2015 INSURANCE LAW REVIEW CASEBOOK
WELCOME TO THE BARRY.NILSSON.
LAWYERS INSURANCE LAW REVIEW 
CASEBOOK FOR 2015.

We remain proud to celebrate the continuation of our long standing relationship with the insurance industry in Australia and overseas. We are pleased to have been again nominated as a finalist for the Professional Services Firm of the Year for the 2015 ANZIIF Australian Insurance Industry Awards. This is our fourth consecutive nomination as a finalist at those awards.

As has become the tradition, our casebook makes reference to all the major insurance related judgments throughout Australia (and in a few cases New Zealand) in the 2015 financial year. The hard working committee chaired by myself and made up of Kim Nicolaidis, Hannah Savins, Nick Robson, Sue Myers, Lisa Hulcombe and Adrian Lewis, collated the cases which appear in the casebook. The case notes (with a hyperlink to judgments) have been prepared by our large team of insurance solicitors and have been grouped under various sub-categories for your ease of reference. We hope that the cases included in the casebook are a useful tool for you in examining policy issues as well as determining approaches to various claims.

Proportionate liability has again been under the spotlight with the High Court recently determining, in Selig v Wealthsure Pty Ltd [2015] HCA 18, that the apportionment of liability provisions in the Corporations Act 2001 (Cth) are limited to claims based on contravention of s 1041H only and do not extend to claims based on other grounds, even where the same conduct is relied upon. This decision is expected to have implications for the increasing number of claims against financial planners and advisers as it makes it more difficult to share the liability flowing from a plaintiff’s losses.

The High Court has provided judicial determination and enhanced legal certainty on a range of other issues. In Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33, the scope of s54 of the Insurance Contracts Act 1984 (Cth) was again reviewed and it was held that insurers cannot refuse indemnity for failure to comply with a policy term not related to the loss suffered and not prejudicial to the insurer. Although the High Court’s decision to adopt a broad interpretation of s54 is favourable to insureds, insurers can take comfort from the fact that s54 only applies to acts or omissions after the policy was entered into, and that in different factual circumstances, there may well be prejudice sufficient to justify a reduction of liability to nil.

In a contrasting, restrictive approach, the High Court continued to resist the imposition of a duty of care for economic loss only particularly where there was a lack of vulnerability between the parties. In Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36, a builder was held not liable for economic loss caused to a owners corporation, arising from defects in apartments purchased by investors. In the High Court’s view, the investors were able to protect their respective interests by appropriate contractual means and their failure to do so was not a matter for the common law to rectify.

The previous financial year has seen an increase in claims associated with aviation accidents. The Queensland Court of Appeal overturned a decision reported in the 2014 casebook, and held that a helicopter manufacturer was liable in negligence to a plaintiff who was seriously injured in a crash which occurred on a Northern Territory cattle property. The New South Wales Supreme Court also considered the duty of care of organisations involved in providing aviation services and found that a local council, a
helicopter charter operator and an energy supplier were all negligent, in breach of duty in varying degrees and liable to the relatives of passengers killed in a collision which occurred during an aerial inspection of a rural property. In another matter, the New South Wales Supreme Court found in favour of a plaintiff who suffered catastrophic head injuries when the tail rotor of a helicopter came into contact with telecommunication lines and crashed. Although a range of issues, including the definitions of ‘accident’ and ‘passenger’ under the Civil Aviation (Carriers’ Liability) Act 1959 (Cth), were considered, in all cases the injured parties or their families were successful in obtaining substantial damages awards. Recent incidents relating to interrupted air travel due to climatic events suggest that this area of aviation insurance law is increasingly tested.

The number of claims arising out of workplace scenarios has remained relatively steady however the circumstances of some claims have been unusual. In Wright v Optus Administration Pty Limited [2015] NSWSC 160, the New South Wales Supreme Court awarded damages of $3.8 million against Optus when a labour hire employee (undertaking training with Optus) attempted to murder another labour hire employee by throwing him off a rooftop balcony. The court held that as a labour hire worker, Mr Wright was subject to Optus’ direction and control. The employer-employee like relationship required Optus to take reasonable care to protect Mr Wright from the criminal acts of others in the workplace.

In another workplace related matter, the Queensland Supreme Court overruled a long established WorkCover Queensland practice of refusing to indemnify an employer under its workers compensation policy for any contractual liability it assumed in favour of a third party. So far anticipated amendments to legislation to overcome this situation, which exposes WorkCover Queensland to significantly higher damages awards, have not yet eventuated. In other legislative changes, the Queensland parliament has recently indicated an intention to repeal the impairment thresholds for access to workers compensation claims. This will clearly have implications for the insurance industry.

We trust that the cases in the 2015 casebook provide useful guidance in analysing and managing claims, in risk identification and mitigation, and in identifying future trends in an era of rapid and sophisticated technological development.

Our commitment to education and training through Elevista remains strong. Elevista continues to attract a loyal following of people looking for high quality practical training in the areas of insurance and corporate risk. As well as addressing new age topics to do with cyber risks, cyber cover and insurance contracts in a digital age, the Elevista team also presents on more traditional topics to do with policy wordings, formation of contracts, class actions and proportionate liability to audiences along the east coast of Australia. The expertise of the Elevista team has also been sought out by insurance companies and insurance broker groups to provide internal bespoke training for their staff and members.

Special mention should be made of our Consultant, Samantha Traves, who has recently been appointed a part time Member of the Queensland Law Reform Commission, a Member of the Queensland Civil and Administrative Tribunal (QCAT) and a Member of the Scientific Council of AIDA. Well done Sam.

Barry.Nilsson. Lawyers has grown over recent years, hence the reference to the iconic Paul Kelly/ Kev Carmody song. Following the opening of our Sydney office in 2014 we have, from 1 July 2015, opened a Melbourne office with a team of 3 partners and supporting lawyers. We have also recently appointed an additional Sydney partner. We remain heavily focused on providing value adds to our clients by joining with them to face the challenges in this changing industry. The involvement of our team with organisations such as the Australian Insurance Law Association, the Australian Professional Indemnity Group, ANZIIF and Women in Insurance have us well positioned to continue to provide quality service to the insurance industry.

I hope you enjoy our casebook for 2015.
ANNUAL INSURANCE LAW REVIEW COMMITTEE

PETER MURDOCH  
Partner  
T: +61 7 3231 6369  
E: peter.murdoch@bnlaw.com.au

NICK ROBSON  
Senior Associate  
T: +61 7 3231 6120  
E: nick.robson@bnlaw.com.au

SUE MYERS  
Senior Associate  
T: +61 7 3231 6366  
E: sue.myers@bnlaw.com.au

HANNAH SAVINS  
Senior Associate  
T: +61 7 3231 6128  
E: hannah.savins@bnlaw.com.au

ADRIAN LEWIS  
Senior Associate  
T: +61 7 3231 6168  
E: adrian.lewis@bnlaw.com.au

KIM NICOLAIDIS  
Precedent & Knowledge Manager  
T: +61 7 3231 6341  
E: kim.nicolaidis@bnlaw.com.au

LISA HULCOMBE  
Senior Associate  
T: +61 7 3231 6354  
E: lisa.hulcombe@bnlaw.com.au
CONTENTS

PUBLIC LIABILITY
Cases considering the liability of State and local authorities, occupiers and the owners and operators of licensed premises

WORKERS’ COMPENSATION
Cases considering the liability of employers for injuries to employees in the workplace

HEALTH LAW
Cases considering the principles of liability and procedural matters arising in the context of medical professionals and institutions

PROFESSIONAL NEGLIGENCE
Cases concerning alleged breaches of duty or contractual obligations in the performance of professional work or provision of professional services

INSURANCE ISSUES
Cases considering insurance policy responses and the application of insurance legislation
DAMAGES
Cases considering damages awarded for injury claims, economic losses and property damage

TRANSPORT
Cases considering liability, quantum and legislation issues involving transport

PROCEDURE
Cases dealing with procedural matters such as the interpretation and application of legislation, costs and offers of settlement

MISCELLANEOUS
Cases concerning specific and/or discrete issues of relevance in an insurance context

LIST OF ABBREVIATIONS
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACA</td>
<td>Accident Compensation Act 1985 (VIC)</td>
</tr>
<tr>
<td>CA</td>
<td>Corporations Act 2001 (CTH)</td>
</tr>
<tr>
<td>CCA</td>
<td>Competition and Consumer Act 2010 (CTH)</td>
</tr>
<tr>
<td>CLA (NSW)</td>
<td>Civil Liability Act 2002 (NSW)</td>
</tr>
<tr>
<td>CLA (QLD)</td>
<td>Civil Liability Act 2003 (QLD)</td>
</tr>
<tr>
<td>CLA (SA)</td>
<td>Civil Liability Act 1936 (SA)</td>
</tr>
<tr>
<td>CLA (TA)</td>
<td>Civil Liability Act 2002 (TA)</td>
</tr>
<tr>
<td>CLA (WA)</td>
<td>Civil Liability Act 2002 (WA)</td>
</tr>
<tr>
<td>CLWA</td>
<td>Civil Law Wrongs Act 2002 (ACT)</td>
</tr>
<tr>
<td>ICA</td>
<td>Insurance Contracts Act 1984 (CTH)</td>
</tr>
<tr>
<td>LAA</td>
<td>Limitation of Actions Act 1974 (QLD)</td>
</tr>
<tr>
<td>LR (MP)</td>
<td>Law Reform (Miscellaneous Provisions) Act 1946 (NSW)</td>
</tr>
<tr>
<td>MAIA</td>
<td>Motor Accident Insurance Act 1994 (QLD)</td>
</tr>
<tr>
<td>MACA</td>
<td>Motor Accident Compensation Act 1999 (NSW)</td>
</tr>
<tr>
<td>OHS</td>
<td>Occupational Health and Safety Act 2001 (NSW)</td>
</tr>
<tr>
<td>PIPA</td>
<td>Personal Injuries Proceedings Act 2002 (QLD)</td>
</tr>
<tr>
<td>TPA</td>
<td>Trade Practices Act 1974 (CTH) now the Competition and Consumer Act 2010 (CTH)</td>
</tr>
<tr>
<td>WCA</td>
<td>Workers’ Compensation Act 1987 (NSW)</td>
</tr>
<tr>
<td>WCA (ACT)</td>
<td>Workers’ Compensation Act 1951 (ACT)</td>
</tr>
<tr>
<td>WCRA</td>
<td>Workers’ Compensation and Rehabilitation Act 2003 (QLD)</td>
</tr>
<tr>
<td>UCPR (QLD)</td>
<td>Uniform Civil Procedure Rules 1999 (QLD)</td>
</tr>
</tbody>
</table>
PUBLIC LIABILITY
LICENSED PREMISES / INTOXICATION

14  PACKER v TALL SHIPS SAILING CRUISES AUST P/L & ANOR [2014] QSC 212
Liability of an employer and cruise operator for an assault that occurred at a Christmas party on board a vessel.

16  TILDEN v GREGG [2015] NSWCA 164
Whether an occupier of licensed premises should be held responsible for an assault by one patron upon another patron.

OCCUPIERS’ LIABILITY

18  WOOLWORTHS LTD v RYDER [2014] NSWCA 223
Whether supermarket owed duty of care to users of common area near entrance to premises where hazard created by product purchased from it.

20  PAVLIS v WETHERILL PARK MARKET TOWN PTY LTD [2014] NSWCA 292
Whether shopping centre and its managing agent failed to take reasonable precautions against the foreseeable risk of a person slipping and whether shopping centre liable to indemnify managing agent.

21  LEE v CARLTON CREST HOTEL (SYDNEY) PTY LTD [2014] NSWSC 1280
Liability of a commercial car park operator and Council in relation to claim brought by a woman who witnessed the death of her husband after an accident involving a car plunging from the second floor of the car park.

23  WEARING-SMITH v SWIFT [2014] NSWDC 159
Whether the owner of a residential premises breached its duty of care to the plaintiff as the result of a failure of a glass balcony balustrading.

24  JACOBE v QSR PTY LTD T/AS KENTUCKY FRIED CHICKEN LAKEMBRA [2014] NSWDC 150
Liability of fast food occupier for injury sustained by a trip and fall over a concrete wheel stop located in car park.

25  ROSS GAZIS v GUAL PTY LTD & ORS [2014] NSWSC 1617
The employer/subcontractor and occupier/principal were in breach of their respective duties of care to a security guard who suffered injuries moving a trolley.

27  LIVERPOOL CATHOLIC CLUB LTD v MOOR [2014] NSWCA 394
The operator of an ice skating rink was found not to have breached its duty of care to the plaintiff for failing to warn him of the obvious risk of descending a set of stairs while wearing ice skates.
29  **ELLERY v SUNSAIL (AUSTRALIA) PTY LTD**  
[2014] QDC 285  
Liability of defendant for operating a vessel for commercial use without altering it for that purpose.

30  **ACKLAND v STEWART, VICKERY & STEWART**  
[2015] ACTCA 1  
Whether the risk of catastrophic injury from performing backward somersault on jumping pillow was obvious.

31  **METAXOULIS v MCDONALD’S AUSTRALIA LTD**  
[2015] NSWCA 95  
Liability of a McDonald’s restaurant to a person injured after rescuing a child on a McDonald’s playground.

**RESIDENTIAL PREMISES**

33  **JOHN LLAVERO v BRETT ANTHONY SHEARER**  
[2014] NSWSC 1336  
The plaintiffs claimed damages for alleged loss of support to their property, caused by the excavation works carried out on the neighbouring residential property.

**SPORTING AND RECREATIONAL ACTIVITIES**

34  **DU PRADAL & ANOR v PETCHELL**  
[2014] QSC 261  
Boat operator negligent for striking spearfisherman with boat and causing significant injuries. Employer not entitled to damages for loss of services.

35  **FRANKLIN v BLICK**  
[2014] ACTSC 273  
Whether the duty owed by one cyclist to another extends to exercising reasonable care to avoid running over objects which may cause loss of control of the bicycle.

36  **MILLER v LITHGOW CITY COUNCIL & ANOR**  
[2014] NSWSC 1579  
Whether Council and/or a swimming school was liable for an injury sustained in the course of swimming training.

37  **PERISHER BLUE PTY LTD v NAIR-SMITH**  
[2015] NSWCA 90  
Assessment of liability of ski field operator for personal injuries to patron whilst boarding chair lift.

39  **VERRYT v SCHOUPP**  
[2015] NSWCA 128  
Contributory negligence of 12 year old boy undertaking dangerous activity and assessment of future economic loss.
STATE AND LOCAL AUTHORITIES

41  CURTIS v HARDEN SHIRE COUNCIL
[2014] NSWCA 314
Liability of Council for exercise of special statutory power relating to failure to provide adequate signage near road works.

42  RANKILOR v CITY OF SOUTH PERTH
[NO. 2]
[2014] WADC 125
Liability of local authority for injury caused by uneven footpath.

43  HAMCOR PTY LTD & ANOR
v THE STATE OF QUEENSLAND & ORS
[2014] QSC 224
Liability of a state government authority for the results of fire fighting actions and liability of broker in respect of arranging appropriate insurances to deal with the effects of those actions.

45  RANKIN v GOSFORD CITY COUNCIL
[2014] NSWSC 1354
Whether Council took adequate precautionary measures to prevent vandals from moving plastic traffic barriers at a roadwork site.

46  DANSAR PTY LTD v BYRON SHIRE COUNCIL
[2014] NSWCA 364
Liability of a local authority for the alleged economic loss of a developer who had its development application rejected on the basis of the local authority’s erroneous implementation of its own policy.

48  ELECTRO OPTIC SYSTEMS PTY LTD
v NEW SOUTH WALES; WEST & ANOR
v NEW SOUTH WALES
[2014] ACTCA 45
Appeal heard in respect of a finding that the state of NSW owed and breached a duty of care to individual property owners when coordinating a response to a large bushfire.

50  STATE OF NEW SOUTH WALES v FULLER-LYONS
[2014] NSWCA 424
Appeal against a finding that the State of New South Wales was liable for injuries sustained by an 8 year old boy after he fell from a moving train.

52  COUNCIL OF THE CITY OF SYDNEY
v HUNTER
[2014] NSWCA 449
Council successfully defends trip and fall on local footpath disturbed by tree roots in circumstances where it was open to the plaintiff to walk in a different area of the footpath.

54  ROCKDALE CITY COUNCIL v SIMMONS
[2015] NSWCA 102
Whether Council liable for operation of a boom gate for which it entered into an informal agreement with the Club for its operation and whether Council could rely upon the local authority defence under section 43A of the CLA (NSW).

56  ZRAIKA v WALSH
[2015] NSWSC 485
Liability of local authorities and driver of vehicle to unborn child for injuries sustained while in utero.
58  MORRIS v REDLAND CITY COUNCIL & ANOR
[2015] QSC 135

Unsuccessful claim against a local Council in relation to catastrophic injuries suffered by the plaintiff when he fell from the top of a cliff at Point Lookout on North Stradbroke Island.

60  TB v STATE OF NEW SOUTH WALES & QUINN; DC V STATE OF NEW SOUTH WALES & QUINN
[2015] NSWSC 575

Whether a statutory authority owed the plaintiffs a duty to exercise its statutory powers to report child abuse to police.

62  BRUNO PISANO v GEORGIA DANDRIS
[2014] NSWSC 1070

Claim by purchasers of a defective house for damages equivalent to the cost of remedying the defects.

64  YMCA v NILLUMBIK
[2014] VSCA 197

Appeal by owner of premises against finding requiring it to indemnify operator of premises in respect of judgment in favour of plaintiff.

66  GARY BENNETT v BAIADA POULTRY PTY LIMITED
[2014] NSWDC 144

Liability of principal to independent contractor.

67  BROOKFIELD MULTIPLEX LTD v OWNERS CORPORATION STRATA PLAN 61288
[2014] HCA 36

Whether duty of care owed by builder to the owners’ corporation of strata titled apartment complex.

69  COURTS v ESSENTIAL ENERGY (AKA COUNTRY ENERGY)
[2014] NSWSC 1483

Liability of electricity authority and property owner for injury to independent contractor from overhead power line.

70  WRIGHT BHT WRIGHT v OPTUS ADMINISTRATION PTY LTD
[2015] NSWSC 160

Liability of host employer for criminal act of a co-worker.

72  WORMLEATON v THOMAS & COFFEY LIMITED (NO. 4)
[2015] NSWSC 260

Liability of a principal contractor and subcontractors for injury to employee of subcontractor.

74  IRELAND v B & M OUTBOARD REPAIRS
[2015] QSC 84

Liability for psychological injury suffered as a consequence of a boat explosion.
THE FACTS

On 2 December 2006, the second defendant, Commercial Waterproof Servicing Pty Ltd (CWS), held a Christmas party on a day cruise to McLarens Landing, operated by the first defendant, Tall Ships Sailing Cruises Aust P/L (TSSCA). The ship was carrying a total of 111 passengers at the time. All but 4 of them belonged to 2 groups: CWS (about 90 people including spouses and children) and Malouf Marine (MM – about 20 people). A 10-person crew was responsible for all safety issues and provided on-board catering that included bar service for the return voyage. There were no special security arrangements in place.

TSSCA also operated the bar and restaurant facilities at McLarens Landing. Both CWS and MM purchased a drinks package at the bar.

On the return voyage, a group of patrons from MM were loudly swearing near the plaintiff and his family. The plaintiff requested that the patrons lower their voices as there were numerous families aboard, and upon making this comment, the plaintiff was assaulted by another passenger from the group. He sued CWS and TSSCA for the consequences of his injuries.

THE DECISION

The court had no difficulty accepting that TSSCA, as the licensee or operator of licensed premises on the cruise and as the operator of the cruise, owed passengers a duty to take reasonable care to avoid a foreseeable risk of injury. However, the court ruled that there was no failure to exercise reasonable care on the part of TSSCA. The failure to act in the relatively short interval that elapsed from the time when the assailant group entered the lower deck cabin or were swearing at the bar and when the assault occurred, was not a failure to take reasonable care for the plaintiff’s safety. Further, the assault was sudden, unexpected and came without prior warning.

There was also no failure to exercise reasonable care in failing to have specialist crowd controllers or other security personnel in addition to the 10 crew members who were manning the vessel on the return journey, having regard to the nature of the trip, the identities of the groups involved, the agenda for the day’s activities and the time over which the events were planned.

The court also held that, although CWS owed a duty of care to the plaintiff, it was not in breach of that duty because CWS had no control over the other passengers on the cruise and, that in the circumstances it was “unrealistic” for CWS to reasonably foresee that a boisterous group of individuals could assault one of their employees. Further, there was no evidence to demonstrate that CWS was made aware that an apparent risk could arise from the plaintiff’s request.

The claim was dismissed.

An appeal against this decision has recently been dismissed by the Court of Appeal.
The appellant then made an insulting remark to Mr Gregg which resulted in Mr Gregg punching the appellant in the face, causing his head to hit the brick wall behind him.

THE DECISION AT TRIAL

The appellant commenced proceedings for assault against Mr Gregg and for negligence against the Club in its capacity as occupier of the licensed premises. The appellant obtained summary judgment against Mr Gregg, and his claim against the Club was determined by North DCJ on 26 May 2014.

The appellant argued that the Club owed him a duty to take reasonable care to prevent injury caused by the violent, quarrelsome or disorderly conduct of persons at the Club. He argued that in order to discharge its duty of care, the Club ought to have informed the duty manager and/or the security officer of Mr Gregg’s propensity for violence and the need to increase the frequency of their inspections of the area in which Mr Gregg was situated. The appellant also argued that a CCTV camera should have been installed in the outside area of the Club as a deterrent for violent behavior. He submitted that if these additional steps had been taken by the Club, Mr Gregg would have been removed from the premises by the Club before the assault took place, or he would have been deterred from acting as he did because of the presence of staff or the visibility of his conduct to a CCTV camera.

The trial judge accepted that the Club owed the appellant a duty to take reasonable care to prevent him being attacked by other persons who are aggressive, but found that the Club was not negligent in failing to take the further precautions that the appellant had contended for. He also found that the Club was not negligent in failing to have someone patrol the outside area more frequently, or in failing to install a CCTV camera in the outside area. The trial judge was not satisfied that if any of those precautions had been taken, the assault would have been prevented. This was because the assault itself took place in a very short space of time, and some sporadic abuse in the 15 to 20 minutes before the assault was only verbal in nature, and no other aggressive actions were made by Mr Gregg until he struck the appellant.

Accordingly, the appellant’s claim against the Club was dismissed.
“The appellant commenced proceedings for assault against Mr Gregg and for negligence against the Club in its capacity as occupier of the licensed premises.”

**THE DECISION ON APPEAL**

The Court of Appeal was asked to consider whether the trial judge erred in finding that the Club had not breached its duty to take reasonable care to prevent injury from violent or disorderly conduct by patrons, and whether he had erred in finding that the appellant had not established factual causation.

The appeal was unanimously dismissed by the Court of Appeal. Although it was accepted that the Club knew that Mr Gregg could be argumentative and quarrelsome, this did not make it necessary for the Club to instruct its staff to increase their supervision of his behaviour. The Court of Appeal noted that whilst there may be some circumstances in which it may be necessary for an occupier of licensed premises to inform its staff of specific concerns about a patron based on past behaviour, that was not the case here, as there had been no evidence of any actual misbehavior by Mr Gregg at the Club prior to his assault upon the appellant.

The appellant’s argument that the installation of a CCTV camera in the outside area would have deterred the type of conduct engaged in by the appellant was also rejected. The appellant’s case was not that the camera should have been continually monitored, but rather it was argued that the presence of a CCTV camera would have been a sufficient deterrent to Mr Gregg’s behaviour. It was noted that the assault happened suddenly and in circumstances where there were other people in the vicinity of Mr Gregg and the appellant who would have witnessed the assault in any event.

The Court of Appeal concluded that the “but for” test of factual causation was not established. If more frequent inspections of the outside area by the duty manager or security officer had taken place, this would not, on the evidence, have resulted in them concluding that Mr Gregg ought to be ejected, and nor was it likely that the presence of a CCTV camera would have prevented Mr Gregg’s assault upon the appellant.

SUE MYERS  
Senior Associate  
Sue.Myers@bnlaw.com.au

The Court of Appeal observed that at its highest, the appellant’s case was that further inspections and the presence of a CCTV camera might have resulted in staff intervening or deterred Mr Gregg’s conduct, but that was not sufficient in establishing factual causation.
THE FACTS
The respondent slipped on soapy residue while walking in the common area of a shopping centre adjacent to the appellant’s supermarket. The residue was left by a child blowing bubbles from a bottle of soapy liquid sold by the supermarket to the child’s parents. The respondent later commenced proceedings against the appellant claiming damages for her injuries.

THE DECISION AT TRIAL
The trial judge found that the appellant owed a duty to the respondent to take reasonable care to prevent a danger being created by reason of the use of products purchased at the supermarket. The trial judge found that one of the appellant’s employees had probably opened the container of soapy liquid at the checkout counter either at the request of the child or her parents. According to the trial judge, this was a breach of the duty of care owed to the respondent.
Damages of $176,032.00 were awarded to the respondent and judgment entered in her favour.

THE ISSUES ON APPEAL

The appellant challenged the trial judge’s finding that one of its employees had opened the bottle of liquid for the child. It also challenged the finding that it was under a general duty to take reasonable care for the safety of people walking along the passageway if it was aware that the danger to them could be obviated by the exercise of reasonable care. Finally the appellant contended that even if it owed a duty of care to the respondent, the trial judge erred in finding that duty had been breached.

THE DECISION ON APPEAL

After analysing the evidence, the Court of Appeal found that the trial judge’s finding that an employee admitted opening the bottle of soapy liquid could not stand as it did not accord with the respondent’s evidence as to the circumstances in which the admission was made and was not supported by the evidence of any other witnesses.

The Court of Appeal noted that the duty of care formulated by the trial judge imposed an obligation on the appellant as the occupier and operator of the supermarket to exercise reasonable care to obviate any foreseeable danger of which it (or its employees) is or should be aware, regardless of whether the danger might exist in the supermarket itself or in the nearby common area of the shopping centre. The duty was said to be owed even to a person not on the supermarket premises and, presumably even if the person did not intend to enter the supermarket.

The trial judge did not confine the duty to dangers emanating from activities conducted in the supermarket or goods sold by the supermarket and it applied in relation to acts of a third person over which the appellant would have no control once that person left the supermarket.

The trial judge held that there was no basis in policy or principle for such a duty. A duty of care of the kind suggested by the trial judge would impose extraordinarily onerous burdens on owners and occupiers of retail premises that go beyond concern for the interest of others which it is reasonable to require as a matter of legal obligation.

The Court of Appeal observed that many stores, not merely supermarkets, sell products that are readily capable of being used (or misused) in a manner that create a hazard to others in the immediate vicinity of the store. If every owner or occupier of such a store was under a duty to take reasonable care to obviate such hazards, for example by warning individual customers not to drop or spill food or drinks, the burden would potentially be very great. For those reasons, the Court of Appeal held that the trial judge erred in concluding that the appellant, in the circumstances, owed a duty to the respondent.

Although it was not necessary to do so, the Court of Appeal considered whether the appellant breached its duty in failing to take precautions against the risk of harm that eventuated in this case. After referring to s5B CLA (NSW) the Court of Appeal had no hesitation in finding that the trial judge erred in finding that the appellant was in breach of duty.

The appeal was allowed.
In Issue:

- Whether the trial judge was in error in finding that reasonable precautions against slipping had been taken.
- Whether the managing agent was entitled to an indemnity from the shopping centre.

Delivered On:
28 August 2014

THE FACTS

On 4 October 2009, the plaintiff was approaching an ATM at Wetherill Park Market Town (Market Town) when she slipped over and fractured her right arm. The pavement was wet from rain. In 2011, the plaintiff commenced proceedings in the District Court against Market Town and its managing agent, Pretti Real Estate Pty Ltd (Pretti) seeking damages for negligence. Some six months before the plaintiff’s slip, the pavement outside Market Town had been painted with a paint containing a non-slip additive. The plaintiff argued that the area where she fell had not been treated with the non-slip paint and that in any event, despite the non-slip paint the pavement remained prone to slipperiness when wet and further preventative measures should have been taken to reduce that risk.

THE DECISION AT TRIAL

The trial judge dismissed the claim against Market Town on the basis that no breach of duty had been established. The trial judge ordered Market Town to indemnify Pretti for the costs of the proceedings.

THE ISSUES ON APPEAL

The plaintiff appealed alleging that the trial judge was in error in failing to find liability on the part of Market Town and Pretti. Market Town sought to challenge the trial judge’s finding that it was required, pursuant to a contractual indemnity, to pay Pretti’s costs of defending the proceedings brought against it.

THE DECISION ON APPEAL

The Court of Appeal held that no error had been demonstrated on the part of the trial judge. The trial judge’s conclusion that reasonable precautions had been taken against the risk of someone slipping was open on the evidence.

Although the risk of slipping was foreseeable, the absence of any evidence that it had happened in any other shopping centre suggested that, if not insignificant, the risk was not high. Since the trial judge was not shown to be in error, the appeal was dismissed.

The Court of Appeal then considered the appeal on the indemnity issue. The Court of Appeal held that there was no reason to read the language of the clause referring to “...the proper performance of any of the powers, duties, or authorities of the Agent...” under the agreement as excluding the non-negligent performance of its duties. Although the grammatical structure of the relevant clause of the contract was less than ideal, it clearly extended to costs incurred by the agent with respect to proceedings brought against it arising out of such non-negligent conduct. The appeal in relation to indemnity was also dismissed.

THE FACTS
On 5 March 2006, the plaintiff was travelling as a passenger in a car being driven by her husband, Thomas Lee (Mr Lee). Mr Lee drove the car to the second level of a commercial car park, operated by Carlton Crest Hotel (Carlton Crest). After Mr Lee had found an empty car space, the plaintiff got out of the vehicle and watched as her husband reversed the car towards the metal perimeter railing of the car park. The car came into contact with the railing which provided little resistance, allowing the car to proceed over the edge and plummet to the floor below. The plaintiff rushed to her husband’s aid but found that he had suffered fatal injuries.

At trial, two matters of significance in respect of liability were noted by the court. Firstly, only one end of the wheel stop at the rear of the subject car space was affixed to the floor. That defect allowed the wheel stop to rotate upon the application of force. Secondly, the perimeter railing was inadequate in terms of its ability to withstand load resistance.

The plaintiff brought proceedings against Carlton Crest as the occupier of the car park as well as the City of Sydney Council (the Council) as the body responsible for the car park’s approval. The plaintiff sought damages for the psychological harm she suffered as a result witnessing her husband’s death. In addition, the plaintiff made a claim under the Compensation to Relatives Act 1897 (NSW) (CRA).

THE DECISION
The duty of care owed by Carlton Crest was found to have included an obligation to have in place a reasonable system of inspection, which it had not done. The court found that had such a system been in place, the partially affixed wheel stop and the inadequate perimeter railing would have been detected and the accident would have been avoided.

The court also found that prior to the accident, Carlton Crest became aware that some of the perimeter railing around the car park was defective. On the basis of those findings, Carlton Hotel was found in breach of its duty and was apportioned 75% of liability for the accident.

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“The Council was also found liable on the basis that it had allowed the Carlton Crest to operate the car park commercially despite the perimeter railing falling short of the relevant standard.”

The Council was also found liable on the basis that it had allowed the Carlton Crest to operate the car park commercially despite the perimeter railing falling short of the relevant standard. The court found that the Council’s initial inspection and subsequent exercise of power were both negligent and unreasonable. Council was consequently apportioned the remaining 25% of liability.

The court then considered contributory negligence. It was found that after Mr Lee’s car had made contact with the wheel stop, he applied some accelerating force because he did not consider that the car had reversed far enough into the car space. Due to the wheel stop not being adequately affixed to the floor, it rotated, allowing the car to collide with the perimeter railing which then gave way. The court considered Mr Lee’s actions and took into account the fact that he had no knowledge of either the faulty wheel stop or the grossly inadequate nature of the perimeter railing.

On that basis, the court considered it appropriate to reduce the total damages recoverable by 20% on account of contributory negligence.

In terms of damages, the court found that as a result of her husband’s death, the plaintiff had suffered an almost complete psychological collapse which affected every part of her life, including her career as a speech pathologist. In relation to the plaintiff’s claim under the CRA, the court also found that the plaintiff could have expected to derive significant economic benefits from her marriage. The court allowed the parties an opportunity to calculate damages in order to give effect to the judgment.
WEARING-SMITH v SWIFT
[2014] NSWDC 159

THE FACTS
The 71 year old plaintiff sustained serious personal injuries to his chest and thoracic spine when he fell from the first floor balcony of a private property. The incident occurred when a framed glass balcony panel gave way when the plaintiff leaned against it to steady himself. The plaintiff issued proceedings against the owners of the property for negligence.

During the course of the trial, quantum was agreed in the sum of $425,000.

THE DECISION
The court had 3 main issues to determine. Firstly, the probable mechanism by which the glass panel gave way. Secondly, whether there was any negligence on the part of the defendant property owners. Thirdly, whether there should be any reduction for contributory negligence.

On the first issue, the court considered a raft of factual evidence from a number of the 20 guests who were in attendance on the day for a birthday celebration. The court concluded that the plaintiff stood up and in order to steady himself, placed his hand and some weight against the glass balustrade. One or more of the 4 bolts holding the glass panel in place at its base failed due to corrosion, resulting in the plaintiff’s fall.

Notwithstanding that there was no reliable evidence as to the condition of the bolts, either when they were painted approximately 3 years prior to the incident or after the panel gave way, the court inferred that the rusting process continued to the point where the bolts sheared or gave way when the plaintiff leaned upon the balustrade. The court also rejected alternative arguments suggesting that the laminated glass had failed or that the plaintiff himself had struck the panel with a great force and momentum.

The court then considered whether the defendants had breached their duty of care to the plaintiff. In this respect, the court considered the foreseeability of the harm in the context of the significant number of guests expected to use the balcony that day.

The court noted that the defendants had obtained a pre-purchase building inspection report in December 2002 and then in 2006, arranged for a painter without any structural qualifications to paint/fix the surface rust on the balcony balustrading. No consideration was given to the state of the structural components, noting there was a recommendation made in the pre-purchase property report for a glazier to review the soundness of the balustrade.

Ultimately, the court found that a reasonable person in the position of the defendants would have taken precautions to ascertain the structural soundness of the balustrade, before allowing guests to be in close proximity to the structure. In terms of the associated costs and burden on the defendants in ensuring this, the court noted that the defendants had seen fit to replace a pool fence on the grounds of safety following an inspection, yet had failed to organise for a structural inspection of the balustrade.

As such, the court held that the defendants had acted negligently and this was causative of the plaintiff’s incident and injuries.

Finally, in terms of contributory negligence, the court did not identify any evidence to support an assertion of contributory negligence, particularly when bearing in mind the sequence and rapidity of the events in question.

Judgment was given for the plaintiff in the agreed amount of $425,000.
JACOBE v QSR PTY LTD T/AS KENTUCKY FRIED CHICKEN LAKE MBA

[2014] NSWDC 150

**In Issue:**
- Whether plaintiff’s fall was due to negligence on the part of the occupier
- Whether risk of injury was an obvious one
- Whether plaintiff contributed to his own injuries

**Delivered On:**
19 September 2014

**The Facts**
At about 8:30pm on 9 May 2012, the 55 year old plaintiff tripped over a concrete wheel stop affixed to the tarmac of the car park within the defendant’s premises and sustained injuries.

The plaintiff alleged that the defendant breached the duty of care that it owed to the plaintiff as the occupier of the car park of a fast food outlet. At issue was whether or not the car park was adequately lit at the time of the plaintiff’s fall. The defendant alleged that the risk of tripping on a concrete wheel stop was an obvious risk within the meaning of s5G CLA (NSW).

Alternatively, the defendant alleged that the plaintiff was 100% contributorily negligent.

**The Decision**
The court considered whether the risk was obvious pursuant to s5G CLA (NSW). The court noted that the plaintiff had been to the defendant’s premises on many previous occasions without incident. The court held that the plaintiff ought to have been aware of the presence of the concrete wheel stop and that the risk of injury was obvious and therefore the defendant had no duty to warn the plaintiff of the presence of the wheel stop in the car park.

The court accepted expert evidence that there was adequate lighting in the car park and that nothing further was required of the defendant by way of precautions to alert the plaintiff of the existence of the wheel stop. The court considered that the wheel stop was readily observable to a pedestrian negotiating the area and that the plaintiff failed to establish that the defendant was negligent.

The court made no finding of contributory negligence with respect to the plaintiff’s choice of route to get to his parked vehicle. However, the court did make a finding of contributory negligence on the part of the plaintiff for failing to keep a proper look out.

A verdict and judgment in favour of the defendant was entered.

“The court made no finding of contributory negligence with respect to the plaintiff’s choice of route to get to his parked vehicle.”
ROSS GAZIS v GUAL PTY LTD & ORS
[2014] NSWSC 1617

In Issue:
• Whether the principal contractor, employer and occupier breached their duties of care to a security guard working at the premises
• Apportionment between tortfeasors

Delivered On: 17 November 2014

THE FACTS
The plaintiff was employed as a security officer by Metro Protective Services (MPS). MPS contracted with Gual Pty Ltd (Gual), to provide armed security services to the South Sydney Junior Rugby Leagues Club Ltd (the Club). The Club’s security arrangements required the presence of an armed guard at the area where money was taken by wheeled trolleys from the poker machines to a counting room. The trolleys were transported by employees of the Club from the area of the poker machines to the counting room. The trolleys were unloaded in the counting room and the empty trolley was placed in an adjacent area which was patrolled by the plaintiff. The plaintiff understood that his tasks included assisting the employees of the Club at the time he was patrolling the area.

The Club was aware that the plaintiff assisted other employees and moved trolleys on a regular basis.

On 19 May 2006 the plaintiff tried to move an empty trolley when the wheels locked causing him to fall backwards and suffer a compression fracture of his spine at the L3 level and an aggravation and exacerbation of other spinal injuries.

The plaintiff issued proceedings against Gual, the Club and MPS. Each sought contribution and/or indemnity against the other by way of cross claims. Gual was in liquidation by the time of the trial and did not participate in it.

THE DECISION
The trial judge apportioned liability 75% to the Club and 25% to MPS with no reduction for contributory negligence.

The trial judge found that Gual did not breach its duty of care to the plaintiff, an employee of a sub-contractor, as it had no duty to provide a safe system of work. It was found that even though Gual had the ability to provide a supervisor, at least from time to time, to supervise the work being done at the Club, such supervision would have been wholly ineffective to allow Gual to foresee or ameliorate the risk in relation to trolleys.

The trial judge held that MPS, as the plaintiff’s employer, had a duty to provide a safe system of work. Although it was found that MPS took no steps to ensure that the conditions under which the plaintiff was working were safe, the trial judge found that the opportunity for it to assess the system of work under which the plaintiff was operating was extremely limited. The trial judge found that an inspection of the Club and the conditions under which its employee was working would not ascertain the particular risk that caused the plaintiff’s injury as it was unlikely that a trolley would be located in the area he supervised at the time of any inspection. The trial judge therefore found that MPS’ liability should be at the lower end of the spectrum.

The trial judge held that the Club was negligent in failing to provide the plaintiff with the requisite training or safety induction, or failing to provide a direction not to handle the trolleys when he had not undergone such training or induction. The trial judge found that the plaintiff was not simply an invitee on the land occupied by the Club, he was there for the mutual commercial benefit of the Club and MPS and for the express requirement to work in accordance with the directions of the Club.

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The trial judge found that the Club was capable of implementing a reasonable system for the movement of the trolleys, and therefore owed a duty to the plaintiff to exercise reasonable care by ensuring that the system of work adopted by it was safe for him and either to provide training in the proper moving of trolleys or to direct him not to move the trolley and allow only personnel that had been trained by the Club to do so. Such training and/or directions were given to the Club’s employees but not to the plaintiff as an employee of a contractor or subcontractor. The trial judge found that this course of conduct involved no additional expenditure and the precautions were inexpensive and easy to effect.

The trial judge found that the Club had specific safe work procedures to be adopted when moving trolleys but those procedures were never provided to the plaintiff nor were they provided to MPS or Gual. The trial judge further found that documents existed which directed contractors not to perform work that was not assigned to them but such documents were also never given to the plaintiff, MPS or Gual.
THE FACTS

The plaintiff attended an ice rink located in a sporting complex occupied by the Liverpool Catholic Club Ltd (the Club). The plaintiff hired a pair of size 13 skates from the counter and went to a row of chairs located a few metres away where he put on the hired skates. He proceeded to the head of a flight of stairs in order to descend to the ice rink which was at a level of about 2m below the head of the stairs. As the plaintiff descended the stairs he placed the blade of the skate boot on the back of the step but because of the length of the skate blade there was an overhang of the blade over the front of the nosing edge of the step. The steps were moist and the treads and risers were of variable dimensions. The plaintiff descended about 6 steps before he slipped and fell and suffered a serious fracture injury to his right ankle.

The plaintiff issued proceedings against the Club alleging that it had breached its duty of care as occupier.

THE DECISION

The trial judge found that the Club owed the plaintiff a duty of care to ensure that he was provided a safe means of access to the ice rink, knowing that its customers used the stairs whilst wearing ice skating boots.

The trial judge found that the defendant was required to warn the plaintiff of an obvious risk and there was no unreasonable conduct on his behalf.

The trial judge found that the Club should have provided a warning that patrons should not put on their ice skating boots before descending the stairs and also a verbal and diagrammatic warning and instruction for patrons to use a splayed footed technique for negotiating the stairs and a statement alerting the patrons to the stairs being slippery due to wetness. By failing to provide the precautions, the trial judge held that the Club breached its duty of care to the plaintiff.

"The trial judge found that the Club owed the plaintiff a duty of care to ensure that he was provided a safe means of access to the ice rink, knowing that its customers used the stairs whilst wearing ice skating boots."
THE ISSUES ON APPEAL
The Club appealed. The issues on appeal included whether the risk of harm was an obvious risk, whether the duty of care required the Club to warn the plaintiff of an obvious risk and whether a reasonable person in the Club’s position would have taken the precautions found by the trial judge.

THE DECISION ON APPEAL
The Court of Appeal found that the trial judge erred in not finding that the risk of harm was obvious under the CLA (NSW). The risk of harm which materialised and caused the plaintiff’s injury was that of slipping and falling whilst descending the stairs in skate boots. The Court of Appeal found that the difficulties in descending the stairs in those boots would have been readily apparent to a person in the plaintiff’s position. The plaintiff was wearing a size 13 skate boot, the blade of which was significantly longer than the tread of any of the stairs. The Court of Appeal found that it would have been apparent to a person in the plaintiff’s position that the risk of falling when walking down the stairs was significantly heightened by the fact that he was wearing skating boots.

The Court of Appeal also held that the problems associated with descending the stairs in those boots was easily observed from the actions of other patrons who descended whilst the plaintiff was standing at the top of the stairs. The Court of Appeal found that the trial judge erred in proceeding on the basis that the risk in question was not only that of slipping or falling when descending the stairs whilst wearing ice skating boots but also involved the uneven dimensions of the stairs and the fact that they were wet. The Court of Appeal found that the evidence did not justify those conclusions.

The appeal was allowed.
THE FACTS
On 3 May 2012, the 79 year old plaintiff, Mrs Ellery, was on board a chartered catamaran with her family at the Hamilton Island Marina. The catamaran was booked with the defendant owner/operator in the course of its business as a commercial provider of sailing charters.

Soon after the party boarded the catamaran, but prior to the safety briefing by the skipper, the plaintiff stepped backwards in the saloon area and fell down a short, steep flight of stairs sustaining fractures of the upper two cervical vertebrae as well as at C5 and C6.

There was no substantial factual dispute, nor was it in dispute that the defendant owed the plaintiff a duty of care. The issue for determination was whether the defendant had taken reasonable steps to avoid the risk of injury, taking into account the design of the vessel and the defendant’s system of introducing customers to it.

The plaintiff relied on the opinion of an engineering consultant who concluded that the stairs presented a risk that should have been addressed by way of a chain or guardrail at the top of the stairway, together with visual contrasts and verbal warnings upon entry to the vessel. The plaintiff also alleged that the defendant ought to have warned of the existence of the stairs prior to customers boarding the vessel. The defendant argued that the risk of falling down the stairway was an obvious one.

THE DECISION
The court was not satisfied that a failure to warn was causative of the plaintiff’s injury. The court considered that while it may have been open to the defendant to warn of the presence of the stairs prior to boarding the vessel, there was doubt as to whether any warning would have prevented the fall.

The court found that the defendant was negligent in operating the vessel for commercial use without altering it for that purpose. The court considered that to discharge its duty, the defendant was required to install a physical safety barrier which would reduce the risk of falling down the access stairway, at least until passengers had received a thorough safety briefing. The court also considered that due to the confines and peculiar structure of the catamaran the risk of falling down the stairway was not an obvious one.

Nevertheless, the court accepted that the plaintiff failed to take notice of her surroundings. Judgment was entered for the plaintiff in the amount of $117,975.69.

“Nevertheless, the court accepted that the plaintiff failed to take notice of her surroundings.”
THE FACTS
The 21 year old respondent, Benjamin Ackland, was a student when in October 2009 he went on a mystery bus tour to Green Valley Farm (the farm) with other students from his residential college. The farm was a holiday/amusement park that contained a number of attractions including a jumping pillow that was used similarly to a trampoline.

The respondent attempted to perform a backflip on the jumping pillow. Unfortunately he landed on his head, sustaining an injury to his neck that rendered him a quadriplegic.

The respondent alleged that the farm operators (the appellants) had failed to warn him of the risk of serious injury in performing back-flips on the pillow and had failed to ban such manoeuvres. Importantly, less than two months prior to the incident the manufacturer of the jumping pillow had written to the defendants recommending that signage prohibiting somersaults on the pillow be erected nearby, and printed onto the pillow itself.

THE DECISION AT TRIAL
While the court was prepared to find that performing a backflip on the jumping pillow was a dangerous recreational activity, it did not accept that the risk of sustaining a serious neck injury whilst doing so was an obvious one.

The appellants failed to establish that the defence of obvious risk applied and the respondent was awarded damages in the sum of $4,626,241.84.

THE ISSUES ON APPEAL
The Court of Appeal had to consider whether the trial judge had erred in finding that the respondent had engaged in a dangerous recreational activity and that the risk of catastrophic injury caused by performing back-flips on the pillow was not an obvious one.

THE DECISION ON APPEAL
The appeal was unanimously dismissed.

The appellants failed to point to any evidence that had been overlooked, what other findings should have been made, or more generally any error made in assessing the implications of the facts as he found them.

While accepting the appellants’ argument that they were not required to eliminate or prevent the risk of injury, they were nevertheless required to avoid the risk to visitors, a risk that they were in a better position to understand and appreciate, particularly in light of the manufacturer’s recent warnings. The appellants were under a positive duty to pass on those warnings to their customers who could then decide for themselves whether to assume the risk warned of.

The Court of Appeal also rejected the appellants’ challenge on causation, finding that there was sufficient evidence before the trial judge to demonstrate that the respondent was of a cautious and prudent nature and would have heeded warnings or prohibitions on performing back-flips had they been provided.
METAXOULIS  v  MCDONALD’S AUSTRALIA LTD
[2015] NSWCA 95

In Issue:
• Liability of a McDonald’s restaurant to a person who was injured after rescuing a child on a McDonald’s playground

Delivered On:
13 April 2015

THE FACTS
On 31 July 2010, a five year old boy got stuck in the back area of the playground equipment in a McDonald’s restaurant where children were not supposed to play. Mr Metaxoulis climbed over the equipment and released the boy. After handing him to his parents, Mr Metaxoulis fell off the equipment and suffered an aggravation of a pre-existing injury to his left wrist and a minor rib injury. Mr Metaxoulis alleged McDonald’s was negligent in failing to have an appropriate system preventing unauthorised access to the back area of the playground through an unsecured gate, which was open at the time of the incident.

THE DECISION AT TRIAL
The matter went to trial in the District Court and the trial judge gave judgment for McDonald’s on the basis that Mr Metaxoulis had failed to establish any negligence on its part. The court undertook a hypothetical quantification of damages of $78,911.95.

THE ISSUES ON APPEAL
Mr Metaxoulis appealed the decision in respect of the finding of no liability and the assessment of damages.

THE DECISION ON APPEAL
On appeal, the Court of Appeal considered that the fact that there was no sign on the gate prohibiting access to unauthorised persons made it more likely that adults or taller children would open it. Once open it was foreseeable that young children would use it to gain access to the back area of the colourful equipment. Once in that area, it was also to be expected that they would climb onto the equipment. The risk of getting stuck or slipping off was readily foreseeable.

The Court of Appeal held that McDonald’s knew children were entering the prohibited area of the playground and had done nothing to prevent it. Precautions which could have been taken did not place an unnecessary burden on McDonald’s and would have prevented the incident. These included, for example, a notice forbidding entry to unauthorised persons, a spring-loaded hinge to ensure the gate closed after being opened or simply installing a lock on the gate.

As none of these precautions were taken the Court of Appeal held that McDonald’s had breached its duty of care by failing to provide a system preventing unauthorised access by children to the back area of the playground.

Accordingly, the Court of Appeal allowed the appeal and awarded Mr Metaxoulis damages of $179,000 after reconsidering the assessment of damages undertaken by the trial judge.

CARLA ELLIOTT
Graduate
Carla.Elliott@bnlaw.com.au

BACK TO CONTENTS  BACK TO SECTION  LINK TO CASE
In Issue:
• Whether excavation works caused damage / loss of support to a neighbouring residential property

Delivered On:
1 October 2014

THE FACTS
The key issue in the matter was whether excavation works carried out on behalf of the first and second defendants, by the third defendant, caused the natural support of the plaintiffs’ neighbouring property to be detrimentally affected. Also in issue was the appropriate amount of damages to be awarded with respect to a separate encroachment onto the plaintiffs’ property as a result of the subject works.

Various works were carried out on the first and second defendants’ property whilst they were on an overseas holiday. During the course of the works, a number of trees were removed and excavation was carried out along the 26m-long boundary, including the erection of a retaining wall.

The plaintiffs pleaded that in breach of their duty of care, the defendants removed part of the support provided to the plaintiffs’ land. The particulars of the breach included the removal of trees, the excavation, the storage of building materials on the land immediately adjacent to the embankment, as well as leaving the excavation untreated for about a month. The plaintiffs originally claimed that because of the defendants’ actions, they would incur very expensive stabilisation costs. Ultimately, a conclave of development experts and consideration of the relevant factual evidence concluded that there was virtually no evidence of any substantial movement of the plaintiffs’ house because of the defendants’ excavations.

THE DECISION
The court had two categories of questions to consider. Firstly, whether there was a breach of s177 Conveyancing Act 1919 (in relation to the right of lateral support) and if so, the quantum of damages and who was obliged to pay. Secondly, relevant issues arising under the Encroachment of Building Act 1922.

In terms of the first issue, after a conclave between the relevant civil engineers, those engineers were almost unanimous in agreement that there were pre-existing settlement cracks in the plaintiffs’ house prior to the excavation taking place and further that the subject excavation did not cause any settlement or cracking to the plaintiffs’ house.

Factually, the court preferred the evidence of the third defendant builder where that evidence conflicted with the plaintiffs’ evidence.

In terms of the second issue, namely the encroachment issue, the parties agreed that there was an encroachment of an area of 2m². Consideration was given to case precedent concerning the best approach in these situations, taking into account the remedies available such as damages, conveyance of the subject encroachment and/or the granting of an easement. Ultimately, the court concluded that the granting of an easement would be an appropriate remedy and based on the factual evidence awarded monetary compensation in the sum of $1,110.

The court was very critical of the plaintiffs, noting that it should have been evident very early in the matter that the relevant experts were almost unanimous in their opinion regarding the alleged damage to the plaintiffs’ property (or lack thereof). It was noted that the costs payable in respect of the failed principal proceedings (payable by the plaintiffs) outweighed the $1,110 compensation and this was set-off against the costs payable. However, the court ordered that an easement be granted with respect to the encroachment.
DU PRADAL & ANOR v PETCHELL
[2014] QSC 261

In Issue:
• Liability of a boat operator for striking a spear fisherman
• Assessment of damages for multiple serious injuries
• Claim by employer for loss of services

Delivered On:
24 October 2014

THE FACTS
In June 2008, the plaintiff (Mr Du Pradal) suffered several significant injuries when he was struck by a boat while spearfishing off the coast of Cape Moreton. The defendant (Mr Petchell) was the driver of the boat that struck Mr Du Pradal. The third party (Mr Willsford) was in Mr Du Pradal’s boat at the time of the accident and was joined to the proceedings by Mr Petchell.

Mr Du Pradal was an employee and director of the second plaintiff (Pia Du Pradal Pty Ltd) which claimed to have suffered loss as a result of the deprivation of Mr Du Pradal’s services.

THE DECISION
At trial, both liability and quantum were in issue. The trial judge canvassed a number of possible causes for the accident, including the manner in which Mr Petchell was operating his boat, Mr Du Pradal’s actions before and after entering the water and Mr Willsford’s actions in the moments immediately prior to the accident.

Ultimately, the trial judge concluded that the accident was caused by Mr Petchell’s negligent operation of his boat. Specifically, it was found that he had been ignorant of the fact that he was in the vicinity of a popular dive spot and failed to recognise the significance of Mr Du Pradal’s dive float. Additionally, Mr Petchell was found to have been travelling in excess of the lawful speed limit at the time of striking Mr Du Pradal.

The trial judge did not accept that Mr Willsford owed a duty to protect Mr Du Pradal from the actions of a stranger. In any case, the trial judge determined that had such a duty been owed, Mr Willsford’s actions in attempting to alert Mr Petchell of Mr Du Pradal’s presence would have discharged such a duty.

Mr Du Pradal was found to have suffered a 24% whole person impairment as a consequence of the multiple compound fractures sustained to his left leg. That injury was considered to be Mr Du Pradal’s dominant injury for the purpose of assessing general damages.

Notwithstanding Mr Du Pradal’s whole person impairment indicating a “moderate lower limb injury” (as described by the Civil Liability Regulation 2003), the trial judge considered that all other indicators suggested that the dominant injury fell within the “serious lower limb injury” classification, which attracts an ISV range of 21 to 30. The trial judge noted that while he would not assess the lower limb injury itself as having an ISV of 30, after consideration of the other injuries suffered by Mr Du Pradal, an ISV of 30 was appropriate. A further uplift of 33.33% was applied to account for the adverse impact of Mr Du Pradal’s multiple injuries, resulting in an ISV of 40. In addition, Mr Du Pradal was awarded amounts for past and future care, past and future medical expenses and past and future economic loss. The total damages award was $675,203.

The second plaintiff sought damages for deprivation of Mr Du Pradal’s services. It did not hire a replacement for Mr Du Pradal and therefore calculated its damages as profits said to have been lost as a consequence of Mr Du Pradal’s absence. The claim was dismissed on the basis that the second plaintiff was not entitled to claim for “lost profits” or the notional cost of replacement labour when no such cost was incurred.
THE FACTS

On 17 June 2009 at 5.45pm, Mr Franklin (the plaintiff) and Mr Blick (the defendant) were both cycling in the same direction within a dedicated bike lane which was adjacent to a traffic lane. The defendant, who was riding slightly in front and to the left of the plaintiff, hit a long piece of wood on the road surface, causing him to veer and collide with the plaintiff. As a consequence the plaintiff fell from his bicycle onto the road surface and was struck by a motor vehicle.

The plaintiff suffered severe injuries (including a fractured pelvis, fractured right transverse process, internal bleeding, grazes and bruising).

