Holman Webb
Lawyers

Insurance Law Bulletin

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Contents

Introduction

Welcome to our first edition of the Holman Webb Insurance Law Bulletin.

The insurance law landscape is continuously changing and this year alone we have already seen many significant and topical cases with implications for insurers.

This edition of the Insurance Law Bulletin highlights legal professional privilege, bullying cases, workers compensation cases, aviation cases, liability and medical malpractice cases and we also discuss the recent High Court decision in respect of section 54 of the Insurance Contracts Act

Holman Webb has been involved in the Australian insurance industry for over 50 years. Today, we act for significant local and international insurers.

We advise our clients on a considerable number of insurance matters including; general insurance (industrial special risks, indemnity and fraud), large scale property and product liability, multi-party litigation, recovery, business practices, directors' & officers', medical malpractice, professional indemnity and transport insurance law including, aviation, marine & motor vehicle claims. We have also developed a comprehensive offering in the Employment Practices Liability field and we have specialised Workplace Relations and Workers Compensation teams.

We trust you will find the articles in this bulletin both topical and interesting.

Please do not hesitate to contact me if you have any questions.

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Section 54 – its application to claims made policies and the current debate in respect of its scope

By John Van de Poll, Partner and Uma Kotecha, Solicitor

What is Section 54 all about?

Section 54 of the *Insurance Contracts Act 1984* (Cth) may well be the bane of all insurers as it is really a double-edged sword. In essence, it prevents an Insurer from relying on a breach of a policy condition to deny a claim because the Insured has committed a particular act, error or omission (after the policy is entered into) which did not cause or contribute to the loss. However, the insurer may instead, reduce the claim to the extent of the prejudice it has suffered. If the act, error or omission caused or contributed to the loss, then the insurer can refuse to pay the claim.

There has been differing judicial opinion interstate as to the correct interpretation of section 54 and in particular as to what constitutes an "act" or "omission". In *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (1999), which is the leading case on section 54, the High Court held that an *'*omission*'* may be a failure by the insured to exercise a right, choice or liberty which the insured enjoys under the policy, such as failing to notify in order to expand the scope of cover to future claims. That case concerned a claims made and notified policy, and it was held that a failure to notify was an "*omission*" for the purpose of section 54 and the insurer could not refuse indemnity on the basis of the failure to notify but could instead reduce the amount paid to the extent of the prejudice suffered.

The position in Queensland and *Johnson v Triple*

In 2010, Queensland adopted a narrow approach to section 54 in *Johnson v Triple C Furniture and Electrical Pty Limited*. In that case, the insurer (relying on a policy exclusion) denied a claim on an aviation policy because the pilot had failed to complete a flight review. The insured sought to rely on section 54 and the insurer contended that section 54 did not apply because the failure to complete a flight review was not an "omission" because the activity engaged in (flight in breach of regulations) was not an activity which the policy insured. The Queensland Court of Appeal held that the circumstances held that the failure of a pilot to complete a flight review were not an "omission", but rather a "state of affairs". The Court said that the insured was claiming indemnity for a loss for which the policy did not offer cover, namely, in circumstances where the aircraft was flown by a pilot who did not complete the flight review in breach of regulations.

The position in Western Australia and *Maxwell v Highway Hauliers*

However, in *Maxwell v Highway Hauliers Pty Ltd* (2013), an endorsement to the policy required drivers of the insured (a freight transport business) to obtain a satisfactory driver test score but they failed to do so. That failure in itself did not cause the accidents. The Court of Appeal (in favour of the insured) held that there was an "act" for the purposes of section 54 and that relevant "act" was that the insured 'allowed' the vehicles to be driven by drivers who did not meet the minimum driving test score. The case went to the High Court on appeal. The insurers contended that because indemnity was denied on the basis of an endorsement (as opposed to the insuring clause), the claim was not for an insured risk and section 54 did not apply. The insured contended that section 54 does not envisage a distinction between a requirement in an insuring clause and a requirement in an exclusion or condition.

