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Injury Liability Gazette

6th edition

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Contents

From the Partner

The sixth edition of the Injury Liability Gazette, compiled by the Carter Newell Property & Injury Liability Team, outlines decisions handed down around Australia. Along with my fellow partners Glenn Biggs and Stephen White, our Property & Injury Liability team have compiled this latest edition of the Gazette to provide practical information on recent cases relevant to insurance professionals.

This edition considers recent decisions involving assessment of damages, occupier's liability, recreational activities, obvious risks and workplace law and policy interpretation. We also look at the basis behind the court's dismissal of a worker's claim against his employer in the case of *Schonnell v La Spina, Trabucco & Co Pty Ltd* [2013] QCA 324 following a fall from an allegedly defective ladder, where the court found that the employer's system of inspection was adequate and reasonable.

As a premier legal service provider with one of the largest insurance practises in Australia, with teams in both Brisbane and Sydney, we are confident that this edition of the Injury Liability Gazette will be a useful resource for our readers. We welcome your feedback on this edition and any suggestions for our future editions (feedback@carternewell.com).

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Case Note

Gray v Richards [2014] HCA 40

The High Court held that an incapacitated plaintiff is entitled to recover the expenses associated with managing the costs of the lump sum award of damages however, is not entitled to recover costs associated with managing the predicted future income of the managed fund.

The facts

This was an appeal from the Court of Appeal of New South Wales which held that costs are not recoverable for managing an incapacitated plaintiff's management fees and the future income of the fund.

The plaintiff (appellant on appeal to the High Court) sustained a traumatic brain injury when a motor vehicle driven by the defendant (respondent on appeal to the High Court) collided with a motor vehicle in which she was a passenger. As a result of her injury, she was left with a significant intellectual impairment and requires constant care. She has no prospects of future employment.

Issues

1. Whether the incapacitated plaintiff is entitled to recover costs associated with managing the cost of managing the lump sum (**fund management fees on fund management damages**).
2. Whether an incapacitated plaintiff is entitled to recover costs associated with managing the predicted future income of the managed fund (**fund management on fund income**).

Both these questions were answered in the negative by the Court of Appeal.

The primary judgment

It was not in dispute that the Trust Company would charge fund management fees, what was in dispute was the fees charged on these fees. The defendant argued that while fund management damages would need to be managed, no allowance should be made for that.

The primary judgment answered affirmative to both issues, indicating that an award for damages reflecting the cost of managing fund income was necessary to preserve the longevity of the fund. They explained the logic of the claim by the following explanation:

> *'[I]f the cost of managing a damages award of $10m over the relevant term were, for example, $2m (20% of the corpus), the total verdict would be $12m, to be received today and managed over*

time. A plaintiff under incapacity would have no better ability to manage the additional $2m than the initial $10m. It follows that the award of a component for fund management would itself give rise to future management expenses in the order of $400,000 (assuming fees charged on that amount at the same rate of 20%). The additional $400,000 in turn would cost a further $80,000 to manage, which would cost a further $16,000, and so on.'

In relation to the fund management on fund income, the court accepted that income derived from the management of the fund and reinvested by the manager would itself become part of the managed fund and, accordingly, would incur its own fund management fees. Her Honour, Justice McCallum observed that:

'*If income earned by the fund is excluded from the calculation of fund management costs… there will be a shortfall in the damages allowed on that account and there will be insufficient money to manage the [appellant's] damages*.'

The Primary Judge stated the discount rate of 5% prescribed by s 27 of *Motor Accidents Compensation Act* 1999 (NSW) (**MACA**) represents the net earning capacity of the fund over time. The discount rate represented a statutory assumption as to the net earning capacity of the damages awarded to a plaintiff.

The Primary Judge also considered whether fund management expenses could be awarded at the rates charged by a private trustee. She indicated the decision to select someone other than the NSW trustee was entirely reasonable. The defendant did not seek to challenge that finding in the Court of Appeal or in the High Court.

Decision of the Court of Appeal

The defendant appealed the decision. The Court of Appeal overturned the decision of the Primary Judge on both issues.

The court stated a reasonable amount for the cost of managing the fund should be provided and there should be no additional amounts awarded on the assumption that fees would be paid on the amount set aside for management costs.

Similarly, damages for managing the fund income was disallowed. Chief Justice Bathurst stated that the

cost to cover the fund management was unacceptably uncertain and it involved speculation of the performance of the fund. He indicated that to provide further funds would result in the plaintiff being over compensated.

The court concluded that the plaintiff's claim with respect to the fund management on fund income issue should not be allowed as s 127 of MACA does not mandate a 5% net return over the life of the loan:

> *'The discount rate assumes a rate of return sufficient to provide the injured plaintiff with a fair and just compensation for the claimed loss. The return is assumed to take into account the costs of earning income would include any fees payable as a consequence. The Court would inevitably be speculating as to what income would be derived from the fund from time to time.'*

Decision of the High Court

The plaintiff appealed this decision.

Issue 1: Fund management fees on fund management damages

The plaintiff's principle contention was that the Court of Appeal's decision was a departure from the first principle in *Todorovic v Waller* [1981] HCA 72 (that is, that the damages should place the plaintiff in the same position) producing a shortfall in damages. The shortfall was argued by the plaintiff as unavoidable having regard to s 79 of the *Civil Procedure Act 2005* (NSW) (**CPA**) as both fund management damages and fund income must be managed as part of the plaintiff's estate.

The court agreed and indicated the cost of managing fund management fees is not separate and distinct from assessing the present value of the plaintiff's future outgoings. The expenses are an integral cost of fund management. The incurring of the expense is as a direct result of the defendant's negligence and damages are to be calculated as the amount that will place the plaintiff so far as is possible, in the position he or she would have been had the tort not been committed.

The court indicated that s 127 of MACA invites an assessment of the present value of ***all*** future outgoings based on the evidence. This encompasses ***all*** of the management expenses.

Issue 2: Fund management on fund income

In relation to the second issue, fund management of fund income, the plaintiff argued the Court of Appeal erred in concluding that the potential costs of managing fund income were covered by the discount rate prescribed by s 127 of MACA.

The court held that the plaintiff's challenge should not be accepted as the cost of managing the income generated by the fund is not an integral part of the plaintiff's loss consequent upon her injury.

The discount rate prescribed by s 127 of MACA does not imply a statutory requirement that the fund should achieve a net future earnings rate of 5%. The discount rate does not assume that the fund will produce an annual net income at an equivalent rate or imply that a lump sum award must be adjusted to ensure that result.

The legislature selected the discount rate having regard to inflation, changes in wage and prices and the costs of managing that income. It is a tool for the purpose of arriving at a lump sum reflecting the present value of future losses. It is the conceptual tool best suited to determine what is fair and reasonable compensation for that loss or expense. The law equates with fair compensation for those losses or expenses irrespective of what the plaintiff intends to do with that sum. It is meant to take into account income from investment of the sum awarded and no further allowance should be made for these matters.

Decision

The plaintiff's challenge to the decision of the Court of Appeal on the first question was upheld (the cost of managing the management fees). Her challenge on the basis of the second question was rejected (the cost of managing the future income).

Staff profile Insurance

Amy Gill

Special Counsel

Amy Gill is a Special Counsel in Carter Newell's Insurance team and has over 17 years experience conducting the defence of a wide range of personal injury and insurance claims for local, national and international clients.