He claimed damages on the basis that his injuries were caused by the defendant’s negligence in failing to keep a proper lookout for dangers on the cycleway. The plaintiff did not bring proceedings against the driver of the motor vehicle as it was unlikely that he could prove that the driver was negligent.

THE DECISION

The defendant owed other road users, particularly cyclists such as the plaintiff, a duty to exercise reasonable care to avoid causing injury. This duty extended to exercising reasonable care to avoid running over objects on the cycleway likely to cause him to lose control of his bicycle.

The defendant was aware that the plaintiff was riding adjacent to him so that any loss of control of the defendant’s bicycle presented a risk of injury to the plaintiff. The need to exercise reasonable care to avoid colliding with objects likely to cause the defendant to lose control of his bicycle was even more apparent because the cycleway on which they were riding was directly adjacent to a busy road.

The large piece of wood was lying on the cycleway directly in the path of the defendant’s bicycle. The lighting was good and he was travelling only at a moderate speed. The court found that the defendant would have seen the piece of wood in adequate time to take evasive action had he been keeping a proper lookout for objects on the cycleway.

As such, the defendant did not exercise reasonable care, and the plaintiff’s injuries were a direct consequence of the defendant’s breach of duty of care.

Given the position of the cyclists on the cycleway, the plaintiff would not have seen the piece of wood had he been keeping a proper lookout. There was also no evidence adduced to establish that a reasonable cyclist would not have ridden side by side in the bicycle lane, as the plaintiff had. Therefore, the claim for contributory negligence failed.

The plaintiff was awarded $1,659,392.75 in damages.
THE FACTS

On 7 January 2008, at age 12, the plaintiff was at a public swimming pool run by Lithgow City Council (Council) for school swimming club training. The plaintiff attempted to dive off the pool edge at the shallow end, when her foot slipped and she fell head first into the pool. The plaintiff sustained catastrophic injuries and was rendered a tetraplegic.

The plaintiff was a very experienced and competent swimmer and a member of her school swimming club. She issued proceedings against Council and Kinross Wolaroi School (the school).

Mr Critoph, the school’s swimming coach, was on annual leave at the time of the plaintiff’s injury and had directed a Mr Brodie to assist the plaintiff with her swimming training. Mr Brodie was not a coach, he was a parent of two children who were also members of the swimming club. Mr Critoph had left written swimming programs for his students to complete over the school holidays, which Mr Brodie implemented in his absence.

The dive that the plaintiff was attempting to execute was a “track start” dive. She had been taught this dive in 2006 at the school’s pool and had performed it hundreds, if not thousands of times previously, and routinely performed it into the shallow end of the school pool.

THE DECISION

The court concluded that the immediate cause of the plaintiff’s dive not proceeding normally was that her foot slipped. The court considered that the absence of gripping facilities at the edge of Council’s pool, when compared to the school’s pool, contributed to the incident.

The court held that Council was not liable for the plaintiff’s injuries on the basis that there was nothing to suggest that slipping was due to any fault in the general pool surround and there was nothing unreasonable in Council allowing diving into the shallow end of the pool in the context of training. Also, the court was not persuaded that better signage or an induction by Council would have prevented the plaintiff’s injury.

The court found the school was liable for the plaintiff’s injuries. Although the court did not consider there was anything unreasonable about the school allowing diving in the shallow end of the pool or the appointment of Mr Brodie to oversee the plaintiff’s training, the court held that a swimming coach is under an obligation to take account of the additional risks associated with track start dives and not simply follow the limited standards available. It was also unreasonable of the school to encourage the plaintiff, who was accustomed to performing track start dives into the shallow end of a pool, to engage in training at Council’s pool which lacked gripping facilities.

In relation to “obvious risk” under the CLA (NSW), the court held that striking the bottom of the pool generally was an obvious risk (even to a child of the age and experience level of the plaintiff). However, the court was not satisfied that the particular risks attendant on the plaintiff in attempting to execute a track start dive from the shallow end of the pool were obvious.

The court held that the school failed to warn the plaintiff of the risks associated with performing track start dives at the shallow end of the pool, and that had such warnings been sufficiently strong and repeated the plaintiff would have aborted the dive when her foot slipped, thereby avoiding the occurrence of the incident.

In Issue:

- Whether Council and/or the school were liable for an injury sustained in the course of swimming training.

Delivered On:

28 November 2014
THE FACTS

The appellant, Perisher Blue Pty Ltd (Perisher), operates ski fields at Perisher, NSW. The respondent, Dr Ghita Nair-Smith, sustained personal injuries whilst boarding a triple chair lift on 18 July 2003.

The respondent and her companions, Mr and Mrs Nowland, waited to board the chair lift at the loading point, when they observed the safety bar on the chair was down. After attracting the attention of Mr Lofberg (Lofberg), the Perisher employee working in the loading area, Lofberg hurriedly raised the safety bar. However, as the respondent boarded the chair, the armrest came between her legs, causing her injuries.

Against Perisher, the respondent alleged negligence, breach of contract and breach of an implied warranty imported by s74 TPA (as it then was) to provide services with due care and skill, but denied any breach or causation.

THE DECISION AT TRIAL

At trial the respondent was successful in her claim against Perisher and was awarded over $1.3 million in damages. The respondent’s primary case at trial was that the actions of Lofberg had caused the chair to move out of alignment. Contrary to this position, however, the trial judge found as a matter of fact (based on expert evidence) that Lofberg’s actions had not caused the chair to move out of alignment.

In assessing breach pursuant to the CLA (NSW) the primary judge categorised the relevant risk as the “risk of physical harm resulting from a chair arriving at the loading station in a state not suitable for boarding”. The risk was foreseeable and not insignificant. A reasonable person in the position of Perisher would have taken the precaution of having a ski operator “near or close to the loading point observing, at the very latest, the state of the chair as it exited the bullwheel”, and in light of the probability and likely seriousness of the harm, the failure to take this precaution was a breach of Perisher’s duty of care. Further, Lofberg’s actions in having to lunge at the chair caused the respondent and her companions to panic, so that the respondent was displaced from her original position. Thus,
Perisher’s breach was causative of the incident.

The trial judge also found there was an implied warranty in the contract pursuant to s74 TPA, which was breached on the same grounds as the negligence claim. The primary judge found that boarding the chair lift was not a dangerous recreational activity for the purposes of s5L CLA (NSW), nor was any allegation of contributory negligence established.

THE ISSUES ON APPEAL

There were a number of grounds to the appeal, including alleged factual errors made by the primary judge and alleged errors in the content, scope and formulation of Perisher’s duty of care, breach and causation. Grounds of appeal were also contended in relation to the assessment of damages.

THE DECISION ON APPEAL

Ultimately, the award in favour of the respondent was overturned. The Court of Appeal agreed, on issues of factual dispute, that there was no evidence the chair was out of alignment as it reached the respondent. It was accepted that at some point after entering the loading area, the respondent herself moved out of alignment. The Court of Appeal agreed that Perisher had breached its tortious duty of care, however found the risk of harm was categorised too broadly by the trial judge. The proper characterisation was the risk that a skier might sustain physical injury as a result of his or her reaction to the manner in which a lift operator responds to a down-bar situation. Given the characteristics of the chair lift and the vulnerability of the skiers waiting to board it, there is both a foreseeable and not insignificant risk that physical injury may result from a skier’s reaction and reasonable care required Lofberg to direct his attention to the chair earlier than he did.

However, the Court of Appeal disagreed that any breach of Perisher’s duty was causative of the respondent’s injuries. It found that the respondent had not discharged her onus of showing that but for the inattention of Lofberg, she would not have moved out of alignment. It is to be noted that the respondent’s primary case (based on her evidence and that of Mr and Mrs Nowland) was that she herself did not move out of alignment, but the chair did.

The Court of Appeal found there was an equal probability that the respondent moved out of position before Lofberg was required to act to the down-bar situation (i.e. before the chair had left the bullwheel). Therefore, it was not open to the trial judge to conclude that Perisher’s breach was a necessary condition of the harm, and causation was not established. This was sufficient to overturn the trial judge’s decision.

The Court of Appeal then went on to briefly discuss the other grounds of appeal for completeness. As to quantum, the respondent contended that the CLA (NSW) did not apply to assessment of damages for breach of terms implied by s74 TPA, due to inconsistencies between the CLA (NSW) and TPA. The trial judge agreed and found that the limitations in assessing damages under the CLA (NSW) were inconsistent with the “full contractual liability” conferred by s74 TPA, and such inconsistency should be construed in favour of the Commonwealth Act, namely the TPA, by virtue of s109 of the Constitution. The Court of Appeal upheld this finding.

Finally, the Court of Appeal also considered the terms of Perisher’s contractual indemnity. The primary judge found that the terms excluding Perisher’s liability for breach of terms implied by s74 TPA were rendered void by s68 TPA. The primary judge did not accept Perisher’s contention that the terms fell within the s68B exclusion, as the contract was not for the supply of “recreational services”, rather it was for the supply of “transportation services”.

Whilst the Court of Appeal generally upheld the finding that the exception at s68B was not triggered, it instead came to this conclusion on the basis that even though riding on chair lifts may be categorised as a “leisure time pursuit” as contemplated by the definition of “recreational services”, it was in no way a “sporting activity” and therefore fell outside the definition.

The Court of Appeal also agreed with the trial judge’s conclusion that the exception in s68B TPA was not triggered as the exclusion clause in Perisher’s ticket attempted to exclude liability for more than personal injury or death.
In Issue:

- Whether a 12 year old boy was contributorily negligent when engaging in a dangerous activity condoned by an adult
- Whether damages for lost opportunity of a higher income were manifestly excessive

Delivered On:
15 May 2015

THE FACTS

The respondent, a 12 year old boy, sustained serious head injuries when he fell while “skitching” (being towed by a car whilst on a skateboard) up a hill. He brought a claim against the appellant driver of the car, who was an adult and the parent of one of his friends.

THE DECISION AT TRIAL

At first instance the appellant unsuccessfully argued for reduction on account of contributory negligence. The trial judge held that there should be no reduction for contributory negligence and apportioned 100% of the responsibility to the appellant.

The trial judge awarded damages in the sum of $2,204,150 including a “buffer” of $200,000 for future economic loss, in addition to the standard loss of income, to reflect the respondent’s loss of opportunity to earn a higher income from self-employment as a qualified carpenter and joiner.

THE ISSUES ON APPEAL

The appellant appealed the findings regarding contributory negligence and the inclusion of the “buffer” of $200,000 in the damages.

THE DECISION ON APPEAL

The Court of Appeal found the respondent to be contributorily negligent by 10% and reduced the future economic loss “buffer” component of $200,000 to $25,000.

In relation to contributory negligence, the Court of Appeal considered that the standard of care to be met by a 12 year old boy is substantially lower than that to be met by an adult. While a 12 year old boy was unlikely to foresee the gravity of the risk of serious brain damage in the circumstances, particularly if an adult condoned the activity, the general risk of injury should have been obvious to the respondent. Some reduction for contributory negligence was accordingly warranted, and 10% was considered to be just and equitable.

As for the future economic loss issue, the Court of Appeal acknowledged that the trial judge’s task was not an easy one. However, it considered that the award of $200,000 was manifestly excessive, having regard to the evidence before the trial judge. In particular, $200,000 was roughly equivalent to a 50% chance that the respondent would succeed as a self-employed carpenter and work from the time of trial for the remaining 46 years of his working life, earning about $80,000 per annum after tax. This was inconsistent with a number of findings of the trial judge regarding the respondent’s most likely circumstances and job prospects and did not take into account the possibility that any business venture might have been unsuccessful or account for potential periodic absences from work.

The Court of Appeal considered that the lost opportunity to earn a greater income by self employment had some value, but the evidence did not permit an award of a substantial sum and $25,000 was considered to be a sufficient allowance.

The Court of Appeal reassessed the respondent’s damages at $1,866,019 and ordered that the respondent pay 90% of the appellant’s costs of the appeal.

VERRYTY
v
SCHOUPP

[2015] NSWCA 128
Meet our Sydney team of insurance law specialists

SIMON BLACK
Partner
E: simon.black@bnlaw.com.au

Simon’s areas of expertise include professional indemnity, management liability, directors and officers, financial lines, and transportation liability.

Simon advises insured professionals on professional indemnity matters, including: property valuers, engineers, architects and builders, accountants and financial planners, Associations, health professionals and film and television production and distribution professionals.

He acts for insurers on construction and engineering matters, in respect of high value and complex contract works and industrial special risks claims. Simon also has experience advising insurers and insureds on high profile ACCC and ASIC investigations, inquiries and prosecutions as well as securities class actions.

NICHOLAS ANDREW
Partner
E: nicholas.andrew@bnlaw.com.au

Nicholas has 15 years experience in advising both Australian and London-based insurers across major lines of insurance including professional indemnity, public and products liability and property (third and first party). He has particular expertise in complex construction and engineering matters.

Nicholas also advises insurers on broader policy and coverage aspects across a range of industries and business classes.
THE FACTS

On 20 August 2004, the plaintiff’s partner was fatally injured when the car she was driving ran off the road and hit a tree. Harden Shire Council (Council) was carrying out road works on the section of road where the accident occurred.

The plaintiff brought proceedings for damages for nervous shock and for dependency under the Compensation to Relatives Act 1897 (NSW). The plaintiff alleged that the cause of the plaintiff’s partner’s accident was her loss of control of her vehicle in the first resurfaced section of the roadwork due to the presence of gravel on that surface and her unchecked speed.

The trial judge also held that, although Council had been negligent, the plaintiff had not established a breach of duty to the standard required by section 43A CLA (NSW). The trial judge was not satisfied that the actions of Council in failing to erect signage were “so unreasonable” that no authority could “properly consider the act or omission to be reasonable”.

THE ISSUES ON APPEAL

The plaintiff appealed the trial judge’s findings with respect to causation and the application of section 43A CLA (NSW).

The appeal was allowed. With respect to causation, the Court of Appeal found that the plaintiff’s partner was a careful driver. The Court of Appeal held that the only reasonable inference to be drawn from the circumstantial evidence was that, had signage warning of the road works and advising a reduced speed been erected, on the balance of probabilities the plaintiff’s partner would have reduced her speed and safely navigated the curve.

With respect to the application of section 43A CLA (NSW), the Court of Appeal found that the expert evidence established that the failure to include signage indicating that the road was slippery and that motorists should reduce their speed was a decision no body with the special statutory powers in question could reasonably have made in these circumstances.

The matter was remitted to the Supreme Court for the assessment of damages.
In Issue:

• Whether the City was negligent in failing to ensure that a paver on which the plaintiff tripped was not raised by 20mm to 25mm

Delivered On:
15 September 2014

“\textit{The trial judge found that the cause of the plaintiff’s fall was that she tripped on a paver.}”

THE FACTS

The plaintiff alleged she sustained a split lip and possible loss of consciousness when she tripped on a protruding paver and fell whilst walking on a pathway on 18 March 2012. The plaintiff alleged that the City of South Perth (the City), the occupier of the pathway, was negligent in that it failed to ensure that the particular paver on which she tripped was not raised and that it failed to follow its “tree” and “footpath” program.

THE DECISION

The trial judge found that the cause of the plaintiff’s fall was that she tripped on a paver that was approximately 20mm to 25mm higher along the width of its leading edge than the adjoining paver as a result of pressure from an adjacent tree root pushing the paver upwards.

The trial judge found that there was no duty on the City to maintain the pathway so that its surface was even. He found that the path was reasonably safe for ordinary use and there was no breach of duty of care.

Even if the City had breached its duty of care, the trial judge found that the City would not be liable by virtue of section 5Z CLA (WA). He noted that section 5Z required actual knowledge of the particular risk posed by the unevenness or irregularity of the very paver that caused the trip and fall. It was not sufficient for the City to know of the more general risk that the plaintiff might trip and fall on an area of irregular pavers in the area where she fell. The trial judge found that there was no basis upon which any inference of actual knowledge of the particular protruding paver causing the plaintiff’s fall could be drawn.

In the event that the City was liable, the trial judge assessed the plaintiff’s contributory negligence at 50% on the basis that the plaintiff failed to watch where she was going. The plaintiff’s claim was dismissed.

ASHLEE
BONANNO
Solicitor
Ashlee.Bonanno@bnlaw.com.au

THE FACTS

The plaintiffs owned land at Narangba and a chemical plant was operated on the site by a related entity, Binary Industries. On 25 August 2005 a fire destroyed the plant, with fire fighting efforts resulting in large quantities of water becoming contaminated and affecting the plaintiffs’ land and neighbouring properties. The Environmental Protection Agency (EPA) issued a notice to the plaintiffs to conduct remediation works. The remediation works required amounted to costs of around $10 million. The plaintiffs’ insurer declined indemnity for those costs. The plaintiffs commenced action against the Queensland Fire and Rescue Service (QFRS), alleging negligence in respect of the actions taken in fighting the fire, and against Binary’s insurance brokers for a failure to obtain appropriate insurance policies for the plaintiffs. In an earlier determination of a separate issue, the question of whether the alleged appropriate polices (a liability policy held by Binary and a hypothetical ISR policy) would have responded to cover the plaintiffs for the costs of the remediation was determined. It was found that the loss would not have fallen within the liability policy. It was found on appeal that the theoretical ISR policy may have covered the loss, but the issue was not resolved.

THE DECISION AT TRIAL

The trial judge gave judgment for the defendant brokers and the QFRS. The QFRS had denied it owed a common law duty of care to the plaintiffs. The plaintiffs had not pleaded a breach of statutory duty. The trial judge found that the QFRS owed a duty to take reasonable care in conducting its fire fighting...
“The trial judge found that the QFRS owed a duty to take reasonable care in conducting its fire fighting operations and had breached that duty by failing to allow the fire to burn, rather than extinguishing it with the water which later became contaminated.”

operations and had breached that duty by failing to allow the fire to burn, rather than extinguishing it with the water which later became contaminated. The QFRS had also sought to rely on section 36 CLA (QLD) to modify the content of the duty owed. Section 36 CLA (QLD) is concerned with situations where a public authority allegedly wrongfully exercises a power or function and provides that an act or omission does not constitute a wrongful exercise or failure unless it was, in the circumstances, so unreasonable that no public or other authority having the functions of the authority in question could consider the act reasonable. The trial judge found that section 36 CLA (QLD) was not applicable in the circumstances, as the plaintiff had not brought an action for breach of statutory duty and the trial judge held that the section only applies to actions for breach of statutory duty. However, if section 36 CLA (QLD) had applied, the trial judge found that it would have defeated the plaintiffs’ claim. Despite those findings, the QFRS escaped liability because of the operation of a statutory immunity under the Fire and Rescue Services Act 1990, which established the QFRS, and protected against liability for actions taken pursuant to that Act. As against the brokers it was found that no duty of care was owed. The plaintiffs had argued that the brokers should have investigated the relationship between the plaintiffs and Binary Industries and determined that the plaintiffs required the relevant polices to cover risks on their property. The trial judge found that the relevant elements required for the existence of a duty of care in respect of pure economic loss were not present. On a complex history of the arrangements between the brokers and the various entities involved in the site, it was found that at the relevant time, the brokers’ retainer was with Binary, but not with the plaintiffs. The trial judge also found that even if the relevant policies were available, the plaintiffs had not established that they would have taken out the policies to cover the loss which eventuated, that an insurer would have offered them such cover, or that the relevant losses would be covered.
THE FACTS
In the early hours of 20 July 2008, “unknown malefactors” moved traffic crash barriers that had been hired by Gosford City Council (Council) for use in cordonning off the shoulder of Woy Woy Road at the site of road works. At around 5.30 am the plaintiff collided with those barriers while riding his motorcycle along Woy Woy Road. He suffered serious injuries as a result.

The plaintiff brought proceedings against the Council in negligence for failing to take adequate precautionary measures against the risk that vandals might move plastic crash barriers across the road.

THE DECISION
The plaintiff sought to rely on the proposition within RTA v Refrigerated Roadways Pty Ltd [2009] NSWCA 263, that road authorities owe a general duty to take reasonable care to protect a road user from the criminal actions of another. In that case, the RTA was found liable for failing to take further precautions against the risk of persons throwing bricks from an overpass onto vehicles travelling on the highway below.

Council argued that case could be distinguished on the basis that there was no evidence that traffic barriers had been interfered with on prior occasions and Council was not aware of the risk that traffic barriers would be moved to obstruct traffic, either generally or with regard to the Woy Woy Road site in particular. Council also submitted that the type of harm suffered by the plaintiff could only arise from criminal conduct.

In refusing the plaintiff’s claim, the court reaffirmed the primary position regarding duties of care to protect against the criminal acts of others set out in Modbury Triangle Shopping Centre v Anzil [2000] 205 CLR 254. The Council did not owe a duty of care to forestall the crimes of others that harmed the plaintiff in circumstances where it had no knowledge of a history of this type of criminal activity.

Furthermore, if Council had breached its duty of care, then this was not causative of the plaintiff’s loss, as the malefactors could still have emptied the barriers of water and moved them in the same manner. It was their conduct that caused the loss.

The court also found that section 45 CLA (NSW) (the equivalent of section 37 in the Queensland Act) did not provide protection to Council as this case related to misfeasance in that it was alleged that Council created the harm and did not warn road users of it.

“Council also submitted that the type of harm suffered by the plaintiff could only arise from criminal conduct.”
THE FACTS
At all relevant times, the respondent (Council) was both the development consent authority and the sewerage authority for the Byron Shire. In mid-2000 Council identified excess capacity within the Shire’s sewerage treatment facilities and resolved to allocate that capacity to new developments. On 6 February 2001 the appellant lodged an application for a residential development. Council rejected the application on the basis that the sewerage facility’s excess capacity had already been allocated. That position proved to be erroneous, Council having relied on various miscalculations when determining that there was insufficient capacity available for the appellant’s development. The miscalculations were eventually discovered and a revised development application was lodged by the appellant and subsequently approved in June 2005. In 2007 the appellant commenced proceedings against Council, alleging that its failure to properly calculate the available sewerage capacity amounted to negligence and caused it to suffer economic loss.

THE DECISION AT TRIAL
The trial judge found that there was no recognised class of duty owed by a public authority to a development applicant. In the absence of a recognised duty, the trial judge considered the relationship between the appellant and Council. Significantly, the trial judge noted that the relevant statutory regimes conferring authority upon Council required it to subordinate the interests of individuals in favour of the public interest. In consideration of that aspect of the Council’s functions, the trial judge considered that to impose upon Council a duty to an individual development applicant would be harmful to Council’s unimpeded exercise of public function. It therefore dismissed the appellant’s claim on the basis that the alleged duty of care did not exist.

THE ISSUES ON APPEAL
On appeal the appellant argued that a distinction ought to be drawn between Council’s policy functions (implementing policies once they had been adopted). The appellant argued that a duty owed by Council that was limited to its operational functions would not conflict with its obligations as a public authority.

THE DECISION ON APPEAL
The Court of Appeal was divided on the issue of duty of care with the majority holding that the Council did not owe a duty of care to the appellant. The majority dismissed the appellant’s argument on the basis that irrespective of its policy in relation to the spare sewerage capacity at the time, the Council retained the ability to alter that policy at any time. Therefore, Council’s decision could not be categorised as solely “operational” because it involved consideration of whether to adopt the previously stated policy or to implement an entirely new one. The majority also upheld the trial judge’s findings that the appellant had failed to demonstrate other requisite elements of the duty of care in pure economic loss cases, namely; reliance, assumption of responsibility and vulnerability.
THE FACTS

These proceedings concerned the infamous 2003 Canberra bushfires (the fires) that claimed 4 lives and damaged more than 500 properties in NSW and the ACT. Wayne and Lesley West and Electro Optic Systems Pty Ltd (jointly referred to as the plaintiffs) each owned properties situated in NSW that sustained significant damage as a result of the fires. The plaintiffs sought an award for damages in negligence from the NSW government (NSW), based on the actions taken by NSW’s incident controllers in response to the fires.

THE DECISION AT TRIAL

At trial, NSW (through the Rural Fire Service and National Parks and Wildlife Service) was found to have negligently caused the damage suffered by the plaintiffs.

However, despite establishing negligence and causation, the plaintiffs’ claim was ultimately unsuccessful due to the application of two distinct statutory defences under both the Rural Fires Act 1997 (NSW) and the CLA (NSW). The plaintiffs were ordered to pay 50% of NSW’s costs.

THE ISSUES ON APPEAL

On appeal, the plaintiffs argued that the trial judge had erred in applying the statutory defences. In response, NSW filed a notice of contention arguing that even if the trial judge had erred in applying the statutory defences, it should not have been found liable because the trial judge was in error when it found that a relevant duty of care was owed by NSW and that the duty of care had
been breached. NSW also sought 100% of its costs from the plaintiffs.

THE DECISION ON APPEAL

In a damning judgment, all three sitting Court of Appeal judges agreed that the trial judge had made a number of significant errors regarding the material facts and relevant legal principles. As a result, the Court of Appeal overturned almost every significant finding made by the trial judge.

Firstly, the Court of Appeal found that NSW did not in fact owe a duty of care to the plaintiffs to protect their property. Rather, the duty of care owed by NSW was informed by the Rural Fires Act 1997 which required all action to be taken in the interests of the greatest community good and not individual property owners.

Further, the Court of Appeal found that even had a duty of care been owed by NSW, breach of such a duty could not be established. The two grounds for breach, upheld by the trial judge, were each dismissed on the basis that the actions of the NSW representatives did not fall below the standard expected of reasonably competent incident controllers. Further still, the Court of Appeal found that even had a duty been owed and subsequently breached by NSW, there was no evidence to support the plaintiffs’ claim that any such breach was causative of the loss they suffered. The Court of Appeal’s views in this regard again departed from those of the trial judge.

Finally, the Court of Appeal also overturned the trial judge’s application of the statutory defence under section 63 CLA (NSW) on the basis that the defence was irrelevant to the actions taken by NSW. The Court of Appeal did, however, agree with the trial judge’s finding that the statutory defence available to NSW under the Rural Fires Act was applicable in circumstances where the NSW representatives had acted in good faith.

In respect of costs, the Court of Appeal upheld NSW’s notice of contention and ordered that the plaintiffs pay 100% of NSW’s costs.
In Issue:
- Whether there was sufficient evidence to enable an affirmative conclusion to be drawn that the respondent’s body was protruding significantly from the train doors when it left the station
- Whether the appellant breached its duty of care to the respondent who became trapped in a door and fell from a moving carriage of a train

Delivered On:
9 December 2014

THE FACTS
On 29 January 2001, 8 year old Corey Fuller-Lyons (the respondent) sustained serious injuries after falling from the moving carriage of a train operated by the appellant, the State of New South Wales.

The respondent could not recall the circumstances surrounding the incident. He therefore relied upon the court drawing inferences in order to make out his case of negligence against the appellant.

The respondent asserted that the court should find that he had become accidentally trapped in the doors of the train when they closed upon departure from the Morisset station. He alleged that the appellant was negligent for its employee’s failure to observe that the doors to the carriage had not closed and parts of the respondent’s body were protruding from it.

The appellant asserted that the respondent’s brothers had any involvement in the incident but was unable to determine whether the respondent had become unwittingly trapped between the doors, whether he had attempted to interfere with the doors and then become trapped or whether he intended to be caught in the doors with a view to attempting to prise them open while the train was between stations.

The trial judge held that the only realistic way that the respondent would have been capable of falling from the train, after becoming stuck in the doors, was if he forced them open while the train was moving. Given the force required to open the door, the only way the respondent could have done so was if his back was against one door and he was able to use his hands to push the other door. That being the case the trial judge found that the doors must have closed on the respondent at the Morisset station such that part of the respondent’s torso as well as one arm and one leg must have been protruding from the train. It followed from that finding that the customer service attendant, who was responsible for ensuring that the train doors were closed prior to signalling the driver that it was safe to depart the station, failed to exercise reasonable care and ought to have observed the respondent trapped in the door.

If the customer service attendant had made a proper observation, he would not have signalled the driver that it was safe to leave the station, failed to exercise reasonable care and ought to have observed the respondent trapped in the door. If the customer service attendant had made a proper observation, he would not have signalled the driver that it was safe to depart the station. As such, breach of duty and causation were established and a finding of liability was made against the appellant.
The appellant failed to discharge the onus of demonstrating any contributory negligence on the part of the respondent. There were a range of circumstances which could have led to the respondent becoming trapped in the doors. In the absence of a finding regarding how that occurred, the trial judge was not prepared to infer that the injury arose from the respondent’s contributory negligence. That was particularly so bearing in mind that the assessment of contributory negligence needed to be made from the respondent’s position, being an 8 year old unsupervised child with little or no experience riding on trains.

THE ISSUES ON APPEAL

On appeal the Court of Appeal was required to consider whether or not there was sufficient evidence to enable an affirmative conclusion to be drawn by the primary judge that a substantial part of the respondent’s body was protruding from the train when it left the Morisset station.

A further issue was whether or not the respondent should be given leave to file a notice of contention alleging that the appellant was liable to him even if his body was not protruding significantly from the train doors when it left the Morisset station.

THE DECISION ON APPEAL

The Court of Appeal held that the evidence did not warrant an affirmative conclusion that the respondent’s body was protruding significantly from the train doors when the train left the Morisset station. The Court of Appeal held that it was plausible that the respondent could have had a shoulder, arm and leg between the doors without any of them protruding significantly in such a way that it would, or should, have been visible to the appellant’s customer service attendant on the platform.

Further, it was plausible that the respondent used an object to keep the doors open to a sufficient extent to enable him to insert at least his shoulders between the doors to then force the doors open.

Supporting either of the above possibilities was the fact that the appellant’s customer service attendant did not observe the respondent’s body protruding from any of the train doors when it left the station. As a result, the Court of Appeal held that the respondent did not prove that the appellant or its employees were negligent.

The Court of Appeal refused to grant the respondent leave to contend that the appellant was negligent for allowing the train to leave the station in circumstances without all of its doors being closed and locked. It did so on the basis that, even if the contention was allowed to be put, it was bound to fail. That was because any failure by the customer service attendant to observe a small opening in the doors might be consistent with him exercising reasonable care in any event.

An appeal to the High Court was heard on 18 June 2015.

“...and his brothers, with whom he was travelling, had deliberately interfered with the doors.”
COUNCIL OF THE CITY OF SYDNEY V HUNTER
[2014] NSWCA 449

THE FACTS

Mr Hunter claimed to have suffered an injury to his right knee and an aggravation of prior right hip and lower back injuries when he tripped and fell on the roots of a Moreton Bay fig tree growing onto the footpath of Catherine Street, Glebe on 25 November 2011.

The Council of the City of Sydney (the Council) had the care, control and management of the footpath.

Mr Hunter alleged that the Council was negligent in failing to repair and maintain the footpath by removing the tree roots and relaying the bitumen surface; failing to bar pedestrian access at the site; and negligently undertaking inspections in 2008 and October 2011.

The Council undertook repairs in the incident location some time after May 2012. Photographic evidence indicated that, even prior to the repairs, there were substantial parts of the footpath that were easily passable by a pedestrian without stepping on the part of the bitumen damaged by tree roots.

The Council disputed that it had breached its duty of care and denied that the plaintiff had suffered any injury as a result of the incident.

THE DECISION AT TRIAL

The trial judge found that the Council breached its duty of care by failing to cut the roots of the tree and re-lay the footpath. If the Council had taken appropriate action in 2008 when it had undertaken an inspection in the area, it was unlikely that the tree roots would have been as dangerous as they were in 2011. Further, if Council had conducted the inspection in October 2011 with due care and attention, action would have been taken to make the area safe and thus the incident involving Mr Hunter would have been avoided.

Mr Hunter’s damages were reduced by 20% for contributory negligence on the basis that he was aware, soon after he turned into Catherine Street, that he was in an area of danger and that, if he had inspected the area more carefully, he may have been able to avoid the danger.
The primary judge was satisfied that Mr Hunter had suffered a significant injury to his left knee as a result of the incident and assessed damages at $97,800 after the reduction for contributory negligence.

THE ISSUES ON APPEAL

The Council contended on appeal that the primary judge erred in concluding that the Council breached its duty of care. It further challenged the primary judge’s finding that Mr Hunter suffered any injury to his right knee and challenged the assessment of damages.

THE DECISION ON APPEAL

Given the photographic evidence demonstrated that there were substantial parts of the footpath that were easily passable by pedestrians without stepping on the part damaged by tree roots, the Court of Appeal was not satisfied that there was any breach of duty on the part of the Council. A pedestrian taking reasonable care for himself or herself would have no difficulty at all in walking along the footpath without walking on the tree roots. The incident involving Mr Hunter could only be due to his own failure to take reasonable care for his own safety.

The Court of Appeal was otherwise not satisfied that Mr Hunter sustained any injury as a result of the incident. Mr Hunter alleged that he consulted his general practitioner in relation to knee pain a few days after the incident. The notes of Mr Hunter’s general practitioner did not support that allegation. Indeed, there was no note of any knee pain until about 2 months following the incident. On that occasion Mr Hunter reported that his pain was due to a fall having occurred only 5 days earlier while climbing a fence. Mr Hunter had attended upon his general practitioner on 3 other occasions following the incident. The notes for those consultations made no reference to knee pain. The Court of Appeal held that it was inconceivable that Mr Hunter would not have mentioned the injury to his knee on one of those occasions. As such, the Court of Appeal was not satisfied that there was any causal connection between the incident and the condition of Mr Hunter’s knee.

BIANCA HORN
Associate
Bianca.Horn@bnlaw.com.au
ROCKDALE CITY COUNCIL v SIMMONS
[2015] NSWCA 102

THE FACTS

On 11 April 2007, Mr Simmons was on an early morning bicycle ride when he collided with a closed boom gate on Riverside Drive causing him to suffer serious injuries resulting in the amputation of his left leg below the knee.

Rockdale City Council had installed the boom gate in 2004 to enclose a stretch of Riverside Drive that was adjacent to the St George Sailing Club (the Club) and its car park to stop hooning in the car park at night. Council had legal authority and control over the boom gate, Riverside Drive and the car park.

After the boom gate was installed, Council and the Club entered into an informal agreement that allowed the Club to open and close the boom gate at its own discretion at unspecified times. Mr Simmons sued both Council and the Club in negligence.

At trial, Mr Simmons’ evidence was that he had ridden the same route hundreds of times and that the boom gate had always been open. He also gave evidence that the boom gate looked the same closed as when it was open. The evidence at trial was that following the erection of the boom gate in 2004, Council was aware that it remained practice for cyclists to continue to use the boom gate entrance area as an exit way, even though “No Exit” signs were erected near the boom gate. The evidence indicated that Council was aware of at least three previous similar incidents.
“At trial, Mr Simmons’ evidence was that he had ridden the same route hundreds of times and that the boom gate had always been open.”

THE DECISION AT TRIAL
The court found that Mr Simmons’ ability to discern if the gate was closed was affected by a visually ambiguous layout or “perceptual trap”, until it was too late for him to have sufficient time to stop. The court held that Council had breached its duty by failing to put in place a system ensuring that the gate would be opened at a specific time each day. The court found the Club had not breached its duty and assessed Mr Simmons’ contributory negligence at 20%. Quantum was agreed at $1.16 million and a $928,000 judgment was entered in favour of Mr Simmons against Council.

Council appealed the findings of the trial judge and Mr Simmons appealed against the failure to find the Club had breached its duty and the finding of contributory negligence.

THE DECISION ON APPEAL
On appeal, the Court of Appeal found that the trial judge was correct in finding that Council had breached its duty of care as it retained control over all aspects of the boom gate and that it had failed to have in place a proper system that coordinated and regulated the boom gate operation. Council sought to invoke the defence under section 43A CLA (NSW). The Court of Appeal held the primary judge was correct in determining the gate was not within the statutory definition of “traffic control facility” of the Roads Act (NSW) as the function of the boom gate was to prevent movement after dark. For that reason, section 43A was not engaged. The Court of Appeal also found that Council could not rely upon the defence as Mr Simmons did not plead or allege the exercise or failure to exercise statutory power. The appeal by Council was dismissed with costs.

In relation to the cross appeal by Simmons, the Court of Appeal considered that as the Club had no knowledge of the propensity of cyclists to use the strip as a thoroughfare it was not expected to have taken precautions against the risk it had no knowledge of. The appeal in that regard was dismissed.

In relation to the issue of contributory negligence, the Court of Appeal accepted that Mr Simmons failed to see the boom gate in time despite the fact that he was exercising reasonable care for his own safety and was keeping a proper lookout. The Court of Appeal concluded that Council alone was liable for the loss and damage suffered by Simmons and there was no finding of contributory negligence.

CARLA ELLIOTT
Graduate
Carla.Elliott@bnlaw.com.au
THE FACTS

The plaintiff, Sharif Zraika, commenced proceedings by his mother claiming damages for injuries he allegedly suffered in a motor vehicle accident in November 2002 when he was an unborn child. At the time, the plaintiff’s pregnant mother was a front seat passenger in a Ford Laser vehicle driven by her husband. The Laser was involved in a collision with a Holden Utility driven by the first defendant, Mrs Walsh, who failed to obey a left turn only traffic sign as she left the driveway of a business complex and entered the intersection where the accident occurred. She admitted breach of duty but alleged that the plaintiff’s injuries were congenital and not caused by the collision.

The plaintiff also sued his father (Mr Zraika) on the basis that he was negligent for driving contrary to a traffic lane arrow directing traffic in the left lane to turn left. In addition, the plaintiff sued Roads and Maritime Services (RMS) for failing to signalise the driveway as part of the intersection and to require vehicles leaving the business driveway to turn left only. The Bankstown City Council (BCC) was also sued for failing to make adequate provision for the safe control of traffic leaving the driveway of the business premises.

THE DECISION

The starting point for consideration of Mr Zraika’s liability was s5B CLA (NSW). The court held that the relevant risk was that of the plaintiff being injured in a collision with a vehicle already in the intersection. The court was satisfied that this risk was foreseeable because the evidence established that Mr Zraika was familiar with the area of roadway and ought to have known that vehicles leaving the driveway of the business complex sometimes crossed to the westbound lanes or turned right to the northbound lanes. The risk of injury was not insignificant, however the court was not satisfied that a reasonable person would have taken precautions such as giving way to Mrs Walsh or taking evasive action because the evidence established that the drivers of the 2 vehicles did not see each other in sufficient time to take such precautions. No question of legal causation therefore arose however the court would have found that Mr Zraika’s driving was not a necessary condition of the plaintiff’s injuries.

The BCC was sued as the consent authority for the redevelopment of the business complex containing the driveway leading into the intersection. The relationship of consent authority and road user was not one that fell within any recognised or established category of duty for the purposes of the law of negligence. The question of whether such a duty was owed in the circumstances had to be determined by common law principles as modified by the provisions of the CLA. The court noted that an essential prerequisite to the existence of a duty of care is foreseeability and had no hesitation in finding that the risk of personal injury arising out of collisions between traffic entering and leaving the driveway into the otherwise signalled intersection was clearly foreseeable. The court found that BCC had complete control over the location and dimensions of the driveway as well as the use to which it would be put. It had the ability to impose conditions which would eliminate traffic conflicts caused by vehicles using the driveway in an uncontrolled or unrestricted manner. Also of relevance was that the plaintiff, as an unborn passenger in the vehicle was vulnerable and unable to protect himself against the risk of collision. The court found...
there was proximity between BCC and road users travelling through the intersection. No question of indeterminacy of litigation arose because the nature of the harm was personal injury and the class of potential plaintiffs was limited to persons actually involved in traffic accidents caused by the exercise of the statutory power. BCC was required by statute to undertake the assessment of the DA and no additional expense was involved in it performing that task carefully having regard to the foreseeable risk of harm. The court therefore found that BCC owed a duty of care to the plaintiff.

In relation to breach, the court noted that the case involved an alleged omission (failure to impose traffic restrictions on the driveway) in the exercise of a statutory power rather than a failure to exercise a statutory power. The court accepted the unanimous evidence of the traffic engineers and held that no consent authority properly considering the traffic movement and safety measures of which it was aware could have decided to leave movements in and out of the driveway entirely unrestricted. There was little or no difficulty, inconvenience or expense involved in imposing appropriate conditions by simple amendments to the approved plans. BCC was therefore in breach of duty as consent authority. Factual causation was made out and the court held that it was appropriate for the scope of liability to extend to the plaintiff’s injuries because it was consistent with the statutory powers conferred on BCC to obviate the risk.

The court accepted that RMS was sued in its capacity as a traffic control authority rather than a road authority. The court noted that RMS accepted it owed a duty to take the steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question. RMS also accepted that at the relevant time it had the statutory power to carry out traffic control work within the curtilage of the business complex relating to the entry of traffic onto the adjoining main road. The court noted that by April 2002, a traffic count at the intersection (arranged by RMS following complaints from members of the public) provided clear evidence that there was foreseeability of the risk of harm and that the risk was not insignificant. The court also noted that RMS had decided in July 2002 to make changes to enhance the safety of the intersection in various ways but did not do so before the plaintiff’s accident occurred.

 Given the modest amount involved in making the proposed safety enhancements, the court was satisfied that no reasonable authority with RMS’s traffic control powers could properly consider the omission to implement its decision a reasonable exercise of the power. The court had no hesitation in finding that both factual and scope of liability causation had been made out and held that Mrs Walsh’s negligence was not of a degree sufficient to sever the chain of causation.

Liability was apportioned to Mrs Walsh in the amount of 50% and to BCC and RMS in the amount of 25% each.
THE FACTS

The plaintiff and a group of friends arrived at premises rented via the second defendant property agent on North Stradbroke Island on the afternoon of 5 February 2010. At approximately 9:00pm, after consuming about 8 beers over the afternoon and evening, and accompanied by 2 friends, the plaintiff left the house to go to the beach. The plaintiff alleged that he and his friends followed a “track” or “path” that led from a boardwalk down through a grassed area. He held onto a tree branch for balance as he leaned out, looking for the steps, however the branch snapped, causing him to lose his balance, and fall down the cliff face. The plaintiff sustained serious injuries, including paraplegia.

The Council, represented by Barry Nilsson, denied that there was any such track or path leading to the cliff, as alleged by the plaintiff. It further alleged that it was not required to warn the plaintiff of the risk of falling from the cliff edge, as it was an obvious risk within the meaning of section 15 CLA (Qld). Further, the Council argued that if it was negligent, such negligence ought to be reduced on account of the plaintiff’s contributory negligence given his intoxication, in accordance with section 47 CLA (Qld).

The plaintiff also commenced proceedings against the second defendant, however did not lead evidence against it at trial.

THE DECISION

The court found that there was no path which led to the edge of the cliff. In making its finding the court preferred the evidence of the first defendant’s supervisor of its parks and conservation team on the island, who said that no paths had been created by the Council in the area where the incident had occurred and that she could not locate any paths matching the plaintiff’s description when she inspected the area approximately 2 weeks after the incident. The court concluded that the plaintiff and his friends had pushed their way through an area mostly covered by thick natural vegetation.
The court found that the plaintiff’s evidence that he lent on a tree was consistent with the plaintiff leaning out to see further around the edge of the cliff and it was more likely than not that the plaintiff knew that he was at the edge of the cliff.

The court found that the Council was unaware of any prior similar incidents and that there was no evidence that the Council had either encouraged people to enter that area or had observed people walking through the area where the incident had occurred. On that basis, and in view of the undulating topography and natural vegetation, the risk that someone might fall from the top of the cliff was not reasonably foreseeable.

The court went on to note further that no evidence had been led by the plaintiff as to the warning signs that he alleged ought to have been erected, including how many signs there should have been and where they should have been placed. In all, the court concluded that the risk of injury was not reasonably foreseeable, and that the Council had not breached its duty of care.

Although unnecessary, in view of its findings above, the court concluded that the risk of injury to the plaintiff would have been obvious to a reasonable person in his position, within the meaning of s15 CLA (Qld) (meaning that the Council was not required to warn the plaintiff of the risk).

The court also concluded that a 50% reduction for contributory negligence, pursuant to s47 CLA (Qld) (intoxication) would have been applicable had the Council been found negligent.

The claim was dismissed.
THE FACTS

The plaintiffs were sisters who had suffered sexual abuse by their stepfather between 1974 and 1983. They commenced proceedings against the Department of Youth & Community Services (DOCS) and its district officer in 2008 and in 2012 alleging that each of the defendants owed them a duty to take reasonable care to avoid them being exposed to the ongoing risk of physical and mental harm from continuing abuse by their stepfather. It was alleged that the requirement to take reasonable care arose out of the exercise of the defendants’ statutory power under the Child Welfare Act 1939 (NSW).

It was uncontested that the plaintiffs’ stepfather sexually assaulted the plaintiffs between 1974 and 20 April 1983. In dispute was whether abuse continued after 20 April 1983, when DOCS first became aware of it. The plaintiffs alleged that abuse did occur, for which the defendants were liable. They argued that the defendants breached their duty of care by failing to report the abuse to the police. Had this occurred, their stepfather would have been denied bail or placed on stringent bail conditions, preventing further abuse from occurring.

DOCS argued that it had notified the police, and that it was not liable for any further abuse (the existence of which was neither admitted nor denied, for policy reasons).

“It was uncontested that the plaintiffs’ stepfather sexually assaulted the plaintiffs between 1974 and 20 April 1983.”
THE DECISION

The court found that the DOCS owed the plaintiffs a duty to take reasonable care in the exercise of its statutory powers and that DOCS had breached its duty by failing to report the abuse to the police.

However the court held that such breach was not causative of the plaintiffs’ loss as the abuse did not continue after DOCS became aware of it. In making this finding, the court relied on a large volume of documentary evidence, including psychiatric interviews with the plaintiffs, in which neither had reported ongoing abuse.

The court otherwise found that had DOCS reported the abuse to the police, the stepfather, who had a significant criminal record, would have been denied bail or placed on stringent bail conditions, and further abuse could not have occurred.

The court found that the district officer did not owe the same duty of care owed by DOCS, as she did not have the powers and duties imposed on her under the Child Welfare Act which had been imposed on DOCS. The court commented that while she may have owed the plaintiffs a duty of care in relation to the provision of welfare services, such a duty had not been pleaded by the plaintiffs.

Although unnecessary in view of its findings on causation, the court assessed quantum for each plaintiff, acknowledging the inevitable issues involved in attempting to disentangle the damages attributable to abuse for which DOCS was, and was not, liable. It found that the correct approach was to treat the harm and its consequences as indivisible, and that it was appropriate to discount by 70% the damages to account for the abuse for which DOCS was not liable.

ANNA CLARKE
Senior Associate
Anna.Clarke@bnlaw.com.au
THE FACTS
Mr and Mrs Pisano purchased a house from Mrs Dandris and Mr Williams. The house had been substantially renovated. However, it was profoundly defective in its construction.

The Pisanos purchased the home based on information as to the quality of the construction given by Mrs Dandris and Mr Williams to their real estate agent who subsequently passed it on to the Pisanos.

The Pisanos commenced proceedings against Mrs Dandris and Mr Williams for damages equivalent to the reasonable cost of remedying the defects.

THE DECISION
The court first addressed the Pisanos’ claim under the Home Building Act 1989 (NSW) (the Act). The Act contains certain warranties that residential building work will be performed in a proper and workmanlike manner. There were many defects the subject of expert evidence at trial with the cost of repairing those defects being approximately $1 million.

The court ultimately found that the defects were the consequence of work not being performed in a proper and workmanlike manner and were in breach of the Act.

The court then addressed the Pisanos’ claim for misleading and deceptive conduct under the Australian Consumer Law (ACL). The representations complained of were contained in advertising material for the sale of the home and included statements that the house was designed and built to the highest standard.

The court found that the sale of the house was in trade or commerce because it was an investment property and a project which formed part of Mrs Dandris’ interior design business. The representations were made to influence the reader to buy the house and were clearly false. The court also found that special conditions in the contract which required the Pisanos to rely on their own inspections could not be relied upon because their perception of the house during the inspection was coloured by the misleading and deceptive conduct of Mrs Dandris and Mr Williams.

“The court also found that special conditions in the contract which required the Pisanos to rely on their own inspections could not be relied upon because their perception of the house during the inspection was coloured by the misleading and deceptive conduct of Mrs Dandris and Mr Williams.”
fixing the house, not the difference between the value of the house with the defects and without the defects.

The court finally addressed the Pisanos’ negligence claim. Negligence was alleged against both Mrs Dandris and Mr Williams but pursued against Mr Williams only.

The Pisanos alleged that Mr Williams owed them a duty of care to avoid causing them economic loss by taking reasonable care in carrying out the renovation work and that he breached this duty by, amongst other things, failing to select competent sub-contractors and constantly supervise the work.

The court held that Mr Williams did not owe such a duty to the Pisanos, firstly because Mr Williams was a passive participant in the actual construction activity constituting the risk, and secondly, the Act imposed statutory warranties on Mrs Dandris as owner-builder and the imposition of a separate duty of care on Mr Williams as non owner-builder did not sit easily with this.

**ADDENDUM**

Mr Williams appealed the findings on whether the misrepresentations in relation to the sale of the house constituted conduct in trade or commerce within the meaning of the ACL, and the findings on whether the claim was an apportionable claim. As this publication went to press, the NSW Court of Appeal held that the misrepresentations did not constitute conduct in trade or commerce. It was therefore not necessary to determine the issues relating to whether the claim was apportionable. The Court of Appeal decision will be reported in the 2016 Case Book.
IN THE FACTS

The plaintiff was employed as a swimming teacher at a leisure centre managed and operated by the YMCA. In 2005 she sustained injuries in the course of her employment when she fell from the edge of a pool deck at the centre. The centre was owned by Nillumbik Council (Council).

The plaintiff brought a claim for damages against both the YMCA and Council. At trial, the plaintiff confined her claim against the YMCA in regard to its duty of care to her as her employer. She confined her claim against Council to its duty to her as occupier of the centre. Both parties denied liability and notices of contribution were delivered between the parties with Council alleging that it was entitled to a full indemnity from the YMCA for its breach of contract for failing to take out insurance in joint names.

THE DECISION AT TRIAL

At trial the plaintiff was successful against both defendants by way of a jury trial and judgment was entered in her favour in the amount of $250,000. The trial judge determined that, indemnification issues aside, each defendant should contribute equally to the judgment entered in favour of the plaintiff. However, upon hearing submissions from Council that it should be indemnified by the YMCA due a contractual breach, the court held that the claim for indemnification succeeded.

YMCA appealed the decision in regard to the finding that it was required to indemnify Council. Council cross appealed in respect of the ruling by the trial judge that “as a matter of law and as a matter of fact in this case the jury could not find that [the Council] had delegated its duties” and that the trial judge’s finding of equal contribution between the defendants could not be sustained.
“At trial the plaintiff was successful against both defendants by way of a jury trial and judgment was entered in her favour in the amount of $250,000.”

THE DECISION ON APPEAL
The Court of Appeal allowed both appeals.

The contract between Council and the YMCA included an obligation on the YMCA to hold a current public liability policy of insurance in the joint names of Council and the YMCA. It was common ground that YMCA did not hold such a policy at the time the plaintiff suffered her injury but had previously done so. Council carried the evidentiary, as well as ultimate, burden of proof that had YMCA had a policy in place naming Council, that policy would have responded.

It was held that it could be inferred that Council had approved the previous public risk policy held by the YMCA in which Council was named an insured. However, no evidence was put forward by Council that such a policy (which was not produced), even if in place at the time of the incident, would have responded to the claim, regardless of whether Council was a named insured, particularly given an exclusion in the current policy which excluded from cover damages arising from injuries to the YMCA’s employees.

The Court of Appeal held that the trial judge’s conclusion that the YMCA breached its contract with Council and such breach was causative of loss and damage to Council was erroneous. In those circumstances, Council could not maintain the claim for indemnity.

Further, it was held that the trial judge had erred in ruling that Council was precluded from discharging the duty owed by it as an occupier and it was therefore not open to the trial judge to conclude that Council had failed to delegate its duties to the YMCA. As a consequence of the trial judge’s conclusion that Council could not delegate performance of its duty of care to the plaintiff, his consideration on contribution issues between the defendants was incomplete and it was held that the outstanding question should be remitted for consideration to a different judge in the county court.

“AT TRAIL THE PLAINTIFF WAS SUCCESSFUL AGAINST BOTH DEFENDANTS BY WAY OF A JURY TRIAL AND JUDGMENT WAS ENTERED IN HER FAVOUR IN THE AMOUNT OF $250,000.”

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**The Facts**

The plaintiff was a director and an employee of G & D Bennett Transport Pty Limited (G & D). G & D contracted with the defendant, Baiada Poultry Pty Limited (Baiada), to deliver poultry products. Baiada was the plaintiff’s principal, but not his employer.

The plaintiff alleged that on 13 March 2010 he sustained lower back injuries in the course of unloading pallets of chicken from his delivery truck. Baiada’s employees were responsible for loading the plaintiff’s truck. Upon inspecting the load the plaintiff identified that it had not been properly packed but did not raise the issue of the packing with Baiada.

The plaintiff alleged that the unsafe loading of the truck by Baiada was responsible for his injury.

**The Decision**

The court accepted that Baiada owed the plaintiff a duty to exercise reasonable care in the packing of his delivery truck. The court found that Baiada had complete control over the loading process, knew that the plaintiff would unload the chicken manually and ought to have taken steps to avoid risks of injury in the unloading process.

Baiada acknowledged that the chicken should not have been loaded in the manner it was, but denied liability on the basis that any damage suffered by the plaintiff was caused by the negligence of G&D; and by unloading the truck after identifying that it had not been packed safely, the plaintiff was contributorily negligent.

The court did not accept that G&D or the plaintiff had contributed to the injury in the absence of evidence that the system of unloading the truck was itself unsafe.

The court found that returning to Baiada’s loading dock was not a viable option for the plaintiff, who was under pressure to work in a timely fashion. The court further found that the plaintiff was justified in proceeding to deliver and unload the order utilising the long-standing system of work.

A verdict and judgment in the sum of $672,000 was entered for the plaintiff.
In Issue:
• Whether the builder of a strata-titled apartment complex owed a duty of care to the Owners Corporation to avoid causing it economic loss resulting from latent defects in the common property

Delivered On:
8 October 2014

THE FACTS
Brookfield built apartments pursuant to a design and construct contract between it and the registered proprietor of the land and property developer. The apartments were purchased by investors and leased to a hotel company for operating as serviced apartments. Upon registration of the strata plan, the Owners Corporation was created by law. The interest in the common property was held by the Owners Corporation as agent for the owners of the lots and the strata scheme.

The design and construct contract contained detailed provisions about the quality of the work to be performed by Brookfield and required it to remedy defects in the work within a defined defects liability period. The contract also specified a standard contract of sale between the developer and investors.

The Owners Corporation made a claim against Brookfield for economic loss arising from latent defects in the common areas of the apartments, including rectification costs.

THE DECISION AT TRIAL
The trial judge held that no duty of care was owed by Brookfield to the Owners Corporation. Therefore Brookfield was not liable.

THE DECISION ON APPEAL
On appeal, the Court of Appeal overturned the primary decision, holding that a duty of care was owed, albeit a narrower duty to avoid causing loss resulting from latent defects which were structural or dangerous or which made the serviced apartments uninhabitable.

THE ISSUES ON APPEAL
By grant of special leave, Brookfield appealed to the High Court for determination whether the builder of a strata-titled apartment complex owed a duty of care to the Owners Corporation to avoid causing it economic loss resulting from latent defects in the common property. The Owners Corporation was granted special leave to cross-appeal, and sought orders providing for a wider duty of care than that found by the Court of Appeal.

