# Insurance Matters

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# IN THIS ISSUE



If you have any questions or suggestions about *Insurance Matters* contact the editor, Chris Wood on +61 2 9260 2765 or chris.wood@sparke.com.au

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## Chris Wood

Editor-in-chief

National Practice Group Leader, Commercial Insurance

Welcome to the 13th issue of *Insurance Matters*. I hope you enjoy the new look and feel of this issue—we're changing it up and I'd like to hear what you think about it.

This month we look at who is responsible for employee fraud—the employer or the client who has been fooled. We also learn more about Global Insurance Law Connect (GILC), which Sparke Helmore joined in February 2019, and chat with Gillian Davidson, Sparke Helmore Partner and GILC Asia Pacific Board Representative.

Is legal professional privilege both a shield and a sword at common law? The argument on this topic between Glencore and the Australian Taxation Office went all the way to the High Court, following the release of the "Paradise Papers".

The reliability and credibility of plaintiffs was up for discussion in the Victorian Courts, with defendants finding that their claims needed to be backed up by comprehensive medical reports and surveillance materials. We also look at a significant judgment by the New South Wales Court of Appeal involving historical child abuse allegations in circumstances where a fair trial was not possible.

Finally, we look at climate and class actions and consider who bears the cost when natural disasters strike.

We hope you enjoy the new and improved *Insurance Matters* and if there are any topics you'd like to see covered in future publications, please send me an email at *chris.wood@sparke.com.au*.

*Chris Wood, National Practice Group Leader, Commercial Insurance, Sparke Helmore Lawyers*

WGEA Employer of Choice for Gender Equality

*Image: Crowd of people walking on busy city street, photo by R.Classen.*

# WHEN EMPLOYEES GO ROGUE

## A refresher on vicarious liability for fraud

*Written by Malcolm Cameron, Partner and*
*Jon Tyne, Senior Associate based in Sydney*

Employee fraud is an unavoidable fact of life, affecting the smallest of small enterprises to multinationals. Companies routinely purchase fidelity cover to protect themselves from direct theft of money or goods. But there is another risk, which might not be so obvious—the risk that a rogue employee will defraud a third party who then seeks to recover from the employer (or its insurer).

*Image: Protection system digital artwork, by vs148 vector artist.*


*Image: Private investigator files, photo by Olivier Le Moal.*

The problem with fraudsters is that, as well as lacking a serviceable moral compass, they are often also very bad at managing their own finances. Many fraudsters spend their ill-gotten gains almost as quickly as they receive them and may have little to no assets on hand. In fact, most of the fraudsters who seem to come into contact with the legal system are problem gamblers. This can mean that attempts to recover from the wrongdoer directly can be drawn out, counterproductive and often fruitless.

When an employee steals directly from his or her own employer, the loss is borne either by the business or by a fidelity insurer. But what if the employee manages to persuade a genuine customer to part with their funds? Who bears the loss—the employer, or the client who has been fooled?

One solution for the defrauded party may be to try to recover from the fraudster's employer. Recovery is possible where the employer is held vicariously liable for its employee's fraud.

Professional indemnity policies typically include cover for claims by clients arising from employee fraud, while management liability insurance may provide some limited cover (such as defence costs) for corporate employers.

An employer can be held liable in these situations despite knowing nothing about the employee's fraud. It does not even matter if the employee has engaged in conduct that their employer specifically prohibited. When considering cases such as this, the court has the unenviable task of determining which of two innocent parties—one that has been defrauded and the other who happened to employ a fraudster—should bear the resulting loss.

## When is an employer vicariously liable?

"Vicarious liability" is the name that the law gives to the concept of one person being made responsible for the conduct of another person, even if the first person has themselves done nothing wrong. Generally speaking, an employer is vicariously liable for the acts of an employee if those acts take place in the course of employment.

Sometimes those principles are easy to apply: where an employed accountant gives negligent accounting advice, then the accounting firm will be liable.

But in cases involving fraud, what the employee does is a crime. It is clearly not within the scope of an employee's duties to steal from a client or to dupe them out of their money.

