**RECENT CASE LAW UPDATES**

WIRO Seminar

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**The risk of advising not to settle**

***Kendirjian v Lepore* [2017] HCA 13 (and *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572)**

1. The High Court recently confirmed that advocate's immunity does not extend to advice given in relation to a settlement offer, because the advice does not affect the judicial determination of the case.

2. Advocate's immunity protects lawyers (or advocates) for work done:

    a. in court; or

    b. out of court, but which is intimately connected with work in court or leads to a decision affecting the conduct of a case.[1]

3. The rationale for advocate's immunity is that it is necessary to ensure the finality of court proceedings, as it prevents re-litigation of decided cases via collateral attacks on the reasoning and judgements given in those cases.

4. In *Attwells* case, the court held that advice given by an advocate in relation to a settlement was not protected by advocate's immunity because the advice simply lead to a settlement, and not the exercise of judicial power.

5. However, *Attwells* case did not specifically deal with the issue of whether advocate's immunity applied in the circumstances where a settlement offer had been rejected resulting in the need for a judicial determination. Arguably, advice to reject a settlement offer was advice that was connected with work in court and affected the conduct of the case.

[1] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [45].

6. This issue was dealt with by the High Court in *Kendirjian*.

    a. Mr Kendirjian was injured in a car accident in 1999. He commenced proceedings against the other driver involved. Liability was admitted.

    b. On the first day of the trial, the other driver's legal representatives made a settlement offer to Mr Kendirjian's legal representatives (solicitor and barrister) in the amount of $600,000 plus costs. The settlement offer was rejected and the matter proceeded to trial.

    c. During the trial surveillance evidence was admitted and Mr Kendirjian's credit was substantially damaged.

    d. Mr Kendirjian obtained a judgement for around $300,000 plus costs.

7. Mr Kendirjian brought proceedings against his legal representatives, asserting that they had been negligent in advising him in relation to the settlement offer. In particular, Mr Kendirjian alleged that the legal advisors did not tell him about the amount of the settlement offer, but only the fact that an offer had been made and that it had been rejected because it was *"too low."*

8. Both the District Court on the Court of Appeal dismissed Mr Kendirjian's claim on the basis that the lawyers' conduct was protected by advocate's immunity.

9. The High Court overturned the Court of Appeal's decision finding that legal work claimed to be protected must bear upon the court's determination of the case in that there must be a *"functional connection"* between the work of the advocate and the actual determination of the case.[2] The giving of advice needed to cease or to continue litigating does not itself affect the judicial determination of the case.

10. *Kendirjian* and *Attwell* are important reminders for all personal injury and workers compensation practitioners – offers must be clearly communicated and advice must be given that is accurate and objectively reasonable. This is particularly the case where

[2] *Kendirjian* at [31] – [32].

settlement negotiations result the compromise of statutory rights under workers compensation legislation.

11. It is essential to provide clients with early and accurate advice about liability and quantum. It is also prudent to obtain written instructions either accept or reject settlement offers that are *"within range*."

**Insurer's fight to bring exempt workers into the 2012 amendments**

***State of NSW v Stockwell* [2017] NSWCA 30 (and *New South Wales v Chapman-Davis* [2016] NSWCA 237)**

12. Schedule 6 of the *Workers Compensation Act 1987* (**the 1987 Act**) provides a specific exclusion from the 2012 amendments to police officers, paramedics and firefighters. Clause 25 of Schedule 6 provides:

> **25 Police officers, paramedics and firefighters**
>
> The amendments made by the 2012 amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.

13. Historically industrial courts have addressed the issue of whether an employee is covered by an industrial instrument, by making an assessment of the *"principal purpose"* of their role and the duties undertaken.[3]

14. However, in *New South Wales v Chapman-Davis* [2016] NSWCA 237 the Court of Appeal held that whether a worker is exempt from the 2012 amendments turns on whether a person held the designation or status of police officer, paramedic or firefighter at the date of his or her injury – the purpose/function of the role being performed by the worker was not a relevant consideration.

[3] *Brand v APIR Systems Limited*, PR938031 Giudice P, Marsh SDP, Thatcher C, 16 September 2003; *Carpenter v Corona Manufacturing Pty Ltd* (2002) 122 IR 387.

15. In *Stockwell*:

a. The worker was employed as an Ambulance Officer Grade 2. The worker's employment was covered by the *Operational Ambulance Officers (State) Award 2006* (**the Award**). The Award provided that persons employed in this classification were required to undertake instruction and certification examinations as required by the employer.

b. In 1996, 1998 and 2000 the worker suffered back injuries in the course of his employment.

c. As a consequence of the injuries from 2001 the worker was redeployed as an Operations Centre Officer. This was consistent with the Award which provided that the Ambulance Officer Grade 2 classification would remain a source of alternative duties for injured officers requiring rehabilitation. Work as an Operations Centre Officer involved coordinating ambulances, assessing the level of ambulance officer required to respond to emergency calls and giving first-aid advice over the telephone.

d. Whilst working in the operations centre, the worker's relevant qualifications lapsed and were not renewed. The qualifications were not required to perform the non-active operations centre tasks.

e. The worker suffered a psychological injury as a result of the operations centre work with the deemed date of injury of 31 January 2007.

f. In 2008 the Workers Compensation Commission (**WCC**) made findings about the worker's psychological injury and made an award for the payment of weekly compensation on the basis of total incapacity.

g. In March 2013 the employer's insurer purported to issue a notice pursuant to section 54 of the *Worker Compensation Act 1987* (**the 1987 Act**) (notice required before termination or reduction of payment of weekly compensation) containing a

> *"transitional work capacity decision".* The notice stated that the worker had been in receipt of weekly payments in excess of 260 weeks and that as weekly payments are only payable after 260 weeks if the worker had no capacity for work and had permanent impairment of more than 20% WPI, he had no entitlement to ongoing weekly payments.

