

Australian Insurance Law Association

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“Liability Update”

by

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1. The past year has produced some significant pronouncements from the High Court in relation to the issues of duty and causation, including a re-statement of the principle that non-delegable duty will be found to exist only in exceptional circumstances. There have also been a number of important judgments handed down by Courts of Appeal in various states. Careful analysis of all of these decisions would be unmanageable and I have therefore concentrated on the most significant decisions of the High Court and State Courts of Appeal, indicating trends. However I have included at the end of the paper, a number of other decisions with a brief description of the issue they cover and the decision. I hope this will be of assistance to those who wish to read further in relation to those decisions.
2. The major trends I have identified are the following :
3. The reluctance of the High court to extend the categories of **non delegable duty** beyond the existing exceptional circumstances;
4. The importance of clearly defining the **scope** of the duty of care when considering whether the duty has been breached;
5. The importance of considering breach of duty prospectively and not retrospectively when determining if there has been a breach of the duty of care , or **avoiding hindsight bias**;
6. Applying the usual test of **causation** in determining damages for loss of chance of a better medical outcome, based on balance of probabilities , rather than the test devised by the court in Rufo v Hosking

Leighton Contractors Pty Ltd - v- Fox; Calliden Insurance Limited - v - Fox [2009] **HCA 35**

7. This is an important decision of the High Court handed down only last month dealing with the liability of a principal for the conduct of its sub-contractor, where, despite the apparent willingness of the New South Wales Court of Appeal, the High Court has

restated its reluctance to extend the categories of non-delegable duty of care, consistent with its decision in Leichardt Municipal Council v Montgomery.¹

8. On 7 March 2003, Brian Allan Fox (“**Fox**”) suffered a severe injury in the course of working at the construction site of the Hilton Hotel in Sydney. Leighton Contractors Pty Ltd (“**Leighton**”), was the principal contractor for the project. It subcontracted to Downview Pty Ltd (“**Downview**”) to carry out the concreting, including the provision of reinforcing and formwork, for certain works. Downview in turn sub-contracted the Concrete Pumping to Quentin Still and Jason Cook. Fox and Warren Stewart (via Warren Stewart Pty Ltd) were engaged by Still and Cook in connection with the concrete pumping for a pour that was scheduled to take place on that day.
9. After the concrete pour was completed, Still, Stewart and Fox commenced to clean the concrete delivery pipes. This involved blowing an object through the pipes with compressed air. In the negligent manner in which this was done, the end pipe swung around and struck Fox in the head.
10. Fox bought proceedings in the New South Wales District Court in negligence against Leighton, Warren Stewart Pty Ltd, which employed Stewart, and Downview. At first instance, the trial judge found the accident was caused by the negligent conduct of Still and Warren Stewart Pty Ltd but dismissed the claim against Leighton and Downview holding that there was no relevant breach of duty by either of them. Warren Stewart Pty Ltd did not appeal against the judgment, but became de-registered.
11. The trial judge found that Still was in charge of the concrete pumping operation and that Stewart followed his directions. No person associated with Leighton or Downview gave any directions in connection with the operation. She found there were two causes of the accident, use of a Dacron filled bag as a purpose-built sponge to clean the line and the failure to tie the end of the pipe to a waste bin. She concluded Stewart’s conduct in failing to secure the end of the pipe was negligent and the omission was contrary to the pumping code.
12. Fox appealed to the Court of Appeal against the dismissal of his claims against Leighton and Downview. The Court of Appeal allowed the appeal, holding that Leighton and Downview were each subject to a common law duty of care for the benefit of Fox and each was in breach of that duty. It also upheld a cross-appeal by Leighton against the dismissal of the cross-claim and ordered Downview to pay 80% of the judgment owed by Leighton to Fox.
13. The Court of Appeal found that Leighton was subject to a general law duty of care to subcontractors and others coming on to a construction site within its control, the scope of which included “*training in matters of safety to subcontractors*”. Discharge of the duty required that they take reasonable steps to ensure that persons coming onto the site to work had undergone relevant induction training.
14. The Court of Appeal inferred, from the statutory scheme, that it was probable that OHS induction training for persons engaged in concrete pumping would have included training in relation to line cleaning and the matters addressed in the relevant clauses of the pumping code. It found that Leighton was negligent in that it failed to take steps to ensure that both Stewart and Fox undertook the relevant induction training. Although the evidential basis for finding the causation was sparse, they concluded that given the

¹ Leichardt Municipal Council v Montgomery (2007) 230 CLR 22

evidence that Stewart had taken the precaution of directing Fox to stand clear before attempting to clear the blockage in the line, the inference should be drawn that had he received the training in the need to tie the end of the pipe to the waste bin, he would have done so. Failure to give the instruction was the cause of the accident for which Leighton was liable.

15. In relation to the case against Downview, the Court of Appeal found that it failed to take any steps to ensure that persons coming onto the site undertook induction training. As a result, Stewart and Fox did not undergo induction training. Apart from any contractual obligation to Leighton, Downview had a general law obligation to those participating in carrying out its contracting work to conduct operations safely and to do that it was obliged to contract with competent, properly trained operators. By leaving it to its own subcontractors to engage other labour and equipment, it effectively abandoned its responsibilities in that respect.
16. Leighton and Downview appealed to the High Court, and each contended the imposition of a common law duty of care owed to Fox, an independent contractor, involved an unwarranted extension of the liability of principals for the negligent acts of other independent contractors engaged by them.
17. After the institution of the appeals, Downview was de-registered and its insurer, Calliden Insurance Limited was substituted.
18. The High Court, constituted by French CJ, Gummow, Hayne, Heydon and Bell JJ unanimously upheld the appeals by Leighton and Downview on the basis that they did not owe a duty to ensure that the subcontractors were trained in relation to the work that they were performing.
19. The High Court concluded that Leighton's only obligation was to ensure that a person engaged to carry out concrete pumping had completed OHS induction training in general health and safety topics and not specific training in relation to pumping, and this obligation arose because the provisions of the regulation were reflected in its contract with Downview.
20. Notwithstanding the High Court concluded that both Leighton and Downview, were subject to statutory duties as employers, and as persons in control of premises used as a workplace, which duties included ensuring that all systems of work and the working environment of employees was safe and without risks to health, and further that those duties extended to ensuring that people other than employees were not exposed to risks to their health or safety arising from the conduct of the employees undertaking while such persons were at the site, breach of those obligations only gave rise to criminal penalties. The court observed that the case against Leighton and Downview was not pleaded as involving breach of statutory duty, no doubt, because the terms of the OHS Act prevented the duties imposed by it on employers and others giving rise to correlative private rights. (The NSW legislation specifically provided breach of the Act did not give rise to a private right to damages. The obiter comments in this regard are not generally applicable when considering legislation without that specific provision.)
21. The Court of Appeal, in finding Leighton and Downview liable had said:

“The older case law concerning accidents on construction sites does not indicate that a general law obligation to provide training in matters of safety to

subcontractors working on a site was envisaged as falling within the requirements of the duty of care of a principal contractor. It is also clear that construction sites were relatively dangerous workplaces in the past. The obligation to ensure a reasonable level of safety is, however now well recognised. The need for induction training is now a recognised part of major construction works. So much was recognised by Leighton in its contract with Downview; clause 32, whilst imposing obligations on Downview, acknowledged continuing obligations on the part of Leighton.

Those obligations should properly be seen as part Leighton's general law duty of care to subcontractors and others coming onto a construction site within its control. Although senior counsel for Leighton suggested that its obligations of training and supervision were delegated to Downview, the contractual provisions did not support that conclusion, nor did the regulation provide support for Leighton to delegate responsibility in that manner".

22. The High Court said that whilst it may be accepted that Leighton, as the occupier of the site, owed a duty to persons coming onto it to use reasonable care to avoid physical injury to them, this said nothing about whether Leighton owed a duty to Fox to take reasonable care to prevent him suffering injury on a site as a result of the negligent conduct of Stewart. The relationship between principal and independent contractor is not one which, of itself, gives rise to the common law duty of care, much less to the special duty resting on employers to ensure that care is taken.
23. The High Court noted the Court of Appeal in reaching the conclusion that the older case law had been supplanted and that the common law now recognised the duty of care by a principal contractor to subcontractors and others coming on to a construction site to provide training in matters of safety to subcontractors working on the site, took into account the following factors:
- (i) Leighton had the legal authority to control who was admitted to the site;
 - (ii) A significant number of tradespeople and other workers were on the site at any one time;
 - (iii) Construction sites are relatively dangerous workplaces;
 - (iv) Induction training was now a recognised part of major construction work.

