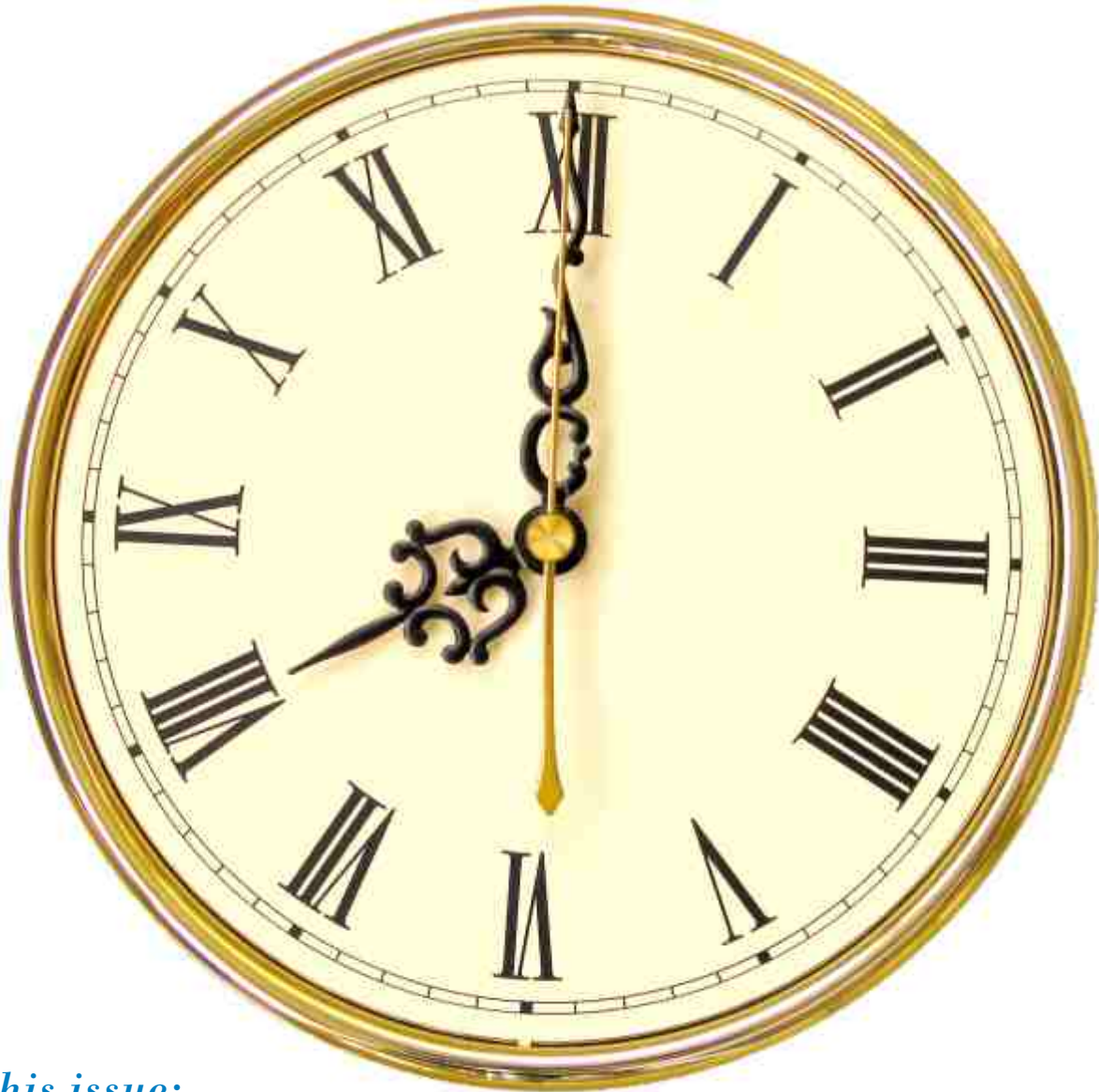


The Queensland Law Society

JOURNAL

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In this issue:

-
- *Property Agents and Motor Dealers Act* – An update
 - An occupier's potential liability for the criminal acts of a third party
 - A clear view on assessing damages in 'no transaction' cases
 - Obvious risks in the workplace
 - Heads of damage in spinal and acquired/traumatic brain injury claims in Queensland
 - Heritage, character & Brisbane City Plan 2000 – Identification, regulation & listing
-

mission statement

‘The Queensland Law Society Journal is a refereed publication containing articles of high legal scholarship relevant to Queensland practitioners. Submissions from both academic and non-academic writers are welcome.’

Welcome

Welcome to first online edition of the relaunched Queensland Law Society Journal.

The first issue of the Journal was in July, 1971, and it continued as Queensland’s premier legal publication until 1996 when, after a review of the Society’s publications, it was decided to cease publication.

By then, Proctor had become prominent as the Society’s main tool for communication with its members and others involved in the state’s legal profession.

Today, Proctor continues in this role, but more strongly focussed on the interests of members, creating an opportunity for the return of the Journal.

Other factors, too, make it a timely revival. The economies of online publication make it cost-effective to offer material online; the recent arrival of compulsory professional development underscores the need for educational resources such as the Journal; and, of course, the need for practical, up-to-date information for practitioners is greater now than ever before.

Today, the QLS Journal follows its original mission – to provide members with serious articles of contemporary interest – with six detailed pieces that will be of practical use to Queensland practitioners.

This first edition will be available to all visitors to the QLS web site. Future editions will be available at no cost to QLS members via their web site log-in and other interested parties via subscription. To offset some of the cost, advertising space will be available in the Journal to interested parties.

Today’s Internet technology also means the Journal will be presented in a convenient form for practitioners to access – there will be a choice of downloading the entire Journal as a single PDF, or as PDF files of individual articles, depending on the viewer’s interest.

Articles will be chosen for their high level of legal scholarship and will be peer reviewed to ensure that they are of the highest standard.

I commend the new QLS Journal to you, and hope you will find it of both interest and benefit.

*Rob Davis,
President, Queensland Law Society*

PROPERTY LAW

***Property Agents and Motor Dealers Act* – An update**

Peter Mackey provides practitioners with a practical toolkit for avoiding some of the problems created by this legislation.
See page 5 or click [here](#).

PERSONAL INJURIES

An occupier's potential liability for the criminal acts of a third party – How far should the law go?

In general, occupiers have not been held responsible for the criminal acts of a third party, but there are occasions when a departure from this fundamental principle may be considered. David Jesser explains.
See page 11 or click [here](#).

CASENOTE

In a nutshell – A clear view on assessing damages in 'no transaction' cases

Steve Bonutto says that the decision of Chesterman J in *Moloney & Anor v Bells Securities Pty Ltd & Ors* [2005] QSC 013 provides a concise analysis and application of the assessment of damages in 'no transaction' cases.
See page 20 or click [here](#).

CIVIL LIABILITY

Obvious risks in the workplace – A consideration of the principles to be applied where employees/contractors engage in risk-taking conduct

Peter Mylne looks at the question of risk in the workplace and considers the differences there may be if it involves contractors rather than employees.
See page 23 or click [here](#).

DAMAGES

Heads of damage in spinal (paraplegic & quadriplegic/tetraplegic) and acquired/traumatic brain injury claims in Queensland

Peter Sacre reviews the guiding authorities and method of assessment of damages in catastrophic claims.
See page 33 or click [here](#).

HERITAGE LAW

Heritage, character & Brisbane City Plan 2000 – Identification, regulation & listing

Chris Robertson provides a comprehensive guide for any practitioner dealing with the Brisbane City Council on a heritage issue.
See page 45 or click [here](#).

Guidelines for QLS Journal contributors

Articles for the QLS Journal are selected for potential publication based on topicality and their relevance to practitioners.

Each article should be accompanied by a 50-100 word abstract summarising the main points and noting the relevance of the material included in the article for Queensland practitioners.

Writers should provide a head-and-shoulders photograph (jpg, tif, eps file or hard copy print) and biographical information with the article.

Feature articles should not exceed 5000 words, though longer articles may be considered. Case notes should not exceed 2500 words.

Always write 'less' rather than 'more'.

- Plain English style is required.
- Articles should be in the third person.
- Convert measures to metric, and money values to Australian dollars.
- Italicise the names of Acts, and names of cases.
- Headings and subheadings should be in lower case; use bold to identify.
- Use double quotation marks.
- Use numerical (1,2,3...) endnotes rather than footnotes.
- When referring to other publications, list author's name, title, vol. no., publisher, year, page.
- Email your article to journal@qls.com.au. Don't forget to include the abstract and photograph!

Once approved by the QLS Journal committee, articles are peer-reviewed and, in some cases, may require amendment prior to publication.

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by Peter Mackey

The property industry has undergone rapid free-market changes, but administratively, dog-fights occur because of the current legislation. The position is that the marketing and processing of real estate sales is now highly regulated.

This presentation has been prepared from a lawyer's perspective and the best way to approach the subject is to give you a practical tool kit for avoiding some of the problems which have been created by the legislation.

I have dealt with the task in the following way:

- Overview
- Examination of the Act / identification of inherent problems
- Significant reference to the Court of Appeal decision in *MNM Developments Pty Ltd v Gerrard* [2005] QCA 230

To start, we need to understand where the legislation came from and where it is going.

Primarily, the marketing and sale of real property and motor vehicles was dealt with by the *Auctioneers and Agents Act* 1971 (174 sections). The area is now regulated by the *Property Agents and Motor Dealers Act* 2000 ('PAMD', 636 sections). Most of the provisions commenced on July 1, 2001.

We are now up to 'strike four'. There have been three substantial amendments of the Act and since the last of those, in December, 2002, further necessary work has stalled. There are also regulations and mandatory practice codes of conduct for each of the categories of licensees. The Property Agents and Motor Dealers Tribunal, which was established by the Act, was abolished on July 1, 2003 and replaced by the Commercial and Consumer Tribunal.

There can be many reasons for change, but I have observed that where a commercial sector of the community can afford to pay the costs of regulation – that is, a high level of surveillance by an increased number of public servants – then that sector will be targeted for a review of legislation which will encompass all of the trimmings. The real estate property industry has been identified as such a sector.

A social or consumer protection agenda is normally identified as the reason justifying the "urgently required" changes and in this area you will all recall the adverse publicity which was focused on the slick information session marketing of Gold Coast units to purchasers who later learned that they had purchased property at well above market values.

It is sad to recognise that no legislation has yet been effective in protecting people against their own stupidity. It is also sad to recognise that in every sector of the community, including the professions, there are a small number of people who bring those sectors into disrepute as a consequence of their actions and disregard for their professional ethics.

It appears that the 'marketeers' who were supposedly the principal targets of the current legislation have adopted two-tier marketing techniques and building investment debenture procedures outside the ambit of the legislation (as one might expect them to do), leaving the legacy of the new legislation

Property Agents and Motor Dealers Act – An update

and regulations with the mainstream community sectors.

Where are we going with this legislation? That will depend on us as a profession to some extent, and it will require people with, above all, practical experience, legal knowledge, drafting skills and good foresight to be involved in constructively managing the further changes which are necessary.

The stated purpose of the Act is to comprehensively provide for the regulation of the activities, licensing and conduct of restricted letting agents, real estate agents, pastoral houses, auctioneers, property developers, motor dealers and commercial agents and their employees, to protect consumers against particular undesirable practices and for other purposes. The Act defines 'marketeer' and establishes judicial processes for 'marketeer' proceedings for misleading conduct, unconscionable conduct and false representations by marketeers.

Those elements in this legislation have been comprehensively dealt with in other state and Commonwealth Acts. 'Marketeer' – "includes a person who provides advisory, management, legal, accounting, administrative or other services in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of residential property" (Schedule 2).

You may not think that "marketeer" has a negative connotation, but I won't be putting it on my CV and my assessment is that we as lawyers are all now 'marketeers'.

'Marketeering' should be discussed further because it and related subjects are repeatedly raised at Queensland Law Society property law conferences and risk management sessions, and it is relevant to the future direction of legislation in Queensland.

Section 162 states that:



(1) A real estate agent must not act for more than 1 party to a transaction. Maximum penalty – 200 penalty units (\$15,000.00)

(2) If a real estate agent acts for more than 1 party to a transaction, an appointment to act for a party to the transaction is ineffective from the time it is made.

(3)...

(4)...

The Act clearly defines the position. When claims are made against lawyers who act for more than one party to a transaction, the judicial response is consistently:

- It is obvious you can't do it;
- We have said so time and again but the profession keeps ignoring it;
- Continue the practice at your peril.

In respect of a lawyer's duty to disclose information, please note comments by Megarry J in *Spector v Ageda* (1973) (1Ch 30, 48):

"A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is act for the client and at the same time withhold from him any relevant knowledge that he has."

I am reluctant to say that there can never be any exceptions, but there should be no excuse for the

practice of acting for more than one party to any transaction in city and provincial areas where alternative legal advice and representation is readily available.

The wider community expects that a lawyer will be fiercely independent and protective of a consumer's rights when engaged by that person. Section 363(c) states that the purpose of the chapter (Residential Property Sales) is to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.

While we tolerate the non-independence of lawyers or excuse lawyers from disclosing to their clients relationships with associated parties which may be perceived by clients as affecting their independence, we will continue to see provisions like Section 365 B of the Act.

The section states:

(1) This section applies if a buyer or prospective buyer ("buyer") engages a lawyer in relation to the purchase or proposed purchase of a residential property under a relevant contract.

(2) The lawyer must give the buyer a lawyer's certificate in the approved form and explain to the buyer the purpose and nature of the certificate. The lawyer's certificate must be signed and dated by the lawyer and must state—

- (a) whether the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and whether the lawyer has a

business, family or other relationship with any of those persons; and

(b) whether the lawyer has received, is receiving, or expects to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer; and

(c) the lawyer has explained to the buyer the purpose and nature of the certificate.

The form referred to is PAMD Form 32a. Version 3 is current at the time of writing. As the form draws a buyer's attention to the cooling-off period provisions, it should be sent to a buyer as soon as possible with a remark that the "purpose" in providing the certificate is to meet the requirements of the Act.

The form is an affront to any ethical lawyer and is a method of regulating the discharge of a lawyer's basic obligation to disclose to a client:

1. Any relationship with an associated person or transaction.

2. The expectation of any benefit (other than professional costs and disbursements payable by the buyer) from other sources.

There is a further prohibition upon a non-independent lawyer certifying the waiving or the shortening of a cooling-off period.

Section 10 of the Act states that the main object is to provide a system of licensing and regulation that achieves an appropriate balance between:

(a) The need to regulate for the protection of consumers; and

(b) the need to promote freedom of enterprise in the marketplace.

The other significant stated object is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property. The objects are to be achieved mainly by:

(a)(i) ensuring only suitable persons with appropriate qualifications are licensed or registered;...

(b)(i) providing protection for consumers in their dealings with licensees and their employees;...

(c) regulating fees and commissions that can be charged for particular transactions;

(d) providing protection for consumers in their dealings with marketeers;

(e) promoting administrative efficiency by providing that—

(i) responsibility for licensing rests with the chief executive;

(ii) responsibility for minor claims against the fund rests with the chief executive;

(iii) responsibility for claims, other than minor claims, against the fund rests with the tribunal;

(iv) responsibility for reviewing particular decisions of the chief executive rests with the tribunal; and

(v) responsibility for disciplinary matters rests with the tribunal.

(f) establishing a claim fund to provide compensation in particular circumstances for persons who suffer financial loss because of their dealings with persons, other than property developers and their employees, regulated under this Act;

(g) providing for the enforcement of matters involving marketeers by the tribunal and the District Court; and

As the form draws a buyer's attention to the cooling-off period provisions, it should be sent to a buyer as soon as possible with a remark that the "purpose" in providing the certificate is to meet the requirements of the Act.

(h) providing increased flexibility in enforcement measures through codes of conduct, injunctions, undertakings, and, for contraventions by marketeers, preservation of assets and civil penalties.

It is necessary to focus on Sections 365 and 366 of the Act.

One of the biggest dangers which has become more prominent since the explosion of mandatory CLE and specialist accreditation is that, when you attend presentations or read prepared material, you will believe what is being presented. As you have observed in the court environment, opinions will often differ and it becomes a matter of who you listen to and who has the last say. Although you can expect sterile advice, all presenters should be able to justify their opinions.

Please operate in surveillance mode and continue to scan for inconsistent or unverified information.

The provisions of Section 365 have created an ongoing problem for property lawyers and clarity is required. Not only did the draftsmen displace the common law relating to the formation of contracts, but there is still confusion about the contract date, which is a primary issue because it affects contract compliance dates, particularly when contracts reference those dates to the contract date as, for example, "30 days from Contract Date".

The consequences of course for any error can be claims for default, repudiation and breach of contract.

I use the term "formation of contract" loosely because it has been used in journal articles when discussing this topic.

Many facets of commercial law are artificial, but rules have been developed for commercial convenience and certainty. You will all be aware that at common law the formation of most contracts required an offer, an acceptance and a communication of that acceptance by the offeree to the offeror. Rules were developed for determining if 'communication' had occurred. In relation to postal communication, there were three commercially acceptable options which could have been adopted by the court as the time when communication occurred:

1. As soon as the advice of acceptance was posted;
2. When the notice of acceptance was delivered to the offeror's address; or
3. When the offeror actually received the notice of acceptance.

Our courts initially adopted the first option, but it is interesting to note that the German system adopted the second, although there was a general rule that the offer was to remain open for a reasonable time.¹

Provisions of the *Property Law Act* (s347) and the *Acts Interpretation Act* (s39A) in respect of the service of notices and documents now provide that such documents will be deemed to be served at the time when they would be delivered in the ordinary course of post.

Section 365 indeed changed the common law and made it clear that the communication of acceptance of an offer to an offeror is not sufficient but rather the buyer or the buyer's agent must receive a copy of the contract signed by all parties. Subsection 1 introduced a new concept which also purportedly allows a seller to change his or her mind even after communicating acceptance so long as a copy of the fully exe-

cuted contract has not at that time been given to the buyer or the buyer's agent.

The suggestion which is supported by at least one presenter is that because the buyer is not bound by the contract until the provisions of Section 365 have been satisfied, the important 'contract date' should be the day the buyer receives a copy of the contract signed by all parties, and not the date the seller or the last party executing the instrument signs the contract.

You must not confuse:

1. the date of a contract or an instrument which is the date of attestation of the instrument by the last party to it; with
2. the date when parties are bound by the provisions of that instrument which historically involved an analysis of the communication of the acceptance and which now pursuant to Section 365 is when the buyer or the buyer's agent receives a copy of the fully attested instrument.

In 2004, the Supreme Court considered the phrase "**the date of this Deed**" in respect of a put and call option. The date was relevant because settlement of the sale of residential lots was required "not later than 120 days from the date of this Deed". The date of execution of the deed by the final executing party was determined to be the date of the deed rather than the subsequent delivery date. (*JLF Corporation Pty Ltd v Mount Petrie Developments Pty Ltd* [2004] QSC 044).

The decision followed the principle in *Styles v Wardle* (1825) 4B. & C. 908, which has also been accepted as authoritative by the NSW Court of Appeal in *Glebe Administration Board v Tifan* [1968] 3 NSW 455. The judgement in *Tifan* established that the ordinary rule of construction will apply unless the evident intention of the parties to the contract would be defeated by the application of the rule.

Section 490 of the *Duties Act* 2001 states that an agreement made by acceptance of an offer contained in an instrument is "**first signed** when the offer is accepted".

There is no mention of communication of acceptance or of the provision of a copy of a signed contract to the buyer. The Act defines "instrument" as a written document in hardcopy form.

In summary, contracts should be dated, as they have been traditionally when the last party to the instrument signs the contract. There are analogies in other legal documents where the date of the instrument is quite different to the operative date, such as in wills.

I should mention that section 472A (3) PAMD referring to the time limit for making claims defines "contract date" with a very loose set of words. It is defined as "the day on which the contract for the purchase was entered into".

Cooling-off period

"Cooling-off period", for a relevant contract, means a period of five business days –

- (a) starting on the day the buyer under the contract is bound by the contract or, if the buyer is bound by the contract on a day other than a business day, the first business day after the day the buyer is bound by the contract; and
- (b) ending at 5pm on the fifth business day (Section 364).

¹ 'Cheshire & Fifoot' 7th Aust. Ed. page 124.



As an example, the cooling-off period for a buyer who receives a copy of the contract signed by the buyer and the seller on Friday would finish at 5pm on Thursday of the following week (assuming that there are no intervening non-business days).

Because there is no qualifying time restraint, the provision of the requisite copy at two minutes to midnight on Friday (if it is a business day) will be the first day of the five business day cooling-off period.

“Business day” means a day other than a Saturday, Sunday or public holiday. Business days are not locality or area qualified, so when you have a Townsville property buyer in Brisbane and the Brisbane Show public holiday intervenes, it is reasonable to ask, when does the cooling-off period end?

Recovery of termination penalty

Section 368(3) requires the refund of a deposit less the amount of the termination penalty (0.25 percent of the contract purchase price) to a buyer if a buyer elects to terminate a contract using the cooling-off period provisions. Section 366(3)(e) requires the warning statement to state the amount or the percentage of the purchase price that will not be refunded from the deposit if the contract is terminated before the cooling-off period ends.

Because there is no provision for recovery of the termination penalty other than from a deposit, it is a practical imperative that a deposit should not be less than the termination penalty amount.

Strict compliance with format of forms.

You are aware that the Act introduces a regime of warnings and procedures. If your client is faced with a challenge that an incorrect version of a form has been used, be aware of Section 49 of the *Acts Interpretation Act*.

Section 49(1) of the *Acts Interpretation Act* states that strict compliance is not necessary and substantial compliance

is sufficient. Section 49(2) of the Act, however, is relevant where an Act requires a form to be completed in a specified way, such as Section 366(4) PAMD requires.

Warning statements

Be aware of Section 366(4) PAMD, which states:

A statement purporting to be a warning statement is of no effect unless—

- (a) before the contract is signed by the buyer, the statement is signed and dated by the buyer; and
- (b) the words on the statement are presented in substantially the same way as the words are presented on the approved form.

Example for paragraph (b) –

If words on the approved form are presented in 14 point font, the words on the warning statement must also be presented in 14 point font.

Section 43 of the *Hire Purchase Act* also prescribes

a minimum size type for documents.

With respect to the use of “the approved form” required by Section 366 (1) PAMD, refer to the Supreme Court decision in *Devine Ltd v Timbs* [2004] QSC 024. The action involved put and call options associated with the River City Apartments development. In early 2002 the prospective buyer signed documents comprising, in each case, the PAMD warning statement, the *Body Corporate and Community Management Act* 1997 information sheet and the contract, and those documents were held in escrow. The seller was prohibited from signing the documents until either option was exercised, and the seller’s right to exercise its option was conditional.

When the contracts were signed by the seller in late 2003, it was claimed by the buyer that the versions of the PAMD warning statement and the BCCM information sheet were no longer the approved forms. The court held that the date of signature by the buyer was the relevant date in determining the currency of the approved form.

In *Celik Developments Pty Ltd v Mayes* [2005] QSC 224 the Supreme Court declared that a contract for the purchase of an “off the plan” unit in the Q1 residential apartment complex at Surfers Paradise had been lawfully terminated. The court examined the meaning of “approved form” in the analogous consumer protection provisions of the *Body Corporate and Community Management Act* 1997. It was held that the correct version of the required form was “the approved form” and an earlier version was not the “approved” form.

New versions of forms are often gazetted and the revocation date of earlier versions is often also gazetted. If the revocation of an earlier version of a form has not been gazetted, it will not be the “approved” form if there are material differences when compared with the current version of the form or if it has the potential to mislead a consumer.

The warning statement includes a notice that, if it is not attached to the front of the contract and signed by the buyer before the attached contract is signed, then the buyer may terminate the contract.

An initial Supreme Court decision in *MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320 has been strengthened by the recent unanimous decision on June 24, 2005, of the Court of Appeal in *MNM Developments Pty Ltd v Gerrard* [2005] QCA 230, an appeal from the District Court at Southport. The Court of Appeal was constituted by de Jersey CJ, Williams JA and McMurdo J.

The respondent sought to sell to the appellant a \$1.25m residential property on the Gold Coast. Although the appeal was dismissed primarily because factual and legal issues could not be dealt with appropriately by summary judgement procedures, the judgements have soundly and thankfully provided a level of certainty to this area.

Leave to appeal was granted in the words of the Chief Justice “because the construction of the statutory provision has not yet been settled at appellate level, and the determination of this case may have a significant impact on contracts for the sale of residential property”.

Before the primary judge, the seller claimed that his agent had sent the buyer a continuous fax comprising, in this order:

- cover sheet / letter

The warning statement includes a notice that, if it is not attached to the front of the contract and signed by the buyer before the attached contract is signed, then the buyer may terminate the contract.

- PAMD Form 27b (selling agent's disclosure to buyer)
- PAMD Form 30c (warning statement)
- Contract.

The buyer's director signed the disclosure statement, the warning statement and the contract in that order and faxed the executed documents back to the seller's agent. The buyer's director then separately sent the original documents back to the agent and the seller then executed the original contract.

Following a consideration of the primary and related meaning of "attach", and concurrence with Justice Muir's observation in *MP Management (Aust) Pty Ltd v Churven*, that "some form of physical joinder or incorporation" was required, the Chief Justice said:

"My view is that on the factual basis adopted below, this warning statement was not attached to the contract, as its first or top sheet. That 'factual basis' assumed the concluded contract was in the facsimile form discussed by the primary judge, which may or may not prove to be correct. But accepting that assumption for the present, the pages of the warning statement appeared in the midst of a series of pages comprising a different form, the relevant statement, the contract and the directors' guarantee. The legislature intended that a purchaser, picking up the contract, would necessarily have first to confront the warning statement. That is achieved by adopting here the ordinary concept of 'attach', which I am satisfied was plainly the legislature's intent. One could not reasonably say this statement was attached to the contract, as its first or top page, where the only physical relationship between the documents, within the continuous fax, was that where the warning statement ended, the separate contract began."

Section 366(1) states: "A relevant contract must have attached, as its first or top sheet, a statement in the approved form ('warning statement') containing the information mentioned in subsection (3)."

Williams JA stated the obvious when he said the provisions of the Act in question were badly drafted and he noted that the reference in Section 366(1) should not be to a "contract" but to documents submitted to an intending purchaser.

McMurdo J wondered at what point was an offence committed by the seller or a person who prepares a contract that does not comply with Section 366(1).

- Is there an offence if no contract is formed?
- What if the relevant document remains a draft?
- Does an agent commit an offence simply by faxing the draft contract and warning statement?

