PERSONAL INJURY LAW

PRESENTED BY

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AT THE

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INTRODUCTION

The topic that I have been given is a very broad one – "Personal Injury Law". It has been left up to myself to determine what might be of interest to you. By and large but not solely I have endeavoured to deal with cases of interest that have been decided in the course of 2005. Of great significance is the *Civil Liability Act* 2003 and the first few cases are now coming through and I will mention those.

The general topics that I propose to cover are:

- The general provisions of the *Civil Liability Act* relating to the assessment of damages
- Assessment of general damages under the *Civil Liability Act*
- Assessment of damages for lost earning capacity under the *Civil Liability Act*
- Where the *Civil Liability Act* does not apply
- The discount for contingencies under the general law
- Damages pertaining to the cost of managing estates of persons under a disability
- The extension of limitation periods
- The *Sturch v. Willmot* principle
- *Griffiths v. Kerkemeyer* damages
- Psychiatric injuries
- Rules re disclosure of video surveillance
- Expert evidence rules
- Practical advocacy

***CIVIL LIABILITY ACT* – GENERAL PROVISIONS**

1. General matters to note about the assessment of damages for personal injury as affected by the *Civil Liability Act* are:

    - Exemplary punitive or aggravated damages cannot be awarded unless the personal injury complained of was an unlawful intentional act done with the intent to cause personal injury or unlawful sexual assault or unlawful sexual misconduct. (s. 52)
    - The loss of superannuation entitlements is to be determined by applying the minimum percentage required by written law to be paid on the employee's behalf as employer's superannuation contributions to the amount assessed for the deprivation or impairment of the earning capacity to which the entitlement relates (Section 56).
    - The discount rate to be applied for all future losses, including gratuitous services, is 5% (Section 57).
    - Interest cannot be awarded on the payment of awards for general damages (Section 60(1)).
    - The appropriate rate of interest is the rate for 10 year treasury bonds published by the Reserve Bank of Australia under "Interest Rates and Yields – Capital Market" as at the beginning of the quarter in which the award of interest is made which is presently around 2.7% or 2.8%.

    These matters came into force on 9 April 2003.

***CIVIL LIABILITY ACT* – ASSESSMENT OF GENERAL DAMAGES**

2. So far as I can discover, there have been four decisions on the application of the provisions of the *Civil Liability Act* to an assessment of damages for personal injury. Those cases are:

    - *Coop v. Johnston & Suncorp Metway Insurance Ltd* [2005] QDC 79 (24 March 2005) per Britton D.C.J.
    - *Tomlins v. Sheikh* [2005] QDC 175 (16 June 2005) per Tutt D.C.J.
    - *Ballesteros v. Chidlow* [2005] QSC 280 (10 October 2005) per White J.
    - *Morrison v. Hudson* [2005] QSC 290 (14 October 2005) per Cullinane J.

3. The procedure is relatively simple. The steps are these:

    - Section 51 of the *Civil Liability Act* ("*CLA*") defines "general damages".
    - Section 61 provides that if general damages are to be awarded by a court in relation to an injury arising after 1 December 2002, then the court must assess an injury scale value in accordance with that Section.
    - Section 62 of the *CLA* provides for the calculation of general damages in accordance with the formulae there set out.
    - Section 6 of the Regulations prescribes the ranges of injury scale values for particular injuries for Section 61(1)(c)(i) of the Act.
    - Section 6 of the Regulations refers you to Schedule 4 which sets out the various injuries and their injury scale values.
    - Schedule 3 of the Regulations directs the court how to use Schedule 4.
    - Of particular interest will be multiple injuries and Section 3 of Schedule 3 is relevant – it requires the court to consider only the dominant injury of the multiple injuries and permits the court to

assess the ISV in the higher end of the range of ISVs for that dominant injury.

- Section 4 of Schedule 3 is of some importance – the significant provision is Subsection 4(3)(b) which provides that the ISV for multiple injuries "should rarely be more than 25% higher than the maximum dominant ISV".
- Schedule 7 of the Regulation, which is the dictionary, defines "dominant injury" of multiple injuries as the injury having the highest range of ISVs.
- Section 7 of Schedule 3 deals with aggravation of preexisting conditions and requires that the court have regard "only to the extent to which the preexisting condition has been made worse by the injury".
- Section 8 of Schedule 3 refers to other provisions to which the court must have regard when assessing general damages and, in particular, the court must have regard to the provisions set out in Schedule 4 such as examples of injury, examples of factors affecting ISV assessment and the comments about the appropriate level of ISV.
- Section 9 of Schedule 3 permits the court to have regard to other matters that it considers relevant, such as age, degree of insight, life expectancy, pain suffering and loss of amenities and so on.

4. Section 11 of the Regulations is of great practical importance. It provides:

> "*If a medical report states a whole person impairment percentage, it must state how the percentage is calculated, including –*
>
> *(a) the clinical findings; and*
>
> *(b) how the impairment is calculated; and*
>
> *(c) if the percentage is based on criteria provided under AMA5 –*
>
> *(i) the provisions of AMA5 setting out the criteria; and*

> *(ii) if a range of percentages is available under AMA5 for an injury of the type being assessed – the reason for assessing the injury at the selected point in the range.*"

5. You might want to draw the attention of medical practitioners to the note at the bottom of the provision which provides that it is the function of the court and not the medical report to assess the ISV.

6. AMA5 is a reference to the 5th edition of the *Guides to Evaluation of Permanent Impairment* published by the American Medical Association – see the dictionary Schedule 7.

7. In *Ballesteros v. Chidlow* [2005] QSC 280 White J. decided that in order to give effect to Schedule 3 Section 3(2) it was necessary that each injury had to be identified and assessed, even though it might be perfectly obvious which of the injuries is the dominant injury as defined. In the case before her, there were 8 separate injuries and she proceeded to assess each and every one of them. Her Honour accepted that the injuries suffered in the accident were as follows:

    - Grazed left shoulder
    - Bruising to left ankle
    - Bruising to left lower leg
    - Bruising to left hip
    - Bruising to chest and stomach
    - Dental injury (cracked tooth)
    - Cervical spine injury with associated muscle tension headaches, ie whiplash injury

8. It is worth considering the damages awarded as it indicates the dramatic effect that these provisions will have on the item of general damages. The plaintiff was aged 35. Her Honour thought that items 88 and 89 were

relevant but that her injury fell between the two descriptions. 88 was the more serious – "moderate cervical spine injury – soft tissue injury" with the comment being that the injury "will cause moderate permanent impairment, for which there is objective evidence, of the cervical spine" and with the further comment that "an ISV of not more than 10 will be appropriate if there is a whole person impairment of 8% caused by a soft tissue injury for which there is no radiological evidence".

