This is the 10th year that Barry.Nilsson. has published its Casebook.

The Insurance and Health team at Barry.Nilsson. are proud to present our Annual Insurance Law Review Casebook for 2012. This is the 10th year that Barry. Nilsson. has published its Casebook.

Our Casebook contains all of the major decisions handed down by the State Superior Courts and the High Court in the 2012 financial year. These have been grouped under various sub-categories for your ease of reference. We hope that the cases included in the book are a useful tool for you in examining policy issues as well as determining approaches to various claims.

This year also marks the 10th anniversary of the Annual Insurance Law Review, and we are delighted to celebrate the occasion with former High Court Judge, the Honourable Michael Kirby AC CMG.

Mr. Kirby was instrumental in the introduction of the Insurance Contracts Act (the ICA) in 1984 which notwithstanding nationwide tort reform, national disasters and inquiries, remains largely intact. Mr. Kirby is going to share with us his views on the circumstances surrounding the introduction of the ICA, its effectiveness, the insurance environment in 2012 and into the future.

Over the last year our Insurance and Health team has continued to consolidate and grow. We remain the largest insurance legal practice in Queensland and were delighted to be a finalist in the Australian Insurance Industry Awards for Insurance Law Firm of the Year.

Our objective, as always, is to provide you with optimal service. We consider our position as an ANZIIF award finalist, this Casebook and our Annual Law Review testimony to this.

The Casebook can be found at our website – www.bnlaw.com.au. Should you have any queries in relation to it or require assistance in any manner please do not hesitate to contact myself, one of my partners or committee members whose details appear below.

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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.
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The plaintiff was an inmate at the Metropolitan Reception and Remand Centre, Silverwater. While the plaintiff was seated with his wife in the visitors centre, a fellow inmate punched the plaintiff in the left eye. The injuries caused blindness in the plaintiff’s left eye.

The existence of a duty of care owed by the defendant was admitted and the risk of one prisoner assaulting another was reasonably foreseeable. The issue for the court was whether the defendant had breached its duty of care to the plaintiff.

The Decision at Trial

The plaintiff argued that better electronic surveillance should have been provided, that more prison officers should have been present and that visits should have taken place in segregated areas described as “boxes”. However, the plaintiff failed to call any evidence to establish that the system proposed would be practical or reasonable or that any other system was appropriate.

The court dismissed the proceedings. The plaintiff failed to discharge the burden to prove that his injuries could have been avoided by some reasonably practical alternative system by the defendant.

The court found that a surveillance system would not have prevented the plaintiff’s injuries in view of the suddenness of the assault. The presence of one or more officers in the visitors centre would not have prevented the injury. The injury could only have been prevented if an officer was standing between the plaintiff and his assailant. The court held that this level of staffing was totally impracticable. Even if all visitor contact had been restricted to “boxes”, there was the potential for interaction between prisoners on their way to or from the boxes.

The Issues on Appeal

The issue on appeal was whether there was any error in the primary judge’s fact finding or reasoning or any other ground which would entitle the Court of Appeal to intervene.

The Decision on Appeal

The appeal was dismissed. The Court of Appeal held that there was no reasonably practical alternative system to prevent an assault on the plaintiff by a fellow inmate. The Court of Appeal particularly noted the social utility and advantages of “contact” visits (keeping order in the prison) rather than mandatory box visits as proposed.

IN ISSUE

• Whether the defendant breached its duty of care to the plaintiff who was assaulted by a fellow inmate whilst incarcerated

DELIVERED ON 2 August 2011

READ MORE  

The Facts

Mr Doherty, a police officer, sued the State of New South Wales ("NSW") for damages for post-traumatic stress disorder contracted during his employment as a crime scene investigator when he was required to attend many crime scenes involving death and serious injury. Mr Doherty attempted to conceal or under-report his symptoms from the various psychologists who examined him over the years and as a result, continued to work and be further exposed to traumatic crime scenes without psychological treatment.

The Decision at Trial

The trial judge found in favour of Mr Doherty and ordered judgment against NSW for $753,000. The trial judge applied a 35% reduction for contributory negligence on Mr Doherty’s part for his failure to honestly and completely report his symptoms and condition to the psychologists who examined him.

The Issues on Appeal

NSW appealed arguing that the trial judge erred in finding negligence and causation. Mr Doherty cross-appealed against the finding of contributory negligence.

The Decision on Appeal

The Court of Appeal upheld the trial judge’s finding of negligence, causation and contributory negligence.

The Court of Appeal found that the trial judge had been correct to hold that NSW should have foreseen a significant risk of psychological injury to officers involved in crime scene investigation and should have adopted a high standard of monitoring of those officers. The Court of Appeal also held failing to ensure that psychologists were appropriately qualified and used correct diagnostic tests left NSW in breach of its duty to Mr Doherty.

The Court of Appeal held that the trial judge was correct in determining that if the concerns noted by some psychologists had been followed up, Mr Doherty would not have been exposed to further traumatic events without appropriate treatment. The Court of Appeal also held that the trial judge was correct in finding that NSW’s negligence had been a necessary condition for the occurrence of Mr Doherty’s injuries, as required by s5D(1)(a) of the CLA (NSW).

The Court of Appeal accepted NSW’s argument that the trial judge should have adopted a higher percentage discount for vicissitudes because of the uncertainties concerning what would have happened even if NSW had fulfilled its duties. The discount for vicissitudes was increased from 15% to 30% and resulted in a slight reduction of the overall damages.

The Court of Appeal rejected Mr Doherty’s appeal for a reduction in the amount of contributory negligence on the basis that the trial judge’s assessment was reasonable in the circumstances.

IN ISSUE

• Whether the trial judge erred in finding negligence and causation in circumstances where the police officer concealed and under-reported his symptoms
• Whether the trial judge erred in assessing contributory negligence at 35%

DELIVERED ON 5 August 2011
READ MORE click here
Gales Holdings Pty Ltd v Tweed Shire Council  
[2011] NSWSC 1128

The Facts

For 37 years, the plaintiff, Gales Holdings Pty Ltd, had been the owner of 27 hectares of undeveloped land in Kingscliff situated in the jurisdiction of the defendant, Tweed Shire Council. From 1994 onwards, the defendant failed to ensure adequate drainage on and around the plaintiff’s land which resulted in a 200% increase in untreated and polluted stormwater runoff. This water pooled ephemerally on and around the plaintiff’s land and resulted in the establishment of a habitat suitable for an endangered species of Wallum Froglets. Under the relevant environmental protection statutes, that portion of the plaintiff’s land was rendered undevelopable and the plaintiff was deemed responsible for the costs of maintaining the froglet habitat.

The plaintiff brought claims in nuisance and negligence against the defendant. The plaintiff sought relief to abate the nuisance, including a mandatory injunction. It also sought damages for devaluation of the land and the costs of maintaining the froglet habitat. The claim in negligence was abandoned during the trial.

The Decision

The court found that the defendant’s failure to install adequate drainage resulted in ephemeral ponding and consequently, the froglet habitat. This constituted unreasonable interference with the plaintiff’s right to enjoy its land and also actionable nuisance. The court found that the defendant had requisite knowledge of the interference no later than 4 May 2004, when the plaintiff first lodged a complaint.

The court held that the defendant could not rely on the statutory defences it sought to invoke because:

(a) Its actions were so unreasonable as to preclude the special statutory powers defence in s43A of the CLA (NSW)

(b) The maintenance of drainage systems did not constitute ‘road work’ under s45A of the CLA (NSW) and, in any event, the defendant had requisite knowledge; and

(c) Its decision to impose a retention basin on the applicant was not done in good faith as required by s733 of the Local Governments Act 1993 (NSW).

The court dismissed the plaintiff’s claim to recover damages for the loss of the value to the land due to the presence of the froglets. The court found that there was a viable population of froglets on the land before the plaintiff made complaints to the defendant. Therefore, their presence did not amount to an actionable nuisance because the plaintiff tolerated the froglets without demur as to its enjoyment of the land. The defendant’s conduct may have led to the presence of the froglets, however there was no unreasonable interference with the plaintiff’s enjoyment of its land until 4 May 2004 because the plaintiff did not complain before then. The court suggested that an action in negligence might have been maintained had it not been abandoned.

The court dismissed the plaintiff’s claims for construction of the ‘Blue Jay Circuit Scheme’ to abate the nuisance. The court held that the imposition of a mandatory injunction was inappropriate because the scheme required significant court supervision and, in any event, damages were an adequate remedy. Instead, the court ordered that the defendant pay $600,000 in damages for the costs of installing a drainage system to divert the additional stormwater from the land.

IN ISSUE

• Whether a local council could be found liable for loss of land value and costs of maintaining a native frog habitat caused by its failure to ensure adequate drainage

DELIVERED ON 21 September 2011

READ MORE click here
The Facts

At approximately 3:30am on 18 July 2002, Craig Jackson (the plaintiff) left his home following an argument with his partner. He was at least “mildly intoxicated” at the time. Around 7:00am, the plaintiff was found injured and unconscious lying in a large drain in a park. At the western end of the drain, there was a vertical wall about 1.4m high, which was partially concealed by foliage. There was dried blood and urine approximately 2.6 metres from the vertical wall. The northern and southern ends of the drain were not vertical but sloped down gradually. Due to the nature of his injuries, the plaintiff could not recall how he became injured and there were no witnesses to the incident. The records of the NSW Ambulance Service noted “fall from 1.5 metres onto concrete” (the representation). The plaintiff commenced proceedings against the Lithgow City Council (the Council), which had care and management of the park.

The Decision at Trial

The trial judge determined that the representation could not be used as evidence of the truth of its contents, and concluded that the plaintiff had not established how he came to be injured. The trial judge found in favour of the Council.

The Decision on Appeal

The plaintiff appealed to the Court of Appeal. The Court of Appeal determined that the Council breached its duty of care to the plaintiff by failing to take steps to avoid the risk of foreseeable injury to someone falling over the vertical wall at night, and found in favour of the plaintiff.

The Issues on Appeal to the High Court

The Council appealed to the High Court on the issue of whether the representation was admissible and, even if the representation was admissible, whether causation was able to be established on the evidence. The plaintiff submitted that the representation was an opinion because it was an inference from observed and communicable data in regards to the plaintiff’s injuries and physical condition, his position in relation to the vertical wall, the location of the pools of dried fluids and the scene generally.

The Decision on Appeal to the High Court

The High Court granted the Council special leave for the matter to be remitted to the Court of Appeal, as the question mark in the representation had been cut off on the photocopy in the original appeal papers. The Court of Appeal adhered to its original conclusion that the plaintiff had established causation.

The High Court determined that the representation was not opinion evidence because it was so ambiguous and obscure that it could not be ascertained what the representation was actually stating and could not rationally support a probability that the plaintiff fell from the vertical wall. The High Court also determined that the location of the bodily fluids and the severity of the plaintiff’s injuries could have been caused by a fall from any side of the drain, and therefore did not support a conclusion that the plaintiff fell from the vertical wall. The High Court determined that the conclusion that the plaintiff had fallen from the vertical wall could not be drawn on the balance of probabilities. The High Court found in favour of the Council and ordered the plaintiff to pay the Council’s costs.

IN ISSUE

• Whether an inference drawn from an observation of an incident scene is admissible on the basis of the opinion evidence exception;
• Whether a circumstantial inference is sufficient to establish causation;

DELIVERED ON 28 September 2011
READ MORE  

The Facts

On 29 May 2000, the plaintiffs obtained development approval from the defendant, Port Stephens Council, to build a residential apartment block (Milan Towers) in Nelson Bay. In May 2002, demolition work commenced on the site, with construction commencing in September 2002. As a result of an injunction obtained by an adjoining property owner, construction was ceased for approximately 18 months from March 2003 until December 2004.

At the same time the defendant was dealing with the plaintiffs’ development, it granted development approval for the construction of several other apartment blocks on properties adjacent to Milan Towers. The plaintiffs, concerned that these apartment blocks would have a detrimental effect on Milan Towers, particularly in terms of blocked views and other design issues, formally lodged a modification application with the defendant under s96 of the Environmental Planning and Assessment Act 1979 (EPA Act) in February 2006, requesting to increase the height and number of units of the apartment block.

The plaintiffs’ application was reviewed by an assessment officer who formed a prima facie view that the application should be refused. Prior to issuing a Notice of Intent to Refuse however, the assessment officer obtained legal advice about whether the defendant had good reason to refuse the modification application on its merits between February 2006 and July 2007, although a predetermined view had been reached that it should be refused. The plaintiffs sued the defendant for misfeasance in public office or alternatively, negligence. They claimed that, but for the conduct of the defendant, they would have built and sold apartments at the site with resulting profits between $2.2 million and $3.7 million.

The Decision

The claim for misfeasance in public office was dismissed. The court accepted that the assessment officer was a public officer who owed a public duty to process the application in accordance with the statutory scheme. The plaintiffs failed, however, to establish that the assessment officer had breached that duty with the intention to cause harm to the plaintiffs in processing the application between February 2006 and July 2007. The court found that the assessment officer had acted appropriately in processing the application, and that a substantial cause for the delay in the determination of the application was the constant amendment of plans submitted by the plaintiffs.

The negligence claim was also dismissed. The court rejected the plaintiffs’ argument that they were owed a duty of care by the defendant because of their vulnerability. In reaching this conclusion, the court placed significant weight on the fact that the plaintiffs had an avenue of appeal under s96(6) of the EPA Act which they did not seek to utilize. This right of appeal became available on 27 March 2006, as the defendant had failed to determine the application within 40 days. The availability of an appeal meant that the plaintiffs were not vulnerable as they were able to protect themselves from the consequences of what they contended was the defendant’s want of reasonable care.

The court also found that had the plaintiff succeeded in proving negligence or misfeasance, the prospects of realising a profit were so low that there was not a loss of a chance.
Scandle v Far North District Council
[2012] NZCA 52

The Facts
In February 2004, Mr Scandle purchased a holiday house from Michael Mullane. Mr Mullane had built the house himself and shortly after he began construction, in September 2000, the Far North District Council ("the Council") issued a notice to rectify after a building inspector detected problems with the construction. Mr Mullane obtained new designs for the house which were approved by the Council in January 2001. Mr Mullane subsequently appointed Nationwide Building Certifiers to inspect and certify the rest of the building work. Mr Mullane resumed building in February 2001 and the house was finished in April 2002. During this period, Nationwide gave the Council various progress reports and in April 2002, issued a code compliance certificate for the building work.

Shortly after Mr Scandle purchased the property in 2004, a number of serious defects in the house emerged, rendering it uninhabitable. It became apparent that the house did not comply with the amended designs or with the building code. Mr Scandle commenced legal proceedings against Mr Mullane's family trust as vendors of the property and Mr Mullane in his capacity as builder. The High Court of New Zealand awarded him $452,000 in damages, however, Mr Mullane and his wife subsequently went bankrupt and Mr Scandle was unable to recover any money from them. Mr Scandle did not sue Nationwide as it was already in liquidation. Mr Scandle then sued the Council for breach of statutory duty and negligence.

The Decision at Trial
The High Court of New Zealand found in favour of the Council on both causes of action. It found that the Council had not been negligent nor were any of the Council’s acts causative of the loss suffered by Mr Scandle.

The Issues on Appeal
Mr Scandle appealed against the trial judge’s finding that the Council was not negligent. He did not pursue the cause of action for breach of statutory duty.

The first issue on appeal was whether the Council’s failure to require a geotechnical report before issuing the first building consent in 2000 was causative of Mr Scandle’s loss. The next question was whether the Council was negligent in permitting building in January 2001 without requiring the loose fill (or ‘overburden’) on the site to be removed. The third issue was whether the Council was negligent in not following through on its notice to rectify issued after an inspection in November 2000 and the final issue was whether the Council was negligent in not checking Nationwide’s reports.

The Decision on Appeal
On the first ground, the Court of Appeal agreed with the trial judge’s finding that there was no substantial and material causal link between the Council’s failure to obtain a geotechnical report and the loss. The failure to require a report before issuing the consent may, of itself, have been a default on Council’s behalf, however, the connection between the default and the loss was trivial.

The Court of Appeal dismissed the second ground as it was not made out in the pleadings.

On the third and fourth grounds, the Court of Appeal found that the Council had acted properly in ordering work to stop when the building inspector detected problems and new plans were then prepared. Mr Mullane subsequently appointed Nationwide to undertake the inspection role and it was Nationwide’s responsibility, not the Council’s, to exercise reasonable care in inspecting the ongoing construction. The Council had no inspection role once Mr Mullane had elected to retain Nationwide and it also had no obligation to monitor Nationwide’s activities. The appeal was dismissed and Mr Scandle was ordered to pay the Council’s costs.
The Facts

The respondent’s prime mover and tanker sustained damage when it rolled down an embankment along a narrow section of a rural road at night. The road comprised a formed section of roadway and a soft edge which was a section of built up soil and loose material. The incident occurred when the vehicle travelled partially on the soft edge of the road which gave way under the heavy vehicle.

The respondent alleged negligence against the local Council for failing to install guide posts to delineate the edge of the formed section of the road.

The Decision at Trial

The trial judge found that the incident was due to the negligence of the Council in failing to install guideposts.

The Council was ordered to pay the respondent around $220,000 in damages plus interest.

The Decision on Appeal

The Council appealed on the basis that:

(a) It was entitled to a defence under s43A of the CLA (NSW) on the basis that the Council’s authority to install guideposts along the roadway was pursuant to a “special statutory power”; and

(b) The trial judge erred in failing to properly identify the relevant risk for the purposes of s5B of the CLA (NSW).

The Court of Appeal found that s43A is a matter that is required to be specifically pleaded under the New South Wales UCPR because it provides a complete defence to the claim against the public authority and, if not pleaded, it would take a party by surprise. The Court of Appeal found that the Council’s defence did not specifically plead s43A, and that it accordingly failed to comply with the pleading rules. The power to dispense with its rules and allow the defence would depend upon a favourable exercise of its discretion. This exercise of discretion is based upon fairness to the parties.

The Court of Appeal unanimously held that the unfairness to the respondent in allowing the s43A defence in the circumstances was such that the defence should not be allowed. In doing so, it considered the prejudice to the respondent and noted that allowing the defence would require a new trial to allow the respondent to adduce further evidence. The appellant had run a contrary argument about certain issues at the trial which had not been contested by the respondent at trial.

The Court of Appeal then identified the relevant risk for the purposes of s5B of the CLA (NSW). The Court noted that the section essentially enacts the common law principles relating to breach of duty. While the Court noted that the trial judge did not engage in a structured approach to the identification of the relevant risk, the trial judge had identified the risk as the harm that occurs when travelling on the soft section of the road. The Court considered that it was foreseeable, given the narrowness of the road, that the wheels of the vehicle would travel too close to the edge. The Court of Appeal accordingly found that the criteria for breach of duty under the CLA (NSW) was satisfied.

The Council’s appeal was dismissed with costs.

IN ISSUE

• Consequences of a failure to adequately plead and prove a statutory defence
• Identification of the relevant risk for the purposes of s9 of the CLA (NSW)

DELIVERED ON 9 March 2012

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[2012] NSWCA 34
The Facts

The first appellants were the registered owners of land on the boundary of Warren National Park in Western Australia. The second appellants leased portions of this land to cultivate grapes for wine production. The respondents were the Executive Director of the Department of Conservation and Land Management ("the Department") and the State of Western Australia.

A prescribed burn was carried out by the Department from late March to early April in 2004, which covered 560 hectares of land in Warren National Park. The burn was carried out on the basis of a forecast that conditions were suitable for the burn. It took place during the period from veraison (a grape developmental stage) to harvest, at which stage it was accepted that there was a not insignificant risk that the grapes would be damaged by smoke from the burn. The appellants lost their annual crop because smoke damage made the grapes unfit for wine making, and they suffered a loss of $620,000.

The Department had issued a Burn Notice advising of its intention to conduct a prescribed burn. The appellants had communicated concerns about smoke damage to the Department. The Department had also received requests from other grape growers to defer the burn until after harvest time.

The Department’s burn prescription was amended to minimise the impact of smoke on the appellants’ vineyards. However, the Minister for the Environment approved the Department’s position to carry out the prescribed burn when the field conditions were deemed suitable, and not to delay it at the request of individual grape growers. There were limited opportunities in any year to safely and effectively conduct a prescribed burn. It was considered a high priority burn due to excessive fuel loads and the land’s close proximity to a significant town.

The Decision at Trial

The trial judge held that the respondents did not owe a general law duty of care to the appellants to avoid smoke damage to their grapes, and even if a duty of care did exist it had not been breached. The trial judge accepted that the Department is under a statutory duty to conduct prescribed burns, and it was neither possible to conduct a prescribed burn on the land without putting some smoke over the appellants’ vineyard, nor to maintain an effective fuel reduction burning programme if burning were restricted to outside the veraison to harvest period.

The Issues on Appeal

The central issue was whether the Department owed a duty of care to grape growers (to avoid the risk of damaging grapes by smoke) when carrying out prescribed burning of adjacent land. The Court of Appeal held that the imposition of a duty of care in the circumstances would be incompatible with the Department’s statutory obligation to manage the land in accordance with the relevant fire management plan. It also held that finding a duty of care would impose a legal obligation that would be incapable of being discharged.

The Court of Appeal noted that it is not a court’s function to rule on the reasonableness of statutory functions. In any event, it also accepted that the Department does not owe a duty of care to grape growers (to avoid the risk of damaging grapes by smoke) when carrying out prescribed burning of adjacent land. The Court of Appeal held that the imposition of a duty of care in the circumstances would be incompatible with the Department’s statutory obligation to manage the land in accordance with the relevant fire management plan.

The Decision on Appeal

The Court of Appeal held that the Department does not owe a duty of care to grape growers (to avoid the risk of damaging grapes by smoke) when carrying out prescribed burning of adjacent land. The Court of Appeal held that the imposition of a duty of care in the circumstances would be incompatible with the Department’s statutory obligation to manage the land in accordance with the relevant fire management plan. It also held that finding a duty of care would impose a legal obligation that would be incapable of being discharged.
Department's decision to proceed with the burn was not so unreasonable that no reasonable public body or officer could have made it. The Court of Appeal accepted that prescribed burning is carried out for the benefit of the south-west community as a whole, which is a wider class than the affected grape growers.

The Court of Appeal held that s132 of the CALM Act provides no immunity to the State in relation to its direct (personal) liability for any negligence of the Department in relation to the prescribed burn area.

In terms of any nuisance claim, the Court of Appeal held that nuisance is a separate cause of action from negligence and liability is strict as it is directed at the harm caused rather than the conduct in causing it. As such, there was no requirement for the appellants to prove in nuisance that the respondents owed them a duty of care. However, the claim in nuisance failed because a defence of statutory authority applied, that is nuisance from the escape of smoke was an inevitable and unavoidable consequence of the Department’s authorised undertaking of prescribed burning.
The Facts

On 19 July 2006, a young girl wandered into the backyard of a property at Garden Avenue, Warren in Western New South Wales. There were a number of hunting dogs in the backyard and one or more of them mauled her so severely that she subsequently died.

The girl’s father and brother (the respondents) brought proceedings against the Council for damages for nervous shock. The respondents alleged that the council was aware that hunting dogs roamed the local area and that complaints had been made about their behaviour. It was alleged that in those circumstances the dogs were dangerous dogs within the meaning of the Companion Animals Act 1998 (NSW) (the Act) and that a declaration should have been made under the Act to declare the dogs dangerous. If this had been done, it was alleged that the dogs would have been secured and the incident would not have occurred.

The Decision at Trial

The trial judge found that the Council owed both respondents a duty of care because the duties imposed on Councils and the objects of the Act, together with the principles stated by the High Court in cases such as Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, established a duty in the circumstances of the case to prevent harm from a foreseeable risk of injury. The trial judge found that the Council was negligent and in breach of that duty for failing to exercise its powers under the Act to declare the dogs in question to be “dangerous dogs”.

The Issues on Appeal

The issues on appeal was whether it was open to the trial judge to conclude that the dogs were “dangerous dogs” within the meaning of the Act and whether s43A of the CLA (NSW) excused the council from liability.

The Decision on Appeal

Section 33 of the Act provided that a dog was ‘dangerous’ if it has, without provocation: a) attacked or killed a person or animal; or b) repeatedly threatened to attack or repeatedly chased a person or animal. The trial judge concluded that because the dogs were hunting dogs they necessarily fell within s 33(a) of the Act. The Court of Appeal held that in doing so, the trial judge was in error. As the dogs were specifically trained to attack animals, it could not be said that they did so “without provocation” as required by s 33(a) of the Act. (The Act has since been amended and a New South Wales council now has power to declare dogs to be dangerous if they are satisfied that the relevant dogs are kept or used for the purposes of hunting).

The respondents argued that the trial judge’s conclusion that the dogs were dangerous could be justified under s 33(b) of the Act because prior to the incident, to the knowledge of the Council, the dogs had “without provocation, repeatedly threatened to attack or repeatedly chased a person or animal ...”. The Court of Appeal rejected this argument because of the unreliable and vague evidence in relation to the identity of the dogs alleged to have been involved in the prior attacks and also because the prior attacks were relatively sparse and insufficiently serious in nature to justify any action on the council’s part.

In any event, the Court of Appeal determined that s43A of the CLA (NSW) prevented the respondents’ action against the council succeeding. That section provides that a claim against a public authority for failure to exercise a statutory power cannot...
succeed unless the failure to exercise the power was so unreasonable that no authority having the power could properly consider the failure to exercise it as a reasonable exercise of that power. The Court of Appeal held that the “unreasonableness” must be at a high level. The trial judge was in error in finding such a high level of unreasonableness in circumstances where the evidence was that the prior incidents relating to the dogs were in the nature of complaints about the dogs being a nuisance as distinct from being a danger.

The Court of Appeal also considered whether a duty of care existed as between the council and the respondents. The Court of Appeal held that the relevant statutory regime (the Act) created a relationship between the council and that class of persons to whom the respondents belonged. The factor of the degree of control given to the council was held to be a highly significant matter.

The appeal was allowed.  

Warren Shire Council v Kuehne & Anor
[2012] NSWCA 81
The Facts

On 26 January 2008 the plaintiff jumped several times from the branch of a tree overhanging the Murray River by about 10 metres, into an adjacent area known as Oddies Creek Park. After observing a number of other people jumping from the same tree directly into the River, the plaintiff attempted to use the same rope in order to perform a back flip into the water. The plaintiff’s attempted backflip was unsuccessful, and his head struck the sandy bottom of the river and he was rendered a C7 quadriplegic.

At the time of the incident, the plaintiff was 16, and an accomplished competitive diver.

On the day in question, the defendant held a number of council events to celebrate Australia Day at Noreuil Park, including live music, face painting and community exhibitions which took place in and around the Noreuil Park foreshore. Other than a regatta (a novelty boat race held on the Murray River), none of the activities or entertainment arranged by the defendant took place outside of Noreuil Park.

The defendant was aware that there were ropes hung from trees along the river bank and expected that people may jump from a bridge into the river when the regatta took place.

The defendant employed a senior gardener/arborist whose duties included tree maintenance in the council area and the engagement of contractors to carry out maintenance work when necessary. The day before the incident, the gardener contacted the contractor and asked if he was available to remove a rope swing (believed to have been the rope swing used by the plaintiff on the date of the incident), from the Oddies Creek Park. The contractor informed that he was unavailable until the following Tuesday (29 January 2008).

The Decision

The court held that the defendant did not owe the plaintiff a duty of care. The defendant did not have exclusive use of the river on the relevant day, and the fact that the defendant went beyond its obligations to remove foreseeable risks of harm from the land under its management and control, by attempting to remove rope swings from trees along the riverbank when detected, did not necessarily give rise to an assumption of responsibility towards persons such as the plaintiff.

The court held that the defendant had exercised reasonable care by instituting a system of weekly inspections of the riverbank and by organising an available contractor to remove the rope swing as soon as practicable after 25 January 2008 (when it was reported).

With respect to whether or not the risk was obvious, the court held that it was, and that there was no duty to warn of the risk of harm. The plaintiff acknowledged that he was performing a risky manoeuvre which increased the risk inherent in diving or jumping from the rope swing.

Although the court held that the defendant did not owe a duty of care to the plaintiff, the court nevertheless considered the defence of whether or not the plaintiff was engaging in a dangerous activity.

Having regard to the risk of the plaintiff suffering serious injury by diving and/or jumping from the rope swing into water of unknown depth, the court held that the plaintiff was engaged in a dangerous recreational activity and that the harm suffered was due to the materialisation of the obvious risks associated with that dangerous recreational activity.

IN ISSUE

• Did the public authority owe a duty of care and was that duty breached by the authority’s failure to remove a rope swing?
• Was the risk obvious?
• Was the plaintiff engaging in a dangerous recreational activity?

DELIVERED ON 28 May 2012

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The Facts

The plaintiff brought proceedings in negligence against the defendant in respect of an accident which occurred on 19 July 2006. The plaintiff was driving in a northerly direction in Channel Road, Curlwaa, NSW, when he lost control of his vehicle as he was negotiating a left-hand corner. The plaintiff alleged that the cause of the accident was the presence of substantial quantities of gravel on the road which had been placed there by servants or agents of the defendant. The plaintiff suffered serious spinal injuries as a result of the accident.

The Decision

The court found that the plaintiff was not travelling at an excessive speed at the time of the accident and was satisfied that the cause of the incident was the loss of traction by his vehicle due to the presence of gravel on the road at that location.

The court held that the relevant risk of harm was the presence of a substantial quantity of gravel on the road surface at a difficult corner, which might cause vehicles attempting to negotiate that corner to leave the road. That risk was foreseeable and was not insignificant because the presence of the gravel on the road surface substantially lowered the critical speed for vehicles attempting to negotiate the corner. In those circumstances a reasonable Council, which carried out the road works at the corner would have taken steps to make sure that the gravel used was not in such quantity as was likely to come upon the road and would have erected appropriate signage. The court was satisfied that the defendant breached the duty of care which it owed to the plaintiff as a road user.

The court further found that the quantity of gravel on the road was substantial and there would have been definite contrast even in poor lighting conditions. In those circumstances the court concluded that the plaintiff failed to keep a proper lookout and therefore was partially responsible for the accident.

The court awarded judgment in favour of the plaintiff against the defendant in the amount of $770,565.00 which was reduced by 15% for contributory negligence.
The Facts

On the night of the 23 December 2001, there were storms and lightning strikes in the Blue Mountains, NSW. The Mount Hall fire began in the Blue Mountains National Park on this night and was caused by a lighting strike. This fire was in remote bush which was not accessible by road or track. A second fire began on the same night (the Brereton Bend fire) which was also caused by lightning.

At around 9:48am on 24 December 2001, National Parks and Wildlife Service (NPWS) personnel noticed 2 smoke columns. The information was passed onto the Rural Fire Service (RFS). By 11:37am further fires were reported. The Sydney Catchment Authority (SCA) dispatched personnel who observed the Mount Hall fire and noted its inaccessibility. The SCA personnel decided not to attack the fire for this reason. They brought the Brereton Bend fire under control. At 2pm on 24 December 2001, a helicopter was deployed and unsuccessfully attempted to bucket water onto the Mount Hall fire.

On 24 and 25 December 2001, there were other fires burning in the Blue Mountains area which presented a far greater threat to lives and property at the time than did the Mount Hall fire. At this point, the Mount Hall fire was still burning in remote bush. The Mount Hall fire remained in the Park until about 10:30am on 25 December 2001. By 2pm, the fire had reached the townships and there was nothing the SCA could have done to prevent its spread. During the afternoon, the fire burnt a number of properties in the townships either owned or occupied by the plaintiffs.

The plaintiffs alleged the NPWS and the RFS were negligent as their officers had failed to carry out any of the known protocols to fight fires. In the alternative, the plaintiffs argued that the NPWS, SCA and RFA failed to warn the plaintiffs of the approach of the fire.

The Decision

The court handed down judgment for the defendants. There was never a realistic possibility the Mount Hall fire could have been fought successfully on 24 December 2001. There were too many other fires of greater threat to people and property for the limited resources. Decisions had to be made about priorities. Any attack on the Mount Hall fire involved the use of ground crew and the track was so poor on that day, that no crew could have used it to get safe access to the fire or to get away from the fire in the case of an emergency.

The plaintiffs did not prove any warnings would have come to their notice if warnings were given or that they would have acted any differently if they had received warnings. The defendants had no obligations to issue warnings referring specifically to the townships where the plaintiffs lived.

The defendants did not owe any duty of care to the plaintiffs, either at common law or pursuant to s43A of the CLA (NSW). Even if a duty of care was owed, both the RFS and NPWS were entitled to rely on s128 of the Rural Fires Act 1997 (NSW) which provided a defence for authorities where acts or omissions were done in good faith.

The RFS and NPWS were not negligent for not attacking the fire earlier or more effectively as:

(a) the aircraft to attack the fire was not available;
(b) the track to allow access by ground crews was useless; and
(c) the fire began to the west of the track and did not begin to the east of the track where crews could have fought it safely.

IN ISSUE

• Whether a duty of care was owed by fire authorities to property owners
• Whether the authorities were negligent for a failure to attack the fire or for a failure to warn
• Whether the authorities could rely on a statutory defence

DELIVERED ON 26 June 2012

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The Facts

Mr Doherty, a police officer, sued the State of New South Wales (“NSW”) for damages for post-traumatic stress disorder contracted during his employment as a crime scene investigator when he was required to attend many crime scenes involving death and serious injury. Mr Doherty attempted to conceal or under-report his symptoms from the various psychologists who examined him over the years and as a result, continued to work and be further exposed to traumatic crime scenes without psychological treatment.

The Decision at Trial

The trial judge found in favour of Mr Doherty and ordered judgment against NSW for $753,000. The trial judge applied a 35% reduction for contributory negligence on Mr Doherty’s part for his failure to honestly and completely report his symptoms and condition to the psychologists who examined him.

The Issues on Appeal

NSW appealed arguing that the trial judge erred in finding negligence and causation. Mr Doherty cross-appealed against the finding of contributory negligence.

The Decision on Appeal

The Court of Appeal upheld the trial judge’s finding of negligence, causation and contributory negligence.

The Court of Appeal found that the trial judge had been correct to hold that NSW should have foreseen a significant risk of psychological injury to officers involved in crime scene investigation and should have adopted a high standard of monitoring of those officers. The Court of Appeal also held failing to ensure that psychologists were appropriately qualified and used correct diagnostic tests left NSW in breach of its duty to Mr Doherty.

The Court of Appeal held that the trial judge was correct in determining that if the concerns noted by some psychologists had been followed up, Mr Doherty would not have been exposed to further traumatic events without appropriate treatment. The Court of Appeal also held that the trial judge was correct in finding that NSW’s negligence had been a necessary condition for the occurrence of Mr Doherty’s injuries, as required by s5D(1)(a) of the CLA (NSW).

The Court of Appeal accepted NSW’s argument that the trial judge should have adopted a higher percentage discount for vicissitudes because of the uncertainties concerning what would have happened even if NSW had fulfilled its duties. The discount for vicissitudes was increased from 15% to 30% and resulted in a slight reduction of the overall damages.

The Court of Appeal rejected Mr Doherty’s appeal for a reduction in the amount of contributory negligence on the basis that the trial judge’s assessment was reasonable in the circumstances.
The Facts

In November 2006, Mr Keith Evans (the deceased) was diagnosed with lung cancer. He had started smoking in about 1941 at the age of 14 or 15 years and had smoked between 20 and 35 cigarettes per day for approximately 40 years up until 1991. He had also suffered occupational exposure to asbestos dust during his employment with the Queanbeyan City Council (the first respondent) between 1975 and 1990.

Following Mr Evans’ death, his widow, Mrs Lola Evans (the appellant) brought an action in the Dust Diseases Tribunal (the Tribunal) claiming that her husband’s lung cancer was caused by exposure to asbestos dust in circumstances imposing responsibility upon the first and second respondents. The second respondent was Amaca Pty Ltd, a manufacturer of asbestos building products throughout much of the deceased’s working life.

The Decision at Trial

The Tribunal was not satisfied, on the balance of probabilities that the deceased’s lung cancer was caused by exposure to asbestos dust in circumstances imposing responsibility upon the first and second respondents. The second respondent was Amaca Pty Ltd, a manufacturer of asbestos building products throughout much of the deceased’s working life.

The Decision on Appeal

The appeal was dismissed. The appellant was required to prove on the balance of probabilities, that the respondents’ wrong caused or materially contributed to the deceased’s lung cancer. It was not sufficient for the appellant to show that the wrong materially increased the risk of harm.

Although there was evidence of a biological synergistic effect of asbestos dust and tobacco smoke in causing lung cancer, the primary judge was entitled to reject, as inconsistent with the epidemiological evidence, the hypothesis that both smoking and asbestos dust worked together in the majority of cases and thus in respect of the deceased’s lung cancer. There was no unequivocal support for the hypothesis that in all or at least the majority of cases, the smoking and exposure to asbestos dust interacted to cause lung cancer.

Evans v Queanbeyan City Council

[2011] NSWCA 230
The Facts
The plaintiff suffered an injury to his left arm on 19 August 2006 in the course of his employment as a fitter with the first defendant, Tucaby Engineering Pty Ltd. North Goonyella Coal Mines Pty Ltd (the second defendant) was the plaintiff’s host employer and the occupier of the site where the plaintiff suffered the injury. The accident occurred when the plaintiff attempted to step over a low slung chain hanging across a wide doorway used to bring machinery into the shed. As he did so, a small hook on a sign located at the mid, and low point of the chain caught in the spats that the plaintiff wore over his boots. The plaintiff tripped and fell heavily onto his left elbow.

The plaintiff commenced proceedings against the defendants alleging a breach of duty both at common law and under the Coal Mining Health and Safety Act 1999 (Qld). The defendants conceded that the plaintiff had made out his case on liability but argued that the plaintiff was guilty of contributory negligence as:
(a) The plaintiff failed to use an alternative and available means of egress from the workshop namely a door available for pedestrian access;
(b) There were other obviously safer means of egressing through the machinery doorway, namely by lifting the chain off the hook where it was attached to the wall or alternatively ducking under the chain; and
(c) The plaintiff’s method of stepping over the chain in not breaking his stride, which led to him both failing to clear the hook and not grounding his right foot before lifting his left foot, was not reasonable given the obvious hazard.

The Decision
The court rejected the defendants’ submissions and held that the plaintiff was not guilty of contributory negligence.

It was foreseeable that in stepping over the chain, the plaintiff might clip it and fall. However, foreseeability of the risk was not a sufficient condition to ground an obligation to act or refrain from acting. It was necessary for the defendants to point to something, other than an everyday risk that was commonly avoided, as justifying a finding of contributory negligence.

There was no reason, absent some express warning, why the plaintiff should have been particularly wary of the chain. The chain was there to keep machinery out of the workshop, not workers such as the plaintiff. It was not unreasonable for a worker to use the shortest, most direct route to access machinery outside the workshop.

The court found that the exercise of reasonable care did not require the plaintiff to pause and carefully consider things before stepping over the chain. There first needed to be some trigger to make the plaintiff realise that he ought to pause and weigh up things before simply stepping over the chain. The defendants had not thought to issue any instruction to workers concerning the chain as a particular hazard.
unknown hooks which bought the plaintiff down. The real problem was that the chain was so low that it appeared to be an easy hurdle to clear. The plaintiff was not negligent in failing to identify the danger and avoiding it. It was not just or equitable to reduce the damages recoverable by the plaintiff.
The Facts

The applicant alleged that on 23 December 2005 she was working at the first respondent’s hardware store when she was required to lift approximately 20 x 23kg drums of paint from the floor, twist around to place them on a stool, mix in tint and then replace the drums on the floor. The applicant swore by affidavit that in the course of doing this work, her back became “sorer and sorer” and by the next day she could hardly move. The applicant received treatment in early 2006, including a CT scan that imaged a disc protrusion at L5/S1, of which she was not informed (possibly because her doctor had failed to keep proper records).

She continued working at the hardware store until 2008, at which time she found lighter work until February 2010. By that time, the sciatic pain in her legs had increased markedly and she went back to her doctor for further medical assistance. On 23 September 2010, her specialist (who 6 months earlier had been dismissive) recommended surgery and in early 2011 she sought legal advice for the first time.

An originating application was filed in August 2011 for leave to proceed pursuant to the WCRA and for an extension of the limitation period.

The 3 newly discovered factors of a decisive nature relied upon by the applicant in the limitation extension application were the causal contribution of the work, the extent of her injury and the consequences thereof.

The Decision

Notwithstanding that the court was satisfied that the applicant had sufficiently pursued investigating her condition and it was only its escalation that caused her to become aware of the facts that were now so evident, the court dismissed the application on the basis that the applicant had failed to prove that there was a cause of action in negligence.

In this regard, the court stated that the applicant had failed to advance any evidence that the repetitive movement of a 20kg – 24kg weight in the manner that she adopted on the day in question involved forces that were liable to injure the spine of a person of normal fortitude. It was not enough that other plaintiffs had succeeded in cases involving lesser weight. Each case must be proved.

It followed that the late discovered material facts on which the applicant now relied, could not be proved to have been “decisive” as her new-found recognition of the causal link and the extent and consequence of the injury could only gain that quality if based on expert medical opinion which appeared nowhere in the material.
The Facts

The respondent allegedly sustained an ankle injury on 5 June 2008 in the course of his employment as a security officer at the Cultural Centre when he stepped on a protrusion at the site. The respondent was employed by the State of Queensland acting through the Department of Public Works in his capacity as a security officer. The Cultural Centre was owned and controlled by the State of Queensland acting as Arts Qld.

The respondent pursued a statutory WorkCover Queensland claim and was assessed as having a 7% whole person impairment. When given the election to receive a lump sum payment or commence a common law worker’s compensation claim, the respondent elected to receive the lump sum, disentitling him to worker’s compensation common law damages.

The respondent subsequently commenced a claim pursuant to the PIPA against the State of Queensland as the occupier of the Cultural Centre.

The appellant sought a declaration from the court that PIPA did not apply and that the respondent was prevented from bringing a claim for common law damages as he had accepted a lump sum, pursuant to s239(2) of the WCRA.

The Issues on Appeal

The appellant submitted that there was no distinction between the entities or the claims.

The Decision on Appeal

The Court of Appeal accepted the appellant’s submissions that Arts Qld was the same entity as the State of Queensland. It made reference to provisions of the Public Service Act 1996 and held that the respondent was employed by the State of Queensland and not the Department of Public Works. Therefore, the claim under PIPA was the same as the claim that had been brought under the WCRA.

The Court of Appeal went on to say that “occupier’s liability” was no longer a discrete basis of liability. The respondent had a right to damages against his employer for negligence, “whatever might be the basis for that negligence, whether it be as employer, occupier or neighbour.”

The Court of Appeal therefore held that the respondent had already received damages for his claim under the WRCA and was prevented from bringing a claim arising from the same cause of action under PIPA.
The Facts

Five agents (the agents), who were travelling sales representatives, brought an action against the Combined Insurance Company of Australia (CIC) claiming payment for annual leave and long service leave entitlements under the Workplace Relations Act 1996 (Cth) and the former Insurance Industry Award 1998 (Cth). The issue was whether or not the agents were in fact employees.

The agents’ various claims covered a period running from October 1981 to October 2006. While the agents worked for CIC, they were paid commission on the insurance premiums that they collected, used their own vehicles, did not have income tax deducted from earnings and issued tax invoices to CIC for the services they provided.

The Decision

The court held that the agents were employees. In reaching his conclusion, the court stated that CIC exercised direct control over the agents and that the agents were told how to conduct their businesses. It found that:

- the tax invoices the agents issued to CIC were generated by CIC and issued to itself;
- the agents accrued no goodwill in their businesses;
- the agents in practical terms were unable to work for any other insurer; and
- the agents sold only CIC’s policies to CIC’s customers and were trained by CIC in a system of business devised and maintained by CIC.

The court did note factors which pointed towards the agents not being employees including that:

- the agents drove their own vehicles and were able to purchase their vehicles GST free by reason of it being a business asset;
- CIC did not deduct income tax instalments from the commission paid to the agents;
- the agents were not required to inform CIC if they were going to take leave;
- the agents were permitted to operate, if they chose, through a corporation; and
- the agents were permitted to hire secretarial or administrative staff to assist them.

These factors however did not change the fact that the agents were under CIC’s control.
The Facts
The Victorian WorkCover Authority (VWA) sued the defendant for recovery of an indemnity in respect of compensation paid by it under the Victorian Accident Compensation Act 1985 (the Act). The claim arose out of a back injury sustained by Mr Stretton when he slipped and fell on the deck of a commercial fishing vessel at sea in Australian waters in October 2000 while working as a deckhand.

The defendant was the owner of the vessel at the time. It denied any responsibility for the condition of the deck, denied that it was an occupier, denied negligence and denied causation.

The Decision
There was no dispute that in October 2000, Mr Stretton slipped and fell on the wooden deck while working on the boat, sustaining a serious injury.

There was also no dispute that the defendant was under a general common law duty of care to Mr Stretton which was, co-extensive with the duty of an occupier as specified in the Wrongs Act 1958 – that is, a duty to take such care as in all the circumstances is reasonable, to see that any person on the premises will not be injured by reason of the state of the premises.

The VWA alleged that the defendant was in breach of this duty because the deck was hazardous or unsafe because it was unduly worn, excessively slippery and it should have repaired or replaced the deck. It also should have warned Mr Stretton about its condition.

The court was not satisfied that a reasonable person in the defendant’s position would have replaced the deck before the injury occurred.

The court noted that the vessel was surveyed twice in 1999, the year before the accident, and no defects were noted in the deck. The court also considered the evidence of the crew. The captain and the engineer of the vessel were considered to be credible and reliable witnesses who were of the opinion that the deck was not unsafe and did not need to be replaced at the time of the accident. Mr Stretton gave evidence and was more critical of the condition of the deck than the other witnesses but his evidence was considered less reliable for a number of reasons.