The High Court's decision

The High Court dismissed the Insurers' appeal and upheld the Court of Appeal's decision that section 54 does apply because the omission was that the insured failed to ensure that the vehicles were only driven by drivers who had passed the test. The court, echoing its previous decision in *Antico v Heath Fielding Australia Pty Limited* (1997) said that section 54 doesn't focus on the reason upon which the

insurer denies indemnity, but on the insured's actual act or omission and whether it excuses the insurer from paying the claim. The High Court also referred to its reasoning in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (1999) and reiterated that no distinction should be made between provisions in a policy defining the scope of cover and conditions. As to the Queensland decision in *Johnson*, the High Court said that it was incorrectly decided on the point that section 54 was not engaged because the Insurer relied on an exclusion to deny indemnity. The operation of an aircraft in breach of safety regulations was an "act" which occurred after the contract was entered into.

Commentary

The case highlights the complex task insurers have in characterising what exactly is the act or omission and framing the risk within policies.

The focus should not be on the basis upon which the insurer refuses to pay the claim (whether that be that the claim falls outside the covered risk, within an exclusion or non-compliance with a condition) but on the insured's actual conduct and the actual act which it does or omits to do.

Please do not hesitate to contact John or Uma should you have any questions about the case.

Defence of a dangerous recreational activity

By Bruce Cussen, Partner and Nicholas Gordon, Senior Associate

The case of *Campbell v Hay* [2014] NSWCA 129 highlights the availability of the defence of a "dangerous recreational activity" under section 5L of the *Civil Liability Act* 2002 (NSW) particularly for aviation insurers of light aircraft.

Campbell v Hay [2014] NSWCA 129

Background

The Plaintiff was injured on 15 May 2007 when the light aircraft which he was taking a flying lesson in suffered engine failure and his flying instructor, the Defendant, made a forced landing in a paddock.

During the flight the aircraft suffered from two sets of vibrations, before the engine suddenly stopped completely. The Defendant described the first set of vibrations as faint and subtle, and the start of the second set of vibrations as being imperceptible. From the onset of the second set of vibrations the time to complete engine failure was about 1 minute 50 seconds to 2 minutes, and there was approximately another 5 minutes before the aircraft reached the ground. The only possible landing strip after the second set of vibrations was the Dalgleish Strip, which the Defendant stated was not all that suitable but conceded would have been better than the paddock in which he was eventually forced to land.

Expert witnesses were called on behalf of the parties, who ultimately agreed that it was a reasonable alternative for the Defendant, after the first set of vibrations, to maintain the aircraft's course, provided that it was within reach of a suitable landing area which was the case. When the experts were asked to assume that there would have been approximately 7 minutes between the second set of vibrations and the forced landing, they agreed that it would have been possible for the Defendant to have reached the Dalgleish landing strip.

The Defendant pleaded s 5L of the Civil Liability Act, that he was not liable "as a result of the materialisation of an obvious risk of a dangerous recreational activity". Under s 5K "recreational activity" includes any sport and any pursuit or activity engaged in for enjoyment, relaxation or leisure, and "dangerous recreational activity" is defined to mean "a recreational activity that involves a significant risk of physical harm".

The trial judge, Marks ADCJ, found that there was negligence on the part of the Defendant for not ensuring that the aircraft was flown towards an appropriate landing strip immediately after the second set of vibrations started, and also continuing to fly, relying on some (misplaced) sense of innate luck.

The trial judge then considered the Defendant's defence under s 5L. The Plaintiff had argued that recreational flying did not constitute a dangerous recreational activity as it was safe, bearing in mind the Defendant was an experienced pilot who had given assurances to the Plaintiff.

However, the trial judge concluded that the activity could not be described as trivial, and that even if the risk occurred only infrequently, there was a real risk that something could go wrong, including pilot error, and that if something did go wrong there was a significant risk of physical harm. In the circumstances the trial judge found that the defence under Section 5L of the Civil Liability Act had been made out, which meant that the Plaintiff's claim failed even though he had established negligence.

Decision

Ward JA, who wrote the leading judgment on behalf of the unanimous Court of Appeal, first considered the Defendant's Notice of Contention that he should not have been found negligent in the first place. After reviewing the evidence, including the expert evidence, Ward JA disagreed with the trial judge's findings that the Defendant acted negligently in not ensuring that the aircraft was flown towards an appropriate landing strip immediately after the second set of vibrations started. In addition, Ward JA found that even if breach of duty had been established, it had not established that that breach was causative of the harm that occurred.