The Court of Appeal also considered the obligation placed on Leighton under the regulation, whilst not founding an action for a breach of statutory duty, was important in its conclusion that a common law duty existed.

24. However, the High Court concluded that if Leighton owed a duty to Fox and Stewart to provide induction training to them in the safe method of line cleaning, it owed a duty to provide training in the safe method of carrying out every trade and conducting every specialised activity carried out on the site to every worker on the site. There was no reason in principle to impose a duty having this scope on a principal contractor. The latter was unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. And the duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent contractors. The High

Court therefore found that the conclusion that Leighton was negligent by reason of an assumed failure to provide OHS induction training to Fox and Stewart could not be sustained.

25. In relation to the case against Downview, the High Court disagreed with the Court of Appeal and said that provided the contractor was competent and, provided the activity of concrete pumping was placed in the contractor's hands, Downview was not subject to an on-going general law obligation with respect to the safety of the work methods employed by the contractor or those with whom the contractor was subcontracting.
26. The court also found that, the trial judge's finding that line cleaning was a self-contained operation that did not require co-ordination with other activities on the site, was not disturbed and as a result the principle in *Stevens -v- Brodribb Sawmilling Co Pty Ltd* (1986) 160CLR 16, did not impose any liability on Downview in respect of the task of line cleaning.
27. In the course of the judgment, the High Court confirmed what had been observed by five Justices of that Court in *Sweeney -v- Boylan Nominees Pty Ltd* (2006) 226CLR 161 that "*whatever the logical and doctrinal imperfections and difficulties in the origins of the law relating to vicarious liability, the concept of distinguishing between independent contractors and employees is one too deeply rooted to be pulled out.*"
28. The case is significant because it reinforces the High Court's reluctance to extend the categories of non-delegable duty of care. This theme was taken up by the New South Wales Court of Appeal in the following case.

Transfield Services (Australia) -v- Hall; Hall -v- QBE Insurance (Australia) [2008] NSWCA 294

29. Hall was employed by the Royal Australian Navy as a member of the Navy Reserve. He worked at HMAS Stirling in Western Australia. At the facility were a course of low ropes and a course of high ropes, on each of which a participant could carry out various physical activities. It was known as the Endeavour Ropes Course. It was installed in 1993 by Rope Tech Australia Pty Ltd ("**Rope Tech**") in conjunction with another company. The trial judge found that Rope Tech was a predecessor of Adventure Training Systems Pty Ltd ("**ATS**").
30. ATS had previously, in 1999, inspected the ropes course and recommended that the high ropes course and tower be taken out of service as it was deemed to be below the safety standard. In relation to that course. the report stated:

"The eye bolts and fittings, including wire rope, had been checked. Some surface corrosion was seen on some fittings, all appeared to be structurally sound other than what has been noted in this report."

It seems likely ATS was engaged by Transfield to carry out the inspection in 1999, although it was not made clear by the evidence.

31. In August 2000, the Commonwealth entered into a contract with Transfield for maintenance of plant and equipment including Stirling base. The contract provided that Transfield:

“employ” and ensure that its subcontractors employ, in connection with the contractors activities, only persons who are careful, skilled and experienced in all respect of trades and callings”.

32. As a result of ATS’s original report, the high ropes course was closed and in 2001 Transfield again engaged ATS to inspect the course. ATS reported as follows:

“An inspection was carried out on the elements and found to be in safe working order. On each elements, all cables, eye bolts (nuts), strand-vices, wire rope, grips and stays and belay pulleys were checked and found to be okay. Belay wire rope lines and belay pulleys are 20 months old at the time of this report.”

33. Once the appropriate naval officer received the report, the course was re-opened, relying on the report. In January 2002 Hall was intending to use the high ropes course but as he placed his weight on his abseiling rope, the safety strop from which it was suspended broke. It broke because the wire was corroded. This had not been detected by ATS because the corroded wire was under a shrink-wrap which had not been removed as the Court found it should have been. It therefore found ATS liable. By the time of the appeal ATS had gone into liquidation and its insurer, QBE, was joined.

34. The trial judge recognised that there were some categories of relationship in which one person had been held to owe the other a non-delegable duty. However, the facts of the case did not fall within those recognised categories. However, she also recognised that a non-delegable duty of care had been held to arise in some circumstances where the relationship between the plaintiff and defendant evidenced elements of *“control”* by the defendant and *“special dependence or vulnerability”* on the part of the plaintiff. She held those characteristics were not manifested in the case.

35. However, she then held that a third category of case where non-delegable duty arose was *“where the activity being carried out by the defendant’s independent contractor was sufficiently dangerous or alternatively a substance associated with the activity being carried out by the independent contractor was sufficiently dangerous”*. She found that Transfield was under a non-delegable duty of this type for the following reasons:

- (i) Transfield’s contractual obligation under its contract to engage only careful, skilled and experienced subcontractors;
- (ii) The activities to be carried out by the subcontractors of Transfield were dangerous, because of the dangerousness of the activities of the high ropes course and the vulnerability of people using the course to deficiencies in its physical integrity;
- (iii) The contractual obligation of Transfield, contained in its contract with the Commonwealth to ensure that the work of its subcontractors was carried out in a proper and workmanlike manner.

36. The Court of Appeal analysed the decisions where a non-delegable duty had been found to exist and there is a careful thorough analysis which I commend to your reading. Having done so, the Court then discussed the term *“collateral negligence”* used to refer to negligence of a contractor and the way in which the contractor chooses

- to perform the work, and that is not inherent in the task that he or she has been asked to perform.
37. The Court said that in accordance with established principles, the employer was liable for anything that was necessarily involved in the performance of the task that had been given to the contractor, but not for collateral negligence of the contractor. For example, the defendant was not liable if an employee from an independent contractor, engaged to install windows in the building, accidentally left a tool in a position from which it fell on a passer-by: Padbury –v- Holliday & Greenwood Limited (1912) 28TLR 494. And further, it has been held that if the defendant engages an independent contractor to deliver beer to a hotel, and an employee of the contractor chooses to do so by delivering that through a cellar flap in the footpath that he negligently leaves open, causing a passer-by to fall in, the defendant is not liable if there was available alternative for the employee to deliver the beer by means that did not create that risk: Wilson –v- Hodgson’s Kingston Brewery Co. (1915) 85LJKB 270.
 38. The Court then noted that in Burnie Port Authority –v- General Jones Pty Ltd (1994) 179 CLR 520, the High Court had held that in some circumstances the defendant could be liable for collateral negligence of an independent contractor, namely where the substance or activity entrusted to an independent contractor or other agent may be relevantly dangerous notwithstanding that foreseeable injury or danger will arise only in the event of collateral negligence. Such that where a principal engages an independent contractor to separately move two chemicals, which will cause a major explosion if they come into contact with one another, into separate storage areas, there may be no real risk of injury or damage at all if the independent contractor does what he or she is engaged to do. The activity is, however, fraught with danger unless special precautions are taken to ensure that the independent contractor does not, through “collateral” negligence, transport the two chemicals together in a way which causes contact between them.
 39. The Court said however they would not regard that statement as providing any justification for holding an employer liable for collateral negligence of an independent contractor in any circumstances other than where a dangerous activity carried out within certain premises by or at the instruction of a person who is in control of those premises, causes reasonably foreseeable damage to a person or property outside the premises.
 40. The Court said that the decision in Burnie Port Authority had not detracted from the principle decided in Stevens –v- Brodribb, that there was no general doctrine in Australian law that a person had a non-delegable duty to ensure that reasonable care was taken by an independent contractor who was employed to engage in an extra-hazardous activity.
 41. The Court therefore concluded that the trial judge’s finding that Transfield owed a non-delegable duty to the respondent was erroneous and should be set aside.
 42. By notice of contention, Hall sought to support the trial judge’s verdict on the basis that Transfield was vicariously liable for the negligence of ATS. The Court rejected that submission. They found that the principle articulated by Jordan CJ, in Torett House – v- Berkman and referred to in the High Court in Stoneman –v- Lyons that someone who engages an independent contractor can be liable because the act or omission which caused the plaintiff’s injuries were necessarily involved in the performance of the contract, was not applicable because that principle was concerned with a situation

where a person directs an independent contractor to perform some act, and the doing of the very act that is directed to be performed, causes damage. Transfield had not directed ATS as to how to perform the work, that resulted in ATS failing to remove the shrink-wrap and thus failing to detect the corroded wire beneath the shrink-wrap.

43. There is also an interesting discussion concerning the application of the QBE policy and the exclusions in it, which is beyond scope of this paper.
44. There was a series of decisions from the New South Wales Court of Appeal relating to the duty of publicans and clubs and the service of alcohol. A number of these decisions have been subject of special leave application and some are subject of appeals which have been heard and reserved.

