Common Law Monthly Summaries December 2017 No 52

Including Motor Accidents & Workers Compensation Monthly Summaries

ABUSE

Malefactor equally answerable

State of New South Wales v Taylor [2017] NSWSC 1794. N Adams J. 21.12.17.

Identities anonymized, here the cross-claiming plaintiff granted 50% contribution to damages after settlement with three plaintiffs.

"On 18 August 1981, Garry Taylor was convicted of indecently assaulting two 11-year-old boys under his care when he was working as a teacher at a recreational camp run by the Department of Education. He had pleaded guilty to the offences. He was placed on a good behaviour bond for three years. The Department of Education was aware of his convictions. It granted him leave without pay until his good behaviour bond expired and then subsequently employed him to teach six-year-old children in a Year 1 class at Young Public School in mid-1984," N Adams J recorded [1].

The three plaintiffs were each six years old when they complained of Mr Taylor's indecent assault at Young Public School in 1985, of which offences Mr Taylor was acquitted in 1986.

The plaintiffs sued in 2011 after learning of other investigations against the defendant.

"I note at the outset that the **Limitation Act 1969 (NSW) was amended** from 17 March 2016 to insert s 6A: Limitation Amendment (Child Abuse) Act 2016 (NSW). Section 6A [**No limitation period for child abuse actions**] has had the effect of removing limitation periods for personal injury claims that relate to 'child abuse'," N Adams J said in [23].

Her Honour detailed the pleadings and recounted evidence.

Later, "I am satisfied that Mr Taylor is not entitled to any indemnity for his actions as perpetrating sexual abuse on children is clearly 'serious and wilful misconduct' within the meaning of s 5 [Act not to apply to serious misconduct of employee or to conduct not related to employment] of the Employees Liability Act 1991 (NSW). There is no doubt that such conduct is serious and there could be no doubt that it was wilful to the extent that he intended his actions," her Honour said [122].

Further, "I am satisfied that Mr Taylor's actions come within the term 'sexual misconduct' in s 3B(1)(a) of the Civil Liability Act 2002 (NSW). That section provides that, with certain exceptions not presently relevant, the Act does not apply to or in respect of civil liability (and awards of damages in those proceedings) of a person in respect of an intentional act that is 'sexual assault or other sexual misconduct' committed by the person," N Adams J said [126].

"Thus the statutory test for causation in s 5D of the Civil Liability Act (the 'but for' test) is not applicable. Rather, in assessing whether there is a probable causal connection between Mr Taylor's actions and the harm suffered (psychiatric injury), I have applied common sense to the facts of this case and inquired whether Mr Taylor's actions can fairly and properly be considered a cause of the injury: *March v E & MH Stramare* (1991) 171 CLR 317; [1991] HCA 12," [127].

"Although assault and battery are described as 'intentional' torts, that does not mean that the intention of any particular harm is required," [128].

Her Honour noted evidence from psychiatrist Dr Patricia Jungfer.

At [151], "The State, having been sued in negligence, settled with the plaintiffs. In each case it did so on the stated basis that it did not admit liability to the plaintiff. However, judgment was entered in favour of each plaintiff," her Honour said.

"The State tendered evidence in these proceedings that establishes that the

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Department of Education knew about Mr Taylor's convictions and re-employed him to teach six-year old children," [152].

To primary liability, "I am satisfied that the State, in its capacity as having the conduct of the school, owed each of the plaintiffs, a student at that school, a duty of care: *Ramsay v Larsen* (1964) 111 CLR 16; [1964] HCA 40; *Geyer v Downs* (1977) 138 CLR 91; [1977] HCA 64. As Gummow J observed in *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; [2007] HCA 42 at 338 [18], '...whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct'," N Adams J said [158].

"The question of breach of duty must be considered by reference to ss 5B, 5C and 5D of the Civil Liability Act," in [159].

"Given what the Department of Education knew about Mr Taylor as at the time it employed him at Young Public School, I am satisfied that it was in breach of its duty of care in employing him and/or, having employed him, not arranging for any supervision or monitoring or counselling of him," [162].

"The **question of causation** is to be determined having regard to the factual circumstances in which the duty of care was owed. The court must be satisfied that, if reasonable steps had been taken, each of the plaintiffs would, on the balance of probabilities, have avoided the harm suffered. That is, but for the State employing Mr Taylor the plaintiffs would not have suffered injury," [167].

"To put this another way, if the Department of Education had terminated Mr Taylor's employment, knowing that he had been convicted of indecent assault offences in 1980, he would not have been in a position to have perpetrated the assaults upon these plaintiffs. The evidence satisfies me that the Department of Education provided Mr Taylor with unfettered access to vulnerable six-year-old children knowing that he had recent convictions for indecent assaults upon young children. I am satisfied that factual causation is established in this matter," her Honour said [168].

"As for the damages, I have had close regard to the reports of Dr Jungfer, which I have extracted above. The uncontradicted expert evidence is that all three men suffer from PTSD caused by child sexual abuse at the hands of Mr Taylor. Mr Taylor was able to commit those acts on these plaintiffs due to the negligence of the State," [169].

Her Honour rejected [173] the State's assertion its liability was to be found in vicarious liability for the acts of an employee.

The State and Mr Taylor were liable for the same damage [179].

The State's settlement of the plaintiffs' suits was reasonable [209], her Honour quoting Hayne J in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; (1998) 192 CLR 603 [129]: objective assessment.

"In relation to all three plaintiffs I note that the claims are subject to assessment under the Civil Liability Act. I note that an award of aggravated or exemplary damages was not available as against the State: s 21 of the Civil Liability Act," N Adams J said [211], before considering unspecified damages ranges.

Orders, including dissolving freezing order.

XC (State): Mr M Hutchings ins Makinson D'Apice. XD: Self.

Foster cause approval

Hopkins bht the New South Wales Trustee and Guardian v State of New South Wales [2017] NSWSC 1733. Adamson J. 11.12.17.

Approval of settlement by Civil Procedure Act 2005 (NSW) s 76 [Settlement of proceedings commenced by or on behalf of, or against, person under legal incapacity].

Adamson J: "On 17 September 1998, when the plaintiff was almost 4 years old, she was declared a ward of the State of New South Wales until the age of 18 years. As a ward of the State, she was entitled to have the State of New South Wales act in her interests. As her guardian it owed her fiduciary duties as well as a duty of care. Her vulnerability as a ward of the State, particularly one of such tender years, is obvious. She was placed with Ruth and Roger Hope, who also had a number of other foster children and ran a childcare centre," [4].

"It was the plaintiff's case that, had the State of New South Wales properly discharged the duties they owed to her, she would have been removed from the placement with Ruth and Roger Hope which, on her case, was manifestly unsuitable having regard to the inappropriate behaviour of both Ruth and Roger Hope in bringing up a child such as the plaintiff, or indeed any child," her Honour said [5].

"The matters relied upon by the plaintiff in support of the claim and in support of the application for approval are as follows. The defendant learned in 2003 that one of the plaintiff's foster sisters had been sexually abused by Roger Hope in 2003 when she reported the abuse to the Department of Community Services (DoCS). For reasons which do not emerge from the evidence relied on in support of the application for approval, no action was taken by DoCS at that time. However, the plaintiff's foster sister, Felicity, swore an affidavit to that effect which was to be relied upon by the plaintiff in these proceedings had they not been resolved," [6].

"The defendant was also aware of the contents of various 'risk of harm' reports which were prepared in relation to the plaintiff pursuant to s 24 of the Children and Young Persons (Care and Protection) Act 1998 (NSW)," [7].

"By 2005, the matters contained in a risk of harm report were such as to lead the defendant to arrange for the plaintiff to be assessed by a psychiatrist. Notwithstanding these matters, the defendant returned the plaintiff to the custody of Ruth and Roger Hope. As a result of the defendant's referral, the plaintiff was assessed by a psychiatrist, Associate Professor Quadrio, in 2005. It was the plaintiff's case that, had the opinion of Associate Professor Quadrio and her recommendations been taken into account, as it is alleged they should have been, the plaintiff would have been removed from the custody of Ruth and Roger Hope in about September 2005," [8].

"In late 2005, subsequent to Associate Professor Quadrio's assessment, the evidence adduced by the plaintiff establishes that Mr Hope began sexually abusing the plaintiff. This sexual abuse continued for the next four years and had, on the plaintiff's case, a very significant detrimental effect on her and caused her to suffer chronic post-traumatic stress disorder. It was her case that the substance abuse from which she later suffered was a result of that sexual abuse. The plaintiff relied on expert evidence to the effect that the offences she committed which led to her incarceration were a direct and natural result of the sexual abuse which she sustained as a young girl, in circumstances where she was entitled to the protection of the State," [9].

Later, "I need hardly remark that a settlement sum of that amount reflects an acknowledgment or concession by the State of New South Wales that it has breached its duty to the plaintiff and caused her substantial loss, although I note that there has been no formal admission of liability," Adamson J said [13].

Settlement damages $990,000, subject to statutory deductions, and costs to be assessed.

P: K Nomchong SC, N Broadbent ins Carroll & O'Dea Lawyers. D: Crown Solicitor's Office, J Graham.

COSTS

Family Court realty transfer set aside

Nguyen v Corbett [2017] NSWSC 1689. Parker J. 7.12.17.

Parker J set aside Family Court consent orders and transfers of residential realty, in Sydney's north-western Baulkham Hills, to the first defendant Mrs Corbett from her husband, the second defendant Mr James Edmund Corbett, who was indebted to the plaintiff to more than $400,000 in assessed costs from another cause commenced by Mr Corbett in 2004 with judgment May 2012.

Two transfers were in question: the first in August 2013 where Mr Corbett transferred his whole interest to his wife and himself as joint tenants, and in June 2015 the whole interest to Mrs Corbett, after Family Court consent orders May 2014 on application for property settlement March 2014 subsequent to divorce by order 7 August 2013 on joint application - a kit form - filed May 2013.

Mr Nguyen served statement of claim by process server at the Baulkham Hills house, which Mr Corbett's son emailed to his father, resident in Vietnam, in October 2013.

In [69] Parker J: "Mr Corbett maintained that he was not told the nature of the document and that he did not open the email.

"Following Mr Corbett's cross-examination, the email was called for and produced to the Court. The heading of the email is 'Statement of Claim against dad'. I indicated to the parties that I would proceed on the assumption that, even if Mr Corbett had not opened the email, the title would have been visible to him. There was no demur from the defendants," his Honour said [70].

Mr Nguyen obtained default judgment and commenced execution process.

To the second transfer, Parker J noted *Semmens v Commonwealth* (1989) 99 FLR 294, 302-303: creditors should be notified of

intended consent orders otherwise may be miscarriage of justice, as in s 79A [Setting aside of orders altering property interests] Family Law Act 1975 (Cth).

"As I have already described, the information put forward in support of the application for consent orders was seriously misleading. The statement of Mr Corbett's liabilities falsely omitted his costs liability from the 2004 proceedings. The statement that there was no person who might be entitled to become a party to proceedings, made in answer to question 19, was wrong. So was the statement in paragraph 6 of Mr Corbett's affidavit that he no longer had any affairs or commitments in Australia. For reasons given below in connection with s 37A, I am satisfied that Mr Corbett was aware of a claim being pursued against him by the Nguyens, and made the application at least in part in an attempt to defeat or delay such claims. However, it is **not necessary to rely on that finding** for the purposes of s 79A. Even if the statements made to the Family Court had not been deliberately incomplete or misleading, that would make no difference. The question is an objective one which depends upon the impact of inaccurate or misleading statements on the Court's process of adjudication," Parker J said [102].

"Having regard to the principles stated by the Full Court in *Semmens*, I am satisfied that had proper disclosure been made, the Family Court would not then have proceeded immediately to the making of the orders. The Court would have been required to consider the impact on the Nguyens. Further information would have been required and, probably, the Nguyens would have been joined. It is not necessary to consider what orders would ultimately have been made if the Nguyens had been joined to the Family Court proceedings. It is enough to say that orders would not have been made as they were on 8 May 2014: compare *Chan v Acres* [2013] NSWSC 1597; (2013) 51 Fam LR 90 at 107 [94] (Kunc J). It follows that the orders must be set aside," his Honour said [103].

"The second transfer therefore cannot stand. Given that the transfer has been registered, it is not practicable to seek to have it delivered up and cancelled; rather, I will order that the defendants take steps to reverse it," [104].

Parker J held Conveyancing Act 1919 (NSW) s 37A [Voluntary alienation to defraud creditors voidable] would avail to set aside the transfer even without recourse to s 79A of the Commonwealth Act.

His Honour noted *Green v Schneller* [2002] NSWSC 671, [23]-[25], [31], Barrett J: s 37A permitted setting aside transfer without setting aside family order.

"The meaning of 'intent to defraud creditors' was considered by the High Court in *Marcolongo v Chen* (2011) 242 CLR 546; [2011] HCA 3. The Court stated that the term '**defraud**' was to be understood as if it read 'delay, hinder or otherwise defraud': at 554 [19]. The Court also held that the intent to defraud need not be the sole, or even the predominant, **motive** of the transferor: at 565 [57]-[58]," Parker J said [**108**].

