



Queensland Insurance Case Law Review

2008/2009



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This paper presents a brief overview of relevant decisions handed down in the Queensland District, Supreme and Court of Appeal in 2008, and two pertinent decisions handed down in early 2009. The focus of this paper are decisions in the areas of Liability, Quantum and, *Personal Injury and Proceeding Act 2002* and Civil Procedure within an overall framework of insurance law.

The cases chosen are those that provide a contribution within one of the above mentioned fields or have been deemed to provide assistance to insurers. Accordingly not all decisions handed down in 2008 are summarised within.

Liability

The summaries provided within the Liability portion of the paper relate to slip and fall type accidents where liability has been in question.

The cases particularly refer to incidents where:

- the claimant was aware of the risk, in which case warning of the risk wasn't required;
- the incident did not occur as alleged by the claimant; and
- the risk was so obvious that the duty of care was not breached by failure to rectify the hazard.

Quantum

This section of the paper provides a snapshot of 8 decisions where the discussion is limited to the Courts findings regarding quantum.

The decisions, which relate to motor vehicle collisions and slip and fall type accidents, have been discussed by providing details regarding:

- the incident;
- injuries sustained including the dominant injury;
- the ISV calculated; and
- damages awarded with emphasis placed on the calculation of past and future economic loss.

Personal Injury and Proceeding Act 2002 and Civil procedure

This section focuses on issues regarding the *Personal Injury and Proceeding Act 2002* and general civil procedure. The cases summarised cover the following points:

- requiring the claimant to undergo medical examination after signing certificate of readiness;
- disclosure under s 27(1) of *Personal Injuries Proceedings Act 2002 (Qld)*;
- Appeal against costs order of magistrates court after operation of s56 of *Personal Injuries Proceedings Act 2002 (Qld)*;
- joining further defendants to the claim; and
- leave to file applications after the expiry of the limitation period.

Should you have any specific queries regarding the contents within, or general queries regarding the above mentioned areas, please do not hesitate to contact **Daniel Best** or **Rebecca Stevens** of Carter Newell, both of whom have considerable experience and expertise within the field of insurance law.



Liability

Drewes v Toowoomba Volley Ball Association Inc [2008] QDC 1

Facts

On 6 March 2006 the plaintiff, while warming up with her volleyball team, allegedly slipped on a puddle of sweat while trying to retrieve a ball and collided with the gymnasium wall, damaging her wrist.

The plaintiff alleged that the defendant breached their duty of care by not ensuring there was a system in place to make sure that the playing surfaces and surrounding areas were free of contaminants, by allowing plaintiff to play on the subject court with a free zone (area between the edge of the court and the wall) of less than three metres, and failing to have padding along the length of the offending wall.

Decision

His Honour Judge Searles dismissed the plaintiff's claim.

It was held that the puddle did not contribute to the plaintiff's accident. In finding this his Honour noted that even though the plaintiff was aware of the puddle prior to warming up she did not bring the existence of the puddle to anyone's attention. She also did not mention the existence of the puddle, or that it contributed to her fall, to the other players or the duty manager who came to assist her following the accident and they did not recall seeing the puddle.

There was also evidence of Mr Russell that the plaintiff was looking at the ball above her head, not at the wall, and that she just ran straight into the wall with her arms outstretched. The plaintiff also told the duty manager that "I think I tripped over" or "I ran into the wall, put my arm out to stop it". This accorded with notes taken by the Queensland Ambulance Service. His Honour accepted the evidence of Mr Russell and held that the plaintiff's injury was a result of chasing the ball and running into the wall.

The plaintiff's contention that there should have been a 3 metre free zone, as opposed to the 2.17 metre zone in the gym, was based on the 'Volleyball Facilities Standards' taken from the Queensland Volleyball website which recommends a 3 metre zone for Regional, State, and National games. As there was no evidence before his Honour to show that the game was within one of these categories, as opposed to recreational volleyball, his Honour rejected there was a breach. Instead, his Honour favoured the 'Sport Dimensions for Playing Areas re Volleyball', which was endorsed by Queensland and recommends a minimum space of 2 metres around each court.

In rejecting the plaintiff's final claim, that the walls should have been padded, his Honour considered the evidence of Ms Henderson, the Queensland Volleyball Association Development Officer, that the padding of walls was not a high priority in risk assessment. Ms Fielding, the General Manager of Volleyball Queensland, also provided evidence that she had never seen, nor was she aware, of any volleyball courts with padding along the entirety of a wall.

The plaintiff's claim was dismissed. In the event the decision was wrong, his Honour then considered quantum.



The parties had agreed on the following items and amounts:-

Pain, suffering and loss of amenities of life	\$35,000.00
Interest on past component thereof	\$1,915.00
Future economic loss	\$61,496.00
Future loss of employers' contributions towards superannuation	\$5,534.64
Past care	\$27,375.20
Interest thereon	\$3,120.77
Special damages	\$11,768.35
Interest on the amount of special damages in respect of which the plaintiff has been out of pocket	\$1,257.98
Future expenses	\$7,110.00
TOTAL	\$154,577.94

The items still to be determined were past economic loss and interest thereon, past loss of contribution towards superannuation and future care.

For past economic loss the plaintiff claimed \$45,000 which was calculated with reference to the income she would have received had she remained with her then employer, the Department of Defence for a further two years, less the amount earned since her resignation and discounted for her residual earning capacity.

The defendant claimed that the plaintiff's decision to leave the Department of Defence was prompted by her family situation and not as a result of the accident and denied the plaintiff was entitled to benefits above the 43 days she was absent from work amounting to \$4,118.

His Honour held that the plaintiff's family situation, being her deteriorating relationship with her children, may not have arisen but for pain caused by the accident and the resulting stress and accordingly she may not have had to terminate her employment. It was found that the plaintiff's claim was reasonable.

The plaintiff's interest on her lost earnings and superannuation contributions was then assessed on the basis of her past economic loss. The plaintiff's interest on her earnings was calculated with reference to her benefits of \$42,876.29 when subtracted from the award of \$45,000, leaving \$2,123.71. The plaintiff claimed 4% being a total of \$424.74. Her lost total superannuation contributions were calculated at 9% of \$45,000, being \$4,050.