9. Item 89 was "minor cervical spine injury" and the comment being "injuries with this item include whiplash injury with no ongoing symptoms, other than symptoms that are merely a nuisance, remaining more than 18 months after the injury is caused. There will be no objective signs of neurological impairment". The ISV range for item 89 was 0 to 4 and for item 88, 5 to 10. The range of assessments by the medical experts was from 1% (Dr Morgan for the defendant) and 8% (Dr Todman for the plaintiff). Her Honour assessed a notional ISV of 7. To take account of other injuries, including the loss of the tooth and the severe impact which her injuries had on her quality of life, she increased that ISV to 9. She applied the formula in Section 62(b) and came up with general damages of $9,800.00.

10. At common law I have little doubt that a plaintiff with such an injury would receive damages at least in the order of $25,000.00 and perhaps much more.

DAMAGES FOR LOSS OF EARNINGS OR EARNING CAPACITY UNDER THE *CIVIL LIABILITY ACT*

11. Section 54 is relevant and it provides:

> "*(1) In assessing damages for loss of earnings, including in a dependency claim, a court must disregard earnings above the limit fixed by Subsection (2).*
> *(2) The limit is three times average weekly earnings per week.*"

12. The provision repeats Section 51 of the *Personal Injuries Proceedings Act* 2002. The phrase "average weekly earnings" is defined in the dictionary in Schedule 2 as meaning:

> "*The seasonally adjusted amount of Queensland full time adult persons ordinary time earnings as declared by the Australian Statistician in the statistician's report on average weekly earnings, averaged over the last four quarters for which the statistician's report is available.*"

13. There are two ways of looking at Section 54 and the alternatives are best illustrated by an example. Say a plaintiff earns $5,000.00 per week gross and say that the "average weekly earnings" as defined is $2,700.00 gross. And say the court takes the view that it ought to apply a discount of say 20% to allow for contingencies, preexisting problems, residual earning capacity and the like to the earnings figure. Should the court apply that discount to the figure of $5,000.00 which are the actual earnings, thereby reducing the figure to $4,000.00? It would thereby disregard the difference between $4,000.00 and the $2,700.00 average weekly earnings figure and so apply the maximum average weekly earnings figure? Or should the court apply the discount to the $2,700.00 average weekly earnings figure and so come up with a figure of say $2,160.00?

14. PD McMurdo J. was called on to determine the matter in *Doughty v. Cassidy* [2005] 1 Qd.R. 462; [2004] QSC 366. He was applying Section 51 of the *Personal Injuries Proceedings Act* to a plaintiff who was a professional jockey and who had the prospect ob substantial earnings. McMurdo J. held that the

interpretation less advantageous to the plaintiff was the appropriate one i.e. disregard entirely the figure above the defined "average weekly earnings".

15. A further practical matter that you will need to bear in mind and will need to bring to the attention of a trial judge is Section 55(3) which applies to cases when earnings cannot be precisely calculated. The subsection provides:

> "*55(3) If the court awards damages, the court must state the assumptions on which the award is based and the methodology it used to arrive at the award.*"

APPLICATION OF *CIVIL LIABILITY ACT*

16. Section 5 of the *Civil Liability Act* provides that the Act does not apply in relation to certain civil claims for damages. There are four exceptions:

    - An injury as defined under the *WorkCover Queensland Act* 1996 other than a journey claim.
    - An injury under the *Workers' Compensation and Rehabilitation Act* 2003 other than a journey claim.
    - An injury that is a dust related condition.
    - An injury resulting from a smoking or other use of tobacco products or exposure to tobacco smoke.

17. It appears too that if you were injured by Dr Patel at the Bundaberg Hospital and your injury arises out of a breach of duty by him, then the *Civil Liability Act* does not apply or at least so the Premier has announced.

18. All that seems fairly plain. However, a dispute has arisen as to whether the Act applies to those persons who suffer an injury as defined under the *WorkCover Queensland Act* or the *Workers' Compensation and Rehabilitation Act* which is not a journey claim but in respect of which the damages claim is not governed by the provisions of those Acts.

19. That fact situation occurs where a worker is injured in the course of their employment whilst going about their work, for example a courier driver, and is injured by the negligence of a third party driver.

20. The point arises because of the difference between the definition of "injury" in the *Workers' Compensation and Rehabilitation Act* and the *WorkCover Queensland Act* and the definition of "damages" in those Acts. "Damages" is defined in Section 10 of the *Workers' Compensation and Rehabilitation Act* 2003 as:

> "*Damages for injuries sustained by a worker in circumstances creating independently of this Act, a legal liability in the worker's employer to pay damages to –*
>
> *(a) the worker; or*
>
> *(b) if the injury results in the worker's death – a dependent of the deceased worker.*"

21. An injury is defined in Section 32 of that Act as:

> "*(1) An 'injury' is a personal injury arising out of or in the course of employment if the employment is a significant contributing factor to the injury.*"

22. Thus, to be an injury all that you need show is that the injury arises out of or in the course of the employment and the employment is a significant contributing factor. However, to have a right of damages the legal liability must be in the employer to pay damages, in the usual case, to the worker. Where you are injured by the negligence of a third party independently of your employer, such as an oncoming driver on the road, you might well have an injury that arises out of your employment and in respect of which your employment is a significant contributing factor but you will not have a claim for damages and your damages claim will not be governed by the provisions of the *Workers' Compensation and Rehabilitation Act*.

23. There are conflicting decisions as to the resolution of the question of whether the *Civil Liability Act* applies. The decisions are:

- *Newberry v. Suncorp Metway Insurance Ltd* [2005] QSC 210 per Dutney J.
- *King v. Parsons* [2005] QSC 214 per PD McMurdo J.