"The question of intent is directed towards the person who 'made' the alienation. On this issue, Barrett J in *Green v Schneller* said that despite the interposition of a court order, the **relevant alienation is made by the person who applied for the consent orders** under s 79: at [29]. The enquiry is, therefore, to focus on the intent of Mr Corbett," his Honour said [109].

When he made application for the Family Court consent orders, Mr Corbett knew Mr Nguyen was pursuing the debt. There was no genuine compromise in the orders sought.

"I accept that Mr Corbett's immediate motive in making the transfer was to benefit Mrs Corbett. But it was not correct that Mrs Corbett had contributed more to the purchase of the Baulkham Hills property than Mr Corbett had. Mr Corbett may well have been influenced by the other considerations that he mentioned. However, he also candidly admitted in cross-examination that he preferred Mrs Corbett to get the house rather than for the Nguyens to get it. I am satisfied that his purpose, at least in part, was to defeat or delay attempts by the Nguyens to enforce payment against the property," Parker J said [115].

His Honour turned to the s 37A(3) proviso of purchaser in good faith without notice of intention to defraud.

After noting Conveyancing Act s 7 defining purchaser requiring valuable consideration, the Family Court compromise "... was valuable consideration irrespective of the strength of Mrs Corbett's claims: *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691 at 698," in [118].

To **good faith**, "Often, an absence of notice of the intent to defraud is sufficient to establish

good faith. I consider the question of Mrs Corbett's notice at a later point, but good faith is an independent requirement: *Midland Bank Trust Co Ltd v Green* [1980] UKHL 7; [1981] AC 513 at 528. The application for consent orders was Mrs Corbett's as well as Mr Corbett's; on the face of it, she was party to misleading the Family Court. I am not satisfied that she signed the application genuinely believing that her matrimonial rights entitled her to the consent orders; she simply signed it because it was a necessary step in Mr Corbett giving her the remainder of the property. In my view, such conduct was not consistent with good faith," Parker J said [125].

Therefore the s 37A(3) defence failed.

"The second transfer is liable to be set aside under s 37A, independently of FLA s 79A," his Honour said in [126].

Of the first transfer, in August 2013 of Mr Corbett to joint tenancy with Mrs Corbett, "As I have mentioned, the defendants contended that, as at the time of the first transfer, Mrs Corbett had equitable proprietary rights in the property which were at least extensive enough to support a half interest in the property. Accordingly, so they contended, the transfer of a half interest to Mrs Corbett did not prejudice the Nguyens," Parker J said [128].

"In my view, this defence does not really arise in the circumstances of the case. The term '**prejudice**' must be understood in the context of s 37A, which includes hindering or delaying: see [108] above. The interest conferred on Mrs Corbett under the transfer was not just a half share in the property; it was a joint tenancy. If Mr Corbett had died, Mrs Corbett would have been left with the whole property, not just half of it. As subsequent events show, even if the Nguyens could have satisfied their claims from Mr Corbett's remaining half share, it would still have been necessary to have the joint tenancy severed first. In my view, this is sufficient to establish hindrance or delay, and thus to establish prejudice arising out of the first transfer. It is not necessary to consider the extent of Mrs Corbett's equitable interest, if any, in the property," [129].

If so erroneous, "...Mrs Corbett's case for an equitable proprietary interest was put on the bases of both the '**failed joint venture**' equity (based on the principles in *Baumgartner v Baumgartner* (1987) 164 CLR 137; [1987] HCA 59) and **proprietary estoppel**", in [131], Parker J noting assertions by the defendants that Mrs Corbett had contributed to the deposit on purchase in 1997 - but the lady then bankrupt; of her earnings and other contributions - "These figures are difficult to accept in the light of the evidence that Mr Corbett made the major financial contribution to the household", in [134].

At [136] "The *Baumgartner* equity focuses on the acquisition of property attributable to the pooling of resources by the parties to the relationship in question. In a case such as the present, the equity depends on the extent to which the party in whose name the property was acquired is able to pay off the mortgage debt as a result of the pooling of income: *Baumgartner* at 148-149, 153. As already mentioned, the evidence demonstrates that in August 2013 there was approximately $100,000 to pay off the mortgage on the Baulkham Hills property. But there is no evidence as to how much was initially borrowed, and accordingly, it is not possible to calculate the reduction in the mortgage debt over the intervening period, even if the parties' respective contributions could be confidently determined for that period. The analysis is further complicated by the evidence of Mr Corbett, already referred to, that from 2000 onwards he was effectively living in Vietnam and separated from Mrs Corbett but was paying off the mortgage. On this state of affairs, the 'joint endeavour' would have come to an end in 2000 and any equitable proprietary interest based on contribution would have ceased to accrue from this point," Parker J said.

Allowance of 10% for non-financial contributions by Mrs Corbett could not be made [137], and renovation works outlays were unproven, therefore "not possible" to attribute any particular share to Mrs Corbett based on *Baumgartner* principles.

Proprietary estoppel "...depends upon capital expenditure on the property in question" here unproven.

"Furthermore, to the extent that the repairs and renovations constituted capital expenditure, relief by way of proprietary estoppel is **discretionary** and depends, or may depend, on the type of claim. Where a promise is made to the plaintiff of a certain interest in the property, then the **usual remedy** is an order compelling the defendant to transfer the interest so promised: *Ashton v Pratt* [2015] NSWCA 12; (2015) 88 NSWLR

281 at 307 [142]. I did not understand Mrs Corbett's proprietary estoppel claim to be put on this basis, and she gave no evidence of having undertaken the works in reliance on any such promise. A proprietary estoppel claim could be put on **the alternative basis** that Mr Corbett had 'stood by' while Mrs Corbett had done works on the property. A claim of that type would, however, not necessarily result in the recognition of a proprietary interest co-extensive with what was spent. It might be appropriate to take into **account the extent to which the capital value** of the works in question had depreciated by the time the issue came to be considered: *Milling v Hardie* [2014] NSWCA 163 at [55(3)], [69] (a promise case, so applying a fortiori). Mrs Corbett's case did not include any evidence that the works had contributed to the value of the property as at August 2013. Accordingly, even if the other requirements for proprietary estoppel had been satisfied, the extent of any resulting proprietary interest would be unclear," Parker J said [141].

"For these reasons, I conclude that it has not been established that Mrs Corbett had an equitable proprietary interest exceeding a 50% value of the property (or indeed, that she necessarily had any equitable proprietary interest in the property) at the time of the first transfer," [142].

To **intention to defraud creditors**, "Mr Corbett's evidence was that he had planned to transfer the property to Mrs Corbett for some time. The difficulty with this is that it does not explain why the transaction was effected when it was. On Mr Corbett's evidence, he raised it with Mrs Corbett completely out of the blue in May 2013, not long after the Nguyens happened to have obtained a large costs order against him," [146].

"I do not accept that this was merely a coincidence. I am satisfied that Mr Corbett's purpose, or least one of his purposes, in effecting the first transfer was to defeat or delay the Nguyens' enforcement of their costs orders. The transfer is caught by s 37A(1)," Parker J said [147].

To **purchaser in good faith**, Parker J: "As I have mentioned, the transfer form described the consideration for the transfer as 'none'. I am not sure that it is open to Mrs Corbett now to contend that this statement was incorrect. It was submitted for Mrs Corbett that 'none' should be understood as a statement only that there was no monetary consideration, but there was no evidence from Mr O'Rourke, who prepared the form and signed it on Mrs Corbett's behalf, to this effect. In any event, I do not think that the first transfer is properly characterised as a compromise. Mr Corbett's account of the conversation in which Mrs Corbett was told she would be receiving the property (quoted at [52] above) did not refer to any such compromise; all that Mr Corbett claims he said was that he would give her the property. Mrs Corbett's **matrimonial rights could only be surrendered** through the making of an order under FLA s 79 or a binding financial agreement: FLA, s 90G. After registration of the first transfer in August 2013, it remained open to her to pursue a claim against Mr Corbett for a property settlement out of Mr Corbett's remaining assets. Accordingly, I think that the description in the form is the correct one; Mrs Corbett in fact provided no consideration for the first transfer and **cannot be seen as a 'purchaser'** under that transfer. The s 37A(3) defence fails," [149].

"For completeness, I now consider whether, even if Mrs Corbett had been a purchaser in good faith for the purposes of the first transfer or the second transfer, she would have been a purchaser without notice," [150] his Honour detailing - although unremarked in submissions - Conveyancing Act s 164 [**Restriction on constructive notice**].

In [152] "Section 164 appears to have been enacted so as to specify the meaning of 'notice' under the rule. There are some parallels between the bona fide purchaser rule and the effect of s 37A(3), but the analogy is not exact. Nonetheless, s 164 defines 'notice' in general terms and, considering that it is found in the same statute as s 37A, as a matter of statutory interpretation s 164 would appear to govern the meaning of 'notice' in s 37A(3)," his Honour said.

"There are **three elements of notice under s 164(1)**. First, a purchaser will have notice if the fact in question is 'within the purchaser's own knowledge'. Second, a purchaser will have notice if the fact 'would have come to the purchaser's knowledge' if such of the specified searches, inquiries and inspections had been made 'as ought reasonably to have been made by the purchaser'. Third, a purchaser will have notice if a solicitor or other agent of that purchaser, acting as such, has either of the first two

elements of notice," Parker J said [153].

In [155] "In my opinion, s 164 appears wide enough to cover conclusions which follow from known facts"; in [157] "Notice under s 37A would, therefore, likewise appear to include constructive notice under s 164(1)", then considering *Lloyds Bank v Marcan* [1973] 1 WLR 339, binding authority of *Coghlan v Alexander* [1905] NSWStRp 62; (1905) 5 SR (NSW) 441, and facts assay.

"I am not satisfied that Mrs Corbett has established that she lacked notice, either at the time of the first transfer or of the consent orders, of the intent to which I have found Mr Corbett had to defeat or delay his creditors. If I had been satisfied that Mrs Corbett was a purchaser in good faith, I would still have concluded that the s 37A(3) defence concerning both the **first and second transfers failed on notice grounds**," Parker J said [171].

Orders, set aside Family Law Act consent orders, set aside both transfers pursuant to s 37A, further orders and costs for submissions.

P: R W Tregenza ins G J Gooden. 1D (Mrs Corbett): S Foda ins Hicksons Lawyers. 2D (Mr Corbett): P D Herzfeld ins Meridian Lawyers.

Costs caveat extended

Weller v Museth [2017] NSWSC 1809. Parker J. 15.12.17.

Parker J granted extension of the plaintiff practitioner's caveat on the former client defendant's realty, ordering the plaintiff to pay the costs of the application.

Mr Museth had instructed Mr Weller in early 2012 "...in a number of matters, including workers compensation claims, family law disputes, claims involving the Child Support Agency, an apprehended violence order and damage caused by water inundation at one of the properties in question (which is at South Windsor)", in [4].

Parker J noted incidents of "...a number of costs disclosures and costs agreements in letter form" including entitlement to lodge realty caveat.

The plaintiff in late 2015 had issued tax invoice $265,550.72 incl GST.

"The principles to be applied by the Court on an application of this sort are not in doubt. The Court proceeds on the basis that an application to extend a caveat is **analogous to an application for an interlocutory injunction** and, accordingly, that the onus lies on the caveator to satisfy the Court both that there is a seriously arguable case raised by the claimed interest in the property to justify maintenance of the caveat and also that the balance of convenience favours extending the caveat pending a trial to substantiate the interest claimed: *CJ Redman Construction Pty Ltd v Tarnap Pty Ltd* [2005] NSWSC 1011; (2005) 12 BPR 23,395 at 23,396 [3]," Parker J said [20].

Then, "At today's hearing, counsel for Mr Weller suggested that the claim was one which arose by way of constructive trust. I do not accept this analysis. It seems to me plain that the substance of Mr Weller's claim is one for specific performance of an agreement by Mr Museth for valuable consideration (namely, Mr Weller undertaking work on the matters in question) to grant a charge over the properties to secure Mr Weller's fees. In my opinion, the interest claimed would properly have been described as **an equitable charge** over the properties in question to secure payment of fees and disbursements owing pursuant to Mr Weller's retainer as solicitor in the matter or matters in question," his Honour said [24].

The costs letters had provided for acceptance by the client signing or giving further instructions.

"It was, therefore, not necessary for the letters to be countersigned to be effective. The evidence before the Court establishes, at least on a prima facie basis, that further instructions were indeed given," [27].

That the bill was not in assessable form was not fatal to the practitioner's position.

"However, I do not think that this is necessarily fatal to Mr Weller's claim. The interest claimed, as I have characterised it, is a charge to secure the amounts which may ultimately be found to be owing. It is not an essential requirement for the validity of such a charge that the amount be specified or ascertainable in advance, and it would be no answer to a claim for specific performance of an agreement to grant such a charge that, at the time the application was made for specific performance, the amount of the fees had not been finally determined. Indeed, so far as I can see, it would not be necessary even to show that a particular amount had been claimed," Parker J said [35].

Suggestion of breach of fiduciary duty, or that the terms of the retainer were unreasonable - *Malouf v Constantinou* [2017] NSWSC 923 at

[133]-[179] - were trial defences which did not vitiate the plaintiff's prima facie case.