The plaintiff also claimed \$59,975 for future care, based on an assessment of weekly assistance requirements, indoors and out, calculated at the rate of \$18 per hour for 5 hours per week over 20 years.

His Honour held that it appeared the plaintiff still required assistance after 5 years but did not conclude whether the plaintiff's claim for assistance for a further 20 years was reasonable but awarded the sum of \$35,000 for future care.

The total damages would have been assessed at:-

Pain, suffering and loss of amenities of life	\$35,000.00
Interest on past component thereof	\$1,915.00
Past economic loss	\$45,000.00
Interest thereon after allowing for the receipt of benefits	\$424.74
Past loss of contributions towards superannuation at 9%	\$4,050.00
Future economic loss	\$61,496.00
Future loss of employers' contributions toward superannuation entitlements	\$5,534.64
Past care	\$27,375.20
Interest thereon	\$3,120.77
Future care	\$35,000.00
Special damages	\$11,768.35
Interest on the amount thereon in respect of which the plaintiff has been out of pocket	\$1,257.98
Future expenses	\$7,110.00
TOTAL	\$239,052.68

Ellis v Uniting Church in Australia Property Trust (Q) [2008] QCA 388

The case involved an appeal from an earlier decision of the Supreme Court of Queensland.

Facts

Lifeline operated premises in Broadbeach on the Gold Coast Highway. While walking home at approximately 12.30am on 27 September 2003, Mr Ellis tripped on a paver protruding approximately 3cm from the respondent's driveway where the driveway passed the footpath. The appellant brought an action for personal injuries against the respondent.

The earlier decision, finding in favour of the respondent, found that Mr Ellis was familiar with the driveway and raised pavers and, while he had consumed some beer on the evening, he was capable of keeping a proper lookout and walk with reasonable skill and agility. It was shown that the paved footpath was not perfectly level with the adjoining surface and there was a risk of an unwary pedestrian twisting an ankle, however, hazards such as these are negotiated day and night by pedestrians without mishap. The unevenness of the surface should be observed by people walking on the border, but might not be a concern to those charged with the duty of care of pedestrians, in this instance Lifeline. Accordingly Lifeline may not have noticed the raised paver during their regular inspections because of the slightness of the risk of injury.

It was found that the paver only posed a risk due to the unusual route that Mr Ellis was taking. The fact that the nearest streetlight was not operating and it was raining did not increase the risk as Mr Ellis did not say it was impossible to see his intended path. It was a route he knew well and he knew of the potential risk.

The trial judge found that the Lifeline system of inspection and correction was commendable, but failed to detect the paver, or correct it, which would have been simple.

The cause of Mr Ellis's injury was not a breach of duty, but was due to his carelessness in failing to maintain a proper lookout and failing to make use of the wide, safe footpath and choosing to walk where he knew there was a potential risk. Even if there was a breach, the contributory negligence of the appellant would have been assessed at 40%.



Mr Ellis appealed on the basis that Lifeline's duty to him was that owed by a commercial occupier to members of the public, rather than the less demanding duty owed by an occupier to entrants of "ordinary residential premises" or by a local authority to users of public roads and footpaths

Decision

In dismissing the appeal the Court found that the local council, not the respondent, was the occupier of the land where the appellant tripped and accordingly the scope of the duty owed by the respondent was not that of the occupier of commercial premises. It was therefore not necessary to decide if a higher duty was owed to users of a footpath on land owned by commercial occupier than land owned by a local authority.

The appellant's claim that the respondent owed him a duty of care also rested upon the contention that the respondent constructed, inspected and maintained the driveway, including that part of the driveway which formed the footpath. There was, however, no allegation that the occupier was prima facie responsible to remove potential hazards.

The Court found that the trial judge adopted the *Wyong Shire Council v Shirt* approach in determining if there was a breach of duty namely, that "the magnitude of the risk and the degree of probability of an accident was so slight that reasonableness did not require any corrective action on behalf of the respondent". This decision was affirmed by the current Court. It was also held that Lifeline's failure to note that the paver was not level did not constitute a breach

It was also held that it would be unlikely that pedestrians would walk on that area and therefore unlikely that pedestrians would have tripped in the past or brought the paver to the respondent's attention. It was held that the unevenness should have been observed by someone walking on the border of the footpath and they should have walked with ordinary care.

It was held it was implicit in the trial judge's reasoning that the respondent's system of inspection and maintenance was adequate for the risk and the respondent did not breach any duty of care.

Anderson v Gold Coast City Council [2008] QCA 353

The case involved an application for leave to appeal the earlier decisions of the Magistrates Court and District court.

Facts

The applicant tripped on the edge of a service pit cover on 14 October 2000 while walking on an unpaved footpath at the intersection of Old Burleigh Rd and Charles Ave at Broadbeach. The applicant brought an action for personal injury as a result of the fall against the Gold Coast City Council (GCCC).

At the original hearing in the Magistrates Court the applicant's claim was dismissed even though it was found the service cover, which protruded approximately one inch from the ground, was the cause of the applicant's fall. The claim was dismissed on the basis the respondent owed no duty to protect the applicant from the risk of the protruding service cover. Even if a duty was owed, it had not been breached by the GCCC by failing to ensure that the service cover was level with the footpath.

This decision was affirmed by the District Court.

In arguing for leave to appeal, the applicant submitted that the hazard was not obvious but created a reasonably foreseeable risk of injury which the respondent, if acting reasonably, would have removed. The applicant also argued that the unpaved area was often used by pedestrians.

Decision

In dismissing the applicant's leave to appeal the Court of Appeal (Keane and Holmes JJA and White AJA), found that no real risk of injury was posed by the uneven surface to pedestrians using the footpath with ordinary care. It was found that pedestrians exercising such care would have been aware the ground was uneven and exercised due care. The service cover was part of the general unevenness of the unpaved footpath.