Her expertise ranges from public liability claims to WorkCover claims, product liability claims that span a broad range of industries including aged care, schools, sporting associations, construction, manufacturing, retail, hotels and resorts and the agricultural industry. She also advises on indemnity and policy interpretation issues, exclusions and endorsements. Amy has extensive experience advising with respect to complex liability and evidentiary issues and handling claims involving significant quantum for both insurers and self-insured corporate clients.

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Case Note

Dillon v Hair [2014] NSWCA 80

Where an owner of residential premises was found liable for injuries sustained by an entrant when she slipped and fell on an mat inside the entrance.

The facts

Margaret Hair (**plaintiff**), a property manager, was conducting a handover inspection at a residential property on 21 May 2010 when she slipped on a mat inside the front entrance and sustained a fractured knee. The property was owned by Harry and Jann Dillon (**owners**) and had been leased to Emma Munro (**tenant**) for around two years.

The incident occurred on the last day of the tenant's lease. By that time the tenant was no longer residing at the property, though some of her possessions still remained on the premises. In the four years prior to the incident (and for the entire period the tenant was residing at the premises), the mat in question had been placed on the patio which had untreated and rough timber flooring.

Prior to the final handover inspection, the owners moved the mat inside the front entrance where the flooring consisted of polished sealed floorboards. At the time of the incident, the floor had just been thoroughly cleaned by the tenant and was described to be in '*very good condition*'.

The plaintiff brought proceedings against the owner and the tenant in the District Court of New South Wales.

District Court decision

The mat had been thrown out by the time proceedings were instituted and was not available for expert testing. Mr Dillon alleged he had thrown out the mat when he became aware of the plaintiff's fall because he did not want it to cause any further problems, notwithstanding his view that there was nothing wrong with the mat. The trial judge considered his evidence lacked credibility and he had thrown out the mat to avoid responsibility for the incident.

At trial, the tenant gave evidence that the mat was most likely synthetic with a '*slightly textured 'felty' surface on top and a slightly more 'plasticy or rubbery' surface on the underside*'. She stated she distinctly recalls the mat felt firm and safe underfoot while it was placed outside, and it did not move at all under her foot when she stepped on it. However, she acknowledged that the floor surfaces of the patio and the interior of the house were very different.

Mr Dillon gave evidence that the mat was synthetic and had a rubber backing. When questioned, he admitted he had never closely inspected the mat and he was aware that rubber would become hard in extreme temperatures and lose its elastic properties.

The trial judge found that the owner, not the tenant, was the occupier of the premises at the time of the incident. His Honour accepted the plaintiff's argument that the mat was very worn as a result of being exposed to weather conditions for at least four years and had lost its slip-resistant properties over time. His Honour held the risk of slipping on a worn mat on a polished floor was foreseeable and not insignificant. His Honour stated a reasonable person in the owners' position ought to have taken precautions against the harm, including inspecting the underside of the mat and placing non-slip material beneath the mat if the mat was to be left inside. In failing to do so, it was found that the owners had breached their duty to the tenant.

The trial judge concluded that the owners were solely liable for the incident.

Issues on appeal

The owners appealed to the Court of Appeal. They argued that the trial judge had erred in finding that the mat was unreasonably slippery as there was no evidence that, even if the mat was worn, or if its rubber backing had hardened over time and had become less elastic, that it would be less slip-resistant than a new mat.

They also argued the trial judge did not give sufficient weight to Ms Munro's evidence that she never found the internal floor to be slippery or the mat to be dangerous.

Appeal decision

The Court of Appeal stated the owners' submissions regarding the slip-resistance of a worn mat '*defied common sense and experience*'. The court held that the primary judge had given adequate consideration to the evidence of both the owners and the tenant, and that their verbal evidence regarding the texture of the mat and Mr Dillon's concession that rubber exposed to high temperatures becomes hard and loses its elastic properties, '*was capable of justifying a finding that a reasonable person in Mr Dillon's position would have inspected the condition of the mat, which would have revealed… that it had substantially lost its slip-resistant properties*'.

As a result, the trial judge's findings were upheld and the appeal failed.

Case Note

Simmons v Rockdale City Council [2013] NSWSC 1431

The plaintiff cycler had his leg amputated after colliding with a closed boom gate.

The facts

The plaintiff was an experienced competitive cyclist and was on an early morning training ride, cycling along a popular cycle route. The route took him through a car park adjacent to the St George's Sailing Club (**club**), in a direction opposite to the directional arrows painted on the pavement. He went over two speed bumps before colliding with a closed boom gate. He suffered serious injuries leading to his left leg being amputated below the knee.

The car park had been enclosed by the council by the construction of a white boom gate in 2004 to restrict access following the problem of '*hooning*' in the car park at night. The plaintiff sued both the council and the club in negligence.

Issues

The plaintiff argued the council and the club were liable for the following reasons:

1. Prior to the construction of the boom gate in 2004, the route that the plaintiff had taken was a popular high traffic route taken by cyclists every morning. Even after the carpark modifications in 2004, it remained the practice for cyclists to continue to use the boom gate entrance area as an exit way.
2. The council and the club failed to establish a safe system for the operation of the boom gate.

The council and club contended the plaintiff hit the boom gate because he was not keeping a proper look out, and that the incident was the result of an obvious risk of the dangerous recreational activity of cycling.

It was also contended that the plaintiff was contributorily negligent as he was cycling at speed through the boom gate access, against directional arrows, and failed to use alternative exit routes, posing a risk of physical harm and constituting a dangerous recreational activity.

Decision

The court held the council had a duty of care to take reasonably practical steps to ensure that the boom gate, once constructed, would not operate as or become a hazard or a trap to cyclists.

The council had failed to provide a safe system by making arrangements with the club for the opening

and closing of the boom gate with the club. The scope of the council's duty of care, required it to appropriately consider a method or scheme for the operation of the gate, and the club was under no arrangement or contract with the council in respect of the gate. In those circumstances the arrangement carried with it a risk that the gate would not be opened at 5.00am or between 5.00am and 6.00am.

The council's acts and/or omission in combination constituted the relevant set of conditions in the analysis of factual causation. Hall J found that the council's:

1. Failed to place a contractual obligation on the club in respect of the operation of the gate;
2. Failed to enhance the visibility of the boom gate thereby reducing or removing the visual trap; and
3. Failed to replace the exits for cyclists thereby preventing the occurrence of the plaintiff's accident.

It was held that there was a foreseeable risk that if the boom gate on occasions was not opened before cyclists commenced to use the cycleway, it could be a hazard. The council knew or ought to have known of this risk by the date of the plaintiff's accident, particularly in light of the fact there had been previous accidents involving the boom gate.

The risk of a cyclist colliding with the boom gate unexpectedly left in the closed position was not an obvious risk of cycling - the closed position of the gate was a visual hazard.

Hall J found that because the plaintiff believed the signs and directional arrows were in place to direct motor vehicle traffic not cyclists, and that the route was a popular one used by cyclists, the plaintiff had not engaged in any form of risk-generating activity to classify it as a '*dangerous recreational activity*' during the course of his cycling up to the boom gate

The plaintiff's failure to react in time to brake to avoid or reduce the force of impact constituted contributory negligence.

Respective liabilities were assessed as being the council at 80% and the plaintiff 20%. The quantum of damages had already been agreed at $1.16 million. A verdict was entered in favour of the plaintiff against the council (only) for $928,000.00.