Despite the above findings putting an end to the Plaintiff's appeal, Ward JA went on to consider the trial judge's findings in relation to dangerous recreational activity under s 5L of the Civil Liability Act. Ward JA noted that in the case of *Fallas v Mourlas* [2006] NSWCA 32, Ipp JA emphasised the need to take into account the particular circumstances of the case in determining whether or not the activity in question was a dangerous recreational activity. Ward JA also referred to the case of *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, where it was determined the definition of "dangerous recreational activity" must be read as a whole and that regard must be had as to

the nature and degree of harm that might be suffered and the likelihood of the risk materialising.

With reference to statistical evidence that 1 in 500 light aircraft flights in 2007 ended in serious accident, Ward JA determined that this was not a case where the potential risk of physical harm arising from engine failure in flight could be described as trivial in the manner of that considered in *Falvo*. In the circumstances Ward JA was satisfied that the trial judge did not err in finding that the s 5L Civil Liability Act defence had also been made out.

Analysis

Whilst an interesting decision on its facts alone, the primary importance of the decision is in relation to the upholding of the s 5L Civil Liability Act defence in relation to dangerous recreational activities. There have now been numerous decisions on dangerous recreational activities with differing results. However, in this case common sense would appear to have prevailed in that light aircraft flights would clearly appear to fall under the definition of a dangerous recreational activity. Insurers are unlikely to have too many cases involving light airplane crashes, but may be able to use the decision in relation to other cases where s 5L can be pleaded as a defence.

What happens when both parties say they had the green light?

By Peter Bennett, Partner

Recently, the New South Wales Court of Appeal was required to determine liability for an accident between a car and a cyclist, where neither party could prove that they had the green traffic light (*Cheng v Geussens*, NSW Court of Appeal, 8 April 2014).

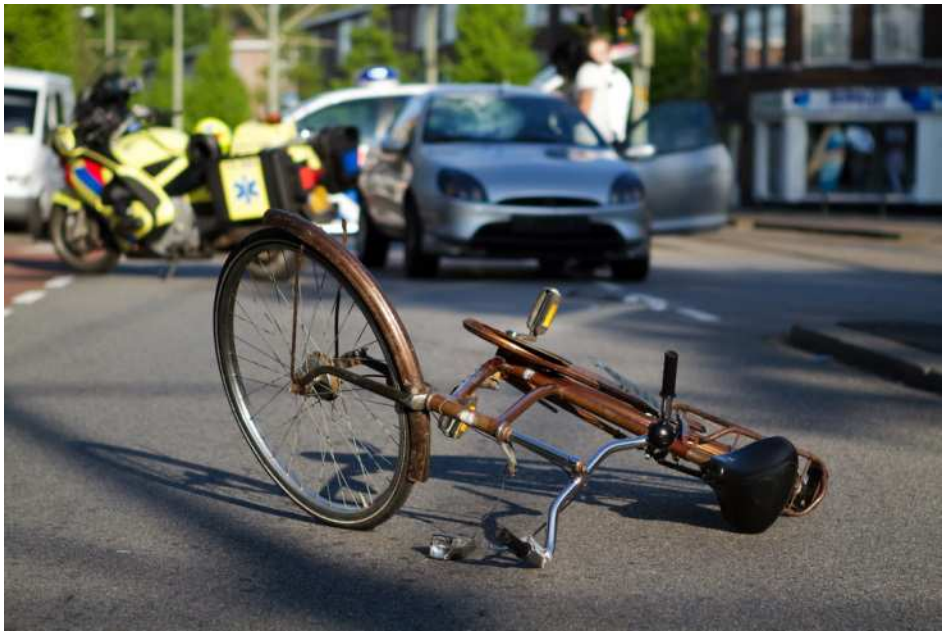
Mr Cheng (the cyclist) and Mr Geussens collided at the intersection of Coogee Bay Road and Carrington Road at Randwick. Both said that they had green lights, which was not possible. Neither saw the other until very shortly before the impact.

Neither party's evidence of the accident could be preferred. The plaintiff, Mr Cheng, had the onus of proof but Mr Cheng failed to prove on the balance of probabilities that he had a green light.

If Mr Cheng's only allegation of Mr Geussens' negligence was Mr Geussens' failure to give way at the red light, then Mr Cheng would have had to prove that Mr Geussens had the red light and Mr Cheng's failure to establish that he faced the green light would have defeated his claim. However, Mr Cheng's allegations of negligence against Mr Geussens included a failure to keep an adequate lookout.