The court also had to balance the cost of replacing the deck against the risk of injury in assessing whether there had been a breach of duty. The deck was replaced 2 years after the accident at a cost of $22,000 while it was in for engine and other repairs. Had the deck been replaced at another time, there would have been significant cost to the crew who would have lost a large amount of income while the boat was out of action. The court found that the VWA had not discharged the burden of proving that the defendant was negligent in failing to replace the deck of the vessel.

The court also held that the VWA failed to establish that any negligence of the defendant caused Mr Stretton’s injury. The VWA was required to show that replacing the deck, more probably than not would have prevented or minimised Mr Stretton’s injury. This could only be established by showing that a defect of the old deck that would not have been present in a new deck was a factor in the sustaining of Mr Stretton’s injury.

The court examined the case law and ruled that the test for causation under the common law in Australia is that unless on the balance of probabilities the defendant’s actionable conduct is shown to be a necessary condition of the plaintiff’s injury, the plaintiff will not succeed.

The court was not satisfied that, on the balance of probabilities, but for the alleged defects in the
deck, Mr Stretton would not have fallen or would have suffered a lesser injury. The court was therefore not satisfied that replacing the deck would have prevented or minimised the injury.

The VWA also argued that the plaintiff slipped because of either a pool of water or a protruding knot or bolt. The court held that the evidence did not support these arguments. The VWA also argued that because of the circumstances of the fall, there was no alternative but to infer that the condition of the deck was responsible for it. The court declined to draw such an inference on the basis that to do so would be little more than speculation.

The court concluded that the VWA had failed to establish that the defendant was negligent and failed to establish that any negligence was a cause of the worker’s injury.
The Facts

In December 2008, Mr Rourke filed a claim for damages for lung cancer and asbestos related pleural disease he allegedly contracted as a consequence of his exposure to asbestos during his employment as a carpenter between 1967 and 1983. Mr Rourke died of lung cancer on 12 January 2009. On 12 June 2009, his estate assigned to WorkCover the cause of action against Amaca (the manufacturer of the asbestos sheeting used by Mr Rourke) in respect of that claim. In October 2009, WorkCover commenced proceedings against Amaca for damages sustained by Mr Rourke as a consequence of Amaca’s negligence. Prior to his death, WorkCover paid to Mr Rourke the amount of $550,351.50 by way of statutory compensation pursuant to the WCRA. An application was made pursuant to r483 of the UCPR for determination as a separate question whether the assignment of the claim for damages for personal injury was valid.

The Decision

WorkCover accepted that, traditionally, actions for damages for personal injuries have been considered to be personal actions which were incapable of assignment. However, WorkCover submitted that recent authority provided support for the conclusion that there can be a valid assignment of such a claim if the assignee has a genuine and substantial interest in the success of the litigation or a genuine commercial interest in its enforcement. Amaca argued that the law continued to prohibit the assignment of such causes of action and that, even if it was wrong on that point, WorkCover did not have the requisite genuine interest.

The court accepted WorkCover’s argument that a claim for damages for personal injury is capable of being validly assigned where the assignee has the requisite genuine interest. English and Australian case law established that causes of action in contract could be validly made where the assignee had the requisite interest and the court held there was no good reason why a distinction should be drawn in respect of the assignment of actions in tort. This was especially so where the assignment was of a cause of action for damages in both contract and tort based on the same facts.

However, the court agreed with Amaca that WorkCover did not have the requisite genuine interest. The court rejected WorkCover’s argument that the existence of the statutory indemnities in the WCRA supported its claim that it had a genuine and substantial interest in the success of Mr Rourke’s claim, or a genuine commercial interest in its enforcement. The Court held that there must be an existing legitimate interest supporting the action, as opposed to the benefit obtained from the assignment. To be a genuine or substantial interest, there must be an interest which already exists and which receives ancillary support from the assignment. WorkCover’s interests did not satisfy that test. Its claim was not like a right of subrogation. WorkCover was given a statutory right of indemnity under the WCRA only in specified circumstances. Those circumstances were not satisfied in the case. WorkCover therefore had no pre-existing interest. It sought to create an interest by an assignment; such an interest did not satisfy the test of a genuine substantial or commercial interest.

The Decision on Appeal

The Court of Appeal allowed the appeal. The Court of Appeal held that WorkCover held the genuine commercial interest to allow for the assignment. The assignment was not such that WorkCover were acting against the interests of justice, or guilty of maintenance or champerty having regard to s207B(7) of the WCRA.
The Facts
In mid 2002 the plaintiff, Mr Shirreff, was working in a lift shaft of a nine story building in Collins Street in Melbourne. The building was owned by the defendant, Elazac Pty Limited. While working in the lift shaft, the plaintiff fell off a ladder and sustained serious injuries to his right foot and right hand.

The plaintiff claimed damages from the defendant for negligence. Among its defences, the defendant denied that the plaintiff was an employee but rather an independent contractor.

The Decision at Trial
The trial judge found that the plaintiff was the defendant’s employee and found that the defendant was liable for the plaintiff’s injuries. Quantum was reduced to reflect contributory negligence.

The trial judge considered the totality of the relationship between the plaintiff and defendant on a practical basis and found a number of factors to be of particular importance:

• The defendant’s owner, Mr Morgan had complete authority over the plaintiff’s activities;
• The plaintiff’s duties were not delegable and had to be personally performed by him;
• The plaintiff was remunerated for the time he spent on Mr Morgan’s projects but not on the basis of his output or the tasks he performed; and
• The plaintiff was required to work on average eight hours per day.

The Decision on Appeal
The Court of Appeal disagreed with the characterisation of the relationship and held that the plaintiff was a contractor. The Court of Appeal considered that an important matter was that the plaintiff had a high degree of control over what he did and the defendant did not have any control as to how a task was to be performed by the plaintiff.

The most significant issue was that the plaintiff had his own employees, and the court found that it would be ‘unusual’ if the plaintiff was actually an employee of the defendant but employed his own staff.

The court noted that the plaintiff:

• Employed employees;
• Disclosed on tax returns and financial documentation that he operated a business in partnership with his wife;
• Could determine who he employed and where they worked;
• Performed additional work for an organisation unrelated to the defendant;
• Did not have taxation or superannuation deducted from his pay; and
• Did not accrue annual leave, personal leave or long service leave.

In those circumstances the court held that the plaintiff was a contractor. Accordingly the appeal was allowed.

IN ISSUE

• Whether plaintiff was an employee or independent contractor

DELIVERED ON 1 December 2011
READ MORE
The Facts

The plaintiff, John Booth, worked as a motor mechanic for a variety of employers between 1954 and 1983. In 2008, he was diagnosed with mesothelioma. The plaintiff’s employment as a motor mechanic involved the replacement of brake linings made from asbestos. The work would involve drilling holes in, and grinding, the linings, and these activities generated asbestos dust. The brake linings were manufactured by Amaca Pty Limited (formerly James Hardie) and, later on, by Amaba Pty Ltd.

The plaintiff was briefly exposed to asbestos on 3 occasions during his childhood: twice during the course of home renovations and once loading bags containing asbestos on to a truck.

The plaintiff argued that his mesothelioma was caused by his occupational exposure. Consequently, he commenced proceedings against Amaca and Amaba (“the defendants”).

The Decision at Trial

After hearing the medical experts, the trial judge concluded that the asbestos dust liberated in the course of replacing the brake linings materially contributed to the plaintiff’s mesothelioma. The brake linings were manufactured by Amaca Pty Limited (formerly James Hardie) and, later on, by Amaba Pty Ltd.

The plaintiff was briefly exposed to asbestos on 3 occasions during his childhood: twice during the course of home renovations and once loading bags containing asbestos on to a truck.

The plaintiff argued that his mesothelioma was caused by his occupational exposure. Consequently, he commenced proceedings against Amaca and Amaba (“the defendants”).

The Decision at Trial

After hearing the medical experts, the trial judge concluded that the asbestos dust liberated in the course of replacing the brake linings materially contributed to the plaintiff’s mesothelioma. The primary judge awarded the plaintiff damages in the sum of $326,640.

The Decision of the Court of Appeal

The defendants appealed to the Court of Appeal.

The Issues on Appeal to the High Court

The defendants argued that on a proper assessment of the medical evidence it was not possible to say which exposures to asbestos had made a material contribution to the development of the plaintiff’s mesothelioma, and therefore there was no basis for the trial judge’s conclusion that exposure to the asbestos from the brake linings materially contributed to the plaintiff’s mesothelioma.

The defendants supported their argument by referring to epidemiological evidence which indicated that statistically garage mechanics did not have an increased risk of developing mesothelioma.

The Decision of the High Court

The High Court was required to consider issues of both factual and legal causation. In the process of doing so, the High Court distinguished between statistical correlation and factual causation. As highlighted by the High Court, the risk of an occurrence and the cause of the occurrence are quite different things. It is generally not possible to prove (or disprove) a causal connection by a statistical correlation alone.

In the present situation, while it may not have been possible to identify which particular exposure might have initiated the development of mesothelioma, the medical evidence indicated that the plaintiff’s exposure to asbestos from the brake linings made a significant causal contribution towards the development of...
the disease. On this basis, the High Court held that the trial judge was entitled to find as a matter of law that exposure to asbestos from the brake linings causally contributed to the development of the plaintiff’s mesothelioma. This conclusion was not overcome by the epidemiological evidence. Consequently, the High Court dismissed the appeal.

In the course of reaching its decision, the High Court made a number of observations regarding causation. The High Court accepted that the threshold test for factual causation was still the “but for” test. The High Court accepted that the test was of limited value in circumstances where multiple events contributed to a particular outcome. In those situations, it is sufficient to demonstrate that a particular act materially contributed to the outcome.

The medical experts gave evidence that all cumulative exposure to asbestos contributed incrementally to the development of the disease. Consequently, in the context of mesothelioma claims, the High Court held that it is enough to show that on the balance of probabilities a particular exposure causally contributed to the development of the disease. This modified concept of causation has been accepted in cases such as Sienkiewicz in order to avoid the injustice that would be caused by the strict application of the “but for” test in dust disease claims.

The High Court’s acceptance of the cumulative effect mechanism means that a causal connection is likely to exist between any non-trivial exposure to asbestos and the subsequent development of mesothelioma. Therefore, each incremental exposure to asbestos will be considered to be a cause of the disease.
The Facts

The plaintiff was employed by Sydney Ports Corporation (SPC) as a port officer. On occasions, as part of his employment, he was required to board vessels moored at the port. The plaintiff did this by walking across the jetty gangway which was held in place by a metal chain and linked by a stainless steel D-shackle located below the surface of the water.

On 23 July 2001, while he was walking across the gangway, the shackle fractured and failed. This caused the unrestrained gangway to rotate suddenly and without warning to a vertical position. As a consequence, the plaintiff was violently propelled onto the wharf below and suffered serious, ongoing orthopaedic and brain injuries.

The plaintiff made a claim against his employer, SPC and Australian Winch and Haulage (AWH) who selected, supplied and installed the shackle.

SPC admitted that it owed a non delegable duty of care to the plaintiff but argued that it discharged that duty by retaining AWH and relying on its expertise to supply and install the shackle. AWH argued that it was not liable to either the plaintiff or SPC because it obtained the shackle from a third party by reference to a particular specification that was suitable for use in salt water.

The court held that SPC breached its duty of care to the plaintiff by failing to provide him with a safe place of work or a safe means of access to work. SPC had no system of inspection or maintenance in place even though the gangway had previously failed and SPC was aware of what caused it to fail. SPC therefore was or should have been aware of the potentially serious consequences that someone in the plaintiff’s position might suffer if another failure occurred. Despite this, SPC took no steps to undertake a risk analysis of the use of the gangway and did not implement any safety measures to avoid such an accident occurring. SPC took no steps at all to avoid the foreseeable risk of harm to the plaintiff and was therefore unsuccessful in arguing that it had discharged its duty to the plaintiff by engaging AWH to supply and install the shackle and to undertake the repairs and modifications to the gangway as necessary.

The court found that AWH was responsible for selecting, supplying and installing the shackle and should have known that the shackle had to be solution annealed in order for it not be corroded by sea water. AWH was unable to produce any evidence that it had specifically ordered a shackle fit for this type of use. The court noted that AWH was frequently required to deal with problems with the gangway and replace failed parts and held as a consequence that it was obliged to specify and select an appropriate grade of stainless steel shackle. The court held that AWH did no more than purchase a so called marine grade shackle and as a result failed to discharge the duty of care it owed to the plaintiff.

The court apportioned liability between SPC and AWH at 65% and 35% respectively in accordance with s5(2) of the Law Reform Miscellaneous Provisions Act 1946 (NSW).
The Facts

On 1 November 2006, Mr Verey was injured at a worksite when he was a passenger in a bucket, attached to the arm of an excavator, which was dropped to the ground. The excavator was being driven and operated by a fellow employee. Mr Verey commenced these proceedings against his employer in the District Court under the MACA alleging that the accident was caused by the negligence of the operator and, vicariously, that of the employer.

The Decision at Trial

At trial, the primary issue was whether the excavator was a “motor vehicle” within the meaning of s3 of the MACA. Section 3 of the MACA defined a motor vehicle as “a motor vehicle or trailer within the meaning of the Road Transport (General) Act 2005” (RTGA). The RTGA defined a motor vehicle as a vehicle on wheels built to be propelled by a motor that forms part of the vehicle.

The trial judge held that the excavator was a “motor vehicle” within the meaning of s3 of the MACA. He distinguished the similar case of Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360, where the NSW Court of Appeal held that an excavator was not a “motor vehicle” within the meaning of s3 MACA. The court found that the decision in Doumit was not distinguishable from the present case and, being a decision of the same court, it should be followed unless the court as presently constituted was convinced that the earlier decision was wrong.

The Issues on Appeal

Whether the excavator was a “motor vehicle” within the meaning of s3 MACA.

The Decision on Appeal

The NSW Court of Appeal held that the excavator was not a “motor vehicle” within the meaning of s3 MACA. The court found that the decision in Doumit was not distinguishable from the present case and, being a decision of the same court, it should be followed unless the court as presently constituted was convinced that the earlier decision was wrong.

The court found that the trial judge had erred in focusing upon the means by which the excavator was propelled. The relevant question was not whether the excavator “gained its locomotion from the rear wheels”, but whether it was “on” its wheels. Following the reasoning of the majority Doumit, the court held that the excavator moved “on tracks” rather than “on wheels” and was therefore not a vehicle within the meaning of s3 MACA.
**The Facts**

Between 1964 and approximately 1979, Mr David Sim was employed by various employers to spray asbestos at commercial and construction sites. He contracted asbestosis and subsequently lung cancer and died in July 2009.

Mrs Sim (the respondent) brought proceedings against 3 of Mr Sims’ former employers in the Dust Diseases Tribunal (the tribunal) as the legal personal representative of Mr Sims’ estate.

**The Decision at Trial**

The tribunal accepted the expert medical evidence of the plaintiff and found the 3 employers jointly and severally liable in respect of Mr Sim’s lung cancer. The employers appealed.

**The Issues on Appeal**

The appellants asserted that the expert evidence as to causation of Mr Sim’s carcinoma was inadmissible, despite the fact that Professor Henderson was a distinguished pathologist with an international reputation and longstanding interest in asbestos caused diseases and Dr Bryant and Dr Yates were clinicians, eminent in the same area. The appellants accepted that each expert had “specialised knowledge based on their training, study or experience” for the purposes of s79(1) of the Evidence Act 1995 (NSW), but disputed that the expert opinions were “wholly or substantially based on that knowledge” which was also required by s79(1).

The appellants argued that:

(a) Because the general theory as to the aetiology of lung cancer was not in dispute there was, in effect, nothing left about which an expert could helpfully opine;

(b) The drawing of the inference of individual causation was not the subject of any organised field of scientific or medical study; and

(c) The experts expressed their opinions in the language of legal standards including “the balance of probabilities” and “material contribution”.

**The Decision on Appeal**

The appellants’ arguments were rejected.

The Court of Appeal’s reasoning as to the first argument was that by purportedly accepting the evidence as to the aetiology of lung cancer, but not accepting evidence as to causation, the appellants were assuming the correctness of their conclusions, namely that the inferences to be drawn as to causation were not available on any logical basis.

The Court of Appeal rejected the second argument on the basis that the appellants failed to consider all aspects of preventative medicine and public health.

As to the appellants’ third argument, the Court of Appeal held that the phrase “the balance of probabilities” did not have a different meaning at law and required no explanation for a jury.

Ultimately the Court of Appeal rejected the appellants’ argument on the basis that they identified no authority for the proposition that cumulative tortuous conduct, independently engaged in by several defendants, did not render each liable for the consequential harm in circumstances where individually, the tortuous conduct was neither necessary nor sufficient to cause the harm.

The appeals were dismissed.

**IN ISSUE**

- Whether expert evidence was admissible
- Whether the lung cancer contracted by Mr Sim (deceased), on the probabilities, was caused by exposure in the appellants’ employment
- Whether the appellants’ negligence was a cause of Mr Sim’s lung cancer.

**DELIVERED ON** 4 April 2012

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

The plaintiff, a qualified carpenter, suffered a significant brain injury when he fell from approximately 3 metres from the ground floor in the kitchen area to the basement of a residential premises under renovation.

The property owner, Mrs Rigby, contracted with David Jonathan Rudd trading as Rudd & Co Constructions (Mr Rudd) and Mr Tilden in order to complete the renovation works. Mr Rudd was retained as the builder for the project. Mr Tilden performed the tasks of a project manager.

It was common ground that the floor in the kitchen was incomplete and that it was dangerous. The flooring had remained in an incomplete state for approximately 6 months and comprised uncovered joists. It was through the gaps between the joists that the plaintiff fell.

The completion of the flooring in the kitchen awaited a final decision from Mrs Rigby in relation to positioning of stairs and an air conditioning unit.

In February 2004, Mr Rudd was absent from the site on holidays. Prior to departing the site he arranged for hazard tape to be put in place to bar entrance to the kitchen. While Mr Rudd was on holidays, Mr Tilden arranged for DMW Carpentry Services Pty Ltd (DMW) to construct an external chimney. The plaintiff was an employee/deemed worker of DMW, and was supervised by the director of DMW, Mr McWilliams. The plaintiff and Mr McWilliams were the only DMW employees that undertook work at the premises.

On 9 February 2004 Mr Tilden gave Mr McWilliams drawings that indicated the dimensions of the chimney and where it was to be constructed. Mr Tilden showed Mr McWilliams around the outside of the site and took him into the entrance on the southern side of the house to show him the stairs that could be utilised for completing the construction of the chimney. The plaintiff was not present at this time and was not shown around the site by Mr Tilden.

The plaintiff first came to be on site on 11 February 2004. He completed that day of work in the company of Mr McWilliams without incident. The system of work did not require either the plaintiff or Mr McWilliams to access the kitchen.

The plaintiff’s fall occurred on the second day of work at a time when Mr McWilliams was not present. The only individuals on site at the time were the plaintiff and a landscaper, Mr Bielik.

Mr Bielik heard a scream and a crash of timber and discovered the plaintiff lying on the floor of the basement with considerable injuries. Mr Bielik did not witness the incident.

The plaintiff had no independent memory of the circumstances surrounding the incident. He was unable to explain why he came to be in the kitchen and relied upon the principle of res ipsa loquitur, such that he came to be in the kitchen in the course of his employment and that a defect with the joists caused him to fall. The plaintiff asserted that given that he was a fit, agile, qualified carpenter accustomed to walking on uncovered joists, the only reasonable explanation for his fall was that there was a defect with the joist which caused him to lose balance and fall.

The Decision

The court was not prepared to find that a defect with the joists contributed to the plaintiff’s fall. The court did not consider the hypothesis that the plaintiff lost his balance on a loose joist to be more probable than other possibilities. To this end the court noted that one can never be complacent when walking on uncovered joists and that it is not uncommon for fit, agile, qualified carpenters like the plaintiff to fall from joists in which there are no defects. On that basis the court found that there was no room for the doctrine of res ipsa loquitur to apply.
The court further commented that it was satisfied that Mr Rudd had discharged his duty of care by arranging for the hazard tape to be put in place in order to warn of the danger and prevent people from entry.

In relation to Mr Tilden, the court commented that while a more comprehensive site induction could have been done, the failure to do so had no causative relevance due to the present of the hazard tape. In this regard the court found that if a person was not dissuaded by hazard tape from entering a particular area, that person is unlikely to be dissuaded by an oral warning or prohibition. Otherwise Mr Tilden’s causal responsibility was limited to him having arranged for DMW to complete the works that caused the plaintiff to be on site. That was not enough to establish liability.

While the court accepted that the plaintiff was an employee of DMW, it was not prepared to find that DMW had breached its duty of care to the plaintiff. In this regard the court found that, because Mr Rudd had caused hazard tape to be installed across the kitchen, DMW was not required to do anything more to satisfy its duty of care to provide a safe system of work to the plaintiff. That finding was made in circumstances where the court accepted that the plaintiff had no need to go into the kitchen in order to complete the chimney works.
The Facts

The appellant was at all relevant times employed by a government agency. She was required to stay overnight in a motel in New South Wales on a business trip. The appellant engaged in sexual activities in the hotel room during which time a light fitting located above the bed was pulled from its mount, causing the applicant to sustain injuries to her nose and mouth.

The appellant made a claim for compensation under the provisions of the Safety, Rehabilitation and Compensation Act 1988 (Cth) (the Act). The matter proceeded to a tribunal hearing, in which the tribunal found that the appellant’s injuries were not caused during the course of her employment. The tribunal held that the appellant’s overnight stay in the motel was an interval in an overall period or episode of work, however, it was interrupted during the time the applicant engaged in sexual activities. The applicant appealed to the Federal Court.

The Decision at Trial

At trial, the appellant argued that where there is no suggestion that her injuries were intentionally self-inflicted or were caused by her misconduct, then the fact that they were sustained in a motel room booked for her by her employer compelled the conclusion that her injuries were suffered in the course of her employment.

The Federal Court agreed. It noted that the fact that the appellant’s employer did not encourage her to engage in a sexual activity does not mean that it disapproved of her doing so. Moreover, many of the activities which an employee might be expected to engage in during such a stay are engaged in privately. The relevant connection or nexus to employment was present by virtue of the fact that the appellant’s injuries were suffered while she was in the motel room in which her employer had encouraged her to stay. The court went on further to state that there was nothing to justify a finding that the interval or interlude of employment was interrupted by the appellant’s lawful sexual activity.

The Federal Court set aside the findings of the tribunal and found that the claimant had sustained the injuries during the course of her employment.
The Facts

On 7 November 2005, Mr Horwood was injured in the course of his employment when the forklift he was driving overturned on a public roadway. At the time of the accident, Mr Horwood was employed by Megbuy Pty Ltd. However, the forklift he was driving was registered to Levira Pty Ltd. Mr Horwood made a claim for workers compensation benefits and a claim for damages under the MACA. Mr Horwood subsequently commenced proceedings in the New South Wales District Court against his employer, Megbuy. He alleged that Megbuy was the owner of the forklift, the forklift was defective and Megbuy had, therefore, been negligent.

In accordance with its obligations under the MACA, QBE investigated Mr Horwood’s claim. After making enquiries with Megbuy, QBE discovered that Megbuy was responsible for servicing and maintaining the forklift involved in the accident, and for supervising and controlling its usage, that the principal of Megbuy was a shareholder in Levira and although the forklift was registered in the name of Levira, Levira had ceased to trade and did not operate any part of Megbuy’s business.

Given these facts, QBE elected not to dispute Mr Horwood’s claim that Megbuy was the owner of the forklift. QBE proceeded to obtain evidence with respect to liability. That evidence suggested that the forklift had been inadequately maintained and had a number of defects. On the basis of this evidence, QBE admitted liability for the incident and negotiated settlement of Mr Horwood’s claim.

QBE then claimed 50% contribution under the principles of dual insurance from CGU, Megbuy’s statutory employer’s liability insurer. CGU disputed the claim on the basis that QBE had no obligation to indemnify Megbuy since Megbuy was not the owner of the forklift, and the accident did not fall within the statutory definition of “injury” under the MACA.

The Decision

The NSW Supreme Court observed that s4 of the MACA can extend the meaning of “owner” under the Act to someone other than the registered owner of the vehicle. On that basis and having regard to the facts, the court held that even though Levira was the registered owner of the forklift, Megbuy was also an owner under the MACA and was, therefore, entitled to indemnity from QBE.

The court held further that the settlement reached by QBE with Mr Horwood was a reasonable compromise of the liability that had been alleged against Megbuy. As a consequence of these two findings, the court was satisfied that the definition of “injury” in the MACA had been met.

On the basis of these decisions, the court concluded that QBE had established an entitlement to recover contribution from CGU. Each contract of insurance was a contract of indemnity that covered the identical loss (liability to Mr Horwood) suffered by the identical insured (Megbuy).
The Facts

Dunbier Marine Products (the first respondent) engaged RBI Haulage (the second appellant) to transport boat trailers from Melbourne to its premises in Sydney. The second appellant used a prime mover with two trailers to transport the boat trailers. Mr Buckley (the second respondent) was employed by the first respondent as the manager of its Sydney premises.

On 20 July 2005, the second respondent was assisting Mr Izzard, the first appellant and driver of the second appellant’s vehicle in unloading trailers at the Sydney premises. The vehicle had moveable metal frames which were used to assist in the stacking of the boat trailers and other equipment. The second respondent used one of the frames as a hand hold to dismount the vehicle. As he did this, the frame fell on him and he sustained injuries.

The Issues on Appeal

The appellants challenged the dismissal of their cross claim against the first respondent and the finding that the injuries were not suffered as a result of a motor vehicle accident within the meaning of the MACA. If the Court of Appeal found that the first respondent was negligent, it was also obliged to consider the effect of s151H(1) of the WCA (NSW).

The Decision on Appeal

The Court of Appeal found that the first respondent was negligent. There was a foreseeable risk of injury which was not insignificant. The first respondent alleged that it had a system that adequately dealt with this risk. In evidence, the first appellant said that normally the frames would be re-secured after they had been moved to facilitate the unloading, but before the actual unloading commenced. The Court of Appeal said that if this could be characterised as a system, it was “far from adequate” because there remained a period of time during the operations when the frames were unsecured.

Further, the Court of Appeal held that it did not matter that the second respondent was using the frame for a purpose for which it was not intended, as this did not mean that his injuries were not caused by the first respondent’s breach of its duty to provide a safe system of work in which the risk of such misjudgement is accounted for. The Court of Appeal apportioned liability 60% to the appellants and 40% to the first respondent.
Izzard v Dunbier Marine Products (NSW) Pty Ltd
[2012] NSWCA 132

As the first respondent was negligent, the Court of Appeal considered the effect of s151H(1) of the WCA. This section states that no damages may be awarded against an employer unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15%. There were difficulties in considering this section, as the second respondent had not originally brought a claim against the first respondent, and therefore, had not completed the injury assessment procedures specified in the WCA. The Court of Appeal remitted this issue to the trial judge for determination on the basis that resolution of the issue would require consideration of material which was not put before the Court of Appeal.

The Court of Appeal also considered whether the MACA applied to this claim. The relevant question in this regard was whether the injury was caused by a defect in the vehicle. The Court of Appeal held that the frames themselves were defective, which rendered the vehicle defective. The unstable nature of the frames when they were unsecured constituted a defect in the vehicle because the frames needed to be unsecured and moved to fulfil their intended purpose. Therefore, the MACA applied to the claim and the CTP insurer (the third respondent) was liable for the second respondent’s injuries.
The Facts

Whilst in the course of his employment at Ultra Tune, the respondent tripped on a small step which he had used frequently (up to 50 times per day for many years without incident), causing him to suffer personal injuries.

The building was constructed in about 1970. The second defendant acquired title to the property in 1975. Renovations, including the step, occurred in 1991.

The respondent’s employer (the first defendant) became the tenant of the premises in 1998. The respondent commenced employment in June 2003.

The step allegedly did not comply with the applicable Australian Standard, in that the tread was too short. It also allegedly breached the Building Code as there was no handrail.

The respondent had raised with his employer concerns about the safety of the step about 5 years prior to the accident when he said it was “slippery”. The employer undertook a risk assessment and satisfied himself that the step was not dangerous. He was not familiar with the Australian Standard or Building Code and he did not obtain any expert evidence.

There had been no prior incidents or complaints about the step made or relayed to the owner.

The Decision at Trial

The trial judge found against the employer at first instance on the basis that it owed the respondent a non-delegable duty of care which had been breached because the step was “technically dangerous”.

The trial judge concluded that the step’s non-compliance with the Australian Standard created a danger of which the employer ought to have known and its failure to rectify same constituted a breach of duty to provide the respondent with a safe workplace.

The trial judge indicated that the employer ought to have obtained expert advice once the respondent complained about the state of the step and if this had occurred, the step would have been widened or a handrail would have been installed.

The claim at trial was unsuccessful against the owner. The court found that the owner had no notice that the step was not in conformance with any relevant Standard or Code.

The Decision on Appeal

The finding in favour of the owner was not appealed by the respondent.

The decision finding the employer/occupier liable was overturned on appeal.

The Court of Appeal noted that “it is unquestionably foreseeable that if a person falls down steps, he or she may be injured, but the more important question in this case was whether the appellant [the employer] exposed the respondent to an unnecessary risk of injury”.

To understand whether the step was a danger or not, the court indicated that it was necessary to consider the proper construction of the Australian Standard and Building Code.

The Court of Appeal stated that compliance did not dictate the standard of care required, but merely acted a guide for the court.

It also noted that whether the Building Code or Australian Standard applied by virtue of statute was matter of law to be decided by the court, not expert witnesses. Further, these had no legal implications unless adopted by statute or contract.

In the absence of any statutory or contractual
application of the Standard or Code, it found that these may still have application if it is accepted as representing the norm of professional opinion.

Citing Fitzpatrick v Job [2007] WASCA 63, The Court of Appeal suggested that Codes and Standards may assist the court in construing the potential danger which calls for the exercise of reasonable care.

If the step was noncompliant and this deficiency gave rise to a reasonably foreseeable risk of injury, which the employer was obliged to take reasonable steps to reduce, the failure to take such steps could constitute negligence. However, the Court of Appeal noted that it must consider what a defendant knew, or what a reasonable person in the position of it ought to have known.

The Court of Appeal ultimately reconsidered all of the evidence and found that there had not, in fact, been a breach of the Australian Standard or Building Code. It therefore found that these had no application and there was nothing about the step which made it a “danger” requiring some response from the employer. It also found that there was no error on the part of the employer in not seeking expert advice (after the respondent’s initial complaint).

The absence of previous accidents was considered not to be determinative, but was highly relevant. In addition, the fact that the step was later widened at little cost was not a basis for a finding of negligence.
The Facts

The respondent, Mr Chaseling, was employed by the appellant, TVH Australasia Pty Ltd, as a spare parts interpreter. The appellant imported parts for forklifts, which were shipped in containers.

On 29 June 2006 the respondent was assisting another employee to unload boxes on pallets from a container. The respondent generally worked in the office but was asked to help the forklift driver unload the container. This involved driving a forklift up a small ramp and into the container, manoeuvring the tines on the forklift under the pallet and reversing the forklift back down the ramp. The respondent was instructed to direct the driver to guide the tines into the pallet. As the forklift backed down the ramp with the respondent walking beside it, the top box on the pallet, which weighed 219kgs, fell off and crushed the respondent’s right leg.

The respondent sued the appellant for negligence.

The Decision at Trial

The trial judge found in favour of the respondent and awarded $712,275 in damages. He considered that the injury fell within the terms of the MACA and that the respondent had not been guilty of contributory negligence.

The Issues on Appeal

The appellant challenged the trial judge’s findings of negligence and that the injury fell within the MACA.

The Decision on Appeal

The appellant argued that although it was open to the trial judge to find that the load was unstable and insecure based on the events which occurred when the box fell off the forklift, there was nothing known to the appellant, the driver or the respondent prior to the incident, which ought to have made them reasonably aware of the risks involved in unloading the containers.

The Court of Appeal observed that the respondent’s supervisor had given evidence that prior shipments of containers had arrived with broken plastic pallets and that these flexed when lifted by the forklift. He had complained to the appellant about this and nothing had been done.

The Court of Appeal held that this supported the conclusion that the respondent was aware of the risks involved in unloading the containers.

In relation to the second ground of the appeal, the appellant argued that the trial judge erred in finding that the respondent had suffered an ‘injury’ within the meaning of the MACA and that the proceedings were not a claim for ‘work injury damages’ within the meaning of the Workers Compensation Acts.

The Court of Appeal noted that previous amendments to the MACA were intended to limit its scope in respect of work injuries. They were designed to limit the extent to which loading and unloading operations would qualify as a motor accident. A distinction was to be drawn between a defect in a motor vehicle that directly causes injury and a defect which leads to the adoption of an alternative negligently devised scheme of work not involving the defective mechanism.

IN ISSUE

• Whether the appellant employer was liable in negligence for the respondent’s injury
• Whether the respondent’s injury fell within the terms of the MACA

DELIVERED ON 22 May 2012

READ MORE [click here]
The Court of Appeal held that in this case, the fault lay in the manner of operating the forklift, namely the driving of a forklift with an unsafe load. That was fault “in the use or operation of” the forklift. The negligence of the appellant was not in respect of a system of work ancillary to the use and operation of the forklift. It related directly to the manner in which the forklift was to be used and operated. It failed to inform the driver of the risk and how to avoid it materialising. The fact that the remedy may have lain at an earlier point in time did not mean that the proximate cause of the accident was not to be located in the manner of operating the vehicle.

The appeal was dismissed with costs.
The Facts
Upon arrival at work on 29 July 2009, the respondent Kane Bowden, found a large industrial waste bin (on wheels) blocking the parking space he was allocated in the basement of the appellant’s building. It was whilst he was trying to move this bin that he sustained an aggravation injury to his right shoulder.

The respondent’s claim for workers compensation was rejected and he appealed this decision to the Administrative Appeals Tribunal (AAT).

The Decision at Trial
At first instance, the AAT found that in order for an injury to arise out of employment, a “sufficient causal connection” is to exist between the injury and employment, which it considered was the case in this claim.

The AAT’s decision was based on facts including, inter alia, that the respondent was entitled to use the car park blocked/occupied by the bin, the appellant issued policies controlling car park use by employees, the area was licensed for use as a car park by the appellant and the respondent was parking his vehicle for the purpose of undertaking employment duties.

The Issues on Appeal
The appellant’s appeal was on the basis that the Tribunal had failed to consider whether the act of moving the bin was a task that the respondent was “required or expected” to do as part of duties of his employment, as found by the High Court in Roncevich v Repatriation Commission (2005) 222 CLR 115.

The Decision on Appeal
The Federal Court considered the decision of Roncevich, as well as relevant case law. It was held however that the appellant’s absolute application of the “required or expected duties test” limited the test for causal connection prescribed in legislation. The High Court had found that it was appropriate for a broad approach to be taken to sufficiency of any causal connection and there was application of facts in the Roncevich decision which did not relate to whether the event which lead to injury was required or expected for usual duties.

The Federal Court noted that various decisions from the New South Wales Court of Appeal and Victorian Supreme courts which considered the meaning of “arising out of employment” had not referred to the Roncevich decision.

The Federal Court held that whilst the “expected or required duties test” was relevant, it did not exclude a broad approach being taken as to whether there was sufficient causal connection for the injury to arise out of employment. It was held that there was no error of law in AAT’s application of the test in determining if the respondent’s injury arose out of employment.

The appeal was dismissed.
The Facts

On 26 January 2008 the plaintiff jumped several times from the branch of a tree overhanging the Murray River by about 10 metres, into an adjacent area known as Oddies Creek Park. After observing a number of other people jumping from the same tree directly into the River, the plaintiff attempted to use the same rope in order to perform a backflip into the water. The plaintiff’s attempted backflip was unsuccessful, and his head struck the sandy bottom of the river and he was rendered a C7 quadriplegic.

At the time of the incident, the plaintiff was 16, and an accomplished competitive diver.

On the day in question, the defendant held a number of council events to celebrate Australia Day at Noreuil Park, including live music, face painting and community exhibitions which took place in and around the Noreuil Park foreshore. Other than a regatta (a novelty boat race held on the Murray River), none of the activities or entertainment arranged by the defendant took place outside of Noreuil Park.

The defendant was aware that there were ropes hung from trees along the river bank and expected that people may jump from a bridge into the river when the regatta took place.

The defendant employed a senior gardener/arborist whose duties included tree maintenance in the council area and the engagement of contractors to carry out maintenance work when necessary. The day before the incident, the gardener contacted the contractor and asked if he was available to remove a rope swing (believed to have been the rope swing used by the plaintiff on the date of the incident), from the Oddies Creek Park. The contractor informed that he was unavailable until the following Tuesday (29 January 2008).

The Decision

The court held that the defendant did not owe the plaintiff a duty of care. The defendant did not have exclusive use of the river on the relevant day, and the fact that the defendant went beyond its obligations to remove foreseeable risks of harm from the land under its management and control, by attempting to remove rope swings from trees along the riverbank when detected, did not necessarily give rise to an assumption of responsibility towards persons such as the plaintiff.

The court held that the defendant had exercised reasonable care by instituting a system of weekly inspections of the riverbank and by organising an available contractor to remove the rope swing as soon as practicable after 25 January 2008 (when it was reported).

With respect to whether or not the risk was obvious, the court held that it was, and that there was no duty to warn of the risk of harm. The plaintiff acknowledged that he was performing a risky manoeuvre which increased the risk inherent in diving or jumping from the rope swing.

Although the court held that the defendant did not owe a duty of care to the plaintiff, the court nevertheless considered the defence of whether or not the plaintiff was engaging in a dangerous activity.

Having regard to the risk of the plaintiff suffering serious injury by diving and/or jumping from the rope swing into water of unknown depth, the court held that the plaintiff was engaged in a dangerous recreational activity and that the harm suffered was due to the materialisation of the obvious risks associated with that dangerous recreational activity.

IN ISSUE

- Did the public authority owe a duty of care and was that duty breached by the authority’s failure to remove a rope swing?
- Was the risk obvious?
- Was the plaintiff engaging in a dangerous recreational activity?

DELIVERED ON 28 May 2012

READ MORE [click here]
The Facts
The plaintiff was seriously injured in a 2-boat collision that occurred at dusk on 16 September 2006.

The first defendant was the executor of Steven Whiteoak, who was killed in the collision. At the time of the collision, Whiteoak was driving a 6 metre speed boat at about 80 km/hr. The boat was not illuminated. The plaintiff was a passenger in the boat being driven by Whiteoak.

The second defendant was driving a half-cabin cruiser at about 35 km/hr. The boat was illuminated.

The plaintiff had no recollection of the collision.

The plaintiff’s evidence on liability consisted of the autopsy report of the coroner; the certificate of analysis of Whiteoak’s blood and urine; a statement of Sergeant Hewitt; and the coroner’s brief of evidence (including several witness statements). The evidence suggested that Whiteoak had a mid-range concentration of alcohol at the time of the collision; that he was a “seasoned” drinker; that he was a regular consumer of marijuana; and that he would consume alcohol and marijuana before and during driving boats.

The Issues
The case against the first defendant was that Whiteoak was driving recklessly at the time of the collision. The case against the second defendant was not pressed at trial.

The first defendant’s defence was that if Whiteoak was driving, the plaintiff was engaged in a “dangerous recreational activity” within the meaning of s5L of the CLA (NSW), being riding in a boat with an intoxicated driver, at an excessive speed and without the lights illuminated. If Whiteoak was driving, it was submitted that the plaintiff was 100% contributory negligent because she was travelling in a boat with Whiteoak in circumstances where she knew that he was affected by the prior use of alcohol and voluntarily assumed that risk.

The Decision
In finding for the plaintiff against the first defendant, the court held that although Whiteoak was engaged in a dangerous recreational activity for himself, the question of whether the plaintiff herself was engaged in a dangerous recreational activity must be assessed at the time of the collision. In this regard, there was no evidence to suggest that even Whiteoak had been engaged in a dangerous recreational activity other than immediately before the collision when he undertook a reckless manoeuvre in the boat. There was no evidence as to what extent, if at all, Whiteoak was exhibiting cues of intoxication to the plaintiff immediately prior to the collision. There were also matters that suggested that the plaintiff might have been objecting to Whiteoak’s dangerous handling of the boat, including that the plaintiff considered that her and Whiteoak had a future together and that she was a mature woman with a daughter, stable job and many friends.

The court held that similar considerations needed to be made regarding whether there had been any contributory negligence. In this regard, there was no evidence that a reasonable person could or should have appreciated the extent that Whiteoak’s judgment was affected at a time when the plaintiff could have done anything to minimise the harm to herself.

For that same reason, the first defendant also failed to prove that the plaintiff freely and voluntarily accepted the risk.
The Facts

Mr and Mrs Longin (the defendants) were owner builders of a two-storey home which was under construction. Mr Haralambopoulos (the plaintiff) attended the premises on 10 April 2008 in order to provide a quote for the construction of a pergola. The pergola was to be constructed at the rear of the upper floor. Interior movement between the two floors was to be by way of stairs. At the time the plaintiff attended the premises, the stairs had not yet been constructed. There was a large rectangular hole in the floor of the upper level where the stairs were intended to be, which was usually covered by large boards.

Mrs Longin took the plaintiff into the property and indicated the intended pergola area to him. As the plaintiff was looking at a wall (which was intended to house a panel for the pergola), he stepped forward and fell through the stairwell void to the lower level of the defendants’ home sustaining injury.

The plaintiff issued proceedings against the defendants on the basis that they were negligent in failing to warn him of the hole in the floor and failing to put a barricade or barrier around it. The defendants denied liability for negligence and alleged that the plaintiff caused or contributed to his own injuries by failing to watch where he was going, failing to take care of his own safety, failing to walk around the stairwell void when it was obvious that he should do so and failing to take notice of a ladder protruding from the void. The defendants also argued that the plaintiff failed to have regard to an obvious risk and that they did not owe him a duty to warn.

The Decision

The court found that the defendants owed the plaintiff a duty of care. The Court held that the plaintiff was not negligent, the risk was not obvious and the sole cause of the plaintiff’s injury was the failure of the defendants to exercise reasonable care by either warning him of the risk and/or putting a protective barrier in place.

The court held that a reasonable person in the position of the defendants would not have failed to take precautions against the risk of harm, such as placing a protective barrier around the stairwell void or warning the plaintiff of its presence. Further, Mrs Longin engaged the plaintiff’s attention pointing to something at eye level, thereby distracting any attention he may otherwise have paid to the floor surface in front of him. The plaintiff’s failure to see the void was reasonable, given the circumstances of him being a stranger to the premises who was being escorted around by Mrs Longin who was directing his attention to aspects upon which she sought his advice.

IN ISSUE

- Whether the defendant was liable for the plaintiff’s injury
- Whether a hole in the floor of premises under construction was an ‘obvious risk’

DELIVERED ON 28 July 2011

READ MORE
The Facts
On 1 March 2005 the respondent was a telecommunications mechanic who attended the residential unit owned by the appellants to undertake work. He was escorted to the upper floor of the unit to complete the work. When he returned down the stairs to collect tools from his vehicle, he apparently mistook a plate glass window for a door. He realised as he got closer that it was in fact a full length glass panel so he attempted to turn left towards the ‘real door’. The respondent then stumbled on a rug causing him to fall into the plate glass window.

The Decision at Trial
The trial judge found that the appellants owed the respondent a duty of care in the circumstances and breached that duty. The trial judge stated that it was reasonably foreseeable that the large plate glass window could be mistaken for a door and that a focused business visitor might mistake it for a door. He realised as he got closer that it was in fact a full length glass panel so he attempted to turn left towards the ‘real door’. The respondent then stumbled on a rug causing him to fall into the plate glass window.

The Issues on Appeal
The appellants appealed the decision on the basis that the trial judge gave no consideration to the CLA (NSW). The appellants also argued that the respondent did not demonstrate that his accident was caused by the negligence of the appellants and that the trial judge should have attached significance to the respondent’s evidence that rugs had been placed in the unit for 10 years without any other accident occurring.

The Decision on Appeal
The Court of Appeal agreed that the trial judge did not give proper consideration to the CLA. Although the CLA governed the proceedings before him, the trial judge only briefly mentioned it. Although it is not strictly necessary for a judge to mention the provisions of the CLA, if the judge nevertheless addresses the requirements of the CLA it is highly desirable that express reference is made to the provisions of it. In this case, it was arguable that the trial judge at some point addressed most of the required elements, but he did not do so in a satisfactory way because he did not explicitly assess ‘the probability that the harm would occur if steps were not taken’ (as required by s 5B(2)(a) CLA, nor did he consider ‘the likely seriousness of the harm’ as required by s 5B(2)(b) CLA.

As a result of those errors, the trial judge’s conclusions could not stand and it was necessary for the Court of Appeal to reconsider the respondent’s claim.

The parties agreed that the accident was foreseeable and significant. The issue was whether a reasonable person would not have done so because the evidence established that there were no prior similar incidents and so the risk of a serious incident occurring was low. In addition, the Court of Appeal noted that although the window in question was not made of safety glass the appellants did not know that and so the likely seriousness of the harm was also considered to be low. Although the burden of taking precautions to avoid the risk of harm (pulling down the blind) was not great and there was social utility in having the window, the Court of Appeal did not consider that a reasonable person in the position of the appellants would have drawn the blind to signify the presence of a window as distinct from a door way. The Court of Appeal held that a reasonable person would not have done so.
Bader v Jelic
[2011] NSWCA 255

of the appellants would have drawn the blind in order to avoid people such as the respondent having an accident.