The plaintiff's claim against the club failed. The club's task was limited to daily opening and closing; this limited task was assumed by the club without other identifiable responsibilities delegated by council and the club did not have contractual responsibility for risk management.

Case Note

Wooby v Australian Postal Corporation [2013] NSWCA 183

Where a contractor suffered a back injury loading a heavy parcel at Australia Post's premises and sought damages based on a duty owed to her on the same basis as if she was an employee.

The facts

The plaintiff suffered an injury to her back when she was lifting a parcel on Australia Post's premises. The plaintiff did not directly work for Australia Post, nor was she contracted by them. Rather, Australia Post contracted with V & E Transport Pty Ltd (**V & E Transport**) for the delivery of parcels from its Kingsgrove delivery centre. V & E Transport entered into an oral subcontract with the plaintiff who delivered parcels on a specific run. The subcontract required the plaintiff to attend at the Kingsgrove delivery centre each weekday morning. V & E Transport was not sued by the plaintiff, nor was it joined as a third party by Australia Post.

Australia Post had devised a system whereby parcels at the Kingsgrove delivery centre were to be delivered in large cages with partly collapsible sides, from which they were collected by subcontractors to be sorted and delivered. Employees of Australia Post weighed the parcels before they were placed into the cages. Australia Post placed a limit on the weight of parcels which subcontractors were required to handle.

The plaintiff alleged that Australia Post owed her a duty of care analogous to that owed by an employer to an employee. At first instance, the District Court rejected that submission and held that Australia Post did not owe the plaintiff a duty of care in relation to the sorting of parcels before delivery. However, Balla DCJ stated that, if she was wrong and Australia Post did owe a duty of care to the plaintiff, such a duty would be akin to the duty of care of an occupier to take reasonable care for the safety of an entrant upon the premises.

Issues

The plaintiff appealed the decision of the District Court that Australia Post did not owe her a duty of care. She also challenged the finding that there had been no breach of duty.

Decision

The Court of Appeal set aside the judgment of the District Court and found in favour of the plaintiff.

The matter was remitted to the District Court for determination of contributory negligence, quantification of damages and costs.

In determining whether a duty of care was owed, the court considered the plaintiff's relationship with Australia Post. Of relevance was the fact the plaintiff was contracted to work solely for Australia Post, wore a uniform and drove a van with Australia Post logos, and she was not exercising any particular skill or specialist expertise or training in carrying out her functions at the delivery centre. In addition, the injury occurred while the plaintiff was performing work as part a system of work devised by Australia Post. Further, it was Australia Post employees who would weigh the parcels to be delivered and place them in large cages from which they were then collected by contractors to be sorted and delivered. Also, Australia Post prohibited employees and contractors from lifting parcels weighing more than 30kgs. As such, the court was satisfied that Australia Post knew of the precise risk which materialised, namely, the risk that a contractor could suffer an injury through lifting a parcel unassisted, and found that Australia Post owed a duty of care to the plaintiff.

The court thought there was no doubt Australia Post foresaw the risk of injury to individual contractors in the event that they lifted parcels of more then 14 or 15 kilograms, as warning stickers were required to be placed on parcels over this weight and Australia Post required that they be lifted by two people.

The court then went on to consider whether such a warning was adequate in the circumstances. The court answered this in the negative. The court found that Australia Post was aware most subcontractors were individuals who were under significant time pressures to sort parcels and load vans, it was difficult to remove parcels from the cage without manual lifting and no system was available to provide for the lifting of heavy parcels.

The plaintiff's expert identified a number of precautions Australia Post could have taken including the use of trolleys with height adjustable load platforms, mechanical lifting devices or ensuring that no workers were permitted or required to manually lift any package that had been identified as too heavy to be safely lifted by an individual. The court noted that these steps all fell within the primary control of Australia Post and there was no evidence that they would place an unreasonable burden on Australian Post. As such, the court was satisfied that Australia Post was in breach of its duty in failing to take such steps.

The claim was remitted to the District Court to consider the potential assessment of contributory negligence for the claimant's failure to heed the warning label about the excess weight of the package and quantum.

The Injury Scale Values and Costs Thresholds pursuant to the Civil Liability Regulation 2014 (Qld) and the *Personal Injuries Act 2002* (Qld) have been updated as at 1 July 2015.

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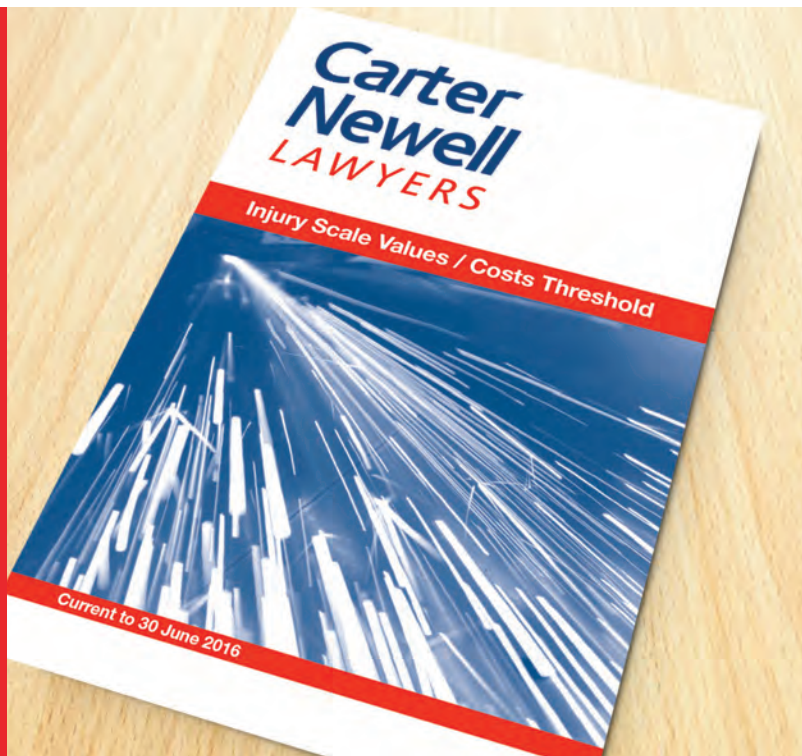

Case Note

Wright v KB Nut Holdings Pty Ltd [2013] QCA 66

Injury to persons entering premises, where entry pursuant to contract, whether risk of harm was foreseeable.

The facts

KB Nut Holdings Pty Ltd (**managers**) managed serviced apartments in Brisbane. The plaintiff and the managers entered into a contract whereby the managers agreed to let the plaintiff reside in a serviced apartment for reward. When the plaintiff arrived at the apartment on 18 April 2009 she found it to be in an unsatisfactory state of repair and cleanliness, in particular, the internal stairs were dirty and sticky and had a build up of dust, hair and fluff where the risers joined the treads. The plaintiff complained to the managers about the state of the apartment. They did not offer to have the apartment cleaned so the plaintiff volunteered to clean it herself and made this known to the managers. While the plaintiff was cleaning the stairs, her hand was pierced by a 2 cm needle which was wedged in the crease at the back corner of the stairs. The needle stick injury caused her psychiatric impairment.