The Court of Appeal determined liability on the basis that the state of the lights was unknown and therefore Mr Geussens was liable for his failure to keep an adequate lookout. That also meant that the court needed to look at whether Mr Cheng also contributed to his damages by his own negligence, with the Court finding that Mr Cheng was also negligent in failing to keep a proper lookout.

In assessing the apportionment of liability in this case, the court found that Mr Cheng had the greater liability. Immediately before the impact, Mr Geussens was travelling through the intersection at a reasonable speed but Mr Cheng had not left the footpath. Had they both looked properly, Mr Geussens still may not have been able to stop in time, but it could have been expected that Mr Cheng would not commence to cross in front of a travelling vehicle. The court apportioned 67% liability to Mr Cheng, reducing his damages by 67% to account for his contributory negligence.



Legal professional privilege over drafts and correspondence with experts

By Peter Bennett, Partner and Sadia Khan Sheikh, Solicitor

Two recent decisions of the Federal Court and the New South Wales Supreme Court can be of assistance to insurers to avoid providing certain documents to opponents. Some correspondence with witnesses, including expert witnesses, and drafts of reports and statements do not have to be produced if legal professional privilege applies to the documents (i.e. if the documents were created for the dominant purpose of a lawyer providing legal advice or for the purpose of litigation).

In *Asahi Holdings (Aust) Pty Ltd v Pacific Equity Partners Pty Ltd (No 1)* (Federal Court, 13 May 2014) Bromberg J. confirmed previous decisions, that even when a statement or expert report is served, the drafts of the documents can still be privileged documents. He relied on the decision of Dawson J in *Attorney-General (NT) v Maurice* (High Court 16 December 1986, from paragraph 486) the drafts "might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time".

In *Sprayworx Pty Limited v Homag Pty Limited* (Supreme Court 24 June 2014) Associate Justice Harrison held that draft reports and some communications with the experts were privileged. Relying on a decision of White J in *New Cap Reinsurance Corporation Limited (in Liq) v Renaissance Reinsurance Ltd* (Supreme Court, 26 March 2007, at paragraph 34) "If an expert prepares a draft report, or notes for the report, with the dominant purpose of a draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer, then it is privileged. If not, it is not".

Asahi involved a claim of misleading and deceptive conduct. The proceedings did not involve Asahi's insurer, but the relevant issue was whether legal professional privilege was lost (waived) when a copy of the complete report was provided to the insurer. Only a redacted version had been provided to the respondent.

Bromberg J held:

92: *A litigant is entitled to be selective as between a draft and the finalised form of a pleading, a witness statement, an affidavit, or a legal submission. As has already been observed, the rationale of litigation privilege is based upon the capacity of one party, in the adversarial process, to keep from the other information that came into existence for the dominant purpose of the litigation and which may be prejudicial. Accordingly, the selective deployment of the contents of a draft document which came into existence for the purposes of the litigation, could not amount to a waiver of the privilege attached to the draft upon the finalised document being filed and served*.

However, Asahi had waived privilege by the disclosure of the report to the insurer. The insurer had not accepted the claim, and therefore, there was no commonality of interests between the insured and insurer - both the insurer and the respondent had similar interests in avoiding liability to Asahi.

Asahi was decided under the common law (paragraph 31 of the judgment "There is no issue that, at this interlocutory stage of the proceedings, the common law of Australia and not the *Evidence Act* 1995…governs the current dispute"); whereas Sprayworx was decided under the *Evidence Act*.

Under the *Evidence Act*, privilege over a document is not waived if it is disclosed under 'common interest immunity' (section 122(65)(c)). If indemnity is in dispute, then there is no 'common interest' and privilege may be lost by the sharing of a document between insurer and insured.

Sprayworx also involved a call for production of drafts of reports which had been served. The respondent, Homag Pty Limited, accepted that the reports were subject to legal professional privilege, having been created for the dominant purpose of litigation, but argued that the material had been used inconsistently with the maintaining of the privilege, as the final report had been served. Homage also argued that the documents were necessary to understand the served expert reports (s126 of the *Evidence Act* covers the loss of privilege if the documents are necessary for a proper understanding of other documents).

The solicitor's correspondence with the expert suggested changes to the report, and Harrison As J considered that those comments could not be said to have influenced the substance of the report or be inconsistent with the claim for privilege over that correspondence. The final report could be understood without reference to the other communications.