The Court also found that it was not within the duty of a local authority, such as the GCCC, to eradicate mundane risks which persons exercising ordinary care can be expected to observe and avoid. The applicant's assertion that the presence of other pedestrians obscured or concealed the hazard was found to have no evidentiary basis.

In affirming the decisions of the Magistrates and District Courts, the Court found that there was nothing unreasonable in the Council's failure to ensure the footpath was perfectly level and smooth, as the condition of the footpath had not been drawn to the Council's attention in time to have the hazard rectified.

Further, the Court held that the applicant had failed to present a case regarding the reasonable level of inspection the Council should have implemented to ensure the hazard would have been rectified prior to the applicant suffering her injury.

Rogers v Body Corporate for the Waterloo Crest CTS 25235 and Anor [2008] QCA 174

The case involved an appeal from an earlier decision of the Supreme Court of Queensland.

Facts

The appellant fell down some internal carpeted stairs outside her unit on 29 December 1999. The appellant failed to depress a pneumatic switch to activate the light in the stairwell which resulted in the light extinguishing before she had reached the bottom of the stairs. When the light went out, the appellant slipped on the tread of the second step, fell down four steps and hit her head on a wall. The appellant claimed that the body corporate and the building manager breached their duty of care to ensure the stairs were safe and to ensure she was aware of the need to press the switch fully.

At first instance it was found that the appellant fell as a result of the shock she received when the light unexpectedly went out, rather than the stairs themselves as when giving evidence the appellant repeatedly referred to the "shock value" of the lights going out. It was also found that no warning was required as the appellant was already aware that the switch had to be depressed fully. In a report the appellant obtained from an engineer, Dr Ludcke, it was found that the variation in height from the first to second stair was in excess of that recommended. That the stairs were carpeted, and the edge of the tread was rounded with a radius of 35mm instead of 10mm, were also found to be risk factors. These visual risk factors were discounted at the earlier trial as the light went out prior to the fall so visual hazards were of no relevance.

It was found that both the body corporate and the building manager owed the appellant a duty of care but that it had not been breached as the condition of the stairs did not contribute to the accident and the appellant was aware the light switch had to be fully depressed.

The appellant submitted that the trial judge had misinterpreted her evidence as she was not aware of the cause of her fall and that she was taking a normal step at normal walking pace and the lights going off did not affect her step.



Decision

The primary issue identified on appeal was whether the trial judge had erred in disregarding the variation in stair height. It was found that the appellant herself did not suggest that the stair height had any bearing on the incident. Further the appellant had never complained about the steps while complaining to the building manager about the property.

The height differential as the cause of the accident was rejected on the basis that it was not intrinsically compelling and also that the appellant gave another explanation of her fall, being the shock of the light going out. The height differential also appeared to take no account of the appellant's experience of using the stairs.

The appeal was dismissed as the fall was attributable to the appellant losing her footing as a result of her "startle response" to the lights going out.

Quantum

Ellis v Uniting Church in Australia Property Trust [2008] QSC 74

Incident Details

On 27 September 2003 at approximately 12.30am, Mr Ellis tripped on a brick paver which was protruding approximately 3cm from the respondent's driveway where the driveway met the footpath.

Dominant Injury Sustained and ISV Rating

Mr Ellis's dominant injury was a fractured left ankle which was classified as a serious ankle injury with an ISV range of 11-20. An ISV rating of 20 was given taking into account that a graft of an artery and muscle flap were taken from Mr Ellis's left arm for the ankle injury.

Calculation of Damages

For pain and suffering and loss of amenities Mr Ellis was awarded \$26,000.

Mr Ellis was previously employed in unskilled or semi-skilled manual occupations. His past economic loss was calculated arbitrarily at an amount of \$10,000 with \$900 for Superannuation contributions. An award of \$1,170 was considered reasonable for interest on past economic loss.

In 2007 following the incident, Mr Ellis moved to Phuket, Thailand, and bought a three year lease on a bar. His probable working life was calculated at 13 years upon his return to Australia. His reduced working capacity was assessed at \$100 per week resulting in a loss of \$50,200 with a superannuation contribution of \$3,114.

Awards for special damages of \$40,181 and \$2,000 for painkillers and future surgery were considered reasonable.

It should be noted that the Court held the respondent was not liable for Mr Ellis's injury.



Wolgast v Connolly's News & Anor [2008] QSC 97

Incident Details

On 19 February 2005 the plaintiff was injured in a motor vehicle collision with the respondent's employee.

Dominant Injury Sustained and ISV Rating

The plaintiff suffered multiple injuries being a bilateral shoulder injury, a phobia of driving, an injury to the cervical spine and a wedge fracture to the thoracic spine. The plaintiff was examined by Dr Campbell and Dr McPhee both of whom calculated his total body impairment at 5%.

Mr Wolgast's predominant injury to his thoracic spine was given an ISV rating between 10-15. An ISV rating of 16 was given taking into account his multiple injuries.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$19,600.

Mr Wolgast's past economic loss was calculated in 2 discrete periods being February 2005 — August 2005 and September 2005 — date of judgment. In calculating the first period, the award of \$33,500 was based on his weekly earning capacity of approximately \$590 per week for 28 weeks. In calculating the award of \$33,500 for the second period, the plaintiff's dismissal for dishonesty and previous periods of unemployment were considered. The award was calculated at a rate of \$295 per week for 142 weeks and a 20% discount was applied taking account of the above considerations. The amount of \$2,474.38 was also awarded for interest on past economic loss.

Mr Wolgast's future economic loss was calculated at \$300 per week over a 20 year period with a 20% discount for contingencies. The resulting award was \$159,936 with a superannuation contribution of \$14,394.24.

Awards for special damages of \$17,589.65, *Fox v Wood* damages of \$4,879, physiotherapy damages of \$2,766 and damages of \$1,644 for pharmaceutical requirements were considered reasonable.

Bertini v Weller & Anor [2008] QDC 139

Incident Details

On 23 January 2004 the plaintiff was involved in a motor vehicle collision.