24. Both cases are on appeal. The argument that McMurdo J. accepted was not put to Dutney J. Essentially, McMurdo J.'s reasoning is that he discerned a legislative intent that all personal injury claims be governed by one legislative regime or another and hence when the *Civil Liability Act* spoke of "an injury as defined" under the *WorkCover* or *Workers' Compensation Act* provisions, it

should be interpreted as an injury as defined and in respect of which damages might be claimed under those provisions.

25. Until the Court of Appeal decides the issue, you can only ensure that you are alive to the point and obviously, if you are for a plaintiff, endeavour to keep the case out of the *Civil Liability Act* regime.

CONTINGENCIES

26. *Murray v. Bluemoon Pty Ltd* [2002] QSC 309 was decided on 8 October 2002. It is a decision of Muir J. It identified no new principle but it highlights something that I think is often overlooked – the fact that there need not be a discount for contingencies in every case.

27. The plaintiff was a 34 year old (when injured) who was a qualified boilermaker that had worked in a number of capacities and, prior to the accident, with a trucking company principally loading pallets onto trucks by means of a forklift. It was a typical case where the injuries restricted the plaintiff to a more sedentary type occupation. Muir J. noted that 15% was sometimes regarded as "conventional" in Queensland (with a reference to *Batiste v. State of Queensland* [2000] QSC) and noting that in New South Wales the usual deduction was 15%; that in Western Australia it was rarely more than 15% and usually between 5% and 10% or, as Professor Luntz suggests, between 2% and 6%.

28. In *Murray v. Bluemoon*, Muir J. did not discount the future economic loss component at all.

29. The leading High Court decision is *Wynn v. NSW Insurance Ministerial Corp* (1995) 184 CLR 485. In the joint judgment of Dawson, Toohey, Gaudron and Gummow JJ. at p. 497 the relevant principle appears:

> "*It is to be remembered that a discount for contingencies or 'vicissitudes' is to take account of matters which might otherwise adversely affect earning capacity and as Professor Luntz notes, death apart, 'sickness, accident, unemployment and industrial disputes are the four major contingencies which expose employees to the risk of loss of income'. Positive considerations which might have resulted in advancement and increased earnings are also to be taken into account for, as Windeyer J. pointed out in Bresatz v. Przibilla ((1962) 108 CLR 541 at 544) 'all "contingencies" not adverse: all "vicissitudes" are not harmful'. Finally, contingencies are to be considered in terms of their likely impact on the earning capacity of a person who has been injured, not by reference to the workforce generally (Lewis v. Todd [1980] 2 SCR 694 at 714;*"

THE COST OF MANAGING ESTATES – *WILLETT V. FUTCHER* [2005] HCA 47

30. For those plaintiffs who suffer catastrophic injury which impairs their capacity to manage their financial affairs, the High Court decision in *Willett v. Futcher* is compulsory reading.

31. It has long been accepted that such a plaintiff is entitled to an amount by way of damages to compensate for the reasonable management fees that their trustee will incur in managing the funds that result from the action. Authority for that proposition can be found in *Campbell v. Nangle* (1995) 40 SASR 161 at 192; *The Nominal Defendant v. Gardikiotis* (1996) 186 CLR 49 and *Mullins v. Duck* (1988) 2 Qd.R. 674.

32. Bear in mind that should the plaintiff be found guilty of contributory negligence, the assessment of the administrative charges payable in respect of the estate are not reduced for that contributory negligence – the charges will be determined in accordance with the award of damages already reduced by the finding of contributory negligence.

33. For those who came in late, there were conflicting decisions in Queensland – or at least that is how it appeared to many of us. The Court of Appeal in *Wills v. Bell* [2002] QCA 419 reversed a trial judge's finding that the only item that could be allowed was the administration fee but not a management fee for managing the fund. White J. was a member of that court and agreed in that decision.

34. The issue came back before White J. in *Willett v. Futcher* - this time as primary judge - and she changed her mind and disallowed the amounts which reflected that extra investment assistance and cost on the basis that they "ought not to be part of the compensation which it a defendant must make an injured plaintiff, even if the injury gives rise to the need for assistance in the management of the fund" at para. [26]. The matter was then

appealed and came before the Court of Appeal as *Willett v. Futcher* [2004] QCA 30. The appellant plaintiff claimed the sum of $713,000.00 odd for damages for fund management – about 20% of the damages awarded of $3.85 million. That amount included the cost of taking independent advice from experts and the cost of ongoing brokerage fees.

35. Thus, in *Wills v. Bell* it seemed that the Court of Appeal had allowed the management fees, but in *Willett v. Futcher* White J. decided that she had been wrong and disallowed that aspect of the management of the fund. White J. concluded that the amount of $180,000.00 should be allowed as damages for the reasonable management fees of administering and managing the compromise sum to be paid by the defendant to the administrator on Ms Willett's behalf. That sum was intended to reflect two categories of charges – an establishment fee and a discretionary portfolio management fee.

36. Four other categories of charge ("advisory portfolio management fee", "fund manager fee", "initial brokerage fee" and "ongoing brokerage fee") were disallowed.

37. White J.'s reasoning was that these fees should be disallowed because "the purpose of investment advice and decision making about investments which concerns the present determination is to maximise the return over and above the amount of compensation awarded which already has an investment strategy inherent in it". Effectively, White J. endeavoured to exclude that proportion of the fees that reflected investment advice.

38. The plaintiff appealed to the Court of Appeal but her appeal was dismissed. She was successful in her appeal to the High Court.