Rooty Hill RSL Club Ltd v Karimi [2009] NSWCA 2

45. Tarique Karimi (“**Karimi**”), suffered serious injury as result from assault, which was committed on him at the Rooty Hill RSL (“**the Club**”) by an intoxicated patron named Michael Smith (“**Smith**”). The assault occurred around 11.30pm in April 2003. Karimi had been the innocent victim of an earlier unprovoked by Smith inside the club that evening (“**the initial incident**”). As a consequence of the initial incident, both men were evicted from The Club by security guards employed by Allied Security Group Limited (“**Allied**”). The departure of each was managed by Allied staff such that Karimi and his companions left by the rear, western entrance and Smith and his girlfriend left by the front, eastern entrance. Smith and his girlfriend told the security guards they intended going home. The security guards saw them drive out of the front car park. This information was conveyed to the security staff at the western entrance who then invited Karimi and his companions to leave. Contrary to the representation made to the security staff, Smith’s girlfriend then drove him into the western car park. As Karimi walked through the car park, Smith ran up to him and “king-hit” him with sufficient force to knock him backwards to the ground. Karimi suffered significant brain damage as a result of the assault.
46. Karimi bought proceedings, by his tutor, in the Supreme Court in negligence against The Club and Allied and in trespass against Smith. The negligence alleged against The Club and Allied was particularised as a failure to devise and maintain a system by which “offenders” such as Smith had completely left the premises before victims such as Karimi were permitted to leave. It was also alleged against The Club that it failed to require Allied to devise and maintain such a system and to satisfy itself that Allied had proper procedures in place for dealing with an incident such as the assault that occurred in the car park. It was further alleged against Allied that it failed to escort Karimi to his vehicle and to advise to him that he should not return to it unaccompanied.
47. At first instance, Judgment was entered against each of the defendants for damages to be assessed. The Club also succeeded on its cross-claim against Allied for contribution to the extent of one-half of the damages payable by it to Karimi.
48. The trial judge found that Allied security guards and the Club’s managers who attended the incident inside The Club ought to have known that Smith was potentially dangerous. He was critical of the Club’s policy which required that all parties to a dispute be evicted without any assessment of the identity of the aggressor.

49. The trial judge found the Club and Allied liable on the basis that it was foreseeable that Smith would seek to re-enter the Club premises through the western car park. Reasonable care for the protection of Karimi required that the vehicle that Smith was known to be travelling in be restrained from re-entering the premises. If restraint failed, it was evident that Karimi should be provided with protection. Further that the departure of both evictees should be significantly staggered by time delayed. A security guard should have escorted Karimi to his vehicle.
50. The Court of Appeal upheld the appeal by the Club and Allied. Bell JA, with whom Allsop P and Basten JA agreed, noted that the law recognises that the occupiers of licensed premises may be liable for the tortious or criminal conduct of patrons. The basis of liability lies in the control exercise by the occupier over the patrons and the occupier's knowledge or ability to know about, the intoxicated condition of patrons. The element of control is subject to statutory obligations not to permit intoxication or violent or quarrelsome conduct on licensed premises and to remove those who engage in such conduct. At the relevant time, these obligations were imposed on the Club under the provisions of the *Registered Clubs Act 1976* (NSW).
51. It was not in issue at the trial, that the Club was subject to a duty to exercise reasonable care arising out of the intoxicated or dangerous conditions of its patrons, which duty extended to the protection of a patron who was on or departing from the premises. Allied also accepted it owed a duty by reason of its provision of security services at the Club to exercise reasonable care to avoid one patron injuring another in circumstances where it knew or had constructive knowledge that the patron was potential source of danger.
52. The Club argued that any duty it owed was not a non-delegable duty and that it had delegated the responsibility for security to Allied. The trial judge found that The Club had not established delegation and the Court of Appeal agreed with that conclusion. The Club had not called any evidence in relation to delegation and merely relied upon some invoices of payments to Allied. (There is a clear message that if a party wishes to rely upon an issue such as delegation, then it must produce all the necessary evidence to establish that delegation.)
53. The Court noted that when considering the inquiry as to breach of duty, involving a judgment made after the event, the Court must seek to identify what the response would be by a person looking forward at the prospect of a risk of injury.
54. The Court again emphasised the danger of reasoning with hindsight in assessing a breach. The Court of Appeal in Western Australia has sounded a similar warning. See *Shire of Gingin v Coombe* below. Analysis of a number of transcripts of appeal hearings in relation to this and other decisions demonstrates that it is also a matter emphasised by judges of the High Court , namely to avoid hindsight bias and to consider breach of duty prospectively.
55. The Court said the conclusion that the Club and Allied were negligent in the failure to adopt the measures the trial judge identified could not be sustained. It was only by reasoning backwards from what was known to have happened that the conclusion was reached. Smith appeared to have calmed down and to be planning to go home with his girlfriend. Karimi was not asked to leave until security staff confirmed Smith had been driven out of the Club's premises by his girlfriend. Karimi was one of a group of men when he left the western foyer of the club (although he was alone at the time of the assault). The Initial Incident, although apparently involving an unprovoked assault

upon Karimi, was not of a character to call for greater measures than those which the Club and Allied took in order to reasonably protect Karimi from further injury at the hands of Smith.

56. The Court also was not prepared to accept that it was probable the assault would not have occurred had the measures that His Honour, the trial judge, proposed been employed.
57. The High Court refused special leave on the basis the decision turned on its facts.

Portelli -v- Tabriska Pty Ltd & Ors [2009] NSWCA 17

58. This case involves consideration of whether a publican and security firm owe a duty of care with regards to later altercations between patrons occurring off the premises where there has been a previous altercation on the premises.
59. Portelli was seriously injured by blows and kicks to the head in a fight which occurred in a public street in Jindabyne.
60. Earlier in the evening, Portelli and his companion had been involved in an altercation with two of the later assailants at a hotel. After the altercation, the assailants had been put off the premises using the front door of the hotel. A short time later, Portelli and his companion were let out the back door of the hotel which opened onto a laneway. The fight occurred in the street intersecting with the laneway as Portelli and his companion walked back to their accommodation.
61. The trial judge dismissed Portelli's claim against both Tabriska Pty Ltd ("**the hotel**") and Elite One National Security Service ("**Elite**").
62. Portelli pleaded that the hotel and licensee owed a non-delegable duty to take such steps as were necessary for the safety of patrons on or in the vicinity of the premises and that they were vicariously liable for the action or inaction of Elite in respect of safety and security on the premises.
63. The trial judge concluded that the duty of care owed by the hotel and licensee relevantly extended only to preventing injury to Portelli on the premises under their control. It did not encompass a duty of care where injury to Portelli was occasioned by the deliberate wrong doing of persons over whom they had no control in a public street.
64. Further, he found that even if there was an operative duty to exercise care for the appellant, there was no acceptable evidence or any facts that were known or ought to have been known to them requiring them to take steps to protect Portelli. There was therefore no breach by not taking additional steps to protect Portelli.
65. In relation to causation, he rejected the suggestion that the hotel or licensee could have called a cab, called the Police to take Portelli and his companion to their accommodation, could have sought to disburse the group, escorted Portelli and his friend clear of the premises or to the Police station, or kept Portelli and his friend on the premises. He was not satisfied any of these steps were practical, or reasonable, or would have been taken following consultation with Portelli and his friend, or would have avoided the injury.

