Andersons issued proceedings against D’Agostino alleging he breached his duty of care to advise them that the development consent had lapsed prior to purchase.

The Decision at Trial

The trial judge found against D’Agostino alleging he breached his duty of care to advise them that the development consent had lapsed prior to purchase.

The Issues on Appeal

The issue for consideration was whether the Andersons suffered actual loss on exchange of contracts or when the lack of development consent was discovered.

The Decision on Appeal

The Court of Appeal noted that the trial judge had held that the case was similar to a case involving a latent defect or a contingent loss and that loss was only suffered (and time began to run) from the date the defect became apparent or the contingency materialised.

However, the Court of Appeal disagreed with that view on the basis that the lack of development consent was readily discoverable following ordinary conveyancing procedures. On purchase, the Andersons acquired a package of rights that was different to what they understood they were acquiring. They acquired premises and business being unlawfully run rather than lawfully run. The Andersons were not exposed to a contingent loss, they suffered a financial loss when they entered into the contract.

The Court of Appeal held the only question for determination was whether the rights held by the Andersons after the exchange, being a property and business without development consent, were worth substantially less than what they understood they were acquiring, being a property and business with the development consent for use as a chiropractic clinic. If they were, actual loss was suffered and time began to run. The Court of Appeal found that the property was worth substantially less without the development consent. Accordingly, the action was statute barred and the appeal was allowed.
The Facts

The plaintiff sustained injuries during the course of his employment as a dogman at a building site at Fairfield Shopping Centre. The accident occurred on 26 June 2002, however the plaintiff did not commence proceedings until 8 June 2010 and his claim was out of time.

The plaintiff sought orders to enable him to maintain proceedings against three parties, and on 24 August 2012, the court extended the limitation period for the plaintiff’s cause of action against the first and second defendants: Murdock v Lipman Pty Ltd [2012] NSWSC 983. However, in that judgement, the court deferred the determination of a separate application brought by the plaintiff for leave to commence proceedings against a third defendant, the insurer of the deregistered employer (the insurer), in order to give the insurer an opportunity to be heard as to the insurer’s contention that it would suffer actual prejudice if the claim against it were allowed to proceed, for damages against the employer/insurer out of time.

The employer could have sought indemnity under s151Z(1)(d) for such payments within time. Indemnity could have been sought under that section regardless of any claim by the plaintiff.

The court therefore concluded that it would be fair and just to grant the leave sought by the plaintiff to commence proceedings against the insurer, and the plaintiff joined the insurer as third defendant in the proceedings.

The Decision

The court held that the insurer’s loss (owing to the passage of time) of the opportunity to claim indemnity under s151Z(1)(d) of the WCA in respect of the compensation payments made to the plaintiff more than six years ago did not amount to prejudice occasioned by the grant of leave to commence proceedings for damages against the employer/insurer out of time.

The employer could have sought indemnity under s151Z(1)(d) for such payments within time. Indemnity could have been sought under that section regardless of any claim by the plaintiff.

The court therefore concluded that it would be fair and just to grant the leave sought by the plaintiff to commence proceedings against the insurer, and the plaintiff joined the insurer as third defendant in the proceedings.
The Facts

The plaintiff brought an application pursuant to s31 of the LAA to extend the limitation period for his personal injuries action. The plaintiff sustained a knee injury on 14 January 2009 when a chair he was sitting on at the Weis Restaurant in Toowoomba collapsed underneath him. The plaintiff was a resident of New South Wales and instructed a solicitor there on 21 July 2009. There was evidence that this solicitor had informed the plaintiff of the 3 year limitation period applicable to his action. The solicitor contacted the Weis Restaurant in 2009 to advise of the potential claim, and the restaurant notified its insurer. No formal claim was commenced. The plaintiff failed to sign and return a costs agreement for the solicitor and this was allegedly followed up on a number of occasions, with advice about the limitation period. The plaintiff alleged that he had not had any discussion with the solicitor about the time limit and had not been asked to sign the agreement.