39. The High Court held that no distinction of the kind made by White J. between investment advice and other services should be drawn in assessing the amount properly to be allowed. The High Court identified the central issue

on the appeal as being "what kinds of costs and managing the damages awarded to a person incapable of managing his or her own affairs, whose incapacity was caused by the defendant's negligence, are to be allowed in assessing the damages allowed to that person". The court answered:

> "*An amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund.*" (at paragraph [49])

40. After identifying the usual basic principle regarding damages – namely that the amount awarded should be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she would have been in had the tort not been committed - the High Court then pointed out that the relevant comparison was not between the position of the plaintiff uninjured and the position that the plaintiff would have been in had the disabling injuries not been sustained, but the plaintiff nonetheless had a lump sum to invest. Rather, the comparison is with the position that the plaintiff would have been in without the award of a lump sum for damages. The High Court pointed out that such a comparison as White J. supposed was "irrelevant and inapt". The court held:

> "*In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of the period.*" (paragraph [51])

41. Thus, the High Court's decision effectively is that all fees and charges that are properly incurred can be allowed by way of damages. The twist in the tail – and the complexities that the decision will introduce – is in determining what are proper charges. The High Court pointed out that there were three statutes that were of immediate relevance – the *Public Trustee Act* 1978, the *Guardianship and Administration Act* 2000 and the *Trustee Companies Act* 1968.

42. Most of you would be familiar with Section 59(1) of the *Public Trustee Act*. It provides that the compromise of an action brought on behalf of a person under a legal disability and claiming monies or damages is not valid without the sanction of either the court within whose jurisdiction the matter lies or the Public Trustee. It further provides that no money or damages recovered or awarded are to be paid to the next friend (now the litigation guardian) of the plaintiff or the plaintiff's solicitor or to any person other than the Public Trustee unless the court otherwise directs.

43. When a person is appointed to manage a fund on behalf of a person under a legal disability, then the relevant Act is the *Guardianship and Administration Act* 2000 ("the *Guardianship Act*"). In cases of the type that concern us here, the *Guardianship Act* permits an administrator to be appointed for a financial matter which is defined in Schedule 2 Part 1 Item 1 as "a matter relating to the adult's financial or property matters". The power to appoint an administrator is found at Section 12(1). The *Guardianship Act* gives the power to the guardianship and administration tribunal, however, the court's position is preserved – Section 239 provides that the Act does not effect the Rules of the Supreme, District or Magistrate Courts about a litigation guardian for a person under a legal incapacity; Section 240 provides that the Act does not affect a Supreme Court's inherent jurisdiction including its parens patriae jurisdiction. Section 245 provides that the Supreme or District Courts sanctioning a settlement or ordering money to be paid for the benefit of a person with impaired capacity "may exercise all the powers of the tribunal under chapter 3 of the Act and chapter 3 applies to the court in its exercise of these powers 'as if the court were the tribunal'."

44. For present purposes, Sections 47 and 48 of the *Guardianship Act* are particularly important. Section 47 entitles a guardian or an administrator "to

reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator". Section 48 regulates the remuneration of professional administrators. It provides:

> "*(1) If an administrator for an adult carries on a business of or including administrations under this Act, the administrator is entitled to remuneration from the adult if the tribunal so orders.*
> *(2) The remuneration may not be more than the commission payable to a trustee company under the Trustee Companies Act 1968 if the trustee company were administrator for the adult.*
> *(3) Nothing in this section affects the right of the Public Trustee or a trustee company to remuneration or commission under another Act.*"

45. As the High Court pointed out in *Willett* there are a number of important points to note, they include:

(1) It is necessary for the tribunal to first order that an administrator is entitled to remuneration before the entitlement arises.

(2) The amount of the charge that the administrator can levy is determined in the manner prescribed by the order authorising the administrator to charge – the order must both authorise the making of the charge and the amount of it.

(3) Section 48(2) makes plain that the amount of remuneration that may be allowed is limited to the amount of commission payable to a trustee company under the *Trustee Companies Act* 1968.

(4) The effect of the provisions in Section 245 of the *Guardianship Act* is that, when approving a compromise, the Supreme or District Court may make an order allowing an administrator whose business includes acting as administrator under the Act to charge remuneration and may make an order fixing the amount that is to be charged.

46. The difficulty for the administrator in *Willett* was that no regard was paid to the provisions when formulating the orders of the court – the compromise order did not provide that Perpetual Trustees (the administrator in that case)

might charge remuneration for its services as administrator nor, of course, were those fees fixed.

47. The point of the action before the court was not to fix the amount that Perpetual Trustees should charge but rather to fix the amount of damages that the defendant should pay to the plaintiff.

48. It is necessary then to have consideration of the *Trustee Companies Act* 1968. Part 4 of that Act is relevant (Sections 41-45A). Section 41 authorises a trustee company "in addition to all monies properly expended by the trustee company and chargeable against the estate" to receive a commission at a rate fixed from time to time by the Board of Directors of the company "but not in any case exceeding, after discounting for any GST payable on any supply the commission relates to" 5% of the capital value of the estate and 6% of the income received by the trustee company on account of the estate. Section 43(3)(b) provides that no other charges beyond such commission and monies so expended "shall be made or allowed". The Supreme Court has the power under Section 41(4) to reduce the rate of commission charged if it is considered excessive.

49. One of the items that White J. had decided could not be brought into account in fixing the damages payable by the defendant was the brokerage fees chargeable on transactions. As the High Court observed, such an expenditure incurred by a trustee company would be a sum properly expended and chargeable against the estate under administration.

50. In addition to the monies expended and the commission fee, a trustee company is entitled to charge for certain work and services provided – Section 45.

51. If the Public Trustee is the person administering the fund, then the Public Trustee is authorised by Section 27(4) of the *Public Trustee Act* to charge for

that administration the fees and charges fixed pursuant to that Act. From time to time there is published in the Queensland Government Gazette notice of the fees and charged to be charged by the Public Trustee. The Public Trustee will make these available upon request to the profession.

52. Although no express finding was made, as it was not relevant to that case, the High Court seems to have indicated quite plainly that in *Willett v. Futcher* the amount that would have been allowed had the Public Trustee been made administrator was $969,336.00 (see paragraph [37]).

53. It is evident from the High Court's review of the evidence, which was fairly brief, that the court was unimpressed with the detail of the evidence led – see paragraph [38]-[42].

54. It remains to be seen whether the Queensland legislature will permit the law to remain in its present state – there is a great deal of difference between the $180,000.00 that White J. would have allowed under the "old" system and the nearly $1,000,000.00 that the High Court seemed to think was appropriate under the law as it now stands. Insurance companies will not be pleased.