The courts have developed some principles to deal with that situation. In the leading case of *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [81], the High Court held that the relevant approach to determining whether an employer should be liable for the criminal acts of its employee was to *"consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim"*.

> "Consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim."

The Court emphasised the distinction drawn in earlier cases between the employer providing merely an "opportunity" for the criminal conduct (which would not give rise to vicarious liability) and an "occasion" for that conduct (which would). The Court said that factors that could be taken into account in determining vicarious liability included the authority, power, trust, control and the ability to achieve intimacy with the victim, which the employer had granted to the employee.

Where employees are given express authority to interact directly with clients without proper oversight, the employer will usually be bound by any transactions which are entered into. In a decision handed down shortly before *Prince Alfred College, Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* [2016] FCAFC 78, the employer was a mortgage originator. The rogue employee was a manager responsible for client services. Over several years, without the knowledge of her employer, the employee made numerous transactions on customer loan accounts—redrawing small amounts from loans that had been paid down by customers. Importantly, the employee had previously been authorised by her employer to process customer redraws (for legitimate purposes) and was been equipped with access to, and knowledge of how to use, the systems used to do this. Also, as a manager responsible for other staff, the employee had additional authority and access. The employer was held liable for the employee's fraud.

In *Pioneer*, it appears the fraud could have been detected by the employer at any time had it reviewed daily transaction records and matched these against valid customer requests. The fraudster succeeded over a long period by taking advantage of a flaw in the company's systems and audit practices.

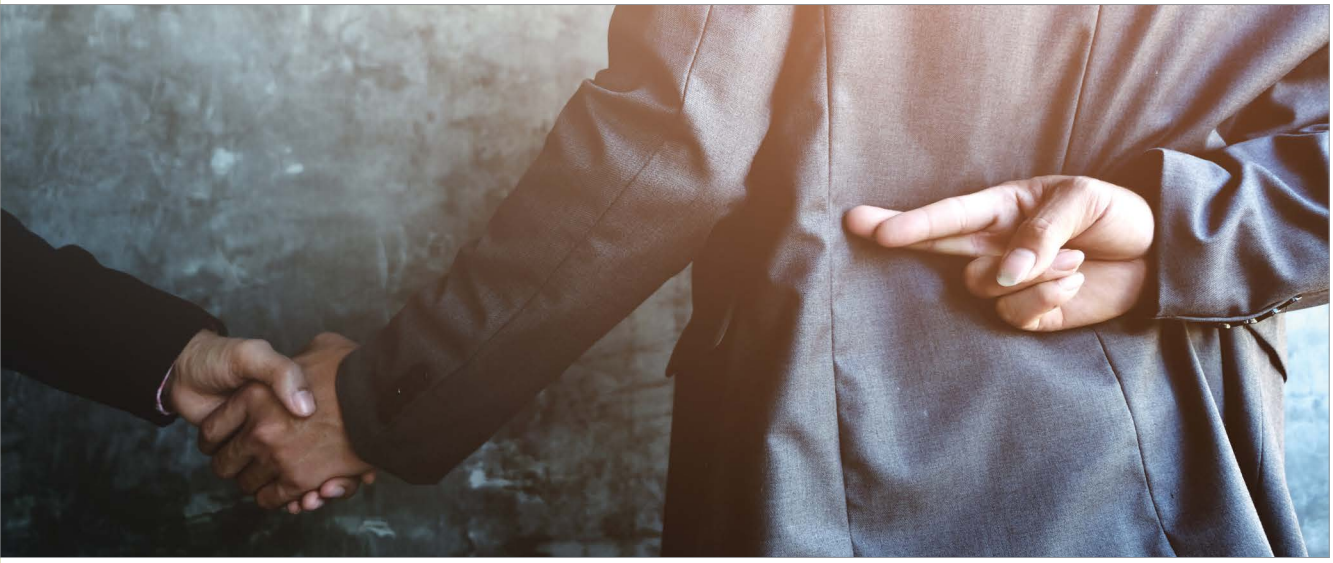

*Image: Concept for betrayal, photo by Seamind.*

## Ostensible authority

An employer can also be held liable for their employees' misconduct where the employee enters into a transaction with a third party, apparently on behalf of the employer, even if the employee did not in fact have that authority. "Apparent" or "ostensible" authority is a relationship between (for example) an employer and a third party created by a representation, made by the employer, that an agent (such as an employee) has its authority to act. This representation acts as an estoppel binding the employer to the actions of the agent.