Dominant Injury Sustained and ISV Rating

Mr Bertini suffered a moderate thoracic or lumbar spine soft tissue injury with an ISV range of 5-10 and a moderate mental disorder with an ISV range of 2-10. Mr Bertini suffered back problems prior to the accident. There were, therefore, multiple medical practitioners who provided evidence of Mr Bertini's impairment. Dr Day calculated Mr Bertini's whole body impairment at 1-2%. Dr McPhee calculated his whole body impairment between 5-8% but only 3% was attributable to the car accident.

Mr Bertini's dominant injury was the thoracic or lumbar spine soft tissue injury. His ISV rating was uplifted from 10 to 15 to take into account his mental disorder.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$18,000.

Mr Bertini was awarded \$78,154.20 for past economic loss calculated at the rate of \$723.65 a week for 108 weeks with a superannuation contribution of \$7,033.88. The amount of \$5,057.97 was also awarded for interest on past economic loss.

Mr Bertini's future economic loss was calculated at \$723.65 per week over a 3 year period with a 30% discount for possible contingencies. The resulting award was \$73,754.41 with a superannuation contribution of \$6,637.90.

Awards for out of pocket expenses of \$1,742.79, interest on those expenses of \$194.75, cleaning expenses of \$2,500, Medicare refund of \$3,112.65 and damages of \$2,000 for future treatment were considered reasonable.

Hick v Frisby & Anor [2008] QSC 161

Incident Details

On 20 August 2004 the plaintiff was involved in a motor vehicle accident.

Dominant Injury Sustained and ISV Rating

Ms Hick suffered the following injuries:-

- head injury with scalp laceration;
- a fracture dislocation of the left shoulder including fractures of the left scapular, acromion, and coracoid process;
- injury to the thoracic spine including fracture of the spinous processes of T1 and T2;
- fractures of the left first rib;
- a right sided pneumothorax;
- a comminuted fracture of the right scapular and fracture of the neck of the right humerus;
- an injury to the lower back including a comminuted burst fracture of the vertebral body of L5;
- soft tissue injury to the cervical spine;
- psychological injury including chronic depression and anxiety; and
- scarring.

The dominant injury was a moderate lumbar spine injury of a soft tissue nature which has an ISV range of 16-35. The ISV rating was uplifted by 25% to 44, to take into account the multiple injuries and the fact the claimant was only 17 at the time of the collision.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$78,320.

Ms Hick was awarded \$10,000 for past economic loss calculated as a global award with a superannuation contribution of \$900. The amount of \$815 was also awarded for interest of past economic loss.



Ms Hick was awarded \$300,000 for future economic loss with a superannuation contribution of \$27,000. As Ms Hick was still a student at the time of the incident, her future economic loss was calculated on the basis of obtaining employment, paid at the rate of a Level 3 Public Service award by the age of 35 and working for a 45 year period. This wage was discounted by 40% to take account of contingencies.

Awards for special damages of \$2,462.20, past gratuitous care of \$26,800, interest on past gratuitous care of \$2,190, future gratuitous care of \$255,250, future medical and surgical expenses of \$15,000 and interest of \$2,257.70 over 3.9 years of \$280 were considered reasonable.

Munzer v Johnston & Anor [2008] QSC 162

Incident Details

On 17 September 2004 Ms Munzer was involved in a motor vehicle collision.

Dominant Injury Sustained and ISV Rating

Ms Munzer suffered the following injuries from the accident:-

- a closed head injury;
- a right elbow open fracture;
- an open comminuted fracture of the right femur;
- an open comminuted fracture of the left femur;
- an open comminuted fracture of the right patella;
- a fracture dislocation of the right talus; and
- a chronic adjustment disorder with depressed mood.

In order to determine the level of whole body impairment, reports of Dr Persley and two orthopaedic surgeons, Dr Foote and Dr Boys, were tendered.

The injuries to the right arm were assessed by Dr Foote and Dr Boys at 6%, the left leg including femur and knee was assessed at 18% and 4% respectively and the right leg including ankle, hind foot and knee at 14% and 17% respectively. An additional 3% was added to the total impairment by Dr Foote to take into account pain resulting in a whole person impairment of 36%. The plaintiff's chronic adjustment disorder with depressed mood was assessed by Dr Persley at 1% using the PIRS method and 10% using the AMA guides.

The dominant injury was the right elbow injury which has an ISV range of 13-25. The ISV rating was uplifted by 75% to 44, to take into account the plaintiff's multiple injuries and percentage of whole body impairment.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$78,320.

Ms Munzer was awarded \$87,836 with a superannuation contribution of \$7,905.24 for past economic loss calculated on the basis of her employment prior to the accident. The amount of \$4,934 was also awarded for interest of past economic loss.

Ms Munzer was awarded \$255,000 for future economic loss with a superannuation contribution of \$22,950 calculated at the rate of \$527 per week based on past employment history and working to the retirement age of 65. This wage was discounted by 20% to take any contingencies into account.

Awards for:-

- special damages for WorkCover \$61,988.05;
- special damages of \$5,845.34;
- interest of special damages of \$705;
- past gratuitous expenses of \$91,900;
- interest on past gratuitous care of \$11,540;
- future gratuitous care of \$358,000;
- future surgical costs of \$34,000;
- future treatment costs of \$41,350;
- home modification costs of \$90,000;
- hydrotherapy pool costs of \$136,710; and
- *Fox v Wood* damages of \$10,476;

were considered reasonable.

Wilkinson v BP Australia Pty Ltd [2008] QSC 171

Incident Details

On 18 November 2004 Mr Wilkinson tripped at the defendant's fuel terminal.

Dominant Injury Sustained and ISV Rating

The dominant injury sustained by Mr Wilkinson was a moderate knee injury, being a tear in the meniscus, with an ISV range of 6-10. An ISV rating of 8 was given taking into account the reports of Dr McFarlane and Dr Steadman who rated the whole body impairment at 5% and 4% respectively.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$8,600.

Mr Wilkinson was awarded \$63,600 for past economic loss, calculated by reference to a fellow employee with comparable earning capacity to Mr Wilkinson, had the incident not occurred. The amount of \$5,990 was also awarded for interest of past economic loss.