Conclusions

Legal professional privilege applies to documents created by a lawyer to provide legal advice to a client, or for documents created (not necessarily involving a lawyer) for the dominant purpose of actual or anticipated litigation.

If the report is served on the defendant/ respondent, then usually, the letter of instructions and brief to the expert are discoverable.

These two decisions assist in resisting orders for the production of documents between the lawyer and the witness and the drafts of the expert reports/witness statements, provided that the court is convinced that the use of the documents or drafts is not inconsistent with the claim for privilege (i.e. that the document has not been provided to another party without a common interest) or that the documents are not necessary for a proper understanding of the served statement or report.

Bullying Update

The anti-bullying laws, 6 months on…

By Rachael Sutton, Partner

Despite what some might call 'hysteria' that prevailed at the time of the introduction of the anti-bullying laws and the expectation of the Fair Work Commission (the **Commission**) that it may receive some 3,500 bullying related applications per month, the reality is that far fewer complaints of bullying have been received by the Commission. Employees are resorting to other avenues of redress such as workers compensation and adverse action. These other avenues are likely to be more attractive as a potential financial remedy is available.

According its report in March, the Commission received 151 applications for orders to stop bullying in the first three months of operation, with the majority from employees of large organisations alleging unreasonable behaviour by their managers.

The workers came from a broad range of sectors, with the highest number (23) in the clerical industry, followed by retail (13).

Below is a summary from recent decisions to assist employers as to how the Commission has handled complaints thus far:

- **The employment relationship has to be on foot for a bullying application to be considered and orders made, if the employment has already ended then it follows that there is no risk of bullying.** However this does not preclude other applications being brought by the employee[1].
- **Orders issued will be specific as to future conduct between a victim and the perpetrator[2].**
- **Orders of the Commission have no expiry.**
- **Past acts of bullying pre 1 January 2014 can be alleged and can be relevant.**
- **No specific number of incidents constitutes "repeated behaviour" however it must constitute a risk to health and safety[3].**
- **Management action does not have to be perfect, it has to be reasonable.** Management action includes "*everyday actions to effectively direct and control the way work is carried out*" and is not limited to disciplinary or performance management alone[4].
- **Whilst not ideal, expressions of upset and anger will not necessarily constitute bullying behaviour depending on the context**. It is to be expected that people, including managers, will from time to time get upset and angry and will express that upset and anger[5].

  Workplace change is often difficult for employees and support should be available to employees who may have difficulty adjusting. Much of an employee's identity and self-worth can be linked to their employment. Change to reporting responsibilities can be very emotionally challenging for some individuals. Senior managers have to support employees who have difficulty adjusting and accept the need for reasonable periods for adjustment.
- **Maintaining privilege over investigation reports may be appropriate to protect employees and in the interests of maintaining ongoing employment relationships between parties**. It was argued by an employer that it should be enough to advise the Commission that an investigation had been carried out and what its findings were, and the Commissioner ultimately appeared to accept this in the interests of there being ongoing employment relationships.
- **Investigations must be conducted rigorously, impartially and independently and an employer will need to potentially satisfy the Commission of this.** Matters the Commission is likely to take into account, are the investigator's terms of reference and how they had been determined, and the quality and reliability of the investigator's report.
- **Obtaining costs against unsuccessful applicants is likely to be difficult.** This is because the Commission is required to identify who is conducting the workplace concerned, the nature of the workplace concerned and the parties involved which can be complex and not always immediately clear for a person bringing a bullying complaint[6].

[1] Mitchell Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank; Bianca Haines (AB2014/1091)
[2] Applicant v Respondent, PR548852 (21 March 2014)
[3] Ms SB [2014] FWC 2104 (12 May 2014)
[4] Tao Sun [2014] FWC 3839 (16 June 2014)
[5] *The Applicant v General Manager and Company C* [2014] FWC 3940 (17 June 2014)
[6] Ms S.W.(AB2014/1135)

Journey Claims in New South Wales – post 19 June 2012

By Rachael Sutton, Partner

In June 2012, the NSW Government removed most journey claim entitlements from the *Workers Compensation Act* 1987 (**the Act**) with its Workers Compensation Legislation Amendment Bill 2012.

Since then, workers injured on a journey between their place of abode and work-related sites are only entitled to compensation - under s 10(3A) of the Act - if there is "a real and substantial connection between the employment and the accident or incident out of which the personal injury arose".