In *Wilh. Wilhelmsen Investments Pty Ltd v SSS Holdings Pty Ltd* [2019] NSWCA 32, an employee placed orders for 197 mobile phones (worth nearly $190,000) with a longstanding supplier, purportedly on behalf of his employer. But the employer had not authorised the purchase, so was surprised when the supplier began demanding payment. The employee (who presumably made off with the phones) had taken steps to conceal the fraud, such as by manipulating the employer's internal email system so that any invoices issued by the supplier would be redirected to an address that only he could access. The employee was also able to send emails impersonating other employees, such as accounts staff, to cover up what he had done. Despite this, the Court held that the employer was bound to pay for the mobile phones the employee ordered.

Key factors in the decision included the informal ordering practices, which had arisen over a number of years between the supplier and the employer. There was no standard process for ordering, and orders were often made by simple email requests without any formal documentation. While specific individuals within the employer had formal authority to make purchases on its behalf, in practice others (without formal authority) were sometimes nominated to do so or to act as contact people for the supplier made orders on their behalf. The rogue employee had, himself, been designated as a contact person for some of the legitimate orders. The supplier had understandably assumed that the employee had his employer's authority to make the purchase he did, and the Court agreed it should be bound to pay.

## What insurers need to know

Companies that do not properly supervise employees in their dealings with clients and others may find themselves responsible for their employees' misconduct, even if it is criminal. It is not enough to have an internal policy that defines employee authority and prohibits misconduct, if there are insufficient checks in place to ensure it is being applied consistently.

For insurers investigating indemnity and liability, close attention needs to be paid to how vicarious liability is said to arise and the steps the insured actually took. This may mean reviewing a course of conduct between the insured and the third party over time, as well as the insured's internal oversight and audit practices. Where insurance is available, the insurer may also have a role to play in recovering losses from the fraudster or even others who may have been at fault.

> "Vicarious liability" is the name that the law gives to the concept of one person being made responsible for the conduct of another person.

# THE BEST OF BOTH WORLDS

## Sparke Helmore and Global Insurance Law Connect

Sparke Helmore joined Global Insurance Law Connect (GILC) in February 2019. As the sole Australian representative firm, joining such a pre-eminent network makes a powerful statement about the firm's focus on and commitment to the insurance sector. Being part of this group gives Sparke Helmore the ability to connect its clients with like-minded and high-performing organisations in key jurisdictions, with the member firms united by a common foundation of meeting client demand for creative and commercial outcomes alongside a shared dedication to innovation.

To tell us more about Sparke Helmore's involvement with GILC and the benefits it brings to clients of the firm, we caught up with Gillian Davidson, Partner and GILC Asia Pacific Board Representative.

*Image: Gillian Davidson, Partner, Commercial Insurance and GILC Board Representative for Asia Pacific*

**Why did Sparke Helmore become a member of GILC? What specific firm and/or market dynamics were driving the decision? What makes GILC different from other networks—and was that a factor in the decision-making process?**

For some time Sparke Helmore had been grappling with the issue of how do we, as a committed national law firm, ensure we are able to provide services to our global clients.

In the Commercial Insurance space, the vast majority of our major strategic and key clients are global. GILC presented us with an opportunity to combine our depth of insurance expertise with the reach of its global network.

It's also true that we recognised and respected the significant impact of the globalisation of law firms. As our competitors increasingly became global firms we needed to have an answer to that and not simply allow them to take up the space. So joining GILC provided us with an answer to our clients to say we are not a global law firm but yes, we have global connections. In fact, with the robust admission criteria applied by GILC, we know we're working with the "best of the best" when it comes to insurance law.

