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LAWYERS

# Injury Liability Gazette

1st edition

Carter Newell LAWYERS

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Carter Newell Lawyers is a leading Queensland based law firm that provides expert advice to Australian and international corporate clients in our key specialist practice areas of:

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# Contents

# From the CEO

Carter Newell is proud to add the Injury Liability Gazette to its suite of publications. This Gazette provides useful, practical and current information to the insurance industry. The Injury Liability Gazette aims to cut through the mass of information available and provide readers with a succinct but comprehensive perspective of relevant cases which have been considered by courts throughout all Australian jurisdictions. The cases themselves are not necessarily developing new law or precedent, rather, they are a collective summary of what has been recently heard by the courts. As a leading provider to the insurance industry and with the philosophy of sharing knowledge, our team of experienced Property and Injury Liability lawyers have gathered, collated and analysed these cases to assist the industry in resolving claims. I trust this new publication will be a useful addition to your reading list.

Dr Peter Ellender

CEO

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# Best lawyer in Australia

Carter Newell congratulates Insurance Partner Rebecca Stevens on her inclusion in the 6th edition of Best Lawyers in Australia.

Rebecca, an experienced insurance lawyer, has been listed in the areas of Liability and Property Insurance.

For the past 10 years Rebecca has specialised in Property and Injury law and leads a team of 20 lawyers acting for local, national and international clients.

Selection to Best Lawyers is based on an exhaustive and rigorous peer-review survey. As one of the oldest and most highly-respected peer review guides to the legal profession worldwide, Rebecca and the firm are delighted at having been included.

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WINNER


Carter Newell is delighted to announce that for the second year in a row, we have been named the winner of 'Brisbane Law Firm of the Year' at the 2013 ALB Australasian Law Awards held in Sydney. We have also previously won this award in 2012 and 2008 and have been a finalist for seven consecutive years.

In addition this year, the firm was also a finalist in the 'Insurance Specialist Firm of the Year' Australia wide category.

Carter Newell recognises the absolute privilege it is to act on behalf of our clients. Our partners and staff focus efforts on delivering exceptional quality and service. The stability of our team has been paramount to us providing our specialised services within our key practice areas.

Winners are chosen for their capabilities and positioning in the legal market. Carter Newell was honoured to have been nominated for the Awards which recognise the excellence and outstanding achievements of leading law firms and in-house legal teams.

The ALB Australasian Law Awards are run by Australasian Legal Business which is owned by Thomson Reuters, the world's leading source of intelligent information for businesses and professionals providing authoritative and unbiased insights to in-house lawyers, corporate counsel and business leaders throughout the Asia Pacific region and Middle East.

On behalf of our partners and staff, we sincerely thank our clients for their ongoing support.


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# Case Note

## *Silvester v Husler & Suncorp Metway Insurance Limited* [2013] QCS 26

Medical receptionist injured in motor vehicle accident. Issues of credit and assessment of damages.

## The facts

The plaintiff, a medical receptionist supervisor, was injured when her car collided with one driven by the defendant. Liability was admitted by the defendants. The plaintiff allegedly sustained multiple soft tissue injuries to her cervical spine, her lumber spine and chest wall together with neurological symptoms affecting her left upper limb. The plaintiff claimed that, since the accident, she has constantly suffered from severe headaches, neck pain, and occasional low back pain, numbness in her left arm and pins and needles in some of the fingers of her left hand.

## Issues

The court was asked to determine the quantum of damages recoverable.

## Decision

Two orthopedic surgeons gave differing expert opinion in relation to the plaintiff's injuries. Both doctors accepted that the plaintiff suffered a lumbar spine injury as a consequence of the accident. Dr Pentis (for the plaintiff) was of the opinion that the injury resulted in a permanent impairment whereas Dr Dörgeloh (for the defendant) was of the opinion that there was no permanent impairment (the injury being assessed as mild and having resolved by the time of the trial). His Honour gave greater weight to the evidence of Dr Pentis, saying that he appeared more open to objectively considering the matter put to him as compared with Dr Dörgeloh, who appeared combative.

In relation to the plaintiff's ability to return to work, two occupational therapists gave evidence. Ms Purse gave evidence that the plaintiff would not, without significant improvement, be able to return to the workforce in any capacity. The other occupational therapist, Ms Jones, gave evidence that, with appropriate rehabilitation and a graduated return to work program, the plaintiff would

be able to return to her role as a medical receptionist or practice manager, albeit possibly not in a full time capacity.

Ms Purse believed the plaintiff suffered significant restrictions in her capacity to engage in normal activities of daily living and that she would require 10 hours of assistance per week. Ms Jones, was of the opinion the plaintiff would have required 11 hours of assistance per week for the first two months post injury, but then only a few hours of assistance per fortnight thereafter. His Honour preferred Ms Jones evidence on both counts.

There was also surveillance footage of the plaintiff. In the opinion of two of the experts (Dr Dörgeloh and Ms Jones) the footage showed the plaintiff freely engaging in activities that she represented during clinical examinations that she could not engage in without pain or discomfort. These activities included sitting and standing for long periods, driving, walking distances, and climbing a grandstand to watch a rodeo, all without apparent discomfort. Whilst his Honour was conscious of the inconsistencies in the plaintiff's evidence, he accepted that her injuries had caused her significant pain and suffering that significantly restricted her capacity to work and her activities in daily life for a lengthy period after the accident.

# Quantum

## *General damages*

His Honour took the mid point between the assessments of the ISV from both of the orthopedic surgeons and assessed it at 10. He accepted that the plaintiff had suffered a 'moderate cervical spine injury' (soft tissue injury). He also accepted that the plaintiff suffered multiple injuries so severe that the maximum dominant ISV was inadequate to reflect the level of impact, and thus applied an uplift of 25%. Damages were therefore assessed based on an ISV of 13 and assessed at $15,200.00.

## *Past Economic Loss*

His Honour took the view that the plaintiff was unable to work at all from May 2010 until March 2012 (when her GP noted an improvement in her condition and surveillance footage showed improved movement). For this period, the plaintiff was awarded 100% of her lost income. From March 2012 to the date of judgment, the plaintiff's lost wages were reduced by 40% to reflect the percentage that her earning capacity had been reduced. In total, $91,658 was awarded.

## *Future Economic Loss*

The plaintiff's future economic loss was assessed on the basis that she would continue to work as a medical practice receptionist and practice manager until she retired. The award was reduced by 40% to reflect the plaintiff's reduced earning capacity. Given there was some evidence that the plaintiff had a pre-injury degenerative cervical spine injury, a further reduction of 12.5% for contingencies was applied. The plaintiff was awarded $166,500.

## *Past Care*

Notwithstanding the reservations about the reliability of the plaintiff's evidence that she had difficulty performing household tasks and required personal care for an extended period post accident, his Honour accepted the plaintiff was provided services, and that the need for the services arose solely out of the injury, and that at times when the plaintiff suffered intense pain.

His Honour awarded the plaintiff $22,825. This was comprised of 7.5 hours a week for two years after the injury and 1.25 hours a week for 40 weeks from the second anniversary of the incident to the date of the judgment, at a rate of $27.50 per hour.