In identifying the type of journey claim that will be accepted under NSW's new restricted journey provisions, the WCC has found that:

- a worker who was injured while travelling home after being required to stay back at work in the dark is entitled to workers' compensation; and
- a worker who was employed as a casual/ relief teacher was injured whilst travelling to work when he tripped and fell on broken and uneven ground while walking hurriedly to work.

Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden **[2014] NSWWCCPD 13 (18 March 2014)**

On 5 July 2012, the service station worker closed the station at 5.30pm and was riding her motorbike home when a car travelling on the other side of the road swerved to avoid cattle on the road and struck her motorbike. The worker suffered leg fractures and claimed workers' compensation, but the employer denied liability.

In December 2013, the Workers Compensation Commission (WCC) found the worker - who normally finished work at 2.30pm - was required to stay at work late for training, which meant she had to travel home in the dark when it would have been harder for drivers to see the cattle.

The WCC found the employee probably wouldn't have been injured during her journey if she wasn't required to stay late at work.

The employer appealed, arguing the connection between the journey and the worker's employment wasn't real and of substance because the worker's daily duties had finished and she had left the workplace.

It also argued there was no evidence that the driver of the car had to swerve suddenly because it was difficult to see the cattle at night.

But on appeal Deputy President Bill Roche found "the darkness played a role in the accident, though it may not have been the sole cause of the accident", and the worker was required to travel in the dark because of her work duties.

"In these circumstances, the connection between the employment and the accident was real and of substance," he said.

Field v Department of Education and Communities **[2014] NSWWCCPD 16 (27 March 2014)**

On 23 December 2012, the worker, a casual relief teacher was contacted by an agency known as Casual Direct at 7.30 am and asked him to attend the Hampton Park Public School at Lakemba to work for the day.

When he received a call from Casual Direct, he would arrange to take the necessary transport to each particular school.

During the Arbitration the worker gave evidence that he had taught at the school in the past and noted it was a strict school; staff were required to be present at the school by 8.30 am in order to be given lessons for the day, shown to the classrooms or given 8.30 am playground duty.

The employer argued that the worker's belief was not sufficient to establish the required link between the employment and the fall because the evidence

- only reflected Mr Field's belief based on past experiences;
- did not disclose how many times Mr Field had worked at the school;
- did not disclose what was meant by "required";
- did not disclose how Mr Field came to know that he was required to be at the school by that time, and
- did not disclose what was required on the day of the injury.

The Arbitrator agreed and rejected the worker's claim, and in summary said any link between the employment and the incident was Mr Field's belief or perception that he had to be at the school at 8.30 am, which was not supported by evidence that the respondent required or demanded his attendance at that time;

The worker appealed. Deputy President Bill Roche upheld the appeal finding that

- s 10(3) may, but does not necessarily require a causal connection between the employment and

the accident, connection is a wider concept than causation.

- It is no answer to a witness's evidence to say that it cannot be accepted because "it is only his or her belief or perception". Virtually all evidence from a witness (apart from things or real evidence) is based on the witness's perception of the particular event or situation he or she is describing. That does not mean that, for that reason alone, it cannot or should not be accepted. It is for the tribunal of fact to assess the reliability of the evidence against the "contemporary materials, objectively established facts and the apparent logic of events" (*Fox v Percy* [2003] HCA 22; 214 CLR 118 at [31]).
- The logic of the worker's evidence was and is compelling. He explained the basis for his assertion that staff were required to be at the school by 8.30 am, namely, his past experience. He also explained why staff had to be present by that time. His reasons were logical and plausible. The respondent called no evidence to rebut Mr Field's evidence and did not challenge it in cross-examination and the Arbitrator erred in not accepting it.
- The worker was hurrying because of the late notice given to him by Casual Direct and from the school's requirement that staff be at the school by 8.30 am. There is no contest that Mr Field was using one of the most direct routes to the school.
- That there may have been other routes available to him that did not have cracked or damaged surfaces.

Conclusion

For a journey claim to succeed, the connection between employment and the accident must be real and of substance and which is a broader concept than causation, that is, that the injury was arising out of the employment.

Provided a worker can prove there is a connection between the employment and the injury they are likely to succeed on liability.

It would appear that the insertion of s 10(3) has made little difference to journey claims in New South Wales. What has changed however is the impact on premiums for employers in that such claims are now premium impacting when they were not previously so. It is extremely important for employers to ensure that such claims are managed in the same way as a non-journey related claims.