To balance of convenience, in [41] "However, it is usually the case that the balance of convenience favours the extension of a caveat because if the caveat is not extended, it will be open to the defendant to create registered interests in the property which would defeat the interest claimed by the caveator. This would not necessarily be decisive if there were evidence of prejudice to Mr Museth as defendant, for instance, that there was some transaction which he had entered into which required him to have the caveats discharged. But Mr Museth did not present any evidence to the Court which would explain why it was that he delayed for a period of more than a year before causing a lapsing notice to be issued; and there was no evidence of any transaction involving the properties which is contemplated and the deferral of which might lead to loss," his Honour said.

Undertaking to damages was required in this case [42].

Parker J said troubling was that the conditional nature of the costs agreements was not disclosed until this interlocutory hearing.

"The second concern is that, as I have stated, the quantum of Mr Weller's claimed entitlement to security, as distinct from his entitlement to register a charge, is very unclear," in [44].

Orders, noting undertaking to damages, caveat extended to delivery of judgment in the suit or further order, plaintiff to pay the defendant's costs of the extension application.

P: P Berg ins Herbert Weller. D: F Santisi ins Michael Vassili Barristers and Solicitors.

ECCLESIASTICAL COURTS

Sydney Beth Din guilty of contempt counts

Live Group Pty Ltd and Anor v Rabbi Ulman and Ors [2017] NSWSC 1759. Sackar J. 14.12.17.

Sackar J: "These proceedings arise from an observant Jew's refusal to answer the summons of a Rabbinic Court. The Defendants have threatened to impose religious sanctions on Mr Barukh (the second Plaintiff) for failure to attend the Sydney Beth Din in respect of a commercial dispute between the first Plaintiff, Live Group Pty Limited (Live Group) and SalesPort LLC (SalesPort)," [1].

"The Plaintiffs claim the Sydney Beth Din does not have jurisdiction to conduct arbitration proceedings. They further contend the Sydney Beth Din cannot otherwise hear the commercial dispute because of apprehension of bias, and they are in contempt of court by applying calculated pressure on Mr Barukh in threatening religious sanctions unless he acquiesces to the Beth Din process," his Honour said [2].

"The Plaintiffs therefore primarily seek declaratory and injunctive relief restraining the Beth Din from hearing the commercial dispute and from continuing to threaten the imposition of religious sanctions on Mr Barukh," [3].

Sackar J noted the establishment of the Sydney Beth Din in 1905. His Honour detailed matters of dispute.

At [70] "The four defendants in these proceedings are all Rabbis of the Sydney Beth Din. The Sydney Beth Din currently comprises three judges (or 'Dayan'). Rabbi Ulman (the First Defendant) and Rabbi Gutnick (the Second Defendant) are the two senior judges, and Rabbi Chriqui (the Third Defendant) is the more junior of the three. Rabbi Schlanger (the Fourth Defendant) is presently the Registrar of the Beth Din, but was only appointed in October 2016 and prior to that he occupied the position of Secretary, where he also fulfilled the function of Registrar," Sackar J noted.

"As the Sydney Beth Din is not a corporate entity, all references to it or 'the Beth Din' hereafter are references to the four Defendants who together make up the religious body," [71].

To apprehension of bias, "The **governing principle of apprehended bias** is whether, subject to qualifications of waiver or necessity, a fair-minded lay observer might reasonably apprehend a judge might not bring an impartial mind to the resolution of the question the judge is required to decide: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (Ebner) at 344 per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Johnson v Johnson* (2000) 201 CLR 488 at [11]-[13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ," Sackar J said [73].

"The fictitious fair-minded lay observer has been described as an 'informed lay observer', a 'reasonable' or 'right-minded' person or a 'dispassionate observer'; see John Tarrant, Disqualification for Bias, The Federation Press, 2012 at pp 58-59. Further, the fair-minded lay observer is assumed to have knowledge which

would afford an opportunity to consider all the relevant circumstances of the case: *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 70 at 87 per Mason CJ and Brennan J," his Honour said [74].

"**Ex parte communications** may give rise to a reasonable apprehension of bias: *R v Warby* [1983] 1 NSWLR 289. In *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155, Gibbs J observed at 158 the question turns on 'whether the fact that such a communication has been made would raise a reasonable suspicion that the judge will not or cannot deal with the case fairly and impartially'," [75], then noting *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 346-347 Gibbs CJ; *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, 562-563 Hayne J.

To justiciability of private determinations, "As the law stands, a Court may only grant a private law remedy in relation to a challenged decision of a private body when enforcing or protecting an underlying contractual or other entitlement recognised at law or in equity: *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331 (Christie) at [35] per Meagher JA. Where there is no 'contractual or other entitlement', the Court has no jurisdiction to intervene in the affairs of a private body," Sackar J said [79].

"The Court of Appeal in *Christie* rejected the proposition a mere affectation of reputation is sufficient to invoke the Court's jurisdiction to intervene in the decision of a private body," in [80] and quoting from the judgment of Meagher JA; also noting *DEF v Trappett* [2016] NSWSC 1698 Beech-Jones J, leave to appeal refused.

Later, "There are several cases of contempt which fall into a similar category as the alleged claim in this case, namely **alleged improper pressure on a litigant**. Beginning with the most relevant, but unfortunately also the most inaccessible, in *Hillfinch Properties Ltd v Newark Investments Ltd* [1981] The Times 1 July (Hillfinch), it was reported Slade J: '... was content to assume that it was a contempt of court for a rabbinical court to threaten practising, orthodox Jews with excommunication merely for the alleged sin of prosecuting litigation, but refused to express final conclusion on the question'," [101].

At [103] "From full judgments that are available it is plain a threat to a party pending proceedings has long been considered possible conduct giving rise to contempt; see *Smith v Lakeman*, 26 L. J. Ch. 305; *In re Mulock* (1864) 3 Sw & Tr 599; 164 ER 1407. In *Mulock*, a case about threatening a petitioner in a divorce suit with the publication of a statement of facts unless he withdrew the petition, the Judge Ordinary, Sir James Wilde, stated at 601:

[**Wilde J**]: "From the pressure of this threat Mrs Chetwynd seeks protection, and she claims a right to approach this court free from all restraint or intimidation. It is a right that belongs to all suitors. ... No one can doubt that the very offering of such a threat to a suitor in this Court, for such a purpose, is in itself, and quite independently of its subsequent fulfilment, a contempt of Court".

Sackar J: "In more recent times, Young CJ in Eq observed, albeit on an interlocutory basis, in *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775 at [31]: '... in my view the proposition that putting pressure on a litigant by having a religious excommunication hanging over his head as the price he may pay if he pursues the litigation may well be a contempt of court'," [104].

His Honour traversed the paries' positions across nine specified charges, and detailed affidavit of Rabbi Gutnick.

"Rabbi Gutnick explained Halacha is the system of the application of Jewish Law comprising the Torah (comprising the books of Genesis, Exodus, Leviticus, Deuteronomy and Numbers), the prophetic writings (Old Testament) and the Oral Law," Sackar J recorded [157].

"He also explained for an observant Jew there is no separation between religious and secular. Every aspect of life both in the Synagogue and outside it is governed by the word of 'G-d' and is therefore regulated by Halacha. Obedience to and compliance with Halacha in every aspect of life is a fundamentally religious obligation and is as much a part of worship of G-d as are prayers in the Synagogue," his Honour noted [158].

"In terms of history of the Jewish legal system, Rabbi Gutnick explained that until approximately 70 AD there was a centralised structure in Israel known as the Sanhedrin that functioned as the central Supreme Court of Israel, consisting of 70 judges. The collective rulings and discussions of the Sanhedrin were recorded in the **Talmud**. This work comprises

20 volumes of over 7000 pages and records what is now known to be much of Jewish Law. Its rulings remain binding on all observant Jews," [159].

"In 70 AD however the Sanhedrin was disbanded. The Talmud thereafter became the basis of all legal decisions involving the Jewish community and remains so today. The Talmud was first codified by Maimonides in 14 volumes. In the 15th Century Rabbi Joseph Karo further codified the Talmud. This has four primary commentaries of which Dayan is expected to be familiar," [160].

"The Beth Din (a Hebrew term for 'House of Judgment') is the name for a Rabbinic Court having authority to determine civil disputes between observant Jews, including matters involving conversions to Judaism and religious divorce and other matters beyond the authority and competence of local Rabbis. When the Sanhedrin existed it appointed judges who sat throughout the land in Israel. When it was disbanded it was the local Rabbis who usually appointed a Beth Din or constituted themselves as a Beth Din as per the Code of Jewish Law," [161].

"Pursuant to one of the four sections of the Code of Jewish Law (the breastplate of judgment) any three Rabbis can constitute themselves at any time as an ad hoc Beth Din for the purposes of issuing summons hearing cases. A 'fixed' Beth Din is said to be a formal body which has more authority than an ad hoc Beth Din. Rabbi Gutnick explained a formal or permanent Beth Din such as the Sydney Beth Din deals with divorces and conversions and has the power under Halacha to apply religious sanctions to litigants who do not comply with their religious obligations to have the matter heard before them. It would only be where permission is granted for a matter to be heard before another Beth Din that a party could refuse or relevantly choose not to appear before the Beth Din when required to do so," [162].

"For **Jewish communities outside Israel**, each community hires a Rabbi who rules on matters of Halacha for his community and has a local Beth Din who hears disputes beyond the jurisdiction of the local Rabbis. Rabbi Gutnick explained it is a fundamental tenet of Judaism that all Jews must seek resolution of their conflicts within the Halachic system rather than in the secular courts. This is regardless of any arbitration agreement that may or may not be signed by the parties. The rule is said to be 'conventionally' traced back to a command found in the Torah, in Exodus, chapter 21 verse 1 which has been elaborated on in the Talmud and codified in the Code of Jewish Law, section 4, chapter 26," [163].

Later, in [201], "The Sydney Beth Din is an ecclesiastical court which was relevantly created by agreement, or so it seems, amongst members of the Jewish community in 1905...".

"With any religious organisation, which, in most instances can be aptly described as a voluntary association, questions always arise about the extent to which a court's jurisdiction can be invoked so as to review or intervene in the affairs of that association," Sackar J said [202].

"As stated above, I am satisfied the Courts have taken the view they will, and can, only interfere in a private dispute, including a religious dispute, where there is a contractual, legal or equitable proprietary right that can be properly enforced or protected by a private law remedy. As the law stands, adverse reputation or financial consequences which may arise from the dispute are insufficient grounds to invoke the Court's jurisdiction," [203].

"On this basis, I accept the Defendants' submissions the Plaintiffs' claim regarding apprehension of bias in **the Beth Din is not justiciable**. While Mr Barukh may well suffer harm going beyond religious matters to reputation and financial, the Beth Din is a purely religious body which lacks any statutory or contractual element," [204].

"However, merely because a body acting in the name of religion may be impervious to a legal challenge, in the exceptional circumstances of this case I believe I am compelled to make the following observations. This is an organisation that wishes, indeed demands, the respect and reverence from its parishioners and adherents, and yet appears to be a law unto itself," [205].

"As set out by O'Connor J in *Dickason v Edwards* [1910] HCA 7; (1910) 10 CLR 243 at 255, a private body is entitled to expressly or by necessary implication exclude the application of 'fundamental principles of common justice' with respect to their proceedings. The Beth Din has not taken such a course. The Beth Din not only does not oust the rules of natural justice, they expressly uphold and indeed embrace them. They hold themselves out as a quasi-adversarial body

which accords with key principles of natural justice," [206].

At [209], "In my view, for the reasons which follow, the conduct of the Beth Din in the Kuzecki commercial dispute displays either arrogant disregard of their own procedures and rules of natural justice, substantial ineptitude, or inexperience dealing with commercial disputes. I am satisfied that were the Beth Din's affairs justiciable in this respect, there would be strong grounds for a finding of apprehension of bias," Sackar J said, before traversing other matters.

His Honour dealt with each charge of contempt, finding two made out.

At [271] "In my view, the Beth Din's enforcement of this position in the 29 December email can only be seen as **improper pressure calculated to intimidate** and coerce Mr Barukh to comply with the Beth Din's directions by attending to, and only to, the Beth Din. This finding is not a restriction on their religious freedom, it is a restriction in our democracy of any person holding and acting upon the view a civil court is the appropriate place for the determination of commercial disputes between Jews, or for that matter gentiles," Sackar J said.

Later, "In my view this maintenance of conduct has the tendency to interfere with the administration of justice. The threats continue to maintain the assertion the Plaintiff was obliged as an observant Jew to abide the orders of the Beth Din and submit to its jurisdiction. Failure to do so has provoked threat of the imposition of the religious sanctions which remain on foot. Therefore this publication, in my view, equally, as a matter of practical reality, has the **requisite tendency to interfere with the administration of justice generally** and therefore I am of the view that Charge 6 has been made out," [286].

At [298] "I am not satisfied this Court has jurisdiction to intervene in the affairs of the Beth Din, despite it being clear in my view on the evidence the Beth Din has not afforded Mr Barukh natural justice," Sackar J said.