EXTENSION OF LIMITATION PERIODS

THE HIDDEN POWER OF SECTION 30(1)(b)(ii)

55. Time periods are the bane of any lawyer's life. Sometimes it is essential that they be observed. In a personal injury action, Section 11 of the *Limitation of Actions Act* 1974 prescribes a 3 year limitation period. The period runs from "the date on which the cause of action arose". In a personal injury action, that is the date on which the harm suffered is more than minimal: *Martindale v Burrows* [1997] 1 Qd R 243.

56. The focus of this discussion is on the power to extend the limitation period given by Section 31 of the *Limitation of Actions Act* 1974.

57. Before turning to those provisions, it is worth noting some of the traps that the less experienced may not be aware of concerning the applicability of the 3 year limitation period.

58. Section 11 of the *Limitation of Actions Act* does not apply to a claim for contribution or indemnity between tortfeasors – that is covered by Section 40 of the Act. See *Bargen v. State Government Insurance Office (Queensland)* (1982) 154 CLR 318 and *Unsworth v. Commissioner for Railways* (1958) 101 CLR 73 at 86 and 91.

59. Similarly, an action for damages against a solicitor for negligently failing to institute a personal injuries action in time is not caught by Section 11 – in that case the damage sustained is the loss of the right or chance to recover damages from a defendant. The quantification of the damage is measured by the damages that could have been recovered in the personal injuries action but that does not fall within the terms of the statute. It does not "consist of or include damages in respect of personal injury": *SGIO v. Newton, Bellamy and Wolfe* [1986] 1 Qd.R. 431, 445-446 per McPherson J.

60. It is worth pointing out too that the phrase "negligence, trespass, nuisance or breach of duty" that appears in Section 11 of the Act has been given a wide construction to include all torts. It includes an action *per quod servitium amisit*: *Ure v. Humes Limited* [1969] QWN 25 per Hart J. It includes an action for loss of consortium: *Opperman v. Opperman* [1975] Qd.R. 345.

61. Sections 30 and 31 are the material provisions and I will assume a reasonable working knowledge of the provisions.

62. Section 31(1) explains the sorts of actions to which the provision applies. Namely, those actions that come within Section 11 of the Act and for which a 3 year limitation period is prescribed.

63. To succeed an applicant must show that a material fact of a decisive character was not within the applicant's means of knowledge until a date more than two years after the cause of action arose and not more than one year prior to the determination of the application.

64. The focus of my discussion today is on the trilogy of cases decided by the Queensland Court of Appeal on 17 December 2004:

- *Stephenson v. State of Queensland* [2004] QCA 483;
- *Reeman v. State of Queensland* [2004] QCA 484; and
- *Bougoure v. State of Queensland* [2004] QCA 485.

65. Each of the cases concerned applications by undercover police operatives who alleged that they had suffered psychiatric harm in the course of carrying out their duties.

66. For present purposes, I will use the facts in *Stephenson* as illustrative of the point. Stephenson commenced an action on 20 December 2001. Without an extension of the limitation period he could complain of injury suffered only on or after 20 December 1998. His complaint was that by reason of the work that he performed in 1994 and 1995 as a covert police officer he had become

a heavy user of cannabis and alcohol and eventually he was unable to continue in his work as a police officer. He ceased work as a police officer in May of 2000 and his general practitioner certified him as unfit for work as a result of a breakdown.

67. By the time of the appeal it was common ground between the parties that the plaintiff knew by the end of November 2000 that he was permanently incapacitated for police work. He knew then that he would have to leave the police service. It was clear that the loss of his police career would result in a substantial loss, whether he retired or resigned. It was common ground that although he did not appreciate that his condition would impact on his ability to perform other equally remunerative work outside the police service, he could have easily found that out had he enquired. Thus, the trial judge held that by the end of November 2000 the facts of his condition and its impact upon his earning capacity were within his means of knowledge as were the facts of the defendant's alleged negligence and its causal effect. By November 2000, as the trial judge held, the material facts relating to the right of action which were within his means of knowledge would have shown that an action would have a reasonable prospect of success resulting in an award of damages sufficient to justify it.

68. The argument advanced for the applicant Stephenson was that the limitation should nonetheless be extended because his personal circumstances were such that it was reasonable for him not to commence proceedings before 20 December 2000. The two circumstances argued were that an institution of an action:

(i) would exacerbate his psychiatric condition; and

(ii) might jeopardise his retirement from the police service on medical grounds and so put at risk a potential $270,000.00 benefit.

69. The argument has generated a sharp division of judicial opinion. At first instance Holmes J. in *Reeman* and McMurdo J. in *Stephenson* each thought that such personal circumstances were irrelevant to their decision. On appeal, Chesterman J. agreed. He, however, was in the minority. Davies A.J. and Williams A.J. each thought such circumstances relevant although Williams A.J. agreed substantially with Chesterman J.'s reasoning in dissent. Special leave was granted to appeal to the High Court on 23 June 2005: [2005] HCA Trans 452 in the matters of *Reeman* and *Stephenson.*

70. The critical difference in thinking is at [15] where Davies J.A. held that material facts existing and known before the critical date may become of a decisive character after that date simply because of circumstances emerging after that date (which may or may not relate to the right of action) cause the character of those material facts to so change.

71. His Honour cited the *New South Wales Law Reform Commission Report* at paragraph 297. It is noteworthy that the introductory words of that paragraph are not discussed:

> "*There may be personal reasons for not suing when the apparent injury is small.*"

In *Stephenson* the potential damages for loss of a career in the police force and inability to perform work outside it must be in the hundreds of thousands of dollars.

72. Thus, Davies J.A. held that although the claimant did not learn any new material fact after the critical date, the facts that he did know took on a new character – they became of a decisive character – when his own circumstances changed. That change was the termination of his

employment. The narrowness of the claimant's victory is apparent from the fact that Williams J.A., who sided with Davies J.A. in the result, disagreed fundamentally with Davies J.A.'s reasoning and agreed substantially with that of the dissenting judge, Chesterman J.

73. Williams J.A.'s approach was to hold that the new fact – the termination of employment – was a material fact of a decisive character and so not within the means of knowledge of the applicant until after the critical date – [41].