The Court of Appeal specifically noted comments by Gleeson CJ in Jones v Bartlett [2000] HCA 56 to the effect that there is no such thing as absolute safety and that the fact that a house can be made safer does not meant that it is dangerous or defective.

Although it was not strictly necessary to do so, given the finding of no breach of duty, the Court of Appeal nevertheless determined that the respondent would have been unable to establish causation – that even if the blind had been pulled down, he would not have stumbled and fallen. Whether or not he would have stumbled depended on how fast he was walking and the degree of instability of the rugs on the tiled floor. The Court of Appeal held that it would be speculation to conclude that he would not have stumbled.

The appeal was allowed.

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PUBLIC LIABILITY
Occupiers' Liability
The Facts

The respondent allegedly sustained an ankle injury on 5 June 2008 in the course of his employment as a security officer at the Cultural Centre when he stepped on a protrusion at the site. The respondent was employed by the State of Queensland acting through the Department of Public Works in his capacity as a security officer. The Cultural Centre was owned and controlled by the State of Queensland acting as Arts Qld.

The respondent pursued a statutory WorkCover Queensland claim and was assessed as having a 7% whole person impairment. When given the election to receive a lump sum payment or commence a common law worker’s compensation claim, the respondent elected to receive the lump sum, disentitling him to worker’s compensation common law damages.

The respondent subsequently commenced a claim pursuant to the PIPA against the State of Queensland as the occupier of the Cultural Centre.

The appellant sought a declaration from the court that PIPA did not apply and that the respondent was prevented from bringing a claim for common law damages as he had accepted a lump sum, pursuant to s239(2) of the WCRA.

The Issues on Appeal

The appellant submitted that there was no distinction between the entities or the claims.

The Decision on Appeal

The Court of Appeal accepted the appellant’s submissions and held that Arts Qld was the same entity as the State of Queensland. It made reference to provisions of the Public Service Act 1996 and held that the respondent was employed by the State of Queensland and not the Department of Public Works. Therefore, the claim under PIPA was the same as the claim that had been brought under the WCRA.

The Court of Appeal went on to say that “occupier’s liability” was no longer a discrete basis of liability. The respondent had a right to damages against his employer for negligence, “whatever might be the basis for that negligence, whether it be as employer, occupier or neighbour.”

The Court of Appeal therefore held that the respondent had already received damages for his claim under the WRCA and was prevented from bringing a claim arising from the same cause of action under PIPA.
The Facts

The plaintiff, Maurice Clive Williams, claimed damages for injuries which he sustained on 15 June 2005 at the premises of the first defendant Zerella Holdings Pty Ltd at Johns Road, Virginia. The second defendant Darren Ian Edwards was employed by the Zerella Holdings as a forklift driver. It was alleged that while Mr Edwards was operating a forklift in a loading bay he caused pallets to fall from the back of a truck and strike Mr Williams.

The forklift was uninsured and the Nominal Defendant was joined as a third defendant.

The plaintiff and the first two defendants asserted that the area where the incident occurred was either a “road” or a “road related area” so that the vehicle was required to be registered and insured in accordance with the provisions of the Motor Vehicles Act 1959 (MVA).

The court ordered that this issue be resolved by preliminary determination.

The Decision

The question rested on the particular facts of the case and specifically, upon whether the attendance of certain classes of people meant that the loading bay was an area open to or used by the public.

The court noted that the characteristics of the persons who entered the property needed to be considered; not the level of activity. The following points were considered:

- A sign pointed in the direction of the property of Zerella Holdings and identified the location of the business, but the sign did not extend an invitation to the public to enter the premises;
- On the other hand there were no signs at the gate of the property to indicate that it was private property or warning against trespassing or seeking to limit entry to the property in any way;
- The gate was closed at night. However the gate was not closed at the time of the accident nor was there any physical restriction preventing access to the property;
- Unless a person had some business, there would have been no reason for a person to be in the loading bay or indeed on the property at all; and
- The loading bay was used by employees, independent contractors and their employees and by other visitors, namely the purchasers of small quantities of produce.

The evidence established that in most cases those persons had express permission to enter the property. In the other cases they had permission which could be implied from the fact that Zerella Holdings sold produce to them. The “friends of friends” who went to the property because they had learnt produce could be purchased may not have had a licence to begin with. However, the procedure described by Zerella Holdings’ health & safety officer would have required those people to present themselves at the head office to obtain permission to proceed to the loading bay area.

There was no evidence that strangers who had no business on the property wandered around the loading bay. The only evidence of persons going into the loading bay was evidence of persons who entered the loading bay for the specific reasons of purchasing produce.

Because of its relatively remote location, it was held unlikely anybody would have found their way to the property without some specific reason.

The various signs established that Zerella Holdings attempted to restrict public access to its premises. The evidence of its health & safety officer established that Zerella Holdings took steps to control the property and to exclude persons who did not have business there.

The court held that the loading bay was not a “road” or a “road related area” as those terms are defined in s5 of the MVA.
The Facts

The plaintiff was injured when she fell whilst descending a flight of stairs that did not contain a handrail. The flight of stairs led from a fitness centre that was leased and occupied by Loose Fit Pty Limited (Loose Fit). Loose Fit was also the lessee and occupier of the staircase. The plaintiff sued Loose Fit for its failure to install a handrail on that section of the staircase. Loose Fit cross-claimed against the owners of the premises on the basis that the owners knew or ought to have known about the imperfections of the staircase.

The Decision at Trial

The trial judge held that Loose Fit breached its duty of care to the plaintiff by failing to install a handrail on that section of the staircase. Loose Fit cross-claimed against the owners of the premises on the basis that the owners knew or ought to have known about the imperfections of the staircase.

The Issues on Appeal

Loose Fit challenged the trial judge’s finding that it had breached its duty of care and breached an implied contractual warranty. Loose Fit also challenged the finding that the owners did not breach their duty of care to the plaintiff, and therefore were not required to contribute to any award of damages payable to the plaintiff.

The Decision on Appeal

The Court of Appeal upheld the trial judge’s finding that Loose Fit breached its duty of care to the plaintiff because there was a real possibility that, in the absence of a handrail, a patron of the fitness centre might fall whilst descending the staircase. The Court of Appeal accepted that the injuries that could be sustained by a patron could be serious or even fatal, and that the installation of a handrail was a simple and inexpensive measure that would not have impeded Loose Fit’s business activities.

The Court of Appeal allowed Loose Fit’s appeal that the owners breached their duty of care to the plaintiff, and ordered that Loose Fit and the owners each contribute 50% of the damages payable to the plaintiff. The Court of Appeal held that the owners were in at least as good a position as Loose Fit to appreciate that the absence of a handrail on that section of the staircase created a risk to the safety of patrons, and that the risk was simple and inexpensive to eliminate. Further, the owners had previously carried out renovations on the premises in a manner that did not comply with safety standards. The staircase was not built with a handrail, and therefore the Court of Appeal held that the owners effectively created the risk by carrying out the renovations on the premises in a manner that did not comply with safety standards.

IN ISSUE

- Liability of owner of premises and occupier of premises – failure to install a handrail on a staircase

DELISTED ON 30 November 2011

READ MORE click here
The Facts

Mr Laoulach (the appellant) and a group of friends (including the respondents) moored a boat they were test driving in Botany Bay and decided to dive off it into the water. One of the parties hit his hands on the bottom of the bay, jarring his shoulders. As a result, the group decided to move the boat to deeper water. The appellant completed one dive safely at the second location. On his second dive he struck the bottom and suffered catastrophic injuries. Amongst others, the appellant sued the individuals who drove the boat throughout the day.

The Decision at Trial

A verdict was entered for the respondents. The trial judge accepted that the respondents owed a duty of care to the appellant but was not satisfied the respondents had failed to act in a matter which a reasonable person in their position would have and therefore found they did not breach their duty of care.

The trial judge accepted the respondents’ submissions that s5 of the CLA (NSW) meant that they were not liable for the injuries suffered by the appellant as a result of the materialisation of an obvious risk of a dangerous recreational activity. The trial judge accepted that the appellant’s actions constituted a ‘dangerous recreational activity’ because the risk of being seriously injured by diving from the boat into water of an unknown depth could not be regarded as trivial or slight.

The Issues on Appeal

The appellant appealed four of the trial judge’s findings of fact and two points of law: the finding that there was no breach of duty and the finding that the appellant was engaged in a dangerous recreational activity.

The Decision on Appeal

The Court of Appeal dismissed the appeals on the findings of fact.

The Court of Appeal accepted the trial judge’s finding that there was a risk of harm when diving in shallow water which was foreseeable and not insignificant and the issue was, would a reasonable person in the position of the respondents have taken precautions to prevent that risk from occurring. The Court of Appeal rejected the appellant’s submissions that a depth sounder or a boathook or paddle should have been used to test the water depth because there was no evidence that any such equipment was available on the boat. The Court of Appeal also rejected the submission that the respondents should have warned the plaintiff the water may not be deep enough to dive in. The Court of Appeal held that the appellant was in just as good a position to judge the water depth as the respondents. The evidence established that at all times the appellant was aware of the risks of diving into water of unknown depth and as a result any warnings given by the respondents would not have informed the appellant of anything he did not already know.

After noting that all witnesses agreed the water was blue or dark blue and no sandy bottom was visible; that no one noticed any gusty winds which might have caused the boat to move or drift; that no one noticed the boat move and that the boat was anchored about ten metres further out from other boats, the Court of Appeal agreed with the trial judge’s finding that there had been no breach of duty.

The Court of Appeal then considered whether the respondents were excused from liability because appellant was engaged in a “dangerous recreational activity” within the meaning of s5k of the CLA (NSW). The Court of Appeal agreed with the trial judge that.
the risk of harm was “obvious” because it existed and was known to the appellant. However, the Court of Appeal held that the trial judge erred in finding that the plaintiff was engaged in a dangerous recreational activity. The Court of Appeal held that a dangerous recreational activity is one which involved a significant risk of physical harm. Whether the risk is significant depends on the chance of it occurring and not the seriousness of the consequence if it does. A risk cannot be ‘significant’ unless there is a real chance of it materialising. In this case, although the consequences of hitting a sandbar were very significant, the risk of the harm materialising was low in terms of the probability of it occurring.

The Court of Appeal held that the plaintiff was not engaged in a dangerous recreational activity and the respondents were not entitled to rely on s5K of the CLA as a defence to the claim.

The appeal was dismissed with costs.
Turjman v Stonewall Hotel Pty Ltd
[2011] NSWCA 392

The Facts

Several plaintiffs were injured on 24 November 2002 when the ceiling on the first level of the Stonewall Hotel (the hotel) collapsed.

The plaintiff at first instance Al Mousawy (as the lead case for several plaintiffs) sued a structural engineering company (the engineers) in respect of a report by it on the basis that the report failed to identify defects in the ceiling on the first level. The plaintiff also sued the lessee and owner of the hotel on the basis that they did not properly investigate complaints received from patrons concerning the dance floor on the second level, that they failed to properly instruct the engineers and that in applying to Council for a renewal of their licence they provided false and misleading information.

The Decision at Trial

The trial judge found for the defendants. Despite finding that the defendant hotelier owed and breached their duty by failing to brief the engineers with all relevant information, the claim failed on causation. Even if all information was given the deficiency in the ceiling would still have not have been detected.

The trial judge held that in the circumstances the engineer’s retainer was restricted to examining the structural integrity of the floors. The lessee and owner of the hotel were both found to not have acted negligently in responding to complaints received from patrons.

The Issues on Appeal

The appeal was brought by the unsuccessful plaintiffs (the non lead case plaintiffs) against the lessee, Stonewall Hotel Pty Ltd. The plaintiffs’ alleged breach of a different duty of care than that alleged at first instance.

The plaintiffs submitted the defendant was liable for breach of an implied warranty that the premises were as safe for their purpose as reasonable care and skill could make them. They further submitted that the appeal should be allowed in the interests of justice and that as non-lead plaintiffs at first instance their responsibility for conduct of the trial was to a lesser extent than the lead plaintiff. The defendant submitted that the plaintiffs should not be permitted to present a different case on appeal.

The Decision on Appeal

The majority held the finding at first instance was not erroneous and the appeal was dismissed with costs. There was no basis that responsibility for the harm should be imposed on the defendant.

Under the case management orders the plaintiffs committed themselves to the lead plaintiff’s case, to the result of which they were bound. The Court of Appeal held that a point cannot be raised for the first time on appeal when it could have been met by calling evidence at first instance. Further, it would be unjust to the defendant to have it respond to a new allegation of breach of duty than the one at first instance.

IN ISSUE

• Whether leave to argue on appeal a different breach of duty
• Implied warranty that premises as safe for their purpose as reasonable care and skill can make them.
• Whether finding as to factual causation erroneous

DELIVERED ON 21 December 2011
READ MORE  click here
The Facts

In May 2005, the plaintiff attended the defendants’ rural property for the purpose of inspecting the property pursuant to a contract to purchase the vacant land. Saw milling was conducted on this land by the defendants.

On the day of the inspection, the plaintiff drove along a dirt road and arrived at a clearing where the male defendant was working on a portable Lucas sawmill, cutting timber.

The plaintiff injured himself when he stepped out of the vehicle and rolled his left ankle on an off-cut (or stick) on the ground. He argued that the stick had been concealed underneath sawdust, whilst the defendants described the area as ‘bare dirt’ that was free from sticks or branches. The defendants denied that there was sawdust in the particular area where the plaintiff was injured.

The plaintiff alleged that the defendants were liable in negligence as occupiers of the vacant land.

The Decision

The court held that the defendants were not liable under the CLA (Qld). The court accepted that the risk of injury from standing on an unstable object while walking across the ground near a rural outdoor business activity was foreseeable and ‘not insignificant’. However, the court was unable to accept that a reasonable person in the defendants’ position would have taken precautions to reduce the risk of injury.

The court held that the risk of injury was one which was obvious and meant the defendants owed no duty to warn of any such risk. A reasonable person would have been aware that they were entering onto a rural property upon which the milling of trees was being conducted. Further, it would be common knowledge that an off-cut, such as the one the plaintiff rolled his ankle on, may be found in such a location.

Warning signs, in general, only serve a purpose if they inform the person of something that the person does not know, or draw attention to something that the person may have overlooked or forgotten. Here, the court accepted the defendants’ evidence that there was no sawdust covering the small branch off-cut or stick. The incident occurred when the plaintiff did not pay attention to where he was putting his foot on the ground immediately in front of him. The stick would have been easily visible to an average person taking the same path. The court noted that ‘living is not risk free.’ Accordingly, the court questioned what type of warning sign, if any, would be required for that area. A general warning sign stating, ‘take care,’ would achieve nothing.

Although no finding was made for liability, the court went on to assess damages at $49,665.40.

The defendants sought costs against the plaintiff. The defendants’ mandatory final offer (MFO) at compulsory conference was $0.00. The plaintiff’s MFO was $80,000 plus costs. Section 56 of PIPA (pertaining to awards above and below MFOs) was not triggered in this case as the court had not “awarded” any damages. An order dismissing a proceeding is not an “award” of “damages”. The court’s ordinary powers with respect to awarding costs applies. In this case the court exercised its discretion to order that the plaintiff pay the defendants’ costs on a standard basis.

IN ISSUE

• Whether an occupier of a rural property is liable to an entrant who rolls his ankle on an off-cut from sawmilling

• Whether the risk of injury is so obvious that no warning was required by the occupier

DELIVERED ON 31 January 2012

READ MORE  click here
The Facts

On 30 December 2002 the appellant provided a quote for painting the roof of the house that the respondent and his wife were purchasing. The respondent accepted the quote and the appellant attended to carry out the work on 9 January 2003. While the appellant was performing the work, the veranda roof collapsed under his weight. The fascia boards, to which the veranda roof had been attached, were rotten. The appellant was seriously injured.

The appellant brought proceedings against the respondent, alleging negligence. The allegations of negligence were that the respondent having obtained building reports indicating “wood decay” in the fascia and a “high risk of concealed timber pest workings to roof timbers”, assured the appellant that it was safe for him to stand on the roof and that he had climbed onto the roof when he had not actually done so.

The Decision at Trial

The trial judge dismissed the proceedings on the basis that the relevant defects were not known to the respondent, nor were they defects of a kind which the respondent, acting reasonably, ought to have discovered. The trial judge found that the content of the building reports did not provide a basis for an obligation to investigate further with respect to the veranda roof. As the respondent neither was nor should, in the exercise of reasonable care, have been aware of the problem with defective construction of the veranda roof, liability could not arise on that basis.

The Issues on Appeal

The issues for determination on appeal were whether the respondent was subject to an extended duty of care flowing from special knowledge that aspects of the roof might be unsafe and whether the respondent had assured the appellant that the roof was safe and that those assurances caused the appellant’s loss.

The Decision on Appeal

The Court of Appeal found that the trial judge did not err in failing to accept that the respondent owed an extended duty of care. The content of the building reports did not provide a basis for an obligation to investigate further with respect to the veranda roof. However, the Court of Appeal did find that the trial judge’s rejection of the appellant’s evidence of the assurances made to him by the respondent was based on flawed reasoning. While a different finding would not necessarily have led to a different outcome, it was critical of the judgment at first instance. The evidence of the appellant, if accepted, could properly have led to an inference that the respondent’s assurances were a necessary condition of the conduct which led to the accident. On any construction of s5D of the CLA (NSW) it would be open to a judge to arrive at such a conclusion.

Accordingly, the Court of Appeal allowed the appeal and set aside the judgment and directed that there be a new trial in respect of liability, but not in respect of quantum.

IN ISSUE

- Whether pre purchase building reports put a homeowner on notice to warn tradesmen of safety aspects of the structure
- Whether the respondent made assurances to the appellant that the roof was safe

DELIVERED ON 7 March 2012

READ MORE  

[click here]
The Facts

The appellant suffered serious spinal injuries when she slipped and fell while shopping at the Centro Taree Shopping Centre with her daughter and a friend. The appellant was disabled and walked with the aid of crutches.

The centre contained Woolworths and Big W stores separated by a common area, part of which operated as a food court. Woolworths had the exclusive right under its lease with CPT Manager Limited (CPT) to conduct “sidewalk sales” extending from the Big W entrance into the common area towards the food court. The appellant was walking towards Big W when the tip of her crutch came into contact with a chip, or with grease deposited by the chip, causing her to fall and suffer serious spinal injuries.

CPT had a contract with a cleaning services company. The contract specified that the premises were to be maintained so that the “floors are to be free of any rubbish and/or spillages”. The maximum time between cleaning inspections for the common areas was stipulated to be 15 minutes. The appellant commenced proceedings against Woolworths and CPT.

The Decision at Trial

The trial judge found that Woolworths was the occupier of the sidewalk sales area and that it owed a duty of care to persons coming into that area. By failing to institute and maintain a cleaning system to detect spillages, Woolworths breached its duty of care. The claim against CPT was dismissed.

Court of Appeal Decision

The sole ground of appeal was directed to the finding that Woolworths’ negligence was a cause of the appellant’s injury.

The Court of Appeal found that reasonable care did not require the continuous presence of a person looking out for slippery substances in the sidewalk sales area. It followed from this that the proof of breach of duty did not of itself make it likely that, had the duty been performed, the plaintiff would not have suffered harm.

The Court of Appeal held that there was no basis for concluding that the chip had been on the ground long enough for it to be detected and removed by the operation of a reasonable cleaning system. In the absence of evidence supporting an inference that the chip had been there for some time, such as that it was dirty or cold to touch, the Court of Appeal said that there was no basis for concluding that it was more likely than not that it had not been dropped shortly before the plaintiff slipped.

The High Court Decision

The appellant’s appeal to the High Court was on the basis that:

The Court of Appeal had incorrectly proceeded upon a view that factual causation under s5D(1)(a) of the CLA excluded consideration of factors making a “material contribution” to the harm suffered by a plaintiff.

This interpretation was said to require that Woolworths’ negligence be the “sole necessary condition of the occurrence of the harm”.

According to the High Court, Woolworths’ negligence lay in its failure to employ a system for the periodic inspection and cleaning of the sidewalk sales area. Proof of the causal link between an omission and an occurrence requires consideration of the probable cause of events had the omission not occurred. Here, the appellant was required to prove that, had a system of periodic inspection and cleaning of the sidewalk sales area been employed on the day of her fall, it is likely that the chip would have been detected and...
removed before she approached the entrance to Big W.

The High Court held that the Court of Appeal’s conclusion that the chip had been deposited at a particular time (ie. in the 20 minutes between the last inspection and the appellant’s fall) rather than any other time on the day was pure speculation.

According to the High Court, reasonable care required inspection and removal of the slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when, in the interval between 8:00am and 12:30pm (the time of the incident) the chip came to be deposited in that area. In these circumstances it was an error of the Court of Appeal to hold that it could not be concluded that the chip had been on the ground long enough for it to be detected and removed by the operation of a reasonable cleaning system. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8:00am – 12:10pm and not the shorter period between 12:10pm and the time of the fall.

The appeal was allowed and the Court of Appeal decision was set aside.
The Facts

The appellant sustained injury after entering the respondents’ house where she encountered a dog owned by them. Having a fear of dogs, she quickly retreated from the house where she slipped and fell. The fall caused significant injuries which required surgery and prevented the appellant from returning to work for 6 months.

The Decision at Trial

The trial judge found that the risk of injury occurring was not foreseeable. The respondents could not have anticipated the appellant’s reaction, even if they had considered the position of a person invited to the premises who was afraid of dogs. The trial judge held that it could not have been anticipated that a person in the position of the appellant would react in the way she did and then slip and fall when she left the premises. It was therefore not reasonable for the respondents to take precautions against a risk of harm.

The Issues on Appeal

The key issue was whether the trial judge erred in finding that the risk of injury occurring was not foreseeable. The respondents could not have anticipated the appellant’s reaction, even if they had considered the position of a person invited to the premises who was afraid of dogs. The trial judge held that it could not have been anticipated that a person in the position of the appellant would react in the way she did and then slip and fall when she left the premises. It was therefore not reasonable for the respondents to take precautions against a risk of harm.

The Decision on Appeal

The Court of Appeal concluded that there was no evidence from the appellant that she feared the dog. Rather, her evidence was that she did not like dogs in general. Further, the dog did nothing which could be characterised as aggressive. The fact that the respondents were prepared to allow the appellant to enter the house while the dog was in the lounge room inferred that the dog posed no risk to entrants.

The Court of Appeal did not accept that the respondents ought to have foreseen that an entrant might have a general fear of dogs, or, confining the inquiry to the appellant, that they ought reasonably to have foreseen her reaction.

In dismissing the appeal, the Court of Appeal held that the trial judge did not err in concluding that the appellant had not established that the risk of injury was foreseeable.

The Court of Appeal noted that what befell the appellant may have had little to do with the presence of the dog. She left the premises hurriedly and slipped on a wet patio. She therefore had removed herself from any area of what might have been envisaged as foreseeable danger before she was injured.

The appellant contended that this slip was also a foreseeable consequence of the respondents’ failure to take reasonable precautions for her safety, that is to say that she might fall and injure herself in the course of fleeing the dog. In any event, the Court of Appeal concluded it was unnecessary to consider this issue further because the appellant did not establish the “triggering event” which would place this part of the incident within the class of foreseeable risk.

IN ISSUE

- Whether the risk of injury was foreseeable and not insignificant
- Whether the respondents should have taken precaution of keeping dog outside.

DELIVERED ON 27 March 2012
READ MORE click here
The Facts

Mrs Karatjas (the plaintiff) was, at all material times, employed by Spotless Services Australia Limited (Spotless).

Deakin University (the defendant) had retained Spotless to operate a cafeteria at its premises.

The plaintiff’s work hours varied and often, particularly during winter months, it was dark when she finished work each day. She was responsible for locking up the cafeteria and therefore was the last to leave.

The only carpark the plaintiff was permitted to leave her vehicle in was located 100m or so from the cafeteria. Ordinarily, the plaintiff walked to and from the carpark by a relatively well lit, wide concrete path (the usual path).

Approximately 3 weeks prior to the incident, the defendant erected barricades which blocked off a substantial section of the usual path. The plaintiff was required to use an alternative path which was narrower and not as well lit. Complaints had been made by the plaintiff about this restricted access route.

At about the same time, the defendant received reports that a man was loitering in the bushes along the alternate path.

On the evening of the incident, the plaintiff locked up the cafeteria and proceeded to her vehicle using the alternate path. During this journey, she was assaulted by the man who had been loitering in the bushes.

Subsequent to the attack, the defendant trimmed back the bushes along the alternate path and ejected the man who had been sleeping in the area. The defendant also then provided a security officer to escort the plaintiff from the cafeteria to the carpark each night.

The Decision at Trial

At first instance, the trial judge found that the defendant was not responsible for the incident and the plaintiff’s injuries on the grounds that the plaintiff failed to establish that the defendant owed her a duty of care to guard against the risk of criminal attack of the kind to which she was subject (following the reasoning in Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254).

The Decision on Appeal

The decision was overturned on appeal. Beyond the confines of the cafeteria, the defendant exercised exclusive powers of management and control over the campus, including power to direct where Spotless employees should park their cars and, in effect, the paths which were made available to them in order to pass between that carpark and the cafeteria. To that extent, the defendant retained a power of supervision.

The Court of Appeal noted that “the society in which...”

PUBLIC LIABILITY
Occupiers’ Liability

Karatjas v Deakin University
[2012] VSCA 53

IN ISSUE
• The duty of care owed by an occupier to a contractor’s employee

DELIVERED ON 28 March 2012
READ MORE click here
we live denies that an organisation which encourages an employee of its cafeteria contractor to park in a remote, dimly lit carpark towards the edge of the campus, and to move to and from that carpark to the cafeteria during hours of darkness by a means of a dimly lit and overgrown path, cannot foresee a risk of serious assault on that employee. And especially is that so where the employee is a woman”.

The Court of Appeal went on to say that “... in circumstances where the defendant required or at least encouraged the plaintiff, as an employee of the defendant’s contractor, to run the risk of moving to and from the carpark during the hours of darkness, by means of the inadequately lit and overgrown alternate path which was believed to be frequented by a man loitering in the bushes, and it was known that the plaintiff was concerned for her safety, proximity or special relationship, foreseeability and thus the existence of duty were all readily apparent”.

The Court of Appeal found that this case was distinguishable from Modbury Triangle in that:

(a) The defendant provided an unsafe system of work by requiring, or at least encouraging, the plaintiff to park her car where she did and then closing off the safe, usual path to and from that carpark;

(b) The defendant either required or authorised Spotless to keep the cafeteria open as long as it did for the benefit of academic staff and students and thus it knew or ought to have known that Spotless employees were likely to walk to and from the cafeteria to the carpark during hours of darkness. Indeed, in this case, it did know because the plaintiff told the defendant’s security guards of her concerns about the closure of the usual path and therefore the defendant knew or ought to have known that she was particularly vulnerable;

(c) Compliance with the duty to take reasonable care to guard the plaintiff against the risk of attack as she moved from the cafeteria to the carpark would have required no more of the defendant than to remove the barricades and thereby restore the plaintiff’s access to the usual path and further, or alternatively, to make available to the plaintiff the security officer escort service which the defendant already made available to university staff and students and to other Spotless employees (and which the defendant was prepared to make available to the plaintiff after she was attacked); and

(d) For the defendant to comply with the duty to take reasonable care to guard the plaintiff against the risk of attack would have required the defendant to do no more than comply with the obligations to which it was already subject under s26 of the Occupational Health & Safety Act 2004 to ensure, so far as reasonably practicable, that the plaintiff’s means of entering and leaving her workplace on the campus was safe and without risk to health.
The Facts

The plaintiff sued the defendant for damages for severe lacerations to her face, neck, arms and torso sustained when she fell through a large glass panel forming a wall of the entrance to the defendant’s building following an office Christmas party on 21 December 2001.

The plaintiff alleged that the defendant ought to have arranged an audit of the glass in the building to comply with its common law duty to act reasonably to guard against foreseeable risk of injury particularly because several months before the incident the defendants had, with the assistance of architects, carried out renovations to the entrance of the building.

The Decision

The parties agreed that the test for liability of the defendant was that set out by Mason J in Wyong Shire Council & Shirt [1980] HCA 12. That is, a tribunal of fact must ask whether a reasonable person in the defendant’s position would have foreseen that his conduct involved a risk of injury to the plaintiff. If the answer is yes, then the tribunal of fact must ask what a reasonable man would do in response bearing in mind the magnitude of the risk, the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking action.

After reviewing the body of case law concerning injuries caused by glass, the court accepted the plaintiff’s submission that the defendant ought to have foreseen the risk of an injury of the type that happened to the plaintiff.

Fourteen factors were identified by the plaintiff as relevant to the court’s determination as to what action (if any) was reasonably required by the defendant. These included: that the premises were commercial premises in the CBD; that the premises were old; that there was a high volume of traffic through the building each week; that the premises were near nightclubs and bars; that customers of other businesses sat on stools near or against the windows; that a major renovation was planned; and that the cost to replace the offending glass panels was only $3,000.

The court rejected all of these arguments. The court determined that there was no evidence that high volumes of traffic posed any threat to the glass nor that the age of the glass was known to cause a danger. The court also noted that if the defendant was obliged to conduct glass audits, then it would also be obliged to audit all other aspects of the building to guard against foreseeable risk and this could cost an enormously greater amount of money. There was no evidence that the defendant knew that there was a practice of sitting near the glass and leaning on it but in any event, the pressure on a glass panel from a seated person would be less than that of a moving person falling onto it and therefore there was no reason why such a situation should be guarded against.

In those circumstances, the plaintiff failed to prove that there was anything the defendant ought to have done by way of replacing glass or undertaking audits or enquiries. The court held that it was reasonable for the defendant to have relied on the advice of competent architects.

Although it was not necessary to do so given the finding that there was no breach of duty, the court considered the issue of contributory negligence in light of the plaintiff’s intoxication and held that if the defendant was liable, damages should be reduced by one-third.

The plaintiff’s claim was dismissed.
The Facts

The appellant was employed by a company called Edensor Transport Pty Ltd (Edensor). Edensor was in the business of concrete delivery. It had its own vehicle suitable for that purpose. The respondent was a building company engaged by the owner of a residential property to carry out a major building redevelopment.

The respondent contracted CSR Ltd (CSR) to enable concrete to be supplied to the building site. Edensor was contracted by CSR to transport the concrete from CSR’s depot. The respondent did not directly engage Edensor or the appellant.

The appellant had been directed by CSR to deliver five cubic metres of concrete to the site. The appellant reversed his truck down a public access road to the building site to reach the location of the pump which was outside the property being developed. In the course of reversing, the appellant lost control of the vehicle. It toppled over onto its left side and fell at least partly into an adjacent gully. The accident occurred on a public road some distance from the building site. As a result of the accident, the appellant suffered a physical and psychiatric injury.

The Decision at Trial

The trial judge held that in the absence of any reliance by the appellant on anything said or done by the respondent in relation to the roadway, the respondent did not owe any duty of care to the appellant. The trial judge considered that if the respondent did owe a duty to the appellant, it had breached that duty.

The Issues on Appeal

The appellant submitted that the trial judge erred in finding that the respondent did not owe a duty of care to the appellant. The appellant argued that liability could be distilled from:

- the actions taken by the respondent after the accident including the provision of a second concrete pump which was closer to the entrance;
- breach of the respondent’s obligation to devise a different method of transporting concrete to the building site so as to avoid putting the appellant at risk of injury; and
- regulation 73(2) of the Construction Safety Regulations 1950 (NSW) which imposes an obligation to “provide and maintain safe means of access’.

The Decision on Appeal

While the Court of Appeal observed that liability might arise for breach of specific duties as an occupier, that clearly had no scope for operation as the appellant sustained his accident well before arriving at the location of the building site.

The Court of Appeal ultimately concluded that while the respondent had a general duty of care as an occupier of the building site, it did not have the duty of care sought to be ascribed to it by the appellant. In any event, the Court of Appeal found that the respondent’s actions in coming to a sensible commercial arrangement with a responsible and experienced supplier were a sufficient discharge of any such duty.

As for Regulation 73(2), the Court of Appeal found that it does not have any operation in relation to a delivery vehicle’s passage along a public road as it makes its way to the construction site.

The appeal was dismissed.
The Facts

The plaintiff, Monika Samaan, sued the defendant for damages for severe brain damage, organ failure, septic shock and spastic quadriplegia as a result of contracting salmonella poisoning on 24 October 2005. The plaintiff alleged that the source of the poisoning was a KFC Chicken Twister, purchased by her father at KFC’s Villawood store and shared with members of her family.

The defendant did not admit that the Twister was purchased by Mr Samaan and denied that such a Twister was unsafe for consumption. Every member of Monika’s family, except her grandmother, suffered from salmonella poisoning at the same time and all were hospitalised. Monika and her family ate a number of suspect meals within the incubation period for salmonella and the defendant asserted that as a result, and as a result of factual inconsistencies in relation to the food consumption history at the relevant time, the plaintiff could not establish a breach of duty.

The Decision

There was no dispute that the plaintiff’s injuries were caused by salmonella poisoning. The issue was whether the source of the salmonella was the KFC Chicken Twister or other chicken eaten by the plaintiff and her family within the incubation period which the court accepted was between 72 hours and 6 hours prior to the first onset of illness. The court also accepted that because the onset of each family member’s illness occurred within a fairly short timeframe, there was a single exposure to the salmonella bacteria that came from a shared meal.

The court closely examined inconsistencies in the food history reports taken by health officials at the time, and in the evidence given about which family members ate which meals and when. The court accepted evidence on behalf of the plaintiff that the only meal to have been shared by all members of the family was the KFC Chicken Twister. The court was satisfied that the inconsistencies could be explained by language and interpretation difficulties (the plaintiff and her family were Arabic speakers) and also by the fact that at the time the histories were given, the relevant family members were extremely ill, extremely anxious for Monika, who had been administered last rites, and in addition, the mother had given birth to a baby a few days beforehand.

The defendant attempted to rely on its computer records to deny that it sold a Chicken Twister to the plaintiff’s father on 24 October 2005. The court rejected this evidence on the basis that it depended for its accuracy on human input which was known to be subject to error especially during busy periods and on the basis of expert evidence of a forensic accountant that it was not possible for a system recording high volume retail cash sales to record every sale that is made because employees do not follow mandated procedures, operational errors can occur and in some cases the system is deliberately manipulated so that theft can occur.

The court noted the food handling and preparation procedures adopted by the defendant and examined the evidence of the defendant’s employees about whether these procedures were followed. The court noted that if the food handling and preparation procedures were strictly followed, there was an almost impossible chance of contracting salmonella. However, the court held that the evidence was consistent that the standards set by the defendant were not met during the relevant time in that hand washing and cleaning procedures were not followed and there was skylarking involving the throwing of food by employees. The court accepted that these circumstances readily allowed for cross-contamination of food. In addition the court relied on evidence that a performance review of the Villawood store at the relevant time indicated that that store was performing at ‘breakdown level’. The store was assessed as

**IN ISSUE**

- Whether the salmonella poisoning was caused by a KFC Chicken Twister or another source
- Whether food handling and preparation procedures were followed at KFC

**DELIVERED ON** 20 April 2012

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receiving 51 out of a possible 100 points for a range of
criteria including cleanliness.

As a result, KFC was held liable to Monika for damages
for her injuries on the basis that it was vicariously liable
for the negligence of its employees.

The plaintiff’s claims for breach of the TPA, breach of
contract and for CLA damages were also successful.

In the separate assessment of damages the plaintiff
was awarded damages of $8m plus costs.
**The Facts**

The defendants purchased a home located in a bushland setting in mid 2006.

The plaintiff (being the second defendant’s elderly aunt) helped the defendants move into their home on 30 September 2006. She was thereafter a regular visitor at the home.

From the time the defendants moved into the home in late September, the first defendant regularly swept the front stairs. Above these stairs was a gumnut tree which had a branch extending across the stairs.

The first defendant gave evidence that gumnuts would appear on the stairs, sometimes only moments after he had swept them. However, neither of the defendants considered that the gumnut tree posed a danger to the stairs and the sweeping of same only occurred as part of routine property management.

Neither the defendants, nor the previous owners of the house who had occupied same for 12 years, were aware of anyone slipping on the stairs.

The plaintiff slipped and fell down the stairs on 27 November 2006 as she was leaving the house. She immediately afterwards noticed gumnuts on the stairs. This was confirmed by another family member. The defendants were not home at the time.

**The Decision**

The court found that the plaintiff slipped on a gumnut on the stairs and that the gumnuts were "clearly a significant hazard on the stairs". The court noted that the stairs were the designated means of access to the front door of the house, the gumnut tree was directly above them and constantly dropped gumnuts.

Despite the absence of previous instances of people slipping and falling, but because of the likely presence of gumnuts, the court found the magnitude of the risk posed by the gumnuts was significant.

The court found the occasional sweeping of the stairs was clearly ineffectual in mitigating the risk the gumnuts posed to people accessing the house.

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

The court refused to reduce the claim for contributory negligence on the part of the plaintiff, as she was using the stairs in a prudent manner and did not expose herself to the risk of injury.
The Facts
Late on 27 November 2007, the appellant was walking with her husband and children at the William Carey Christian School (the school), back to the family motor vehicle after attending a concert.

The appellant was required to walk across an internal road to access the car park, upon which there was a pedestrian crossing marked with 5 white rectangular sections.

The appellant’s foot slipped backwards when she reached the last of the painted sections and she fell forwards sustaining severe injuries.

She made a claim against the first respondent as operator of the school and against T&J Turner Building Services Pty Ltd (the second respondent), the school’s maintenance contractor. The crossing had been repainted by the second respondent in July 2007 using Rocol Easyline Paint.

The school had no record of any other incident having occurred on the relevant crossing prior to the incident date, nor on other surfaces in the school grounds where the same paint had been used.

The Issues on Appeal

The Court of Appeal considered whether the trial judge had correctly applied the CLA (NSW) principles to the facts.

The Decision on Appeal

The Court of Appeal dismissed the appellant’s appeal. It found the risk of injury in the circumstances could be identified as simply as “...that of a person slipping on the painted surface of the crossing and thereby suffering injury”. In relation to whether the respondents failed to take precautions against that risk, the majority of the Court of Appeal found that the respondents failed to take the step of determining whether the paint used in July 2007 was adequately slip resistant in circumstances where it was known the paint would not wear in a uniform fashion and that the respondents had breached their duty of care to the appellants.

In terms of causation, the Court of Appeal found that the fact that the appellant fell over did not establish that the crossing was slippery due to the painted surface as there was no evidence to establish that the incident area had fallen below accepted levels of slip resistance. The appellants were ordered to pay the respondents costs.
Lewis v Clifton & Ors
[2011] NSWDC 79

The Facts

On 28 August 2005 the plaintiff was assaulted by another patron while he was in the urinal at the Vandenberg Hotel (the hotel).

The plaintiff arrived at the hotel around midnight and was in the company of his wife and a number of friends. He had not been drinking prior to his arrival at the hotel as he had participated in a boxing competition earlier in the evening.

Shortly after arriving at the hotel the plaintiff observed a fight in progress at the other side of the bar. People, including bar staff, tried to get the individuals involved in the fight to “settle down”. The plaintiff noticed one of the individuals remained in the same place after the incident and continued drinking. The plaintiff said this individual, who was not known to him, was the same person that later assaulted him, being Mr Shelker. This was denied by the hotel.

The sole security guard on duty on the night of the incident acknowledged that there had been an earlier altercation in the hotel. It was unclear whether this incident was in fact the one witnessed by the plaintiff. Relevantly the security guard said he did not observe Mr Shelker as being involved in that altercation. To this end the security guard suggested that had Mr Shelker been involved in the incident he would have been evicted from the hotel and barred for 24 hours.

The plaintiff sued the hotel on the basis that it was negligent in failing to take action against Mr Shelker after the first fight to prevent him being a threat to other patrons. The court said this could only be achieved by removing Mr Shelker.

The Decision

The issue in relation to liability was factual. The court preferred the evidence of the plaintiff and his witnesses and found that the earlier altercation did involve Mr Shelker. In drawing this conclusion the court noted that the plaintiff was an impressive and honest witness. As such, the court found the hotel was negligent for failing to evict Mr Shelker, who the court found was “an obvious danger to the remaining patrons of the hotel” and awarded damages to the plaintiff in the sum of $296,247.73.
The Facts

The defendants owned and managed the Park Beach Hoey Moey Hotel in Coffs Harbour. The premises were the plaintiff’s regular drinking location. On 17 September 2004 he spent the afternoon and evening drinking there. He also told a number of other patrons that his former flat mate, Mr Robinson, was a thief.

Mr Robinson was also drinking at the Hotel that evening and (principally verbal) confrontations took place between the plaintiff and Mr Robinson at approximately 5:00 pm and 5:30 pm.

The Hotel dealt with the situation by requiring the plaintiff and Mr Robinson to stay in separate parts of the Hotel where the plaintiff continued to drink until around 9:30 pm when he left the premises.

Approximately 200 metres away, he was approached and assaulted by Mr Robinson and suffered severe injuries.

The Decision at Trial

The trial judge found in favour of the plaintiff on the basis that the defendants failed to take reasonable care for the plaintiff’s safety when he was ejected from the Hotel around 9:30 pm. The trial judge allowed the defendants 70% contribution from Mr Robinson.

The Issues on Appeal

The defendants appealed against the decision with respect to liability, contributory negligence, damages and contribution.

The Decision on Appeal

The Court of Appeal considered the trial judge’s analysis of the evidence and held the finding that the plaintiff had been ejected from the Hotel rather than simply leaving could not be supported. It noted that industry practice was a guide but not the determinate of what constituted reasonable care for the safety of a hotel patron. The Court of Appeal determined that what is reasonable always depends on the circumstances.

The Court of Appeal found that it was a reasonable response to initially separate the plaintiff and Mr Robinson and the fact that a subsequent verbal confrontation had occurred did not exclude that reinforced separation would be effective. The Court of Appeal noted that such separation had in fact been effective for around 4 hours. The Court of Appeal concluded that the defendants did not breach the duty of care owed to the plaintiff by failing to eject Mr Robinson at around 5:30 pm and that given that no further incidents occurred and the plaintiff subsequently left of his own accord, breach of duty of care did not arise thereafter.

The Court of Appeal set aside the orders of the trial judge and gave judgment for the second and third defendants.
The Facts

The defendant supplied security staff to the Beetle Bar and adjacent Cloud 9 Backpackers (the hostel). The plaintiff was an Irish backpacker who was staying at the hostel. At around 5.30pm on 9 June 2009 the plaintiff attended the Beetle Bar and proceeded to consume a significant quantity of alcohol. The extent of his intoxication was noticed by staff so that when he left the bar to have a cigarette outside he was refused re-entry.

Upon being refused re-entry, the plaintiff became angry and aggressive. He attempted to gain access to the hostel but after abusing the duty manager and making a number of threats, was ejected from the hostel by Nicholas Simi, the security guard employed by the defendant.

The police arrived at the scene and issued the plaintiff with a move on direction. Nonetheless, the plaintiff returned to the hostel after about 15 minutes, and the police arrived moments later. The officers attempted to arrest the plaintiff for contravening the move on direction. The plaintiff resisted the arrest and the police struggled to put handcuffs on him. Mr Simi endeavoured to assist the police by tackling the plaintiff and throwing him to the ground. In the process of doing so, the plaintiff suffered a broken leg.

The plaintiff commenced proceedings against the defendant on the basis that it was vicariously liable for Mr Simi’s actions.

The Decision

The court found that the plaintiff was intoxicated and aggressive, and that the police struggled to arrest him. However, the court accepted the evidence of the police officers that they would have been able to affect the arrest without assistance. This enabled the court to find that it was unnecessary for Mr Simi to intervene, and when he did, he used unreasonable force. On this basis, the court made a finding of negligence against the defendant.

The court also considered the plea of battery, and accepted that a battery occurred. The defendant argued that the battery was lawful and sought to rely on a variety of statutory defences. The trial judge rejected the defendant’s arguments. S45 of the CLA (QLD) (which affords protection in circumstances where a claimant is harmed during the course of committing an indictable offence), did not apply to intentional torts such as battery. The court held that s254 of the Criminal Code (which makes it lawful to assist police to make an arrest) and s260 (which permits a person to take steps to prevent a breach of the peace) were inapplicable due to the fact that the force used by Mr Simi was not reasonable and necessary. A similar finding was made in respect of s615 of the Police Powers & Responsibilities Act (which makes it lawful to assist a police officer in the course of his duty).

The court considered contributory negligence. The court held that while the plaintiff was intoxicated, and his behaviour was violent, any link between those matters and the incident was severed by the involvement of the police. Consequently, the court declined to make a finding of contributory negligence.

In relation to quantum, the court accepted the orthopaedic evidence that the plaintiff had made a good recovery from his injuries and would be left with little or no permanent impairment. Taking into account the plaintiff’s relatively poor employment history in the United Kingdom, coupled with the fact that he was on a backpacking holiday at the time of the incident, the court only awarded $6,000 for past economic loss and nothing for future economic loss. It was conceded by the plaintiff that he did not meet the legislative threshold to claim care. Consequently, the plaintiff was awarded damages of only $44,380, with the largest component being the hospital refund of $25,818. As damages were less than $50,000, and did not exceed the plaintiff’s MFO, the plaintiff’s costs were capped at $2,500. Barry.Nilsson. acted for the defendant.

IN ISSUE

- Liability for actions of bouncer in assisting police arrest a patron
- Application of statutory defences
- Whether force used was reasonable and necessary

DELIVERED ON 18 May 2012

READ MORE click here
The Facts

The plaintiff was the owner of 2 properties in the Condamine region that grew cotton. On 15 December 2005 aerial spraying was performed on 2 properties located 20km from the plaintiff’s properties. The sprays being used were herbicides. The herbicides were being used in quantities above their recommended label rates.