"However, on the question of contempt, in my view the Beth Din's threat of sanctions directed at Mr Barukh, in the context of the 29 December email and the 28 February letter, is **improper pressure** which, as a matter of practical reality, has the tendency to interfere with the administration of justice by coercing Mr Barukh to accept the exclusive jurisdiction of the Beth Din and not resort to a civil court to achieve the same result. On these grounds, I am satisfied beyond reasonable doubt the Defendants are guilty of Charge 2 and 6," his Honour said [299].

Relief, penalty, costs for submissions.

P: S A Wells, J R Anderson ins Lazarus Legal Group. D: I Neill SC, L Saunders ins Schweizer Kobras.

Employment Contracts

Absent restraint tells against injunction

Sprout Network Pty Ltd v Roth [2017] NSWSC 1717. Kunc J. 7.12.17.

Kunc J declined the plaintiff former employer's application for interim injunction to restrain the defendant from using alleged confidential information.

"Sprout operates as what is known as a venue aggregator. For present purposes, that is most easily understood by reference to the well-known phenomenon of pop-up shops. Sprout has both vendor clients and purchaser clients. The vendor clients are entities such as Westfield, QIC/GRE, GPT and AMP who offer space for pop-up shops in their shopping centres. Sprout also has purchaser clients, being agencies which represent those persons who wish to erect pop-up shops or such persons directly," Kunc J noted [7].

Mr Roth was the plaintiff's sales manager from April 2013, his employment contract letter stipulating to confidential information.

"Significantly for present purposes, Mr Roth's contract of employment did not include a restraint of trade," his Honour noted [9].

The defendant gave notice - "going to start up an e-learning business" - in early September 2017, the plaintiff learning two months later the defendant was plying in direct competition with it, the company then unearthing emails from the defendant to its customers.

The plaintiff's submissions "...have led me to the conclusion that there is either no serious question to be tried or, if there is a question at all, it is a very weak one. The balance of convenience is also against an order being made," his Honour said in [16].

"First and foremost, it is necessary in cases such as this to **identify with precision the confidential information** that is sought to be protected. In this case, it is clearly said to be the names and email addresses of the

executives of Sprout's clients. In my view, Sprout's case falls into serious difficulties at this liminal stage. Mr Roth's evidence makes it clear that for many, and it would appear to be most, of both the vendor and purchaser clients, the names and email contacts of those persons are freely available on the relevant websites. That is to say, the information is not really confidential at all," [17].

In [19] "Second, I do not accept that it is strongly arguable from the fact that Mr Roth copied the emails to himself that he did not in fact have those names and email addresses in his memory," his Honour said.

At [21] "Third, I have not overlooked that Mr Flaherty also submitted that there was another alleged piece of confidential information involved in this case, namely the fact that those particular people were clients of Sprout. It may be that would be a piece of confidential information. However, it is not the piece of confidential information which Mr Roth was using or disclosing. It is not, for example, as though he was telling anybody else who Sprout's clients were. I do not accept that the characterisation of the confidential information in that way gives rise to any different result from that to which I have come.

"Fourth, the authorities make it clear, at least in relation to the equitable jurisdiction, that a plaintiff must establish that the **particular information was provided in circumstances of confidence**, that is to say that the employee understood or ought to have understood that the information was to be kept confidential. The evidence, in my view, does not support any such inference being drawn in relation to the names of the executives and their email addresses," [22].

"Fifth, in the exercise of the Court's discretion, I would not be prepared to lay injunctions in the terms sought by Sprout (or in any other varied form) seeking to restrain Mr Roth's use of those contact details, in circumstances where the utility of such an order is, in my view, seriously in doubt. This may just be another consequence of the fact that the information is not truly confidential. Even if the Court were to lay an injunction of the kind sought by Sprout, there would be nothing to prevent Mr Roth going on the internet the next day and finding exactly the same information and proceeding to conduct his business based on that information rather than on the same information that was said to have been confidential," [23].

"Sixth, I am not satisfied that it would be appropriate to make an order of the breadth of order 1 sought by Sprout or any order of such kind. I accept Mr Steirn's submission that any such order would, in effect, be **a backdoor way of achieving a restraint of trade** to prevent Mr Roth from competing with Sprout in circumstances where it did not have a contractual restraint upon which it could rely," Kunc J said [24].

His Honour addressed the engagement stipulation, holding [26] its any construction could not sound more than nominal damages and without warrant for injunction.

Kunc J noted reliance on *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 per Samuels JA: tripartite classification of confidential information:

[**Samuels JA**] "...First, that which, because of its triviality or public availability, cannot reasonably be regarded as confidential at all. Secondly, information which the employee must treat as confidential (either because he is expressly told that it is confidential, or because from its character it obviously is so), but which he is free to use after his employment has terminated. Thirdly, specific trade secrets 'so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's'."

Here the information was not confidential.

To balance of convenience, "I accept that making orders of the kind sought by Sprout today would have the effect of shutting down Mr Roth's new business barely as it had started in circumstances where Sprout does not have a contractual right to restrain Mr Roth from competing with it. Especially in circumstances where I am satisfied that Sprout's case is not a strong one, the balance of convenience points firmly against any order being made against Mr Roth," Kunc J said in [29].

Undertaking to damages was neither apt "... in circumstances where the quantification of such damages in connection with a new business would, in my view, prove particularly difficult and speculative," his Honour said in [30].

Application dismissed, costs for submissions.

P: D M Flaherty ins The Property Practice. D: D Steirn ins The Workplace Employment Lawyers.

MEDICAL NEGLIGENCE

Neurologist opinion in neurosurgeon suit

Sandra Battersby v Allan; Darrel Battersby v Allan [2017] NSWSC 1724. Bellew J. 15.12.17.

Holding neurologist opinion admissible in cause against neurosurgeon. The second plaintiff was husband of the first.

Bellew J: "On 30 October 2013, the plaintiff Sandra Battersby underwent a CT scan which had been arranged for her by an Ophthalmologist for the diagnostic evaluation of what were thought to be optic nerve and retinal abnormalities. The CT scan showed evidence of a left sided supratentorial enhancing calcified mass which was thought to be meningioma. A subsequent MRI scan of the brain confirmed the presence of an inferior left sided extra-axial mass within the anterior of the middle cranial fossae, extending to the left parasella area and left cavernous sinus," [9].

"The defendant is a specialist Neurosurgeon. Mrs Battersby consulted him on 8 December 2013, at which time he advised her to undergo surgery. On 10 December 2013 the defendant performed a left fronto-temporal craniectomy on Mrs Battersby. Mrs Battersby alleges that during the course of that surgery, damage was caused to her left middle cerebral artery which was subsequently confirmed by CT scan. CT scans of the brain also demonstrated ischemia within the left hemisphere in the area of the supply of Mrs Battersby's left middle cerebral artery," his Honour said [10].

"On 11 December 2013, the defendant performed a further craniectomy on Mrs Battersby, in the form of an extracranial-intracranial bypass. That was followed by the removal of a clot lodged within Mrs Battersby's left middle cerebral artery. CT scans of her brain which were performed on the same day demonstrated an infarction on the left hand side within the frontal and temporal lobes, the former being associated with a haemorrhagic transformation," [11].

"Mrs Battersby alleges that as a consequence of the defendant's negligence, she has developed a right hemiplegia which has given rise to significant disabilities. The allegation of negligence is denied by the defendant," [12].

The question was whether evidence from neurologist Dr Dan Milder was admissible.

Bellew J canvassed Evidence Act s 79 [Exception: opinions based on specialised knowledge] and Dr Milder's specialty qualification.

"Section 79 of the Act imposes two preconditions to the admissibility of expert opinion evidence, namely: (i) the witness must have specialised knowledge based on his or her training, study or experience: *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [32]; and (ii) the opinion expressed by the witness must be wholly or substantially based on that knowledge: *Dasreef* at [32]; *Honeysett v R* (2014) 253 CLR 122; [2014] HCA 29 at [23]," Bellew J said [40], further authorities *R v Anderson* (2000) 1 VR 1; [2000] VSCA 16 and *R v Farquharson* (2009) 26 VR 410; [2009] VSCA 307, and Macquarie Dictionary (7th ed) definitions.

"I am mindful of the observations of the Court in *Farquharson* (at [79]) regarding the importance of considering the precise character of the question upon which the expert evidence is sought to be given. In the present case, the precise character of the question is centred upon a surgical procedure to an area of the anatomy in which he has considerable training, study and experience. It may be the case that ultimately, the weight to be attached to Dr Milder's opinion is less than that to be attributed to the opinion of a Neurosurgeon. However, questions of admissibility must not be confused with questions of weight: *Farquharson* at [81]," Bellew J said [49].

And, "For all of these reasons, I am satisfied that the opinion of Dr Milder is one of specialised knowledge based upon his training, study and experience. Accordingly, the provisions of s. 79 of the Act are satisfied, and the opinion is admissible," his Honour said [51].

The plaintiff had had difficulty qualifying a neurosurgeon and had lately qualified Dr Webster, whose report was resisted by the defendant.

Bellew J was unpersuaded by reliance on Uniform Civil Procedure Rules 2005 (NSW) r 31.28 [Disclosure of experts' reports and hospital reports] and Civil Procedure Act 2005 (NSW) s 14 [Court may dispense with rules in particular cases].

His Honour considered CPA ss 56, 57, 58, noted *Yacoub v Pilkington Limited* [2007] NSWCA 290 [66] Campbell JA to

exceptional circumstances.

"That said, it remains the case that the hearing of the proceedings will not be delayed as a consequence of the service of Dr Webster's report. Moreover, and although the report was served outside of orders made by the Court, counsel for the defendant candidly, and properly, conceded that there would be no demonstrable prejudice to the defendant if the report were admitted. Perhaps even more importantly, if the report were excluded it would leave the plaintiffs in a position where they would be precluded from relying upon important expert evidence in support of their respective cases. That, in addition to the matters to which I have already referred, is sufficient in my view, to constitute exceptional circumstances," Bellew J said [77].

"In the course of submissions it was suggested by counsel for the defendant, albeit faintly, that it was relevant to take into account that in the event that the report of Dr Webster were excluded, the **plaintiffs may have some cause of action against their solicitor**. If that be a possibility, it is one which is of little weight in the discretionary exercise: *Repco Corp Limited v Scardamaglia* [1996] VicRp 2; [1996] 1 VR 7 at 15 per Smith J; *Simms v Western Sydney Area Health Service* [2003] NSWSC 445 at [11]-[12] per Burchett AJ," his Honour said [78].

Report admitted.

Orders, costs for submissions.

P: P Bates ins Gerard Malouf & Partners. D: K Burke ins HWL Ebsworth.

Birth cause approval

Banks (bht Banks) v Hunter New England Local Health District [2017] NSWSC 1682. Rothman J. 4.12.17.

Approving an infant's medical negligence settlement.

"The matter involves, or originally in its Statement of Claim involved, the birth of a child who suffered Hypoxic Ischaemic Encephalopathy (Stage 2) with metabolic acidosis, seizures and hypoxemia. The child suffers from Cerebral Palsy and is severely disabled," Rothman J noted [2].

"The child was born in circumstances where apparently there was an absence of cardiotocograph signal which monitors the foetal heartbeat and uterine contractions during pregnancy," [3].

"A controlled artificial rupture of membranes was performed at 10.58am and the plaintiff was born with no respiratory effort and was taken to resuscitation at the Neo-Natal Intensive Care Unit," [4].

"I have had the advantage of a Confidential Advice provided by counsel for the plaintiffs which has been most helpful. I am grateful for its prior provision so that it enabled me to look at the proceedings in a manner that was appropriate prior to the matter coming before the Court," his Honour said [5], then referring to Civil Procedure Act 2005 (NSW) s 76 [Settlement of proceedings commenced by or on behalf of, or against, person under legal incapacity] and exposition in *Fisher v Marin* [2008] NSWSC 1357 at [27]-[41].

Orders, including defendant to pay plaintiffs' costs agreed $500,000, and payment to the parents $250,000, after statutory deductions the balance into Court.

P: D J Higgs SC ins Stacks Goudkamp Solicitors. D: Curwoods Lawyers, J Fox.

INSURANCE

House fire fraud appeal dismissed

Sachin Sharma v Insurance Australia Ltd trading as NRMA Insurance [2017] NSWCA 307. Meagher JA, Macfarlan JA & Sackville AJA agreeing. 1.12.17.

The Court of Appeal dismissed appeal against Montgomery DCJ - [2017] NSWDC 10 - rejecting for fraud the appellant landlord's property fire damage claim against the respondent insurer.

Leading, Meagher JA [66] noted *Palmer v Dolman* [2005] NSWCA 361 at [41] per Ipp JA to principles in civil cases whether circumstantial evidence infers fraud. His Honour dealt with each of the 18 grounds of appeal. Macfarlan JA and Sackville AJA simply agreed.

From the judgment headnote, "The wholly circumstantial evidence on which the insurer relied included records for the usual phone of the landlord's friend, a prepaid phone belonging to the friend and found at the scene, the landlord's usual phone and a prepaid phone called by that found at the scene at the time of the fire (alleged also to have been operated by the landlord).

