Insurance Matters

Sparke Helmore Lawyers

Issue 12 | December 2018

Offers and costs aren't always best friends

Inside this issue:

Contents

If you have any questions or suggestions about *Insurance Matters* contact the editor, Mark Doepel, on +61 2 9260 2445 or mark.doepel@sparke.com.au

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Looking over the horizon

What an incredible year. As we look back over the last 12 months, it's hard to comprehend just how much has changed and how much we have achieved. From being named Insurance Specialist Firm of the Year for the third year running, to opening a new office in Darwin, bringing on a 32-strong team (including four partners) as well as countless other promotions and award nominations across the board.

Suffice to say none of it would have been possible without the support of our clients.

We're delighted to bring you this 12th issue of *Insurance Matters*—recapping some of the most significant and game-changing legislative updates from 2018. We look at the long-awaited Notifiable Data Breaches Scheme and what that means for insurers and their insureds, as well as the three reports released by the Office of the Australian Information Commission.

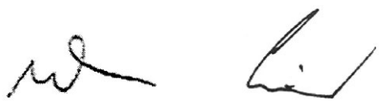
The Australian Financial Complaints Authority (AFCA) began operating as a one-stop shop for financial disputes in November of this year, which marks some significant process changes. We delve into AFCA—how it came about, how it will work and what you need to know.

Offers and costs often go hand in hand, but not always. Recent case law indicates that courts are giving greater consideration to the allocation of costs and parties should not assume this will happen in their favour. We dissect some cases to understand the trend.

An increasing number of damages claims are being accompanied by economic loss claims and a recent decision highlights to insurers that the onus rests with them to refute such claims. We review the decision and how it applies to you.

Finally, we cover a few of the noteworthy recent developments across various jurisdictions to keep you abreast of what's going on around the country.

We hope you enjoy this issue of *Insurance Matters* and if there are any topics you'd like to see covered in future publications, please let us know by emailing james.johnson@sparke.com.au or chris.wood@sparke.com.au



James Johnson and Chris Wood
National Insurance Group Leaders
Sparke Helmore Lawyers

The NDB Scheme–are notifiable data breaches happening?

By Colin Pausey

The *Privacy Amendment (Notifiable Data Breaches) Act 2017* (NDB Scheme) came into effect on 22 February 2018 requiring Australian Privacy Principle (APP) entities to notify individuals if an eligible data breach has occurred.

The Office of the Australian Information Commission (OAIC) released its third quarterly notifiable data breaches report on 30 October 2018. While it is too early to suggest trends, the majority of causes of breaches are linked to human error and malicious/criminal attacks in each of the past three reports.

What is an eligible data breach?

Generally speaking, an APP entity must notify affected individuals if an eligible data breach occurs in line with s 26WE(2) of the NDB Scheme.

There are two key elements of an eligible data breach:

- unauthorised access to, unauthorised disclosure of or loss of information, and
- a reasonable person would conclude that the access, disclosure or loss of information would be likely to result in serious harm to any of the individuals to whom the information relates.

Information includes personal information, credit reporting and credit monitoring information as well as tax file number information.

OAIC quarterly notifiable data breach reports

Notifiable data breaches must be notified to the OAIC, which issues a notifiable data breach report each quarter.

The statistics in the October 2018 report are similar to the statistics in the second report (issued on 31 July 2018). The key similarities are the number of reportable data breaches (245 notifiable data breaches in Quarter 3 and 242 notifiable data breaches in Quarter 2) and the similarity of the percentage of breaches caused alternatively by human error and malicious/criminal attacks. There is also a similarity in the business sectors being affected.

Differences between Quarter 2 and Quarter 3

Although the percentage of notifiable data breaches caused by criminal and/or malicious attacks was constant between Quarter 2 and Quarter 3, in the latter there was a marked increase in phishing attacks across all sectors.

In Quarter 2, 29% of criminal and/or malicious attacks involved phishing attacks. In Quarter 3, 50% of criminal and/or malicious attacks involved phishing attacks. Compromised and stolen credentials accounted for 34% of the criminal and/or malicious attacks in Quarter 2 and only 19% of attacks in Quarter 3.