What evidence is required to support a claim for care?

By Julia Brabant, Special Counsel

In a recent NSW Court of Appeal decision of *Boral Bricks Pty Ltd v Cosmidis*; *Boral Bricks Pty Ltd v DM & BP Wifkich Pty Ltd* (2013) NSWCA 443 (18 December 2013), the Court of Appeal provided some guidance on what evidence is required to substantiate a claim for domestic care.

The Plaintiff was injured in 18 April 2008 when hit from behind by a forklift. He brought proceedings for damages against Boral both as occupier of the premises and as the employer of the forklift driver. The Plaintiff succeeded in the District Court and was awarded damages of nearly $1.2m. Boral filed an appeal in relation to contributory negligence and damages. Insofar as domestic assistance was concerned, Boral submitted that the award of damages for past and further domestic assistance was excessive.

At the trial, the primary evidence in respect of the amount of assistance the Plaintiff received was his own evidence and those who provided the services, which were primarily his sister and his nephew. The net effect of the evidence was that he received assistance of some 2½ hours per week in the garden and 2 hours per week with housework. Those figures do not meet the threshold required by s15(3) of the Civil Liability Act 2002 (NSW) (which provides for a minimum of 6 hours per week for 6 consecutive months before a claimant can claim damages for gratuitous care). Based on the lay evidence alone, the Plaintiff's claim for gratuitous care failed.

However, the Trial Judge also relied upon evidence from medical practitioners. Counsel for the Plaintiff drew the Court's attention to the report of Dr Matthew Giblin, orthopaedic surgeon, dated 18 July 2011 who stated "domestic assistance is recommended 4 hours a fortnight for gardening and 4 hours a week for homecare". Based on this expert evidence, the Trial Judge found the Plaintiff overcame the threshold and was entitled to damages.

In Dr Giblin's report there was no suggestion that he had explored with the Plaintiff the size and configuration of his home, the nature of his domestic environment prior to the incident or the basis on which he made his assessment. Dr Giblin did not provide any explanation as to how he reached his finding that the Plaintiff required 6 hours per week assistance.

Justice Basten commented on the approach of the Trial Judge to the medical evidence as follows - "on what basis the orthopaedic surgeon assessed the number of hours per week required to undertake domestic duties and gardening was not revealed. It is not the kind of "expertise" which is normally attributed to orthopaedic surgeons. Justice Basten found that the evidence was clearly inadmissible, although not objected to, and should be given no weight at all." He remarked "why the Court was taken to it is obscure."

Accordingly, Justice Basten held that the evidence did not establish on the balance of probabilities that the Plaintiff had a need in the past (or at the time of trial) for domestic assistance at a level of intensity of 6 hours per week over a period exceeding 6 months. The amount allowed for domestic care should be removed.

In relation to future domestic care, the Trial Judge awarded an amount of $168,801. He did so on the basis that the Plaintiff had established an entitlement to 6 hours of assistance per week and such an entitlement would continue over 33 years (that is until the Plaintiff was 85 years of age). The Trial Judge allowed 15% reduction on account of vicissitudes.

Justice Basten found that the approach of the Trial Judge was problematic for 3 reasons namely:

- if the Plaintiff sought to recover an amount on account of domestic assistance to be calculated at commercial rates, rather than a rate for gratuitous assistance, the burden lay on him to establish that those presently providing gratuitous assistance would not continue to do so;
- secondly, the future circumstances were not matters to be established on the balance of probabilities, but were to be considered as hypothetical matters which, like vicissitudes, are properly addressed by reference to possibilities and probabilities in a proportionate sense, rather than on an all or nothing basis;
- thirdly, the suggestion that, absent the accident, the Plaintiff would have expected, subject only to the normal reductions for vicissitudes, to continue to carry out the domestic activities referred to until the age of 85 was implausible. A greater reduction for the vicissitudes, particularly of age, was required.

Justice Basten reviewed the evidence at the trial. Justice Basten agreed that it was true that the Plaintiff gave evidence that he would prefer if monies were available to pay someone to come and help around the house (rather than rely on family). Justice Basten, however, commented that while that evidence may be accepted, it does not establish a need caused by the accident for which Boral must pay. The witnesses were not asked if they were willing or able to continue to provide the assistance.