THE HIGH COURT DECISION
The High Court unanimously allowed the appeal and dismissed the cross-appeal. In 4 separate judgments, the High Court held that no duty of care was owed to the Owners Corporation by Brookfield because such a duty would have required vulnerability on the part of the Owners Corporation. It was held that a builder owes no duty of care in tort to protect a subsequent owner from incurring the cost of repairing latent defects by virtue of the freedom they have to choose the terms on which they are prepared to contract to purchase. The existence of provisions about the developer’s repair obligation in the standard contract with the investors meant that the investors were not vulnerable and so nor was the Owners Corporation. Further, the High Court concluded that the relevant contractual and statutory frameworks were adverse to Brookfield owing the Owners Corporation a duty. To supplement the contractual provisions with a duty of care in tort would alter the allocation of risks effected by the contracts.
The plaintiff claimed damages for alleged negligence against Country Energy and Phillip Ridge (the first and second defendants), for injuries sustained by him on 27 November 2008 at Mr Ridge’s property in Wapweelah.

The plaintiff was unloading sheep from the top deck of his B-double vehicle when he came into contact with an uninsulated electric power wire carrying 19.1kW. The electricity passed from his head through his body and out through the toes of his left foot.

As a consequence of the incident the plaintiff sustained significant and debilitating injuries, necessitating a number of skin grafts and ultimately a below knee amputation of his left leg.

The court found for the plaintiff, and apportioned liability against the first defendant (Country Energy) 40% and the second defendant (Phillip Ridge) 20%. The plaintiff’s contributory negligence was assessed at 40%.

The court held that power lines, while of considerable social utility, pose a significant risk of harm to persons if they come in contact with them. The risk of harm is particularly significant when the lines are high-voltage and uninsulated, such as the 19.1kW line in the present case. The risk was such that Country Energy had a duty to take reasonable precautions to prevent contact between persons or vehicles, and the lines. In this case that meant installing the lines at a height of at least 6m as was envisaged in Country Energy’s own design documents. The evidence established that at the time of the accident the lines were erected at a height of 5.65m, and the court held that this was too low.

Further, the court found that Mr Ridge was in breach of his duty as an occupier for failing to instruct the plaintiff not to unload the sheep at a location where part of the truck would be under the lines.
THE FACTS
The plaintiff was placed with the defendant, Optus, his host employer, by his employer IPA Personnel Pty Ltd (IPA), for training in a call centre role. The plaintiff was in training with a Mr George. The plaintiff had general contact with Mr George, as a co-worker, during the preceding days, but no particular relationship had formed, of animosity or otherwise. On 15 March 2001, Mr George began behaving strangely, with his behaviour described by some of those who observed it as psychotic, or severely affected by drugs. He left the training room and some time later was found on the roof. A number of personnel, including management, took steps to locate and try to reason with Mr George. Mr George asked to see the plaintiff, who agreed to go and see Mr George on the roof. There was evidence that Mr George had in fact fixed his mind on killing someone in the days prior, and shortly prior to the incident, had fixed on the plaintiff.

Upon attending the roof, in the presence of other Optus workers who were monitoring Mr George’s behaviour, Mr George attempted to throw the plaintiff off the roof and, when he failed, commenced punching the plaintiff, before being subdued. The plaintiff claimed a severe psychiatric injury as a result.

THE DECISION
The plaintiff succeeded and was awarded $3,851,286 in damages. The plaintiff alleged that the defendant owed the duties of a host employer, whereas the defendant contended that it owed duties as an occupier of premises only. The defendant relied on the principle that a person does not have a duty to prevent the criminal conduct of others, except by virtue of certain exceptions, which did not apply in the circumstances (Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61). Causation and contributory negligence were also in issue. IPA was a cross defendant, but the plaintiff did not pursue IPA.

As against the defendant, it was found that a duty of care analogous to that of an employer was owed. The employment relationship is one of the special categories recognised to be an exception to the Modbury principle. There was breach of the duty because the risk of harm to the plaintiff was foreseeable and not insignificant, because of the way in which Mr George had been behaving. It was found that the reasonable response to that risk was to remove Mr George from the premises and until that was done, no one should have been permitted to approach Mr George. A key issue highlighted in respect of Modbury exceptions, was the extent to which an employer (or host employer) can prevent a person ‘going in harms way’. Here, there were options available to the defendant to address the risk of harm.

As to causation, it was held that the failure of the defendant to take precautions of calling the police to remove Mr George, and to in the meantime keep other
workers away from Mr George, was causative of the injuries. In respect of contributory negligence it had been argued that the plaintiff was a volunteer willing to help and/or that he should have been able to perceive the risk which arose from Mr George’s behaviours. This argument was rejected and there was no contributory negligence found.

As to the liability of IPA, the court was not satisfied that it had any control over the plaintiff in the relevant situation in which the injury occurred. The defendant was entitled to exercise all control over the plaintiff and also occupied the premises and controlled the actions of others on the premises. The issues related to Mr George’s conduct were completely unknown to IPA. As a result, Optus failed to prove that IPA was a party who if sued by the plaintiff would have been liable to him in tort for the damage he suffered.
THE FACTS

In March 2009, Transfield Services Engineering Group Pty Ltd (Transfield) was the major contractor undertaking works for BlueScope Steel (AIS) Pty Ltd, which was carrying out an upgrade of its facilities at Port Kembla. Part of the work involved dismantling and moving a sinter cooler. Transfield subcontracted that work to Thomas & Coffey Ltd (T&C). The crane work was subcontracted by T&C to a company related to Allstate Labour Hire Pty Ltd (Allstate), the claimant’s employer. Allstate provided the labour for this part of the work, including the plaintiff, a dogman.

A supervisor employed by T&C supervised the dismantling works on the day in question. As part of the dismantling process, large steel frames constructed of beams were to be removed. The supervisor instructed T&C workers and the plaintiff that the securing nuts on the hold-down bolts were to be loosened or removed only after the frame had been securely rigged to the crane. It was during the process of rigging the frame that a beam came down on the plaintiff’s leg, resulting in amputation. The nuts had been loosened prior to the frame being rigged and therefore the correct process had not been followed by the T&C workers. The relevant order of works was found to not be clearly set out in T&C’s Job Safety Environment Analysis (JSEA).

At the commencement of the trial, T&C and Transfield admitted breach of a duty of care owed by them to the plaintiff, however, Allstate denied liability.
THE DECISION

Liability was established on the part of Transfield and T&C, and Allstate escaped liability. Whilst breach of duty of care was admitted by Transfield and T&C, the court still considered the scope of the relevant duties. The principles outlined in Leighton Contractors Pty Ltd v Fox [2009] HCA 35, in respect of the duty of care owed by a principal contractor were applied. The task of dismantling in this instance was a complex task, and involved a number of contractors. The court found that the circumstances were such that it was necessary for Transfield to retain and exercise supervisory power over the shared responsibility of T&C and Allstate for the works. Transfield failed to properly supervise the works and this was said to be a personal, systemic failure. The court found that T&C owed a general duty of care to take reasonable steps to avoid foreseeable risk of injury. T&C failed to implement and maintain a safe system of work for the removal of the frames, and in particular, failed to set the safe system out in its JSEA. The two T&C employees who were found to have removed the nuts prematurely were admitted by T&C to have been negligent (and therefore T & C was liable for their negligence). The court commented that given the defects in the JSEA and the supervision by T&C and Transfield, the blame could not be laid solely in the casual act of negligence of those workers.

Allstate was found to owe the traditional non-delegable duty of care of an employer, however, the circumstances of the incident did not fall within the scope of the duty of care. Allstate had control over the actual lift of the components by the crane, but no other control over the general process of disassembly or over T&C’s employees. The particular risk which materialised in this case was beyond the scope of the employer/employee relationship. Further, the court found that even if Allstate had breached its duty of care, by failing to make enquiry into T&C’s procedure for the dismantling, the breach was not causative because a reasonable employer would have accepted T&C’s explanation as to how the dismantling was to be carried out. The award of damages totalled $2,286,832.
IRELAND v B & M OUTBOARD REPAIRS  
[2015] QSC 84

In Issue:
• Whether contractors engaged to carry out work on a boat were responsible for explosion  
• Whether intentional over-payment of salary ought to be accounted for when calculating economic loss

Delivered On:  
8 April 2015

THE FACTS
On 10 April 2006, Colin Ireland (the plaintiff) was attempting to launch his outboard recreational boat when an explosion occurred, after which a fire broke out and severely damaged the boat. The plaintiff alleged that he suffered a debilitating psychiatric illness as a consequence of the explosion.

The defendants were partners in a business which carried out maintenance and modifications of outboard marine engines. In 2004, they had been engaged by the plaintiff to replace fuel lines and install an electric fuel pump in the plaintiff’s boat.

The plaintiff alleged negligence and breach of contract in respect of the defendants’ installation of the electric fuel pump. Both liability and quantum were in issue at trial.

THE DECISION
The court found that the fire occurred due to leaking fuel inside the boat’s battery compartment. The leak occurred due to corrosion, caused by non-marine grade clamps that had been installed by the defendants as part of the modification works in 2004.

The defendants’ use of non-marine grade clamps was said to constitute a breach of duty and a breach of a parallel implied contractual obligation to perform the modification works with due care and skill.

The court questioned the defendants’ decision to install a fuel pump within the same small compartment as the boat’s battery. Despite some evidence suggesting that the practice was not uncommon within the boating industry, the court found that the installation amounted to a further breach of duty and the parallel contractual obligation.

The court held that given the danger posed by installing the fuel pump in proximity to the boat’s battery, the defendants were obliged to advise the plaintiff to have the fuel pump and lines regularly inspected. The failure to do so also constituted a breach of duty and of its contractual obligations.

In respect of quantum, aside from some minor ongoing neck pain, the plaintiff did not sustain any physical injuries as a result of the explosion. However, the plaintiff gave evidence that, almost immediately after the explosion, he began suffering from anxiety and nightmares. The plaintiff’s psychological decline was supported by the evidence of the plaintiff’s family members and a friend at trial.

At the time of the explosion, the plaintiff was working as a pastor at a church. Despite being unable to continue with his duties following the explosion, the church agreed to continue paying the plaintiff his full salary on the condition that he would repay 50% of the benefits received upon receipt of any compensation settlement arising out of the explosion.

In calculating economic loss, the court noted the uncertainties concerning the precise amount of any repayment to the Church but held that it was probable that the Church would require repayment and economic loss was calculated on that basis.

The plaintiff was awarded total damages of $703,721.90, including $589,000 for past and future economic loss.

KINGSLEY GRIMSHAW  
Solicitor
Kingsley.Grimshaw@bnlaw.com.au
WORKERS’ COMPENSATION
<table>
<thead>
<tr>
<th>Page</th>
<th>Case Name</th>
<th>Decision</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>77</td>
<td>TAWERA v BDS RECRUIT PTY LTD &amp; ANOR [2014] QDC 167</td>
<td></td>
<td>Breach of duty of employer and host employer for injuries to plaintiff and whether injuries caused by any breach.</td>
</tr>
<tr>
<td>78</td>
<td>BURFORD v RSL (QUEENSLAND) WAR VETERANS’ HOMES LIMITED [2014] QDC 203</td>
<td></td>
<td>Whether pre-existing injury aggravated by unsafe system of work in kitchen of aged care facility.</td>
</tr>
<tr>
<td>79</td>
<td>BYRNE v PEOPLE RESOURCING (QLD) PTY LTD &amp; ANOR [2014] QSC 269</td>
<td></td>
<td>Whether WorkCover has to stand behind an employers’ promise to indemnify a non-employer.</td>
</tr>
<tr>
<td>80</td>
<td>COWEN v BUNNINGS GROUP LIMITED [2014] QSC 301</td>
<td></td>
<td>Whether the fertiliser dust inhaled by the plaintiff was the causative factor in her development of pneumococcal meningitis.</td>
</tr>
<tr>
<td>81</td>
<td>ZEALLEY v LIQUORLAND (AUSTRALIA) PTY LTD &amp; ANOR [2015] VSC 62</td>
<td></td>
<td>Apportionment of liability between employer and owner/driver of delivery truck for injuries to employee.</td>
</tr>
<tr>
<td>83</td>
<td>GOVIC v BORAL AUSTRALIAN GYPSUM LTD [2015] VSCA 130</td>
<td></td>
<td>Whether an employer breached its duty of care by failing to take reasonable care to avoid risk of injury by providing a safe system of work.</td>
</tr>
</tbody>
</table>
In Issue:
• Whether employer and host employer breached duty of care
• Whether injuries caused by any breach of duty

Delivered On:
11 August 2014

THE FACTS
The plaintiff alleged that he sustained personal injuries on 22 February 2010 whilst working at Victoria Park, Spring Hill. The plaintiff was an employee of BDS Recruit Pty Ltd (BDS) and was working with Brisbane City Council (Council) as a labourer pursuant to a labour hire agreement.

The plaintiff was a manual worker with over 40 years of experience. The incident occurred when he opened a cabinet on Council’s truck to look for yellow caps to place atop of star pickets. After doing so, the plaintiff tried to close the cabinet door but found he could not secure it in a closed position. He concluded that bags of pre-mix cement in the cabinet were blocking the door. There were 2.5 bags of pre-mix cement in the cabinet weighing approximately 67kg in total. He pushed to get the door closed but was unsuccessful. After expending several minutes trying to close the door he became frustrated. He therefore held onto the side of the truck and gave the bottom bag of cement an “almighty kick” causing his Achilles tendon to snap.

The plaintiff claimed that both defendants had breached their duty of care. As against BDS, the plaintiff’s claim centred around a failure to provide appropriate manual handling training and to undertake an appropriate risk assessment, including a site inspection at the relevant worksite. As against Council, the plaintiff claimed they had failed to undertake a risk assessment and that Council had breached its duty of care in providing a truck with cabinets situated at a height (adjacent to the truck’s wheel) which was unsafe for manual handling and allowed the stored bags of cement to move against the door of the cabinet whilst the truck was being driven.

THE DECISION
The court held that neither BDS nor Council had breached their duty of care.

The court found that BDS had undertaken a proper risk assessment, including site inspections, based on the evidence. Further, the court rejected the plaintiff’s submissions that BDS had failed to properly instruct him in the safest method of manual handling as the plaintiff had conceded in his evidence that he had seen diagrams showing the proper method for manual handling in BDS’ training documents.

As against Council, the court accepted the evidence of a Council employee that an adequate risk assessment of a day’s task was undertaken. Further, the court rejected the submission that Council had failed to provide a truck in which the cabinets were situated at a height safe for manual handling. The court found it was not a breach of duty to store the bags at the height at which they were stored as the plaintiff had sufficient knowledge to know how to engage in manual handling safely. Further, the court was not satisfied that the bags of cement were pressed against the door as a result of them being moved while the truck was driven.

The court also held that even if there had been a breach of duty, none of the allegations of negligence caused the incident. The plaintiff knew it was unwise to kick the bags of cement and how to shift them without kicking them. The plaintiff’s failure to take reasonable care for himself was the cause of the injury.

The plaintiff’s claims were dismissed and costs were reserved at the request of the parties.

AMANDA CANN
Senior Associate
Amanda.Cann@bnlaw.com.au
BURFORD v RSL (QUEENSLAND) WAR VETERANS’ HOMES LIMITED [2014] QDC 203

In Issue:
• Liability of a railway authority for injury arising from operation of train

Delivered On: 17 September 2014

THE FACTS
The plaintiff worked in the kitchen of the defendant’s aged care facility over a period of 17 years. Her work was physically demanding and involved preparation of meals for residents including loading and unloading and moving trolleys of food trays. She was promoted to kitchen supervisor before suffering a back injury. Her employment was terminated at the age of 56.

The plaintiff commenced proceedings against the defendant claiming damages in negligence for an injury to her lumbar spine which she alleged was caused by unreasonable duties regarding dispatch trolleys and cambro boxes (insulated boxes for keeping food or drink hot) between 1990 and 2007.

The defendant argued that the plaintiff’s case was too vague, and the link between the unreasonable system of work and the injury was too weak to establish causation.

THE DECISION
The court noted that in the years before the plaintiff’s injury, other employees had reported to management on the difficulties with the system of work. Nothing was done and the defendant did not improve the safety of the work system until after the plaintiff’s injury. The court held that on the evidence, the work required training, less congestion and lighter loads on the trolleys. The defendant breached its duty to the plaintiff in failing to provide those things.

The court observed that since the claim was based upon an aggravation of a pre-existing condition, the threshold question for consideration was whether the condition of the spine was adversely affected to any appreciable extent by the unsafe system of work. Unless the lumbar condition was accelerated, worsened or aggravated by the unsafe work activity, the claim would fail.

The court was persuaded by the experience and knowledge of the defendant’s medical experts who had the benefit of current or recent surgical practice (in contrast to the plaintiff’s expert, Dr Pentis, who did not) and who by virtue of their respective leadership positions could reasonably be expected to be abreast of current medical knowledge. The court criticised Dr Pentis’ evidence as “bald assertion without scientific reference”. In contrast the defendant’s medical evidence was expressed in terms of the nature of degeneration and the absence of discrete injury and was marked by careful attention to detail.

On that basis the court was satisfied on the balance of probabilities that the plaintiff's spinal condition was not caused by the unreasonable stresses of her work activities. The defendant’s breach of duty did not affect the development of her condition, its progress or severity to any discernible extent.

The claim was dismissed.

SUE MYERS
Senior Associate
Sue.Myers@bnlaw.com.au
In Issue:
• Important decision canvassing WorkCover’s obligation to stand behind employers’ promises to indemnify non-employers

Delivered On:
29 October 2014

THE FACTS
Nicholas Byrne (the plaintiff) was injured in a work accident on 21 January 2010, in the course of his work on the Airport Link project. He brought a claim for damages for personal injuries arising out of the incident against People Resourcing (Qld) Pty Ltd (PRQ), his employer and a contracted provider of labour hire, and Thiess John Holland (TJH), the principal contractor and host employer of the plaintiff pursuant to a labour hire agreement.

The labour hire agreement between PRQ and TJH contained contractual indemnities in favour of TJH, along with obligations (including as to the provision of certain insurance) upon PRQ, for the benefit of TJH.

In the usual course WorkCover was the workers’ compensation insurer of PRQ, pursuant to the WCRA.

THE ISSUES AT TRIAL
Prior to trial the parties had settled the plaintiff’s claim, judgment had been entered by consent, and PRQ and TJH had resolved all issues between them, including the contractual issues.

The sole issue at trial was whether WorkCover was obliged to provide coverage to PRQ in respect of its contractual promise to indemnify TJH.

WorkCover contended that the indemnity it owed the employer did not cover a loss suffered as a consequence of a private promise by an employer in favour of another entity.

TJH submitted that there were judgments against each of PRQ and TJH as a result of which both defendants were jointly and severally liable. Consequent upon those judgments (leaving aside the contractual indemnity) both parties were separately obliged to meet 100% of the judgment, there being no proportionate liability in personal injuries disputes. Accordingly, it was argued that WorkCover was required to stand behind PRQ’s promise to indemnify TJH, in accordance with binding High Court authority in State Government Insurance Office v Brisbane Stevedoring Pty Ltd (1969) 123 CLR 228.

THE DECISION
The court agreed with the submissions of TJH that Brisbane Stevedoring was binding on the Supreme Court, and found in favour of TJH.

In that regard, Brisbane Stevedoring supported the following propositions contended for by TJH:

(a) The liabilities of TJH and PRQ were joint and several (and the liability of the employer was not proportionate);
(b) The existence of a valid and effective contractual indemnity prevented WorkCover from pursuing tortfeasor contribution under the LR (Qld); and
(c) WorkCover was required to stand behind PRQ’s promise to indemnify TJH.

The decision has not been appealed.

BACK TO CONTENTS  
BACK TO SECTION  
LINK TO CASE
WORKERS’ COMPENSATION

COWEN v BUNNINGS GROUP LIMITED
[2014] QSC 301

In Issue:

• Whether the inhalation of fertiliser dust was causative of the plaintiff’s illnesses.

Delivered On:
16 December 2014

THE FACTS

The plaintiff was employed by Bunnings in Mt Isa. She alleged that on 24 March 2008 she spent 2.5 hours sweeping, dusting, re-bagging and disposing of fertiliser which had been stored outside uncovered and exposed to the weather. She did not wear any personal protective equipment.

The plaintiff alleged that following that work she began to sneeze, her nose was running and she was coughing. This continued throughout the night and into the next morning when the plaintiff returned to work. She claimed that she had a headache which grew steadily worse. She last remembered serving a customer and next, waking out of a coma in Townsville Hospital.

The plaintiff was in a coma for some days and diagnosed with pneumococcal meningitis, encephalitis and septicaemia.

Bunnings admitted a breach of its duty of care to the plaintiff as her employer, and conceded that it was foreseeable that the work she was performing might cause injury. Damages were agreed at $700,000.

Bunnings denied however that its breaches were causative of the plaintiff’s serious illnesses in this instance which it argued were coincidental to the work that she did that day. It argued that the plaintiff could not prove it was more probable than not that her exposure to the fertiliser dust was causative given that other potential causes (such as smoking) were equally likely to have caused her illness.

THE DECISION

The court accepted that, on the balance of probabilities, the plaintiff’s exposure to the fertiliser dust while working at Bunnings led to her developing symptoms, which instigated the internal process of her infection.

The court considered that the compelling features pointing to a causal connection were, firstly, the strong relationship between the exposure and the development of the illness and secondly, the nature of the material to which the plaintiff was exposed and the duration of her exposure. The extent of exposure was serious and caused immediate upper respiratory symptoms.

The close relation in time between exposure and the development of the illness provided an acceptable causative pathway and accorded with common sense.

Furthermore, while other causes were advanced as possibilities, they all involved such a high degree of coincidence that they were considerably less plausible such that the attribution of causation to them would defy common sense.
**THE FACTS**

On 22 July 2008, the plaintiff was employed by Liquorland (Australia) Pty Ltd (Liquorland) and assisted a truck driver in the unloading of a truck. The truck driver unexpectedly let go of a cage full of alcohol cartons which the plaintiff grabbed and as a result injured her back. The plaintiff also developed a major psychiatric condition from the incident.

The plaintiff sued Liquorland and Linfox Australia Pty Ltd (Linfox), the truck driver’s employer, in negligence. It was conceded by Linfox that the truck driver was inexperienced and incompetent and did not know how to operate the device which lowered the tailgate of the truck.

Before the commencement of the trial, the plaintiff settled her claims against Liquorland and Linfox. However, the two defendants could not settle their contribution dispute. Therefore, the main issue at trial was the apportionment of responsibility between the defendants for the plaintiff’s injuries pursuant to Part IV of the *Wrongs Act 1958* (Vic).

Evidence led proved that the plaintiff performed her pre-injury duties and worked longer hours than allowed by her medical certificate post incident, causing several aggravations of her original back injury. Linfox asserted that Liquorland should face the greater apportionment as Liquorland failed to manage the plaintiff’s return to work program post incident.

The court accepted that normally the plaintiff would not have taken up a position on the rear of the truck to assist unloading it. Further, the court noted that the additional training for truck drivers provided by Linfox after the incident should have been adopted before the incident.

In relation to the failure to manage the plaintiff’s return to work program, the court noted it was the responsibility of Liquorland, as the plaintiff’s employer, to ensure that there was compliance with the advice of the medical practitioners as to her capacity to carry out work. The court accepted that the plaintiff’s condition and pain levels increased following her return to work.

The court held that Liquorland breached its duty as it should have provided its workers with specific instructions not to assist with unloading trucks. The court also held that Liquorland breached its duty in relation to management of the plaintiff’s return to work program resulting in exacerbation of her back injury, although of a minor nature.
The court apportioned liability 35% to Liquorland and 65% to Linfox. More responsibility was apportioned to Linfox as its acts and omissions were both greater in culpability and causal potency than those of Liquorland. This is because Linfox sent an inexperienced and incompetent employee to carry out a difficult task without adequate training.

The court then varied the apportionment by increasing Liquorland’s liability by 5% for allowing the plaintiff to complete duties outside her restrictions, ultimately producing an apportionment of 40% to Liquorland and 60% to Linfox.
THE FACTS

The appellant had been employed by the respondent, Boral, as a repair plasterer since 1997. In November 2010, the appellant ceased work due to degenerative tendonitis in his left and right Achilles tendons. The appellant suffered from Haglund’s deformity and was predisposed to ankle tendon degeneration. Relevantly, stretching and stressing of the Achilles tendon in the course of his work duties was likely to aggravate degeneration in his tendons.

The appellant sued Boral for his injuries in the County Court for damages in negligence, or in the alternative, for breach of statutory duty arising out of the Occupational Health and Safety (Manual Handling) Regulations 1999 (the 1999 Regulations) and the Occupational Health and Safety Regulations 2007 (the 2007 Regulations).

THE DECISION AT TRIAL

The trial judge examined the expert evidence that the appellant performed a range of difficult and awkward manual handling tasks including carrying loads of plaster weighing up to 20kg that would have increased the load on the appellant’s Achilles area, particularly when climbing onto stools and step ladders. The trial judge characterised the tasks performed by the appellant as ordinary plasterer’s work and held that Boral was not negligent in requiring him to undertake those ordinary duties. The trial judge was also satisfied that Boral had not been put on notice of the appellant’s vulnerability to injury.

The trial judge also considered it was proper to assume (without finally deciding) that the appellant had been involved in hazardous manual handling and that the Regulations therefore required Boral to carry out a risk assessment to reduce the risks of musculoskeletal injuries. Although no such assessment had been conducted, the trial judge was not satisfied any failure to do so was causally connected to the appellant’s injuries. The trial judge held that Boral had not breached its statutory duties pursuant to the Regulations and dismissed the appellant’s claim.

THE ISSUES ON APPEAL

On appeal by rehearing, the central issue was whether the system of work utilised by the appellant was ordinary plasterer’s duties and as such, whether Boral had discharged its common law and statutory duties as an employer.

“The trial judge characterised the tasks performed by the appellant as ordinary plasterer’s work and held that Boral was not negligent in requiring him to undertake those ordinary duties.”

CONTINUED ON NEXT PAGE
THE DECISION ON APPEAL

The appeal was allowed.

The Court of Appeal found that the trial judge had erred in failing to squarely address the safety of the particular system of work adopted by the appellant. The Court of Appeal held that although the appellant’s work involved ‘ordinary plasterers’ work’, the evidence did not enable a finding that the practices adopted were normal practices or that they were reasonably safe. The Court of Appeal accepted that the risk of injury could have been managed by performing a risk assessment and providing training in manual handling. The Court of Appeal ultimately held that Boral had breached its duty of care in allowing the appellant to adopt unsafe work practices and not taking reasonable steps to reduce the risk of injury.

The Court of Appeal examined the Regulations and held that the trial judge had erred as the Regulations inform the content of the relevant common law duty to provide a safe system of work. Having found that the appellant’s work practices were unsafe and risky, Boral was required to assess the consequent risk. In failing to do so, Boral breached its duty under the Regulations.

The Court of Appeal nevertheless found that the appellant had contributed to his own injuries allowing a 30% reduction.

The matter was remitted to the County Court for the assessment of quantum.
HEALTH LAW
MEDICAL NEGLIGENCE

87 LANE v NORTHERN NSW LOCAL HEALTH DISTRICT (NO. 3) [2014] NSWCA 233
Liability of hospital for psychiatric injury caused by death of mother where appointed legal guardian (husband) consented to treatment provided.

89 ROBINSON v NG [2014] ACTSC 227
Whether a dentist was negligent for not discontinuing an attempted tooth extraction and whether there was a causal connection between the treatment and subsequent condition.

90 DEKKER v MEDICAL BOARD OF AUSTRALIA [2014] WASCA 216
Whether a medical practitioner was guilty of improper conduct for failing to stop and assist following a near miss motor vehicle accident.

92 O’REILLY v WESTERN SUSSEX NHS TRUST (NO.6) [2014] NSWSC 1824
Application of UK law in a compensation to relatives and nervous shock claim arising out of the failure to diagnose bowel cancer in the plaintiff’s husband.

94 MULES v FERGUSON [2015] QCA 5
Whether referral for specialist treatment would have led to diagnosis and treatment before onset of catastrophic injuries and availability of s22 CLA defence.

96 SMYTHE v BURGMAN (NO. 2) [2015] NSWSC 298
An unsuccessful claim against a General Practitioner for misdiagnosis of a vascular condition which resulted in the plaintiff having her leg amputated.

PROCEDURE POLICY

99 HUNTER & NEW ENGLAND LOCAL HEALTH DISTRICT v MCKENNA; HUNTER & NEW ENGLAND LOCAL HEALTH DISTRICT v SIMON [2014] HCA 44
The liability of a hospital for discharging a mentally ill patient into the care of a friend whom the patient subsequently killed.
THE FACTS
On 10 March 2007, Helen Lane (the mother of the appellants) had a seizure at home. She subsequently received care at 2 of the respondent’s hospitals and passed away on 24 March 2007. Mrs Lane suffered from dementia and was not able to give consent to treatment at the relevant time. Staff at the hospital consulted with the family as to the treatment to be provided to Mrs Lane. At times the family was divided, with the appellants taking differing views to their father and brothers. They sought more active intervention, while their father (Mrs Lane’s next of kin and appointed guardian) and brothers accepted that Mrs Lane’s death was inevitable and were content with palliative care being given.

As her legal guardian, Mr Lane’s view prevailed and the hospitals correctly followed his instructions. The appellants brought proceedings in the New South Wales District Court alleging negligent mistreatment of their mother at the hospitals. Damages were sought for psychiatric injuries resulting from the allegedly negligent treatment of Mrs Lane.

THE ISSUES ON APPEAL
The appellants argued that; (a) their father had not been adequately advised and that his consent to the treatment of Mrs Lane was “invalid”; and (b) if the consent was invalid, the treatment of Mrs Lane was tortious, with the result that any psychiatric injury suffered by the appellants as a result of witnessing the treatment was compensable.

THE DECISION AT TRIAL
While the trial judge accepted that the appellants had suffered a psychiatric condition relating at least in part to their mother’s death, he failed to find negligence on the part of the hospitals. He dismissed the appellants’ claims.

THE DECISION ON APPEAL
The Court of Appeal found that the trial judge’s conclusions in relation to the validity of the consent provided by Mr Lane were justified on the evidence. The hospital notes established that the staff of the
hospitals took extraordinary steps to explain how they believed the patient should be treated and to obtain consent from the family by way of consensus. The Court of Appeal observed that although Mr Lane had the final say he went to lengths to act on the basis of consensus rather than authority. In the Court of Appeal’s view these 2 factors were inconsistent with an argument of breach of duty by the hospitals to either the patient or the family members. In addition, at no point during the hearing of the appeal (at which the appellants were self represented), did the appellants obtain any concession from Mr Lane that he did not consent to the treatment that was given.

The trial judge ultimately concluded that causation had not been made out and that Mrs Lane’s outcome would not have been very different in the short-term and that she would have died at or about the same time she in fact did die. The Court of Appeal held that the steps taken by the hospital were both reasonable and appropriate. The Court of Appeal accepted the evidence of the clinicians who treated Mrs Lane that she was at the end of her life, and that nothing else could have been done other than to provide palliative measures to keep her comfortable.

The appellants sought to rely upon hospital guidelines as setting the relevant standard, and argued that breach of the guidelines would demonstrate a breach of duty of care. The Court of Appeal was of the view that the relevant standard would not in this case be found in the guidelines but rather from relevant health care professionals identifying “competent professional practice”. The medical evidence indicated that there had been no breach of duty of care.

The appeal was dismissed, with the appellants to pay the respondent’s costs.
THE FACTS

On 29 December 2009, the plaintiff attended at the dental surgery of the defendant with a painful right upper molar. The defendant took an x-ray (first x-ray) and told the plaintiff that there was extensive decay under the existing filling in the tooth. Treatment options included root canal therapy and tooth extraction. The plaintiff opted for extraction. The extraction was lengthy and the crown of the tooth was broken in the process. At this point, a further x-ray was taken (second x-ray). The extraction continued, resulting in the tooth being pushed through the wall of the plaintiff’s maxillary sinus. The plaintiff subsequently developed a severe infection, underwent surgery to remove the tooth fragment, was diagnosed with Bell’s palsy and suffered osteomyelitis in her jaw.

The plaintiff brought personal injury proceedings against the dentist both in tort and contract. The case was assessed on the basis of the claim being in tort in circumstances where no submissions were ultimately directed to any difference in relation to liability or quantum between the claim in tort and contract.

THE DECISION

The plaintiff alleged that there was a drawn out attempt at extraction. The defendant claimed that the plaintiff insisted that he continue with the procedure in spite of him informing her that she should be referred to a specialist. The court in general terms preferred the evidence of the plaintiff. The plaintiff alleged that the defendant breached the duty of care he owed to her by continuing to attempt the extraction after the second x-ray when he should have stopped the surgery and referred the plaintiff to an oral surgeon to complete the procedure. The court accepted the evidence of the plaintiff’s expert dentist, and found that had the plaintiff been referred to an oral surgeon no later than the second x-ray, it was likely that the roots of the tooth would have been extracted without a communication with the sinus being created. The defendant was therefore found to have breached his duty of care to the plaintiff.

In relation to the defence of voluntary assumption of risk, the court found that this was not open to the defendant because the defence had not been pleaded.

The court reviewed the plaintiff’s injuries in order to determine causation. It concluded that there was nothing in the reports relied upon by the defendant that indicated that the plaintiff’s neuropathic pain had a cause other than the defendant’s conduct and sequelae. The onset of Bell’s palsy was also found to have been caused by the defendant’s breach of duty.
DEKKER  v  MEDICAL BOARD OF AUSTRALIA  
[2014] WASCA 216

In Issue:
• Whether a medical practitioner was guilty of improper conduct for failing to assess the potential injuries of the occupants of a vehicle involved in a “near miss” collision
• Whether the Tribunal’s finding of “improper conduct” should stand

Delivered On:
21 November 2014

THE FACTS
The appellant is a medical practitioner. On 27 April 2002, the appellant was involved in a “near miss” event whilst driving her car. The appellant’s car was in a stationary position. Another vehicle veered towards her at significant speed causing the appellant to take evasive action by moving her car forward across the road and ending up on the edge of an embankment. The other vehicle passed behind her and ended up in a ditch. Immediately following the “near miss” the appellant drove to a police station, which was only a short distance away to report the incident. It was dark at the time of the accident.

THE DECISION AT TRIAL
The State Administrative Tribunal found the appellant was guilty of improper conduct in a professional respect by leaving the scene of an accident to notify police without stopping to make an assessment of and render assistance if necessary. It did not matter that there was no existing professional relationship between the medical practitioner and the persons injured.

It was further concluded that the appellant’s professional duty was not discharged by reason of the fact that the appellant did not have a mobile phone with her and that the police station was only a short distance away.

The fact that the practitioner was in a state of shock after the near accident was hardly surprising. However, the Tribunal found that her professional duty required that she overcome or at least put aside the shock and provide assistance to the occupants of the other vehicles.

THE ISSUES ON APPEAL
The appellant argued that the Tribunal erred in law in finding that as a medical practitioner she owed a professional duty to check and assess the medical condition of the occupants of the other vehicle. In particular she argued that if the Tribunal determined the question of the existence of a professional duty by relying on the expertise of its medical members it erred in law by failing to inform the appellant, giving her the opportunity to bring evidence and by failing to state the reasons.

The evidence brought before the Tribunal was accordingly incapable of sustaining the respondent’s case. The Court of Appeal set aside the Tribunal’s decision for want of evidence.

THE DECISION ON APPEAL
The Court of Appeal found for the appellant on a number of grounds. Firstly, there was no evidence of a specific professional duty. The rules of natural justice precluded the Tribunal from drawing on its own knowledge and experience to find a specific professional duty and the Tribunal’s findings could not be upheld in the absence of relevant evidence.

In relation to the relevance of whether the appellant was suffering from shock, it was unnecessary for the Court of Appeal to reach a concluded view given the lack of evidence of a relevant professional duty and it was not clear from the Tribunal’s reasons whether it concluded that the appellant was suffering from shock in a medical sense. If she was, on the Tribunal’s reasoning that should have been taken into account. Any finding of improper conduct would have depended upon finding that the appellant was physically able to render medical assistance, which the respondent failed to prove.

The evidence brought before the Tribunal was accordingly incapable of sustaining the respondent’s case. The Court of Appeal set aside the Tribunal’s decision for want of evidence.

KRISSY FOX
Solicitor
Krissy.Fox@bnlaw.com.au
THE FACTS

In August 2003, Dr David O’Reilly attended St Richard’s Hospital, in the United Kingdom (the Hospital), and underwent a colonoscopic examination by Dr Sen, a locum consultant surgeon. Dr Sen determined to undertake a further examination of the left colon.

In November 2003, when Dr O’Reilly attended the hospital for his follow-up procedure, Dr Poushin was the acting locum consultant surgeon. Dr Poushin conducted a certain colonoscopic procedure (a flexible sigmoidoscopy) and should have reached and/or visualised a particular point in the colon (the splenic flexure) in the course of his examination. Dr Poushin reported that he had visualised and/or reached the splenic flexure and nothing was found.

On 26 July 2006 Dr O’Reilly collapsed whilst at home. Imaging undertaken detected the existence of a cancerous lesion in the area of the splenic flexure. Dr O’Reilly underwent a number of surgeries and procedures to try to remove the cancer. However, on 2 November 2006 Dr O’Reilly died.

Dr David O’Reilly’s wife, Mrs O’Reilly (the plaintiff) brought proceedings in negligence against the Hospital, Dr Sen and Dr Poushin (collectively, ‘the defendants’) arising out of the death of her husband pursuant to the Fatal Accidents Act 1976 (UK) (the compensation to relatives proceeding). She also brought proceedings claiming damages for psychiatric injury by way of nervous shock (‘the nervous shock proceeding’).

In circumstances where the events which gave rise to the cause of action occurred in the United Kingdom, the parties agreed that the relevant law which was to be applied was the law of England and Wales.
THE DECISION – COMPENSATION TO RELATIVES PROCEEDING

The Hospital admitted it was liable for the clinical acts of the Hospital staff. The defendants conceded that Dr Poushin did not reach and/or visualise the splenic flexure in November 2003 and that, at that time, a lesion was present at or slightly below the splenic flexure.

The court held that Dr Sen breached his duty to Dr O’Reilly as he should have ordered examination by way of colonoscopy, rather than the more limited flexible sigmoidoscopy. This was despite the relevant UK “Guidelines” permitting the use of the latter in such circumstances, because the court considered Dr Sen had intended a more thorough investigation of the whole of the left colon.

The court also held that Dr Poushin’s conduct was in breach of his duty as he should have examined the whole of the left colon and realised that he had not reached the splenic flexure. The court found that, had he carried out the examination properly, he would have discovered the lesion.

The court held that the likelihood was that by November 2003 the tumour had metastasized. Therefore, if discovered, Dr O’Reilly would have had surgery to remove it and been treated with chemotherapy. The court accepted the medical evidence that, even with such treatment, Dr O’Reilly would probably have died, but could have lived until about the end of November 2008 and therefore he died prematurely by a period of 2 years.

The court awarded damages to the plaintiff for loss of financial support from Dr O’Reilly; loss of services provided to the plaintiff’s son, who suffered from cerebral palsy; loss of services provided to the family generally; and a sum for bereavement.

DECISION AT TRIAL – THE NERVOUS SHOCK PROCEEDING

The plaintiff’s claim for nervous shock was based on the collapse of the late Dr O’Reilly at home on 26 July 2006. This gave rise to an issue as to whether the claim was statute barred, as that event occurred more than three years prior to commencement of the proceedings.

In those circumstances, the plaintiff had to establish that she first had knowledge of the following matters within a period of three years before she commenced the nervous shock action:

1. That her psychiatric injury was significant;
2. That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
3. The identities of the defendants.

The court was not satisfied that the plaintiff had specifically addressed her state of knowledge and when it was reached, and was not prepared to draw inferences in her favour. The court therefore held that the claim for nervous shock was statute barred.

In any event, the court considered that the plaintiff would not have succeeded in her claim for nervous shock due to certain “control mechanisms” entrenched in UK law which limit the liability in respect of claims for nervous shock by secondary victims (as first propounded by Lord Oliver in Alcock). The court noted that that result would probably have been different if the applicable law had been the common law of Australia.
THE FACTS
The respondent, Dr Ferguson, was a general practitioner. The appellant, Ms Mules, consulted the respondent on several occasions in September 2008 about neck pain. The respondent suspected that the appellant’s symptoms had a musculo-skeletal cause.

Following the final consultation with the respondent, the appellant was admitted to a hospital, where she was diagnosed with cryptococcal meningitis. As a result of this disease, the appellant became blind, deaf and suffered other grievous disabilities.

The appellant brought an action in negligence against the respondent claiming that she did not undertake a proper examination or make proper enquiries as to the appellant’s symptoms in order to exclude cryptococcal meningitis. The appellant contended that had the respondent acted competently, she would have referred the appellant to a specialist or a local hospital for tests and treatment, so that the disease was diagnosed and treated before she suffered injuries.

THE ISSUES ON APPEAL
The Court of Appeal had to consider whether the respondent breached her duty of care; whether the respondent’s breach of duty of care caused the appellant’s injuries; and whether the respondent had a defence under s22 CLA (QLD), and whether, in light of the exclusion provided in s22(5), s22 applied at all.

THE DECISION ON APPEAL
The Court of Appeal unanimously held that the respondent breached her duty of care to the appellant. In the Court of Appeal’s view, a consideration of the evidence as a whole supported a conclusion that the presence of a visibly reduced range of movement in the appellant’s neck required a physical examination of the neck if the respondent was exercising reasonable care and skill. The Court of Appeal observed that a neck examination was a simple and a
standard exercise to undertake on patients complaining of neck pain.

By majority the Court of Appeal held that the respondent’s breach of duty of care caused the appellant’s injuries. Based on evidence of experts and other witnesses, the majority found that had the respondent examined the appellant’s neck by performing the chin on chest test, she would have detected neck stiffness suggestive of meningeal irritation. This combined with the appellant’s history of headaches and facial flushing required the respondent, acting reasonably, to refer the appellant to a neurologist or specialist physician so as to exclude the possibility of cryptococcal meningitis. The majority of the Court of Appeal found the appellant would have promptly attended a specialist and the disease would likely have been diagnosed and treated earlier, preventing the grievous injuries suffered by the appellant.

The Court of Appeal further unanimously held that s22 CLA (QLD) did not provide a defence for the respondent. The Court of Appeal noted that in reaching the conclusion that s22 applied to the respondent, the trial judge relied upon the opinions of two expert witnesses. However, these opinions were based on facts consistent with the respondent’s version of events only, and this version was not entirely accepted by the trial judge. In these circumstances, the Court of Appeal determined that there was no evidence upon which the trial judge could be satisfied that s22 CLA (QLD) applied to the respondent. The Court of Appeal also noted that the exclusion in s22(5) did not apply because this was not a failure to warn or advise case.
SMYTHE v BURGMAN (No. 2)  
[2015] NSWSC 298

THE FACTS

The plaintiff attended her General Practitioner, the defendant, on 14 March 2011 complaining of pain in her left foot. The defendant diagnosed an infection and prescribed antibiotics. The defendant maintained prior to making her diagnosis she had taken the plaintiff’s dorsalis pedis pulse in the left foot and found that it was normal. There was no record of this in the defendant’s notes but the defendant claimed that it was her usual practice not to note normal findings.

The plaintiff returned to see the defendant on 22 March 2011 and advised that her foot had improved but was not fully resolved. The defendant noted there was still some pinkness in the foot, but that it was improving and she prescribed another course of antibiotics.

Later that evening the plaintiff was admitted to the Gold Coast Hospital. She was diagnosed with left leg ischaemia secondary to acute embolus in the left sub-femoral artery. Micro-emboli which were too small to remove by surgery were also present. Surgery was performed to remove the large embolism, however, eventually, it was necessary for the plaintiff’s lower leg to be amputated.

THE DECISION

The court held that the defendant owed the plaintiff a duty to consider arterial ischaemia as a diagnosis and to take the plaintiff’s pulse to confirm or exclude this. However, accepting the defendant’s usual practice was not to record normal results, the court was satisfied that the defendant did in fact check the plaintiff’s dorsalis pedis pulse on 14 March 2011. This was despite expert opinion that, considering the progression of the plaintiff’s injury,
it was unlikely that the plaintiff’s dorsalis pedis pulse was normal on this date. The court considered that, once it had accepted it was possible the pulse was normal the chance of this being true should not incline it to reject the defendant’s evidence.

The court rejected the plaintiff’s evidence that she complained to the defendant of tingling or pins and needles on 22 March 2011, finding that, had she done so, the defendant would have “reopen[ed] the possibilities” and considered other diagnoses.

The court held that as long as the defendant checked the pulses on 14 March, it was not reasonably necessary for her to do so again on 22 March in light of the clinical presentation, which tended to corroborate the diagnosis of infection (i.e. the improvement of the foot after prescription of antibiotics).

The court noted that, even if the defendant had been negligent, the plaintiff would have failed on causation. The evidence was insufficient to assess the value of any chance the plaintiff had of avoiding amputation.

In fact, the court considered that the evidence there was on the accumulation of the inoperable microemboli in the leg and foot suggested that any chance of avoiding amputation was speculative and therefore should not be taken into account for the purposes of an award of damages. Judgment was entered for the defendant.
Meet our Melbourne team of insurance law specialists

**PETER EWIN**
*Partner*

**E:** peter.ewin@bnlaw.com.au

Peter has over 30 years experience, specialising in insurance law. He has an in-depth understanding of the insurance industry and has managed numerous successful class actions and is highly regarded as a litigator.

Peter has extensive experience in handling injury liability, compulsory third party, recovery, ISR and property liability claims. He has also worked on a broad range of public and product liability and medical negligence claims, and provides advice on policy interpretation. Another one of Peter’s areas of specialisation is in defending professional indemnity claims, particularly for construction and engineering clients.

**NIEVA CONNELL**
*Partner*

**E:** nieva.connell@bnlaw.com.au

Nieva has extensive litigation experience and a reputation as a highly capable and commercially astute lawyer. She has conducted successful litigations for national, multinational and international insurers.

Nieva’s experience also includes advising clients on commercial and insurance claims and coverage disputes, particularly those involving public and products liability, professional indemnity, occupational health and safety, and trade practices. Assisting clients with policy interpretation and drafting, claims assessment and statutory and compliance issues, is also part of Nieva’s area of specialisation.

**HUBERT WAJSZEL**
*Partner*

**E:** hubert.wajszel@bnlaw.com.au

Hubert is an experienced insurance law and commercial litigation specialist who handles contentious and non-contentious matters for local and overseas insurers and captives, regularly appearing in VCAT, the County, Supreme and Federal Courts, and local government inquiries.

Hubert specialises in professional indemnity insurance, with a particular focus on construction professionals, financial institutions and directors’ and officers’ liability. He acts for professionals regularly defending claims brought against, architects, engineers, building surveyors, accountants, mortgage brokers and introducers, directors and officers, conveyancers and real estate agents.

Hubert’s practice also extends to providing risk management advice, including undertaking reviews of contract documents and policy wordings.
HUNTER & NEW ENGLAND LOCAL HEALTH DISTRICT v MCKENNA; HUNTER & NEW ENGLAND LOCAL HEALTH DISTRICT v SIMON
[2014] HCA 44

In Issue:
• Whether a hospital was negligent in discharging a mentally ill patient who subsequently killed another person

Delivered On:
12 November 2014

THE FACTS
On 20 July 2004, Stephen Rose was concerned about the mental state of his friend William Pettigrove, and arranged for him to be taken by ambulance to hospital. Following a medical assessment, Mr Pettigrove was compulsorily detained at the hospital pursuant to the Mental Health Act 1990 (NSW) (MHA). After an assessment by a psychiatrist working at the hospital, Mr Pettigrove was discharged on 21 July 2004 into the custody of Mr Rose so they could drive to where Mr Pettigrove’s mother lived. It was expected that Mr Pettigrove would then undergo further psychiatric treatment.

When the two men stopped on the highway after nightfall, Mr Pettigrove strangled and killed Mr Rose. Mr Pettigrove said in an interview with police that he had acted on impulse, apparently believing that Mr Rose had killed him in a past life and seeking revenge. Mr Pettigrove subsequently committed suicide.

Mr Rose’s mother and sisters (the relatives) claimed damages for psychiatric injury resulting from nervous shock caused by the negligence of the New England Local Health District (the Health Authority), which was responsible for the conduct of the hospital and those working in it. They claimed that the hospital breached the duty of care it owed to Mr Rose by discharging Mr Pettigrove from the hospital into his custody.

THE DECISION AT TRIAL
The trial judge held that the plaintiffs had not established negligence on the part of the psychiatrist and therefore the hospital. Further, the plaintiffs had not established that Mr Rose’s death, and therefore the psychiatric injuries the plaintiffs had suffered, were causally related to the negligence they alleged. The relatives appealed to the New South Wales Court of Appeal which held that the hospital owed Mr

“Mr Rose’s mother and sisters claimed damages for psychiatric injury resulting from nervous shock caused by negligence.”
Rose, and therefore his relatives, a duty to take reasonable care to prevent Mr Pettigrove causing harm to Mr Rose. The hospital breached its duty by discharging Mr Pettigrove in circumstances where he had suicidal tendencies and there was a risk of harm to Mr Rose if Mr Pettigrove attempted to harm himself.

**THE ISSUES ON APPEAL**

The Health Authority appealed and the main issue for consideration was whether the hospital owed Mr Rose’s relatives a duty of care.

**THE DECISION ON APPEAL**

The High Court unanimously held that the hospital and the psychiatrist did not owe a duty of care to Mr Rose’s relatives.

The High Court noted that if the hospital and the psychiatrist owed Mr Rose and his relatives a duty of care as alleged, it was not easy to see why that duty would not extend to any and every person with whom Mr Pettigrove would come into contact after his release from hospital, and this could be a very extensive range of people to whom a duty was owed.

However, the High Court held it was not necessary to consider the extent and potential indeterminacy of the liability which imposing a duty of care would entail, because the powers, duties and responsibilities of doctors and hospitals regarding the involuntary admission and detention of mentally ill persons were prescribed by the MHA. It was the provisions of that Act which identified the matters to which doctors and hospitals must have regard when exercising those powers. Since those provisions were inconsistent with the common law duty of care alleged by the relatives, no such duty was owed to them.

The High Court found that the hospital and the psychiatrist complied with their responsibilities under the MHA. The appeals were therefore allowed.
PROFESSIONAL NEGLIGENCE
DIRECTORS AND OFFICERS

104 OZ MINERALS HOLDINGS PTY LTD & ORS v AIG AUSTRALIA LTD [2015] VSC 185
Whether a major shareholder exclusion clause required assessment of claimant’s status at the time of the wrongful act and/or the time of the claim.

110 FALKINGHAM v HOFFMANS (A FIRM) [2014] WASCA 140
Assessment of liability and causation for loss of opportunity to commence medical negligence proceedings.

112 HUDSON INVESTMENT GROUP LIMITED v ATANASKOVIC [2014] NSWCA 255
Whether drafting of ambiguous provision in deed breached a solicitor’s duty of care and whether causative of alleged loss.

INSURANCE BROKERS

105 HAMCOR PTY LTD & ANOR v THE STATE OF QUEENSLAND & ORS [2014] QSC 224
Liability of a state government authority for the results of fire fighting actions and liability of broker in respect of arranging appropriate insurances to deal with the effects of those actions.

114 HOWE v FISCHER NSWCA 286
Scope of duty of care owed by solicitor to disappointed beneficiary - whether solicitor required to take immediate steps to have informal will signed.

SOLICITORS AND BARRISTERS

107 BIRD v FORD [2014] NSWCA 242
Unsuccessful appeal against dismissal of professional negligence claim against solicitor.

116 FTV HOLDINGS CAIRNS PTY LTD v SMITH [2014] QCA 217
Liability of a solicitor for failure to comply with an Irrevocable Authority.

Measure of damages flowing from matrimonial litigation following non binding financial agreement prepared by solicitor.

118 YOUNG v HONES [2014] NSWCA 337
Consideration of the scope of advocate’s and witness’s immunity.

120 CALVERT v BADENACH [2014] TASSC 61
Whether a solicitor preparing a will has a duty to advise about frustrating potential claims under the Testator’s Family Maintenance Act.
121  **GADENS LAWYERS SYDNEY PTY LTD v SYMOND**  
[2015] NSWCA 50

Appeal against an assessment of damages flowing from advice given relating to tax consequences of a revised ownership structure of a business.

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123  **KAMBOURIS v TAHMAZIS (NO. 2)**  
[2015] VSC 174

A solicitor’s breach of duty in failing to advise a client she was not protected by a mortgage, was found not have caused the alleged loss.

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125  **ABU-MAHMOUD v CONSOLIDATED LAWYERS PTY LTD**  
[2015] NSWSC 547

Whether advice given by solicitor was negligent and whether plaintiff contributed to the loss.

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**OTHER**

126  **BRIREK INDUSTRIES PTY LTD v MCKENZIE GROUP CONSULTING (VIC) PTY LTD BC201406219**  
[2014] VSCA 165

The applicable limitation period for claims in contract or tort relating to building contracts and whether a duty of care in negligence is owed.

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128  **JK v NEW SOUTH WALES**  
[2014] NSWSC 1084

Whether school entitled to contribution from teacher to settlement of claim for sexual assault.
In Issue:
- Whether the wording of a major shareholder exclusion clause under a D&O policy excluded claims by shareholders at the time of the claim, the time of the wrongful act or both

Delivered On:
6 May 2015

THE FACTS
The first plaintiff, Oz Minerals Holdings Pty Ltd (OZMH) was formerly called Zinifex Ltd. In March 2008, OZMH announced that it intended to merge its mining businesses with Oxiana Ltd. This scheme of arrangement was approved by the court on 20 June 2008. As a result of the merger, Oxiana Ltd was re-named OZ Minerals Ltd (OZM) and it acquired all the shares in OZMH. OZMH’s shareholders were issued shares in OZM.

In February 2014, a representative proceeding was commenced against OZM alleging breach of continuous disclosure obligations in s674 CA based on conduct which occurred before the scheme of arrangement was approved.

As a result, OZM commenced a contribution proceeding against OZMH. OZMH then sought indemnity under a Director’s and Officer’s policy issued by the first defendant (AIG).

AIG denied indemnity on the grounds that a ‘Major Shareholder and Board Position’ exclusion clause applied. This clause provided that there was no liability to indemnify a claim brought by a past or present shareholder who had or has (i) direct ownership or control of 15% or more of the voting share or rights in OZMH or any subsidiary; and (ii) a representative individual/s holding a board position with OZMH.

The facts established that prior to approval of the scheme of arrangement, neither of the above conditions were satisfied but at the time the claims were made, both conditions were satisfied.

The issue for determination was whether the shareholder exclusion would apply where its two conditions were only satisfied at the time of the claim.

THE DECISION
The court preferred AIG’s construction of the exclusion clause because it was grammatical, it accorded with the structure of the policy (which, as a claims made policy, required two events, not one, to establish liability) and because the suggested commercial rationale was objectively reasonable.

In contrast, OZMH’s suggested construction of the exclusion was inconsistent with the policy’s structure, contrary to authority and required a strained approach to find ambiguity. The court specifically rejected the argument that the ‘claims made’ structure of the policy merely reflected an additional condition for cover and held that it was an essential condition precedent to cover under the policy.

The court also rejected OZMH’s argument that other clauses in the policy dealt with the risks to AIG of co-operation and misuse of company information and that therefore the exclusion clause did not operate. The court held that those other clauses all demonstrated, albeit to different degrees, an express intention to protect AIG from the risks of co-operation and misuse of company information in connection with a claim and supported AIG’s arguments on the proper construction of the exclusion clause and the commercial rationale of the policy.