Comparative table–first three notifiable data breach reports

	Quarter 1	Quarter 2	Quarter 3
	(22/2/18 to 31/3/18)	(1/4/18 to 30/6/18)	(1/7/18 to 30/9/19)
Notifications	63	242	245
Human error	51%	36%	37%
Malicious/criminal	44%	59%	57%
Health industry	24%	20%	18%
Finance sector incl. superannuation	13%	15%	14%
Legal accounting & management services	16%	8%	14%
Private education	10%	8%	7%

The NDB Scheme and cloud providers

By Colin Pausey

The *Privacy Amendment (Notifiable Data Breaches) Act 2017* (NDB Scheme) came into effect on 22 February 2018 requiring Australian Privacy Principle (APP) entities to notify individuals if an eligible data breach has occurred. The NDB Scheme applies to cloud providers as well as the entity that originally collected the personal information.

Almost one-third of Australian businesses now use commercial cloud computing services. In 2016, the second-largest healthcare insurer in the USA suffered a data breach that affected 80 million customers. Investigators analysing the breach found hackers smuggled data out in a cloud-based file sharing service. The incident illustrates the potential for cloud-related breaches as well as the risk when data is unsecured.

Cloud providers are considered to hold personal information if it has in its possession or control a record that contains personal information, such as dates of birth and credit card details.

Cloud computing is one of many examples where one or more entities may hold the same information. Where more than one entity holds the same record of personal information, both are responsible for complying with the NDB Scheme for the records held. Even though both entities have the responsibility to notify, only one of the entities jointly holding the information need comply with the NDB assessment—whether or not there has been an eligible data breach—and notify the individuals to whom the information relates.

The NDB Scheme, however, does not specify which entity should conduct the assessment of the data breach and notify affected individuals. For this reason, where information is held jointly such as through a cloud computing arrangement, entities holding the information should establish clear procedures in a service agreement or other contractual documents as to who notifies the affected individuals. A sensible rule of thumb is that the entity with the most direct relationship with the individuals at risk is best placed to handle the notification responsibility and deal with the regulator.

In addition to clarifying who will be responsible for notifying affected individuals, there are a number of matters to be considered when dealing with a cloud provider. The entity should be satisfied the provider's data handling framework is certified to a relevant Australian or international standard. Wherever possible, relevant data should be encrypted before it is disclosed, rather than relying on the cloud provider to solely safeguard the information. It is also important to know whether the cloud provider intends to use any of the information for its own purposes, if it intends to sub-contract its services to other parties and the notification regimes the cloud provider is required to comply with in its host jurisdiction.

An entity subject to the NDB Scheme that discloses personal information to an overseas recipient will remain accountable for an offshore eligible data breach, even if that entity is not responsible for the breach.

Entities can't avoid the NDB Scheme by outsourcing the handling or storage of personal information to cloud providers or other third-party suppliers. Companies should review their cloud and other outsourcing contracts to ensure responsibilities are clearly defined.

One authority to rule them all–new external dispute resolution authority to examine all financial disputes

By Patrick McGrath and Ryan Lee

The Australian Financial Complaints Authority (AFCA) began operating as a one-stop shop for financial disputes and started taking complaints in November 2018. We discuss some of AFCA's key features that you need to know about.

How did AFCA come about and how is it set up?

On 3 April 2017, an expert panel chaired by Professor Ian Ramsay of the University of Melbourne published the *Final Report of the Review of the financial system external dispute resolution* (EDR) and *complaints framework* (the Ramsay Report). The Report was the first comprehensive review of the financial system's EDR framework and made 11 recommendations for reform—all of which were accepted by the Turnbull Government.

The Ramsay Report's central recommendation was that there should be a new single EDR body for all financial disputes (including superannuation disputes) to replace the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).

On 9 May 2017, in response to the Ramsay Report, the Government introduced the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017* and announced it would create a new EDR framework with AFCA acting as a one-stop shop to deal with all financial disputes. This will also ensure consumers and small businesses have access to free, fast and binding dispute resolution.

The way AFCA is set up is such that it:

- operates as a company limited by guarantee
- is governed by an independent board with an independent chair and equal number of directors with industry and consumer backgrounds
- is industry-funded, and
- requires compulsory membership through a licensing condition for financial firms (including superannuation funds).