The aerial spraying was performed in order to kill wattle trees located on 420 hectares of land used as cattle fields. It was performed by 2 fixed wing aircrafts and took 5 hours in total.

Four days after the spraying took place, yellowing and damage was observed on cotton crops belonging to the plaintiff.

In March 2007 the plaintiff instituted proceedings against 8 defendants alleging negligence in relation to the performance of the spraying. The 8 defendants to the action included the owners, managers and operators of the 2 properties on which the spraying was undertaken, the supplier of the herbicides, the company that undertook the spraying and one of the pilots of one of the aircrafts (this pilot was in fact the director of the spraying company). The pilot of the second aircraft, Michael Baker, was an employee of the spraying company. Mr Baker was not a party to the action.

Prior to trial, the plaintiff settled with the 1st to 5th and 7th defendants (settling defendants). The matter proceeded only against the 6th and 8th defendants, the spraying company and pilot.

The central issue was whether the spraying caused the damage. This was an issue because the plaintiff’s properties were located 20km from where the spraying was undertaken.

Extensive expert evidence was adduced by the parties in relation to the question of causation. All of the experts agreed that, if applied in sufficient quantities, the herbicides could affect cotton crops. Further they all conceded that some of the chemicals could have been deposited 20km from the site of the aerial spraying. However, the defendants’ experts disputed that sufficient quantities of the herbicides could have drifted onto the plaintiff’s property such that damage was caused.

The Liability Decision

Despite the extensive expert evidence the court was unable to make a finding as to the amount of chemicals that could have been deposited on the plaintiff’s crops. This was due to the variables that were present at the time the spraying was performed and the disparity of views amongst the experts. Notwithstanding this, the court was satisfied that it was more probable than not that the chemicals which did drift caused the damage. In this regard the court was swayed by the evidence of the plaintiff’s agronomist who was responsible for monitoring the crops over the relevant time; by contemporaneous photographs which overwhelmingly established extensive damage to the crops and also by analysis that had been undertaken on samples of the crops which supported the conclusion that the damage sustained was herbicide damage.

In making this decision the court rejected the
The court noted that Amaca v Ellis merely applied settled legal principles to the facts of that particular case. It was not of assistance in the present case because there was no evidence of competing causes that could explain the crop damage.

The Apportionment Argument

Following the liability decision the court heard further submissions in relation to the apportionment of liability under the CLA (QLD) as well as the effect of the pre-trial settlement.

The 6th and 8th defendants (the judgment defendants) argued that liability ought to be apportioned between them respectively as well as with the settling defendants and Mr Baker.

Further the judgment defendants argued that the judgment against them ought to be reduced to account for the pre-trial settlement.

The Apportionment Decision

In order to determine whether the pre-trial settlement should be taken into account the Court had regard to s32B of the CLA (QLD) which deals with subsequent actions. The wording of that provision relates only to a situation where a plaintiff has previously recovered judgment against a concurrent wrongdoer. Given that the plaintiff had settled rather than obtained judgment against the settling defendants, s32B of the CLA (QLD) was not triggered and the court was not required by the CLA (QLD) to have regard to the pre-trial settlement.

Given that the proportionate liability provisions of the CLA (QLD) provide a limitation of liability, the Court found that the judgement defendants had the onus of proving that the claim was an apportionable claim for the purposes of s31 of the CLA (QLD).

The judgment defendants had to prove that:

(a) The claim was an apportionable claim within the meaning of s28 of the CLA (QLD); and

(b) They, the settling defendants and/or Mr Baker were “concurrent wrongdoers” in accordance with s30 of the CLA (QLD).

The plaintiff’s claim was for economic loss arising from property damage. As such the Court had no difficulty finding that it was an apportionable claim for the purposes of s28 of the CLA (QLD).

The judgement defendants sought to rely upon the pleadings in order to satisfy the Court that the settling defendants were concurrent wrongdoers. The Court held that the pleadings were not sufficient to satisfy the onus and it was not prepared to draw the necessary inferences in order to conclude that the settling defendants ought to have been aware of the risks of using the herbicides. The court noted that no evidence was called from the settling defendants at trial.

The situation in relation to the judgment defendants and Mr Baker was different, they had given evidence at trial although Mr Baker was not on point as to his knowledge of the risks. Notwithstanding this the court noted that:

(a) The 8th defendant (pilot) was the director of the 6th defendant spraying company; and

(b) Mr Baker was an employee of the spraying company.

Given the existence of these relationships the Court found that there was no evidence that either had acted independently of each other. The wording of s30 of the CLA (QLD) provides that a concurrent wrongdoer is a person whose acts are independent of each other. As such the absence of the words “or jointly” in s30 of the CLA (QLD) meant that neither the judgement defendants and/or Mr Baker could be concurrent wrongdoers.

Arguments in Relation to the Appropriate Form of Judgment

The matter came before the court on a third occasion so that the parties could make submissions in...
PUBLIC LIABILITY
Aerial Spraying

GEJ & MA Geldard Pty Ltd v DN Mobbs & Ors

relation to the amount of the judgment, interest and
costs. The court was required to reconsider the effect
of the plaintiff’s pre-trial settlement, in accordance
with the common law as opposed to the CLA (QLD).
By this time the deed of settlement (the Deed)
between the plaintiff and judgment defendants was
in evidence. The Deed indicated that the settlement
sum was $300,000, being $100,000 for damages and
$200,000 for costs.

The judgement defendants submitted that the
judgment sum ought to be reduced by $100,000 to
account for the settlement and further that they ought
only be required to pay the plaintiff’s standard costs
insofar as they exceeded $200,000.

Further, the judgment defendants argued that the
plaintiff had not established an entitlement to interest
because it failed to lead evidence in relation to the
date the loss was sustained and when the money for
the cotton was received, if at all.

The plaintiff made no submission in relation to the
judgment sum. It did submit however that:

(a) Interest should be awarded in accordance
with s47 of the Supreme Court Act 1995; and

(b) It ought to be awarded indemnity costs in
accordance with rule 360 of the UCPR given that
it obtained judgment in excess of its formal offer
to settle.

Decision Regarding Appropriate Form of
Judgment

The court noted that the common law clearly prohibits
a plaintiff recovering more than its actual loss. As such
it held that it was appropriate to reduce the judgment
against the judgment defendants by $100,000 in order
to account for the pre-trial settlement and prevent
the plaintiff from obtaining a windfall. The court
commented however that if the plaintiff was able to
prove that it had not been paid in accordance with the
Deed, then no reduction would have been ordered.

The court rejected the judgment defendants’
arguments in relation to interest and found that it was
reasonable to assume that the plaintiff would have
been paid for the 2005/2006 season crops by 1 July
2006. As such it awarded interest from that date. The
interest was payable on the entire sum of the plaintiff’s
damages until the $100,000 settlement had been
received by the plaintiff, it was then payable on the
reduced sum.

In relation to costs, the court ordered that the
judgement defendants pay the plaintiff’s costs on
the standard basis so far as those costs related to
the action against them. There was no reduction
for the $200,000 costs paid by the other parties. In
making this decision the court noted that rule 360 of
the UCPR is in mandatory terms such that indemnity
costs should be awarded unless the defendant can
show another order is appropriate. The judgment
defendants persuaded the court that another order
was appropriate because there was a material change
in the evidence following the delivery of the plaintiff’s
mandatory final offer. That change came about on
the first day of trial when one of the plaintiff’s experts
delivered an amended report (correcting errors in his
earlier report) significantly improving the plaintiff’s
liability position. Hence a standard costs award was
made.

READ MORE
[2010] QSC 220
READ MORE
[2011] QSC 33
READ MORE
[2011] QSC 297
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 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.

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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 court accepted all of the defendants were aware of the risks associated with the use of glyphosate from both long experience in the agricultural industry and from previous problems of overspray between the 2 properties. The court was satisfied that the first defendant knew that the plaintiffs had emergent crops which were more likely to be adversely affected by glyphosate than more mature plants.

The court noted that whilst flying an aeroplane it a specialist activity that would be beyond the control of someone like the first defendant, it was expected that a broad acre farmer like himself would have developed experience of the types of conditions likely to generally impact on aerial spraying activity. The court held that an occupier of farm premises cannot, once a decision is made to aerial spray a noxious substance, simply pass over responsibility to either or both the pilot or the aircraft company.

The plaintiffs also made a claim under the Damage By Aircraft Act 1999 (Cth) (DBA Act) against the third and fourth defendants. The court accepted that s11 of the DBA Act applies absolute liability to all or any of the persons jointly and severally liable under the section. The court referred to the purpose of the DBA Act, which is designed to relieve the...
sufferer of damage on the ground from having to work out who an actual tortfeasor might be in particular circumstances and then prove a duty of care and breach. The court held that if the deliberate spraying of the first defendant’s land resulted in the accidental drift of spray onto a neighbour’s crops then that was a sufficient enlivenment of the word “accident” to justify the application of the legislation. The DBA Act was found to apply and the third and fourth defendants were both found vicariously liable for any damage caused to the plaintiffs’ crops.

The court held that each defendant was jointly and severally liable for the damage caused by the aerial spraying.
HEALTH LAW
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Liability of hospital for discharge of psychiatric patient who killed a person.

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98  Alder v Khoo & Anor [2011] QCA 298
Application in relation to non-disclosure of documents destroyed as part of a document retention policy and prejudice to a fair trial.

Whether a statement written by a doctor and/or solicitor file notes of a conference with a doctor fell within the definition of “investigative report” or “medical report” and as such were required to be disclosed pursuant to s30 (2) of PIPA.
The Facts

Mr Pettigrove was admitted to hospital on 20 July 2004 at 3.50am after his friend who he lived with, Mr Rose, called an ambulance. Mr Pettigrove had a 20 year history of chronic paranoid schizophrenia and Mr Rose was concerned about his friend’s unusual behaviour that morning.

Dr Coombes was the consultant psychiatrist working at the hospital who oversaw Mr Pettigrove’s admission. Dr Coombes made the decision that Mr Pettigrove should be discharged from hospital and transferred to the Mental Health Unit at Echuca which was 1,171 kilometres away. Mr Rose agreed to transport Mr Pettigrove to the Mental Health Unit the following day. On 21 July 2004 while undertaking this journey, Mr Pettigrove killed Mr Rose.

This proceeding was concerned with two separate actions, heard together, by Mr Rose’s relatives claiming damages for nervous shock they suffered as a result of Mr Rose’s death. One action was on behalf of the mother and a sister of Mr Rose, and the other action was by a different sister of Mr Rose. They alleged that Mr Rose ultimately died as a result of the negligence of Dr Coombes and the hospital staff.

The court narrowed the issues to focus on the negligence of Dr Coombes, namely, allowing Mr Rose to transport Mr Pettigrove from the hospital to Echuca; failing to properly medicate Mr Pettigrove and failing to seek out and read overnight notes made by nurses checking on Mr Pettigrove.

The Decision

The action was governed by the CLA (NSW). The court held that the defendant, Hunter & New England Local Health District, would have been vicariously liable for the actions of Dr Coombes had Dr Coombes been found negligent. The court applied s5B of the CLA to consider whether the risk was foreseeable, not insignificant and what precautions a reasonable person would have taken in Dr Coombes’ position. In finding that s5B was not breached by Dr Coombes, the court relied upon the opinion of expert witnesses which commented that there was no history of violence in Mr Pettigrove’s 20 year history of schizophrenia. In relation to the failure to medicate Mr Pettigrove after his overnight stay, the expert witnesses stated that distress noted by the nurses was not an uncommon experience with people who have a psychotic illness. The court noted that they should not view the actions of Dr Coombes with the benefit of hindsight.

While the court repeated several times that Dr Coombes made a number of errors and ought not to have discharged Mr Pettigrove after spending only one night in hospital and without proper medication applying the meaning of negligence as set out in s5B of the CLA there was no breach. It was held that the purpose of the CLA was to limit and not expand liability and satisfying the CLA was more difficult than under the common law. The court was not satisfied “...that a reasonable person in Dr Coombes’ position would have concluded that there was a not insignificant risk of Mr Pettigrove...” reacting the way he did, nor would have concluded there was a significant probability of the harm occurring.

Section 5O of the CLA was also considered by the court to determine whether Dr Coombes’ actions fell below the standard of care for professionals. The court rejected the plaintiffs’ submission that Dr Coombes had acted irrationally. The court noted there was a distinction between making errors and acting irrationally.

The court also considered causation. Under s5E of the CLA the plaintiff has the onus to establish causation. The court considered whether placing Mr Pettigrove into Mr Rose’s care was “a necessary condition of the occurrence of the harm”. The court held that while allowing Mr Pettigrove to go with Mr Rose was one of the many conditions that had to occur before the event (the killing), it could not be viewed as the cause of the event. The cause here would be the trigger that compelled Mr Pettigrove to attack Mr Rose. In this case, there was no evidence to indicate that Mr Pettigrove’s compulsion to kill Mr Rose was triggered by being in a car or on a long journey with Mr Rose.
The Facts

On 3 September 2009, the plaintiff attended the defendant general practitioner with a black lesion on his foot. The defendant diagnosed the lesion as a plantar wart and treated it as such, administering cryotherapy. The lesion did not regress and the defendant performed similar treatments in September and October 2009. The lesion continued to grow and on reassessment in March 2010, the defendant again treated it as a plantar wart. The lesion grew further and was treated as a plantar wart by a second general practitioner in September 2010 and a third general practitioner in January 2011.

It was not until March 2011, after the plaintiff was referred to an oncologist by a third general practitioner, that the lesion was diagnosed as an acral lentiginous melanoma (ALM). The lesion was excised but by this stage, the ALM had metastasised to the plaintiff’s lymph nodes. Throughout 2011, the plaintiff underwent various surgeries and undertook chemotherapy treatment. By the time of the trial, the plaintiff had a very short life expectancy, with the ALM having spread to his spine and through many other parts of his body.

The plaintiff brought proceedings in negligence against the defendant, claiming that he had wrongly diagnosed and treated the lesion as a plantar wart. The issues in dispute were whether the plaintiff had a plantar wart in 2009; the state of the lesion when the defendant treated it in September 2009 and up until the time he last treated the plaintiff in March 2010; whether the plaintiff had an ALM in September 2009; and whether or not the alleged negligence occurred.

The Decision

The court heard evidence from the plaintiff and his wife; and numerous expert medical witnesses. Based on the evidence, the court concluded that the plaintiff had both an ALM and a plantar wart in September 2009, a situation which was extremely rare but one which the expert witnesses accepted as being possible.

The court accepted the expert evidence that when the plaintiff presented to the defendant with a black lesion in September 2009, the defendant should have examined the lesion with magnification, obtained a history of the lesion, considered ALM as a differential diagnosis, and referred the plaintiff for biopsy and specialised assessment. By failing to do this, the defendant breached his duty of care to the plaintiff.

While the court was satisfied that the defendant had breached his duty of care to the plaintiff, it was not satisfied that the breach of that duty was causally related to the plaintiff’s condition. Based on the evidence, it was probable that in September 2009, the ALM had already metastasised and was lethally advanced. As such, the court was unable to conclude that had the lesion been excised in 2009, there would have been a different outcome for the plaintiff.
The Facts

In 1996, Daniel Jordan (the plaintiff), aged 11 years, was diagnosed with a brain tumour with leptomeningeal metastases (where cancer cells spread to the tissue that cover and protect the brain and spinal cord).

The plaintiff was referred to Dr Michael Lee, neurosurgeon (the first defendant) who advised that, at that time, the risks of surgery to remove the tumour outweighed the benefits. The first defendant referred the plaintiff to Dr David Baker, oncologist (the second defendant) for adjuvant treatment.

By 2000, the plaintiff’s condition had deteriorated and the first defendant considered that it was appropriate to surgically decompress the tumour. However, for reasons unrelated to the defendants, that surgery was not completed.

In June 2000, the plaintiff was referred to Dr Charles Teo, neurosurgeon, who resected about 98% of the tumour with good results. Dr Teo reported that the resection of the tumour should have been performed earlier.

The Decision

The plaintiff alleged that the first and second defendants had a duty to advise of all available treatment options. The plaintiff alleged that the first and second defendants failed to advise, as early as 1996, that resection was the first choice for curative treatment and there were surgeons who, acting reasonably, would have performed the resection.

The first and second defendants alleged they advised the plaintiff’s parents of resection surgery as early as 1996, but surgery was not appropriate at this time and the plaintiff’s tumour could best be treated in other ways. They allege that the plaintiff’s parents accepted that advice. They agreed that by 2000, it was appropriate to decompress the plaintiff’s tumour.

The plaintiff alleged that if he underwent surgical resection earlier, he would not have undergone unnecessary surgical procedures and adjuvant therapy and would not have the residual disabilities with which he is now encumbered. Quantum was agreed at $400,000.

Dr Teo asserted that he and other unnamed neurosurgeons performed such surgeries in the United States, and that he considered a large body of neurosurgeons would have recommended the resection because it was the best curative treatment. The court determined that Dr Teo’s evidence was not persuasive, and noted that no other medico could name a surgeon who would have proceeded to surgery on the plaintiff prior to 2000.

The court considered that it would be wrong for the first and second defendants, who did not consider surgery to be reasonable in the plaintiff’s circumstances, to suggest the plaintiff attend upon another unidentified neurosurgeon to excise the tumour. The court determined that other neurosurgeons would not have been acting reasonably in resecting the plaintiff’s tumour between 1996 and 2000.

The court held that the fact that Dr Teo was successful at surgery in 2000 did not mean that the first and second defendant were negligent in any way, because the plaintiff’s relevant neurological circumstances were quite different in each of the years between 1996 and 2000.

The court dismissed the plaintiff’s claim against the defendants.

IN ISSUE

• Whether there is a duty on medical practitioners to provide full advice of all possible regimes of medical treatment
• Whether there is a duty on medical practitioner to advise patients of treatment options that the medical practitioners considers to be inappropriate in the patient’s circumstances
• Whether a medical practitioner breaches their duty of care by not recommend- ing or advising on “radical” treatment in circumstances where adopting conservative treatment would result in the eventual death of a patient

DELIVERED ON 25 May 2012

READ MORE  ▸
The Facts

Mrs Algar ("the plaintiff"), a 53 year old woman, attended BreastScreen Queensland ("the defendant") on three separate occasions between December 2007 and September 2009. On each occasion she was advised that lumps in her right breast were dense breast tissue. The plaintiff subsequently developed breast cancer, which was terminal. She argued that the advice she was given by the defendant was negligent as they failed to diagnose her condition in a timely manner.

The plaintiff made an application to the Supreme Court of Queensland for disclosure of documents from the defendant pursuant to its obligations under the PIPA. The plaintiff submitted that a disclosed file note indicated that the defendant's lawyer had participated in a conference with Professor Osbourne, an employee of the defendant, during which he gave expert evidence. The plaintiff contended that any opinion expressed by Professor Osbourne was properly characterised as expert opinion. Accordingly, it was required to be disclosed under s20(3) or 27 of PIPA.

The defendant submitted that the purpose of the conference was to obtain instructions and provide legal advice and that they did not intend to obtain an expert report from Professor Osbourne. However, the court held that Professor Osbourne was not being called as a witness of fact and he was not going to be called as an expert to give evidence at trial. Therefore, the file note was protected by legal professional privilege and was not required to be disclosed.

As the purpose of the conference was to obtain instructions and provide legal advice, s30 of PIPA applied and the file note was subject to legal professional privilege.

The Decision

The court held that if an expert's report is to be obtained for the purposes of pre-litigation procedures, it is required to be disclosed under s20(3) of PIPA. This includes any communications associated with the provision of the report, including file notes of conversations with the expert.

IN ISSUE

• Disclosure of ‘expert opinions’ under ss 20(3) or 27 of PIPA.

DELIVERED ON 21 July 2011

READ MORE
The Facts

In March 2005, the applicant commenced proceedings against Dr George Quittner for failure to diagnose and properly treat a Hepatitis C infection. The applicant alleged that as a result of that failure, he developed a type of non Hodgkin’s lymphoma. The applicant had been a patient of Dr Quittner from the early 1990’s until 2004. He had a lengthy and complicated medical history prior to 2001 when he consulted Dr Waugh, a physician and nephrologist, and Dr Barr, a gastroenterologist (the respondents).

The applicant filed a Notice of Motion in April 2009 seeking an extension of the limitation period in which to sue the respondents. An Amended Notice of Motion was filed in September 2010 seeking orders for an extension of the limitation period against the respondents under the provisions of s 60C, s 60E, and/or s 60G and s 60I of the Limitation Act 1969 (NSW) (the Act).

The Decision

The court dismissed the Amended Notice of Motion.

The court held that the evidence provided no proper excuse for the very lengthy delay that occurred before the application was made. The evidence also established that the applicant had sufficient knowledge of the factual matters he intended to rely on in support of the claims against the respondents for as long as 4- 5 years before the application for an extension of time was made. The claim which the applicant intended to make against the respondents was essentially the same as the claim he had already made against Dr Quittner. It was clear from the evidence that the reason the applicant wanted to bring a claim against the respondents was due to concern that recovery of any judgment against Dr Quittner may be complicated because he was uninsured and had no assets.

The court also noted that the evidence established that the applicant suffered from lymphoma before either of the respondents were consulted. In those circumstances the court was not satisfied that the applicant had any cause of action, or that either of the respondents was under a duty of care or in breach of any duty.

As a consequence, the court determined that it would not be just and reasonable to extend the limitation period in respect of either respondent.

IN ISSUE

- Whether applicant satisfied statutory criteria for extension of time
- Whether just and reasonable to extend limitation period

DELIVERED ON 2 August 2011

READ MORE

[2011] NSWSC 809
Gilmore v Quittner
[2011] NSWSC 809
The Facts

Ms Felgate underwent laparoscopic surgery on 14 November 2007. Dr Tucker was her anaesthetist. Ms Felgate experienced a phenomenon termed ‘surgical awareness’ in which she was conscious but paralysed for the entire duration of the surgery.

Ms Felgate made a claim under the PIPA against Dr Tucker. At the compulsory conference, Dr Tucker produced a document entitled ‘Interpretation of anaesthetic record’ (‘the document’). The document was different to the hospital record and indicated to Ms Felgate that there was a statement by Dr Tucker which should be disclosed. Dr Tucker claimed the document was subject to legal professional privilege.

The Decision on Application

Ms Felgate’s application to the Supreme Court of Queensland for disclosure of the statement was dismissed and she appealed this decision.

The Issues on Appeal

The main issues before the Court of Appeal were whether the statement was required to be disclosed under the PIPA and if so, was the statement otherwise subject to professional privilege? If so, was it required to be disclosed under s30(2) of PIPA? If the statement was not required to be disclosed, did Dr Tucker waive privilege when he produced the document at the compulsory conference?

The Decision on Appeal

The Court of Appeal factually distinguished the case from the cases of Watkins v State of Queensland; Allen v State of Queensland and James v WorkCover Queensland. Those decisions all concerned documents relating to communications with third parties, as opposed to communications between clients and their lawyers.

The Court of Appeal accepted that the statement taken by Dr Tucker’s lawyers was “to provide him with legal advice about any anticipated judicial proceeding.” As the PIPA pre-court procedures were an essential part of future litigation and the dominant purpose of the statement was in contemplation of future litigation, the statement was privileged.

The Court of Appeal held that it was well established that privilege cannot be abrogated by legislation without express intention. Dr Tucker’s statements were therefore privileged, unless they were ‘reports’ which are required to be disclosed under s30(2) of PIPA. The Court of Appeal was not persuaded that ‘reports’ included notes or recordings of statements of clients to their legal representatives.

The Court of Appeal also held that Dr Tucker did not waive privilege when he produced the document at the compulsory conference. Ms Felgate failed to establish that the document contained information which was in addition to the hospital records and that its production at the conference in any way waived privilege over the statement.
The Facts

On 1 April 2009 an article in the Cairns Post caught the attention of 4 women (Sharp, Byfield, McKeown and Livett) who had undergone plastic surgery procedures in 2003, 2004, 2005 and 2006 with a Cairns surgeon. For each of the women, the article was said to be the catalyst for making enquiries as to whether they had a right of action against the surgeon.

By the time each of the women obtained legal advice to commence proceedings the statutory 3 year limitation period prescribed under s31 of the LAA had passed.

Each woman made applications to extend the limitation period pursuant to the LAA.

Sharp

On 22 August 2003 at the Cairns Day Surgery, the applicant underwent a bilateral breast augmentation. She alleged post surgical complications within 6 months with the implant moving downwards. On 20 June 2006 corrective surgery was undertaken and the left implant was replaced. Her limitation period expired on 22 August 2006. On 1 April 2009, the applicant read the Cairns Post article. On 26 May 2009, the applicant instructed lawyers in order to investigate the matter and a report from Dr Marshall was obtained. Dr Marshall concluded that “[t]here was a significant risk of an unsatisfactory outcome and this should have been explained to...” the applicant.

The applicant filed her claim on 11 March 2010 (3 years and 7 months after the expiry of the limitation period).

Dr Marshall’s evidence which was obtained on 20 May 2010, suggested that the advice and treatment of the respondent fell below the standard expected of a competent and skilled surgeon.

Byfield

In April 2006, the applicant underwent surgery to remove and replace breast implants. She sustained post surgical complications of ripples in her breast implants and bruising at the drain site. In the weeks after the Cairns Post article, she sought legal advice and subsequently obtained a report from an expert who concluded that the treatment was below the standard to be expected of a reasonably competent surgeon, which included a failure to warn the applicant that because of her low body fat she was at a particularly high risk of an adverse outcome.

Proceedings were filed 11 months after the expiration of her limitation period.

Livett

The applicant underwent surgery for breast augmentation in August 2004. She sustained infections and ultimately underwent further surgery, and in April 2005 she was suffering from a significant infection and came under the care of other doctors who were critical of her earlier treatment. She underwent further surgical intervention. The applicant sought legal advice after reading the Cairns Post article. Her solicitors obtained a medical report which said the advice and treatment she had received in 2004 was below the standard to be reasonably expected. The applicant issued proceedings on 11 March 2010.

McKeown

The applicant underwent surgery for a breast reduction procedure in December 2005. Infection followed which caused scarring. On 1 April 2009 the applicant read the Cairns Post article and instructed solicitors on 5 May 2009. Proceedings were issued on
11 March 2010 (1 year and 3 months following expiry of her limitation period). On 5 May 2010, she obtained a report from an expert who concluded that there had been a failure to warn of the risks of infection, scarring and loss of sensation.

The Decision

Applications to extend the limitation period were brought in each of the 4 cases. Three failed and 1 succeeded.

Section 31(2) of the LAA permits a court to extend a limitation period if “it appears to the court –

(a) that a material fact of a decisive character relating to the right of action was not within the means and knowledge of the applicant until a date after the commencement of the year last proceeding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation”.

Other critical elements to succeed are:

1. Evidence which goes to establishing a right of action; and

2. Absence of prejudice to the defendant caused by the delay.

If the criteria is met, then the court may extend the limitation period for 1 year after that date.

Relevantly for medical negligence cases, the case of Dick v University of Queensland [1979] Qd R 469 was endorsed. In that case it was considered that a patient discovering that his or her medical practitioner had performed at a standard below that to the reasonably expected outcome would ordinarily be a “material fact of a decisive character”.

**Sharp – applicant unsuccessful**

The applicant was unsuccessful. The court concluded that the applicant had not established the two limbs of s31(2) of the LAA. The court found that the applicant had been “…given appropriate warnings and was aware of the potential “complications and risks”...” of the surgery prior to it being performed. As a result there was no evidence that there was a right of action based on this alleged failure to warn where there was in fact evidence to the contrary.

**Byfield – applicant successful**

The applicant was successful in having her limitation period extended. The court accepted that the discovery of the surgeon’s apparent breach as set out in the report was sufficient to be a material fact of a decisive character. It was found that the applicant had acted reasonably with her follow up, and therefore the “material fact” could not have been expected to have been known earlier. The report was also sufficient to establish that the applicant had a cause of action and she was found to have a prima facie case of causation. It was found that the respondent surgeon would not be prejudiced if the matter was permitted to proceed as all relevant witnesses were available as were the surgeon’s own notes and other hospital notes.

**Livett – applicant unsuccessful**

The applicant was unsuccessful because it was found that she knew of all the relevant physical matters and the absence of warnings well before her limitation period expired. She had been told as much by various treating doctors. Furthermore, the surgeon had previously apologised to her and revealed that she had contacted her medical indemnity insurer. The surgeon also paid for the applicant’s surgery.

**McKeown – applicant unsuccessful**

The expert report was relied upon as the material fact of a decisive character. However it was found by the court that the failings identified in the expert report were risks that were in fact warned of. Therefore there was no basis to extend the limitation period. There was no evidence to establish that the applicant had a cause of action against the surgeon.
The Facts

The appellant was treated by the respondent on various dates between October 2000 and January 2001.

The appellant’s right leg was amputated below the knee on 22 January 2001 after her right foot had become irremediably infected. The appellant attributed this outcome to the respondent who was responsible for the operation of the Mt Isa Base Hospital and had allegedly provided inadequate medical services to arrest the progress of the infection.

Between January and October 2003 the appellant delivered notices of claim under PIPA to various entities, including the respondent. On 4 December 2003 leave was granted to the appellant to issue proceedings to preserve the limitation period pursuant to s43 of PIPA. The appellant’s claim and statement of claim were filed on 5 December 2003 and stayed pending compliance with PIPA.

The PIPA process continued from 2003 until April 2010 when it was accepted that the stay ceased to have effect after the mandatory final offers had been exchanged. The appellant’s claim and statement of claim were served formally in May/June 2010.

In June 2010 the respondent filed an application seeking orders dismissing the appellant’s proceedings pursuant to the UCPR and the inherent jurisdiction of the court. The assertion was that the delay over the whole period of the PIPA and UCPR processes was such that the respondent was prejudiced to an extent which precluded it from receiving a fair trial.

There was a great deal of inconsistency in the evidence regarding the identity of one of the treating doctors and the nature of treatment (if any) sought and provided to the appellant. The respondent’s solicitors had requested a medical report pursuant to s 22 of PIPA supporting a causative link. It appeared the appellant was unable to pay for a report which caused significant delay.

The Decision at Trial

In September 2010 the appellant’s proceedings were struck out for want of prosecution. The trial judge concluded that because there was actual and presumed prejudice due to the delay by the appellant in proceeding against the respondent which could not be remedied, her proceedings should be struck out.

The appellant appealed.

The Issues on Appeal

The appellant contended that the trial judge erred in the exercise of discretion in striking out the claim. The appellant alleged that the trial judge failed to give proper weight to the failure of the respondent to seek an earlier remedy pursuant to s35 of PIPA and thereby acquiesced to the slow progress of the claim. Further, the appellant alleged that the trial judge failed to take into account the respondent’s failure to give proper disclosure of documents thereby impeding the appellant’s ability to progress her claim.

The Decision on Appeal

The appeal was dismissed. The Court of Appeal delivered a unanimous judgment finding the trial judge engaged in an appropriate weighing exercise, recognising that the effect of the delay on the quality of justice and the capacity for the parties to have a fair trial.

It was open to the trial judge, in the exercise of his discretion to conclude that given the slow pace of the PIPA proceedings and the contradictory statements by the appellant that the unknown whereabouts of staff and their recollection was a likely source of prejudice.

The trial judge did not fail to give proper weight to the failure of the respondent to use s35 of PIPA concerning the appellant’s delay in providing a medical report. Given that the respondent’s solicitors regularly sought the report, it could not be said to be acquiescing in the appellant’s delay.

IN ISSUE

- Whether there was sufficient prejudice to strike out a claim under the UCPR
- Whether respondent acquiesced to delay by not taking steps to force claimant to progress claim under s35 of PIPA

DELIVERED ON 16 September 2011

READ MORE  click here
The Facts

On 3 January 1989, the appellant was born and alleged that he suffers from cerebral palsy and spastic quadriplegia. The appellant instituted proceedings against his mother's obstetrician (the first respondent) and the State of Queensland (the second respondent), claiming the respondents were negligent in relation to the care of his mother when giving birth. The respondents claim that the appellant suffers from a genetic condition.

The evidence indicated that the respondents destroyed some of the appellant's medical records, including an EEG, as part of its document retention policy (given the length of time since the appellant's birth). The appellant brought an application alleging the respondents deliberately destroyed the documents which would prejudice a fair trial.

The appellant's medical records also included complex blood testing, the results of which contained various codes such as “AUSLAB” and various gelled images. The respondents provided an affidavit from the pathology company which explained that the AUSLAB codes referred to a computer system that performed the test and that no documents could in fact be produced. The gelled images could not be located and were most likely destroyed in accordance with the respondent’s document retention policy. The appellant’s application also sought production of documents in relation to the codes and missing gelled images.

The Decision on Application

The judge held that there was no evidence the documents had been destroyed other than innocently. Whilst the destroyed EEG scan was relevant to the issues raised on the pleadings, the trial judge considered the destruction of the EEG would not prejudice a fair trial as other medical information was available, including CT and MRI scans, which contained the same information.

The court considered the respondents’ explanation of the AUSLAB codes to be satisfactory and was content that the respondents undertook a thorough search for the gelled images.

The Decision on Appeal

The Court of Appeal upheld the court’s findings that the destroyed EEG and gelled images would not prejudice a fair trial as it was not crucial to the opinions of experts or to the determination of any medical issue in the case given there was an abundance of other evidence available. The appeal was dismissed.

Alder v Khoo & Anor

[2011] QCA 298
The Facts

The respondent was a 9 year old boy with multiple congenital problems, including a heart abnormality. The appellant was the State of Queensland, which is responsible for the Prince Charles Hospital (PCH). On 23 December 2003, the respondent was undergoing a study in relation to his heart, following which he developed a complete heart block and suffered severe brain damage.

In 2010, the respondent brought a claim for compensation against the appellant pursuant to PIPA. The respondent’s solicitors sought an order that the appellant disclose 2 file notes taken by the PCH’s solicitors following discussions with doctors involved in the respondent’s treatment, and also a written statement prepared by a doctor at the request of the PCH’s solicitor.

The Decision on Application

The issues for determination were whether the documents were protected by legal professional privilege and if so, whether they had to be disclosed pursuant to s30 (2) of PIPA because they were “investigative reports”.

The judge found that the documents came into existence for the dominant purpose of anticipated litigation. However, they were investigative reports and therefore fell within the exceptions to privileged documents and were required to be disclosed.

The Issues on Appeal

The appellant appealed and argued that the trial judge erred in finding that the documents were “investigative reports”. The appellant argued that the rule of statutory construction (that provisions are not to be construed as abrogating important common law rights, privileges, or immunities, including legal professional privilege, in the absence of clear words or necessary implication), meant that “investigative reports” should not be given a broad meaning.

The Decision on Appeal

The Court of Appeal did not accept that the scope of a provision abrogating legal professional privilege should necessarily be read narrowly, but nevertheless reviewed whether the documents could be characterised as investigative or medical reports.

Justices White and Fryberg agreed that, contrary to the application judge’s finding, the documents were not investigative reports. However, they found that the statement by the doctor was a medical report within the meaning of s30(2). It was further concluded that the 2 file notes could not be described as reports let alone investigative reports. The Court of Appeal ordered that the doctor’s statement be disclosed, but not the file notes, which were subject to privilege.

Justice Fraser dissented in part. He held that the term “medical reports” set out in s30(2) of PIPA does not include reports about a medical incident which relates to liability. The document prepared by the doctor fell within this category. He concluded that the file notes did not constitute “medical reports” for the same reason and because they did not constitute “reports.”
PROFESSIONAL NEGLIGENCE

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PROFESSIONAL NEGLIGENCE
Solicitors

Woodland v Donnellan
[2011] NSWSC 777

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 (NSW).

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

The Decision

The court found that the defendant was negligent in advising the plaintiff to the effect 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 court accepted that this negligence was repeated on a number of occasions when contrary views were expressed by the Council and settlement offers were exchanged. The defendant did not advise the plaintiff of the advantages in accepting a settlement offer or of the disadvantages in rejecting an offer.

Relying on the High Court's decision in D’Orta-Ekenake v Victoria Legal Aid [2005] HCA 12, the court held that that advocates' immunity did not operate so as to preclude the plaintiff succeeding in his action against the defendant for the advice he gave. It was found that advice to institute proceedings could not sensibly fall within the test of “work done out of court which leads to a decision affecting the conduct of the case in court” or “work intimately connected with work in court” and should not be protected by the immunity.

While it may be said that such advice has a close connection with the proceedings in that the advice may have been a cause of the proceedings being conducted at all, it did not bear on “the conduct of the case in court” or “on the way that case is to be conducted”. A mere connection or relationship between the conduct subject of the challenge and the litigation was not sufficient.
The Facts

The plaintiff was a French national living in Noumea. The first defendant, a lawyer, had an incorporated legal practice (the third defendant) and had previously acted for the plaintiff in relation to some property transactions in Australia.

The first defendant and his brother (the second defendant) controlled a company that was undertaking a property development. Finance had been obtained through a company called Greenfel Securities Limited who acquired, by way of security, a first mortgage over the property. The plaintiff lent the first and second defendants an additional $1.5 million and was given a second mortgage over the property. The first and second defendants guaranteed the loan.

The company defaulted and the plaintiff sued the first and second defendants as guarantors. He also alleged a breach of fiduciary duty on the part of the first and third defendants on the basis that he had allegedly retained them to act for him in connection with the loan. He also alleged that they had breached their contractual and common law duties of care in various respects.

The first and third defendants held a professional indemnity policy with LawCover Insurance Pty Ltd. Law Cover was joined as a fourth defendant with the plaintiff seeking a charge and payment pursuant to s6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW).

The Decision

The parties accepted that if there was a contract of retainer, then the first and third defendants had breached their contractual, common law and fiduciary duties to the plaintiff. Therefore the issues were limited to the retainer and causation.

The court concluded that there was a contract of retainer and that if the plaintiff had been properly advised he would not have proceeded with the loan. Therefore, the question of causation was also resolved in favour of the plaintiff.

On 4 November 2011 the court awarded judgment for the plaintiff against the first and second defendants for $1,890,000 including interest and judgment against the third defendant for $1.5 million plus interest and the plaintiff to have a charge over the fourth defendant’s policy.

A dispute arose between the plaintiff and the fourth defendant as to the precise orders that should be made and that matter was dealt with separately.

The limit of indemnity under the policy was $2 million, including cover for the plaintiff’s costs and defence costs. Defence costs were irrelevant because the fourth defendant did not undertake the defence of the proceedings on behalf of the third defendant. There was an excess of $7,500 inclusive of the plaintiff’s costs and therefore any recovery against the fourth defendant was limited to $1,992,500.

The plaintiff had no prospects of recovery from the principal debtor, and sought an order that judgment be entered against the third defendant in the amount of $1,946,130 inclusive of interest plus costs, provided that the amount secured by such a charge over the fourth defendant’s policy did not exceed $1,992,500. In addition, the plaintiff sought costs from the fourth defendant for the costs of the proceedings from 10 September 2011 which was the date the plaintiff made an offer of compromise to the fourth defendant.

The fourth defendant attempted to argue that to make a costs order against it would outflank the limitation of liability contained in the policy. The court held that fourth defendant had not indemnified the third defendant and had defended the proceedings on its own account and, therefore, any costs ordered to be paid against the fourth defendant were not costs for which it was liable under the policy. Therefore the court ordered that the fourth defendant pay the plaintiff’s costs from 10 September 2011 on an indemnity basis.

IN ISSUE

• Whether costs awarded against insurer impacted on limitation of liability in insured’s policy

DELIVERED ON 1 December 2011

READ MORE

[2011] NSWSC 1511
Jeandin v Tzovaras

Solicitors

PROFESSIONAL NEGLIGENCE
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 to the County Court of Victoria 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 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

The first issue considered by the court was the likelihood that the plaintiff would have succeeded on the liability questions against her employer. Taking into account the competing arguments for and against a finding of negligence against the employer, and for and against a finding of contributory negligence against the plaintiff, the court found her 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 third issue considered was whether an award of damages for loss of earning capacity would have exceeded the plaintiff’s past and future entitlements to statutory weekly payments. It was held that the plaintiff did not suffer any loss of a chance to pursue a claim for loss of earning capacity because an award of damages for loss of earning capacity would not have exceeded her past and future entitlements to weekly payments. Post injury the plaintiff had been in receipt of weekly statutory payments for loss of earnings which would have been deducted from a sum awarded for loss on that basis. Further, future entitlements to weekly compensation would have ceased.

The final question 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 Facts

The plaintiff law firm was retained by the mentally ill defendant to act on his behalf in a property settlement proceeding in the Family Court of Australia. On the day of the trial the matter settled on terms which were described as being ‘overly generous to his wife’. Around the time of the settlement, the defendant was very ill and experiencing suicidal thoughts and shortly thereafter he was admitted to a psychiatric hospital.

When the defendant was sued by the plaintiff for outstanding legal fees, he counter-claimed against the plaintiff, his barristers and accountant in negligence (and other causes of action), on the basis that they took and acted on instructions which the defendant did not have the mental capacity to give. There was also an allegation of negligence arising out of lack of preparation for the trial. The defendant sought damages of approximately $1.6 million, the alleged difference between the amount he received under the settlement and the amount he would have received under a just and equitable order of the Family Court.

The barristers and accountant settled with the defendant. The plaintiff claimed that the defendant had the mental capacity to instruct and had voluntarily settled the case to avoid significant forensic, taxation and other risks. Alternatively, the plaintiff pleaded that if a finding of negligence was made, the defence of advocates immunity provided a complete defence to the defendant’s claim.

The Decision

The court held that the plaintiff had been negligent in two respects. It was negligent in its preparation of the case because it failed to have expert valuation and taxation evidence ready for the hearing; failed to prepare any answering affidavits to the wife’s application for costs and failed to prepare any affidavits or other evidence in relation to the post-separation expenditure by the defendant (‘preparation negligence’). The plaintiff was also found to have been negligent by taking and acting on instructions from the defendant to settle the case when it should have known he did not have the mental capacity to give those instructions (‘capacity negligence’).

The preparation negligence was found not to have caused any loss or damage to the defendant. The capacity negligence deprived him of the opportunity to obtain a better result by going to trial. The value of the defendant’s lost opportunity was assessed at $900,000, with the court apportioning liability 75% to the plaintiff and 25% jointly to the barristers.

The court then considered whether the defence of advocates’ immunity applied to the plaintiff’s negligence. After examining various decisions of the High Court which bound it, the court reluctantly concluded that the plaintiff’s negligence fell within the scope of the immunity because it had occurred in the course of work leading to decisions about, or intimately connected with, the conduct of a case in court, a test which the judge observed to be ‘very wide’. As such, the plaintiff was not liable to pay damages for the loss which its negligence caused the defendant and was successful in its claim for outstanding fees. In reaching his decision, The court sympatised with the defendant, observing that he was driven to his decision ‘by the binding authorities’ and found the application of advocates’ immunity to the case ‘deeply troubling’.

IN ISSUE

- Whether a law firm was negligent in preparing a case for trial, and for acting on instructions from a client lacking mental capacity
- Whether advocates’ immunity provided a defence to the law firm

DELIVERED ON 14 March 2012
READ MORE click here
The Facts

The first defendant owned a fleet of heavy transport vehicles for which it required insurance. It engaged the second defendant broker, Transport & General Pty Ltd, to arrange that insurance. In March 2004, the second defendant placed cover for the first defendant’s vehicles with the plaintiff, Suncorp Metway Insurance Limited. Suncorp’s policy was relatively inexpensive compared with other available cover. However, the policy contained a premium adjustment endorsement the effect of which was that the annual premium payable increased with the number of claims under the policy. In reality, the clause allowed for very significant increases in the premium when the claims exceeded a relatively modest amount. In the first year, there were no claims. Following renewal, the number of claims increased and the premium rose significantly in accordance with the premium adjustment endorsement. The first defendant refused to pay the increased premium. The plaintiff sued for recovery of the premium.

The Decision

The thrust of the first defendant’s defence was that the plaintiff had failed to notify it of the effect of the premium adjustment endorsement as required by s37 of the ICA and that this failure amounted to a breach of the plaintiff’s duty of utmost good faith. However, the court held that the plaintiff had a full answer to this defence by virtue of s71 of the ICA (s71 provides that where a broker has arranged the insurance, those provisions of the ICA that require insurers to give notices, statements, documents or information to an insured do not apply). Accordingly, the insurer was entitled to recover the unpaid, increased premium from the insured.

The court further held that the second defendant had breached its duty of care to the first defendant. The second defendant gave evidence to the effect that it provided a copy of the policy together with documents explaining the operation of the premium adjustment endorsement to the first defendant. The first defendant denied having received the documents and the court did not make a clear finding as to whether the documents had, in fact, been received by the first defendant. However, the effect of the court’s decision was that provision of the documents was not sufficient in any event to discharge the broker’s duty. The court made the following observations: (i) the first defendant had no proper understanding of insurance matters and relied totally on the second defendant to arrange the insurance, (ii) the defendants had a long history of dealings with one another which should have made it plain to the second defendant that the accepted mode of communication between them was verbal, and (iii) the second defendant ought to have been aware that no recourse would be had by the insured to any documents so the second defendant could not reasonably have relied on the insured to read, let alone understand, the policy documents or any written explanations of the policy’s terms.

Therefore, the court held that it was incumbent upon the broker to ensure that the insured not only had the information but also understood the implications of the cover that had been arranged. The second defendant had failed to do this and was in breach of his duty of care. The second defendant was held to be liable for the increased premium payable by the first defendant to the plaintiff.