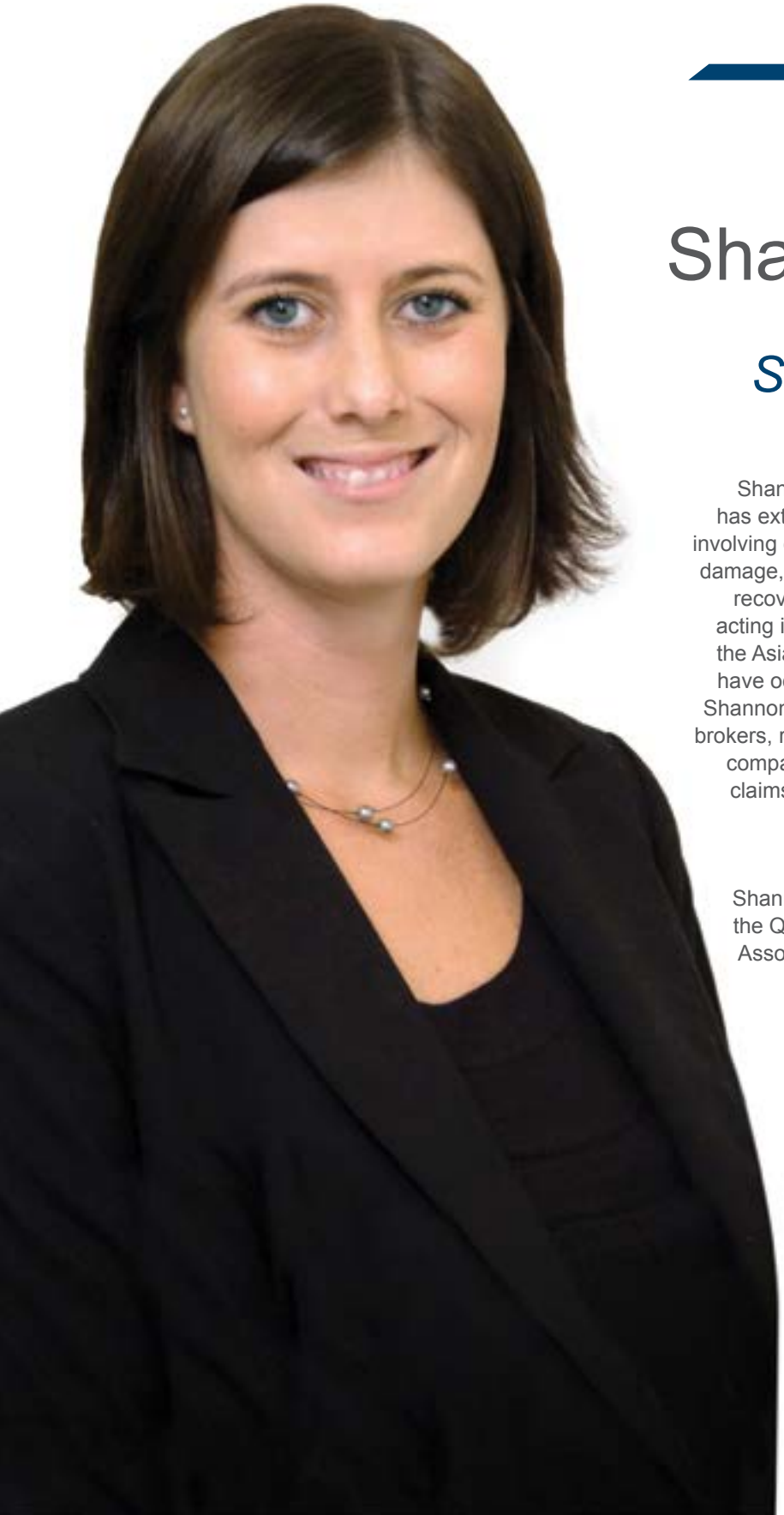
## *Future Care*

His Honour based his assessment on the evidence of Ms Jones. He assessed the plaintiff's needs at 1.25 hours per week for 35 years (i.e. until the claimant was 85 years old). The assessment was discounted 25% for contingencies. The award for this head was $24,000.

## *Future Allowances*

The plaintiff was awarded $5,000 for the cost of attending a future pain management course. In relation to future medical expenses, the plaintiff claimed $17,500 for future medical costs and chiropractic treatments. This amount was reduced to $6,000.00 due to the fact the plaintiff had demonstrated an improvement in her movement since the injury.

In total, the plaintiff was awarded $378,427.46 in damages.



Staff profile Aviation Insurance

# Shannon O'Hara

## *Senior Associate*

Shannon joined Carter Newell in 2008 and has extensive experience in aviation insurance involving coronial inquests, personal injury, property damage, aviation products liability and subrogated recovery actions. Her experience includes acting in significant aviation losses occurring in the Asia Pacific region as well as incidents that have occurred in the United States of America. Shannon also regularly acts for aircraft operators, brokers, regional and city airports and maintenance companies with respect to risk management, claims, CASA, AOC and Federal airport and regulatory issues.

Shannon is the immediate past president of the Queensland Branch of the Aviation Law Association of Australia and New Zealand.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# Case Note

## *Strahinja Pandurevic v Southern Cross Constructions (NSW) Pty Limited & Ors (No 3)* [2012] NSWSC 1601

Issue of whether s54 of the Insurance Contracts Act 1984 (Cth) applied so that an insurer is liable to indemnify a party for costs.

## The facts

The cross-claimant, Allmen Steel Pty Ltd (**Allmen**), was involved in a personal injuries dispute with Mr Pandurevic and Southern Cross Constructions Pty Ltd (**Southern Cross**). The insurer for Southern Cross was Mechanical and Construction Insurance (**MCI**).

Allmen's insurer, QBE, relied upon a clause in its policy which excluded indemnity for personal injury to subcontractors and employees of Almen, and declined to indemnify Allmen for Mr Pandurevic's claim. Allmen subsequently sought to rely upon a provision in the MCI policy which extended indemnity to *'principals and sub-contractors in contract with them who are not otherwise insured'*.

Allmen made a claim under the MCI policy on the basis that it was a sub-contractor of Southern Cross without insurance. The MCI policy also extended cover for 'legal charges, expenses and costs' with MCI's prior written permission.

Allmen wrote to MCI's solicitors informing that if it did not agree to accept Allmen's claim, it would have no alternative but to cross-claim against QBE, and in the event that the cross-claim was unsuccessful, Allmen would seek both Allmen and QBE's costs of the cross-claim. A similar letter was sent to MCI on a separate occasion in relation to Allmen's cross-claim against Southern Cross.

MCI refused to accept Allmen's claim, and Allmen proceeded to file cross-claims against QBE and Southern Cross.

Allmen sought a motion from the New South Wales Supreme Court that MCI pay its costs for the cross-claims on an indemnity basis, or alternatively, a party/party basis.

At the time of the proceedings MCI accepted it was liable to indemnify Allmen for damages and costs ordered against it, but it argued it was not responsible for the payment of Allmen's own legal costs as written permission was never sought in accordance with the policy.

## Issues

The main issue for determination was whether s 54 *of the Insurance Contracts Act 1984* (Cth) (**Act**) applied so that, notwithstanding Allmen's failure to obtain prior written consent, MCI would be liable to indemnify Allmen for its legal costs.

Section 54 (1) provides:

*'…where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim… by reason of some act of the insured… the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act'.*

Allmen submitted that its failure to obtain MCI's written permission was an omission for the purposes of s 54.

## Decision

The court considered Allmen's application '*presents the very sort of circumstances to which the section is directed*'[1] and held that s 54 of the Act applied. The court considered the following factors were important in determining the application of the provision:

- From the outset of its dealings with MCI, Allmen had contended it was entitled to indemnity under the MCI policy for costs incurred and damages awarded against it;
- MCI never raised Allmen's omission to obtain written consent as grounds for refusing indemnity throughout the proceedings. The motion hearing was the first time the issue was raised; and
- MCI did not identify any relevant prejudice for the purposes of s 54(1).

The court noted that it was MCI's refusal to indemnify Allmen which led Allmen to pursue the cross claims and incur legal costs.

The court ordered MCI to pay Allmen's costs of bringing cross-claims against QBE and Southern Cross. Costs were awarded on a party/party basis, as the court did not consider there were any special or unusual features in the circumstances warranting an award of costs on an indemnity basis.

[1] *Strahinja Pandurevic v Southern Cross Constructions (NSW) Pty Limited & Ors (No 3)* [2012] NSWSC 1601 at para [21].

# Case Note

## *ISS Property Services Pty Ltd v The Underwriter Insurance Company Ltd* (2013) SASC 53

Interpretation of insuring clause in policy and whether Workers Compensation exclusion applied to recovery claims brought by WorkCover.

## The facts

ISS Property Services (**ISS**) was the operator of a cleaning business. In 2003 and 2004, two unrelated workers slipped and sustained injuries while working at premises cleaned by the ISS. The injured workers received statutory compensation from WorkCover. WorkCover subsequently commenced recovery proceedings against ISS for the amounts paid.

ISS was insured under broad form liability policies between 1 January 2002 and 1 January 2003, and 1 January 2003 and 1 January 2004. The two policies were identical in content and provided that the insurer will indemnify ISS for all sums which it becomes '*legally liable to pay as compensation for personal injury*'. The policy also contained an exclusion clause which stated that the insurer is not liable to indemnify ISS for any liability imposed by the provisions of any workers compensation legislation.

ISS informed its insurer (**insurer**) of the claims being made against it, but the insurer declined indemnity and refused to take over conduct of the defence on ISS's behalf. ISS subsequently settled both claims, and sought recovery of the settlement sums from the insurer on the grounds that the insurer had wrongfully declined indemnity.

## Issues

The issues in the claim were:

- Did the claims made by WorkCover against ISS fall within the insuring clause of the policies?
- If the insuring clause of the policies applied, were the claims otherwise excluded by the operation of the exclusion clause?

### *The insurer's submissions*

The insurer argued the policies did not cover ISS's obligation to pay WorkCover as the amounts sought by WorkCover were not '*compensation for personal injury'.* Instead, the amount was payable in accordance

with the enforcement of a statutory benefit.

It was submitted that the term '*for*' limited the insurer's liability to compensation paid by ISS where the liability arose as a direct consequence of ISS's breach of duty. Had the insurer used the term '*in respect of*' instead of '*for*', it would have captured a wider range of events and the insurer would have been liable to indemnify ISS.

Finally, the insurer contended that even if the insuring clause was wide enough to cover the claims, the exclusion clause captured and excluded liability imposed by *Workers Rehabilitation and Compensation Act 1986* (Qld) (**Act**).

### *ISS's submissions*

On the other hand, ISS submitted that the Act granted WorkCover the pre-existing common law right to recover damages from a third party responsible for the injuries of an employee. Accordingly, the ISS submitted its liability was not imposed by the Act. For this reason, ISS argued the claims fell within the operative clause of the policy and could not be excluded by the exclusion clause.

ISS referred to Gleeson CJ's judgment in *McCann v Switzerland Insurance Australia Ltd*[1] which held that a policy of insurance is a commercial contract and should be given a businesslike interpretation. ISS submitted that when construing the insuring clause in the context of a commercial contract, the term '*for*' should be read as bearing the same meaning as '*in respect of*'. ISS has no control over who the injured workers wished to pursue, and creating an uncertainty in this respect was not commercially acceptable.