The court concluded that the exclusion clause applied and AIG was not liable to indemnify OZMH in respect of the claim.

AMELIA JENNER
Solicitor
Amelia.Jenner@bnlaw.com.au
THE FACTS
The plaintiffs owned land at Narangba and a chemical plant was operated on the site by a related entity, Binary Industries. On 25 August 2005 a fire destroyed the plant, with fire fighting efforts resulting in large quantities of water becoming contaminated and affecting the plaintiffs’ land and neighbouring properties. The Environmental Protection Agency (EPA) issued a notice to the plaintiffs to conduct remediation works. The remediation works required amounted to costs of around $10 million. The plaintiffs’ insurer declined indemnity for those costs. The plaintiffs commenced action against the Queensland Fire and Rescue Service (QFRS), alleging negligence in respect of the actions taken in fighting the fire, and against Binary’s insurance brokers for a failure to obtain appropriate insurance policies for the plaintiffs. In an earlier determination of a separate issue, the question of whether the alleged appropriate polices (a liability policy held by Binary and a hypothetical ISR policy) would have responded to cover the plaintiffs for the costs of the remediation was determined. It was found that the loss would not have fallen within the liability policy. It was found on appeal that the theoretical ISR policy may have covered the loss, but the issue was not resolved.

THE DECISION AT TRIAL
The trial judge gave judgment for the defendant brokers and the QFRS. The QFRS had denied it owed a common law duty of care to the plaintiffs. The plaintiffs had not pleaded a breach of statutory duty. The trial judge found that the QFRS owed a duty to take reasonable care in conducting its fire fighting operations and had breached that duty by failing to allow the fire to burn, rather than extinguishing it with the water which later became contaminated. The QFRS had also sought to rely on section 36 CLA (QLD) to modify the content of the duty owed. Section 36 CLA (QLD) is concerned with situations where a public authority allegedly wrongfully exercises a power or function and provides that an act or omission does not constitute a wrongful exercise or failure unless it was, in the circumstances, so unreasonable that no public or other authority having the functions of the authority in question could consider the act reasonable. The trial judge found that section 36 CLA (QLD)was not applicable in the circumstances, as the plaintiff had

“The trial judge also found that even if the relevant policies were available the plaintiffs had not established that they would have taken out the policies to cover the loss which eventuated…”

CONTINUED ON NEXT PAGE
not brought an action for breach of statutory duty and the trial judge held that the section only applies to actions for breach of statutory duty. However, if section 36 CLA (QLD) had applied, the trial judge found that it would have defeated the plaintiffs’ claim. Despite those findings, the QFRS escaped liability because of the operation of a statutory immunity under the Fire and Rescue Services Act 1990, which established the QFRS, and protected against liability for actions taken pursuant to that Act.

As against the brokers it was found that no duty of care was owed. The plaintiffs had argued that the brokers should have investigated the relationship between the plaintiffs and Binary Industries and determined that the plaintiffs required the relevant polices to cover risks on their property. The trial judge found that the relevant elements required for the existence of a duty of care in respect of pure economic loss were not present. On a complex history of the arrangements between the brokers and the various entities involved in the site, it was found that at the relevant time, the brokers’ retainer was with Binary, but not with the plaintiffs. The trial judge also found that even if the relevant policies were available, the plaintiffs had not established that they would have taken out the policies to cover the loss which eventuated, that an insurer would have offered them such cover, or that the relevant losses would be covered.
The appellants’ child was expelled from Broughton Anglican College, a private school (the school), in March 2007. The appellants retained a solicitor (the solicitor) to act on their behalf in proceedings against the school. Those proceedings were dismissed with costs awarded in favour of the school.

The appellants then commenced proceedings against the solicitor claiming damages for breach of retainer and negligence in the provision of advice in relation to the proceedings against the school. The appellants alleged that the solicitor failed to advise them that they had no arguable cause of action against the school and that the proceedings were entirely misconceived and manifestly hopeless.

THE DECISION ON APPEAL

In the initial proceedings against the school the court held the school was not bound by the rules of procedural fairness and natural justice in the way pleaded, and further, that no principle of law required the headmaster of a non-government school, as a domestic decision maker within a private institution, to observe the rules of natural justice in making disciplinary decisions.

The appellants argued that this represented a ruling that the claims brought by them in the proceedings against the school were entirely misconceived and manifestly hopeless. The Court of Appeal found that the trial judge made no such finding. At the time the proceedings were instituted and the court’s decision was made, the state of the law in Australia in relation to the issue was unsettled and there was no clear or consistent Australian authority which established that private schools were obliged to provide a student procedural fairness before a decision to expel was made.

The Court of Appeal noted the evidence at trial that the solicitor had informed the appellants that it was a novel and difficult case and that he agreed with senior counsel that there was an arguable view of the law in support of the claim but that the case could be lost because of jurisdictional questions, or on the facts, or on discretionary factors.

The Court of Appeal also noted that the appellants told the solicitor more than once that, if he did not wish to pursue the matter, they would continue without him and held that the solicitor did not breach the duty of care that he owed to his clients in the matter of advising on prospects of success. The Court of Appeal also noted that general law principles confirm that a solicitor may, with impunity, act for a client in proceedings which are apparently hopeless, provided that the solicitor is not aware that the proceedings might amount to an abuse of process; and that a client has a right to have his or her case conducted irrespective of the view his or her lawyer has formed about the case and prospects of success.

The appeal was dismissed. It was unnecessary for the Court of Appeal to consider advocates’ immunity.
THE FACTS

In 2002, the respondent retained the appellant firm of solicitors to prepare a financial agreement between him and his then wife (the wife). In 2003, the respondent purchased a home in his own name but granted his wife a 15 per cent interest in the house. The financial agreement was varied to reflect this arrangement between the respondent and his wife. In 2004, the respondent increased his wife’s share in the house to 20 per cent by signing a letter to this effect.

The parties separated in 2006, and the wife brought proceedings against the respondent for spousal maintenance and division of property in the Federal Magistrates Court (the FMC proceedings). The wife alleged that the financial agreement did not comply with the relevant legislation and therefore was invalid and unenforceable. This allegation was accepted by the FMC but the proceedings eventually settled in 2008 (the 2008 settlement) on less advantageous terms to the respondent than those provided for in the defective financial agreement.

The respondent commenced proceedings against the appellant for damages with respect to the loss he had suffered as a result of the invalid financial agreement. The respondent’s wife did not give evidence during these proceedings.

THE DECISION AT TRIAL

The trial judge upheld the respondent’s claim. He awarded the respondent damages in the amount of $804,420 for, amongst other things, the loss suffered by the respondent as a result of property division and payment of spousal maintenance on the terms of the 2008 settlement rather than of the financial agreement. There was also an award of damages to reimburse the respondent for legal costs incurred during the FMC proceedings.

The appellant appealed.

THE ISSUES ON APPEAL

On appeal, the appellant’s liability was no longer in issue. The appeal was limited to the assessment of two heads of damages - spousal maintenance and legal costs incurred during the FMC proceedings. The appellant further alleged that the trial judge failed to discount damages for “numerous variables and contingencies which adversely affected the chance lost by the respondent”.

THE DECISION ON APPEAL

In making its decision, the Court of Appeal proceeded on the basis that the parties had agreed that

“The wife alleged that the financial agreement did not comply with the relevant legislation and therefore was invalid and unenforceable.”
the damages were to be calculated as the difference between the amount payable by the respondent under the 2008 settlement and the amount which would have been payable pursuant to a valid and enforceable financial agreement executed in 2002 and varied in 2003.

In relation to the spousal maintenance head of damages, the Court of Appeal held that the evidence supported a conclusion that the amount of spousal maintenance that the respondent was required to pay under the 2008 settlement was not greater than the amount of spousal maintenance payable under the financial agreement (if it was valid and enforceable). As a result, the Court of Appeal concluded that the appellant’s negligence in preparing the financial agreement caused the respondent no loss on this aspect of the claim and ordered that damages awarded by the trial judge on account of spousal maintenance, together with interest on that amount, be removed from the award.

In relation to legal costs incurred during the FMC proceedings, the Court of Appeal found that even if the financial agreement complied with the relevant legislation, matrimonial litigation would have occurred because the wife had other arguable bases to challenge the validity of the financial agreement (such as mistake and undue influence). The respondent would have defended the proceedings and therefore the Court of Appeal found that the respondent would have incurred legal costs in any event regardless of the appellant’s negligence. Accordingly, the Court of Appeal removed this component of damages from the award.

The Court of Appeal further made an allowance for the possibility that the FMC proceedings may have resulted in a binding financial agreement being set aside on the basis of other grounds such as those referred to above and the respondent’s wife achieving an outcome more favourable than that provided for in the financial agreement. Such an outcome would have reduced the difference between the amount payable under the 2008 settlement and the amount for which the respondent would have been liable but for the appellant’s negligence. Accordingly, the Court of Appeal made a 15 per cent discount on the amount awarded under the property settlement head of damages.

The appeal was allowed and judgment entered for approximately $208,000 less than the original judgment.
THE FACTS

In January 1998, the appellant suffered an injury to his collarbone and back when riding a mountain bike. On the advice of his neurosurgeon, the appellant underwent a microdiscectomy. Following the operation, the appellant had a dysfunction of nerve roots (cauda equina syndrome) which caused permanent injury of his right leg. At the time of the operation, the appellant was 22, had limited education and limited work experience.

In October 1998, the appellant consulted the respondent firm of solicitors about a potential claim against the neurosurgeon for failure to warn the appellant of the prospect of the cauda equina syndrome and/or for negligent post-operative care and treatment. The respondent firm obtained an expert report supporting the appellant's claim in relation to the negligent post-operative care but advised that they would need to obtain a further opinion. Due to time limitations, the respondent advised, and was instructed, to commence proceedings against the neurosurgeon before 24 February 2004. The respondent failed to obtain a further opinion and commence proceedings before that day.

As a result, the appellant commenced proceedings against the neurosurgeon in the District Court of Western Australia for the loss of opportunity to commence proceedings against the neurosurgeon before 24 February 2004. The respondent argued that instead the trial judge should have found that the respondent's negligence caused the appellant to lose a valuable opportunity to settle the lost action.

THE DECISION AT TRIAL

At trial, it was not in issue that the respondent was negligent and in breach of contract. On the post-operative care claim, the trial judge evaluated the appellant's loss of chance at 40%. In relation to the failure to warn claim, the trial judge found that the appellant's loss of chance was 55%.

However, he ultimately dismissed the appellant's claim because the appellant had not established that the solicitors' negligence was causative of his loss. In this regard, the trial judge found that whilst the appellant would have issued a writ, he had not established whether he would have pursued the action against the neurosurgeon. Nevertheless, the trial judge assessed damages provisionally at $80,000 for past and future loss of earning capacity.

The appellant appealed.

THE ISSUES ON APPEAL

The Court of Appeal had to decide whether:

1) the trial judge erred in determining that the relevant test for causation was whether the appellant would have pursued his "lost" action against the surgeon to an ultimate trial. The appellant argued that instead the trial judge should have found that the respondent's negligence caused the appellant to lose a valuable opportunity to settle the lost action;

2) the trial judge erred in assessing that the value of the loss of opportunity was 55%; and

3) the trial judge's award of $80,000 for past and future loss of earning capacity was inordinately low and amounted to an error of law.
“The appellant commenced proceedings against the respondent for the loss of opportunity to commence proceedings against the neurosurgeon.”

THE DECISION ON APPEAL

On the first issue, the majority of the Court of Appeal did not agree with the appellant’s assertion that the trial judge required the appellant to prove that he would have litigated the action against the neurosurgeon to final judgment. The majority held that “the real import” of the trial judge’s finding was that there was no basis for the inference that the appellant would have pursued the litigation beyond the issue of the writ, i.e. either to the point of judgment or to an earlier settlement. The Court of Appeal held that the onus was on the appellant to prove that he would have litigated the matter to judgment or an earlier valuable settlement. However, the majority agreed with the appellant that the trial judge was in error when he determined that there was no basis to draw an inference as to what the appellant might have done and he should have inferred that causation was established.

On the second issue, the Court of Appeal disagreed with the trial judge’s assumption that the starting point for an assessment of the loss of chance was 50/50. The Court of Appeal held that the correct approach to a loss of opportunity case is to identify all factors bearing on the prospects of success and to then make a judgment about the discount to be applied for the uncertainties which may have attended the pursuit of the claim if it had not become statute barred. The Court of Appeal noted that the question of assessment ultimately involved a degree of impression and nothing but a “broad brush” approach could be applied in such cases. In the circumstances the Court of Appeal ultimately considered that the fair value of the lost opportunity was 40% of the damages the appellant would have been awarded if he had been wholly successful at trial.

On the third issue, the Court of Appeal held that the trial judge’s award of $80,000 for past and future loss of earning capacity was manifestly inadequate. The trial judge had not explained how that amount was assessed, nor was it apportioned between past and future loss. This award did not fairly compensate the appellant for the significantly reduced scope of the employment opportunities available to him due to the disability acquired as a result of the operation. The Court of Appeal assessed compensation for loss of earning capacity at $149,350 i.e. after applying a discount of 60%.
THE FACTS

On 8 June 2001, the appellant (Hudson) executed an Entitlement Deed with Australian Hardboards Ltd (Hardboards). Hudson alleged that it retained solicitors (the respondent) to draft a deed between it and Hardboards that provided for Hudson to receive the first $10 million from the proceeds of sale of the whole or part of large parcels of land (Land) owned by Hardboards.

Australian Hardboards sold two lots which comprised part of the Land for a total of $9.5 million. It did not pay any of that sum to Hudson. Hudson commenced proceedings against Hardboards claiming that it was entitled, pursuant to the Entitlement Deed, to payment of that $9.5 million. Those proceedings were settled with Hardboards agreeing to pay the amount of $6.1 million to Hudson.

Hudson then commenced proceedings against the respondent. Hudson alleged that the respondent had drafted the Entitlement Deed in language which created a large degree of uncertainty as to whether Hudson was entitled to the first $10 million of the proceeds of disposal should Hardboards dispose of part (as opposed to the whole) of the Land. The basis of the claim was that it was forced to compromise its claim against Hardboards for $6.1 million as a result of the uncertainty created by the negligent drafting of the Entitlement Deed.

THE DECISION AT TRIAL

The trial judge rejected Hudson’s claim and found for the respondent.

THE ISSUES ON APPEAL

Hudson argued that the trial judge erred in a number of respects and that she should have found that the respondent breached its contractual and tortious duties of care by drafting a deed with ambiguous provisions.

THE DECISION ON APPEAL

The Court of Appeal observed that this case was unusual in that Hudson did not assert that the Entitlement Deed did not reflect its instructions. Rather, its claim against the respondent was that, had the Entitlement Deed been drafted clearly and unambiguously, it would not have had to settle its claim with Hardboards for less than it was entitled to.

The Court of Appeal approached the case on the assumption that the respondent had breached it’s duty of care.

The Court of Appeal considered whether the respondent’s (assumed) breach of duty caused Hudson to sustain loss. The Court of Appeal found that Hudson’s claimed loss occurred as a consequence of its own independent and unreasonable actions, or lack of action. In this regard, the Court of

“Hudson commenced proceedings against Hardboards claiming that it was entitled, pursuant to the Entitlement Deed, to payment of that $9.5 million.”
Appeal found that Hudson failed to take the advantage of other provisions in the Entitlement Deed that were designed to protect its interests in the event of a partial sale of the land. Had it taken those measures it would, as a matter of probability, have averted the loss that it claimed as a consequence of the respondent’s negligence. For example, Hudson was entitled, in accordance with the Entitlement Deed, to execute a mortgage over the Land to secure Hardboards’ obligations under the Deed. Further, Hudson was entitled to prevent Hardboards from partially disposing of the Land.

Since Hudson’s appeal failed on the ground that the claimed loss was not caused by the respondent’s negligence, there was no need to decide whether the respondents had breached its duty of care. However the Court of Appeal nevertheless expressed the view that the respondent was only obliged to exercise reasonable care in giving effect to Hudson’s instructions when drafting the deed. The respondent was not bound to draft the deed in such away as to eliminate all ambiguity and uncertainty. In considering whether in drafting the deed the respondent departed from the standard of care, skill and diligence reasonably to be expected from them, the Court of Appeal observed that it is necessary to consider the deed as a whole. Viewed in that light, the respondent did not breach the duty of care owed to the appellant because the deed incorporated safeguards which, if enforced or availed of by Hudson, would have protected it against any adverse consequences flowing from any ambiguity in the other clauses of the deed.

On 9 April 2015 the High Court refused special leave to appeal this decision. The High Court noted that the Court of Appeal had held that it was not appropriate for the scope of the respondent’s liability to extend to Hudson’s loss because Hudson’s loss was, in part, the result of Hudson’s own independent and unreasonable actions. The High Court held that no reason had been shown to doubt the correctness of the Court of Appeal’s decision and accordingly, an appeal to the High Court would enjoy insufficient prospects of success to warrant the grant of special leave to appeal.
THE FACTS

The appellant was a solicitor who was retained by Mrs Marie Fischer to prepare a will. He attended her residence on 25 March 2010. He had not previously met her. She was 94 years old. Mrs Fischer did not appear to be suffering ill health. He spent 90 minutes with her obtaining instructions for a new will. The only evidence on what transpired at the meeting was from the appellant. Mrs Fischer told him she had lost confidence in her accountant who was one of the executors named in her then current will. She was not sure who she would appoint as the new executor and the appellant told her to think about it and let him know when he attended with the draft will.

At the conclusion of the conference the appellant told Mrs Fischer that he would be away over the Easter break. He informed her that he would prepare a draft in accordance with her instructions and visit again in the week after Easter. Mrs Fischer agreed stating that she wanted her son (who was presently out of town) and another person to be present at the next meeting which would be after her son returned to Sydney.

Mrs Fischer died on 6 April without the new will having been made. A claim was brought against the appellant by the son and granddaughter as beneficiaries who would have received greater portions of Mrs Fischer’s estate if a valid will had been prepared. Although the claim of the granddaughter was settled prior to trial, the claim by the son proceeded.

THE DECISION AT TRIAL

The trial judge found that the appellant’s retainer was to give legal effect to the deceased’s testamentary intentions, not merely to prepare a formal will and arrange for its execution.

The trial judge found that the appellant was required to procure an informal will at his meeting on 25 March 2010 on the basis that: Mrs Fischer had a settled dispositive intention in respect of the whole estate; the appellant knew Mrs Fischer was in her nineties, had difficulties with mobility and was at greater risk of falling and sustaining serious injury or other incidents that would compromise her testamentary capacity; Mrs Fischer was adamant that she wanted to change the identity of her executor because she had lost faith in him; the appellant was responsible for the delay and there was no practical impediment to drawing up an informal will.

The failure to procure an informal will was found by the trial judge to be a breach of duty.

THE ISSUES ON APPEAL

The appellant challenged several findings of fact made by the trial judge as well as the scope and content of the duty of care.

Delivered On:
1 July 2014

In Issue:
• Duty of care to a deceased and beneficiaries
• Whether a duty existed to prepare an informal will immediately

Delivered On:
1 July 2014

THE DECISION ON APPEAL

The Court of Appeal disagreed with the trial judge’s findings.

The Court of Appeal found that it was not clear that Mrs Fischer had committed herself irrevocably to the scheme of benefaction communicated in the conference on 25 March.

The Court of Appeal found that the identity of the person to be named as an executor was not settled at the time of the conference.

Further, the appellant, in his initial conference with Mrs Fischer, had given advice regarding the possibility of a challenge by her daughter if she was omitted from her will and that was something Mrs Fischer may well have reflected on further pending the appellant’s return.

In support of that finding, the Court of Appeal noted that the evidence did not establish that there was a
“A claim was brought against the appellant by the son and granddaughter as beneficiaries who would have received greater portions of Mrs Fischer’s estate if a valid will had been prepared.”

Not insignificant risk of death or loss of testamentary position in the period of two weeks after the initial conference or that the appellant should be aware of such a risk.

The appellant formed the opinion during the conference that she was mentally intact. Her GP had told him that in her opinion she was of sound mind and mentally intact. There was no evidence that her medical condition at the conference was such to indicate pending death or loss of mental capacity. The GP who saw her on 26, 29, 30 March, 1 and 6 April said she had pneumonia, was being treated by the doctor and did not note anything which concerned her or suggested during the course of the last consultation that she would die that day.

The Court of Appeal found that the appellant did not unilaterally dictate the timing of the preparation of the will. The appellant had proposed the timing for the draft will and Mrs Fischer agreed to it. There was a common expectation that no work would be done over Easter.

Further, Mrs Fischer told the appellant she wished to have her son present when the appellant returned. Evidence was given that Mrs Fischer told her son that she would schedule the appellant’s return after the son returned to Sydney after Easter.

Mrs Fischer had made wills on at least nine occasions and they were typed in a solicitor’s office to give effect to instructions previously communicated. She was therefore familiar with the process. It was intended on her part that that process would be adopted for this will and that the appellant would return with a draft will at a future time. In fact she wanted certain people to be present on the subsequent occasion.

The duty owed by the appellant was to take reasonable steps to achieve the fulfilment of the client’s objective of making a formal will according to the agreed timeframe and to avoid any reasonably foreseeable frustration of that objective. The duty to call attention to the possibility of making an informal will would only have arisen if the appellant was aware of some factor that might have frustrated the objective such as an expectation that Mrs Fischer would die or lose testamentary capacity in the following two weeks. There was no such basis to be so aware for the reasons outlined above.
In Issue:
• Solicitor’s liability in respect of an irrevocable authority issued by solicitor’s client to a creditor

Delivered On: 29 August 2014

THE FACTS
The respondent was a solicitor. His clients (the debtors) owed money to the appellant, FTV Holdings. After the appellant repeatedly demanded payment, the debtors executed an “Irrevocable Authority” directing that the debt plus interest be paid to the appellant out of the proceeds of the anticipated sale of their house. The terms of this irrevocable authority were negotiated by the appellant’s solicitor and the respondent, acting as the debtors’ solicitor.

Later the respondent also acted for the debtors in relation to the sale of their house. In breach of the terms of the irrevocable authority, the debtors instructed the respondent that they would not pay any of the proceeds of the sale to the appellant. In accordance with those instructions, the respondent directed the purchaser of the house to pay the purchase price to the debtors’ bank account.

The appellant brought a claim against the respondent for monies had and received, a claim under s55 Property Law Act 1974 (Qld) (PLA) for damages for breach of a promise, and a claim for equitable compensation.

THE DECISION AT TRIAL
The trial judge dismissed all three bases of the appellant’s claim and found that the respondent was not liable.

THE ISSUES ON APPEAL
The issue for consideration on appeal was whether the respondent was liable under the causes of action outlined above.

THE DECISION ON APPEAL
The Court of Appeal found that the irrevocable authority constituted an agreement between the debtors and the appellant based on valuable consideration. The Court of Appeal also held that the respondent was not liable under the claim for monies had and received because the respondent did not make any promise to the appellant, nor did he receive or hold the proceeds of sale. The Court of Appeal also rejected the appellant’s claim under s55 PLA because the respondent did not make any promise to the appellant and there was no acceptance of the alleged promise by the appellant.

In relation to the equitable compensation claim, the Court of Appeal held that the respondent did not hold the part of the proceeds sufficient to discharge the debt on trust for the appellants. The Court of Appeal also gave consideration to the appellant’s claim for equitable compensation based on the second limb of Barnes v Addy (knowing assistance) i.e. whether the respondent knowingly assisted the debtors in their “dishonest and fraudulent” breach of fiduciary duties to the appellant.

The Court of Appeal ultimately held that this claim failed in circumstances where the debtors’ and the respondent’s state of mind was raised for the first time on appeal i.e. the appellant did not plead at trial that the debtors’ breach of trust was dishonest and fraudulent and that the respondent knew the facts from which such an inference should be drawn. The Court of Appeal determined that allegations of that character should be specifically pleaded and concluded that it would be unjust to permit such a case to be made for the first time on appeal in circumstances in which the respondent could possibly have given or called evidence to rebut it.

The appeal was therefore dismissed.

GUSEL SCHNEIDER
Solicitor
Gusel.Schneider@bnlaw.com.au
Meet our Sydney team of insurance law specialists

SIMON BLACK
Partner
E: simon.black@bnlaw.com.au

Simon’s areas of expertise include professional indemnity, management liability, directors and officers, financial lines, and transportation liability.

Simon advises insured professionals on professional indemnity matters, including: property valuers, engineers, architects and builders, accountants and financial planners, Associations, health professionals and film and television production and distribution professionals.

He acts for insurers on construction and engineering matters, in respect of high value and complex contract works and industrial special risks claims. Simon also has experience advising insurers and insureds on high profile ACCC and ASIC investigations, inquiries and prosecutions as well as securities class actions.

NICHOLAS ANDREW
Partner
E: nicholas.andrew@bnlaw.com.au

Nicholas has 15 years experience in advising both Australian and London-based insurers across major lines of insurance including professional indemnity, public and products liability and property (third and first party). He has particular expertise in complex construction and engineering matters.

Nicholas also advises insurers on broader policy and coverage aspects across a range of industries and business classes.
THE FACTS
The appellant, Ms Young commenced proceedings in the Land and Environment Court (the LEC proceedings) against her neighbours in relation to building works carried out on their property. The appellant alleged that the building works had adversely impacted the drainage on her property. The appellant was represented by two solicitors and a barrister. She also retained hydrological engineers to advise as to an appropriate remediation plan in respect of the adverse consequences of the building works.

In 2004, shortly after the hearing commenced, the parties settled the LEC proceedings. The settlement was reached after the experts retained by the parties met in conclave under the auspices of the court and reached an agreement as to the appropriate remediation plan in respect of the adverse consequences of the building works.

In 2010, the appellant commenced proceedings for damages in the NSW Supreme Court against the solicitors and the barrister (the lawyers) as well as the expert engineer and the engineering company that employed him (the engineers). The appellant’s claim against the lawyers was based on negligence and misleading and deceptive conduct, the claim against the engineers was based on negligence. The appellant alleged that the settlement of the LEC proceedings was inadequate for her interests and that the appropriate remedy would have been an order under s124 of the Environmental Planning and Assessment Act 1979 (NSW) requiring the neighbours to reinstate their land and the buildings on it to the state that they were in prior to the building works. In particular, the appellant alleged that the lawyers should have advised her to seek a section 124 order, to join the Council (that issued a development consent and a construction certificate) as a party, claim damages in trespass from her neighbours in the Supreme Court if they did not agree to pay the costs of reinstatement of the appellant’s land and damages in trespass, nuisance and the law of support when the land was reinstated. In relation to the engineers, the appellant alleged that they failed to advise her as to the appropriate remediation plan.

THE DECISION AT TRIAL
The trial judge summarily dismissed the appellant’s claim and held, on a separate question of law, that advocate’s or witness immunity was a complete answer to all claims made by the appellant against the lawyers and the engineers.

THE ISSUES ON APPEAL
The Court of Appeal had to consider whether the scope of the advocate’s immunity extended to a failure to advise on the joinder of a party to a proceeding, a failure to advise as to the proper jurisdiction in which proceedings are to be brought, and the institution of proceedings that were not capable of providing the adequate remedy for the appellant’s interests. A further issue was whether witness immunity applied to the engineers’ conduct.

THE DECISION ON APPEAL
Consistent with previous Australian decisions on advocate’s immunity, the Court of Appeal emphasised that the rationale for the immunity rests largely on the public interest.
in the finality of litigation. The Court of Appeal held that the appellant’s claim against the lawyers involved re-opening the settlement of the LEC proceedings and determining issues that had been resolved by the settlement. This would be contrary to the rationale for the advocate’s immunity and should not be permitted.

The Court of Appeal further noted that advocate’s immunity is an immunity “from suit”, not from particular causes of action. In this regard, the immunity applies not only to the claim based on negligence, but also to statutory causes of action, such as misleading and deceptive conduct. The Court of Appeal also noted obiter that there was no reason in principle why advocate’s immunity would not apply to lawyers’ conduct which was in bad faith.

The Court of Appeal agreed with the trial judge that the engineers were also immune from suit. The test for the application of the witness immunity was the same as that for advocate’s immunity. Since the appellant’s claim arose directly out of the result of an expert conclave forming part of the LEC proceedings, the work done by the engineers was work done out of court which affected the conduct of the case in court. Therefore, the engineers were immune from suit.

To attract witness immunity, it was sufficient that the advice as to the remediation plan was sought in the context of a litigious dispute, that the engineers participated in the discussion that led to the settlement and gave evidence at the costs hearing. It did not matter whether or not at the time the engineers were retained the retainer contemplated the giving of expert evidence at the hearing.

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RICHARD LEAHY
Partner
Richard.Leahy@bnlaw.com.au
In Issue:

• Whether a solicitor retained to prepare a will owed a duty of care to take instructions regarding a potential family maintenance claim and provide advice as to how to frustrate such a claim
• Whether a solicitor retained to prepare a will owed a duty of care to an intended beneficiary

Delivered On:
24 November 2014

THE FACTS

Robert Badenach (the first defendant) was a solicitor and partner in the firm Murdoch Clarke Solicitors (the second defendant). In March 2009, the first defendant took instructions from Jeffrey Doddridge (the deceased), who was elderly and terminally ill, for the preparation of his will. In that will, the deceased treated the plaintiff like a son, but they were not related. The first defendant subsequently prepared the will which was executed by the deceased on 26 March 2009. The deceased died in 2009 without revoking that will.

The deceased had a daughter but made no provision for her in the will. The daughter made an application under the Testator’s Family Maintenance Act 1912 (the TFM Act). Her application proceeded to a trial and it was ordered that $200,000 be paid to her from the deceased’s estate. It was also ordered that the costs of all parties be paid out of the estate on a solicitor and client basis.

The plaintiff alleged that the defendants failed to advise the deceased and the plaintiff of the risk that the daughter could make a claim under the TFM Act and failed to provide the deceased with options available to him to arrange his affairs during his life time so that his testamentary wishes were not disturbed. Relevantly, the plaintiff alleged that the deceased could have reduced or extinguished his estate so that the assets of the estate were worth far less than $200,000. The deceased’s principal assets were his interest in two properties, which he and the plaintiff owned as tenants in common in equal shares. The plaintiff alleged that if the deceased had made arrangements for he and the plaintiff to hold the properties as joint tenants, when he predeceased the plaintiff, those properties would have ceased to form part of the estate.

The defendants contended that they had no duty to provide such advice. There was no evidence that the first defendant knew of the daughter’s existence.

THE DECISION

The Supreme Court of Tasmania determined that the first defendant owed a duty to the deceased to enquire as to the existence of any family members who could make a claim under the TFM Act. The court determined that, if the first defendant had enquired about the deceased’s family members as he should have done, then the deceased would have disclosed the existence of his daughter, and the solicitor would have advised of the risk of successful proceedings under the TFM Act. Accordingly, the court held that the solicitor breached that duty to the deceased.

However, the court was not satisfied on the balance of probabilities that a conversation about the daughter and a possible TFM claim would have triggered an enquiry by the deceased about ways of protecting the plaintiff’s position. Further, the court was not satisfied that the defendants owed the deceased, let alone the plaintiff, a duty to provide advice about creating joint tenancies or any steps that could be taken to reduce or extinguish the estate and frustrate a possible claim under the TFM Act in the absence of such an enquiry.

Therefore, it was not necessary for the court to determine whether the defendants owed the deceased, let alone the plaintiff, a duty to provide advice about the risk of a claim being made under the TFM Act.

The plaintiff’s claim failed and judgment was entered for the defendants.
THE FACTS

In 2003, John Symond (the respondent), the founder of Aussie Home Loans (the business), obtained legal advice from Gadens Lawyers Sydney Pty Ltd (Gadens) in relation to the tax consequences of a revised ownership structure of the business. In accordance with Gadens’ advice, the business was restructured in 2003 and 2004. As part of the restructure, the respondent was able to withdraw funds from the business by redeeming preference shares, which Gadens advised would be “tax free” in his hands. During the 2004 to 2006 financial years, the respondent drew down approximately $57 million.

In 2007, the Australian Taxation Office (ATO) conducted an audit of the respondent’s tax affairs, which led to him entering into a Deed of Settlement with the ATO.

He agreed to pay approximately $7 million (comprising tax, penalties and interest) to the ATO and the business agreed to deduct approximately $5 million from its franking account. In 2009, the respondent commenced proceedings against Gadens seeking damages for negligent advice, breach of contract and misleading conduct under the TPA.

THE DECISION AT TRIAL

At trial, Gadens contended that the respondent had suffered no loss because the benefit of the restructure of the business exceeded the amount paid by the respondent under the settlement with the ATO and related expenses. Gadens also argued that the implementation of the alternative structures suggested by the respondent would have resulted in significantly greater amounts of tax than the amount paid pursuant to the settlement with the ATO.

The trial judge rejected Gadens’ argument and found in favour of the respondent and awarded damages of $4.9 million. Gadens appealed against the assessment of damages.

THE ISSUES ON APPEAL

(a) Did the trial judge err by concluding the respondent had suffered loss by comparing his financial position under the restructure with the financial position he would have been in had he received and followed competent advice to pursue an alternative structure?

(b) Did the trial judge err by concluding that the respondent suffered loss as a result of the forfeiture of franking credits?

(c) Did the trial judge err in determining the amount of pre-judgment interest to be included in the respondent’s damages?

“In 2009, the respondent commenced proceedings against Gadens seeking damages for negligent advice, breach of contract and misleading conduct under the TPA.”
THE DECISION ON APPEAL

The Court of Appeal allowed Gadens’ appeal in part, finding that the trial judge had erred in relation to issue (b) as the respondent did not suffer any loss as a consequence of the forfeiture of the franking credits. With regards to issue (a), the Court of Appeal found that the trial judge had not erred in undertaking a comparison of the respondent’s financial position. The benefit of the restructure was the value to the respondent of the delay in payment of tax on dividends issued by the business under the restructure. The benefit was a timing difference, not a permanent tax saving. With regards to issue (c), the Court of Appeal found that the trial judge was correct in his determination of the pre-judgment interest.

As Gadens had already paid the damages awarded to the respondent by the trial judge, the Court of Appeal ordered the respondent to repay part of those damages, being an amount of approximately $1.6 million.
KAMBOURIS v TAHMAZIS (No. 2)
[2015] VSC 174

In Issue:
• Whether a solicitor breached his duty of care in failing to advise his client that a security provided to the client by a third party was unenforceable
• Whether a solicitor’s failure to advise was causative of his client’s loss

Delivered On: 30 April 2015

THE FACTS
The plaintiff’s husband was involved in a property development joint venture with the defendant, Mr Kiatos (the plaintiff’s solicitor), and another individual, Mr Floros. The joint venture was undertaken through two corporate entities, BTC Developments Pty Ltd (BTC) and Betac Investments Pty Ltd (Betac).

Between April 2005 and May 2006, BTC obtained a number of loans with the National Australia Bank (NAB) which were secured by guarantees issued by the plaintiff, her husband, Mr Floros and Betac. These guarantees were supported by mortgages over three properties owned by the plaintiff and her husband. In July 2005, Mr Floros granted a mortgage over his property to the plaintiff in consideration of allowing her properties to be used as security for BTC’s indebtedness to NAB. While it was agreed that Mr Kiatos’ wife (Mrs Kiatos) would also provide a mortgage over her property to the plaintiff, she never signed it. Mr Kiatos knew that his wife did not sign the mortgage.

In October 2006, a winding up process in relation to BTC was commenced, and it was decided that refinancing should take place. Between November 2006 and February 2008, Betac obtained five loans with NAB using a portion of the advanced funds to pay out the BTC’s indebtedness to NAB. The plaintiff, her husband and their son acted as guarantors under the loans. The guarantees were, in turn, supported by the mortgages over the plaintiff’s properties. Prior to the refinancing in October 2006, and also in November 2006 and May 2007, Mr Kiatos advised the plaintiff that the changeover from one entity to another would not affect the mortgages provided to her by Mr Floros and Mrs Kiatos and that she remained legally protected by those mortgages. Even though the plaintiff became aware that there was no enforceable mortgage over Mr Kiatos’ wife’s property by late 2007, she still signed the last guarantee in February 2008.

Betac went into liquidation in December 2008 and NAB, relying on the February 2008 guarantee, recovered its debt by selling the plaintiff’s properties.

The plaintiff commenced proceedings against Mr Floros seeking possession of the property that he had mortgaged to her and later joined Mr Kiatos as a defendant claiming damages. After Mr Floros’ death, he was substituted in the proceedings by Mr Tahmazis as a representative of his estate. The proceedings against Mr Floros were settled, leaving the claim against Mr Kiatos on foot.

“The plaintiff commenced proceedings against Mr Floros seeking possession of the property that he had mortgaged to her and later joined Mr Kiatos as a defendant claiming damages.”
THE DECISION

A trial was conducted on liability in 2013 and the court held that Mr Kiatos had breached his duty of care to the plaintiff by failing to advise her that she was not protected by the mortgage provided by his wife.

In these proceedings, the court considered causation and quantum and held that the plaintiff’s loss was not caused by Mr Kiatos’ negligence. The plaintiff did not satisfy the court that she would not have signed the Betac guarantees if she had been advised that there was no mortgage over Mrs Kiatos’ property. Also, the plaintiff failed to establish that had she not signed the guarantees, the loss of her properties would have been avoided, and not merely that it may have been avoided. If the plaintiff had not signed the guarantees, BTC would have gone into liquidation triggering a default, and NAB could have called on the existing BTC guarantees.

The court further held that it was not appropriate to extend Mr Kiatos’ liability for negligence to the loss of the plaintiff’s properties for three reasons. Firstly, by virtue of the BTC guarantees, those properties were already at risk, prior to the first occasion of Mr Kiatos’ negligence in October 2006. Secondly, the plaintiff ultimately lost her properties by a call on a guarantee that she gave after she already knew that there was no enforceable mortgage over Mrs Kiatos’ property. Thirdly, as found by the court at the liability trial, Mr Kiatos’ breach of duty of care only extended to a failure to advise the plaintiff that there was no mortgage and did not relate to a failure to advise that her properties were at risk by reason of the guarantees.

Since the plaintiff failed to establish causation, it was unnecessary for the court to consider damages. The court observed, however, that if it was required to do so it would have awarded nominal damages of $100 only against Mr Kiatos.
ABU-MAHMOUD  v  CONSOLIDATED LAWYERS PTY LTD
[2015] NSWSC 547

In Issue:
• Whether advice given by solicitor to client was negligent
• Whether plaintiff contributed to the loss

Delivered On:
18 May 2015

THE FACTS
The plaintiff (Mr Abu-Mahmoud) was an engineer, builder and property developer. The plaintiff first retained Mr Kassem, a lawyer, in March 2005, to undertake the conveyance of a development. Mr Kassem subsequently acted on behalf of the plaintiff on a number of occasions.

The plaintiff alleged that in about November 2006, Mr Kassem advised him to take a series of steps with regard to property development, including a restructure scheme which would have enabled the plaintiff to avoid personal liability for a tax debt related to a development (the restructure advice). At the time of providing the restructure advice, Mr Kassem was employed by Consolidated Lawyers (the defendant).

The plaintiff claimed that in reliance on the restructure advice, he entered into the recommended restructure scheme. The plaintiff’s property empire later failed, he became personally liable for a guarantee to St George Bank, and he lost his equity in a series of properties.

Mr Kassem denied giving the restructure advice to the plaintiff, and claimed that the collapse of the plaintiff’s property empire was his own fault.

THE DECISION
The plaintiff alleged that the restructure advice was given at two meetings between about September 2006 and November 2006, the latter occurring at a restaurant in Granville. There were no contemporaneous notes of either meeting, and the participants (the plaintiff, Mr Kassem and Mr Kassem’s brother) had very different recollections of what occurred (or no recollection at all).

Mr Kassem denied the first meeting occurred as alleged and argued the restructure advice given at the restaurant in Granville was provided to the plaintiff by his brother only (an accountant and liquidator).

The court was satisfied that prior to the meeting at the restaurant in Granville, the plaintiff had sought assistance from Mr Kassem about the appropriate way to deal with the Australian Taxation Office and his tax debt. Mr Kassem then acted upon the plaintiff’s request for assistance and advised the plaintiff about the restructure scheme. He then acted to give effect to the restructure scheme after the plaintiff instructed him to do so.

The court was satisfied that the restructure advice was given in circumstances where Mr Kassem owed the plaintiff a duty of care. In reaching this conclusion, the court considered that the relationship was strictly one of a solicitor and client and the absence of a retainer and the informality of their communications did not tell against the existence of a duty.

The court found that Mr Kassem had breached his duty in giving advice about the restructure scheme and was negligent. It was held that a prudent solicitor would have been aware of the likely consequences of implementing the scheme (namely, the directors becoming personally liable and the call up of guarantees) and should have made the plaintiff aware of them.

The court rejected the defendant’s submissions that the plaintiff had failed to prevent his own loss, and was satisfied that the plaintiff had proved that his reasonable losses were caused by the restructuring advice and implementation of that advice.

The plaintiff’s claim therefore succeeded, with quantum to be calculated.

Sarah Hull
Associate
Sarah.Hull@bnlaw.com.au
THE FACTS
Brirek Industries Pty Ltd (Brirek) was the owner of a property at Southbank, Melbourne. It commenced proceedings against McKenzie Group Consulting (Vic) Pty Ltd (McKenzie), alleging that McKenzie breached contractual and tortious obligations to exercise all due care and skill and to comply with all relevant statutory obligations in issuing building permits, particularly as the final two building permits were issued after the planning permit had in fact expired. Brirek alleged that as a result of delays caused by McKenzie’s actions, it suffered economic loss.

THE DECISION AT TRIAL
The trial judge found that the pleaded contractual claims were statute-barred and that McKenzie did not owe Brirek a duty of care in tort.

THE ISSUES ON APPEAL
The Court of Appeal was required to consider a number of issues including whether the limitation period was 6 years as provided by the Limitation of Actions Act 1958 (Vic) (the LA) or 10 years as provided by s134 of the Building Act 1993 (Vic) (the BA); and whether McKenzie owed Brirek a duty to exercise reasonable care to avoid the economic loss Brirek claimed it suffered.

THE DECISION ON APPEAL
The Court of Appeal overturned the trial judge’s decision on the limitation point and held that actions founded in contract, independent of any tort claim, fall within the cope of s134 BA and may be brought within 10 years from the date of issue of the occupancy permit. The Court of Appeal noted that the BA does not contain any express limitation that confines its application to cases in contract or in tort and that no such limitation should be read into it. The Court of Appeal held that the trial judge’s interpretation placed an artificial constraint on the plain meaning of the words of the BA and he was accordingly wrong to conclude that the claims under the 2004 contract were statute-barred. However, the trial judge was right to conclude that McKenzie did not owe Brirek a duty of care in negligence. The Court of Appeal noted that the general principles that govern the duty of care in tort to avoid pure economic loss have been considered extensively by the High Court which has pointed out time and again that it is not enough for a plaintiff to show that it was reasonably foreseeable that...
the defendant’s acts or omissions would cause harm to the plaintiffs. The only cases where building professionals have been found liable to first or subsequent owners for pure economic loss were cases involving loss arising from a decrease in value of a property because of an inadequacy in its construction. This case did not involve any such inadequacy or diminution in value – the loss in this case was solely attributed to delays in completion of a commercial project. Brirek attempted to argue that the statutory scheme justified the imposition of a duty of care in relation to economic loss but this was rejected because the claim did not arise out of any frustration or violation of the purposes of the BA so far as it regulated the conduct of building surveyors.

The trial judge was right to identify vulnerability as the key determinant of whether a duty of care to avoid pure economic loss should be imposed in the circumstances of the case. Here, Brirek was well placed to contractually allocate the relevant risk between itself and other parties and it chose not to do so. The claim for damages for pure economic loss was consequently rejected.
THE FACTS

The plaintiff alleged that she suffered psychiatric injury as a result of a number of sexual assaults by a teacher at the school where she was a student. The assaults occurred between 2002 and 2004. In 2006, the teacher was arrested and charged with 15 counts of aggravated indecent assault. All but one of the assaults occurred off school premises and outside school hours. In 2007, the teacher pleaded guilty to all charges and received a custodial sentence. In 2013, the teacher was released from prison.

The plaintiff claimed that she suffered post traumatic stress disorder/borderline personality disorder as a result of the sexual abuse and brought a claim for personal injuries against the State of New South Wales (the State), the principal and deputy principal of the school. The plaintiff alleged that the State, acting on behalf of the school, was vicariously liable for the acts of the teacher and failed to prevent the sexual assaults. In October 2012, consent judgment was entered and the State paid the plaintiff $525,000 inclusive of her legal costs.

In a cross claim against the teacher, the State sought indemnity or contribution towards the consent judgment and the costs of defending the plaintiff’s claim. The State alternatively sought damages for breach of contract from the teacher arguing that the teacher’s criminal conduct was in breach of his conditions of employment.

The teacher, who was self represented, alleged that the school was aware that the plaintiff, who was 13 years old at the time, had a “crush” on him and that while he was initially directed to have no contact with the plaintiff, she was later placed in a class taught by him. The teacher also claimed that he was bullied and intimidated by the head teacher of his faculty which caused him to suffer from a major depressive illness that affected his judgment at the time of the assaults. He alleged that despite numerous complaints, the principal and deputy principal failed to adequately deal with the abuse from the head teacher.

THE DECISION

The court determined that, taking into account the plaintiff’s age at the time the sexual assaults occurred and the psychological injuries she sustained, the settlement sum paid was reasonable.

As to contribution and indemnity the court considered that the teacher’s conduct was serious and wilful, was deliberately concealed from the school and his supervisors and did not occur in the course of his employment.

While the school owed a non delegable duty of care to the plaintiff, the court acknowledged that this did not extend to cover the criminal actions of the teacher and determined that the State was not vicariously liable for the teacher’s conduct.

The court found that nearly all of the fault could be attributed to the actions of the teacher and ordered the teacher to indemnify the State and pay 90% of the consent judgment. The orders made required the teacher to pay $472,500 to the State, plus the costs of the cross claim and interest from the date of the judgment.

The court also found that the teacher was not liable to pay the State’s costs of defending the plaintiff’s claim.
INSURANCE ISSUES
CONTENTS

133  HADDAD v ALLIANZ AUSTRALIA INSURANCE LTD (NO2) [2014] NSWDC 308
Whether insurer breached home insurance policy in failing to automatically renew or in unilaterally cancelling the policy.

135  GRAHAM v COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED (NO. 2) [2014] FCA 717
Whether insured made fraudulent non-disclosure and insurer entitled to avoid policy.

137  ALLIANZ AUSTRALIA INSURANCE LTD v BLUESCOPE STEEL LTD [2014] NSWCA 276
Insurer not obliged to assume defence of claim and no repudiation of policy in declining indemnity.

139  METLIFE INSURANCE LTD v FSS TRUSTEE CORPORATION/FSS TRUSTEE CORPORATION v MAUND [2014] NSWCA 281
Interpretation of the term “the time of the Insured Event” for the purpose of calculating the “Sum Insured”.

140  RIDGECREST NEW ZEALAND LTD v IAG NEW ZEALAND LTD [2014] NZSC 117
The plaintiff was entitled to be paid for the damage resulting from the earlier earthquakes up to the limit of indemnity and for the loss caused by the final earthquake up to the limit of the indemnity under the policy.

142  ROADS AND TRAFFIC AUTHORITY OF NEW SOUTH WALES v BARRIE TOEPFER EARTHMOVING AND LAND MANAGEMENT PTY LTD (NO. 7) [2014] NSWSC 1188
Owner of truck liable for damage pursuant to Roads Act 1993 (NSW) where driver’s conduct reckless. Insurers not liable to indemnify owner.

144  MCLENNAN v INSURANCE AUSTRALIA LTD [2014] NSWCA 300
Who bears the burden of proof that a fire was/was not deliberately started when interpreting an exclusion clause in a home and contents policy.

145  HANNOVER LIFE RE OF AUSTRALASIA LTD v COLELLA [2014] VSCA 205
Interpretation of a total and permanent disability clause of a life insurance policy.

146  ISLINGTON PARK LTD v ACE INSURANCE LTD [2014] NZCA 446
Dispute regarding the extent of an insurer’s obligations under a policy of insurance and whether it was required to meet the cost of compliance with building regulations under a policy which provided “old for old” cover.

148  MAXWELL v HIGHWAY HAULIERS PTY LTD [2014] HCA 33
Whether s54(1) of the ICA was engaged so as to prevent insurer from refusing to pay a claim.
150  QBE INSURANCE (INTERNATIONAL) LIMITED v WILD SOUTH HOLDINGS LIMITED AND MAXIMS FASHIONS LIMITED [2014] NZCA 447
Consideration of the operation of automatic reinstatement clauses, doctrine of merger and the indemnity principle in the context of the Christchurch earthquakes.

152  AMLIN CORPORATE MEMBER LTD v AUSTCORP PROJECT NO. 20 PTY LTD [2014] FCAFC 78
Whether Commercial List Response in Supreme Court proceedings constituted a “claim” to which an insurance policy responded.

154  LIBERTY INTERNATIONAL UNDERWRITERS v THE SALISBURY GROUP PTY LTD (IN LIQ) & ORS [2014] QSC 240
Consideration of related entities exclusion clause in professional indemnity insurance policy.

156  BIRLA NIFTY PTY LTD v INTERNATIONAL MINING INDUSTRY UNDERWRITERS LTD [2014] WASCA 180
Consideration of the proper meaning of an excess clause within a property damage and business interruption insurance policy.

158  GUILD INSURANCE LTD v HEPBURN [2014] NSWCA 400
Unsuccessful appeal against order joining insurer to proceedings.

Whether insurer or insured is entitled to elect manner and measure of insured loss under a full replacement value policy.

162  AIG AUSTRALIA LIMITED v JAQUES [2014] VSCA 332
Consideration of whether a person was an executive or non-executive director and determination of the resulting issues in relation to their insurance coverage.

164  PREPAID SERVICES PTY LTD v ATRADIUS CREDIT INSURANCE NV [2014] NSWCA 440
Whether insurer entitled to reduce its liability under a policy of trade credit insurance under section 28(3) ICA.

165  THE HANCOCK FAMILY MEMORIAL FOUNDATION LTD v LOWE [2015] WASCA 38
Consideration of the circumstances in which a third party may recover directly from another person’s excess insurer.

167  SIENKIEWICZ (AS TRUSTEE FOR THE SIENKIEWICZ SUPERANNUATION FUND) v SALISBURY GROUP PTY LIMITED (IN LIQUIDATION) (NO. 2) [2015] FCA 147
Consideration of whether indemnity available under a Financial Services Errors and Omissions policy including application of various exclusion clauses and s54 ICA.
169  O’FARRELL v ALLIANZ AUSTRALIA INSURANCE LTD [2015] NSWCA 48
    Insurer’s duty to inform an insured of their duty of disclosure.

170  INGLIS v SWEENEY [2015] WADC 34
    Whether an exclusion clause in a home insurance policy applied to a claim against a fourth party for indemnity made by multiple third parties in circumstances where the plaintiff resided in the subject home.

171  MATTON DEVELOPMENTS PTY LTD v CGU INSURANCE LIMITED (NO. 2) [2015] QSC 72
    Whether the insurer was entitled to decline indemnity for the loss of the plaintiff’s crane in circumstances where there was conflicting evidence as to the cause of the boom’s collapse.

173  SHUETRIM v FSS TRUSTEE CORPORATION [2015] NSWSC 464
    Two insurers were found to have breached their duties of good faith and fair dealing by selectively relying upon evidence in a TPD claim to deny indemnity to the plaintiff insured.

175  HAMMERSLEY v NATIONAL TRANSPORT INSURANCE [2015] TASFC 5
    Interpretation of exclusion clauses in a driver’s motor vehicle accident policy.

177  SELIG v WEALTHSURE PTY LTD [2015] HCA 18
    Whether liability should be apportioned under Div 2A of the Corporations Act 2001 (Cth) and whether an insurer, acting in its own interests in bringing an appeal, should be the subject of an adverse costs order.

179  NICHOLAS v ASTUTE HIRE PTY LTD [2015] NSWSC 711
    Application to join insurer of a de-registered company to a claim for damages for personal injuries.

180  LAMBERT LEASING INC. v QBE INSURANCE LTD [2015] NSWSC 750
    Consideration of dual insurance and other insurance issues, arising out of a fatal aeroplane accident.

182  HITCHENS v ZURICH AUSTRALIA LTD [2015] NSWSC 825
    Whether insurer validly avoided policies of insurance due to fraudulent misrepresentation and fraudulent non disclosure.
INSURANCE ISSUES

HADDAD v ALLIANZ AUSTRALIA INSURANCE LTD (NO2)
[2014] NSWDC 308

In Issue:
• Whether unilateral cancellation of policy was in breach of policy and/or the ICA
• Whether insurer engaged in misleading and deceptive conduct following repudiation of policy

Delivered On:
13 May 2014
21 August 2014

THE FACTS
In 2003 the plaintiff effected a home insurance policy (the policy) with the defendant (Allianz) over her house in Wadalba, NSW. The policy was renewable annually.

In 2007, the house was damaged by a storm. The plaintiff lodged a claim which was indemnified under the policy. She made a further claim on the policy in 2009 in respect of delayed damage said to have been sustained during the 2007 storm, which was also paid.

In 2010 the house was extensively damaged by vandals. The plaintiff made a further claim but Allianz rejected that claim on the basis that the policy had not been renewed and had expired on 22 July 2009. Allianz had not sent a renewal notice to the insured.

The plaintiff alleged that Allianz had breached the terms of the policy either by contravening the “automatic renewal process” or unilaterally cancelling the policy prior to its expiration date. The plaintiff also alleged that Allianz had breached the Australian Consumer Law by engaging in unconscionable conduct and/or misleading and deceptive conduct. Finally, the plaintiff alleged Allianz was estopped from cancelling the policy in the circumstances.

THE DECISION AT TRIAL
The court found that the policy did not contain an “automatic renewal process”. If the policy had lapsed upon its expiration date, Allianz would not have been in breach for failing to issue a renewal notice. However the court found that the policy had not simply lapsed upon its expiration date. Instead, Allianz had unilaterally cancelled the policy based on perceived irregularities concerning the house’s occupancy and the status of the storm repairs from 2007.

Allianz had no basis under s60 ICA to unilaterally cancel the policy. Therefore, Allianz had breached both the policy and s63(1) ICA.

Despite having found that the plaintiff was not prevented from seeking relief under the Australian Consumer Law (ACL), the court held that Allianz had not engaged in unconscionable conduct. The court did, however, find that Allianz had engaged in misleading and deceptive conduct following repudiation of the policy.

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deceptive conduct by failing to notify the plaintiff that the policy had been cancelled, despite ongoing communications with her throughout the latter part of 2009.

The court dismissed the plaintiff’s argument in respect of estoppel on the basis that the plaintiff failed to establish a common assumption upon which both parties had relied.

THE DECISION ON SUPPLEMENTARY ISSUES

In a separate, subsequent judgment, the court considered whether the plaintiff’s claimed loss was too remote to sound in damages for breach of contract and/or under the ACL.

Firstly, in relation Allianz’s breach of contract, in circumstances where the repudiation was not communicated to the plaintiff and Allianz was under no contractual obligation to offer renewal, it found that the plaintiff had suffered no damage.

Secondly, in relation to the ACL claim, the court acknowledged that the plaintiff’s failure to ensure that her policy had been renewed contributed to her loss. However, the court considered that Allianz’s misleading and deceptive conduct had materially contributed to the plaintiff’s loss and, on that basis, the plaintiff was entitled to claim damages under the ACL.