McMurdo J also considered that, if a document is not "a relevant contract" unless and until it records a contractual relationship, then Section 366(2) does not strongly indicate that the warning statement must be attached before the buyer receives the draft contract. Although McMurdo J said that it would be logical to require the warning statement to be attached when the prospective buyer received the (draft) contract, Her Honour also said an alternative interpretation was that the statement had to be attached by the time the buyer signed the contract, which would make the warning equally effective but would allow for greater convenience and expedition.

It was also noted that contracts are sometimes prepared by buyers.

The buyer may terminate the contract "**at any time before the contract settles**" and those rights are not waived by a buyer who continues to perform the contract with knowledge of the contravention of Section 366 (*MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320). Muir J found that the right to terminate the contract at any time before settlement and the right to continue with the contract were not inconsistent rights and the time of election did not arise until the time of settlement.

A buyer terminating a contract upon the basis of a non-complying warning statement is entitled to recover from the seller and the person acting for the seller who prepared the contract (jointly and severally) reasonable legal and other expenses incurred in relation to the contract after the buyer signed the contract.

We have to be very careful in considering **unsafe** procedures.

My observations as a commercial lawyer are that about 20 percent of contracts at the initial stage are faxed or emailed, and that percentage is rapidly increasing, particularly where interstate and overseas clients' time requirements need to be met. No one can blame the courts for dealing appropriately with this messy legislation.

The two questions yet to be answered are:

1. At what stage does the warning statement have to be attached to the instrument which is loosely referred to as the contract?; and
2. Will the execution of a further warning statement and attached contract by the buyer destroy the buyer's rights provided by Section 367 or nullify the purported offence by the seller or the seller's agent referred to in Section 366(2)?

I don't like your chances arguing the second point for the affirmative, but there is a belief, subject to judicial determination, that a buyer may receive directions to attach the warning statement to the contract before the warning statement and contract are signed.

Of course you cannot contract out of the provisions of the Act and it will remain a matter of fact as to whether or not the requisite attachment occurred.

Beneficial interest

A real estate agent or a real estate salesperson commits an offence if they obtain a beneficial interest in property placed by a client with the agent for sale unless full written disclosure is made in the approved form before the contract is entered into. The maximum penalty is 200 penalty units (\$15,000) or three years' imprisonment (Section 145).

In the event of a sale, no commission or other reward is payable in relation to the sale. A spouse, de facto spouse, parent, brother, sister, child or stepchild of the person, or a child or stepchild of the person's spouse or de facto spouse are included in the pool of restricted transferees, and options to purchase are similarly regulated (Section 13).

Claim fund

A claim fund is established for meeting motor vehicle title claims and claims associated with contraventions of the Act such as the non-notification of beneficial interests.



A claim against the claim fund is currently limited to \$200,000, and the total amount that may be paid from the fund because of, or arising out of, a wrong by a single person is \$2,000,000 (reg 55).

Buyers dealing with property developers

A property developer is a person who completes more than six residential property sales in any 12-month period other than through a real estate agent, pastoral house or auctioneer (Sections 261(2)(a) and 262(2)). A buyer who suffers financial loss buying a property directly from a property developer cannot make a claim for compensation against the claim fund.

Buyers dealing with marketeers

Only buyers of principal places of residence who have claimed stamp duty concessions are eligible for a claim against the claim fund for losses as a result of a contravention by a marketeer and as a consequence the ability of people to make claims has been gutted. Such claims are limited to \$35,000 and will be very difficult to access because of the strict procedural requirements. Because of the wide definition of ‘marketeer’, it would appear that a person suffering loss as a consequence of an agent’s dishonest conversion of trust monies would have no recourse against the claim fund if the relevant transaction was in respect of an investment property!

Lands not lawfully useable for residential purposes

If land cannot, “as at the day of sale”, be lawfully used for residential purposes, then the real estate agent must give a written statement to that effect to a proposed buyer before the buyer signs a contract (Sections 148 and 149).

Agents’ commission

The PAMD Regulations prescribe the maximum commission payable in respect of property sales and rentals. The regulations also prescribe the educational qualifications required for the licensing of specific licensees and applicable fees.

Codes of conduct

Licensees, including real estate agents and salespersons, are subject to the mandatory provisions of a code of conduct. Contraventions of the provisions are grounds for disciplinary proceedings, injunction proceedings or the seeking of undertakings under the Act. Many agents are not yet aware of the provisions of their code and that breaches may adversely affect their businesses. Some of the requirements are common sense, others are unlikely to be followed in practice even though mandatory, and include:

1. A requirement for a real estate agent to immediately communicate to a client each expression of in-

terest, whether written or oral, about the sale, purchase, exchange or lease of a property (reg 11(2));

2. A requirement for a real estate agent to disclose to the client the agent’s policy about conjunction sales, including the percentage apportionment of commission between the agents before accepting an appointment to sell property for a client, and a real estate agent must conduct a sale in conjunction with another real estate agent if the client authorises a conjunction sale (reg 20(1) and (3));

3. A requirement that, if a real estate agent gives a person an opinion about the market price or market rent for a property, the agent must not accept instructions from the person to act as a real estate agent for the property unless the agent has given the person a written statement of the material facts that the agent has taken into account in forming an opinion about the property’s market price or market rent (reg 21(2));

4. A requirement that a real estate agent must inform a client in writing if the time under the contract for payment of the deposit has passed without the deposit being received by the agent (reg 31(a));

5. A requirement that the agent must not accept any late payment of the deposit unless the client has been informed and gives written instructions to accept late payment of the deposit (reg 31(b));

6. A requirement that a real estate agent managing a rental property must accompany a customer on an inspection of the property and that a real estate agent must not give the keys to a property to a customer, even for a short time, unless authorised by the client in writing (reg 33(1) and (2));

7. A requirement that a real estate agent managing a rental property must immediately notify the client in writing if the agent becomes aware of a customer’s breach of the agreement or contract for the property (reg 36);

8. A requirement that, if a real estate agent managing a rental property is aware that the property is listed for sale or the client intends to sell the property by private sale, then the agent must immediately give the customer (tenant) written notice of the intended sale of the property (reg 38(1) and (2));

9. A requirement that a real estate agent must prominently display a notice of the existence and availability of this code in the public area of each of the agent’s offices (reg 42);

10. A requirement that a real estate agent/principal licensee follows the complaint resolution procedures detailed in the code (reg 43).

Investment of deposits

Deposits may only be invested if a sale is to be completed more than 60 days after the amount is received and the licensee is directed to invest the amount by all parties (Section 380). A person who suffers financial loss because of, or arising out of, the stealing, misappropriation or misapplication of an amount that a relevant person was directed to invest cannot make a claim against the claim fund (Section 471(1)).

Disputed trust monies

Sections 388, 389 and 390 prescribe the procedure for the payment into court, disbursement or retention of trust monies in dispute. Trust monies will be “in dispute” if a licensee receives written notice from

Deposits may only be invested if a sale is to be completed more than 60 days after the amount is received and the licensee is directed to invest the amount by all parties.

a party to the transaction that ownership is in dispute (Section 387(1)(b)).

Judicial matters and remedies

A substantial part of the Act deals with structures and procedures associated with investigations, inspections, public examinations, claims, complaints, disciplinary proceedings, reviews and enforcements, and those elements of the Act are, in most cases, logical.

“Inspections” may be conducted by the chief executive or a person appointed by the chief executive. Section 556A allows an inspector to require a marketeer or another person to produce relevant documents immediately unless the person has a reasonable excuse. The Act allows an inspector to enter a place if it is the licensee’s place of business and it is open for entry or if the entry is authorised by warrant (Section 547).

A system of “undertakings” has been introduced which allows the chief executive to seek from a person an undertaking in respect of a contravention of the Act or a code of conduct (Section 569). Undertakings are recorded in a public register (Section 572) which may be accessed through the Office of Fair Trading website: www.fairtrading.qld.gov.au. Undertakings may be enforced by the chief executive applying to the District Court for an order (Section 571).

The Manager of Investigations has advised that there were two successful marketeering prosecutions in the 2004/2005 financial year. In one of those, group members were ordered to pay almost \$310,000 in fines, costs and compensation, and parties were disqualified from holding a licence or engaging in real estate activity for four years.

The chief executive or any person aggrieved by a respondent’s conduct may apply to the District Court for an injunction to restrain a contravention or attempted contravention of the Act or a code of conduct (Sections 564 and 565).

The process for disciplinary proceedings has now changed. Previously, the chief executive filed a complaint notice with the tribunal registrar. Now, Section 497 prescribes that “the chief executive may apply to the tribunal to conduct a proceeding to decide whether grounds exist under section 496 for taking disciplinary action against a licensee or registered employee”. The Act allows a person dissatisfied with a decision of the chief executive to apply to the tribunal to have the decision reviewed.

The tribunal has power to consider applications for summary orders, impose fines of \$15,000 for an individual or \$75,000 for a corporation, and cancel or suspend licences (Section 529). The tribunal is not bound by the rules of evidence and has a discretion whether or not to take evidence on oath.

Proceedings for an indictable offence (one for which the maximum penalty of imprisonment is more than two years) are taken in the usual way by way of summary proceedings under the *Justices Act* or on indictment (Section 589), and the District Court can impose a penalty of \$40,500 for false or misleading information about a property provided by a licensee or registered employee (Section 574).

The abolished Property Agents and Motor Dealers Tribunal gave a right of appearance to a party’s lawyer. Now, except in a narrow range of proceedings,

including disciplinary proceedings, an individual appearing before the Commercial and Consumer Tribunal may only be represented by a person, and then only by a person who is not a lawyer if the tribunal directs that it is appropriate (Section 76 *Commercial and Consumer Tribunal Act 2003*).

Remember that real estate agents and lawyers may be “marketeers”.*

Peter Mackey



Peter Mackey has been principal of Mackey & Wales, Townsville, since 1979. In 1984, he established the first firm in Queensland totally specialising in commercial law services. He was NQLA president in 1993 and arranged the first QLS mediation qualification course for solicitors in north Queensland. He was appointed a QLS Senior Counsellor in 1999.

by David Jesser

An occupier's potential liability for the criminal acts of a third party – How far should the law go?

Recent criticism of the legal profession for contributing to an increasingly litigious society in Australia has provided an impetus for the courts to take a harder line with personal injury cases.

Well before the passage of the *Civil Liability Act* 2003 (Qld) and other legislation implementing reforms called for by the Ipp report,¹ the courts had begun to turn the tide back toward the defendant, particularly in occupier's liability cases.²

Such a trend could be traced from the High Court's decision *Ghantous v Hawkesbury City Council*,³ where the majority of the court⁴ stated:

"It is in the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. . . . persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards . . . Of course, some allowance must be made for inadvertence. Certain dangers may not be readily perceived because of inadequate lighting or the nature of the danger, or the surrounding area. . . . These hazards will include dangers in the nature of a trap or . . . of a kind calling for some protection or warning."

Even in cases where the plaintiff sustained terrible injuries, the courts were reluctant to find negligence without compelling justification.⁵

There then followed an avalanche of matters where plaintiffs' claims against occupiers were dismissed.⁶ Cases where once the courts might have drawn favourable inferences for plaintiffs also failed.

In *Miller v Council of the Shire of Livingston & Anor*⁷ the plaintiff was found lying seriously injured below a road. There were no witnesses to the event and the plaintiff had no recollection of how or why he fell. The court was asked to draw an inference that he had probably put his foot into a gap between a concrete path and a fence and stumbled across a fence because it was too low to be safe. The trial judge found and the Court of Appeal upheld that:

"The footpath itself was safe. It had been in use for some years without complaint to the Council. It was flat, well lit and its limits clearly defined. Whatever may have been the state of the fence, there is no basis for concluding that it was causative of the injury unless there is evidence to establish if and how the Plaintiff came to fall over it.

" . . . I am not satisfied the Plaintiff has discharged the onus of establishing that the hypothesis relied upon by him occurred or was more probable than any other inference that may have been drawn from the evidence. It is not inevitable that the fence which I have found . . . to be inadequate and substantially below the design height . . . was causative of the injury."

However, as Justice Young AO recently remarked,

"it seems the tide is turning back".⁸ In *Junkovic v Neindorf*,⁹ the Full Court of the Supreme Court of South Australia found that a home owner had breached a duty of care to an entrant who had come onto her property for the purposes of attending a garage sale. The plaintiff had tripped on an uneven joint between two slabs of the concrete driveway. The majority of the court (Doyle CJ dissenting) found at para 105:

"Ms Neindorf invited the public at large to attend her premises. . . . Intending purchasers had no alternative but to approach the goods for sale by using the driveway . . . it could be expected the attention of entrants might be drawn to goods on display . . . As a result, through lack of awareness, an entrant could trip, stumble or fall and suffer injuries. All this was readily foreseeable. . . . A simple warning at the entrance to the property to take care – dangerous [or uneven] driveway could have been erected. . . . Some form of barrier could have been placed over or around the dangerous area. . . . She had the capacity and opportunity to assess potential hazards and take steps to remove or minimise those hazards. . . . A real risk of injury should be eliminated unless the cost of doing so is disproportionate to the risk."

The above case is an example of how lower courts are tending to erode the '*Ghantous*' principle, which embodies a high expectation that people will take reasonable care for their own safety by distinguishing between duties owed by a commercial occupier and that owed by a public authority.

- 1 Review of the Law of Negligence, Final Report, September 2002; Ipp, Caine, Sheldon, Macintosh <http://www.reofneg.treasury.gov.au/content/report2>.
- 2 See comments of Spigelman CJ in *Waverly Municipal Council v Swain* [2003] NSW CA 61 at [114].
- 3 [2001] HCA 29.
- 4 Gaudron, McHugh and Gummow JJ said at [163].
- 5 In *Borland v Makaskas* [2000] QCA 521 the Queensland Court of Appeal overturned a jury decision in favour of a person rendered a tetraplegic as a result of diving from a fence into a shallow canal. Similarly, in *Waverley Municipal Council v Swain* [2003] NSWCA 61 at [182], the New South Wales Court of Appeal rejected the case of a swimmer rendered a quadriplegic as a result of diving into a sandbar at Bondi Beach.
- 6 See for example: *Percy v Noosa Shire Council* [2003] QCA 250; *Spencer v City Council of Maryborough* [2002] QCA 250; *Lanyon v Noosa District Junior Rugby League Football Club Inc.*



In *Wyong Shire Council v Vairy/Mulligan v Coff's Harbour City Council*,¹⁰ the court said:

"It would be wrong to elevate the obviousness factor into some doctrine or general rule of law. . . . All the circumstances must be looked at of which the obviousness of the risk is only one."

Further, in *Burns v State of Queensland*,¹¹ Chesterman J held that the defendant's argument that the plaintiff's case should fail because the hazard on which he injured himself was obvious:

"Overstated the effect of the authorities. The fact that a danger is obvious, or such that could be avoided by the exercise of the degree of care ordinarily exercised by a member of the public, will always be highly relevant to the question whether the occupant on whose premises the danger exists has failed to take reasonable care for the safety of entrants. Indeed it will usually be decisive but in the end it is a question of fact whether an occupier took reasonable care to protect an entrant against a danger which was readily apparent."

This swaying of the pendulum, begs the question of how the courts will deal in the future with the thorny issue of imposing liability on an occupier for the criminal acts of another. If the courts continue to move away from 'insurers have deep pockets' policy considerations and place continued emphasis on the individual taking care for their own safety, what prospects will a person injured on another's property by the criminal acts of a third party have of successfully claiming against that occupier?

The Modbury immunity

With respect to criminal activities of others, Dixon J laid down the guiding principle in *Smith v Leurs*¹² where he stated, "The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third".

In *Modbury Triange Shopping Centre v Ansel*¹³ ('Modbury'), the court held that the duty of an occupier does not generally extend to taking reasonable care to prevent physical injury to a person resulting from the criminal behaviour of third parties on their land ('the Modbury immunity'). There are of course exceptions to the rule, however, it is suggested that if the hardened stance of the court continues such exceptions will arise rarely and not be expanded lightly.

According to Heydon JA (as he then was):

"an occupier of land owes a duty to entrants in relation to its physical state and condition. The duty is not to make premises as safe . . . as reasonable care and skill on the part of anyone can make them . . . The duty is only to take what care is reasonable in the circumstances. . . . Occupiers lack the control and knowledge of the behaviour of unpredictable but potentially criminal third parties which they possess or ought to possess of the physical state of their land."¹⁴

Gleeson CJ outlined the primary policy consideration for not imposing such a duty when he said:

"The conduct which caused the first respondent's injuries was deliberate criminal wrongdoing. By its very nature that conduct is unpredictable and irrational. It occurs despite society devoting its resources to deterring and preventing it through the work of the police forces and the punishment of those offenders who are caught.

That is, such conduct occurs despite the efforts of society as a whole to prevent it. Yet the respondent's contention is that a particular member of that society should be held liable for not preventing it."¹⁵

Exceptions to the Modbury immunity

In what circumstances will the court be persuaded to depart from this general principle?

Heydon JA in *Ashrafi* placed particular emphasis on "control" leading to "special relationships". He said:

"The relationship of an employer and employee is one which the law has for a long time been exceptionally solicitous for the employee's interests inter alia because of the control which the employer has over the incidents of the relationship. The relationship of school and pupil is one which the pupil can be exceptionally vulnerable by reason of youth and inexperience and in which the school has the measure of control. It is inherent in relationship of bailor and bailee that the bailee has a duty to take reasonable care to keep goods bailed safe against third parties including criminal third parties, because the bailee, by reason of its control of the goods, is in the best position to fulfil it. Strangers cannot control the children of others, but parents are supposed to be able. A gaoler has control over prisoners and control imports responsibility."¹⁶

Thus if there is a significant measure of control over the offender, there may be an argument that the Modbury immunity should not be applied. Heydon JA went on to say:

"The High Court made it plain that the 'special relationships' do not constitute a closed list of categories; nor are the boundaries of each particular category fixed, because ultimately each category rests on particular circumstances which make it just to impose liability.

"A famous instance of particular circumstances of that kind is *Haynes v Harwood* [1935] 1 KB 146 where the Defendant's carter created a source of danger by leaving a horse-drawn van unattended in a crowded street. The horses bolted when a boy threw a stone at them. A police officer who suffered injuries in stopping the horse before they injured others was held entitled to recover damages from the Defendant. To be rendered liable for having created a source of danger, of course, is to be rendered liable for more than mere inaction. Indeed, the category of 'special circumstances' or 'a special relationship' can obviously overlap with cases where liability is found because of 'a high degree of certainty that harm will follow from lack of action' . . ."¹⁷

If the plaintiff is not a part of these recognised 'special relationship' categories listed above, how else can they avoid the Modbury immunity? It appears there may be two other alternatives:

- (a) where the occupier has a high degree of certainty that harm will follow from lack of action; or
- (b) the occupier failing to control access to or continued presence on the premises. This exception primarily concerns the duties of hotel owners with respect to excluding or ejecting intoxicated persons.

It is proposed to deal with each of these three exceptions below.

[2002] QCA 163; *Hurst & Anor v Langford & Ors* [2002] QSC 228; *Hoyts v Burns* [2003] HCA 61; *Enright v Cooloom Resort Pty Ltd & Ors* [2002] QSC 394.
 7 [2003] QCA 29.
 8 Current Issues – Flood of Litigation (2004) 78 ALJ 763.
 9 [2004] SASC 325.
 10 [2004] NSWCA 247.
 11 [2004] QCA 199.
 12 (1945) 70 CLR 265 at 262.
 13 (2001) 205 CLR 254 Gleeson CJ, Gaudron, Hayne and Callinan JJ (Kirby J dissenting).
 14 *Ashrafi Persian Trading Company Trading as Roslyn Gardens Motoring & Anor v Ashrafinia* (2002) Aust Torts Reports 81-636 at [56].
 15 Gleeson CJ, *Modbury*; opcit at [109].
 16 Heydon JA; *Ashrafi*; opcit at 65.
 17 Heydon JA; *Ashrafi*; opcit at [66].

1 The 'special relationship' exception

In *Modbury*, Gaudron J said:

"There are situations in which there is a duty of care to warn or take other positive steps to protect another against harm from third parties. Usually, a duty of care of that kind arises because of special vulnerability on the one hand, and on the other a special knowledge, the assumption of a responsibility or a combination of both. Those situations aside however, the law is, and in my view should be, slow to impose a duty of care on a person with respect to the actions of third parties over whom he or she has no control."¹⁸

As indicated above, the recognised categories of 'special relationship' are employer/employee; bailor/bailee, parent/child, gaoler/prisoner and school/student. Arguably, such a relationship can be found between other persons in the right circumstances.

In *Club Italia (Gelong) Inc. v Ritchie*¹⁹ a policeman was injured in a brawl at a social club. Security staff employed by the club had recognised his assailant as a troublemaker but they had not ejected him for fear of escalating hostilities. The police had been to the pub about an hour before the brawl and performed a 'walk through'. They agreed to return later. They had not been advised that the situation had subsequently deteriorated. When they returned there was widespread fighting. An injured policeman sued the club successfully. The Victorian Court of Appeal found that there was a 'special relationship' between the club and the policeman deriving from the club's ability and its duty to control aggressive patrons.

However, in *Proprietors of Strata Plan 17226 v Drakulic*,²⁰ the plaintiff was injured as she returned home from work at about 2.45am after being attacked by an intruder in the entrance foyer to her unit complex.

The property manager had disarmed the locking mechanisms to the door giving entry from the driveway into the foyers of the unit complex due to complaints that the lock occasionally stuck and thereby prevented entry. The trial judge, who found for the plaintiff, obviously placed considerable significance on this, stating:

"The assault on the Plaintiff occurred inside the building. It could not have happened if the entry door had been locked and would probably not have happened . . . if the door had been capable of being locked . . . the lock to the entry door ought not to have been disarmed and rendered useless unless a reasonably safe alternative system . . . was installed at the time."

The trial judge found that there was a 'special relationship' existing between the unit proprietor and unit occupier.

However, Heydon JA found no such relationship existed as:

"the Defendants did not have any particular control over third parties who might commit crimes. They had no special knowledge about them. The Plaintiff had no special vulnerability within the building which exceeded her vulnerability just before crossing the outside boundary of the land on which it was built . . .

"It is plain that the relationship of unit owner and body corporate . . . [is] not [a relationship] of

the type recognised as special under the existing case law. . . . in searching for a special relationship . . . it is necessary to remember what Gleeson CJ said in the *Modbury* case at [35]:

"The principle cannot be negated by listing all the particular facts of the case and applying to the sum of them the question – begging characterisation that they are special. There was nothing special about the relationship between the appellant and the first respondent. There was nothing about the relationship which relevantly distinguished him from large numbers of members of the public who might have business at the centre, or might otherwise lawfully utilise the carpark. Most of the facts said to make the case special are, upon analysis, no more than evidence that the risk of harm to the first defendant was foreseeable." . . .

"If new categories of 'special' relationship are to be created within which a defendant is to be liable for the criminal acts of third parties, the step is not merely factual. It would involve a matter of law – indeed a change in the law. A change in the law of that order of significance is not something that this Court should undertake. It is a matter for the High Court."²¹

Therefore, Heydon J has moved to the view that the categories of the special relationship are closed until such time as they are further extended by the High Court.

Also of interest in the *Drakulic* case is how His Honour reconciled the 'failing to control access' exemption. It was obviously argued that the defendants had failed to control the access of the assailant to the unit complex by disarming the lock. To this Heydon JA responded:

"The locked door would not have controlled the assailant so far as he chose to attack persons connected with the units outside the building, or after following them in, or after breaking the door. . . . the Defendants here had no control over the assailant: they had no power to assert control over him, they could not assert authority over him, they were not expected to be able to control him as of right. . . . if it is right to say that the Defendants had control over the assailant because a locked entry door would have controlled him, it would have been equally right to say that the Defendant in the *Modbury* case had control over the criminals because a system of denying unauthorised access to the carpark could have controlled them. . . . the possibility of returning to a locking door: is not a relevant form of control."²²

Heydon JA also made some interesting observations as to the content of the duty (if one was owed). His Honour was critical of the trial judge's finding that the duty owed was to prevent harm to the plaintiff from the criminal conduct of the third party. He said this was too high and would require engaging armed guards. Heydon JA reiterated that the duty of a landlord of residential premises is only to take such steps as are reasonable in the circumstances. It is not to make the premises safe for residential users as reasonable care and skill on the part of anyone can make them.

He said:

¹⁸ Gaudron J *Modbury*; *opcit* at [43].

¹⁹ [2001] 1VR 447.

²⁰ [2002] NSWCA 381.

²¹ *Ibid* at [86]-[89].

²² *Ibid* at [75].



“Similarly, if there is a duty in relation to criminals, it is only a duty to take those steps to prevent harm from criminals which are reasonable in the circumstances, not an absolute duty to prevent harm. The circumstances relevant to reasonableness are those which control the response to a reasonable man to the risk: he would consider the magnitude of the risk; the degree of probability of its occurrence; the expense; difficulty and inconvenience of taking alleviating action; and any other responsibilities. . . . The outcome of that process for consideration might be that no response was called for.”²³

Relevantly, the plaintiff’s case would have also failed on causation with Heydon JA stating that the person who attacked the plaintiff was a determined criminal who had already gained entry, was disguised, equipped with the means of subduing victims and armed with a dangerous weapon. Even if the door were locked, it was probable the assailant would have waited outside in a dark place and attacked there.

Another instance where the New South Wales Court of Appeal determined that the trial judge had erroneously found a ‘special relationship’ was the matter of *Parissis & Ors v Bourke*.²⁴

In this matter, the court was considering the liability of householders in respect of a party held by their son at their house, after a considerable period of drinking, one of the guests had taken to throwing methylated spirits onto a smouldering barbecue. A flashback occurred and the bottle exploded, injuring other guests.

The trial judge found that “the combination of youth, alcohol and the presence of a dangerous substance [was] sufficient to put the Plaintiff and other guests into the position of a special relationship with [the home owners] and hence to require reasonable steps to be taken to protect them from being burnt”.