On 11 January 2012, the plaintiff engaged a firm of solicitors in Queensland and on 13 January 2012, 1 day before the limitation period expired, an originating application was filed to obtain an extension of the limitation period and for leave to commence proceedings pursuant to the PIPA. The plaintiff did not obtain an order giving an extension prior to the limitation period expiring and did not commence proceedings prior to the expiry of the limitation period.

The Decision at Trial

The trial judge allowed the application. The court accepted the plaintiff’s evidence that he did not know that the company Weis Restaurant Toowoomba Pty Ltd was the legal entity he would be required to name as a defendant to the action, until 5 April 2012. In oral evidence the plaintiff had also denied receiving advice from the NSW solicitor about the limitation period. The plaintiff gave evidence that by the middle of 2009, he had decided to pursue a claim but that he had no knowledge about the formal identity of the entity operating the restaurant. The trial judge found that the discovery of that fact qualified as a material fact of a decisive character, as required under s31 LAA. The trial judge found that the plaintiff had taken all reasonable steps to find out the relevant fact prior to 5 April 2012 by engaging the NSW solicitor. The trial judge also found there had been no prejudice to the defendant and that there was sufficient evidence of the cause of action for personal injury being established, to allow the application.

The Decision on Appeal

The Court of Appeal overturned the trial judge’s decision. The court analysed the discretion under s31(2) LAA which arises if an applicant satisfies the court that a material fact of a decisive character was not within their means of knowledge before a certain date. It was noted that not every material fact is of a decisive character and that while the legal identity of the owner of the restaurant was material, it was not critically important, such that it was a decisive factor in the plaintiff commencing his action. The plaintiff’s evidence that by mid 2009 he had resolved to pursue his claim was found to be relevant pursuant to s30(1) (b)(i) LAA. On the facts, there was nothing about identifying the legal owner of the restaurant which was necessary to justify the bringing of the action. The court found that the plaintiff not only knew all the facts necessary to pursue his claim, but had in fact decided to pursue the claim. The trial judge’s finding that the plaintiff had taken all reasonable steps to find out the fact in relation to the proper identity of the owner of the restaurant was also not available on the evidence because the plaintiff had only retained the NSW solicitor to conduct initial correspondence with the restaurant’s insurer. The evidence was that there was no general retainer so as to satisfy the requirement of having taken all reasonable steps to find out the relevant fact.

The appeal was allowed.
The Facts

The respondent, Sharon Mead, was injured on 5 October 2010 as a result of an incident at a Coles Supermarket at Port Douglas in far north Queensland. The respondent was delivering a parcel to the loading dock at Coles when she was crushed against the rear of the docking area by a truck being driven by another employee.

The respondent served a Notice of Claim under the PIPA on Coles Supermarkets (the applicant). She also served a Notice of Accident Claim form under the MAIA in relation to the driver of the truck.

The applicant sought a declaration that, by virtue of s6(2)(a) of the PIPA, the PIPA did not apply to the respondent’s claim for damages for personal injuries, as the claim fell under the scope of the MAIA.

The Decision

Section 6(2) of the PIPA provides that the PIPA does not apply to a personal injury within the meaning of the MAIA and in relation to which the MAIA applies. There was no dispute that the respondent had suffered a personal injury within the meaning of the MAIA, but the relevant questions were whether the MAIA applied to her claim and whether it was so clearly an injury in relation to which the MAIA applied that the court could make the declaration sought by the applicant at that stage in the proceedings.

The court noted that it was possible that the driver of the truck may be found wholly or partly liable for the incident, but it was also possible that other parties including the applicant, TNT Australia and/or Bluestar Security may be found wholly or partly liable for the incident. Therefore, it was possible that the personal injury was a result of the driving of a motor vehicle or a collision with a motor vehicle, but it was also possible that it was not.

The court ultimately held that it was inappropriate to grant the declaration sought by the applicant in circumstances where the MAIA may or may not apply to the respondent’s claim for damages.

