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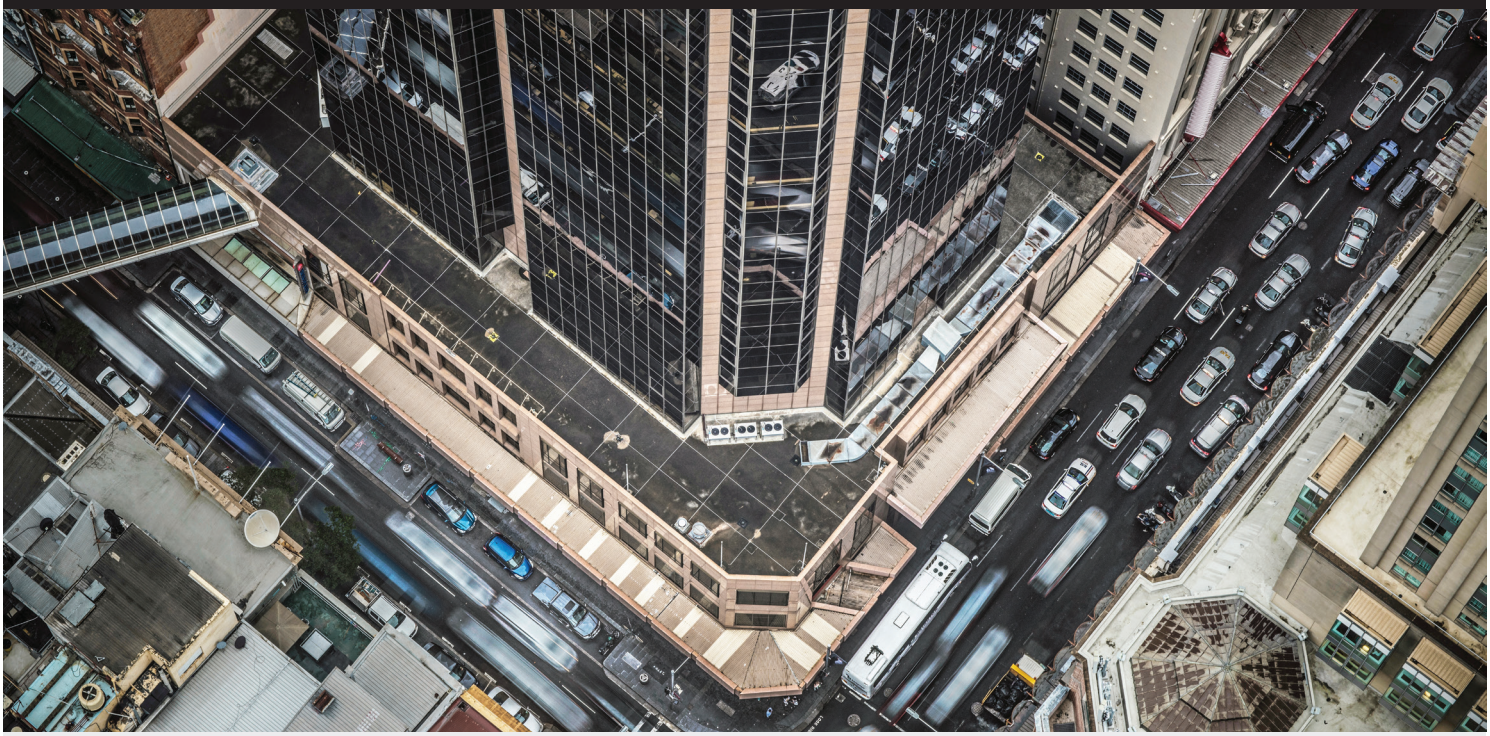

LEGISLATIVE DEVELOPMENTS

- 2018 Workers Compensation Amendments

RECENT DECISIONS

- **Court of Appeal NSW Supreme Court Decision**

Pacific National Pty Ltd v Baldacchino (2018) NSW CA 281

- **Defendant fails to satisfy evidentiary onus - Police Officer entitled to CTP damages**

Parrish v Olympic Roadways Pty Ltd and Broome

TurksLegal will be presenting an in-house seminar on the latest changes to the workers compensation scheme in early 2019.