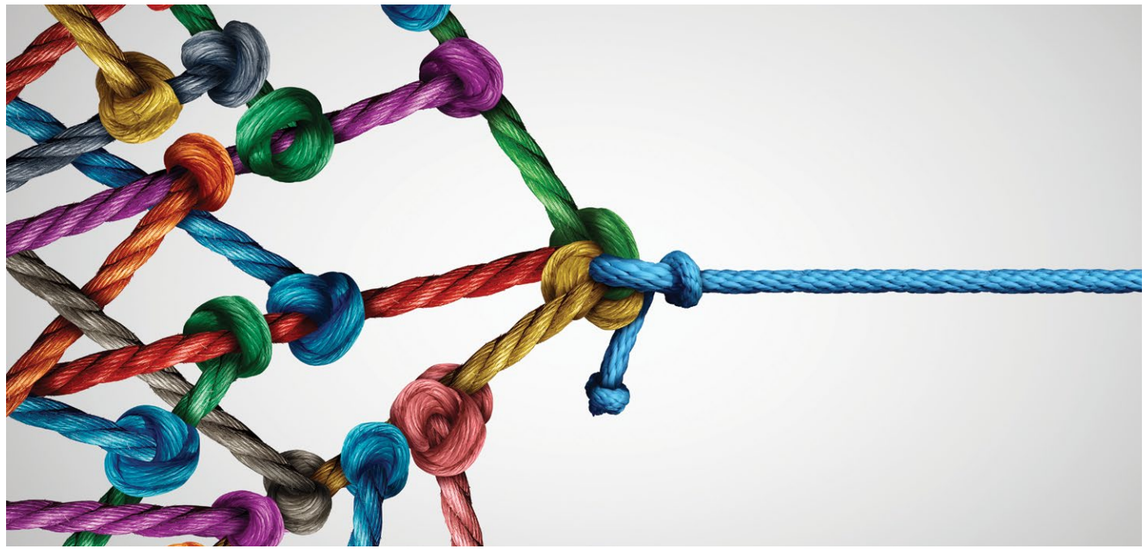
Determinations of AFCA are binding on members and the EDR scheme is free to complainants when they lodge a complaint.

What are AFCA's monetary limits?

When reviewed in the Ramsay Report, the FOS and CIO's monetary limits of $500,000 and compensation caps of $309,000 were considered no longer fit for purpose as they were out of step with the value of some financial products (resulting in a gap in EDR coverage). The panel also found that small businesses did not have adequate access to EDR because of the monetary limits and compensation caps in place.

Now that it is operational, AFCA has significantly increased these monetary limits, including:

- (continuing) unlimited monetary jurisdiction for superannuation complaints
- for complaints other than superannuation complaints (and complaints involving income stream insurance, general insurance broking, uninsured motor vehicles and credit facilities), there is a monetary limit of $1 million on the amount claimed by a complainant
- the ability to award up to:
    - $500,000 in compensation to complainants in complaints involving direct financial loss claims, and
    - $250,000 in compensation in claims against an insurance broker (except claims involving life insurance policies)
- no monetary limits and compensation caps for disputes about whether a guarantee



should be set aside where it has been supported by a mortgage or other security over the guarantor's primary place of residence, and
- for small business credit facility disputes, jurisdiction to deal with credit facilities of up to $5 million and the ability to award up to $1 million in compensation in disputes involving small business loans and $2 million in compensation for primary producer loans.

Internal dispute resolution (IDR)

Where an IDR response has not been provided when the complaint is initiated, AFCA will refer the complaint back to the financial firm for a final opportunity to resolve it via IDR within a defined timeframe (with the exception of death benefit complaints within superannuation). AFCA will register and track the progress of complaints referred back to IDR and has the power to determine a complaint where the financial firm fails to resolve it within a set timeframe.

To improve IDR transparency, financial firms will be required to report to ASIC on their IDR activities, including outcomes for consumers on complaints resolved through IDR. ASIC will be able to publish data on IDR activity at an aggregate level and, at its discretion, a firm level. This will allow consumers to determine the effectiveness of a financial firm's IDR process.

What are AFCA's rules and guidelines?

Similar to the way the FOS operated, AFCA is governed by rules and operational guidelines.

The AFCA Rules were approved by ASIC on 6 September 2018 and include:

- AFCA's complaint resolution processes, including time limits for submission of complaints
- the types of disputes AFCA can or can't consider, including mandatory and discretionary exclusions
- the remedies AFCA can award, including monetary limits, and
- AFCA's reporting obligations.

Have the decision-making requirements changed?

AFCA's decision-making test for non-superannuation disputes will remain unchanged (which is based on achieving "fairness in all the circumstances") as will the test for superannuation disputes (whether the trustee's decision was "fair and reasonable" in the circumstances).

The AFCA decision-maker must consider the:

- legal principles [although AFCA is not required to strictly apply legal principles, including the *Insurance Contracts Act 1984* (Cth)]
- applicable industry codes and practice guidelines

- good industry practice, and
- previous AFCA (or predecessor scheme) determinations.