In doing the analysis of whether we should join GILC, when we ran through the list of clients and the strategic interest areas of the firms across the network we just kept ticking boxes. And when we looked at what its strategic objectives were, we could see that these were also aligned with Sparke Helmore. Ultimately it was an easy decision for us.

GILC's focus on insurance is a strength, which combined with the special interest groups the network has established means that we can contribute our local insights, add the insights of our global members and then shape and deliver smart solutions in those areas for our clients.

**You're on the GILC Board as Asia Pac representative. Tell me about the role. What sort of initiatives will you be championing?**

Being in that role requires me to attend two board meetings per month—one is for the network board meeting and the second is for the regional members. My biggest challenge is to remember that often at 9pm I have to make a phone call and attend a board meeting!

The primary strategy is working out ways we can collaborate with the key clients

identified from across the network as well as building the special interest groups. The Board spends some time considering how the powerful insights these groups produce can be leveraged and rolled out across the network.

**With Australia continuing to see Asia as a growth opportunity, both inbound and outbound, what sort of initiatives will be on your agenda to foster relationships across Asia?**

We are focused on building out the network in the Asia Pacific area and expect to see new members join over the next year.

The Asia Pacific group is concentrating on how to firstly, build the network and secondly respond to the issues in the region. We are looking at producing an emerging market report and participating in conferences with clients at key locations throughout the region.

**Closer to home, what do you see as the key issue/s facing the Australian insurance industry?**

The GILC Risk Radar report is the network's most recent "leading thinking" initiative and provides a fascinating snapshot of the issues facing the global insurance market. We identified three areas in Australia that we believe are having the greatest impact on this market—building and construction risk, climate risk and liability of directors.

Interestingly the most common issue throughout the global network is the impact of regulation on the insurance industry. Seeing that regulatory impact is a cause of discussion and concern from India to Italy to Taiwan and knowing that the situation is similar in this country, particularly post the Hayne Royal Commission, is both insightful and reassuring.

The other consistent theme that I see from the report and which certainly comes up in our discussions as a network, is the war for talent. The insurance industry requires large numbers of engaged, highly trained people in it and ensuring that the best people are able to participate in the sector is a challenge for many markets around the world including Australia.

> "With the robust admission criteria applied by GILC, we know we're working with the *best of the best* when it comes to insurance law."

# CLIMATE AND CLASS ACTIONS – WHO BEARS THE COST?

*Written by James Clohesy,*
*Senior Associate based in Sydney*

Fire, tempest, flood, earthquake; natural disasters are part of life in Australia. The 2018 World Disasters Report released by the International Federation Red Cross and Red Crescent Societies estimated that natural disasters in Australia over the past 10 years have resulted in a US$27 billion damage bill (A$39.73 billion).[1]

The instance of natural disasters is only increasing.[2] The burden of this is being acutely felt by the insurance industry. As at August 2019 the Insurance Council of Australia had released figures that put the claims cost at A$2.51 billion across the February 2019 floods in Townsville and severe hail in Sydney in 2018.[3] The director of the Climate and Energy Program at the Australia Institute, Richie Merzian, has publically expressed concern that the increased instance of natural disasters in Australia may lead to premiums becoming prohibitively expensive.[4] To manage this, do first party insurers spread their risk by looking to third party claims?

The obvious mode to conduct such recoveries is by class action litigation. The instance of class actions in Australia has increased over recent years, particularly following the High Court endorsing contingency fee arrangements for litigation funders in *Fostif's* case.[5] While shareholder class actions make up the bulk of class actions, class action activity around natural disasters is by no means novel.

Class actions are common in the case of bushfires. However, avenues for recovery in the case of bushfires can be difficult. The 2014 ACT Bushfires decision held that agencies responding to bushfires do not owe a duty to prevent the spread of the fire, and at any event, statutory intervention of the *Civil Liability Act 2002* and *Rural Fires Act 1997* (NSW) offers substantial protection.[6] Similarly, recent decisions in Victoria[7] and Western Australia[8] have found that the imposition of a private common law duty for those affected by bushfires would conflict with the statutory regimes in which energy distributors operate. Relying on well-established principle,[9] the courts refused to recognise a duty of care to prevent ostensibly healthy trees from striking lines or to inspect power poles generally. As such, there was no right of action against the energy distributors.