IN ISSUE

• Notification of unusual terms under s37 of the ICA
• Broker’s duty to advise an insured of the implications of unusual policy terms

DELIVERED ON 16 September 2011
READ MORE  

[2011] QDC 209

Suncorp Metway Insurance Limited v Mason Place Pty Ltd & Anor
The Facts

Kotku Bread Pty Ltd operated a bakery business out of premises in Brisbane. In 2010, the premises were destroyed by fire. Kotku made a claim for the property losses it sustained under a policy that it held with Vero Insurance Limited.

In the policy year preceding the fire, Kotku had been insured by Suncorp. Suncorp had, however, re-structured aspects of its business in 2009 and had transferred some of its policies to Vero. To allow that transfer to occur, Kotku’s broker, OIB, provided underwriting information to Vero using an online form that had been created by Suncorp and/or Vero. The online form completed by the broker included a question about the presence and quantity of a highly flammable insulating material known as ‘expanded polystyrene’ or EPS in the internal walls of Kotku’s premises. The broker completed the online form which included the answer “zero percent” on the question about the extent of the internal construction of Kotku’s premises comprised of EPS. EPS made up more than a third of the internal construction of the premises.

Vero declined Kotku’s claim on the basis of the non-disclosure or misrepresentation about the quantity of EPS in the premises. Kotku subsequently commenced proceedings against Vero, claiming indemnity under the policy, and against the broker for breach of contract and negligence.

The Decision

Regarding the claim for indemnity, the court held that the broker’s answer to the question about EPS was a relevant non-disclosure on the part of Kotku. The broker had submitted that Vero held relevant knowledge about the EPS because information concerning the existence of insulating material in the insured’s premises had been provided to Suncorp years before by a different broker seeking a quotation. Suncorp had quoted terms on that occasion but those terms were not accepted and the information never made it to the insured’s underwriting file. The court held that the mere fact Suncorp held information somewhere in its files was insufficient to fix Vero with relevant knowledge. The court accepted that had the question about EPS been answered correctly by the broker, Vero would have declined to cover Kotku. On that basis, Vero was entitled to reduce its liability under the policy to nil pursuant to s 28(3) ICA.

With respect to the broker, the court held that the broker was liable to Kotku in negligence and for breach of contract for the full value of Kotku’s loss, less the increased premium payable in respect of alternative cover that it found would have been available. The court noted that the presence of EPS was a matter known within the insurance industry to be relevant to whether cover would be offered. The broker knew this and should have made appropriate enquiries of Kotku. Its failure to do so amounted to a breach of duty and of the contract. In this case, the broker’s general reminders to Kotku about Kotku’s duty of disclosure were not sufficient to discharge the broker’s duties.
The respondent was the developer of a luxury residential apartment complex at Mandurah, Western Australia.

The respondent engaged Colliers International as the selling agent for the development and Mr Copley was head of sales team. Marketing for the development began in April 2006 and construction shortly after.

The first applicant dealt predominantly with Mr Copley throughout negotiations and entered into a contract with the respondent on 26 June 2007 to purchase a unit off the plan for $1,535,000. The second, third and fourth applicants were the first applicant’s wife and two sons, who were named as nominees on the contract.

The contract was signed on 26 June 2007 and the first applicant paid a deposit of $153,000. Construction of the development was not completed until May 2008.

The first applicant alleged that Mr Copley, the respondent’s agent, had continually told him on a number of occasions before he entered into the contract that the ground floor commercial area of the building would be used for a cafe/deli, that there would be no licensed liquor trading from the area, that the business would be a small scale operation and that it would fit in with the character of the building as a luxury apartment development. The first applicant further alleged that he was induced by these representations to enter into the contract.

The respondent eventually sold the ground floor commercial area to the Dome Restaurant chain, which held a licence to sell alcohol to patrons with their meals. The applicant became aware of this prior to settlement. The first applicant did not settle the contract and instead brought these proceedings to recover the deposit.

The applicants alleged that respondent engaged in misleading and deceptive conduct in contravention of s52 of the TPA.

Mr Copley gave evidence in support of the first applicant’s assertions; namely that he had maintained to first applicant that the commercial space would be used as a cafe/deli without liquor licence trading.

The Decision

It was established that the representations were in fact made, that the representations were false and that the first applicant relied on them when deciding to purchase the unit.

The representations were about a future matter and the respondent did not have reasonable grounds for making the representations. Even though the respondent had instructed Mr Copley that the commercial area would be used for a small scale cafe/deli and that there would be no liquor trading from the area, the respondent had instructed its project manager to seek an amendment of the strata title by-laws to allow licensed liquor trading.

The respondents conduct constituted a breach of s52 and s52A of the TPA.

The contract was declared void ab initio and the respondent was ordered to repay the applicant’s deposit of $153,000 plus interest at 6% and costs.
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112  Smart v Westpac Banking Corporation [2011] FCA 829
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*Rail Corporation New South Wales v Vero Insurance Limited* [2012] NSWSC 632  
Liability of insurer under s51 ICA to third parties for property damage caused by insured following collision at railway crossing.
The Facts

The cross-claimant, Mr Fitzgerald, sought leave to file an amended second cross-claim against the fourth and fifth cross-respondents, Chubb Insurance Company of Australia Limited and Allianz Australia Limited (the insurers) by a notice of motion filed on 30 June 2011.

Mr Fitzgerald was a former employee of Westpac Banking Corporation (Westpac). The insurers and Westpac were parties to a contract of insurance under which cover was extended to Mr Fitzgerald as an officer of Westpac. Various proceedings were brought against Westpac by its former employees. Westpac had brought 9 cross claims including Mr Fitzgerald’s who sought indemnity under the contract of insurance, and although the cross-claim by Westpac against the cross-claimant (and the other former officers) had been resolved, the cross-claimant’s cross-claim against the insurers continued.

Mr Fitzgerald inter alia, sought damages based on the alleged breach of the insurers’ duty to act in the utmost good faith pursuant to s13 of the ICA.

The insurers submitted that s13 of the Act applies only to the parties to the contract, and that Mr Fitzgerald was not a party to the policy.

The Decision

The court held that s13 of the Act implies into a contract of insurance a statutory duty of the utmost good faith between the parties to the contract only.

Section 48 vests in an insured person who is not a party to the contract only a right to recover the amount of the person’s loss notwithstanding that the person is not a party. Therefore, s48 does not deem an insured person to have the same rights as a party to a contract of insurance. Neither does it deem s13 to apply as between an insurer and an insured person who is not a party to the contract.
The Facts

Ronald Steele was sub-contracted to erect a scaffold at Albert Park for the purposes of the 1998 Australian Grand Prix. Part of the scaffold subsequently collapsed and caused damage to a video screen operated by Screenco Pty Ltd. Screenco sued Steele in the New South Wales Supreme Court.

At the time of the incident, Steele was insured under two policies of insurance: the first was a general liability policy issued by a company in the HIH Group (‘the HIH policy’) and the second was a liability policy issued by SGIC General Insurance Ltd for the benefit of the Australian Grand Prix Corporation and its contractors and sub-contractors (‘the SGIC policy’). Both policies responded to Screenco’s claim against Steele. Following notice of Screenco’s claim, Steele made a claim under the HIH policy only. HIH confirmed indemnity and appointed solicitors to act in Steele’s defence. However, shortly prior to trial, the HIH Group collapsed. Steele was subsequently held to be liable to Screenco.

Following the collapse of HIH, the Commonwealth Government established the HIH Claims Support Scheme (‘the Scheme’) and appointed the appellant as administrator and manager of the Scheme. The Scheme enabled qualifying HIH policyholders to access public funds on the making of a valid claim. Steele made a claim under the Scheme and, in doing so, agreed to assign his rights under the HIH policy to the appellant. In return, the appellant paid 90% of Steele’s legal costs, damages and of the costs awarded against him in the Screenco claim. The appellant then sought equitable contribution, based on the principles of dual insurance, from the respondent (who had assumed the liabilities of SGIC). The respondent declined to contribute so the appellant commenced proceedings against the respondent in the Victorian Supreme Court.

The Decision at Trial

The trial judge dismissed the claim on the basis that the liabilities of the appellant and the respondent insurers were not co-ordinate as they did not co-exist at the relevant date. The SGIC policy existed at the time of the incident in 1998 whereas the contract between Steele and the appellant only commenced after the Scheme was established in 2001.

The Issues on Appeal

On appeal, the central submission of the appellant was that it “effectively stood in the shoes of HIH”, thus replicating the circumstances where two insurance policies responded to a shared liability. The primary issue on appeal, therefore, was whether these particular circumstances gave rise to equitable contribution between the appellant and respondent.

The Decision on Appeal

The Court of Appeal held that the appellant was not entitled to contribution because there was no “common interest”, “common burden” or “common risk” in respect of the liabilities of the appellant and the respondent. The Court of Appeal observed that: (i) the liabilities of the parties were different in that the appellant’s obligation to indemnify Steele was subject to the condition that Steele assign to the appellant his rights against HIH, (ii) having regard to notions of fairness, equity and natural justice, the circumstances of the case did not require the intervention of equity, and (iii) Steele did not have equal recourse to both the appellant and respondent as required by the doctrine of contribution. If Steele had been paid under the SGIC policy, no contract of indemnity would or could have come into existence between him and the appellant. The appellant then appealed to the High Court.

The Decision of the High Court

The High Court dismissed the appeal. The High Court emphasised that it is essential for the operation of the doctrine of equitable contribution that the liabilities of the parties be co-ordinate. In this case, the obligations of the appellant to Steele were not co-ordinate as
they were not "of the same nature and to the same extent" as the obligations of the respondent. The High Court observed that: (i) there was no common interest or common burden between the appellant and the respondent because if the respondent had paid Steele under its insurance policy, Steele would not have been entitled to claim from the appellant, (ii) the respondent would never have had the opportunity to bring a claim against the appellant and (iii) the appellant's contract to indemnify Steele was conditional upon the assignment of Steele's rights under the HIH policy and, on that basis, it could not be said that the risk undertaken by the appellant was the same risk undertaken by the respondent.
The Facts

The Bridgecorp Group was a group of finance companies that borrowed money from the investing public to fund property development. The Bridgecorp Group collapsed and was placed in receivership in July 2007, owing investors nearly $500 million. The former directors of the Bridgecorp Group faced numerous criminal and civil claims, including allegations that the directors made numerous false statements in prospectuses, extension certificates and investment statements. Companies within the Bridgecorp Group (companies), all in receivership and/or liquidation, advised the directors that they intended to institute civil proceedings against them seeking orders that the directors pay more than $450 million in damages, alleging that the directors managed the companies in a manner that breached their statutory and common law duties.

The Bridgecorp directors held two policies of insurance, including a Directors and Officers’ insurance policy with QBE (the D&O policy), which had a $20 million indemnity limit. In June 2009, the companies asserted a charge over the D&O policy for amounts they intended to claim from the directors in civil proceedings. The companies claimed that the charge arose by virtue of s9 of the Law Reform Act 1939 (NZ), which they alleged created a charge in favour of plaintiffs over monies that may be payable under any insurance policy held by the person against whom the claim was made. The directors sought a declaration from the High Court of New Zealand that s9 of the Law Reform Act did not prevent QBE from meeting its contractual obligations under the D&O policy to reimburse defence costs, which they estimated would be approximately $3 million to the end of the trial. By counterclaim, the companies contended that if QBE were not prevented from reimbursing the directors for defence costs, the amount advanced to the directors should be limited to $500,000.

The Decision

The court determined that the companies could assert a charge over the D&O policy, which prevented the directors from having access to the D&O policy to meet their defence costs. It was held that as the claim by the companies was for a sum significantly greater than the cover available under the D&O policy, QBE was bound to keep the insurance fund intact for the benefit of the companies and any other civil claimants who might have priority. It was noted that while this decision may produce some unsatisfactory consequences for the directors, the outcome was partly a consequence of the fact that the directors elected to take out a policy of insurance that provided combined cover for both defence and claims costs, when the directors could have taken out a policy for greater cover for defence costs only. The directors had a second policy of insurance for defence costs only (that had been exhausted), which was not susceptible to a charge. As there was a charge over the entire D&O policy, it was not necessary to consider the companies’ counterclaim.

In relation to costs, the court determined that the companies should be awarded their costs and disbursements. As QBE’s presence was only rendered necessary by the counterclaim, the directors were not required to meet QBE’s costs.
The Facts

The first defendant owned a fleet of heavy transport vehicles for which it required insurance. It engaged the second defendant broker, Transport & General Pty Ltd, to arrange that insurance. In March 2004, the second defendant placed cover for the first defendant’s vehicles with the plaintiff, Suncorp Metway Insurance Limited. Suncorp’s policy was relatively inexpensive compared with other available cover. However, the policy contained a premium adjustment endorsement the effect of which was that the annual premium payable increased with the number of claims under the policy. In reality, the clause allowed for very significant increases in the premium when the claims exceeded a relatively modest amount. In the first year, there were no claims. Following renewal, the number of claims increased and the premium rose significantly in accordance with the premium adjustment endorsement. The first defendant refused to pay the increased premium. The plaintiff sued for recovery of the premium.

The Decision

The thrust of the first defendant’s defence was that the plaintiff had failed to notify it of the effect of the premium adjustment endorsement as required by s37 of the ICA and that this failure amounted to a breach of the plaintiff’s duty of utmost good faith. However, the court held that the plaintiff had a full answer to this defence by virtue of s71 of the ICA (s71 provides that where a broker has arranged the insurance, those provisions of the ICA that require insurers to give notices, statements, documents or information to an insured do not apply). Accordingly, the insurer was entitled to recover the unpaid, increased premium from the insured.

The court further held that the second defendant had breached its duty of care to the first defendant. The second defendant gave evidence to the effect that it provided a copy of the policy together with documents explaining the operation of the premium adjustment endorsement to the first defendant. The first defendant denied having received the documents and the court did not make a clear finding as to whether the documents had, in fact, been received by the first defendant. However, the effect of the court’s decision was that provision of the documents was not sufficient in any event to discharge the broker’s duty. The court made the following observations: (i) the first defendant had no proper understanding of insurance matters and relied totally on the second defendant to arrange the insurance, (ii) the defendants had a long history of dealings with one another which should have made it plain to the second defendant that the accepted mode of communication between them was verbal, and (iii) the second defendant ought to have been aware that no recourse would be had by the insured to any documents so the second defendant could not reasonably have relied on the insured to read, let alone understand, the policy documents or any written explanations of the policy’s terms.

Therefore, the court held that it was incumbent upon the broker to ensure that the insured not only had the information but also understood the implications of the cover that had been arranged. The second defendant had failed to do this and was in breach of his duty of care. The second defendant was held to be liable for the increased premium payable by the first defendant to the plaintiff.

IN ISSUE

• Notification of unusual terms under s37 of the ICA
• Broker’s duty to advise an insured of the implications of unusual policy terms

DELIVERED ON 16 September 2011

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The Facts

The plaintiff was a supplier of synthetic resins. Throughout 2007 and 2008, the plaintiff supplied resin, on 60 day payment terms to Signum Specialities Pty Ltd, a manufacturer of plastic containers. In late 2007, the plaintiff instructed its broker, the first defendant, to arrange a policy of insurance against the risk that Signum might fail to pay money due under its trading account. Between January and May 2008, the first defendant negotiated with the second defendant, Atradius Credit Insurance NV, to place cover for the risk up to an amount of $800,000. By 28 April 2008, all essential terms of the insurance had been agreed and both the first and second defendants agreed that the policy should commence on 1 April 2008. However, a few days before the terms of the insurance were finalised, the second defendant sent the plaintiff a document stating that the terms were provided “without commitment...until such time we provide you with written confirmation that we are on risk for your transaction and agree to issue a policy”. The second defendant never provided that written confirmation. On 5 May 2008, the first defendant wrote to the second defendant with respect to a number of risks and stated that cover for the Signum risk was “placed awaiting outcome on others prior to processing”. The second defendant responded with respect to other risks but made no mention of the Signum risk. No policy was prepared, no invoice sent and no premium paid.

In November 2008, Signum went into liquidation, owing the plaintiff $2.265 million. The plaintiff made a claim on the second defendant for the policy limit of $800,000. That claim was declined on the basis that no policy existed. The plaintiff sued both the first and second defendants.

The Decision

The Victorian Supreme Court was called upon to consider three matters: (i) whether a policy existed, (ii) whether the insured had breached its duty of disclosure and (iii) if the policy existed, whether cover had been automatically suspended by virtue of an automatic stoppage provision in the policy.

The court held that a proper contract of insurance had been made. In deciding that there was an intention to create legal relations between the parties, the court noted that a critical feature of the transaction was the sense of urgency that characterised the final stage of negotiations: the plaintiff had made known its need for immediate cover, the insurer had promptly provided a proposal, the plaintiff had responded with an offer to contract on the terms proposed subject to a change in the commencement date, the insurer had counter-offered a different date and the plaintiff had accepted. The court held that at that point, the contract was formed. The court also held that the insurer was, in any event, estopped from denying the existence of the contract.

The court found that the conduct of the second defendant had induced an assumption in the plaintiff that cover had been placed, and the second defendant knew or ought to have known that the plaintiff would refrain from obtaining other insurance because of that assumption. In its defence, the second defendant raised two alternative arguments. Firstly, it alleged that, in breach of s21 of the ICA, the plaintiff failed to disclose matters relevant to the insurer’s decision whether or not to accept the risk. More particularly, the second defendant submitted that the plaintiff had failed to disclose the fact that Signum had paid a number of debts more than 60 days after the due date for payment of those debts. The court held that, having regard to the policy terms and the content of the proposal form, the plaintiff knew that the second defendant was concerned about debts outstanding more than 60 days beyond the due date. However,
INSURANCE ISSUES

Leading Synthetics Pty Ltd v Adroit Insurance Group Pty Ltd & Anor
[2011] VSC 467

the court held further that the plaintiff did not know that the debts had, in fact, been outstanding for longer than 60 days after the due date. The court found that the plaintiff knew that Signum had traded close to or on the margins of 60 days after the due date in one or two instances, but the court held that this was not a fact relevant to the second defendant’s decision whether or not and on what terms to accept the risk. The court emphasised that, in the proposal, the second defendant had confined its attention only to debts outstanding more than 60 days after the due date.

Secondly, the second defendant sought to rely on a standard automatic stoppage term of the credit risk policy. That term provided that cover would not apply in respect of any loss sustained in relation to goods despatched after payment by the buyer of any receivable became (and remained) overdue. The second defendant alleged that cover for the whole of Signum’s debts was suspended because a debt of $957 owed by Signum to the plaintiff had been outstanding since 2002. The court held that, properly construed, the automatic stoppage provision did not have the operation the second defendant contended. Rather, the court considered that the object of the provision was to prevent an insured who had the benefit of credit risk insurance from continuing to supply product to a buyer, at the insurer’s risk, while abandoning normal prudential practices of refusing to supply the buyer until trading terms normalised. The court held that the fact that a proposed insured has allowed a debt from a buyer to remain long-outstanding, before inception of the policy, is not a manifestation of the mischief the provision was designed to prevent. Accordingly, the court considered that the proper interpretation of the provision was to confine the meaning of “receivable” to a receivable that first arises after the commencement of the policy.

Accordingly, the second defendant was ordered to pay the plaintiff the sum owing under the terms of the policy.
The Facts

The applicant (a mortgage insurer) sold insurance policies to money lenders under which it indemnified them against the risk that their security was insufficient to discharge a borrower’s indebtedness. The applicant obtained valuations of the properties over which lenders proposed to take security. The respondent was a valuer who issued valuations in respect of 4 properties at Tweed Heads, Bundall, Burleigh Waters and Surfers Paradise. The applicant relied on the valuations in issuing the insurance policies.

The borrowers all defaulted and the properties were sold (at an amount less than the valuations), creating a shortfall between the sale proceeds and the amount secured by the mortgages. The lender claimed under the applicant’s insurance policy for the difference. Those claims were paid. The applicant had formed the view that the valuations were negligently prepared and sued the valuer. Shortly afterwards, the valuer went into liquidation which had the effect of staying the present proceedings. The court granted leave to continue them.

The valuer had a policy of professional indemnity insurance issued by the International Insurance Company of Hannover Limited, which had accepted that the valuer was entitled to indemnity in respect of the claims arising from the valuations of 3 of the 4 properties. The policy was a “claims made policy” and therefore provided indemnity to the insured in respect of claims made during the insured period regardless of when the factual circumstances giving rise to that claim occurred.

The Issues

The applicant sought leave to join the professional indemnity insurer to the proceedings as a second respondent.

The applicant submitted that it was entitled to rely on s 6(1) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (the Act) which, in certain circumstances, creates a statutory charge over insurance funds which may be enforced by a party benefited by, if not privy to, a contract of insurance. Section 6(4) of the Act gives a claimant a direct right of action in respect of the charge with the leave of the court.

The Decision

Tweed Heads property

The professional indemnity insurer did not dispute that it was liable to indemnify the valuer for this claim. The relevant event was agreed to be the payout of the lender’s policy on 12 November 2010 within the period of cover provided by the valuer’s professional indemnity insurance. The court granted leave to continue them.

Bundall property

The court found the claim against the valuer for the purposes of s 6(1) of the Act accrued when it was readily ascertainable that a loss would be made. The relevant event was agreed to be the payout of the lender’s policy on 12 November 2010 within the period of cover provided by the valuer’s professional indemnity insurance. The court granted leave for the applicant to proceed against the professional indemnity insurer under s6 (4) of the Act.

Burleigh Waters and Surfers Paradise properties

The court did not grant leave in relation to the claims over the Surfers Paradise and Burleigh Waters properties under s6 (4) of the Act as the applicant had paid out to the lender before the valuer’s professional indemnity policy incepted. No charge under s6 (1) arose because the event giving rise to the claim happened no later than the time at which the payment by the applicant to its insured lender occurred.

IN ISSUE

• Whether a charge arises pursuant to s6(1) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW)

DELIVERED ON 4 October 2011

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The Facts

The respondent, Gordian, wrote a 7 year directors and officers (D&O) runoff policy for FAI Insurance Limited (the FAI policy). The FAI policy applied to wrongful acts occurring before 31 May 1999 and allowed for claims to be made and notified for 7 years thereafter. Numerous claims were made on the policy and all but 1 were notified within 3 years.

There was a dispute between Gordian and Westport (the reinsurers) as to whether Gordian’s liabilities for claims under the FAI policy were reinsured under reinsurance treaties. The primary issue was whether the reinsurance treaties covered the FAI policy given that it covered claims made and notified to Gordian within an extended period of 7 years from 31 May 1999, rather than a period of 3 years.

There was a dispute between Gordian and Westport (the reinsurers) as to whether Gordian’s liabilities for claims under the FAI policy were reinsured under reinsurance treaties. The primary issue was whether the reinsurance treaties covered the FAI policy given that it covered claims made and notified to Gordian within an extended period of 7 years from 31 May 1999, rather than a period of 3 years.

The reinsurers had not been aware of the existence of the FAI policy until after 23 February 2001. On that day, Gordian had been notified of circumstances that could give rise to a claim under the FAI policy and the reinsurers were informed of this. The reinsurers contended that they had conducted their dealings with Gordian on the basis that it would not change the classes of business to which the reinsurance applied without their prior approval.

The reinsurers resisted the claims made by Gordian on the grounds that the class of business they had agreed to cover was limited to underlying policies with a term not exceeding 3 years, which excluded a 7 year policy, so that the reinsurers had no liability to Gordian, even upon claims made and notified within 3 years under a 7 year policy. Gordian responded by relying upon s18B of the Insurance Act 1902 (NSW) (the Insurance Act). The rejoinder pleaded by the reinsurers was that they were obliged to indemnify it without any additional premium for coverage of a 7 year policy, which they would have refused.

It was common ground that the reinsurance treaties required the dispute to be decided by arbitration and the law to be applied was that of New South Wales. An arbitration was conducted under the Commercial Arbitration Act 1984 (NSW) (the Arbitration Act) and the arbitrators delivered a written award supported by written reasons in favour of Gordian.

The Arbitrators’ Decision

The arbitrators were not persuaded that the FAI policy was covered by the reinsurance treaties. However, they accepted Gordian’s contention that even if this was the case, provisions of the Insurance Act applied to contracts of reinsurance and s18B saved its position.

Section 29(1) of the Arbitration Act required the arbitrators to provide a written award, including a statement of reasons. The arbitrator’s reasons included the following when referring to s 18B(1):

“However, we see no reason to doubt that s18B applies in relation to the 3-year claims if the requirements of s18B(1)(a) are met. In particular, we are comfortably satisfied that it would be reasonable within the meaning of s18B(1), and entirely consistent with ‘considerations of general justice and fairness’ within the meaning of the reinsurance treaties, for the reinsurance treaties to apply in relation to the 3-year claims.”

The Supreme Court’s Decision

The arbitrators’ decision was appealed to the Supreme Court. The reinsurers complained that the arbitrators did not explain why, by reason of the concluding words in s22(2) of the Insurance Act, which refer to considerations of general justice and fairness, s18B(1) should still be held to apply. The reinsurers asserted an absence of explanation as to why in all

IN ISSUE

- Whether the arbitrator’s failure to provide reasons for their decision amounted to a manifest error of law
- Whether s18B of the Insurance Act 1902 (NSW) applied to the reinsurance treaties

DELIVERED ON 5 October 2011

READ MORE click here
INSURANCE ISSUES

Westport Insurance Corporation v Gordian Runoff Ltd
[2011] HCA 37

the circumstances it was reasonable for them to be bound to indemnify Gordian.

Section 38 of the Arbitration Act allows an appeal on any question of law arising out of an award to be made with the consent of the parties or the leave of the Supreme Court. The Supreme Court is not to grant leave unless, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement and there is either a manifest error of law on the face of the award, or strong evidence that the arbitrator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

The Supreme Court dealt both with the application by the reinsurers for leave to appeal and with the appeal itself in the proceeding. It granted the reinsurers leave to appeal and allowed the appeal, set aside the award and dismissed the claim of Gordian in the arbitration.

The Supreme Court described the primary error of law as the failure of the arbitrators to recognise that an agreement made at the request of Gordian to extend cover to include D&O policies issued for up to 3 years was not a limitation or exclusion in the sense contemplated by s18B(1) of the Insurance Act.

The Court of Appeal’s Decision

The Court of Appeal granted Gordian leave to appeal from the decision of the Supreme Court, allowed the appeal, and made an order refusing leave to the reinsurers to appeal the arbitrators’ award.

The High Court’s Decision

The High Court held that to succeed, the reinsurers had to show that the Court of Appeal erred in refusing leave. This required particular attention to the construction and operation of s38(5) of the Arbitration Act.

The High Court stated that what was required was that the existence of error be manifest on the face of the award, including the reasons given by the arbitrator, in the sense apparent to the understanding by the reader of the award. If that error is manifest and its determination could substantially affect the rights of at least one of the parties, then the Supreme Court may go on to decide to grant or refuse leave. The High Court held that failure to provide a statement of the reasons for the making of the award may itself amount to a manifest error of law on the face of the award. The reasons, for this purpose, are part of the award.

If there is no such manifest error on the face of the award but there is strong evidence that an error of law was made, and its determination may add, or be likely to add, substantially to the certainty of commercial law and also may substantially affect the rights of at least one of the parties, then leave may be granted.

If either of these situations has occurred to enliven the power to grant leave, then upon the grant of leave, a question of law arising out of an award is presented to provide the subject matter of the appeal which lies to the Supreme Court.

The High Court held that the Court of Appeal’s decision in Natoli v Walker should not be accepted as correctly construing s38(5)(b)(1) of the Arbitration Act. In that case, the Court of Appeal treated the use of the word ‘manifest’ not as directed to what is presented on the face of the award but as requiring the error of law itself to have a particular quality or character. The High Court considered that the character or quality of the error of law falls for consideration at the next stage when the Supreme Court is considering whether to grant leave.

The High Court held that the correct construction of s18B of the Insurance Act would be likely to add substantially to the certainty of commercial law, and the strong evidence of error would appear from the reasons themselves. So too would the question of the content of the requirement in s29(1)(c) that there be included a statement of the reasons for making the award.

The High Court granted special leave to appeal on the basis that the Court of Appeal had erred in not concluding that the arbitrators had failed to give reasons for their conclusion that it was reasonable for reinsurers to be required to indemnify Gordian within the meaning of the proviso of s18B(1) of the Insurance Act, and for their conclusion that considerations of general justice and fairness did not compel a finding that the reinsurers should not be required to indemnify Gordian within the

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meaning and on the proper construction of s22(2) of the Arbitration Act.

The High Court held that the reinsurers correctly submitted that no wholly satisfactory formula can be found to flesh out the requirement in s29(1)(c). Both Gordian and the reinsurers were content to rest upon what was set out in the English Court of Appeal decision of Reimer Handelsgesellschaft mbH v Westszucker GmbH (No. 2).

Treating s18B of the Insurance Act as a critical element in reaching their award, the arbitrators were obliged to explain succinctly why the various integers in that complex statutory provision were satisfied.

The High Court held that there was no indication of:

(a) Factual findings in the reasons which supported the inapplicability of the proviso or of those considerations tending to support its application;

(b) Consideration of the reinsurer’s rejoinder pleading concerning the adjustment in premium; and

(c) Any apparent consideration that the proviso in s18B(1) was designed to guard against a strained application of the sub-section.

The High Court held that the result was that there was both a manifest error of law on the face of the award and strong evidence that the arbitrators made an error of law, the determination of which may add substantially to the certainty of commercial law.

The appropriate remedy in respect of the inadequacy of reasons would be an order for remitter to the arbitrators for reconsideration. However the reinsurers contended that if they succeeded in obtaining special leave on either of the remaining grounds respecting the operation of s18B of the Insurance Act, which were referred to the Full Court and extensively argued, they should obtain a more drastic remedy, being the setting aside of the award by the restoration of the order to that effect made by the Supreme Court.

The reinsurers submitted that if the FAI policy was outside the terms of the reinsurance treaties as held by the arbitrators, there could be no 3 year claims within the terms of the reinsurance treaties if they were made under a policy to which the treaties had no application. The stipulation in the reinsurance treaties that they speak only to D&O policies limited to reporting periods of less than 3 years was then said by reinsurers to render those treaties unable to attract s18B at all. A policy which is limited to a 3 year reporting period is not a policy with a 7 year period, as was the situation with the FAI policy. It is no answer that 3 year claims might fall within both policies. The exclusion upon which the treaties operated was in respect of “policies issued for periods longer than 36 months”. The High Court accepted these submissions in respect of s18B.

The treaties contained no stipulations by or under which the reinsurers excluded or limited their liability to indemnify Gordian by reason of the circumstance that the FAI policy had the 7 year period, so that Gordian was thereby disentitled to what otherwise would have been its right to indemnity under the treaties. The words in s18B(1)(a), “on the happening of particular events or on the existence of particular circumstances”, mark off exclusions and limitations from the content of the “contract of insurance” identified in the opening words of the sub-section. Accordingly, s18B was never engaged.

The appeal was allowed with costs.
The Facts

The respondent, Anthony Hitchens, commenced proceedings against the appellant, Zurich, for failure to pay benefits under a policy of life insurance that came into effect on 1 December 2004.

Hitchens had injured his hand and sought the payment of benefits under the policy. Zurich commenced paying the benefits on 9 October 2007 but later wrote to Hitchens on 28 November 2008 indicating that it intended to cease making payments. Zurich held concerns about the accuracy of certain information that Hitchens had provided when entering into the policy. He also failed to provide further information requested by Zurich, which ceased making payments on 8 December 2008.

Hitchens commenced proceedings seeking a declaration determining the amounts due and not yet paid by Zurich under the policy, plus damages, interest and costs. He also alleged that Zurich's failure to make payments in full amounted to a repudiation of the policy and that he had accepted the repudiation as a termination of the policy.

Zurich filed its defence on 27 April 2010. In May and June 2010 it issued subpoenas for the production of Hitchens' medical records. As a result of reviewing the records, which disclosed numerous attendances on various medical centres and hospitals prior to 20 November 2004 relating to several significant conditions, Zurich advised Hitchens that it was avoiding the policy under s29(2) of the ICA on the grounds of fraudulent non-disclosure. It also advised Hitchens that it would seek to amend its defence accordingly, and filed a Notice of Motion seeking leave to do this on 15 October 2010.

The amended defence alleged that Hitchens knew that his medical conditions were relevant to Zurich's decision whether to accept the risk of insuring him and on what terms. The amended defence also alleged that Zurich would not have entered into the policy had it been aware of the matters outlined in the amended defence and that Zurich had avoided the policy in accordance with s29(3) of the ICA or alternatively avoided it on the ground that the non-disclosure/misrepresentations were fraudulent.

Hitchens' solicitor gave evidence that he was only able to confer with Hitchens in relation to Zurich's letter of 28 November 2008 on 11 June 2009. However he did not take detailed instructions at that time because Zurich had not made a decision in relation to the claim. After the Notice of Motion was filed in October 2010, Hitchens' solicitors met with his treating psychiatrist for the purpose of taking proper instructions. His solicitor formed the view that he was unable to give detailed and coherent responses to questions.

Hitchens' treating psychiatrist's evidence was that Hitchens had a severe post-traumatic stress disorder, severe major depressive disorder, frequent severe panic attacks, a severe pain disorder and a substance abuse disorder. He believed that Hitchens was not capable of providing instructions and that he was perhaps slightly more able to give instructions in June 2009. Hitchens' GP thought that his mental state had deteriorated due to the accusations that he had been fraudulent.

The Decision at Trial

The court was not satisfied that if the allegation of fraud had been made in the defence in April 2010 it would have produced the same response in Hitchens. He also thought that if Hitchens proved that there had been an earlier determination of the contract as a result of repudiation by Zurich, the issue of avoidance would not arise and there was no chance of any multiplicity of proceedings.

The trial judge noted that he was required to...
INSURANCE ISSUES

Anthony Hitchens v Zurich Australia Limited
[2011] NSWSC 1198

exercise discretion as to whether the amendments should be granted and that one of the matters involved in the exercise was the question of prejudice to Hitchens. A consideration of all necessary factors led to the conclusion that he should refuse the application.

The Issues on Appeal

At the hearing of the appeal, Zurich sought leave to amend the grounds of its appeal to include a ground in relation to the concept of avoidance under s29 of the ICA and this leave was granted.

The other issues on appeal included whether the trial judge erred in finding that if the allegation of fraud had been made in the defence in April 2010, it would not have produced the same response in Hitchens; that Hitchens would suffer very real and extensive prejudice if the defence were amended and exercising his discretion with regard only to the prejudice to Hitchens at the time of the application; and failing to take into account the injustice to Zurich if leave to amend were not granted.

The Decision on Appeal

The Supreme Court considered that Hitchens’ decline had been gradual. He was aware of the contents of the letter of 28 November 2008, at least at a general level, and was still able to give comprehensible instructions. He declined further when the subpoenas were issued but was still able to confer in a rational, although distressed state. It was only when Zurich decided to take the formal step to make the claims in the proceedings that he declined into his present state. The Supreme Court was not satisfied that the trial judge’s findings were against the weight of the evidence.

However the Supreme Court was satisfied that the trial judge failed to give proper consideration to the degree of injustice that would be suffered by the ‘respective parties’ if leave to file the amended defence was refused.

The Supreme Court emphasised that the issue at this stage of the proceedings, was whether it was reasonably arguable that Zurich was entitled to avoid the policy irrespective of whether it was brought to an end prior to the purported avoidance.

The Supreme Court was satisfied on the proper construction of s29, read with the definition of ‘avoid’, that it was reasonably arguable that an insurer is not prohibited from avoiding a contract of insurance that has come to an end. It was satisfied that it was reasonably arguable that accrued rights and obligations under the terminated contract are amenable to avoidance under s29.

The trial judge’s finding that avoidance of the policy was not available where it had been earlier terminated had the consequence that he did not properly take into account the injustice to Zurich of not allowing it to defend the claim on the basis in the proposed proceeding. The determination of this issue was pivotal in the main proceedings and the dictates of justice required that it be decided. Zurich was granted leave to amend its defence.
The Facts

The plaintiff was a French national living in Noumea. The first defendant, a lawyer, had an incorporated legal practice (the third defendant) and had previously acted for the plaintiff in relation to some property transactions in Australia.

The first defendant and his brother (the second defendant) controlled a company that was undertaking a property development. Finance had been obtained through a company called Greenfel Securities Limited who acquired, by way of security, a first mortgage over the property. The plaintiff lent the first and second defendants an additional $1.5 million and was given a second mortgage over the property. The first and second defendants guaranteed the loan.

The company defaulted and the plaintiff sued the first and second defendants as guarantors. He also alleged a breach of fiduciary duty on the part of the first and third defendants on the basis that he had allegedly retained them to act for him in connection with the loan. He also alleged that they had breached their contractual and common law duties of care in various respects.

The first and third defendants held a professional indemnity policy with LawCover Insurance Pty Ltd. Law Cover was joined as a fourth defendant with the plaintiff seeking a charge and payment pursuant to s6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW).

The Decision

The parties accepted that if there was a contract of retainer, then the first and third defendants had breached their contractual, common law and fiduciary duties to the plaintiff. Therefore the issues were limited to the retainer and causation.

The court concluded that there was a contract of retainer and that if the plaintiff had been properly advised he would not have proceeded with the loan. Therefore, the question of causation was also resolved in favour of the plaintiff.

On 4 November 2011 the court awarded judgment for the plaintiff against the first and second defendants for $1,890,000 including interest and judgment against the third defendant for $1.5 million plus interest and the plaintiff to have a charge over the fourth defendant’s policy.

A dispute arose between the plaintiff and the fourth defendant as to the precise orders that should be made and that matter was dealt with separately.

The limit of indemnity under the policy was $2 million, including cover for the plaintiff’s costs and defence costs. Defence costs were irrelevant because the fourth defendant did not undertake the defence of the proceedings on behalf of the third defendant. There was an excess of $7,500 inclusive of the plaintiff’s costs and therefore any recovery against the fourth defendant was limited to $1,992,500.

The plaintiff had no prospects of recovery from the principal debtor, and sought an order that judgment be entered against the third defendant in the amount of $1,946,130 inclusive of interest plus costs, provided that the amount secured by such a charge over the fourth defendant’s policy did not exceed $1,992,500. In addition, the plaintiff sought costs from the fourth defendant for the costs of the proceedings from 10 September 2011 which was the date the plaintiff made an offer of compromise to the fourth defendant.

The fourth defendant attempted to argue that to make a costs order against it would outflank the limitation of liability contained in the policy. The court held that fourth defendant had not indemnified the third defendant and had defended the proceedings on its own account and, therefore, any costs ordered to be paid against the fourth defendant were not costs for which it was liable under the policy. Therefore the court ordered that the fourth defendant pay the plaintiff’s costs from 10 September 2011 on an indemnity basis.

IN ISSUE

• Whether costs awarded against insurer impacted on limitation of liability in insured’s policy

DELIVERED ON 1 December 2011

READ MORE [click here]
The Facts

The defendant was the owner of an aircraft. In April 2006, the aircraft crashed at Bankstown Airport whilst being piloted on a test flight after having repairs. The pilot was killed, and part of the aircraft hit another aircraft which was owned by the plaintiff and standing on the ground at the airport. Damage was incurred to the plaintiff’s aircraft.

Both the plaintiff and the defendant called upon their insurance. The plaintiff’s insurer, a QBE company, indemnified the plaintiff and exercised its subrogation rights by making a claim against the defendant, which was handled by his insurer, Hemisphere.

After lengthy negotiations, an agreement was reached between the loss adjusters for each insurer. Two release documents were signed, one dealing with loss of use of the plaintiff’s aircraft and the other with the damage it sustained.

The loss of use claim was paid. However, the $73,408 for damage to the plaintiff’s aircraft was not paid by the defendant, and Hemisphere reportedly was not in a position to pay this sum. The plaintiff instituted proceedings against the defendant. The defendant filed an unhelpful defence.

The Decision at Trial

The trial judge awarded summary judgment for $73,408 plus interest in favour of the plaintiff. Leave to appeal was granted on 27 May 2011.

The Issues on Appeal

The defendant did not dispute that, on the wording of the release, it constituted an agreement to which he was a party, under which $73,408 was payable to the QBE company at the plaintiff’s direction. The issue was whether Hemisphere had authority to enter into the release on the defendant’s behalf.

The Decision on Appeal

The Court of Appeal held that the documentary evidence before the trial judge did not permit a finding to the requisite satisfaction that the insurer had been authorised to enter into the release on behalf of the defendant. The defendant’s policy had not been tendered into evidence. The Court of Appeal considered that any inference available from the negotiation and signature of the release was insufficient. The policy of insurance was a key matter in determining whether the release was entered into with the defendant’s authority. The Court of Appeal held that summary judgment should not have been granted.

On the substantive issue, the plaintiff relied upon a clause in the defendant’s policy which gave Hemisphere authority to enter into the release on the defendant’s behalf. It stated that “The company shall be entitled (if they so elect) at any time and for so long as they desire to take absolute control of all negotiations and proceedings and in the name of the Insured to settle, defend or pursue any claim”.

The defendant submitted, however, that there was a question as to whether the clause applied to the settlement recorded in the damages’ release. Under the release, the defendant alone would have to pay the sum of $73,408. He would obtain a release, but so also would the estate of the pilot. The estate would pay nothing. If the pilot had been liable and covered under the same policy, the estate would have benefited at the defendant’s expense. If the pilot had not been covered under the same policy, it was submitted that the misuse of authority was all the greater.

The defendant alleged that in determining whether there had been a misuse of authority by his insurer it was material to consider whether he and the pilot had both incurred liability for the plaintiff’s damage.

The Court of Appeal held that the defendant’s allegations should be permitted to go to trial and the summary judgment should not have been granted. The appeal was allowed.

IN ISSUE

• Whether defendant was bound to pay a settlement sum in circumstances where defendant’s insurer settled claim against him
• Where policy provided an authority to settle
• Whether there was a misuse of authority

DELIVERED ON 2 December 2011
READ MORE click here
The Facts
In January 2001 the plaintiff made a claim on his income protection policy held with the defendant insurer as a consequence of an incident which occurred in November 2000. The plaintiff completed a claim form on 16 January 2001 in which he advised that, while working as a plumber, he was carrying roofing material around a property when he experienced pain in his shoulder and back. He advised that his first treatment was from his general practitioner on 5 January 2001.

Dr Winstanley, orthopaedic surgeon, considered that the plaintiff had aggravated underlying degenerative changes in his cervical and thoracic spine. He was of the opinion that the plaintiff’s condition would prevent him from performing plumbing duties. In the longer term, he thought the plaintiff should return to lighter activities. Dr Christie, occupational physician, was of the view that the plaintiff should be fit to return to full duties 1 month from the date of his review on 18 April 2001.

On 3 May 2001, the defendant wrote to the plaintiff stating that as Dr Winstanley considered that he was fit to perform the duties of a computer programmer or database administrator they were denying the claim. The plaintiff objected on the basis that he was a plumber and not a computer programmer at the time of the incident. He alleged that he had notified the defendant that he was working as a plumber and was paying his premiums as a plumber.

The defendant sought to avoid the policy on the basis of fraudulent misrepresentations on the part of the plaintiff.

The Decision
Evidence was led that the plaintiff initially took out an income protection policy in 1993 in which he advised that his principal occupation was computer operator/programmer. His cover was increased in 2005. The plaintiff’s tax returns revealed that his income was considerably less than the income declared to the defendant. Further, his medical records revealed that he had received treatment for a mental disorder which he denied on his policy application.

The court held that the defendant would not have entered into the policies if the plaintiff had complied with his duties of disclosure or had not made the misrepresentation. If he had disclosed he had a second job as a plumber he would not have been offered premium cover because of the greater risk of injury. If his true level of income had been disclosed, he would not have been offered cover at all, being below the minimum level for insurance. The court also held that the misrepresentations were made deliberately and for the purpose of procuring insurance cover. The plaintiff acted dishonestly and the misrepresentations were fraudulent.

It followed that the defendant was entitled to avoid the contract of insurance, pursuant to ss 21 and 29 of the ICA as a consequence of the plaintiff’s fraudulent failure to comply with the duty of disclosure and fraudulent misrepresentations.

The court noted that s31 of the ICA confers a discretion to disregard the avoidance if it would be harsh and unfair not to do so. The discretion may only be exercised if the court is of the opinion that in respect of the loss which is the subject of the proceedings before the court, the defendant has not been prejudiced by the failure or misrepresentation, or if such prejudice is minimal or insignificant. The court held that it was clear that the policies would never have been entered into if the plaintiff had told the...
truth. It therefore could not be said that any prejudice was minimal or non-existent. The court held that the defendant was entitled to avoid the policy.

In the event that the finding that the defendant could avoid the policy was incorrect, the court looked at the claim under the policy.

The entitlement to benefits required the plaintiff to be unable to perform at least 1 of the duties of his occupation which was necessary to produce income, not to be employed in any occupation and to be under the regular care of a registered medical practitioner.

The court concluded that at the time of the incident the plaintiff was a computer programmer, not a plumber, and that the incident did not render him unable to perform at least 1 of the duties of that occupation. The court further held that the claim was pursued dishonestly and, therefore, fraudulently by the plaintiff and that the defendant, by virtue of s56 of the ICA could refuse to pay the claim.
The Facts

Highway Hauliers (the plaintiff) 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. Two of the plaintiff’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 insurers. The plaintiff commenced proceedings against the insurers on the basis that s54 of the ICA obliged the Insurers to indemnify the plaintiff in respect of the claim.

The Decision

The court held that the insurers were obliged to indemnify the plaintiff.

The plaintiff argued that the relevant “act” for the purposes of s54 ICA was the act of the drivers driving the trucks involved in each accident without having achieved the required minimum score on the PAQS Test. The plaintiff argued that s54 ICA only allows an insured to reduce its liability for the claim by the amount that represents the extent to which the act caused or contributed to the loss. As all parties agreed that the drivers’ failure to achieve the minimum score on the PAQS Test had not caused or contributed to the loss, the plaintiff argued it was entitled to be completely indemnified.