Previous AFCA (or predecessor scheme) determinations will not be treated as precedents, however AFCA states it will seek to apply consistent decision-making, and will publish case studies and determinations in a similar manner to the way FOS determinations were published—with party names removed.

AFCA will use decision-making panels to resolve disputes where necessary. Factors to be considered when deciding whether to use a panel include:

- the complexity of the dispute
- the amount of loss and other potential consequences of the dispute
- whether the dispute raises a systemic issue, and
- whether the dispute is likely to be a "new" decision that will set an industry standard in a particular context.

Can it join other parties?

In dealing with complaints (other than superannuation complaints), AFCA may decide at any time that it is appropriate to join another financial firm as a party to a complaint.

What are the rights of appeal?

Complainants will not be bound by AFCA determinations but (subject to limited appeal rights, similar to the appeal rights applying in respect of FOS/CIO determinations) financial firms will be bound by them. In superannuation disputes, parties can appeal determinations to the Federal Court on matters of law.

How can matters be referred to appropriate authorities?

AFCA will have powers to refer matters to the authorities where:

- it becomes aware, in connection with a complaint, that a serious contravention of any law may have occurred, or a party to the complaint may have refused or failed to give effect to a determination by AFCA
- the parties to a complaint agree to a settlement, but AFCA thinks the settlement may require investigation, and
- it considers that there is a systemic issue arising when considering complaints.

AFCA must refer such matters to APRA, ASIC and/or the Commissioner of Taxation.

What are the transitional arrangements?

On 1 September 2018, the CIO scheme was transferred to AFCA as part of the transition arrangements and began managing the CIO scheme. Any CIO complaint that was received before 1 November 2018 will be dealt with under the CIO Rules. Any disputes received by AFCA since 1 November will be handled under the AFCA Rules.

Although AFCA is now operational, all existing unresolved matters under the FOS scheme will continue to be considered under their respective Terms of Reference by AFCA until they are resolved.

For disputes before the Superannuation Complains Tribunal (SCT), superannuation trustees and insurers need to continue to liaise with the SCT about any open complaints received before 1 November 2018. Any superannuation complaints received since 1 November 2018 are being handled by AFCA.

Complaints about AFCA's service and reporting

Board appointed Independent Assessors will have broad powers to consider and respond to service complaints about AFCA. Any person or business directly affected by how AFCA deals with a complaint against a financial firm can escalate a complaint. The Independent Assessor will identify, address and report on issues affecting AFCA's complaint handling operations and performance that arise from service complaints.

The Independent Assessor will report in writing to the AFCA Board and ASIC on a quarterly basis, and will report publicly on all service complaints received or finalised by AFCA or the Independent Assessor every six months.

In summary

Increased monetary limits and compensation caps will mean more consumers and businesses will gain access to the one-stop EDR scheme run by AFCA. The establishment of AFCA should address the existing overlap between these three bodies and resolve consumer confusion by reducing complexity.

AFCA's principles include providing a scheme that is accessible to complainants—independent, impartial and fair as well as being efficient, effective and timely. AFCA seeks to be cooperative, proceed with a minimum of formality and be as transparent as possible.

It remains to be seen whether the new one-stop shop EDR framework will be more effective and faster than previous EDR frameworks. If it is to achieve transparency, AFCA will have to publish information that will allow consumers and financial firms to determine whether or not these objectives have indeed been met.

We would like to acknowledge the contribution of Wen Wen Qiu to this article.

The Ramsay Report's central recommendation was that there should be a new single EDR body for all financial disputes (including superannuation disputes) to replace the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).

Offers and costs aren't always best friends

By Jehan Mata

Recent decisions in the Supreme Court of Victoria provide insight into the factors that should be considered by a Court when applying the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* (Rules) to order indemnity costs following offers made by way of Offers of Compromise or *Calderbank offers* (offers).

Rule 26.08 allows for the provision of indemnity costs to a party where an offer of compromise is made and not accepted, but the Plaintiff ultimately obtains a judgment that is no less favourable than the terms of the offer, unless the court otherwise orders. If applied, indemnity costs would be awarded from the second business day after the offer of compromise is served.

Rule 26.08 is often viewed with some certainty that if a party served an offer of compromise that was more favourable to the Plaintiff than the judgment ultimately received, they would be entitled to recover indemnity costs. However, the court retains discretion to order otherwise and we have seen this exercised in recent cases.