Mr Wilkinson's future economic loss was calculated at \$520 per week over an 8 year period. The resulting award was \$180,000 with a superannuation contribution of \$16,200.

Awards for special damages of \$5,911.40, interest of special damages of \$540 and future treatment costs of \$20,000 were considered reasonable.



Lee v Richards and the Transport Accident Commission [2008] QDC 257

Incident Details

On 23 June 2003 the plaintiff was involved in a motor vehicle collision.

Dominant Injury Sustained and ISV Rating

The dominant injury suffered by the plaintiff was a cervical spine injury. General damages were agreed at \$8,600. The plaintiff therefore had an ISV of 8.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$8,600.

Ms Lee was awarded \$7,355 with a superannuation contribution of \$662 based on her current employment at the time of the hearing.

Ms Lee's future economic loss was calculated at an extra three years unemployment resulting in \$82,500 and a loss of \$100 per week over a 30 year period discounted for possible contingencies. The resulting award was \$120,000 with a superannuation contribution of \$8,100.

Awards for special damages of \$1,462.10, interest of special damages of \$216.89, future paid care of \$15,000 and future treatment costs of \$6,346 were considered reasonable.

Xu v Thurgood & Anor [2008] QSC 288

Incident Details

On 13 December 2005 the plaintiff was involved in a motor vehicle collision.

Dominant Injury Sustained and ISV Rating

As a result of the accident Ms Xu suffered a soft tissue injury to her cervical spine and a soft tissue injury to her lumbar spine. The dominant injury was to her cervical spine which has an ISV range of 5-10. An ISV rate of 9 was given taking into account both injuries.

Damages Awarded

For pain and suffering and loss of amenities, the plaintiff was awarded \$9,800.

Ms Lee was awarded \$9,945 for past economic loss, including superannuation calculated on the basis of an inability to work for 4 hours a week based on her current employment at the time of the hearing. The amount of \$969 was also awarded for interest of past economic loss.

Ms Lee was awarded damages of \$50,000 based on a global figure of income she would have lost over a 27 year period.

Awards for special damages of \$1,965.30, interest on out of pocket expenses of \$136.49 and future treatment and medication costs of \$1,740.60 were considered reasonable.

Personal Injuries Proceedings Act 2002 and Civil Procedure

Luck v Lusty [2008] QSC 146

This was an application by the defendant to obtain an order requiring the plaintiff to undergo a medical examination.

Facts

The defendant wanted to compel the plaintiff to undergo a medical examination under s25 of the *Personal Injuries Proceedings Act 2002* ("the Act") or alternatively under rule 429G of the *Uniform Civil Procedure Rules* (UCPR).

The plaintiff submitted that the obligation to undergo examination under s25 ceased when the defendant signed the certificate of readiness to proceed to a compulsory conference under s37 of the Act. The basis of this submission was that there was an implied restriction under s25 whereby the section does not apply once the certificate of readiness has been signed and the Court no longer has power to make an order under that section. The plaintiff also relied on s37(1)(b) and s37(2)(c) of the Act. Section 37(1)(b) states that the parties must provide a statement, prior to the compulsory conference, verifying that all relevant documents in the possession of the party have been given as required. Section 37(2)(c) provides that the certificate of readiness must contain a statement stating that all medical or other expert reports have been obtained from expert witnesses the party proposes to call at trial.

The defendant's solicitors initially decided to spare the expense of a medical report, additional to the plaintiff's, as it was considered that the claim would settle at the compulsory conference. Once litigation commenced, the defendant's solicitors wished to have the plaintiff assessed.

Decision

His Honour Justice Byrne ordered that the plaintiff undergo examination. His Honour held that a strict interpretation of the section would be consistent with treating the Act as paramount and would expedite litigation and ensure parties made informed settlement offers.

His Honour held however, that it was not the intention of the Act that injustices, such as innocent and mistaken certification, or inaccurate facts appearing on the certificate would be binding. If this was the intention of parliament, then such a provision could have been included in the Act.

It was held that the restriction on the Court's power to order a medical examination under s25 or r429G was not implied and his Honour ordered that the plaintiff undergo medical examination.

Mount Isa Mines Limited & Ors v Hare [2009] QCA 91

The case involved an appeal from the decision of the District Court of Queensland and discussed whether the Part 1 Notice of Claim was compliant under s9 of the *Personal Injuries Proceedings Act 2002*.

Facts

On 24 April 2008 a Part 1 Notice of Claim was served by the respondent on the appellants. The appellants replied on 7 May 2008 advising that the Notice was non-compliant. The respondent sent further correspondence of 14 May 2008 addressing part of the appellant's concerns. On 23 May 2008 the appellants sent detailed correspondence outlining all the perceived issues which made

the Notice non-compliant. The respondent replied on 16 June 2008 seeking acknowledgement that the Notice was compliant and taking issue with the appellants' assertions. The appellants replied on 23 June 2008 advising they would not acknowledge the Notice was compliant and requested further medical information. The respondent enclosed further documents in correspondence of 25 June 2008 and filed an originating application seeking relief on 26 June 2008.

Further correspondence was exchanged subsequent to filing the application.

The appellants submitted that the Notice was non-compliant as the incident description was vague regarding what the incident/s were and why the appellants caused them, that the respondent, when mentioning she was exposed to other toxic elements, failed to identify these elements, and that the respondent provided a false answer when disclosing past personal injuries, illnesses or disability as she failed to disclose she was born prematurely. The appellants submitted that the respondent's premature birth may be a contributing cause or be the cause of her current problems. The appellants submitted that allowing the claim would be severely prejudicial and the deficiencies in the Notice prevented the appellants from replying sensibly or investigating the claim.

In response, the respondent submitted that the description of the incident contained in the Part 1 Notice of Claim was satisfactorily compliant with s9 of PIPA. Further, the respondent provided significant information regarding the other toxins and answered the appellants' queries in correspondence. The respondent also submitted that the response regarding past illness was reasonable as the respondent's premature birth did not impact on the injuries sustained.