The insurer argued that s54 did not apply because the drivers’ failure to obtain the minimum PAQS score was not an act or omission and also the PAQS endorsement was related to the scope of cover and not breach of policy conditions.

The court sought to characterise the relevant act with reference to the substance of the insurance contract. As the policy in question was a motor vehicle policy, the court analysed the relevant act by reference to the use of the vehicles involved in the accidents, rather than by reference to the attributes of the drivers concerned. As a result, the relevant act was held to be the act of the insured operating vehicles on the east-west runs in which accident occurred with drivers who did not satisfy the requirements of the policy. The insurers were obliged to indemnify the plaintiff because that act did not cause the loss in respect of which indemnity was sought.

The insurer was ordered to indemnify the plaintiff for the loss and damage to the relevant vehicles and also to pay damages for lost profits as a result of the insurer’s breach of the policy for failing to grant indemnity.
The Facts

On 7 November 2005, Mr Horwood was injured in the course of his employment when the forklift he was driving overturned on a public roadway. At the time of the accident, Mr Horwood was employed by Megbuy Pty Ltd. However, the forklift he was driving was registered to Levira Pty Ltd. Mr Horwood made a claim for workers compensation benefits and a claim for damages under the MACA. Mr Horwood subsequently commenced proceedings in the New South Wales District Court against his employer, Megbuy. He alleged that Megbuy was the owner of the forklift, the forklift was defective and Megbuy had, therefore, been negligent.

In accordance with its obligations under the MACA, QBE investigated Mr Horwood’s claim. After making enquiries with Megbuy, QBE discovered that Megbuy was responsible for servicing and maintaining the forklift involved in the accident, and for supervising and controlling its usage, that the principal of Megbuy was a shareholder in Levira and although the forklift was registered in the name of Levira, Levira had ceased to trade and did not operate any part of Megbuy’s business.

Given these facts, QBE elected not to dispute Mr Horwood’s claim that Megbuy was the owner of the forklift. QBE proceeded to obtain evidence with respect to liability. That evidence suggested that the forklift had been inadequately maintained and had a number of defects. On the basis of this evidence, QBE admitted liability for the incident and negotiated settlement of Mr Horwood’s claim.

QBE then claimed 50% contribution under the principles of dual insurance from CGU, Megbuy’s statutory employer’s liability insurer. CGU disputed the claim on the basis that QBE had no obligation to indemnify Megbuy since Megbuy was not the owner of the forklift, and the accident did not fall within the statutory definition of “injury” under the MACA.

The Decision

The NSW Supreme Court observed that s4 of the MACA can extend the meaning of “owner” under the Act to someone other than the registered owner of the vehicle. On that basis and having regard to the facts, the court held that even though Levira was the registered owner of the forklift, Megbuy was also an owner under the MACA and was, therefore, entitled to indemnity from QBE.

The court held further that the settlement reached by QBE with Mr Horwood was a reasonable compromise of the liability that had been alleged against Megbuy. As a consequence of these two findings, the court was satisfied that the definition of “injury” in the MACA had been met.

On the basis of these decisions, the court concluded that QBE had established an entitlement to recover contribution from CGU. Each contract of insurance was a contract of indemnity that covered the identical loss (liability to Mr Horwood) suffered by the identical insured (Megbuy).
The Facts

Kotku Bread Pty Ltd operated a bakery business out of premises in Brisbane. In 2010, the premises were destroyed by fire. Kotku made a claim for the property losses it sustained under a policy that it held with Vero Insurance Limited.

In the policy year preceding the fire, Kotku had been insured by Suncorp. Suncorp had, however, re-structured aspects of its business in 2009 and had transferred some of its policies to Vero. To allow that transfer to occur, Kotku’s broker, OIB, provided underwriting information to Vero using an online form that had been created by Suncorp and/or Vero. The online form completed by the broker included a question about the presence and quantity of a highly flammable insulating material known as ‘expanded polystyrene’ or EPS in the internal walls of Kotku’s premises. The broker completed the online form which included the answer “zero percent” on the question about the extent of the internal construction of Kotku’s premises comprised of EPS. EPS made up more than a third of the internal construction of the premises.

Vero declined Kotku’s claim on the basis of the non-disclosure or misrepresentation about the quantity of EPS in the premises. Kotku subsequently commenced proceedings against Vero, claiming indemnity under the policy, and against the broker for breach of contract and negligence.

The Decision

Regarding the claim for indemnity, the court held that the broker’s answer to the question about EPS was a relevant non-disclosure on the part of Kotku. The broker had submitted that Vero held relevant knowledge about the EPS because information concerning the existence of insulating material in the insured’s premises had been provided to Suncorp years before by a different broker seeking a quotation. Suncorp had quoted terms on that occasion but those terms were not accepted and the information never made it to the insured’s underwriting file. The court held that the mere fact Suncorp held information somewhere in its files was insufficient to fix Vero with relevant knowledge. The court accepted that had the question about EPS been answered correctly by the broker, Vero would have declined to cover Kotku. On that basis, Vero was entitled to reduce its liability under the policy to nil pursuant to s 28(3) ICA.

With respect to the broker, the court held that the broker was liable to Kotku in negligence and for breach of contract for the full value of Kotku’s loss, less the increased premium payable in respect of alternative cover that it found would have been available. The court noted that the presence of EPS was a matter known within the insurance industry to be relevant to whether cover would be offered. The broker knew this and should have made appropriate enquiries of Kotku. Its failure to do so amounted to a breach of duty and of the contract. In this case, the broker’s general reminders to Kotku about Kotku’s duty of disclosure were not sufficient to discharge the broker’s duties.

IN ISSUE

• The insured’s duty of disclosure
• The duties of the broker when an insured proposes for insurance

DELIVERED ON 26 April 2012

READ MORE [click here]
The Facts

The plaintiff, Ms Livesay, and her husband were tenants in a house they rented from the first and second defendants. The third defendant, Mr Newman, operated the real estate agency which was retained by the first and second defendants to manage the rental property.

On 25 April 2005, Ms Livesay was injured when a pelmet above a door in the house fell and struck her. She claimed Mr Newman failed to take reasonable care to keep and maintain the property in a safe condition for tenants.

Mr Newman held a professional indemnity policy with the third party, American Home Assurance Company (AHAC). Mr Newman claimed AHAC was liable to indemnify him for any civil liability he might have in respect of Ms Livesay.

AHAC denied that it was liable to indemnify Mr Newman on the basis that no claim had been made against him during the policy period nor was the matter notified to AHAC during the policy period. Therefore the policy did not respond.

The Decision

The letter was found to be a “Claim” as defined in the policy as it expressly asserted an entitlement on the part of the plaintiff to recover for her personal injury claim due to injury caused by the dangerous fixture. That was sufficient for the letter to be considered as a form of demand or assertion of liability.

However, the court found that exclusion for bodily injury applied. The exclusion formed part of the contract of insurance between Mr Newman and AHAC. It followed that, as Ms Livesay’s claim against Mr Newman is one for damages for bodily injury, that claim falls within the ambit of the exclusion.
The Facts

On 27 May 2007, the Australian Securities and Investment Commission (ASIC) commenced Federal Court proceedings against Mr Kyriackou (the plaintiff), alleging that the plaintiff and the Australvic Group (of which the plaintiff was considered to be the “directing mind”) had, amongst other allegations, been trading while insolvent and was involved in an unregistered managed investment scheme. ASIC sought interlocutory and final relief against the plaintiff and the Australvic Group, and sought orders including restraining further operation or promotion of the scheme which was in contention (the ASIC proceedings).

The plaintiff engaged solicitors and counsel to defend the ASIC proceedings, and in doing so, incurred substantial legal costs and expenses.

ASIC sought leave to discontinue the ASIC proceedings and on 20 January 2010, leave to discontinue was granted. Accordingly, there was no determination on the merits of the ASIC proceedings.

The plaintiff had a policy of professional indemnity insurance with ACE Insurance Limited (Ace) for the period 6 September 2006 to 6 September 2007 (the policy).

On 20 March 2009, the plaintiff lodged a claim under the policy seeking indemnity for the ASIC proceedings. Ace refused to indemnify the plaintiff under the policy. That the plaintiff was entitled to indemnity, subject to a number of exclusions, for amounts payable as civil compensation or damages in respect of a claim, including payment of defence costs incurred.

The plaintiff brought proceedings against Ace for a declaration that Ace was liable to indemnify him in respect of certain legal costs incurred by him under the policy. The plaintiff also sought damages.

The Decision

The issue central to the proceedings was whether the ASIC proceedings were a claim for policy purposes. The plaintiff placed reliance on the Originating Process in the ASIC proceedings which was made pursuant to the Corporations Act 2001 (Cth), which provides a power to award damages.

The court determined that no claim for damages or compensation was made against the plaintiff in the ASIC proceedings, and therefore the plaintiff’s claim must fail.

Further, the court held that the plaintiff’s claim would fail on a second ground as the policy confines indemnity to be provided in circumstances arising from a breach of a duty in a “professional capacity”. The court was not satisfied on the evidence that any claim had been made against the plaintiff in respect of civil liability for a breach of a duty owed in a professional capacity because the ASIC proceedings were brought against him in a management capacity with respect to Australvic.

On this basis, the court held that the plaintiff’s claim against Ace had not succeeded and the proceedings must be dismissed.

The court ordered the plaintiff to pay Ace’s costs of the proceedings.

IN ISSUE

- Whether proceedings issued against an insured in which damages can be awarded, but are not sought, constitutes a claim for compensation for policy purposes

DELIVERED ON 18 May 2012

READ MORE click here
The Facts

On 4 May 2004 a CountryLink Xplorer Train collided with a vehicle driven by Mrs Jeffries at a railway crossing in north western New South Wales. Both carriages of the train derailed and certain rail infrastructure was extensively damaged. Mrs Jeffries was killed instantly. The plaintiffs were the owners of the rail carriages and the infrastructure respectively. Mrs Jeffries' vehicle was insured by the defendant against claims for third party property damage.

As the plaintiffs could not sue Mrs Jeffries to recover their damages, they commenced proceedings directly against the defendant insurer pursuant to s51 of the ICA for recovery of the very substantial costs of repairing the train and rail infrastructure.

The defendant denied liability on the basis that the claim was not covered by the policy because the collision occurred as a result of a deliberate, illegal intention on the part of Mrs Jeffries to commit suicide.

The decision

The court noted at the outset that there is no longer any presumption against a conclusion that a person has committed suicide. It is a matter for the court to decide in accordance with the usual process of reasoning.

After considering the evidence from police, mechanics, and experts about the state of the vehicle, and evidence in relation to Mrs Jeffries’ mental history and current condition, the court concluded that the collision occurred as a result of inadvertence on her part and that it was not the result of a deliberate intention to commit suicide.

The court then had to decide whether the plaintiffs were able to satisfy the pre-conditions in s 51 of the ICA. The only condition in contention was whether the contract provided coverage in respect of the liability. This depended on whether the insuring clause of the policy was satisfied and whether any of the exclusion clauses applied.

The policy provided cover for legal liability for loss or damage to other people’s property. For legal liability to arise, the court was required to find that Mrs Jeffries was legally responsible to pay compensation for loss or damage to the property of another as a result of an accident. The plaintiffs were therefore required to prove that their claim for damages was the result of an “accident”. The term was not defined in the policy and the court had to consider the common law and earlier authorities to determine that issue. After doing so, the court held that what occurred was an accident because it occurred without intentional design on the part of Mrs Jeffries and was an unexpected and unintended mishap. The court did not decide what the consequence would be if the evidence had established that Mrs Jeffries had intentionally placed her vehicle in the path of the oncoming train.

The court then had to consider the application of the policy exclusions. The defendant argued that, in contravention of certain provisions of the Crimes Act 1900, the vehicle was being used for an illegal purpose and/or to conduct an illegal activity with the result that two policy exclusions applied to exclude liability for the claim. This argument was rejected by the court on the basis that the negligence required to establish such offences under the Crimes Act 1900 was negligence to the criminal standard. The court held that the negligence of Mrs Jeffries did not even approach, let alone reach, that standard.

The claim for contributory negligence was dismissed on the basis that there was insufficient evidence in support of it.

The court concluded that the policy responded to the claim and that the defendant was obliged to indemnify the plaintiffs in accordance with the policy.

IN ISSUE

- Whether s51 of the ICA obliged the insurer to indemnify third parties in respect of property damage caused by the deceased insured

DELIVERED ON 8 June 2012

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Pettigrew v Wentworth Shire Council [2012] NSWSC 624  
Claim against local authority for presence of loose gravel on road.
The Facts

On 3 August 2007 the plaintiff had an argument with her partner and walked off into the night on her own. She was dressed in dark clothes and intoxicated. The plaintiff was walking along the highway near the Serpentine Channel Bridge when a semitrailer travelling in the opposite direction threw her into the air as it went past her. The plaintiff alleged that she was walking just inside the fog lane when she saw the truck veer to the middle of the lane. The plaintiff alleged that she had her hand up to shield her eyes from the truck’s lights, when the truck went past and threw her into the air. The plaintiff reported to police attending the scene that she had been hit by a truck.

The plaintiff suffered significant injuries to her lower leg, resulting in its amputation. The plaintiff also suffered fractures and injuries to her lower right arm. The plaintiff was unable to locate or identify the truck that had struck her, and proceedings were issued against the Nominal Defendant.

The Decision at Trial

The trial judge found that the plaintiff had been injured as a result of the negligence of the driver of the unidentified truck. The trial judge found that the truck driver had seen the plaintiff and taken insufficient evasive action to prevent the collision. The trial judge found that the Nominal Defendant was liable to the plaintiff, but reduced damages by 55% for contributory negligence. Judgment was entered in favour of the plaintiff in the sum of $405,000 plus costs.

The Issues on Appeal

The Nominal Defendant appealed to the New South Wales Court of Appeal on 2 bases. First, it challenged the finding of the trial judge that the driver of the unidentified truck breached his duty of care to the respondent. Secondly, and in the alternative, it contended that in any event, the assessment of contributory negligence was manifestly inadequate, and should be as high as 80%.

The Decision on Appeal

The appeal was dismissed in full with costs.

The Court of Appeal considered whether the plaintiff was walking in the traffic lane itself or on the western side of the lane, in a fog lane. The Court of Appeal accepted the factual determinations of the trial judge that the plaintiff was walking in the fog lane.

The Court of Appeal also noted the trial judge’s conclusion that the unidentified truck driver was either inattentive to the plaintiff’s presence on the road or simply too slow reacting when he did see her. The Court of Appeal was satisfied that the reasons given by the trial judge, when read as a whole were sufficient.

Finally, in relation to the appeal grounds regarding contributory negligence, the Court of Appeal confirmed that the trial judge made the correct conclusions about the role that the unidentified truck driver played in the accident and the fact that it amounted to negligence of a kind that cannot be described as slight.
The Facts
On 5 March 2007 the plaintiff was riding her motor cycle home from work when she was involved in a collision with a vehicle driven by the first defendant, causing the plaintiff to sustain serious injuries. The plaintiff was unable to recall the incident and was unsure whether her headlight was on. She was a Corporal in the Royal Australian Air Force (RAAF) and was dressed in her uniform (a camouflage ensemble of khaki and green hues) at the time of the incident.

The defendants argued the plaintiff was contributorily negligent for failing to make herself more visible to motorists (by wearing lighter coloured clothing and using a headlight) and failing to take evasive action to avoid the collision.

The Decision at Trial
The court considered s5D and 5R of the CLA (NSW) in relation to the defendants’ allegation of contributory negligence. The court held that although there was not enough evidence to address the issue of whether the wearing of a different coloured outfit would have made any difference, it was satisfied that the use of a headlight would have made the plaintiff more visible to motorists.

In relation to s5R of the Act, the court found that the capacity of the first defendant to see the plaintiff’s motorcycle would have significantly increased ‘but for’ the headlight not being illuminated. Ultimately the court found the first defendant liable for the incident but reduced the amount of the plaintiff’s damages by 7.5% for contributory negligence for failing to use her headlight.

The plaintiff was awarded $868,831.30 reduced to $803,668.96 after discounting for contributory negligence.
The Facts

The plaintiff, Maurice Clive Williams, claimed damages for injuries which he sustained on 15 June 2005 at the premises of the first defendant Zerella Holdings Pty Ltd at Johns Road, Virginia. The second, Darren Ian Edwards was employed by the first defendant as a forklift driver. It was alleged that while Mr Edwards was operating a forklift in a loading bay he caused pallets to fall from the back of a truck and strike Mr Williams.

The forklift was uninsured and the Nominal Defendant was joined as a third defendant.

The plaintiff and the first two defendants asserted that the area where the incident occurred was either a “road” or a “road related area” so that the vehicle was required to be registered and insured in accordance with the provisions of the Motor Vehicles Act 1959 (MVA).

The court ordered that this issue be resolved by preliminary determination.

The Decision

The question rested on the particular facts of the case and specifically, upon whether the attendance of certain classes of people meant that the loading bay was an area open to or used by the public.

The court noted that the characteristics of the persons who entered the property needed to be considered; not the level of activity. The following points were considered:

• A sign pointed in the direction of the property of the first defendant and identified the location of the business, but the sign did not extend an invitation to the public to enter the premises;

• On the other hand there were no signs at the gate of the property to indicate that it was private property or warning against trespassing or seeking to limit entry to the property in any way;

• The gate was closed at night. However the gate was not closed at the time of the accident nor was there any physical restriction preventing access to the property;

• Unless a person had some business, there would have been no reason for a person to be in the loading bay or indeed on the property at all; and

• The loading bay was used by employees, independent contractors and their employees and by other visitors, namely the purchasers of small quantities of produce.

The evidence established that in most cases those persons had express permission to enter the property. In the other cases they had permission which could be implied from the fact that the first defendant sold produce to them. The “friends of friends” who went to the property because they had learnt produce could be purchased may not have had a licence to begin with. However, the procedure described by the first defendant’s health & safety officer would have required those people to present themselves at the head office to obtain permission to proceed to the loading bay area.

There was no evidence that strangers who had no business on the property wandered around the loading bay. The only evidence of persons going into the loading bay was evidence of persons who entered the loading bay for the specific reasons of purchasing produce.

Because of its relatively remote location, it was held unlikely anybody would have found their way to the property without some specific reason.

The various signs established that the first defendant attempted to restrict public access to its premises. The evidence of its health & safety officer established that the first defendant took steps to control the property and to exclude persons who did not have business there.

The court held that the loading bay was not a “road” or a “road related area” as those terms are defined in s5 of the MVA.

IN ISSUE

• Whether area where incident occurred was a “road” or a “road related area” as defined in s5 of the Motor Vehicles Act 1959

DELIVERED ON 22 November 2011

READ MORE click here
The Facts

On 1 November 2006, Mr Verey was injured at a work site when he was a passenger in a bucket, attached to the arm of an excavator, which was dropped to the ground. The excavator was being driven and operated by a fellow employee. Mr Verey commenced these proceedings against his employer in the District Court under the MACA alleging that the accident was caused by the negligence of the operator and, vicariously, that of the employer.

The Decision at Trial

At trial, the primary issue was whether the excavator was a “motor vehicle” within the meaning of s3 of the MACA. Section 3 of the MACA defined a motor vehicle as “a motor vehicle or trailer within the meaning of the Road Transport (General) Act 2005” (RTGA). The RTGA defined a motor vehicle as a vehicle on wheels built to be propelled by a motor that forms part of the vehicle.

The trial judge held that the excavator was a “motor vehicle” within the meaning of s3 of the MACA. He distinguished the similar case of Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360, where the NSW Court of Appeal held that an excavator was not a “motor vehicle” within the meaning of s3 MACA, alleging that the accident was caused by the negligence of the operator and, vicariously, that of the employer.

The Issues on Appeal

Whether the excavator was a “motor vehicle” within the meaning of s3 MACA.

The Decision on Appeal

The NSW Court of Appeal held that the excavator was not a “motor vehicle” within the meaning of s3 MACA. The Court of Appeal found that the decision in Doumit was not distinguishable from the present case and, being a decision of the same Court of Appeal, it should be followed unless the Court of Appeal as presently constituted was convinced that the earlier decision was wrong.

The Court of Appeal found that the trial judge had erred in focusing upon the means by which the excavator was propelled. The relevant question was not whether the excavator “gained its locomotion from the rear wheels”, but whether it was “on” its wheels. Following the reasoning of the majority Doumit, the Court of Appeal held that the excavator moved “on tracks” rather than “on wheels” and was therefore not a vehicle within the meaning of s3 MACA.

Andy’s Earth Works Pty Ltd v Verey
[2012] NSWCA 32

IN ISSUE

• Whether an excavator was a “motor vehicle” within the meaning of s3 of the MACA

DELIVERED ON 8 March 2012

READ MORE  click here
The Facts
At approximately midnight on 16 October 2008, 8 young persons entered a station wagon with the intention of travelling a distance of about 25 kilometres. Approximately one hour later the car ran off the road. Three of the passengers in the car – Mitchell Green, Twilia Campbell and James Golding – were very seriously injured. They claimed for compensation against the Nominal Defendant because the car was not registered at the time of the accident.

The court was asked to consider whether the defendant owed the plaintiffs a duty of care and if so, whether the duty of care was breached in circumstances where all occupants of the car had been drinking alcohol and whether any of them gave any consideration to the driver’s capacity to drive.

The Decision
The court held that the driver’s duty of care to the plaintiffs was not displaced by the circumstances in which the accident occurred. The extent to which the plaintiffs placed themselves in positions of peril was to be determined by reference to the principles of contributory negligence. The court found that the factors of speed and alcohol were the cause of the accident. The driver therefore breached his duty of care to his passengers in driving at speed and while his capacity to drive was impaired by the extent to which he consumed alcohol.

With regards to Ms Campbell, the court found that she travelled in a car with the driver knowing that he held no licence and that the car was not registered. She also knew or ought to have known that the driver’s capacity to drive was impaired by his consumption of alcohol. She was also not wearing a seat belt at the time.

The court found that Ms Campbell’s injuries were the result of her having been ejected from the car and, while it was not possible to state that, had she worn a seat belt, she would have suffered no injury, it was highly probable that the risk and extent of her injuries would have been substantially reduced. These factors established both a considerable degree of contributory negligence on the part of Ms Campbell and a causative connection between the negligence and the increased severity of her injuries. As such, her damages were reduced by 35% for contributory negligence.

With regards to Mr Golding and Mr Green, the court found that each knew or ought to have known that the driver’s capacity to drive was impaired by his consumption of alcohol. The court also noted that both were not occupying seats and not wearing seat belts at the time.

The court found Mr Golding’s and Mr Green’s injuries were the result of their failure to occupy a passenger seat and to wear a seat belt and, while it was not possible to state that, had they been properly seated in a passenger seat with a seat belt in place, they would have suffered no injury, it was highly probable that the risk and extent of their injuries would have been substantially reduced. As such, the court reduced their damages by 40% for contributory negligence.
The Facts

The plaintiff was the comprehensive third party insurer of the defendant. On 8 June 2005 the defendant was driving a motor vehicle when he was involved in an accident with a vehicle driven by Mr Larrasquet. Mr Larrasquet and his passenger, Mr Brettes, suffered serious injuries and subsequently served notice of accident claim forms on the plaintiff. Both claims settled at the compulsory conference in the amount of $42,539.60 for Mr Larrasquet and $1,221,567.22 for Mr Brettes.

The plaintiff sought to recover the settlement amounts from the defendant pursuant to s58(3) of the MAIA which entitles an insurer to recover the amount if at the time of the accident the insured was unable to exercise effective control of the vehicle because of the consumption of alcohol or drugs. The defendant opposed the claim on the basis that the plaintiff could not demonstrate that the costs were reasonably attributable to the inability of the defendant to exercise effective control of his motor vehicle and further, that the costs of the subject claim were not reasonably incurred.

The Decision

The plaintiff argued that the collision was caused by the defendant being unable to exercise effective control over his vehicle which was evidenced by his driving while asleep or not alert and allowing his vehicle to cross to the wrong side of the road. The defendant argued that there was no evidence that the alcohol he had consumed had the effect of inducing sleep. The court rejected this argument and noted that there was ample expert evidence that the defendant’s level of intoxication meant he was not alert or aware of his vehicle’s position on the road.

The court noted that the defendant had pleaded guilty to a charge of dangerous driving in respect of the collision. As a result, the court had no hesitation in finding that the plaintiff was justified in concluding that the defendant was unable to control his vehicle because of the consumption of alcohol and that the defendant was entirely at fault.

The defendant contended that the settlement amount in respect of Mr Brettes’ claim was unreasonable. Specifically, the defendant argued that the amounts paid in respect of future earning capacity, out of pocket expenses and future care were unreasonable. The court accepted that the amount for future earning capacity was unreasonable because although the medical evidence was that Mr Brettes was unable to work in his former capacity as a waiter, he had in fact done so. The court held that on becoming aware of this discrepancy, the plaintiff should have made further inquiries. As a result, the cost of that part of the settlement relating to future earning capacity, was not reasonable.

Judgment was given for the plaintiff in the sum of $764,106.82, being $42,539.60 for the Larrasquet claim and $721,567.22 (being the settlement amount less the damages for future economic loss) for the Brettes claim.
The Facts

On 7 November 2005, Mr Horwood was injured in the course of his employment when the forklift he was driving overturned on a public roadway. At the time of the accident, Mr Horwood was employed by Megbuy Pty Ltd. However, the forklift he was driving was registered to Levira Pty Ltd. Mr Horwood made a claim for workers compensation benefits and a claim for damages under the MACA. Mr Horwood subsequently commenced proceedings in the New South Wales District Court against his employer, Megbuy. He alleged that Megbuy was the owner of the forklift, the forklift was defective and Megbuy had, therefore, been negligent.

In accordance with its obligations under the MACA, QBE investigated Mr Horwood’s claim. After making enquiries with Megbuy, QBE discovered that Megbuy was responsible for servicing and maintaining the forklift involved in the accident, and for supervising and controlling its usage, that the principal of Megbuy was a shareholder in Levira and although the forklift was registered in the name of Levira, Levira had ceased to trade and did not operate any part of Megbuy’s business.

Given these facts, QBE elected not to dispute Mr Horwood’s claim that Megbuy was the owner of the forklift. QBE proceeded to obtain evidence with respect to liability. That evidence suggested that the forklift had been inadequately maintained and had a number of defects. On the basis of this evidence, QBE admitted liability for the incident and negotiated settlement of Mr Horwood’s claim.

QBE then claimed 50% contribution under the principles of dual insurance from CGU, Megbuy’s statutory employer’s liability insurer. CGU disputed the claim on the basis that QBE had no obligation to indemnify Megbuy since Megbuy was not the owner of the forklift, and the accident did not fall within the statutory definition of “injury” under the MACA.

The Decision

The NSW Supreme Court observed that s4 of the MACA can extend the meaning of “owner” under the Act to someone other than the registered owner of the vehicle. On that basis and having regard to the facts, the court held that even though Levira was the registered owner of the forklift, Megbuy was also an owner under the MACA and was, therefore, entitled to indemnity from QBE.

The court held further that the settlement reached by QBE with Mr Horwood was a reasonable compromise of the liability that had been alleged against Megbuy. As a consequence of these two findings, the court was satisfied that the definition of “injury” in the MACA had been met.

On the basis of these decisions, the court concluded that QBE had established an entitlement to recover contribution from CGU. Each contract of insurance was a contract of indemnity that covered the identical loss (liability to Mr Horwood) suffered by the identical insured (Megbuy).
The Facts

Dunbier Marine Products (the first respondent) engaged RBI Haulage (the second appellant) to transport boat trailers from Melbourne to its premises in Sydney. The second appellant used a prime mover with two trailers to transport the boat trailers. Mr Buckley (the second respondent) was employed by the first respondent as the manager of its Sydney premises.

On 20 July 2005, the second respondent was assisting Mr Izzard, the first appellant and driver of the second appellant’s vehicle in unloading trailers at the Sydney premises. The vehicle had moveable metal frames which were used to assist in the stacking of the boat trailers and other equipment. The second respondent used one of the frames as a hand hold to dismount the vehicle. As he did this, the frame fell on him and he sustained injuries.

The Decision at Trial

At trial in the New South Wales District Court, the trial judge found that the appellants were both negligent and that the second respondent was contributorily negligent to the extent of 20%.

The second respondent did not originally sue the first respondent, but the appellants brought a cross claim against the first respondent in respect of the second respondent’s damages. The cross claim was dismissed, as the trial judge found that the first respondent had not been negligent.

The trial judge considered whether the MACA applied to the claim, but held that it did not, as the injury did not fall within the scope of the MACA. In reaching this conclusion, the trial judge considered that the predominant, proximate or immediate cause of the injury was the unsafe system of work created by the first appellant in not locking the frame after it had been moved to allow access and not instructing the second respondent about the correct way to move the frame.

The Issues on Appeal

The appellants challenged the dismissal of their cross claim against the first respondent and the finding that the injuries were not suffered as a result of a motor vehicle accident within the meaning of the MACA. The Court of Appeal considered whether the first respondent was negligent. If the Court of Appeal found that the first respondent was negligent, it was also obliged to consider the effect of s151H(1) of the WCA (NSW).

The Decision on Appeal

The Court of Appeal found that the first respondent was negligent. There was a foreseeable risk of injury which was not insignificant. The first respondent alleged that it had a system that adequately dealt with this risk. In evidence, the first appellant said that normally the frames would be re-secured after they had been moved to facilitate the unloading, but before the actual unloading commenced. The Court of Appeal said that if this could be characterised as a system, it was “far from adequate” because there remained a period of time during the operations when the frames were unsecured.

Further, the Court of Appeal held that it did not matter that the second respondent was using the frame for a purpose for which it was not intended, as this did not mean that his injuries were not caused by the first respondent’s breach of its duty to provide a safe system of work in which the risk of such misjudgement is accounted for. The Court of Appeal apportioned liability 60% to the appellants and 40% to the first respondent.

IN ISSUE

- Whether the second respondent’s employer was negligent
- If the employer was negligent, the effect of s151H(1) of the WCA (NSW)
- Whether the provisions of the MACA apply

DELIVERED ON 10 May 2012

READ MORE [click here]
MOTOR VEHICLES

Izzard v Dunbier Marine Products (NSW) Pty Ltd
[2012] NSWCA 132

As the first respondent was negligent, the Court of Appeal considered the effect of s151H(1) of the WCA. This section states that no damages may be awarded against an employer unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15%. There were difficulties in considering this section, as the second respondent had not originally brought a claim against the first respondent, and therefore, had not completed the injury assessment procedures specified in the WCA. The Court of Appeal remitted this issue to the trial judge for determination on the basis that resolution of the issue would require consideration of material which was not put before the Court of Appeal.

The Court of Appeal also considered whether the MACA applied to this claim. The relevant question in this regard was whether the injury was caused by a defect in the vehicle. The Court of Appeal held that the frames themselves were defective, which rendered the vehicle defective. The unstable nature of the frames when they were unsecured constituted a defect in the vehicle because the frames needed to be unsecured and moved to fulfil their intended purpose. Therefore, the MACA applied to the claim and the CTP insurer (the third respondent) was liable for the second respondent’s injuries.
The Facts

The respondent, Mr Chaseling, was employed by the appellant, TVH Australasia Pty Ltd, as a spare parts interpreter. The appellant imported parts for forklifts, which were shipped in containers. On 29 June 2006 the respondent was assisting another employee to unload boxes on pallets from a container. The respondent generally worked in the office but was asked to help the forklift driver unload the container. This involved driving a forklift up a small ramp and into the container, manoeuvring the tines on the forklift under the pallet and reversing the forklift back down the ramp. The respondent was instructed to direct the driver to guide the tines into the pallet. As the forklift backed down the ramp with the respondent walking beside it, the top box on the pallet, which weighed 219kgs, fell off and crushed the respondent's right leg.

The respondent sued the appellant for negligence.

The Decision at Trial

The trial judge found in favour of the respondent and awarded $712,275 in damages. He considered that the injury fell within the terms of the MACA and that the respondent had not been guilty of contributory negligence.

The trial judge held that the appellant had breached the duty of care that it owed to the respondent. It was also vicariously liable for the negligence of the forklift driver. The trial judge considered that the pivotal causative event was the driving of the forklift in reverse down the ramp with an unsecured top heavy load perched towards the end of its tines. This caused the load to overbalance and was fundamentally unsafe.

The Issues on Appeal

The appellant challenged the trial judge’s findings of negligence and that the injury fell within the MACA.

The Decision on Appeal

The appellant argued that although it was open to the trial judge to find that the load was unstable and insecure based on the events which occurred when the box fell off the forklift, there was nothing known to the appellant, the driver or the respondent prior to the incident, which ought to have made them reasonably aware of the risks involved in unloading the containers.

The Court of Appeal observed that the respondent’s supervisor had given evidence that prior shipments of containers had arrived with broken plastic pallets and that these flexed when lifted by the forklift. He had complained to the appellant about this and nothing had been done.

The Court of Appeal held that this supported the conclusion that the appellant was aware of the risks associated with unloading the containers. It should have notified an inexperienced forklift driver as to what steps to take to avoid an accident arising while unloading possibly unstable packages, which may have shifted in the container in transit. It should also have warned the respondent of the risk.

In relation to the second ground of the appeal, the appellant argued that the trial judge erred in finding that the respondent had suffered an ‘injury’ within the meaning of the MACA and that the proceedings were not a claim for ‘work injury damages’ within the meaning of the Workers Compensation Acts.

The Court of Appeal noted that previous amendments to the MACA were intended to limit its scope in respect of work injuries. They were designed to limit the extent to which loading and unloading operations would qualify as a motor accident. A distinction was to be drawn between a defect in a motor vehicle that directly causes injury and a defect which leads to the adoption of an alternative negligently devised scheme of work not involving the defective mechanism.
The Court of Appeal held that in this case, the fault lay in the manner of operating the forklift, namely the driving of a forklift with an unsafe load. That was fault “in the use or operation of” the forklift. The negligence of the appellant was not in respect of a system of work ancillary to the use and operation of the forklift. It related directly to the manner in which the forklift was to be used and operated. It failed to inform the driver of the risk and how to avoid it materialising. The fact that the remedy may have lain at an earlier point in time did not mean that the proximate cause of the accident was not to be located in the manner of operating the vehicle.

The appeal was dismissed with costs.
**MOTOR VEHICLES**

*Pettigrew v Wentworth Shire Council*

[2012] NSWSC 624

**The Facts**

The plaintiff brought proceedings in negligence against the defendant in respect of an accident which occurred on 19 July 2006. The plaintiff was driving in a northerly direction in Channel Road, Curlwaa, NSW, when he lost control of his vehicle as he was negotiating a left-hand corner. The plaintiff alleged that the cause of the accident was the presence of substantial quantities of gravel on the road which had been placed there by servants or agents of the defendant. The plaintiff suffered serious spinal injuries as a result of the accident.

**The Decision**

The court found that the plaintiff was not travelling at an excessive speed at the time of the accident and was satisfied that the cause of the incident was the loss of traction by his vehicle due to the presence of gravel on the road at that location.

The court held that the relevant risk of harm was the presence of a substantial quantity of gravel on the road surface at a difficult corner, which might cause vehicles attempting to negotiate that corner to leave the road. That risk was foreseeable and was not insignificant because the presence of the gravel on the road surface substantially lowered the critical speed for vehicles attempting to negotiate the corner. In those circumstances a reasonable Council, which carried out the road works at the corner would have taken steps to make sure that the gravel used was not in such quantity as was likely to come upon the road and would have erected appropriate signage. The court was satisfied that the defendant breached the duty of care which it owed to the plaintiff as a road user.

The court further found that the quantity of gravel on the road was substantial and there would have been definite contrast even in poor lighting conditions. In those circumstances the court concluded that the plaintiff failed to keep a proper lookout and therefore was partially responsible for the accident.

The court awarded judgment in favour of the plaintiff against the defendant in the amount of $770,565.00 which was reduced by 15% for contributory negligence.

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**IN ISSUE**

- Whether local authority was responsible for gravel being on road

**DELIVERED ON** 12 June 2012

**READ MORE** [click here](#)
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Whether documents held by insurer and loss adjuster were privileged.

152  Algar v State of Queensland [2011] QSC 200
Whether solicitor file note of conference with medical employee of respondent, not intended to be called as an expert witness, was required to be disclosed.

153  Felgate v Tucker [2011] QCA 194
Disclosure of statements under PIPA and legal professional privilege.

Whether a statement written by a doctor and/or solicitor file notes of a conference with a doctor fell within the definition of “investigative report” or “medical report” and as such were required to be disclosed pursuant to s30 (2) of PIPA.
The Facts
The plaintiffs trading as Sydney Filmworks, were the tenants of premises leased from Mr Barbro. On 19 February 2005, the premises were flooded by stormwater. The plaintiffs claimed a substantial sum for loss to damage for equipment and other material and loss of profit.

Mr Barbro, who had died before the application, held a contract of insurance with Zurich (the defendant) which provided cover in respect of the liability alleged by the plaintiffs. The plaintiffs sought to recover an amount equal to its liability from the defendant under its insurance contract with Mr Barbro.

The plaintiffs issued subpoenas against the defendant and its loss assessors, Freemans Insurance Services. The defendant objected to access being given to the plaintiffs to some of the documents on the basis of legal professional privilege.

The Decision
The court determined that all communications between the defendant, its legal advisors and its loss adjustors in considering Mr Barbro’s claim for insurance were privileged from disclosure, as they were made for the dominant purpose of obtaining legal advice regarding the defendant’s liability under the contract of insurance.

The court found that documents obtained by the defendant’s loss adjustors from third parties (either originals, copies or in electronic format) were not privileged in the defendant’s loss adjustor’s hands.

However, the copies of documents from third parties that were copied and sent to the defendant or the defendant’s legal representatives were determined to not be subject to disclosure.

The court held that expert reports commissioned by the defendant’s loss adjusters were privileged. However, any expert reports commissioned or held by the defendant’s loss adjusters that were created on or on behalf of Mr Barbro in respect of earlier claims (in relation to similar matters arising in 1995, 2003, 2004 and 2005) were not privileged.

The court determined that documents that were in the hands of third parties (such as Mr Barbro’s real estate agent) were not privileged, and if it was not possible for them to be produced (such as if they had been lost), then the copies made by the defendant’s loss adjustors may be disclosable.
The Facts

Mrs Algar ("the plaintiff"), a 53 year old woman, attended BreastScreen Queensland ("the defendant") on three separate occasions between December 2007 and September 2009. On each occasion she was advised that lumps in her right breast were dense breast tissue. The plaintiff subsequently developed breast cancer, which was terminal. She argued that the advice she was given by the defendant was negligent as they failed to diagnose her condition in a timely manner.

The plaintiff made an application to the Supreme Court of Queensland for disclosure of documents from the defendant pursuant to its obligations under the PIPA. The plaintiff submitted that a disclosed file note indicated that the defendant’s lawyer had participated in a conference with Professor Osbourne, an employee of the defendant, during which he gave expert evidence. The plaintiff contended that any opinion expressed by Professor Osbourne was properly characterised as expert opinion. Accordingly, it was required to be disclosed under either s20(3) or 27 of PIPA.

The defendant submitted that the purpose of the conference was to obtain instructions and provide legal advice and that they did not intend to obtain an expert report from Professor Osbourne.

The Decision

The court held that if an expert’s report is to be obtained for the purposes of pre-litigation procedures, it is required to be disclosed under s20(3) of PIPA. This includes any communications associated with the provision of the report, including file notes of conversations with the expert.

However, the court held that Professor Osbourne was not being called as a witness of fact and he was not going to be called as an expert to give evidence at trial. Therefore, the file note was protected by legal professional privilege and was not required to be disclosed.

As the purpose of the conference was to obtain instructions and provide legal advice, s30 of PIPA applied and the file note was subject to legal professional privilege.
The Facts

Ms Felgate underwent laparoscopic surgery on 14 November 2007. Dr Tucker was her anaesthetist. Ms Felgate experienced a phenomenon termed ‘surgical awareness’ in which she was conscious but paralysed for the entire duration of the surgery.

Ms Felgate made a claim under the PIPA against Dr Tucker. At the compulsory conference, Dr Tucker produced a document entitled ‘Interpretation of anaesthetic record’ (‘the document’). The document was different to the hospital record and indicated to Ms Felgate that there was a statement by Dr Tucker which should be disclosed. Dr Tucker claimed the document was subject to legal professional privilege.

The Decision on Application

Ms Felgate’s application to the Supreme Court of Queensland for disclosure of the statement was dismissed and she appealed this decision.

The Issues on Appeal

The main issues before the Court of Appeal were whether the statement was required to be disclosed under the PIPA and if so, was the statement otherwise subject to professional privilege? If so, was it required to be disclosed under s30(2) of PIPA? If the statement was not required to be disclosed, did Dr Tucker waive privilege when he produced the document at the compulsory conference?

The Decision on Appeal

The Court of Appeal factually distinguished the case from the cases of Watkins v State of Queensland; Allen v State of Queensland and James v WorkCover Queensland. Those decisions all concerned documents relating to communications with third parties, as opposed to communications between clients and their lawyers.

The Court of Appeal accepted that the statement taken by Dr Tucker’s lawyers was “to provide him with legal advice about any anticipated judicial proceeding.” As the PIPA pre-court procedures were an essential part of future litigation and the dominant purpose of the statement was in contemplation of future litigation, the statement was privileged.

The Court of Appeal held that it was well established that privilege cannot be abrogated by legislation without express intention. Dr Tucker’s statements were therefore privileged, unless they were ‘reports’ which are required to be disclosed under s30(2) of PIPA. The Court of Appeal was not persuaded that ‘reports’ included notes or recordings of statements of clients to their legal representatives.

The Court of Appeal also held that Dr Tucker did not waive privilege when he produced the document at the compulsory conference. Ms Felgate failed to establish that the document contained information which was in addition to the hospital records and that its production at the conference in any way waived privilege over the statement.
The Facts
The respondent was a 9 year old boy with multiple congenital problems, including a heart abnormality. The appellant was the State of Queensland, which is responsible for the Prince Charles Hospital (PCH). On 23 December 2003, the respondent was undergoing a study in relation to his heart, following which he developed a complete heart block and suffered severe brain damage.

In 2010, the respondent brought a claim for compensation against the appellant pursuant to PIPA. The respondent’s solicitors sought an order that the appellant disclose 2 file notes taken by the PCH’s solicitors following discussions with doctors involved in the respondent’s treatment, and also a written statement prepared by a doctor at the request of the PCH’s solicitor.

The Decision on Application
The issues for determination were whether the documents were protected by legal professional privilege and if so, whether they had to be disclosed pursuant to s30 (2) of PIPA because they were “investigative reports”.

The judge found that the documents came into existence for the dominant purpose of anticipated litigation. However, they were investigative reports and therefore fell within the exceptions to privileged documents and were required to be disclosed.

The Issues on Appeal
The appellant appealed and argued that the trial judge erred in finding that the documents were “investigative reports”. The appellant argued that the rule of statutory construction (that provisions are not to be construed as abrogating important common law rights, privileges, or immunities, including legal professional privilege, in the absence of clear words or necessary implication), meant that “investigative reports” should not be given a broad meaning.

The Decision on Appeal
The Court of Appeal did not accept that the scope of a provision abrogating legal professional privilege should necessarily be read narrowly, but nevertheless reviewed whether the documents could be characterised as investigative or medical reports.

Justices White and Fryberg agreed that, contrary to the application judge’s finding, the documents were not investigative reports. However, they found that the statement by the doctor was a medical report within the meaning of s30(2). It was further concluded that the 2 file notes could not be described as reports let alone investigative reports. The Court of Appeal ordered that the doctor’s statement be disclosed, but not the file notes, which were subject to privilege.

Justice Fraser dissented in part. He held that the term “medical reports” set out in s30(2) of PIPA does not include reports about a medical incident which relates to liability. The document prepared by the doctor fell within this category. He concluded that the file notes did not constitute “medical reports” for the same reason and because they did not constitute “reports”.

As none of the documents constituted a “medical report” he concluded disclosure of the file notes and the statement of the doctor was not required.
DAMAGES

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Assessment of compensatory and aggravated damages for defamatory statements about a surf club patron being a paedophile and a wog.

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164  Powercor Australia Ltd v Laurence Peter Thomas [2012] VSCA 87
Assessment of damages for fixtures damaged by fire but reinstated by plaintiff and volunteer labour.

165  Jackson v Mazzafero (2012) NSWCA 170
Appeal from assessment of damages awarded under CLA (NSW).
The Facts
The plaintiff claimed damages, including aggravated damages, for defamation arising from statements made about him by the defendant in a sports bar of the Rainbow Bay Surf Club (RBSC) in February 2009. The plaintiff alleged that, without provocation, the defendant kicked him and repeatedly called him a paedophile and a wog in a crowded bar of about 40 – 50 people. The defendant denied making the defamatory statements and relied on the defence of triviality.

The Decision
The court accepted the plaintiff’s version of events and found that the defamatory statements were made as alleged. The primary defence, that the words were not said, failed because the court did not believe the defendant and did not accept his evidence as credible.

The defendant attempted to rely on the defence of triviality in relation to the word ‘wog’. The court rejected that defence. The court ruled that the word ‘wog’ was used in a derogatory, insulting and offensive way to denigrate the plaintiff for the way he looked. The circumstances in which the word was used – being shouted angrily and aggressively in a crowded public bar together with repeated allegations that the plaintiff was a paedophile – were such that the plaintiff was likely to sustain harm and it was therefore not a “trivial defamation”.