In *Stevens v Spotless Management Services Pty Ltd (No 2)* [2016] VSCA 311 *(Stevens)*, the Court of Appeal set three questions to be answered when applying Rule 26.08:

- whether the offer was "of a genuine compromise" (the onus of which lies on the Plaintiff to establish)
- if the offer is genuine, whether the judgment obtained is no less favourable than the offer, and
- regardless of the answer to the second question, whether the court should order "otherwise" than in the terms set out in Rule 26.08 (the onus of which lies on the Defendant).

Assessing a genuine offer

Principles in considering whether an offer of compromise was "genuine" have emerged from case law as follows:

The stage of the proceeding at which the offer was received

An offer made when the parties have a better understanding of the strengths and weaknesses of the case are more likely to be considered "genuine" by courts and more likely to be relied on compared to those made earlier in the proceedings. Accordingly, it would be best to make an offer after mediation when both sides have had an opportunity to consider the merits of the claim and the anticipated evidence if the matter goes to hearing.

In *Noble v Fraraccio (Ruling No 2)* [2016] VCC 680, the Court found no merit to an argument that an offer of compromise should not be enforced simply because it was made at the beginning of a trial. It is good practice to consider putting a fresh offer of compromise forward before a trial commences.

In *Nillumbik Shire Council v Victorian YMCA Community Programming Pty Ltd* [2016] VSCA 192, the Court of Appeal noted that the reasonableness of the rejection of an offer is to be assessed at that particular point in time and not with the benefit of hindsight or, in that case, through the "prism of a subsequent appellate determination".

Time allowed to consider the offer

Rule 26.03 (specific to Offers of Compromise) provides that a party be given at least 14 days to consider the offer before it expires. However, recently in *Re Williams; Smith v Thwaites* (No. 2) [2017] *(Williams)*, it was noted that while each case is different, relevant considerations include whether the Plaintiff had ample time to consider the offer and if they did, whether they chose to obtain professional advice.

The extent of the compromise

When assessing the extent of the compromise offered, *Williams* said "a trivial, contemptuous or derisory discount would not involve a genuine compromise". However, evaluating the compromise can get particularly difficult when the case is "all or nothing", in which the Court in *Stevens* stated it makes it "difficult to select a discount based on an assessment of particular aspects of the case".

Similarly, in cases where a settlement is based on each party walking away bearing their own costs, particular attention should be paid to how the offer is framed to evidence that a compromise is being made with reference to the merits of the case known at that stage of the proceedings.

Whether judgment is no less favourable than offer

Assessing whether a judgment is no less favourable than an offer can be difficult, particularly where an offer that is inclusive of costs needs to be compared with a judgment where costs have not yet been determined.

The *Supreme Court (Chapter I Offers of Compromise Amendments) Rules 2013* altered the regime for offers of compromise under the Rules. Rule 26.02(4) now expressly provides that offers of compromise may be inclusive of costs or state that costs are additional to the offer. However, this can still present difficulties when the Court is required to compare offers to determine whether they are more favourable than the judgment.

This was recently addressed in *Williams* where the Court considered that where costs have been excluded in an offer, a simple "like for like" analysis can be made. The Court noted that the actual costs incurred by the Plaintiff up until judgment should not be used for comparison as it would result in the figure at judgment being higher than an offer made at an earlier stage. This would essentially defeat the reason behind the Rules, which aims to encourage parties to resolve matters at an early stage of the proceedings.

The court must also consider the reasonableness and proportionality of the Plaintiff's costs to the issues in dispute, by referring to the overarching obligations in the *Civil Procedure Act 2010*, as stated in *Yara Australia Pty Ltd v Oswal*, "the court must weigh the legal costs expended against the complexity and importance of the issues and the amount in dispute, in order to determine whether the parties used reasonable endeavours to ensure those costs were proportionate".

When will a Court exercise its discretion to order otherwise?

In *Williams*, the Court noted that caution should be exercised in departing from the prima facie rule and to "only do so in cases that warrant such a departure, invariably expressed in terms such as 'compelling and exceptional circumstances'"—e.g. in a case where the difference was $400 and as such, the cost consequences may be viewed as operating harshly.

What to do

It's clear there are no assurances that a costs order will be made even if a party has obtained judgment in their favour and wants to rely on previous offer(s) in seeking a costs order. Courts will consider many factors, including the timing and scope of the offer, and the time for parties to respond to it.

These aren't novel concepts, but they remind parties not to assume they will automatically get costs in their favour (assuming they get a more favourable award).

This should not dissuade parties from making offers to progress matters as there should always be some level of open discussion between parties that is done through without prejudice communication.