Cleaners contracted by the managers gave evidence that they did a standard clean of the apartment on 12 April 2009, which involved a three step procedure of vacuuming, mopping and wiping the stairs, without observing the needle. The Primary Judge inferred that the needle was sitting flatly in the crease between the tread and the riser. He thought it probable that the cleaners had followed their standard cleaning procedure and, as the needle was not protruding, the standard cleaning procedure would not have led to any observation of the needle. As such, the Primary Judge held that the risk of harm was not foreseeable as it was a risk of which the managers did not know or ought not reasonably have known.

The plaintiff appealed the Primary Judge's decision.

Issues

1. Whether the risk of harm to the plaintiff was foreseeable.
2. If the risk was foreseeable, what precautions a reasonable person in the managers' position would have taken.

Decision

The court thought it difficult to reconcile the Primary Judge's acceptance of the plaintiff's evidence as to the state of the apartment with his finding that cleaners followed their standard cleaning procedure. If the standard cleaning procedure had been followed, the court thought it was unlikely the apartment would have been in the filthy state the plaintiff found it in. Accordingly, the court did not accept the evidence of the cleaners that they did a standard cleaning job and thought that as the needle was dislodged by the plaintiff's cleaning, it was likely to have been dislodged or detected by a cleaner using normal skill, diligence and equipment.

The court therefore held there was a foreseeable risk of injury to the plaintiff of which the managers knew or ought to have known. The risk was that the plaintiff would be cut by or impaled as a result of general waste. The build up of filth in the apartment increased the risk that things such as shards of glass, safety pins and needles would lie unobserved until stood on or touched by an occupier. The court thought it could also be anticipated that an occupier would be likely to walk around the apartment bare footed or that they might clean the apartment due to its poor state. A reasonable person therefore, in the position of the managers, would have taken the precaution of properly cleaning the premises to avoid these risks. The court considered such cleaning would be no more then deemed necessary by the managers to attract customers and no more than a user of the apartment would consider acceptable.

Case Note

Du Pradal & Anor v Petchell [2014] QSC 261

Action in negligence brought against the driver of a speedboat who drove over the first plaintiff while he was diving, causing multiple significant injuries. The second plaintiff brought a claim of per quod servitium amisit for loss of the first plaintiff's services as an employee.

The facts

Mr Du Pradal (**plaintiff**) was diving in a popular dive spot approximately 30 meters away from anchored boats near Cape Moreton, Queensland. He was an experienced diver and his friend Mr Willsford was in the plaintiff's boat at the time of the accident, on which the plaintiff had displayed a dive float to warn other boats he was in the water.

Immediately prior to the accident, the plaintiff was floating in the water with his face downwards but with his head and shoulders out of the water. He was unable to hear the defendant's boat. Mr Willsford observed the defendant's boat approaching '*quite fast*' from 100 meters away. Mr Willsford waved his arms and yelled at the people on the boat to attract their attention. He noticed them looking at and pointing to the plaintiff's dive float. He was not watching when the plaintiff was struck by the boat but he heard the sound of the collision.

The defendant was driving the boat at approximately 13 miles per hour, equivalent to 11.3 knots which exceeded the 6 knot speed limit imposed when in such close proximity to anchored boats. The defendant claimed to have spotted the dive float and at the last second he saw '*something bob up*' and felt a thud. After the thud, the defendant put the boat into neutral, slowed down and saw the plaintiff in the water.

The defendant denied liability for the accident and sought to reply on contributory negligence by the claimant. The defendant also brought a third party proceeding against Mr Willsford, claiming that the accident was caused or contributed to by his negligence in failing to intervene to protect the plaintiff.

The second plaintiff, Mr Flynn, was the plaintiff's employer who claimed damages for loss of the plaintiff's services as a result of his significant injuries. Mr Flynn claimed he was financially incapable of paying the replacement labor and therefore his business had become less profitable since the plaintiff's accident. The defendant claimed that loss of profits was an inappropriate measure of damages in an action for employee's services and therefore the action should be dismissed.

Issues

Was the defendant negligent in speeding and failing to keep a proper lookout.

Did the plaintiff contribute to his own injuries by failing to take the necessary precautions.

Did Mr Willsford owe the plaintiff a duty of care and was this breached.

Could the plaintiff's employer claim damages for loss of employee's services.

Decision

The court found that the accident was caused by the defendant's breach of the duty of care he owed to the plaintiff. The defendant was considered to have been ignorant to the fact he was driving his boat in a popular dive spot and failed to keep a proper look out. He was found to have been exceeding the prescribed speed limit. Although the defendant saw the orange dive float, he did not have regard to the diver in the vicinity of the dive float and did not slow down or navigate away. The risk or harm to a diver in the water at a popular dive spot and in the vicinity of anchored recreational boats was a risk of which the defendant ought reasonably to have known and the risk was not insignificant. The defendant was liable for the accident.

The court held that the impact of the plaintiff's multiple injuries was so severe that the maximum Injury Scale Value (**ISV**) for the dominant injury, an ISV of 30, was inadequate in assessing general damage. Therefore, the court applied a 33.33% uplift resulting in an ISV of 40 and $68,000 in general damages. The plaintiff's age was relevant in this finding, as at the date of the accident he was almost 65 but was exceptionally fit and healthy. The total assessment of damages awarded for the plaintiff was $675,203.

The court held that the plaintiff did not cause or contribute to the accident through contributory negligence. The plaintiff did not fail to take precautions and was entitled to rely on the basis that any boat would be navigated as to avoid the dive float and the closely surrounding area where it would be likely a diver would be attached.

As Mr Willsford was not responsible for supervising the plaintiff while he was diving, no duty of care was imposed on him. Even if he did owe the plaintiff a duty of care, the court found that this would not have been breached as Mr Willsford tried to attract the attention of the defendant and his passengers. It would have been unreasonable to suggest that he should have been trying to warn the plaintiff at the same time.

The second plaintiff's claim for loss of employee's services was dismissed. The court considered that the action for the loss of the plaintiff's services was for the notional cost of replacement labor at $70,000, although no substitute employee was employed. The second plaintiff claimed the amount of $40,000 per annum, which was the $70,000 per annum for replacement labor save the wages paid to the plaintiff at $30,000 per annum. The second plaintiff also claimed $7,000 for fitting out his new studio, a task the plaintiff would have done had he not sustained the injuries. The court applied *Barclay v Penberthy* (2012) 246 CLR 258 in finding that damages for the action *per quod servitium amisit* were confined to the cost of substitute labor and did not include profits lost. To allow for loss of profits was considered to be a substantial departure from the general principles concerning the recovery of economic loss in tort. On this basis, the second plaintiff's action could not succeed.

Case Note

McDermott v Woods [2015] NSWDC 27

Where a horse riding instructor was sued by a lady who suffered an ankle injury when she fell off a horse.

The facts

On 26 March 2010, Elizabeth McDermott (**plaintiff**) was injured during a horse riding lesson with Milea Woods (**defendant**). The plaintiff was a relatively inexperienced rider and was riding her own horse, Star, at the time.

During the lesson, the plaintiff experienced problems controlling Star's behavior when transitioning from a trot to a canter. Upon witnessing Star's misbehaviour, the defendant allegedly called the plaintiff over and tightened Star's bridle to the tightest notch, despite having been advised that Star did not like tight equipment over her nose and mouth. The plaintiff alleges that the defendants act of tightening the bridle caused Star to misbehave resulting in the plaintiff losing control and falling from the horse and injuring her left ankle.