The court also granted the applicant leave to join TNT Australia and Bluestar Security to the proceedings.
MISCELLANEOUS

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State Fire Commission and Chief Officer of the Tasmania Fire Service entitled to statutory immunity under s121 of the Fire Service Act 1979 (Tas).

247  WorkCover Queensland v AMACA Pty Ltd [2012] QCA 240
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248  Perpetual Trustees Victoria Ltd v Malouf [2012] NSWSC 1119
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249  Trkulja v Google Inc LLC & Anor (No. 5) [2012] VSC 533
Whether the defence of innocent dissemination is available where material is published on the internet.

250  Electro Optic Systems Pty Ltd v State of New South Wales; West & West Anor v State of New South Wales [2012] ACTSC 184
Whether NSW liable for spread of fire to neighbouring lands and consideration of distinction between failure to exercise statutory duty and the negligent manner of its exercise. Consideration of choice of law where tort committed in jurisdiction where act causing damage occurred rather than where loss sustained.

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252  A&B Grains Pty Ltd v Launcells Feedlot Systems Pty Ltd [2013] QSC 58
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253  Ferguson v WorkCover Queensland [2013] QSC 78
Whether applicant’s employment connected with Queensland or New South Wales.

Appeal against decision that casino did not act unconscionably by allowing the appellant to lose large sums of money gambling at its premises.
The Facts

The first plaintiff, Myer Stores Ltd, was the occupier of a building in Hobart that was destroyed by fire in September 2007. Myer, along with the owner of the building, the Retirement Benefits Fund Board, sued the State Fire Commission and the Chief Officer of the Tasmania Fire Service for damages for breach of statutory duty and negligence, alleging various failures in relation to preparation and training prior to the fire.

Section 121 of the Fire Service Act 1979 (Tas) (the Act) provides the Commission and its officers with immunity from liability in certain circumstances. The court was asked to determine as a preliminary issue whether the defendants were entitled to the statutory immunity provided under s121 of the Act. The plaintiffs’ contentions included that s121 created a new form of statutory liability on the part of the Commission and was not concerned with common law torts.

The Decision

The court considered that the wording of s121 of the Act, and the history of immunity provisions in earlier legislation, compelled the conclusion that they should be construed as conferring immunities on fire service personnel except in relation to acts and omissions involving bad faith; ensuring the Commission was vicariously liable for its staff, and providing an immunity to the Commission in relation to deaths, injury and damage attributable to the acts and omissions of fire service personnel, not involving bad faith, in fire-fighting, risk reduction and training operations.

The court held that there was no reason to give s121(2) of the Act an interpretation that was inconsistent with its ordinary literal meaning. That subsection is applicable if death, injury or damage “is attributable wholly or partly” to an act or omission by a brigade or by certain individuals. If a death, injury or damage is attributable to a tort of the Commission, but not partly to an act or omission of a brigade or individual within the scope of the subsection, then the subsection confers no immunity on the Commission. However, if any death, injury or damage is attributable partly to a tort of the Commission and partly to an act or omission by a brigade or individual within the scope of the subsection, then the Commission has no liability.

Accordingly, if the plaintiffs’ allegations were proved as assumed, the relevant damage, even if attributable partly to tortious breaches of duty by the Commission in relation to planning and training, was at least partly attributable to acts and omissions of officers and firefighters during the operation directed to extinguishing, or preventing the spread of, the fire. The Commission was therefore entitled to the immunity provided by s121(2) of the Act.

The court rejected the plaintiffs’ arguments in relation to the Chief Officer that he was not an “officer, firefighter, employee or agent of the Commission or a brigade” within the meaning of the section. The court held that the Chief Officer was subject to the direction of the Commission and was therefore an “agent”; he was appointed to the Government service and subject to the direction of the Commissioner, the Minister and the public sector Code of Conduct and was therefore an “employee” for the purposes of the Act and entitled to the protection of s121 of the Act.
The Facts

Mr Rourke was a carpenter in Queensland between the late 1960s and early 1980s. In the course of his work he handled asbestos sheeting which was manufactured by Amaca. He subsequently developed lung cancer and asbestos related pleural disease which he claimed was caused by exposure to Amaca's asbestos.