The buck stops with defendants to refute economic loss claims

By Kerri Thomas and Jehan Mata

The last decade has seen an increasing number of plaintiffs claiming pure mental harm and/or nervous shock arising from the death of a family member or as ancillary claims to proceedings commenced by an injured party. Often, these damages claims are accompanied by economic loss claims.

The recent *Sorbello* decision (*South Western Sydney Local Health District v Sorbello* [2017] NSWCA 201) dealt with a claim made by the parents of a severely brain damaged child. The mother was seeking damages for her psychiatric injury and alleged that she was now totally precluded from working in paid employment. The Court of Appeal's decision highlights to defendants facing similar claims that the onus rests with them to refute claims for total and complete ongoing economic loss damages, when there is evidence of a theoretical residual earning capacity.

Background

In 2008, Ms Sorbello gave birth at Bankstown Hospital to her son who was born with profound disabilities due to oxygen deprivation during birth. At four months of age, he was diagnosed with cerebral palsy, meaning that his life expectancy would be significantly shortened and that he would require lifetime care.

In the related case of *Sorbello v South Western Sydney Local Health Network; Sultan v South Western Sydney Local Health Network* [2016] NSWSC 863, the child's parents claimed damages in the Supreme Court for personal injury, specifically mental harm, suffered as a result of the negligence of South Western Sydney Local Health Network (SWS Health). Liability was admitted by SWS Health and damages were awarded to the parents for non-economic loss, and past and future economic loss.

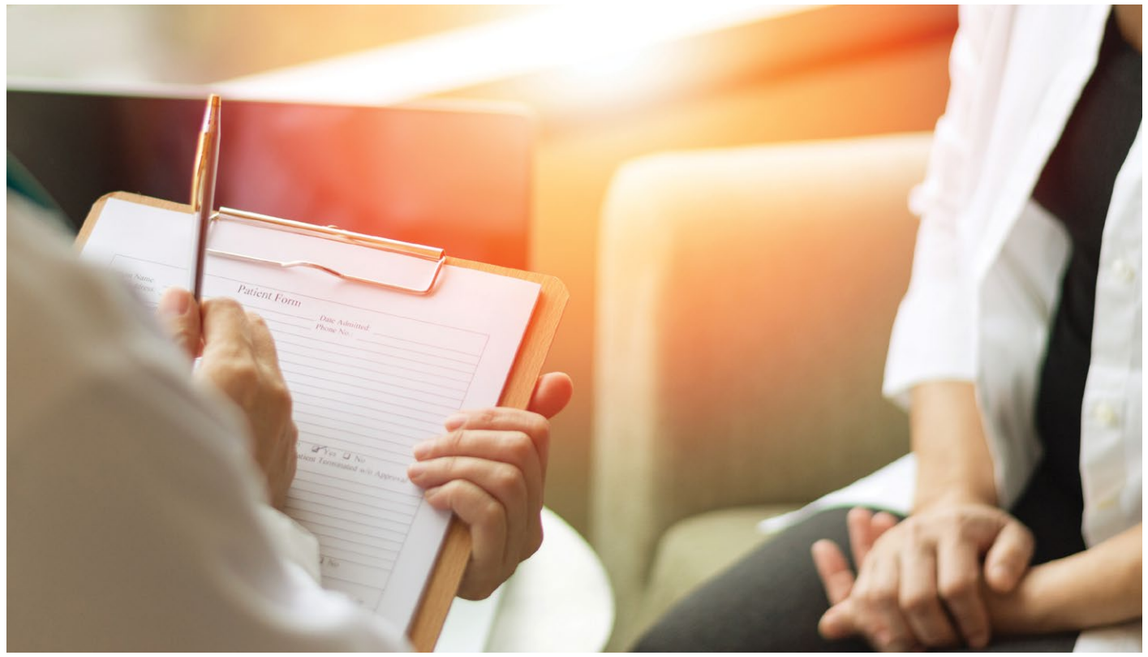
In issue for the Court was the extent of the psychiatric illness suffered by Ms Sorbello, its consequences and the appropriate measure of damages to compensate her for this condition.

The contest at first instance focused on the extent Ms Sorbello's psychiatric illness diminished her past and ongoing earning capacity and her need for treatment, past and future. A key argument was whether Ms Sorbello had a residual earning capacity and had made a choice not to return to paid employment after the birth. The Trial Judge considered that while there was a theoretical residual earning capacity, no evidence had been led by SWS Health about what work was available that would meet her capacity and, on that basis, a full award for future economic loss was made.