1 *https://media.ifrc.org/ifrc/world-disaster-report-2018/*
2 *https://www.climatecouncil.org.au/wp-content/uploads/2019/02/Climate-council-extreme-weather-report.pdf*
3 *https://www.insurancecouncil.com.au/media_release/plain/534*
*https://www.insurancecouncil.com.au/media_release/plain/516*
4 *https://www.abc.net.au/news/2019-02-06/could-climate-change-make-australia-uninsurable/10783490*
5 *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] HCA 41. Funding and management of class actions against that background has been the subject of the ALRC Report tabled on 24 January 2019; Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders
6 Electro Optic Systems Pty Ltd v State of New South Wales; West & Anor v State of New South Wales [2014] ACTCA 45
7 *Block v Powercor Australia Ltd* [2019] VSC 15
8 *Daniel Herridge & Ors v Electricity Networks Corporation T/As Western Power* [No 4] [2019] WASC 94
9 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [126] per Gummow J, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [146] - [147] per Gummow & Hayne JJ, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 at [52], [75] per Gummow, Hayne & Heydon JJ, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [203] per Kirby J

*Image: Concept of climate change, photo by Sepp.*

These decisions follow settlements of actions against energy distributors in New South[10] Wales and Victoria[11] where those defendants made no contribution to the settlement (albeit bearing their not insignificant costs). Conversely, contractors to whom energy distributors delegate responsibility for inspection of trees[12] or power poles[13] have either contributed to settlements or sustained adverse judgments. Indeed, in the Western Australian Parkerville Bushfire action, a home owner was found liable on the basis that they did not detect termite damage to a power pole when the pole fell and started a fire.

While the risk of proliferation and ignition of bushfires is increased by climate based changes, those catastrophes uniquely lend themselves to class action litigation given intervention by humans has the ability to prevent the disaster itself (i.e. removing the ignition source). The position is more difficult with floods, cyclones and earthquakes. Actions are less likely to involve a question of causing the catastrophe, but rather the failure of steps that were taken to mitigate the effects or spread of such a catastrophe.

An example of this is the concurrent Queensland flood class actions of *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority* and *Lynette Joy Lynch v Queensland Bulk Water Supply Authority* litigated in the NSW Supreme Court. The plaintiffs in those actions allege that the negligent operation of the Wivenhoe and Somerset dams in the lead up to and during the 2011 flood significantly contributed to the extent and the level of flooding downstream of the dams. In turn, the plaintiffs say this created a flood that was much worse than it would have been if the dams had been operated competently. The matter has been heard and judgment is presently reserved. This action demonstrates that human intervention in the management of natural disasters means that the increase in climate based natural disasters is not only a risk for first party insurers, but third party insurers who bear the ultimate financial burden of their insured's conduct.

The Government is, as always, an insurer of last resort. As mentioned in the July 2019 GILC Risk Radar, France and Norway are both exploring the best methods of managing catastrophe cover; with Norway introducing a Natural Perils Pool with parallels to the Australian Terrorism Reinsurance Scheme. But even if the introduction of a Reinsurance Scheme aids to partially relieve the burden on first party insurers, class actions are here to stay and the risk profile of third party insurers will continue to develop on that basis.

10 *Eades v Endeavour Energy* – Mt Victoria Class Action. A prior settlement of the Winmalee/Springwood Class Action saw insurers being reimbursed ~1-6% of losses incurred with a payment of $18m.
11 *Hawker v Powercor Australia Limited* - Gnotuk Bushfire Class Action
12 The Mt Victoria Class Action saw the contractor contribute to a settlement.
13 *Herridge* at n 8 above.

*Image: Bush fire, burning grass and small trees, photo by Dmitry Sedakov.*

GLOBAL INSURANCE LAW CONNECT

Global Insurance Law Connect—Global Insurance Law Connect is a formal network of leading insurance law experts with its formation inspired by client demand. The network is comprised of like-minded and high-performing independent firms from across the globe that specialise in insurance law.