ADDENDUM

Allianz subsequently sought and was refused a stay of proceedings. Allianz then sought and was granted leave to appeal. As this publication went to press, the Court of Appeal allowed the appeal and held, among other things, that Allianz did not engage in misleading and deceptive conduct by failing to provide the plaintiff with information in relation to the expiry or lapse of insurance in July 2009. The Court of Appeal decision will be reported in the 2016 Case Book.
INSURANCE ISSUES

GRAHAM v COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED (No. 2)  
[2014] FCA 717

In Issue:
• Whether insurer entitled to avoid policy on the basis that the insured made fraudulent non-disclosures
• Whether insured would have entered into the contract even if full disclosure had occurred

Delivered On:  
4 July 2014

THE FACTS
Ms Graham claimed under a life insurance policy issued by Colonial Mutual Life Assurance Society Ltd (Cominsure) which insured the life of her late husband, Mr Elwaly. Cominsure avoided the policy pursuant to s29(2) ICA on the basis of fraudulent non-disclosure by Mr Elwaly.

Mr Elwaly and Ms Graham, as trustees for the EG Self-Managed Super Fund, completed an application for increased life insurance with Cominsure. Ultimately, cover was approved subject to an increased annual premium. The Total Care Plan policy provided for the payment of a Life Care Benefit of $1 million in the event of Mr Elwaly's death. The Life Care Benefit included a Life Care Advance Benefit which was payable regardless of whether Mr Elwaly's death was deliberately or accidentally caused or came about because of the involvement in a criminal activity.

In 2010, Mr Elwaly died in a fire at his business premises during what appeared to be an attempt by him to deliberately set fire to computer and business records in order to destroy them. Three days later, Ms Graham notified Cominsure of his death and on 16 March 2010, Cominsure paid the Life Care Advance Benefit to her pending Cominsure’s determination of the claim for the Life Care Benefit.

Cominsure avoided the policy on the basis of fraudulent non-disclosures by Mr Elwaly in his answers to questions in the life insurance application. It was contended that Mr Elwaly had sought treatment for depression, anxiety, seizures, that he had received counselling for misuse of alcohol and had undergone gastric bypass surgery. In his application, however, Mr Elwaly had wrongly answered those questions in the negative. Cominsure refused cover and contended that it would not have accepted the risk and would have declined to offer any cover on Mr Elwaly’s life on any terms.

Subsequently, Ms Graham brought proceedings against Cominsure.

THE DECISION
The court held that at the time of the application, the only incorrect answer on the application was whether Mr Elwaly had sought advice or experienced symptoms or suffered from fainting episodes. The court determined that between 1994 and 1997 Mr Elwaly suffered episodes of fainting and on one occasion Mr Elwaly did receive advice or treatment in relation to this. The court noted that Mr Elwaly must or should have known the correct answer to the question was ‘yes’ not ‘no’.

The court then considered whether Cominsure would have placed the cover in any event. The court noted that although Cominsure’s risk assessor recommended that a full medical history be obtained, Cominsure was satisfied in accepting a medical history for Mr Elwaly of only three years. Additionally, internal officers of Cominsure who had considered the claim unequivocally reached the conclusion that cover would...
have been issued and should have been granted. Accordingly, the court concluded that it was clear Comminsure would have still entered into the policy and therefore it was not open to Comminsure to avoid the contract under s29(2) ICA.

Comminsure submitted that cover under the policy should not be provided as Mr Elwaly died as a result of him committing arson and, on public policy grounds, the court should not allow a criminal to profit from his crime. The court noted that the actual cause of death was smoke inhalation when Mr Elwaly unexpectedly could not get out of the premises and that under the contract Comminsure agreed to pay the Life Care Benefit regardless of whether Mr Elwaly’s death came about because of involvement in a criminal activity. The court held that there was no wording in the policy that supported the argument advanced by Comminsure that it should be implied that recovery was precluded if the loss was caused by the insured’s deliberate or criminal act. The court held that there was no scope for implying such a term as it would be directly contrary to the terms of the policy.

Accordingly, the court concluded that Ms Graham was entitled to succeed in her claim.
INSURANCE ISSUES

ALLIANZ AUSTRALIA INSURANCE LTD
v
BLUESCOPE STEEL LTD
[2014] NSWCA 276

THE FACTS

BlueScope Steel Ltd (BlueScope) employed Youden Jackson for certain periods of time between 1957 and 1965. During part of that time Mr Jackson worked at the Newcastle steel works, which was operated by BHP Billiton Ltd (BHP). Mr Jackson commenced proceedings against BlueScope and BHP in the Dust Diseases Tribunal on 5 July 2006, alleging exposure to airborne asbestos. Mr Jackson died less than 2 weeks later.

During the relevant period, BlueScope held statutory workers compensation insurance (the policy) with Allianz Australia Insurance Ltd (Allianz). BHP was self-insured. BHP retained the same firm of solicitors to act for itself and BlueScope on the basis that it assumed BlueScope’s liabilities. An urgent bedside hearing was held due to the state of Mr Jackson’s health on 12 July 2006. Allianz was first notified of the claim on 14 July 2006. Shortly after this, BHP’s solicitors served BlueScope with a notice of intention to cease acting for it in the proceedings. They continued to act for BHP with BlueScope’s consent.

BlueScope formally notified Allianz of the claim for indemnity by letter dated 25 January 2007. On 9 May 2007 Allianz’s solicitors advised BlueScope that it was in breach of various provisions of the policy and that Allianz would not take over running the case or indemnify BlueScope. BlueScope proceeded to defend Mr Jackson’s claim without reference to Allianz until BlueScope’s lawyers wrote to Allianz’s lawyers on 17 August 2007, noting that the matter had been listed for hearing, there was a possibility of settlement discussions occurring and inviting Allianz to participate.

BlueScope settled Mr Jackson’s claim on 21 August 2007 for $225,000 plus costs. BHP was released from liability by a judgment in its favour. BlueScope sought to recover the settlement amount from Allianz under the policy. Allianz declined the claim and BlueScope commenced proceedings against it by cross-claim in Mr Jackson’s proceedings.

It was Allianz’s position that BlueScope had breached several policy conditions. One of the conditions obliged BlueScope to give notice of the claim as soon as practicable after it came to BlueScope’s knowledge (condition 2). Another precluded BlueScope from incurring any expense of litigation or from making any payment, settlement or admission of liability in respect of an injury claim by a worker, without Allianz’s authority (condition 3). Allianz also contended that BlueScope had breached its duty of utmost good faith as it was represented by the same solicitors and counsel as BHP when there was a conflict of interest.

THE DECISION AT TRIAL

The Tribunal held that BlueScope had an obligation to inform Allianz of Mr Jackson’s claim before the bedside hearing on 12 July 2006. However, Allianz had not suffered any prejudice as a result of BlueScope’s breach of this condition.

The Tribunal also held that Allianz was in breach of the insurance contract for declining to take over conduct of the proceedings and in

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declining indemnity. This entitled BlueScope to act as a prudent uninsured and settle Mr Jackson’s claim. Allianz had no entitlement to be consulted about the policy, having declined indemnity without any reason.

**THE ISSUES ON APPEAL**

Allianz appealed the Tribunal’s decision arguing that it had erred in excusing BlueScope’s breach of condition 2 and in finding that Allianz’s declinature was a repudiation of the policy.

**THE DECISION ON APPEAL**

The Court of Appeal held that the Tribunal did not misconstrue the meaning of “prejudice” in s18(1) of the *Insurance Act 1902* (NSW) to mean “irretrievable” prejudice. In response to Allianz’s contention that it had suffered real prejudice by reason of the lack of opportunity to cross-examine Mr Jackson the Court of Appeal held that the opportunity Allianz lost of cross-examining Mr Jackson was of uncertain value and the Tribunal had not erred. BlueScope’s breach of condition 2 did not result in anything more than a theoretical prejudice to Allianz.

Insofar as the Tribunal held that no prejudice was occasioned by breach of condition 3, with the result that the breach could reasonably be excused under s18(1) and went on implicitly to decide that such a breach should be excused, it did so without providing reasons. Accordingly, the Court of Appeal remitted this to the Tribunal to consider.

The Court of Appeal held that the Tribunal erred in approaching the matter on the basis that Allianz had a contractual obligation to assume conduct of the defence. It also erred to the extent that it implicitly found that there was any breach of the obligation of good faith in declining to take over the conduct of the defence without any, or any substantial, reason.

It has been recognised that an insurer is permitted to put the insured to proof under a contract of indemnity insurance. Allianz was not obliged to confirm its agreement to indemnify the claim until a liability to indemnify was established. The fact that Allianz did not advise BlueScope on notification of the claim or until May 2007 that it accepted liability to indemnify under the policy, would not of itself dispense BlueScope from its obligation to comply with condition 3. For such a conclusion to follow, there would need to be further factual findings and the Tribunal had not made these.

The Court of Appeal held that under the policy there was no express obligation to provide reasons for the declinature. In any event, there was a sufficient reason to decline indemnity if Allianz bona fide considered that it had been prejudiced by the late notification of the claim. While the Court of Appeal had difficulty seeing any breach of the obligation of good faith in this regard, the matter needed to be remitted to the Tribunal to be determined having regard to the factual findings.

The Court of Appeal held that Allianz did not repudiate its obligations under the insurance policy. Rather, it acted on what was ultimately proved to be a correct view as to the consequence of BlueScope’s breach of condition 2. Allianz’s appeal was allowed in part with no order as to costs.
**INSURANCE ISSUES**

**METLIFE INSURANCE LTD v FSS TRUSTEE CORPORATION/ FSS TRUSTEE CORPORATION v MAUND**

[2014] NSWCA 281

**In Issue:**
- What is meant by “the time of the Insured Event” for purpose of calculating the “Sum Insured”

**Delivered On:**
25 August 2014

**THE FACTS**
The respondent, Ms Maund, suffered physical injuries and subsequent psychological illness in the course of her employment as a police officer in 2004. The appellant, Metlife, issued a group life insurance policy to FSS, the trustee of a superannuation scheme which afforded member police officers with total and permanent disablement (TPD) cover. In 2009, Ms Maund received a partial permanent disability benefit from the Crown which was to be repaid in the event that she subsequently received a TPD benefit. In July 2010, Metlife deemed the respondent eligible to receive a TPD benefit.

**THE DECISION AT TRIAL**
MetLife and FSS submitted that “the time of the Insured Event” for the purpose of calculating the sum insured was the date that Ms Maund became incapacitated for work – 8 May 2007. Ms Maund argued the correct date was the date she was medically discharged from the police force – 21 January 2010.

The trial judge found that the appropriate date was a different date – 8 November 2007 – the date 6 months after Ms Maund first became incapacitated for work and by which time Ms Maund satisfied all bar one of the entitlement requirements under the policy. Judgment was entered in Ms Maund’s favour based on this date.

**THE ISSUE ON APPEAL**
Leave to appeal was granted on the basis of a number of other claims involving the identical issue and the appellant’s agreeing to meet Ms Maund’s costs of the appeal.

The sole issue on appeal was the appropriate date for calculation of the “sum insured” – this required a determination of the proper construction of the term “time of the insured event giving rise to the claim”.

**THE DECISION ON APPEAL**
The Court of Appeal unanimously overturned the trial judge’s decision, and held that the proper construction of the policy recognised the appropriate date as the time a bodily injury occurs, or illness is contracted, or aggravated, resulting in an insured member’s ability to satisfy, then or later, the definition of TPD under the policy. Looking at the medical evidence, the court accepted that Ms Maund satisfied that construction in January 2007.

Ms Maund was ordered to repay the sum awarded pursuant to the orders of the trial judge.

JANELLE BARRON
Senior Associate
Janelle.Barron@bnlaw.com.au
INSURANCE ISSUES

RIDGECREST NEW ZEALAND LTD v IAG NEW ZEALAND LTD
[2014] NZSC 117

In Issue:
• Whether the plaintiff was entitled to the limit of indemnity under the policy for a final happening along with losses caused by earlier happenings
• Whether the losses resulting from the earlier happenings are to be treated as merged or subsumed in the losses caused by the final happening
• The application of the indemnity principle

Delivered On:
27 August 2014

THE FACTS
The plaintiff was the owner of a building in Christchurch, New Zealand which was insured by IAG. The relevant policy provided separate cover for the costs of repairs to the building and the costs of replacement where the building was damaged beyond repair. IAG’s maximum liability under the policy in respect of any single happening was $1,984M which was less than the replacement value of the building.

During the currency of the policy, the building was affected by 4 earthquakes. IAG commissioned builders to repair the damage to the building caused by the first 2 earthquakes but all work was stopped after the third earthquake. Although the parties differed regarding whether the building was damaged beyond repair after the third or fourth earthquakes, it was common ground that by the fourth earthquake at the latest, the building was damaged beyond repair.

The plaintiff claimed that it was entitled to the sum of $1,984M in respect of the final earthquake, along with the losses caused by the earlier earthquakes. IAG argued that its liability under the policy was limited to the costs of repairs actually undertaken to remediate the damage caused by the earlier earthquakes and, in respect of the final earthquake, the maximum amount payable under the policy for any one happening, being $1,984M.

THE DECISIONS AT TRIAL AND ON THE FIRST APPEAL
The plaintiff commenced proceedings against IAG in the High Court.

In the course of the proceedings, the parties sought a ruling from the High Court on a preliminary question expressed as follows - if (1) there have been 4 happenings within the period of insurance, (2) each happening caused damage to the plaintiff’s building, (3) subsequent to the first 2 happenings repairs were commenced but not completed by the time of the next happening, (4) following the third or fourth happening, the building was damaged so that the cost of repair exceeded the sum insured, (5) the building has been damaged beyond repair as a result of either the third or fourth happening, then is the plaintiff entitled to be paid for the damage resulting from each happening up to the limit of the sum insured in each case?

The High Court answered the preliminary question in favour of IAG.

On appeal, the Court of Appeal reached the same conclusion as the High Court but on different grounds.

THE ISSUES ON APPEAL
The plaintiff appealed to the Supreme Court of New Zealand.

The Supreme Court dealt with the issues by reference to 3 questions, firstly, whether the policy requires IAG to make payments in relation to the earlier earthquakes, secondly, whether the losses resulting from the earlier earthquakes are to be treated as merged or subsumed in the losses caused by the final earthquake, and finally, whether the plaintiff’s claim was precluded by the indemnity principle.

THE DECISION ON THE FIRST APPEAL
The Supreme Court held that the plaintiff was entitled to be paid for
the damage resulting from each of the earlier earthquakes up to the limit of indemnity and for the loss caused by the final earthquake up to the limit of the indemnity.

The Supreme Court found no basis upon which the plaintiff’s causes of action in relation to the earlier earthquakes could have been lost by reason of later events. It found that IAG’s liability was not subject to repairs being, or able to be, effected and the fact that the building was later destroyed by the final earthquake was of no moment. The Supreme Court held that the damage caused by the earlier earthquakes (and the associated diminution in value of the building) did not merge with the plaintiff’s entitlement to the costs of replacement cover in relation to the final earthquake. The Supreme Court found that this was simply a consequence of the policy resetting after the earlier earthquakes in relation to the building in its damaged state and providing replacement cover for the building in that state.

The Supreme Court held that, leaving aside the possibility of double counting, the indemnity principle was only engaged if $1.984M was deemed to be the replacement value of the building so that payment by IAG of that amount to the plaintiff was to be regarded as the equivalent of payment of the replacement value of the building. The Supreme Court found that this would not be an appropriate approach to take in respect of the policy because it would result in the liability cap being applied to more than one happening, which was inconsistent with the cap resetting after each event and would involve a very substantial rewriting of the liability cap provision in favour of IAG. This approach would also treat the liability cap as if it represented an agreed replacement value of the building when that was not the way the policy was structured. It was well understood by the parties that the liability cap was not based on, and was less than, the replacement value of the building.

The Supreme Court allowed the plaintiff’s appeal and answered the preliminary question in the affirmative subject to 3 limits, firstly, there can be no double counting, secondly, each happening gives rise to a separate limit in respect of which the contractual limit of $1.984M applies, and thirdly, the total of all claims cannot exceed the replacement costs of the building.
INSURANCE ISSUES

ROADS AND TRAFFIC AUTHORITY OF NEW SOUTH WALES v BARRIE TOEPFER EARTHMOVING AND LAND MANAGEMENT PTY LTD (No. 7)
[2014] NSWSC 1188

In Issue:
• Whether the driver/owner of a truck was liable for damage to a bridge pursuant to s102 of the Roads Act 1993 (NSW)
• Whether an RTA officer breached his duty of care to the owner of the truck
• Whether insurers could deny indemnity for breach of a reasonable care condition and recklessness exclusion

Delivered On:
28 August 2014

THE FACTS
The first defendant, Barrie Toepfer Earthmoving and Land Management Pty Ltd (Barrie), was the owner of a prime mover and low loader (the truck). On 15 April 2003, the truck, carrying an excavator, was being driven by Mr Luck, an employee of Barrie, south on the Pacific Highway across the Hexham bridge (the bridge) in NSW. The bridge is a lift span opening bridge that had a sign at its northern end that indicated ‘Low Clearance 4.8m’.

The plaintiff, the Roads and Traffic Authority of New South Wales (RTA), claimed that when the truck was driven onto the bridge, the excavator projected beyond the vertical clearance available and part of it or the truck struck the overhead structural beams causing extensive damage. It alleged that by virtue of s102(1) of the Roads Act 1993 (NSW) (the Act), Mr Luck was liable for repair costs, and by virtue of s102(2) Mr Luck and Barrie were jointly and severally liable for the repairs to the bridge as a debt.

The RTA sued Barrie as the owner of the vehicle and claimed damages for over $12.7M in repair costs to the bridge. Barrie cross claimed against the RTA on the basis that prior to the incident Mr Luck had attended a heavy vehicle checking station and was directed by an RTA officer to reconfigure the position of the excavator on the truck which resulted in a significant increase in the height of the vehicle. Barrie also cross claimed against its insurers alleging they were obliged to indemnify it under a commercial motor vehicle policy. The insurers denied liability to indemnify because of Barrie’s failure to comply with the reasonable care and precaution condition and for breach of an exclusion clause relating to loss or damage caused by recklessness.

THE DECISION
The court noted that negligence or culpability was not a necessary ingredient for a claim under s102 of the Act which establishes a strict liability in favour of the RTA unrelated to fault or liability in tort. Since the evidence established that the boom of the excavator struck several of the bridge’s transverse beams, it was only necessary for the court to consider the cross claims.

The court found that the RTA officer who directed the reconfiguration of the excavator breached the duty of care he owed to Barrie because he was aware of the obvious risk to safety that a vehicle with a height in excess of 4.8m posed. At the very least, he should have warned Mr Luck of the risk that the height of the load created but a reasonable person in his position would have gone further and refused permission for further travel until the load height was reduced. Despite this finding of breach of duty, Barrie’s cross claim against the RTA failed because the court was not persuaded that the RTA officer’s negligence was
INSURANCE ISSUES

a necessary pre-condition for the damage to the bridge. The court held that the collision did not occur but for the alteration to the load and the RTA officer’s negligence; it occurred because of Mr Luck’s failure to stop and check if it was safe to proceed, and his decision to proceed onto the bridge without even slowing down broke the chain of causation.

Despite this, he proceeded to drive onto a bridge marked with a low clearance sign without slowing down or taking any measures to avert the danger that the vehicle might strike the bridge. The court noted that the commercial purpose of the policy was to indemnify Barrie against liability for the negligence (but not recklessness) of its employees when using the company’s vehicles.

As the damage in the present situation was caused by an employee’s recklessness, it followed that the consequences would not be covered by the policy. Accordingly, the insurers were entitled to rely on the recklessness exclusion to decline indemnity.

For the same reason, the reasonable care condition extended to the acts of employees. Mere negligence would not suffice to constitute a breach of the condition, but recklessness would. As Mr Luck was reckless, Barrie had not discharged its onus of bringing itself within the condition and the cross claim against the insurers failed.

The court then had to consider whether Mr Luck was reckless and if so whether that was sufficient to trigger the operation of the condition and the exclusion clause in the policy.

The court was satisfied that Mr Luck was aware, before he left the heavy vehicle checking station, that the height of the load had been substantially increased, even though he was not aware of the actual height of the load.
MCLENNAN v INSURANCE AUSTRALIA LTD
[2014] NSWCA 300

THE FACTS
Ms McLennan (the appellant) owned a property in Orange, New South Wales. The property, along with its contents, was insured by the respondent (NRMA). On 27 December 2006, the appellant’s house and contents were severely damaged by fire. NRMA declined indemnity.

The policy contained an exclusion clause providing that the insurer would “…NOT cover loss or damage as a result of fire started with the intention of causing damage by you or someone who has entered the property with your consent.”

NRMA alleged that Ms McLennan, or someone with her consent, had deliberately lit the fire.

THE ISSUE ON APPEAL
Whether the burden of proving that the fire was not deliberately started lay with the appellant.

THE DECISION ON APPEAL
The Court of Appeal unanimously overturned the trial judge’s decision, holding that the onus of establishing that the fire was deliberately lit rested with the NRMA. Judgment was entered against the respondent who was ordered to indemnify Ms McLennan in the amount of $750,000.

However, with respect to the latter, once the insured has established that the claim falls within the scope of the promise, the burden shifts to the insurer to prove that the claim falls within the exception it seeks to rely on.

Looking at the construction of the contract of insurance, the court found that NRMA had promised to indemnify Ms McLennan against loss or damage caused by fire. The qualification relied upon by NRMA operated as an exception to exclude particular loss or damage from that promise. Having relied on the exception, the court held that the onus was on the insurer to prove that the qualification applied.

In Issue:
• Interpretation of exclusionary provisions in contract of insurance
• Whether insured had burden of proving fire was not deliberately started

Delivered On: 2 September 2014
INSURANCE ISSUES

HANNOVER LIFE RE OF AUSTRALASIA LTD v COLELLA
[2014] VSCA 205

In Issue:
• Whether plaintiff had to show that he could not perform “any work” or “any job” to claim TPD benefit

Delivered On:
9 September 2014

THE FACTS
In April 2007, the plaintiff left his employment as a despatch manager with Carter Holt Harvey, a paper and cardboard production and distribution company, as a result of a significant and continuing knee condition. He subsequently made a claim on the Carter Group Life Policy for the total and permanent disability (TPD) benefit.

To succeed in his claim under the policy, the plaintiff had to show that he satisfied both limbs of the TPD clause: first, that he was unable to do any work as a result of the injury for six consecutive months; and second, that at the end of the six month period, he continued to be so disabled that he was unable to resume his previous occupation and any other occupation in the future.

The insurer rejected the claim. The plaintiff commenced proceedings to recover the TPD benefit.

THE DECISION AT TRIAL
The trial judge found that the plaintiff satisfied both limbs of the TPD clause and the insurer was ordered to pay the TPD benefit to the plaintiff.

THE ISSUES ON APPEAL
The insurer appealed on the basis that the trial judge erred in the construction of the first limb of the TPD clause, namely that the phrase “any work” should be interpreted to mean “any job” reasonably available in the marketplace and in the area for which the plaintiff could apply.

As to the second limb of the TPD clause, the insurer argued that the trial judge erred in finding that the claimant was unable to do any work as a result of the injury and argued that the claimant was able to do work, even if he could not perform all tasks of his usual occupation.

THE DECISION ON APPEAL
The Court of Appeal upheld the trial judge’s decision.

As to the first limb, the Court of Appeal held that the trial judge erred in finding that the claimant was unable to do any work as a result of the injury and argued that the claimant was able to do work, even if he could not perform all tasks of his usual occupation.

However, the Court of Appeal held that the trial judge went too far in construing the word “work” as being dependent on the existence of work which is reasonably available in the marketplace and in an area for which the plaintiff could reasonably apply. The policy does not insure the availability of work.

In any event, the Court of Appeal held that the plaintiff satisfied the first limb of the TPD clause. As to the second limb of the clause, the Court of Appeal agreed with the trial judge that the claimant could not perform his previous job as a despatch manager due to the physical nature of the role and the extent of his injury.

The Court of Appeal also agreed that there was no occupation which the plaintiff was capable of performing with his disability either on a full or part time basis given his education, training and experience. The determination of the second limb was to be made at the end of the six month period, not at a later date when the insurer made its assessment.

MELISSA CARIUS
Solicitor
Melissa.Carius@bnlaw.com.au

BACK TO CONTENTS  BACK TO SECTION  LINK TO CASE
INSURANCE ISSUES

ISLINGTON PARK LTD v ACE INSURANCE LTD
[2014] NZCA 446

In Issue:
• The meaning of the phrase “cost of repair” in a Basis of Settlement clause;
• Whether the “cost of repair” includes the cost of complying with building regulations

Delivered On:
10 September 2014

THE FACTS
Islington Park is a complex of 31 industrial buildings owned by the appellant. In September 2010 and February 2011 seven of the buildings were damaged by earthquakes.

The appellant made a claim under the insurance policy it held with the respondent. The policy insured against earthquake and other risks. There was a dispute between the parties as to the quantum of the respondent’s obligations under the policy.

The complex was insured for an agreed value of $9 million. The schedule to the policy contained a “Basis of Settlement” clause. In clause 1.2.1 it provided for cover on an indemnity basis and in clause 1.2.2 it provided for reinstatement cover, that is, “new for old” cover. It was common ground that the appellant did not take out any reinstatement cover.

The trial judge found that the phrase “cost of repair” meant the cost of repairing the buildings to their pre-earthquake condition excluding any additional cost to meet the requirements of building regulations.

The appellant contended that the complex was deemed a total loss because the cost of undertaking repairs compliant with building regulations would cost more than $7.2 million (being 80% of the agreed value). The respondent denied that the complex was deemed a total loss and argued that the cost of repairs required by the policy would cost substantially less.

The dispute between the parties turned upon the meaning of certain phrases in the Basis of Settlement clause. In particular the court was required to consider the meaning of the phrases “cost of repair” and “reinstating such loss or damage.”

THE DECISION AT TRIAL

The trial judge found that the phrase “cost of repair” meant the cost of repairing the buildings to their pre-earthquake condition excluding any additional cost to meet the requirements of building regulations.

The phrase “reinstating such loss or damage” in the context of the Basis of Settlement clause meant reinstating the buildings to a condition that was in accordance with building regulations and statute, rather than reinstating the buildings to the same condition as prior to the earthquakes.

THE ISSUES ON APPEAL

The only issue on appeal was whether or not the trial judge had correctly determined the meaning of the phrase “cost of repair”. The appellant contended that the objective of the Basis of Settlement clause was to achieve a functional replacement and therefore any actual repair must comply with current building regulations. The appellant sought support for that interpretation on the basis that clause 1.2.1 provides that it was the respondent’s option to reinstate or replace the property damaged or destroyed instead of paying the amount of the loss or damage.

“The appellant contended that the complex was deemed a total loss because the cost of undertaking repairs would cost more than $7.2 million (80% of the agreed value).”
THE DECISION ON APPEAL

The Court of Appeal agreed with the trial judge regarding the meaning of the phrase “cost of repair.” The Court of Appeal noted that, if the appellant succeeded with its claim, it would have the effect of providing a degree of reinstatement cover on a “new for old” basis. The Court of Appeal held that it would be anomalous if the policy were construed in that manner given that it was common ground that the appellant had not taken out any reinstatement cover.

The primary basis of indemnity under the policy was found in clause 1.2.1 which provided indemnity on an “old for old” basis. Whilst the policy entitled the respondent to elect to commission repair work, which must meet current building regulations, that election did not alter the indemnity. The respondent remained obliged to indemnify the appellant on an “old for old” basis and as such, where repairs were commissioned by the respondent, the appellant was required to contribute to the cost of those repairs to the extent of any necessary regulatory upgrade costs or betterment.

The Basis of Settlement clause was not independent of clause 1.2.1. The Basis of Settlement clause called for comparison between two measures of indemnity: the cost of repairs under clause 1.2.1 and the amount of a deemed total loss ($7.2 million) under the schedule. The property is a total loss where the cost of repairs matches or exceeds $7.2 million. The Court of Appeal noted that comparison of these two measures was the whole point and held that the cost of repairs must be estimated in the same way under the Basis of Settlement clause as it was under clause 1.2.1. It would make no sense to do otherwise.

The appeal was dismissed.
INSURANCE ISSUES

MAXWELL v HIGHWAY HAULIERS PTY LTD
[2014] HCA 33

In Issue:
• Whether the insured could rely on s54(1) of the ICA to cure a deficiency in the testing of its drivers

Delivered On:
10 September 2014

THE FACTS
The respondent, Highway Hauliers Pty Ltd, owned a fleet of vehicles used to transport freight. It had taken out a policy of insurance with certain Lloyd’s Underwriters (the Insurers), which covered the vehicles for specified loss, damage or liability occurring during the period 29 April 2004 to 30 April 2005. An endorsement, which formed part of the insurance contract, stated that indemnity would not be provided under the policy when the vehicles were being operated by drivers of B Doubles unless they, amongst other things, had a PAQS driver profile score of at least 36. The policy defined PAQS as People and Quality Solutions Pty Ltd, a company that undertook psychological testing of drivers’ attitudes towards safety.

Two of the respondent’s vehicles (B Doubles) were damaged in accidents on 16 June 2004 and 2 April 2005. Neither of the drivers had undertaken a PAQS test.

The respondent made a claim for indemnity from the Insurers for accidental damage to the vehicles, liability to a third party and legal costs. The Insurers relied on the endorsement in refusing to pay the claims on the basis that there was “an absence of relevant cover...by virtue of the fact that the vehicle was being driven by an untested driver”.

The respondent commenced Supreme Court proceedings against the Insurers seeking indemnity under the policy and consequential damages for breach of contract.
INSURANCE ISSUES

THE DECISION AT TRIAL
The Supreme Court held that the Insurers were obliged to indemnify the respondent. The failure of the drivers to obtain a minimum PAQS test score was a failure that could be remedied by section 54(1) ICA.

The Insurers appealed the Supreme Court’s decision. The Court of Appeal dismissed the appeal and held that the requirement for drivers to satisfactorily complete a PAQS test was not a condition of cover and did not define the scope of cover under the policy. Section 54(1) applied to remedy the act.

The Insurers appealed the Court of Appeal’s decision to the High Court.

THE ISSUES ON APPEAL
The only issue to be determined by the High Court was whether section 54(1) ICA operated. The Insurers had conceded at trial that the fact that the vehicles were being driven by untested drivers could not reasonably be regarded as being capable of causing or contributing to any loss incurred by the respondent as a result of each accident. As such, s54(2) had no application. The Insurers also accepted that their interests were not prejudiced as a result of the vehicles being driven by untested drivers.

THE DECISION ON APPEAL
The Insurers argued that the effect of the endorsement was that no indemnity was provided under the policy in respect of an accident that occurred when a vehicle was being operated by an untested driver. The substantive effect of the policy was that the claims were for damage to vehicles whose drivers had a characteristic that removed the accidents from the scope of cover. That is, the “claim” to which section 54(1) refers is limited to a claim for an insured risk.

The High Court rejected the Insurers’ argument and found that the “claim” was the claim in fact made by the respondent. A restriction or limitation that is inherent in the claim actually made by an insured, is a restriction or limitation which must necessarily be acknowledged in the making of a claim, having regard to the type of insurance contract that the claim is made under.

The High Court unanimously held that the fact that each vehicle was being driven at the time of the accident by an untested driver was properly characterised as an “act” that occurred after the contract of insurance was entered into. The respondent had omitted to ensure that the vehicles were driven by drivers who had undertaken a PAQS test. The respondent having made claims for indemnity under the policy in relation to accidents that occurred during the period of insurance, it is sufficient to engage s54(1) that the effect of the policy is that the Insurers may refuse to pay those claims by reason only of acts which occurred after the contract was entered into.

The High Court also held that the decision of the Queensland Court of Appeal in Johnson v Triple C Furniture and Electrical Pty Ltd [2012] 2 Qd R 337 was wrong to the extent that it accepted that s54(1) was not engaged in circumstances where the insurer, relying on the temporal exclusion, refused to pay a claim by reason of the operation of the aircraft in breach of air safety regulations and should not be followed. The operation of the aircraft in breach of air safety regulations was an “act” which occurred after the contract was entered into.

The appeal was dismissed.

KYLIE POWELL
Senior Associate
Kylie.Powell@bnlaw.com.au

BACK TO CONTENTS  BACK TO SECTION  LINK TO CASE
INSURANCE ISSUES

QBE INSURANCE (INTERNATIONAL) LIMITED
v WILD SOUTH HOLDINGS LIMITED AND MAXIMS FASHIONS LIMITED
[2014] NZCA 447

In Issue:
• Whether the insureds could claim the cost of repairing damage caused by each of several successive earthquakes
• The impact of the automatic reinstatement clauses
• Whether the doctrine of merger could apply to limit insurers’ liability
• The impact of the indemnity principle upon the amount that can be recovered
• Circumstances in which a building will be found to be “destroyed” rather than “damaged”

Delivered On:
10 September 2014

“The Court of Appeal was asked to consider several questions in order to clarify which losses the insureds could claim indemnity for, and the limits of the insurers’ liability in the circumstances.”

THE FACTS
This decision involved a joint appeal from 3 decisions of the New Zealand High Court. The insured parties in all 3 cases were commercial property owners whose buildings suffered damage as a result of the Christchurch earthquakes in 2010 and 2011. Each of the properties was incrementally damaged in the successive earthquake events, which were atypical in that the aftershocks were more destructive than the main event. Damage from one earthquake often awaited repair at the time the next one struck.

Each of the proceedings concerned the application of full replacement policies in circumstances where the sum insured was less than the actual replacement cost, and each policy provided for automatic reinstatement of cover upon loss. This created a risk of “double counting”, i.e. claims for successive damage to part of a building which could ultimately be repaired for less than the aggregate of the claims.

THE DECISION
The Court of Appeal was asked to consider several questions in order to clarify which losses the insureds could claim indemnity for, and the limits of the insurers’ liability in the circumstances.

The Court of Appeal rejected the application of the doctrine of merger on the basis that it was inconsistent with a policy in which the sum insured was reset after each happening.

In terms of reinstatement of cover, the insureds and insurers disputed whether cover reinstates as soon as an event causing loss occurs or when the insurer pays for that loss. The Court of Appeal held that the wording of the policies clearly indicated the former, and that the insureds became...
indemnified up to the maximum sum insured immediately following a loss causing event. At the same time, the insureds incurred liability for any corresponding additional premiums. Each of the policies allowed for insurers or insureds to give notice that the automatic reinstatement clause would not apply following loss or damage. The Court of Appeal noted that such notice could only operate prospectively, such that an insurer cannot give notice following a second loss causing event that the reinstatement clause was cancelled after the first event.

However, the Court of Appeal confirmed that the policies were indemnity policies, notwithstanding the provision for reinstatement on a “new for old” basis. The indemnity principle means that where damage to a building has not been remedied when a subsequent event occurs, the insured is only entitled to recover the cost of remedying the cumulative damage (plus the cost of any expenditure upon repairs that may have already taken place at the time of the second event). The total amount recovered may exceed the sum insured, provided that the loss from each event is less than the sum insured.

The Court of Appeal otherwise considered the issue of when a building is “destroyed” rather than “damaged” for the purposes of a policy, emphasising that this is a question of fact to be answered in all the circumstances. The Court of Appeal noted that there is no uniform test, and that a number of considerations may be relevant, including the insured’s intentions for the property and reasons for owning it as well as the policy terms and feasibility of repair.

An application for leave to appeal was declined.
In Issue:

- Whether professional indemnity insurer liable to indemnify
- Whether Commercial List Response in Supreme Court proceedings constituted a “claim” to which the insurance policy responded

Delivered On:
30 September 2014

THE FACTS

Austcorp Project No 20 Pty Ltd (the applicants) were the professional indemnity insurers of the third respondent, LM Investment Management Ltd (LM). LM was a lender to Bellpac Pty Ltd (Bellpac) in respect of its acquisition of the assets of the Bellambi Colliery in 2003 and Mr Wong had guaranteed LM’s loan. The assets included land (Bellambi Land) which was subject to a first mortgage in favour of The Trust Co (PTAL) Ltd (PTAL). The applicants and Compromise Creditors Management Pty Ltd (CCM) also held securities over the Bellambi Land.

Bellpac went into liquidation and LM commenced proceedings in the Supreme Court Commercial List seeking to recover its losses pursuant to Mr Wong’s guarantee. In June 2011, LM, PTAL, the receivers and other creditors of Bellpac participated in a settlement which provided for the sale of the Bellambi Land. In December 2011, Mr Wong filed a Commercial List Response alleging that LM had breached certain duties that it owed to Bellpac in connection with the sale of the property and alleged that the Bellambi Land had been sold at a gross undervalue. Mr Wong also contended that his obligations under the guarantee were discharged or, alternatively, that any liability under the guarantee should have been reduced by reason that LM was knowingly concerned or involved in breaches of duty committed in connection with the sale of the Bellambi Land.

The professional indemnity policy provided indemnity in respect of “loss and defence costs and expenses arising from any claim for any civil liability”. The insurers submitted that the Commercial List Response was a claim first made against LM prior to the period of the policies, that any liability LM may have had arose from that claim and therefore the policies did not respond. The question for determination was whether the Commercial List Response was a claim that fell within the insuring clause.

THE DECISION AT TRIAL

At first instance, the court observed that the Commercial List Response did not claim damages or any order for compensation by LM and the court concluded that the Commercial List Response was not “a particular defined species of claim that fell within the insuring clause” as it did not sound in “Loss” as defined by the policies. It was not a claim “brought against” LM and it did not give rise to “defence costs and expenses” as provided for in the insuring clause.

THE ISSUES ON APPEAL

The applicants sought leave to appeal. Three issues arose: whether the Commercial List Response was a claim, whether any loss LM may incur in the proceedings were losses “arising from” the Commercial List Response, and whether it was a claim for “any civil liability”.
THE DECISION ON APPEAL

The Court of Appeal noted that the Commercial List Response did not allege a civil liability on behalf of LM to account to Belpac and Belpac did not assert any liability or claim any relief. Accordingly, the Court of Appeal held that the Commercial List Response was not “brought against” LM and on that basis it was not a claim within the meaning of the policies.

Secondly, the Court of Appeal noted that there was no causal link between the Commercial List Response and the losses claimed in the proceedings because LM could not be found liable for those losses. At most, Mr Wong’s guarantee could be discharged. The parties acknowledged that would involve a loss to LM but that was not the loss claimed in the proceedings. Therefore, the claims in the proceedings were not claims “arising from” the Commercial List Response.

In respect of the third issue, the Court of Appeal held that to the extent that the Commercial List Response did assert a liability on the part of LM to account to Belpac, that assertion was made in support of the existence of an equitable defence and did not involve or require the establishment by judgment of LM’s responsibility in law to Belpac. It was therefore not a claim for civil liability.

The appeal was dismissed with costs.
INSURANCE ISSUES

LIBERTY INTERNATIONAL UNDERWRITERS v THE SALISBURY GROUP PTY LTD (IN LIQ) & ORS
[2014] QSC 240

In Issue:
- Whether the insurer could deny indemnity under a professional indemnity policy by relying on the ‘related entities’ exclusion

Delivered On:
2 October 2014

THE FACTS
The Salisbury Group Pty Ltd (in liq) (TSG) was an Australian Financial Services licence holder carrying on an investment advice business until it was placed into liquidation. Mr Ian Weaver was an authorised representative of TSG. TSG was insured under a professional indemnity policy (the policy) issued by Liberty International Underwriters (Liberty). This policy also provided cover to Mr Weaver.

In his capacity as an authorised representative, Mr Weaver provided financial advice to Treadstone Developments Pty Ltd (Treadstone).

Treadstone’s two directors were Jillian Weaver and Scott Weaver. Its only shareholders were Scott Weaver and his brothers Jonathon Weaver and Justin Weaver. Mr Weaver is the husband of Jillian Weaver and the father of Scott, Jonathon and Justin Weaver. Treadstone was the trustee of the Weaver Family Trust (the Trust). The Trust is a discretionary trust with an open class of beneficiaries.

On 26 July 2013, Treadstone (as the trustee of the Trust) commenced proceedings against (among others) TSG and Mr Weaver.

Treadstone alleged that the provision of advice by TSG through Mr Weaver constituted a breach of contract, negligence or misleading and deceptive conduct.

TSG and Mr Weaver notified Liberty of the potential claims against them. However, Liberty refused to indemnity them due to the “Related Entities” exclusions in clause 4.14 of the policy.

“Liberty sought a declaration that the matters in Treadstone’s proceeding were not the subject of an indemnity under the policy because of the related entities exclusion clause.”

The clause excluded cover for a claim by or on behalf of (a) one Insured against another Insured, (c) any current or former spouse or partner, parent, child or sibling of any Insured against another Insured, or (d) any entity the Insured has a financial interest in. “On behalf of” was not defined in the policy.

Liberty sought a declaration that the matters in Treadstone’s proceeding were not the subject of an indemnity under the policy because of the related entities exclusion clause.

THE DECISION
To exclude cover on the basis of clause 4.14(a), Liberty had to establish that Treadstone’s claim was made “on behalf of” Mr Weaver against TSG, while to use clause 4.14(c), Liberty had to show that Treadstone made the claim against TSG “on behalf of” the wife or any of the sons of Mr Weaver.
The court decided that the phrase “on behalf of” contemplated some representative capacity or agency because the term was used in relation to the doing of an act, namely the act of making an application. On an ordinary and natural reading of the words of these exclusions in the context of making a claim, it could not be said that Treadstone (as trustee) made the claims in the proceedings on behalf of Mr Weaver, his wife and his sons as beneficiaries of the Trust.

It was not accepted that Treadstone, as trustee, made the claims on behalf of the beneficiaries because it brought the proceeding in its own right as trustee of the Trust. It did not do so, as a matter of fact or law, in any representative capacity or as the agent on behalf of the beneficiaries of the Trust.

In regard to clause 4.14(d), the issue was whether Mr Weaver, as a beneficiary of a discretionary trust, could be said to have a financial interest in the Trust.

The court found that whilst Mr Weaver had standing to compel the proper administration of the Trust, this did not constitute a “financial interest” in the Trust because such a right did not equate to any right of Mr Weaver to either share in the ownership of trust property or to participate in any distribution of the Trust capital or income.

The court noted that while Liberty intended to exclude claims from which Mr Weaver may benefit directly or indirectly, the plain and natural meaning of the words agreed to by Liberty had to apply.

Liberty could have expressly excluded claims made by trustees of a trust of which an Insured, or member of an Insured’s family, were beneficiaries, but it did not do so. Liberty’s application was dismissed.
In Issue:
• The excess payable under the policy in respect of the appellant’s business interruption claim
• The meaning of the phrase “annual value” of the site affected

Delivered On:
8 October 2014

THE FACTS
The appellant, Birla Nifty Pty Ltd, operated the Nifty Copper Mine in Western Australia and the Mount Gordon Mine in Queensland. The appellant entered into an insurance contract with the respondent, International Mining Industry Underwriters and other underwriters, for the period 31 March 2008 to 31 March 2009. The insurance contract provided property damage and business interruption cover for the appellant’s Nifty Copper and Mount Gordon mine operations.

On 3 June 2008 an explosion interrupted the supply of gas to the appellant’s Nifty Copper mine. The appellant made a claim under the policy for business interruption losses. That claim was rejected by the respondent on the basis that it was below the applicable excess.

The excess clause in the schedule to the policy provided for calculation of an excess by multiplying the average daily value by 30. The average daily value was stated to be the “annual value” of the site affected divided by 365. Neither of the phrases “average daily value” nor “annual value” were defined by the policy.

The respondent also contended that the “annual value” was the estimated gross profit and payroll of the Nifty Copper mine which was specified by the appellant as the declared value in the placing slip. The policy expressly provided that the declared value was used by the respondent only for the purpose of calculating premium.

The respondent argued that the “annual value” was the estimated gross profit and payroll of the Nifty Copper mine which was specified by the appellant as the declared value in the placing slip. The policy expressly provided that the declared value was used by the respondent only for the purpose of calculating premium.

The respondent also contended that the appellant was estopped from disputing its interpretation of the excess clause on the basis that the appellant had conveyed to the respondent that it accepted its construction of the excess clause, in reliance on which the respondent entered into an insurance contract for 2009/10 year.

THE DECISION AT TRIAL
The application was dismissed. The trial judge held that the policy drafting did not make it clear that the “annual value” was to be the declared value and that it was not possible to find a common intention to use the declared value to calculate the excess. The trial judge therefore rejected all of the contentions advanced by the parties and suggested that “annual value” may be the value calculated on the gross profit of the affected site in the 12 month period immediately preceding the damage event. As neither party embraced that alternative, the primary judge made no final determination as to the meaning of the excess clause.

The trial judge dismissed the respondent’s estoppel claim as there was no relevant representation, conduct, reliance or detriment.
“The appellant sought a declaration from the court as to the proper construction of the excess clause.”

THE ISSUES ON APPEAL

The appellant contended that the trial judge erred by:

(a) Assessing the meaning of the words within the policy by reference to his own views about the commercial common sense and commercial purpose of the policy; and

(b) Failing to undertake an assessment of each construction contended by the parties against the other provisions of the policy so as to consider whether those constructions were consistent with the text of the policy as a whole.

THE DECISION ON APPEAL

The Court of Appeal dismissed the appeal and upheld the construction of the excess clause contended by the respondent (that is, the excess clause derived its meaning from the declared value in the placing slip). In doing so it had regard to the policy, the placing slip and evidence of the surrounding circumstances.

Prima facie the expression “annual value” in the excess clause meant the estimated value of the gross profits and payroll for the 12 month period of insurance as declared by the appellant at the commencement of the policy in the placing slip. The placing slip was created by the appellant’s broker and the declared value was provided to the respondent pursuant to the appellant’s obligations under the premium declaration clause.

The Court of Appeal noted that the purpose of business interruption cover is to compensate the appellant for insurable losses consequent upon property damage that occurs during the period of insurance. Business interruption cover is concerned with the effect of that property damage on the trading results that might have materialised in the future had the damage not occurred. It followed that in order to calculate the excess the respondent relied upon the appellant’s estimate of its future gross profit and payroll for the 12 month period of insurance.

Applying ordinary construction principles, the Court of Appeal had regard to the surrounding circumstances. In particular, the preparation and exchange of a draft placing slip, the amendment of the placing slip so that the excess clause was in materially the same terms as the policy and the scratching of the placing slip by the respondent.

The Court of Appeal was satisfied that the insurance policy was not intended to replace the placing slip entirely because the slip contained the agreed premium and declared values of the mines to be insured.

The Court of Appeal dismissed the respondent’s estoppel argument on the basis that it was unable to show any detriment. The Court of Appeal held that detriment must exist after and as a consequence of reliance upon a common assumption. There was no detriment to the respondent by the renewal of the 2009/10 policy, but rather a benefit to the appellant in obtaining insurance cover that the respondent would otherwise have denied.
**THE FACTS**

Mrs Hepburn commenced proceedings against her former dentist Dr Jasmin White, claiming damages for trespass, assault and negligence. Mrs Hepburn alleged that between May 2008 and September 2009 she suffered injury as a result of wrongful dental advice and treatment including drilling teeth, extracting teeth, glueing teeth together and incompletely removing decay. All of the procedures were carried out without anaesthesia and caused extreme pain and discomfort.

After the proceedings were commenced, Mrs Hepburn sought leave under s6 LR (MP) to join Guild Insurance Ltd (the Insurer) as a second defendant to the proceedings.

**THE DECISION AT TRIAL**

The trial judge granted Mrs Hepburn leave to join the Insurer to the proceedings on the basis that there was a real possibility that Dr White would not be able to satisfy any judgment obtained against her; there was an arguable case that Dr White would be found liable; and also there was an arguable case that the Insurer was obliged to indemnify Dr White because of the retired dentist provision in the latest of the 4 consecutive policies issued by the Insurer.

**THE ISSUES ON APPEAL**

The Insurer argued that the trial judge was not entitled to rely on the retired dentist provision in the final policy issued because the allegedly wrongful acts occurred before that policy period. Mrs Hepburn argued that the Insurer was nevertheless liable to indemnify Dr White (and therefore liable to be joined pursuant to s6 LR (MP) under the earlier policies which were current when the allegedly wrongful acts occurred. There was also an issue as to whether the trial judge erred in concluding that Mrs Hepburn had shown an arguable case that Dr White might be unable to meet a judgment against her.
THE DECISION ON APPEAL

Although neither party put the relevant policies into evidence, the Court of Appeal concluded from correspondence that at all relevant times professional indemnity policies issued by the Insurer were in force and that they were in the nature of ‘discovery’ policies in that the critical issue to enliven cover was the insured’s discovery of the making of a claim or her discovery of an occurrence which may give rise to a claim.

The Court of Appeal noted that both parties agreed that the trial judge was in error in relying on the retired dentist provision to conclude there was an arguable liability on the part of the Insurer to Dr White. This was because the retired dentist provision could only apply to the final policy issued which was not the policy on foot at the time the allegedly wrongful acts occurred.

However, Mrs Hepburn argued that the trial judge’s decision was nevertheless correct on a different basis, namely that there was an arguable case that the Insurer was liable to indemnify Dr White under the 2 earlier policies which were current at the time of the allegedly wrongful acts because Dr White was aware of circumstances which could give rise to a claim.

The Court of Appeal accepted Mrs Hepburn’s argument that the nature of Dr White’s allegedly wrongful acts were such as to render it arguable that Dr White knew at the time of those acts that they might give rise to liability. The Court of Appeal accepted expert evidence tendered by Mrs Hepburn that after ceasing treatment with Dr White she still had severe periodontal disease and that during the multiple procedures carried out by Dr White she received no anaesthesia and suffered intense pain and profuse bleeding.

The Court of Appeal held that there was no reason in principle why wrongdoers’ knowledge of their own wrongful acts could not constitute awareness by them of circumstances that might give rise to claims against them, thus triggering insurance policy notification provisions. In this case, an inference was arguably available that Dr White was aware that her conduct might give rise to a claim because of the intense pain suffered by Mrs Hepburn as a result of procedures undertaken without anaesthesia.

The Court of Appeal noted that there was no evidence that the Insurer was prejudiced by Dr White’s failure to notify it of the potential liability of which she was arguably aware. Therefore it was also arguable that Mrs Hepburn could rely on s54 ICA to avoid the consequences of the absence of notification.

The Court of Appeal agreed with the trial judge that Mrs Hepburn also established that it was arguable Dr White may not be able to meet any judgment obtained against her. Although the evidence (a letter from Dr White stating she was experiencing severe financial hardship) was very limited, it was sufficient to satisfy the low standard of arguability required.

The Court of Appeal exercised its discretion under section 6 LR (MP) to join the Insurer as a party to the proceedings, albeit for reasons that were different from those expressed by the trial judge. Consequently, the appeal was dismissed with costs.
INSURANCE ISSUES

TOWER INSURANCE LTD v SKYWARD AVIATION 2008 LIMITED
SC 41/2014 [2014] NZSC 185

In Issue:
• Whether insurer or insured entitled to elect manner of payment of claim
• The measure of the insured’s loss under a full replacement value policy

Delivered On:
15 December 2014

THE FACTS
A house and land owned by Skyward (the respondent) was damaged by the Christchurch earthquakes. The respondent had insured the house with Tower (the appellant) for its full replacement value. The respondent accepted an offer from Christchurch Earthquake Recovery Authority (CERA) to buy the land at its then current value and pursued claims for loss of the house against the Earthquake Commission (EQC) and Tower. The claim against EQC was settled but there was a dispute between the respondent and Tower about the basis for and the measurement of the insured loss under the full replacement value policy.

The respondent argued that it was entitled to payment of an amount equal to the estimated cost to rebuild or repair the house. The appellant argued that it had the right to choose from a variety of settlement options under the policy and that it was obliged to pay only...
the fair price of a replacement house elsewhere of comparable size, construction and condition as the respondent’s house was when it was new. The financial difference between the 2 approaches was approximately $300,000.00.

**THE DECISION AT TRIAL**

The parties submitted 3 questions to the High Court for determination: a) on what basis is the amount payable by the appellant to be calculated if the respondent’s claim is to be settled by the appellant paying the cost of buying another house; b) is it the appellant’s choice whether the claim is to be settled by paying the costs of buying another house, or if the appellant settles by making payment, whether it is to be made based on the costs of rebuilding, replacing or repairing the house under the terms of the policy; and c) did the appellant make an irrevocable election to settle the respondent’s claim by making payment based on the full replacement value?

At first instance the High Court answered all 3 questions in favour of the appellant. The respondent appealed to the Court of Appeal, which found in favour of the respondent.

**THE ISSUES ON APPEAL**

The appellant argued that it had the right to choose from a variety of payment settlement options under the insurance policy and is entitled to discharge its obligations by doing no more than paying the costs of another and not necessarily a new house elsewhere.

**THE DECISION ON APPEAL**

The Supreme Court noted that the policy was for a full replacement value; that is, replacement on a new for old basis. The Supreme Court held that once the appellant had decided to make payment (as opposed to rebuild, replace or repair) under the policy, its obligations to the respondent were solely monetary in character and as long as the respondent actually incurred the expenditure for which it was entitled to be reimbursed, the appellant’s payment obligations were determined by the choice which the respondent made as to whether to rebuild, replace or buy another house.

The court dismissed the argument that any new house purchased must be comparable to the insured house because the practical implications were that such a house may not exist. If the respondent chose to buy another house, the only limit on the amount payable by the appellant was that it must not exceed the cost of rebuilding at the current site. The appeal was dismissed.

“The respondent argued that it was entitled to payment of an amount equal to the estimated cost to rebuild or repair the house.”
INSURANCE ISSUES

AIG AUSTRALIA LIMITED v JAQUES
[2014] VSCA 332

In Issue:
• Meaning of “non-executive director” in an insurance policy
• Whether Mr Jaques was at the relevant time a non-executive director as defined in the policy

Delivered On:
16 December 2014

THE FACTS
AIG issued an insurance policy to Australian Property Custodian Holdings Ltd (Holdings) by way of which it undertook to cover the loss of any insured person resulting from a claim being made against them during the policy period for a wrongful managerial act.

Mr Jaques was a director of Holdings and an insured person under the policy. A number of claims were made against him during the period covered by the policy.

The policy covered executive directors for losses up to $5,000,000. Non-executive directors were entitled to extended cover of an additional $1,000,000. Mr Jaques sought further cover pursuant to the extension. AIG refused cover on the basis Mr Jaques was an executive director at the relevant time and thus not entitled to the benefit of the extension.

DECISION AT TRIAL
The trial judge determined that the essential characteristic of an executive director is his or her discharge, usually as an employee, of executive functions in the management and administration of the company. He noted that non-executive directors are usually independent of corporate management.

The trial judge noted that whether a director, other than the managing director, is an executive director is a question of fact which may depend on whether there is some feature of the company’s constitution or conduct of the company that evidences the delegation of executive function.

The trial judge reviewed the factual background. He noted that during the relevant period Mr Jaques was employed by a business related to Holdings (Custodians) that was involved in the management of retirement villages. Holdings’ business activity, however, was its investment decisions.

The trial judge therefore concluded that Mr Jaques was employed by and worked for Custodians, but that his services were not at the relevant time provided in connection with the business of Holdings.

In the circumstances, the trial judge ultimately held that Mr Jaques was a non-executive director for the purposes of the insurance policy. AIG appealed the trial judge’s decision.

THE DECISION ON APPEAL
AIG argued that the trial judge should have placed greater weight upon how the director was represented to the public, whether the Board regarded the director as a non-executive director, whether the director saw himself as a non-executive director, whether the director was independent, whether the director was responsible for guiding and monitoring the management of the company and whether the director was involved in the operations of the company.