Click here to register your interest

We would like to take this opportunity to wish all clients a safe and merry festive season!

LEGISLATIVE DEVELOPMENTS

2018 Workers Compensation Amendments

Link to website

The commencement date for the remaining amendments regarding PIAWE (Preinjury average weekly earnings), weekly compensation, and work capacity disputes will be 1 January 2019.

PIAWE will be calculated on the basis of a worker's weekly gross earnings for work in any employment, averaged over the period of 52 weeks prior to the injury. There will no longer be a need to separately identify special allowances and overtime payments. However, non-monetary benefits (previously non-pecuniary benefits) will have to be identified.

An employer and employee will be able toagree on the PIAWE, subject to any requirements contained in the regulations.

Special provisions will apply to calculating PIAWE for apprentices, young workers, and workers with fewer than 52 weeks continuous employment.

Reviews of work capacity decisions made by insurers will no longer be required to be referred to WIRO and SIRA. Instead reviews/ appeals will be referred to the Workers Compensation Commission which will become the 'one-stop shop' for dispute resolution.

All of the changes are expected to be incorporated into the TurksLegal Online Guide in the first week of January 2019.

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RECENT DECISIONS

Court of Appeal NSW Supreme Court Decision

Pacific National Pty Ltd v Baldacchino (2018) NSW CA 281

Link to decision

Mr Baldacchino injured his left knee in the course of his employment in 1999. The injury eventually required Mr Baldacchino to undergo a total knee replacement. The employer disputed the claim and the worker filed an Application to Resolve a Dispute.

At the initial hearing, Arbitrator Harris held that the surgery was reasonably necessary with respect to the work related injury to the left knee. He also found that the time limits contained in section 59A (1) and (2) of the 1987 Act were not applicable due to a total knee replacement being an *artificial aid* in accordance with section 59A(6)(a) .

The employer appealed from the arbitrator's decision that was then confirmed by Deputy President Snell.

An appeal was then brought from the Presidential decision that a total knee replacement was not subject to the limitations contained in sections 59A of the Act as it involved the provision of an *artificial aid*, within the meaning of section 59A(6)(a) of the Act.

The appellant argued that the Deputy President had incorrectly held that a total knee replacement was an *artificial aid* within the meaning of section 59A(6)(a). In the alternative, the appellant argued that if any compensation was payable then it was in respect of the cost of the materials used in the knee replacement operation and not the cost of the surgery itself.

The Court held that the Deputy President had not erred in finding that a total knee replacement was an artificial aid within the meaning of the section. It was also noted that the Deputy President did not err in his reference to the case of *Thomas v Ferguson Transformers Pty Ltd* (1979) 1 NSWLR 216.

The Court also did not accept that only the cost of materials required for the knee replacement surgery should be covered (as opposed to the surgery itself). The Court considered that the total knee replacement surgery was an *artificial aid* and fell within the meaning in section 59A(6)(a).

Macfarlan JA held that artificial aids must *work to ameliorate the effect of a person's disability and may comprise a single object or a composite of objects operating together. However a knee replacement has these characteristics.* Macfarlan JA stated that the surgery involved the ends of the femur and tibia being replaced with an introduced material and a piece of plastic being inserted between the bones as reconstructed.

The provision of those could not occur without a surgical operation and therefore the operation itself was found to also fall within the statutory provision.

Macfarlan JA considered that there was no reason why an artificial aid could not be internal to the body. He did not accept that the article or object must be complete in itself and indicated that there was no such requirement evident in the statutory words.