"Accepting the insurer's case, the primary judge (Montgomery DCJ) concluded that the landlord's friend lit the fire and that the

landlord consented to his doing so. The former conclusion relied on the friend's familiarity with the property, lies to investigators, phone records proving continued use of the phone found at the scene and the lack of any other plausible explanation for his presence at the scene. The latter involved dismissing a suggestion of disgruntled tenants or strangers having started the fire, analysis of the outgoing use of the landlord's usual phone and the prepaid phone called at the time of the fire, the prospect of a substantial insurance payout being sufficient motive, and the landlord's failure to explain satisfactorily the deletion of five contacts from his usual phone between days four and five of the hearing and while he was under cross-examination."

Appeal dismissed with costs.

A: R Cavanagh SC, C O'Neill ins Marsdens Law Group. R: I Jackman SC, B Tronson ins William Roberts Lawyers.

MOTOR ACCIDENTS - NSW

WPI inconclusive to treatment

Sadr v Allianz Australia Insurance Ltd t/as Allianz Insurance & Anor [2017] NSWSC 1718. N Adams J. 12.12.17.

N Adams J declined with costs the claimant's application for judicial review of the Proper Officer referring a treatment dispute for medical assessment, when the treatment - neck surgery - had founded WPI assessment of 25%.

Ms Sadr hurt her neck in a motor accident on Anzac Day 2014. Allianz declined several times to pay for C6/7 anterior cervical discectomy and fusion by Dr Kam. The lady went ahead and paid herself. She applied for WPI assessment.

Allianz applied for treatment dispute assessment, resisted by the plaintiff who later informed SIRA, in response to direct question, she had no intention of claiming the surgery cost from the insurer, leading SIRA to dismiss the insurer's application.

Medical Assessor Ian Cameron had found 25% WPI at the neck, noted causation was contentious, opining "...causation has been established because the subject motor accident has materially contributed to the injury to the cervical spine. It is a contributing cause which is more than negligible and it is unlikely that the fusion of the cervical spine would have been required, at the time that it was performed, if the motor vehicle crash had not occurred", quoted by her Honour in [38].

The insurer's application for medical review was rejected.

The plaintiff made CARS application, its damages schedule including the cost of the surgery.

Allianz made further treatment dispute application, allowed by the Proper Officer, that decision here for review.

N Adams J noted in [45] two elements of the referral, "... whether the treatment was causally related to the injury sustained in the relevant motor accident and whether the treatment was 'reasonable and necessary' in relation to the injury sustained in that accident".

Noted for the plaintiff "Mr Robinson relied upon the decisions in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213 (at [24]) as to the distinction between 'ultimate' and 'evidentiary' facts for the purposes of estoppel; *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464 (at 532); *Hoystead v Commissioner of Taxation* [1926] AC 155 (at 165, 170); and *Carl Zeiss Stiftung v Rayner and Keller Ltd (No 2)* [1967] 1 AC 853 (at 936)," in [49], grounds and submissions, the defendant's also surveyed.

Later, "The decisions in *Brown v Lewis* (2006) NSWLR 587; [2006] NSWCA 87, *Pham v Shui* (2006) 47 MVR 231; [2006] NSWCA 373 and *Owen v Motor Accidents Authority (NSW)* (2012) 61 MVR 245; [2012] NSWSC 650 all support Allianz's contention that a certificate as to permanent impairment is conclusive of the matters that it certifies," N Adams J noted in [70].

"The plaintiff relied upon a number of further decisions in support of his position that the MAC is conclusive of the treatment dispute in this matter. Those decisions were *Allianz Australia Insurance Ltd v Girgis* (2011) 59 MVR 548; [2011] NSWSC 1424 at 553 [11] and 554-562 [16]-[43], *Motor Accidents Authority of New South Wales v Mills* (2010) 78 NSWLR 125; [2010] NSWCA 82 at 136 [63], 138 [74]-[75], 141 [92] and 142 [102], and *AAI Limited (t/as AAMI) v State Insurance Regulatory Authority* (NSW) (2016) 79 MVR 57; [2016] NSWCA 358 at 91 [158]. I did not find any of those authorities to be of assistance for the purposes of this matter. They **all restate the principle** that questions of permanent impairment and causation under Pt 3.4 of the Act are matters for determination by a medical

assessor, and that such determinations are conclusive. These decisions all confirm that a MAC issued under s 60 of the Act is conclusive of the matters referred to the assessor. They go no further than that," N Adams J said [74].

"It seems to me prudent that, in matters where an assessor will be required to have regard to disputed questions of treatment in order to resolve an impairment dispute, all outstanding medical disputes be resolved at the same time even if one of the parties resists this. No criticism of the proper officer who determined on 20 April 2016 that no treatment dispute existed is intended in this regard, but the plaintiff must have realised at that time that the impairment dispute was closely tied to the treatment dispute. It is difficult to understand why she resisted having the treatment dispute referred at the same time as the impairment dispute so strongly," her Honour said [78].

"The fact remains that assessments of treatment and impairment disputes are conclusive of different matters. That an assessor may need to consider material relevant to the question of treatment in order to resolve an impairment dispute does not lead to a conclusion that he or she of necessity determines any outstanding treatment dispute that has not been referred," [79].

"The decision of the proper officer that the treatment dispute had never been resolved is consistent with the documents before me and with s 61 of the Act, as construed in the line of authority beginning with *Brown v Lewis* and reiterated in *Pham v Shui*. I am not satisfied that the MAC issued on 20 May 2016 is conclusive of the treatment dispute. No error has been established in this regard," [80].

Summons dismissed with costs.

P: Messrs M Robinson SC, K Andrews ins NSW Compensation Lawyers. D: Mr K Rewell SC ins Moray & Agnew Lawyers.

All panel members should re-examine

Wolarczuk v NRMA Insurance Australia Limited [2017] NSWSC 1691. Schmidt J. 6.12.17.

Allowing with costs the claimant's application for judicial review of a motor accidents medical review panel.

In August 2013 Mr Wolarczuk was driving a van stationary when struck by the insured. He had prior motor accident in 2010 and work injury 2011 with low back consequences.

A fortnight before the latest motor accident, Mr Wolarczuk had undergone successful right L5 nerve block.

After the motor accident, Dr James van Gelder in February 2014 performed L5 nerve root decompression and microdiscectomy, the surgery assessed by medical assessor James Wong as reasonable and necessary and caused by the accident injuries, the medical assessor noting herniated L4/5 disc compressing the right L5 nerve root symptoms ameliorated after the procedure.

"Neither party challenged Assessor Wong's certificate and they were, accordingly bound by it," Schmidt J said in [9], noting MACA s 61(2).

Medical assessor Gliksman subsequently brought in 5% WPI, reasoning 10% DRE III less pre-existing DRE II.

The claimant applied for medical review, granted.

"There was no issue between the parties that Assessor Gliksman's approach to the assessment of the permanent impairment Mr Wolarczuk suffered as the result of the 2013 motor accident, did not accord with the requirements of the Motor Accidents Compensation Act and the applicable [Medical Assessment] Guidelines," Schmidt J said [13].

The medical review panel determined to re-examine the claimant, but one of the three assessors was unable to attend the re-examination.

The panel certified 0% WPI, holding in contradictory terms but the post accident impairment was the same as pre-existing impairment.

To panel reasons sufficiency, "illogical and contradictory as the reasons given were", Schmidt J noted *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43, at [65], including: "...statement must explain the actual process of reasoning by which the Medical Panel in fact formed its opinion and must do so in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law"; *Zahed v IAG Limited t/as NRMA Insurance* [2016] NSWCA 55 at [6] (Leeming JA): "...whether the reasoning process can be discerned".

Schmidt J said: "The Review Panel explained, under the heading 'Pre-existing injury', that it had assessed Mr Wolarczuk's whole person impairment prior to the 2013 accident, to be 5%. It considered that post-

accident, his impairment remained 5%. Accordingly, when that was deducted from his pre-existing impairment, the Panel concluded that the 2013 accident had resulted in 'no new level of percentage impairment'," [39].

"This approach did not accord with the Permanent Impairment Guidelines, which required, in the case of spine impairment, that the current impairment be estimated first; that the impairment from any pre-existing spine problem then be estimated; and that this estimate then be subtracted from the present impairment, 'to account for the effects of the former': Clause 1.34," her Honour said [40].

"The Review Panel's final conclusions were, in any event, different. The result is that its reasons are impossible to understand," [41].

The Panel had presented a table.

"There reference is made under the heading 'AMA Guides/Guideline Reference (Chapter/ Page/Table)' to 'DRE II Page 3/102 AMA IV'. That **suggests that the Panel did not pay necessary regard** to the applicable provisions of Chapter 4 of the Permanent Impairment Guidelines," Schmidt J said in [42].

Notwithstanding the panel's earlier finding of DRE II before and after, later it found both as DRE III, the insurer conceding the error, but contending it was of no moment, the submission unaccepted.

"Fairly read, what the Review Panel's reasons do establish is that it did not conduct its assessment in accordance with the requirements of Chapter 4 'Spinal Impairment' of the [Permanent] Impairment Guidelines, as it was required to do," Schmidt J said in [48].

"That **assessment must begin with Table 4.1** 'to establish the appropriate category for the spine impairment': Clause 4.6. The assessment of spinal impairment must be made 'at the time a person is examined': Clause 4.3. Assessors, including the Review Panel, are also required to include in the report a description of how the impairment rating was calculated, with reference to the Tables and/or figures used: Clause 4.12," her Honour said [49].

Schmidt J noted aspects of Table 4.1, then cll 4.14, 4.15, 4.18 and quoted 4.20 "...assessor must reference the relevant differentiators and/or structural inclusions", then referred to cll 4.28 through 4.31.

"In its reviews **the Review Panel made no reference to any of these requirements**. Its reasons reveal that the Panel did not pay necessary regard to the applicable Permanent Impairment Guidelines which bound its assessment. In explaining its conclusions, the Panel made no reference to those requirements, or to Assessor Wong's unchallenged conclusions," Schmidt J said [55].

"The Review Panel's final observation was that the Guidelines do not provide for increased percentage impairment for those who undergo operative intervention. That does not accurately reflect the provisions of Chapter 4 of the Impairment Guidelines. There it is required that the results of post-accident surgery must be taken into account in that exercise: Clause 1.27," [56].

In [57] "...the Panel's findings do not shed necessary light on why it was that the application of the applicable Guidelines to the evidence before it led the Panel to the result it finally arrived at, whichever it actually was, a 5% DRE II or 10% DRE III impairment, both before and after the 2013 accident.

"It follows that despite all that the Review Panel said in its certificate, its **reasoning process cannot be discerned**, even reading the reasons as a whole and applying a beneficial construction to them. Nor can the gap in the Panel's logic be filled as a matter of necessary inference, on a fair reading of those reasons," Schmidt J said [58].

"It thus must be concluded that the Panel did not discharge its statutory obligation, to explain the actual process of reasoning by which it in fact formed its opinion. What it did reveal, however, establishes that it did not adhere to the applicable Guidelines," her Honour said [59].

While the panel was not bound by the findings of Assessor Wong, it was bound to consider those findings which underscored the submissions of the claimant [69].

Her Honour rejected the insurer's submission that the Guidelines did not mandate surgery as "the only method by which the degree of permanent impairment is determined".

"The difficulty with the latter submission is that the Impairment Guidelines not only required Table 4.1 to be used by the Review Panel to establish the appropriate category for Mr Wolarczuk's spine impairment, both before and after the accident, but that the Table specifies the available DRE Categories for both previous spine operation, with and without

radiculopathy. The Guidelines also provide that the effect of surgery must be taken into account, on an assessment of impairment: Clause 4.4," Schmidt J said [76].

"That being so, it cannot be accepted that the Guidelines give assessors the discretion to assess the level of impairment of those who have had spinal surgery, as falling into one of the other specified conditions, such as patients who simply suffer lower back pain, or those who only have radiculopathy. Under these Guidelines, if there has been **surgery, it must be taken into account** in the way the Guidelines and the Table direct," her Honour said [77].

"The Review Panel gave no explanation of how it reached its conclusions, by reference to the Table and the other requirements of the Impairment Guidelines I have discussed. Why it did not accept Mr Wolarczuk's case, including as to causation, is not apparent," [78].

To whether all panel members were required to re-examine Mr Wolarczuk, [79]+, Schmidt J detailed s 63 [Review of medical assessment by review panel], and rejected the insurer's submission any members might re-examine thereto relying on Medical Assessment Guidelines cl 11.

Her Honour quoted Leeming JA in *Ali v AAI Ltd* [2016] NSWCA 110 [79]-[96]: questioning whether Guidelines were delegated legislation; and Giles JA in *McKee v Allianz Australia Insurance Ltd* (2008) 71 NSWLR 609; [2008] NSWCA 163 at [23] including: "...**plain purpose of s 63** is that the collegiate professional expertise of three or more medical assessors should be applied in the review, resulting in an assessment which is more likely to be correct and to be accepted by the parties to the medical dispute" and [38] including "... the review panel must give consideration to the matters referred for assessment in whole".

Schmidt J: "Consistently with this approach to purpose of the section and the requirements of the 'one task' involved in the review process established by s 63, **all three members of a review panel which determines that a re-examination is necessary, must be involved together in that examination**, as a part of the new 'assessment of all the matters with which the medical assessment is concerned', which s 63(3A) requires," [86].