The Superior Court took a very dim view of this finding, stating that whilst the particular guest’s conduct was probably sufficient to establish criminal liability:

“What excludes criminal behaviour from the occupier’s responsibility is not specifically its criminality but its extreme nature in relation to what the occupier could reasonably foresee and should reasonably control. When behaviour is extremely unlikely, extremely irresponsible or otherwise extreme, it may be beyond the limits of the occupier’s responsibility whether or not on close consideration it is subject to some criminal sanction. Extreme behaviour cannot be reasonably foreseeable because either 1) the risk is reasonably foreseeable but the maturation of the risk depends on criminal behaviour; or 2) the risk is not reasonably foreseeable because the maturation of risk depends on unpredictable criminal behaviour. If behaviour is unpredictable, the harmful outcome of the maturation of the risk may not be reasonably foreseeable. [The offender’s] conduct was obviously extremely dangerous, and this must have been obvious to him, and that in my mind, is enough to place his conduct outside the range of occupier’s liability.”²⁵

The court went onto say that, even if the injury was foreseeable:

“The reasonable response to such a risk was to leave a group of 10 or 12 young adults, with their liquor, to their own devices. That is what practically every adult in Australia would do. It is remote from the realities of Australian lives that the elder generation would remain awake or keep an eye every few minutes on younger adults until 2.00am or thereabouts although wishing to retire at about midnight. The magnitude of any risk that an event would occur of the kind which did occur, and the degree of probability of its occurring were very slight.”

Importantly, the court said that the householders were not in any special relationship with the guest and there was no established relationship of social host and guest in Australian negligence law.

In *Riley v Francis*,²⁶ the plaintiff suffered scarring when another patron at a nightclub struck her in the face with a glass. The plaintiff had gone to the ladies toilet when she was attacked by a woman with whom she had been in a previous altercation. The plaintiff was then set upon again by a male who struck her hard in the face and held her to the wall. Security staff intervened, dragging away the male assailant.

As they went to remove the female assailant, she threw a glass over one of the bouncer’s shoulders, hitting the plaintiff in the face. The plaintiff’s claim against the club failed on the basis that the bouncers had acted reasonably in making their first priority to remove the male who was actually assaulting the plaintiff. Further, the bouncer was unaware the female was holding a glass it was not reasonably foreseeable and that she might attempt to injure the plaintiff whilst the bouncer, who was very large, had positioned himself between them.

Essentially the finding was that this was a random act that the bouncer could not readily have anticipated.

The opposite finding was made in *Wormald v Robertson*.²⁷ In this matter the plaintiff had attended a function at a hotel. Robertson, another patron, had been jumping on tables, breaking glass and molesting other guests for about half an hour. Two complaints were made to hotel staff but nothing was done. Robertson continued to misbehave for another half an hour. He then grabbed a female friend of the plaintiff. The plaintiff called out to him, then went over to him and tapped him on the shoulder. Robertson swung around and smashed a glass beer jug into the plaintiff’s face.

The Queensland Court of Appeal found that:

“In effect, a powder keg situation existed and trouble should reasonably have been anticipated. . . . The Plaintiff’s action would not have been viewed as an external factor placing a different complexion on the pattern of behaviour at the hotel which the licensee was negligently accepting and taking no steps to control. The Plaintiff’s approach to Robertson was not a supervening cause in any relevant sense. . . . The exact form of Robertson’s aggression might not have been predictable but the real likelihood was that because of his highly provocative conduct some disturbance or violence might be the outcome and that one or other patrons might be injured.”

Here the situation developed such that a real likelihood of violence was imminent and the hotel was

23 Ibid at [93].

24 [2004] NSW CA 373.

25 *Parissis & Ors v Bourke* [2004] NSW 373 per Bryson JA at [60].

26 [1999] NSW CA 52.

27 (1992) Aust Torts per 81-180.

28 [2004] NSWCA 113.

29 *The Home Office v Dorsett Yacht Company Ltd* [1970] AC 100.

found to have a duty to intervene.

Thus, the thrust of later cases, particularly from the NSW Court of Appeal, led by Heydon J, now of the High Court, appears to be that the categories of 'special relationship' should not be readily extended. The courts have conceded, however, that there has been some overlap between the 'special relationship' exception and the duty to control presence on premises.

As to the scope of the duty owed by a person in a special relationship, this issue was examined in *The State of New South Wales v Godfrey & Godfrey*.²⁸ Spigelman CJ stated:

"Dorsett Yacht,²⁹ with its focus on the immediate vicinity of the gaol, may be based on the proposition that a prison authority should be taken to still have control at that point, because the possibility of recapture is at its highest . . . If Dorsett Yacht does represent the law in Australia, its application should, in my opinion, be confined to the course of the escape, where control is capable of being reasserted by the persons who should have prevented the escape. No such duty has ever been found to encompass conduct hundreds of kilometres from, and months after, an escape. . . . That a prison authority has duties within the confines of a prison, where it exercises a high degree of control, can readily be accepted. . . . such a situation is not of the same character as that which arises after an escape, where, by definition, the authority no longer has any element of control. . . . Control has been emphasised as a relevant factor in a number of cases . . . in substance, this is not a case about the ability to control the conduct of others. This is a case about a duty not to lose control."³⁰

In this instance, indeterminacy issues weighed against the imposition of such a duty.

With respect to the issue of when a breach will be found when a special relationship does arise, some recent cases of the New South Wales Court of Appeal are again instructive. The *State of New South Wales v Finnan*,³¹ the respondent was a Year 9 school student who had injured his knee jumping over a fence whilst running away from a fellow student who had threatened him.

That duty of care was owed was not in doubt. On the issue of breach, however, the Court of Appeal, overturning the trial judge's decision, found that the plaintiff had not satisfied the onus of proof in demonstrating a failure to take reasonable care by way of supervision in the "fleeting moments"³² in which these events took place.

Contrast that to the decision in *Bujdoso v State of New South Wales*³³ where a prisoner had been severely bashed whilst in a minimum-security prison. It was again not disputed that the prison authority owed the plaintiff a duty of care because "the control vested in a prison authority is the basis of special relationship which extends to a duty to take reasonable care to prevent harm stemming from the unlawful activities of third parties".³⁴

Again, the question was whether there was a breach. Here the trial judge had found there was no such breach on the basis that inmates had passed through every possible check before being put into a low security, work release section and they had much to lose if they stepped out of line. On appeal, how-

ever, the plaintiff's claim was upheld on the basis that:

1. There had been known breaches of trust;
2. The authorities in fact knew the plaintiff had been threatened with actual violence;
3. The plaintiff, as a paedophile, was at a greater general risk of violence in any event.
4. The authority had reduced the number of guards for reasons unrelated to prisoner safety.

"Those in control and who knew that the [Plaintiff] had been threatened did not even inform the guard at the units . . . of this fact, and did not even provide the [Plaintiff] with a more secure lock on his door. Nothing was done. In my view that was negligence."³⁵

2 High degree of certainty of harm exception

The existence of this exception is by no means certain. Gleeson CJ has commented that:

"There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predicability, that it is possible to argue that the case will be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it. . . . It is unnecessary to express a concluded opinion as to whether foreseeability and predicability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour. It suffices . . . as a matter of principle that such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another."³⁶

In the *Modbury* case, evidence of illegal activity in the area was that a restaurant in the car park had been broken into, there had been two attempts to break into an automatic teller machine and the car window of an employee in the video shop had been smashed.

These events had occurred over about a one-year period. Gleeson CJ said, "This does not indicate a high level or recurrent, predictable criminal behaviour" and was "nowhere near" enough to the enliven such an exception.³⁷

3 Failing to control access or presence on premises exception

The law in this regard is also by no means settled. It certainly appears to be the area where most inroads into the *Modbury* immunity can be made.

In *TAB Ltd v Atlas*,³⁸ the court was divided 2-1 on the issue of what the scope of duty was and whether there had been a breach. The particular TAB was located at a western suburb of Sydney. The premises described by Ipp JA as "small" with a "family type atmosphere" and "relatively sedate".

However on this particular occasion, two intoxicated men had begun to swear loudly and behave offensively.

30 Spigelman CJ Ibid at para [34-35] and [48-49].

31 [2004] NSWCA 314.

32 Ibid at [36].

33 [2004] NSW CA 307.

34 Mason P in *State of New South Wales v Napier* [2002] NSW CA 402 at [75].

35 Ipp JA, Ibid at [64].

36 Gleeson CJ, *Modbury*, opcit at [30]-[34].

37 Ibid at [34].

38 [2004] NSW CA 322.



Throughout the course of the afternoon they had been asked to quieten down by an elderly patron, a female employee of the TAB and the TAB manager. The elderly patron had reprimanded the two younger men on three occasions for their noisy behaviour. On the third occasion he told them to leave. One of the men then threw a bottle, striking the elderly man in the face. He then grabbed the elderly man around the neck. The injured plaintiff, Mr Atlis, tried to assist by pulling the drunken attacker away. He injured his shoulder in the course of wrestling this larger man.

Ipp JA in the majority, found that a duty was owed, but ultimately dismissed the plaintiff's claim.

The TAB of course relied upon the *Modbury* immunity, however, Ipp JA referred to his own judgment in *South Tweed Heads Rugby League Football Club Ltd v Cole*³⁹ (with which he said Heydon JA and Santow JA agreed and the High Court did not disagree in the subsequent appeal), where he said that "The general duty on the part of the occupier to take reasonable care to avoid a foreseeable risk

of injury to the entrant, ordinarily concerns risk of injury from the condition of the premises, but this is not an inevitable limitation on the scope of the duty. If, to the knowledge of the occupier, activities conducted on the premises bring about a risk of injury to the entrant, the circumstances may give rise to a duty of care wide enough to encompass a duty to take reasonable care to avoid foreseeable risk of injury arising from those activities. Typically, the foreseeable risk of injury in such a case is the risk of physical injury directly caused by the known activities on the premises."⁴⁰

Ipp JA noted that the plaintiff's complaint in this case was the failure to control the continued presence of the two young men on the premises. He said this distinguished it fundamentally from *Modbury*. Ipp JA felt it fell squarely within the exception espoused by Hayne J where he said "The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land."⁴¹

The TAB also argued that no liquor was sold on the premises but Ipp JA said this was not conclusive. Ipp JA felt it was very much to the point that the manager, at the time he spoke to the men, realised their activities on the premises constituted a risk of injury to other patrons. Ipp JA said that in his view, the circumstances were such as to give rise to the imposition of the duty on the claimants to take reasonable steps to prevent injury to other patrons. His Honour said: "This conclusion is simply the product of the concept of reasonableness."

Ipp JA referred to Gleeson CJ's statement that: "The concept of care and carelessness themselves require closer definition. The police officer in the case of Miss Tame made a mistake. In that sense, he was careless. He made a slip; he noticed the error within a fairly short time, and corrected it. His error was the consequence of a lack of care. However, in the context of the law of neg-

ligence, carelessness involves a failure to conform to a legal obligation. It does not necessarily involve a mistake. It involves the failure to protect the interests of someone with whose interest the Defendant ought to be concerned. A definition of the ambit of a person's proper concern for others is necessary for a decision about whether a Defendant's conduct amounts to actual negligence. The essential concept in the process of definition is reasonableness. What is the extent of concern for the interests of others which it is reasonable to require as a matter of legal obligation, breach of which will sound in damages?"⁴²

Gleeson CJ referred back to Lord Atkin's test in *Donoghue v Stevenson* where his Lordship spoke of the effects of acts or omissions on "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"⁴³

Gleeson CJ said it was therefore the reasonableness of a requirement the defendant should have certain persons, and certain interests, in contemplation that determines the existence of a duty of care.

In the same vein, in *Dovuro Pty Ltd v Wilkons McHugh J* emphasised that "If negligence law is to serve a useful social purpose, it must ordinarily reflect the foresight, reactions and conduct of the ordinary members of the community. . . . to hold Defendants to standards of conduct that do not reflect the common experience of the relevant community can only bring the law of negligence, and with it the administration of justice, into disrepute."⁴⁴

The entirety of the NSW Court of Appeal in the *TAB* case were therefore prepared to find that the facts removed the TAB from the *Modbury* immunity. This was on the basis that this was not an unanticipated or random attack from persons unknown. It was as Mason P put it "the very thing that Mr Young was concerned might happen" when he issued his earlier warning to the two young men.

Where the Court of Appeal differed was on whether that duty had been breached. Ipp JA noted that the trial judge's conclusion and the conclusion of Mason P that the duty was breached because the men were not removed by police prior to the fight taking place.

Ipp JA noted that the TAB did not employ security guards and there was no suggestion that it should have done so. There was nothing in its history of some 19 years that indicated that such step was necessary. Ipp JA was also not prepared to accept that it was reasonably practical for the manager, a 54-year-old man, to have physically removed two younger aggressive men. Ipp JA noted that realistically the only way the men could have been removed was by the police. In this regard, Ipp JA noted that only about 10 or 15 minutes had elapsed from the time the two men made bets to the occurrence of the violence. There was no suggestion that the police could have arrived in time to prevent the fight that occurred. Therefore, the finding that the removal of the young men would have been an effective measure in preventing the injury could not be sustained.

His Honour stated:

"The men had only been behaving badly for a matter of minutes. . . . It was not aimed at any individual patrons. Although under the influence

The general thrust of the cases appears to be that where there is an overarching element of control – meaning a power to assert control over the criminal third party – a departure from the fundamental principle will be seriously considered.

39 (2002) 55 NSW LR 113.

40 *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSW LR 113 at 137, [152].

41 *Modbury*, opcit at [112].

42 *Tame v State of NSW* (2002) 211 CLR 317, 330. [8].

43 [1932] AC 562 at 580.

44 (2003) 215 CLR 317 at 329 [34].

45 *TAB v Atlis*; opcit at [63] - [65].

of alcohol, they did not seem to be uncontrollable. They had shown no signs of violence to other patrons (albeit that [the manager] recognised the possibility of violence) and, as indicated, they quietened down at first. While [the manager] feared that violence could occur, particularly if a patron accosted the men while they were behaving so aggressively and obscenely, as he stood at his office door he adjudged the situation to be reasonably safe.

“[The manager] may have made an error of judgment in not telling the men to go and that he would call the police immediately however I do not think that amounted to negligence. In my view, a finding to that effect would have been an impermissible finding of negligence by hindsight.”⁴⁵

Thus, the New South Wales Court of Appeal was happy to further diminish the extent of the *Modbury* immunity but it ultimately concluded that it would not be fair, just or reasonable to hold that the TAB manager’s omission to threaten to call the police or to actually call them to remove the men was an omission that could properly be described as negligence.

Conclusion

The courts have openly expressed the desirability of the law of negligence according with the prevailing standards of the community. The general principle that, in the absence of some special relationship or special circumstances, an occupier should not be responsible for the criminal acts of a third party, would clearly reflect that position as to do otherwise would be manifestly unfair on the occupier.

As with most other guiding principles, however, difficulties arise at the periphery.

The general thrust of the cases appears to be that where there is an overarching element of control – meaning a power to assert control over the criminal third party – a departure from the fundamental

principle will be seriously considered. This means the third exception – the duty to control access or presence on premises – grows in significance if it can be shown that:

1. An occupier is, or should be, aware of an emerging danger caused by the presence of a person on the premises; and
2. They have the power to assert control over such a person; and
3. It is reasonable in the circumstances for the occupier to have the potential plaintiff in mind when determining whether or not to take some form of alleviating action;
4. It is reasonable, fair and just to require the occupier to take that alleviating action;
5. The injury would have been avoided if the occupier had acted.

the *Modbury* immunity will not stand. If, however, in the absence of an established ‘special relationship’, the injury is shown to be caused by a senseless and random act of violence which could not have been reasonably anticipated by the occupier, the *Modbury* immunity will protect the occupier from any claim. It is submitted that this approach best allows for the application for the law to a novel case whilst at the same time according to community expectations.*

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CASENOTE:

by Steve Bonutto

In a nutshell: A clear view on assessing damages in 'no transaction' cases

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The decision of Chesterman J in *Moloney & Anor v Bells Securities Pty Ltd & Ors* [2005] QSC 013 in the Queensland Supreme Court Trial Division has provided a concise analysis and application of the assessment of damages in 'no transaction' cases. The case also illustrates the evidentiary hurdles facing a plaintiff in proving liability and quantum in such cases.

The parties

The first defendant (Bells Securities) carried on the business of private mortgage lending and raised moneys for each loan by obtaining varying amounts from various clients (contributors) of the second defendant (Bells Solicitors). The directors and shareholders of Bells Securities also constituted Bells Solicitors, which was responsible for preparing loan documentation and making investigations into the value of proposed securities.

On May 14, 1999, Bells Securities lent \$1,040,000 to Longhampton Pty Ltd, such moneys having been made available by various contributors. The loan to Longhampton was for a term of 12 months, but repayment was not made. The property interest taken as security for the loan was worth less than the advance, and there was a subsequent loss of principal and interest.

Due to subsequent legislative amendments, Bells Securities' money-lending business was considered to be a "managed investment scheme" for the purposes of Part 5C of the *Corporations Act* 2001 (Cth). Bells Securities chose to discontinue the business rather than seek registration.

On June 6, 2002, the Supreme Court of Queensland appointed the plaintiffs (Moloney and others) as liquidators to wind up the scheme. Thereafter, the plaintiffs commenced an action against Bells Securities and Bells Solicitors for damages for negligence, breach of retainer and contravention of Section 52 of the *Trade Practices Act*, being the equivalent of the lost principal, interest and realisation expenses that were unable to be recovered from Longhampton.

Bells Securities and Bells Solicitors joined two valuers (Collins and MCH) as third parties, alleging that the loan was made in reliance upon their valuations that the subject security was sufficiently valuable for the purpose of the advance.

The valuations

His Honour found that Collins valued the unencumbered freehold interest in the land on February 4, 1999, at in excess of \$1,500,000 (the Collins valuation). However, one month later, Longhampton entered into a five-year lease of the property. Bells Solicitors was aware of the existence and the terms of the lease at the time of considering the proposed advance. Bells Solicitors requested and received an assignment of the Collins valuation. Additionally, Bells Solicitors instructed MCH to carry out a "desktop

check valuation”, that is a review and verification of the Collins valuation.

After an extensive review of the evidence, his Honour was satisfied that Bells Solicitors did not ask Collins or any other valuer to provide a valuation of Longhampton’s proposed security interest as lessor in the land, namely Longhampton’s right to receive rent and the reversion (which was worth between \$900,000 to \$1,100,000). Additionally, his Honour expressly found that Bells Solicitors did not advise MCH of the existence of the lease.

Decision – Liability in the principal proceedings

Bells Solicitors was negligent in failing to obtain an appropriate valuation of the proposed security and otherwise failing to advise Bells Securities whether the loan met its prudential lending requirements. Further, his Honour found that Bells Securities failed to take reasonable care for the preservation of the trust fund constituted by the contributions. His Honour was satisfied that the transaction would not have occurred but for the negligence of Bells Securities and/or Bells Solicitors.

Decision – No liability in the third party proceedings

His Honour found that Bells Solicitors did not advise MCH of the existence of the lease. MCH was instructed only to carry out a “desktop check valuation” of the Collins valuation, and that the MCH valuation was appropriate in the circumstances. In any event, his Honour found there was no reliance by Bells Securities and/or Bells Solicitors upon the MCH valuation.

As regards the Collins valuation, the critical issue was the contents of a conversation between Bells Solicitors and Collins on April 19, four days after it had been assigned to Bells Securities, namely as to whether Collins was made aware of the existence of the lease and the impact upon the Collins valuation.

After a lengthy analysis of the evidence from both parties, his Honour found he was unable to conclude what was actually said in relation to the lease and its effect on the valuation. As a result, the claim against Collins failed for lack of proof.

Assessment of damages

The plaintiffs claimed in respect of the principal the amount being the difference between the amount due under the loan agreement at the date of sale and the amount recovered, after expenses from the sale of the property. This amount included interest at 14.5% per annum compounding monthly (effectively the ‘default’ rate set out in the loan agreement).

His Honour summarised the relevant law as:

- (a) Where a party makes a contract by reason of another’s negligent misstatement or failure to advise, whether the cause of action be in negligence contract or contravention of the *Trade Practices Act*, the measure of damage is not the loss of the bargain the contract would have yielded, but the cost to the Plaintiff of making the contract;
- (b) Recent High Court decisions in *HTW Valuers*

(*Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54 and *Henville v Walker* (2001) 206 CLR 459 show that there is no rigid formula which will determine how to assess damages in every case. Instead, a degree of flexibility is required so that the damages assessed are apposite to the circumstances of the case;

(c) The ‘contractual’ measure of damages, that is an award of the profits the plaintiff would have made from entering a contract, is inapplicable in circumstances where, had a defendant not contravened the statute or been negligent, the plaintiff would not have made the contract. In ‘no transaction’ cases, the assessment rather depends upon the extent to which the plaintiff is worse off as a result of entering the contract which, on the relevant hypothesis, he did because of the negligence or statutory contravention.

Applying the above principles, the plaintiffs were entitled to recover the difference between the amount of the advance and the amount recovered from the sale of the security, together with appropriate expenses incurred in realisation.

His Honour specifically rejected the claim for compound interest, noting that such interest ought only be awarded where there is a contractual basis for it, or against a defaulting trustee guilty of serious misconduct, or in circumstances prescribed in *Hungerfords v Walker* (1989) 171 CLR 125. What the contributors lost was not the amount payable under the mortgage, but a lost opportunity to invest elsewhere.

As was noted by McHugh J in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 147: “The opportunity cost of lending the principal sum . . . was the interest that it was deprived of in not being able to lend that principal to another borrower . . . And it was the opportunity cost, not the interest that [the borrower] failed to pay, that was the relevant loss for the purpose of Section 82.”

His Honour found that there was no evidence led by any of the contributors as to what they would have done with their money had they not lent it to Longhampton. Accordingly, the rate should be modest, reflecting a guaranteed return such as bank deposits or government bonds, and was awarded at 5 percent.

Implications

1. His Honour’s decision provides a commonsense approach to the assessment of damages in ‘no transaction’ cases by focusing upon the extent to which the plaintiff is truly worse off as a result of entering into a contract due to alleged negligence or statutory contravention.
2. The case demonstrates the importance of assessing the ‘opportunity cost’ sustained by lenders and rejecting claims for compound interest save in limited circumstances. This will pose particular difficulties for private mortgage lenders acting on behalf of various contributors.
3. Finally, the failure of the claims against the valuers underlines once again the need for rigorous forensic examination of the facts alleged to establish reliance in claims for negligent misstatement or statutory contravention. *

by P.F. Mylne

Obvious risks in the workplace

1 What is an obvious risk?

There has been much discussion in recent years as to the principles to be applied in cases where plaintiffs seek damages from courts in circumstances in which the injury, sometimes catastrophic, is suffered as a consequence of the plaintiff engaging in risky behaviour.

It has frequently been said that such a plaintiff has engaged in behaviour which carries with it an 'obvious risk'. Is such behaviour able to be defined more accurately?

In *Wyong Shire Council v Vairy*,¹ Tobias JA considered that question and adopted the definition contained in the 'Restatement (Second) of Torts' (1965). He stated:²

"In that commentary 'obvious' is defined as follows: 'Obvious' means that both the condition and the risk are apparent to and would be recognised by a reasonable man, in the position of the [plaintiff] exercising ordinary perception, intelligence and judgment.'

"In this definition, 'condition' refers to the factual scenario facing the plaintiff. Thus, in a diving case the condition might typically be the fact that the plaintiff is faced with water of unknown depth. Under such a condition, the risk would be that diving into the water (while the depth remains unknown) might result in 'serious' injury. The risk would be considered obvious if, in the context of the case, it was perceptible to a reasonable person in the position of the plaintiff that if you do not know the depth of a body of water into which you are about to dive, then to dive into such water under such conditions inevitably brings with it the risk of injury."

2 Summary of the duties owed to an employee in the context of the existence of obvious risks

The employment relationship, of course, is one of those in which the standard of care is high. In circumstances in which employees engage in risk-taking behaviour in the course of employment however, the applicable principles have not always been as benevolent as they currently stand. In *Waverley Municipal Council v Swain*³ Spigelman CJ gave a brief summary of the development of the law in this respect.

In *Bressington v The Commissioner of Railways (NSW)*⁴ a widow sued the Commissioner of Railways on the death of her husband, a railway worker. He had been struck by a railway van which moved forward suddenly during a shunting operation. There were two acts of negligence alleged by the plaintiff which failed:

(a) there was no notice warning people in the yards

A consideration of the principles to be applied where employees/contractors engage in risk-taking conduct

of the danger of crossing the lines;

(b) there was no system of warning people when stationary trucks situated in the shunting yard were above to move.

The Full Court of the New South Wales Supreme Court dismissed an appeal by the plaintiff. In the High Court, only the second particular was argued and, by a majority 4-1, the appeal was dismissed. This robust approach in respect of requiring employees to look out for their own safety was reflected as late as 1972 in *Sydney City Council v Dell'Oro*.⁵ Jacobs J found that there was no negligence in circumstances in which a skilled electrician was electrocuted when he accidentally touched certain exposed wires which he knew carried live current.

A very similar factual case came before the court in *Bus v Sydney City Council*.⁶ By this time, however, *McLean v Tedman*⁷ and *Bankstown Foundry Pty Ltd v Braistina*⁸ had been decided. The court stated at p90:

"Since the decision in *Dell'Oro*, the law has progressed by placing an increased emphasis upon the relevance of the possibility of negligence or inadvertence on the part of the person to whom the duty of care is owed. That possibility is now recognised as being relevant to the standard of care owed by an employer to an employee and as well generally in situations in which a duty of care exists."

Of course in the last three to four years, a trend has emerged whereby greater emphasis is given to the suggestion that people will take reasonable care for their own safety (see *Romeo v Conservation Commission (NT)*,⁹ *Ghantous v Hawkesbury City Council*,¹⁰ *Woods v Multi-Sport Holdings Pty Ltd*¹¹).

- 1 [2004] NSW CA 247.
- 2 *ibid* at [161] and [162].
- 3 [2003] NSWCA 61.
- 4 (1947) 75 CLR 339.
- 5 (1970) 132 CLR 97.
- 6 (1989) 167 CLR 78.
- 7 (1984) 155 CLR 306.
- 8 (1986) 160 CLR 301.
- 9 (1998) 192 CLR 431 at [123].
- 10 (2001) 206 CLR 512 at [163] and [355].
- 11 (2002) 76 ALJR 483 at [44].

In a frequently referred to statement, Heydon JA (as His Honour then was) said in *Van der Sluice v Display Craft Limited*:¹²

“The fact that the higher up the ladder one moves the more care one must take for one’s own safety is one of those simple facts affecting human existence in the physical world which adults in industrial societies have learned by the time, or indeed well before the time, they have become adults. It is a fact as fundamental, as elementary, as clear and as well known, as for example, the fact that it is dangerous to behave boisterously near pots cooking on stoves, the fact that broken glass needs to be carefully handled when picked up, the facts that rocks along the seashore can be slippery, the fact that shells in the sand of beaches can be sharp, and the fact that when moving about rubbish dumps one must bear in mind the possibility that rubbish may be lying there. There are matters which no adult need be told about and which any adult can be trusted to guard against the dangers of because it is part of the equipment of all normal adult human beings. All citizens can safely and reasonably assume that each normal adult human being acting autonomously and voluntarily will not incur unnecessary and blatantly obvious risks.”