16. The matter progressed through the WCC where the arbitrator found that the worker to be exempt from the 2012 amendments because he was a paramedic and fell within the clause 25. The decision was upheld by the President.

17. On appeal, the employer argued that the President erred in law by failing to find that the worker was a not a paramedic within the meaning of clause 25 because he was had not been recertified on the deemed date of his injury. The employer argued that the worker had lost his status as a *"paramedic"* because he failed to undertake the relevant courses and examinations to maintain his qualifications as an active ambulance officer, therefore he was not excluded by clause 25. The employer argued that the fact that the employer continued to employ the worker and pay him as if he was an Ambulance Officer Grade 2 was not relevant – what was relevant was that he did not hold the mandatory qualifications.

18. The Court of Appeal reviewed the terms of the Award and found that there was no provision to indicate that a failure by a worker to undergo refresher courses and examinations did not mean that he or she failed to be a *"paramedic"* under the Award:

> [76] The proviso imposed a requirement that an ambulance officer had to undertake the courses and complete the examinations to which it refers…it does not explicitly state the consequences of the officer's failure to do so.
>
> [77] Further, the SNSW's contention that such a failure meant an employee lost their classification as an Ambulance Officer Grade 2, in my view, is an improbable consequence in the context of a negotiated industrial agreements such as industrial award.

19. This matter turned on the Court of Appeal's interpretation of the Award, which was construed beneficially.

20. However, a different very result may have eventuated had it not been for the terms of the Award and the interpretation given to them by the Court of Appeal.

21. Industrial awards (and enterprise agreements) can be of great utility in personal injury matters, particularly in disputes concerning the quantification of past and future economic loss.

**Work capacity, study capacity and suitable employment**

***Wiech v Aldi Stores* [2017] NSWCCPD 19 (5 May 2017)**

22. This matter concerned the quantification of weekly compensation, and in particular the WCC's assessment of the worker's residual earning capacity.

23. Section 32A sets out the definitions of *"current work capacity"* and *"suitable employment"* as follows:

> *"current work capacity"*, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.
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> *"suitable employment"*, in relation to a worker, means employment in work for which the worker is currently suited:
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> (a) having regard to:
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> (i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
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> (ii) the worker's age, education, skills and work experience, and
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> (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
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> (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
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> (v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of:

(i) whether the work or the employment is available, and

(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker's pre-injury employment, and

(iv) the worker's place of residence.

24. The worker suffered a psychological injury and an award was made for weekly payments. After reviewing the evidence, the arbitrator found the worker had a *"current work capacity"* to work 30 hours per week as a librarian.

25. The arbitrator's findings were based on a report from Dr Lee (medicolegal psychiatrist).

    a. Dr Lee recorded that the worker had told him that she felt too scared to return to work due to headaches and fluctuating severe depressive episodes, on good days that she could do light housework and that she believed she could cope with less stressful work, for example in a library.

    b. The worker also told Dr Lee that she was studying a mental health diploma part-time online between 10 and 20 hours per week *"with many breaks"*.

    c. Dr Lee opined that the applicant was fit for restricted duties commencing at about three hours per day in an alternate location such as in the library.

26. On the basis of Dr Lee's report the arbitrator found that the worker was fit to work 15 hours per week in an alternate location such the library, but that the capacity to work as a librarian must be seen in addition to the applicants studying which has been some 10 to 20 hours per week. The arbitrator used the mid figure, being 15 hours. The arbitrator therefore found that the applicant had capacity to work 30 hours per week as a librarian (i.e. $900 per week).

27. The worker appealed alleging, amongst other things, that the arbitrator erred by finding that part-time study, which she had undertaken online should be seen as *"in addition"* to her capacity to work.

28. President Judge Keating accepted this submission on the basis that there was no evidence to support the inference that time spent studying at home was notionally equivalent to an ability to return to the workforce working in a library.

29. President Judge Keating observed:

> Dr Lee acknowledged that Ms Wiech was undertaking studies at home and was coping provided she took *"many breaks"*. Noting that to be the case, he opined that Ms Wiech was fit to return to duties in a non-stressful job such as in a library commencing at 15 hours per week. He did not opine that Ms Weich was fit to work 30 hours per week. The arbitrator's conclusion to that effect was an error…Time spent studying in the privacy of one's home when the hours of study may be spread out or punctuated with *"many breaks"* is quite a different proposition to undertaking permanent employment for the equivalent number of hours. If the respondent's submission is accepted, the graduated return to work would commence at 30 hours per week, almost the equivalent of full-time work.