## Decision

Vanstone J agreed with ISS's submissions and held that to interpret the policy in the manner which excludes liability runs contrary to the commercial intent of the parties who enter into a broadform liability insurance policy of this type.

His Honour referred to *Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd*[2]. In that case, the relevant insuring clause covered compensation for personal injury and property damage. Similar to the present case, the policy included wide definitions of insurable loss and the court determined that the broad, general nature of the policy inferred a broad interpretation of the term '*for*'. His Honour held that similar to *Regal Pearl,* the language used in the current policies were a textual indication of an intention for the policies to have a broad scope. A restrictive interpretation of the insuring clause would undermine the very purpose of taking out broad form liability insurance. Accordingly, the term '*for*' should be interpreted as having the same meaning as '*in respect of*' in these circumstances.

Further, his Honour held that WorkCover's right to recover sums paid to employees from third parties was a codification of a pre-existing common law right. Therefore, the exclusion clause only operates to exclude liabilities incurred by ISS in its capacity as an employer, and does not apply in the present circumstances.

[1] *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579.

[2] *Zurich Australian Insurance Ltd v Regal Pearl Pty Ltd* [2006] NSWCA 328.

# Case Note

## *O'Donnell v Ainslie Football and Social Club Ltd and Focus Signage Pty Ltd* [2013] ACTSC 18

Liability for electric shock at commercial football club. Claim against the occupier and electrician that installed signage. Occupier argued it had engaged an appropriately qualified electrician.

# The facts

On 20 March 2008, the plaintiff and her six year old daughter suffered an electric shock at the premises of Ainslie Football and Social Club (also known as Gungahlin Golf Club). The plaintiff and her daughter were standing in front of the club's reception counter when her daughter placed her arm under the counter and screamed suddenly. A loud electrical noise ran through the counter, followed by the smell of burnt flesh and hair. The plaintiff immediately turned toward her daughter, who had become stiff and unmoving, and upon touching either her daughter or the counter she felt an electric shock to her hip. She quickly pushed herself and her daughter away from the counter and they fell to the ground. Her daughter suffered a burn to her wrist and arm.

A neon lighting system had been installed beneath the counter which failed to meet Australian Standards. The high voltage lighting was exposed and no warning sign was erected to alert the club's patrons of the hazard.

The plaintiff allegedly suffered psychological injury as a result of the incident and brought a claim against the operator of the club, Ainslie Football and Social Club Limited (**occupier**), and Focus Signage Pty Ltd (**contractor**), an electrical contractor which had previously installed and had then been engaged by the occupier to repair the neon lighting from time to time prior to this incident (the contractor).

# Issues

It was not in dispute that the plaintiff and her daughter had suffered an electric shock because the wiring of the neon lighting was defective.

The Supreme Court of the Australian Capital Territory was required to consider:

- Whether the plaintiff had suffered an injury;
- If so, whether the occupier and/or contractor were liable for the plaintiff's injury; and
- How the plaintiff's damages were to be assessed.

# Decision

The occupier argued that it was not liable for the plaintiff's injury as it had retained an appropriately qualified contractor to attend to repairs of the neon lighting.

The court confirmed that the occupier should not be held responsible for the defective workmanship of the contractor. However, the court noted that, at the time of the incident, the occupier was aware that the lighting system was accessible by the public and, in particular, presented a hazard to children. There had been a previous incident in 2006 where a child had placed their hand inside the lighting installation and had broken a piece of glass. Both the occupier and contractor were aware of that incident. It seems the broken glass was not repaired.

The court ruled that, even if the occupier was not qualified to appreciate the potential for electric shock arising from the contractor's defective workmanship, it ought to have recognised that the exposed lighting system was a foreseeable risk of injury to persons including children. A reasonable person in the occupier's position would have taken precautions to enclose the area in which the lighting was installed in order to prevent inadvertent access to the area. Had these steps been taken, the incident would not have occurred.

The court also found the contractor liable and apportioned liability on the basis of 70% to the contractor and 30% to the occupier.

# Quantum

## *The plaintiff's alleged injuries*

The plaintiff alleged that, in the days following the incident, she was constantly crying and unable to sleep. Her condition did not resolve over time and she continued to suffer from anxiety and panic attacks, sleep difficulties and flashbacks of the incident. She found the smell of smoke to be intrusive and distressing, and sold the family's station wagon because it discharged electricity when exiting the vehicle. She became hyper-vigilant of her children and avoided social activity which did not involve them. There was no evidence to suggest the plaintiff suffered from any pre-existing psychological condition prior to the incident.

She consulted a psychologist in May 2008 and was diagnosed with Post Traumatic Stress Disorder. The medical records of her treating practitioners noted exhaustion from work and symptoms of anxiety, distress and depression. She was prescribed various anti-depressant and sedative medications which she became heavily reliant on.

The plaintiff's daughter suffered from Obsessive Compulsive Disorder. It was uncertain whether the condition preceded the incident or whether it was related to the incident, but her ritualistic behavior added further stress on the plaintiff.

The plaintiff's husband claimed that in the 18 years they had been together, the plaintiff was a happy, resilient and social person, and she was not overprotective of her children prior to the incident. Following the incident, the plaintiff's mood was constantly flat, she was easily startled and she was no longer outgoing.

## Assessment of damages

### *General Damages*

The court accepted that the plaintiff suffered from Post Traumatic Stress Disorder as a result of the incident and continued to suffer ongoing impairment. It was found that, *'the plaintiff's condition, although not totally debilitating, was permanent and of significant severity,'*[1] . The court allowed a high assessment of general damages at $150,000, allocating 40% of the compensation for past pain and 60% for future pain and suffering.

### *Economic Loss*

At the time of the incident, the plaintiff was working part time to take care of her then-one year old son. She alleged that she intended to return to full time employment when her son started school. At trial, the plaintiff's son was seven years old. She claimed she was not able to return to full time work due to the stress of coping which was generated by her condition, and said that she had to reduce her work hours from 27 hours to 24 hours per week. She claimed the difference between her part-time income and what she would have earned if she was working full-time.

The defendants relied upon the fact that the plaintiff only took two days of sick leave following the incident and extensive amounts of carer's leave, and contended that the stress the plaintiff experienced at work was not caused by her condition but by the pressures of coping with the needs of her family.

It was further argued that, in any event, the plaintiff was unlikely to return to full-time work having regard to her family responsibilities as a mother of two young children, her daughter's condition and the advancing age of her parents.

This was not accepted the court, which held that these circumstances were better addressed by applying a factor for vicissitudes.

The court was satisfied that the plaintiff's psychological condition prevented her from returning to full-time work and accepted the plaintiff's proposed method of calculating economic loss. A 15% discount for vicissitudes was applied. She was awarded some $279,000 for future economic loss.

### *Care*

The plaintiff claimed an allowance of one and a half hours of domestic assistance per week. The court accepted her claim of some $40,000, concluding that it was justified and modest.

The total award for damages was in excess of $500,000 plus costs.

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# Case Note

## *Brown v Owners Corporation SP021532U and Bensia Thirteen Pty Ltd* [2013] VSC 126

Liability for injury resulting from climbing fence at residential property where usual route of ingress/egress was obstructed.

## The facts

The defendants were occupiers of a residential apartment complex. On the day of the incident, the front gate of the defendants' property was disabled due to power failure and could not be opened. The plaintiff, in an attempt to leave the defendants' property, climbed the back fence of the defendants' property and sustained injury to his foot.

## Issues

This was an application by the defendants for the court to summarily determine if a duty of care was owed by the defendants to the plaintiff. If no duty was owed, the defendants submitted the proceedings should be dismissed because no question of breach would arise.

The issues for the application were:

- Did the defendants owe a duty of care to the plaintiff?
- Was the risk of injury far fetched or fanciful?

## Decision

The defendants argued that no duty of care was owed to the plaintiff as the risk of injury in the circumstances was not reasonably foreseeable. Accordingly, the defendants agreed they did not breach any duty of care.

The defendants asserted that the plaintiff's injury was sustained in bizarre and unforeseen circumstances. It was not foreseeable that the plaintiff would choose to climb the fence and subsequently injure himself, and therefore they were not obliged to take reasonable precautions to ensure persons on the premises would not be injured when climbing the back fence.

On the other hand, the plaintiff contended there was no requirement that the mechanics of the injury or how it came about to be reasonably foreseeable. So long as the risk of a person engaging in an activity that resulted in an injury is not far-fetched or fanciful, an occupier owed a duty to take reasonable precautions to prevent the injury.

Dixon J referred to *Amaca Pty Ltd v King*[1] which

provides an occupier's duty to a lawful entrant includes exercising reasonable care to prevent reasonably foreseeable risks of injury resulting from the physical condition and state of the premises, or activities engaged in on the premises.

His Honour determined the defendants owed a duty of care to ensure safe access to and from the premises in all reasonably foreseeable conditions, including where the driveway gate could not be opened. The duty obliged the defendant to take reasonable care to guard against foreseeable risks of physical injury in relation to entering and leaving the premises.

His Honour differentiated between an improbable risk which is foreseeable and a far-fetched and fanciful risk. His Honour applied Sydney Water Corporation v Turano[2] and held it was not necessary that the precise sequence of events leading to the injury be foreseeable. Here, the question was whether it was reasonably foreseeable that by failing to provide a safe form of egress from the property, persons on the premises may attempt to exit the premises by climbing the back fence. The foreseeability of risk is to be assessed objectively.