The trial judge found that the Part 1 Notice of Claim served on the appellants on 24 April 2008 was complaint and provided sufficient information regarding:-

- the nature of the incident giving rise to the claim;
- when it happened;
- where it happened;
- why the appellant is alleged to be responsible; and
- the nature of the alleged injury caused.

In the event the notice was not compliant in the form it was originally served, his Honour proceeded to find that any alleged deficiency was subsequently remedied by the respondent.

The appellant was granted leave to appeal to the Court of Appeal.

Decision

The Court of Appeal allowed the appeal and set aside the declaration of compliance issued by the trial judge.

The Court found that the respondent did not provide sufficient details of the incident by failing to explain how various toxins in locations around Mt Isa were absorbed by the respondent. If this information was not available to the respondent at the time of completing the form, the respondent should have sought authorisation from the court under s18(1)(c)(ii) PIPA to proceed notwithstanding.

The Court also held that the respondent failed to give reasons why the appellant was liable as the respondent failed to make a connection between the respondent's absorption of toxins and the appellant's contamination of the various locations in Mt Isa.

It was also held that the respondent gave a false answer when disclosing past personal injuries, illnesses or disability. It was held that when deciding if the answer given was correct, the Court should make reference to what answer a reasonable person, with the same knowledge as the respondent, would have given in the same circumstances. The Court held that the respondent had knowledge of prior illness as they had in their possession the discharge summary from the Department of Neonatology at the Townsville Hospital, where the respondent was born, which



stated that the respondent was born with a myriad of health complications. The Court held that no one with that knowledge could reasonably state that the respondent had no injury, illness or disability prior to the incident that may affect the claim. The Court held accordingly that the Notice was non-compliant. The Court then examined if the non-compliance had been remedied by the respondent.

It was found that in order to remedy non-compliance, the other party must be placed in the position they would have been in had the Notice been compliant. The respondent submitted that numerous documents, including expert reports and medical records, had been provided to the appellant curing any deficiency in the Notice. It was held that this was not sufficient. Simply providing documents from which the respondent could deduce the correct answers would not satisfactorily remedy the non-compliance of the notice. To effectively remedy the breach the respondent should have articulated the answers to the questions as requested by the appellant. Specifically in relation to the medical history of the respondent, such articulation was required to give the appellant the correct authority in the notice to request medical records.

The Court also considered that the case was not one where the respondent should be allowed to proceed despite non-compliance of the Notice.

Hare v Mount Isa City Council [2009] QDC 39

The case involved an application under s27(1) of the PIPA to compel Mount Isa City Council (MICC) to disclose further documents.

Facts

The applicant, born on 11 November 2001, served a Notice of Claim on MICC for injury suffered as a result of exposure to, and absorption of, lead, arsenic, cadmium and other toxic elements from 2002 to the present date.

The applicant claimed in her Notice of Claim that MICC was liable as the Council was aware of the contamination of Mt Isa and failed to:-

- warn the members of the community;
- provide information regarding the contamination; and
- develop an environmental management plan to reduce the level of toxins.

The applicant further claimed that the Council approved land that it knew, or ought to have known, was contaminated for residential use.

The applicant submitted that the duty under s27(1)(a)(i), which requires that the parties provide "reports and other documentary material about the incident", extended to documents directly relevant to the claim. In the present case the applicant submitted this included documents or reports regarding the Council's acts or omissions as detailed in the applicant's Notice of Claim. In the alternative, the applicant requested that the compulsory conference and mandatory final offers be dispensed with in favour of litigation as, without the additional information requested, the applicant would not be able to conduct informed negotiations.

The respondent submitted, in accordance with the decision in *Haug v Jupiters Limited (Haug)*, that that the duty to provide reports and documents under s27(1)(a) was limited to reports and documents about the "incident" that allegedly caused the injury rather those pertaining to issues raised in the Notice of Claim.

Decision

In dismissing the application, his Honour Judge McGill SC followed the earlier Court of Appeal decision of *Haug*. The court in *Haug* held that the obligation to provide material under s27(1)(a)(i) was limited to material directly relevant to the incident which allegedly caused the injury. This does not extend to material which may be directly relevant to the alleged cause of the incident or a matter raised in the Notice of Claim.

Accordingly his Honour held that MICC was only required to provide reports or documents regarding the applicant's absorption of toxins from 2002 to 24 April 2004 when the Council was served with the applicant's Notice of Claim. Material detailing the Council's knowledge of the contamination of Mt Isa generally was not required.

The applicant's request to commence court proceedings and dispense with the compulsory conference and mandatory final offers was also refused. His Honour held that while the applicant may not have all possible material, there was other material available to assist in conducting informed negotiations. Further it was held that the applicant's likelihood of settlement with the other respondents to the claim may be jeopardised by allowing the matter to proceed directly to litigation.

Woolworths v Hidassy [2008] QDC 43

This was an application by Woolworths for leave to appeal against a costs order made in the Magistrates Court.

Facts

On 25 May 2005 Mr Hidassy fell at the Woolworths supermarket in Kawana and was injured. He served Woolworths with a Notice of Claim on 10 July 2005.

The compulsory conference took place on 24 October 2006. Woolworths admitted liability and made a mandatory final offer of \$1.00. Mr Hidassy made an offer of \$12,000. Proceedings were then commenced by Mr Hidassy in the Maroochydore Magistrates Court and on 22 November 2007 the trial was held before Magistrate Killeen. Judgement was found for Mr. Hidassy in the sum of \$2,859.55. The Magistrate then invited submissions for costs. The representatives for Woolworths submitted, pursuant to s56(2)(a) of the *Personal Injuries Proceedings Act 2002* (PIPA), that, where the damages awarded were less than the plaintiff's mandatory final offer but more than the defendant's, the Court did not have residual discretion to make an order for costs. Despite this submission, Magistrate Killeen ordered Woolworths pay Mr. Hidassy's costs.

Under ss45(1)(a) and (2)(a) of the *Magistrates Courts Act 1921* leave to appeal is required where the amount of the action is less than \$5,000 and leave will not be granted unless an important principle of law or justice is involved.

