

# Novus Actus creates dual action

## *Advanced Arbor Services Pty Ltd v Phung* [2009] NSWSC 1331

By Robert Guthrie

**T**odd Dean was injured in the course of his employment when pushing bushes into a wood chipper at a worksite. A small log jumped out of the chipper and struck him on the chin. Although at first the injuries did not appear severe, about a month after the accident Mr Dean experienced pain in his teeth, together with a sore mouth. Mr Dean complained of pain to his employer who, in due course, arranged for Mr Dean to see the defendant dentist, Dr Phung. There was no dispute that the treatment sought by Mr Dean would be covered as treatment under workers' compensation and, in fact, the employer's insurer, GIO, accepted liability for the claim. The defendant treated Mr Dean on a number of occasions between 2002 and 2003 and issued invoices for approximately \$74,000 for dental treatment. Additional payments were made to Mr Dean by way of weekly compensation, amounting to \$89,192. A further \$6,906 was paid for subsequent rehabilitation.

In April 2003, Mr Dean was referred to consultant dentist, Dr Howe, who declared the work done by Dr Phung to be 'a complete case of fraud ... by the dentist' and involved 'extremely poor dentistry' work. Dr Howe noted that 28 ceramic crowns had been inserted by Dr Phung and, at the same time, he had removed every nerve from all of Mr Dean's teeth. In a report from Dr Howe to the employer's insurer, it was noted that it was 'quite impossible to believe that Mr Dean fractured 28 teeth in his accident at work'. Despite this report, the insurer paid outstanding accounts due to Dr Phung. At first instance, Johnson J found these payments to be made under a mistake in law, on the basis that, as was later found, such payments were not in fact due and owing. This was so, because the work done bore no relationship to the work accident. At some point following his review by independent consultants, Mr Dean underwent remedial dental work, costing a total of \$50,564.

In an action to recover the amounts paid to Dr Phung for dental treatment for Mr Dean, and the costs of all compensation otherwise paid, GIO commenced proceedings in the employer's name against Dr Phung. Justice Johnson held this to be the appropriate procedure, on the grounds that the insurer had a right of subrogation under the compulsory policy of workers' compensation insurance. Justice Johnson arrived at this conclusion after considerable discussion of the rather labyrinthine provisions of the NSW legislation.

Importantly, in any event, Johnson J held that the general law would apply to allow the insurer the right to sue the defendant. Johnson J found that the insurer had a number of causes of action. At the core of these actions was the finding that the defendant's treatment was so negligent as to constitute a *novus actus interveniens*. *Novus actus* applied in

this case because the treatment administered by Dr Phung was so inexcusably poor that it broke the link between the treatment and the work-related injury, such that the work of Dr Phung amounted to a fresh injury, giving the worker and the insurer various causes of action. The worker had an action in negligence against Dr Phung, which was dealt with separately from the action by the insurer. For the insurer, the right of recovery was grounded in the following actions:

1. Restitution and unjust enrichment – this ground was successful on the basis that the payments made by the insurer to Dr Phung had been made under a mistake of fact with a mistake of law affecting payments after April 2003. Such payments were, on the authorities cited, recoverable. Additionally, the defendant had been unjustly enriched by the payments not required by law (as they were not consequent upon a workplace injury) and the plaintiff was entitled to recovery on this ground.
2. Contract – the plaintiff, the employer, was held in this instance to have engaged the defendant to perform the dental work as a workers' compensation matter and, on that basis, Johnson J found that a contract existed. It was then held that, by reason of the poor work performed by Dr Phung, the contract was breached, giving rise to an action for contractual damages.
3. *Trade Practices Act* and *Fair Trading Act* claims – Johnson J found that Dr Phung had misrepresented himself as a competent dentist and misrepresented that the services he had provided were reasonable. These misrepresentations lead to the injuries suffered by Mr Dean and subsequently the loss which occurred to the defendant employer (and insurer by subrogation).

In the end, the defendant was comprehensively routed. The final verdict against him was \$220,302.

This decision is instructive not simply because it provides a roadmap for recovery by insurers against negligent medical care-providers, but also because it assists those representing employees/workers seeking to recover damages for negligence against medical practitioners and the like. The successful claims for breaches of the *Trade Practices Act* and *Fair Trading Act* are particularly useful in this regard. On the negative side, workers affected by such poor treatment may find workers' compensation payments put in peril where insurers/employers are successfully able to argue that payments should be ceased by reason of *novus actus*. ■

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