His Honour held it was reasonably foreseeable that where the driveway gate could not be opened (even through power failure) a person would not wait for assistance and may try to leave the premises by climbing over the back fence. The back fence was a 'typical suburban fence' approximately two metres high, consisting of wooden vertical posts with three railings. On objective assessment, it was physically easier for a person of average physical ability to climb the back fence than the front gate from the inside. His Honour held that if a fence is not intended to be scalable, then it would present a greater barrier than a typical suburban fence. Further, there was evidence that the defendants were aware of instances in the past where tenants who were unable to open the driveway gate had scaled the back fence.

It was concluded that the act of scaling a fence carried an appreciable risk of injury and it was not far-fetched or fanciful to foresee that a person who scales a fence that is two metres high risks sustaining an injury to the foot.

His Honour rejected the defendants' application and directed the jury as follows:

1. *'The defendant's duty of care extended to taking reasonable care to ensure that ingress and egress from the premises to [the street] could be safely achieved in all reasonably foreseeable conditions in which visitors might enter or leave the apartments, including, in particular, that the driveway gate could not be opened in the usual way;*
2. *That duty was to take reasonable care to guard against reasonably foreseeable risk of physical injury resulting from the state or condition of the premises or those activities;*
3. *A risk of injury which is quite unlikely to occur may, nevertheless, be foreseeable in the sense that its occurrence is not far-fetched or fanciful;*
4. *The jury would need to be satisfied on the balance of probabilities that the defendants should reason ably have foreseen that -*
    - *There was a risk that the plaintiff might scale the fence to exit from the premises;*
    - *There was a risk that the plaintiff might suffer a foot injury in the activity of scaling a fence; and*
    - *The defendants with their knowledge and ex perience did not respond to that risk as a reasonable occupier of the apartments would have responded.'*

……..

[1] *Amaca Pty Ltd v King* [2011] VSCA 447.

[2] *Sydney Water Corporation v Turano* (2009) 239 CLR 51.

# Case Note

## *Bailey v Lend Lease Funds Management Limited t/as Woden Plaza and Anor* [2013] ACTSC 56

Liability of commercial shopping centre owner and manager. When owner sufficiently delegated management tasks to contracted manager.

## The facts

The plaintiff suffered personal injuries when she slipped on a spillage in the common area of the Woden Plaza Shopping Centre near the entrance to Woolworths. The plaintiff commenced proceedings against the defendant, Lend Lease Funds Management Ltd t/as Woden Plaza, as owner of the shopping centre.

The defendant joined the third party, SSL Facilities Management Pty Limited (**Spotless**), asserting a service agreement between the defendant's agent and Spotless to supply cleaning services at the centre. The defendant asserted in its claim against Spotless that it had negligently failed to keep the area of the spillage clean, failed to sign post it or clean it up and failed to maintain an adequate cleaning system.

Lend Lease Property Management (Australia) Pty Ltd (**Lend Lease Property**) had the same registered office and ultimate holding company as the defendant. Lend Lease Property entered into a management agreement with the defendant. Under the agreement Lend Lease Property was appointed agent of the owner, the defendant, for the purpose of managing the centre and was authorized to enter into and enforce contracts and subcontract part or all of the services it was required to provide.

Lend Lease Property entered into a services agreement with Spotless. The services to be supplied included the cleaning and presentation of the Plaza, including any spillage be attended to promptly, to be dried with a damp mop and 'slippery when wet signs' be displayed immediately. Any spillage in the common areas of the centre was to be rectified within 15 minutes during business hours.

The limitation period expired five months after the institution of proceedings and before the plaintiff became aware of the involvement of Lend Lease Property and Spotless so they were unable to be joined as defendants.

## Issues

Whether the defendant successfully delegated the management of the centre to Lend Lease Property.

## Decision

The court was satisfied that the defendant, whilst it was the owner of Woden Plaza, it was not the occupier as it had fully delegated the management, administration and operation of the centre to Lend Lease Property.

The court was further satisfied that the contractual arrangements made by the defendant with Lend Lease Property for the management of the centre and between Lend Lease Property and Spotless in relation to the cleaning of floors in common areas were reasonable and satisfactory.

The court found that if Lend Lease Property had been sued as occupier, it would have escaped liability. The court was satisfied that Lend Lease Property exercised reasonable skill and care in selecting Spotless as its contract cleaner, in arranging the terms of engagement and in ensuring that Spotless was complying with its contractual arrangements. The obligations imposed by the contract were sufficiently detailed and thorough to enable the conclusion that Lend Lease Property successfully delegated to Spotless its duty of care to protect the plaintiff from injury by reason of a spillage.

For these reasons, the court could not find any evidence of negligence on the part of the defendant. Counsel for the plaintiff submitted that the defendant should be found liable by reason of vicarious liability for the negligence of Lend lease Property. However, the court was not satisfied that the necessary framework for vicarious liability would have been established if Lend Lease Property was found to be negligent.

# Case Note

## *Weis Restaurant Toowoomba v Gillogly* [2013] QCA 21

An appeal by the Weis Restaurant against an order granting the plaintiff an extension to the limitation period under s31 of the Limitation of Actions Act 1974 (Cth).

## The facts

### *Background*

This was an appeal against an order of the Toowoomba District Court made pursuant to s 31 of the *Limitation of Actions Act 1974 (Qld)* (**LAA**) extending the plaintiff's limitation period for a personal injuries action.

On 14 January 2009, Allan Gillogly (**plaintiff**) was dining at the Weis Restaurant Toowoomba (**defendant**) and his chair collapsed beneath him, causing him to sustain personal injuries.

On 21 July 2009, the plaintiff sought legal advice from a solicitor in New South Wales, Mr Russell Booby, with respect to the incident and injury suffered. During their conference Mr Booby discussed the time limitations of personal injury claims in Queensland.

On 22 July 2009, Booby wrote to Weis Restaurant advising that he acted for the plaintiff and seeking the name of the defendant's insurer. On 31 July 2009, the defendant's insurer responded with a letter captioned 'Our insured: Weis Restaurant Toowoomba'. Shortly after, Booby sent a costs agreement to the plaintiff.

The plaintiff failed to sign and return the costs agreement despite Booby writing to him on various occasions reiterating that he would not be able to act on the plaintiff's behalf unless the cost agreement was signed, and that the claim would expire three years from the date of the incident.

On 21 December 2011, Booby wrote to the plaintiff advising that the three year statutory limitation expired on 14 January 2012 and if he wished to proceed he should instruct a solicitor in Queensland prior to that date.

The plaintiff instructed new solicitors in Queensland on 11 January 2012 who then filled an application at the Toowoomba District Court on 13 January 2012 seeking an extension of the limitation period under

s 31 LAA. The application was heard after the plaintiff's limitation period had expired.

*The primary judge had erred in finding that the plaintiff had taken all reasonable steps to ascertain the actual legal identity of the defendant.*

## Issues

### *Section 31 of the LAA*

To succeed on a s 31 application, there needs to be:

- A material fact unknown to the plaintiff until a year before the expiry of the limitation period or afterwards;
- The material fact needs to be of a decisive character;
- There needs to be sufficient evidence to establish a cause of action.

If these tests are satisfied, the court can extend the period of limitation so that it expires 1 year after the date the material fact became known to the plaintiff.

## District Court decision

At the hearing, the plaintiff asserted he did not know the correct legal entity of the defendant (Weiss Restaurant Toowoomba Pty Ltd) until April 2012 and he submitted that was a material fact of a decisive character.

The primary judge accepted the plaintiff's submission. It was held that the actual identity of the company operating the restaurant was a material fact of decisive character as it was critical to know against whom an action might succeed.

Further, the primary judge found that the plaintiff could not have done anything further to ascertain the legal identity of the operator of the restaurant.

Accordingly, the plaintiff's limitation period was extended pursuant to s 31 of the LAA.

## Decision on appeal

The Court of Appeal reversed the primary judge's decision and found that the legal identity of the restaurant's owner was not a material fact of decisive character and disagreed with the primary judge's view that it was critically important to know against whom an action might succeed. The court held a material fact is of a decisive character only if a reasonable person with knowledge of that fact would regard it as giving rise to a right of action with reasonable prospects of success.

Here, the plaintiff not only knew of all the facts that demonstrated he had an action with reasonable prospects of success, but he had also decided to pursue the action. It was not necessary for him to know the precise legal identity of the restaurant's owner in order to pursue the action.

The court noted that a reasonable person in the plaintiff's position would have given his solicitors appropriate general instructions to pursue the personal injuries claim by mid-2009. His solicitor would then have easily ascertained the legal identity of the defendant via a simple business name search, or issued the defendant with a notice of claim under the Personal Injuries Proceedings Act 2002 and necessitated a response containing the correct legal identity of the defendant. The primary judge had erred in finding that the plaintiff had taken all reasonable steps to ascertain the actual legal identity of the defendant.

## Conclusion

The court allowed the appeal and set aside the orders of the primary judge. The plaintiff was ordered to pay the defendant's costs of the appeal.


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# Case Note

## *Baggs v University of Sydney Union* [2013] NSWSC 152

Whether the plaintiff was entitled to commence proceedings against the defendant occupier after the expiration of the limitation period.