The appeal

SWS Health appealed the award of damages to Ms Sorbello on two bases. First, it challenged the Trial Judge's acceptance of the expert opinion evidence of Ms Sorbello's psychiatrist and psychologist over that of SWS Health's psychiatrist as to the cause of Ms Sorbello's condition. Second, SWS Health asserted that the Judge was in error in assessing Ms Sorbello's residual earning capacity by placing the onus on SWS Health to establish what employment remained open to her. Further, it was contended by SWS Health that the Judge ought to have taken the approach outlined in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 (*Malec*), which concerns the assessment of the chance that circumstances other than the Defendant's negligence would, in any event, have brought about the injury of which the Plaintiff complained.

The Court was satisfied that the Trial Judge was not in error in accepting the opinions of Ms Sorbello's psychiatrist and psychologist over that of SWS Health's psychiatrist. It considered that SWS Health had not advanced sufficient reasons to prefer the opinion of its psychiatrist, particularly given that the balance of the evidence did not support that opinion. The Court ultimately agreed that SWS Health's expert did not appreciate the magnitude of Ms Sorbello's psychiatric injuries.



Further, the Court affirmed the approach taken by the Judge in assessing future economic loss—once a loss of earning capacity has been established by a plaintiff, the onus of demonstrating a failure to exploit any residual earning capacity lies on the Defendant, taking into account all of the circumstances that apply to the Plaintiff. No error was demonstrated by SWS Health in this regard.

The Court held that assessment on *Malec* principles was not appropriate as there was no dispute that SWS Health's negligence was the cause of Ms Sorbello's condition and it was not part of SWS Health's case that there was a chance that Ms Sorbello would, without SWS Health's negligence, have suffered a disabling psychiatric injury in any event.

The Court of Appeal also discussed the Trial Judge's reliance on lay evidence, which had been adduced to support the proposition that Ms Sorbello was incapable of working due to her psychiatric condition. It held that such evidence could be led and needed to be considered in conjunction with the rest of the evidence from Ms Sorbello and the expert witnesses. As such, the appeal was dismissed and SWS Health was ordered to pay Ms Sorbello's costs.

Implications

The Court confirmed that a Trial Judge may properly rely on lay evidence as part of the assessment of whether a person is psychiatrically capable of working and that once a plaintiff has established a loss of earning capacity, the onus of demonstrating a failure to exercise any residual earning capacity lies with the defendant.

It is important for defendants to appreciate the onus they are required to meet to rebut an argument that a full award for economic loss should be made even in cases where a theoretical residual earning capacity appears to exist. The Court of Appeal agreed with the Trial Judge that Ms Sorbello's hyper-vigilant state and ongoing stress about her child was such that her ability to participate in any paid employment would be highly dependent on a supportive employer with very flexible work practices. Absent any cogent evidence from a defendant about the availability of such employment, such claims for complete economic loss are likely to succeed in proceedings of this nature.

Recent developments

There have been a range of recent legal developments that affect decision-makers in insurance organisations, self-insureds and reinsurers.

Shift in assessment of professional misconduct behaviour

A recent decision in New South Wales indicates courts and tribunals are shifting their view on professional misconduct. The determining factor appears to be the extent to which conduct falls substantially below the standard of care and whether that conduct warrants suspension or cancellation of a practitioner's registration.

Trends in Victorian general damages awards

Victorian courts have traditionally been quite conservative when awarding general damages, however recent decisions suggest they are becoming more generous when awarding these sums. Now the gap between Victoria and New South Wales is closing rapidly in this space.

Queensland personal injury claim decisions

Two decisions in Queensland last year could potentially impact defendants and insurers in future personal injury claims—the outcomes highlight some important lessons for considering economic loss assessments.

A review of the Return to Work Scheme

The *Independent Review of the Return to Work Act 2014* provides significant retrospective analysis of the scheme's operation as well as recommendations for the continued, sustainable operation of the scheme in the future.

Customer safety beyond the four walls

Did you know that retailers have a duty of care for customer safety, even once they've left the store? This has been reiterated when a customer was injured while collecting an item from a loading bay in Western Australia.

Commonality and relatedness

Despite having their principal argument rejected, insurers have been successful in arguing that the wrongful acts that gave rise to a series of claims lacked sufficient commonality and relatedness to be considered as "a series of related wrongful acts" as required by the policy aggregation clause.

About the contributors

Kerri Thomas, Partner
Kerri's professional indemnity expertise spans professionals in the health, allied health, insurance, construction and engineering sectors. She is regularly singled out in local and international guides as being one of the country's leading insurance lawyers.

Patrick McGrath, Partner
Patrick is a highly experienced insurance lawyer and litigator who helps insurers, underwriters and insureds to resolve claims across a broad range of products.