Issues

In his judgment, Bozic DCJ considered the following factual issues:

1. Whether the plaintiff signed a waiver and release form prior to having any lessons.
2. Whether the defendant knew of the horse's sensitivity to tight equipment around its nose and mouth.
3. Whether the defendant did in fact tighten the bridle during the lesson and, if so, whether the tightening of the bridle was the cause of the accident.
4. Whether the risk was an inherent or obvious risk and whether the plaintiff voluntarily accepted the risk.
5. Whether the plaintiff contributed to the occurrence or the nature or extent of her injury.

Decision

Waiver form

The defendant argued that it was her general practice to have students sign waiver forms, or if the students were under the age of 18, the forms were signed by the parents of the students. The defendant was not able to locate or produce a waiver form signed by the plaintiff, nor could she locate the forms allegedly signed by the plaintiff on behalf of her children. the defendant explained that in 2009 and 2010, providing

riding lessons was not a business, rather it was a small '*hobby*' and she did not keep accurate records.

The judge was unable to accept that the defendant had an invariable practice of having students sign the waiver and release forms and accepted the plaintiff's evidence that she did not sign a waiver form. This finding was based on the defendants evidence about the keeping of records generally for the '*hobby*' which the court found suggested that record keeping and attention to paperwork was virtually non-existent.

Knowledge of the horse's sensitivity to tight equipment

Ms Smithers, the former owner of Star, gave evidence that she had informed the defendant that Star had an issue with anything that was under her chin and would react by throwing her head about and would be unwilling to walk forward. The judge accepted this evidence.

The judge also accepted the plaintiff's evidence that there was an incident during a lesson with the defendant which occurred prior to the incident in which Star exhibited sensitivity to equipment being placed around her nose and mouth.

The plaintiff alleged that there were numerous conversations between herself and the defendant about Star's sensitivity to equipment being placed around her nose and mouth. The judge did not accept that these conversations had occurred. Rather, he was only satisfied that, in the lesson, the plaintiff had demonstrated to the defendant that she had fitted the bridle loosely on Star and the defendant had agreed with such a fitting.

Whether the defendant's actions caused the subject incident

The judge accepted the plaintiff's account of what took place on the date of the incident, finding that it was corroborated in significant respects by the evidence of another witness, Ms Dunn, who observed that Star's bridle was loose before the lesson and very tight and difficult to remove after the lesson. Further, Ms Dunn also corroborated the plaintiff's account that the defendant was standing inside the arena and that, at one point, the plaintiff was stationary on the horse while the defendant was standing at Star's head.

The judge considered ss 5B, 5C and 5D of the *Civil Liability Act 2002* (NSW) and found that the risk was plainly foreseeable. The defendant herself agreed in cross-examination that the way in which equipment is put on a horse is important as far as safety is concerned and is something that a qualified instructor should pay attention. the defendant also agreed that, if equipment is tightened to the extent that it causes the house to feel discomfort, it creates a foreseeable risk of injury.

The judge found that the risk was not insignificant and that a reasonable person in the position of the defendant would have taken practical precautions against the risk occurring, such as discussing the matter with the plaintiff when tightening the equipment gradually by one increment at a time, suggesting the plaintiff dismount when the equipment was being tightened and lunging the horse (walking alongside a horse to lead it) until the defendant was satisfied that the horse was comfortable with the adjustment.

The judge found that the defendants act in tightening the bridle was the cause of the subject incident. Prior to the incident occurring, there were no behavioural problems with Star and she obeyed all commands and did not give any indication that there was anything wrong with her equipment. It was only after the defendant tightened the equipment that Star started to misbehave.

Whether the plaintiff voluntarily accepted the risk

The defendant argued that the plaintiff knew of the horse's propensity and assumed that the defendant had been advised by Star's former owner of the horse's propensity. In making these assumptions, the plaintiff voluntarily assumed the risk of fitting the bridle and permitting the defendant to tighten the bridle without anything more than a request that it not be tightened.

The judge considered the defence of a voluntary assumption of a risk and held that the plaintiff did not fully appreciate and accept the danger. She did not know the extent that the defendant had tightened the bridle and could not have been said to freely and voluntarily agree to and accepted the risk.

Contributory negligence

The defendant argued in the alternative to a voluntary assumption of risk that, if the risk of injury was not adequately in the plaintiff's mind, she was nevertheless guilty of contributory negligence and any damages awarded should be reduced by 50%. The judge was of the view that the plaintiff should have expressly raised Star's sensitivity to tight equipment around the mouth and nose of the horse with the defendant.

Her failure to raise this issue was found to constitute a lack of care on the part of the plaintiff. Any such lack of care did not, however, cause or contribute to the incident in the judge's view. the defendant was aware of Star's sensitivity as a result of a conversation with the previous owner and she would not have done anything differently had the plaintiff expressly informed her of Star's sensitivity.

The judge therefore did not reduce the plaintiff's damages award for contributory negligence.

Judgment

The judge concluded that the defendant was an experienced instructor with knowledge of the horse's sensitivity to tight equipment around its mouth and nose, yet proceeded to tighten the bridle to its tightest notch during a lesson with a rider of limited experience.

As a result, it was found that the defendant acted negligently and was wholly liable for the plaintiff's injuries. The plaintiff was awarded judgment in the amount of $334,734 plus costs.

Staff profile Insurance

Peter Dovolil

Special Counsel

Peter Dovolil specialises in insurance claims with an industrial relations, retail and employment focus, acting for insurers and major corporates. In addition to this he has conducted defences of public and product liability claims for a number of major national and international insurers, including agribusiness claims, together with advising on indemnity issues/policy interpretation of policy wordings and endorsements.

Peter has particular experience in the defence of claims arising from incidents at or about the workplace, in personal injuries claims involving labour hire employees and contractors, as well as complex multi-party contractual claims following personal injury on construction or mining sites. Peter regularly provides advice on recovery prospects and where appropriate prosecutes recovery actions on behalf of insurers and has extensive knowledge of the *Civil Liability Act and Regulations 2003* (Qld), *Personal Injuries Proceedings Act 2002* (Qld), *Workers' Compensation and Rehabilitation Act 2003* (Qld) and the interaction between those acts in multi-party claims involving the employer.

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Case Note

BlueScope Steel Ltd v Cartwright [2015] NSWCA 25

The court of appeal considered the scope of the duty owed by a manufacturer to a truck driver after changing the design of goods being carted, and whether the alleged breach of this duty or the excessive speed of the first respondent was the cause of the accident.

The facts

Mr Sydney Cartwright sustained a serious injury while driving a prime mover loaded with a container holding two 7.3 tonne steel coils and one 6.4 tonne steel coil. An accident occurred while Mr Cartwright was negotiating a left hand bend during which the trailer capsized to the right, onto the wrong side of the road, pulling the prime mover with it. Mr Cartwright's employer, Mannway Logistics Pty Ltd (**Mannway**) was contracted to transport the coils on behalf of the appellant, BlueScope Steel Ltd (**BlueScope**) who had manufactured the coils.

Shortly before the accident, BlueScope, without informing Mannway, began manufacturing coils with an additional timber runner underneath. This change was significant, as it meant that the method of loading employed by Mannway no longer ensured that the coils would remain stable in the container during transport. Previously, Mannway forced wooden wedges underneath the coils, in accordance with BlueScope's guidelines, to prohibit them from moving. However, as a result of the changed design, the wooden wedges were no longer high enough to come into contact with the coils.