## The facts

On 21 May 2003 the plaintiff, who was at that time employed by the University of Sydney (**University**) as a clinical psychologist, fell down a flight of stairs during a fire drill in a building occupied by the University of Sydney Union (**Union**). She was in the building for a scheduled medical appointment and suffered extensive injuries during the fall.

The plaintiff lodged a workers compensation claim against her employer and received benefits. On the form that she filled out for the workers compensation claim, the plaintiff noted that, in her opinion, the Union was by their negligence, responsible for her injuries.

The plaintiff did not seek legal advice as to whether she might have a cause of action for damages against the Union (or any other party) before submitting the workers compensation claim.

In September 2003, the plaintiff consulted a solicitor, and was advised that:

- a title search revealed that the University was the registered proprietor of the building where she was injured;
- because the University was also her employer, the *Workers Compensation Act 1987* (NSW) would govern any claim against them;
- she would be entitled to a lump sum compensation payment pursuant to workers compensation legislation; and
- a three year limitation period applied to a common law work injury damages claim.

Based on this advice, she did not instruct her solicitors to pursue a claim for work injury damages.

In November 2003, the plaintiff consulted a second solicitor about her workers compensation claim. Because she was already in receipt of benefits, she did not instruct her solicitor to pursue a common law claim. She however continued in the belief that the University was the party responsible for the maintenance of the fire stairs and the party against whom she believed

an action in damages would be brought were she to elect to do so.

In February 2007, the plaintiff instructed a third law firm to act for her in relation to her workers compensation claim. Again, she was advised of the time limitation period. In August 2008, the plaintiff settled her claim against her employer for lump sum payment under workers compensation legislation.

*'…the claim…was not maintainable because it was commenced more than three years after the cause of action occurred.'*

On counsel's advice, the plaintiff then initiated a common law claim for work injury damages against her employer. The University responded by saying that they were not the entity responsible for maintaining the stair well where the injury occurred, and accordingly, the injury was not the result of their negligence.

In December 2009, the plaintiff gave instructions to commence proceedings in the District Court against the University as occupiers of the building. The University filed a defence stating that they were the owners of the building but, at the time of the injury, the occupier was the Union. The proceedings against the University were eventually struck out due to the plaintiff's failure to comply with procedural requirements.

The plaintiff then commenced proceedings against the Union for damages in negligence. The Union defended the claim on the basis that it was statute barred.

## Issues

Pursuant to s 50C and s 50D of the *Limitation Act 1969* (NSW) (**Act**) an action for personal injury damages is not maintainable if brought after three years from the date on which the injury became 'discoverable', that is, the date that the person knew that an injury was serious enough to bring an action and that the injury was caused by the fault of the defendant. It was accepted that the injury had occurred and was serious, so the only issue for determination was that the injury was the fault of the defendant.

## Decision

Both parties agreed that essential to the element of knowing the defendant was at fault was properly knowing the identity of the defendant.

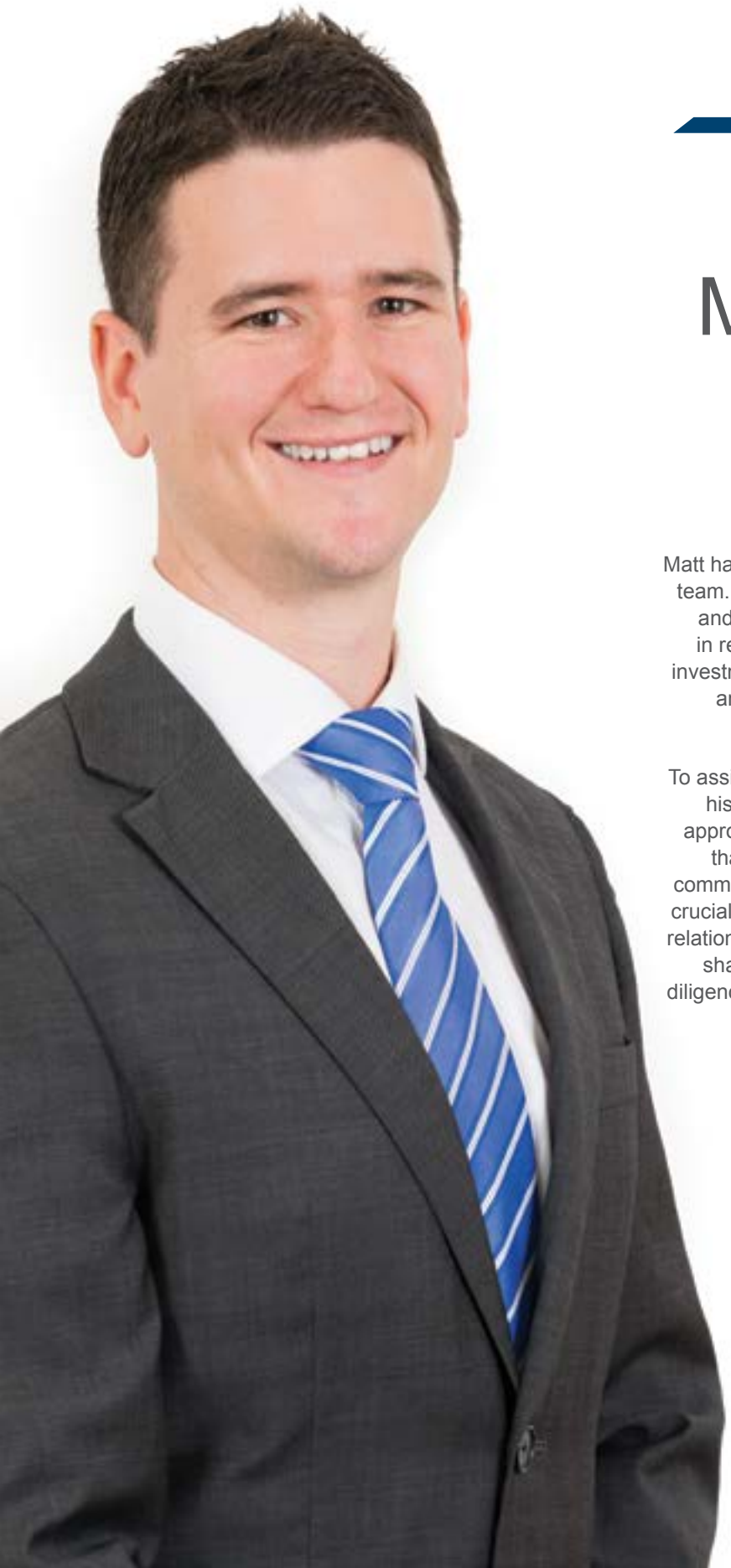
In affidavit evidence, the plaintiff categorically stated that she did not know the Union was the occupier of the building (and therefore the proper defendant) until she was told of that fact by her solicitors in May 2011. However, during cross-examination, she admitted she believed the Union was the owner/occupier of the building because their name was 'written everywhere' on the interior and exterior of the building.

Counsel for the plaintiff submitted the statement on the workers compensation claim form at the time of the injury that the Union was negligent was nothing more than an uninformed assertion which did not amount to knowledge of the identity of the defendant. It was submitted that the relevant sections of the Act were concerned with actual or constructive knowledge, not subsidiary states of belief. They argued that, for the defendant to be successful, they would have to establish that the plaintiff actually knew that it was the defendant who was legally liable for her injury as distinct from the plaintiff holding a belief that the defendant was a possible entity that was legally liable.

Counsel for the defendant submitted that the plaintiff knew that it was the Union that was at fault when she completed the form. It was further argued that the plaintiff's assertion that the Union was negligent meant it was probable that she knew that the circumstances of her fall gave rise to an actionable claim, a fact of which she did not require legal advice to confirm.

After reviewing relevant authority, Fullerton J summarised the issue as whether the plaintiff needed to make a legally informed evaluative judgment as to the identity of the occupier of the building before knowledge or awareness that the defendant was the entity at fault could be attributed to her under the Act or whether, as the defendant submitted, her belief that the Union was at fault at the time of the injury was sufficient.

Her Honour concluded that it was difficult to interpret the plaintiff's belief that the Union was negligent as anything other than an attribution of fault based on her belief that the Union was the occupier of the building and therefore was liable to her for injuries caused by their failure to adequately maintain the stairwell. Despite the plaintiff's lack of adequate legal advice, her Honour was satisfied that the plaintiff was aware of these facts at the time of the injury. Given this, her Honour concluded that the plaintiff's claim for damages in negligence against the defendant was not maintainable because it was commenced more than three years after the cause of action occured.



Staff profile Corporate

# Matt Couper

## *Special Counsel*

Matt has recently joined Carter Newell in the Corporate team. Matt has 10 years experience advising public and private companies and government entities in relation to mergers and acquisitions, strategic investments, joint ventures, structuring, due diligence and general corporate and business issues.

To assist our corporate insured clients, Matt combines his commercial acumen with a straightforward approach to corporate law issues and understands that, however big or small the transaction, its commercial significance and successful outcome are crucial to his clients. Matt regularly provides advice in relation to share and asset acquisitions and disposals, shareholder arrangements, restructurings, due diligence and general commercial contracting matters.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# Case Note

## *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38

Liability of ski field operator to reduce or remove the risk posed by ditch on a 'beginners' ski run.