AIG also argued that the trial judge erred in finding that Mr Jaques was a non-executive director given a number of references in documents and his own evidence in another forum that described him as an executive director. It also alleged that the trial judge erred in his findings regarding the structure of the business.

The Court of Appeal found that the trial judge did not err in his findings regarding Mr Jaques being a non-executive director under the policy.

The Court of Appeal also concluded that the trial judge’s findings regarding the structure of the business and the significance of his employment relationship with Custodians were sufficiently soundly based.

The appeal was therefore dismissed.
Meet our Melbourne team of insurance law specialists

PETER EWIN
Partner
E: peter.ewin@bnlaw.com.au

Peter has over 30 years experience, specialising in insurance law. He has an in-depth understanding of the insurance industry and has managed numerous successful class actions and is highly regarded as a litigator.

Peter has extensive experience in handling injury liability, compulsory third party, recovery, ISR and property liability claims. He has also worked on a broad range of public and product liability and medical negligence claims, and provides advice on policy interpretation. Another one of Peter’s areas of specialisation is in defending professional indemnity claims, particularly for construction and engineering clients.

NIEVA CONNELL
Partner
E: nieva.connell@bnlaw.com.au

Nieva has extensive litigation experience and a reputation as a highly capable and commercially astute lawyer. She has conducted successful litigations for national, multinational and international insurers.

Nieva’s experience also includes advising clients on commercial and insurance claims and coverage disputes, particularly those involving public and products liability, professional indemnity, occupational health and safety, and trade practices. Assisting clients with policy interpretation and drafting, claims assessment and statutory and compliance issues, is also part of Nieva’s area of specialisation.

HUBERT WAJSZEL
Partner
E: hubert.wajszel@bnlaw.com.au

Hubert is an experienced insurance law and commercial litigation specialist who handles contentious and non-contentious matters for local and overseas insurers and captives, regularly appearing in VCAT, the County, Supreme and Federal Courts, and local government inquiries.

Hubert specialises in professional indemnity insurance, with a particular focus on construction professionals, financial institutions and directors’ and officers’ liability. He acts for professionals regularly defending claims brought against, architects, engineers, building surveyors, accountants, mortgage brokers and introducers, directors and officers, conveyancers and real estate agents.

Hubert’s practice also extends to providing risk management advice, including undertaking reviews of contract documents and policy wordings.
INSURANCE ISSUES

PREPAID SERVICES PTY LTD v ATRADIUS CREDIT INSURANCE NV
[2014] NSWCA 440

In Issue:
• Whether insurer entitled to reduce its liability under a policy of trade credit insurance due to non-disclosure by insured

Delivered On: 19 December 2014

THE FACTS
The appellant held a policy of trade credit insurance with the respondent. The appellant had engaged Bill Express Limited (BXP) to manage point of sale terminals selling pre-paid phone credit for its telecommunications networks. BXP became insolvent and the appellant claimed under the policy. The respondent sought to avoid coverage under the policy by alleging fraudulent misrepresentation on the part of the appellant. It was alleged that on the insurance proposal form, a relevant officer had given false answers about the appellant’s knowledge of BXP’s payment history regarding late payments, and whether BXP had previously been placed on a payment plan. It was alleged that the appellant had prior knowledge of BXP consistently being unable to pay its debts when they fell due.

THE DECISION AT TRIAL
At first instance it was held that the respondent was entitled to avoid the policy for fraudulent misrepresentation or alternatively, reduce its liability to nil in accordance with section 28(3) ICA. Section 28 ICA allows an insurer to reduce its liability to place itself in the position in which it would have been if the misrepresentation had not been made.

The appellant appealed and the Court of Appeal found that there was insufficient evidence of fraudulent misrepresentation and therefore the respondent was not entitled to avoid the policy. The alternate question of whether the respondent could reduce its liability on the basis of section 28(3) ICA given alleged ‘innocent’ misrepresentations was remitted back to the trial judge. The trial judge was required to consider whether, on the balance of probabilities, the policy would not have been issued by the respondent if the full extent of the knowledge of BXP’s payment history was disclosed. Evidence from various witnesses holding authority for risk and underwriting decisions within the respondent’s business was examined. That evidence included opinions that BXP was an ‘unacceptably high risk of loss’ when the whole of the payment history was considered.

The trial judge found that the respondent would not have issued the policy if truthful and complete answers had been given by the relevant officer and therefore the respondent was able to reduce its liability to nil.

THE ISSUES ON APPEAL
The Court of Appeal considered whether the parties had each discharged their onus of proof in relation to the actions which would have been taken in the hypothetical situation where the non-disclosure had not occurred.

THE DECISION ON APPEAL
In dismissing the appeal, it was held that the respondent had the onus of proving that it would not have issued the policy had the non-disclosure not occurred. The appellant was also required to prove that it would have provided other information to explain the non-disclosure. It was held that no other evidence was identified to establish that the policy would have been issued had the non-disclosure not occurred. It was sufficient for the respondent to prove on the balance of probabilities that in the hypothetical circumstance of the non-disclosure not occurring, the policy would not have been issued. It was also sufficient for the respondent to call evidence from its ultimate decision maker in respect of whether the policy would have been issued, rather than having to call subordinates also involved in the underwriting process.

ELIZABETH O’CONNOR
Associate
Elizabeth.Oconnor@bnlaw.com.au
THE HANCOCK FAMILY MEMORIAL FOUNDATION LTD v LOWE [2015] WASCA 38

THE FACTS
Mr Fieldhouse was a solicitor providing legal services to Mr Lang Hancock and the companies under his control including the Hancock Family Memorial Foundation Ltd (the Foundation).

In August 1995 the Foundation commenced proceedings against Mr Fieldhouse claiming that he acted for the Foundation as well as Mr Hancock in a sale of shares and that he breached his contractual and tortious duties. Mr Fieldhouse held primary insurance through the Solicitors Mutual Indemnity Fund administered by LawCover (the Fund). Mr Fieldhouse died in 2007.

In 2010, the WA Supreme Court held that because of the features of the statutory scheme, there was no “contract of insurance” within the meaning of s51 ICA (which permits a third party to recover from an insurer directly where the insured is deceased) between Mr Fieldhouse and the Law Society. As a result, the Foundation was not permitted to bring a claim against the Law Society under s51 ICA. This meant that the Foundation was unable to access the first $1.1 million of Mr Fieldhouse’s cover under the Fund.

The Foundation therefore brought proceedings against Mr Fieldhouse’s excess insurers under s51 ICA. No order was sought to join Mr Fieldhouse’s estate as a party to the action.

The central issue for determination concerned the construction of a condition of the excess insurer’s policy (Condition C), which provided that the excess insurers were only liable where the underlying insurers ‘have paid or have admitted liability or have been held liable to pay the full amount of their indemnity’. The trial judge and Court of Appeal considered that at least one of these elements had to be met for Condition C to operate and oblige the excess insurers to indemnify.

Relevantly, the Fund was considered an underlying insurer and LawCover had confirmed indemnity in writing (with a reservation of rights) to the insured. However, LawCover disputed that the insured was liable to the Foundation.

THE DECISION AT TRIAL
The trial judge held that no payment had been made and therefore the first element had not been satisfied. Further, as LawCover had not admitted liability to pay the full amount of their indemnity and LawCover had not admitted, nor a court held, that Mr Fieldhouse was liable to pay the Foundation, elements 2 and 3 were not satisfied.

The trial judge held that the excess insurers were therefore not liable under the excess insurance policy in respect of Mr Fieldhouse’s liability in damages to the Foundation, and the Foundation was therefore not entitled to recover under s51 ICA.

THE ISSUES ON APPEAL
The Foundation appealed the trial judge’s decision.

The Foundation contended that the trial judge had erred in finding that element 2 of the Policy could not be satisfied. The Foundation alleged that element 2 could be fulfilled by LawCover’s grant of indemnity, either individually, together with a finding of liability for or up to the full amount of the indemnity, or together with the finding of liability sought in the appeal proceedings for an amount greater than the full indemnity under the Fund.

The Foundation also asserted that the trial judge had erred with respect to its construction of element 3. It submitted that element 3 could be satisfied either because s51 ICA required element...
3 to be read down to include a finding in proceedings in which Mr Fieldhouse and/or LawCover were not parties, or alternatively, by a finding of liability of Mr Fieldhouse to the Foundation in the appeal proceedings.

Finally, the Foundation argued that if Condition C was not satisfied because neither Mr Fieldhouse nor LawCover were parties to the proceedings, Condition C would be void under s52 ICA, because its effect would be to contract out of s51 ICA.

**THE DECISION ON APPEAL**

The Court of Appeal dismissed the appeal.

The Court of Appeal held that, consistent with the ‘nature and purpose’ of excess liability insurance, element 2 required the underlying insurers to have admitted both the fact and full extent of the insured’s liability. The Court of Appeal considered it was clear that LawCover, in granting Mr Fieldhouse indemnity, did not admit the fact or extent of his liability to the Foundation. It further opined that even if Mr Fieldhouse were held liable in the proceedings, element 2 would not be satisfied as LawCover still would not have admitted liability to the full extent, and neither Mr Fieldhouse’s estate nor LawCover would be bound by the judgment, as they were not parties to the proceedings.

The Court of Appeal also upheld the trial judge’s construction of element 3, finding that it required a binding determination of liability by a court. As LawCover and Mr Fieldhouse’s estate were not parties to the proceedings, the Court of Appeal held there could not be any binding determination of liability. The Court of Appeal rejected the Foundation’s argument regarding s51(1) ICA, considering that would otherwise reverse the relationship intended by excess insurance.

Finally, the Court of Appeal held that Condition C was not void because it did not, in terms or effect, prevent a person from claiming against the liability insurer of a deceased insured. In this case, the Foundation’s claim failed because s51(1) ICA had no application to the Fund or LawCover. The Court of Appeal stated that Condition C went to ‘the heart of the nature of an excess liability policy’ and that it could not have been the intention of the legislature, in enacting s51 ICA, to fundamentally alter the nature of the contractual relationship between an insured and his excess insurers in the event that an insured died.
SIENKIEWICZ (AS TRUSTEE FOR THE SIENKIEWICZ SUPERANNUATION FUND) V SALISBURY GROUP PTY LIMITED (IN LIQUIDATION) (No. 2) [2015] FCA 147

**In Issue:**
- Whether an insurance policy applied to financial planning advice in relation to certain investment products;
- Whether the insured’s act of agreeing to amend the insurance policy by an endorsement fell within s54 ICA

**Delivered On:**
6 March 2015

**THE FACTS**
Mr and Mrs Sienkiewicz (as trustees for the Sienkiewicz Retirement Fund) and AT Melville Pty Ltd (as trustee for the AT Melville Retirement Fund) brought proceedings against their former financial advisers, the Salisbury Group and its representatives Mr Todd and Mr Martin. As part of these proceedings, Mr Todd brought a cross-claim against his professional indemnity insurers. Later, the original proceedings against the financial advisers were settled, leaving Mr Todd’s cross-claim against the insurers on foot.

Pursuant to the insuring clause of the policy, the insurers agreed to indemnify the “Insured” in relation to any claims alleging an act, error or omission of the Insured in the performance of Professional Services which was defined as “financial planning encompassing advice on approved investment products and life insurance products”.

The policy and an endorsement to it contained three relevant exclusions. They excluded cover for any loss arising out of, or in any way connected with (i) the insured’s involvement in buying, selling or underwriting as principal for their own account (the dealing exclusion); (ii) any guarantee or warranty given by the insured in relation to the performance of any investment (the Investment Performance Exclusion); (iii) any representation or advice relating to any fund or product which is not approved by the Named Insured for distribution by its Authorised Representatives (the unapproved Product Exclusion).

The issues for the court to determine were whether (i) the insuring clause applied to Mr Todd’s investment advice as it did not satisfy the definition of “Professional Services” in the policy. It considered that the term “Professional Services” meant financial planning being advice on approved investment products only. The court further concluded, based on expert and other evidence in the case, that to be “approved”, the investment products had to be on the Approved Product List adopted by the Salisbury Group at the time when the professional service was provided. It was not established that the investment products advised by Mr Todd to the plaintiffs were on the Approved Product List at the time of the advice and, therefore, Mr Todd’s advice was not “Professional Services” as defined by the policy.

**THE DECISION**
The court held that the insuring clause did not cover Mr Todd’s investment advice as it did not satisfy the definition of “Professional Services” in the policy. It considered that the term “Professional Services” meant financial planning being advice on approved investment products only. The court further concluded, based on expert and other evidence in the case, that to be “approved”, the investment products had to be on the Approved Product List adopted by the Salisbury Group at the time when the professional service was provided. It was not established that the investment products advised by Mr Todd to the plaintiffs were on the Approved Product List at the time of the advice and, therefore, Mr Todd’s advice was not “Professional Services” as defined by the policy.

**CONTINUED ON NEXT PAGE**
Given the court’s conclusion that the policy did not apply to Mr Todd’s advice, it did not have to consider the question of policy exclusions. Nevertheless, the court observed by way of obiter that the dealing Exclusion did not apply in this case because although the court accepted that Mr Todd had a personal financial interest in advising the plaintiffs to invest into one of the investment products, that was insufficient to be characterised as selling as “principal for his own account”.

In relation to the Investment Performance Exclusion, the court was not satisfied on the evidence before it that Mr Todd had made any unconditional statement in relation to the performance of the recommended investment products. Further, it was not established that the plaintiffs were unaware of a level of risk in relation to the investment.

However, the Unapproved Product Exclusion did apply, as the investment products were not on the Approved Product List.

Although it was not necessary to determine whether s54 ICA operated to prevent the insurer from refusing to pay the claim, the court nevertheless considered the matter since the point was argued. The court held that s54 ICA did not operate to prevent the insurer from refusing to pay the claim. The court noted that an agreement to vary a contract of insurance did not fall within the words “... by reason of some act of the insured... that occurred after the contract was entered into” in s54 ICA. The court accepted the insurer’s submission that s54 did not capture bilateral or multilateral agreements with the insurer.
The applicant (O’Farrell) obtained a comprehensive motor vehicle insurance policy from the respondent, Allianz. The motor vehicle was subsequently stolen, and O’Farrell made a claim under the policy. Allianz rejected the claim and sought cancellation of the policy on the basis that while O’Farrell had disclosed previous driving offences, he failed to disclose two convictions for offences arising out of brawls.

O’Farrell brought proceedings against Allianz in the Consumer, Trader and Tenancy Tribunal (Tribunal) and was successful in obtaining an order for payment of the value of his vehicle to the sum of $20,000.

The Tribunal found that there was no satisfactory evidence that Allianz had properly advised O’Farrell of the nature and effect of his duty of disclosure in accordance with the ICA. Accordingly, Allianz could not rely on O’Farrell’s non-disclosure of criminal convictions in seeking to deny payment of his claim.

Allianz appealed this decision to the District Court.

The issue for the court was whether the Tribunal applied the correct test in section 22 ICA by considering the expression “properly advised” as opposed to “clearly inform”.

The court found that the proper test was not applied and that use of the words “properly advised” was a misstatement of the relevant test. The court therefore held that the Tribunal had committed an error of law in failing to use the precise words of the legislation.

O’Farrell then sought review of this decision by the New South Wales Court of Appeal.

The Court of Appeal concluded that there was no difference in meaning in the language used by the Tribunal and it did not depart from the meaning of section 22 ICA. Accordingly, Allianz had not complied with section 22 ICA and was not entitled to exercise any rights with respect to O’Farrell’s failure to comply with the duty of disclosure.

The Court of Appeal set aside the judgment of the District Court, and reinstated the decision of the Tribunal. Allianz was ordered to pay O’Farrell’s costs for the District Court and Court of Appeal proceedings.

In Issue:
- Insurer’s duty to inform an insured of their duty of disclosure

Delivered On:
13 March 2015

THE DECISION ON APPEAL

The Court of Appeal concluded that there was no difference in meaning in the language used by the Tribunal and it did not depart from the meaning of section 22 ICA. Accordingly, Allianz had not complied with section 22 ICA and was not entitled to exercise any rights with respect to O’Farrell’s failure to comply with the duty of disclosure.

The Court of Appeal set aside the judgment of the District Court, and reinstated the decision of the Tribunal. Allianz was ordered to pay O’Farrell’s costs for the District Court and Court of Appeal proceedings.
INSURANCE ISSUES

INGLIS v SWEENEY
[2015] WADC 34

In Issue:
• Whether third parties to a claim were entitled to indemnity pursuant to a home insurance policy for a personal injury claim brought by a resident of the home which was the subject of the policy

Delivered On:
1 April 2015

The plaintiff was injured in 2004 when she was aged 10 during a game which involved her being towed behind a ride-on lawnmower driven by the first defendant, who was 11 years old at the time. The plaintiff also made a claim against the first defendant’s parents, as the second and third defendants.

The defendants issued third party proceedings against the plaintiff’s father and brother (the third parties) who were present at the time of the incident. The plaintiff was aged 10 at the time. The defendant also made a claim against the first defendant’s parents, as the second and third defendants.

Proceedings were brought to determine the liability of the fourth party before a trial commenced.

THE DECISION
The relevant policy contained an exclusion which excluded “injury to any person who normally lives with you or damage to their property”.

The third parties firstly submitted that the definition of “you” and “your” was set out in the policy schedule to include persons who lived permanently at the home as a member of the named insured’s family. They submitted that the plaintiff therefore fell within the definition of “you” and that the exclusion clause should be narrowly construed and due to ambiguity, applied in their favour.

However, the third parties submitted that the exclusion clause should not apply by operation of s54(1) ICA, as the act of living with someone is not an act that could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover was provided.

Therefore s54(1) ICA applied in respect of the claim for indemnity and/or contribution from the fourth party and the fourth party was not entitled to rely on the exclusion to decline indemnity.

AMANDA CANN
Senior Associate
Amanda.Cann@bnlaw.com.au

In Issue:
• Whether third parties to a claim were entitled to indemnity pursuant to a home insurance policy for a personal injury claim brought by a resident of the home which was the subject of the policy

Delivered On:
1 April 2015

The plaintiff was injured in 2004 when she was aged 10 during a game which involved her being towed behind a ride-on lawnmower driven by the first defendant, who was 11 years old at the time. The plaintiff also made a claim against the first defendant’s parents, as the second and third defendants.

The defendants issued third party proceedings against the plaintiff’s father and brother (the third parties) who were present at the time of the incident. The plaintiff was aged 10 at the time. The defendant also made a claim against the first defendant’s parents, as the second and third defendants.

Proceedings were brought to determine the liability of the fourth party before a trial commenced.

THE DECISION
The relevant policy contained an exclusion which excluded “injury to any person who normally lives with you or damage to their property”.

The third parties firstly submitted that the definition of “you” and “your” was set out in the policy schedule to include persons who lived permanently at the home as a member of the named insured’s family. They submitted that the plaintiff therefore fell within the definition of “you” and that the exclusion clause should be narrowly construed and due to ambiguity, applied in their favour.

The court held that the words of the exclusion clause, given their ordinary natural meaning in the context of the claim, made it clear that there was no need to resort to a narrow interpretation of the exclusion clause nor was there any ambiguity and the exclusion clause was triggered.

However, the third parties submitted that the exclusion clause should not apply by operation of s54(1) ICA, as the act of living with someone is not an act that could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover was provided. The fourth party submitted that s54(1) ICA did not apply as the act of the plaintiff living with the third parties was a pre-existing state of affairs.

The court held that the rationale behind the insertion of the exclusion clause was to prevent collusive claims by members of the insured’s family and household who are under the same roof as the insured.

In applying the tests set out in FAI General Insurance Company Limited v Australian Hospital Care Pty Ltd [2001] HCA 38, the court concluded that:

(a) The act, for the purpose of s54 ICA, was that at the time of the accident, which was a date during the policy of insurance, the plaintiff was normally living with the insured;

(b) The fact that the plaintiff was normally living with the insured could not reasonably be regarded as being capable of causing or contributing to the loss in respect of which insurance cover was provided; and

(c) The act of the insured, in having the plaintiff normally live with them on the date of the accident, was not a restriction or limitation inherent on the actual claim by reference to the type of kind of insurance.

Therefore s54(1) ICA applied in respect of the claim for indemnity and/or contribution from the fourth party and the fourth party was not entitled to rely on the exclusion to decline indemnity.

AMANDA CANN
Senior Associate
Amanda.Cann@bnlaw.com.au
In Issue:

- The cause of the boom’s collapse
- Whether the loss fell within the insuring clause (whether the damage was accidental, sudden and unforeseen)
- Whether the claim was saved by the Accidental Overload additional benefit
- Whether the defendant insurer breached its duty of utmost good faith

Delivered On:
15 April 2015

THE FACTS

On 1 February 2009, the plaintiff’s Liebherr 100T Telescopic Crawler Crane (the crane) suffered damage when its boom collapsed whilst engaged in lifting concrete panels at a building site in Darra, Brisbane. The plaintiff held a Contractors, Plant & Machinery policy of insurance (the policy) with the defendant and submitted a claim for the loss of the crane. The defendant refused to pay the claim on the basis that the damage was not ‘accidental, sudden and unforeseen’ within the meaning of ‘insured damage’ in the policy and it was excluded by virtue of various exclusions in the policy.

The plaintiff thereafter commenced proceedings against the defendant. The plaintiff obtained expert engineering evidence which concluded that the boom collapsed due to pre-existing structural damage in the welds at the base of the boom. The defendant’s expert evidence was that the crane was being operated in circumstances of structural overload – in particular that at the time of the boom’s collapse, the crane was on a slope with a gradient of 7 degrees. The defendant submitted that this was also consistent with contemporaneous photographic and eye-witness evidence that immediately after the collapse the crane was atop a concrete rubble ‘ramp’ (namely not on level, even ground).

“The court noted that such a finding was consistent with photographic evidence and it was also the ‘most logical’ explanation.

Having regard to its findings as to the cause of the collapse, the court was then required to determine whether the loss fell within the insuring clause in the policy. The relevant section, namely Material Damage cover, defined insured damage as ‘accidental, sudden and unforeseen’. Accidental was not defined in the policy and the court had regard to a number of decisions which considered the term. Ultimately the court concluded that it should be taken to mean unintended and unexpected, and therefore the test in this instance was whether the damage was unintended and unexpected (accidental), sudden and unforeseen.
The court concluded that the plaintiff failed to establish that the damage was accidental because the crane operator fully appreciated the crane had to be operated on level ground (and that if it was not, there was a real risk of the boom collapsing) and that by continuing to crawl the crane up the concrete rubble ramp the operator displayed ‘recklessness, a gamble or a deliberate courting of the risk’.

The plaintiff’s submission that the claim was saved by the Accidental Overload additional benefit was similarly dismissed. In particular, the plaintiff sought to argue that the word ‘overload’ extended to a situation where the crane was being operated on a slope. The court however, concluded that ‘overload’ contemplated scenarios where the overloading of the crane was physical (ie carrying excess weight) but it was otherwise being operated in a manner for which it was designed (ie in accordance with manufacturer’s guidelines).

For completeness the court also gave consideration to the relevant exclusions in the policy. The court concluded that even in the event that it was wrong as to the application of the insuring clause / accidental overload additional benefit then coverage would still be excluded because the crane was being operated in contravention of several express exclusions in the policy. In particular at the time of the collapse the crane was being used in a manner other than for which it was designed; was not used in compliance with the relevant standards; and was being operated contrary to manufacturer’s guidelines.

An argument was also advanced by the plaintiff that the defendant had breached the policy terms and its duty of utmost good faith by not accepting the plaintiff’s account of events and also by refusing to pay the claim. It further argued that the duty of utmost good faith gave rise to a statutory cause of action based on s13(2) of the ICA. The court rejected that argument noting that the decision to decline indemnity was made after careful consideration of the available evidence, including lay evidence. The court further noted that whilst 2013 amendments to the ICA provided for regulatory sanctions (in the event of a breach by an insurer) they did not create a statutory duty capable of giving rise to a separate entitlement to damages.

The plaintiff has appealed the decision.
In Issue:

- Whether insurers breached duties of good faith and fair dealing by selectively relying upon evidence to deny indemnity
- Whether the plaintiff met the definition of TPD under the relevant policies

Delivered On:
24 April 2015

THE FACTS

The plaintiff was a beneficiary of policies of life insurance held by the trustee of his superannuation fund, FSS Trustee Corporation (the first defendant), which provided cover for Total and Permanent Disablement (TPD). The second and third defendants were the life insurers, MetLife Insurance Ltd (MetLife) and TAL Life Ltd (TAL).

The plaintiff sustained an elbow injury, and also an anxiety and adjustment disorder, which arose from his employment as a police officer and claimed that he met the definition of TPD under the policies. To meet the definition of TPD under the policies, however, the plaintiff was required to prove that he was “incapacitated to such an extent as to render him unlikely to ever engage in or work for reward in any occupation or work for which he is reasonably qualified by reason of education, training or experience” at the relevant times of assessment (defined in the policies as being 3 and 6 months after the plaintiff ceased his employment).

Both MetLife and TAL denied indemnity on the basis that the plaintiff did not meet the definition of TPD.

MetLife, on the one hand, drew a conclusion from a vocational assessment report that further employment options were available to the plaintiff by reason of his education, training or experience notwithstanding that the substance of the report did not support this conclusion. TAL, on the other hand, had deemed all medical evidence dated after the time of assessment as irrelevant to its determination notwithstanding that later reports supported the severity of the plaintiff’s condition at the time of assessment.

The plaintiff sought, among other things, a declaration that he met the definition of TPD under the relevant policies. Neither MetLife nor TAL had adduced evidence which properly countered the plaintiff’s assertion that he was unlikely ever to engage in work for which he was reasonably qualified by reason of education, training or experience. The court therefore determined that the plaintiff met the definition of TPD and ordered that the TPD entitlements be paid to him.

THE DECISION

The court was highly critical of MetLife drawing conclusions that could not be properly substantiated by the evidence and equally as critical of TAL in selectively relying upon only the parts of the evidence in its favour. Accordingly, the court found that both MetLife and TAL breached their duties of good faith and fair dealing in declining the claim in circumstances where the evidence was mostly in favour of the plaintiff.

The court held that procedural fairness required insurers to not only identify the documents they were intending to use in arriving at their decisions but also notify the plaintiff of any matter that they considered adverse to him or needed clarification (which both MetLife and TAL failed to do).

The question as to whether the plaintiff met the definition of TPD was therefore open for determination by the court.
On 1 July 2008, in the course of his employment with Kellara Transport Pty Ltd (Kellara), Mr Hammersley was driving along the East Tamar Highway, Tasmania. He was driving a prime mover that was towing a Caterpillar excavator on a trailer. Other items were also being transported on the trailer and the excavator’s boom had been elevated to accommodate the additional load. Mr Hammersley ultimately collided with a railway overpass as the boom was too high to enable him to pass underneath. The overpass was damaged as a result.

The State of Tasmania (the State) was the owner of the overpass. It sued Mr Hammersley and Kellara for damages in negligence. Mr Hammersley and Kellara commenced third party proceedings seeking to be indemnified by National Transport Insurance, their insurer. National Transport Insurance relied on three exclusion clauses in its policy and declined cover.

THE DECISION AT TRIAL
The trial judge gave judgment for the State against Mr Hammersley and Kellara but dismissed the third party proceedings on the basis that the insured vehicle was conveying an excess load at the time of the incident which triggered the excess load exclusion. Although Mr Hammersley and Kellara had both admitted that the trailer was overloaded the trial judge nevertheless did not accept that the overloading was accidental such that it would fall under the extension clause extending cover for “accidental overloading”. In coming to that conclusion, the trial judge noted Mr Hammersley’s extensive experience as a truck driver and with these types of loads.

THE ISSUES ON APPEAL
The Full Court had to consider whether the trial judge erred by not characterising the overloading as accidental.

THE DECISION ON APPEAL
The appeal was allowed. Mr Hammersley and Kellara submitted that, on a proper interpretation of the extension clause, the overloading was accidental unless it was something Mr Hammersley intended, foresaw, looked for, expected, or brought about by design. The Full Court unanimously accepted that submission holding that a finding as to Mr Hammersley’s state of mind was necessary in order to determine whether the overloading was accidental.
The Full Court held Mr Hammersley did not advert to the height of the load and therefore the overloading was neither intended nor foreseen – the overloading was therefore accidental within the meaning of the policy, such that the excess loading exclusion was not triggered.

The Full Court then examined the application of two further exclusion clauses relied upon by NTI. The Full Court held that a clause excluding coverage for loss caused by a vehicle being driven whilst in an unsafe or unroadworthy condition was directed to matters such as the ability of the driver to safely control the vehicle. The Full Court held that because the handling of the vehicle was not affected by the height of its load, it was not being used in an unsafe or unroadworthy condition and the exclusion was not triggered.

The Full Court then examined a clause pertaining to reckless non-compliance with regulations and held that recklessness ordinarily involves both a recognition that a danger exists and indifference as to whether or not it is averted. The Full Court held that Mr Hammersley was “appallingly inadvertent” but that there was no basis for concluding that he foresaw or was recklessly indifferent to the possibility of a collision with the overpass or any breach of relevant regulations.
INSURANCE ISSUES

SELIG v WEALTHSURE PTY LTD
[2015] HCA 18

In Issue:
• Whether liability should be apportioned under Div 2A of the Corporations Act 2001 (Cth)
• Whether an insurer, acting in its own interests in bringing an appeal, should be the subject of an adverse costs order

Delivered On:
13 May 2015

THE FACTS
The appellants invested in a Ponzi scheme on the advice of the second respondent. The first respondent was a holder of an Australian Financial Services licence. The appellants lost their investment and suffered consequential losses as a result of the Ponzi scheme.

THE DECISION AT TRIAL
The appellants brought proceedings in the Federal Court against the first and second respondents and were successful. The first and second respondents claimed that they were entitled to declarations as to the extent of their liabilities to the appellants, having regard to the comparative responsibility of other involved parties. These parties had been joined to the proceedings but no judgment was entered against them on account of liquidation and bankruptcy.

The appellants’ claim against the respondents had been based upon contraventions of a number of provisions of the CA. The respondents relied on the provisions of Div 2A of Part 7.10 CA to argue that the claims against each of them should be limited to a portion of the appellants’ loss and damage. However, the trial judge held that Div 2A applies only where there has been a contravention of Section 1041H and had no application.

The respondents appealed to the Full Court of the Federal Court and by a majority, the Full Court allowed the appeal and held that the claim was apportionable. The appellants then appealed to the High Court.

CONTINUED ON NEXT PAGE
THE DECISION OF THE HIGH COURT

The High Court held that the proportionate liability provisions in Div 2A CA only apply to claims of misleading or deceptive conduct, based on a contravention of Section 1041H and unanimously allowed the appeal. They came to their finding by applying the established rules of construction to the word “claim” where it appeared in s1041L(1) which outlines the type of claims for which Div 2A applies.

The appellants sought an order that the professional indemnity insurer of the first respondent, a non-party to the proceedings, pay the cost of the appeal and the cost of the appeal in the Federal Court on the basis that the insurer had the conduct of the defence and made the decision to appeal the judgment of the trial judge. At a time shortly after the Notice of Appeal was filed, the second respondent was declared bankrupt and the first respondent’s ability to meet the judgment sum and costs was uncertain.

The relevant professional indemnity policy provided cover to a maximum of $3,000,000 on any one claim, inclusive of costs and expenses. At the time the insurer filed the appeal to the Full Court, it had incurred legal costs and expenses in the order of $1,350,000. The High Court held that it was reasonable to assume that a considerable portion of the sum representing the balance of the insurer’s liability under the policy had now been spent and from the appellants’ perspective, there was likely to be a significant shortfall in the amount they were able to recover from the respondents.

The High Court held that at the time of the insurer’s decision to appeal the judgment of the trial judge, the first and second respondents did not continue to have an interest in the outcome of the litigation given bankruptcy and liquidation.

“The respondents appealed to the Full Court of the Federal Court and by a majority, the Full Court allowed the appeal and held that the claim was apportionable.”

The insurer acted solely for itself in seeking to better its position and took a chance in doing so. Therefore, the insurer should not be regarded as immune from the risk of an adverse order as to costs. It was obvious to the insurer incurring further legal costs would reduce the amount available to meet any order for costs in the appellants’ favour and any order that might be made on future appeals. Therefore the High Court ordered that the insurer ought to pay the appellants’ cost of the appeal to not only the High Court, but also the appeal to the Full Court.

AMANDA CANN
Senior Associate
Amanda.Cann@bnlaw.com.au

BACK TO CONTENTS  BACK TO SECTION  LINK TO CASE
In Issue:
• Whether insurer of a deregistered company should be joined as a party to a personal injury claim.

Delivered On:
5 June 2015

THE FACTS
Mr Nicholas suffered significant leg injuries on 9 June 2008 while employed by a labour hire firm, Astute Hire Pty Ltd (Astute). He pursued a claim for damages for personal injuries against his employer. Astute sought to join another subcontractor working on the project, On Track Pty Ltd (On Track). On Track was alleged to have been engaged to undertake materials handling work involving the removal of building materials from the site and was said to have provided the machine and an operator to perform that work.

On Track had however in the preceding period been deregistered. Astute applied to join On Track’s insurer QBE Insurance (Australia) Limited (QBE) to the action pursuant to s601AG CA.

s601AG CA provides that a person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:

(a) The company has a liability to the person; and
(b) The insurance contract covered that liability immediately before deregistration.

QBE opposed the application on the basis that firstly there was no liability established in respect of On Track, and secondly, that the insurance contract issued by QBE to On Track did not in any case cover such a liability.

THE DECISION
Both parties relied upon affidavits and documentary material in relation to the application. Having considered this material, the court concluded that there was evidence that supported an arguable case against On Track. The court was satisfied that liability was established to the standard required by s601AG CA.

QBE argued that the wording of the endorsements on the policy indicated that the policy was limited to occupier’s liability, and that this case did not fall within that category.

The court rejected that argument and held that while the precise scope and meaning of the endorsement was not entirely clear, it did not operate to effectively convert the policy to an occupier’s liability policy only. The court noted that for the purposes of the application to join an insurer it is sufficient for the applicant to demonstrate a prima facie case that the deregistered company held the relevant insurance. The court was satisfied that the applicant had satisfied this requirement in this case, and ordered that Astute be given leave to file and serve its amended cross claim (thereby joining QBE to the proceedings).
INSURANCE ISSUES

LAMBERT LEASING INC. v QBE INSURANCE LTD
[2015] NSWSC 750

In Issue:
- The effect of s45 of the ICA on an “other insurance” clause
- Dual insurance
- The duty of utmost good faith

Delivered On:
12 June 2015

THE FACTS
On 7 May 2005 a Transair flight crashed killing 13 passengers and the 2 pilots. In 2007 the relatives of the passengers issued proceedings in Illinois, which were dismissed for jurisdictional reasons. Fresh proceedings were commenced in 2008 in Missouri against the chief pilot of Transair, the lessor (described as the Partnership) and the entity that had sold the plane to the Partnership in 2003 (Lambert).

The purchase agreement for the aircraft required the Partnership to effect insurance naming Lambert as an additional insured. Lessbrook Pty Ltd (who traded as Transair) obtained insurance with QBE that named Lambert as an “additional insured”. Lambert was also insured by Global Aerospace Underwriting Managers Limited (Global) through cover arranged by its parent company.

On commencement of the Illinois proceedings Lambert made a claim on the Global policy. Global funded the defence of those and the Missouri proceedings.

Global and Lambert then entered into a deed in 2010 (unbeknownst to QBE) agreeing that the Global policy provided excess cover, the QBE policy provided primary cover and that payments made by Global were on a loan basis, provided that QBE indemnified Lambert.

Lambert sought indemnity from QBE in relation to the costs of defending the Illinois and Missouri proceedings and any liability it was found to have to the relatives. QBE declined indemnity and Lambert commenced proceedings against it in the NSW Supreme Court.

THE DECISION
The court was required to determine several issues, including, inter alia, the impact of the ICA on the QBE policy, whether there was dual insurance, the extent of cover of the QBE policy and the duty of utmost good faith.
“Lambert sought indemnity from QBE in relation to the costs of defending the Illinois and Missouri proceedings and any liability it was found to have to the relatives.”

Clause 9 of the QBE policy related to ‘other insurance’ and purported to exclude cover where other insurance existed. Lambert argued that clause 9 was rendered void by virtue of s45 ICA. QBE argued that it did not offend s45 as Lambert was not a party to the insurance contract written by it.

The court relied on the decision in Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pty Ltd [2009] HCA 50 to conclude that Lambert was not a party to the contract with QBE. Accordingly, clause 9 was not voided by s45 ICA.

QBE argued that there was dual insurance. Lambert disagreed but argued if there was it was entitled to elect which policy it claimed under. The court analysed the cover available under each of the policies and found that there was dual insurance, save for aggravated damages, and noted that diligence and compliance preconditions had not yet been established.

Both QBE and Lambert raised good faith issues. Lambert argued that QBE had breached its duty by, among other things, failing to indemnify it in circumstances where other insureds had been indemnified (arising out of the same incident). QBE argued that Lambert had breached its duty by entering into the deed with Global and by failing to inform it of the deed.

The court found that QBE had not breached its obligation of good faith. It found it unnecessary to make a finding on whether Lambert had breached its duty, but noted that there was force in QBE’s contentions.

In considering issues of good faith, the court observed that the proceedings had been commenced to benefit Global rather than Lambert, and that they were effectively subrogation proceedings. The court noted that if Global had any remedies, the appropriate method of enforcing them was by seeking contribution, not through subrogation.

In terms of indemnity, the court concluded that it was premature to determine indemnity under QBE’s policy as Lambert had not provided it with sufficient disclosure. The court held that Lambert could not recover from QBE the costs of the Illinois and Missouri proceedings paid to date, on the basis that it had already been indemnified for those costs, by Global.
INSURANCE ISSUES

HITCHENS v ZURICH AUSTRALIA LTD
[2015] NSWSC 825

In Issue:
- Whether insured’s proposal form was knowingly false
- Whether insured’s answers in proposal in breach of duty of disclosure
- Whether insurer waived compliance with duty of disclosure

Delivered On:
30 June 2015

THE FACTS
In December 2004, the plaintiff, Mr Hitchens, and the first defendant, Zurich Australia Ltd (Zurich) entered into two life insurance policies – an Income Replacement Insurance Plus (IRIP) policy and a second policy, with his then partner, the second defendant (against whom no relief was claimed and who played no part in the proceedings), called a Term Life Insurance Plus (TLIP) policy, which covered both of them in the event of Total or Permanent Disablement.

On 9 September 2007, Mr Hitchens severed the second, third and fourth fingers of his right hand and a small section of his right thumb while using a power saw at home. The three fingers were later surgically amputated to varying degrees. Mr Hitchens claimed that he was totally and permanently disabled as a result of the injuries and the psychological problems caused by them. He claimed under both policies. He later terminated the IRIP policy following Zurich’s repudiation of it by reducing and then ceasing payments under it.

In August 2010, Zurich purportedly avoided both policies on the grounds of misrepresentation and non disclosure of treatment Mr Hitchens received for cancer, lymphedema, cellullitis and stress and depression and pain following a motor vehicle accident when he was deliberately run over by a work colleague. Mr Hitchens claimed that any non disclosure was not fraudulent and that in any event Zurich was on notice of the prior illnesses and injury and the treatment he was receiving in respect of them.

THE DECISION
After examining the evidence, the court found that Mr Hitchens made misrepresentations to Zurich and failed to comply with his duty of disclosure in numerous respects: his statement in answer to question 2 of the proposal form that the reason for his visits to numerous medical centres for the previous two years was for stitches and antibiotics was substantially false, in that although obtaining antibiotics and stitches was a reason, the principal reason for his attending medical centres in that period was to obtain strong pain relief for lymphedema and cellullitis. In addition, his statement that he suffered mild lymphedema of the leg and from the odd lymphedema misrepresented the extent of his condition and concealed the extent of pain relief he was receiving.

Further, his statement that he had not ever had depression, stress, anxiety, behavioural disorder or other mental or nervous condition was false; his statement in answer to question 33 on the proposal form that he did not believe that he might need to seek advice or treatment from a doctor for any current health problems, was also false, but because he was not cross-examined on that answer the court could not conclude it was knowingly false. Finally, Mr Hitchens’ failure to disclose his ongoing consumption of Endone and Tramal and the fact that he had been, and was, in the habit of obtaining prescriptions for those drugs from different doctors without advising one that he was getting a prescription for the drugs from another, was a breach of his duty of disclosure under s21(1) ICA.

The court then had to determine whether Zurich had waived Mr Hitchens from complying with the duty of disclosure. The court observed that the question of what is meant by waiver of an insured’s duty of disclosure and when such waiver is to be imputed to an insurer is unclear. Mr Hitchens argued for a broad interpretation such as that propounded in Jagger...
v QBE Insurance International Limited [2006] NZCA 258. However, the court rejected that argument and held that it was bound to find that ‘waiver’ in s21(2)(d) ICA takes its meaning from how the concept has been applied in insurance law, which requires that before a question of waiver arises, there must be a fair presentation of risk to the insurer. In this case, there was no fair presentation of risk because of the lack of information in the proposal about the extent of the plaintiff’s attendances on medical centres and doctors. The matters not disclosed were unusual. Zurich was not put on notice that there were material matters relevant to its decision whether or not to accept the risk relating to Mr Hitchens’ use of pain medication. Accordingly, there was no waiver of the duty to disclose.

In case it was wrong on that point, the court nevertheless considered whether the doctrine of waiver had the expansive operation argued by Mr Hitchens, it would have operated to relieve Mr Hitchens from disclosure of the extent of his condition. The court held it did not because it was unlikely that any further enquiries made (because of the disclosure of matters that indicated the existence of possible further material facts) would have led to the discovery of the full extent of Mr Hitchens’ condition and treatment and particularly his doctor shopping for prescription pain medication. The court held that on any view of the width of the doctrine of waiver, an underwriter is not a detective. There was no waiver of the duty of disclosure by Zurich.

The court then had to consider whether any of the misrepresentations by Mr Hitchens were made fraudulently and whether his failure to disclose his consumption of strong opioid analgesics and doctor shopping amounted to fraudulent concealment. Although the court accepted that Mr Hitchens disclosed every important matter relating to his health, and that he knew and understood that Zurich would probably make further enquiries, his failure to name any doctors or medical centres on the proposal, combined with his anodyne description of his medical history amounted to fraudulent misrepresentations. In addition, his statement in the proposal form that he did not suffer form depression (allegedly because he was never aware he had been formally diagnosed with it) was also held to be knowingly false given that his frequent attendances on a psychologist and his claim for damages in respect of the motor vehicle accident.

The court held that Mr Hitchens’ failure to satisfy his duty of disclosure was deliberate and that he knew the answers he gave were false and misleading.

Zurich was therefore entitled to avoid the policies on the grounds of fraudulent misrepresentation and fraudulent non disclosure.
Meet our Sydney team of insurance law specialists

SIMON BLACK
Partner
E: simon.black@bnlaw.com.au

Simon’s areas of expertise include professional indemnity, management liability, directors and officers, financial lines, and transportation liability.

Simon advises insured professionals on professional indemnity matters, including: property valuers, engineers, architects and builders, accountants and financial planners, Associations, health professionals and film and television production and distribution professionals.

He acts for insurers on construction and engineering matters, in respect of high value and complex contract works and industrial special risks claims. Simon also has experience advising insurers and insureds on high profile ACCC and ASIC investigations, inquiries and prosecutions as well as securities class actions.

NICHOLAS ANDREW
Partner
E: nicholas.andrew@bnlaw.com.au

Nicholas has 15 years experience in advising both Australian and London-based insurers across major lines of insurance including professional indemnity, public and products liability and property (third and first party). He has particular expertise in complex construction and engineering matters.

Nicholas also advises insurers on broader policy and coverage aspects across a range of industries and business classes.
DAMAGES
187  **GRAHAM v POWELL (NO. 4)**  
[2014] NSWSC 1319  
Determination of damages in a defamation claim.

189  **DOULIS v STATE OF VICTORIA**  
[2014] VSC 395  
Consideration of content of duty of care to avoid psychiatric injury to employee.

190  **GRAY v RICHARDS**  
[2014] HCA 40  
Whether damages for fund management expenses are recoverable.

191  **LEWIN v GOULD & ANOR**  
[2014] QDC 231  
Assessment of damages for cervical spine injury to 9 year old child including weight to be given to competing experts when one has relevant practical expertise and one does not.

192  **WINTERS v BISHOP & ANOR**  
[2014] QSC 312  
Assessment of damages for plaintiff pedestrian struck by vehicle causing a brain injury and personality changes.

194  **ALI v AUGUSTE & ANOR**  
[2014] QDC 272  
Quantum of damages, particularly economic loss, assessed in favour of a minor who sustained nervous shock after witnessing a fatal motor vehicle accident.

196  **CAMPTON v CENTENNIAL NEWSTAN PTY LTD (NO. 3)**  
[2015] NSWSC 410  
Whether an award of damages should be reduced due to carer payments received by the plaintiff's wife under the Social Security Act 1991 (Cth).

197  **INGRID MARGARET STEPHENSON v PARKES SHIRE COUNCIL; NATALEE STEPHENSON v PARKES SHIRE COUNCIL; JAY STEPHENSON v PARKES SHIRE COUNCIL; SOUTH WEST HELICOPTERS PTY LIMITED v ESSENTIAL ENERGY; PARKES SHIRE COUNCIL v SOUTH WEST HELICOPTERS PTY LIMITED (NO. 2)**  
[2015] NSWSC 719  
Damages for nervous shock and apportionment of liability following a helicopter crash which killed all on board.
GRAHAM v POWELL (No. 4)
[2014] NSWSC 1319

The proceedings arose out of a number of internet articles and an email published by the defendant. The publications related, broadly, to the affairs of the Palerang Council of which the plaintiff was a Councillor.

The court previously granted the plaintiff’s application to have the amended defence struck out. No further defence was filed and when the proceedings were next before the court, the defendant did not appear. On that date, the court gave judgment for the plaintiff against the defendant for damages to be assessed.

THE DECISION

In determining the amount of damages to be awarded, the court commented that it was required to ensure that there was an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded. The court noted that there were a total of nine publications in this case, comprising eight internet articles and one email correspondence. The court accepted that the imputations contained in the publications were very serious because they involved allegations of bribery, theft, corruption and dishonesty against a serving Councillor.

The court was satisfied that the defamatory publications caused substantial and lasting damage to the plaintiff’s reputation as a Councillor and also in his capacity as a company director.

The court held that the plaintiff was also entitled to an award of damages for “hurt to feelings”.

The court accepted without equivocation that the plaintiff had suffered intense hurt as a result of the savage content and the persistence and viciousness of the defendant’s publications.

The court was also persuaded that, unless restrained, the defendant would persist in his irrational allegations against the plaintiff notwithstanding the rejection of the allegations by ICAC, the NSW Police and a magistrate and notwithstanding the defendant’s failure to defend the defamation proceedings.

Accordingly, the court awarded $80,000 in damages and a permanent injunction restraining the defendant from publishing any of the matters complained of in the plaintiff’s claim.
DOULIS v STATE OF VICTORIA

[2014] VSC 395

In Issue:
• Whether psychiatric injury to employee was reasonably foreseeable
• Assessment of damages for psychiatric injury to teacher

Delivered On:
5 September 2014

THE FACTS
The plaintiff was employed as a teacher at Werribee Secondary College (the College) between 1998 and 2004. He taught a number of classes for special needs, difficult, and low-ability students. The plaintiff developed a psychological injury during the course of his employment with the College. He alleged that the College was aware of his deteriorating health and failed to take any steps to address this.

In September 2003, the plaintiff advised the College, both verbally and in writing, that he could not cope with all of his classes. He was given a short period of paid sick leave and returned to work later that month.

The College did not put in place any formal monitoring of the plaintiff, nor did the principal enquire about his condition once he returned to work. The plaintiff did not make further complaints and attempted to continue with his teaching.

The plaintiff ultimately commenced proceedings against the College claiming damages for a major depressive condition which he alleged was caused by exposure to highly stressful circumstances in his work environment of which the College was aware and failed to control.

THE DECISION
The court accepted the plaintiff's evidence that teaching these classes could be exceptionally difficult and stressful given the difficult attitudes and behaviour of the students. However, it was found that the initial complaints which the plaintiff had made to co-workers about his workload and the stress of teaching difficult students were not sufficient to bring to the College's attention the risk of psychiatric injury.

However, the court ruled that once the formal complaint was made in 2003 to the principal, the College was on notice that the plaintiff was at risk of developing a psychiatric injury. Despite this, the College did not take any action in response to the complaint and it was that failure to act which was negligent. The court held that a reasonable person would have removed or reduced the plaintiff's classes and monitored his condition when he returned to work. The court was therefore satisfied that the College breached its duty whilst the plaintiff was a teacher at the College by not taking those steps.

As a result of the College’s negligence the plaintiff developed a chronic severe major depressive condition. He was awarded $300,000 for pain and suffering and loss of enjoyment of life on the basis that there was a significant contrast between his former life in which the plaintiff was an active, bubbly person and his present life in which he was said to be a shell of his former self, with suicidal thoughts. The court held that the impact of the illness was significant as he was unable to participate in his family life and was in a state of permanent fatigue.

The plaintiff was awarded $446,433 for past economic loss following agreement between the parties regarding this head of damage.

The court assessed the plaintiff’s future economic loss on the assumption that he would have advanced to the level of leading teacher after 9 years. However, the plaintiff’s teaching career was by no means certain to proceed by way of steady progress because he had already suffered a depressive condition prior to 2003. There was also the possibility that he would obtain future employment. Because of the uncertainties concerning the plaintiff’s future and possibility that he would be unable to continue teaching regardless of the College’s breach of duty, the court adopted a discount for vicissitudes of 35% and awarded $550,000 for future economic loss.

VENESSA WERYNSKI
Solicitor
Venessa.Werynski@bnlaw.com.au
In Issue:

• Whether plaintiff entitled to recover costs associated with management of damages awarded for the purpose of managing funds under management and costs associated with managing predicted future income of managed fund

Delivered On:
15 October 2014

THE FACTS

In 2003, Rhiannon Gray (the plaintiff) sustained a traumatic brain injury in a motor vehicle accident. As a result of her injuries, she will require constant care and will remain incapable of managing her own affairs. Through her mother, she commenced proceedings against Mr Richards (the defendant) for negligence. Damages were agreed in the sum of $10 million (the initial sum). However, quantification of expenses associated with managing the damages remained in dispute.

THE DECISION AT TRIAL

The trial judge determined that damages provided for fund management purposes also require management, therefore an allowance should be made for management of those fees given that a plaintiff under incapacity will not have an ability to manage the additional funds. The trial judge also concluded that income earned as part of the managed fund would give rise to management fees because the capacity of the fund to earn income was critical to its adequacy.

THE DECISION ON APPEAL

The Court of Appeal reversed the decision of the trial judge, holding that an amount of damages for the cost of managing the fund management damages should not be awarded because the process of calculating fund management expenses involves speculation as to the performance of the fund. Further, allowing an award for the fund’s predicted future income would be contrary to the requirement in s127(1) Motor Accidents Compensation Act 1999 (MACA), because a discount rate is selected to take into account uncertainties and assumes a rate of return sufficient to provide the plaintiff with fair compensation.

THE ISSUES ON APPEAL

By special leave, the plaintiff appealed to the High Court for determination of whether damages for fund management expenses are recoverable.

THE HIGH COURT DECISION

The appeal was allowed in part. The High Court held that the calculation of the cost of managing the plaintiff’s damages was not a separate exercise from calculating the fund management expenses. The expenses are not incurred separately from the cost of fund management because they are an integral part of that cost. The High Court concluded that if the fund management expense component of the award reflects the actual market conditions, then it is a compensable expense. Therefore the plaintiff was entitled to recover the costs associated with managing the fund management damages.

The High Court agreed with the Court of Appeal in deciding that no allowance should be made for the cost of managing the predicted future income of the management fund because the discount rate prescribed in s127 MACA is a conceptual tool deployed for the purpose of arriving at a lump sum which reflects the present value of the anticipated loss, factoring in inflation, changes in wages and prices, and imposts on the income of the fund, including management of income. Accordingly, the plaintiff was not entitled to recover costs associated with managing future income of the management fund.
THE FACTS

The plaintiff, through her mother and litigation guardian, claimed damages for personal injuries arising from a motor vehicle collision which occurred on 26 March 2010. The plaintiff was a front seat, seat-belted passenger in the family’s Holden Commodore when it was struck from behind, whilst stationary, by the first defendant’s car. Only quantum was in dispute.

The plaintiff was born on 22 August 2000 and was 9 years old at the time of her injury.

The plaintiff alleged that she suffered a back injury, shoulder injuries, neck injury and headaches. There was no evidence to support any injuries other than the cervical spine injury. The defendants conceded that the plaintiff suffered a soft tissue injury to the cervical spine as a result of the subject motor vehicle accident. The duration of that injury, and the extent of any residual accident-related symptoms, was in dispute.

THE DECISION

The court preferred the evidence of Dr Simon Journeaux, orthopaedic surgeon, who gave evidence on behalf of the defendant. He opined that the plaintiff’s ongoing symptoms were not related to the subject accident.

The court noted that Dr Journeaux is an experienced orthopaedic surgeon who works with both adults and children.

Dr John Pentis, orthopaedic surgeon gave evidence on behalf of the plaintiff. The court held that he had based his opinion on a number of incorrect assumptions. Further, Dr Pentis had not practiced in orthopaedics since the early 1990’s and had no particular speciality in paediatric orthopaedics when he did practice.

The court awarded $1,000 for general damages based on an ISV of 1 and $1,470.60 (plus interest) for past special damages.

An application for leave to appeal this decision was recently refused by the Court of Appeal on the basis that there was a solid evidentiary basis for the trial judge’s preference of Dr Journeaux’s evidence over that of Dr Pentis.
WINTERS v BISHOP & ANOR
[2014] QSC 312

In Issue:
• Assessment of damages for brain injury following motor vehicle accident

Delivered On:
2 December 2014

THE FACTS
The plaintiff was walking across a pedestrian crossing on 31 October 2007 when she was struck by a motor vehicle. The incident occurred at the Brisbane Airport (BA), the plaintiff’s place of employment. The plaintiff suffered severe head injuries, orthopaedic injuries and a psychiatric injury leading to an alleged change in her personality and behaviour. Liability was admitted by the driver’s CTP insurer (Suncorp) and the trial determined the value of the plaintiff’s claim only.

THE DECISION
At the time of the incident, the plaintiff was working as a landside planning manager at BA. She had completed a Bachelor of Town Planning in 2003 and had worked in various roles prior to commencing work as an infrastructure planner at BA in May 2006. She was then promoted in mid 2007 to her pre-incident role, which required her to liaise with the Federal Government, undertake community consultation and coordinate with relevant departments of BA as well as external consultants. Many BA employees gave evidence about the plaintiff and her high level of work performance and personality. Evidence was also given by the plaintiff’s previous co-workers and supervisors.

Evidence was also led that the plaintiff was happily married at the time of the incident. The plaintiff met her husband at university whilst completing the same degree. Both described themselves as being happy and successful. The plaintiff asked for a divorce shortly after the incident and attributed many of her incapacities to her husband.

The plaintiff was 34 years old at the time of judgment. At trial, there was no dispute that the plaintiff had suffered a significant brain injury and spent a significant period in a brain injury rehabilitation unit where she experienced seizures and amnesia and demonstrated behavioural changes including aggression.
The changes continued after her hospital discharge. The plaintiff eventually returned to work on a graduated basis but felt she was never the same and ultimately resigned due to her incident related injuries. By the time of the trial, the plaintiff was working again but had spent time working in a hotel overseas and had taken a job that was less demanding than her pre-incident role. The major issue was whether the plaintiff’s personality change was as a result of the incident or an underlying personality trait not attributable to the incident.