Mr Rourke issued proceedings against Amaca and applied for statutory compensation from WorkCover. WorkCover accepted his claim and paid him compensation of $550,000. Five days after WorkCover paid the money, Mr Rourke passed away.

Six months after Mr Rourke's death, his personal representative, WorkCover and various employers signed a deed under which Mr Rourke's estate assigned to WorkCover the causes of action which caused or contributed to his injury.

Importantly, under the deed WorkCover was not to profit from the assignment. If it recovered damages exceeding the compensation paid it would hold the excess on trust for Mr Rourke's estate.

The Decision on Appeal

Amaca argued that the assignment was unlawful because it offended the longstanding common law rule against assignment of bare causes of action like personal injuries claims.

The Court of Appeal unanimously allowed the appeal and held that the assignment by Mr Rourke's estate to WorkCover was valid. The Court of Appeal noted the old common law rule that bare causes of action cannot be assigned. However, it noted that this rule had been incrementally refined over the years with the recognition of exceptions.

In particular, in the recent decision of Equuscorp Pty Ltd v Haxton [2012] 86 ALJR 296, the High Court held that the old common law statement of principle was subject to an exception where the assignee had a genuine and substantial commercial interest in the suit.

Here the Court of Appeal considered that there was nothing special about actions for damages for personal injury which would make the above statement of principle applicable to them. Accordingly, if it could be shown that WorkCover had a genuine commercial interest in the cause of action, the assignment could be valid.

The Court of Appeal noted that a genuine commercial interest must have come into existence prior to the assignment and need not be an interest which itself is enforceable at law or in equity.

Here, at the time of the execution of the deed, WorkCover had an interest in recouping the money it had paid to Mr Rourke by way of statutory compensation. This interest arose upon payment of the compensation 6 months prior and accordingly well before the execution of the deed. It was not a legal interest but it was a genuine commercial interest.

The Court of Appeal accordingly held that the assignment of Mr Rourke's cause of action to WorkCover was valid and that WorkCover was able to be substituted as the plaintiff and continue with the proceedings.
The Facts

In May 2004, Ains and Alice Malouf (the first and third defendants respectively), believing that they were providing short term financial assistance to their son (the second defendant), were driven to the offices of a solicitor, Mr Goldberg (the cross defendant), where they signed certain documents. Those documents were not explained to the first and third defendants but had the effect of:

(a) transferring the third defendant’s share in their residential property to the second defendant;

(b) granting a mortgage over the property in favour of the plaintiff, Perpetual Trustees Victoria Ltd, as security for a loan agreement with a draw down facility of $700,000. The first and second defendants were the borrowers on that loan.

The advance of $700,000 was paid to the second defendant from the cross defendant’s trust account in June 2004. The second defendant used those funds to invest in the short term lending market. Due to the negligence of the cross defendant, the second defendant failed to obtain adequate security for the funds on-loaned to a third party. The on-loan went into default, causing default upon the loan to the plaintiff which was secured by the second defendant’s parents’ house. The plaintiff sued for possession of the property.

The second defendant sought to join Law Cover Insurance Pty Ltd (Law Cover) as a defendant to a second cross claim he had brought against his former solicitor, the cross defendant, pursuant to s6 of the LR (MP). Law Cover resisted that application.

The issue for determination was when the event giving rise to the liability of the cross defendant arose. If the event occurred before the inception of the Law Cover policy of insurance, s6 of the LR (MP) required that leave to join the insurer should be refused because Law Cover was entitled to disclaim liability.

The relevant policy with Law Cover commenced on 1 July 2006 and ran until 30 June 2007. It was a “claims made” policy. There was no dispute that the cross defendant was served with the statement of claim within the policy period, on 14 March 2007.