Have these sentiments found any place in the principles applied to the employer/employee relationship? In *Czatyryko v Edith Cowan University*¹³ the High Court considered the following facts. The plaintiff and another employee were required to load 30 or so boxes onto a truck for the purpose of removing them to another campus. The tray of the truck was fitted with an hydraulic lifting platform about the width of the truck. The platform sounded a loud noise when being raised and made a ‘clanging’ sound when it reached a point flush with the tray. It made no sound when being lowered.

The other employee performed the task of taking a trolley load of books onto the platform, caused the platform to be hydraulically lifted to a point flush with the tray and unloaded the books for the plaintiff to arrange. He then left the tray of the truck, descending on the platform with the trolley to gather another load. This system of loading the books was performed on a number of occasions.

On the last trip, the second employee left the truck without saying anything to the plaintiff. The plaintiff, who was reorganising the boxes, stepped backwards not realising that the lifting platform had moved and fell heavily. Had the platform been in place, he would not have fallen. The plaintiff succeeded at first instance, however, lost in the Full Court of the Supreme Court of Western Australia. There, Murray J stated:¹⁴

“In my opinion the appellant acting reasonably, was entitled to expect that the respondent would look where he was going rather than that he would step back, knowing that he was about to step off the back of the truck tray, without looking to see whether the hoist, which he knew was constantly on the move and which he knew he would not necessarily hear being lowered, was in fact in a position level with the tray of the truck.”

He referred also¹⁵ to the comments of Kirby J in *Romeo* where it was said:

“Where a risk is obvious to a person exercising

reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just.”

Whilst there was reference to cases revolving around the liability of occupiers, there was no reference in the Full Court to any authority pertaining to the extent of the obligation imposed employers. The case was neither a warning case nor an occupier’s liability case. It was an employment case in which the central allegation against the employer was a failure to provide a safe system within the factual background of the plaintiff being required to perform repetitive and boring work. The High Court applied the usual principles found in the older cases (*Hamilton v Nuroof (WA) Pty Ltd*,¹⁶ *Smith v The Broken Hill Company Limited*¹⁷) and stated that:¹⁸

“Compliance by the respondent, as an employer, with its duty of care to an employee was not to be measured by reference to the reasonableness of imposing on an occupier of land an obligation to warn members of the public about the obvious risks on the land. The case for the appellant was not that he should have been warned by his employer that if he fell off the truck he might suffer injury, or whether if he stepped off the back of the truck into space he would fall. It was not a question of warning the appellant of a risk, it was a question of creating a risk by failing to adopt a safe system of work.”

3 Circumstances in which employers may succeed on liability

Czatyryko shows that the many decisions of recent times in courts around the country which emphasise the need for a plaintiff to take care for his/her own safety as a pre-requisite to the establishment of liability in some circumstances have no application in the employment relationship over and above the long standing principles which have governed this area. Given the trend of authorities in the last 30 years or so outlined earlier, it is apparent that the circumstances in which employers shall succeed are extremely narrow in scope. The following classes represent an attempt to identify such areas.

(a) Where there is nothing further the employer could have done or provided in order to eliminate or minimise the risk

This proposition is demonstrated by *O’Connor v Commissioner for Government Transport*.¹⁹ There, an experienced plumber, employed by the defendant, fell through an awning affected by dry rot. He was directed to reduce the length of the awning which consisted of corrugated iron sheets. He was provided with a party of workers and tools with which to complete the job. Whilst he was standing on the awning, it collapsed under him due to the rot. There was obviously a foreseeable risk of injury to the deceased and there were precautions which could have been taken which would have eliminated the risk. The court held, however, that those precautions such as examination by a superior officer or some form of instruction to the plaintiff were all matters in respect of which it was not reasonable to expect the employer to perform or provide. Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ said:²⁰

“The defendant as employer was of course under a duty, by his servants and agents, to take rea-

12 [2002] NSWCA 404 at [74].

13 [2005] HCA 14.

14 [2002] WASCA 334 at [29].

15 *ibid* at [16].

16 (1956) 96 CLR 18 at p25.

17 (1957) 97 CLR 337 at p342.

18 *supra* at [14].

19 (1954) 100 CLR 225.

20 *ibid* at pp229-230.

sonable care for the safety of the deceased by providing proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to be required to secure him from danger of injury. But the party was provided with trestles and plank and nothing was wanting in tools or equipment. The deceased was experienced in his work. It was obvious that a question must exist whether the awning would bear his weight.

“The party sent down was as ‘expert’ or competent to judge of that simple subject as anybody that could reasonably be sent. . . . In such a simple matter who else should be left to judge? Does the reasonable care demanded of the employer require him to cause a scientific or other elaborate examination to be made of the strength of the structure lest the working plumber may decide to trust himself to it rather than work from a plank or trestle?

“ . . . The standard of care for an employee’s safety is not a low one, but in a case such as this the question must be whether any suggested course that was omitted could really be regarded as reasonable (my emphasis). The case is not one of a defect in premises provided by the employer as the place where the employee is to do his work. The awning was the very thing to be worked at. . . . Obviously any experienced plumber would see that there must be a question whether a structure like the awning supported not by posts, but by brackets was strong enough to bear his weight as he dismantled it.”

An example of the extent to which employers need go in order to satisfy the requisite standard of care is provided by *Bartley v Coles Myer Limited*.²¹ There, the unsuccessful plaintiff at trial was a butcher employed by the respondent. On two separate occasions he cut his left hand whilst boning and slicing meat with a sharp knife. It was alleged that the employer was negligent by failing to provide the plaintiff with a meshed glove to protect his hand and/or alternatively if it provided one it failed to supervise him properly in order to ensure that he wore the glove.

The first point failed; he had been provided with all necessary equipment, including gloves. The Court of Appeal focused upon whether the employer had exercised proper enforcement of the system of wearing gloves. The plaintiff was an experienced butcher. He had been trained without the use of gloves and carried on in his trade for many years without using them. He preferred not to wear them.

The plaintiff had been instructed by his superiors that he was expected to wear a glove and there were notices around his workplace carrying that instruction as well. He declined however to do so. The employer knew that the plaintiff was not complying with the direction and did not make any serious attempt to enforce the instruction until after the first accident. After the first accident, but before the second, the manager tried to enforce the safety rule. The manager’s evidence was that the plaintiff refused to wear the glove and this led to arguments. The second accident then occurred which would have been averted with the wearing of the glove.

The Court of Appeal found that if suitable pressure

had been applied to the plaintiff he would have complied with the instruction rather than lose his job. Alternatively he would have been dismissed and would not have been injured in any event.

(b) Simple uncomplicated tasks

Glass McHugh & Douglas in their text ‘The Liability of Employers in Damages for Personal Injury’ (2nd edn. 1979) state:²²

“An area is marked out within which the employer’s duty to provide a safe system of work is inoperative. It would appear that the immunity of the employer will be limited to isolated operations of no complexity outside the normal system or simple uncomplicated operations within it. It is not likely that the principle will undergo much further elucidation as scope for its operation is essentially a matter of degree depending on the nature of the industrial activity. The only unifying principle available is the power of the court to hold that on the evidence in the particular case it would be beyond all reason to find an employer in breach of duty for failure to take certain specified steps.”

An example of a case where a plaintiff failed in his claim for damages by wrongly executing a simple uncomplicated procedure is *McLean’s Roylen Cruises Pty Ltd v McEwan*.²³ There, the plaintiff was employed as a deckhand on a barge and was injured when his arm was crushed between the barge and a jetty. Although this was primarily a warning case, the High Court stated that it ought to have been obvious to anyone that there is a danger if a deckhand allows his arm to extend beyond the rail of the vessel that it may be caught between the vessel and the jetty when it is close to the jetty.

(c) Where the employee acts outside the scope of a duty of care owed to him or her by creating a risk of an unforeseeable character

An example of such a circumstance was *Jones v Persal*.²⁴ There, the plaintiff, whilst attempting to assist a co-worker fit a boom and bucket to a truck, climbed onto the truck’s bullbar. This was a dangerous position to be in and he fell from the bullbar.

The trial judge found that it was foreseeable that the plaintiff may offer assistance and thereby subject himself to a risk of injury. He found that it was not necessary to go so far as to foresee the exact detail of that assistance such as climbing onto the bull bar. There were also safe means of performing the task which were not adopted by the plaintiff. The Court of Appeal held that the acts of the plaintiff, being outside his normal duties, and performed in circumstances in which there was an otherwise safe way to complete them, created a risk of an unforeseeable character.

4 Summary of the duties owed to a contractor in the context of the existence of obvious risks

(a) Introduction

The content or scope of any duty of care owed to a contractor is still the subject of debate. The starting point is *Stevens v Brodribb Sawmilling Company Pty Ltd*.²⁵

The Court of Appeal found that if suitable pressure had been applied to the plaintiff he would have complied with the instruction rather than lose his job. Alternatively he would have been dismissed and would not have been injured in any event.

²¹ [1994] QCA 427.

²² pp45-46.

²³ (1984) 54 ALR 3.

²⁴ [2000] QCA 386.

²⁵ (1986) 160 CLR 16.



There the plaintiff, a log carrier, was injured as a consequence of the negligence of a snigger who negligently loaded a log onto the plaintiff's truck. The three commonly repeated views expressed in the case are set out as follows.

Mason J said:²⁶

"If an entrepreneur engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work and where there is a need for him to give directions as to when and where the work is to be done and to co-ordinate the various activities, there is an obligation to prescribe a safe system of work. The fact that they are not employees, or that he does not retain a right to control them in the manner in which they carry out their work, should not affect the existence of an obligation to prescribe a safe system. Brodribb's ability to prescribe such a system was not affected by its inability to direct the contractors as to how they should operate their machines."

Wilson & Dawson JJ said:²⁷

"... we are prepared to assume that [Brodribb] was under such a duty of care although it seems to us that the extent of the duty would have to take account of the independent functions of the contractors and be something less than that owed by an employer to his employees. To equate the duty with that owed by an employer to his employees would be to give no weight to the very circumstance which differentiates the contractors from employees... any such duty was, in effect, a duty to exercise care in the co-ordination of the activities of the various contractors."

Brennan J said:²⁸

"An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he has created the risk (*my emphasis*) (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at p479) and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury.

"But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. "If there is no failure

to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractor's respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility."

In *McDonnell v Hoffman*²⁹ (a case factually very similar to *Brodribb*), Chesterman J considered the above statements of principle and concluded that:

"The most comprehensive discussion of the principle underlying the imposition of duty on one who engages a contractor is found in the judgment of Brennan J. The essence of it seems to lie in the organisation of an activity which carries a risk of injury. The activity is to be organised with reasonable care to avoid risk of injury. A builder who engages a plumber and an electrician to work on the same site at the same time must take reasonable care that each can work without harm from the other. Beyond this sort of consideration the duty appears to have no scope for operation."

That decision can be contrasted with the remarks of Ipp JA (who whom Mason P & McColl JA agreed) in *Rockdale Beef Pty Ltd v Carey*³⁰ where he stated:

"In my opinion, nothing said by Mason J or Brennan J in *Stevens*, or Heydon JA in *Kolodziejczyk*, prevents the general law of negligence imposing on an entrepreneur a duty of care owed to an independent contractor. Such a duty may arise in circumstances where there is no need for the entrepreneur to give directions as to when and where the work is to be done and to co-ordinate the various activities, but where, for other reasons, reasonable care on the part of the entrepreneur affects the way in which the work is to be undertaken and the safety of the worksite, and where other consideration (not applicable in *Stevens* & *Kolodziejczyk*) such as vulnerability, inequality of bargaining power, control, and the other manifold factors that the law recognises as being relevant to the existence of a duty of care, are present." (*my emphasis*)

(b) Cases where the contractor has failed to establish liability

In *Van der Sluice v Display Craft Pty Ltd*³¹ the plaintiff fell from the ladder upon which he was standing whilst installing Christmas decorations as an independent contractor for the defendant. The master dismissed the claims and the plaintiff appealed to the New South Wales Court of Appeal.

This was plainly a case involving a genuine independent contractor who was engaged for a particular purpose of installing and dismantling Christmas decorations at various locations. As Gleeson CJ described it in the special leave application, it was a seasonal business.

Now in the context of this factual background, it is submitted that, as a permitted entrant on the defendant's premises, whilst there was a duty on the principal to do what was reasonable to avoid a foreseeable risk of injury to the contractor, the scope or measure of that duty would have been very limited indeed.

²⁶ *ibid* at p31.

²⁷ *ibid* at p45.

²⁸ *ibid* at pp47-48.

²⁹ [2000] QSC 54 at [25].

³⁰ [2003] NSWCA 132 at [84].

³¹ [2002] NSW CA 204.

The important feature of this case, however, is that the New South Wales Court of Appeal upheld the master's view that the risk of injury was not foreseeable.³² This is a finding which would appear to be contrary to binding authority. As Kirby J stated in *Douvro Pty Ltd v Wilkins*:³³

"It has sometimes been argued that the decision of the Privy Council in *The Wagon Mound [No.2]* [1967] 1 AC 617 resulted in a wrong turning of the law of negligence. Instead of asking what was 'liable to happen' in the sense that 'it was not unlikely to happen' (as some Judges suggested), their Lordships in *Wagon Mound* embraced what has been described as the 'undemanding' test of reasonable foreseeability. By that test, it is sufficient that a reasonable person in the defendant's position would have foreseen that its conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. It remains, if this question is answered in the affirmative, to decide what a reasonable person would then have done by way of response to such risk. However, the risk is posed at a general level of possibility and in terms of risk of harm. It is not posed in terms of the likelihood of the particular harm that allegedly occurred. There is a reason for this. The duty which the law of negligence invokes is concerned with securing a response to a risk of harm generally. It does not demand exact prescience, so that the putative tortfeasor will be expected to see into the future and predict a specific way in which events will work out."

The plaintiff failed on questions of breach as well as duty in *Van der Sluice* and he was always going to be unlikely to succeed on the breach issue. However, in the special leave application, whilst the plaintiff was unsuccessful in obtaining leave, both Gleeson CJ and Kirby J expressed reservation with the reasoning of the Court of Appeal on this point, but saw little reason in giving special leave where the appeal would have otherwise failed (on the breach issue).

It is in the context of the finding that the risk of injury was not reasonably foreseeable that Heydon JA made the oft-quoted remarks that care needs to be taken when moving about a rubbish dump, that shells in the sand of beaches can be sharp, and that rocks along the seashore can be slippery. Heydon JA refers to *O'Connor v Commissioner for Government Transport* in support of his position. However, that was not concerned with issues of foreseeability on the issue of duty. It was concerned with the scope of the duty of care which an employer owed to the plaintiff. It was concerned with what further steps could reasonably have been expected of the employer so that a risk of injury of the kind suffered could have been eliminated or minimised.

In *Kolodziegczyk v Grandview Pty Ltd*,³⁴ the plaintiff and his business partner worked for the defendant as sub-contractors for the purpose of installing roof cladding on houses. The plaintiff fell from an unsecured ladder whilst performing these tasks which was leaning against a house on which he was installing the cladding.

The plaintiff was unsuccessful in establishing either duty, breach or causation. The court took a narrow view of *Stevens* and stated that the duty arises in cases "only where there is a need for directions to be

given as to when and where work is to be done and for the co-ordination of various activities".³⁵

The court found, even if there was a duty, that had not been breached because of the plaintiff's failure to tie the ladder at the top and bottom. Heydon JA said:³⁶

"The objective circumstances of the plaintiff's position largely known to the defendant, meant that the defendants assumed the duty of care was not breached either by the non-provision of better scaffolding or the failure to supply rope and instructions about how to use it. The danger was the reverse of hidden. It was actually apparent to the plaintiff. The Trial Judge found that he spoke of that danger to the defendant. Particularly in view of the plaintiff's experience the need to behave with an eye to safety was so plain, and the measures to be adopted which would achieve safety were so simple, that the defendant was not in breach of duty. The defendant was entitled to trust the plaintiff to make appropriate provision for his own safety."

Even in the event of the establishment of duty and breach, the court found that the plaintiff would have failed on causation in any event, as the cause of the fall was found to have been the plaintiff's failure to have tied the ladder.

In *Pack-Tainers Pty Ltd v Moore*³⁷ the plaintiff was a contractor who was a qualified fitter and machinist who had special training in respect of the maintenance of container carriers and forklifts. He operated the business of maintaining container carriers and associated equipment including forklift trucks. He was injured while working at the defendant's premises when trying to solve a problem whereby one container would not disengage from a forklift.

In order to attempt to solve the issue, the plaintiff made his way onto the top of the container which was about three metres above ground level and slipped and fell.

Young CJ specifically remarked that this was not a '*Brodribb*' set of facts and stated:³⁸

"The situations where the relevant duty may attach are not limited to cases which fit within the facts of *Brodribb*."

In circumstances in which there was no evidence that the principal (if asked) would not have provided some form of equipment to assist the plaintiff to safely complete the task and there was evidence that the plaintiff was expected to seek the help of the principal's employees, the defendant was found to have taken all reasonable steps in the circumstances to avoid or minimise the risk of injury.

(c) Cases where the contractor has been successful in establishing liability

In *Hoekstra v Residual Assco Industries Pty Ltd*³⁹ an employee was sent to the premises of a third party to perform work and was injured when he fell whilst descending a ladder after steel plates which were supposed to be at the foot of the ladder were removed. This case does not involve a contractor, however there are interesting statements of principle in it which are relevant when discussing *Thompson v Woolworths*⁴⁰ (considered later). Counsel for the defendant submitted that no duty of care was owed to the plaintiff because the plaintiff was not acting with reasonable care for his own safety.

³² see [74].

³³ [2003] HCA 51 at para. [104].

³⁴ [2002] NSWCA 267.

³⁵ *ibid* [53].

³⁶ *ibid* [52].

³⁷ [2005] NSWCA 43.

³⁸ *ibid* [77].

³⁹ [2004] NSW SC 564.

⁴⁰ [2005] HCA 19.



It was submitted that, in the case of a defendant who was not an employer, a duty of care arises only to those persons who are at the time, exercising reasonable care for their own safety.

Dunford J found this suggestion “novel and surprising”. *Van der Sluice* was one of the cases relied upon in support of that proposition. Dunford J said:⁴¹

“... A duty of care may be owed notwithstanding a failure of the other person to take reasonable care for his or her own safety. . . . To hold otherwise, i.e., that there is no duty of care owed to those who failed to take reasonable care for their own safety, would have the effect of making contributory negligence an absolute defence to actions of negligence and negate the provisions of the apportionment legislation . . .”

In *Surf Coast Shire Council v Webb*,⁴² the Victorian Court of Appeal considered the following circumstances. The plaintiff and his wife were proprietors of a small business and had entered into a contract with the defendant shire to collect rubbish from a number of public bins located throughout the shire. The bins had no handles or protruding parts which could be easily grasped, so that they could only be lifted by being taken by a thin outer lip. When full, considerable effort was required to remove them from the cradle in which they sat. Sometimes the bottom of the bin became jammed into the base of the cradle.

One of the bins which the plaintiff was required to empty was opposite a shop. It seems that rubbish from the shop was placed into the bin and there was a much greater effort involved in lifting that bin than others. On the day in question, the plaintiff sought to lift the heavy bin out of its cradle but found that it was jammed into the base of the stand. The plaintiff gave the bin a “violent jerk” and he suffered an injury.

It was alleged that the shire breached its duty and failed to prevent the dumping of commercial rubbish in excessive quantities in the bins and failed to provide suitable or appropriately designed bins.

Chernov JA who gave the judgment of the court accepted that the ambit of any duty owed was narrower than that owed by an employer to an employee. There was some evidence that a simple method of fitting the bins with lids which limited the size and amount of rubbish which could be placed in them would have alleviated this risk. Chernov JA considered the submission that the plaintiff was in a good position to assess the risk involved in lifting a heavy bin when it was jammed and to protect himself against the possibility of injury by seeking assistance. He stated, however, that that went to the question of contribution and found the defendant liable.

In *Thompson v Woolworths*⁴³ the plaintiff and her husband owned and conducted a bread delivery service in the course of which they made daily deliveries to the local Woolworths store. Deliveries were made to a loading dock at the end of a lane. The loading dock led to a storeroom which was under the control of a storeman and there were roller doors between the loading dock and the storeroom. The system was that suppliers of goods would reverse the truck along the laneway and unload the goods onto the loading dock from where they were taken to the storeroom.

The presence of the storeman was necessary once the truck reached the loading dock, obviously for the purpose of invoicing goods and determining the correct quantity and so forth. When the storeman was not present, it was necessary to press a buzzer to attract his attention and bring him to the loading dock. The evidence was that on some occasions it took up to 10 or 15 minutes for the storeman to arrive. The plaintiff was unable to unload her bread and continue on to perform her other deliveries without the assistance of the storeman.

In an area adjacent to the loading dock, two industrial waste bins were located. The waste bins were usually placed alongside the loading dock. Upon them being emptied by the local council, the council workers would regularly leave the empty bins in the laneway in front of the loading dock without returning them to the position where they ordinarily stood. The presence of the bins in front of the dock effectively prevented delivery vehicles from obtaining access to it.

The trial judge found as a fact that it was the responsibility of the defendant to move the bins. He found that the defendant’s employees were aware that the bins constituted an obstacle and also that drivers often moved the bins.

The advantage of moving the bins for the delivery driver was that it saved some amount of time and allowed that person to go on their way to complete further deliveries. However, the time saved by moving the bins must have been not significant, as the delivery driver had to wait for the storeman in any event to permit the actual delivery to occur on the loading dock.

Prior to being injured, the plaintiff and her husband complained to the defendant’s staff and management about the bins being left in the laneway. Shortly prior to the accident the plaintiff wrote in her diary “too heavy for manual moving . . . too heavy for me to move by myself”. Over the 18 months or so prior to the accident, the plaintiff moved the bins between 20 and 30 times. A week or two prior to her injury, she was attempting to lift a crate of bread and injured her back.

On the relevant day, the plaintiff arrived at the defendant’s premises and no other person was present. There were empty waste bins in front of the loading dock. The plaintiff reversed the truck along the laneway and then after leaving the truck attempted to move one of the bins. During this episode, she was injured.

Samios DCJ found for the plaintiff on the basis that there was a failure to provide a safe system in circumstances in where the defendant knew that the bins represented an obstacle for the delivery drivers, and that they knew that the drivers would often move the bins. He found that there was evidence which demonstrated that there were measures, not expensive or difficult to implement, which would have changed the system and alleviated the risk.

The defendant successfully appealed to the Queensland Court of Appeal.⁴⁴ The Chief Justice found that, while the risk of the plaintiff injuring herself was obvious, this did not bear upon the existence of a duty itself, but on the formulation of the content of the duty. He referred to the relationship between the parties, the obviousness of the risk and the undertaking of the risky manoeuvre as being im-

41 *supra* [35].

42 [2003] VSCA 162.

43 [2005] HCA 19.

44 *Woolworths v Thompson* [2003] QCA 551.

portant elements in the formulation of that content. In his view, the duty owed to the plaintiff did not extend to taking steps to eliminate this risk.

Williams JA focused primarily upon the obviousness of the risk, given the plaintiff's knowledge of the weight of the bins, as well as her previous injury. He referred to her statement under cross-examination where she stated that "it was obvious to me that I shouldn't have pushed the bins".

McMurdo J dissented. He referred to the majority judgment in *Nagel*⁴⁵ where it was stated:

"We are left in no doubt that the trial Judge was correct in concluding that the risk of injury to those diving from the rock ledge was reasonably foreseeable. As he said 'it may have reasonably been considered foolhardy or unlikely' for a person to dive as the appellant did, but as he recognised, that was not the relevant question: a risk may constitute a foreseeable risk even though it is unlikely to occur. It is enough that the risk is not far fetched or fanciful."

McMurdo J referred to the fact that the majority in the High Court dismissed the appeal in *Romeo*, not because a duty of care was not owed, but because it was not breached. He stated:

"Toohey & Gummow JJ remarked that 'the risk existed only in the case of someone ignoring the obvious' but added:

"In putting the matter in that way, there is a danger of drawing in the question of contributory negligence of the plaintiff to what is a consideration of the duty of care on the defendant. For that reason we think it is preferable to approach the matter on the footing that there was a duty of care on the respondent to take any steps that were reasonable to prevent the foreseeable risk becoming an actuality."

"Kirby J & Hayne J each distinguished between the issue of whether a duty of care existed and the issue involving what was alternatively described as the measure, scope or content of that duty. The obviousness of the danger presented by the cliff was relevant to the second of those issues: see pp488-489 where Hayne J said:

"What is reasonable must be judged in the light of all the circumstances. Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty in cost of averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the question. In the case of a public authority which manages public lands, it may or may not be able to control entry on the land in the same way that a private owner may: it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those of all ages and conditions. All of these matters may bear upon what the reasonable response of the authority may be to the fact that injury is reasonably foreseeable. Similarly, it may be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree

of care ordinarily exercised by a member of the public or to consider whether the danger is one created by the action of the authority or is naturally occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which go towards judging what reasonable care on the part of a particular defendant required. In the end that question, what is reasonable, is a question of fact to be judged in all of the circumstances of the case.'"

McMurdo J also dealt with arguments advanced by the defendant which, it was argued, pointed towards comments in cases such as *Brody* supporting the proposition that no duty is owed in respect of an obvious risk. He found (like the members of the majority) that the defendant owed a duty to do what was reasonable to avoid the risk of injury in her movement of the bins whilst unassisted. He disagreed however with the majority on the basis that the content of the duty did extend to cover this particular risk, albeit obvious.

The plaintiff obtained special leave and was successful in the High Court. The High Court agreed with the reasoning of McMurdo J and said:⁴⁶

"When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to the expectation that the other will exercise reasonable care for their own safety is a matter of factual judgment. . . . The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. . . . The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an inter-play of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. . . . The question was whether the respondent had a proper delivery system in place. Such a system should have included arrangements for moving the waste bins left in the laneway by the council workers in order to clear access to the loading dock. The [plaintiff] and other delivery drivers had no responsibility to design, and no power to implement, the delivery system operating on the respondent's premises." (*my emphasis*)

It is submitted that the difference in views in this case represents one of those circumstances upon which reasonable minds may differ, particularly in light of the fact that it was likely that the actions of the plaintiff in moving the bin resulted in little saving of time.