66. He also concluded the hotel and licensee were not vicariously liable for any default by Elite and its employees.
67. The Court of Appeal upheld the trial judge's findings and in particular his finding that the evidence did not support the conclusion that either the hotel, licensee or Elite should have appreciated some danger to Portelli.
68. Although it made it unnecessary to embark on any consideration of duty of care of a publican or security firm, the Court thought it appropriate to say something about the question of duty.
69. Firstly, the Court had reservations about whether it could be said, as the trial judge did, that the duty cannot extend to any circumstances where the wrong-doing causing injury to the plaintiff occurred in a public street. The fact that the aggressor has been put out of the hotel may not exhaust the obligation of the licensee or occupier to take reasonable steps to respond to a foreseeable risk of injury to the remaining patron. Care was required however, to prevent recognition that the control able to be exercised by the licensee or occupier could be the foundation of a duty of care to a patron becoming transformed into a proposition that the licensee or occupier has a positive obligation to become the protector and guardian of the so-called "innocent" patron whenever danger outside the hotel can be reasonably apprehended.
70. The Court referred to the statement of Gleeson CJ (with whom Gaudron and Hayne JJ agreed) in Modbury Triangle that:
- "The first respondent suffered personal injury, the direct and immediate cause of which was the deliberate wrong-doing of the three men who attacked him. If the attack had occurred in a nearby street, or anywhere other than on land occupied by the appellant, there would have been no possible basis for attributing liability to the appellant. It is the appellant's occupation of the land on which the attack occurred that is the basis for the claim."*
71. The Court also referred to McHugh J in Graham Barclay Oysters Pty Ltd -v- Ryan 211 CLR 540 where he said:
- "Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless the person has created the risk."*
72. The Court then said the usual duty of care of an occupier to entrants must be recognised. Further, the conduct (whether it is occupier or otherwise) of a public house or other place of entertainment may, of itself, create foreseeable risks to the safety of attendees, which may include the possible violent or rowdy behaviour of some attendees. This may found a duty based on control (perhaps springing in part from occupation) to exercise reasonable care to avoid harm to attendees from such risks. Nevertheless, it may mislead to speak, invariably, in terms of a generalised duty of care of a publican to take reasonable care for the safety of persons on occupied premises. The question will always be whether, in the circumstances, the duty was owed to the plaintiff, in respect of the damage suffered by him or her, to exercise reasonable care in some relevant respect arising from the occupation of premises, control involved in any such occupation, any statutory responsibilities in relation to the license or in relation to the conduct of the establishment and any assumption of responsibility.

73. Here the Court was emphasising the importance of defining the scope of the duty of care.
74. The Court also disagreed with the trial judge's views in relation to causation and concluded that if there had been a duty to call the Police, it was difficult on the evidence to conclude other than that the Police would have come and no further fight would have occurred.

PAB Security Pty Ltd -v- Mahina [2009] NSWCA125

75. On a related issue, the New South Wales Court of Appeal was required to consider the duty of care owed by an employer to a Bouncer.
76. In this instance, Mahina was a bouncer providing security services at a nightclub. He was with two other security officers, one of whom was responsible for checking the I.D of potential patrons to verify their age, their level of sobriety and their standard of dress. At about 12.30am a scuffle developed between one of the other security officers, Mooney, and several young men whom he had endeavoured to turn away from entering the club. There were about six men in the group who had exhibited aggressive tendencies when standing in the queue waiting to enter the club. Mahina came to Mooney's assistance and punches were exchanged. He had buttons ripped from his shirt and sustained red marks on his face. He returned the punches and at least one of the men in the group sustained a bloody face. The scuffle broke up after about ten minutes and the men were told to leave. When they were a short distance away one threw a bottle which struck the third security officer, Tah.
77. Mahina was then spoken to by one of the barmen whereupon he left the entrance to the club and walked around to an adjoining street where his new motor vehicle was parked. He found it had been badly damaged. The front and rear windows had been smashed and so had the bonnet and roof. He then returned to the club where he and the other two security officers remained on duty until about 2.40am. At this time a male, dressed in a long black coat, with a black beanie pulled down to his eyebrows, approached Mahina stared at him and pulled out a handgun from inside his coat and started shooting at him. Six shots were fired and three struck Mahina. The shooter turned out to be the brother of a man who had been punched by Mahina and who had left the scene with a bloody face.
78. The trial judge found that it was foreseeable that a member of the group would come back and cause serious injury to Mahina. He considered that Mahina should have been rotated into the club away from the front door and out of sight. Another of the security officers from the club could have then come out the front. He found in failing to do so, the employer breached its duty of care. He also found that if it had been done, that Mahina would not likely have sustained the injuries he did.
79. The Court of Appeal again considered the statement by Gleeson CJ in Modbury Triangle Shopping Centre Pty Ltd -v- ANZIL 205 CLR 254 that:

"There are circumstances where the relationship between two parties may mean one has a duty to take reasonable care to protect the other from the criminal behaviour of third parties, bland and unpredictable as such behaviour may be. Such relationships may include those between employer and employee."

80. Whilst recognising the relationship between Mahina and his employer was not a normal “run of the mill” employer/employee relationship because he was a security guard or bouncer and was therefore at all times exposed to an element of risk in the ordinary carrying out of his work, the Court of Appeal was of the view that having regard to the terms of the threat which were made, namely:

“We’re going to come and get you. We’re going to kill you”,

it was foreseeable that notwithstanding the nature of Mahina’s employment as a bouncer, the employer’s refusal to rotate Mahina inside the club involved the risk of injury to him in the event that the perpetrators or someone on their behalf returned to carry out the threat. The Court found the magnitude of the risk was high (the threat was Mahina would be killed) and so to was the probability of its occurrence.

81. On the question of causation, the Court concluded there was no doubt that in the circumstances that prevailed, had Mahina been rotated as he requested, he would not have been shot when the gunman appeared outside the club. If it is to be suggested that he would have been shot in any event, notwithstanding he was rotated inside the club, there had to be a finding to that effect on the balance of probabilities and the proposition remained mere speculation and was not established as a matter of probability. The Court therefore dismissed the appeal and upheld the primary judge’s conclusion that the employer was liable.
82. The decision leaves one with the uneasy feeling that if Mahina had been rotated inside, the bouncers on the door would nonetheless have been at risk of being shot . Was rotating Mahina a reasonable course of action in those circumstances ?.

Adeels Palace Pty Ltd -v- Moubarak; Adeels Palace Pty Ltd v Bou Najam (2009) NSWCA

83. The duty of licensees was again considered by the New South Wales Court of Appeal in the context of a “reception/restaurant”.
84. In this instance Adeels Palace Pty Ltd (“Adeels Palace”) conducted a business described as “reception restaurant”. It held a new year’s function attended by members of the public on payment of an admission price. In the early hours of 1 January 2003 a dispute on the dance floor escalated, and came to involve a fight between Moubarak and a Mr Danny Abbas. Abbas left the premises and returned with a gun. He shot Moubarak and Bou Najam.
85. Moubarak and Bou Najam commenced proceedings against Adeels Palace claiming damages for negligence or breach of contract.
86. The trial judge held Adeels Palace liable in negligence. He held Adeels Palace owed Moubarak and Bou Najam a general and wide duty *to take care to avoid injuries caused by the unlawful actions of patrons (or invitees) on the premises during the course of the evening of 31 December 2002 and the early hours of 1 January 2003 and that the duty of care was breached because Adeels Palace’s security arrangements at the time of the function were far short of what reasonable care and skill required in all the circumstances. The inadequacy materially contributed to, and so caused, the injuries suffered by Moubarak and Bou Najam*”. He did not deal with the claim based on contract.

87. Adeels Palace had one security officer on duty that night. There were 300 to 400 persons present in the restaurant. The restaurant had 10 closed circuit televisions but they weren't being monitored at the time. Evidence was given by an expert that there should have been at least 6 and possibly 8 security officers on duty that night. Adeels Palace submitted there could not be a duty of care unless there was knowledge of risk from a particular patron or group of patrons and that there was no knowledge sufficient of that requirement at least until a fight between Abbas and Moubarak. Moubarak and Bou Najam submitted that more general knowledge of a risk of violence from a patron or patrons coupled with control over the violence occurring or leading to injury, could give rise to the duty of care and that there was knowledge sufficient for that requirement.
88. The Court of Appeal dismissed the appeal by Adeels Palace on the basis that it owed a duty of care which was breached and which resulted in the injury to Moubarak and Bou Najam. The court concluded the duty of care owed by Adeels Palace to patrons attending the new year's function extended to taking reasonable care to guard against injury from intoxicated, unruly or violent (including criminal) behaviour of other patrons. The court said the duty of care in the hotel and club cases can be owed in relation to violent behaviour, whether for intoxication of a patron or for other cause. Intoxication may be a common cause, and may be what brings occasion for intervention to protect other patrons, but is not essential. Liquor Acts strictures have extended and extend to indecent, violent or quarrelsome conduct.
89. Adeels Palace had the capacity to control behaviour within the premises, through its director who was the licensee but also through its ability as occupier to control who entered and remained in the premises. This ability was ordinarily exercised by the presence of security staff. There was foreseeable behaviour of the patron or patrons presented a danger to other patrons and the capacity to exercise control over that behaviour. The duty of care owed by Adeels Palace therefore extended to taking reasonable care to guard against injury to Moubarak and Bou Najam by the unlawful conduct of another patron or other patrons. There was a breach of that duty in particular in not having access control to prevent persons such as Abbas entering the club with the gun.
90. However, it should be noted that Adeels Palace was granted leave to appeal to the High Court, without being called upon and the appeal has now been heard. Both Moubarak and Bou Najam filed notices of contention submitting that occupiers of licensed premises and entrants are a special relationship, a category exempted from the general rule, as enunciated in *Modbury Triangle* that there is no duty owed in relation to the criminal activity of third parties. Adeels Palace on the other hand is advancing the proposition that there is no duty owed once the unruly patron leaves the premises.
91. The decision once delivered is likely to be an important one both in relation to duty and causation as each of these issues were discussed at length during the course of the appeal hearing.