With respect to the *Thomas* case, Macfarlan JA stated that this case was a relevant authority despite the changes in legislation since it had been determined in 1979. Macfarlan JA considered that the only *arguably material change in the form of the legislation has been the insertion in it of express reference to "the modification of a worker's home or vehicle" as constituting medical treatment (s 59A (6)(b))*. This change was stated as endorsing the outcome in *Thomas* rather than contradicting it.

The decision of the Supreme Court has significant implications in that while total knee replacement surgery is now clearly considered to be an *artificial* aid it is likely that similar surgical procedures relating to other joints and body parts will also qualify for the same exemption.

Decision Number: (2018) NSW CA 281
Decision Date: 23 November 2018
Decision Maker(s): Macfarlan JA, Payne JA and Simpson JA of the Court of Appeal NSW Supreme Court

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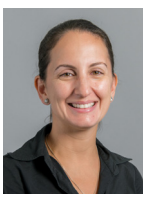

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RECENT DECISIONS

Defendants fails to satisfy evidentiary onus - Police Officer entitled to CTP damages

Parrish v Olympic Roadways Pty Ltd and Broome

Link to decision

The plaintiff was a police officer who suffered physical and psychological injuries on 24 May 2006 in the course of his employment on attending the scene of a single vehicle incident on the Hume Highway near Bargo.

After inspecting the scene, the plaintiff was standing on the road near a truck driver whose vehicle had become jammed against a safety rail. The plaintiff directed the truck driver to move off the road where he was standing being in a position of danger.

At that time, two trucks approaching the accident scene collided causing one of them (the defendant's truck) to hit the rear of a stationary police wagon which became airborne landing on top of the truck driver who died as a result. The defendant's truck continued moving forward and collided with another semi-trailer before then crashing into bushes at the road side.

The plaintiff was able to avoid being struck by the defendant's truck by diving a number of metres to the side avoiding death by a matter of centimetres.

The plaintiff landed forcefully face down on the road on both knees with his chest striking the gravel and rocky road surface.

The plaintiff suffered a hernia, knee injuries and psychological trauma. He underwent surgery in June 2006 and remained off work until November 2006. He had further surgery on his knees in 2008, 2009 and 2011 and had other operations in 2010 and 2012. He was diagnosed as suffering PTSD before being medically retired from the Police Force in February 2011.

The defendants challenged the plaintiff's evidence asserting that despite him being medically discharged he was nonetheless capable of doing other work such as a toll collector (noted by the plaintiff as being a position that was now obsolete) and that he was physically capable of carrying out household chores (denied by the plaintiff).

His Honour found the plaintiff and his wife to be credible and reliable witnesses and accepted their evidence entirely.

His Honour was required to consider the worker's history of injuries sustained as a serving police officer and to review a significant volume of medical records and opinion.

His Honour observed that the medical evidence was to the effect that the plaintiff's past trauma exposures had primed him and predisposed him to developing PTSD in the circumstances of the motor vehicle accident.

The defendants argued that there was a delay in the diagnosis and treatment of PTSD and that this condition was not due to the motor vehicle accident.

His Honour expressed the view that notwithstanding that the plaintiff's prior work and injury history may have rendered him vulnerable to further injury by the occurrence of supervening events, the defendant's must take him as they find him including any underlying predisposition to incur further or aggravating injuries.

After reviewing all of the evidence, His Honour concluded that the defendants had not discharged the evidentiary onus to show that the plaintiff's disabilities were due to underlying causes and not related to the subject injury, taking account of the principles of causation in terms of material contribution as contained in section 5D of the *Civil Liability Act 2002*. Judgment was provisionally entered in favour of the plaintiff for a sum of damages in excess of $3 million subject to the application of section 151Z(2) of the *Workers Compensation Act 1987*. Having regard to His Honour's findings on causation and the circumstances of the accident, it is difficult to envisage how any employer negligence might then be brought into account.

Decision number: [2018] NSWDC 258
Decision date: 20 September 2018
Decision maker: Levy DCJ District Court of NSW

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