Her Honour cited PI Guidelines cll 1.20 - three stages of assessment; 4.3 - assessment at time of assessment; MA Guirdelines Ch 16, cll 16.19 materials; 16.20 - no delegation to Proper Officer - "The Guidelines make no provision for the delegation of any of the functions of the panel to one or more of its members," her Honour said in [90] - and replicated cll 16.21 through 16.26, and those provisions' embrace of cll 9.11.4, 9.11.5 and Chs 10,11,12,18.

"Such a divided process would be the antithesis of that considered in *McKee* to be required by s 63, namely, by the review panel's application of its collegiate professional expertise to all of the information relevant to the new assessment," Schmidt J said [105].

"Thus it is that the only step in the assessment process which the panel is empowered to determine only one of their members will take, is the signing of the panel's certificate: cl 16.21.7," her Honour said [106].

Schmidt J noted contrary holdings of Adamson J in *Mackenzie v Allianz Australia Insurance Ltd (No. 2)* [2015] NSWSC 1320 [58]-[61], and *Bradley v Insurance Australia Ltd t/as NRMA Insurance* [2015] NSWSC 950.

"Regrettably I cannot agree with Adamson J that 'the assessment itself', which her Honour considers that the review panel must arrive at collectively, does not include any re-examination it has determined is necessary," Schmidt J said [109].

"In my view, as I have explained, given the requirement of s 63(3A), that there be a 'new assessment of all the matters which the medical assessment is concerned', which is not limited to that part of the earlier assessment which is alleged to be incorrect, if the panel determines that a re-examination is necessary, that being one part of such an assessment, **all panel members must be present when the re-examination is undertaken**," [110].

"Regrettably, in the result, I must depart from the conclusions reached by Adamson J, convinced as I am that they do not reflect the proper construction of s 63 of the MACA or of the Guidelines to which I have referred: see *Favelle Mort Limited v Murray* (1976) 133 CLR 581 at 591; [1976] HCA 13," [111].

Schmidt J rejected submission for discretionary refusal for remitter being unlikely to bring other result. Time extended, panel certificate set aside, remitted to Authority, costs, subject to other application.

P: Messrs R Sheldon SC, B Tzatzagos ins Brydens Lawyers PL. 1D: Mr W Fitzsimmons ins Hall & Wilcox Lawyers.

Panel remitter on false fact reliance

CIC Allianz Insurance Limited v Pillay [2017] NSWSC 1638. Bellew J. 4.12.17.

Bellew J: "The proceedings now brought by the plaintiff seek judicial review of the Panel's determination on the grounds more fully set out below. The plaintiff invokes the court's supervisory jurisdiction which is derived principally from s 69 of the Supreme Court Act 1970 (NSW). The proceedings do not involve a review of the merits of the Panel's decision. The court's **jurisdiction arises** where there is an error of law on the face of the record, or jurisdictional error: *NRMA Insurance Limited v Mulcahy* [2017] NSWSC 1499 at [19] per Adamson J," [23].

"Whether error on the face of the record has been shown is confined to an examination of the record itself: *Craig v State of South Australia* (1995) 184 CLR 163; [1995] HCA 58 at 180-181. However, evidence may be given of what was before the decision-maker if it is germane to establishing jurisdictional error: *Allianz Australia Insurance Limited v Kerr* (2012) 83 NSWLR 302; [2012] NSWCA 13 at [15]," his Honour said [24].

"The plaintiff takes no issue with the Panel's determination that the first defendant's left shoulder injury gives rise to a whole person impairment of 6% (as opposed to the 5% calculated by Assessor [Queensland neurologist Dr Geoffrey] Boyce). The plaintiff accepted that in this respect there appeared to have been a mathematical error in Assessor Boyce's calculations. However, it was the plaintiff's position that in the event that error was found, the matter should nevertheless be remitted to a differently constituted Panel. I have addressed this submission further below," [25].

Assessors Christopher Oates, Geoffrey Stubbs and Clive Kenna comprised the review panel, which determined left shoulder WPI at 6%, instead of Assessor Boyce's 5%, which brought 11% WPI when added to 5% WPI cervical DRE II.

The insurer plaintiff had relied on the Authority's Permanent Impairment Guidelines cll 1.3 - bold provisions directory, and the bolded 2.5, as follows:

2.5 "If the contralateral uninjured joint has a less than average mobility, the impairment value(s) corresponding with the uninjured joint can serve as a baseline and are subtracted from the calculated impairment for the injured joint only if there is a reasonable expectation the injured joint would have had similar findings to the uninjured before injury. The rationale for this decision should be explained in the impairment evaluation report".

The panel stated the left shoulder ROM should not suffer deduction for comparison with the right shoulder because that part had been injured in the motor accident, therefore was not an "uninjured joint".

In [37], "... in the third paragraph of its reasons under the heading 'Permanent Impairment', the Panel concluded (inter alia) that the first defendant's right shoulder was a referred injury related to the accident which Assessor Boyce 'found had resolved in his previous certificate of 10 November 2015'. That conclusion was demonstrably incorrect. Nowhere in Assessor Boyce's certificates did he express any such finding, or any finding to that general effect. That conclusion was reached by the Panel in circumstances where there was **no evidence** to support it," Bellew J said.

Such warranted relief.

His Honour addressed other submissions.

To reasons, Bellew J noted MACA s 61(9), then *Wingfoot Australia Partners Pty Limited v Kocak* (2013) 252 CLR 480; [2013] HCA 43 [65], including: "...statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law".

Bellew J: "The statutory scheme under consideration in *Wingfoot* was substantially similar to that prescribed by the MACA: *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39; (2014) 66 MVR 140 at [2]; [40]. As a result, the observations in *Wingfoot* have been applied to reasons given by medical assessors when performing their functions under the MACA: see for example *Zahed v IAG Limited t/as NRMA Insurance* [2016] NSWCA 55; (2016) 75 MVR 1 at [34]. Moreover, the provision of reasons is a requirement imposed upon a medical assessor by virtue of the Guidelines, which have the status of delegated legislation: *AAI Limited v Fitzpatrick* (2015) 72 MVR 97; [2015] NSWSC 1108 at [13]; *Sadsad v NRMA Insurance Limited* (2014) 67 MVR 601; *Allianz Insurance Limited v Francica* [2013] NSWSC 1577; (2012) 63 MVR 1; *Campbelltown City Council v Vegan* (2006)

67 NSWLR 372; [2006] NSWCA 284," [54].

"It is important to bear in mind that in determining this ground, it is not appropriate to parse the language of the Panel in the way that an appellate court might review the judgment of a single judge, nor is it appropriate to examine the reasons with a critical eye attuned to error: *Sadsad* at [16] and the authorities cited therein. The **ultimate question** is whether the reasons given disclose the pathway of reasoning by which the Panel arrived at its conclusions: *Wingfoot* at [55]," Bellew J said [55].

The ground was made.

To complaint the panel had not in fact performed its assessment, his Honour noted s 63(3).

"Medical assessors are obviously entitled to rely upon their own expertise in making their assessments. That extends to relying upon such expertise to determine **whether re-examining an injured party is necessary** for the purposes of carrying out their task: *Boyce v Allianz Australia Insurance Limited* [2017] NSWSC 780; (2017) 80 MVR 366 at [53]. The fact that the Panel chose not to re-examine the first defendant does not disclose error," Bellew J said [62].

In [63], "At the same time, the Panel was under an obligation to carry out an assessment of the nature and extent of the first defendant's injuries sustained in the accident. In other words, the Panel was required to determine afresh the medical assessment issues which were referred to it: *Frost* at [39] per Leeming JA. That required the Panel to engage in a process of clinical judgment having regard to the material which was before it. In *Rutland v Allianz Australia Insurance Limited* [2014] NSWSC 1583; (2014) 68 MVR 533 Garling J explained the nature of the Panel's task, in terms which I respectfully adopt (at [74]):

[**Garling J**] "What is required of the review panel by the Act is that it conducts its own assessment of the extent of the whole person impairment of the claimant. In order to do so, in accordance with the guidelines, it **must engage in an exercise of clinical judgment**. It does so on the basis of the claimant's history as contained in all of the documents with which the review panel is provided".

Bellew J: "In my view, the Panel failed to perform that task, and thus failed to properly engage in the process of assessment. That failure is evident from the Panel's **blanket adoption of an asserted conclusion** reached by Assessor Boyce. For the reasons outlined, no such conclusion was ever actually reached," [64].

"That is not to say that it is not open to one medical assessor to consider and adopt the findings of a previous medical assessor. However in doing so, it remained incumbent upon the Panel to engage in its own exercise of clinical judgment. I accept the submission of counsel for the plaintiff that the Panel's adoption of the asserted conclusion of Assessor Boyce is, of itself, indicative of a failure on the part of the Panel to engage in that exercise," [65].

His Honour rejected submission to discretionary refusal.

At [68], "I am not persuaded that this is the case for two principal reasons.

"Firstly, for the reasons set out at [63], if the matter were remitted to a differently constituted Review Panel, that Review Panel would be required to make a fresh determination of the issues referred to it.

"Secondly, one of the complaints made by the plaintiff, which I have found has been made out, is that the Panel erroneously adopted what was said to have been a conclusion reached by Assessor Boyce which was never in fact reached. Another complaint, which has also been made out, is that there was a failure on the part of the Panel to properly engage in an exercise of clinical judgment in making an assessment of the first defendant's injuries. What conclusions might be reached when the matter is considered afresh, purported conclusions are not incorrectly taken into account, and clinical judgment is properly exercised, will be a matter for those who are appropriately qualified to reach those conclusions. In my view, it could not be said that those conclusions will inevitably be the same as those which were reached in the course of the adoption of a process which was infected by error," Bellew J said.

Panel determination set aside, matter remitted, costs for submissions.

P: J Gumbert ins McInnes Wilson Lawyers. 1D: J Turnbull SC, H Ward ins AM Legal. 2&3D (Authority, Panel): Submitting.

NEGLIGENCE

CLA s 5L risk proviso defeats jockey's claim

Goode v Angland [2017] NSWCA 311. Beazley P, Meagher and Leeming JJA agreeing separately. 7.12.17.

The Court of Appeal upheld Harrison J's verdict for the defendant - [2016] NSWSC 1014 - on a horse race jockey's injury suit against another jockey accused of riding negligently causing the plaintiff's mount to fall in a race at Queanbeyan in mid 2009.

"The incident had been the subject of a stewards inquiry conducted in March 2010 by Racing NSW. Both the appellant and the respondent gave evidence at that enquiry, as did two other riders, Mr Cumberland and Mr Clark. The video of the race was played at the inquiry. The inquiry concluded that the fall of the appellant's horse could not be attributed to rider error. The inquiry found that the appellant's horse's inclination to overrace resulted in it improving into an awkward position, which was available as the respondent's horse had momentarily shifted position," Beazley P said in [9].

Her Honour reviewed evidence below, noting the trial, which included viewing film and photographic evidence at specialised facilities in London, depended on that graphic evidence.

Beazley P noted [89]+ authorities to use of photographic evidence, including *Blacktown City Council v Hocking* (2008) Aust Torts Reports 81-956; [2008] NSWCA 144, et al.

"A matter that frequently arises in the use of photographs is that they can be deceptive, particularly in relation to perspective and distance. This was the subject of observation in *Angel v Hawkesbury City Council* (2008) Aust Torts Reports 81-955; [2008] NSWCA 130 where the Court (Beazley and Tobias JJA, Spigelman CJ, Giles and Campbell JJA agreeing) said, at [69]-[72], that photographic evidence could not trump the direct evidence of witnesses that compelled acceptance," Beazley P said [93].

Harrison J had not erred in reliance on the films and photos, nor had he erred in other respects.

Her Honour considered Civil Liability Act 2002 (NSW) ss 5F [Meaning of obvious risk], 5K [Definitions], 5L [No liability for harm suffered from obvious risks of dangerous recreational activities] and noted *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 86 NSWLR 55; [2013] NSWCA 361 and *Belna Pty Ltd v Irwin* [2009] NSWCA 46.

"These authorities might be seen to support the proposition that a 'recreational activity' as that term is defined in s 5K only applies to activities that are of a recreational character. This approach is arguably consistent with the provisions of Pt 1, Div 5 more generally. Section 5M relates to circumstances where a person engages in a recreational activity in which the defendant gave a risk warning to the plaintiff. Section 5N relates to contracts for services supplied to a person in relation to recreational activities. These provisions would appear to be directed to persons taking part in 'recreational' activities, as that term is commonly understood, and not to professional sportspeople who are either in employment or otherwise engage in the sport professionally for reward. It also seems incongruous that an activity undertaken as one's profession, trade or livelihood would be subject to the same legislative exclusion as an activity undertaken for enjoyment, relaxation or leisure, or for that matter, physical fitness or the acquisition of skill. However, I am persuaded for the reasons given by Leeming JA that that is the proper construction of, and therefore the effect of, ss 5K and 5L," Beazley P said [174].

Leeming JA determined s 5L was dispositive.