Mr Cartwright succeeded against both BlueScope and Mannway at trial and was awarded $926,000 in damages for the alleged breaches. That decision was appealed by BlueScope, with cross-appeals made by Mr Cartwright and Mannway's insurer.

Issues

There were three key issues considered on appeal:

1. Whether the Primary Judge erred in failing to make a finding as to the speed at which the prime mover was travelling at the time of the accident.
2. Whether the Primary Judge erred in failing to accept opinion evidence of the parties' expert engineers.
3. Whether BlueScope was in breach of any duty owed to Mr Cartwright and, if so, how liability ought to be apportioned between BlueScope and Mannway.

Decision

The New South Wales Court of Appeal held that:

1. The accident was caused by Mr Cartwright travelling at an excessive speed;
2. BlueScope was not in breach of the duty of care that it owed Mr Cartwright; and
3. Mr Cartwright was entirely responsible for his own injuries.

Cause of the capsize

It was implicit in the decision reached by the trial judge that the court concluded the load had shifted, thereby causing the trailer to capsize due to inadequacies in the placement of the wooden wedges. In arriving at this conclusion, Her Honour relied upon the evidence of Mr Cartwright who stated that he heard and felt '*a loud bang and a thud'* before the trailer capsized.

BlueScope contended that the evidence before the Primary Judge could not support a conclusion that the relevant coils shifted position and toppled prior to the capsizing of the trailer. It argued that, in order to reach a determination as to whether the load shifted before the trailer capsized, the speed at which the vehicle was travelling must be known and Her Honour made no such finding.

The Court of Appeal found in favour of BlueScope on this issue, finding there was considerable doubt as to the speed at which the vehicle was travelling when the trailer capsized as it was unclear whether Mr Cartwright was travelling at 55km or 60km per hour at the time of the accident. Both engineers giving evidence agreed if the vehicle was travelling over 70km per hour, the trailer would have rolled on the bend at the accident site before the load would have shifted or toppled, even assuming BlueScope's guidelines had been complied with. Conversely, the load would not have shifted or toppled if the vehicle was travelling at a speed of 55km per hour, even if the wedges were not in contact with the pallets on which the coils were mounted.

The Court of Appeal went on to find that Mr Cartwright's evidence was equivocal. The '*loud bang and a thud*' allegedly felt and heard by Mr Cartwright could have been the result of the coils hitting the side of the container as the trailer rolled, or *after* it began to roll, as opposed to being, as the Primary Judge found, an indication that the load shifted *before* the trailer began to roll. The sounds heard by Mr Cartwright could be explained by multiple scenarios.

Consequently, the Court of Appeal determined that Mr Cartwright had failed to establish on the balance of probabilities, that improper or incorrect packing, namely by use of the wedges, caused the trailer to capsize. The expert evidence that the accident would not have occurred unless the vehicle was travelling at a speed in excess of the limit applicable at the accident site was accepted.

Scope of BlueScope's duty

The Court of Appeal found that BlueScope was not in breach of any duty of care it owed to Mr Cartwright. Although it failed to notify Mannway about the change to the coils, the guidelines it had previously provided to Mannway made it clear, by use of the word '*forced*', that the wedges used in the loading process were required to make physical contact with the pallet or coils.

The court therefore found that Mannway should have adapted its loading process to take into account the change to the coils and to ensure the wedges still came into contact with the coils.

However, this finding did not have a material impact on the claim as the Court of Appeal had already found that it was Mr Cartwright's excessive speed that caused the accident, rather than Mannway's failure to adapt its loading process.

Apportionment and the cross-appeals

Since Mr Cartwright's claim against Mannway was based on its failure to adapt the loading process and the Court of Appeal found this failure did not cause the incident, Mr Cartwright's case against Mannway also failed.

Interestingly, the Court of Appeal indicated that a broader claim against Mannway may have been successful, such as a claim based on failure to provide adequate training in relation to driving trucks around corners at an appropriate speed.

Case Note

Grima v RFI (Aust) Pty Ltd [2014] NSWCA 345

Consideration of issues concerning equal shared liability and contributory negligence.

The facts

Mr Carmel Grima (**plaintiff**) was an employee of Allied Overnight Express Pty Ltd (**Allied**). The plaintiff was responsible for unloading trucks containing rolls of carpet underlay which had been loaded by the defendant RFI (Aust) Pty Ltd (**RFI**). The plaintiff was unloading a pantechnicon truck when two unsecured rolls of carpet fell on him, causing serious injuries.

Generally, the carpet rolls would be stored vertically and be visibly supported by four metal bars. The plaintiff said that on occasion, there would be extra rolls of carpet stored horizontally on top of the vertical rolls. If there were horizontal rolls they would be supported by an additional fifth metal bar to keep them in place and the extra rolls would be visible and pressed against the back doors.

Immediately before the incident, the plaintiff says he complied with Allied's standard procedure which he and his fellow coworkers had been instructed to use for unloading. The plaintiff opened the doors of the truck slightly ajar and visually inspected the load from the ground. He noticed there were only three bars in place so acted on the usual assumption that the absence of a fifth bar meant there were no horizontal rolls stored on top of the vertical ones. He was concerned about how he could unload the rolls with only three supporting bars, so he stepped away, seeking to ask his supervisor, when two of the horizontal rolls fell on him.

At trial, the New South Wales Supreme Court determined that RFI and Allied were to share equally in liability for their negligence. RFI was directly responsible for causing the plaintiff's injuries by failing to load the truck in a safe manner consistent with proper practice. Allied, as the plaintiff's employer, was held to be liable for failing to properly instruct and require the plaintiff to conduct thorough inspections of loads in anticipation that there may be loose rolls of carpet underlay. The plaintiff was not found to be guilty of contributory negligence. Damages payable by RFI to the plaintiff were assessed under the *Civil Liability Act 2002* (NSW) at $5.75 million. In contrast, under the *Worker's Compensation Act 1987* (NSW), damages payable by Allied to the plaintiff were assessed at $330 000.

On appeal, the plaintiff argued that RFI was solely responsible for the accident and therefore sought to reduce the percentage of damages restricted by the provisions of the *Worker's Compensation Act 1987* (NSW). Allied defended the trial judge's finding of equal apportionment of liability between itself and

RFI. RFI did not dispute its liability, but submitted that a much greater share should be attributed to Allied as the plaintiff's employer. RFI also claimed that the plaintiff was guilty of contributory negligence and that damages should be reduced accordingly.

Issues

1. Was the trial judge's finding of equal shared liability between Allied and RFI appropriate in the circumstances.
2. Was the plaintiff guilty of contributory negligence.

Decision

The court upheld the trial judge's decision that both RFI and Allied were negligent and contributed to the accident that caused the plaintiff's injuries. Relying on RFI's own evidence, the court found that the fact the truck left RFI's premises with only three support bars present represented a '*complete failure of the proper practice*'. RFI's personnel were aware of the particular function of the fifth bar in restraining horizontal rolls and RFI's failure to administer this was a very significant departure from a safety procedure.

Allied was also negligent by failing to provide a safe system of work and having undertaken an inadequate inspection procedure which did not deal with the possibility that loose rolls may not be visible from immediately below. If an inspection was conducted from a higher vantage point, the plaintiff would have been able to see the risk presented by the loose carpet rolls.