Scott –v- C.A.L. No. 14 Pty Ltd (No. 2) [2009] Tass CT

92. The final case involving the duty of a publican relates to the duty owed to customers in relation to the service of alcohol. Evans and Tennant JJ, Crawford CJ dissenting, found circumstances justifying the departure from the general rule that the hotelier's

duty does not ordinarily require the taking of care to prevent harm caused by the customer's own intoxication.

93. Scott was a patron of the respondent's hotel and had spent the evening drinking. The licensee, Kirkpatrick, had agreed to store Scott's bike in a hotel storeroom, on the understanding that someone would telephone his wife and arrange for her to pick up her husband when he was ready to leave. Kirkpatrick put the keys to both the storeroom and motorbike in a box behind the bar. Some 3 hours later, having consumed 6 or 7 cans of pre-mixed Jack Daniels & Cola, Scott asked to have his motorcycle back. Kirkpatrick suggested that he ring Scott's wife but received an abusive response. He then returned the keys and facilitated the removal of the bike from the storeroom. On the way home Scott lost control of the bike, collided with a bridge and was killed. He had a blood alcohol level of .253% at the time of his death. Scott's wife and the Motor Accidents Insurance Board brought consolidated actions against the respondent and Kirkpatrick. At first instance both actions were dismissed on the basis the respondents owed no duty of care to prevent harm caused by Scott's own intoxication.
94. The finding was reversed on appeal. Evans J, having observed that the scope of the duty between a hotelier and a patron may be extended by the particular circumstances of a case found that by assisting Scott to put his bicycle in a locked storeroom and then retaining the keys to both the storeroom and the motorcycle, Kirkpatrick had taken on a role that went beyond the normal relationship of a hotelier serving alcohol and a patron. In the circumstances, the duty of care imposed was to take reasonable care to prevent Scott riding the motorcycle from the hotel whilst intoxicated to such extent that his capacity to ride safely was reduced.
95. Kirkpatrick, by failing to do what he reasonably could to avoid Scott riding the motorcycle home, had breached his duty of care. A reasonable response to the relevant risk would have been, firstly, to renew his offer to telephone Scott's wife, and secondly, if that offer was refused, to delay Scott's departure in order to telephone Scott's wife regardless of his wishes and request her to collect her husband.
96. Tennant J found that Kirkpatrick, once he had taken possession of Scott's motorbike, owed a duty not to return it to him such that he could drive it away whilst intoxicated. He found that Kirkpatrick had made a conscious decision, knowing Scott was inebriated, to hand over both the bike and keys even though there were clearly steps he could have taken to avoid such an outcome.
97. The hotel and Kirkpatrick both obtained leave to appeal to the High Court and the appeal was heard on 1 September 2009. The court reserved its decision. A reading of the transcript leaves one with the impression that the decision of the Tasmanian Supreme Court is likely to be overturned, if only on the question of causation. In my view, there is a reasonable prospect that the High Court will also find that the hotel and licensee did not owe a duty not to return the bike and to keep Scott at the hotel until his wife arrived to collect him.

Coles Supermarket Australia Pty Ltd -v- Tormey [2009] NSWCA 13

98. The New South Wales Court of Appeal has also considered the liability of a supermarket operator for injury to a customer caused by another customer's unruly behaviour with a trolley.

99. In February 2005 Mrs Tormey shopped at a supermarket operated by Coles in Gladesville. Her 11 year old daughter accompanied her. Saturday was the busiest day of the week for the supermarket and there were many customers in the store.
100. Whilst shopping in an aisle displaying cleaning materials, Ms Tormey crouched down to pick up an item which she wished to purchase. She was thereupon struck in the back by a shopping trolley and was significantly injured by the blow.
101. Two men in their late 20's or early 30's had been playing with the trolley. One had been pulling it from the front while the other held onto the bar at the back and lifted his feet so that they were off the ground. The man in front would let go his hold and the momentum would propel the trolley forwards with the man at the rear clinging onto it with his legs in the air. Whilst the trolley was being propelled in this way, it collided with Ms Tormey.
102. This was not an isolated incident. Ms Tormey had seen the two men behaving in the same way at previous times while she was shopping that afternoon.
103. She brought a claim in negligence against Coles for damages. The trial judge upheld her claim. He found that Coles had negligently failed to ask the two men to cease their behaviour and its omission to do so had cause Ms Tormey to sustain a significant disability in her lumbar spine.
104. Coles appealed the decision.
105. The court found that the critical finding made by the trial judge was that Coles, by its employees, must have known "of the unruly behaviour of the two men". It was this finding which was the foundation of the trial judge's conclusion that Coles was negligent.
106. The Court of Appeal referred to the decision in South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 2005 where it had said:

"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 a foreseeable risk of injury arising from those activities: Canterbury Municipal Council v Taylor [2002] NSWCA 24. Typically, the foreseeable risk of injury in such a case is the risk of physical injury directly caused by the main activities on the premises".

107. The court said it was not necessary to consider whether the duty arose from Coles' capacity to control the conduct of persons on its premises or from its status as occupier (or both) as both factors were present in the case.
108. The Court of Appeal found that whilst Coles' employees did witness the first incident, there was no evidence that any Coles' employee witnessed the second incident. The court therefore concluded that the evidence adduced on behalf of Ms Tormey did not establish an inference that Coles' employees must have known of the second incident. Whilst Coles must have known of the first incident, it was not proved that it knew of the second incident. Its knowledge of the relevant circumstances was insufficient to give rise to a duty on its part to take reasonable care to avoid a risk of injury arising from those activities. Alternatively, as Ms Tormey did not prove that Coles knew of the

second incident, she did not prove that they failed to respond adequately to the risk of harm constituted by those activities and, therefore, did not prove that Coles' breached any duty of care imposed on it.

Gett -v- Tabet [2009] NSWCA 76

109. This case is of considerable significance to the law of causation. In this decision the New South Wales Court of Appeal has reconsidered and over-ruled its own decision in Rufo -v- Hosking [2004] NSWCA 391 finding that loss of a chance was not sufficient to establish causation and that it was necessary for the court to find, on the balance of probabilities, the appellant's negligence caused her brain injury. It is a very significant decision for that reason.
110. The respondent was diagnosed with a brain tumour on 14 January 1991. She was then age 6. The diagnosis was made following a seizure, CT scan and EEG and was preceded by a history of chicken pox, as well as headaches, nausea and vomiting. She received treatment, including surgery to remove the tumour and suffered irreversible brain damage as a result of the seizure, the tumour and the treatment received. She brought proceedings against the appellant, a specialist paediatrician, alleging he had been negligent in his treatment of her. The primary allegation was the CT scan should have been done earlier, either on the 11th or 13th January and that if it had, she would have had a better medical outcome.
111. The trial judge, found the respondent breached his duty of care by failing to order a CT scan on 13 January 1991. He held that had a CT scan had been performed on that date, the respondent's brain tumour would have been detected. He concluded the respondent lost her chance of a better medical outcome because of the respondent's negligence on 13 January 1991. He also held that the appellant did not perform any negligent acts or omissions prior to 13 January 1991. In assessing damages he held that the respondent's decline on 14 January 1991 contributed 25% to her ultimate disabilities and that of the 25%, 40% was referable to her loss of a chance of a better medical outcome.
112. The appellant appealed and contended that the trial judge had erred in three ways:
- (a) by finding he was negligent in failing both to consider other possible diagnoses and to order a CT scan on 13 January 1991;
 - (b) by awarding damages on the basis of a loss of a chance of a better medical outcome rather than concluding that the found negligence was not causative of the respondent's loss;
 - (c) by assuming Rufo v Hosking to be correct and applicable in calculating the loss of a chance.
113. The respondent cross-appealed and submitted the trial judge had erred in three ways:
- (a) by finding that a provisional diagnosis of the 11th January 1991 illustrated reasonable care on the appellant's part at that time;
 - (b) by determining her claim on the basis of a loss of a chance rather than finding that, on the balance of probabilities, the appellant's negligence caused her brain damage;