## The facts

This decision concerned an appeal from a decision of the District Court of New South Wales awarding the plaintiff damages for personal injury. The proceedings arose out of a skiing accident which occurred at the Perisher Ski Resort on 29 July 2006. The plaintiff was a year 10 student on a three-day school excursion to the Resort. The plaintiff took part in a beginners' skiing lesson. The students in the beginners' lesson were given instructions on the basics of skiing for 30 minutes. The students, including the plaintiff, were then asked to ski down a slope which was graded green for beginners. The plaintiff failed to negotiate a ditch located towards the bottom of the slope, he somersaulted forward and landed on his back, causing serious injuries.

## Primary Judgment

The plaintiff issued proceedings against the first defendant (Perisher Blue Pty Limited, the operator of the Resort) (**Perisher Blue**) and the second defendant (Trustees of the Roman Catholic Church for the Archdiocese of Sydney who conducted the school at which the plaintiff attended) (**Trustees**). The Trustees filed a cross-claim in which they sought indemnity or contribution from Perisher Blue in respect of any damages for which they were found liable to the plaintiff.

The plaintiff's claim against Perisher Blue rested on its alleged negligence in failing to take adequate precautions to prevent injury to beginner skiers by reason of the difficulty they would confront in negotiating the ditch. The primary judge upheld the plaintiff's damages claim in negligence against Perisher Blue. He was satisfied that there was a ditch of sufficient depth and width to cause the plaintiff to be thrown into the air and land on his back. The presence of a ditch on a beginners' slope created a risk of injury that was foreseeable and not insignificant. Perisher Blue was therefore negligent in failing to identify the obstacle or, if it had identified the risk, in failing to take action to negate the possible danger created by the obstacle. In his Honour's view, precautions available to Perisher Blue could reasonably include:

- Placing a barrier around the ditch;
- Filling in the ditch with snow; and/or
- Not conducting lessons in an area proximate to an obstacle.

The primary judge considered that but for the failure of Perisher Blue to identify the ditch and take the above precautions the plaintiff's accident would not have occurred.

The primary judge rejected Perisher Blue's contention that the harm suffered by the plaintiff was from an obvious risk of a dangerous recreational activity within the meaning of s 5L of the *Civil Liability Act 2002* (NSW). His Honour accepted that the plaintiff was engaged in a dangerous recreational activity but the harm did not result as a materialisation of an obvious risk. If the plaintiff had simply fallen over or lost control and fallen over this would have been the materialisation of an obvious risk. However, while skiing into a ditch on a beginners' slope is the materialisation of a risk, a reasonable person in the plaintiff's position would not regard the presence of the ditch on a beginner's slope to be obvious.

The primary judge also held the Trustees liable to the plaintiff by reason of the breach of the non-delegable duty of care owed by a school to its pupils. On the cross-claim, Perisher Blue was ordered to indemnify the Trustees in respect of the whole of their liability, including costs, to the plaintiff.

## Issues

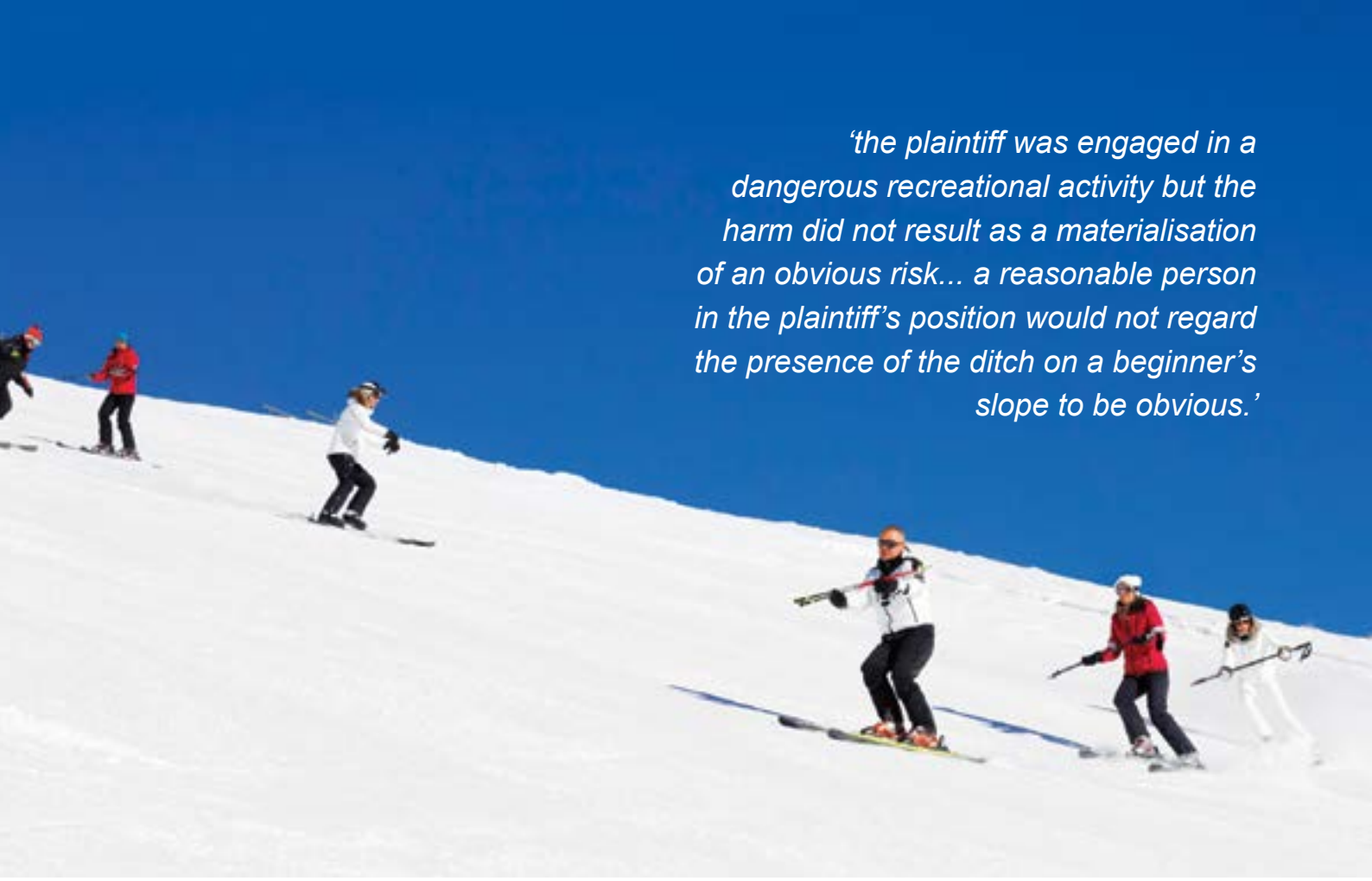
Perisher Blue appealed the decision of the District Court on 11 grounds including causation, damages and costs.

## Decision

The Court of Appeal dismissed the appeal with costs.

Counsel for Perisher Blue identified two fundamental errors made by the primary judge on the question of liability. Counsel submitted that the primary judge proceeded from the fact of injury and reasoned backwards to infer that Perisher Blue was negligent in failing to obviate the risk created by the ditch. The Court of Appeal however, considered the primary judge addressed the question of negligence independently from his knowledge that the plaintiff had been injured by the ditch and there was sufficient evidence before the court to support His Honor's finding that a reasonable person in the position of Perisher Blue would have taken the relevant precautions against the risk.

The second fundamental error identified by counsel for Perisher Blue was that the primary judge incorrectly analysed the question of causation. Counsel submitted



*'the plaintiff was engaged in a dangerous recreational activity but the harm did not result as a materialisation of an obvious risk... a reasonable person in the plaintiff's position would not regard the presence of the ditch on a beginner's slope to be obvious.'*

that the primary judge failed to consider whether the plaintiff would have avoided injury even if Perisher Blue had implemented the measures His Honor thought should have been taken to avoid or minimise the risk.

The Court of Appeal considered the approach taken by the High Court in Adeels Palace[1] and Strong v Woolworths[2]. When addressing the question of causation, the High Court's approach has been to inquire what probably would have occurred had the negligent party taken the action a reasonable person would have taken to avoid or minimise the risk. This involves an identification of the action required to avoid a relevant breach of duty. The plaintiff must then discharge the burden of proving that, but for the breach, the plaintiff would not have suffered harm.

The Court of Appeal considered that while the primary judge found Perisher Blue would have avoided breaching its duty of care by taking any one of the three identified steps, no finding was made as to whether or not the plaintiff would have avoided the accident if the three measures identified by His Honour had been taken. The Court of Appeal considered the three steps in turn and concluded as follows:

**Barrier** - the evidence before the primary judge supported the inference that had a barrier or warning sign be erected around the ditch, the likelihood is that the plaintiff would have been able to avoid it.

**Filling ditch** - had Perisher Blue filled in the ditch with snow before the lesson, the strong likelihood was that the plaintiff would not have suffered injuries when he reached the ditch.

**Moving lesson** - had the group skied down a different part of the slope to avoid the ditch, in all likelihood, even if the plaintiff had lost control, he would not have traversed the ditch.

The Court of Appeal considered the primary judge was correct in finding that the breach of duty by Perisher Blue was causative of the plaintiff's injury. Consequentially, the appeal failed on the causation aspect.