The court deviated from the trial judge's finding, however, by deciding that RFI was more responsible as it was the creator of the risk of harm by loading the vehicle as it did. It created a hidden danger masked by a false sense of security engendered by the absence of the fifth support bar. Allied was found to have then consummated the hazard which was put in place by RFI through its deficient system of inspection. As such, the Court held that the appropriate apportionment was 75% to RFI and 25% to Allied.

The court upheld the trial judge's finding that the plaintiff was not guilty of contributory negligence. The plaintiff followed procedures consistent with his employer's system of work and the method of unloading he had employed previously without incident. RFI created a hidden danger and the plaintiff did not fail to meet the standard of reasonable care required for his own protection.

Case Note

Schonell v La Spina, Trabucco & Co Pty Ltd [2013] QCA 324

Where an employee suffered injury due to falling from an allegedly defective ladder and the Court of Appeal considered whether the system of inspection implemented by his employer was reasonable and adequate.

The facts

The appellant was employed by the respondent as a block layer. The appellant had been working from a platform which was made up of aluminum planks set on trestles. The appellant then stepped from that platform onto an adjacent ladder. This ladder gave way and as the appellant attempted to return to the platform, he injured his knee.

Immediately following the incident, it was apparently observed that the ladder had a defective brace and it was alleged that this defect in the ladder caused the incident. However, the appellant was not successful in establishing that the brace was defective prior to the incident.

The appellant alleged that the employer was negligent as it failed to conduct proper and adequate inspections of the ladder which would have identified any defect which caused it to collapse.

In respect of the employer's system of inspection:

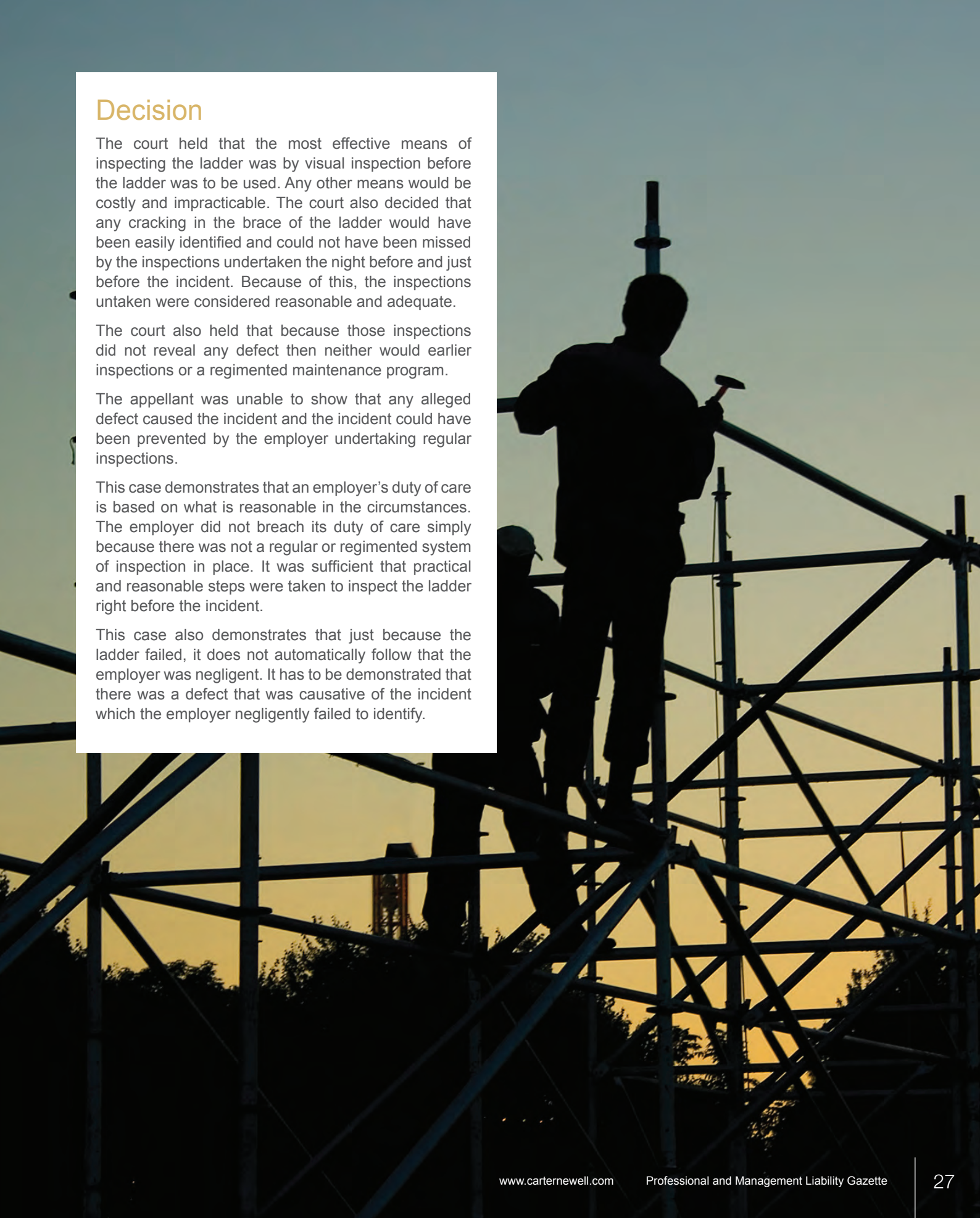
1. The employer did not have a regular system of inspection in place.
2. Another employee visually inspected the ladder the night before the incident as he was setting it up.
3. Another employee also gave the ladder a brief visual inspection before using it.

Neither of these visual inspections revealed any defect.

Issues

The court considered the following issues:

1. What was reasonable and adequate in respect of inspections of the ladder.
2. Whether any defect in the ladder was discoverable by any reasonable inspection that the employer ought to have performed.
3. Whether a defect in the ladder caused the appellant's fall.



Decision

The court held that the most effective means of inspecting the ladder was by visual inspection before the ladder was to be used. Any other means would be costly and impracticable. The court also decided that any cracking in the brace of the ladder would have been easily identified and could not have been missed by the inspections undertaken the night before and just before the incident. Because of this, the inspections untaken were considered reasonable and adequate.

The court also held that because those inspections did not reveal any defect then neither would earlier inspections or a regimented maintenance program.

The appellant was unable to show that any alleged defect caused the incident and the incident could have been prevented by the employer undertaking regular inspections.

This case demonstrates that an employer's duty of care is based on what is reasonable in the circumstances. The employer did not breach its duty of care simply because there was not a regular or regimented system of inspection in place. It was sufficient that practical and reasonable steps were taken to inspect the ladder right before the incident.

This case also demonstrates that just because the ladder failed, it does not automatically follow that the employer was negligent. It has to be demonstrated that there was a defect that was causative of the incident which the employer negligently failed to identify.

Case Note

Sharp v Emicon Pty Ltd [2014] NSWC 1072

Employer found liable for failing to provide site specific and comprehensive instructions in how to safely perform duties, even for the most obvious risks.