It is submitted that the reasoning in the Court of Appeal and the High Court demonstrates a number of points.

It is submitted that the difference in views in this case represents one of those circumstances upon which reasonable minds may differ, particularly in light of the fact that it was likely that the actions of the plaintiff in moving the bin resulted in little saving of time.

⁴⁵ supra at pp430-431.

⁴⁶ supra [35] to [38].



First, each decision shows that the proposition that there can be no duty owed in respect of a foreseeable but obvious risk is incorrect.

Second, each decision must also demonstrate that the finding that the risk of injury in *Van der Sluice* was not foreseeable is incorrect. If the risk of injury to Mrs Thompson was foreseeable in circumstances in which she voluntarily moved a heavy industrial bin, how can the risk of injury (by falling off a ladder) to a contractor who was engaged to install Christmas decorations not be foreseeable?

Third, the decision of the High Court rests upon the failure to have in place a proper delivery system⁴⁷ and the inability of the plaintiff to 'implement' or 'design' such a system. In that regard, there appears to be some convergence of principle with that put forward by Ipp J in *Rockdale Beef*. There, a factor which was said to be particularly relevant to the imposition of a duty on a principal to a contractor was the plaintiff's inability to protect himself from injury by way of the configuration of the worksite, that is, the plaintiff was vulnerable to a risk of injury over which he had no control.

5 The application of the Civil Liability Act 2003

The above discussion has hitherto excluded a consideration of this legislation. The first thing to note is that the Act will have no application to conventional employer/employee relationships. Section 5 of the *Civil Liability Act* states:

5 Civil liability excluded from Act

This Act does not apply in relation to any civil claim for damages for personal injury if the harm resulting from the breach of duty owed to the claimant is or includes—

(a) an injury as defined under the WorkCover Queensland Act 1996, other than an injury to which section 36(1)(c) or 371 of that Act applies; or

Example for paragraph (a)—

A worker employed under a contract of service with a labour hire company is injured at the premises of a host employer while driving a defective machine. The worker pursues claims for damages for civil liability against the labour hire company, the host employer and the manufacturer of the machine. The worker suffers a number of injuries but only 1 of them is accepted as an injury under the WorkCover Queensland Act 1996, section 34. This Act does not apply to any of the claims for damages.

(b) an injury as defined under the Workers' Compensation and Rehabilitation Act 2003, other than an injury to which section 34(1)(c) or 352 of that Act applies; or

(c) an injury that is a dust-related condition; or
(d) an injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.

Section 32 *Workers' Compensation and Rehabilitation Act 2003* relevantly states:

"32(1) An "injury" is personal injury arising out of, or in the course of, employment if the employment is the major significant factor causing the injury."

It can also be seen from Schedule 2 Part 1 *Workers' Compensation and Rehabilitation Act* that a person performing work under a contract is employed by an

employer (and may thus suffer an injury within the meaning of the Act) unless he or she:

(i) is paid to achieve a specified result or outcome; and

(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and

(iii) is, or would be, liable for the cost of rectifying any defect in the work performed.

It is not proposed to conduct a wide-ranging overview in respect of the effect of the entire *Civil Liability Act* on such cases, however, for present purposes, the relevant sections are set out as follows:

"General Principles

9 (1) A person does not breach a duty to take precautions against a risk of harm unless—

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—

(a) the probability that the harm would occur if care were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity that creates the risk of harm."

"Meaning of 'obvious risk'

13 (1) For this division, an 'obvious risk' to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

(5) To remove any doubt, it is declared that a risk from a thing, including a living thing, is not an obvious risk if the risk is created because of a failure on the part of a person to properly operate, maintain, replace, prepare or care for the thing, unless the failure itself is an obvious risk."

"Persons suffering harm presumed to be aware of obvious risks

14 (1) If in an action for damages for breach of duty causing harm, a defence of voluntary assumption of risk is raised by the defendant, and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk.

(2) For this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk."

After ascertaining whether or not the legislation applies, the next thing to note about the sections

47 see [36].

dealing with obvious risks is that whilst section 15 prescribes that a duty is not owed to another person to warn of an obvious risk and section 19 declares that a person is not liable in negligence for harm suffered by another as a result of the materialisation of an obvious risk of a dangerous recreational activity, the position is different in respect of other activities where an obvious risk is taken.

A person may still succeed despite engaging in conduct which involves an obvious risk (not being activities referred to in sections 15 or 19) subject to the statutory form of voluntary assumption of risk encapsulated in s14. Therefore, whilst there is a denial of the establishment of liability in respect of recreational activities and warning cases in respect of obvious risks, other situations are left to the common law subject to the application of s14.

It can be seen that there are two major changes to the common law concept of voluntary assumption of risk. First, the plaintiff need only be aware of the "type or kind of risk even if [he] is not aware of the precise, nature, extent or manner of occurrence of the risk". Contrast this to the common law position where there needs to be a full appreciation of the precise risk before the defence can apply. Second, the onus of proving the awareness of the risk is reversed; it now lies on the plaintiff to establish that he or she was not aware of the risk.

In the context of this background, it is submitted that the plaintiffs in both *Surf Coast Shire Council* and *Thompson* would not have suffered an "injury" within the meaning of the *Workers' Compensation and Rehabilitation Act*. Each plaintiff was an independent contractor who would have fallen within the three conjunctive categories of Schedule 2 of that Act. The *Civil Liability Act* would have applied. Using these authorities as examples, would the *Civil Liability Act* have made a difference to the outcome of either case?

It is submitted that a volenti defence may well have been raised in *Surf Coast Shire Council* in that the plaintiff may be found to have been aware of the type or kind of risk to him in circumstances in which he lifted the bin out of the cradle. It is worth noting that the test in section 14(1) is subjective. Compare this to section 13(1) which defines an obvious risk as one which would have been obvious to a reasonable person in the position of the plaintiff.

The plaintiff in *Thompson* would certainly have had to deal with greater difficulties than the substantial ones which she did encounter. The plaintiff would have had to have proved that she was not aware of the general risk of injury to her back in circumstances in which she has previously diarised that the bins were too heavy for her and in circumstances in which she had injured her back, only a matter of weeks earlier. This would have been a difficult hurdle for her to overcome.

The concept of voluntariness, however, is still present. In *Suncorp Insurance and Finance v Blakeney*,⁴⁸ Pincus JA stated:

"... the definition of the volenti defence accepted in *Roggenkamp v Bennett* (1950) 80 CLR 292 at 300 places a heavier burden on a defendant in a case of this sort. McTiernan and Williams JJ held that the elements of a defence of a defence of volenti non fit injuria were conveniently stated in the then current edition of

Halsbury:

'In order to establish the defence, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, but also that he fully appreciated it and voluntarily accepted the risk.'

The trend of modern authorities is that there must be an "absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will".⁴⁹ In other words, if for example the evidence in *Thompson* had been that the plaintiff would have suffered some form of genuine economic harm had she not moved the bin, it could legitimately be argued that the act of moving the bin was not a voluntary one. She may perhaps have been able to lead some evidence on this issue.

Similar remarks apply to the plaintiff in *Surf Coast Shire Council*. Section 14 makes no reference to the party who bears the onus of proof on this issue. It can be safely said then that such onus of proving voluntariness lies on the defendant. It is submitted therefore, that in circumstances in which a plaintiff is unable to prove that he or she was not aware of the risk, a plaintiff will defeat the volenti defence, as altered by section 14, unless the defendant is able to establish voluntariness.

6 Conclusion

The manner of dealing with circumstances in which it is argued that people ought to take greater care for their own safety in the context of workplace incidents has generally been thought to contain fairly well settled principles in the employer/employee relationship. Despite that, the matter has recently been dealt with by the High Court where the only issue was the provision of a safe system.

In respect of contractors, it is submitted that a theme can be detected. In circumstances in which a plaintiff finds himself or herself in a dangerous or unsafe situation as a consequence of the system which he or she is required to work within, it appears that there will be a significantly greater chance of a plaintiff establishing a relevant duty owed to him or her (see *Rockdale Beef* and *Thompson*). An example of the inverse of this proposition is *Pack-Tainers Pty Ltd* where there was adequate scope for the plaintiff to control the system within which he was required to work.

In those circumstances, it is submitted that the views of the High Court in *Thompson* are consistent with the statements of Ipp JA in *Rockdale Beef* and Young CJ in *Pack-Tainers Pty Ltd* and inconsistent with the narrow interpretation of the duty owed to an independent contractor. It must be doubted whether the High Court in *Brodribb* ever intended to prescribe such a narrow formulation for general application to contractors. Apart from any argument in respect of the vicarious liability of the principal because of the negligence of the snigger, the factual background necessarily made for the formulation of a narrow duty of care.

Indeed, the judgment of Brennan J refers to the entrepreneur's duty arising "because he has created the risk". It would be odd then if a duty was denied in circumstances in which an entrepreneur created a risk but simply in a different way.

⁴⁸ (1993) Aust Torts Reports 81-253 at 62,648.

⁴⁹ *Bowater v Rowley Regis Corp* [1944] KB 476 at p.479 per Scott LJ.



By defining the scope of the duty in a narrow fashion, a contractor who does not depend upon the safe organisation of activities between contractors, but does depend upon a safe system being in place, would fail in a situation in which there is no relevant aspect of the former circumstance present, but as to the latter, is required to work in an unsafe system over which he has little or no control.

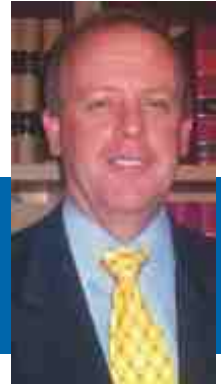
It is difficult to see how the plaintiff in *McDonnell v Hoffman* could have succeeded; Chesterman J in fact remarked that the debate as to whether the plaintiff was an employee or a contractor made no difference to the decision. There, the plaintiff, an experienced tree feller, elected to commence work alone without his co-worker and, because of the way in which he approached his task, was injured. The only allegation of negligence that was advanced was a failure to provide a safe system in circumstances in which the injury was caused by the plaintiff's own misjudgment of a situation.

In *Brodribb*, the only way in which the plaintiff could have succeeded against his principal was to allege the duty which ultimately was found to exist (although of course the breach was not proved). In neither *Brodribb* nor *Hoffman* was there any unsafe system present which placed the plaintiff in a vulnerable position.

It is submitted that contractors who fall outside the scope of the *Civil Liability Act* will in many circumstances be in relationships with their principals which shall be very close to employment. This is because where a contractor:

- (i) is paid to achieve a specified result or outcome; and
- (ii) has to supply the plant and equipment or tools of trade needed to perform the work; and
- (iii) is, or would be, liable for the cost of rectifying

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any defect in the work performed;

he or she will not be a "worker" within the meaning of the *Workers' Compensation and Rehabilitation Act 2003*; will not be able to suffer an "injury"; and will therefore fall outside the *Civil Liability Act*. It is submitted that contractors who fall outside the Act therefore will be more likely to face situations where they face risks because of an unsafe system to which they may be vulnerable and have no control over, and that those situations shall more readily fall within a factual scenario like *Rockdale Beef*.

The difficulty for contractors arises not necessarily because of the effect which the *Civil Liability Act* ought to have on claims but because of the type of contractor generally included in its operation.

Those contractors who fall within the application of the *Civil Liability Act* will, generally speaking, be more truly 'independent' and therefore more likely to be in a position to exert more control over their work systems. There is the prospect of an absolute defence here, however the issue of voluntariness shall loom large as it has under the common law.*

by Peter Sacre¹

Heads of damage

in spinal (paraplegic & quadriplegic/tetraplegic) and acquired/traumatic brain injury claims in Queensland

In Queensland in the last 11 years, there has been significant prescriptive intervention affecting common law claims for damages arising out of personal injury. The *Motor Accident Insurance Act 1994* (as amended), *Workers' Compensation and Rehabilitation Act 2003*, *Personal Injuries Proceedings Act 2001* (as amended) and the *Civil Liability Act 2003* are the principal prescriptive statutes affecting the common law.² Some of the common law principles of assessing damages have been modified by these statutes. It is therefore timely to review the guiding authorities and the method of assessment of damages in catastrophic claims.

Quantifying the damages for a catastrophic injury claim is an extension of general principles applied to assessing damages for personal injury, with which most personal injury lawyers are familiar. This paper examines the heads of damage in spinal and acquired brain injury claims, which lawyers may only encounter infrequently.

Turning to the heads of damage:

Pain, suffering and loss of amenities

Assessment of general damages in respect of injuries consequent upon negligence on the highway and all other claims, save for master and servant claims, for damages for personal injury occasioned after December 2, 2002, are the subject of ss 51, 61 and 62 of the *Civil Liability Act 2003* and the 'injury scale value' ('ISV') as calculated by reference to, inter alia, Schedule 4, Part 1, Items 1, 2 and 5 of the *Civil Liability Regulation 2003*. The calculation of ISV for multiple injuries is prescribed by Schedule 4, Part 1, Division 1 of the *Civil Liability Regulation 2003*.

Because catastrophic injury, in addition to paraplegia, quadriplegia and acquired brain injury, often includes associated neurological, orthopaedic, urological, sexual or intestinal injuries, it is necessary to examine the schedules of the *Civil Liability Regulation 2003* carefully to properly estimate the ISV.

In respect of master/servant claims, the common law as modified by the *Workers' Compensation and Rehabilitation Act 2003* applies (as distinct from the assessment of the work-related injury for the statutory compensation claim under the *Workers' Com-*

pensation and Rehabilitation Act 2003).

In acquired brain injury claims, often there is a loss of speech, memory, insight and motor function, but not the utilities. Acquired brain injury claims attract inferior awards when compared with the awards in high level quadriplegic claims.

In respect of catastrophic injury claims, a component of the quantum of the award for general damages is the objectively determined social and psychological suffering and social disability which a claimant with an acquired brain or spinal injury will endure for the remainder of their life. Consequent upon catastrophic injury, there are often psychiatric disorders including depression and behavioural disorders.³

Age is relevant. An older person has less time to suffer, but the remainder of the unimpaired life is more precious because it is a scarce resource.



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² On September 1, 1994, the *Motor Accident Insurance Act 1994* became the statute which prescribed for compulsory third-party insurance for injuries caused on the highway. The *Workers' Compensation Act 1990* is the relevant statute law for work injuries suffered prior to February 1, 1997. For work injuries suffered between February 1, 1997, and July 1, 2003, the *WorkCover*

Queensland Act 1996 (as amended) is the relevant statute. After July 1, 2003, the *Workers' Compensation and Rehabilitation Act 2003* is the relevant statute. For common law claims, other than highway or master and servant claims, after June 18, 2002, the *Personal Injuries Proceedings Act 2001* (as amended) and after December 1, 2002, the *Civil Liability Act 2003* (the

CLA applies to PIPA claims after December 1, 2002).

³ *Scarf v State of Qld & Anor* unreported, SC Qld No.1272 of 1993, White J, October 30, 1998; C6 quadriplegia with consequent depression; *Winterton v Mercantile Mutual Ins. (Aust) Ltd* [2002] QCA 249 (brain injury).

Younger people suffer longer but have more time and flexibility of mind and body to adapt to the impairment. The pain and suffering consequent to the initial injury and any relevant surgery or treatment thereafter sounds in damages.⁴

Musculo skeletal and neuropathic pain are common problems following spinal cord injury and sound significantly in awards of general damages.⁵

In awarding a C5 quadriplegic female \$200,000 for general damages in *Theden v Nominal Defendant & Ors* [2004] QSC 310, in addition to various differences between the comparative plaintiffs by way of age and comparative upper limb disability, Jones J noted much depended on the quality of the pre-accident life of the claimant and what their prospects for the future were.⁶

Loss of consortium

In respect of highway claims and other claims, save for master and servant claims, the court must not award damages for loss of consortium unless the injured person died, or general damages are assessed in excess of \$30,000. Loss of servitium claims are limited to three times average weekly earnings per week.⁷

In any event, the awards for loss of consortium demonstrate the low monetary value the courts attach to loss of sexual function.⁸

Loss of expectation of life

In respect of highway claims for injuries occurring after December 2, 2002, awards under this head of damage are captured within the award for “general damages” calculated by reference to the Civil Liability Regulation 2003.⁹

The award for loss of life expectancy is referred to as the loss of expectation for life. It is not usually a large sum of money.¹⁰

Interest on general damages

Interest on general damages has been abolished for highway claims and other claims, save for master and servant claims.¹¹ In respect of master and servant claims, the court determines the appropriate interest rate up to judgement.¹²

Life expectancy

Life expectancy is a contingency which must be reflected in the calculation of future economic damages.¹³ It is determinative of the multiplier applied using the 5 percent tables to calculate present values of future weekly costs. The beginning point for an Australian claimant when calculating an estimate of life expectancy is the most recent Australian Bureau of Statistics life expectancy tables. There are Australian Bureau of Statistics life expectancy tables for indigenous Australians. When assessing damages for foreign nationals, the life expectancy tables of their country of origin need to be ascertained.

Some acquired brain injury claimants have their life expectancy discounted to reflect any loss caused by accident-related injuries.¹⁴

Some acquired brain injury claimants have normal life expectancy.¹⁵

A paraplegic’s life expectancy is usually the normal expectancy, save where there is some pre-existing condition such as arteriosclerosis, hypertension, diabetes, smoking or a post-accident history of recurrent pressure sores or urinary tract infections.¹⁶

A quadriplegic’s life expectancy, in addition to the risk of recurrent pressure sores or urinary tract infections, is prejudiced by risk of respiratory infection. Further, quadriplegics – because of their upper limb disability – are not as able in relieving pressure on their backsides by lifting. This is usually exacerbated by post-injury weight gain consequent to sedentary lifestyle.

4 *Winterton v Mercantile Mutual Ins. (Aust) Ltd* [2000] QCA 249 brain injury, general damages \$150,000; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, SC Qld No Ambrose J, July 2, 2002, brain injury, general damages, \$150,000; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510, brain injury, general damages \$160,000; *Theden v Nominal Defendant & Qld* [2004] QSC 310 C5 quadriplegia, general damages \$200,000; In *Castro (by her next friend Castro) v Hillery* [2001] QSC 510 Jones J compared the various brain injury cases for the purposes of assessing general damages. In assessing the comparatives relevant to Mrs Castro, Jones J noted (para phrasing): in *Winterton v Mercantile Insurance* a plaintiff, 14 years of age, sustained severe brain damage resulting in an impairment of gross and motor skills and severe cognitive deficits who received \$150,000. In *Goode v Thompson*, a 12-year-old boy was struck by a motor vehicle and suffered severe brain damage which resulted in physical

and cognitive deficits. Goode’s injuries were dissimilar to and not as severe as Mrs Castro’s injuries. Both of these plaintiffs were younger than Mrs Castro and therefore had to endure their respective disabilities for a longer period. Prior to the accident, the plaintiff Winterton was in the mildly retarded range and had very significant cognitive deficits. The effect of her injury was to reduce her from being a person who, although not very bright, could be expected to cope on her own to one who was unable to live independently. Winterton, prior to her accident, demonstrated behavioural problems and had difficulty in socialising with her peers and coping with school discipline. The diagnosis was she was suffering from was Attention Deficit Disorder. However, she did have a higher than average range of intellectual activity. But because of the uncertain outcome of her pre-existing disorder, it is difficult to compare her prospects in light of those of Mrs Castro. Further, Mrs Castro lost the power of speech. \$160,000 was

assessed with \$60,000 apportioned to the past period; In *McChesney (by her litigation guardian McChesney) v Singh* [2002] QSC 311, McKenzie J found the plaintiff suffered reduced expectation of life, closed head injury, reduced cognition, orthopaedic injuries, reduced function in left hand and arm, and an affected gait. General damages were assessed \$150,000. 5 *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, SC Qld, No.3500 of 1986, Ambrose J, November 1, 1995, paraplegia minus arteriosclerosis resulted in award of general damages of \$100,000; *Hoban v Amcor Ltd* unreported, SC Qld BC 960 1930, Cullinane J, April 2, 1996, general damages \$150,000; T12 paraplegic with burning pain; *Groeneveld v Mt Isa Mines Ltd*, unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic with ongoing back pain resulted in award of general damages of \$100,000. 6 *Hornberg v Horrobin & Horrobin & The*

Council of the Shire of Warroo unreported 24.10.97, SC Qld, No.836 of 1997 & No.8196 of 1996, Ambrose J, 23, female, C3, general damages \$200,000; *Scarf v State of Qld & Anor* unreported, SC Qld, No.1233 of 1993, White J, October 24, 1997, male C6 general damages \$180,000; *LeBon v. Lake Placid Resort Pty Ltd & AMP & Ors* [2000] QSC 49, female, C6, general damages \$170,000. 7 Section 58 of the *Civil Liability Act* 2003. 8 *LeBon v Lake Placid Resort Pty Ltd* [2000] QSC 49, Justice Williams, as he then was, awarded \$4,000 to the ex-husband under this head, referring to the claim as a “relic of a bygone era”. 9 Section 51 of the *Civil Liability Act* 2003. 10 *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported 24.10.97, SC Qld, No.836, 1997, & No.8196 of 1996, Ambrose J, 23, female, C3, \$3,000; *Scarf v State of Qld & Anor* unreported, SC Qld, No.1233 of 1993, White J, October 24, 1997, male C6 lost 10-15 years of his life expectancy \$3,000; *LeBon v Lake Placid*

For quadriplegics, loss of life expectancy may be 10 to 15 years.¹⁷ Life expectancy of ventilated quadriplegics is additionally prejudiced by the risk of ventilator failure.

Rehabilitation physicians have produced predictive tables as to the estimated loss of life expectancy associated with various levels of spinal lesion.¹⁸ After the court makes a finding in respect of life expectancy, it is not further discounted when the court turns its mind to other contingencies which might require discounting of various heads of future damages.¹⁹

Employability

The usual principles apply when assessing damages under this head. The most significant indicia of future loss of earnings is the history of past employment.

In respect of economic loss, if an acquired brain or spinal injured claimant's life expectancy is shorter than the pre-accident working life, there will need to be a set-off for the lost years.²⁰

Retraining as part of rehabilitation, where possible, answers the claimant's duty to mitigate their loss.

Post-injury employment for remuneration for acquired brain-injured claimants, who are able and willing to work, is possible. Work opportunities are limited to employers who are able and willing to integrate brain-injured persons into their workforce in a position for which they are competent.

Where there is wheelchair access, including bathroom access, in the workplace, and a willing employer, post-injury employment of spinal-injured claimants is possible.

There are statutory affirmative action measures to assist catastrophically injured persons into public service employment.²¹

Paraplegics and quadriplegics will likely have a

shortening of their post-injury working life, because the energy necessary to ambulate in a wheelchair is at least twice that required by persons walking. There are also arthritis and joint problems, and spinal cysts and nerve compression consequential to spinal cord injury. Residual employability²² is often an issue in paraplegic claims.

Some quadriplegics do work without carer support and others require carer support to undertake work. There is usually little discounting for residual employability in quadriplegic claims.

Prior to any trial or settlement, there would need to be substantial participation in paid post-injury employment, prior to discounting of economic loss.

Interest on past economic loss

For highway claims, interest on damages awarded for past loss of income is calculated by reference to the ½ of the 10-year Treasury bond rate as set and published by the Reserve Bank of Australia.²³ In respect of master and servant claims, the court determines the appropriate interest rate up to the date of trial.²⁴

For claims other than highway and master and servant claims, interest on damages awarded for past loss of income is calculated by reference to the ½ of the 10 year Treasury bond rate as set and published by the Reserve Bank of Australia.²⁵

Discount rate on future economic loss

For highway claims, the discount rate on compensation for future loss is 5 percent.²⁶ In respect of master and servant claims, the discount rate for compensation for impairment of earning capacity is 5 percent.²⁷ For claims, other than highway and master and servant claims, the discount rate for compensation for future expenditure and loss is 5 percent.²⁸

Resort Pty Ltd [2000] QSC 49, His Honour, Justice Williams, as he then was, awarded \$3,000 under this head for a C6 female quadriplegic who lost five to 10 years of her life expectancy.

11 Section 60(1) of the *Civil Liability Act* 2003.

12 Section 47 of the *Supreme Court Act* 1995.

13 *Malec v J.C. Hutton Pty Ltd* (1989-90) 169 CLR 638.

14 In *Castro (by her next friend) v Hillery* [2001] QSC 510, Mrs Castro was at risk of choking when unsupervised because her gag reflex was impaired. At time of trial, but for injury, she had 42 years of future life expectancy. Discounting for risk of choking reduced her life expectancy to 34 years.

15 *Winterton (an infant) v Mercantile Mutual Insurance (Australia) Limited*, unreported, Supreme Court of Queensland, No.8 of 1999, Demack J, 6.9.99, female plaintiff 18 years at injury had future life expectancy 64 years.

16 *Beecroft v Prop. Top of the Mark B.U.P. No.3410 and Ors* unreported, SC Qld,

No.3500 of 1986, Ambrose J, November 1, 1995, pre accident arteriosclerosis & smoking, age 39 at time of accident and age 51 at trial, pre-existing arteriosclerosis would have reduced his life expectancy to 30 years, at age 51 his arteriosclerosis & paraplegia reduced his future life expectancy to 10-15 years = 12 years; *Hoban v Amcor Limited* unreported, Supreme Court of Qld, Cullinane J, 2.4.96, age 51 at trial, life exp. 25 years; *Groeneveld v Mt Isa Mines Ltd*, unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic pre-existing hypertension, diabetes & past history of smoking were a risk to his life, history urinary tract infection, 59 yrs at trial, actuarial life tables indicated future 18 years reduced to 15 future years.

17 *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported, 24.10.97, Supreme Court Queensland, No.836 1997 No.8196 of 1996, Ambrose J, 23, female, C3, at time of trial 47 future years; *Scarf v State of Qld & Anor* unreported, No.1233

of 1993, White J, October 24, 1997, male C6 hospitalised for urinary tract infection, depression, smoking loss of 10-15 years to 33 future years; *Lebon v Lake Placid Resort Pty Ltd & AMP & Ors* [2000] QSC 49, female, C6, 35 years at time of trial, 48 future years reduced to 33-38 years.

18 Yeo et al, 'Mortality following spinal cord injury' *Spinal Cord* (1998) 36, 329-326 is the most comprehensive recent paper on life expectancy after spinal injury.