Colin Pausey, Consultant
Colin works with life insurers and accident and health underwriters, advising on claims issues, policy wordings and compliance-related issues. He has operational management experience and has acted on behalf of insurers, reinsurers and brokers.

Jehan Mata, Special Counsel
Jehan is an experienced insurance litigator with a strong background in professional indemnity, professional negligence, casualty line and health law claims. She is passionate about health law, medical and professional ethics, and legislative and contractual interpretation.

Ryan Lee, Special Counsel
Ryan is an experienced insurance lawyer and litigator with a primary focus on professional indemnity and product liability litigation.

Want to know more?

sparke HELMORE LAWYERS

To find out more about ways we can help you, please contact one of our insurance partners:

Adelaide

Michael Dwyer | t: +61 8 8415 9820 | e: michael.dwyer@sparke.com.au
Julie Kinnear | t: +61 8 8415 9823 | e: julie.kinnear@sparke.com.au

Brisbane

Kevin Bartlett | t: +61 7 3016 5084 | e: kevin.bartlett@sparke.com.au
Kiley Hodges | t: +61 7 3016 5007 | e: kiley.hodges@sparke.com.au
Yvette McLaughlin | t: +61 7 3016 5072 | e: yvette.mclaughlin@sparke.com.au

Canberra

Maxine Feletti | t: +61 2 6263 6338 | e: maxine.feletti@sparke.com.au
Stuart Marris | t: +61 2 6263 6301 | e: stuart.marris@sparke.com.au
Kent Owen | t: +61 2 6263 6305 | e: kent.owen@sparke.com.au
Catherine Power | t: +61 2 6263 6373 | e: catherine.power@sparke.com.au

Darwin

Colin Davidson | t: +61 8 8963 5687 | e: colin.davidson@sparke.com.au

Melbourne

James Johnson | t: +61 3 9291 2354 | e: james.johnson@sparke.com.au
Adrian Kemp | t: + 61 3 9291 2342 | e: adrian.kemp@sparke.com.au
Patrick McGrath | t: + 61 3 9291 2369 | e: patrick.mcgrath@sparke.com.au
Kerri Thomas | t: +61 3 9291 2305 | e: kerri.thomas@sparke.com.au

Newcastle

Greg Guest | t: +61 2 4924 7674 | e: greg.guest@sparke.com.au

Perth

Piet Jarman | t: +61 8 9492 2277 | e: piet.jarman@sparke.com.au
Belinda Michalk | t: +61 8 9288 8007 | e: belinda.michalk@sparke.com.au
Garry Nutt | t: +61 8 9492 2269 | e: garry.nutt@sparke.com.au
Rani Aria Retnam | t: +61 8 9492 2266 | e: rani.ariaretnam@sparke.com.au
Chris Rimmer | t: +61 8 9492 2288 | e: chris.rimmer@sparke.com.au

Sydney

Robyn Brewster | t: +61 2 9373 3546 | e: robyn.brewster@sparke.com.au
Malcolm Cameron | t: +61 2 9373 1485 | e: malcolm.cameron@sparke.com.au
John Coorey | t: +61 2 9260 2461 | e: john.coorey@sparke.com.au
Gillian Davidson | t: +61 2 9373 3535 | e: gillian.davidson@sparke.com.au
Mark Doepel | t: +61 2 9260 2445 | e: mark.doepel@sparke.com.au
Kerry Haddock | t: +61 2 9260 2437 | e: kerry.haddock@sparke.com.au
Ian Jones | t: +61 2 9260 2693 | e: ian.jones@sparke.com.au
Julian McGrath | t: +61 2 9260 2527 | e: julian.mcGrath@sparke.com.au
Larissa Mepstead | t: +61 2 9373 1428 | e: larissa.mepstead@sparke.com.au
Kristina Miller | t: +61 2 9260 2688 | e: kristina.miller@sparke.com.au
Joanne Palamara | t: +61 2 9373 3569 | e: joanne.palamara@sparke.com.au
Wes Rose | t: +61 2 9260 2769 | e: wes.rose@sparke.com.au
Renée Sadler | t: +61 2 9260 2731 | e: renee.sadler@sparke.com.au
Matthew Seisun | t: +61 2 9260 2699 | e: matthew.seisun@sparke.com.au
Jesse Webb | t: +61 2 9373 3504 | e: jesse.webb@sparke.com.au
Chris Wood | t: +61 2 9260 2765 | e: chris.wood@sparke.com.au

www.sparke.com.au

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