The court was satisfied that the words used and the way they were said were defamatory of the plaintiff and likely to injure his reputation by causing those to whom the words were published (or subsequently published) to shun, avoid or ridicule him.

In considering the appropriate amount of damages to be awarded, the court noted that the plaintiff was a 38 year old financial advisor with strong social and professional ties to the RBSC which was a source of business for him. The plaintiff was well known in the surfing community and attended the RBSC frequently. During surf carnivals he would do a lot of networking and promotion of his business. His personal appearance, integrity, reputation and personal contact with clients were important to him and his business.

The court accepted that the defamatory statements impacted on his business by affecting his mental state. The court held that to call a person a paedophile was a most serious allegation because it involved the imputation that the plaintiff was guilty of serious criminal conduct. As a result of this, he suffered significant personal distress and hurt.

The court noted that the damages awarded were to bear an appropriate relationship to the harm suffered and may include aggravated damages. The court also noted that the damages awarded should reflect the fact that the defamation may spread and reappear at other places unknown to and unheard of by the plaintiff. In this case the statements were of such a nature, said loudly and aggressively in a public bar, that it would be extremely surprising if they were not repeated later, especially because the plaintiff was well known at the club and the defendant was a president of the supporter’s club.

The court was satisfied that prior to the incident the plaintiff had a very good reputation and that he was genuinely and significantly distressed by the allegations particularly the repeated allegation that he was a paedophile. The court accepted that the plaintiff’s health and reputation were still being adversely affected by the defamatory statements.

The court was satisfied that there was more than a sufficient basis for an award of aggravated damages.

IN ISSUE
• Whether the defendant made defamatory statements about the plaintiff when calling him a paedophile
• Whether the defence of triviality applies
• The appropriate amount of damages and whether such damages should include aggravated damages

DELIVERED ON 8 November 2011
READ MORE click here
Nowak v Putland
[2011] QDC 259

because the conduct of the defence was unjustifiable, improper or lacking in bona fides. The court took into account the conduct of the defence of the case, in particular, the defendant’s refusal to concede that it was a serious allegation to call someone a paedophile, his denial that any damage had been caused to the plaintiff’s reputation and his contention that the statements that the plaintiff was a paedophile were not capable of meaning that the plaintiff was a paedophile.

The court assessed compensatory damages at $80,000 and aggravated damages at $70,000 and awarded judgment for the plaintiff for $150,000 plus interest and costs.
The Facts

The plaintiff sued for damages for personal injuries sustained in an accident on 17 August 2005 while employed by the first defendant at a zinc mine in north-west Queensland. Liability was admitted between the defendants and all contribution proceedings resolved. The issue in dispute was the quantum of damages recoverable by the plaintiff.

The plaintiff’s injury occurred while he was driving a large haul truck with tyres “twice as tall as him”. The plaintiff had reversed the truck in to be loaded by a digger machine. The digger operator dumped a 56 tonne rock into the haul truck, resulting in the plaintiff being violently jolted in the cab and winded. The plaintiff stated that he felt a sharp pain in his lower back.

The plaintiff claimed that apart from an episode in 1985, he had suffered no symptoms in his lower back until the incident concerned in 2005. Additionally (and in the years prior to the accident), the plaintiff had played professional rugby league football from the ages of 19 to 34 with a wide variety of clubs. The plaintiff gave evidence that since the incident, he suffered persistent back pain which significantly restricted him. He ceased employment with his then current employer and several subsequent employers because of the back pain. The defendants attacked the plaintiff’s credit, particularly in relation to the histories he provided to medical practitioners, his history of fighting and his abuse of alcohol.

The Decision at Trial

The main issues were the awards for past and future economic loss. The trial judge found that the chances of the plaintiff continuing in his current employment (or similar) were probable but not overwhelming. The trial judge also found there was a very small chance that the plaintiff would, absent the accident, have obtained a promotion.

The trial judge balanced the potential earnings for the plaintiff in the same position and with the promotion and discounted that amount to 80%. The trial judge considered that “the difficulty is that all three doctors reported on the assumption that the worker did not have any symptoms between 1985 and the accident. I have found to the contrary”.

The trial judge was of the view that the plaintiff’s post-accident impairment attributable to the pre-existing back disease was greater than the doctors considered. It was likely that, by the time around the accident, the plaintiff would have begun to suffer restrictions in certain work.

The trial judge determined to award as a component for the loss of earning capacity in the future a sum of $200,000 reflecting the notional loss of earning capacity for a notional working life to age 67 at approximately $300 net per week. $50,000 general damages was awarded.

Quantum was ultimately allowed at $367,449.13.

The Decision On Appeal

The decision has been appealed but has not yet been heard.
The Facts

On 29 May 2000, the plaintiffs obtained development approval from the defendant, Port Stephens Council, to build a residential apartment block (Milan Towers) in Nelson Bay. In May 2002, demolition work commenced on the site, with construction commencing in September 2002. As a result of an injunction obtained by an adjoining property owner, construction was ceased for approximately 18 months from March 2003 until December 2004.

At the same time the defendant was dealing with the plaintiffs’ development, it granted development approval for the construction of several other apartment blocks on properties adjacent to Milan Towers. The plaintiffs, concerned that these apartment blocks would have a detrimental effect on Milan Towers, particularly in terms of blocked views and other design issues, formally lodged a modification application with the defendant under s96 of the Environmental Planning and Assessment Act 1979 (EPA Act) in February 2006, requesting to increase the height and number of units of the apartment block.

The plaintiffs’ application was reviewed by an assessment officer who formed a prima facie view that the application should be refused. Prior to issuing a Notice of Intent to Refuse however, the assessment officer obtained legal advice about whether the defendant had good reason to refuse the modification application on its merits between February 2006 and July 2007, although a predetermined view had been reached that it should be refused. The plaintiffs sued the defendant for misfeasance in public office or alternatively, negligence. They claimed that, but for the conduct of the defendant, they would have built and sold apartments at the site with resulting profits between $2.2 million and $3.7 million.

The Decision

The claim for misfeasance in public office was dismissed. The court accepted that the assessment officer was a public officer who owed a public duty to process the application in accordance with the statutory scheme. The plaintiffs failed, however, to establish that the assessment officer had breached that duty with the intention to cause harm to the plaintiffs in processing the application between February 2006 and July 2007. The court found that the assessment officer had acted appropriately in processing the application, and that a substantial cause for the delay in the determination of the application was the constant amendment of plans submitted by the plaintiffs.

The negligence claim was also dismissed. The court rejected the plaintiffs’ argument that they were owed a duty of care by the defendant because of their vulnerability. In reaching this conclusion, the court placed significant weight on the fact that the plaintiffs had an avenue of appeal under s96(6) of the EPA Act which they did not seek to utilize. This right of appeal became available on 27 March 2006, as the defendant had failed to determine the application within 40 days. The availability of an appeal meant that the plaintiffs were not vulnerable as they were able to protect themselves from the consequences of what they contended was the defendant’s want of reasonable care.

The court also found that had the plaintiff succeeded in proving negligence or misfeasance, the prospects of realising a profit were so low that there was not a loss of a chance.
The Facts
The appellant was injured in a motor vehicle accident on 28 August 2000 when his stationary vehicle was rear ended by the respondent at high speed on the Castlereagh Highway, near Lithgow. The appellant suffered from an underlying progressive neurological condition which pre-dated the accident.

The Decision at Trial
The trial judge noted that the appellant failed to accurately report his pre-accident history to some of the doctors who assessed his condition after the incident. The trial judge concluded that the appellant had a significant vulnerability before the accident which had deteriorated due to the natural progression of an underlying neurological condition not related to the accident.

The trial judge held that the accident had exacerbated the appellant’s pre-existing cervical spondylosis. The trial judge rejected the submission that the accident caused myelomalacia on the ground that a report obtained from Dr Presgrave was affected by a fundamental error as it was not consistent with his earlier reports. The trial judge accepted Dr Farey’s opinion that the appellant’s underlying condition would have eventually progressed to the point that he would be unfit to work. The trial judge concluded that the appellant’s condition had deteriorated by November 2008 when it had overwhelmed the consequences of the motor vehicle accident.

The trial judge awarded damages of $126,512.30 in respect of the injuries, allowing damages for past economic loss and past care from the date of the accident until November 2008 when the consequences of the accident had been subsumed.

The Issues on Appeal
The issue on appeal was whether there was an error in the trial judge’s finding that the consequences of the pre-existing would have subsumed the consequences of the accident and whether the trial judge was correct to find no causal relationship between the accident and further degeneration of the spinal condition.

The Decision on Appeal
The Court of Appeal accepted that the accident aggravated the appellant’s pre-existing cervical spondylosis. At the time of the accident, the spinal cord compression had not developed to the point where myelomalacia had been observed, although the appellant’s symptoms increased significantly after the incident over the period from 2000 to 2008.

In allowing the appeal, the Court of Appeal held that the trial judge erred in finding that the accident did not materially contribute to the deterioration of the appellant’s degenerative disc condition. The medical evidence on a whole, was inconsistent with the trial judge’s findings and the trial judge was not justified in rejecting Dr Presgrave’s report. The Court of Appeal held that the opinion of the appellant’s treating doctor prior to the accident must be given considerable weight.

The Court of Appeal also established that the trial judge erred in finding that the consequences of the accident had been subsumed by the progression of the appellant’s degenerative condition. It relied on the principles in Purkess v Crittenden [1965] HCA 34 and Malec v JC Hutton Pty Ltd [1990] HCA 20 in determining the burden of proof and...
distinction between the balance of possibilities with that of the balance of probabilities. The Court of Appeal concluded that the trial judge treated the progression of the degenerative condition as an event which actually occurred (assessed on the balance of probabilities), rather than as a hypothetical past situation (assessed by reference to possibilities and probabilities).

The Court of Appeal ordered that the appellant was entitled to an extra $17,500 in respect of past economic loss from November 2008 to the date of trial, and loss of future earning capacity with a reduction of 40% for vicissitudes to reflect an assessment that the appellant’s earning capacity would have been reduced by reason of the progression of his degenerative condition.
The Facts

The plaintiff was the comprehensive third party insurer of the defendant. On 8 June 2005 the defendant was driving a motor vehicle when he was involved in an accident with a vehicle driven by Mr Larrasquet. Mr Larrasquet and his passenger, Mr Brettes, suffered serious injuries and subsequently served notice of accident claim forms on the plaintiff. Both claims settled at the compulsory conference in the amount of $42,539.60 for Mr Larrasquet and $1,221,567.22 for Mr Brettes.

The plaintiff sought to recover the settlement amounts from the defendant pursuant to s58(3) of the MAIA which entitles an insurer to recover the amount if at the time of the accident the insured was unable to exercise effective control of the vehicle because of the consumption of alcohol or drugs. The defendant opposed the claim on the basis that the plaintiff could not demonstrate that the costs were reasonably attributable to the inability of the defendant to exercise effective control of his motor vehicle and further, that the costs of the subject claim were not reasonably incurred.

The Decision

The plaintiff argued that the collision was caused by the defendant being unable to exercise effective control over his vehicle which was evidenced by his driving while asleep or not alert and allowing his vehicle to cross to the wrong side of the road. The defendant argued that there was no evidence that the alcohol he had consumed had the effect of inducing sleep. The court rejected this argument and noted that there was ample expert evidence that the defendant’s level of intoxication meant he was not alert or aware of his vehicle’s position on the road.

The court noted that the defendant had pleaded guilty to a charge of dangerous driving in respect of the collision. As a result, the court had no hesitation in finding that the plaintiff was justified in concluding that the defendant was unable to control his vehicle because of the consumption of alcohol and that the defendant was entirely at fault.

The defendant contended that the settlement amount in respect of Mr Brettes’ claim was unreasonable. Specifically, the defendant argued that the amounts paid in respect of future earning capacity, out of pocket expenses and future care were unreasonable. The court accepted that the amount for future earning capacity was unreasonable because although the medical evidence was that Mr Brettes was unable to work in his former capacity as a waiter, he had in fact done so. The court held that on becoming aware of this discrepancy, the plaintiff should have made further inquiries. As a result, the cost of that part of the settlement relating to future earning capacity, was not reasonable.

Judgment was given for the plaintiff in the sum of $764,106.82, being $42,539.60 for the Larrasquet claim and $721,567.22 (being the settlement amount less the damages for future economic loss) for the Brettes claim.
The Facts

The respondent was the owner of a farm that was significantly damaged on Black Saturday, 7 February 2009. The fire, which was caused by the fall of the assembly at the top of a power pole to the ground, burnt approximately 2,346 hectares, 31 sheds, 47 other outbuildings, 160 kilometres of fencing, 280 sheep and various other machinery and equipment.

On the 24th day of trial, appellant’s agreement was reached over the liability to the respondent. However, some of the remaining issues dealt with at trial were appealed. Those issues related to the question of whether the respondent should be compensated for fire damage to farm fixtures and, if so, on what basis those damages should be assessed.

The Decision at Trial

The trial judge concluded that:

(a) In general, the basis of assessment of damages in respect of the loss of, or damage to, farm fixtures due to negligence is the reasonable commercial cost of repairing and/or reinstating the damaged fixtures;

(b) The fact that the fences and fixtures were repaired by the respondent himself does not preclude him from claiming for their damage; and

(c) The fact that the fences and fixtures were partly repaired by volunteers does not preclude the respondent claiming for their damage.

The Issues on Appeal

The overall ground of appeal was that the trial judge erred in holding that the method of assessment was the reasonable commercial cost of repairing and/or reinstating the damaged items and the trial judge should have rejected claims for the respondent’s own labour and volunteers’ labour.

The Decision on Appeal

The Court of Appeal dismissed the appeal.

In regards to the issue of the reasonable commercial cost of repair, the Court of Appeal found that the trial judge was correct to hold that:

(a) The measure of tortious damage to fixtures such as fencing, sheds and stockyards is the reasonable commercial cost of repairing and/or reinstating them;

(b) There is an exception where a reasonable substitute is available for a price significantly less than the cost of repair. In that instance the replacement cost is the measure of damages; and

(c) The underlying principle was that when goods are damaged by the negligence of another, the owner suffers immediate loss represented by the diminution in the value of the goods.

In regards to the remaining issue of whether the respondent could recover in respect of damage to fences and other fixtures that were repaired by volunteers, the Court of Appeal again agreed with the trial judge and the principle in Insurance Australia v HIH Casualty and General Insurance Limited (in liq) (2007) 18 VR 528 – that where an injured party has benefitted from the kindness of others not intended to relieve the wrongdoer of his or her obligation, then such benefits should be ignored in the assessment of damages.

IN ISSUE

- Whether damages recoverable where fixtures reinstated by plaintiff’s own labour or by labour of volunteers
- The appropriate measure of assessment of damages

DELIVERED ON 9 May 2012

READ MORE click here
The Facts

On 3 December 2007, the plaintiff fell at the entrance of commercial premises owned by the defendants and suffered a serious fracture injury to her left wrist which required surgery. At the time of the accident the plaintiff was 56 years of age and had worked as a registered nurse for the previous 40 years. The plaintiff was diagnosed with regional pain syndrome following removal of the surgical pins in January 2008 and that condition gradually resolved. However, she developed depression and anxiety and underwent psychological treatment and was placed on medication. The plaintiff alleged that she experienced pain and discomfort in her left shoulder following the accident but that it had resolved by the time of the trial.

The Decision at Trial

The trial judge accepted that the plaintiff had suffered a serious injury to her left wrist with psychological consequences as a result of the fall. The trial judge found that there was a real possibility that the plaintiff would need further surgery at some point in the future and that her left wrist would continue to worsen. No findings were made as to the cause of the left shoulder problems. The trial judge awarded damages of $173,707 which included amounts of $40,000 for non-economic loss (on the basis that the plaintiff’s injury was 26% of a most extreme case); $30,000 for economic loss and $20,000 for future domestic assistance.

The Issues on Appeal

The plaintiff appealed against the trial judge’s assessment of quantum. The plaintiff argued that the trial judge was in error in failing to take into account the prospect that future deterioration of her condition would result in the need for surgery. The plaintiff also argued that the trial judge should have found that her left shoulder condition was caused by the fall at the defendant’s premises and as a result failed to take into account an important part of her injuries even though she was experiencing no symptoms at the time of the trial.

The plaintiff also appealed against the trial judge’s assessment of past economic loss on the basis that insufficient reasons had been provided and the assessment was against the weight of the evidence.

The Decision on Appeal

The Court of Appeal noted that the principles to be applied when determining a challenge to an assessment of non-economic loss were set out in Basha v Vocational Capacity Centre Pty Ltd [2009] NSWCA 409. In essence, an appellate court will not interfere with the discretion exercised by a trial judge when assessing non-economic loss unless it can be demonstrated that the conclusion reached was manifestly wrong.

In this case, the plaintiff’s general practitioner was only prepared to say that there “may” have been a causal connection between the shoulder symptoms and the fall. The plaintiff’s treating orthopaedic surgeon, who was noted to have been “meticulous” in recording the plaintiff’s complaints, had no record of any history of shoulder pain following the accident. In any event, the Court of Appeal held that the shoulder injury was minor compared to her other disabilities. Consequently, the Court of Appeal held that the trial judge’s assessment of the plaintiff’s injuries as being 26% of a most extreme case was well within the range of assessments of non-economic loss.

The Court of Appeal allowed the plaintiff’s appeal against the assessment of damages for economic loss because the trial judge misunderstood the very little evidence presented in support of that part of the claim. The trial judge mistakenly took into account the weekly amount of long service leave the plaintiff received while she was off work. This was incorrect as those monies were paid not as a result of the accident but because of the plaintiff’s work entitlements generally.

The damages awarded in respect of future of economic loss and future domestic assistance were also increased slightly by the Court of Appeal.
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Consideration of what constitutes an apportionable claim.
The Facts

The court permitted substituted service of an application for criminal compensation via a newspaper advertisement. The advertisements were never placed.

The applicant’s solicitor communicated with the respondent on Facebook and provided a copy of the application, although without the supporting documents. There was an invitation to contact him or his firm for further information.

The applicant’s solicitor also then contacted the respondent later via mobile phone and explained the date, time and how he could find the courtroom etc. The respondent was also advised to seek legal advice.

The Decision

The court permitted substituted service of the application.

The court was satisfied that the respondent ‘received’ the application by a copy being sent to his Facebook page. The court was satisfied that the respondent knew as much as he wanted to know about the application.

In the interests of efficiency and not incurring further costs, service via Facebook was sufficient under r117 of the UCPR.
Anthony Hitchens v Zurich Australia Limited
[2011] NSWSC 1198

The Facts

The respondent, Anthony Hitchens, commenced proceedings against the appellant, Zurich, for failure to pay benefits under a policy of life insurance that came into effect on 1 December 2004.

Hitchens had injured his hand and sought the payment of benefits under the policy. Zurich commenced paying the benefits on 9 October 2007 but later wrote to Hitchens on 28 November 2008 indicating that it intended to cease making payments. Zurich held concerns about the accuracy of certain information that Hitchens had provided when entering into the policy. He also failed to provide further information requested by Zurich, which ceased making payments on 8 December 2008.

Hitchens commenced proceedings seeking a declaration determining the amounts due and not yet paid by Zurich under the policy, plus damages, interest and costs. He also alleged that Zurich’s failure to make payments in full amounted to a repudiation of the policy. Zurich filed its defence on 27 April 2010. In May and June 2010 it issued subpoenas for the production of Hitchens’ medical records. As a result of reviewing the records, which disclosed numerous attendances on various medical centres and hospitals prior to 20 November 2004 relating to several significant conditions, Zurich advised Hitchens that it was avoiding the policy under s29(2) of the ICA on the grounds of fraudulent non-disclosure. It also advised Hitchens that it would seek to amend its defence accordingly, and filed a Notice of Motion seeking leave to do this on 15 October 2010.

The amended defence alleged that Hitchens knew that his medical conditions were relevant to Zurich’s decision whether to accept the risk of insuring him and on what terms. The amended defence also alleged that Zurich would not have entered into the policy if it had been aware of the matters outlined in the amended defence and that Zurich had avoided the policy in accordance with s29(3) of the ICA or alternatively avoided it on the ground that the non-disclosure/misrepresentations were fraudulent.

Hitchens’ solicitor gave evidence that he was only able to confer with Hitchens in relation to Zurich’s letter of 28 November 2008 on 11 June 2009. However he did not take detailed instructions at that time because Zurich had not made a decision in relation to the claim. After the Notice of Motion was filed in October 2010, Hitchens’ solicitors met with his treating psychiatrist for the purpose of taking proper instructions. His solicitor formed the view that he was unable to give detailed and coherent responses to questions.

Hitchens’ treating psychiatrist’s evidence was that Hitchens had a severe post-traumatic stress disorder, severe major depressive disorder, frequent severe panic attacks, a severe pain disorder and a substance abuse disorder. He believed that Hitchens was not capable of providing instructions and that he was perhaps slightly more able to give instructions in June 2009. Hitchens’ GP thought that his mental state had deteriorated due to the accusations that he had been fraudulent.

The Decision at Trial

The court was not satisfied that if the allegation of fraud had been made in the defence in April 2010 it would have produced the same response in Hitchens. He also thought that if Hitchens proved that there had been an earlier determination of the contract as a result of repudiation by Zurich, the issue of avoidance would not arise and there was no chance of any multiplicity of proceedings.

The trial judge noted that he was required to...
exercise discretion as to whether the amendments should be granted and that one of the matters involved in the exercise was the question of prejudice to Hitchens. A consideration of all necessary factors led to the conclusion that he should refuse the application.

The Issues on Appeal

At the hearing of the appeal, Zurich sought leave to amend the grounds of its appeal to include a ground in relation to the concept of avoidance under s29 of the ICA and this leave was granted.

The other issues on appeal included whether the trial judge erred in finding that if the allegation of fraud had been made in the defence in April 2010, it would not have produced the same response in Hitchens; that Hitchens would suffer very real and extensive prejudice if the defence were amended and exercising his discretion with regard only to the prejudice to Hitchens at the time of the application; and failing to take into account the injustice to Zurich if leave to amend were not granted.

The Decision on Appeal

The Supreme Court considered that Hitchens’ decline had been gradual. He was aware of the contents of the letter of 28 November 2008, at least at a general level, and was still able to give comprehensible instructions. He declined further when the subpoenas were issued but was still able to confer in a rational, although distressed state. It was only when Zurich decided to take the formal step to make the claims in the proceedings that he declined into his present state. The Supreme Court was not satisfied that the trial judge’s findings were against the weight of the evidence.

However the Supreme Court was satisfied that the trial judge failed to give proper consideration to the degree of injustice that would be suffered by the ‘respective parties’ if leave to file the amended defence was refused.

The Supreme Court emphasised that the issue at this stage of the proceedings, was whether it was reasonably arguable that Zurich was entitled to avoid the policy irrespective of whether it was brought to an end prior to the purported avoidance.

The Supreme Court was satisfied on the proper construction of s29, read with the definition of ‘avoid’, that it was reasonably arguable that an insurer is not prohibited from avoiding a contract of insurance that has come to an end. It was satisfied that it was reasonably arguable that accrued rights and obligations under the terminated contract are amenable to avoidance under s29.

The trial judge’s finding that avoidance of the policy was not available where it had been earlier terminated had the consequence that he did not properly take into account the injustice to Zurich of not allowing it to defend the claim on the basis in the proposed proceeding. The determination of this issue was pivotal in the main proceedings and the dictates of justice required that it be decided. Zurich was granted leave to amend its defence.
The Facts

On 3 January 1989, the appellant was born and alleged that he suffers from cerebral palsy and spastic quadriplegia. The appellant instituted proceedings against his mother’s obstetrician (the first respondent) and the State of Queensland (the second respondent), claiming the respondents were negligent in relation to the care of his mother when giving birth. The respondents claim that the appellant suffers from a genetic condition.

The evidence indicated that the respondents destroyed some of the appellant’s medical records, including an EEG, as part of its document retention policy (given the length of time since the appellant’s birth). The appellant brought an application alleging the respondents deliberately destroyed the documents which would prejudice a fair trial.

The appellant’s medical records also included complex blood testing, the results of which contained various codes such as “AUSLAB” and various gelled images. The respondents provided an affidavit from the pathology company which explained that the AUSLAB codes referred to a computer system that performed the test and that no documents could in fact be produced. The gelled images could not be located and were most likely destroyed in accordance with the respondent’s document retention policy. The appellant’s application also sought production of documents in relation to the codes and missing gelled images.

The Decision on Application

The judge held that there was no evidence the documents had been destroyed other than innocently. Whilst the destroyed EEG scan was relevant to the issues raised on the pleadings, the trial judge considered the destruction of the EEG would not prejudice a fair trial as other medical information was available, including CT and MRI scans, which contained the same information.

The court considered the respondents’ explanation of the AUSLAB codes to be satisfactory and was content that the respondents undertook a thorough search for the gelled images.

The Decision on Appeal

The Court of Appeal upheld the court’s findings that the destroyed EEG and gelled images would not prejudice a fair trial as it was not crucial to the opinions of experts or to the determination of any medical issue in the case given there was an abundance of other evidence available. The appeal was dismissed.

IN ISSUE

• Prejudice to a fair trial in circumstances where documents had been destroyed

DELIVERED ON 21 October 2011

READ MORE

The Facts

In December 2008, Mr Rourke filed a claim for damages for lung cancer and asbestos related pleural disease he allegedly contracted as a consequence of his exposure to asbestos during his employment as a carpenter between 1967 and 1983. Mr Rourke died of lung cancer on 12 January 2009. On 12 June 2009, his estate assigned to WorkCover the cause of action against Amaca (the manufacturer of the asbestos sheeting used by Mr Rourke) in respect of that claim. In October 2009, WorkCover commenced proceedings against Amaca for damages sustained by Mr Rourke as a consequence of Amaca’s negligence. Prior to his death, WorkCover paid to Mr Rourke the amount of $550,351.50 by way of statutory compensation pursuant to the WCRA. An application was made pursuant to r483 of the UCPR for determination as a separate question whether the assignment of the claim for damages for personal injury was valid.

The Decision at Trial

WorkCover accepted that, traditionally, actions for damages for personal injuries have been considered to be personal actions which were incapable of assignment. However, WorkCover submitted that recent authority provided support for the conclusion that there can be a valid assignment of such a claim if the assignee has a genuine and substantial interest in the success of the litigation or a genuine commercial interest in its enforcement. Amaca argued that the law continued to prohibit the assignment of such causes of action and that, even if it was wrong on that point, WorkCover did not have the requisite genuine interest.

The court accepted WorkCover’s argument that a claim for damages for personal injury is capable of being validly assigned where the assignee has the requisite genuine interest. English and Australian case law established that causes of action in contract could be validly made where the assignee had the requisite interest and the court held there was no good reason why a distinction should be drawn in respect of the assignment of actions in tort. This was especially so where the assignment was of a cause of action for damages in both contract and tort based on the same facts.

However, the court agreed with Amaca that WorkCover did not have the requisite genuine interest. The court rejected WorkCover’s argument that the existence of the statutory indemnities in the WCRA supported its claim that it had a genuine and substantial interest in the success of Mr Rourke’s claim, or a genuine commercial interest in its enforcement. The court held that there must be an existing legitimate interest supporting the action, as opposed to the benefit obtained from the assignment. To be a genuine or substantial interest, there must be an interest which already exists and which receives ancillary support from the assignment. WorkCover’s interests did not satisfy that test. Its claim was not like a right of subrogation. WorkCover was given a statutory right of indemnity under the WCRA only in specified circumstances. Those circumstances were not satisfied in the case. WorkCover therefore had no pre-existing interest. It sought to create an interest by an assignment; such an interest did not satisfy the test of a genuine substantial or commercial interest.

The Decision on Appeal

The Court of Appeal allowed the appeal. The Court of Appeal held that WorkCover held the genuine commercial interest to allow for the assignment. The assignment was not such that WorkCover were acting against the interests of justice, or guilty of maintenance or champerty having regard to s207B(7) of the WCRA.

IN ISSUE

- Whether a claim for damages for personal injury is capable of assignment
- Whether the plaintiff had a genuine, substantial or commercial interest in taking the assignment

DELIVERED ON 29 November 2011

READ MORE  click here
The Facts

The defendant was the owner of an aircraft. In April 2006, the aircraft crashed at Bankstown Airport whilst being piloted on a test flight after having repairs. The pilot was killed, and part of the aircraft hit another aircraft which was owned by the plaintiff and standing on the ground at the airport. Damage was incurred to the plaintiff’s aircraft.

Both the plaintiff and the defendant called upon their insurance. The plaintiff’s insurer, a QBE company, indemnified the plaintiff and exercised its subrogation rights by making a claim against the defendant, which was handled by his insurer, Hemisphere.

After lengthy negotiations, an agreement was reached between the loss adjusters for each insurer. Two release documents were signed, one dealing with loss of use of the plaintiff’s aircraft and the other with the damage it sustained.

The loss of use claim was paid. However, the $73,408 for damage to the plaintiff’s aircraft was not paid by the defendant, and Hemisphere reportedly was not in a position to pay this sum. The plaintiff instituted proceedings against the defendant. The defendant filed an unhelpful defence.

The Decision on Appeal

The trial judge awarded summary judgment for $73,408 plus interest in favour of the plaintiff. Leave to appeal was granted on 27 May 2011.

The Issues on Appeal

The defendant did not dispute that, on the wording of the release, it constituted an agreement to which he was a party, under which $73,408 was payable to the QBE company at the plaintiff’s direction. The issue was whether Hemisphere had authority to enter into the release on the defendant’s behalf.

On the substantive issue, the plaintiff relied upon a clause in the defendant’s policy which gave Hemisphere authority to enter into the release on the defendant’s behalf.

The defendant submitted, however, that there was a question as to whether the clause applied to the settlement recorded in the damages’ release. Under the release, the defendant alone would have to pay the sum of $73,408. He would obtain a release, but so also would the estate of the pilot. The estate would pay nothing. If the pilot had been liable and covered under the same policy, the estate would have benefited at the defendant’s expense. If the pilot had not been covered under the same policy, it was submitted that the misuse of authority was all the greater.

The defendant alleged that in determining whether there had been a misuse of authority by his insurer it was material to consider whether he and the pilot had both incurred liability for the plaintiff’s damage.

The Court of Appeal held that the defendant’s allegations should be permitted to go to trial and the summary judgment should not have been granted. The appeal was allowed.

IN ISSUE

- Whether defendant was bound to pay a settlement sum in circumstances where defendant’s insurer settled claim against him
- Where policy provided an authority to settle
- Whether there was a misuse of authority

DELIVERED ON 2 December 2011

READ MORE
The Facts

In 2009, Mrs Stoddart was summoned by the Australian Crime Commission (ACC) to answer questions regarding alleged tax avoidance schemes run by her husband, Ewan Stoddart, who was a self-employed accountant. Mrs Stoddart refused to answer questions on the basis of an entitlement to the privilege of spousal incrimination. The Australian Crime Commission Act 2002 (Cth) ("the Act") did not mention such a privilege. The examination was adjourned and Mrs Stoddart commenced proceedings in the Federal Court seeking an injunction restraining the ACC from asking her questions relating to her husband and a declaration that the common law privilege or immunity against spousal incrimination existed and had not been abrogated by the Act.

The Decision at Trial

The primary judge dismissed Mrs Stoddart’s application holding that spousal privilege existed at common law but that it was abrogated by the Act. On appeal, the Full Court of the Federal Court granted a declaration that the common law privilege against spousal incrimination existed and had not been abrogated.

The Issues on Appeal

The ACC submitted that the Federal Court erred in following earlier decisions recognising common law privilege against spousal incrimination and also in holding that s30 of the Act abrogated the privilege.

The Decision on Appeal

Following an extensive review of historical imperative for this type of privilege, and of the relevant case law, the High Court held that the privilege against spousal incrimination does not exist at common law. It was therefore not necessary to consider whether the Act abrogated spousal privilege.

The High Court held that Mrs Stoddart was a competent witness to be examined by the ACC and that she was not entitled to claim spousal privilege in answer to that obligation.
PROCEDURE

Miscellaneous

Mothership Music Pty Ltd v Darren Ayre (t/as VIP Entertainment & Concepts Pty Ltd) and Flo Rida (also known as Tramar Dillar)
[2012] NSWDC 42

The Facts

The plaintiff commenced proceedings against the defendants for damages for breach of contract in respect of the second defendant’s non-appearance at a music concert in Newcastle on 22 October 2011. The defendants left the jurisdiction prior to service of the proceedings.

The plaintiff brought an application for an order for substituted service against the second defendant of orders made by the court on 13 April 2012 regarding freezing of assets and other matters.

The Decision

The court relied on a decision of the New South Wales Supreme Court, Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet AG [2002] NSWSC 727, where an order for substituted service was also made in circumstances where the defendant left the jurisdiction. The court noted that if an order for substituted service was made, there was every likelihood that on the return date there would be representation to enable argument to be heard and as a result, there would be no prejudice to either party.

As to the form of substituted service, the court noted that in cases in both the ACT Supreme Court and the Federal Magistrates Court, orders had been made for substituted service via Facebook. The court held that the international reach of Facebook was well known. The court also noted that service by email is not controversial and had been ordered in several cases by various courts in Australia and New Zealand.

IN ISSUE

• Whether substituted service can be ordered where the defendants leave the jurisdiction

DEVELOPED ON 18 April 2012

READ MORE  

[2012] NSWDC 42
Mothership Music Pty Ltd v Darren Ayre (t/as VIP Entertainment & Concepts Pty Ltd) and Flo Rida (also known as Tramar Dillar)
The Facts
In March 2005, the applicant commenced proceedings against Dr George Quittner for failure to diagnose and properly treat a Hepatitis C infection. The applicant alleged that as a result of that failure, he developed a type of non Hodgkin’s lymphoma. The applicant had been a patient of Dr Quittner from the early 1990’s until 2004. He had a lengthy and complicated medical history prior to 2001 when he consulted Dr Waugh, a physician and nephrologist, and Dr Barr, a gastroenterologist (the respondents).

The applicant filed a Notice of Motion in April 2009 seeking an extension of the limitation period in which to sue the respondents. An Amended Notice of Motion was filed in September 2010 seeking orders for an extension of the limitation period against the respondents under the provisions of s 60C, s 60E, and/or s 60 G and s 60I of the Limitation Act 1969 (NSW) (the Act).

The Decision
The court dismissed the Amended Notice of Motion. The court held that the evidence provided no proper excuse for the very lengthy delay that occurred before the application was made. The evidence also established that the applicant had sufficient knowledge of the factual matters he intended to rely on in support of the claims against the respondents for as long as 4-5 years before the application for an extension of time was made. The claim which the applicant intended to make against the respondents was essentially the same as the claim he had already made against Dr Quittner. It was clear from the evidence that the reason the applicant wanted to bring a claim against the respondents was due to concern that recovery of any judgment against Dr Quittner may be complicated because he was uninsured and had no assets.

The court also noted that the evidence established that the applicant suffered from lymphoma before either of the respondents were consulted. In those circumstances the court was not satisfied that the applicant had any cause of action, or that either of the respondents was under a duty of care or in breach of any duty.

As a consequence, the court determined that it would not be just and reasonable to extend the limitation period in respect of either respondent.
The Facts

The applicant alleged that on 23 December 2005 she was working at the first respondent’s hardware store when she was required to lift approximately 20 x 23kg drums of paint from the floor, twist around to place them on a stool, mix in tint and then replace the drums on the floor. The applicant swore by affidavit that in the course of doing this work, her back became “sorer and sorer” and by the next day she could hardly move. The applicant received treatment in early 2006, including a CT scan that imaged a disc protrusion at L5/S1, of which she was not informed (possibly because her doctor had failed to keep proper records).

She continued working at the hardware store until 2008, at which time she found lighter work until February 2010. By that time, the sciatic pain in her legs had increased markedly and she went back to her doctor for further medical assistance. On 23 September 2010, her specialist (who 6 months earlier had been dismissive) recommended surgery and in early 2011 she sought legal advice for the first time.

An originating application was filed in August 2011 for leave to proceed pursuant to the WCRA and for an extension of the limitation period.

The 3 newly discovered factors of a decisive nature relied upon by the applicant in the limitation extension application were the causal contribution of the work, the extent of her injury and the consequences thereof.

The Decision

Notwithstanding that the court was satisfied that the applicant had sufficiently pursued investigating her condition and it was only its escalation that caused her to become aware of the facts that were now so evident, the court dismissed the application on the basis that the applicant had failed to prove that there was a cause of action in negligence.

In this regard, the court stated that the applicant had failed to advance any evidence that the repetitive movement of a 20kg – 24kg weight in the manner that she adopted on the day in question involved forces that were liable to injure the spine of a person of normal fortitude. It was not enough that other plaintiffs had succeeded in cases involving lesser weight. Each case must be proved.

It followed that the late discovered material facts on which the applicant now relied, could not be proved to have been “decisive” as her new-found recognition of the causal link and the extent and consequence of the injury could only gain that quality if based on expert medical opinion which appeared nowhere in the material.
The Facts

On 1 April 2009 an article in the Cairns Post caught the attention of 4 women (Sharp, Byfield, McKeown and Livett) who had undergone plastic surgery procedures in 2003, 2004, 2005 and 2006 with a Cairns surgeon. For each of the women, the article was said to be the catalyst for making enquiries as to whether they had a right of action against the surgeon.

By the time each of the women obtained legal advice to commence proceedings the statutory 3 year limitation period prescribed under s31 of the LAA had passed.

Each woman made applications to extend the limitation period pursuant to the LAA.

Sharp

On 22 August 2003 at the Cairns Day Surgery, the applicant underwent a bilateral breast augmentation. She alleged post surgical complications within 6 months with the implant moving downwards. On 20 June 2006 corrective surgery was undertaken and the left implant was replaced. Her limitation period expired on 22 August 2006. On 1 April 2009, the applicant read the Cairns Post article. On 26 May 2009, the applicant instructed lawyers in order to investigate the matter and a report from Dr Marshall was obtained. Dr Marshall concluded that “[t]here was a significant risk of an unsatisfactory outcome and this should have been explained to...” the applicant.

The applicant filed her claim on 11 March 2010 (3 years and 7 months after the expiry of the limitation period).

Dr Marshall’s evidence which was obtained on 20 May 2010, suggested that the advice and treatment of the respondent fell below the standard expected of a competent and skilled surgeon.

Byfield

In April 2006, the applicant underwent surgery to remove and replace breast implants. She sustained post surgical complications of ripples in her breast implants and bruising at the drain site. In the weeks after the Cairns Post article, she sought legal advice and subsequently obtained a report from an expert who concluded that the treatment was below the standard to be expected of a reasonably competent surgeon, which included a failure to warn the applicant that because of her low body fat she was at a particularly high risk of an adverse outcome.

Proceedings were filed 11 months after the expiration of her limitation period.

Livett

The applicant underwent surgery for breast augmentation in August 2004. She sustained infections and ultimately underwent further surgery, and in April 2005 she was suffering from a significant infection and came under the care of other doctors who were critical of her earlier treatment. She underwent further surgical intervention. The applicant sought legal advice after reading the Cairns Post article. Her solicitors obtained a medical report which said the advice and treatment she had received in 2004 was below the standard to be reasonably expected. The applicant issued proceedings on 11 March 2010.

McKeown

The applicant underwent surgery for a breast reduction procedure in December 2005. Infection followed which caused scarring. On 1 April 2009 the applicant read the Cairns Post article and instructed solicitors on 5 May 2009. Proceedings were issued on

IN ISSUE

• Four applications to extend limitation periods in which to commence actions against a doctor in a medical negligence matter
• One application was successful with three being unsuccessful

DELIVERED ON 25 August 2011

READ MORE Sharp

READ MORE Byfield

READ MORE McKeown

READ MORE Livett
11 March 2010 (1 year and 3 months following expiry of her limitation period). On 5 May 2010, she obtained a report from an expert who concluded that there had been a failure to warn of the risks of infection, scarring and loss of sensation.

The Decision

Applications to extend the limitation period were brought in each of the 4 cases. Three failed and 1 succeeded.

Section 31(2) of the LAA permits a court to extend a limitation period if “it appears to the court –

(a) that a material fact of a decisive character relating to the right of action was not within the means and knowledge of the applicant until a date after the commencement of the year last proceeding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation”.

Other critical elements to succeed are:

1. Evidence which goes to establishing a right of action; and

2. Absence of prejudice to the defendant caused by the delay.

If the criteria is met, then the court may extend the limitation period for 1 year after that date.

Relevantly for medical negligence cases, the case of Dick v University of Queensland [1979] Qd R 469 was endorsed. In that case it was considered that a patient discovering that his or her medical practitioner had performed at a standard below that to the reasonably expected outcome would ordinarily be a “material fact of a decisive character”.

Sharp – applicant unsuccessful

The applicant was unsuccessful. The court concluded that the applicant had not established the two limbs of s31(2) of the LAA. The court found that the applicant had been “...given appropriate warnings and was aware of the potential “complications and risks”...” of the surgery prior to it being performed. As a result there was no evidence that there was a right of action based on this alleged failure to warn where there was in fact evidence to the contrary.

Byfield – applicant successful

The applicant was successful in having her limitation period extended. The court accepted that the discovery of the surgeon’s apparent breach as set out in the report was sufficient to be a material fact of a decisive character. However it was found by the court that the failings identified in the expert report were risks that were in fact warned of. Therefore there was no basis to extend the limitation period. There was no evidence to establish that the applicant had a cause of action against the surgeon.

Livett – applicant unsuccessful

The applicant was unsuccessful because it was found that she knew of all the relevant physical matters and the absence of warnings well before her limitation period expired. She had been told as much by various treating doctors. Furthermore, the surgeon had previously apologised to her and revealed that she had contacted her medical indemnity insurer. The surgeon also paid for the applicant’s surgery.

McKeown – applicant unsuccessful

The expert report was relied upon as the material fact of a decisive character. However it was found by the court that the failings identified in the expert report were risks that were in fact warned of. Therefore there was no basis to extend the limitation period. There was no evidence to establish that the applicant had a cause of action against the surgeon.
The Facts

The plaintiff was a student at Serviceton State School from 1979 to 1985. In 1983 and 1984, one of the teachers at the school, Alain Francois, sexually abused the plaintiff. In July 1985 the plaintiff informed his parents of Francois’ conduct and Francois was subsequently charged, convicted and imprisoned for indecent dealing.

In November 2009, the plaintiff filed a statement of claim claiming damages for the negligence of the defendant school for failing to take all reasonable precautions for the plaintiff’s safety and for exposing the plaintiff to a risk of injury of which the defendant knew or ought to have known.

The defendant pleaded that the action was statute barred and the plaintiff brought an application for an extension of the limitation period.

The Decision

The plaintiff argued that the material fact of a decisive character (that when Francois began teaching at Serviceton the school was aware of sexual misconduct allegations against him) was not within his means of knowledge until after 27 November 2008. The plaintiff alleged that it was only during a conversation with his brother in December 2008, that he learned that the school had notice of prior allegations against Francois. At this point, the plaintiff became very angry that the school had known about Francois being a possible danger but had allowed him to be left alone with him.

The plaintiff conceded that he had advised a doctor in March 2008 that he was contemplating a claim but said that he intended to claim against Francois personally. After he became aware that the school had notice of the prior allegations against Francois, the plaintiff decided to investigate a claim against the school.

The court accepted the plaintiff’s evidence and held that a reasonable person in his position would focus on Francois’ responsibility for his conduct and that there was no reason for the plaintiff to investigate any responsibility on the part of the defendant until after December 2008 when he received information of prior knowledge of alleged sexual misconduct. The court was therefore satisfied that the material fact of a decisive character was not within the plaintiff’s means before December 2008.

However, the court refused to exercise its discretion to grant an extension of time because the evidence established that, while there were witnesses and documents available relating to Francois’ sexual misconduct, there were almost no documents and no living witnesses on the defendant’s failure to properly supervise Francois and take other action to ensure the safety of the students. The school’s and district inspector’s reports of the prior alleged incidents were unable to be located, the relevant school principals were dead or presumed to be dead and the then regional director of the relevant region had no recollection of the matter.

In those circumstances, the court held that it would be impossible to have a fair trial and refused to exercise its discretion to grant an extension of time.

IN ISSUE

• Whether the material fact of a decisive character was within the plaintiff’s means of knowledge before the relevant date
• Whether the court should exercise its discretion to grant an extension of time

DELIVERED ON 7 October 2011
READ MORE click here
The Facts

The 48 year old applicant injured her right shoulder on 18 November 2005 whilst working as a gaming room co-ordinator at the Bribie Island Hotel. She was diagnosed as having sustained supraspinatus tendon strain and attended physiotherapy for many months. Dr Ryan, the applicant’s treating orthopaedic surgeon, diagnosed acute AC joint injury in March 2006, however believed the symptoms would settle. The applicant underwent 2 unsuccessful steroid injections. The applicant also attended upon Dr Kelly Macgroarty and Dr Dodsworth, orthopaedic surgeons. Dr Dodsworth diagnosed rotator cuff tendonitis in the right shoulder which he considered would take approximately 1 year to settle (to November 2006).

The applicant was on light duties for 12 months before moving to an administrative position in December 2006.

In late 2009/early 2010 the applicant reported experiencing increased pain and, in July 2010, Dr Langley recommended surgery. The applicant filed an application pursuant to s31(2) of the LAA seeking leave to commence proceedings out of time against the respondent. The applicant argued that this was the material fact of a decisive character. She further argued she was not absent from work due to the injury following February 2006 and had previously been advised by 2 orthopaedic surgeons that her symptoms would settle.

The Decision

It was accepted in cross-examination by the applicant that during the 4 year period since the incident, she had experienced pain, limitations in movement and lack of strength. She was unable to undertake domestic activities and work tasks. It was also accepted by the applicant that she should have been concerned if her symptoms had not settled within the period suggested by Dr Dodsworth (by November 2006).