- (c) by concluding that he she was not entitled to damages for the loss of pecuniary benefits that might have been expected to accrue on marriage.
114. The New South Wales Court of Appeal upheld the appeal. The court rejected the suggestion that the appellant was not negligent. However, it found that it was not legally bound by its own earlier decisions but should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if the court was of the view the decision was “*plainly wrong*” and, such an error having been identified, there were “*compelling reasons*” to depart from the earlier decisions. It was not sufficient for the court to merely conclude that the earlier approach was open, but no longer preferred. It must conclude that the earlier judgment was erroneous.
115. Applying those principles it stated that its earlier decision in *Rufo -v- Hosking*, which together with *Gavalas -v- Singh [2001] VSCA 23*, which had been put forward as Australian authority for awarding damages for loss of a chance of a better medical outcome, should not be followed. This is because the decisions were plainly wrong. In particular awarding damages for loss of a chance of a better medical outcome altered the principle of causation as the plaintiff did not need to prove on the balance of probabilities that the damage was caused by the breach of duty. There were no compelling reasons for adopting that change in principle and that a change to the law of torts with respect to proof of causation based on the creation of risk and fair recompense for loss was a matter of policy for the High Court. It was also inconsistent with conventional authority, now reflected in the Civil Liability Acts of the states and territories, as to the nature of harm required to justify a finding of negligence and the requirement that causation must be established on the balance of probabilities.
116. A related case is that of *Sydney South West Area Health Service -v- Stamoulis*, which is briefly referred to below.
117. Having found the appellant breached his duty of care, the trial judge did not conclude the negligence caused or contributed to the seizure and deterioration which occurred on 14 January. Rather, he found the respondent lost a chance of a better medical outcome had the brain tumour been detected on 13 January 1991, as it would have been if the CT scan had been performed that day.
118. Applying the correct test of causation on the balance of probabilities the Court of Appeal concluded that there was no sufficient evidence to establish that if the breach had not occurred, the plaintiff would not have suffered the seizure and subsequent brain damage.
119. The high Court has granted special leave to appeal the decision, and the appeal has been listed for hearing in November. The question remains whether the decision of the Court of Appeal has application beyond cases involving damages for loss of a better medical outcome to other categories of cases involving loss of chance, such as *Sellars v Adelaide Petroleum 179 CLR 332*. Hopefully the High Court will provide clarification through the appeal in this matter, which is to be heard next month together with another causation case of *Amaca Pty Ltd v Ellis and others*, where the court will consider whether the case of *Fairchild v Glenhaven Funeral services [2003] 1 AC 32* is good law in Australia.

QBE Insurance (Australia) Limited -v- Stewart [2009] NSWCA 66

120. This is an important decision in the New South Wales Court of Appeal in relation to the burden of proof with respect to limit on an insurance policy.
121. Kearns J, sitting in the Dust Diseases Tribunal of New South Wales, found against the appellant, QBE Insurance (Australia) Limited and another defendant, Wallaby Grip Limited, and entered a verdict of \$356,510 in favour of the plaintiff, the legal personal representative of the estate of the late Angus Clugston Stewart. QBE was sued on the basis that it was the workers' compensation insurer of Pilkington Brothers (Australia) Limited ("**Pilkington**"), the employer of Stewart from 1964 to 1967. In fact, the insurer at the relevant time was Eagle Star Insurance Ltd. QBE admitted it was liable to meet the responsibilities of that company.
122. QBE did not admit that the policy provided cover to Pilkington in excess of the statutory minimum level of cover from time to time which as at 1967 was \$40,000 inclusive of the plaintiff's entitlement to costs. Further, it did not admit that Pilkington was entitled to indemnity pursuant to the policy for greater than the statutory minimum level of cover from time to time.
123. A notice to produce was served on QBE requiring that it produce all contracts of insurance between Eagle Star Insurance and Pilkington for the period 1 January 1957 to 31 December 1974. It was also required to produce any document howsoever described setting out any contractual term limiting indemnity in the contract of insurance between Eagle Start Insurance and Pilkington during that period. QBE did not produce any documents in answer to the notice to produce.
124. Kearns J gave a ruling in advance of his ultimate judgment as to the extent of cover to be afforded by QBE. He held QBE's liability to indemnify Pilkington was unlimited, and in particular was not limited to \$40,000.
125. QBE appealed both in relation to the finding of liability and in relation to Kearns' determination that the policy was unlimited.
126. In a majority judgment Ipp JA and Gyles AJA rejected QBE's submission that Pilkington was not negligent but found that the policy was limited to \$40,000.
127. Ipp and Gyles found the amount of cover provided by a policy of insurance was an essential term of the contract between the insurer and insured. The onus was on the plaintiff to prove the amount of cover provided by the policy issued by QBE, that is whether it was for a specific amount or whether it was open ended.
128. Section 18(1) of the *Workers' Compensation Act 1926* (NSW) at the relevant time provided that every employer was required to obtain a policy for an amount of "*at least \$40,000*" in respect of its liability independently of the Act for any injury to its workers. It was common ground that the employer had complied with s.18(1) by obtaining such a policy from QBE.
129. The fact that QBE could not produce the policy did not transform the onus of proof that otherwise arose. The true question is not whether the cover was limited; it was rather what was the amount of the cover? The argument that, because the cover was limited to \$40,000, this constituted an "*exception*" to unlimited cover was fallacious. There was no proof of any agreement to provide unlimited cover. Thus, an inferred provision fixing cover at \$40,000 (because that was the minimum cover the statute required the

policy to provide) was not an exception to any obligation on the part of QBE that otherwise existed.

130. This is an important decision. The events in question took place 40 years or more before trial. QBE could not produce any policy documents. This would be a common occurrence in asbestos litigation particularly.
131. The court rejected the suggestion that QBE bore an evidentiary onus. Further, the suggestion that an adverse inference should be drawn under *Jones -v- Dunkell* arising out of the failure to adduce evidence of the limit on the policy was also rejected. No relevant witness had been identified and there was no evidence to be answered.
132. The court also rejected the suggestion that the burden of establishing a condition of, and exception to or a limitation upon liability lies upon the insurer. It was suggested that in circumstances where the policy has been admitted as being responsive, it is for the insurer to show why the policy should not respond or should only respond to a particular monetary limit. The court rejected that argument and found that the normal onus of proof lay upon the insured.
133. It should be noted that the decision was a split decision with Brereton J finding that QBE having admitted that the policy existed and was responsive bore the onus of establishing the limit on the policy. Further, the High Court granted special leave in early October. During the course of the leave application the Respondent was called upon first to address the court and Gummow J indicated the court expected to be referred to authority from other countries on the question of onus of proof of policy limits. The decision will be an important one, with potentially significant ramifications for insurers.

Amaca Pty Ltd -v- Novek [2009] NSWCA 50

134. This case involved an interpretation of the meaning of dependent in s.15B of the *Civil Liability Act 2001* (New South Wales).
135. The respondent's mother (Ms Dawson) contracted mesothelioma due to the negligence of the appellant's corporate predecessor. She began action in the Dust Diseases Tribunal, but died before it had been determined. The respondent then continued the proceedings as the legal personal representative of her estate. Judgment and an award of damages were ultimately given for her.
136. One of the heads of damage that the tribunal awarded was to compensate Ms Dawson for the loss of the capacity to provide gratuitous childminding services to her daughter. That allowance was awarded on the basis that, before she became ill with mesothelioma, Ms Dawson lived in the same household as the respondent and her husband (Mr Novek). Whilst the respondent and Mr Novek had worked full-time, Ms Dawson had cared for their two young children. The tribunal thus found that, but for her illness, Ms Dawson would have continued to look after the children. An amount was accordingly awarded as compensation for Ms Dawson's loss of capacity to provide gratuitous domestic services. It was based on s.15B of the *Civil Liability Act*, which allowed claims for loss of capacity to provide gratuitous services.
137. The appellant then appealed that award to the Court of Appeal and submitted that the judge at first instance had erred in construing s.15B of the CLA and that had he construed the section correctly he would have found that:

- (a) the grandchildren were not dependants of Mrs Dawson;
 - (b) Mrs Dawson's services were not provided to the grandchildren, but to their parents,
 - (c) the provision of services was not reasonable.
138. The appellant also submitted that, in consequence of the error and the construction of s.15B, the trial judge failed to take into account the benefits of the provision of services conferred on the respondent and Novek. One was for freeing them to work and earn money, the other was the performance of household tasks during parts of the day when children did not take up the whole of Mrs Dawson's time and attention. The appellant submitted that had the judge taken those benefits into account the damages would have been reduced.
139. The court held the definition of "dependants" in s.15B admitted the possibility of a person whom the claimant had no legal obligation to support. That was because the decision included, as potential dependants, people in as diverse a set of relationships as the claimant. The period of time which Mrs Dawson had provided the care justified the finding of dependant relationship. After referring the decision in *Aafjs -v- Kearney* (1976) 180 CLR 199, the court concluded that whether dependency total or partial, exist is a question of fact. In deciding whether a relationship of dependency in fact existed between Mrs Dawson and the grandchildren, it is irrelevant, the respondent and Novek could have chosen to have one or other of them stay at home to care for the children.
140. The fact that Mrs Dawson provided no financial support to her grandchildren was not necessarily enough to show that they were not her dependants. The court concluded that the law remained accurately stated in the joint judgment of Sugerman P, Jacobs and Mason JJA in *Middleton -v- Kiama District Hospital* (1973) NSW 136 where their honours said:

"Dependency is, moreover, a complex question of fact, which may involve the consideration of many elements, including both past events and future probabilities. It is not necessarily correlative with a legal duty to maintain. A person may in fact be dependent upon another who is under no legal duty to maintain him, and may be so dependent even though there is also in existence one who has a legal duty to maintain e.g. a husband his wife. On the other hand there may be no dependency in fact upon a person who is under a legal duty to maintain. The existence of the legal duty is, however, one of the many elements to be taken into account in deciding upon a question of dependency in fact. Dependency and actual support are not necessarily correlative. There may be dependency although for the time being was no actual support. And it seems to us to be possible to figure cases in which there may have been a provision of support, or some measure of support, at least for a short time or for some special purpose, which did not amount to dependency. The definition of 'dependants' does not merely refer to one who was in fact supported by the deceased worker at the time of his death; a 'dependent' is a member of the worker's family who was 'wholly or partially dependent for support upon the worker at the time of his death'. Dependency refers to a state or condition of being dependent, to having been in this relationship to the deceased".

141. The court therefore concluded the trial judge made no error in law in failing to hold that a duty of the respondent and Novek to care for the children showed that the children were not dependent upon Mrs Dawson. The period of time over which Mrs Dawson provided care to the children, the frequency with which it was provided, and the extensive nature of the care she provided was such that there was an evidentiary basis upon which it was legally open to the judge to conclude that the children were dependent upon Mrs Dawson.
142. Further, there was no legal error in the judge's factual conclusion that Mrs Dawson provided services to the children by looking after them. The fact that several members of the household benefit provides no reason for concluding that it is erroneous in law to say that the person who performed such a service provided a service to some particular one of those household members.
143. Finally, the fact that the dependants were not (or will not be) capable of performing the services themselves by reason of their age or physical or mental incapacity, and the fact that the services would have been provided for the threshold periods of time, are not necessarily enough, even when taken together, to show that the need for the services being provided for the threshold periods of time was reasonable.
144. The appellant argued that it could not have been the intention of Parliament that the respondent and her husband should in effect, receive paid childcare from the appellant for the next 15 years. However, the court was not persuaded that the outcome of which the appellant complained was one that was so unreasonable that Parliament could not have intended it to arise. The decision that the need for services to be provided for the threshold periods of time was reasonable was not a decision on a question of law and in making that decision the judge was not shown to have applied an erroneous construction of the section, or arrived at a conclusion it was not open on the evidence.
145. The court also found the decision of the judge that the benefit of being free to go out to work was not one that needed to be taken into account was not erroneous in law.

Shire of Gingin -v- Coombe [2009] WASCA 92

146. This is a decision of the Western Australian Court of Appeal which contains an interesting discussion in relation to causation and hindsight bias. As the Chief Justice said in opening his reasons, *"this is another case in which a person suffering personal injury whilst participating in an inherently dangerous recreational activity has sought to recover compensation for those injuries from the public authority in control of the site, on the basis the authority breached a duty to warn him of the dangers involved in that activity"*. Whilst he went on to say that the resolution of cases like this turns critically on the particular facts and circumstances of each individual case, nonetheless it is a useful discussion in relation to hindsight bias.
147. The plaintiff was aged 24. He went to an off-road vehicle area (ORVA) under the control and management of the Shire. It was an area of sand dunes overlaying limestone rock. The configuration of the dunes changed constantly, and quickly, and was effected by the strength and direction of the wind. From time to time, areas of limestone were uncovered as a consequence of the movement of dunes. The action of wind also caused some of the dunes to have a steep face on one side, and a more gentle slope on the other.

148. The vehicular access to the ORVA was provided by an unsealed road leading to a car park on a flat area of land immediately adjacent to the dunes.
149. On the unsealed road leading to the car park, the Shire erected on a sign on the side of the road. The width of the road adjacent to the sign was quite adequate to accommodate any vehicle parking or pausing at the sign for the purpose of reading it. It was a large sign, easily noticed by anyone accessing the area. It stated as follows:

“Gingin Shire

Welcome to

Lancelin off road vehicle (ORV) area

Control of Vehicles (Off Road Areas) Act 1978”

150. Below a coloured diagram of the area was the words:

“The off road area is a hazardous environment many serious injuries occur every year

Beware

Sudden steep descent

Collisions with vehicles/pedestrians”

151. Below that was set out some regulations.
152. The plaintiff had no recollection of any events giving rise to his injuries. The evidence however established that another motorcyclist had suffered injuries which proved to be fatal, after falling, whilst on a motorbike from the top of a steep face of a dune to a flat area at the base of the dune comprising a thin layer of sand overlaying the base of limestone. This incident had occurred approximately half an hour before the plaintiff's accident. Police and ambulance officers had been called to attend the earlier accident. Whilst they were doing so, the plaintiff travelled up the gentle slope of the dune on the other side from its steep face. He then drove his motorbike between the middle of two groups and then fell down the steep side of the dune landing 5m to 6m from where a nurse was attending the previous accident.
153. The trial judge found that around the time of the accident the ORVA had attracted 70,000 visitors per annum and they were encouraged to visit by the Shire. There had been a number of accidents known to the Shire, giving rise to injuries of varying degrees in severity in the years preceding the plaintiff's accident. The accident occurred prior to the provisions of the *Civil Liability Act 2002 (WA)* coming into force.
154. The Shire accepted it was the occupier of the ORVA within the meaning of the *Occupiers' Liability Act 1985 (WA)* and that it owed the plaintiff the normal duty of an occupier, whether it be pursuant to the common law or pursuant to the statute. The trial judge concluded the nature of the terrain and activities carried on in the ORVA created a significant risk of injury to those engaging in recreational off-road activities in the area. The risk was not far fetched or fanciful and it therefore followed the Shire

- owed a duty to the plaintiff as a member of the class of persons engaging in that activity. That conclusion was not controversial.
155. The trial judge concluded the Shire had breached its duty by failing to provide a sign which adequately warned entrants to the ORVA (including the plaintiff) of the dangers which they faced. At trial the plaintiff alleged there were a number of deficiencies to the sign, in particular, the location and the contents of the sign. The trial judge found the sign was inadequate. He found that its placement on the access road was inappropriate and that whilst there were warnings on the sign they did not stand out amongst the other information. He found that the provision of an adequate warning sign would have involved relatively modest expense.
 156. There was no evidence from the plaintiff as to the course he would have taken if he had been presented with an adequate warning sign but the trial judge concluded it was unlikely that if presented with such a sign, he would not have ridden in the dunes at all, having travelled all the way to Lancelin for that express purpose. However, he found that applying commonsense, if warned appropriately, it was unlikely that a person of the plaintiff's experience would ride at speed in areas where there was a sheer drop without first acquainting themselves with the terrain. The trial judge found that proceeding over the edge of the dune where the other side could not be seen was foolhardy and by launching off a sand dune without first ascertaining the nature of the descent, the plaintiff self-evidently exposed himself to a significant risk of harm. He assessed contributory negligence at 40%.
 157. The Chief Justice, with whom Miller J agreed said that although there was no dispute that the Shire owed a duty of care to the plaintiff, the ascertainment of the content of that duty is relevant to the issue of breach.
 158. He said that in this case, the risk which materialised and caused Coombe to suffer injury was that arising from driving, or in his case, riding, over the crest of a sand dune at such a speed he could not stop if confronted with an unexpectedly steep descent. When the risk is expressed in those terms, it is pertinent to note that the Shire was not the source of any aspect of a risk, in the sense that it did not create the sand dune nor provide Coombe with his motorbike. Nor did it have the capacity to control the likelihood of the risk materialising. These matters are relevant to the assessment of the reasonableness of the Shire's response to the risk.
 159. He then said the trial judge did not address, in his reasons, the exact content of the warning which he considered should have been given. If he had done so, it would have been apparent that he was impermissibly reasoning retrospectively from the particular circumstances which caused the plaintiff's injuries, and postulating a sign which addressed only that circumstance, whilst excluding from consideration the myriad of other risks to which users of the ORVA are exposed and which would have had to be included in any comprehensive warning. Those risks would include such things as a risk of injury when a motorcycle or vehicle comes unexpectedly to a halt in unusually soft sand, or rolls over, or collides with another vehicle or pedestrian.
 160. He noted that the trial judge, whilst expressly acknowledging that it was his obligation to assess breach of duty by looking forward from a time before the occurrence of the injury giving rise to the claim, rather than looking back at what had in fact happened, the process of reasoning elucidated by the reasons for decision is, in fact, a retrospective process. That was evidenced from its starting point, which was the particular dune upon which Coombe suffered his injuries. The trial judge had then

assessed the reasonableness of the care taken by the Shire by reference to that particular circumstance, rather than by reference to the range of risks to which all entrants to the ORVA were exposed, as a class. He described this as hindsight bias.