# NO LUCK IN PUTTING THE PRIVILEGED CAT BACK IN THE BAG

*Written by Julie Kinnear, Partner based in Adelaide*

Glencore took its fight with the Australian Tax Office (ATO) over the use of documents stolen by hackers from Bermuda law firm Appleby to the High Court and lost. In a unanimous judgment by the High Court, Glencore's attempt to keep the ATO from using hacked documents invoking legal professional privilege was rejected.

In 2017 the International Consortium of Investigative Journalists revealed more than 13 million leaked files, referred to as the "Paradise Papers". The files documented the use of complex offshore structures in tax havens, such as Bermuda, to avoid tax by international companies and some of the world's wealthiest people. More than half of the leaked documents were taken from Appleby. Documents revealing Glencore's use of currency swaps to divert millions of dollars through tax havens were released and made public, eventually making its way into the hands of the ATO. The leaked documents included legal advice provided to Glencore by Appleby that would ordinarily be protected by legal professional privilege.

Glencore sought the return of the documents from the ATO, which was refused. Glencore sought an injunction to restrain the ATO from using the documents and for an order for the delivery of the documents on the basis that the legal professional privilege still attached to the documents and there had been no waiver of privilege.

Legal professional privilege has, to date, always been considered in the context of a common law immunity from compulsory production of documents. Glencore was asking the High Court to recognise legal professional privilege as a common law right sufficient of itself to generate a positive remedy, such as an injunction, and, in an appropriate case, potentially also damages. That is, for legal professional privilege to be both a shield and a sword.

The ATO maintained that privilege is merely a right to resist compulsory disclosure. Once disclosure has occurred, it was no longer a question of privilege but of admissibility, as counsel for the ATO put it "privilege entitles one to refuse to let the cat out of the bag; once it is out of the bag, however, privilege cannot help to put it back".

Glencore in its submissions did not assert that the Commissioner intended to use the information to make an

assessment that was adverse or incorrect. The High Court considered it particularly problematic that if the injunction Glencore sought was granted, the ATO would be required to assess the Australian entities in the Glencore group "on a basis which may be known to bear no real relationship to the true facts".

The Court in rejecting Glencore's argument, said that Glencore was not seeking the development of the settled principles of legal professional privilege but were rather seeking "to transform the nature of privilege from an immunity to an ill-defined cause of action which may be brought against anyone with respect to documents which may be in the public domain".

The Court noted that once privileged communications had been disclosed, a party could look to equity for protection, such as an injunction on the ground of confidentiality, or expansion of other areas of law such as tort of "unjustified invasion of privacy". "But if there is a gap in the law, legal professional privilege is not the area which might be developed in order to provide the remedy sought."

## What does this mean for you?

The ATO has raised concerns about the misuse of claims of legal professional privilege to resist the production of documents to the Commissioner, with a recent article in the *Australian Financial Review* reporting that one in five major audits by the ATO were complicated by blanket claims of legal professional privilege over tens of thousands of documents.

This decision paves the way for the ATO (and other regulators) to use stolen privileged material which has been made public in their investigations and assessments. The Law Council of Australia and the Australian Bar Association are reported to be in discussions with the ATO to develop a new protocol to protect privilege claims.

Until then, if stolen privileged communications have entered the public domain, legal professional privilege will not get the cat back in the bag.

*Image: The double exposure image of the hacker using a laptop, photo by Preechar Bowonkitwanchai.*

# THINK TWICE BEFORE ATTACKING PLAINTIFFS' CREDIBILITY

Defendants' lawyers are always looking to challenge the reliability and credibility of plaintiffs. However, two recent personal injury cases in Victoria may take the wind out of defendants' sails.

## ***Qayom v Kylamanda Investments Pty Ltd (trading as Xanadu Playcentre & Cafe)* [2018] VCC 1675 *(Qayom)***

In 2014, Mr Qayom attended the Xanadu Playcentre with his wife and two daughters where he injured his neck and spine and sustained psychological injury as a result of trying to 'rescue' his daughter from a platform.