19 *Sharman v Evans* (1976) 138 CLR 563@ 587 per Gibbs & Stephen JJ; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, SC Qld No.S5829 of 1999, Ambrose J, July 2, 2002; contra *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported, 24.10.97, Supreme Court Queensland, No.836 1997 & No.8196 of 1996, Ambrose J found life expectancy of 47 years but discounted future care by \$250,000 for reasons including that Dr Hill was over-generous with life expectancy.

20 *Skelton v Collins* (1966) 115 CLR 94.

21 *Equal Opportunity in Public Employment Act* 1992 (Qld); *Equal Employment Opportunity (Commonwealth Authorities) Act* 1987 (Cth).

22 *Cecil v Property Unit Nominees (No.3) Pty Ltd* unreported, SC Qld, No.154 of 1989, Helman AJ 25.06.92, male T8/9 complete paraplegia age 54 at trial earned money writing computer programs post-accident; *Coughlin v Stanley & Ors* unreported SC Qld, No.3330 of 1988, Byrne J, 3.11.92, female T9 complete paraplegia, age 22 at trial, physical capacity of four to six hours daily but prospect of permanent work slim.

23 Section 55 E(1) of the *Motor Accident Insurance Act* 1994 (as amended).

24 Section 47 of the *Supreme Court Act* 1995.

25 Section 55(1) of the *Personal Injuries Proceedings Act* 2002 (as amended).

26 Section 55 B (a) of the *Motor Accident Insurance Act* 1994 (as amended).

27 Section 16(1) of the *Supreme Court Act* 1995.

Past care (*Griffiths v Kerkemeyer & commercial*)

Post-hospitalisation, the acquired brain and spinal injured are rehabilitated from the hospital ward to their own accommodation in the community or an institution.

Prior to rehabilitation to their own accommodation, there may be need for house alterations, aids and equipment to be provided, and care arranged. The cost of rehabilitation is borne by the motor accident insurers, WorkCover or by the public hospital system. In respect of master and servant claims, workers have a right to a care allowance and additional sum as part of their entitlement to statutory compensation.

Motor accident insurers and WorkCover have rehabilitation coordinators, who work closely with clinicians to provide necessary house alterations, aids and equipment, and care for claimants where liability is admitted or partially admitted.²⁹ In respect of claims occasioned by negligence on the highway, after April 9, 2003, claims for damages for gratuitous care are subject to s59 of the *Civil Liability Act 2003*.³⁰

The requirement that the need for services arises “solely out of the injury” in the equivalent New South Wales legislation³¹ has been the subject of comment that damages may be awarded for that portion solely attributable to the accident.³²

In master and servant claims for damages for past paid care, the court is limited to awarding damages for services not usually provided, either of a kind performed by the worker himself prior to the injury or gratuitously by others, or by paid carers to the worker after the injury.³³

The harshness of this in catastrophic claims is set off in part by the worker’s right to additional lump sum compensation for gratuitous care as part of the their statutory claim for workers’ compensation

benefits.³⁴ Care must be taken to document the need for care during the statutory claim and to insist that the additional lump sum is paid by WorkCover by way of gratuitous care and not by way of an additional lump sum for having a work-related impairment equal or in excess of 50 percent.³⁵

The distinction between the two statutory entitlements becomes relevant in common law proceedings because the additional lump sum paid by WorkCover for gratuitous care is not included in the statutory refund³⁶ whereas an additional lump sum for having a work-related impairment equal or in excess of 50 percent is included in the statutory refund.³⁷

For other common law claims, s54 of the *Personal Injuries Proceedings Act 2002* (as amended) provides the services must be necessary and, inter alia, for at least six hours a week and be for at least six months.

Most catastrophically injured claimants need more than six hours of care per week. In the early period, post-hospitalisation care needs are likely to be higher until the daily routine becomes familiar.³⁸ The findings of fact, in respect of awards for future care, are a good indicator of the medium and long-term care needs of the catastrophically injured claimants.

Acquired brain injury claimants often need a full-time housekeeper to supervise them lest they harm themselves unknowingly and to discourage predators.³⁹

Paraplegics, who are able to transfer independently and use a manual wheelchair, can usually live independently and need a number of hours of domestic care per week (dependent on their level of impairment) rising to four to eight⁴⁰ hours a day when they are aged about 50 to 60 years.⁴¹

The care needs of quadriplegics are harder to predict, depending on their residual ability to transfer independently and their security needs. However, the prescription usually involves a full-time housekeeper and a number of extra hours of personal care per day.⁴²

- 28 Section 52(1)(a) of the *Personal Injuries Proceedings Act 2002* (as amended).
- 29 Section 51(3) of the *Motor Accident Insurance Act 1994* (as amended) obliges insurers to provide rehabilitation services; s268(1) of the *Workers’ Compensation & Rehabilitation Act 2003* – an insurer “may” provide rehabilitation.
- 30 Section 59 of the *Civil Liability Act 2003* provides the services must be necessary, the need for the services must arise solely out of the injury and, inter alia, for at least six hours a week and be for at least six months.
- 31 Section 15 of the *Civil Liability Act 2002* (NSW).
- 32 *Woolworths v Lawlor* [2004] NSWCA 209.
- 33 Sections 308A-308E of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 34 Section 193 of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 35 Section 192 of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 36 Section 270(2) of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 37 Section 270(1) of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 38 *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, Supreme Court of Queensland, No.3500 of 1986, Ambrose J, November 1, 1995; *Lebon v Lake Placid Resort Pty Ltd & AMP & Ors* [2000] QSC 49.
- 39 Awards for future care – *Winterton v Mercantile Mutual Ins (Aust.) Ltd* [2000] QCA 249, female age 18 years at trial, \$1,600,000; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, SC Qld No Ambrose J, July 2, 2002, brain injury, age 17 years at trial, \$1,607,908; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510, age 40 years at trial, \$2,850,000;
- 40 *McChesney (by her litigation guardian McChesney) v Singh* [2002] QSC 311, age approx. 25 years at trial, \$877,000.
- 41 *Morrison v Gessey*, unreported, SC NSW No.19124 of 1993, Spender AJ, 28.7.95 & unreported SCNSWCA, No.40563 of 1995.
- 42 Awards for future care – *Coughlin v Stanley & Ors* unreported SC Qld, No.3330 of 1988, Byrne J, 3.11.92, female T9 complete paraplegia, age 22 at trial, six hrs per week inclusive of child care; *Cecil v Property Unit Nominees (No.3) Pty Ltd* unreported, SC Qld, No.154 of 1989, Helman AJ 25.06.92, male T8/9 complete paraplegia age 54; *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, Supreme Court of Queensland, No.3500 of 1986, Ambrose J, November 1, 1995, paraplegic age 51 years at trial; *Hoban v Amcor Ltd* unreported, SC Qld BC 960 1930, Cullinane J, April 2, 1996, T12 paraplegic age 51 at trial; *Groeneveld v Mt Isa Mines Ltd* unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic age 62 at trial.
- 43 Awards for future care – *Hornberg v Horrobin & Horrobin & The Council of the Shire of Warroo* unreported, 24.10.97, Supreme Court Queensland, No.836 of 1997 No.8196 of 1996, Ambrose J, 23, female, C3, age 23 years at trial, 47 future years, live in housekeeper; *Scarf v State of Qld & Anor* unreported, No.1233 of 1993, White J. October 24, 1997, male C6, approx. age 33 years at trial, 33 future years, live in housekeeper plus lifestyle carer; *Theden v Nominal Defendant & Qld* [2004] QSC 310, C5 female, age 49 at trial, 30 future years, live in housekeeper plus handyman plus care.
- 44 Section 308A-308E of the *Workers’ Compensation & Rehabilitation Act 2003*.
- 45 *Theden v Nominal Defendant & Qld* [2004] QSC 310.

Catastrophically injured claimants injured at work, who after hospitalisation are cared for in the home by their families or paid carers, are not able to claim damages for gratuitous or paid services, respectively, in court proceedings.⁴³

The practical effect of ss308A-308E *Workers' Compensation & Rehabilitation Act* 2003 is that injured workers either refuse to leave hospital or their families and friends provide their care. The latter option has the risk of family dislocation.⁴⁴ Catastrophically injured claimants injured at work, who after hospitalisation are cared for by professional carers or who, after the court case, genuinely intend to engage professional services, even if that intention is formed after taking legal advice, may claim for future care.⁴⁵

Rehabilitation physicians usually opine that the additional stress and workload occasioned by caring for a catastrophically injured spouse, child or parent should be avoided if independent paid care is available. Practically, this difficulty is overcome, at least for a period of time, because an injured worker may claim for care in their statutory compensation claim arising from Chapter 3 of the *Workers' Compensation and Rehabilitation Act* 2003.

In respect of Chapter 3 claims for statutory compensation, WorkCover rehabilitation coordinators provide up to a monetary limit necessary house alterations, aids and equipment, and care to catastrophically injured workers irrespective of whether the injured worker has a common law claim. The claim by a catastrophically injured worker for statutory compensation, pursuant to Chapter 3 of the *Workers' Compensation and Rehabilitation Act* 2003, includes a right to a monetary allowance for care by family and a lump sum of, presently, \$157,955.⁴⁶

In respect of common law claims, past *Griffiths v Kerkemeyer* damages may be evidenced by diaries of care showing the date of the service, the nature of the service and the time spent. The commercial cost of care is applied for the time spent providing the ser-

vices. In the absence of care diaries, the occupational therapist or clinical nurse consultant/care agency may be asked to opine to the claimant's need for care during the relevant period.

At common law, the insurer must pay the commercial cost for the services reasonably required to satisfy the need for which the claimant's impairment gives rise.⁴⁷ If the evidence is that, in addition to daytime care, overnight care is required by way of repositioning in bed, supervision or sometime personal care needs in accordance with the principles enunciated in *Griffiths v Kerkemeyer*, the insurer must pay for services reasonably required to satisfy a 24-hour-a-day period. The damages are to be assessed not by actual cost but by market costs of providing those services.⁴⁸ Personal care is related to the person – the management of the utilities, bathing, toileting, dressing changes, suction, catheter changes, pressure lifts, loading into the transport and assistance with transfers and turns. Domestic care is related to the domicile, management of the home, cleaning, cooking, shopping, washing car, washing clothes and changing linen.

There is a blurring of the divide between personal and domestic care when it comes to supervision. An acquired brain damaged claimant who can ambulate but has behavioural or short-term memory problems may need supervision with money, medication or gas and electricity.

A high-level quadriplegic who cannot turn in bed may need someone within hailing distance if they get into an awkward position whilst asleep or need assistance to evacuate in the event of fire. In both cases there will be little daily hands-on care of the person but there is a need for supervision and physical intervention of short duration to prevent harm from time to time.

The adoption of commercial care agency costs based on the Disability Workers' Award – State has made this head of damage problematic.



45 *Karanfilov v Inghams Enterprises Pty Ltd* [2003] QCA 242,

46 Section 274 of the *Workers' Compensation and Rehabilitation Act* 2003 provides an insurer may pay a caring allowance to a worker entitled to compensation, if the worker depends on care for the fundamental activities of daily living and the care is provided in the worker's home by a person on a voluntary basis to whom compensation is not payable. Section 192 *Workers' Compensation & Rehabilitation Act* 2003 provides that, in addition to the usual statutory benefits payable under the Act, claimants with a work-related impairment in excess of 50 percent are entitled to additional lump sum compensation of \$157,955.

47 The common law principle applied in respect of gratuitous care is as established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 and explained in *Van Gerven v Fenton* (1992) 175 CLR 327, Mason CJ, Toohey & McHugh JJ at

p. 333, stated the principle as follows: "Consequently, it should not now be accepted that the true basis of a *Griffiths v Kerkemeyer* claim is the need of the plaintiff for those services provided for him or her, and that the plaintiff does not have to show, as Gibbs J held, that the need is or may be productive for financial loss . . ."

Damages under this head are costed at the commercial cost of providing the needed care pursuant to the principles in *Grincelis v House* (2000) 74 ALJR 1427 and *Marshall v Andjelic* (1993) 31 NSW LR 162 where Kirby P & Meagher JA found @ 174.

"However in the light of the decision in *Van Gerven* it would appear that what is nowadays to be taken as a reasonable objective measure of damages will invariably be the commercial market cost."

The majority in *Marshall v Andjelic* (*supra*) went on to observe that it is wrong to reduce the quantum of damages for

support which would "commonly be expected from a member of the family" and to do so was to proceed contrary to the principle laid down in *Van Gerven*. In *Grincelis v House* (1988) 84 FCR 190 the Federal Court of Australia held that the satisfaction of the appellant's need for full-time care was the commercial value of that care which included a live-in allowance for a commercial care-giver. The care had in fact been rendered by the plaintiff's parents and a live-in allowance initially had not included. Hill & Keifel JJ @ 207 observed:

"In our respectful view the only basis apparent from the master's reasons for what is a very substantial reduction in the award for this head was a concern that the cost of the parent's services appeared to be too much. The evidence however required such a conclusion; it follows in our view, that the award must be increased . . ."

In *Grincelis v House* (2000) 74 ALJR 1247

@ 1250 the majority remarked in respect of the cost of the parents' services, that the parties did not seek: "to reopen the decision in *Van Gerven v Fenton*."

48 The application of *Griffiths v Kerkemeyer*, *Van Gerven v Fenton* & *Kars v Kars* resulted in Mr Castro being paid at commercial rates whilst sleeping in his own bed at night and supervising his sleeping wife. [*Castro (by her next friend Castro) v Hillery* [2001] QSC 510] The insurer suggested this was not contemplated by the High Court *Van Gerven v Fenton* and *Kars v Kars*. The claimant relied on the remarks of Mason CJ, Toohey & McHugh JJ) in *Van Gerven* @ p335:

"It does not seem reasonable that the defendant's liability to pay damages should be reduced at the direct expense of the provider by invoking notions of marital or family obligation to provide the services free of charge or at less than market rates."

For the care of many acquired brain injury claimants, where the utilities are not impaired, the services needed may amount to domestic care (house-keeping, shopping and cooking) and supervision where there are security issues. Level 2, pay point 1 of the Disability Workers' Award – State is often relied on as the basis of calculating the carer's rate of remuneration including overtime rates (not including administration and statutory on costs) for the provision of needed domestic care.

Persons who have suffered acquired brain injury in non-compensable circumstances are often cared for gratuitously by relatives, even grandparents. The cost of care for the same acquired brain injury

suffered in compensable circumstances attracts the inclusion of administration fees (sometimes up to \$5 an hour), statutory charges (superannuation levy, Goods and Services Tax, WorkCover insurance, payroll tax) and penalty rates for non-daytime and weekend attendance of carers (based on the Disability Worker's Award – State) in the commercial cost.

The rate of remuneration, included in the commercial cost of care, increases when the needs of high-level quadriplegics (lesions complete

above C 5) are contemplated. There may be a need for lifting and turning claimant/plaintiffs (sometimes with hydraulic hoists), insertion of suppositories, changing in-dwelling catheters, cleaning tracheostomy and supra pubic catheter sites, and suction of fluids out of ventilated lungs.

The carers who attend to these tasks usually receive specialist training from the Princess Alexandra Hospital Spinal Injuries Unit, their care agency or at local TAFE colleges. The carers rate of remuneration for providing personal care to a high-level quadriplegic is often based on Level 3, Pay point 1 of the Disability Workers' Award – State which calling description includes hands-on personal care. The commercial cost (including overtime rates and statutory on costs) can be up to \$30 an hour on weekdays and \$40 an hour on weekends. A likely need for 24 or even 30 hours of care a day – the latter in the case of a ventilated quadriplegic – can produce a weekly cost

of \$5,000 to \$6,000 when the care is provided by a commercial agency.

Despite the seeming unfairness, the cost of past gratuitous care should include the administration and statutory on costs of the commercial care agency if those costs are a reasonable valuation of the services provided.⁴⁹

High-level quadriplegics injured in non-compensable circumstances are often cared for by family members who receive no payment or the disability support pension. The evidence of expert rehabilitation physicians in Queensland has consistently been that high-level quadriplegics cared for gratuitously by family members are at no greater risk of medical complications than if they are cared for by commercial carers, and there is no need to have a qualified nurse to provide such care.⁵⁰

Until *McChesney (by her litigation guardian McChesney) v Singh* [2002] QSC 311, the Queensland trial courts were valuing the gratuitous services of friends and relatives by reference to the commercial costs, inclusive of overtime rates, the administration costs and statutory on costs, and then discounting for the likelihood the care prescription would not be filled by a commercial agency.⁵¹

In *McChesney v Singh & Ors* [2003] QCA 498, Williams JA, with whom Davies JA and Wilson J agreed, referred to the judgment of Mason CJ, Toohey and McHugh JJ @ 334 in *Van Gervan* when deciding to not interfere with the trial judge's finding that future gratuitous care should be costed at a rate of \$15 an hour. The basis of Justice Williams' deviation from the ratio in *Van Gervan* was "in some cases the market cost may be too high to be the reasonable value of the services." More recently, \$20 an hour was awarded as the rateable value of this type of care.⁵²

Wilson v McLeay damages

The leading case dealing with visits by families of an injured person is *Wilson v McLeay* (1961) 106 CLR 523, a decision of Taylor J in which an amount was allowed in general damages for the cost of transport for attendance of the plaintiff's parents at hospital where she had been taken after injury.⁵³

When making a claim for a catastrophically injured, it is difficult to evince an alleviation of symptoms distinguishable from the alleviation of symptoms provided by the nursing, therapy and medical services in a specialist spinal or brain injury hospital unit. However these claims do sound in damages.⁵⁴

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The notion is further answered by Toohey, McHugh, Gummow & Kirby JJ in *Kars v Kars (supra)* @ p372:

"It is an accepted principle in Australia that damages for past and future gratuitous services constitute a sum designed to provide for the injured plaintiff's established needs. That sum may be calculated by reference to what the provider does and even what commercial costs of doing it would entail, but the focus is on the plaintiff's needs."

⁴⁹ *Goode v Thompson & Suncorp General Insurance Ltd* unreported, Supreme Court of Qld, No. S5829 of 1999,

Ambrose J. July 2, 2001, The claimant did not claim administration or statutory on costs but it was clear Ambrose J was of the view they were claimable; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510; *Theden v Nominal Defendant & Ors* [2004] QSC 310.

⁵⁰ *Hornberg v Horrobin & Anor* unreported, SC Qld, No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97.

⁵¹ *Winterton (an infant) v Mercantile Mutual Insurance (Australia) Limited* unreported, Supreme Court of Queensland, No.8 of 1999, Demack J. 6.9.99 & *Winterton v Mercantile Mutual*

Ins. (Aust) Ltd [2000] QCA 249; *Goode v Thompson & Suncorp General Insurance Ltd* unreported, Supreme Court of Qld, No. S5829 of 1999, Ambrose J. July 2, 2001; *Castro (by her next friend Castro) v Hillery* [2001] QSC 510.

⁵² *Winter v Bourboulas and Ors* [2005] QSC 164 per Douglas J.

⁵³ *Wilson v McLeay (supra)* Taylor J at p. 527:

"She was in hospital being hundreds of miles from home, her injuries were serious and such comfort and consultation as her parent's reasonable attention could provide . . . according to the medical

evidence, it was of some importance in the alleviation of her condition that she should have the comfort and assistance of her parents."

In *Bresatz v Przibilla* (1962) 108 CLR 541 the fares incurred by the plaintiff's mother coming from Italy to help her were disallowed as items of special damages but the principle in *Wilson v McLeay* was accepted that the cost of relatives and others visiting an injured person may be allowed in the case of a young person injured far from home.

Past special damages

(save for past *Griffiths v Kerkemeyer* damages)

These are expenses arising from accident-related injuries, incurred by claimants or on their behalf, and include rehabilitation, hospital, medical, therapy, pharmaceutical, aids, equipment and travelling expenses. They should be evidenced by a chronologically ordered schedule, category by category showing the date the expense was incurred, the nature of the service or item, the cost of the item or service and a note as to whether the expense has been paid or not.

In master/servant claims, the cost of rehabilitation, hospital, medical, therapy, pharmaceuticals, equipment and travelling expenses will be met by WorkCover, but are refundable in the common law claim. Accordingly, the claimant must extract the costs of rehabilitation, hospital, medical, therapy, pharmaceuticals, equipment and travelling expenses from the WorkCover refund notice and claim those expenses as special damages.

In respect of highway claims, the Motor Accident Insurance Commission pays the cost of hospitalisation in any event and it need not be claimed by the claimant. The cost of hospitalisation will not be shown on the notice of refund of the compulsory third-party insurer who provides rehabilitation to the claimant. However, the rehabilitation expenses paid by the insurer must be claimed by the claimant as special damages because they must be refunded at the conclusion of the common law claim. In respect of other claims, it is necessary to write to the chief executive officer of any relevant hospital to obtain a letter particularising the refund or charge owed by the claimant so the refund or charge may be claimed as past special damages.

In respect of the Commonwealth Rehabilitation Service, Health Insurance Commission and Queensland Health it is necessary to write to obtain a letter particularising the refund or charge owed by the claimant so the refund may be claimed as past special damages.

Interest on past special damages

In respect of highway claims, interest on past monetary loss is calculated by reference to the ½ of the 10-year Treasury bond rate as set published by the Reserve Bank of Australia.⁵⁵ In respect of master/servant claims, interest is calculated on past special damages at the rate the court determines the appropriate interest rate up to the date of trial.⁵⁶ In re-

spect of claims, other than highway and master/servant claims, interest on past monetary loss is calculated by reference to the ½ of the 10-year Treasury bond rate as set and published by the Reserve Bank of Australia.⁵⁷

Discount rate for future *Griffiths v Kerkemeyer* damages

In respect of highway claims, the discount rate to be applied where damages are awarded for gratuitous services is 5 percent for persons compensated for future expenditure and loss.⁵⁸ In respect of claims, other than highway claims, where damages are awarded for gratuitous services the discount rate to be applied is 5 percent.⁵⁹

Discount rate for future special damages

In respect of highway claims, for persons compensated for future expenditure and loss, the discount rate to be applied is now 5 percent.⁶⁰ In respect of master and servant claims, the discount rate to be applied is now 5 percent for persons compensated for future loss or damages including future care.⁶¹ In respect of other claims, where a claimant is to be compensated for future expenditure or loss the discount rate to be applied is 5 percent.⁶²

Future special damages

The provision of future special damages requires a weighing of the cost of an aid, item of equipment or service against the benefit to the claimant such that only reasonable expenses are recoverable from the insurer.⁶³ Having regard to the alternatives that are available to a catastrophically injured claimant in respect of aids, equipment, therapy and domicile, contingency discounting for possible alternatives is an integral part of what is reasonable.⁶⁴

Care

When care is provided by commercial care providers, it takes the character of future special damages. If the care is provided gratuitously, the principles to be applied are derived from *Griffiths v Kerkemeyer* (1977) 139 CLR 161. The principles applicable to the assessment of future special damages arising from the need for care in catastrophic injury claims begin with *Sharman v Evans* (1976-1977) 138 CLR 563.

Notions of reasonableness underlie both lines of

54 *Winterton (an infant) v Mercantile Mutual Insurance (Australia) Limited* unreported, Supreme Court of Queensland, No.8 of 1999, Demack J. 6.9.99, \$4,499 awarded for mileage claim family Rockhampton, Gladstone to Brisbane; in *Goode v Thompson (supra)*, Ambrose J allowed \$5,000 for attendance of the claimant's mother at hospital for 77 days. In *Lebon v Lake Placid Resort Pty Ltd (supra)* Williams J allowed \$4,140 for the six months rent expenses of the quadriplegic plaintiff's husband to attend whilst she was in hospital and rehabilitating in Brisbane.

55 Section 55E of the *Motor Accident Insurance Act* 1994 (as amended).

56 Section 47 of the *Supreme Court Act* 1995.

57 Section 55 of the *Personal Injuries Proceedings Act* 2002 (as amended) 60(2) *Civil Liability Act* 2003.

58 Section 57(1)(b) of the *Civil Liability Act* 2003.

59 Section 52(1)(b) of the *Personal Injuries Proceedings Act* 2002 (as amended).

60 Section 55B of the *Motor Accident Insurance Act* 1994 (as amended).

61 Section 16(1) of the *Supreme Court Act* 1995; *Karanfilov v Inghams Enterprises*

Pty Ltd [2003] QCA 242.

62 Section 52(1)(a) of the *Personal Injuries Proceedings Act* 2002 (as amended).

63 *Sharman v Evans* (1977) 135 CLR 562 @ 573-574 per Gibbs & Stephen JJ.

64 *Malec v J.C. Hutton Pty Ltd* (1991) 169 CLR 638 @ 642 & 643:

"the Court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability."

authority.

The issues relevant to the determination of reasonably needed past services provided gratuitously/commercially are relevant to the determination of future care. However, often the claimant will be managing on a minimalist care prescription pursuant to rehabilitation by a motor accident insurer or, if having received a lump sum compensation from WorkCover, has run out of money for paid carers or an insurer is otherwise not providing care. The common law claim for future care is the only chance of having a reasonable assessment made, costed and awarded.

In master/servant claims for damages for future paid care, the court is limited to awarding damages for services not usually provided either by the worker himself prior to the injury or gratuitously by others, or by paid carers to the worker after the injury.⁶⁵

The trial judge in *McChesney v Singh & Ors (supra)* held the commercial cost of paid care of \$32 an hour should be discounted to \$30 an hour. The \$30 an hour for paid care was not interfered with on appeal.

In *Theden v Nominal Defendant & Ors* [2004] QSC 310, in balancing the need for the plaintiff to have a housekeeper to be able to attend upon her when called, and having that person live-in with a number of others of care allowed, Jones J found that the plaintiff would have \$2,200 a week for the next seven years and \$3,000 thereafter. In total, \$2.2 million was allowed. This was affirmed by the Queensland Court of Appeal.⁶⁶

Child care costs

The inability of a claimant/plaintiff to assist in the provision of care for any children they may have, or intend to have, will sound in damages.⁶⁷ The report of the occupational therapist will address the need for and cost of child care. The need for the provision of care will likely be limited to the children reaching school age. In the event children are not in existence at the time of injury, there must be a probable rather than possible chance of the claimant having children.⁶⁸ This may be evidenced by an existing relationship and positive fertility tests on the claimant. The allowance for care for children must be considered as part of the overall prescription for care in respect of the claimant.⁶⁹

In vitro fertilisation

In the case of a catastrophically injured claimant, there may be a need for in vitro fertilisation to produce a child. Brain and spinal-injured women usu-

ally conceive normally and are carefully managed till delivery.