The court accepted the diagnosis of Dr Troy (the plaintiff’s expert) and found, relying on the evidence of the plaintiff’s family, former co-workers and supervisors, that the plaintiff’s personality change was due to the brain injury suffered in the incident. After also attributing the plaintiff’s resignation to these symptoms, the court proceeded to assess economic loss with reference to the plaintiff’s husband’s earnings over the relevant period, on the basis that he was an appropriate comparator.

In relation to future economic loss, the plaintiff was awarded 20% of her current annual net salary until a retirement age of 70 after a 15% reduction for contingencies. The sum of $225,675 was therefore awarded for the plaintiff’s impairment to her residual earning capacity. She was also awarded $562,575 for loss of opportunity to pursue her intended career path to work as a project manager within the industry. Finally, the plaintiff was awarded $80,000 for the loss of opportunity to progress her career to the highest income bracket of her profession. This brought the plaintiff’s total future economic loss award to $832,250.

The plaintiff also received damages for general damages assessed pursuant to the CLA (Qld), past and future gratuitous care as well as past and future treatment and medication costs. The total amount of damages awarded was $1,335,870.26.
DAMAGES

ALI v AUGUSTE & ANOR
[2014] QDC 272

In Issue:
- Quantum of damages for a minor who witnessed a fatal motor vehicle accident

Delivered On:
3 December 2014

THE FACTS

The plaintiff, Ms Ali, suffered personal injuries following a motor vehicle accident in September 2011. The plaintiff, then 12 years old, was walking along a footpath with her cousin, who was of similar age, when the vehicle driven by the first defendant mounted the kerb and struck the plaintiff’s cousin, causing fatal injuries.

The plaintiff suffered psychiatric injuries as a result of witnessing the accident. Liability was admitted by the second defendant CTP insurer on the part of the first defendant driver and quantum only remained in issue.

THE DECISION

The main issue in contention was the extent of any allowance that should be made for future economic loss. General damages also were in issue (namely the appropriate ISV to be adopted under the CLA(Qld)), but a number of other heads of damage were agreed prior to trial.

The medical evidence of the clinical neuropsychologist was that the plaintiff suffered post-traumatic stress disorder, of a chronic to severe nature. The plaintiff was also diagnosed as suffering from possible Persistent Complex Bereavement Disorder (not yet recognised by DSM V). The plaintiff was assessed with a 7% PIRS impairment.

The court went into a detailed factual assessment of the plaintiff’s evidence, considering factors such as her feelings before and after the incident, her relationship with her cousin and her academic performance in school before and after the accident. Recognition was made of the plaintiff’s arrival in Australia from Iraq at age 8 and some initial schooling difficulties associated with her limited English skills at that time.

The plaintiff sought $200,000 for future economic loss. The court accepted that a global award should be made. In assessing economic loss, the court considered in great detail the plaintiff’s evidence regarding her past and future career aspirations, noting that she originally wanted to become a dentist when she left school but had since lowered her expectations due to her academic performance. The plaintiff’s evidence was that her studies are affected by poor concentration which only became apparent following the accident.

The court accepted that the plaintiff’s injury was likely to have a long term impact and there was a likelihood of her continuing to suffer from some degree of psychiatric impairment into the future, affecting both her academic and occupational career.

The court awarded $110,000 for future economic loss, assuming that the plaintiff will need time off work due to her susceptibility to relapse. The assumed period of time off work was 18 months. The court adopted average weekly earnings over this period. The court also included an allowance for lost opportunity of career progression and promotion, assessed at $60 net per week ongoing, discounted for contingencies.

General damages were assessed at $13,350 based on an ISV of 10. The plaintiff was also successful in obtaining awards for special damages, future treatment and trustee administration, management and investment fees, bringing the total judgment in favour of the plaintiff to $151,641.
Meet our Melbourne team of insurance law specialists

PETER EWIN
Partner
E: peter.ewin@bnlaw.com.au

Peter has over 30 years experience, specialising in insurance law. He has an indepth understanding of the insurance industry and has managed numerous successful class actions and is highly regarded as a litigator.

Peter has extensive experience in handling injury liability, compulsory third party, recovery, ISR and property liability claims. He has also worked on a broad range of public and product liability and medical negligence claims, and provides advice on policy interpretation. Another one of Peter’s areas of specialisation is in defending professional indemnity claims, particularly for construction and engineering clients.

Nieva has extensive litigation experience and a reputation as a highly capable and commercially astute lawyer. She has conducted successful litigations for national, multinational and international insurers.

Nieva’s experience also includes advising clients on commercial and insurance claims and coverage disputes, particularly those involving public and products liability, professional indemnity, occupational health and safety, and trade practices. Assisting clients with policy interpretation and drafting, claims assessment and statutory and compliance issues, is also part of Nieva’s area of specialisation.

HUBERT WAJSZEL
Partner
E: hubert.wajszel@bnlaw.com.au

Hubert is an experienced insurance law and commercial litigation specialist who handles contentious and non-contentious matters for local and overseas insurers and captives, regularly appearing in VCAT, the County, Supreme and Federal Courts, and local government inquiries.

Hubert specialises in professional indemnity insurance, with a particular focus on construction professionals, financial institutions and directors’ and officers’ liability. He acts for professionals regularly defending claims brought against, architects, engineers, building surveyors, accountants, mortgage brokers and introducers, directors and officers, conveyancers and real estate agents.

Hubert’s practice also extends to providing risk management advice, including undertaking reviews of contract documents and policy wordings.
CAMPTON v CENTENNIAL NEWSTAN PTY LTD (No. 3)  
[2015] NSWSC 410

THE FACTS
On 1 July 2010, Mr Campton was a passenger in a specialised underground mine transport vehicle driven by a fellow employee, both of whom were in the course of employment with the defendant at Awaba Colliery. The vehicle was travelling along a transport road within the mine when it struck a hole causing Mr Campton to bounce heavily.

Mr Campton suffered injury to his lumbar spine and underwent surgery on 13 September 2010 (the first operation) and 8 April 2013 (the second operation). He claimed that as a result of the injury and associated disability he was totally incapacitated for work.

Liability was admitted and the trial proceeded on quantum issues only.

THE DECISION
In the principal judgment, the court upheld the claim and entered judgment for the plaintiff in the sum of $1,190,976.56. The court directed the parties were to provide further submissions and address the court with respect to various outstanding issues regarding quantum.

The parties had agreed that the award of damages for past and future loss of superannuation was to be excluded from the schedule of damages as it formed part of the ‘economic loss’ assessment pursuant to the WCA (where Mr Campton’s damages for past and future loss of earnings had been calculated at the maximum rate allowable).

The defendant argued that the award of damages for past care and future domestic assistance ought to be reduced to account for payments Mr Campton’s wife had received pursuant to the Social Security Act 1991 (Cth) (the SSA) as his carer. The court held that a ‘carer payment’ under the SSA compensated ‘attention’ and ‘supervision’ provided by the carer to the care receiver. The court reduced the damages for past care to reflect the period in which Mrs Campton was in receipt of a carer’s payment.

The court also held that the relevant provisions of the SSA pertaining to the provision of domestic care and assistance are expressed as ‘care provided by a care provider to a care receiver’ and not as payments for domestic house cleaning, house maintenance or external gardening. The court therefore did not consider any offset in the award of damages was justified in that regard.

The matter was relisted for determination of any outstanding calculation issues, entry of judgment and costs.

“He claimed that as a result of the injury and associated disability he was totally incapacitated for work.”

NATHAN LAWLER  
Graduate  
Nathan.Lawler@bnlaw.com.au
THE FACTS

In 2006, a helicopter struck an overhead power line while performing an aerial survey for the purposes of determining the presence of noxious weeds. The helicopter was piloted by an employee of South West Helicopters (South West) who was engaged by the Council to conduct the survey. Also on board were two employees of the Council, Mr Stephenson and Mr Buerckner. All three were killed in the crash.

THE DECISION AT TRIAL – LIABILITY

In December 2014, the court held that the Council had breached its duty of care to its employees in failing to conduct a proper risk assessment and failing to impose, as a condition of the flight, a height threshold of 500ft. Such negligence was held to be a cause of the accident. It was similarly held that the Council had breached its duty of care to South West.

The court also held that South West breached its duty of care to its passengers through the acts of its chief pilot and pilot who failed to conduct a proper briefing and by flying at an inappropriate and unnecessary height and that that negligence was causative of the damage to the plaintiffs.
The court held that Essential Energy (EE) owed a duty of care to aircraft owners and all persons who could sustain damage as a consequence of a pilot flying low in the area. By not providing markers on the wires to enable them to be seen from a distance, it breached its duty of care and this was a cause of the accident.

THE DECISION AT TRIAL – PLAINTIFFS’ DAMAGES

Mrs Stephenson and her children, Jay and Natalee, all sought damages for nervous shock from the Council and South West. The court considered medical expert reports regarding the psychological effect of Mr Stephenson’s death on each of the plaintiffs as well as the impact of such on the plaintiffs’ past and future employment history and medical expenses. The court assessed damages for non-economic loss for Mrs Stephenson at 45% of a most extreme case ($257,500), Jay at 30% of a most extreme case ($131,500) and Natalee at 35% of a most extreme case ($200,000). Various awards were made for out of pocket expenses and past and future economic loss depending on the circumstances of each plaintiff.

Mrs Stephenson also made a claim under the Compensation to Relatives Act 1987 (“the Act”) on behalf of herself and her children. The court did not consider that Jay and Natalee were dependent upon their father at the time of his death for the purposes of the Act. A comparison was made of Mr and Mrs Stephenson’s earnings at the time of the accident and an award was made for $145,917 for past loss of dependency and $243,274 for future loss of dependency. No award was made for loss of services due to a lack of sufficient supporting evidence.

THE DECISION AT TRIAL – OTHER DAMAGES AND APPORTIONMENT OF LIABILITY

The Council brought claims against South West pursuant to s151Z of the WCA seeking indemnity for compensation payments made to its employees, Mr Stephenson and Mr Buerckner. Past caselaw on this issue was considered in detail with the court ultimately concluding that an employer has a right of indemnity under s151Z irrespective of whether it is a tortfeasor. The Council succeeded in both claims.

South West and Country Connection brought proceedings against EE for the total loss of the helicopter, costs expended to modify another helicopter, loss of profits and costs occasioned by the investigation into the accident and coronial inquest. The court held that only Country Connection (as owner of the helicopter) could claim for loss of the helicopter and South West could claim for loss of profits as operator of the helicopter. Any claim for costs associated with the investigation was held to be too remote to be awarded as part of the damages in the proceedings.

The court held that the claims brought by Country Connection and/or South West were apportionable claims within the meaning of Part 4 of the CLA (NSW) with the Council, South West, EE and Mr Thrupp (as pilot) all concurrent wrongdoers. As Mr Thrupp’s employer, South West was vicariously liable for his negligence.

On the issue of apportionment of liability, the court held that regardless of the Council’s negligence, it was entitled to rely upon the experience of South West who had ultimate control of the flight conditions. Further, the court held that whilst EE could have marked the wires to improve visibility, it was of less causal potency than the acts and omissions of the Council and South West. EE had no responsibility to conduct any risk assessment in respect of the flight and it had no control over the flight – as a result, the culpability of EE must have been substantially less than that of South West or the Council. Accordingly, the court apportioned liability as against South West at 70%, the Council at 20% and EE at 10%.
<table>
<thead>
<tr>
<th>Case Reference</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>T AND X COMPANY PTY LTD v CHIVAS</strong> [2014] NSWCA 235</td>
<td>Whether a taxi driver who fatally injured a pedestrian was negligent for failing to reduce his speed and whether 40% contributory negligence assessment was inadequate.</td>
</tr>
<tr>
<td><strong>NOMINAL DEFENDANT v AYACHE</strong> [2014] NSWCA 253</td>
<td>Entitlement to issue proceedings against Nominal Defendant pursuant to s34(1AA) of MACA.</td>
</tr>
<tr>
<td><strong>STAFFORD v CARRIGY-RYAN AND QBE INSURANCE (AUSTRALIA) LIMITED</strong> [2014] ACTCA 27</td>
<td>Assessment of contributory negligence where injured passenger aware of driver’s intoxication and whether passenger withdrew from enterprise.</td>
</tr>
<tr>
<td><strong>ALLEN v CHADWICK</strong> [2014] SASCFC 100</td>
<td>Whether an assessment of 25% contributory negligence for failure to wear a seatbelt was too high and whether damages should have been reduced because the plaintiff was travelling with an intoxicated driver.</td>
</tr>
<tr>
<td><strong>PALLIER v SOLOMONS (NO. 2)</strong> [2014] NSWSC 1524</td>
<td>Whether the plaintiff was contributory negligent for choosing to travel with the defendant driver where it was alleged the plaintiff knew or ought to have known that the defendant’s driving would be impaired by alcohol.</td>
</tr>
<tr>
<td><strong>BAYON v BAYON</strong> [2014] NSWCA 434</td>
<td>Whether MACA applies where plaintiff shot in head by friend operating rifle during night time spotlighting from back of vehicle.</td>
</tr>
<tr>
<td><strong>INSURANCE AUSTRALIA LIMITED T/AS NRMA INSURANCE v IULI &amp; ANOR</strong> [2014] ACTSC 336</td>
<td>Whether the driver of a motor vehicle is entitled to indemnity from his CTP insurer in respect of a later accident.</td>
</tr>
<tr>
<td><strong>KIGETZIS v ROCHE</strong> [2014] VSC 657</td>
<td>Liability of defendant motor vehicle driver for personal injuries sustained by plaintiff pedestrian.</td>
</tr>
<tr>
<td><strong>DAVIS v SWIFT</strong> [2014] NSWCA 458</td>
<td>Whether breach of duty of care by driver and whether contributory negligence by pedestrian.</td>
</tr>
<tr>
<td><strong>LEE v RACQ INSURANCE LIMITED</strong> [2015] QSC 120</td>
<td>Whether an insurer can change a without admission of liability decision to fund rehabilitation costs.</td>
</tr>
</tbody>
</table>
216  **Hornby v Opbroek & Anor**
[2015] QDC 101

A plaintiff who was injured by broken glass due to a beer bottle being thrown by the driver of another vehicle travelling in the opposite direction was not able to bring a CTP claim under the relevant legislation.

218  **Roads & Maritime Services v Grant**
[2015] NSWCA 138

Whether the appellant’s failure to install a “Keep Left” sign on a median strip was a breach of its duty to the respondent motor cyclist.

220  **King v Philcox**
[2015] HCA 19

A plaintiff’s entitlement to damages for psychological harm that was sustained after the plaintiff was informed that a motor vehicle accident scene he had witnessed had involved his brother and resulted in his brother’s death.

221  **Endeavour Energy v Precision Helicopters Pty Ltd**
[2015] NSWCA 169

Employer, operator of helicopter and owner of catenary wire liable for injuries and damage suffered in helicopter crash that occurred during aerial inspection of power lines.
THE FACTS
At 12.50pm on 6 October 2008, Mr Imad Khallad was driving a taxi owned by the appellant in a westerly direction down Market Street, Sydney. He had a green light permitting him to cross George Street. As he approached the intersection, two young men ran across Market Street, ignoring the red pedestrian light. They passed in front of the taxi. Mr Khallad did not slow down. As he crossed George Street, a third young man, Scott Chivas, ran onto Market Street and was fatally injured when hit by the taxi.

The mother of the deceased pedestrian did not witness the accident but later sued in the District Court for nervous shock.

THE DECISION AT TRIAL
The trial judge found the driver of the taxi was negligent and assessed the plaintiff’s damages at just under $800,000. He reduced the damages by 40% on account of the deceased’s contributory negligence.

THE ISSUES ON APPEAL
The appellant challenged the finding that its driver was negligent or that negligence caused the incident. In the alternative, the appellant argued that the assessment of contributory negligence should be increased to at least 75%.

THE DECISION ON APPEAL
The Court of Appeal rejected the challenges with respect to negligence and causation but allowed the appeal on contributory negligence and increased it to 75%.

“The appellant challenged the finding that its driver was negligent or that negligence caused the incident. In the alternative, the appellant argued that the assessment of contributory negligence should be increased to at least 75%.”
that a reasonable driver would reduce his speed so that he did not simply miss the second of the two young men crossing the road, but pass at a safe distance. In doing so, the driver would avoid the need to focus all attention on the man he could see on the road, to the exclusion of other possible risks.

The challenge to the trial judge’s finding on causation was based on the argument that even if the taxi had been travelling at 35kph or below, the collision would still have occurred. The Court of Appeal preferred the evidence of the respondent’s expert and rejected that argument and held that there was no application of hindsight reasoning as alleged.

The Court of Appeal noted the complex statutory scheme (s 5R CLA and s138 MACA) applicable to determining contributory negligence and the uncertain role of the common law in it. The Court of Appeal also referred to uncertainty in relation to whether the principles in determining negligence also apply in determining contributory negligence and the uncertainty in relation to the standard of care required of the injured person.

In this case, the deceased was affected by Asperger’s syndrome and this may have raised questions as to his ability to judge the behaviour of other road users and in turn, raised questions as to whether this was a factor in assessing contributory negligence. However, these issues were not raised at trial and it was therefore inappropriate they be explored on appeal.

The majority of the Court of Appeal noted the significant although subtle change of emphasis that the CLA placed on the capacity of a motor vehicle to cause far greater damage than a pedestrian. The majority observed that it was not appropriate to treat that factor as an independent consideration (as the trial judge apparently did) because it could lead to the conduct of a driver being judged against a higher standard than that of a pedestrian. The weighty factor in assessing relative responsibility for the accident was the unpredictable step taken by the deceased in crossing the road against a red pedestrian light and in the face of oncoming traffic. This required a far higher level of contributory negligence than that assessed by the trial judge. Contributory negligence was assessed at 75%.

Beazley P, dissenting on this issue only, held that both the deceased and the driver were careless but the likely seriousness of harm of the driver’s conduct was such that he should bear a higher proportion of the blame for the accident.
THE FACTS
On 25 April 2012, the respondent sustained personal injuries when he fell from his motorcycle whilst riding along Reservoir Road, Mount Pritchard, New South Wales. He issued proceedings against the appellant pursuant to s34(1) MACA on the basis that a “white Holden utility motor vehicle” failed to give way, which caused him (the respondent) to take evasive action and fall.

Pursuant to s34(1)(AA) MACA, a claim cannot be made against the Nominal Defendant “unless due enquiry and search has been made to establish the identity of the motor vehicle concerned”.

THE DECISION AT TRIAL
The trial judge acknowledged the respondent’s injuries, the various telephone conversations he made immediately following the incident and his concession that he did have the opportunity and means to record the driver’s name, address and registration number as well as an appreciation of the necessity to do so. However, the trial judge accepted that because of the severity of the respondent’s injuries, he was disabled from making the obvious enquiries immediately after the incident and therefore, those enquiries were not ‘due’. The trial judge therefore allowed the respondent to continue with his proceedings.

THE ISSUES ON APPEAL
The Court of Appeal was required to consider whether the respondent conducted due enquiries after the incident to identify the driver of the white Holden utility motor vehicle.

THE DECISION ON APPEAL
The Court of Appeal accepted the respondent had an opportunity to record the utility’s details at the scene as the driver stayed at the scene for some minutes after the accident. In particular, the Court of Appeal noted the respondent was conscious after the incident and therefore, he could have recorded the registration details either on his iPhone or speak to the driver. Notwithstanding this, the Court of Appeal accepted that the respondent’s shock and pain levels immediately after the incident were severe and this supported a finding that he was unable to direct his mind to the need to obtain the relevant information from the other driver. As the focus of the respondent’s phone calls immediately after the incident were to obtain assistance because he was hurt, the Court of Appeal accepted this was consistent with the respondent being unable to direct his mind to obtaining the details of the at fault vehicle.

The Court of Appeal affirmed the trial judge’s finding that the respondent was disabled from making the obvious enquiries because of the severity of his injuries. The appeal was dismissed.
TRANSPORT

STAFFORD v CARRIGY- RYAN AND QBE INSURANCE (AUSTRALIA) LIMITED
[2014] ACTCA 27

THE FACTS
The appellant was a passenger in a motor vehicle driven by the first respondent at about 1am on 25 October 2008 when it failed to negotiate a corner, ran off a road and overturned several times. The appellant and the first respondent had been drinking together in the 6 – 7 hours preceding the accident. A blood sample taken from the first respondent 2 hours after the accident revealed a reading of 0.155 grams of alcohol per 100ml of blood.

The motor vehicle was owned by the appellant’s father, but was on extended loan to the appellant. The evidence was that the first respondent got into the driver’s seat of the appellant’s car and told the appellant he wanted to go for a drive because he was upset and wanted to talk. There was evidence that in the month prior to the accident the first respondent, who had mental health issues, had attempted self harm. On that occasion, the appellant cared for the first respondent and took him to hospital for treatment.

THE DECISION AT TRIAL
The trial judge found that at the relevant time, both the appellant and the first respondent were intoxicated and that the appellant ought to have known that the first respondent was intoxicated. The trial judge was satisfied that the first respondent owed the appellant a duty of care which he had breached. She assessed contributory negligence at 35%.

THE ISSUES ON APPEAL
The appellant argued that the trial judge erred in holding that the starting point for assessment of contributory negligence was that the appellant and the first respondent were intoxicated and that the appellant ought to have known that the first respondent was intoxicated. The trial judge was satisfied that the first respondent owed the appellant a duty of care which he had breached. She assessed contributory negligence at 35%.

THE DECISION ON APPEAL
The Court of Appeal did not accept that the trial judge was purporting to suggest that there was a presumption of 50% negligence based on the parties’ equal knowledge of the first respondent’s alcohol consumption and equal appreciation of the risk they were undertaking. The trial judge carefully considered the respective roles of the appellant and the first respondent in the events in question.

The Court of Appeal then had to consider the argument that the assessment of contributory negligence at 35% was too high. After noting the relevant provisions of the Civil Law (Wrongs) Act 2002, relating to the assessment of contributory negligence in circumstances where one or more parties are intoxicated, the Court of Appeal found that in the circumstances of the case before the trial judge, a finding of contributory negligence was inevitable.

In Issue:
• The extent of contributory negligence where injured passenger aware driver intoxicated
• Whether passenger withdrew from enterprise

Delivered On:
27 August 2014

CONTINUED ON NEXT PAGE
After noting the common law principles relating to assessment of contributory negligence, the Court of Appeal was far from satisfied that the trial judge’s assessment of contributory negligence was so high as to be in error and noted that in fact, it was quite generous to the appellant because the appellant, as the person lawfully in possession of the vehicle, had the authority to refuse permission to the first respondent to drive it. The evidence established that he never even attempted this course instead attempting to dissuade the first respondent from driving the vehicle. There was no suggestion in the evidence that the first respondent, by words or action, intended to drive the vehicle without the appellant’s permission. The Court of Appeal specifically rejected the appellant’s argument that an equal apportionment of liability between a passenger and an intoxicated driver is almost never appropriate and noted case law demonstrating that assessments of contributory negligence considerably greater than 35% are not unknown.

The appellant then argued that by repeatedly asking the first respondent to slow down in the moments leading up to the accident, he had withdrawn his consent to being driven dangerously. The Court of Appeal agreed with the trial judge that this argument could not succeed. The ‘enterprise’ in which the appellant and the first respondent were engaged was not an enterprise of driving dangerously. The course of conduct, or enterprise, in which they were engaged was that of the appellant being a passenger in a car being driven by the first respondent while he was intoxicated. There was nothing in the evidence to suggest that the appellant ever withdrew or sought to withdraw from that enterprise. The request to the first respondent to slow down could not amount to a disavowal by the appellant of willingness to engage in the course of conduct that ultimately led to his injuries.

The grounds of appeal in relation to assessment of damages were also dismissed.
THE FACTS
The plaintiff sustained spinal injuries resulting in permanent paraplegia as a result of a motor vehicle accident in which the defendant was the driver and the plaintiff was a rear seat passenger.

Shortly before the accident, the plaintiff was driving the motor vehicle and stopped the car to go to the toilet on the side of the road, approximately 200 metres from the nearest township. When she left the car, the defendant assumed the driver’s seat. Despite knowing that the defendant had been drinking, the plaintiff got into the back seat of the vehicle. The plaintiff also was not wearing a seatbelt at the time of the accident. Her evidence was that she had attempted to fasten her seatbelt after re-entering the car but was unable to do so because of the manner of the defendant’s driving.

THE DECISION AT TRIAL
The trial judge held that no person in the plaintiff’s situation could reasonably be expected to have had any practical choice other than to get into the vehicle and that the exception under s47(2)(b) CLA (SA) was enlivened. Accordingly, the trial judge declined to make a 50% reduction to account for the defendant’s intoxication, as is allowed under s47(2)(b) CLA (SA).

The trial judge did, however, reduce the plaintiff’s damages award by 25% to account for her failure to wear a seatbelt in accordance with s49 CLA (SA).

THE ISSUES ON APPEAL
The defendant appealed on the basis that the trial judge erred in failing to reduce the plaintiff’s damages by 50% under s47(2)(b) CLA (SA). The plaintiff cross appealed against the reduction in damages awarded by 25%.

THE DECISION ON APPEAL
Firstly, the court held that having regard to the objective circumstances facing the plaintiff, the trial judge was correct to conclude that the plaintiff could not reasonably be expected to have avoided the risk of re-entering the vehicle. The court specifically noted that the plaintiff was a vulnerable young woman. She was 21 years old and pregnant. She was concerned about her other 3 children who were alone at a hotel. She was in an unlit rural area in the early hours of the morning when it was dark and she was disoriented. She had to make an immediate decision about whether or not to get back into the car. The evidence that she was emotionally and financially dependent on the driver (her partner) together with evidence that she suffered from a personality disorder adequately explained her compliance with the driver’s aggressive demand that she get into the car. The court therefore held that the plaintiff established that the statutory exception to the presumption of contributory negligence where an injured person relies on the skill of an intoxicated person in s47(2)(b) CLA (SA) applied.

Secondly, the court held that the trial judge erred in reducing the plaintiff’s damages by 25% for the plaintiff’s failure to wear a seatbelt. The court noted that the trial judge’s own findings were that the plaintiff was unable to secure her seatbelt because, panicked by the reckless driving of the defendant, she had tugged at the seatbelt in a way which engaged the locking mechanism. As such, her failure to wear a seatbelt was not voluntary and s49 CLA (SA) did not apply.
PALLIER v SOLOMONS (No. 2)  
[2014] NSWSC 1524

In Issue:
• Whether the plaintiff was contributorily negligent for travelling in a vehicle in circumstances where he knew or ought to have known that the driver was impaired by alcohol.

Delivered On:  
11 November 2014

THE FACTS
The defendant, who was on his provisional licence, offered to drive the plaintiff and others home from a party. The defendant had been drinking at the party. The vehicle collided with a culvert just off the side of the roadway, causing the vehicle to roll. Shortly after the incident, the defendant recorded a blood alcohol level above the legal limit of nil.

The plaintiff suffered serious injuries including a brain injury causing almost total incapacity.

THE DECISION
The parties agreed that the defendant was negligent in his care and control of the vehicle. The main issues in dispute were: whether the defendant had deliberately driven off the road in order to scare the passengers and whether the plaintiff was contributorily negligent for choosing to travel with the defendant in circumstances where it was alleged he knew or ought to have known that the defendant’s driving would be impaired by alcohol.

On the balance of the available evidence the court concluded that the defendant had driven off the side of the road to scare the passengers.

The court determined that there were a number of circumstances which would have led a reasonable person in the plaintiff’s position to have concluded that the defendant was intoxicated to a degree whereby his driving would be impaired. In particular, the defendant took a circuitous route (using backstreets) where the most direct route was through the centre of town, and the other passengers in the vehicle (whom, unlike the plaintiff, were well known to the defendant) asked the defendant on several occasions whether he was alright to drive.

It was determined that these events should have put the plaintiff on notice that there was a risk that the defendant was over the legal limit to drive.

However, the court stated that whilst the plaintiff knew or ought to have known the defendant’s driving may have been impaired due to intoxication, this did not mean the plaintiff had knowledge that the defendant would deliberately drive off the road. This was held to be an unpredictable risk that the plaintiff and the other passengers could not reasonably have foreseen and taken steps to avoid. For this reason, the defendant failed to establish contributory negligence.

The court entered a verdict for the plaintiff in the amount of $1.68 M.

“The plaintiff suffered serious injuries including a brain injury causing almost total incapacity.”
In Issue:
• Whether CTP policy applies where a person is accidentally shot from the rear tray of a stationary utility motor vehicle in the course of a hunting expedition
• Whether injury caused by fault of the driver of the vehicle
• Whether the driver of the motor vehicle was negligent

Delivered On:
18 December 2014

THE FACTS
On 8 August 2009, the appellant was on a hunting expedition and was a passenger in a stationary motor vehicle driven by his father, the first respondent. The second respondent was located in the rear tray of the utility motor vehicle and accidentally fired the rifle she was holding into the cabin of the motor vehicle, striking the appellant in the head.

At trial, the appellant argued that the third respondent, the compulsory third party insurer of the first respondent, should be liable for the damages the appellant suffered. The third respondent argued it should not be held liable as compulsory third party insurance is only deemed to apply by s10 MACA where the injury is caused by the fault of the driver of a motor vehicle.

THE DECISION AT TRIAL
The trial judge dismissed the appellant’s claim on the basis the injury was not a result of the driving of a motor vehicle or a dangerous situation caused by the driving of a motor vehicle. It was held the injury was the result of a shooting accident, not a motor vehicle accident. Accordingly, the third respondent insurer was not liable for the damages the appellant suffered. The trial judge did not consider it necessary to determine whether the injury was caused by the fault of the driver.

THE ISSUES ON APPEAL
The appellant contended that the injury he suffered was covered by the statutory compulsory third party insurance policy and that the trial judge was in error in finding for the third respondent.

The key issue on appeal was whether the injury the appellant suffered was caused by the fault of the first respondent, the driver of the motor vehicle.

THE DECISION ON APPEAL
The appeal was dismissed. The Court of Appeal found that in order for the insurer to be held liable, the appellant had to establish that his injury was caused by the negligence of the driver. To do so, the appellant had to show, pursuant to the CLA (NSW), that there was a foreseeable risk of not insignificant harm and that the driver failed to take reasonable precautions.

The appellant contended that the driver was negligent by failing to position the vehicle in such a way that the cabin lay between where the shooters were located and the identified prey. The Court of Appeal did not accept this argument. It found that the risk of an accidental shooting by a firearm existed irrespective of the direction the vehicle faced and could not have been avoided by taking further precautions.

Accordingly, it was held the injury was not caused by the fault of the driver and the insurer was therefore not required to compensate the appellant for the injuries suffered.

MICHAEL DONNELLY
Graduate
Michael.Donnellyk@bnlaw.com.au
THE FACTS
At 3:00am on 29 May 2011, the second respondent was driving his motor vehicle when he left the road and crashed down an embankment near a bicycle and pedestrian underpass. Approximately 40 minutes later, the first respondent was riding his bicycle to work. The second respondent’s vehicle was still in the position where it had come to rest and the police were in attendance. The first respondent struck debris on the path as a result of the second respondent’s earlier accident and fell from his bicycle, sustaining various injuries.

The second respondent held a compulsory third party insurance policy with the appellant, Insurance Australia Limited t/as NRMA Insurance. The appellant sought a declaration that it was not required to indemnify the second respondent because the accident involving the first respondent was not a ‘motor accident’ within the meaning of section 7 of the Road Transport (Third Party Insurance) Act 2008 (ACT) because the first respondent was not injured because of a motor vehicle accident. Section 7 defines ‘motor accident’ to be an incident that:

(a) involves the use or operation of a motor vehicle; and

(b) causes personal injury to an individual (the injured person); and

(c) happens when –

(i) someone is driving the motor vehicle; or

(ii) someone or something collides with the motor vehicle; or

(iii) someone takes action to avoid colliding with the motor vehicle; or

(iv) the motor vehicle runs out of control.

In Issue:
• Whether CTP policy applies where cyclist suffered injuries after a motor vehicle accident
• Whether injuries must have a temporal or causal link to the motor vehicle accident

Delivered On:
18 December 2014
THE DECISION AT TRIAL
The appellant’s application was dismissed. The appellant’s contention that it was only required to indemnify the second respondent in circumstances where the first respondent’s injury ‘happened when’ the second respondent was driving the motor vehicle was not successful.

THE ISSUES ON APPEAL
The issue on appeal was whether the definition of ‘motor accident’ under section 7 of the Road Transport (Third Party Insurance) Act 2008 (ACT) extends to incidents occurring after the accident itself has occurred, such that compulsory third party insurers are liable to indemnify their insured.

THE DECISION ON APPEAL
The court dismissed the appellant’s appeal. The court held there must be a causal link between the personal injury and the actions of the motor vehicle, but there does not have to be a temporal link such that the injuries must occur at the time of the accident itself.

Accordingly, the driver of the motor vehicle which ran out of control (the second respondent) was entitled to the benefit of the indemnity provided by his compulsory third party insurance policy in respect of any action instituted by the injured cyclist (the first respondent).

“The court held there must be a causal link between the personal injury and the actions of the motor vehicle, but there does not have to be a temporal link such that the injuries must occur at the time of the accident itself.”
THE FACTS
The 36 year old plaintiff was walking across a major intersection in Collingwood when he was struck by a vehicle driven by the first defendant. The plaintiff sustained personal injuries as a result of the accident and commenced proceedings against the first defendant driver and the second defendant compulsory third party insurer for negligence.

THE DECISION
Liability was strongly contested. The first defendant’s evidence was that he was travelling at approximately 50 to 60kph as he approached the intersection. He faced a red light, so he slowed the vehicle to 15 – 20kph. As he got closer to the intersection, the light turned green so he increased his speed to around 30 – 40kph. He was travelling at this speed as he entered the intersection. A bus travelling in the same direction as the first defendant was stopped in the right-hand lane, partially blocking the first defendant’s view of the intersection. The bus remained stationary for at least 5 seconds after the lights turned green.

As the first defendant’s vehicle entered the intersection it struck the plaintiff, who was walking across the intersection. The plaintiff’s counsel conceded in closing submissions that the plaintiff had entered the intersection on a red pedestrian light. The court had to consider whether the first defendant had breached his duty of care to the plaintiff, as the driver of the motor vehicle, by entering the intersection in the manner he did.

The court found that the first defendant was negligent because the standard of care expected of a reasonable driver required him to enter the intersection at an appropriate speed and with sufficient control over his vehicle to enable him to be aware of what was happening in the vicinity of his vehicle (and the intersection), and to react appropriately to his surroundings.

In particular, the court found that the first defendant had breached his duty of care by accelerating past the stationary vehicles on his right hand side and entering the intersection at 30 – 40kph, even though his ability to observe what was happening in the intersection was limited. Further, the first defendant did not slow down as he entered the intersection, nor did he have his foot near the brake to enable him to stop suddenly.

The court also considered contributory negligence and found that the plaintiff’s conduct in crossing the road on a red pedestrian light amounted to a reckless departure from the standard of care expected of a pedestrian at a major intersection. Contributory negligence was assessed at 60%.

The court then went on to assess quantum. The plaintiff’s injuries included a left shoulder fracture and a fracture of the left knee, which required a series of surgeries. Evidence was led in relation to the plaintiff’s drug taking history, including heroin and marijuana, which was taken into consideration in assessing economic loss. Damages were assessed at $1,120,427. This was then reduced by 60% for contributory negligence, to $448,171.

In Issue:
• Liability of the defendant driver in relation to personal injuries sustained by the plaintiff pedestrian

Delivered On:
19 December 2014

AMY LUCAS
Solicitor
Amy.Lucas@bnlaw.com.au
DAVIS v SWIFT
[2014] NSWCA 458

In Issue:
• Whether the respondent driver breached her duty of care by failing to keep a proper lookout as she pulled out from the kerb;
• Whether the trial judge erred in holding that if the accident were a ‘blameless accident’, contributory negligence should be assessed at 100%

Delivered On:
22 December 2014

THE FACTS
On 20 March 2009, the respondent’s vehicle was parked on the eastern side of Vincent Street, Cessnock, facing south. The nearest pedestrian crossing was 60m to the north of the respondent’s vehicle. The appellant pedestrian crossed Vincent Street from the eastern side, stepping off the kerb in front of the respondent’s parked vehicle and walked to the middle of the road. Northbound traffic made it unsafe for the appellant to cross further and she ran or stepped backwards into the southbound traffic lane. As the appellant did so, the respondent pulled out from the kerb and drove over the appellant’s foot.

The appellant brought proceedings against the respondent in negligence and, in the alternative, on the basis the injuries were the result of a “blameless motor vehicle accident” within the definition of the MACA.

THE DECISION AT TRIAL
The trial judge held the respondent was not negligent and if the respondent was liable, the appellant’s damages should be reduced by 100% for contributory negligence.

THE ISSUES ON APPEAL
The appellant argued that the respondent driver breached her duty of care by failing to keep a proper lookout as she commenced driving her vehicle from the kerb and that the trial judge erred in holding that if the accident were a “blameless accident”, contributory negligence should be assessed at 100%.

THE DECISION ON APPEAL
In relation to the first issue, the Court of Appeal held the evidence did not show with sufficient precision where the appellant was on the roadway relative to the respondent’s position immediately prior to the collision. Further, the evidence of one of the witnesses was that the appellant was walking backwards immediately prior to the incident and that the respondent’s vehicle was barely moving at the time. As the other witnesses could be no more precise as to the appellant’s position on the roadway, the Court of Appeal held the trial judge did not err in not inferring fault on the part of the respondent.

In relation to the second issue, the Court of Appeal noted that by upholding the finding that the respondent was not negligent, the subject motor vehicle accident was automatically deemed to be a “blameless motor accident” (defined as an accident that results in death or injury that is not caused by the owner or driver of the motor vehicle). However, the Court of Appeal held that the accident was the result of both the appellant’s conduct in walking backwards into the path of the respondent’s vehicle and the respondent’s conduct in driving from the kerb. Although the appellant’s conduct did not conform to the standard of care required of someone in her position, it was not an example of the worst possible conduct. That is, the appellant’s conduct was not such that it made it inevitable that the respondent’s vehicle would run over her foot.

On this basis, the Court of Appeal assessed contributory negligence to be 80%.
In Issue:
• Whether an insurer is able to renege on its agreement to provide rehabilitation services for an insured under the MAIA on the basis that it suspects the insured has acted fraudulently

Delivered On:
7 May 2015

THE FACTS
The applicant was 16 years old when he suffered severe spinal injuries after a motor vehicle in which he was travelling, and allegedly being driven by his father, collided head-on with another vehicle. After being notified of the incident, the respondent insurer, mindful of the applicant’s youth and severe disabilities, stated in response to the notice of claim that it was prepared to meet the reasonable and appropriate cost of the applicant’s rehabilitation (without admitting liability) under s39(1)(a)(iv) of MAIA. The preliminary police investigation report received by the respondent noted that there was an issue as to who was driving at the time of the collision.

At a later point in time, and after becoming aware of police investigations which indicated that there was extensive blood over the driver’s side airbag which belonged to the applicant (not his father), the respondent gave notice to the applicant that it would not continue to pay the costs of the applicant’s rehabilitation as it had reason to believe that the applicant was in fact driving the car at the time of the incident, not his father.

The applicant subsequently made an application to the court to prevent the respondent from ceasing to make payment for rehabilitation services. It was the applicant’s case that s51(3) MAIA prevented the respondent from rescinding its decision to pay the costs of the applicant’s rehabilitation.

The respondent claimed that if it had known of the police evidence at the time the decision was made pursuant to s39(1)(a)(iv) MAIA, it would not have agreed to fund rehabilitation services. The respondent further alleged that the claim was fraudulent and that it was entitled to reconsider and/or rescind its original decision.

THE DECISION
After taking into account various considerations, the court concluded that the purpose of the MAIA would not be served by insurers who wish to change their decisions pursuant to s39(1)(a)(iv) of it. Even though there were concerns raised regarding fraud, it was held that this was a matter to be determined at trial as the applicant’s father and mother had sworn that the applicant was not driving the vehicle at the time of the incident. The court noted that the applicant had no assets and that in all likelihood the rehabilitation costs would not be able to be recovered by the respondent. However, the balance of convenience favoured making an order for the rehabilitation funding to continue given that there was some prospect of improvement in the applicant’s condition if rehabilitation was provided.

Weighing up all the factors, the court decided to exercise its discretion such that the respondent insurer could not renege on its decision and was required to continue paying for rehabilitation services.
THE FACTS

The plaintiff suffered personal injuries as a result of broken glass striking her face and upper body caused by the first defendant throwing a beer bottle at the motor vehicle in which she was a passenger. The first defendant was the driver of a motor vehicle travelling in the opposite direction and when the vehicles passed one another the first defendant threw the beer bottle. The first defendant threw the beer bottle with one hand whilst holding onto the steering wheel with the other hand.

The plaintiff alleged that the first defendant was negligent by failing to drive his vehicle for lawful purposes, driving his vehicle so that it could be used to position himself to throw a bottle at the plaintiff’s vehicle and positioning his vehicle so that he could throw the beer bottle at the plaintiff’s vehicle.

The plaintiff sought a declaration that the MAIA applied and that she was entitled to bring a CTP claim in respect of her injuries. Section 5(1) provides that the MAIA applies to personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury was caused, wholly or partly by a wrongful act or omission in respect of the motor vehicle by a person (other than the injured person) and is as a result of the driving of a vehicle.

The CTP insurer argued that with respect to the first defendant’s conduct, there were no allegations of a negligent (or wrongful) act, separate from the throwing of the bottle. The CTP insurer also argued that there was no factual basis upon which the court could make any finding to do with the driving of the vehicle and the injuries suffered by the plaintiff.

THE DECISION

The trial judge considered two earlier Queensland decisions in Mani v Nominal Defendant [2002] QSC 152 and Coley v Nominal Defendant [2003] QCA 181 where the plaintiff was injured following a projectile being thrown from another vehicle.
In *Mani* the plaintiff was driving a van along a road when the driver (or a passenger) of an unidentified motor vehicle travelling in the opposite direction threw a rock at the van, smashing the windscreen and injuring the plaintiff. The plaintiff in *Mani* did not allege that the manner of driving of the vehicle contributed to the injury in any way. The court held that the throwing of a rock was not the result of the driving of the unidentified vehicle, which was merely the occasion for the throwing, and that the two activities (the driving of the vehicle and the throwing of the rock) were discrete, although contemporaneous, whether or not done by the same person.

In *Coley* the plaintiff alleged he was driving along a road when the driver or passenger in an unidentified vehicle threw a Molotov cocktail into his vehicle, setting it alight and causing him injury. The decision in *Mani* was distinguished because it was specifically alleged that the unsafe manner of the driving of the vehicle (driving alongside the plaintiff’s vehicle and veering towards the plaintiff’s vehicle when it was unsafe to do so) enabled the Molotov cocktail to be thrown into the plaintiff’s vehicle. The plaintiff in *Coley* therefore alleged fault in the manner of the driving itself, not merely that there was driving so as to enable the cocktail to be thrown.

Although it was noted in *Coley* that the plaintiff may have evidentiary difficulties establishing his case, if he was able to prove at trial that the unsafe manner of driving the unidentified motor vehicle enabled the Molotov cocktail to be thrown at his vehicle, then his claim could come within the MAIA.

The trial judge relied on *Coley* and found that to come within s5(1) MAIA, the plaintiff was required to establish at trial that the driving of the vehicle was, in a common-sense way, a cause of the injuries. It was not necessary to prove that the injuries were caused “solely” by the manner of driving if the wrongful driving was also, in a common-sense way, the whole or a partial cause of the injuries. The trial judge found that the term “in respect of” in s5(1) MAIA has a very wide meaning and that the relevant enquiry concerns the existence of a discernible and rational link between the vehicle and the driver’s wrongful act or omission. In determining the matter, the connection between the vehicle and the driver’s wrongful act or omission must be more than one of “time or sequence”.

The trial judge found that there was no discernible and rational link, on the pleadings, between driving of the motor vehicle and the injury. The MAIA therefore did not apply.

“The CTP insurer also argued that there was no factual basis upon which the court could make any finding to do with the driving of the vehicle and the injuries suffered by the plaintiff.”
In Issue:
- Whether the failure to install a “Keep Left” sign at the recommencement of a median strip breached the duty the appellant owed to the respondent as a road user
- Whether the appellant was absolved from liability as a public authority exercising, or not exercising, a “special statutory power” pursuant to s43A CLA (NSW)

Delivered On:
21 May 2015

THE FACTS
On 1 January 2009, Mr Grant lost control of his motorcycle after passing through an intersection. His motorcycle allegedly collided with the nose of a median strip which divided the road and then impacted a pedestrian barrier some 30 metres away. Mr Grant commenced proceedings against Roads & Maritime Services (RMS) asserting it was negligent in designing and constructing the road as it failed to install a “Keep Left” sign on the concrete median strip. RMS defended the action on the basis it had statutory immunity from liability under s43A CLA(NSW) which grants immunity when a public authority exercises, or fails to exercise, a “special statutory power”.

The fundamental factual controversy at trial was whether Mr Grant’s motorcycle first impacted the median strip, prior to colliding with the pedestrian barrier some 30 metres away, or whether Mr Grant’s motorcycle impacted the median strip at all. Mr Grant accepted at trial that if he was unable to establish that his motorcycle first impacted the median strip, his action against RMS had to fail.

THE DECISION AT TRIAL
The trial judge accepted Mr Grant’s version of events. RMS was found to be in breach of the duty that it owed to Mr Grant. The trial judge also found that the breach by RMS caused the injuries that Mr Grant suffered.

In regards to s43A CLA(NSW), the trial judge concluded that RMS was not exercising a “special statutory power”. Accordingly, the immunity granted by s43A was held not to apply. The trial judge gave judgment in favour of the plaintiff, awarding damages in the amount of $2,656,665.49 (after reducing damages by 30% due to the speed at which Mr Grant was travelling through the intersection).

THE ISSUES ON APPEAL
The key issues for consideration on appeal were whether the accident occurred as Mr Grant had stated, whether RMS had breached its duty of care, whether there was a causal connection between the breach and the accident, whether s43A CLA (NSW) applied and whether the quantum, as assessed by the trial judge, in relation to both economic and non-economic loss was appropriate.

THE DECISION ON APPEAL
The Court of Appeal allowed the appeal and set aside the trial judge’s decision. After reviewing the expert evidence tendered by both parties, it was concluded that, on the balance of probabilities, Mr Grant had not first collided with the median strip. As such, his action had to fail. The trial judge erred in concluding to the contrary. The trial judge also erred in concluding that RMS had breached its duty to road users by failing to install a “Keep Left” sign on the median strip.

Although it was not necessary to do so, the Court of Appeal nevertheless held that the immunity granted under s43A CLA (NSW) did apply in these circumstances as the failure to install a “Keep Left” sign on the median strip involved a failure by RMS to exercise a “special statutory power”. It was also held that the failure to install such a sign was not so unreasonable (having regard to what a reasonable authority would or would not have done) that the immunity should be held not to apply.

Michael Donnelly
Graduate
Michael.Donnelly@bnlaw.com.au
Meet our Sydney team of insurance law specialists

SIMON BLACK
Partner
E: simon.black@bnlaw.com.au

Simon’s areas of expertise include professional indemnity, management liability, directors and officers, financial lines, and transportation liability.

Simon advises insured professionals on professional indemnity matters, including: property valuers, engineers, architects and builders, accountants and financial planners, Associations, health professionals and film and television production and distribution professionals.

He acts for insurers on construction and engineering matters, in respect of high value and complex contract works and industrial special risks claims. Simon also has experience advising insurers and insureds on high profile ACCC and ASIC investigations, inquiries and prosecutions as well as securities class actions.

NICHOLAS ANDREW
Partner
E: nicholas.andrew@bnlaw.com.au

Nicholas has 15 years experience in advising both Australian and London-based insurers across major lines of insurance including professional indemnity, public and products liability and property (third and first party). He has particular expertise in complex construction and engineering matters.

Nicholas also advises insurers on broader policy and coverage aspects across a range of industries and business classes.
THE FACTS
On 12 April 2005, Scott Philcox was travelling as a passenger in a vehicle driven by George King (Mr King). As a consequence of Mr King’s negligence, the vehicle was involved in an accident, causing the death of Scott Philcox.

The brother of Scott Philcox, Ryan Philcox (the plaintiff), travelled past the scene of the accident on 5 separate occasions. On each of those occasions, he witnessed the aftermath of the accident, including the attendance of emergency services. At the time, the plaintiff was not aware that the accident had involved his brother.

The plaintiff sustained mental harm upon later being informed that his brother had died as a result of the accident.

THE DECISION AT TRIAL
The trial judge found that pursuant to s33 CLA (SA), Mr King owed a duty of care to the plaintiff. That finding was upheld on appeal to the Full Court of the Supreme Court.

However, the trial judge and Full Court disagreed as to the correct interpretation of s53 CLA (SA). That section precludes a person who is not a parent, spouse or domestic partner of a person killed or injured in an accident from claiming damages for mental harm, unless they were present at the scene of the accident when the accident occurred.

The trial judge adopted a plain reading of s53 and found that because the plaintiff did not witness his brother being killed, he was not entitled to damages. The Full Court took a different view, allowing damages on the basis that the CLA (SA) definition of “accident” included the term “incident” which is synonymous with “event, eventuality and aftermath”. Therefore, because the plaintiff had witnessed the accident’s aftermath, he was entitled to damages.

The Full Court also relied upon the reasoning of the High Court decision in Wicks v State Rail Authority (NSW) [2010] HCA 22 which considered the similar s30 CLA (NSW).

THE ISSUES ON APPEAL
The High Court was asked to consider firstly whether Mr King owed the plaintiff a duty of care and secondly, whether the plaintiff was entitled to damages under s53 CLA (SA).

THE DECISION ON APPEAL
The High Court delivered a unanimous judgment, allowing the appeal and finding that although a duty of care was owed to the plaintiff, s53 operated to exclude the plaintiff from obtaining an award for damages.

The High Court considered that s53 did not allow for an extended notion of “presence at the scene when the accident occurred”. It was determined that even if Mr Philcox was found to have been present in the aftermath of the accident, he could not be considered to have been present when the accident occurred. Therefore, s53 clearly operated to preclude him from recovering damages.

As to the Full Court’s reliance upon the decision in Wicks and the apparently analogous s30 CLA (NSW), the High Court found that the Full Court did not give adequate effect to the significant textual differences between the two provisions. Specifically, the High Court noted that s30 CLA (NSW) does not require a plaintiff to be at the relevant scene at the time of the accident.
In Issue:
• The respective liabilities of an employer, a helicopter operator and the owner of a catenary wire for injuries sustained to a person on board a helicopter that crashed after contacting the catenary wire
• Whether a person was a ‘passenger’ for the purposes of the Civil Aviation (Carriers’ Liability) Act 1967 (NSW)

Delivered On:
22 June 2015

THE FACTS
On 4 April 2006 Mr Edwards, an employee of the appellant, Endeavour Energy (Endeavour), was conducting an aerial inspection of power lines north-west of Sydney. Endeavour had contracted the first respondent, Precision Helicopters Pty Ltd (Precision), to supply the helicopter and pilot. While inspecting a power line over rural property, the helicopter’s tail rotor came into contact with a dummy line known as a catenary wire that had been strung across a small gully by the second respondent, Telstra Corporation Ltd (Telstra).

The pilot was able to land the helicopter in a paddock. However, due to damage to the tail rotor, the helicopter tipped over causing the main rotor to hit Mr Edwards in the head. Mr Edwards was not wearing a helmet and suffered catastrophic head injuries.

The evidence indicated that while the catenary line was visible from some directions, it was not readily visible from above. It was not marked on any map to which either the pilot or Endeavour staff had access.

Mr Edwards brought proceedings against Endeavour, Precision and Telstra and those claims were settled on the basis that Endeavour pay Mr Edwards $10,000 per week for the rest of his life. The appellant and the respondents then brought various proceedings against each other for indemnity, contribution and damages, requiring the court to consider the respective liabilities of each to Mr Edwards.

THE DECISION AT TRIAL
The trial judge held that Endeavour was liable to Mr Edwards in negligence. Precision was also liable to Mr Edwards in negligence on a limited basis and liability was apportioned between Endeavour and Precision at 90% and 10% respectively. Telstra did not owe a duty care or, if it did, the duty had not been breached.

The trial judge further found that the Civil Aviation (Carriers’ Liability) Act 1967 (NSW) (‘CACL’) did not apply to Precision’s liability because Mr Edwards was not a “passenger” in the helicopter.

THE ISSUES ON APPEAL
Endeavour appealed the trial judge’s findings so far as they were favourable to Precision and Telstra. Precision cross-appealed with respect to the finding of liability against it.

The issues on appeal were whether Telstra was liable in negligence to Mr Edwards and therefore for contribution to Endeavour and Precision; whether Mr Edwards was a “passenger” for the purposes of the CACL; whether Precision was negligent in not requiring Mr Edwards to wear a helmet; whether Endeavour was liable to Precision for not mapping the wire as a hazard and whether Precision was liable in negligence for breaches of duty by its pilot in the route taken.

THE DECISION ON APPEAL
The Court of Appeal found that Telstra did owe a duty of care to Endeavour and Precision and that this duty had been breached. Evidence that it was a long-standing practice within the electricity industry to conduct aerial surveys of power lines in rural areas, combined with the public advertising campaigns which preceded such activities, was sufficient to find that Telstra ought
to reasonably have known of the practice of aerial inspection. The possibility of a helicopter carrying out such an inspection coming into contact with a telephone line that was unknown to the pilot and not readily detectable by visual inspection imposed a duty of care on Telstra as the company responsible for the wire. Telstra could and should have removed the wire (which served no purpose) when 1 of the poles supporting it was replaced in 2005.

Precision claimed that its liability in respect of the incident was covered by the CACL, which would render it strictly liable for Mr Edwards’ injuries but cap damages at $500,000. The Court of Appeal held that Mr Edwards’ role on the flight as Endeavour’s observer was to identify for inspection infrastructure owned by Endeavour. In doing this he was serving the interests of his employer, was not employed by Precision as an assistant pilot or navigator and did not have any physical control over the flying of the helicopter. Mr Edwards was accordingly a “passenger” for the purposes of s4 CACL and Precision was strictly liable for the damage suffered by Mr Edwards capped at $500,000.

The Court of Appeal upheld the trial judge’s finding that both Precision and Endeavour should have required all crew and passengers engaged in low flying activities to wear helmets. This finding was amply supported by procedural documents for the inspection of overhead lines and expert evidence that had Mr Edwards been wearing a helmet, he would not have sustained any long term head injury.

It was not disputed that Endeavour did not have actual knowledge of the wire and the Court of Appeal held that its contractual duty was to mark hazards on the route plan that were known to it. The question of negligence was therefore whether it should have, in the exercise of reasonable care, identified the existence of the hazard. The Court of Appeal held that the evidence did not support a finding that a ground based inspection was a precaution that a reasonable operator in the position of Endeavour would have taken against the risk of harm which materialised.

However, it did hold that the trial judge’s finding that Endeavour was liable to Mr Edwards for failing to make inquiries of Telstra should be accepted. Endeavour’s operational documents were emphatic as to the risks associated with power lines and related hazards. The same concern should have extended to telephone wires and an inquiry to the known owners of such infrastructure would have been an obvious precaution. As such, Endeavour was in breach of its contractual and general law duties of care to Precision.

