In considering how to assess damages, the CARS assessor considered whether Mrs Pellegrino's entitlement should be determined by way of independent award for each accident or as a whole for both accidents, after which responsibility should be apportioned between the two accidents whether it be by way of all, or some, heads of damage. Given the degree of overlap of injuries between the two accidents, the assessor determined the second option to be preferable and apportioned damages accordingly.[4] Zurich submitted that the assessor had made an error at law in not making an assessment in relation to each accident.

In considering Zurich's claim, the court indicated that the assessment of damages is not an exact science, and referred to previous decisions that supported this conclusion (see *Oakley*,[5] *Barbaro*[6] *and Aboushadi*,[7] in which approaches to the assessment of damages were identified). From these cases it has been established that where a further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage is greater because the earlier injury has been aggravated, the damage from the injury should be treated as the defendant's negligence.[8] The overall damage can be calculated and then apportioned between the tortfeasors.

The court found that there had been no error in law, nor did it find any jurisdictional error in the assessor's approach. The appeal was dismissed. ■

Notes: **1** *Zurich Australian Insurance Limited v Elizabeth Pellegrino; Elizabeth Pellegrino v NRMA Insurance Australia Ltd* [2010] NSWSC 1114 at 4. **2** *Ibid* at 5. **3** *Ibid.* **4** *Ibid* at 21. **5** *Ibid* at 31. **6** *Ibid* at 32. **7** *Ibid* at 34. **8** *Ibid* at 43.

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Insurance contract read down – indemnity upheld

Dargham v Kovacevic [2011] NSWSC 2

By Shane Dawson

Justice Hislop of the NSW Supreme Court awarded damages to the plaintiff, Fadi Dargham, after he suffered a fall while working as a labourer on a building site. His honour found the owner-occupier of the site, Sibin Djuric, liable for the plaintiff's injuries. The Court also upheld a cross-claim by Mr Djuric against his insurer, Mecon, ordering the insurer to indemnify Mr Djuric for the damages.

THE PLAINTIFF'S CLAIM

The plaintiff was injured in 2005 after slipping and falling down a partially constructed stairwell, which essentially consisted of an unfenced void in the second floor, with a plank and some plywood covering an estimated third of the void. The floor was wet with dew, and Mr Dargham slipped on to the covering plywood, which gave way under his weight, and he fell down the stairwell. He suffered injuries

from the fall, and was unable to return to work for over a year. In 2008, Mr Dargham sued Mr Djuric as owner-occupier of the site, alleging that he had breached his duty of care by failing to provide a safe work environment.

Mr Djuric was held liable as both occupier and principal. His honour followed authority that a principal does not automatically owe a duty of care to an independent contractor, but in certain circumstances is required to 'use reasonable care to ensure that a system of work [is safe]'.[1] Such circumstances include organising an enterprise that carries risk; in such cases, the principal is under a duty to use reasonable care to avoid unnecessary risks of injury, and to minimise any other risks of injury.[2] On these bases, Mr Djuric was found to owe a duty to the plaintiff, and should have properly fenced the stairwell.

Mr Djuric submitted that damages should be reduced for contributory negligence, but this was dismissed by the Court due to lack of evidence. However, the damages payable by Mr Djuric were reduced under s151Z(2) of the *Workers' Compensation Act* 1987 (NSW), which apportioned damages between the liable parties, Mr Djuric and another contractor. The Court found that Mr Djuric bore the greatest responsibility, as principal and occupier, and ordered him to pay 75 per cent of the damages. The plaintiff was ultimately awarded damages of $206,382.11, including damages for past economic loss, and pain and suffering.

THE INSURANCE CROSS-CLAIM

Mr Djuric cross-claimed against his insurer, Mecon, who had refused to indemnify him for the damages, alleging that he had breached the insurance policy. Under the policy, 'Mecon would provide indemnity for amounts which the [defendants] would become legally liable to pay in compensation of personal injury', and also for 'legal charges, expenses and costs incurred'. Conditions were set out that the insured party must abide by in order to be eligible for indemnity:

'10.08 [Employer and their employees must:]

...

(b) Fully comply with all legal requirements and relevant work place authority regulations regarding safety, and maintenance of property, including but not limited to observance of the *Occupational Health and Safety Act* operable in your State; and

(c) Ensure that any safety devices (including, but not limited to, load movement and overload indicators), where fitted or required to be fitted, are in place and fully operational at all times; and

(d) Take all reasonable steps to prevent incurring any loss, damage or liability.'

Mecon alleged that Mr Djuric had breached the conditions set out in 10.08, and that he had breached the *Home Building Act* 1989 (NSW), thus constituting a breach of 10.08(b) and (d).

The Court held that Mecon could refuse indemnity only if the terms of the policy were applicable, were breached, and that such breach resulted in the particular loss or legal liability for which indemnity was being sought. It found that literal interpretation of the conditions in 10.08 would frustrate the commercial aims of the policy, and thus the conditions should be read down, giving effect to the contract's commercial purpose.[3] Any ambiguity in the contract should be interpreted *contra proferentem*.

Mecon failed to establish that the cross-claimant had contravened the *Occupational Health and Safety Regulations* 2001 (NSW), and thus breached 10.08(b). Furthermore, his honour determined that a handrail, fence or covering did not fall within the ordinary meaning of 'safety device', which instead connotes a 'contrivance of mechanical device', and thus the cross-claimant had also not breached 10.08(c). With regard to 10.08(d), Mecon argued that Mr Djuric was in breach by failing to remedy the danger posed by the void, despite being aware of it. In response, the Court noted that literal interpretation of 10.08(d) 'would be repugnant to the commercial purpose of the policy, as it would deprive the insurer of any cover in the circumstances of this case'. It drew on authority that an insured party has satisfied its obligation to 'take all reasonable precautions to avoid or minimise injury, loss or damage' by demonstrating either unawareness of the danger's existence or, if aware of the danger, that they 'took some action to avoid it', and were not indifferent to its aversion.[4] On the facts, the cross-claimant had not been indifferent to the risk, erecting a partial covering of the hole but not knowing that it would give way so readily. Mecon was thus found to have been unable to demonstrate any breach of the policy.

Mecon's allegations that the cross-claimant's breach of the *Home Building Act* 1989 (NSW) contravened the policy were also rejected. The Court found that the Act did not fall under 10.08(b), as it was not concerned with safety, and that 10.08(d) was not contravened, as a contractor rather than Mr Djuric held the building licence, and Mr Djuric did not carry out any actual building work himself. Thus, he was not considered to be involved in residential building work under the Act.

Dargham v Kovacevic demonstrates the willingness of courts to read down insurance contracts, giving effect to their commercial purposes. This is particularly important in personal injury cases, where defendants can lack the financial resources to pay out damages to provide for the proper compensation and continued care of injured plaintiffs. ■

Notes: **1** *Leighton Contractors Pty Limited v Fox* (2009) 83 ALJR 1086. **2** *Stevens v Brodribb Sawmilling Co Pty Limited* (1986) 160 CLR 16, 47-8. **3** *Fraser v BN Furman (Productions) Ltd* [1967] 1 WLR 898. **4** *Legal and General Insurance Australia Limited v Eather* (1986) 6 NSWLR 390.

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