Spinal-injured men usually need medical intervention to have children.⁷⁰ The rehabilitation physician will evidence the need and cost of IVF treatment, or recommend a further report from a specialist in fertility issues.

Capital cost of housing

The contingency which must be addressed prior to assessing future capital cost of housing is whether the claimant will live in institutional care or independently in the community with the support of carers if necessary.⁷¹ In most cases where there is insight into their condition, the court will award damages based on independent living. When the medical evidence evinces no insight, the court will assess damages based on institutional care costs.

The report of the expert architect/builder will disclose the additional costs associated with altering a house for a brain or spinal-injured claimant. The architect/builder will particularise each necessary alteration in a list describing the alteration and indicating the associated cost. Because of the availability of wheelchair/disability design features in project-built homes, the architect's fees of designing the alterations and managing the alteration are often in dispute and result in discounting by the court.⁷²

Insurers need not go to the expense of briefing an architect when a quantity surveyor or builder is sufficient to challenge the costings of the claimant's architect.

Housing depreciation and recurrent maintenance

The architect's/builder's report will likely have a list of the depreciation particulars for any fittings and equipment associated with each necessary alteration. The depreciation particulars will describe the life expectancy and cost of each fitting or item of equipment associated with each necessary alteration. There will likely be a list describing the recurrent maintenance costs of each fitting or item of equipment associated with each necessary alteration and the maintenance of the total house alterations and remainder. By calculating the weekly cost of each fitting or item of equipment and applying the 5 percent tables over the period of the claimant's life expectancy, a present value of the future depreciation and recurrent maintenance costs is produced which is then discounted for alternative contingencies by the court.⁷³

65 Sections 308A-308E of the *Worker's Compensation and Rehabilitation Act* 2003.
 66 *Theden v Nominal Defendant & Ors* [2005] QCA 236.
 67 *Castro v Hillery & Ors* [2001] QSC 510.
 68 *McChesney v Singh & Ors* [2003] QCA 498.
 69 See Williams JA in *McChesney v Singh & Ors* [2003] QCA 498.
 70 *Scarv v State of Qld & Anor* unreported, Supreme Court of Qld, No.1272 of 1993,

White J, October 30, 1998, C6 male, not in a relationship, \$15,000 awarded after discounting.
 71 *Wieben v Wain* (1991) 13 MVR 393; *Castro v Hillery* [2001] 510 brain-injured claimant communicating "I can't speak" = insight into her condition.
 72 *Beecroft v The Proprietors Top of the Mark Building Units Plan No.3410 & Ors* unreported, Supreme Court of Queensland, No.3500 of 1986, Ambrose J, November 1, 1995; *Hoban v Amcor*

Ltd unreported, SC Qld BC 960 1930, Cullinane J, April 2, 1996; *Groeneveld v Mt Isa Mines Ltd* unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, incomplete paraplegic in rented premises \$40,043.50 for capital costs and \$23,565 for maintenance; *Lebon v Lake Placid Resort Pty Ltd* unreported, SC No.2043 of 1992, Williams J 13.3.00, award of \$110,000 under this head for a female C6 quadriplegic; *Winterton (an infant) v Mercantile*

Mutual Ins. (Aust) Ltd unreported, SC Qld No.8 of 1999 Demack J, September 6, 1999. Plaintiff able to walk with one person assisting. Modifications, including capital, depreciation and recurring costs of home were \$127,644.
 73 In *Hornberg v Horrobin & Anor* (unreported SC No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97), the court awarded \$43,000 for the recurring costs, including ongoing house maintenance; *Castro (by her next friend)*

Aids & equipment

The rehabilitation physician's and/or occupational therapist's reports will advise the need for and cost of each aid or item of equipment, its life expectancy, capital cost and any associated maintenance costs indicating its cost and frequency of maintenance, the cost of consumables/incontinence aids indicating their frequency of use and cost, the need for, frequency and cost of therapies (physiotherapy, occupational therapy, speech therapy, hydrotherapy) and additional cost of the special vehicle and its necessary adaptations. The costs can be reduced to a schedule setting out the annual cost, weekly cost and capital cost after the 5 percent discount tables are applied over the claimant's life expectancy.

Swimming pool

Awards including damages for the costs of a swimming pool are rare. The medical evidence must show it is needed and provides a therapeutic benefit. The court must then weigh the benefit to the claimant against the cost to ascertain its reasonableness.⁷⁴

Transport

The measure of damages is the cost beyond the cost of the vehicle the plaintiff would have had in any event, and the cost of the necessary adaptations. The report of the occupational therapist will provide the cost of the necessary adaptations and vehicle life expectancies to make the vehicle usable for the claimant.

For paraplegics who are able to independently transfer, there are usually hand controls provided to an automatic vehicle. The measure of the loss may include the additional cost of automatic as opposed to manual transmission.⁷⁵

Quadriplegics who are able to transfer independently and have sufficient residual hand function may drive automatic vehicles with hand controls. Quadriplegics usually require the provision of a motor van with a ramp at the rear or the side and special fasteners to tie the chair down in the rear of the van.⁷⁶

Carers are needed to load and unload persons with brain or spinal injury in electric wheelchairs into vehicles. Some ventilated quadriplegics in the habit of travelling need two carers in the vehicle – one carer to restart the ventilator if the primary batteries fail or to manually resuscitate in the event of wheelchair battery failure and the second to manage the vehicle and calls for help.

The same care prescription applies to ventilated quadriplegics when they are away from mains power support in a park or shopping centre.

Hospitalisation

The cost of future hospitalisation cannot be left in the hope that the free public hospital system will always accommodate the claimant. The daily cost of staying in a Queensland Government hospital is regulated.⁷⁷

Acquired brain injury claimants have a varying need, depending on the residual disability for hospitalisation over their lifetime.⁷⁸

The courts have discounted this item in spinal injury cases because the long stays in hospital usually come later rather than sooner. Generally, paraplegics average a week to 10 days a year over their residual lifetime.⁷⁹ Quadriplegics usually average two weeks a year over their residual lifetime.⁸⁰ The report of the rehabilitation physician will evince the likely number of days per year as the future hospitalisation need of the claimant. A weekly value can be calculated and the 5 percent tables applied.

Urology

Spinal-injured claimants usually have lifelong problems in keeping harmful bacteria out of their bladders and kidneys. Spinal-injured claimants usually need periodic investigation by way of ultrasound, x-ray and periodic pathology tests, and review by a specialist urologist. The need for, frequency and cost of periodic investigation and review by a specialist urologist is usually found in the rehabilitation physician's report with sufficient particulars to calculate a weekly cost. Where there are unusual urological problems, the spinal claimant's needs and the cost of those needs are addressed in the report of a urologist.⁸¹

Plastic surgery

Bed-bound brain-damaged persons, paraplegics and quadriplegics are vulnerable to bedsores. The treatment of these sores is often a combination of plastic surgery and bed rest. Cost of treating a pressure sore and the likely frequency of pressure sores over a lifetime is usually found in the rehabilitation physician's report with sufficient particulars to calculate a weekly cost.

Specialist counselling, occupational & speech therapy, physiotherapy

The need for and frequency of future counselling and therapies are opined for in the rehabilitation physician's report and the costs are opined for in the occupational therapist's report with sufficient particulars to calculate a weekly cost.⁸²



v Hillery [2001] 510, Jones J awarded \$9,000 for recurring expenses relevant to alterations.

74 *Theden v Nominal Defendant & Qld* [2004] QSC 310, A C5 quadriplegic was prescribed and had regular pre-trial hydrotherapy, but had to travel for over two hours to and from the local hydrotherapy pool. The court took the evidence of the architect as to the cost of providing a pool in the claimant's house and discounted the costs of

providing a pool in the claimant's house by subtracting the pro-rated costs attributable to the surface area of the pool in excess of the surface area of a hydrotherapy pool.

75 *Groeneveld v Mt Isa Mines Ltd* unreported, SC Qld, No.1562 of 1993, White J, June 19, 1996, change to automatic car with hand controls \$15,000.

76 *Theden v Nominal Defendant & Qld* [2004] QSC 310, subject to appeal, past

capital cost changeover to van + adaptations \$90,000 + future capital cost changeover to van every seven years + adaptations \$100,000 = \$190,000.

77 The daily bed cost of \$730 a night is presently prescribed as by regulation. Health Services Regulation s6 & Schedule 1 Part 1 Item 6.

78 *Castro (by her next friend Castro) v Hillery* [2001] QSC 510, the award was \$30,000.

79 *Coughlin v Stanley & Ors*, unreported SC

Qld, No.3330 of 1988, Byrne J, 3.11.92, female T9 complete paraplegia, age 22 at trial, on average 10 days per year for rest of life.

80 *Lebon v Lake Placid Resort Pty Ltd* [2000] QSC 49, C6, average 10 days per year.

81 *Hornberg v Horrobin & Anor*, unreported SC Qld, No.836 of 1999, Ambrose J, 24.10.97, future cystoscopies \$15,000 + future IVP or ultrasound \$3,750.

Pharmaceuticals

The rehabilitation physician will advise as to the claimant's need for injury-related pharmaceuticals. The claimant's general practitioner will have a record of the claimant's historical and current prescriptions. The pharmacy where the claimant has their prescriptions filled will be able to provide the unsubsidised cost of the claimant's prescription medicine with sufficient particulars to calculate a weekly cost.⁸³

General references:

1. Granwell, D. & Ors, 'Head Injury – The Facts', Oxford University Press, 1995.

2. Queensland Spinal Cord Injuries Service, 'Handbook of Spinal Cord Injuries', 2nd ed. November 2001.

3. Capildeo, R. & Anor, eds, 'Progressive Rehabilitation Paraplegia'.

General practitioner

The accident-related injury may necessitate an increased use of the services of a claimant's general practitioner. This need in excess of what would normally be needed is usually the result of the need for periodic prescription of medication, pathology or radiology testing associated with the injury. The cost of a consultation and the frequency allow a weekly cost to be calculated.

Computers

In *Theden v Nominal Defendant & Ors*,⁸⁴ there was a substantial claim for computers to reduce the claimant's dependence on others. The evidence showed the claimant used her computer up to six hours a day and that reliability, sturdiness and functionality were beyond what ordinarily would be required. The claimant was attempting to facilitate her use of voice activation software.

Jones J, taking a "broad brush approach", awarded \$120,000.

Claims for computers are common in other jurisdictions.⁸⁵ The NSW authorities suggest that expert evidence as to the need and cost are required to have computer costs sound in substantial damages.

Future travel

It is difficult to objectively quantify damages for this item because it is dependant on variable pre-accident preferences, resources and residual capacity. The courts often assess a global sum on an arbitrary basis.⁸⁶ An award in the range of \$7,000 to \$20,000 is likely for most claimant/plaintiffs who evinced a bare intention to travel post-accident.

The better approach is to establish from the claimant their pre-accident travel history and post-accident travel intentions. The rehabilitation physician's report usually suggests that business or first class travel is needed as opposed to economy class. Upon inquiry to a travel agent, the evidence is likely to suggest accommodation in five-star hotels as opposed to three-star accommodation. There may be a need for an additional carer when a claimant travels. Within these parameters, the additional cost of travel occasioned by impairment can be calculated and reduced to a weekly cost.

Specific evidence was adduced in respect of a C5 female quadriplegic with a pre-accident history of international, national and local travel founding an award of \$175,000.⁸⁷

Funds management

A frequently asked question is whether the costs of the claimant taking advice from an investment adviser regarding the investment of large sums of money may be claimed from the insurer. The necessary evidence is obtained by requesting the Public Trustee or one of the private trustee companies to provide their costs and charges for managing the settlement or judgement sum. Except for claimants suffering a legal disability as a result of a compensable injury, the cost of fund management does not sound in damages.

The concept of damages being awarded once and for all as a lump sum necessitates the assessment of future losses and expenses on a weekly basis and applying discount rates to produce present values of future income streams. Theoretically, at least, a claim-

82 *Hornberg v Horrobin & Anor*, unreported, SC Qld, No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97, future counselling \$4,500, future physiotherapy \$7,000, future occupational therapy \$6,500; *Castro (by her next friend) v Hillery* [2001] 510, Jones J awarded \$70,000 for future speech therapy.

83 *Hornberg v Horrobin & Anor*, unreported, SC Qld, No.836 of 1997 No.8196 of 1996, Ambrose J, 24.10.97, future medication \$145,000.

84 [2004] QSC 310 and [2005] QCA 236.

85 *Beck v State of NSW & Perisher Blue Pty Ltd* [2001] NSW SC 278. The claim for \$220,000 was supported by an expert report which was unchallenged by the defendants. Studdert J awarded \$220,000; *Simpson v Diamond & Anor* [2001] NSWSC 1048, \$292,679 awarded for computer expenses.

86 *Scarv v State of Qld & Anor* unreported, Supreme Court of Qld, No.1272 of 1993,

White J, October 30, 1998, \$7,000 awarded for travel; *LeBon v AMP, LeBon v Lake Placid Resort Pty Ltd* (2000) SC 49, \$20,000 awarded for travel; *Castro v Hillery* [2001] 510 Jones J awarded \$25,000 for future holiday expenses.

87 *Theden v Nominal Defendant & Qld* [2004] QSC 310 & [2005] QCA 236, one overseas trip every four years @ \$29,000 a trip plus two interstate trips every three years @ \$16,000 a trip plus two weekend trips every year @ \$1,200 a trip, then discounted to produce \$175,000.

88 *Nominal Defendant v Gardikiots* (1996) 186 CLR 49 The only amount properly claimable for managing judgment monies was an amount directly referable to the injury. The costs of the Public Trustee or a private trustee, including the costs of funds management, are usually confirmed at the time the sanction and protection orders are made.

In *Wills v Bell* [2002] QCA 419 White and McPherson JJ relying on a passage, quoted by Gummow and McHugh JJ in *Nominal Defendant v Gardikiots (supra)*, from the judgement of Zelling J in *Campbell v Nangle* (1985) 40 SASR 161 @ 178 and 192: "If you injure a plaintiff so badly that he has permanent brain damage and he can neither manage the resulting fund for himself nor make any decision with regard to its management, then it is foreseeable that there is going to have to be a manager to do that for him and, with a large fund of this kind, a skilled manager whose fees must be paid for." (See now *Willett v Futcher* (2005) HCA 47).

89 *Willett v Futcher* [2004] QCA 30, "Where the standard of services which a plaintiff is obliged to accept, as a matter of law, as a necessary product of the defendant's negligence, is higher than the standard which would be provided by

the unassisted decision making of an adult of no particular skill, training or interest, the defendant is liable to pay the cost of those services at the higher standard."

90 *Willett v Futcher* [2005] HCA 47 "In a case, again like the present, where the plaintiff will never be able to manage his or her affairs and will never be able to work, the damages awarded will often include a significant allowance for future economic loss. The plaintiff can make no decision about the fund. An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The incurring of the expenses is a direct result of the defendant's negligence. The damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she

ant should be able to put the money in an investment which returns an, after tax, interest rate of 5 percent to answer the periodic costs of their future needs. Reasonable management fees are the expenses incurred to answer the purpose which the damages must fulfil based on assumptions, including the fund's return to zero at the end, a future income stream to answer the plaintiff's needs having regard to inflation and the necessary, after tax, rate of return on investment.⁸⁸

In *Willet v Futcher* [2004] QCA 30, Davies JA, Jones and Holmes JJ, affirmed the chamber judge's finding that the establishment fee and discretionary portfolio management fee were a necessary product of the defendant's negligence. The court found the advisory portfolio management fee, fund manager fee and initial and ongoing brokerage fees, plus underlying investment manager fees, were not a necessary product of the defendant's negligence.⁸⁹ However, the High Court⁹⁰ found the correct measure of damages was an amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund.

The judgement of the Queensland Court of Appeal was set aside and the High Court referred the case back to that court for further assessment of what damages ought be allowed. Lawyers will have to wait until the Court of Appeal determines what fees are properly claimable.*



Peter Sacre

would have been in had the tort not been committed. That requires comparison with the position the plaintiff would have been in without the award of a lump sum for damages. It does not, as the distinction adopted by White J supposes, require or permit comparison with the position that the plaintiff would have been in had the disabling injuries not been sustained but the plaintiff nonetheless had a lump sum to invest. That comparison is irrelevant and inapt. In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of the period."

by Chris Robertson

Heritage, character & Brisbane City Plan 2000 – Identification, regulation & listing

One can picture the scenario. A practitioner alone in his office late on a Friday, a knock at the door and in walks an important client brandishing a letter with Brisbane City Council letterhead.

The practitioner, who successfully handled the conveyancing on the client's property two years before, politely seats his guest and begins to read the letter. It states the property has been identified as a heritage place of cultural significance and that the owner has until Monday next to lodge a submission regarding the listing.

What then does the practitioner do? After reassuring the client that there was no such issue at the time he purchased the property, the practitioner then packs his briefcase for a weekend in the trenches, preparing for battle on Monday with the council.

But understanding how the heritage listing process occurs within the ambit of the Brisbane City Plan 2000 (City Plan), and what it actually means, is half of the battle and may well be the saviour of their weekend.¹

This paper provides background information which will aid in understanding the heritage listing and character housing designation process, and the subsequent regulation of such designated properties within the ambit of the City Plan.

1 Heritage listings

Administration of heritage listings occurs with BCC's Heritage Unit, which is currently part of City Planning, within the newly named City Policy and Strategy Division. In mid-1989 the council established the unit to implement the heritage policies of council.² A priority is to conserve places of the cultural significance to Brisbane.

The foremost point to note with heritage listings is that state listings occur under the *Queensland Heritage Act 1992* and local government listings occur under the respective city or town plans. Nearly all (apart from those most recent additions to the Queensland Heritage Register) state heritage listed places within Brisbane appear within the City Plan³ Heritage Register.

Apart from regulatory aspects, the systems run relatively independent of each other.⁴ Initially we need to recognise that there are different types of protection within the City Plan. These include straight heritage listings, 'commercial character buildings' and 'character houses in demolition control precincts'.

This first section discusses the process of identification and entry onto the 'Schedule 1 Heritage Places of Cultural Heritage Significance' (Heritage Register), located in Volume two Appendix 2 of the City Plan.

The City Plan Heritage Register contains about 2400 to 2500 individual listings ranging from remnants such as sewer vent pipes to City Hall. The Heritage Register is a Planning Scheme Policy as per Division 5 Chapter 2 of *Integrated Planning Act 1997* (IPA). It is as equally important to envisage the Heritage Register as a dynamic document constantly being updated with places being removed, entered and amended as required.

Those who turn to the register will see that it is organised alphabetically by suburb and then by street. Properties that are also entered onto the Queensland Heritage Register are highlighted by shading.

1 The predecessor of City Plan, the Brisbane Town Plan 1987, did have heritage listings, mainly by area, and these were transferred across in the City Plan Heritage Register.

2 The BCC Heritage Unit is located on

Level 11 of the Brisbane Administrative Building. Contact phone: 07 3403 5048.

3 It is important to note here that all IPA-compliant town plans should recognise places that appear on the Queensland Heritage Register as per

s2.1.3A, 'Core matters for planning schemes'.

4 The recent discussion (2005) on the review *Queensland Heritage Act 1992* released by the state has mooted the combining of a number of aspects,

including listing and administration, of state and local government heritage matters, and in particular the creation of a single register.

The register is preceded by the Heritage Register Planning Scheme policy that outlines the criteria for entry and processes.

It is important to take time to read this page as it holds important key basics. Section 2, 'Criteria for entry in the Heritage Register' states that a place may be entered in Schedule 1 if it meets one of the listed cultural heritage values. (It should be noted that in appraisal and regulation of places, generally the guidelines in the Burra Charter⁵ are adhered to).

Continuing under point 2 in the statement, "(W)hen a citation is prepared documenting these characteristics (criteria), it should include:", and secondly under point 3, "Process for entry in the Heritage Register", it states: "(C)itations need not be prepared prior to inclusion of sites in the Heritage Register."⁶ Thus a place can be nominated for listing without a citation being completed, so long as prima facie it satisfies at least one of the criteria for entry.⁷

In practice, if you are required to lodge a submission against a heritage listing (the process is discussed below) you must address the grounds (criteria) upon which a potential heritage place has been nominated. The criteria are generally applied in the property's citation.

The first step then is to contact the BCC Heritage Unit and ask for the citation on the property, or in the every least the criteria that have been applied to identify the place as a place of cultural heritage significance. Until you are supplied with such information, together with adequate time to respond, the entire process should be put in abeyance.

It is important to note that there are two levels of listing, unlike the state, where a property must be of cultural heritage significance to the state. The City Plan criteria recognise two levels of importance – local and city-wide. Thus you may see that under Criterion 1, "it is important in demonstrating the evolution or pattern of the City's or local area's history", a place may be of cultural significance to Brisbane City and/or the local area.

The Heritage Register as a planning scheme policy requires that any amendment to it must follow the correct procedure as outlined in IPA Schedule 3.⁸ However, while the requirements in IPA only state that to amend a planning scheme policy a public advertisement containing stipulated information in a "newspaper circulating generally" is all that is necessary, the BCC has elected to, as a matter of policy, notify owners direct by letter.⁹ But it is important to remember this is not a requirement of IPA.

Further, as a planning scheme policy the final decision whether to enter a place on the Heritage Register or not is the sole prerogative of the elected representatives, councillors. Nominations for heritage listing may be derived through BCC surveys, by

owners or through individuals or groups who feel a place may be of cultural significance. The listing generally encompasses the property's Real Property Description or where appropriate, part thereof.

The actual listing procedure within BCC is quite complex and time-consuming. Once a place has been identified and nominated, preliminary research is undertaken to assess whether it should proceed further.¹⁰ If it is assessed that the listing should not proceed, then the process goes no further.

If it is determined that listing should proceed to the next stage, the place is then assessed by the BCC's independent Heritage Advisory Committee (HAC).¹¹ It is evaluated against the criteria for listing. If it is decided not to proceed then again the process regarding the particular property goes no further. If the HAC decides the place is worthy of listing, the next step is to present the recommendations to Council's Civic Cabinet, also referred to as the Establishment and Co-ordination Committee.¹² This comprises the Lord Mayor and the six chairs of the committees of the council. Once the place has passed this assessment, it is then given to full council as a resolution proposing to amend a planning scheme policy.¹³

From this point the amendment becomes the consultation stage.¹⁴ This involves advertising and the sending out of letters as per the scenario in the introduction. Submitters have 20 business days to lodge a submission after the notice is first published.¹⁵ For this reason (and the possible need for expert advice) it is important owners do not 'sit on' letters of notification.

A submission must address the listing criteria (thus the need for BCC to supply it) and include all pertinent information that supports the submission. This may include additional information, both historical and architectural, that will assist in further evaluating the cultural significance of the place. In addition it is quite within the bounds of reason to argue structural unsoundness and/or that the structure is irreversibly altered in that its heritage integrity has been compromised.

Generally it is advisable for the practitioner to seek independent heritage advice regarding a property. While the heritage profession within Brisbane is a relatively small group, there is a number of highly experienced conservation architects available to provide advice and evaluation. Above all, it is important to remember that each property is unique to its own particular circumstances, thus the need for specialist advice.

Such arguments in a submission as financial hardship on the owner/s are not administrative issues. Council officers can only assess a property against the applicable criteria. While financial hardship may

5 The Burra Charter 1999: The Australia Charter for Places of Cultural Significance. (Burwood: Australia ICOMOS Inc.2000). But also note the recent Peter Marquis-Kyle & Meredith Walker, *The Illustrated Burra Charter: Good Practice for Heritage Places* (Burwood: Australia ICOMOS. 2004).

6 This was not always the case. When City Plan came into force on October 30,

2000, a citation was required prior to a property being listed. This amendment became effective on July 1, 2003.

7 A citation should document the characteristics disclosed in the applicable criteria on the respective property. City Plan Vol.2. Appendix 2, p93.

8 'Schedule 3: Process for making or amending planning scheme policies', IPA

pp369-72. Note there are three stages – Proposal, Consultation and Adoption.

9 Ibid., Part 2, p369.

10 An often-asked question is why not get the property owners involved at this stage before progressing to the formal stage. Frequently they are, but there is a need for consistency of approach as well as input from elected representatives and for initial research to be completed in

order to adequately assess and discuss the matter with owners.

11 HAC is comprised of elected representatives (councillors), professionals within the architecture/heritage fields, and representatives form various interested community groups and organisations.

12 It is important to contrast the HAC with the State Heritage Council. HAC, unlike

be argued, any decision not to heritage list on such grounds is a policy decision and thus is the prerogative of the elected council. The council officers administering the submission do, however, have a duty to list financial hardship as one of the grounds of objection for the policymakers to consider.

One of the interesting idiosyncrasies of IPA is that a submission can also be made by individuals and organisations, not only the owners or controllers of a property. Thus an owner may lodge a submission against a listing and there may be others that favour the listing. Once a submission is made, the staff of the BCC Heritage Unit process the submissions and respond to the points raised. For example, a point may be raised that the structure has had such extensive later alterations that its heritage integrity has been compromised. In such instances an inspection by an architect and historian will normally follow to assess the extent of the alterations.

The procedure then follows the initial assessment process, with all additional information being included to allow HAC, the establishment and co-ordination committee and council to reassess the potential listings in light of the submissions made. Once council adopts the amendments, there is usually a period of time before they come into effect.¹⁶

There are three final points that practitioners needs to keep in the back of their minds. Once the initial list of places, at the commencement of the process, has been adopted by the council, only council may remove it from the process. Thus, if a submission correctly details that a nominated structure is structurally unsound and it is assessed as such by council officers, then a recommendation is made to council that the listing should not proceed. The usual course of action is that recommendations are made when the final list is presented to council to adopt as an amendment to the planning scheme policy. But again council is not bound to follow the recommendations.

Secondly, unlike the state heritage listing process, there are no grounds for appeal once the planning scheme policy has been adopted.¹⁷ Neither is compensation automatic.¹⁸

However, practitioners are not faced totally with brick walls. They need to consider three process options once a place appears on the register and the amendment has come into effect. Firstly, council may choose to make a policy decision for a particular reason and remove the place from the Heritage Register (this is extremely rare). Secondly, the owner of the listed place may still lodge a development application. This may be done under a superseded planning scheme or under the current amended planning scheme policy. The former may lead down the road of injurious affection¹⁹ and the latter possibly to

a suitable negotiated outcome. If the development application is refused, then the matter may be appealed to the Environment and Planning Court and thus, if applicable, incorporating a challenge to the validity of the property as a heritage place. But emphasis needs to be directed to the individual nature of a particular property, including the property's designation and potential.