74. His point of difference with Chesterman J. was that material facts of a decisive character were not limited to facts essential to the existence of a cause of action. It was only necessary that the facts relate to the cause of action. Williams J.A. therefore rejected the reasoning of McMurdo J. at first instance in *Stephenson* where he had held that the only relevant facts were facts which were relevant to the likely outcome of the action. In Williams J.A.'s reasoning, the fact may be decisive because of its impact on the decision whether or not the person ought to sue at a particular time in their own interests [39].

75. Williams J.A. expressly agreed with Chesterman J. in rejecting Davies J.A.'s approach [42]. Re-evaluation of known facts cannot convert facts which had been known for some time into facts of a decisive character [43].

76. Chesterman J. would limit the factors that could be brought into account to those which effect the economic consequence to an applicant from a proposed action – such as whether the amount in issue is too small to bother about, and whether there is a worthwhile cause of action [99].

77. The essence of Chesterman J.'s reasons at paragraph [107]. He held:

> "*There is no warrant, in my opinion, for regarding that subsection [31(2)] as requiring a judgment as to when a reasonable man ought to sue and when he may be excused from not suing by reference to matters other than this knowledge of facts relating to the cause of action. … Section 30(1)(b)(ii) does not confer on a plaintiff a right, acting reasonably, to choose*

> *when he should sue. … It is what he knows about the cause of action that determines whether a fact is of a decisive character.*"

78. It remains to be seen what the High Court will make of all this. For my part, I agree with the reasoning of Holmes J., McMurdo J. and Chesterman J.

79. Finally I will mention the Court of Appeal decision in *Raschke v. Suncorp Metway Insurance Ltd* [2005] QCA 161 (13 May 2005) which I think is important for these reasons:

- It demonstrates the difficulties that can occur where a plaintiff sues an employer but where a vehicle is involved and hence a potential action under the *Motor Accident Insurance Act*.
- It affirms that the material fact of a decisive character that is relied upon need not be one established on the balance of probabilities.
- The defendant's pleading that the incident had occurred by reason of a particular cause of itself suggested there was evidence to support such a hypothesis and is sufficient to convert what to that point might be a "bare possibility" into knowledge of a material fact.
- As well, the pleading by the defendant of a fact is sufficient to enable the plaintiff to satisfy the requirements of Section 31(2)(b), namely that there is "evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation".

***CSR LIMITED V. EDDY* [2005] HCA 64 (21 OCTOBER 2005)**

80. In *Griffiths v. Kerkemeyer* (1977) 139 CLR 161, the High Court held that an injured person may recover from a tortfeasor the commercial cost of domestic services provided to him or her to satisfy a need created by the injury, regardless of whether or not those services are provided gratuitously.

81. *Sturch v. Willmot* [1997] 2 Qd.R. 310 was concerned with the question of whether damages could be awarded to a plaintiff-mother to cover for the cost of care for the plaintiff's children for the period of time after her injury caused death until they no longer required such care. It was conceded by Counsel in *Sturch v. Willmot* that such damages could be awarded up to the date of death but not thereafter. The distinction therefore is between the need of an injured plaintiff for services to be provided **to** the plaintiff and replacement of the provision of gratuitous services provided **by** the plaintiff to another.

82. Such a claim had been rejected in New South Wales in *Burnicle v. Cutelli* [1982] 2 NSWLR 26 and in Western Australia in *Maiward v. Doyle* [1983] WAR 210. *Burnicle v. Cutelli* was later reversed in New South Wales by a five bench Court of Appeal in *Sullivan v. Gordon* (1999) 47 NSWLR 319. Since *Sullivan v. Gordon* Western Australia has reversed its position: *Easther v. Amaca Pty Ltd* [2001] WASC 328 and *Thomas v. Kula* [2001] WASCA 362. South Australia has taken the opposite view: *Weinert v. Schmidt* (2002) 84 SASR 307.

83. The High Court has now determined that there is no validity to the claim: *CSR Limited v. Eddy* [2005] HCA 64 (21 October 2005).

84. The important thing to note from the decision is not that no claim can be made but rather that the claim that can be made must fall into the component of general damages and not as an item of special damages to be

calculated separately. As the majority judgment put it (Gleeson C.J., Gummow and Heydon JJ.) at [39]:

> "*The substantive issue is, assuming impairment of capacity, how the damages for that impairment are to be assessed. The question is whether there are good legal reasons to select as the basis of calculating damages for the plaintiff's impaired capacity to care for others sums which those others would have to pay in the market to get the same care.*"

85. It is necessary to note Section 59(3) of the *Civil Liability Act* 2003. It provides:

> "*Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.*"

86. That subsection plainly assumes that the common law allows for damages to be awarded for such gratuitous services.

87. The effect of *CSR Limited v. Eddy* is that damages are not to be awarded for gratuitous services provided by an injured person to anyone whether inside or outside the household.

88. Some will argue that Section 59(3) should be construed as meaning that damages are to be awarded for non-gratuitous services replacing services provided by an injured person or that would have been provided by an injured person if the injury had not been suffered and some will argue that the subsection authorises damages to be awarded for gratuitous services provided by an injured person within the home.

89. These arguments are unlikely to be successful. The majority judgment characterised the provision as one which "simply limited the common law rule".

90. For practical purposes such claims are now gone.

***GRIFFITHS V. KERKEMEYER* DAMAGES**

91. In *Griffiths v. Kerkemeyer* (1977) 139 CLR 161, the High Court held that an injured person may recover from a tortfeasor the commercial cost of domestic services provided to him or her to satisfy a need created by the injury, regardless of whether or not those services are provided gratuitously.

92. In *Van Girvan v. Fenton* (1992) 175 CLR 327, the High Court affirmed the view expressed by Steven and Mason JJ. in *Griffiths v. Kerkemeyer* that the true basis of the claim was the need of the plaintiff for the services. The important point was that the plaintiff did not have to show that the need was or might be productive of financial loss. It is authority for the proposition that the plaintiff's damages are not to be determined by reference to the actual cost to the plaintiff of having the services provided or by reference to the income foregone by the provider. Rather, the damages are determined by reference to the cost of providing those services generally in the marketplace.