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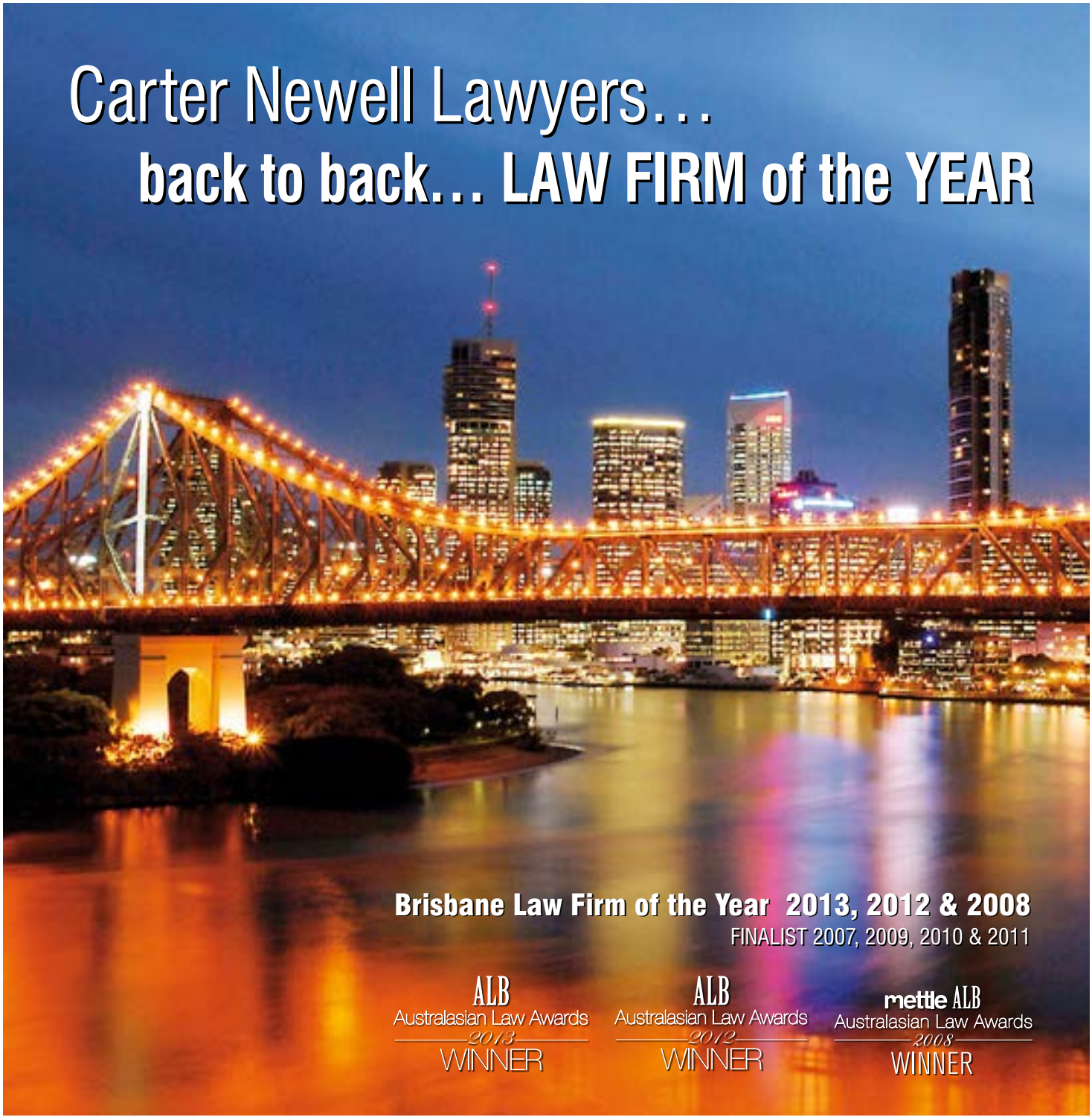
[1] *Adeels Palace Pty Ltd v Moubarack* (2009) 239 CLR 420.

[2] (2012) 246 CLR 182.

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# Case Note

## *Sharp v Cairns Regional Council* [2013] QDC 14

Worker injured when mowing lawn on median strip and passing car sounded its horn.

### The facts

The plaintiff was employed as a gardener by the defendant. During the course of his employment, the plaintiff suffered a personal injury while he was mowing a median strip. While using the mower, the plaintiff leaned forward and to his left to clear a potential hazard (a spring that had fallen from the mower) from his path. Whilst he was doing so, a car passed by and sounded its horn. The sound of the horn allegedly startled him and caused him to bump the mower. This caused the mower to move over his left hand, resulting in the partial amputation of his ring and little finger.

## Issues

The court was asked to consider whether the defendant breached its duty of care by failing to provide him with a safe system of work. The plantiff alleged the defendant was liable because it did not require:

- a formal risk assessment be undertaken by the plaintiff;
- workers to only mow in the direction of oncoming traffic;
- a routine inspection of its mowers; and
- employees undertaking this type of work to erect a safety barrier between the area of work and the adjacent traffic.

## Decision

In relation to the first three deficiencies in the system of work listed above, the court found, inter alia, that:

- the failure to require the plaintiff to undertake a formal risk assessment was of no consequence. This was because there was evidence that the plaintiff was in fact aware of the risks associated with the task but would likely not have undertaken the task any differently had a risk assessment been performed;
- given the fact that the plaintiff was bending down at the time of the incident, the direction of the traffic was immaterial; and
- the spring falling from the mower was a random event, not one borne out of a lack of adequate maintenance.

In relation to the final deficiency in the system of work, the court found that the defendant did breach the duty of care it owed to the plaintiff.

The failure of the defendant to require the plaintiff to ensure that appropriate signage and traffic control devices were used to provide a safety buffer between the plaintiff and the adjacent traffic was said to be causative of the injury. The court was of the opinion that a safety buffer would have prevented the plaintiff from being startled by the sound of the car horn, thereby preventing the injury. Accordingly, the court found in favor of the plaintiff.


The Injury Scale Values and Costs Thresholds pursuant to the Civil Liability Act 2003 and the Personal Injuries Proceedings Act 2002 have been updated as at 1 July 2013. If you would like a copy of this publication please contact us on: newsletters@carternewell.com

# Case Note

## *Heywood v Commercial Electrical Pty Ltd* [2013] QSC 52

Worker severed his ulnar nerve on piece of scrap metal which he placed near a ladder he was working on.

## The facts

On 17 October 2008 the plaintiff was working for the defendant at an apartment building where the defendant had been contracted to install electrical cables.

The plaintiff had recently commenced employment with the defendant and was shortly to commence working as an apprentice electrician. Edges of U-shaped framing installed as part of the works on site were sharp and, when electrical cables came into contact with the frame, there was a risk the cables may become live. An electrical subcontractor working at the complex devised a method of protecting the sharp edges of the framing by cutting a piece of framing and fastening it upside down over the original U-shaped frame, creating a soft edge along which the cables could run. The director of the defendant adopted this method and demonstrated the technique to the plaintiff to be undertaken as part of his work on site.

As a by-product, this process created pieces of scrap metal which had the same sharp edges as the U-shaped framing.

The plaintiff located a piece of U-shaped framing and cut a piece of the framing to form the required shape. He left the remainder of the framing on his tool box which was positioned around 110 centimeters above the ground. He ascended the ladder and positioned the framing into place. He then descended the ladder and, as he stepped off the last rung, he swung around to his left and his elbow came into contact with the piece of steel framing, causing an injury to his elbow by severing his ulnar nerve.

## Issues

Counsel for the plaintiff submitted that the defendant failed to:

- implement a system which made adequate provision for inattention or inadvertence on the part of an inexperienced worker;
- warn the plaintiff of the risk of injury presented by the sharp edge;

- instruct the plaintiff to place the sharp edge pointing down and to look for hazards before stepping backwards off the ladder; and
- consider other, safer methods of protecting the cable or to use one of the commercially available products designed specifically for the task.

Counsel for the defendant denied liability on the basis that its obligation was only to take reasonable care and not to protect its employee from all perils. It alternatively claimed contributory negligence by the plaintiff.

## Decision

### *Liability*

Martin J dismissed the plaintiff's claim.

Martin J acknowledged that, while an employer owes a non-delegable duty of care to its employees, an employer is not obliged to safeguard an employee from all perils. The duty imposed on employers is only to take reasonable care. It is not a duty to avoid all risks by all reasonably affordable means or to protect careless people from the consequences of their own carelessness.

Expert evidence was adduced by each party as to whether the dangers associated with the sharp edges of the U-shaped framing could be reduced or removed. The plaintiff's expert suggested the use of spiral binding and rubber edge protection. The defendant's expert gave evidence that the method used by the defendant to protect the sharp edges complied with the requirements of the *Electrical Safety Act* 2002 (Qld) and the relevant Standards and that the alternatives proposed by the plaintiff's expert would not comply with the requirements of the Australian Standards. Martin J preferred the defendant's expert over the plaintiff's expert and was satisfied that the method used by the defendant was appropriate and satisfied the requirements of the Standards and the relevant legislation.