30. The President found that Ms Wiech was fit to resume work, during the relevant period, working in a suitable stress environment, such as a library for 15 hours per week. The effect of this decision was that the award for weekly payments in favour of the worker increased from $429.61 per week to $879.61 per week.

**When can a matter be referred to an AMS?**

***Favetti Bricklaying Pty Limited v Benedek and Anor*** **[2017] NSWSC 417**

31. The facts in *Favetti* were as follows:

    a. The worker was injured in 2005.

    b. In 2008 a complying agreement under section 66A of the 1987 Act was entered into. The agreement noted the worker has suffered 14% WPI.

c. In April 2015 the worker's solicitor wrote to the insurer making a further claim for WPI, based on a report of Dr Patrick. The worker sought a concession from the insurer that the level of WPI now exceeded 15%.

d. The insurer denied liability asserting that the injury particularised (an injury to the thoracic spine, which had not been previously accepted) was not related to employment. The section 74 notice relied on sections 4 and 9A. The insurer relied on a report of Dr Cassikar who formed the view that the workers condition was due, in the main, to degenerative disease of the lumbar spine and diabetes.

e. The worker's solicitors served an application for assessment of the worker's injury by an Approved Medical Specialist (**AMS**).

f. The insurer submitted that the WCC had no power to refer the matter to an AMS, relying on section 321(4)(a) of the WIM Act.

g. Notwithstanding the insurer's submissions, the WCC refer the matter to an AMS.

h. The insurer appealed to the Supreme Court, seeking a declaration that the referral to the AMS was invalid and an injunction preventing the WCC from making the referral until such a time that liability had been determined.

32. This matter concerned the proper construction of section 321 of the WIM Act, and in particular whether there was a limitation on the power of the Registrar to refer a medical dispute concerning the degree of WPI of a worker for assessment in the circumstances where there was an issue of liability which had not been determined.

33. Section 321 provides:

> 321 Referral of medical dispute for assessment
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> (1) A medical dispute may be referred for assessment under this Part by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute. The Registrar is to give the parties notice of the referral.
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> (2) The parties to the dispute may agree on the approved medical specialist who is to assess the dispute but if the parties have not agreed within 7 days after the

dispute is referred, the Registrar is to choose the approved medical specialist who is to assess the dispute.

(3) The Commission may not refer for assessment under this Part a medical dispute concerning permanent impairment (including hearing loss) of an injured worker.

(4) The Registrar may not refer for assessment under this Part:

(a) a medical dispute concerning permanent impairment (including hearing loss) of an injured worker where liability is in issue and has not been determined by the Commission, or

(b) a medical dispute other than a dispute concerning permanent impairment (including hearing loss) of an injured worker, except when dealing with the dispute under Part 5 (Expedited assessment).

34. Having reviewed the interrelationship between sections 313, 314 of the WIM Act (threshold disputes) and section 319 and 321 (powers of the Registrar), the Supreme Court determined that the plain text of section 321(4)(a) did not allow the Registrar to determine that the matter should be referred to an AMS.

35. Further, the Supreme Court held that the construction contended for by the worker would lead to perverse results, for example the District Court would be asked to determine a work injury damages claim on the basis of an AMS certificate (MAC) in the circumstances were liability for part of the degree of permanent impairment was disputed. According to the Supreme Court, the construction of section 321(4)(a) advanced by the insurer recognised the obvious – that the existence of a compensable injury is a fundamental prerequisite to any liability for work injury damages.

**Limitations to MAC appeals**

***Ivaneza v Dalsil Constructions Pty Ltd* [2017] NSWSC 218 (9 March 2017)**

36. In *Ivaneza* the worker sought judicial review of the medical assessment certificate (MAC), asserting that there has been an error of law.

37. This matter had an interesting background:

    a. The worker suffered an injury to his neck, back and left shoulder whilst working as a carpenter at a building site in late 2011.

    b. A medical dispute arose (as defined in section 319 of the WIM Act) and in June 2013 the matter was referred to an AMS.

    c. In July 2013 the AMS produced a MAC determining that the applicant suffered 5% WPI.

    d. In October 2013, the proceedings were settled by way of consent order (clause 15.9 of the *Workers Compensation Rules 2011*), which resulted the payment of lump sum compensation.

    e. In 2016 the worker commenced judicial review proceedings seeking to set aside the MAC and an order remitting the matter back to WCC for referral to another AMS to determine the matter according to law. The primary basis of the worker's submission was that the AMS had made a demonstrable error by failing to give adequate reasons for his decision, particularly in relation to assessment of left and right shoulder injuries.

38. After considering the terms of the MAC, the Supreme Court (Button J) found that the AMS had applied logical reasoning which was readily able to be derived from the MAC and was legally adequate.

39. Further, the Supreme Court found that because there were no proceedings on foot between the parties, and no claim made by the plaintiff on foot, it was not appropriate to make an order referring the matter for further assessment. This was because there was no medical dispute with regard to which an assessment could be made pursuant to section 327.

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