93. In *Kars v. Kars* (1996) 187 CLR 354, the High Court held that a tortfeasor's liability to pay damages for gratuitous future care to be given to an injured plaintiff is not reduced because the tortfeasor, rather than a third party, is likely to provide that care.

94. Then in *Grincelis v. House* (2000) 201 CLR 321 the High Court held that in respect of *Griffiths v. Kerkemeyer* type damages it was appropriate for interest to be allowed effectively at a full commercial rate. The effect of these decisions has alarmed insurers. There has been a legislative response.

95. To claims of such damages generally Section 59 of the *Civil Liability Act* applies. It provides:

> "***59 Damages for gratuitous services***
>
> *(1) Damages for gratuitous services are not to be awarded unless—*
>
> *(a) the services are necessary; and*

(b) the need for the services arises solely out of the injury in relation to which damages are awarded; and

(c) the services are provided, or are to be provided—

(i) for at least 6 hours per week; and

(ii) for at least 6 months.

(2) Damages are not to be awarded for gratuitous services if gratuitous services of the same kind were being provided for the injured person before the breach of duty happened.

(3) Damages are not to be awarded for gratuitous services replacing services provided by an injured person, or that would have been provided by the injured person if the injury had not been suffered, for others outside the injured person's household.

(4) In assessing damages for gratuitous services, a court must take into account—

(a) any offsetting benefit the service provider obtains through providing the services; and

(b) periods for which the injured person has not required or is not likely to require the services because the injured person has been or is likely to be cared for in a hospital or other institution."

96. The key practical question, in most cases, is the interpretation of Section 59(1)(c). The issue that has been agitated is whether the services need to be provided for at least 6 hours a week and for at least 6 months.

97. It is plain enough from the ordinary meaning of the words that it is necessary that both conditions be satisfied, ie the services must be provided for at least 6 hours per week and for at least 6 months. 4 hours per week for a year or 10 hours per week for 5 months will not do.

98. You should note that there was a slightly different provision in the *Personal Injuries Proceedings Act* 2002 (s. 54(2)) and in the *Motor Accident Insurance Act* (Section 55D). For injuries occurring after 9 April 2003, the *Civil Liability Act* applies. Section 54(2) of *PIPA* and 55D of *MAIA* have each been repealed and replaced by the *Civil Liability Act* provision. It is important to note that

for injuries suffered prior to 9 April 2003 the old provisions continue to apply. They are different in their effect.

99. In *Grice v. Queensland* [2005] QCA 272 the Queensland Court of Appeal determined that the old provisions should be interpreted such that the plaintiff would only be disentitled to damages for gratuitous services if both limbs were met – it was sufficient to satisfy one condition only. As was pointed out by McMurdo P. in *Grice* the provisions in the *Civil Liability Act* are more restrictive than the former provisions in *PIPA* and *MAIA*: [24].

100. For claims involving workers that are caught by the provisions of the *Workers' Compensation and Rehabilitation Act* 2003, a different set of provisions has been legislated. Before coming to those provisions, it is important to recognise when they apply. They were implemented by the *Workers' Compensation and Rehabilitation Others Acts Amendment Act* 2004 (Act No. 45 of 2004). A number of the provisions in that Act were said to commence on 1 January 2005 and others on 1 July 2005. However, the provisions relating to the provision of gratuitous services, which are contained in Chapter 5 Part 10, which were in force immediately before the commencement of Section 622 continue to apply to a proceeding for damages "only if the trial in the proceeding was started before the commencement".

101. When precisely Section 622 commenced is not easy to determine. It is not referred to in Section 2 of the Amending Act. The answer seems to lie in Section 2 of the 2003 Act which provides that the remaining provisions of this Act commence on 1 July 2003 which, presumably, relates to Section 622 as amended. There is no other provision that I can find.

102. In actions for damages for workers, the current provisions which are contained in Chapter 5 Part 10, ie Sections 308A to 308E, will apply to any claim for an injury suffered after 1 July 2003 for all practical purposes.

103. Sections 308B, 308C and 308D are relevant to cases where the injured worker had services performed for him before the injury or performed services before the injury.

104. The more usual case with which practitioners are concerned is the situation where a worker requires services after injury, and because of the injury, which he had not previously required. Section 308E provides as follows:

> "***Services not required by or provided to worker before injury***
>
> *(1) This section applies if the worker usually did not require or was not provided with particular services before the worker sustained the injury.*
>
> *(2) A court cannot award damages for the cost or value of any services provided to the worker after the worker sustained the injury, or that are to be provided to the worker in the future as either gratuitous services or paid services, if the services that have been provided to the worker after the worker sustained the injury are gratuitous services.*"

105. In his Second Reading Speech, when he introduced the Amending Act, the Minister said:

> "*The Bill adopts the Queensland Court of Appeal recommendation to clarify when an award of damages for gratuitous care is prohibited.*
>
> *A court is prevented from awarding damages for the value of domestic services where these services have been, are to be, or ordinarily would be provided gratuitously to the worker by a member of the workers' family or household. In line with the original policy intention of the Act, this also clarifies that where gratuitous care has previously been provided to a worker, the worker is not entitled to damages for paid future care.*"

106. The first point to note is that there is nothing in the new provisions that says anything about services that "ordinarily would be" provided to a worker.

107. Secondly, it seems plain enough that if, following injury, services are provided to a worker on a paid basis, then the prohibition in Section 308E does not apply.

108. Thus, those workers who are rich enough to be able to afford cleaning services for their home, yard services for their yard and mechanics to service

their cars (where they happen to be handy that way prior to the accident) will get damages but those who are not will not.