161. He concluded that had the trial judge directed his attention to the exact content of an appropriate sign, as Gleeson CJ suggested in *Woods-v- Multi Sport Holding Pty Ltd* (2002) 208 CLR 460, he would have likely concluded the range of risks appropriately covered rendered a description of those risks in “*short simple language*”, or pictorially, impractical, in a way which was likely to attract the attention of entrants to the area.
162. He also considered that the trial judge had erred in concluding that the sign should have been placed in a car park where visitors had an opportunity to read the same. The question was not whether it would have been more appropriate, or preferable, or advantageous to have placed the sign in the car park instead of across the access road. The question was whether by placing the sign on the access road, the Shire had departed from a standard of reasonable care.
163. He therefore concluded that the trial judge had erred in relation to the issue of causation and he upheld the appeal and dismissed the plaintiff’s claim.

Hickson v- Goodman Fielder Limited [2009] HCA 11

164. This case involved an interpretation of s.151Z(1)(b) of the *Workers’ Compensation Act* 1987 (NSW) and the *Law Reform Miscellaneous Provisions Act* 1965 (NSW) s.10(2). The plaintiff suffered serious injury as a result of the collision between his push bike and a motor vehicle. The accident occurred whilst he was on a journey to which s.10 of the *Workers’ Compensation Act* 1987 (NSW) (“**the Compensation Act**”) applies. His injury was accordingly compensable and he received compensation payments from the employer.
165. He then sued the driver of the motor vehicle which struck him (“**the tortfeasor action**”). The employer was not a party to that action. The driver of the other vehicle filed a notice of grounds of defence containing extensive particulars of the plaintiff’s alleged contributory negligence. The tortfeasor action was settled by the plaintiff and the other driver. Effect of the settlement was given by an order of the District Court for a judgment in favour of the plaintiff for \$2.8 m plus costs. No formal order was settled and entered.
166. The employer then commenced proceedings in the District Court against the plaintiff seeking repayment of the amount of compensation which he had paid to him, the sum of \$607,315.43. In answer to that claim, the plaintiff pleaded that his actions at the time of the accident contributed to his injuries and that his liability to repay compensation to the employer was reduced to the same extent that the damages recoverable by him against the other driver were reduced, namely 50%.
167. The employer alleged in its action that because there was no judgment of the court the plaintiff was required to repay the entire compensation.
168. The plaintiff argued that because the amount of damages he received after the deduction for contributory negligence was less than the amount of compensation paid by the employer, he should not have to repay any amount.

169. At first instance the trial judge was asked to determine three questions separately. The first was whether s.10(2) of the *Law Reform Act* can operate to reduce the amount of workers' compensation benefits repayable to the employer for damages recovered as a result of the settlement in the tortfeasor action without any determination by a court concerning contributory negligence and the quantum of damages. The trial judge answered this yes. He then went on to hold, subject to the rules of evidence, that evidence was admissible in the repayment action to establish the extent to which the damages recovered by the plaintiff as a result of the settlement of the tortfeasor action were in fact reduced on account of his contributory negligence. He also held that evidence was admissible to establish the degree of the plaintiff's contributory negligence and the quantum of damages to which he would have been entitled without reduction for contributory negligence.
170. The employer appealed and the appeal was successful. The Court of Appeal held that the answer to the first question was no with the result that the other questions did not arise.
171. The plaintiff obtained special leave to appeal to the High Court and the High Court reversed the decision of the Court of Appeal reinstating that of the trial judge.
172. The High Court found that the plaintiff was required to repay the employer proportionate to the liability established against the other driver, and that evidence of those matters were entitled to be adduced in the hearing. The matter was then remitted back for further consideration.

Sydney South West Area Health Service –v- Stamoulis [2009] NSWCA 153

173. This decision covers a number of areas including those related to expert testimony but the most interesting and important part of the decision is that relating to causation and comments on the use of epidemiological and statistical evidence. This issue is currently under consideration by the High Court in the matter of *Amaca Pty Ltd Ellis and Others* [2009] HCA Trans. 77 where the High Court has granted special leave to appeal in relation to the personal representatives of a plaintiff who died of lung cancer and who alleges that he sustained asbestos exposure in addition to his smoking history. The decision is likely to consider the use of epidemiological and statistical evidence. The appeal has been listed to be heard in November, at the same time as the Appeal in Tabet v Gett

State of New South Wales (NSW) Police -v- Nominal Defendant [2009] NSWCA 225

174. This case involves a plaintiff who sustained injury during the course of a police pursuit. The decision on appeal deals with whether the initiation and continuation of the pursuit broke the chain of causation. After finding that the police pursuit was reasonable in all the circumstances, the Court of Appeal concluded that the trial judge ought to have found that the driver of the vehicle involved in the pursuit, as a matter of law, caused the accident. There is also an interesting discussion in relation to contributory negligence.

Neil -v- Ambulance Service of New South Wales (2008) NSW CA 346

175. This case involves a plaintiff who having sustained a serious blow to the head whilst walking in the street rejected assistance from ambulance officers. Being clearly inebriated, police took him into custody under the *Intoxicated Persons Act 1979*

(NSW). The following morning, his condition was observed to deteriorate, and being unable to arouse him easily, he was taken to hospital, a CT scan showed an extra-dural haematoma with a fracture to the skull. He sustained ongoing disabilities.

176. He succeeded at first instance against the Ambulance Service but not the State as responsible for the police. He appealed the decision with respect to the State's liability and the Ambulance Service cross-appealed in relation to its liability. The Court of Appeal found that the ambulance officers owed a duty to pass on information at the place of injury to the police because they were unable to provide relevant medical assistance and knew that the plaintiff was about to be taken into police custody. However, the trial judge did not determine whether the plaintiff established on the balance of probabilities would have agreed to go to the hospital or, if taken unwillingly, he would have submitted to medical assessment and treatment. The only available inference was he would not have done so, whether taken by police or in an ambulance.
177. He therefore failed to establish that he would have accepted medical assessment and treatment and therefore failed to establish that any breach of duty on the part of the ambulance officers caused the delay in treatment. The claim against the ambulance officers was therefore dismissed on appeal.
178. The court also found that the police had not breached their duty of care. Whilst the custody manager had a general law obligation to provide medical treatment as required by the plaintiff, there was no breach of that duty in the circumstances of the case. Whether or not the police had power to detain the plaintiff for the purpose of taking him to hospital, under s.5 of the *intoxicated Persons Act 1979* (NSW), they had no power to require him to remain in hospital. The police were unlikely to have taken the plaintiff to hospital in a police car and if an ambulance had been called it was likely that the plaintiff would have been unwilling to go with the ambulance officers to the hospital.

Imbree v- McNeilly; McNeilly -v- Imbree (2008) HCA 40

179. This is a decision on the standard of care owed to a person who was injured whilst supervising driving by an unskilled and inexperienced driver.

Kekatosis v- Sanson & Another [2009] NSWCA 171

180. This decision establishes the principle that a solicitor has a duty to exercise reasonable care but no duty to ensure a particular result.

Zhang & Another -v- Minox Securities Pty Ltd & Others; Liu & Others -v- Minox Securities Pty Ltd & Others [2009] NSWCA 182

181. This case involves the interpretation of a composite policy in the construction of an exclusion clause for unauthorised acts. Whilst a financial adviser was denied indemnity because of his failure to recommend approved products of the principal, the principal was entitled to indemnity under the policy.

CONCLUSION

182. There are a number of matters currently heard and reserved by the High Court ,or to be heard by the High Court which will shape the law in relation to duty of care,

causation and onus of proof. The coming months are likely to be very interesting , and you should watch out for these significant decisions which will no doubt have an impact on everyday management of claims.

David M McKenna
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