The Decision

The court noted that what is described as “the event” in s6 of the LR (MP) is what causes the charge on the insurance monies to arise and brings about the liability to pay under the policy of insurance. So “the event” is whatever completes the cause of action.

In this instance, the court found that the cross defendant was in breach of his retainer in 2004 when the loans were made to the on-lenders. That breach gave rise to civil liability for a claim. Given that “the event” occurred prior to the inception of the Law Cover insurance policy, leave to join Law Cover to the proceedings was declined. In coming to that conclusion the court opined that it was irrelevant that a further cause of action (ie. negligence) arising from the same matters may not be complete until a time later because damage had not been suffered. Further and in any event, the court concluded that even if the materialisation of the later damage was relevant, in the circumstances of this case it was reasonably ascertainable by 30 June 2006 (being the last day prior to the inception of the Law Cover policy) that the recoupment of the advances the second defendant had made on the on loan was impossible. Therefore, the court declined to order the joiner of the insurer pursuant to s6 of the LR (MP).
The Facts

During 2009, there was material on the internet about the plaintiff which was available for downloading and viewing in Australia. The plaintiff alleged that the material imputed that he was a prominent figure in the Melbourne criminal underworld, a hardened and serious criminal in Melbourne and in the same league as notorious alleged murderers and drug traffickers who were also named and pictured in the same material.

The defendants (2 Google companies) denied publication, denied the material carried the meanings alleged by the plaintiff and pleaded defences of innocent dissemination at common law and pursuant to s32 of the Defamation Act 2005 (VIC).

The Decision

The jury found that the plaintiff was entitled to damages in relation to the material published between certain dates because the material did carry the defamatory imputation that the plaintiff was a member of the Melbourne crime world.

The central argument in the proceedings was whether the plaintiff could establish that the defendants intended to publish the material complained of. Google maintained that there was no human intervention between the request made to the search engine in the publication of the search results – that is the system was fully automated and therefore it was not a publisher at law. The court rejected that argument and agreed with the plaintiff that the automated system was a consequence of computer programs written by human beings, with those programs doing exactly what Google and its employees intended and required.

The defence of innocent dissemination was therefore rejected and the plaintiff was awarded $200,000 for the devastation, hurt feelings and stress caused by the various publications.
The Facts

On 8 January 2003, a major electrical storm occurred across VIC, NSW and the ACT, and accompanying lightning strikes ignited fires throughout the Brindabella Ranges in both NSW and the ACT. The resulting property and personal injury damage was severe and extensive. Two groups of plaintiffs commenced action against NSW (the defendant) on the basis that it was the owner and occupier of the relevant areas, and it was responsible for the negligence of members of the NSW Rural Fire Service (RFS) and the NSW National Parks and Wildlife Service (NPWS).

The plaintiffs alleged that the decision by the NWPS that the fire was beyond direct attack, and that the appropriate strategy for fighting the fire would be indirect attack was a decision that no reasonable fire authority would have adopted.

The primary issue in the proceedings was whether the defendant was liable to any or both groups of plaintiffs, either in negligence or for breach of statutory duty. Further, in deciding these issues, it was also necessary to consider whether a defence was available for the defendant under the Rural Fires Act 1997 (NSW) (RFA (NSW)) and the Civil Law (Wrongs) Act 2002 (ACT) (CLWA (ACT)).

The Decision

The claims in negligence of both plaintiffs were successful, but as a matter of law, were denied by the court because of the statutory immunity claimed by the defendant. The court specifically noted that but for the express limitations on the liability which otherwise would attach at common law, the plaintiffs would have been entitled to compensation for their losses. Effectively, they were deprived by statute of what would, under the general law, be regarded as just compensation.