The court held that Dr Langley had confirmed that the applicant had a permanent injury due to constant symptoms, which she had known since at least 2007.

There was insufficient evidence to establish that the applicant’s symptoms had deteriorated in December 2009 to the point where she was unable to work in December 2010. The applicant was aware that her working capacity had been affected as she changed positions to a lighter role in December 2009.

Ultimately the court held that the applicant had sufficient knowledge to commence an action since at least late 2006/early 2007, had she taken appropriate advice. The application was dismissed.
The Facts

The respondent was involved in a motor vehicle accident on 29 March 2005 when two items dropped off the back of a vehicle ahead of her in traffic. Although the identity of the driver at fault was discovered by the police prior to May 2005, the respondent was unaware of the identity of the driver at fault or the existence of the Nominal Defendant prior to consulting solicitors in August 2010. The respondent was also unaware of the nature and severity of her accident-induced neck injury until a flare up of her symptoms in August 2010. The respondent relied on these 2 matters to justify an extension of time under s31 of the LAA.

The Decision at Trial

The court found that these 2 matters amounted to material facts of a decisive nature under s31(2) of the LAA and an extension of time was granted.

The Issues on Appeal

The appellant submitted that the court applied the wrong test when approaching the exercise of discretion under s31 of the LAA, or alternatively, misapplied the facts to the correct test. It was submitted that the court erred in finding that reliance by the respondent on advice from an unidentified police officer, who advised her that she would be contacted if the other driver was identified, was not sufficient for the court to hold that the identity of the other vehicle was not within the respondent’s means of knowledge within the limitation period.

The Decision on Appeal

The Court of Appeal held that it was open on the evidence for the trial judge to conclude that it would have been unreasonable to expect the respondent to have made further inquiries prior to the flare-up in her symptoms in August 2010.

Further, the Court of Appeal found that there was nothing to suggest that it was unreasonable for the respondent to accept the information given to her by the unidentified policeman that she would be contacted by the police if and when the other vehicle was identified.

The appeal was dismissed.
The Facts

Mrs Algar (“the plaintiff”), a 53 year old woman, attended BreastScreen Queensland (“the defendant”) on three separate occasions between December 2007 and September 2009. On each occasion she was advised that lumps in her right breast were dense breast tissue. The plaintiff subsequently developed breast cancer, which was terminal. She argued that the advice she was given by the defendant was negligent as they failed to diagnose her condition in a timely manner.

The plaintiff made an application to the Supreme Court of Queensland for disclosure of documents from the defendant pursuant to its obligations under the PIPA. The plaintiff submitted that a disclosed file note indicated that the defendant’s lawyer had participated in a conference with Professor Osbourne, an employee of the defendant, during which he gave expert evidence. The plaintiff contended that any opinion expressed by Professor Osbourne was properly characterised as expert opinion. Accordingly, it was required to be disclosed under either s20(3) or 27 of PIPA.

The defendant submitted that the purpose of the conference was to obtain instructions and provide legal advice and that they did not intend to obtain an expert report from Professor Osbourne.

The Decision

The court held that if an expert’s report is to be obtained for the purposes of pre-litigation procedures, it is required to be disclosed under s20(3) of PIPA. This includes any communications associated with the provision of the report, including file notes of conversations with the expert.

However, the court held that Professor Osbourne was not being called as a witness of fact and he was not going to be called as an expert to give evidence at trial. Therefore, the file note was protected by legal professional privilege and was not required to be disclosed.

As the purpose of the conference was to obtain instructions and provide legal advice, s30 of PIPA applied and the file note was subject to legal professional privilege.

IN ISSUE
- Disclosure of ‘expert opinions’ under ss 20(3) or 27 of PIPA.

DELIVERED ON 21 July 2011

READ MORE
The Facts

Ms Felgate underwent laparoscopic surgery on 14 November 2007. Dr Tucker was her anaesthetist. Ms Felgate experienced a phenomenon termed ‘surgical awareness’ in which she was conscious but paralysed for the entire duration of the surgery.

Ms Felgate made a claim under the PIPA against Dr Tucker. At the compulsory conference, Dr Tucker produced a document entitled ‘Interpretation of anaesthetic record’ (‘the document’). The document was different to the hospital record and indicated to Ms Felgate that there was a statement by Dr Tucker which should be disclosed. Dr Tucker claimed the document was subject to legal professional privilege.

The Decision on Application

Ms Felgate’s application to the Supreme Court of Queensland for disclosure of the statement was dismissed and she appealed this decision.

The Issues on Appeal

The main issues before the Court of Appeal were whether the statement was required to be disclosed under the PIPA and if so, was the statement otherwise subject to professional privilege? If so, was it required to be disclosed under s30(2) of PIPA? If the statement was not required to be disclosed, did Dr Tucker waive privilege when he produced the document at the compulsory conference?

The Decision on Appeal

The Court of Appeal factually distinguished the case from the cases of Watkins v State of Queensland, Allen v State of Queensland and James v WorkCover Queensland. Those decisions all concerned documents relating to communications with third parties, as opposed to communications between clients and their lawyers.

The Court of Appeal accepted that the statement taken by Dr Tucker’s lawyers was “to provide him with legal advice about any anticipated judicial proceeding.” As the PIPA pre-court procedures were an essential part of future litigation and the dominant purpose of the statement was in contemplation of future litigation, the statement was privileged.

The Court of Appeal held that it was well established that privilege cannot be abrogated by legislation without express intention. Dr Tucker’s statements were therefore privileged, unless they were ‘reports’ which are required to be disclosed under s30(2) of PIPA. The Court of Appeal was not persuaded that ‘reports’ included notes or recordings of statements of clients to their legal representatives.

The Court of Appeal also held that Dr Tucker did not waive privilege when he produced the document at the compulsory conference. Ms Felgate failed to establish that the document contained information which was in addition to the hospital records and that its production at the conference in any way waived privilege over the statement.
The Facts

The plaintiff was injured at work while working for a labour hire company which had hired his labour to a company at whose premises the injury occurred. The plaintiff commenced one set of proceedings against his employer under the WCRA and, on the same day, a separate set of proceedings against the company which was the occupier of the premises where the accident occurred under PIPA.

The employer defendant brought an application to consolidate the proceedings, arguing that the commencement of 2 actions was unnecessary.

The Decision

The court dismissed the employer defendant’s application for consolidation and ordered instead that the 2 proceedings be heard together with the evidence led to be evidence in both proceedings.

The court agreed that ordinarily, having 2 actions when 1 will do results in additional costs and work which is unnecessary and inefficient.

However, the court was concerned that the 2 statutes (WCRA and PIPA) in each claim have a legislative regime restricting the orders which can be made in relation to costs. The WCRA is more prescriptive than PIPA and there is potentially a conflict between the PIPA provisions and the WCRA provisions, because the WCRA attempts, in certain circumstances, to regulate the costs regime between the plaintiff and the non-employer defendant.

As a result of that potential conflict, the court took the view that consolidation of the proceedings might disadvantage the plaintiff. The court therefore ordered that the 2 sets of proceedings be heard together.

IN ISSUE

- Whether appropriate to consolidate separate actions under WCRA and PIPA

DELIVERED ON 5 October 2011

READ MORE
The Facts

The respondent was a 9 year old boy with multiple congenital problems, including a heart abnormality. The appellant was the State of Queensland, which is responsible for the Prince Charles Hospital (PCH). On 23 December 2003, the respondent was undergoing a study in relation to his heart, following which he developed a complete heart block and suffered severe brain damage.

In 2010, the respondent brought a claim for compensation against the appellant pursuant to PIPA. The respondent's solicitors sought an order that the appellant disclose 2 file notes taken by the PCH's solicitors following discussions with doctors involved in the respondent’s treatment, and also a written statement prepared by a doctor at the request of the PCH’s solicitor.

The Decision on Application

The issues for determination were whether the documents were protected by legal professional privilege and if so, whether they had to be disclosed pursuant to s30 (2) of PIPA because they were “investigative reports”.

The judge found that the documents came into existence for the dominant purpose of anticipated litigation. However, they were investigative reports and therefore fell within the exceptions to privileged documents and were required to be disclosed.

The Issues on Appeal

The appellant appealed and argued that the trial judge erred in finding that the documents were “investigative reports”. The appellant argued that the rule of statutory construction (that provisions are not to be construed as abrogating important common law rights, privileges, or immunities, including legal professional privilege, in the absence of clear words or necessary implication), meant that “investigative reports” should not be given a broad meaning.

The Decision on Appeal

The Court of Appeal did not accept that the scope of a provision abrogating legal professional privilege should necessarily be read narrowly, but nevertheless reviewed whether the documents could be characterised as investigative or medical reports.

Justices White and Fryberg agreed that, contrary to the application judge’s finding, the documents were not investigative reports. However, they found that the statement by the doctor was a medical report within the meaning of s30(2). It was further concluded that the 2 file notes could not be described as reports let alone investigative reports. The Court of Appeal ordered that the doctor’s statement be disclosed, but not the file notes, which were subject to privilege.

Justice Fraser dissented in part. He held that the term “medical reports” set out in s30(2) of PIPA does not include reports about a medical incident which relates to liability. The document prepared by the doctor fell within this category. He concluded that the file notes did not constitute “medical reports” for the same reason and because they did not constitute “reports”.

As none of the documents constituted a “medical report” he concluded disclosure of the file notes and the statement of the doctor was not required.
The Facts

The respondent allegedly sustained an ankle injury on 5 June 2008 in the course of his employment as a security officer at the Cultural Centre when he stepped on a protrusion at the site. The respondent was employed by the State of Queensland acting through the Department of Public Works in his capacity as a security officer. The Cultural Centre was owned and controlled by the State of Queensland acting as Arts Qld.

The respondent pursued a statutory WorkCover Queensland claim and was assessed as having a 7% whole person impairment. When given the election to receive a lump sum payment or commence a common law worker’s compensation claim, the respondent elected to receive the lump sum, disentitling him to worker’s compensation common law damages.

The respondent subsequently commenced a claim pursuant to the PIPA against the State of Queensland as the occupier of the Cultural Centre.

The appellant sought a declaration from the court that PIPA did not apply and that the respondent was prevented from bringing a claim for common law damages as he had elected to receive a lump sum pursuant to s239(2) of the WCRA.

The Issues on Appeal

The appellant submitted that there was no distinction between the entities or the claims.

The Decision on Appeal

The Court of Appeal accepted the appellant’s submissions and held that Arts Qld was the same entity as the State of Queensland. It made reference to provisions of the Public Service Act 1996 and held that the respondent was employed by the State of Queensland and not the Department of Public Works. Therefore, the claim under PIPA was the same as the claim that had been brought under the WCRA.

The Court of Appeal went on to say that “occupier’s liability” was no longer a discrete basis of liability. The respondent had a right to damages against his employer for negligence, “whatever might be the basis for that negligence, whether it be as employer, occupier or neighbour.”

The Court of Appeal therefore held that the respondent had already received damages for his claim under the WCRA and was prevented from bringing a claim arising from the same cause of action under PIPA.
The Facts

On 24 August 2004, Mr Martens (the appellant) was charged with two criminal offences under s 50BA of the Crimes Act 1914 (Cth). The appellant was tried and convicted of one of the charges. Subsequently, the Court of Appeal allowed an appeal and quashed the conviction on a reference by the Federal Attorney-General pursuant to s 672A of the Criminal Code 1899 (Qld). The second charge was withdrawn.

On 29 November 2010, the appellant commenced proceedings in the Queensland Supreme Court against the first defendant (a member of the Australian Federal Police (AFP)) and the second defendant (the Commonwealth of Australia). The claim arose out of alleged deficiencies in the AFP investigation. The appellant pleaded the following causes of action: conspiracy to pervert the course of justice; malicious prosecution; misfeasance in public office; breach of statutory duty; defamation; breach of international obligations to the sovereign state of PNG; negligence and perjury.

He claimed that pursuant to s 64B of the Australian Federal Police Act 1979 (Cth) (“the AFP Act”) the second defendant was jointly liable for torts committed by the first defendant. He claimed damages, including exemplary damages and interest, for physical, emotional, psychological and financial injury. There was no claim for damages for loss of reputation, and no clearly articulated claim for damages other than damages for personal injuries. The appellant did not serve a PIPA notice of claim on either of the respondents before commencing proceedings.

The Decision at Trial

The trial judge held that the appellant could pursue his claim for personal injuries only under the statutory regime imposed by PIPA. As the appellant had not complied with the pre-litigation requirements of PIPA, the trial judge held that the appellant’s claim and statement of claim should be struck out.

The Issues on Appeal

The Court of Appeal had to consider whether the appellant’s injuries arose out of “an incident” within the meaning of s6 PIPA, whether PIPA was in conflict with the AFP Act such that PIPA did not apply and whether the lex loci delicti was Queensland.

The Decision on Appeal

The appellant submitted that the conduct complained of was not an “incident” because it was a course of conduct over an extended period of time. It was further submitted that “circumstance” as used in PIPA implies a passive condition. The Court of Appeal held that a course of conduct necessarily consists of acts and omissions. Even if the appellant’s submission was correct, there is no reason why a course of conduct should not fall within the definition of “incident” on the basis that it consisted of acts or omissions which caused the personal injury of which the claimant complained.

The appellant submitted that s64B of the AFP Act, which creates statutory vicarious liability on the part of the Commonwealth in respect of a tort committed by a member of the AFP, covers the field to the extent that a State Act such as PIPA has no force or effect. The appellant contended that, in accordance with s109 of the Constitution, the inconsistency resulted in the laws of the Commonwealth prevailing so as to exclude PIPA. The Court of Appeal agreed with the trial judge’s finding that PIPA merely regulates the pursuit of claims for personal injury arising in the State of Queensland; it does not attempt to impair the capacities of the Commonwealth executive but, rather, the manner in which claims, including claims against the Commonwealth, are pursued.
The appellant submitted that the trial judge erred in applying Queensland law as the laws of the jurisdiction and submitted further that His Honour should have applied the law of the place where the tort was committed, which he submitted was the common law of Australia. The Court of Appeal held that the appellant’s attempt to establish a locus in some part of Australia outside of Queensland was without foundation. The appellant did not identify a specific jurisdictional locus elsewhere in Australia, nor did he submit that the law of the place where the tort was committed was PNG. In the case of an intranational tort, the law of the jurisdiction is not Australia, but the State or Territory where the tort occurred. The Court of Appeal concluded that, in so far as the torts occurred in Australia, they occurred in Queensland, and the law of the place where the tort was committed was Queensland law.
The Facts

On 28 December 2009 the applicant fell and injured herself at the respondents’ premises. The respondents are the applicant’s mother and stepfather. The applicant delivered a notice of claim pursuant to PIPA on 13 December 2010.

The applicant sought orders under s35 of PIPA for the disclosure of a draft statement of the female respondent and signed statements of both respondents. The respondents resisted disclosure of the documents on the grounds that they were subject to legal professional privilege.

The Decision

The 3 witness statements were prepared by loss adjusters on the instructions of the respondents’ solicitors. On the specific instructions of the solicitors, the statements were provided separately to the loss adjusters’ investigation report.

The applicant argued that the statements were investigation reports which PIPA requires be disclosed notwithstanding any claim for privilege. The court rejected that argument holding that the statements were not in the nature of an examination or enquiry as they contained the respondents’ account of events relating to the claim and therefore did not constitute reports.

The applicant also argued that s20 of PIPA compelled the disclosure of the statements. The court disagreed on the basis that there was no evidence that the statements were obtained for the purposes of complying with s20 of PIPA.

The applicant also argued that the respondents had not established privilege. The court rejected this argument and held that the respondents had properly established the existence of legal professional privilege in each statement and that each constituted a confidential communication brought into existence for the dominant purpose of obtaining legal advice.

The court also rejected the applicant’s argument that privilege was waived because the loss adjusters’ investigation report referred to the statements. The court was satisfied that there was no waiver of privilege because it would not be unfair or misleading to allow privilege to be maintained.

The applicant also submitted that it would be unfair to allow the respondents to claim privilege in circumstances where they deliberately and consciously arranged for the statements to be provided in such a way as to prevent the applicant’s access to them. The applicant submitted that this was contrary to the objects of PIPA. The court rejected this argument also and held that the statements were properly the subject of legal professional privilege and in seeking to ensure that privilege was maintained, the respondents’ solicitors did not adopt a procedure contrary to PIPA.

The application for disclosure was dismissed.
The Facts

The plaintiff succeeded in her claim for personal injuries against the second defendant and sought costs of the proceedings on an indemnity basis. This claim was advanced by virtue of both the plaintiff’s formal offers under the UCPR being less than her ultimate award for damages.

The second defendant submitted that the court ought to make an alternative order for costs given that following the delivery of the plaintiff’s formal offers the evidence changed in a material way. This was by virtue of the plaintiff’s late delivery of expert evidence which went to the issue of care and assistance. This was a very significant component of the plaintiff’s claim, with it comprising over 50% of the ultimate award for damages.

The second defendant submitted further that a departure from the rule was warranted given that it increased its formal offer to match the plaintiff’s first formal offer only 4 months after it was initially made. Despite the second defendant’s formal offer being made prior to the change in evidence, the plaintiff rejected the offer.

The second defendant also sought costs of applications it filed following the plaintiff’s late delivery of evidence. Those applications sought leave to adduce further expert evidence and an adjournment of the trial. The application for leave was resolved by consent between the parties (presumably with costs reserved). However, as it transpired, the court was not required to determine the adjournment application because the criminal work before Justice Cullinane prevented the trial from going ahead in any case.

The Decision

The court was not prepared to depart from r360 of the UCPR which provided that the plaintiff was entitled to indemnity costs by virtue of improving upon her formal offers at trial. The court noted that the rule was in mandatory terms and, despite it having sympathy for the second defendant, the change in evidence and increase in formal offer to match the plaintiff’s first formal offer 4 months later did not justify an alternate award for costs.

The court noted, however, that it was concerned as to whether the plaintiff was at all material times willing and able to carry out the first formal offer (as required by rule 360 of the UCPR) given her unwillingness to accept the second defendant’s offer prior to the evidence having changed. The court noted that no arguments were addressed on this subject. As such, it assumed that the plaintiff’s first offer, which was not before the court, was made on the usual terms requiring payment within 14 days. Therefore, the court held that the plaintiff’s reluctance to accept the second defendant’s offer 4 months later was not relevant to her being willing and able to carry out her earlier offer.

In relation to the costs of the second defendant’s applications, the court accepted that it would have acceded to the applications had it been required to determine them. As such, the second defendant was entitled to the costs of same. However, in circumstances where the trial would have been adjourned regardless of the second defendant’s application (due to court timetabling) it was not entitled to costs thrown away as a result of the adjournment.

IN ISSUE

- Should the plaintiff obtain indemnity costs in accordance with r360 of the UCPR despite the evidence changing in a material way after making her formal offer?

DEVELOPED ON 22 June 2011

READ MORE click here
The Facts

The plaintiffs issued proceedings against the defendants seeking financial relief alleged to be due and owing under certain guarantees. On 2 June 2011, the plaintiffs’ claim against both defendants was dismissed.

This proceeding was an application by the first defendant for a costs order against the plaintiffs on an indemnity basis.

The Decision

The first defendant sought indemnity costs against the plaintiffs based on an offer to settle made on his behalf on 5 July 2010. On 5 July 2010 the first defendant made a without prejudice offer of $5,000 in full and final settlement of the plaintiffs’ claim inclusive of costs. That offer was rejected by the plaintiff. On 23 September 2010 the first defendant’s solicitors made another offer in the amount of $25,000 plus GST. This second offer was also rejected by the plaintiffs.

The first defendant agreed that while the second offer was of little relevance pursuant to r361 (4) of the UCPR, it was indicative of a strong attempt on the part of the defendants to bring the matter to a successful conclusion.

The first defendant accepted that r361 of the UCPR had no application in the circumstances as the plaintiff did not obtain a judgment, however argued that it would be entitled to indemnity costs irrespective of that rule. The grounds for this approach were that:

(a) The plaintiffs had unreasonably refused the first offer to settle;

(b) The case essentially boiled down to one of construction of various documents where the plaintiffs should have known that the prospect of success was unlikely.

The court disagreed and held the plaintiffs had an arguable case and otherwise conducted their case in a fair and reasonable manner. It also considered that the offer of $5,000 by the first defendant was an extremely modest one, and unlikely to elicit acceptance.

For these reasons, the court refused to depart from the usual orders and held that there was nothing in the conduct of the litigation by the plaintiffs that called for sanction by way of indemnity costs.

The court ordered that the plaintiffs pay the first defendant’s costs of and incidental to the proceedings on the standard basis.

IN ISSUE

• Indemnity costs order sought against an unsuccessful plaintiff

DELIVERED ON 22 July 2011

READ MORE click here
The Facts

On 22 June 2011, judgment was given in favour of the plaintiff in the sum of $201,430. The plaintiff sought an order pursuant to r360 of the UCPR that costs be calculated on an indemnity basis.

The plaintiff relied upon a letter of 26 February 2010, which contained a formal offer to settle for the sum of $100,000 plus standard costs to be assessed on the District Court scale. The court considered that the plaintiff had obtained a judgment “no less favourable then the offer to settle”. It was satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer and put the onus on the defendants to show that another order for costs was appropriate in the circumstances.

The second defendant, in an attempt to discharge its onus, relied on the plaintiff’s mandatory final offer made under the MAIA, to which, pursuant to s51 (C) (10), the court “must” have regard in making a decision about costs. That offer was $300,000 plus standard costs.

According to the second defendant, the mandatory final offer was grossly excessive and not a genuine offer to settle the claim. It was satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer and put the onus on the defendants to show that another order for costs was appropriate in the circumstances.

The second defendant, in an attempt to discharge its onus, relied on the plaintiff’s mandatory final offer made under the MAIA, to which, pursuant to s51 (C) (10), the court “must” have regard in making a decision about costs. That offer was $300,000 plus standard costs.

The court did not consider that the offer made under the MAIA was grossly excessive.

The court did not consider that the mandatory final offer of $300,000 (exclusive of certain payments plus costs) was not a genuine offer to settle the claim. In the court’s opinion, $300,000 was not an unrealistic assessment of the likely outcome of the proceedings based upon a recognition of the deceased’s contributory negligence.

The disparity between the plaintiff’s mandatory final offer of $300,000 and its offer of $200,000 made under the UCPR was not enough for the court to make an order other than that provided for in r360.

The court was satisfied that no sufficient grounds were advanced as to why the defendants should not face the consequences of not accepting a proper, formal offer to settle under the UCPR.

The defendants were ordered to pay the plaintiff’s costs of and incidental to the proceeding on the indemnity basis.

IN ISSUE

- Whether Rule 360 of the UCPR applies in circumstances where the plaintiff obtained judgment for more than the offer made under the UCPR but less than an earlier offer

DELIVERED ON 22 July 2011

READ MORE click here
The Facts

Mr McCracken’s wife owned land on which a development was proposed. Mr McCracken, the appellant, was the sole director of Coastline Constructions (Coastline). Coastline entered into a joint venture agreement with Mrs McCracken for the development of the land. In September 2004, Coastline retained Phoenix Constructions (Phoenix) to be the construction managers for the development.

By June 2006, Phoenix had not been paid for its services and instituted proceedings against Mr McCracken, his wife and Coastline for approximately $2 million in outstanding fees. Phoenix successfully obtained judgment against Mr McCracken for that amount. Mr McCracken filed an appeal in relation to the decision. Phoenix subsequently filed an application seeking security for costs in the sum of $53,000 in relation to the appeal and an order that the appeal proceedings be stayed until the security was paid.

The evidence was such that Mr McCracken and his related companies were heavily in debt (with debts in excess of $5 million) and that Mr McCracken and his wife were undischarged bankrupts.

The Decision

The court noted that it has an unfettered discretion as to whether to order security for costs of the appeal. The relevant factors include the prospects of the appeal, the financial position of the appellant and the cause of the impecuniosity. The court considered that Mr McCracken’s appeal was arguable. The court otherwise noted the voluminous evidence to the effect that Mr McCracken’s financial position was parlous.

The court ordered that Mr McCracken provide $40,000 for security for costs of the appeal. The court did not consider it appropriate to grant a stay of the proceedings, primarily on the basis that Mr McCracken’s appeal had arguable prospects of success.
The Facts

On 2 December 2011 the court gave judgment in 6 appeals, jointly heard. All of the appellants were successful and were awarded judgments in the range of $276,701.79 - $364,762.45. The appellants had previously made a formal offer to settle to the first respondent prior to trial in the sum of $59,250 inclusive of costs.

The appellants were entitled to an award for costs on the basis that they were awarded a higher judgment than their previous offer to settle. The question before the court was whether costs should be awarded on a standard or indemnity basis.

The Issues on Appeal

The appellants submitted that indemnity costs should be awarded against the first respondent pursuant to rule 353 of the UCPR, which states that if an award is less favourable than a previous offer to settle, indemnity costs should be awarded.

The Decision on Appeal

The Court of Appeal awarded the costs of the hearing to the appellants on an indemnity basis. The Court of Appeal noted that each appellant had been awarded a judgment well in excess of the amount they offered to settle for.

Accordingly, the first respondent was ordered to pay the appellant’s costs of the trial on an indemnity basis. The court further ordered the costs of the appeal were to be awarded on a standard basis.

Williamson v McGillivray & Ors v JIA Holdings & Anor

[2012] QCA 3

or that the party was not willing and able to carry out what the offers proposed.

There was no evidence introduced by the first respondent to demonstrate either of those conditions.

The Court of Appeal referred to the decision of Yara Nipro Pty Ltd v Interfert Australia Pty Ltd [2010] QCA 164 as authority for the proposition that only the costs of the trial and not an appeal can be awarded on an indemnity basis.

Accordingly, the first respondent was ordered to pay the appellant’s costs of the trial on an indemnity basis. The court further ordered the costs of the appeal were to be awarded on a standard basis.

IN ISSUE

• Costs on indemnity basis awarded for costs of the action but not for the costs of the appeal

DELIVERED ON 2 December 2011

READ MORE
The Facts

In May 2005, the plaintiff attended the defendants’ rural property for the purpose of inspecting the property pursuant to a contract to purchase the vacant land. Saw milling was conducted on this land by the defendants.

On the day of the inspection, the plaintiff drove along a dirt road and arrived at a clearing where the male defendant was working on a portable Lucas sawmill, cutting timber.

The plaintiff injured himself when he stepped out of the vehicle and rolled his left ankle on an off-cut (or stick) on the ground. He argued that the stick had been concealed underneath sawdust, whilst the defendants described the area as ‘bare dirt’ that was free from sticks or branches. The defendants denied that there was sawdust in the particular area where the plaintiff was injured.

The plaintiff alleged that the defendants were liable in negligence as occupiers of the vacant land.

The Decision

The court held that the defendants were not liable under the CLA (Qld). The court accepted that the risk of injury from standing on an unstable object while walking across the ground near a rural outdoor business activity was foreseeable and ‘not insignificant’. However, the court was unable to accept that a reasonable person in the defendants’ position would have taken precautions to reduce the risk of injury.

The court held that the risk of injury was one which was obvious and meant the defendants owed no duty to warn of any such risk. A reasonable person would have been aware that they were entering onto a rural property upon which the milling of trees was being conducted. Further, it would be common knowledge that an off-cut, such as the one the plaintiff rolled his ankle on, may be found in such a location.

Warning signs, in general, only serve a purpose if they inform the person of something that the person does not know, or draw attention to something that the person may have overlooked or forgotten. Here, the court accepted the defendants’ evidence that there was no sawdust covering the small branch off-cut or stick. The incident occurred when the plaintiff did not pay attention to where he was putting his foot on the ground immediately in front of him. The stick would have been easily visible to an average person taking the same path. The court noted that ‘living is not risk free.’ Accordingly, the court questioned what type of warning sign, if any, would be required for that area. A general warning sign stating, ‘take care,’ would achieve nothing.

Although no finding was made for liability, the court went on to assess damages at $49,665.40.

The defendants sought costs against the plaintiff. The defendants’ mandatory final offer (MFO) at compulsory conference was $0.00. The plaintiff’s MFO was $80,000 plus costs. Section 56 of PIPA (pertaining to awards above and below MFOs) was not triggered in this case as the court had not “awarded” any damages. An order dismissing a proceeding is not an “award” of “damages”. The court’s ordinary powers with respect to awarding costs applies. In this case the court exercised its discretion to order that the plaintiff pay the defendants’ costs on a standard basis.
The Facts

The plaintiff was the owner of 2 properties in the Condamine region that grew cotton. On 15 December 2005 aerial spraying was performed on 2 properties located 20km from the plaintiff’s properties. The sprays being used were herbicides. The herbicides were being used in quantities above their recommended label rates.

The aerial spraying was performed in order to kill wattle trees located on 420 hectares of land used as cattle fields. It was performed by 2 fixed wing aircrafts and took 5 hours in total.

Four days after the spraying took place, yellowing and damage was observed on cotton crops belonging to the plaintiff.

In March 2007 the plaintiff instituted proceedings against 8 defendants alleging negligence in relation to the performance of the spraying. The 8 defendants to the action included the owners, managers and operators of the 2 properties on which the spraying was undertaken, the supplier of the herbicides, the company that undertook the spraying and one of the pilots of one of the aircrafts (this pilot was in fact the director of the spraying company). The pilot of the second aircraft, Michael Baker, was an employee of the spraying company. Mr Baker was not a party to the action.

Prior to trial, the plaintiff settled with the 1st to 5th and 7th defendants (settling defendants). The matter proceeded only against the 6th and 8th defendants, the spraying company and pilot.

The central issue was whether the spraying caused the damage. This was an issue because the plaintiff’s properties were located 20km from where the spraying was undertaken.

Extensive expert evidence was adduced by the parties in relation to the question of causation. All of the experts agreed that, if applied in sufficient quantities, the herbicides could affect cotton crops. Further they all conceded that some of the chemicals could have been deposited 20km from the site of the aerial spraying. However, the defendants’ experts disputed that sufficient quantities of the herbicides could have drifted onto the plaintiff’s property such that damage was caused.

The Liability Decision

Despite the extensive expert evidence the court was unable to make a finding as to the amount of chemicals that could have been deposited on the plaintiff’s crops. This was due to the variables that were present at the time the spraying was performed and the disparity of views amongst the experts. Notwithstanding this, the court was satisfied that it was more probable than not that the chemicals which did drift caused the damage. In this regard the court was swayed by the evidence of the plaintiff’s agronomist who was responsible for monitoring the crops over the relevant time; by contemporaneous photographs which overwhelmingly established extensive damage to the crops and also by analysis that had been undertaken on samples of the crops which supported the conclusion that the damage sustained was herbicide damage.

In making this decision the court rejected the

IN ISSUE

• Whether aerial spraying of herbicides caused damage to the plaintiff’s crops
• Whether the liable defendants could limit their liability in accordance with the proportionate liability provisions of the CLA (QLD)
• The effect of the pre-trial settlement on apportionment of liability

DELIVERED ON

23 June 2010
11 March 2011
1 July 2011

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[2010] QSC 220
[2011] QSC 33
[2011] QSC 297

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defendants’ submissions that the plaintiff had not satisfied the burden of proof in accordance with Amaca v Ellis [2010] HCA 5. The court noted that Amaca v Ellis merely applied settled legal principles to the facts of that particular case. It was not of assistance in the present case because there was no evidence of competing causes that could explain the crop damage.

The Apportionment Argument

Following the liability decision the court heard further submissions in relation to the apportionment of liability under the CLA (QLD) as well as the effect of the pre-trial settlement.

The 6th and 8th defendants (the judgment defendants) argued that liability ought to be apportioned between them respectively as well as with the settling defendants and Mr Baker.

Further the judgment defendants argued that the judgment against them ought to be reduced to account for the pre-trial settlement.

The Apportionment Decision

In order to determine whether the pre-trial settlement should be taken into account the Court had regard to s32B of the CLA (QLD) which deals with subsequent actions. The wording of that provision relates only to a situation where a plaintiff has previously recovered judgment against a concurrent wrongdoer. Given that the plaintiff had settled rather than obtained judgment against the settling defendants, s32B of the CLA (QLD) was not triggered and the court was not required by the CLA (QLD) to have regard to the pre-trial settlement.

Given that the proportionate liability provisions of the CLA (QLD) provide a limitation of liability, the Court found that the judgement defendants had the onus of proving that the claim was an apportionable claim for the purposes of s31 of the CLA (QLD).

The judgment defendants had to prove that:

(a) The claim was an apportionable claim within the meaning of s28 of the CLA (QLD); and

(b) They, the settling defendants and/or Mr Baker were “concurrent wrongdoers” in accordance with s30 of the CLA (QLD).

The plaintiff’s claim was for economic loss arising from property damage. As such the Court had no difficulty finding that it was an apportionable claim for the purposes of s28 of the CLA (QLD).

The judgement defendants sought to rely upon the pleadings in order to satisfy the Court that the settling defendants were concurrent wrongdoers. The Court held that the pleadings were not sufficient to satisfy the onus and it was not prepared to draw the necessary inferences in order to conclude that the settling defendants ought to have been aware of the risks of using the herbicides. The court noted that no evidence was called from the settling defendants at trial.

The situation in relation to the judgment defendants and Mr Baker was different, they had given evidence at trial although Mr Baker was not on point as to his knowledge of the risks. Notwithstanding this the court noted that:

(a) The 8th defendant (pilot) was the director of the 6th defendant spraying company; and

(b) Mr Baker was an employee of the spraying company.

Given the existence of these relationships the Court found that there was no evidence that either had acted independently of each other. The wording of s30 of the CLA (QLD) provides that a concurrent wrongdoer is a person whose acts are independent of each other. As such the absence of the words “or jointly” in s30 of the CLA (QLD) meant that neither the judgement defendants and/or Mr Baker could be concurrent wrongdoers.

Arguments in Relation to the Appropriate Form of Judgment

The matter came before the court on a third occasion so that the parties could make submissions in...
relation to the amount of the judgment, interest and costs. The court was required to reconsider the effect of the plaintiff’s pre-trial settlement, in accordance with the common law as opposed to the CLA (QLD). By this time the deed of settlement (the Deed) between the plaintiff and judgment defendants was in evidence. The Deed indicated that the settlement sum was $300,000, being $100,000 for damages and $200,000 for costs.

The judgement defendants submitted that the judgment sum ought to be reduced by $100,000 to account for the settlement and further that they ought only be required to pay the plaintiff’s standard costs insofar as they exceeded $200,000.

Further, the judgment defendants argued that the plaintiff had not established an entitlement to interest because it failed to lead evidence in relation to the date the loss was sustained and when the money for the cotton was received, if at all.

The plaintiff made no submission in relation to the judgment sum. It did submit however that:

(a) Interest should be awarded in accordance with s47 of the Supreme Court Act 1995; and

(b) It ought to be awarded indemnity costs in accordance with rule 360 of the UCPR given that it obtained judgment in excess of its formal offer to settle.

Decision Regarding Appropriate Form of Judgment

The court noted that the common law clearly prohibits a plaintiff recovering more than its actual loss. As such it held that it was appropriate to reduce the judgment against the judgment defendants by $100,000 in order to account for the pre-trial settlement and prevent the plaintiff from obtaining a windfall. The court commented however that if the plaintiff was able to prove that it had not been paid in accordance with the Deed, then no reduction would have been ordered.

The court rejected the judgment defendants’ arguments in relation to interest and found that it was reasonable to assume that the plaintiff would have been paid for the 2005/2006 season crops by 1 July 2006. As such it awarded interest from that date. The interest was payable on the entire sum of the plaintiff’s damages until the $100,000 settlement had been received by the plaintiff, it was then payable on the reduced sum.

In relation to costs, the court ordered that the judgement defendants pay the plaintiff’s costs on the standard basis so far as those costs related to the action against them. There was no reduction for the $200,000 costs paid by the other parties. In making this decision the court noted that rule 360 of the UCPR is in mandatory terms such that indemnity costs should be awarded unless the defendant can show another order is appropriate. The judgment defendants persuaded the court that another order was appropriate because there was a material change in the evidence following the delivery of the plaintiff’s mandatory final offer. That change came about on the first day of trial when one of the plaintiff’s experts delivered an amended report (correcting errors in his earlier report) significantly improving the plaintiff’s liability position. Hence a standard costs award was made.
The Facts

Mr Caradonna and Mr Vella entered a joint venture and opened a joint bank account. Mr Caradonna obtained possession of certificates of title for properties owned by Mr Vella and unknown to Mr Vella, used them to borrow money for his own purposes. One such borrowing was from Mitchell Morgan Nominees Pty Ltd (Mitchell Morgan). Mr Caradonna was assisted by his solicitor, Mr Flammia, who dealt with Mitchell Morgan’s solicitors, Hunt & Hunt, and made fraudulent representations to them that certain documents had been signed in front of him by Mr Vella. The mortgage was registered and Mitchell Morgan paid over $1 million into the joint bank account. Mr Caradonna then withdrew the contents of the joint account by forging Mr Vella’s signature.

Mr Vella discovered the mortgage and the drawing from the joint account and commenced legal proceedings against Mr Caradonna, Mr Flammia and Mitchell Morgan. By the time of the trial, Mr Caradonna and Mr Flammia were bankrupt.

The Decision at Trial

In Mr Vella’s claim against Mitchell Morgan, Mitchell Morgan issued a cross-claim against Hunt & Hunt alleging negligence. The trial judge held that Hunt & Hunt had been negligent, but limited Hunt & Hunt’s liability on the basis that Mitchell Morgan’s claim was an “apportionable claim” in the context of the CLA (NSW). The trial judge held that Mr Caradonna and Mr Flammia were “concurrent wrongdoers” as they were liable for fraudulently causing Mitchell Morgan to pay out over $1 million. The trial judge limited Hunt & Hunt’s liability to 12.5% of the claim.

The Issues on Appeal

Whether the acts or omissions of Mr Caradonna and Mr Flammia that gave rise to their liability to Mitchell Morgan caused the loss that was the subject of Mitchell Morgan’s claim for loss against Hunt & Hunt.

The Decision on Appeal

The Court of Appeal agreed with the trial judge that Mitchell Morgan’s claim was an “apportionable claim”, but held that Mr Caradonna and Mr Flammia were not concurrent wrongdoers, as their actions did not cause the same loss and damage as had been caused by Hunt & Hunt’s negligence. In this regard the Court of Appeal distinguished between the loss caused by Mr Caradonna’s and Mr Flammia’s actions (ie fraudulently inducing Mitchell Morgan to pay out the money) as distinct from the loss or damage caused by Hunt & Hunt’s negligence (ie Mitchell Morgan not having any security for the money it paid out). The acts or omissions of Mr Caradonna and Mr Flammia did not cause that harm and did not cause the loss the subject of Mitchell Morgan’s claim for economic loss against Hunt & Hunt.

The Court of Appeal held that Hunt & Hunt’s liability should not be limited.
SOCIAL MEDIA

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205  *Symes v Saunders* [2011] QDC 217
Substituted service of application for criminal compensation via Facebook.

206  *Mothership Music Pty Ltd v Darren Ayre (t/as VIP Entertainment & Concepts Pty Ltd) and Flo Rida (also known as Tramar Dillard)* [2012] NSWDC 42
Application for substituted service via Facebook and by email.

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Whether Diageo’s Smirnoff Facebook page content constituted advertising in breach of the Advertiser Code of Ethics.

208  *Advertising Standards Board v Fosters Australia, Asia & Pacific* [2012] 0271/12
Whether Fosters Australia, Asia & Pacific’s VB Facebook page content constituted advertising in breach of the Advertiser Code of Ethics.
The Facts

The court permitted substituted service of an application for criminal compensation via a newspaper advertisement. The advertisements were never placed.

The applicant's solicitor communicated with the respondent on Facebook and provided a copy of the application, although without the supporting documents. There was an invitation to contact him or his firm for further information.

The applicant's solicitor also then contacted the respondent later via mobile phone and explained the date, time and how he could find the courtroom etc. The respondent was also advised to seek legal advice.

The Decision

The court permitted substituted service of the application.

The court was satisfied that the respondent 'received' the application by a copy being sent to his Facebook page. The court was satisfied that the respondent knew as much as he wanted to know about the application.

In the interests of efficiency and not incurring further costs, service via Facebook was sufficient under r117 of the UCPR.
SOCIAL MEDIA

Mothership Music Pty Ltd v Darren Ayre (t/as VIP Entertainment & Concepts Pty Ltd) and Flo Rida (also known as Tramar Dillard)
[2012] NSWDC 42

The Facts

The plaintiff commenced proceedings against the defendants for damages for breach of contract in respect of the second defendant’s non-appearance at a music concert in Newcastle on 22 October 2011. The defendants left the jurisdiction prior to service of the proceedings.

The plaintiff brought an application for an order for substituted service against the second defendant of orders made by the court on 13 April 2012 regarding freezing of assets and other matters.

The Decision

The court relied on a decision of the New South Wales Supreme Court, Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet AG [2002] NSWSC 727, where an order for substituted service was also made in circumstances where the defendant left the jurisdiction. The court noted that if an order for substituted service was made, there was every likelihood that on the return date there would be representation to enable argument to be heard and as a result, there would be no prejudice to either party.

As to the form of substituted service, the court noted that in cases in both the ACT Supreme Court and the Federal Magistrates Court, orders had been made for substituted service via Facebook. The court held that the international reach of Facebook was well known. The court also noted that service by email is not controversial and had been ordered in several cases by various courts in Australia and New Zealand.

The court ordered that substituted service be effected on the second defendant by Facebook and email.

IN ISSUE

- Whether substituted service can be ordered where the defendants leave the jurisdiction

DELIVERED ON 18 April 2012

READ MORE click here
Advertising Standards Board v Diageo Australia Ltd
[2012] 0272/12

The Facts
Complaints were made to the Advertising Standards Bureau regarding Diageo Australia Ltd’s (Diageo) Smirnoff brand Facebook page regarding photographs and comments uploaded by Smirnoff and Facebook users.

The comments made on the Facebook page allegedly featured sexism, racism and other forms of discrimination and vilification, irresponsible drinking and excessive alcohol consumption, depiction of people aged under twenty-five consuming alcohol, obscene language and material which linked the consumption of alcohol with sexual and social prowess. The Facebook page was also easily accessible by Facebook users under the age of eighteen.

It was argued that Diageo had the responsibility to moderate content on their Facebook page and remove content in breach of the Australian Association of National Advertiser’s (AANA) Code of Ethics (the Code) and the Alcohol Beverages Advertising Code (ABAC).

The Decision
The Advertising Standards Board (the Board) found Diageo’s Facebook page was a marketing communication tool which could draw the attention of a segment of the public to their product and could also be used to promote their product. It was also considered that Diageo had a reasonable degree of control over the content of the page.

As the Facebook page was used to engage with customers, it was considered that the Code applied to the content generated by Diageo and customers alike.

The Board concluded that images which depicted young people with drinks in their hands did not indicate ‘excessive consumption of alcohol’ as they appeared confident and in control. Additionally, all images of people drinking alcohol appeared to be in licensed premises where people under the age of eighteen are not allowed to enter. The issue of the depiction of people aged under twenty-five consuming alcohol is not covered under the Code and is an issue to be considered by ABAC.

The Board considered one image showing a number of empty Smirnoff bottles, however, there was a lack of context to indicate the location, occasion or number of people consuming the product.

Ultimately, it was found that the Facebook page was not in breach of s2.6 of the Code.

As the page did not breach the Code on any other grounds, the Board dismissed the complaints.

IN ISSUE
• Was Diageo Australia Ltd. in breach the AANA Code of Ethics
DE DELIVERED ON 11 July 2012
RE READ MORE click here
Advertising Standards Board v Fosters Australia, Asia & Pacific

[2012] 0271/12

The Facts

Complaints were made to the Advertising Standards Bureau regarding Fosters Australia, Asia & Pacific’s (Fosters) VB Beer Facebook page regarding questions posted by the advertiser and comments posted by Facebook users.

The comments made on the Facebook page allegedly featured sexism, racism and other forms of discrimination and vilification, irresponsible drinking and excessive alcohol consumption, depiction of people aged under twenty-five consuming alcohol, obscene language and material which linked the consumption of alcohol with sexual and social prowess. The Facebook page was also easily accessible by Facebook users under the age of eighteen.

It was argued that Fosters had the responsibility to moderate content on their Facebook page and remove content in breach of the Australian Association of National Advertiser’s (AANA) Code of Ethics (the Code) and the Alcohol Beverages Advertising Code (ABAC).

The Decision

The Advertising Standards Board (the Board) found Fosters’ VB Beer Facebook page was a marketing communication tool which could draw the attention of a segment of the public to their product and could also be used to promote their product. It was also considered that Fosters had a reasonable degree of control over the content of the page.

As the Facebook page was used to engage with customers, it was considered that the Code applied to the content generated by Fosters and customers alike.

Fosters breached s2.1 of the Code as many comments were discriminatory towards women and degrading to the homosexual community.

Fosters did not breach s2.2 of the Code as the advertisement did not use sexual appeal or images to promote VB Beer.

Fosters breached s2.4 of the Code as sexuality and nudity were not treated with the appropriate sensitivity by Facebook users.

Fosters breached s2.5 of the Code due to the use of obscene language by Facebook users.

Fosters did not breach s2.6 of the Code, as although the page referred to excessive alcohol consumption, the general nature of the comments could not be found to be contrary to the prevailing community standards on health and safety.

The Board upheld the complaint.

In response to the decision, Fosters acknowledged the Facebook comments were inappropriate and that they were disappointed that they were not removed through the review process in place. Fosters removed all user comments which were highlighted by the Board.

Fosters now has strict procedures in place, including monitoring user comments twice per day, broader language filters and age restrictions.
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