Mr Qayom contacted the Xanadu Playcentre to make an insurance claim. He discussed a similar incident that had occurred the day prior with staff and returned to the Xanadu Playcentre to record a conversation to obtain evidence.

At trial, the Xanadu Playcentre admitted liability and the only issue was the assessment of damages. Mr Qayom sought compensation totalling $1.6 million.

The Xanadu Playcentre submitted damages should be assessed between $460,000 and $510,000 and attacked Mr Qayom's credibility alleging:

- he fabricated the story about another incident the day before (as no such incident occurred)
- sought financial recompense within a short time, proving his purpose was for financial gain rather than concerns about public safety, and
- exaggerated the extent of his injuries and was putting on a performance.

Ultimately, the Court accepted that Mr Qayom was credible and awarded him a sum of $1.37 million. The Court accepted that:

- a similar incident did happen a day before
- Mr Qayom was no more compensation-focussed than any other injured plaintiff and just because he sought compensation promptly did not undermine his credibility, and
- the medical evidence presented did not contain any suggestion of exaggeration.

## ***Quilligan v Copyshift Group Pty Ltd* [2018] VSC 784 *(Quilligan)***

In 2016, Copyshift Group Pty Ltd (Copyshift) purchased rolls of plastic wrap from Melbourne Packaging Supplies Pty Ltd, which engaged Swift Transport Services (Swift) to collect the rolls and deliver them to Copyshift. Mr Benjamin Callos was the delivery driver engaged by Swift.

John Quilligan, Copyshift's Head of Sales and Business and also a Director of the company, claimed that he sustained an injury after a forklift ran over his feet, which caused a micro-abrasion that became infected—leading to an infection in the bone and the resultant amputation of his lower right leg. Mr Quilligan is a blind

diabetic with significant pre-existing pathology, including being diagnosed with Charcot's Foot syndrome. Mr Quilligan was granted leave to proceed without having obtained a Serious Injury Certificate because he suffered a life threatening condition unrelated to the proceeding.

There were competing accounts of what happened on the day of the incident with substantial key differences between Mr Quilligan's and the Defendant's accounts. Ultimately, the Court accepted Mr Quilligan's recollection of the incident. Nevertheless, Mr Quilligan ultimately failed to establish that the incident caused the injuries.

The Court found that there was no connection between the incident and the blister or the blister and the infection. The injury was not considered work-related and his Serious Injury Application was dismissed.

## What does this mean for you?

These judgments are reminders that Victorian Courts' inclination start from the position that the plaintiff is a credible witness. If defendants do intend to attack a plaintiff's credibility, this decision needs to be backed up by comprehensive medical reports and surveillance materials to substantiate their assertions.

*We would like to acknowledge Brydee Hodgson for her contributions to this article.*

*Written by Kerri Thomas, Partner and Jehan Mata, Special Counsel both based in Melbourne*

*Image: Forklift putting cargo to truck, photo by Andrei Mayatnik*

# HISTORICAL ABUSE: WHEN A FAIR TRIAL ISN'T POSSIBLE

*Written by Catherine Power, Partner and Nikolas Willing, Senior Associate based in Canberra*

*Image: Portrait of a child, photo by Altanaka.*

In a reminder of the frailties of a case based on events alleged to have occurred many years ago, the New South Wales Court of Appeal has delivered a significant judgment for claims involving historical child abuse allegations in *Moubarak by his tutor Coorey v Holt* [2019] NSWCA 102—demonstrating that a defendant may escape liability where it can be shown that a fair trial isn't possible.

However, caution should be exercised in applying the decision because of the particular circumstances the Court of Appeal dealt with.

## Background

Ms Holt brought a civil claim against her uncle, Mr Moubarak, for common law damages from four sexual assaults alleged to have occurred in 1973 or 1974 when she was 12 years old.