Woolworths then applied to the District Court for leave to appeal. Woolworths submitted that leave was not required as the amount involved in the action was more than \$5,000 as opposed to the damages awarded. This was in accordance with the decisions of *Graham v Roberts* and *Thompson v Franko*. Woolworths further submitted that s56 does not allow any residual discretion to award costs in cases involving awards under s56.

Mr Hidassy contended that there was a residual discretion to make a costs order, after the application of s56.

Decision

It was found that the submissions of Woolworths were in accordance with the natural and ordinary meaning of s45(1)(a) and that leave was not necessary.

In the event the decision was incorrect, his Honour then determined that the issue raised by Woolworths at the trial, that there was no residual discretion to award costs after the mandatory application of s56, was an important principle of law or justice and that leave would have been granted on that basis.

The basis on which the costs order had been awarded at first instance was that the settlement offer made by Woolworths was not a fair or reasonable offer to settle and that the Court has inherent jurisdiction to make an order for costs

In answer to this reasoning Woolworths argued that the unreasonable offer was justified by s48(2) PIPA. This argument was rejected as the only evidence before the Magistrate was of the mandatory final offers made. It was found the s48 allows discretion to award costs in proceedings based on claim for failure to comply with Part 1 Division 1 of PIPA, but that s56 applied when an award of damages of less than \$50,000 is made.

It was held that s56(2)(a) only makes reference to the amount of the mandatory final offer, not if that offer was reasonable. It was therefore held that the Magistrate erred when determining there was a residual discretion to award costs.

Jacobson v Martello & Ors [2008] QDC 201

This was an application by the plaintiff to join Aatlantis Fencing Company Pty Ltd (Aatlantis) as a defendant

Facts

The plaintiff fell down internal stairs in her apartment and suffered injury on 21 November 2001 when the hand rail gave way.

She proceeded to serve Notices of Claim on 27 and 28 November 2002 on the owners of the unit, the body corporate and a building company that renovated the unit, including the handrail. The extended limitation period expired on 9 January 2005. Proceedings were commenced on 5 January 2005 against the three defendants served with *Personal Injuries Proceedings Act 2002* notices.

The third defendant, the renovation company had employed Aatlantis to install the hand rail. Aatlantis further subcontracted this work to G & M Fencing whose employee, Mr McGuire, did or arranged for the work to be done.

The third defendant's insurer wrote to the plaintiff's solicitors on 9 February 2005, claiming that Aatlantis should be added to the claim.

On 22 November 2007 a compulsory conference was held during which the plaintiff's solicitors claimed that they learned that Mr McGuire did work for Aatlantis and obtained details regarding Mr McGuire's relationship with Aatlantis. The plaintiff's solicitors claimed that only after the conference did it become clear that Aatlantis should be joined as a defendant.

Decision

The plaintiff's application to join Aatlantis was dismissed. In reaching this decision the Court found that the solicitors for the plaintiff knew that Aatlantis had been added as a contributor to the action and had not acted on that information which would have revealed the third defendant's claim against Aatlantis and become clear that Aatlantis should have been added.

His Honour did not accept that the plaintiff's solicitor was not aware of the involvement of Aatlantis until the compulsory conference. His Honour found that the plaintiff knew or ought to have known about the involvement of Aatlantis and added them as a party before the expiry of the limitation period.



In case that decision was incorrect, his Honour went on to describe why discretion should be exercised to prevent Aatlantis from being added.

His Honour held that the reason for the delay was not satisfactorily explained and the explanation given was wrong and disingenuous. It was also held that evidence would be lost due to the delay, and it would be oppressive to the defendant to bring an action so long after the incident. It was also held that limitation periods were important and should not be overruled lightly. Accordingly, there was no sufficient reason for adding Aatlantis as a defendant to the action.

Wood & Anor v Tots Professional Services P/L & Anor [2008] QDC 241

The case involved an application by Mr Wood and Adcray Pty Ltd to join their insurer GIO as a defendant to the claim pursuant to r 69(1)(b)(ii) of the Uniform Civil Procedure Rules.

Facts

The plaintiff operated a newsagent in a shopping complex owned by the defendant. Mr Wood, the newsagent's director, was injured when he was hit by an industrial bin at the shopping complex. The plaintiff alleged that the Mr Wood suffered personal injuries as a result of the incident and that the newsagent lost the benefit of Mr Wood's assistance which caused the newsagent loss. The landlord alleged that the negligence of Mr Wood caused or contributed to the damage.

The landlord counterclaimed that the newsagent agreed to indemnify the landlord against liability for injuries suffered by Mr Wood and that the newsagent breached its agreement to maintain a policy of public liability insurance in the landlord's name to cover the landlord's liability for the claims of the newsagent and Mr Wood.

The landlord's counterclaims were based on a deed entered into by the newsagent upon occupying the premises. The newsagent agreed to indemnify the landlord against any liability and costs incurred in relation to "damage, loss, injury or death caused or contributed to by the act, negligence or default of the Tenant or the Tenant's Employees and Agents" during the tenancy. The newsagent also agreed to hold public liability insurance in both the tenant's and landlord's name.

Prior to the incident, the applicant took out a policy with GIO Insurance (GIO) insuring the newsagent and Mr Wood for damages for personal injury. The policy provided that GIO would indemnify, "in a like manner to you", the lessor where the lease required the lessor to be indemnified for personal injury occurring as a result of the insured's negligence.

After the incident the landlord demanded GIO indemnify it against Mr Wood's claims which GIO refused to do on 25 November 2003.

The newsagent was seeking to join GIO as a defendant so that GIO would indemnify the landlord against claims for personal injuries, such as those suffered by Mr Wood, and by doing so would reduce the loss suffered by the landlord, and reduce or extinguish the amount the landlord can seek from the newsagent by way of indemnity pursuant to the deed. The newsagent was also seeking a declaration from GIO stating that GIO would indemnify the landlord.