A majority of the Court of Appeal was prepared to assume that the exercise of reasonable care by the pilot required a high level survey of the area before inspecting the power lines. However, they also considered that the trial judge’s finding that a high level survey would not have discovered the existence of the wire was soundly based on the evidence. Any breach of duty by Precision was not causative of Mr Edwards’ loss. To impose liability on Precision when the exercise of due care could not have detected the hazard would be to hold it responsible for the materialisation of risks that the exercise of due care could have done nothing to avoid.
PROCEDURE
226  THE AVENUES TAVERN (TOWNSVILLE) PTY LTD v KP ARCHITECTS [2015] QSC 182
Whether a claim for loss caused by delay in redesign and construction was an apportionable claim.

228  JJES PTY LTD v SAYAN (NO. 2) [2014] NSWSC 975
Whether indemnity costs should be awarded and whether a non party costs order is appropriate.

229  LEACH v THE NOMINAL DEFENDANT (QBE INSURANCE (AUSTRALIA) LTD) (NO. 2) [2014] NSWCA 391
The Court of Appeal declined to make an order for indemnity costs based on an offer of compromise which constituted a “walk-away offer”.

231  CARLYON v TOWN & COUNTRY PUBS NO. 2 PTY LTD T/AS QUEENS HOTEL GLADSTONE (NO. 2) [2015] QSC 25
Entitlement of a successful defendant to costs on an indemnity basis where plaintiff had refused defendant’s offer.

232  MULES v FERGUSON [2015] QCA 77
Whether following a successful appeal, interest was payable on the entire judgment sum calculated from the date of the judgment at first instance.

233  KING v ALLIANZ AUSTRALIA INSURANCE LIMITED [2015] QCA 101
Whether primary judge erred in disallowing costs of clinical anatomist’s report and reducing care and consideration from 30% to 25%.

235  A, DC v PRINCE ALBERT COLLEGE INCORPORATED [2015] SASC 12
Whether a school was liable for a teacher’s sexual abuse of a boarder student.

237  TEOH v GREENWAY [2015] ACTSC 133
Whether evidence of settlement offers was admissible such that the respondent’s limitation period was extended and was not statute barred.
### MISCELLANEOUS

238 **BORAL RESOURCES (VIC) PTY LTD v CONSTRUCTION, FORESTRY, MINING & ENERGY UNION**  
[2014] VSC 429  
Whether the tort of intimidation is recognised as part of the common law of Australia.

239 **CAHILL v KENNA; CAHILL v FERRIER**  
[2014] NSWSC 1763  
Whether a mediator and/or valuer were liable for damages allegedly flowing from the valuation of a property which formed part of a dissolution of a joint venture arrangement.

242 **NALOS PTY LTD AND ANOR v ROBERT BIRD GROUP PTY LTD & ORS**  
[2015] QSC 174  
Application to amend pleadings to add new cause of action which was statute barred at time of application but not at commencement of proceedings.

### PIPA

244 **SHAPCOTT v W.R. BERKLEY INSURANCE (EUROPE) LIMITED & ANOR**  
[2015] QDC 102  
Whether an insurer can be joined as a contributor to a PIPA claim.
THE AVENUES TAVERN (TOWNSVILLE) PTY LTD v KP ARCHITECTS [2015] QSC 182

In Issue:
• Whether the plaintiff’s claim is an apportionable claim

Delivered On:
17 June 2015

THE FACTS
The plaintiff alleged in these proceedings that the defendant architect designed a building over a sewerage easement which necessitated a redesign and caused delay to the project. The plaintiff alleged this was a breach of duty of care and breach of duty in contract to perform obligations with due care and skill and with the skill of a reasonably competent architect. The plaintiff sought recovery of additional costs, loss of profits and loss of opportunity. No claim for physical damage or any other claim was made.

The defendant sought a declaration that the plaintiff’s claim was not an apportionable claim.

The plaintiff had not admitted that its claim was an apportionable claim for the purpose of Part 2 of Chapter 2 CLA (QLD). The plaintiff’s position was that it was not appropriate to admit an allegation of law and there was no obligation on the plaintiff to admit the allegation and any admission would not be determinative of the issue.

THE DECISION
The court held, based on the plaintiff’s pleaded case:
(a) that the claim was for economic loss because it was a claim for additional costs, loss of profits and loss of opportunity and there was no claim relying on physical or other damage;
(b) the action arose from a breach of duty of care falling within the definition in the schedule 2 CLA (QLD); and
(c) the plaintiff’s claim was therefore an apportionable claim.

While the court accepted that an admission of law by a plaintiff may not necessarily resolve a matter, it did not make an order for costs in the plaintiff’s favour. The court found that there was utility for both parties in seeking the declaration at this stage in the proceedings. The court ordered that costs be in the cause.
Meet our Melbourne team of insurance law specialists

**PETER EWIN**  
*Partner*  
*E:* peter.ewin@bnlaw.com.au

Peter has over 30 years experience, specialising in insurance law. He has an indepth understanding of the insurance industry and has managed numerous successful class actions and is highly regarded as a litigator.

Peter has extensive experience in handling injury liability, compulsory third party, recovery, ISR and property liability claims. He has also worked on a broad range of public and product liability and medical negligence claims, and provides advice on policy interpretation. Another one of Peter’s areas of specialisation is in defending professional indemnity claims, particularly for construction and engineering clients.

**NIEVA CONNELL**  
*Partner*  
*E:* nieva.connell@bnlaw.com.au

Nieva has extensive litigation experience and a reputation as a highly capable and commercially astute lawyer. She has conducted successful litigations for national, multinational and international insurers.

Nieva’s experience also includes advising clients on commercial and insurance claims and coverage disputes, particularly those involving public and products liability, professional indemnity, occupational health and safety, and trade practices. Assisting clients with policy interpretation and drafting, claims assessment and statutory and compliance issues, is also part of Nieva’s area of specialisation.

**HUBERT WAJSZEL**  
*Partner*  
*E:* hubert.wajszel@bnlaw.com.au

Hubert is an experienced insurance law and commercial litigation specialist who handles contentious and non-contentious matters for local and overseas insurers and captives, regularly appearing in VCAT, the County, Supreme and Federal Courts, and local government inquiries.

Hubert specialises in professional indemnity insurance, with a particular focus on construction professionals, financial institutions and directors’ and officers’ liability. He acts for professionals regularly defending claims brought against, architects, engineers, building surveyors, accountants, mortgage brokers and introducers, directors and officers, conveyancers and real estate agents.

Hubert’s practice also extends to providing risk management advice, including undertaking reviews of contract documents and policy wordings.
In Issue:
- Whether an order should be made that costs be paid on an indemnity basis
- Whether a non-party costs order should be made

Delivered On:
4 July 2014

THE FACTS
In May 2014, the court delivered judgment in favour of the solicitor defendant, in respect of a claim against him alleging negligent advice in relation to the purchase of a 7-Eleven franchise by the plaintiff. The defendant subsequently sought costs against the plaintiff on the ordinary basis up until 2 February 2012 (the date of an offer of compromise it made to the plaintiff) and on an indemnity basis thereafter. Additionally, the defendant sought costs against the plaintiff on the ordinary basis up until the date of the offer of compromise (2 February 2012) and on the indemnity basis thereafter, as provided for by r42.15A UCPR (NSW). The rejected offer provided for judgment for the defendant, and each party to bear its own costs. The court found the defendant was prima facie entitled to the benefit of r42.15A UCPR (NSW) because he obtained a judgment no less favourable than the terms of the offer. Each of the arguments made by the defendant in support of the offer was made out at trial.

In relation to the non-party costs order, the court referred to its power to make such orders under s98(1) of the Civil Procedure Act 2005 (NSW), and the general category of case where a non-party costs order might be appropriately made, as identified by the High Court in Knight v FP Special Assets Ltd [1991] HCA 28. The court considered that this case fell into the general category identified in Knight, based on the following factors: the plaintiff was “an entity of straw” (Ms Navaei was a driving force of the company, she only formed that company for the purpose of the franchise business because 7-Eleven insisted upon it); the plaintiff company was insolvent; Ms Navaei was the main active player in the proceedings against the defendant, she was the main witness on all issues of liability and damages, she provided all relevant instructions to the plaintiff’s lawyers and she was the person who would benefit from any damages recovered from the defendant. In addition, the court referred to the “non-exhaustive and non-exclusive” criteria identified by Basten JA in FPM Construction v Council of City of Blue Mountains [2005] NSWCA 340, which may inform a proper exercise of the discretion to make a non-party costs order. In particular, the court noted the unsatisfactory and unreliable nature of Ms Navaei’s evidence at trial, which made the conduct of the litigation unreasonable.

The court observed that, although it was satisfied that a non-party costs order should be made against Ms Navaei, it did not necessarily follow that she should pay these costs on an indemnity basis. However, it concluded that it was appropriate that an order be made against Ms Navaei in the same terms as the order made against the plaintiff, given that Ms Navaei would have been aware of the offer of compromise when it was made and the reasoning behind it, that these matters would have been communicated to her by her lawyers, and she was the person who gave the instructions to reject the offer.
In Issue:
• Decision to “order otherwise” where valid offer of compromise made
• Offer valid despite incorrect wording and form
• Not unreasonable to reject a “walk-away offer” where issues difficult or novel

Delivered On:
14 November 2014

THE FACTS
The appellant, Mr Leach, was a passenger in a motor vehicle which was involved in a collision with a Holden Commodore (the Holden). Gunshots were fired from the Holden and the appellant was shot, causing him to suffer a serious brain injury. The driver of the Holden was never identified and proceedings were brought against the Nominal Defendant (the respondent).

The District Court of New South Wales considered that the injuries did not fall within the causative meaning in s3A MACA and dismissed the claim. The respondent sought an indemnity costs order based on an offer of compromise. This was rejected by the trial judge, who considered it was not unreasonable for the appellant to reject the offer given the extent of his injuries and the success of plaintiffs in similar circumstances in recent case law, particularly Nominal Defendant v Hawkins [2011] NSWCA 93.

The appellant appealed to the Court of Appeal, who agreed with the trial judge and dismissed the appeal. The respondent submitted that the appellant should pay its costs of the appeal on an indemnity basis based on another subsequent offer of compromise (the Offer) and its letter of cover. The terms of the Offer were that there be a verdict for the respondent and each party would pay their own costs in respect of the District Court and Court of Appeal proceedings. The covering letter advised of time for acceptance and made provision for the Offer to operate as a Calderbank letter if it was found not to be valid under the UCPR.

The UCPR r 20.26 (r 20.26), which sets out the requirements for the making of an offer, was amended on 7 June 2013. The Offer incorrectly referred to the pre-amendment form of the rule.

CONTINUED ON NEXT PAGE
THE DECISION

The court determined that a prima facie entitlement arose in favour of the respondent to have indemnity costs awarded in its favour. The court considered that neither the use of words different to those required by the amended r 20.26, nor the failure to state the time for acceptance in the Offer itself, should invalidate the Offer. Further, the court noted that r 20.26 did not sanction non-compliance with otherwise apparently obligatory requirements for the form of the offer, suggesting the legislature did not intend to render inefficacious an offer which otherwise complied with the requirements.

The court also considered that the Offer constituted a “genuine offer of compromise”. As the issue on appeal was an all or nothing determination, in the court’s opinion, the only room for compromise was in relation to costs and therefore, foregoing the costs of the District Court trial was sufficient.

However, despite these findings, the court chose to exercise its discretion to “order otherwise”, concluding that it was not unreasonable for the appellant not to have accepted the Offer. The court considered that while a “walk-away” offer could successfully trigger the indemnity costs mechanisms under the rules, the claim would have to approach something of the character of being frivolous or vexatious for that to be the case. In the court’s view, at the time the offer was made, “the outcome on liability was far from a foregone conclusion”. The court also considered relevant the seriousness of the appellant’s injuries, the substantial claim for damages, and that the Offer did not serve the public policy of encouraging settlement because it offered the appellant nothing by way of damages.

The court noted that it would have reached the same conclusion if the Offer had not been effective under the UCPR and had taken effect as a Calderbank letter.

The respondent’s application to vary the costs order was dismissed.

“However, despite these findings, the court chose to exercise its discretion to “order otherwise”, concluding that it was not unreasonable for the appellant not to have accepted the Offer.”
CARLYON v TOWN & COUNTRY PUBS No. 2 PTY LTD T/AS QUEENS HOTEL GLADSTONE (No. 2) [2015] QSC 25

THE FACTS
The plaintiff sought compensation from the defendant for personal injuries. A trial was conducted over 3 days and at the conclusion judgment was entered for the defendant. The court gave leave for the parties to make submissions on costs.

The defendant sought an order for indemnity costs on the basis that on 15 July 2013 it served the plaintiff with an offer to settle for $30,000 in damages and $45,000 in costs in accordance with Chapter 9, Part 5 of the UCPR (QLD) which the plaintiff rejected. The defendant argued that the court should award indemnity costs after that date as the plaintiff’s refusal of the offer was “imprudent”.

The plaintiff submitted that the application for indemnity costs was unwarranted and oppressive.

THE DECISION
The court noted that the costs issue was to be determined in the exercise of the court’s general discretion as to costs. The court also noted that there would need to be some special or unusual feature to justify a departure from ordinary practice and award indemnity costs to the defendant. The court considered categories of cases that have been recognised as giving rise to an order for indemnity costs in favour of the defendant and noted that the only one relied upon here was an imprudent refusal of an offer to compromise.

The court was not satisfied that the plaintiff’s refusal of the offer was imprudent in the circumstances. The court was satisfied that the plaintiff did not commence proceedings for any ulterior motive or purpose but rather to obtain compensation for the serious injuries he suffered and to protect his family against the foreseeable deterioration of his economic capacity as he aged. The court was not satisfied that this was a case where there was no prospect of success and ordered that the plaintiff pay the defendant’s costs of and incidental to the proceedings on a standard basis.

In Issue:
• Whether there was an imprudent refusal of an offer to compromise on the part of the plaintiff, or other circumstances justifying an indemnity costs order

Delivered On: 13 February 2015

Sam Pillay
Senior Associate
Sam.Pillay@bnlaw.com.au
The Facts

On 6 February 2015, the Court of Appeal allowed the appellant’s appeal, setting aside the earlier judgment and entering judgment for the amount of damages assessed by the trial judge “together with interest thereon” (see case note in this casebook).

A dispute arose regarding whether additional interest was payable on the entire judgment sum, calculated from the date of judgment at first instance, namely 25 March 2014, or whether it was only payable on those heads of damages which attracted interest on the original assessment of damages (past economic loss, past gratuitous care and past out-of-pocket expenses).

The Decision

The Court of Appeal rejected the appellant’s contention that she was entitled to interest on the entire judgment amount from 25 March 2014 by virtue of s58(3) and/or 59(2) of the Civil Proceedings Act 2011 (Qld). Whilst s58(3) provides a wide discretion in awarding interest, the Court of Appeal noted the judgment at first instance was not provisional or pending outcome of any appeal. There was no reason why the respondent should have been required to make commercial decisions about the retention of monies on the basis that a judgment may be overturned.

The Court of Appeal noted that the appellant received the financial benefit of an award of damages as a consequence of a successful appeal and held there was nothing in the conduct of the respondent or the appellant’s circumstances to justify the exercise of the discretion under s58(3).

Similarly, the Court of Appeal refused to exercise the discretion available under s59(2) to vary the date from which the judgment was to take effect. In order to exercise the discretion under this section there must be some “wrongdoing” or “unreasonable act” more than the mere withholding of money. There were no such circumstances in the case.

The Court of Appeal declined to exercise its discretion pursuant to either s58(3) or 59(2) to order that additional interest be payable on the whole judgment entered on 6 February 2015, from 25 March 2014. Additional interest payable was limited to past losses only.
THE FACTS
The plaintiff was injured in a motor vehicle collision in October 2004 and commenced proceedings in the Supreme Court in June 2011. The claim was settled in March 2013 on the basis that the defendant pay the plaintiff $275,000 plus standard costs and outlays to be assessed on the District Court scale.

In assessing the plaintiff’s costs on the standard basis, the costs assessor allowed the costs of a medico-legal report of a clinical anatomist engaged by the plaintiff. The defendant objected to the costs on the basis that it was not necessary or proper under rule 702 of the UCPR and overlapped with the reports obtained from the other medical specialists.

The costs assessor also allowed 30% for the plaintiff’s solicitor’s care and conduct of the proceeding. The defendant submitted that the allowance was excessive having regard to the plaintiff’s solicitor’s heavy reliance upon counsel and the items which had been reduced by the costs assessor.

The respondent applied to the court for review of the costs assessor’s decision.

THE DECISION AT TRIAL
The trial judge found no error on the part of the costs assessors in determining that the costs associated with obtaining the clinical anatomist’s report were necessary or proper. However, the trial judge went on to consider an issue he had raised with the parties during submissions as to the expertise of the clinical anatomist and whether he could offer opinion evidence. The trial judge concluded that the report was inadmissible and that the plaintiff was not entitled to the costs of the report on that basis.

The trial judge considered that the case was not particularly complex and there was heavy reliance on counsel. His Honour found that the costs assessor’s reasons for allowing 30% for care and consideration to be inadequate and reduced the amount to 25%.

THE DECISION ON APPEAL
The Court of Appeal found that the defendant’s objection in respect of the costs of the clinical anatomist’s report was confined to a concern that the evidence of the clinical anatomist did not add further to the existing medico-legal reports. The costs assessor had discretion to determine whether or not the costs of the report were necessary or proper and there was no error in the exercise of that discretion. The application for reviewing that aspect of the costs assessor’s decision should not have succeeded.

With respect to the allowance for care and consideration, the Court of Appeal noted that, pursuant to the UCPR, a costs assessor may allow an amount for a solicitor’s care and conduct that the costs assessor considers reasonable. There was no specific ground before the trial judge that the costs assessor’s reasons for not reducing care and consideration from 30% to 25% were inadequate. The reduction in the amount for care and consideration made by the trial judge was an adjustment to quantum only. In circumstances where there was no error of principle on the costs assessor’s part, it was not the type of adjustment that should have been made on the application for review, and the trial judge’s decision on this aspect of the review could not be upheld.

The orders at first instance were set aside.

ASHLEE BONANNO
Solicitor
Ashlee.Bonanno@bnlaw.com.au
A, DC
v
PRINCE ALBERT COLLEGE INCORPORATED
[2015] SASC 12

In Issue:
• Whether the school breached its duty of care in employing, supervising or responding to the conduct of a teacher that sexually abused a student
• Whether the school was vicariously liable for the teacher’s conduct
• Whether the claim is statute barred

Delivered On:
4 February 2015

THE FACTS
In 1962, when the plaintiff was 12 and was boarding at Prince Alfred College (the defendant), he was sexually assaulted by a housemaster of the defendant’s boarding house, Mr Bain. Immediately after the school learned of the abuse, Mr Bain was dismissed. The plaintiff subsequently experienced a range of psychological difficulties, and in 1996 he was diagnosed with post traumatic stress disorder.

The plaintiff later learned that in 1954, some seven years before commencing employment with the defendant, Mr Bain was convicted for gross indecency. Further, the plaintiff became aware that Mr Bain had “acted inappropriately” in a previous school posting.

In December 2008, the plaintiff brought a claim against the defendant for damages suffered as a result of his psychological injury. The plaintiff alleged that the defendant breached its non-delegable duty of care, breached its general duty of care and/or was vicariously liable for Mr Bain’s conduct.

The plaintiff also argued that his claim was not statute barred because the cause of action did not arise until 1996 when he was diagnosed with post traumatic stress disorder. He further argued that since 1996 he was under a legal disability and, by virtue of s45 LAA (SA), the time for bringing an action should be extended for the period of the disability. In the alternative, the plaintiff relied on the court’s general power to grant an extension under s48 LAA (SA).

THE DECISION
The court held that although the defendant owed a non-delegable duty of care to the plaintiff, this duty did not extend to protect the plaintiff against the intentional criminal conduct of Mr Bain.

In relation to the breach of the general duty of care, the plaintiff argued that the defendant failed to:
1) make reasonable enquiries about Mr Bain with his previous employer or the police before employing him;
2) supervise Mr Bain and implement adequate systems within the boarding house that would guard against inappropriate conduct; and
3) arrange counselling for the plaintiff and to report Mr Bain’s conduct to the police.

In relation to the first argument, the court was satisfied (based on expert evidence) that in the 1960s there was no practice among private schools to apply for criminal record...
checks for prospective employees. Further, the court observed that there was no evidence that, had the defendant enquired about Mr Bain, either with his previous employer or with the police, it would have been given information which indicated anything untoward about him. Accordingly, the court concluded that the defendant did not breach its duty of care to make reasonable enquiries about Mr Bain before employing him.

The court was unable to find on the evidence before it, that the existing systems in the boarding house or the level of Mr Bain’s supervision was so deficient as to amount to a breach of duty of care by the defendant. The court also found that it would have been wholly impractical to insist that a boarder should never be alone with a master.

With respect to the third argument, the court assessed the defendant’s conduct in light of the standards that prevailed in 1962 rather than today’s standards. The court observed that while by contemporary standards more could have been done for the plaintiff (e.g. counselling should have been insisted upon and the police should have been advised), the court could not find that the defendant’s response to the situation was in breach of its duty of care in terms of the standards then prevailing.

The court held that the defendant was not vicariously liable for Mr Bain’s conduct because the sexual abuse was so far from being connected to Mr Bain’s proper role that it could neither be considered as an unauthorised mode of performing an authorised act, not in pursuit of the employer’s business, nor in any sense within the course of Mr Bain’s employment.

Although there was insufficient evidence with respect to Mr Bain’s designated role, the court was influenced by the fact that the primary responsibility for supervising the boarders was with prefects and not housemasters. Further, the court observed that the abuse happened not only in the boarding house but also off campus and outside the school term.

The court found that, although the plaintiff was only diagnosed with post traumatic stress disorder in 1996, he had in fact been suffering from it since 1962. Accordingly, the court held that “in all likelihood” the cause of action arose in 1962 and the claim was statute barred.

The court further found that, since the cause of action arose in 1962, an extension of time under s45 LAA (SA) was unavailable because under that section time cannot be extended for more than 30 years from when the cause of action arose.

The court refused to exercise its discretion to grant an extension of time pursuant to s48 because it was the plaintiff’s own rational decision not to initiate proceedings earlier.

GUSEL SCHNEIDER
Solicitor
Gusel.Schneider@bnlaw.com.au
THE FACTS
On 18 February 2008, the respondent was injured in a motor vehicle accident. On 18 December 2008, the appellant, by his insurer, admitted liability for the accident. Thereafter the appellant’s insurer paid the respondent’s medical treatment accounts until 15 June 2010. The parties engaged in negotiations, culminating in the appellant’s lawyer making a written offer to the respondent on 28 June 2011 (the final offer). The offer was not accepted.

On 11 December 2013, the respondent commenced proceedings in the Supreme Court claiming damages for personal injury arising out of the accident. The parties engaged in negotiations, culminating in the appellant’s lawyer making a written offer to the respondent on 28 June 2011 (the final offer). The offer was not accepted.

THE DECISION AT TRIAL
The trial judge found that evidence of the final offer was admissible because it confirmed the respondent’s right of action and therefore directly affected the rights of the respondent. The application for summary judgment was dismissed.

THE DECISION ON APPEAL
The Supreme Court found that evidence of the final offer did not create, alter, vary or interfere with any relevant right of the respondent. His Honour noted that the commencement of proceedings was always the responsibility of the respondent, and it had not been suggested that there was any impediment to the respondent commencing proceedings within the limitation period. There was no suggestion that the appellant represented to the respondent that he would not plead the limitation period if the respondent did not commence proceedings in time, or that the appellant conducted himself in such a way that he should not be allowed to plead the expiration of the limitation period.

His Honour found that evidence of the final offer would also be contrary to the policy considerations underlying the exclusionary principle in s131(1) of the Evidence Act.

Evidence of the final offer was not admissible as an acknowledgement of the respondent’s cause of action. The decision of the trial judge was set aside and summary judgment entered for the appellant.

ASHLEE BONANNO
Solicitor
Ashlee.Bonanno@bnlaw.com.au
THE FACTS
The plaintiffs are subsidiaries of Boral Limited and manufacture / supply concrete and bricks for use in the construction of buildings and other structures in Victoria. The defendant is a national trade union with several divisions including the Construction & General Division. Its members include persons employed or engaged in construction work in connection with Victorian construction projects.

The crux of the claim by the plaintiffs was that the defendant had caused them loss by imposing an industrial ban on concrete and other building products supplied by the plaintiffs. In February 2013, the plaintiffs commenced proceedings by filing a writ and indorsement of claim (the claim). No appearance was made on behalf of the defendant for many months, despite being served with all relevant documents. Default judgment was entered in favour of the plaintiffs on 20 May 2013. After the plaintiffs applied for an assessment of damages, the defendant filed an Appearance and an application to have the default judgment set aside. In support of that application, the defendant relied on numerous procedural irregularities and also an argument that the plaintiff’s cause of action was based on the tort of intimidation, which was not a recognised tort in Australian law.

THE DECISION
The defendant argued that the allegations made in the pleadings raised the tort of interference with business by unlawful means of which intimidation was a variant. In either case, the defendant argued, no cause of action was disclosed because an analysis of Australian legal authorities at High Court and State appellate court level showed that the tort was not recognised in Australia.

The plaintiffs argued that the pleadings raised only the tort of intimidation and not the broader tort of interference with business by unlawful means. The court agreed. The plaintiffs also argued that the tort of intimidation was authoritatively established in Australia. The court noted the established proposition that intermediate appellate courts and trial judges Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth or uniform national legislation or the common law unless they are convinced that the interpretation was plainly wrong. Until the High Court rules on a particular matter, the doctrines of precedent which bind the respective courts at various levels below the High Court provide a rule for a decision. Contrary to the defendant’s argument, this did not mean that until there was a decision of the High Court a particular common law of Australia did not exist.

The court therefore held that the plaintiffs were correct in their argument that it did not matter that the High Court had not ruled on the tort of intimidation because there was a decision of the New South Wales Court of Appeal (Sid Ross Agency Pty Ltd v Actors & Announcers Equity Association [1971] INSWLR 760) to the effect that the tort of intimidation was recognised, and that decision was binding on the Victorian Supreme Court.

The court was satisfied that the tort of intimidation was a proper cause of action and that the pleadings in the case alleged the elements of the tort. All of the defendant’s challenges to the entry of the default judgment against it were rejected by the court.
THE FACTS
From 1992 to 2005, Peter Cahill and Peter Bega carried out a number of property developments in joint venture through their related companies. After their relationship broke down in 2006, it became necessary for them to separate their interests in various joint venture projects and on 12 April 2007, they entered into two agreements: a Heads of Agreement (HOA), and a Mediation Agreement (MA) in which Ian Ferrier was the nominated “mediator”.

The HOA included a provision for a “swing payment” to be made by Mr Bega to Mr Cahill, the amount of which was dependent upon the valuation of a joint venture property located in Narrabeen, NSW (the property). Pursuant to a clause in the HOA, Mr Ferrier was engaged to instruct Greg Kenna of LandMark White NSW Pty Ltd (LMW) to value the property. The HOA provided that the valuation would be binding on the parties to the HOA.

Mr Kenna valued the whole of the property at $21.5 million. Mr Cahill disputed the valuation, arguing that it greatly undervalued the property, however, Mr Bega contended that the valuation was binding for the purpose of resolving their dispute. The effect of the HOA was that the higher the valuation, the higher the payment to be made by Mr Bega to Mr Cahill.

Mr Cahill and his company, Duel Estates Pty Ltd (the plaintiffs) brought two sets of proceedings in the Supreme Court of NSW, which were heard together. The first was commenced against LMW and Mr Keena for negligence in the preparation of the valuation or alternatively, for misleading and deceptive conduct in stating the value of the property at $21.5 million. The second was commenced against Mr Ferrier for breach of contract, or negligence, in relation to the instructions that he gave to Mr Kenna and LMW.

THE DECISION
One of the key issues at trial concerned the expert evidence tendered by two valuers. Each of the expert valuers was instructed to assess the market value of the property as at 25 June 2007 (the date of Mr Kenna’s valuation).

LMW and Mr Kenna’s expert valuer, Mr Panapoulos, was instructed to provide a “blind” valuation, which essentially replicated the task given to Mr Kenna in 2006. In contrast, the plaintiffs’ expert,
Mr Davis, did not perform the same task that Mr Kenna was instructed to perform and had performed. Mr Davis was provided with a significant amount of material which contained opinions as to the value of the property. None of that material had been provided to Mr Kenna or Mr Panapoulos. The valuations prepared by Mr Davis and Mr Panapoulos differed greatly. The court ultimately preferred the valuation evidence of Mr Panapoulos given that it was produced under relatively the same conditions as Mr Kenna’s original valuation.

Another issue considered by the court was whether LMW, Mr Keena and Mr Ferrier owed a duty of care to the plaintiffs, in circumstances where the plaintiffs’ claims were for pure economic loss. The court held that there was no duty of care owed because neither vulnerability nor reliance on the part of the plaintiffs had relevantly been established.

The court ultimately dismissed both of the plaintiffs’ claims, finding in favour of LMW and Mr Keena in the first proceedings, and Mr Ferrier in the second proceedings.

“The first was commenced against LMW and Mr Keena for negligence in the preparation of the valuation or alternatively, for misleading and deceptive conduct in stating the value of the property at $21.5 million.”
Meet our Sydney team of insurance law specialists

SIMON BLACK
Partner
E: simon.black@bnlaw.com.au

Simon’s areas of expertise include professional indemnity, management liability, directors and officers, financial lines, and transportation liability.

Simon advises insured professionals on professional indemnity matters, including: property valuers, engineers, architects and builders, accountants and financial planners, Associations, health professionals and film and television production and distribution professionals.

He acts for insurers on construction and engineering matters, in respect of high value and complex contract works and industrial special risks claims. Simon also has experience advising insurers and insureds on high profile ACCC and ASIC investigations, inquiries and prosecutions as well as securities class actions.

NICHOLAS ANDREW
Partner
E: nicholas.andrew@bnlaw.com.au

Nicholas has 15 years experience in advising both Australian and London-based insurers across major lines of insurance including professional indemnity, public and products liability and property (third and first party). He has particular expertise in complex construction and engineering matters.

Nicholas also advises insurers on broader policy and coverage aspects across a range of industries and business classes.
THE FACTS

The plaintiffs commenced proceedings against the defendants in New South Wales on 5 October 2012 for breach of contract and negligence in relation to the design and construction of a building. Those proceedings were transferred to Queensland on 2 November 2012.

On 5 February 2015 the plaintiffs informed the defendants that they were considering amending the pleadings to include a claim for breach of s52 TPA.

In March 2015, a draft amended pleading was delivered to the defendants’ solicitors. The limitation period for this cause of action had expired in the time since proceedings were instituted.

The plaintiffs sought leave to amend their claim to add the new cause of action. The application was made pursuant to Rule 376(4) UCPR (QLD) which allows the court to grant leave to a plaintiff to amend a claim to introduce a new cause of action where the relevant period of
The application turned on whether it was appropriate to allow the amendment and in that regard what was in issue was whether a fair trial could be secured given the plaintiffs’ delay in adding the new cause of action.

The court noted that the majority of the representations to be pleaded against the defendants were with respect to future matters, and that under the TPA provisions, representations in respect of future matters made without reasonable grounds are taken to be misleading. The court further noted that the effect of s51A TPA is that unless a defendant can adduce evidence to the contrary, it is deemed that there are no reasonable grounds.

The court found that a fair trial could not occur because of the time that had passed and because, in circumstances where the evidentiary onus was reversed, the defendants were required to answer allegations regarding representations made more than 10 years in the past.

The court held that the plaintiffs did not provide any satisfactory explanation for the delay and had no confidence that if leave was granted to amend, an investigation of the design and construction considerations taken into account by the engineers and builders engaged at the time could not satisfactorily be carried out. The defendants would accordingly be prejudiced.

The application was therefore dismissed.

ELSBETH REYNOLDS
Senior Associate
Elsbeth.Reynolds@bnlaw.com.au

The limitation was current as at the date of commencement of proceedings but had expired by the time of the application to amend, if:

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief had already been claimed in the proceedings by the party applying for leave to make the amendments.

The defendants objected to the plaintiffs’ application.

THE DECISION

(a) a plaintiff bears the onus of proving that a fair trial can be secured;

(b) it is not appropriate to allow an amendment if the plaintiff has not established an absence of prejudice from the cause of action being claimed so late; and

(c) that a court should not be seen to accede to applications made without any adequate explanation for the delay, although the absence of explanation for delay will not necessarily, without anything else, be a decisive factor.

The court noted that the majority of the representations to be pleaded against the defendants were with respect to future matters, and that under the TPA provisions, representations in respect of future matters made without reasonable grounds are taken to be misleading. The court further noted that the effect of s51A TPA is that unless a defendant can adduce evidence to the contrary, it is deemed that there are no reasonable grounds.

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The court held that the plaintiffs did not provide any satisfactory explanation for the delay and had no confidence that if leave was granted to amend, an investigation of the design and construction considerations taken into account by the engineers and builders engaged at the time could not satisfactorily be carried out. The defendants would accordingly be prejudiced.

The application was therefore dismissed.
THE FACTS

Mr Gary Michael alleged that he sustained personal injuries as a result of massage therapy treatment he received from Mr Raymond Shapcott and Mr Paul Camac over a period of time between September and November 2011.

Mr Camac held a professional indemnity policy (as a massage therapist) with Marsh Pty Ltd (“Marsh”), underwritten by W.R. Berkley Insurance (Europe) Limited (“Berkley”). Mr Shapcott had no relevant policy of insurance for which he was the named insured.

Mr Shapcott was issued with a compliant PIPA notice of claim and subsequently issued a contribution notice to Mr Camac. On behalf of Mr Camac, Berkley denied Mr Shapcott’s claim for contribution against Mr Camac.

Mr Shapcott then sought to make a claim as an insured under Mr Camac’s policy. Berkley declined Mr Shapcott’s claim for indemnity.

Mr Michael then issued a compliant PIPA notice of claim against Mr Camac and Berkley assumed conduct of the PIPA claim on behalf of Mr Camac.

Mr Shapcott issued a contribution notice directly to Berkley. The contribution notice was issued out of time.

Berkley did not consent to the late issue of the contribution notice. An application was made by Mr Shapcott for leave to issue the contribution notice despite it being out of time.

S16(1)(a) PIPA states that a respondent (such as Mr Shapcott) who receives a complying notice of claim may, within the prescribed time, add “someone else” as a contributor for the purpose of the pre-court procedures by giving that person a written notice (contribution notice) claiming indemnity for the respondent’s liability.

The primary issue to be resolved was whether, in the circumstances, s16(1) PIPA was engaged so as to make Berkley a contributor to the claim.

THE DECISION

The court held that the reference to “indemnity” in s16(1)(a) PIPA can include indemnity under an insurance policy.

This is because the meaning of “indemnity” in other sections of PIPA is consonant with insurance indemnity and is not limited to indemnity as a joint or concurrent tortfeasor or under a contract (other than an insurance contract).

The court therefore granted leave to Mr Shapcott to join Berkley as a contributor.
248  MELLARE v UNITED PACIFIC INDUSTRIES LTD [2014] NSWSC 1626

Whether manufacturer was liable to supplier for breach of contract for supplying poisonous goods.

249  INGRID MARGARET STEPHENSON v PARKES SHIRE COUNCIL; NATALEE STEPHENSON v PARKES SHIRE COUNCIL; JAY STEPHENSON v PARKES SHIRE COUNCIL; SOUTH WEST HELICOPTERS PTY v ESSENTIAL ENERGY (FORMERLY COUNTRY ENERGY); PARKES SHIRE COUNCIL v SOUTH WEST HELICOPTERS PTY LIMITED [2014] NSWSC 1758

Liability of Council, helicopter company and energy supplier for fatal accident when helicopter struck overhead power lines, exploded and crashed killing all on board.

251  MCDERMOTT & ORS v ROBINSON HELICOPTER COMPANY INCORPORATED [2014] QCA 357

Defective goods claim and whether the maintenance manual produced by the manufacturer contained defective instructions to ensure the safety of a helicopter.

253  GOODHUE v VOLUNTEER MARINE RESCUE ASSOCIATION INCORPORATED [2014] QDC 29

The extent of the duty of care of a volunteer organisation.

255  POPE v MADSEN [2015] QCA 36

Whether Australian law recognises the right of a child to bring a claim for equitable compensation against a parent for breach of fiduciary duty based on physical and sexual abuse.

256  SIEROCKI & ANOR v CLERK & ORS (NO. 2) [2015] QSC 92

Allegations of defamation, in the form of emails and website postings, made against the first plaintiff’s former business partner and a former client.
Meet our Melbourne team of insurance law specialists

PETER EWIN
Partner
E: peter.ewin@bnlaw.com.au
Peter has over 30 years experience, specialising in insurance law. He has an indepth understanding of the insurance industry and has managed numerous successful class actions and is highly regarded as a litigator.

Peter has extensive experience in handling injury liability, compulsory third party, recovery, ISR and property liability claims. He has also worked on a broad range of public and product liability and medical negligence claims, and provides advice on policy interpretation. Another one of Peter’s areas of specialisation is in defending professional indemnity claims, particularly for construction and engineering clients.

NIEVA CONNELL
Partner
E: nieva.connell@bnlaw.com.au
Nieva has extensive litigation experience and a reputation as a highly capable and commercially astute lawyer. She has conducted successful litigations for national, multinational and international insurers.

Nieva’s experience also includes advising clients on commercial and insurance claims and coverage disputes, particularly those involving public and products liability, professional indemnity, occupational health and safety, and trade practices. Assisting clients with policy interpretation and drafting, claims assessment and statutory and compliance issues, is also part of Nieva’s area of specialisation.

HUBERT WAJSZEL
Partner
E: hubert.wajszel@bnlaw.com.au
Hubert is an experienced insurance law and commercial litigation specialist who handles contentious and non-contentious matters for local and overseas insurers and captives, regularly appearing in VCAT, the County, Supreme and Federal Courts, and local government inquiries.

Hubert specialises in professional indemnity insurance, with a particular focus on construction professionals, financial institutions and directors’ and officers’ liability. He acts for professionals regularly defending claims brought against, architects, engineers, building surveyors, accountants, mortgage brokers and introducers, directors and officers, conveyancers and real estate agents.

Hubert’s practice also extends to providing risk management advice, including undertaking reviews of contract documents and policy wordings.
THE FACTS
Taiwan Stanch Co Ltd (Taiwan Stanch) manufactured a cold gel pack product, known as Thermoskin, which it supplied to United Pacific Industries Pty Ltd (United Pacific) for sale in pharmacies in Australia. It was the plaintiff’s case that the plaintiff, who was an infant at the time of the incident, bit into the skin of the cold pack, puncturing it and ingesting some of its contents, which were poisonous. The plaintiff issued proceedings against United Pacific.

Judgment was entered against United Pacific in the sum of $685,000 by way of damages. Costs were subsequently agreed between the plaintiff’s lawyers and United Pacific’s lawyers in the sum of $215,000.

United Pacific issued a cross-claim against Taiwan Stanch. United Pacific alleged that Taiwan Stanch made representations that the gel used in Thermoskin was non-toxic and that those representations were promissory in nature and formed a term of the contract. United Pacific sought indemnity from Taiwan Stanch in the sum of $900,000.

United Pacific brought an application seeking summary judgment on its cross-claim. Taiwan Stanch did not oppose the application.

THE DECISION
The trial judge accepted that Taiwan Stanch made representations to United Pacific that the gel used in Thermoskin was propylene glycol and was non-toxic in nature. The trial judge noted that the representations were frequently put into writing and contained statements of fact of the type that would be within the knowledge of Taiwan Stanch but not within the knowledge of United Pacific.

The trial judge found that the representations were made in a serious commercial setting and for the purpose of inducing United Pacific to enter into a contract with Taiwan Stanch. The trial judge therefore found that the representations that the gel contained propylene glycol and was non-toxic were promissory in nature and formed a term of the contract between Taiwan Stanch and United Pacific. The court was satisfied that the Thermoskin supplied to United Pacific (and acquired by the plaintiff’s mother) was supplied in breach of that warranty.

 Judgment was entered in favour of United Pacific against Taiwan Stanch on the cross-claim in the sum of $900,000 plus interest.

“It was the plaintiff’s case that the plaintiff, who was an infant at the time of the incident, bit into the skin of the cold pack, puncturing it and ingesting some of its contents, which were poisonous.”
THE FACTS

In 2006, a helicopter struck an overhead power line while performing an aerial survey for the purposes of determining the presence of noxious weeds. The helicopter was piloted by an employee of South West Helicopters who was engaged by the Council to conduct the survey. Also on board were two employees of the Council, Mr Stephenson and Mr Buerckner. All three were killed in the crash.

The family of Mr Stephenson (the plaintiffs) brought proceedings for nervous shock and pursuant to the Compensation to Relatives Act 1897 against the Council and South West Helicopters. South West Helicopters claimed that the nervous shock claims were time barred by operation of the Civil Aviation (Carriers’ Liability) Act 1959 (Cth) (“CAA”). A number of other claims and counter/cross claims were also brought between the Council, South West Helicopters and Essential Energy (the owner of the overhead power lines) although these were not considered in the first instance.

THE DECISION

In respect of the claim against the Council, the court found that the Council owed a non-delegable duty to its employees to ensure a safe system of work and to take reasonable care for their safety to avoid exposing them to...
unnecessary risk of injury. The risk must not be identified in terms which are too narrow and here the relevant risk was that the helicopter would impact with a power line and crash thereby injuring or killing those on board. The Council breached its duty of care to Mr Stephenson by failing to access information available to it regarding the presence of wires in the relevant area, failing to conduct a proper risk assessment and failing to impose, as a condition of the flight, a height threshold of 500ft.

The court also held that the Council’s negligence was a cause of the accident even though the accident occurred at a time when matters were beyond the control of the Council because the Council had the ability, prior to the flight, to control the height at which the survey was conducted.

The court considered that the Council also owed a duty of care to South West Helicopters (even though the relationship was generally one of hirer and operator) because the Council retained some control over the conditions of the flight including the altitude at which the plane flew to conduct the survey. It breached this duty by not imposing a height threshold and it was causative of the accident.

The court held that South West Helicopters owed a duty of care to its passengers and, through the acts and omissions of its Chief Pilot and the pilot, was in breach of this duty by not flying at an inappropriate height and that negligence was causative of the damage to the plaintiffs.

With respect to Essential Energy, the court had to consider whether it owed a duty of care to South West Helicopters as the relationship between the two entities did not fall into an established category of duty. The court held that it owed a duty of care to aircraft owners and all persons who could sustain damage as a consequence of a pilot flying low in the area, including South West Helicopters, even though it did not know that the survey was to be conducted. By not providing markers on the wires to enable them to be seen from several hundred feet away, it breached its duty and this was a cause of the accident.

The court was also required to consider whether the plaintiffs’ claims would fail as against South West Helicopters because of the 2 year limitation period imposed by the CAA. The CAA would apply if Mr Stephenson was a passenger and the flight was one that involved the carriage of passengers or cargo.

The court held that as the flight was engaged in commercial transport operations and not the carriage of passengers, the CAA did not apply. Further, Mr Stephenson was not a passenger within the definition given in the CAA.

In any event, the court considered whether nervous shock claims were caught by the CAA. It upheld the decision in South Pacific Air Motive Pty Limited v Magnus [1998] FCA 1107 that the CAA has no application to claims for psychological injury to non passengers arising out of injuries to passengers as the result of an accident on board an aircraft and, as a result, the time limitations did not apply.
THE FACTS

Mr McDermott (first appellant) was seriously injured on 30 May 2004 when the helicopter in which he was a passenger crashed while engaged in an inspection of fence lines on a very large cattle property on the Queensland-Northern Territory border. The pilot of the helicopter, Kevin Norton, did not survive the crash. The helicopter had been purchased by the owner of the property (the third appellant – NTB) in March 2004 and was delivered in April 2004. The helicopter had been regularly inspected and maintained before purchase by NTB. NTB employed Mr Norton.

It was common ground that the accident was caused by the failure of the forward flexplate which was a four-pointed, flexible metal sheet located within the helicopter’s drive mechanism that transfers power from the engine to turn the helicopter blades. This part failed because one of the four bolts in the flexplate (Bolt 4) had not been properly tightened at some earlier time, creating a gap between the nut and the flexplate. This gap increased over time causing fretting on the surface of the bolthole in the flexplate and the formation of two cracks.

Bolt 4 was one of the critical fasteners in the helicopter which, if incorrectly installed or removed or lost, jeopardised the safe operation of the helicopter with potentially catastrophic results. Each bolt was installed with a primary locking nut, washers and a secondary locking nut called a palnut, and torqued at installation to achieve a specified degree of tightness. All critical fasteners were then to be applied with a torque seal (strip of paint) across both nuts and exposed bolt threads to allow bolt rotation to be detected by visual inspection.

The maintenance manual provided for regular periodic inspections of the helicopter and required maintenance engineers to inspect the condition of the flexplate and “verify the security” of the bolts. According to the manual, by visually inspecting the condition of the torque stripes, the engineers were able to identify if any of the bolts had rotated as the torque stripe would break and be seen during the inspection.

Neither party was able to establish, as a matter of fact, whether the bolts and the associated torque stripes were originally installed correctly. No concerns had been raised about Bolt 4 following the earlier inspections.

The appellants alleged that the use of torque stripes was an unreliable indicator of bolt tightness and, as Bolt 4 was a critical fastener, the respondent’s maintenance manual failed to specify an adequate inspection procedure of the bolts and should have provided for a more stringent method of bolt inspection.

“Neither party was able to establish, as a matter of fact, whether the bolts and the associated torque stripes were originally installed correctly.”
THE DECISION AT TRIAL

The respondent was successful at trial. The trial judge held that the instructions in the maintenance manual relating to the inspection of the flexplate (particularly the instruction to verify that it was securely fastened) was, in light of other instructions in the manual, adequate to address the risk of failure of the flexplate from an inadequately secured bolt joint.

THE ISSUES ON APPEAL

The Court of Appeal was required to consider whether reliance upon torque stripes was an adequate method of alerting an engineer during an inspection to check the torque of the bolt.

THE DECISION ON APPEAL

By majority, the Court of Appeal upheld the appeal and remitted the matter to the trial division for the assessment of the appellants’ damages.

The Court of Appeal held that the manual did not provide adequate instructions to the engineers performing periodic inspections to verify the security of the bolts by means other than reliance upon the visual inspection of torque stripes in circumstances where torque stripes were not a ready, safe and reliable indicator of the ‘security’ of a bolt. In reaching this conclusion, the Court of Appeal considered a number of factors. In particular, the Court of Appeal viewed photographs of torque stripes on other helicopters which showed that stripes deteriorate over time so that large parts of the stripe fall off and/or fade without necessarily indicating that a defect exists. It was found that, regardless of whether the stripe was installed originally and had deteriorated or was not installed previously, the condition of the torque stripe on Bolt 4 was not such as to alert any of the engineers or pilots to the fact that Bolt 4 was loose and rotating or even to the need to investigate further. Further, the manual did not require engineers to re-torque the bolts and apply new stripes in circumstances where the stripe had deteriorated.

In addition, the Court of Appeal found that a simple and inexpensive torque wrench or spanner could be used to manually check each bolt for looseness rather than relying on torque stripes, and in those circumstances, it was held that the manual did not provide adequate instructions to engineers performing periodic inspections. Had those further, simple instructions been in the manual, the engineers would have followed them and inevitably detected movement in the incorrectly assembled bolt. The engineers would have re-assembled and re-torqued the bolt and the accident would have been avoided.

Judgment was entered for the appellants and the matter was remitted to the trial division for assessment of damages.
In Issue:
• Whether the defendant was liable for damage caused to a boat after its agents anchored it

Delivered On:
20 February 2015

THE FACTS
In about July or August 2003 Mr Goodhue (the plaintiff) anchored his vessel in Marine Stadium, Southport. The plaintiff went overseas on 11 August 2003. On 25 October 2003, in response to a report indicating the vessel was dragging anchor, authorised agents of the Volunteer Marine Rescue Association (the defendant) sought and obtained police approval and subsequently proceeded to re-anchor the vessel. The agents returned on the same day to confirm the vessel had not moved from its new position. A week later, on either 1 or 2 November 2003 the agents carried out a further check on the position of the vessel and observed it to be in the same position. The plaintiff returned on 6 November 2003 and discovered that his vessel had run aground and both the vessel and contents were damaged.

The plaintiff brought an action alleging the defendant organisation had breached the duty of care owed to him because its agents had moved the vessel without permission and re-anchored it too close to shore, which he claimed caused his vessel to run aground.

THE DECISION
The court rejected the plaintiff’s claim and found there was no negligence on the part of the defendant and its authorised
The court concluded that the defendant did not breach its duty of care as its agents competently re-anchored the vessel and left the vessel in a safer state than when they found it.

agents. The court accepted that when the defendant intervened to re-anchor the vessel, it assumed a duty of care to do so competently. However, the court refused to accept that the duty extended to continuing to monitor the position of the vessel indefinitely and to contact the owner. In reaching this conclusion the court noted that the plaintiff had left the vessel for a lengthy period of time under the supervision of friends (not the defendant) and the only reason the defendant intervened was in response to an emergency situation. Further, the defendant was a voluntary organisation that was only intended to respond to emergency marine incidences, not to monitor each vessel anchored in the area.

The court concluded that the defendant did not breach its duty of care as its agents competently re-anchored the vessel and left the vessel in a safer state than when they found it. Further, the plaintiff could not exclude the possibility that someone else interfered with the vessel.

Although, as a result of these findings, it was not necessary to do so, the court went on to consider the plaintiff’s submission that a volunteer organisation could be held vicariously liable for the actions of its volunteers on the basis that the protection afforded under s39 CLA (QLD) is directed to individual volunteers and not to a volunteer organisation.

This argument was rejected and the court followed Commonwealth of Australia v Griffiths [2007] NSWCA 370, a case concerning the equivalent New South Wales provisions, and held that the defendant who would ordinarily be vicariously liable for the conduct of its agent was protected by any immunity available to the actual wrongdoer.

The plaintiff’s claim was dismissed and the defendant’s counterclaim for $200 plus interest of $205.73 for salvaging the vessel was allowed.
In Issue:
• Whether the abuse of a child by her parents constituted a breach of fiduciary duty

Delivered On:
13 March 2015

THE FACTS
The respondent brought proceedings in the District Court seeking equitable damages and exemplary damages for breach of fiduciary duties against her father (the applicant and first defendant at trial) and her mother (the second defendant at trial). The respondent’s parents had separated in 1986, when she was eight years old, and she had continued to reside with the applicant. She alleged that her father owed her fiduciary duties which included duties to care for and protect her, to act in her best interests, to secure her interests above his own and to ensure she was not exposed to inappropriate conduct when she was in his presence. The respondent alleged that her mother owed her fiduciary duties of a similar nature.

The respondent alleged that her father breached those fiduciary duties by engaging in acts of a sexual nature which he knowingly allowed the respondent to witness, by sexually and physically abusing the respondent, and by failing to provide her with a safe and hygienic environment and adequate clothing. The respondent alleged that her mother had also breached the fiduciary duties by engaging in similar conduct. The respondent alleged that the breaches by her father and her mother had caused her to suffer psychological and physical injuries.

THE DECISION AT TRIAL
The father and mother both brought strike out applications, alleging that the respondent’s statement of claim disclosed no cause of action at law. The trial judge considered a number of authorities and concluded that there was no binding decision which clearly showed that the plaintiff’s cause of action was not arguable. The trial judge dismissed the strike out applications and gave the plaintiff leave to amend the statement of claim for equitable compensation, rather than equitable damages.

The father then sought leave to appeal the decision of the trial judge. The mother did not seek leave to appeal.

THE ISSUES ON APPEAL
The Court of Appeal had to consider whether, under Australian law, a child can sue her parents for equitable compensation for breach of fiduciary duty as a result of an injury sustained due to the abusive conduct of the parents.

The Court of Appeal referred to numerous authorities and noted that the law of Australia only recognises proscriptive fiduciary duties, and does not impose positive legal duties on a fiduciary. The term “fiduciary” may be applied to the relationship of a parent and child in some circumstances, but the existence of a fiduciary duty that is enforceable by way of equitable remedies depends on the application of the settled established principles as to the circumstances of when fiduciary obligations are imposed.

The Court of Appeal endorsed the view expressed by the Full Court Federal Court in Paramasivan v Flynn [1998] FCA 1711 that just because sexually abusive conduct of a minor by her guardian could be described in terms of an abuse of a position of trust or confidence, this did not mean that the respondent could succeed in an action for breach of fiduciary duty.

The Court of Appeal unanimously held that the current state of Australian law was such that the respondent had no maintainable cause of action against her father for breach of fiduciary duty. Accordingly, the father’s appeal was allowed, and the respondent’s claim and statement of claim was struck out.
SIEROCKI & ANOR
v CLERK & ORS (No. 2)
[2015] QSC 92

THE FACTS
This matter involved allegations of defamation arising from 10 publications, 2 of which were in the form of emails with the balance comprising various posts on a range of websites. The first plaintiff and the first defendant were business partners who began a company called Insolvency Guardian, (the second plaintiff), in early 2011. The relationship between the first plaintiff and the first defendant broke down and arrangements were made to separate the parties’ business affairs in November 2011. Following the separation, the first defendant began publishing the allegedly defamatory material.

There were 5 named defendants to the claim. The second, third and fifth defendants were corporate entities associated with the first defendant. The fourth defendant was a disgruntled former client of the second plaintiff who aligned himself with the first defendant and published various defamatory remarks on two websites in January 2013.

In Issue:
- Defamation proceedings in relation to various online posts concerning an individual and a related corporate entity
- Appropriate damages for defamatory material published on the internet

Delivered On:
17 April 2015
“The plaintiffs alleged that the relevant publications had been actuated by ill will and by greed as well as the desire to profit at the plaintiffs’ expense.”

The plaintiffs alleged that the relevant publications had been actuated by ill will and by greed as well as the desire to profit at the plaintiffs’ expense. The plaintiffs further pleaded that the relevant publications had the intention of causing people who read them to shun and lower their estimation of the plaintiffs.

THE DECISION

The court considered all 10 allegedly defamatory publications in turn. The publications largely consisted of comments suggesting that the first plaintiff lacked business ethics and that people ought to avoid doing business with either of the plaintiffs.

The first plaintiff successfully argued that the publications had caused him significant emotional distress and had lowered his standing within the community. The publication of two allegedly defamatory emails was limited to their respective recipients. However, the eight website publications were found to constitute a publication to the world at large. The court acknowledged that in respect of at least two of the website publications, it was extremely difficult, if not impossible, to remove the defamatory statements. The court also acknowledged that there had been no apology forthcoming from the defendants in respect of any of the publications.

In assessing damages, the court noted that section 35 of the Defamation Act 2005 (QLD) capped non-aggravated damages for non-economic loss at $366,000. The court considered that the damages award needed to be sufficient to vindicate the plaintiffs’ reputation both up to the time of the judgment and into the future.

In favour of the first and second plaintiff respectively, the court awarded total damages of $130,000 and $80,000 against the first, second, third and fifth defendants. As against the fourth defendant, the court awarded damages of $60,000 and $20,000.

The plaintiffs also sought a permanent injunction. The court found that the defendants had continued to post defamatory material after they had been served with the statement of claim which indicated that they had not been deterred by the likely financial consequences of their actions. On that basis, the permanent injunction sought by the plaintiffs was granted.
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