The facts

The plaintiff was a carpenter working on affixing aluminum guttering to the fascia boards of a building on a scaffolding platform five metres above ground. In order to retrieve a tape measure that had dropped into the eave space, the plaintiff stood upon a horizontal scaffolding rail. In the course of doing this, the rail moved and the plaintiff lost his balance, causing him to fall head first through unlined roof timbers into a stairwell void and onto a concrete floor. He sustained spinal injuries and sued Emicon, the occupier of the site, Coastwise, his employer (**employer**), and Staiger, the company that erected the scaffolding, for damages in negligence.

Issues

Plaintiff's inconsistent evidence

There was a factual dispute about whether the plaintiff was standing on the top or the middle rail of the scaffolding. The plaintiff originally stated that he had stepped on the middle rail, however after viewing photographs demonstrating the unsecured top rail, had retracted the statement. Ultimately the court found the plaintiff to be a witness of truth and held that his versions of events were reasonable and not *'a self serving shift in his evidence borne of a recognition or realisation that it favoured his case'.*

First and third defendant's claims

The claim against Emicon as the occupier was dismissed by consent of the parties. The claim against Staiger, the scaffolding company, was dismissed by the court on the basis that it was satisfied that the scaffolding had been altered or amended following its original erection by Staiger and as such could not be proved that the company left the scaffolding in an unsafe or dangerous condition.

However, the issue was whether the employer had failed to take proper care of the plaintiff in the course of his employment.

Did the employer fail to maintain a safe place of work?

It was determined that the employer had failed to maintain a safe place of work for employees,

demonstrated by way of the lack of handrails on the scaffolding, the gaps in between the scaffold deck and the building structure. In addition, during cross-examination, it became clear that the employer had failed to instruct employees as to the correct use of the scaffolding and failed to inspect and examine the scaffolding to ensure its safety.

Damages

At 30 years of age, the court calculated a weekly loss of $1,000 for 37 years at a discount rate of 5% producing 893.6 x $1,000 or $893,600. Taking account of vicissitudes at 15%, the plaintiff's loss of future income was assessed at $807,205.70. That sum reduced was reduced by 15% for contributory negligence to $686,125.

Case Note

Verney v The Mac Services Group Pty Ltd [2014] QSC 57

Whether employer failed to take reasonable care for employee's safety, assessment of future economic loss where intermittent work history and pre-existing condition.

The facts

Mr Verney (**plaintiff**) who was 29 years old at the time of this incident suffered an injury to his back in a workplace accident in May 2011. The plaintiff was employed by The Mac Services Group (**MSG**) as a laborer at its camp at Coppabella, Queensland. MSG provides construction and other services to mines in Central Queensland.

On the day of the incident, the plaintiff says he was using a wheelbarrow to move blue metal crusher dust from a stockpile to another area where the dust was to be deposited. The plaintiff gave evidence that, as he was pushing the wheelbarrow along the pathway, it tipped to the left. The plaintiff then tried to compensate by pushing down his right hand but this caused him to lose his balance and he fell down an embankment, injuring his back. The plaintiff conceded that he did not know what caused the wheelbarrow to tip.

The plaintiff alleged that there had been complaints by employees to MSG prior to the incident about tools, including wheelbarrows. In particular, he said another employee, Matthew Wicht, made a complaint regarding the poor condition of the wheelbarrows at a toolbox meeting three weeks prior to the incident. Mr Witch gave evidence that, a few days after this incident, he assisted in disposing of a number of broken wheelbarrows that had been on the site. He inspected the wheelbarrow used by the plaintiff and said a bracket holding the wheel had broken and been re-welded together and the weld had since broken. Mr Witch described a history of a failure and repairs to the wheelbarrows supplied by MSG and agreed with the plaintiff that there had been complaints about the condition the wheelbarrows and other tools at toolbox meetings.

The court also heard evidence from MSG's safety officer, Gareth Jones. He could not recall receiving any complaints with respect to the wheelbarrows at toolbox meetings but said that, from time to time, machinery was used which was faulty and the attitude at site was to '*get on with the job*', notwithstanding that equipment may be faulty. MSG's regional construction supervisor, John Maloney, also gave evidence that, at the time of the incident, there was urgency to have the works completed quickly.

Issues

1. Whether the incident occur as alleged by the plaintiff.
2. Whether MSG breached its duty of care by supplying the wheelbarrow to the plaintiff.
3. Whether the breach of duty was causative of the incident.

Decision – liability

The court did not consider the plaintiff to be a reliable historian and noted that, at different times, the plaintiff gave contradictory accounts as to how the incident occurred. However, the court concluded that the evidence of the other witnesses supported the plaintiff's claim. The court accepted the direct evidence of Mr Wicht that the repaired weld on the wheelbarrow broke, causing the bracket supporting the tyre to fail and the plaintiff to lose control of the wheelbarrow.

The court then went on to consider whether MSG breached its duty of care by supplying the claimant with the wheelbarrow.

The fact that the wheelbarrow had been repaired prior to its use by the plaintiff did not necessarily lead the court to the conclusion that MSG had breached its duty of care. However, the court accepted the evidence of the plaintiff and Mr Wicht that the wheelbarrows and other tools were defective and complaints had been made about them. The court also put weight on the evidence of Mr Jones and Mr Maloney that there was pressure on employees to complete the job and employees would be allowed to use faulty equipment to meet their deadlines.

The court noted that MSG did not call any evidence to show that they had followed up complaints about the wheelbarrows or that it had a system for checking or monitoring tools and equipment such as wheelbarrows in place. It also did not lead any evidence that, if repairs were carried out on the wheelbarrows, they were done by qualified tradesmen.

In the absence of any evidence that the plaintiff was using the wheelbarrow in an unsafe manner, for example by overloading it or performing unsafe maneuvers, the court concluded that MSG breached its duty of care and caused the plaintiff's injury and subsequent loss.

Quantum

The plaintiff gave evidence of a history of illness including depression, bipolar, time in rehabilitation centers and illicit drug use including the continual use of cannabis. He had an intermittent work history with periods of unemployment. He was working full time for MSG at the time of the incident, but was unemployed at the time of trial. The plaintiff had a limited education and trade but was qualified as a sheet metal worker who could preform some boilermaker and laboring tasks. His intention prior to the incident appeared to be to continue working as a sheet metal worker. The court accepted the evidence of Dr Labrom that the plaintiff was suffering from a pre-existing back condition and there was evidence of disc degeneration at the time of the incident and that his pain and suffering could be attributed in part to the injury and also partially to the pre-existing condition.

The court was satisfied that the plaintiff's injury caused a loss of his capacity to earn income. The plaintiff was earning $1,700 net per week at the time of the incident, however the project the plaintiff was working on was finite and as such, the court allowed past economic loss for one year. For the remaining 1.8 years the court allowed a loss of $1,000 net per week (less the amount earned while working in his parent's business).

With respect to future economic loss, the court accepted that the plaintiff's assumed earning capacity was between $900 to $1,200 net per week. The court proposed that future economic loss be calculated in one of two ways:

A loss of $350 net per week until age 67 discounted on the 5% tables; or

A loss of $500 net per week until age 45 (when Dr Labrom thought the plaintiff would begin to suffer significant symptoms from his pre-existing back injury), plus a loss of $250 for the remaining 20 years.

Both of these methods provided a similar figure which the court then rounded up to allow for the hypothetical possibility that the plaintiff would have enjoyed earnings at a higher rate than those used in its calculations given the potentially high earnings a qualified boilermaker could earn in central Queensland.

Overall the court assessed damages in the sum of $585,767.78.

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