Before 2016 it wasn't possible for Ms Holt to bring her claim. In that year, s 6A was introduced to the *Limitation Act 1969* (NSW), removing the limitation period for claims that relate to personal injury as a result of child abuse. Ms Holt first reported the assaults to a friend in 1987, but took no action

*Image: Briefing for Court Appeal, photo by Sharomk.*

about them until discussions with her GP in 2013, psychologists in 2015, and reporting the assaults to police in 2015.

After proceedings commenced, Mr Moubarak sought a permanent stay or indefinite pause to the claim on the basis that a fair trial would not be possible. It was common ground that Mr Moubarak had advanced dementia and could not participate in the proceedings. Mr Moubarak had moved to a nursing home in 2014, at the age of 85. A legal guardian and financial manager was appointed to Mr Moubarak, and he also ran Mr Moubarak's defence.

The primary judge in the District Court did not consider the circumstances of the case were sufficiently exceptional to warrant a permanent stay. Mr Moubarak challenged that decision in the Court of Appeal.

## Appeal decision

The lead decision was given by President Bell who found that a permanent stay was warranted. His Honour outlined some broader concepts (more likely to be applicable to other claims), summarised as follows:

- In his defence, Mr Moubarak had appropriately recognised that abuse survivors often take decades to understand and act on the harm arising from abuse. It was important to remember that this concept does not make the passage of time irrelevant when assessing whether a claim should be permanently stayed.
- The public interest in removing the limitation period for claims relating to historical sexual assault/abuse does not prevent permanent stays. There may be cases where a permanent stay would be appropriate even if a limitation period applied but had not expired.
- The availability of "forensic steps" at trial (such as cross-examination of the claimant) cannot make up for a situation where a defendant is "at all relevant times utterly in the dark about the allegations made against him and quite unable to give instructions in relation to them".
- Unfairness to a defendant does not imply any wrongdoing on the claimant's part by bringing the claim years after the abuse. One of the consequences of removing a limitation period altogether is that a

claimant is allowed to take this approach, although obviously with the possibility that a fair trial cannot occur.

- The Defendant was never confronted with the Plaintiff's allegations before the onset of dementia.
- Unfairness to a defendant does not imply any wrongdoing on the claimant's part by bringing the claim years after the abuse. One of the consequences of removing a limitation period altogether is that a claimant is *allowed* to take this approach, although obviously with the *possibility* that a fair trial cannot occur.

The particular features that warranted the permanent stay according to President Bell were:

- the Defendant was never confronted with the Plaintiff's allegations before the onset of dementia
- the Defendant had advanced dementia before the assaults were reported to police
- the Defendant had advanced dementia at the commencement of the civil claim
- there were no eyewitnesses
- the Defendant was unable to give instructions to lawyers to file a defence, or during trial
- the Defendant could not give evidence at trial
- the alleged events occurred 45 years ago (although noting that "this fact alone would…be unlikely to warrant a permanent stay"), and
- there was no documentary evidence to affect the likelihood of whether the assaults occurred.

The decision of Bell P was briefly added to by Justice of Appeal Leeming and Acting Justice of Appeal Emmett who both agreed with her Honour's conclusions. The proceedings were permanently stayed.

## Key points

This decision is relevant to most cases of historical sexual abuse, including historical child abuse, mostly in instances where the defendant is a natural person who, medically (or presumably otherwise) is unable to participate in the claim process and is not made aware of the claim at a time when they could have participated.

However, particularly for matters involving *institutional* child abuse, caution should be exercised in applying the Court of Appeal's dramatic conclusion. President Bell made it clear that the simple passing of time (even at 45 years) was *unlikely* to be sufficient to grant a stay. Justice of Appeal Leeming also commented that the "distinction between a trial being necessarily unfair and a trial which is so unfairly and unjustifiably oppressive as to constitute an abuse of process, is no doubt a fine one."

Also, in most institutional claims the defendant is the institution rather than the alleged perpetrator. Institutions cannot develop dementia. It is possible that an analogous scenario might exist (such as the destruction of documents combined with the death of an alleged perpetrator), but that is not entirely clear from the Court of Appeal's decision in this case.

*Images: Arrangement of photos depicting abuse, dementia and court, from Shutterstock.*

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