At [183] "An 'obvious risk' to a person who suffers harm for the purposes of these provisions is 'a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person': s 5F(1). It was common ground, both at trial and on appeal, that the risk that a jockey might fall from a horse during a race and suffer injury was an obvious risk, and that horse racing involved a significant risk of physical harm; there is thus no occasion to consider the views expressed as to the operation of the terms 'obvious risk' and 'significant risk' in *Fallas v Mourlas* (2006) 65 NSWLR 418; [2006] NSWCA 32. Instead, the appeal proceeded on the footing that if horseracing is a 'recreational activity', then s 5L would apply, and be dispositive," Leeming JA said.

"Section 5L, like s 5I, provides that a defendant 'is not liable in negligence ...'. Unlike s 5I, which in terms limits the operation of the section so as not to exclude liability in connection with a duty to warn, s 5L applies

whether or not the plaintiff was aware of the risk (this reflects the nature of an 'obvious risk', as opposed to an 'inherent risk', and accords with what was held in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; [2002] HCA 9). Further, like s 5I, s 5L employs the language of 'as a result of', which conveys a broader notion of causality than s 5D requires the plaintiff to establish," his Honour said [184].

"Noting that 'negligence' for the purpose of Part 1A is defined to mean 'failure to exercise reasonable care and skill', s 5L is thus **a complete answer to liability** which is governed by Part 1A. That is to say, even if a plaintiff establishes duty and breach and causation, if s 5L applies, then a defendant is not liable to the plaintiff. It is an example of a 'liability-defeating rule' which is 'external to the elements of the claimant's action' and thus a clear example of something properly regarded as a defence: see J Goudkamp, Tort Law Defences (Hart Publishing, Oxford, 2013), p 2, and see *Fallas v Mourlas* at [122]. The **onus of establishing the defence** rests with the defendant: *Fallas v Mourlas* at [24] and [123]. Although it was not how the appeal was presented, there is much to be said, in my respectful view, for dealing with the defence at the outset: see *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311 at [54]- [57]; *Schultz v McCormack* [2015] NSWCA 330 at [84], [132] and [153]; *Action Paintball Games Pty Ltd (in liq) v Barker* [2013] NSWCA 128 at [25]; *Bankstown City Council v Zraika; Roads and Maritime Services v Zraika* [2016] NSWCA 51 at [81]. Although those decisions involved different provisions of the Civil Liability Act, namely, ss 5I, 5M and 44, in each case the statutory defence was an entire answer to that aspect of the plaintiff's claim," [185].

His Honour disagreed with the holding in *Dodge v Snell* [2011] TASSC 19 that horseracing was not a recreational activity.

"For those reasons, I consider that the primary judge was correct to conclude that s 5L applied. Horseracing is a sport which engages the first limb of the definition of 'recreational activity' in s 5K. It was common ground that if that were so, ss 5K and 5L were engaged. That is sufficient to resolve this appeal," Leeming JA said [211].

Of reliance on photographic evidence, "The explanation for what appears on the photographs reproduced above is that at that point of the race, described in the evidence as 'the sharpest part of the curve', the horses were turning, while at all times, there was an inevitable parallax error in the apparent lining up of horse and distance mark in the photographic images," [223], then echoing the President's proposition to care in use of photographic evidence.

In [177] Meagher JA: "I agree for the reasons given by Leeming JA that Civil Liability Act 2002 (NSW), s 5L provides a complete defence to the appellant's claim."

Appeal dismissed with costs.

A: D Higgs SC, F Tuscano ins Ken Cush & Associates. R: J E Sexton SC, D Lloyd ins Clyde & Co.

Occupier's Liability

Non-slip coating would have avoided fall

Bridge v Coles Supermarkets Australia Pty Ltd (No 3) [2017] NSWSC 1800. Campbell J. 19.12.17.

Occupier's cause, damages $688,071 and costs and indemnity costs.

"The plaintiff, Mr Bridge, claims damages from the defendant, Coles Supermarkets Australia Pty Ltd (Coles) for personal injury suffered on 6 April 2014 when he slipped and fell in the below ground car park of Coles' Coffs Harbour store. Mr Bridge had undergone a total left hip replacement on 5 May 2013. In the subject fall he suffered peri-prosthetic hip fracture in the region of his left hip requiring a painstaking and difficult complete revision of the hip replacement," Campbell J noted [1].

His Honour noted plaintiff's expertise from "... Mr Jason Wagstaffe, who has qualifications in mining engineering and safety and risk management. He is also a member of the BD-094 Committee of the Australian Standards Association. This is the technical committee for slip resistance of flooring," in [6].

The defendant did not adduce responsive expertise.

"Mr Bridge was wearing casual clothing with a pair of **thongs**. He had had the thongs for about six months and he had walked on wet concrete while wearing them in the rain previously in service stations, shopping centres and on pathways. He had never noticed any problem with them being slippery," his Honour noted [11], accepting the plaintiff as credible, as well with respect to receiving a mobile

telephone call about the time of the incident.

"From Mr Wagstaffe's evidence, I infer that the carpark surface in the area where Mr Bridge fell was unduly slippery. Mr Wagstaffe had the benefit of inspecting the carpark on 21 August 2014 and undertook slip resistance testing in the place where Mr Bridge indicated to him he had fallen and its near vicinity. He employed the Wet Pendulum Test Method in compliance with Australian standard AS 4663:2013. That standard was current at the time of the testing but came into effect after the floor had been laid in 2011. Mr Wagstaffe explained that the relevant classifications according to which slip resistance is rated originate, for Australian purposes, in the 1994 standard but 'they had worked their way through' to subsequent standards. The applicable standard at the time of construction was Australian standard 4586:2004," Campbell J noted [21].

"The contribution of the surface to the risk of slipping when wet could be alleviated by the creation of a pedestrian pathway by the application of **a three-layered non-slip coating** to the concrete surface consisting of a basecoat, a gritty non-slip coat and a top coat to protect the gritted coat. These products are applied by hand, are relatively inexpensive, and have no effect upon the structural integrity of the building," his Honour said [24].

His Honour noted occupier's liability authorities, *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7 (at 484-8); *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; [2000] HCA 61 [17]-[18], [112], and noted reliance on *Garzo v Liverpool/Campbelltown Christian School* [2012] NSWCA 151 at [19]; *Schultz v McCormack* [2015] NSWCA 330 at [74]-[75] and *Swift v Wearing-Smith* [2016] NSWCA 38.

At [38] "Mr Roberts also submitted that I would infer that Coles knew or ought to have known that the surface of the floor was unduly slippery when wet. This inference was to be drawn from a number of factors: The area where Mr Bridge slipped was polished rather than a broomed non-slip finish 'as required by the contract'; secondly, a 'smooth surface' was likely to be 'highly dangerous if wet'; thirdly, according to Exhibit CB2.44, albeit due to a separate problem of blocked sump-pump flooding the carpark in October 2013, the builder raised the concern with Coles's Retail Leasing Manager for New South Wales that pushing trolleys through the water was a 'safety hazard'; and the failure to call any of the authors or recipients of any of the emails gave rise to a *Jones v Dunkel* inference that their evidence would not have advanced Coles's case, making it easier to draw the inference from the other factors that Coles was aware that aspects of the concrete surface of the carpark were unduly slippery when wet. Counsel pointed to Exhibit CB2.74 and 75 as proving that within a very short time of Mr Bridge's fall and injury 'Slippery When Wet' signs were erected in the carpark. However, Senior Counsel relied most heavily on Coles' failure to treat the slippery surface of the carpark by applying a non-slip coating as discussed by Mr Wagstaffe either across the polished concrete areas or in a marked pedestrian walkway as an omission constituting negligence," Campbell J said.

His Honour [40]+ distinguished *Garzo*, *Schultz v McCormack*, *Swift v Wearing-Smith*.

At [45], "I identify the risk of injury which materialised in the present case as the risk of a customer suffering personal injury by slipping and falling when walking over that portion of the surface of the carpark which was of smooth polished finish when wet," Campbell J said.

"I accept that an occupier of newly constructed premises may have no reason to suspect anything untoward about their fitness for use. And the same may equally be true of a commercial occupier of a supermarket like Coles. On the other hand, the evidence I have referred to provides **clear evidence of constructive knowledge** that the smooth portion of the carpark floor may be 'dangerous' because of its slipperiness when wet. I infer that the matter could have been easily checked by Coles if it had any doubt about the accuracy of the information conveyed by the developer in February 2012. This inference was all the more readily drawn given **the failure of Coles to call any witness at all**, particularly about the issue of what it knew or appreciated about the condition, properties and performance of the carpark surface before April 2014," Campbell J said [48].

"I am not of the view that Coles is assisted by the absence of any **evidence of prior incidents**. As Mason, Wilson and Dawson JJ observed in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301; [1986] HCA 20 at 309. The 'weight that will attach to an

accident-free history involves a question of fact to be determined in the light of all the relevant circumstances'. One of the relevant circumstances is that no evidence has been called by Coles to affirmatively establish that matter proof of which it must have been in the power of Coles to produce and not in the power of Mr Bridge to contradict: *Blatch v Archer* [1774] EngR 2; (1774) 98 ER 969 at 970. As in *Braistina*, in these circumstances all that can be said is that 'no evidence has been lead of any similar accidents in the past'," [49].

"Nor does the evidence allow me to infer favourably to Coles that it actually relied upon the consideration that the premises were new when it occupied them to conclude that the surface of the carpark was not unduly slippery when wet. As I have said, in any event, this is contradicted by the direct evidence provided by Exhibit 5 and the use by the developer of the word 'dangerous'," [50].

"I am satisfied on the balance of probabilities that the **risk of injury was foreseeable** to a reasonable occupier in the position of Coles," [51].

"I am also satisfied that the **risk was not insignificant**. Given what Mr Wagstaffe has said about the high contribution of the floor surface when wet to the risk of a customer losing his or her footing and slipping, and the well-known risk of appreciable, even serious, injury if a person unexpectedly falls onto concrete, the contrary could not be seriously contended," [52].

"Mr Bridge's case is that Coles was negligent in failing to take precautions against the risk of harm which materialised in his case. The **precautions** put forward are: (a) Carrying out tests of the type subsequently performed by Mr Wagstaffe to ascertain the degree of slipperiness of that part of the carpark having the smooth polished surface; (b) Creating a non-slip walkway as described and suggested by Mr Wagstaffe; and (c) Erecting the warning signs stating, 'Slippery when wet', which were in fact erected on 9th April 2014," Campbell J said [53].

"The question posed by [Civil Liability Act 2002 (NSW)] s 5B(1)(c) whether, in the circumstances, a reasonable person in Coles position would have taken those precautions is to be determined having regard to the considerations listed in s 5B(2), 'amongst other relevant things'. It is also absolutely fundamental that the question be evaluated entirely prospectively, that is to say, looking forward as though Mr Bridge's accident had not occurred and without any advantage of hindsight whatsoever," [54], then noting *Ratewave Pty Ltd v BJ Illingby* [2017] NSWCA 103 [54] Meagher JA: defendant entitled to expect plaintiff will take reasonable care for his own safety.

Slip resistance testing was not a reasonable precaution [56].

"I am, however, satisfied that a reasonable person in Coles position would have adopted the precaution of creating a **non-slip pathway** by treating or coating the surface of the carpark as described by Mr Wagstaffe. Just as the ambit of foreseeability covers the expectation that entrants will use reasonable care, so too it is 'reasonably to be expected that users [of the carpark] would include those that were distracted or inattentive or even less than careful': *Ratewave Pty Ltd v BJ Illingby* at [57]. This is the allowance for human nature that Mahoney JA spoke of in *Phillis v Daly* (1988) 15 NSWLR 65. **Distraction from or inattention to the floor** may be especially in play in the busy carpark of a suburban supermarket where it may be expected that there will be many claims upon the attention of customers, including keeping a lookout for passing vehicles," his Honour said [58].

The recommended floor coating "... was well within the lessee's powers under the lease. Even if I am wrong in this legal conclusion, a reasonable person in the position of Coles would have sought permission to have the work carried out, given it identified the risk as a safety hazard.

"It would have in the circumstances been unreasonable for the lessor to withhold consent or permission," in [61].

To erection of a warning sign, Campbell J considered [62] CLA ss 5C, 5F, 5H.

"So far as s 5H is concerned, I am not satisfied that the risk of slipping on the smooth polished concrete was obvious in the statutory sense, that is, 'obvious to a reasonable person in the position of' Mr Bridge," in [63].

In [65], "At the same time, I am not satisfied on the balance of probabilities that the erection of the warning signs, effective as such measures may be, would have avoided the risk of harm in this case.

"I am satisfied on the balance of probabilities that Coles was negligent in failing to treat the smoothed polished surface with non-slip

material as described by Mr Wagstaffe. It would have been sufficient to create a walkway at the edge of the trafficable lane in the carpark in a prominent manner so as to attract the attention of entrants and encourage its use," his Honour said in [66].

"Questions of **causation** are required to be decided in accordance with ss 5D and 5E of the Civil Liability Act.

"I am satisfied that the negligence I have identified was a necessary condition of the occurrence of Mr Bridge's injuries. I infer from all of the circumstances that had the precaution I have identified been adopted, Mr Bridge would have walked on the pedestrian walkway so created," in [67].