Justice Basten then addressed the question as to the number of hours per week which would be required in the future by way of domestic assistance. He stated a reasonable approach would be to accept that at some stage the Plaintiff would need to obtain some hours of paid assistance with household activities and with gardening. It was also possible that he will be provided with gratuitous assistance in the future exceeding 6 hours a week.

Justice Basten stated that while it is possible to calculate the present value of services with a delayed starting date, the relevant elements (when gratuitous services would no longer be available, the level of services attributable to accident related disabilities and the risks associated with age and obesity) are matters of speculation and not capable of precise calculation in any useful sense.

Justice Basten considered it appropriate to provide a cushion for future domestic care of $50,000.

Implications

In light of the findings of the Court:

- Object to any medical evidence from a medical expert who does not have the appropriate expertise (for example an orthopaedic surgeon) on the amount of assistance required, does not disclose reasons for his opinion and /or does not disclose on what facts the doctor relies to support that opinion.
- Scrutinise the evidence of witnesses who give evidence as to the assistance provided as to whether they are able to continue and willing to provide the assistance in the future.
- Allow (or argue for) a greater reduction for vicissitudes when calculating future care.
- Ensure appropriate expert evidence is obtained on the claim for domestic assistance, for example where appropriate, qualify an occupational therapist.
- If qualifying an orthopaedic surgeon to comment on the claim for domestic assistance ensure the instructions are specific so the doctor discloses:
  - the reasons on which he reaches his opinion;
  - on what facts does the doctor rely to support that opinion.
  - their requisite expertise so as to be qualified to provide such an opinion.

Late diagnosis and surgical complications – identifying relevant risk - is the radiologist liable for failing to diagnose? Paul v Cooke [7]

By Zara Officer, Special Counsel and Vahini Chetty, Associate

Mrs Paul underwent a scan to determine whether she had a berry aneurysm in 2003, which her radiologist, Dr Cooke failed to diagnose at the time. In 2006, Mrs Paul underwent a further scan in which the aneurysm was detected.

Following her diagnosis, Mrs Paul underwent removal of the aneurysm in 2006 during the course of which the aneurysm ruptured, causing her to suffer a stroke. Dr Cooke had no involvement in that surgery.

Mrs Paul subsequently brought proceedings against Dr Cooke alleging that he was negligent in failing to diagnose the aneurysm in 2003, holding him responsible for the stroke.

Based on the evidence that in 2003 a procedure known as clipping was used to remove such aneurysms and that in 2006, a different procedure known as coiling was used, Mrs Paul argued that in the event she had undergone surgery in 2003, she would have avoided the injury.

Clipping involved open brain surgery whereas coiling was a procedure performed through the arteries. Although both procedures carried an approximately equal inherent risk of rupture, there was found to have been an increased risk of stroke in the event of rupture with coiling as there was greater access to minimise damage from the rupture during clipping by virtue of it being an open brain procedure.

Rupture and stroke were an inherent risk in both surgeries and could not be avoided with the exercise of reasonable care and skill.

The Court found that had there been a correct diagnosis in 2003, Mrs Paul would willingly have faced the risk of surgery then.

The evidence indicated that the delayed diagnosis did not itself increase the risks associated with surgery in that Mrs Paul's aneurysm did not change in size, shape or propensity to rupture during those three years.

The Court concluded that Mrs Paul's condition pre-dated Dr Cooke's diagnosis and the relevant risk – the risk of surgery - only arose after the aneurysm had been diagnosed. Although Dr Cooke had breached his duty to Mrs Paul by failing to diagnose her in 2003, this failure did not cause the stroke Mrs Cooke suffered during her surgery. Dr Cooke did not create the relevant risk and the risk could never materialise until Ms Paul chose to undergo surgery.

Dr Cooke was not held liable for the harm suffered by Mrs Paul despite his failure to diagnose as there was no causal connection.

[7] See *Paul v Cooke [*2013] NSWCA 311*,* where s.5D(1) and s.5I Civil Liability Act 2000 are discussed

SPOTLIGHT ON

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Litigation is a serious business. Colin makes it his business to listen, and then collaborate with clients to achieve strategic and commercial objectives. Achieving the result is of paramount importance and so Colin takes active responsibility for, and closely monitors, all matters entrusted to him. His clients say he is driven and also approachable, keeping them in the loop at all times..

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