GIO objected to being joined as a party on the basis that the case against it was "untenable, deficient and wrong" and that the arguments were yet to be crystallised. GIO also submitted that the counterclaim brought by the landlord against the newsagent for indemnity was not a claim for damages for personal injury, but a claim for economic loss. GIO submitted that they are only obliged to indemnify the landlord against liability for personal injury not economic loss. GIO also argued that while the clause was possibly satisfied, GIO was not required to indemnify the landlord on the proper construction of the words "in a like manner to you".

Decision

The joinder application was allowed. His Honour held it was arguable that:

- The liability of the newsagent to indemnify the landlord pursuant to the deed was not liability for damages for personal injury within the policy and GIO was not liable to indemnify the newsagent; and
- The liability of the landlord to pay damages to Mr Wood was a liability to pay damages for personal injury and GIO was liable to indemnify the landlord in respect of that liability.

These arguments were found to satisfy the threshold for joinder under r69 of the UCPR being that a person's presence before the Court would be desirable, just and convenient to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.

GIO submitted that the declaration that the plaintiff requested did not directly affect property, legal right or obligation of the plaintiff and that the declaration could not prevent GIO from litigating again. His Honour favoured the plaintiff's view that the declaration would directly affect a legal right of the newsagent as the newsagent was entitled to enforce the policy at general law and the declaration may have the effect of reducing the amount of indemnity the newsagent may be required to pay to the landlord.

GIO further submitted that the plaintiff's claim was essentially a claim to indemnify the insured for liability under contract, being the landlords counterclaim pursuant to the deed. The policy specifically excluded GIO's liability to indemnify for liability assumed, by the insured under contract. The wording of "in like manner to you" in the policy also shows that the landlord was not indemnified for claims pursuant to contract. It was found that the plaintiff's claim was not pursuant to contract, but to indemnify the landlord for claims for personal injury.

GIO further submitted that the limitation period of 6 years commenced on 30 December 2000, when Mr Wood was injured and that the limitation period had expired. This submission was rejected on the basis that a cause of action against GIO arose when GIO allegedly breached the policy in November 2003 by refusing to indemnify the landlord.

Boyd v State of Queensland & Anor [2008] QDC 208

This was an application by the plaintiff for leave to proceed after the expiry of the limitation period pursuant to rule 389(2) of the Uniform Civil Procedure Rules.

Facts

The plaintiff was injured when she fell on 9 November 2001 after stepping into a depression in a footpath at the Gold Coast. The Claim and Statement of Claim were filed on 27 October 2004. Following filing, numerous steps were taken under rule 389(2) to advance the matter, the last of these being the service of the second defendant's statement of expert and economic evidence and list of documents on the plaintiff on 29 July 2005.

On 30 May 2007 the plaintiff proposed mediation to the second defendant who advised on the 25th of July 2007 that they would only attend if the first defendant also attended. On 1 August 2007 the plaintiff filed the present application. On 6 August 2007 the first defendant advised it would not participate in mediation until further particulars, which were requested on 23 November 2005, were provided. At the time of handing down the decision the particulars had not been provided. The absence of advancement of the matter between 29 July 2005 and 30 May 2007 was allegedly due to intent of the plaintiff's solicitors to resolve the matter through mediation. The plaintiff's solicitors further explained the delay on the basis of an administrative oversight as a result of a running a busy practice.

It was the defendants' submission that the delay has not been satisfactorily explained and that the delay was due to the plaintiff's solicitors but that did not explain why the plaintiff herself did not do anything to progress the action or keep abreast of the progress of the matter.

Decision

The application was dismissed. It was held that no significant basis had been established to allow the application. The explanation that the plaintiff's solicitors were busy was found not to be sufficient. It was also found that the plaintiff herself could not be absolved of responsibility as she did not prompt her solicitors to advance the matter. Accordingly the application for leave to proceed was dismissed.

McAnalen v Nextra Strathpine Newsagency [2008] QDC 18

This case involved an application to start a proceeding after the expiry of the limitation period.

Facts

The applicant had an accident at the respondent's premises on 9 March 2004 injuring her shoulder. She engaged legal services within the week and Part 1 and 2 Notices of Claim were served. Consent was given for a contribution notice to be given to Ideal Doors Pty Ltd.

A medical consultation occurred on 13 January 2006 with Dr Dickinson who seemed to expect resolution of the injury. As this was not occurring the plaintiff sought further prognosis on 4 May 2006 and underwent surgery in 2007 performed by Dr Cutbush. It was estimated that it would take a year before the outcome of the surgery could be adequately assessed.

The respondent admitted liability to the extent of 75% and claimed contributory negligence of 25% for the applicant's failure to maintain a proper look out.

Further PIPA requirements were satisfied throughout 2006 including the applicant providing a statutory declaration on 12 September 2006 and requests for disclosure of employment records.

On 9 March 2007, noting the limitation period, the solicitors exchanged emails, during which the respondent agreed to an extension of time after compliance with pre-litigation procedures, to 4pm on 9 June 2007.

The applicant's solicitors sent correspondence to the respondent's solicitors detailing that the applicant was recovering from surgery and that a proper assessment of her disability could not be completed by 9 June 2007. On 14 May 2007 the applicant's solicitors received correspondence from the respondent's solicitors that was interpreted as saying the respondent was also not in a position to hold the compulsory conference and that there was consensus that nothing could be done to advance the claim at that time.

The applicant's solicitors advised the respondent on 21 September 2007 that obtaining a final medical report had not been possible due to the fact the applicant's condition had not yet stabilised and accordingly they could not adequately respond to the respondent's settlement offer. The applicant also requested a further extension of the limitation period or alternatively that the respondent consent to an order under s59 to proceed after expiry of the limitation period.

The respondent subsequently advised that they were not prepared to waive their rights in relation to the limitation periods and would oppose any s59 application.



Decision

The application was allowed. It was held that the only prejudice which would be suffered by the respondent would be the loss of the limitation period. No evidence would be lost by the delay and allowing the applicant's medical condition to stabilise would be beneficial to the trial. His Honour found that relief for the delay must be related to actual difficulties in complying with the Act and such difficulties could be resolved upon obtaining the final medical report.

The discretion was exercised favourably to the applicant as it had not been possible to make an informed offer or hold a constructive compulsory conference before the limitation period expired.