"No occasion arises in the circumstances of this case for the consideration of the question of **whether it is appropriate for the scope of Coles's liability to extend** to the personal injury so caused. If it is necessary to make a positive finding, I am so satisfied. I am satisfied that the normative standards which inform the law of negligence are served by rendering Coles liable for the consequences of its negligence," Campbell J said [68].

The defendant contended contributory negligence in failing to keep a proper lookout and wearing inappropriate footwear.

"I am satisfied that he would have slipped when and where he did even if he had not been answering his phone, but rather had been looking ahead at the surface he was about to cross," in [70].

And, "There is no evidence that thongs per se are unduly slippery," in [71].

Contributory negligence not made.

To **damages** [74]+, noted plaintiff born 1960, truck driving, guarded prognosis post incident, qualified physiological expertise from Drs Bodel and Smith, qualified psychiatric opinion Dr Michael Prior, psychologist Mr Baker,.

Non economic loss 36% mec (submissions 38% v 29%) $217,800; past OPs $4,971, future OPs $27,791, past economic loss $92,700, future economic loss $226,063, super past at 11% $10,197, future at 14% $31,649, past gratuitous care $23,588, future commercial care 2hrs weekly x 20 years at $40 hourly: $53,312, liberty to apply for interest.

Orders, costs ordinary to 20.6.17, thereafter indemnity.

P: I Roberts SC ins Monaco Solicitors. D: D Weinberger ins McCabes Lawyers.

Water slipping upheld

Sutherland Shire Council v Safar [2017] NSWCA 203. Macfarlan JA, White JA, Harrison J separately. 15.12.17.

The Justices delivered separate reasons dismissing with costs appeal against Levy DCJ - *Safar v Sutherland Shire Council* [2016] NSWDC 232 - holding for the plaintiff respondent injured after slipping on water on the appellant's auditorium floor at a dance eisteddford in mid 2013.

Macfarlan JA said "...the primary judgment should be upheld, substantially for the reasons given by the primary judge", in [10].

White JA: "I agree with Harrison J's reasons for concluding that the primary judge did not err in holding that a reasonable person in the position of the Council would have taken the precautions of, at minimum, providing bins or receptacles at appropriate locations near the entrance to the auditorium for the deposit of wet umbrellas. The primary judge also found that appropriate signage should have been provided. Such signage would invite, although it might not compel, visitors to place their wet umbrellas in the bins provided," [31].

Later, White JA: "There was no dispute that it is not enough for a plaintiff to establish that had reasonable precautions been taken the risk of injury would have been reduced. What **must be shown is that on the balance of probabilities** had the reasonable precautions been taken, the slip and fall would not have occurred. The question is one of fact to be determined using common sense," [54].

Then, "The primary judge considered that more precautions were required than I have considered to be the case, namely, I have not agreed with his Honour's view in respect of the provision of mats. Nonetheless, I see no reason to depart from his Honour's conclusion that had reasonable precautions been taken, the injury would have been avoided," in [56], noting *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5.

Harrison J: "It would, as Macfarlan JA has intimated, have been a matter of inexpensive simplicity for the Council to have placed bins or receptacles at some appropriate location or at several locations near the entrance to the auditorium that were suitable for the deposit of wet umbrellas. The provision of one bin near the box office was inadequate for that purpose. The same applies to what have been described

as umbrella bagging devices. I am unable to accept that the provision of these items was unreasonable. It remains unclear to me how the Council maintains that his Honour failed properly to deal with Mr Brien's evidence on this issue," in [78].

Later, "In my opinion it is more probable than not that the water upon which Ms Safar slipped would not have been deposited inside the auditorium if the relevant precautions had been taken. There were no competing causes for its presence, in the sense that there is an equally likely and available explanation to account for the presence of the water. It is trite to observe that on a wet and rainy day such as the day in question there could be no guarantee that the floor might not have become wet for some other reason. The test is, however, not so onerous. The probabilities in my opinion favour the floor remaining dry if the precautions had been adopted," [108].

Appeal dismissed with costs.

A: J Sexton SC, R Gambi ins Mills Oakley Lawyers. R: H Marshall SC ins Beilby Poulden Costello Lawyers.

PRACTITIONERS

Post settlement loss sets time running

Dougall v Melville [2017] NSWCA 309. McColl JA, Payne JA & Davies J agreeing. 5.12.17.

The Justices allowed with costs the practitioners' appeal against Gibbs DCJ refusing to dismiss the respondent's negligence suit for being out of time.

Leading, McColl JA: "The first to sixth and eighth appellants are, and at all material times were, solicitors, relevantly, the partners in the firm White Barnes Solicitors (the firm) during the period of about 2005 to 2007. The respondent retained the firm as his legal representatives in a claim for workers compensation from Toll in respect of an incident involving a forklift which occurred on 25 July 2005 (first WC claim). The seventh appellant, a barrister, was retained by the firm to act on that application. The eighth appellant, another member of the firm, was joined as a defendant upon the filing of a Second Further Amended Statement of Claim (SFASC) on 29 June 2015," [9].

Her Honour noted the first workers compensation claim settled in May 2007 on aggregated weekly payments $27,500, medical expenses $5,000, costs, as well as terms which amended the initiating process to include, inter alia, the worker's knees, and an award respondent for any other injuries.

In November 2007 the respondent had bilateral knee replacements, with complications, and did not work further.

The worker claimed against Toll, which in reply contended the worker estopped.

In late 2013, the worker commenced in the Workers Compensation Commission. The proceeding settled by 1987 Act s 66A complying agreement on 13% WPI $18,700 and pain and suffering $47,300 by subsequently repealed s 67, again with conclusive terms,

In September 2014 the worker commenced over professional negligence in the District Court, including a claim by the Fair Trading Act 1987 (NSW). McColl JA noted process incidents, then detailed Limitation Act 1969 (NSW) ss 14 [General], 63 [Debt, damages etc] and FTA ss 42 [Misleading or deceptive conduct], 68 [Actions for damages]. Her Honour noted reliance on and distinguished *Commonwealth of Australia v Cornwell* [2007] HCA 16, 81 ALJR 933.

"The majority in the High Court characterised the nature of the interest infringed for the purposes of determining the limitation question as being "an 'entitlement' conferred by federal statute law", which Mr Cornwall "stood to enjoy upon 'retirement',". Their Honours analysed the legislative schemes for the Superannuation Act 1922 (Cth) and the Superannuation Act 1976 (Cth). Having done so, they concluded that Mr Cornwell had sustained actual loss only on his retirement, so that his cause of action in tort for the negligent advice accrued on that date. Hence the action had been commenced within the relevant limitation period under s 11 of the Limitation Act 1985 (ACT)," McColl JA said [79].

Then, "In my view, the matters upon which the respondent sought to rely as contingencies were not contingencies such as were considered in *Cornwell*. Rather, they were matters which would have to be proved in the course of any workers compensation claim or work injury damages claim the respondent may have sought to bring," her Honour said [83].

"Rather, as the appellants contended in the operations case, the respondent suffered

measurable damage for the purposes of both his negligence and misrepresentation claims in November 2007 when he suffered the total loss of his earning capacity after his knee replacement.

"This was clearly loss which was more than negligible in the sense referred to in the authorities to which I have referred.

"On his pleaded and particularised case, the respondent was, thereafter, precluded from making any, or any adequate, workers compensation or work injury damages claim by reason of the compromise of the first WC claim as reflected in the compromise of the second WC claim," [84].

"Accordingly, in my view, both the respondent's causes of action accrued on or around the date of that surgery. They were extinguished by the operation of s 63 of the Limitation Act on or around November 2013. His statement of claim pleading the negligence claim was not filed until approximately 7 years after the accrual of that cause of action. The amendment pleading the misrepresentation claim took effect from 29 June 2015, more than seven and a half years after the accrual of that cause of action. Both were **clearly statute barred**," [85].

To **appeal from interlocutory determination**, earlier McColl JA said: "An erroneous interlocutory order which allows proceedings to be commenced or continued should, if possible, be corrected before trial, not later.

"Accordingly, leave to appeal should be granted readily in proper cases. Such a case will be one which involves 'an injustice which is reasonably clear, in the sense of going beyond what [is] merely arguable': *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 (at 46]) per Campbell JA (Young and Meagher JJA agreeing); see also *Be Financial Pty Ltd (as Trustee for Be Financial Operations Trust) v Das* [2012] NSWCA 164 (at [33]) per Basten JA (Tobias AJA agreeing).

"In my view, this is such a case. Leave to appeal should be granted," [6].

Orders, appeal allowed, setting aside District Court judgment, the plaintiff there to pay the defendants' costs, respondent to pay 50% of the appellants' costs.

A: Patrick Knowles, Derek Wong ins Yeldham Price O'Brien Lusk. R: Ross Goodridge ins Firths The Compensation Lawyers.

WORKERS COMPENSATION

Evidence required to make apprehended bias

Inghams Enterprises Pty Ltd v Belokoski [2017] NSWCA 313. Basten JA, McColl JA & Bellew J agreeing. 7.12.17.

Apprehended bias appeal dismissed with costs, where Workers Compensation Commission Deputy President Snell - [2017] NSWWCCPD 15 at [22]+ - declined to recuse himself on the appellant's application based on non-determinative involvement of Mr Snell as a senior arbitrator in the Commission in the matter previously.

"The application for the Deputy President to recuse himself was made in response to a direction given by him to the parties noting his involvement in the earlier proceedings (which had been resolved by agreement on 25 September 2014), inquiring if either party objected to his involvement in the appeal and, if so, requesting that it advise the basis of the objection. The appellant's objection, raised in an email of 20 March 2017, stated that recusal of the Deputy President was appropriate 'in view of his involvement in the previous proceedings as Senior Arbitrator and comments made at that time'," Basten JA said [6].

"The Deputy President responded by email on the same date noting that (i) the only orders made by him in the earlier proceedings had been procedural, (ii) the proceedings had been resolved by consent on 25 September 2014 and (iii) he had 'no recollection of the earlier proceedings'. The email stated a tentative view that withdrawal would not be appropriate and required that any party seeking to make an application for recusal should advise his associate the following day and should 'lodge evidence relevant to any such application'," his Honour said in [7] before noting the determination below at [27]-[30].

No evidence was put on. Basten JA noted Snell DP's references to authorities and the 1998 Act s 355 [Arbitrator to attempt conciliation].

Instant process was application for leave to appeal, granted, and direction to file draft notice of appeal of a single ground - "erred in law" - with two parts, failing to disqualify himself, and "a fair-minded lay observer might reasonably apprehend".

"There was no further relevant material placed before this Court. There was, for example, no documentation as to the issues in the earlier proceedings in the Commission dealt with by Mr Snell as a senior arbitrator; nor as to the issues raised at the telephone conference on 11 August 2014. Further, there was no challenge to any aspect of the reasoning of the Deputy President in rejecting the recusal application, other than the final conclusion that no reasonable apprehension of bias had been demonstrated," Basten JA said [14].

"There was no dispute as to **the relevant legal test**. As explained in *Johnson v Johnson* (2000) 201 CLR 488; [2000] HCA 48 at [11], the question is 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'," in [15], Basten JA then noting *Livesey v NSW Bar Association* [1983] HCA 17; 151 CLR 288 at 294.

"A similar view was expressed in *Western Australia v Watson* [1990] WAR 248 at 264 noting that 'the **duty of the judge** to disqualify himself for proper reasons is matched by **an equally significant duty** to hear any case in which there is no proper reason to disqualify himself," Basten JA said [17].

"The second matter of principle is encapsulated in the second finding made by the Deputy President relating to the logical connection between the basis of the apprehension and the nature of the proceedings from which recusal is sought," in [18] then noting *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; [2011] HCA 48 at [63].

Later, in [37] "What the appellant sought to do in support of this ground was to sift through the Deputy President's reasons for decision and light upon aspects of the reasoning which, it was conceded, did not reveal any error of law, and seek to use these to demonstrate that the initial apprehension of bias was confirmed. Whether or not that was what this Court did in *Michael Wilson & Partners*, it is beyond doubt that, as the High Court categorically stated, such an approach is fallacious," Basten JA said.

Appeal dismissed with costs.

A: D Saul, J Emmett ins Leigh Virtue & Associates. R: M Allars SC, C Tanner ins Carroll & O'Dea.

PUBLISHING

* From 2018, Workers Compensation and Motor Accidents summaries will appear in Common Law Monthly Summaries.

BACKYARD

"No evidence is required to establish that horses do not double or triple their speed during the course of a race," **- Leeming JA, *Goode*, 7.12.17.**

"In my view, Sprout's case falls into serious difficulties at this liminal stage," **- Kunc J, *Sprout Network*, 7.12.17.**

"As alluded to, despite extensive investigative efforts, I have been unable to locate a full judgment of *Hillfinch*," **- Sackar J, *Live Group*, 14.12.17.**

"There are, of course, legal complications," **- Campbell J, *Bridge*, 19.12.17.**

"The State tendered evidence in these proceedings that establishes that the Department of Education knew about Mr Taylor's convictions and re-employed him to teach six-year old children," **- N Adams J, *State of New South Wales*, 21.12.17.**

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