Although the court held that the strategy adopted by the fire crews was below the standard the common law would require of competent fire suppression authorities, it did not fail compared with the standard required by s43 of the CLA (NSW). In this regard, the court held that it was unreasonable in the context of s43 for the first service authority to have held the belief that the indirect strategy adopted could succeed in avoiding the widespread destruction that occurred.

It was also held that there was no lack of good faith so as to avoid the effect of s128 of the RFA (NSW). Even if the defendant had been held to be negligent, by virtue of the common law or otherwise, the actions of the defendant were made in good faith, and as such, it was immune from liability by virtue of s128 of the RFA (NSW).

With respect to the jurisdictional issues, it was held that the law of NSW was the law applicable to the determination of the liability of the defendant for the acts and omissions of its officers, as it was the place where the negligent acts and omissions occurred, notwithstanding that the injuries, loss and damage occurred in the ACT.
The Facts

The plaintiff and the defendant were involved in a motor vehicle collision on 8 September 2009. The defendant brought proceedings in the Local Court for property damage caused by the collision. On 2 May 2011, judgment was entered in favour of the defendant in the sum of $5,044.20.

The plaintiff later commenced proceedings in the District Court seeking damages for personal injuries she sustained in the same motor vehicle accident. In his defence, the defendant denied liability and argued that his success in Local Court proceedings against the plaintiff amounted to issue estoppel, as it raised common issues, namely duty of care and contributory negligence.

At the commencement of the hearing, the defendant brought an application for summary judgment on the same basis.

The Decision

The court held that there were 2 issues for it to determine: firstly, whether there was an issue estoppel and secondly if so, whether the court should exercise its discretion not to apply it.

As to the first issue, the court held that it was bound by the decision in *Tiufino v Warland* [2000] NSWCA 110, that if the issues are the same in both cases, an issue estoppel arises. The court held that they were the same. The plaintiff argued that it was not enough for the issues to be the same and that since the legislative structure in the Local Court was different, with different rights of appeal and entitlements to cross examination of witnesses, no issue estoppel could arise. The court rejected that argument and held that, as the issues (breach of duty of care and contributory negligence) were common to both sets of proceedings it was bound to find issue estoppel.

As to whether the court should exercise its discretion not to apply the principles of issue estoppel, it was specifically noted that the personal injury proceedings were commenced nine months after judgment was entered against the plaintiff in the Local Court proceedings. The plaintiff, and her legal advisors, would have been aware of those proceedings being concluded against her at that time and of the consequences arising. The court held that there were strong reasons to apply the principles of issue estoppel in order to deliver justice between the parties, and avoid the parties and the community devoting further resources to the re-agitation of matters which have been the subject of earlier proceedings.
The Facts

The plaintiff operated a business buying and selling grains. Mr McKerrow was a grain trader employed by the plaintiff. The defendant operated a feedlot called Launcells and its directors, Mr & Mrs Sturrock, were customers of the plaintiff.

The plaintiff claimed $626,719.83 owed under contracts for grain. A counterclaim was made by the defendant that the plaintiff had engaged in misleading or deceptive conduct that contravened s52 of the TPA or was negligent in providing advice on the purchase of the grain. The defendant ultimately admitted the plaintiff’s claim for money owing, however pursued the counterclaim.

The plaintiff began purchasing grain futures for the purpose of profit after Mr Sturrock met Mr McKerrow sometime in 2005. It had previously purchased grain from the plaintiff for the purpose of the feedlot business. The counterclaim was concerned with 3 sets of purchases made in 2007 and 2008.

There were discrepancies in the evidence about what had been said by Mr McKerrow in conjunction with the transactions and whether ‘advice’ had been provided. The evidence was that Mr McKerrow was knowledgeable and enthusiastic about grain sales, and grain futures in particular, and that he did provide Mr Sturrock with information regarding grain futures.

Ultimately, the price of certain grain plummeted leaving Mr Sturrock with product which was worth less than the purchase price. It was Mr Sturrock’s evidence that he had only purchased and stockpiled the amount of grain that he had after being advised by Mr McKerrow to do so.