The plaintiff gave evidence that he understood and appreciated the risks of handling sharp objects and he understood that care was required in working with sharp objects. Martin J reasoned that, as the plaintiff cut the framing himself he would have known the edges were sharp and accordingly, there was no requirement for the defendant to tell him it was sharp (that is, it was an obvious risk). Martin J found the plaintiff to have created the hazard by placing an object which he knew was dangerously sharp, with the sharp edge exposed, on his tool box located close to the ladder he was using. The plaintiff knew where the framing was when he descended the ladder as he had placed it in that position. As such, Martin J found the defendant had not breached its duty of care to the plaintiff.

# Case Note

## *Guinery v S H Gowing & Co Pty Limited* [2013] NSWDC 51

Worker injured while manually unloading heavy crate. Assessment of damages for worker with intentions to enter the mining industry.

## The facts

The plaintiff sustained personal injuries in 2003 whilst manually unloading a large crate from the back of a truck. The plaintiff was employed by the defendant as a motor mechanic. He was 46 years old at the time of the incident. The plaintiff, together with other employees, attempted to manually unload a large crate from the back of a truck which was parked on uneven ground, causing the truck to slope to one side. The defendant had not supplied its employees with any equipment to maneuver the crate. During the course of unloading the crate, the weight of the crate shifted in the direction of the plaintiff. The full weight of the crate struck the plaintiff in the abdomen and he was knocked to the ground.

The plaintiff's injuries required surgery. He took approximately 12 weeks off work and returned to his pre-injury employment on light duties. The plaintiff continued to suffer ongoing symptoms and further pain. He left work with the defendant and found alternative employment as a trades assistant. While this was a demotion in status for the plaintiff he was earning more than he would have earned had he stayed with the defendant. The plaintiff continued to suffer worsening symptoms and considered leaving his current employer. The plaintiff maintained that but for the injury he would have left the defendant and entered the coal mining industry.

The plaintiff commenced proceedings against the defendant as his former employer. This meant any damages he could recover were limited by the provisions of Pt 5 of the *Workers Compensation Act 1987 (NSW)* (**Act**). Pursuant to s 151G of the Act the only damages that may be awarded to the plaintiff are damages for past and future economic loss.

## Issues

Neilson DCJ did not spend much time considering liability and he had no hesitation in finding the defendant negligent in failing to obtain the use of a forklift to lift the heavy crate off the truck and convey it into the defendant's premises or in failing to park the truck on an even surface.

The main issue for the court was a determination of the plaintiff's damages. Neilson DCJ thought the consideration of two particular issues was essential to the determination of the plaintiff's damages:

- Whether the plaintiff was suffering any current economic loss; and
- Whether the plaintiff would likely have obtained employment in the mining industry but for the injury.

*'… the court found it more probable than not that the plaintiff would have been offered a job in the mining industry had he been uninjured.'*

## Decision

With respect to the first issue, the defendant submitted that the plaintiff was not suffering any economic loss as he was earning more remuneration at his current employment and at most, the plaintiff would only be entitled to a buffer to account for a perhaps early retirement.

The court dealt with the two issues simultaneously. The court accepted that had the plaintiff remained uninjured he would have sought to obtain employment in the mining industry. The plaintiff gave evidence that he was dissatisfied with his pay with the defendant and sought higher remuneration. The court thought this was supported by the fact that in 2001/2002 he had applied to join the police force. The court accepted that the plaintiff would have sought to enter the coal mining industry but for the injury.

The court went on to determine whether it was more probable than not that the plaintiff would have been offered a job in the mining industry had he applied uninjured. The plaintiff exhibited the 2011 *Hays Salary* Guide (**Guide**) which gave a sector overview of the resources and mining industry in Australia and referenced '*Australia's booming resources and mining sector'*. The Guide referred to the need for employers to exercise flexibility in their recruiting, not to adhere to rigid selection criteria and to consider employees with transferable skills. The court thought it was clear that in 2010 there was an unprecedented demand for workers in the mining industry and particularly in New South Wales.

The plaintiff exhibited a number of job advertisements he obtained in the previous two years. While the advertisements required previous underground mining experience or work with underground mining equipment, the court thought that unless these rigid requirements be overlooked the workforce could not expand to meet the demand. The court emphasized that even though the plaintiff had no direct experience in the mining industry, he was *'an intelligent, well-presented and articulate man'* and a highly-qualified tradesman and automotive engineer. The advertisements also showed a large demand for mechanics and fitters in the mines, including persons with experience in auto electrics and airconditioning maintenance of which the plaintiff had. On this evidence, the court found it more probable than not that the plaintiff would have been offered a job in the mining industry had he been uninjured. As such, the court found the plaintiff was currently suffering economic loss with respect to the difference between his current earnings and what he would have earned in the mining industry.

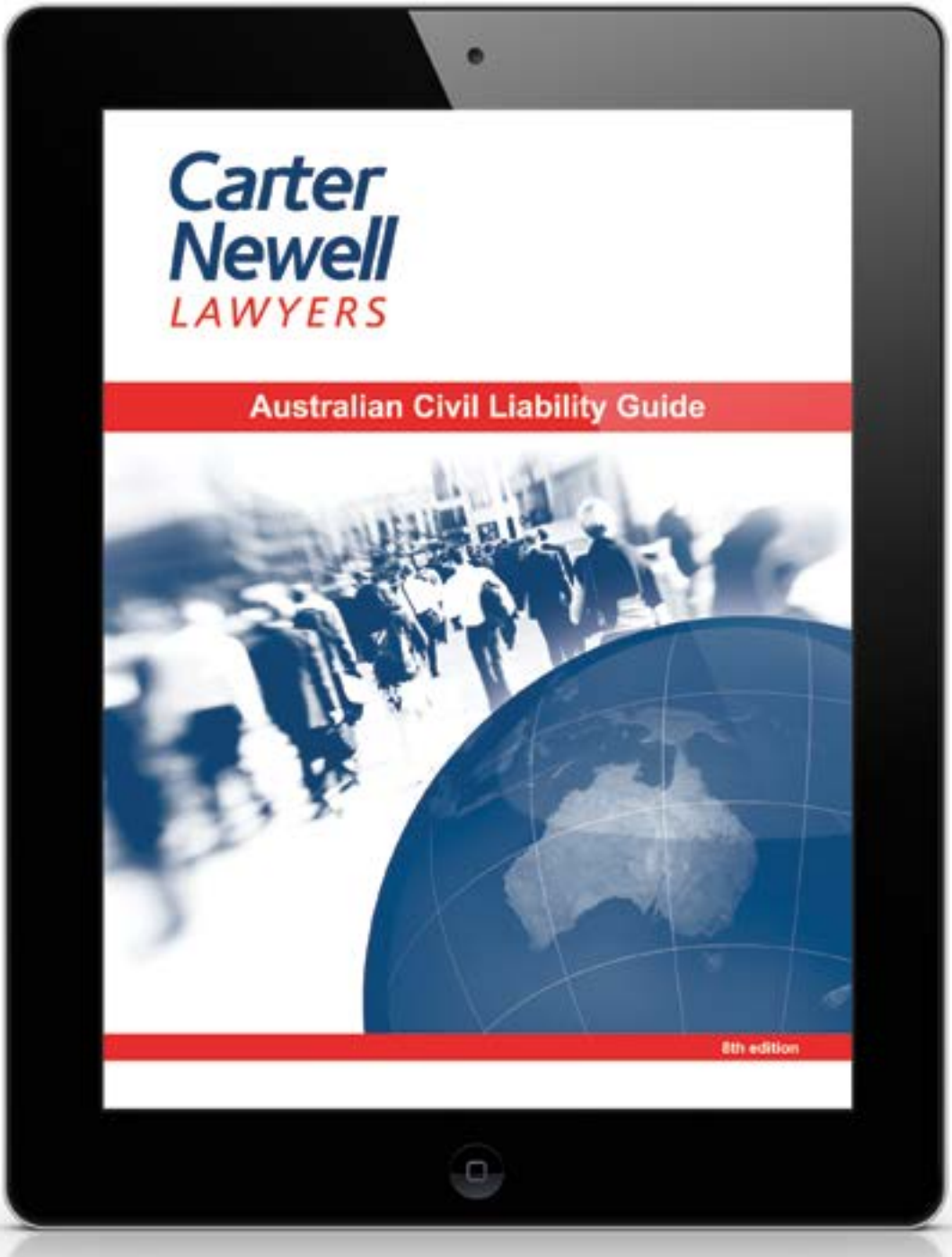
The plaintiff submitted that he should be seen as being eligible to join the mining workforce in 2006/2007 and therefore was entitled to six years' past economic loss. However, the court, which was heavily influenced by the Guide and job advertisements exhibited by the plaintiff, took the view that the plaintiff would have entered the mining industry in 2010 when the demand for employees in the mining industry in New South Wales was high.

Therefore, the court held that the plaintiff would have been working in the mining industry for the previous three years. The parties agreed on the average salary ($94,500 net per year/$1,817 net per week) which the plaintiff might have commanded in the mining industry – a difference of $461.30 per week.

The court calculated the plaintiff's economic loss as follows:

- The plaintiff's initial time off work following surgery;
- three years past economic loss at $461.30, being the difference between his earnings in the mining industry, had he gone into that industry and what he was currently earning – totaling $71,963; and
- 11 years future economic loss, 4 years at $461.30 then 7 years at $1,817, including a deduction for vicissitudes – totaling $467,615.60.

Interestingly, the court allowed 11% for loss of past superannuation benefits and 13.2% future loss of superannuation benefits.

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