The third option, often seldom considered, is that the property owner can elect, after weighing up just what effect the listing will actually have, to do nothing. Unless there are major building works planned on the property, there are no onerous maintenance requirements.

Finally, even though council has provided notice of the proposal to amend the planning scheme policy, a development application may still be lodged with council.²⁰ There is nothing to prohibit the lodging of a development application under the current planning scheme and planning scheme policy right up until the final adoption of the list as a planning scheme amendment. Council may elect to, and this is the usual practice due to the delay in printing of the amendments, bring the amendment into effect at a later date.

It is important to note the difference between adoption and effect.²¹ In this instance, any application lodged between the adoption and the effect date, dependent of course on what regulations are already in force upon the property, may well receive the Coty principle treatment.²²

The strategic decision as to whether and when to lodge an application will again depend upon the collective assessment of all the factors, including intention of the owners, concerning a particular place. One often over-looked consideration is that such a listing may well be of advantage to an owner.

2 Regulation of a heritage-listed place

Under the City Plan, the Heritage Place Code, a planning scheme, has at least on face value quite wide application. According to City Plan, the code will "apply in assessing building work (including demolition), reconfiguring a lot or operational work on a premises that includes a heritage place or a premises adjoining a heritage place".²³

While this may seem rather all-encompassing, the reality is that it is not. A brief run through this code will clarify this point.

Clearly a property must be entered in 'Schedule 1 Heritage Places of Cultural Heritage Significance' City Plan identified by place, address and lot and plan number (this, of course, excludes the adjoining premises mentioned).

The second paragraph offers the next exclusion "where a citation prepared by Council in response to

the Heritage Council, has no legislative power. It is solely an advisory committee.

13 'Part 1. Proposal Stage', 'Schedule 3' IPA. p369.

14 'Part 2. Consultation Stage', 'Schedule 3' IPA. p369-70

15 Ibid., Part 2 (2) (2).

16 Note the requirements of Schedule 3, 'Process for making or amending

planning scheme policies.' IPA.

17 A lodged objection may be appealed to the Planning and Environment Court; refer s30(5) *Queensland Heritage Act* 1992. p26.

18 Refer Chapt 5 Part 4 or see Chris Robertson, 'Compensation lost Compensation Found: Injurious affection and the *Integrated Planning Act* labyrinth'. Proctor, April 2002, pp20-21

19 Ibid.

20 It is important to note that, unlike s24 of the *Queensland Heritage Act* 1992, there is no provisional listing process. A place is not bound from the day of notification. pp21-22.

21 Refer to 'Dictionary', 'Schedule 10' under definition of 'Development application (superseded planning scheme)' IPA pp421-22.

22 *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117 accepted in *Lewiac Pty Ltd v Gold Coast City Council* 1996 2 QdR 266.

23 'Heritage Code', '1 Application.' Brisbane City Plan 2000, Vol.1 Chapter 5. p89.

a development application does not support retaining the site on the Heritage Register". The most obvious of these would be where a particular structure was entered on the Heritage Register but has subsequently been burnt down. The citation aspect basically refers to a reappraisal and obtaining written clearance from the council.

Secondly, and this is quite obvious, that where a property appears on the BCC Heritage Register but is also included on the Queensland Heritage Register, the Heritage Place Code will not apply where the work constitutes "excluded Work".²⁴

A distinction is made in the code between "building work" and "minor building work". As with all good government planning schemes, the answer will not be found in one location. Under Definitions in Chapter 3 of the City Plan, "Building Work" is "as defined in the *Integrated Planning Act* 1997, but excludes minor building work". A lengthy definition of "minor building work" and "minor demolition work" is provided in the above section.²⁵

Basically the scenario is this, if it is "minor building work", then the level of assessment is 'code', whereas if it is "building work", as outlined in the Heritage Code, the level of assessment is 'impact'. The difference can be exemplified simply – under "Minor Building Work" (with reference to Schedule 5 of the Standard Building Regulation 1993) "in a Residential area (where not on a small lot)" includes "internal building Works".²⁶

If this were impact assessment, that would mean that as per IPA requirements, an owner would have to advertise, with submitters being given the right to object, to internal works they would be undertaking on their residence.²⁷ By making it code assessable, the only assessing that would be done is through the council, ensuring the work maintains the heritage integrity of the place and that it was indeed minor building works.²⁸

As stated in the introductory quote, the Heritage Code is also applicable on premises adjoining a "heritage place". Despite this, the code goes on to limit the ambit of the extent of this statement, in that:

1.5 Unless impact assessment is required elsewhere in the level of assessment tables, relevant assessable development on land adjoining a Heritage Place is subject to code assessment where it involves:

- building work except for a house . . .

The reality is that where the new development (adjoining to a heritage place) is related to a house, it is not subject to the code, unless of course some other

factor triggers the code or another code within City Plan.

However, all is not as simple as it sounds. In the Introduction Section of City Plan it states that the codes may be "varied by the Local Plans in Chapter 4"²⁹ – for example, the City Centre Local Plan. In particular, refer to Appendix A, which lists sites allocated Transferable Development Rights (TDR).³⁰ Essentially where council was assured of the conservation of a heritage place, a calculable and transferable site area was defined and this TDR is able to be transferred (sold) to another site to enable greater development on a non-heritage site.

Importantly, it should be recognised that there is not total prohibition of development on or adjacent to a heritage site. Reference to the Performance Criteria and Acceptable Solutions section of the Heritage Place Code should be made.³¹ Under 3.2 Performance Criteria and Acceptable Solutions, for each proposal put forward the acceptable solution is a report accompanying the application that "... verifies the proposal has been prepared in accordance with the Australia ICOMOS Charter for the Conservation of 'Burra Charter' Places of Cultural Significance 1998"³²

Essentially, if an application has such documentation accompanying it, is prepared by an experienced conservation architect and addresses the conservation issues concerning a heritage place, then it is highly likely the application would proceed. However, as stated in Part I, the application is subject to impact assessment and therefore subject to submissions. A properly made submission/s may have a bearing on a decision as to whether to approve the application or not.³³

If an application is refused, what then should you do? Realistically there are four options:

- Do nothing; or,
- Address any issues the council may have (a pre-lodgement meeting may well point an applicant in the right direction prior to lodgement of the application);³⁴ or,
- Determine whether or not injurious affection is applicable;³⁵ or,
- Challenge the decision to refuse the application.

If the fourth option is selected, this will of course be dependent on what type of development is sought, and it is always pertinent to remember that each heritage-listed place is unique in its circumstances.

A challenge to an application refusal can be under a number of grounds, including that the place was incorrectly entered onto the Heritage Register; it is

24 The reality is that the Queensland Heritage Regulation 1992 was repealed by s11 SL268 2003. Reference should now be made to the issue of exemption certificates as per Part 5 Division 2 *Queensland Heritage Act* 1992. However, it should be noted this does not totally exempt local government jurisdiction within an application where the application involves other planning matters.
25 Chapter 3 pp66-71. City Plan.
26 *Ibid.*, p70.
27 Chapter 3, Part 4 IPA.

28 Refer to the tables in Chapter 3 and the 'Heritage Place Code' in City Plan.
29 '1.1 How to Use the Codes', 'Introduction', City Plan. Vol.1 Chapter 5. p3.
30 Chap.4 p417. TDRs were introduced in c1989 shortly after the Town Plan for the City of Brisbane 1987 was introduced. While the practical effectiveness of TDRs has always been questioned, about eight have been taken to date. Currently BCC is undertaking a CBD Masterplan and these may be under review.
31 While special sections within the code

have been set aside for places on or adjoining a place of special cultural significance to indigenous people or a place of natural heritage significance, generally most applications concern development on or adjoining a heritage place.
32 This should read 1999. The Burra Charter 1999: The Australia Charter for Places of Cultural Significance. (Burwood: Australia ICOMOS Inc.2000).
33 s3.4.9 'Making A Submission (p124) and Schedule 10', 'Dictionary', 'Properly Made Submission', IPA, pp434-435.

34 The BCC offers limited assistance in the form of architectural advice and is going to commence grants (subject to conditions) to owners of places which appear on the BCC Heritage Register.
35 See Chris Robertson, 'Compensation lost Compensation Found: Injurious Affection and the *Integrated Planning Act* Labyrinth'. Proctor. April 2002 pp.20-21.
36 Structural soundness is not specifically referred to in the Heritage Place Code. However, valid argument could be made that one may read into P4 of the Performance Criteria under 3.2.1 of the

structurally unsound and is not reasonably capable of being made structurally sound.³⁶

In dealing with the incorrect entry issue, the practitioner should consider two main points. Ensure that a copy of the citation, identifying which criteria the heritage place satisfies, is obtained from the BCC. An experienced conservation architect will be able to advise whether listing on the grounds determined in the criteria may be sustained.³⁷

This should have been completed in the report that accompanied the development application.³⁸ Secondly, they need ensure the property was correctly entered (as per Schedule 3 IPA) onto the Heritage Register.³⁹

Further grounds for challenge may be the current condition of the property. This has been examined in two relatively recent cases, *Gould v BCC*⁴⁰ and *Armstrong v BCC*.⁴¹ While not directly dealing with the Heritage Place Code, both cases dealt with the issue, among other things, of structural soundness and whether a structure is reasonably capable of being made structurally sound.⁴² Both judgments understandably dealt with the particular elements and conditions of each structure.

In *Gould*, an application was made under the old Town Plan for the City of Brisbane (1987) s7.3.6.2. (c) for a waiver based upon the fact that a Heritage and Character Building “is structurally unsound and not capable of being made structurally sound”. The BCC argued that while aspects of the annexe (to the subject building) were considered “to be not structurally sound in the short term”, the “(H)ouse is of heritage significance and is structurally sound”.⁴³

The overall condition of the building was assessed and evidence produced by both parties. His Honour Quirk J accepted the evidence of the appellants that the building was not structurally sound but stated that the question to be decided was “whether the dwelling is reasonably ‘capable of being made structurally sound’”.⁴⁴ Emphasis was made on the word reasonable.

His Honour also distinguished between the need to make the building structurally sound and a “complete and faithful restoration of a building to its original condition”.⁴⁵

While acknowledging the importance of preservation of heritage and character buildings, his Honour applied the test of that of a “reasonable and prudent owner” in consideration of advice as to whether to choose between demolition and “reinstatement of structural soundness”.⁴⁶ In this instance his Honour

held that a reasonable and prudent owner would reject the latter and chose the former option.

Armstrong, while being an appeal of a refusal of an application to demolish a pre-1946 dwelling under the “Demolition Code” of City Plan, re-examined the issue of structural soundness and whether a structure is reasonably capable of being made structurally sound.⁴⁷

In *Armstrong*, evidence was again given as to the condition of the structure. In this instance, his Honour Newton J preferred the evidence of the respondent (BCC) to that of the appellant as to the cost of repairs and in doing so applied the test of Quirk J:

“I am satisfied that a reasonable and prudent owner of the house at 40 Boyd Street would consider that the expenditure of moneys approximating the estimate given by Mr Pope (builder) to reinstate the house to structural soundness would be moneys wisely spent.”⁴⁸

Gould was distinguished by his Honour in *Armstrong* on the basis that the “house in question had long since passed beyond the point where it could, on any reasonable and competent assessment of its condition, be considered to be structurally sound”.⁴⁹

One other comment (which distinguished *Gould* from *Armstrong*) is worth mentioning here. His Honour Newton J commented that the condition of Armstrong’s house “had come about as a direct result of a decision taken by the appellants in 1994 to restrict maintenance to that of an essential nature only”.⁵⁰

Yet in *Gould* his Honour Quirk J, accepted the owner’s assertion that deteriorated condition of the structure had come about “because it lacked the attention needed over some 20 years prior to my ownership”.⁵¹ This is despite the fact that the owner in *Gould* had purchased the property some 10 years before.

Clearly the contribution and approach of an owner to the condition of the structure cannot be disregarded if a practitioner is contemplating such an action.⁵² It is perhaps with a touch of irony that Armstrong’s property burnt down while under going renovation!

While any discussion on each of the following categories could easily fill a book, and strictly speaking have a peripheral relationship to heritage, it is important to understand not only these individual categories, but how they also fit into the broader picture with regard to City Plan. It is proposed to deal with the ‘commercial character’ and ‘residential design’ briefly.



code in that structural soundness and whether the structure is reasonably capable of being made structurally sound is directly pertinent to the conservation of a heritage place. Such comments would be addressed in the report accompanying the application.
37 This is particularly so where a citation not recommending the property remains on the Heritage Register is sought – as per the Heritage Place Code.
38 For example, if the selection criterion identifies the place as a rare type of duplex in a certain area, have this

verified and ensure the place has indeed retained its heritage integrity.
39 This is particularly relevant as the state’s EPA has elected to remove from the Queensland Heritage Register all properties owned by the Commonwealth at the time of listing and where they have since passed into private ownership, moved to re-enter them (refer s52.1 Australian Constitution) Also refer to *Old Heritage Council v The Corp of the Trustees of the Roman Catholic Archdiocese of Brisbane* (2000) QCA 378.

40 *Gould v BCC* [2000] QPE 048.
41 *Armstrong v BCC* [2003] QPEC. 007.
42 It is actually dealt with in the Demolition Code under ‘5. Performance Criteria and Acceptable Solutions’. pp70-71, City Plan. This code, however, only has applicability to those buildings identified in the Demolition Code. It excludes those places that fall within the ambit of the Heritage Place Code.
43 *Gould v BCC* [2000] QPE 048 at 4-5.
44 *Ibid.*, p8.
45 *Ibid.*, p9.
46 *Ibid.*

47 The ‘Demolition Code’ of City Plan is discussed below.
48 *Armstrong v BCC* [2003] QPEC at 16-17.
49 *Ibid.*, p12.
50 *Ibid.*, p10.
51 *Gould v BCC* [2000] QPE 048 at 3.
52 It should be noted here that there are, apart from the requirements in the *Building Act 1975* – specifically Part 4, s22, no wilful neglect provisions in City Plan nor the *Queensland Heritage Act 1992*.

3 Commercial character

'Commercial character' properties have their own register (a Planning Scheme Policy) within City Plan located in Volume 2 Appendix 2⁵³ in addition to the Commercial Character Building Code.⁵⁴ The criteria for entry on the 'Register of Commercial Character Building' is that the property is pre-1946 (this term is explained below under Character Housing), has a non-residential gross floor area of less than 250m² and is essentially your neighbourhood corner shop.⁵⁵

Two other points regarding commercial character are worth noting. The first is that buildings that essentially qualify as commercial character but lie within a multi-purpose centre are excluded from the Commercial Character Register.⁵⁶

The second point is that any proposed change of use within a commercial character building on the register becomes self-assessable (excluding restaurants) provided the "Performance Criteria and Acceptable Solutions" within the Commercial Character Code are met.⁵⁷ This is offered as an incentive to owners for entry onto the register.

4 Residential design

Brief mention of the residential design codes need only occur at this stage as much of the character housing issues are discussed below. Of note are the following:

- The Residential Design – Character Code applies to "Residential Areas in the Demolition Control Precinct" (DCP). In a nutshell, this code applies to both pre-1946 and post-1946 residences. The idea is to conserve the pre-1946 housing character of DCPs while ensuring new infill does not detract from the existent character housing.⁵⁸
- Residential Design – Low Density, Character and Low-medium Density Code. The purpose here is to retain pre-1946 dwellings and buildings built prior to 1900.⁵⁹
- Residential Design – Medium Density Code & Residential Design High Density Code. Specifically refer to the performance criteria to retain buildings built prior to 1900.

5 Character housing

While 'character housing' has a somewhat lower profile than heritage-listed places, character houses are far more common.⁶⁰ It is important to understand the evolution of character housing within Brisbane, as this provides an indication of how the current controls have been derived.

The first introduction to character housing occurred in October 1995 when three defined areas were mapped. These were essentially the older suburbs it was envisaged that had developed in pre-1940 Brisbane.⁶¹

Interestingly enough, these controls were all encompassing. That is, all development applications were technically within the ambit of this section. Once an application was made, those residences that were regarded as pre-1940 were assessed as such. Policy at this stage was that character houses must be within a minimum group of five.

The next jump came with the introduction of Brisbane City Plan 2000. Under City Plan, character housing has taken both an expanded yet narrowly applicable role. The trigger planning mechanism and thus key for the retention for character housing is the Demolition Code.

To understand the ambit of this code and character housing, five points need to be considered. The first is that a character house must be within a Demolition Control Precinct. Its definition, often resulting in confusion, is explained in the Strategic Plan section of City Plan:

Demolition Control Precincts are those locations in older suburbs that contain pre-1946 housing with distinctive 'timber and tin' architecture.

A precinct contains either:

- a minimum group of three houses, and at least two-thirds of the precinct contains pre-1946 houses⁶²

OR

- A building built prior to 1900.

DCPs also contain non-residential buildings . . .⁶³

Secondly, the operation of character housing was extended to what has been softly termed pre-1946.⁶⁴ This date is somewhat of an anomaly. The actual reference is that the residence must not be substantially constructed prior to 31 December 1946. If it is constructed after this date then it is not classified as a character house.⁶⁵

Thirdly, the Demolition Code under "1. Application" provides the extent to which the code applies. Generally the code does not come into operation where minor demolition work (as defined in Chapter 3) extends to commercial character buildings, registered boarding houses in defined circumstances and again where demolition is assessable against the code under a local plan.

It is also important to note "2. Using the Code" reference is made to which level of assessment is applicable.⁶⁶ In general, it has a City Plan unique level of

53 At last count there were fewer than 1000 properties listed on the Register of Commercial Character Buildings.

54 It should be noted that the code clearly states the code does not apply where the building is "substantially demolished or destroyed" unless the new building is rebuilt with the same architectural detail, character, floor area and setbacks. City Plan Vol.1. Chapter 5 p59.

55 The qualification for entry is provided in the Commercial Character Planning Scheme Policy in City Plan, Vol.2, Appendix 2.p29.

56 This would appear to be a policy decision implemented by council and it is presumably based around the rationale that commercial character buildings essentially receive the same development advantages (for example, self-assessment) as buildings located within the multi-purpose centres.

57 As stated in the Commercial Character Building Code, reference must be to the level of assessment table in Chapter 3 and Local Plans in Chapter 4.

58 Reference should be made to the Residential Design Code – Character

Code and in particular the 'Performance and Acceptable Solutions' part of the code, as there is building work excluded from the code.

59 For further discussion on the buildings erected prior to 1900, refer to the discussion on the Demolition Code within this paper.

60 It is estimated that within Brisbane there are 50,000-55,000 character houses.

61 These included Wynnum, Sandgate and an area that roughly encircled the wider central Brisbane area.

62 Note the important reduction from a

minimum of five character houses within a group down to three.

63 Brisbane City Plan 2000. 4.2.2.4 'Maintaining Character' Vol.1. Chapter 2, p17-18.

64 There were a number of practical reasons for changing for this date. As styles did not substantially change during the war period, it was felt many of these dwellings contributed to the streetscape. In addition, as the first complete existent set of aerial photos of Brisbane, the 1946 aerial photos provided a definitive and reliable source

assessment termed Notifiable Code. This provides for public notification (outlined under “6. Public Notification” of the code) which facilitates public comment on the development but allows no submitter appeal rights, as would be the case for impact assessment.

The fourth point is that the “Performance Criteria and Acceptable Solutions” provide what a residential building “must not have”, in order for it to exclude itself from the character protection controls. Briefly, these are that it has been substantially altered and does not have the appearance of being constructed in or prior to 1946, that an engineering report states that the building is structurally unsound and is not reasonably capable of being made structurally sound, and that the building does not contribute to the streetscape.

The foremost point with regard to character housing is that it has at its centre contribution to the streetscape. The Demolition Code and the outline within the Strategic Plan in Chapter 2 of City Plan both refer to what makes the unique character of the older suburbs of Brisbane as deriving “mainly from the topography, urban layout and ‘timber and tin’.”⁶⁷ The above point has often been the matter of controversy where arguments have been made that the character is limited to the traditional Queensland “timber and tin” home, implying exclusion of other styles such as brick and stucco.

However, two recent cases provide further illumination with regard to this argument. The first of these is *Berlese v Brisbane City Council*.⁶⁸ This case concerned an appeal against a refusal for demolition of a pre-1946 dwelling house at Annerley. Council argued that the subject house positively contributed to the traditional built character of the street. The appellants argued the house was not a “remarkable building worthy of retention”.⁶⁹

While the appeal was dismissed, his Honour, Quirk DCJ, remarked that the word “remarkable” did not actually appear within the Demolition Code and importantly held that:

“Nor is it, in my view, essential that a particular building should exhibit each and every one of the features identified in the Code’s explanation of ‘traditional building character’.”⁷⁰

In the recent case of (2004) *Razia Developments Pty Ltd*, which was another appeal against a refusal by the council to approve a development for building work, being the demolition of a pre-1946 house; an explanation of the term of “Traditional Building Character”, which appears in the code, was under-

taken and further expanded.⁷¹ In this instance the appellants argued that the house, while having “important features which distinguish it from the ‘austere’ post-1946 houses” and which did “possess many of the features of the inter-war house” did not have the appearance of a dwelling constructed prior to 1946.⁷²

The respondents (Council) argued that the house represented “a transitional style of Queensland house with its roots in the style of the inter-war period but features which anticipate post-war housing”.⁷³ Importantly, it was not disputed that the “street possessed traditional building character”.⁷⁴

In this instance, it was held by his Honour, Skoien J, that the definition of traditional building character within section 4 of the Demolition Code “. . . may be seen as a useful guide, it is only an explanation. It is not, and does not purport to be, a definition.”⁷⁵ His Honour further elaborated:

“I do not read the Code as suggesting that ‘traditional building character’ denotes some type of prototype from which only minor deviations of style are permitted. To accept that would be to accept that architects and builders of the period were devoid of flair, artistry, experimentation and individuality.”⁷⁶

Essentially these cases widen the ambit of the Demolition Code in that a character house need not satisfy all the features of traditional building character to qualify as a character house and that the type of house may not be limited to the accepted style of “timber and tin”. One further minor yet important point is that within both these cases the court refers to the dwellings more correctly as pre-1947.

The fifth, final and perhaps currently one of the most important and extensive recent changes to the ambit of the Demolition Code is the extension of the Code to cover pre-1900 buildings.⁷⁷ Essentially the only way a pre-1900 building will be able to be demolished, aside from it not being in a Demolition Control Precinct, is if an engineering report is “submitted demonstrating that the building is structurally unsound and not reasonably capable of being made structurally sound”.⁷⁸ Any argument with regard to streetscape or that the building is substantially altered where a pre-1900 building is concerned (it is presumed that its qualification is a building substantially constructed prior to 31 December 1899) is superfluous.⁷⁹

To the practitioner facing refusal on these grounds, the only options are structural unsoundness or demonstrating the building was not erected

as to whether a house was constructed prior to this date in conjunction with the BCC record keeping moving from the old Building Register entries system to building cards attached to individual properties.

65 Under the old pre-1940 scheme, the cut-off date was that a property must not be substantially constructed prior to January 1, 1940.

66 City Plan. Chapter 3 & Chapter 5 under the Demolition Code. p69. It should be noted no reference to ‘Notifiable Code’ is made within IPA. However, as the City

Plan underwent a state interest check and approval prior to its introduction, **74** *Ibid.*, p3.
75 *Ibid.*, p7.
76 *Ibid.*, p7-8.
77 Under P7 of the ‘Performance Criteria and Acceptable Solutions’ Demolition Code. City Plan Vol.1. Chapter 5, p71. Affective from July 1, 2005.

67 City Plan Vol.1. Chapter 2, p17.

68 *Berlese v Brisbane City Council* [2002] QPEC 073.

69 *Berlese v BCC* at 5.

70 *Ibid.*

71 *Razia Developments Pty Ltd* [2004] QPEC 059.

72 *Ibid.*, p8.

73 *Ibid.*

74 *Ibid.*, p3.

75 *Ibid.*, p7.

76 *Ibid.*, p7-8.

77 Under P7 of the ‘Performance Criteria and Acceptable Solutions’ Demolition Code. City Plan Vol.1. Chapter 5, p71. Affective from July 1, 2005.

78 *Ibid.* But for a discussion on cases relevant to structural soundness and reasonably capable of being made structurally sound, refer to *Gould v BCC* [2000] QPE 048 and *Armstrong v BCC* [2003] QPEC 007.

79 This is in contrast with the pre-1946 character houses performance criteria and acceptable solutions, which as explained above, uses the end of the demarcation year. that is, December 31, 1946.

before 1900.⁸⁰ In each instance specialist advice is required.⁸¹ If it is the latter, then the applicant may well be faced with streetscape issues. It is likely that post-1900 elements of a building, where they can be identified, may still not be able to be demolished or altered if the additions are post-1900 but completed prior to 1947, as they may contribute to the streetscape and therefore are required to be retained.

With the December 31, 1946, cut-off date established for pre-1947 character buildings within a DCP, in most instances it is relatively easy, primarily due to existent and accurate BCC records at this time, to establish the application date and thus the likely construction date of a building.

In practice, could an argument be successfully mounted by parties that, as the intention of the code was to protect pre-1900 buildings, a structure possibly constructed after 1900 that has the appearance of a pre-1900 building, in the absence of a definitive date, should fall within the ambit of the code and thus receive the same protection? That, however, may be a decision for the courts to consider.

Prior to the introduction of the above pre-1900 performance criteria in the Demolition Code, the only power to retain pre-1900 buildings was that within the residential codes mentioned above. But this required that an application to demolish and to build was made within the same application. The alternative option was to lodge a demolition application only, thus circumventing triggering the residential design codes and the dreaded pre-1900 retention clause.⁸²

What then is the best approach regarding heritage, character listings and regulation? Firstly, a phone call to BCC Heritage Unit to discuss intended plans. Then consider all your options.✱

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80 Unlike the pre-1946 character housing date, the sources existent to prove that a building was erected after 1900, depending of course upon the building, are not so readily available. In addition, there is no clear definitive style finish and start based upon this date. Many of the styles considerably overlap. In short, be prepared for in-depth research on your subject property.

81 This of course does not mean injurious affection is not an option. Refer Chapter 5 IPA or see Robertson 'Compensation lost Compensation Found: Injurious

Affection and the *Integrated Planning Act* Labyrinth'. Proctor. April 2002 pp20-21.

82 Reference should also be made to local plans in Chapter 4 of City Plan. Some of these local plans have the requirement to have a "committed program" for building work on the site. For an example refer to City Plan, Vol.1. Chapter 4 .p409 'Generally inappropriate'.