The Decision

The court found that Mr McKerrow had been acting as a sales agent and offering the grain for purchase, rather than advising Mr Sturrock to purchase it. It was noted that Mr Sturrock was familiar with the grain market, even prior to his involvement with Mr McKerrow. Mr McKerrow admitted that he would have conveyed to Mr Sturrock information about grain prices and his opinion about where the market was heading. The court was not satisfied that this amounted to advice to make certain purchases. The defendant had prior experience in buying significant quantities of grain for use in the feedlot and was aware of the volatility of the market.

Reliance on the representations which were alleged to have been made was relevant in order to recover damages for misleading or deceptive conduct under s82 TPA. The parties were both commercial operators dealing in contracts for the purchase and sale of grain, in the usual course of their businesses. Both were aware of the risks associated with the transactions. To the extent that the defendant had proved any misleading representations were made, the defendant failed to prove reliance on any representations in purchasing the grain.

As to the claim in negligence, it was alleged that the plaintiff had assumed responsibility to advise the defendant as to when and how much grain to purchase. The defendant, however, failed to prove the plaintiff owed a duty to the defendant to take reasonable care in making any representations, as the plaintiff was not an adviser. Any predictions about price movements did not constitute advice and there was no reliance on advice when entering into contracts for grain purchase.

IN ISSUE

• Whether a purchaser of grain relied on representations made by a seller as to the future price of grain when purchasing grain
• Whether representations given negligently or such that s52 TPA contravened

DELIVERED ON 15 March 2013

READ MORE  click here
The Facts

The applicant was employed as a delivery driver by Reece Pty Ltd. His duties involved delivering products to areas extending to Beenleigh (in the north), Beaudesert, Jimboomba and Springfield Lakes (in the west), to Casino and Lismore in New South Wales (in the south). His evidence was that 70% to 80% of his deliveries were in Queensland.

On 5 May 2010 the applicant was undertaking 6 deliveries, 3 in Queensland and 3 in New South Wales. When making a delivery on the outskirts of Lismore, New South Wales, the applicant suffered significant injury.

A workers’ compensation claim was lodged with WorkCover Queensland, however this was rejected on the basis that the applicant worked in New South Wales. The applicant also lodged a claim under the New South Wales workers’ compensation scheme, which was accepted and payments made to the claimant.

The applicant attempted to bring a workers’ compensation common law claim in Queensland. WorkCover informed the applicant that he was not entitled to seek damages in Queensland pursuant to s10(2)(b) WCRA. This section excluded cover to claims made where an employer is obliged to hold a policy in another state.

The court reviewed and interpreted the meaning of “usually works” and “usually based” through statute and common law and found that the applicant usually worked in both Queensland and New South Wales. Whilst he made the majority of deliveries in Queensland, he also attended at the warehouse in Tweed Heads every day to receive instructions, plan deliveries, load and ultimately return the truck. Deliveries in New South Wales were also common. The court noted that the authorities demonstrate that whether there is a state in which the worker “usually works” depends on the circumstances of the particular employment. In this case, as the applicant habitually or customarily worked in more than one state, no one state was able to be identified as the “state in which the worker usually works in that employment”.

It was then necessary to consider where the applicant was “usually based” for the purpose of his employment. The court noted that this may not be the same place in which a majority of the worker’s time is spent each day. It was noted that the Tweed Heads warehouse was part of the Queensland operation, the majority of the applicant’s employment was administered and costed to the Queensland branch and the applicant took Queensland public holidays. These factors were relevant but not conclusive evidence of where the applicant usually worked or was usually based. The trial judge found that the Tweed Heads warehouse was the applicant’s “usual base” as this was where he went to work every morning, loaded his truck and returned to at the end of the day.

Ultimately the trial judge declined to declare that Queensland was the state to which the applicant’s employment was connected and found that the applicant’s employment was connected with New South Wales.

The application was dismissed.

Ferguson v WorkCover Queensland
[2013] QSC 78

IN ISSUE
• Whether the Queensland workers compensation scheme applied to a claim for personal injuries

DELIVERED ON 27 March 2013

READ MORE • click here
The Facts

The appellant was a regular visitor to Crown casino in Melbourne operated by the respondent (Crown). He was a high-stakes gambler. He turned over $1.5 billion at the casino between 2005 and 2006. The appellant issued proceedings in the Supreme Court of Victoria to recover his net loss of $20.5 million over that period.

The appellant claimed that Crown and its employees had engaged in unconscionable conduct in violation of s 51AA of the TPA and under the general law.

He argued that Crown had exploited his gambling addiction and had lured him to gamble at its casino by providing incentives, including rebates on losses and the use of Crown’s private jet. He also alleged that Crown had allowed him to gamble while it knew or ought to have known that he would be required to forfeit winnings by virtue of an interstate exclusion order.

The Decision at Trial

The trial judge held that the appellant’s gambling issue was not a kind of special disadvantage that rendered him susceptible to exploitation. Crown was not, at the relevant time, aware that he was suffering any relevant disadvantage and there was no inequality of bargaining power or exploitation of special disadvantage.

The appellant claimed that Crown and its employees had engaged in unconscionable conduct in violation of s 51AA of the TPA and under the general law. He argued that Crown had exploited his gambling addiction and had lured him to gamble at its casino by providing incentives, including rebates on losses and the use of Crown’s private jet. He also alleged that Crown had allowed him to gamble while it knew or ought to have known that he would be required to forfeit winnings by virtue of an interstate exclusion order.

The Decision on Appeal

The appellant appealed to the Court of Appeal, which found that he had failed to demonstrate that the trial judge’s conclusion was in error, or that the transactions between himself and Crown were unfair, unjust or unreasonable. The Court of Appeal upheld the trial judge’s finding on the basis that the appellant had presented himself as a successful businessman entirely capable of making decisions in his own interests, and that Crown was entitled to accept him as such. The Court of Appeal concluded that Crown did not take advantage of the appellant.

The Court of Appeal rejected the claim in relation to the interstate exclusion order, noting that Crown did not act unconscionably in permitting the appellant to gamble at its casino notwithstanding the existence of the order.

The Decision of the High Court

On appeal to the High Court, the appellant argued that Crown had exploited his inability, by reason of his pathological gambling addiction, to make decisions in his own interests.

The High Court held that the relevant question in this case was whether the appellant’s gambling was procured by Crown’s taking advantage of an inability on his part to make rational decisions in his own interests, which was sufficiently evident to Crown’s employees to render that conduct exploitative.

The High Court observed that there was no special foundation that distinguished the appellant’s dealings with Crown from the ordinary course of Crown’s business (particularly given his status as a high roller), nor did he suffer from a continually operating compulsion to return to the casino. The appellant had repeatedly and voluntarily put himself in a position where he might lose money. Further, the gambling activities took place in a commercial context in which the unmistakable purpose of each party was to inflict loss on the other party to the transaction.

A further issue the High Court considered was the extent to which Crown knew of the alleged special disadvantage.
disadvantage. Whilst Crown knew the appellant had a history of gambling problems, this did not require the trial judge to find that Crown knew the appellant could not make rational decisions in his own interest, particularly so, because the appellant presented as a robust and confident salesman.

The High Court rejected the appellant’s claim and concluded that his pathological interest in gambling was not a special disadvantage which made him susceptible to exploitation by Crown. He was able to make rational decisions to refrain from gambling had he chosen to do so, and was certainly able to choose to refrain from gambling with Crown. The High Court also rejected the appellant’s attempt to rely upon constructive notice of his special disability. Although the High Court accepted that wilful ignorance of, or blindness to, a special disability would constitute knowledge of that disability, it refused to extend the doctrine of constructive notice to commercial transactions. 

Kakavas v Crown Melbourne Limited
[2013] HCA 25
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