PSYCHIATRIC INJURIES

109. I wish to refer you to two cases:

- *Jocumsen v. Thiess Pty Ltd & Anor* [2005] QCA 198 (10 June 2005)
- *Koehler v. Cerebos (Australia) Ltd* [2005] HCA 15; (2005) 79 ALJR 845

110. *Jocumsen* represents a problem that frequently comes up in psychiatric cases – the psychiatric illness itself prevents the plaintiff from taking action to prosecute his or her cause of action. In *Jocumsen* the Court of Appeal affirmed the primary judge's decision to permit an extension of the limitation period despite the fact that the applicant had been diagnosed as having a post traumatic stress disorder following a workplace accident within a month of the subject accident. He had been referred by the GP to a psychologist for counselling but did not pursue that course, believing that he could cope with his problems and because of concerns about his what his work mates might think when they became aware that he was receiving counselling. Symptoms continued over a number of years including nightmares, flashbacks, lack of sleep and effects adversely on his marriage. There were some four changes of employment in an endeavour to get away from the reminders of the subject accident.

111. *Koehler v. Cerebos* concerned a claim for damages for psychiatric injury caused by an excessive workload. The High Court unanimously confirmed the decision of the Full Court of the Supreme Court of Western Australia which found that there was no foreseeable risk of psychiatric injury as a consequence of her duties at work.

112. The interesting points that seem to me to emerge from *Koehler* are these:

- An important factor in cases of this type will be the actual contract of employment and the duties which the employee freely takes on.

- The court was plainly sceptical of the notion that there ought to be read into an employer's obligations under a contract of employment a qualification which would excuse performance if performance is or may be injurious to psychiatric health.
- Importantly, the majority judgment pointed out that seeking to qualify the operation of the contract of employment as a result of information the employer later acquires about the vulnerability of the employee to psychiatric harm would be contradictory of basic principle – the obligations of the parties are fixed at the time of the contract unless and until they are varied.
- Of significance, the majority judgment (McHugh, Gummow, Hayne and Heydon JJ.) pointed out that different considerations might intrude when an employer is entitled to and does vary the duties to be performed by an employee from those originally stipulated in the contract. The distinction drawn was between the exercise of powers under a contract and the insistence upon performance of work for which the parties stipulated when making the contract.
- Fundamentally, however, the plaintiff lost because there was no indication of any particular vulnerability to suffering psychiatric harm.

113. In his judgment, in which he agreed with the majority decision, Callinan J. said that the employer's duty to take reasonable care for the plaintiff's safety in doing her work "did not oblige the respondent to reduce the amount of part time work that it was prepared to offer to the appellant, or to dismiss her". He pointed out that these were the only two measures that could have prevented the appellant from becoming stressed to the point that she became psychiatrically injured ([53]).

114. Again, at [57], Callinan J. put it this way:

> "*I doubt whether any term could have been implied in the contract, consisting as it did, of the letter of engagement only, that imposed upon the respondent a duty not to ask, or require the appellant to do the amount of work that she herself agreed to do. If asked to do more, or if what she agreed to do was more than she could do, then it was for her either to refuse to do it at all, or to relinquish her position.*"

115. The decision obviously has great significance for the flood of psychiatric cases that seems to be developing. It might have a wider significance in those employment situations where there is precise agreement as to what work is to be performed.

PRACTICAL ADVOCACY

116. On 20 April this year, the New South Wales Court of Appeal referred the appeal papers in an appeal heard earlier in the month to the Legal Services Commissioner of New South Wales to investigate whether two solicitors ought to be the subject of complaint against either or both of them pursuant to the *Legal Profession Act*.

117. The original appeal is *Day v. Perisher Blue Pty Ltd* [2005] NSWCA 110. The hearing at which the referral of the papers to the Legal Services Commissioner is *Day v. Perisher Blue Pty Ltd (No. 2)* [2005] NSWCA 125.

118. For those of you not familiar with the ethics of conferring with witnesses in the preparation of evidence, then it would be a good idea to study these cases.

119. At para. [30] of the appeal hearing the following observation was made:

> "*It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with other and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly.*"

120. Amongst other things, the evidence disclosed that the solicitors involved on behalf of the defendant:

- Held at teleconference which included all relevant witnesses on a particular point.
- Set out the possible areas of questioning that each witness would be subjected to.
- Familiarised themselves with statements given by other witnesses, particularly one to be called by the plaintiff.
- Provided to the witnesses a document headed "Witness Protocols for Court Cases and Arbitration Hearings" (although the source of the

document was not explained) which included such things as "not about facts about credibility"; "lawyers are there to destroy your credibility not establish the facts" and suggested ways of appearing not to be dogmatic.

121. The *Miles-Finklestein* manoeuvre - don't call any witness – particularly a professional - unless you have ensured that he or she has been thoroughly proofed, is aware of the issues, and in fact assists your case.

122. I draw your attention to the decision of the Court of Appeal in *Martin v. Rowling* [2005] QCA 128. The judges in the majority (Fryberg and Mullins JJ.) were critical of the defendant's counsel. The defendant called Dr Cameron who gave oral evidence to the effect that the plaintiff had not complained of certain symptoms at the time he saw her some years before and that they must have emerged since. Fryberg J. said at paragraphs [27] and [28]:

> "*[27] … However there was no reason why [the plaintiff and her lawyers] should have thought that the defence was contending that she had not told Dr Cameron of her complaints or that upon presentation to him she seemed quite well. Those matters were not put to her in cross examination. They are contrary to the thrust of the defendant's medical reports.*
>
> *[28] The probability is that counsel for the respondent was not aware of it; otherwise he would have elicited in evidence in chief. When the evidence was given, counsel faced a tactical decision. He could ignore it or he could rely upon it. If he chose to rely upon it, he was obliged to apply to have the appellant recalled for further cross examination, so that it could be suggested to her that, apart from her shoulder, she was quite well in April 2002 and that she made no complaint of other symptoms to Dr Cameron. [citing Smith v. Advanced Electrics Pty Ltd [2003] QCA 432]. It was not the responsibility of counsel for the appellant [plaintiff] to make such an application. He did not wish to rely upon the evidence.*"

EXPERT EVIDENCE

123. A new Part 5 of Chapter 11 has been introduced to the *Uniform Civil Procedure Rules* 1999. The relevant Rules are Rules 423 through to 429S. It is essential that you familiarise yourself with these Rules.

124. So far as the giving of evidence by an expert, you will need to note the following:

- An expert may give evidence in a proceeding by a report – Rule 427(1)
- It is first necessary that a report be disclosed under Rule 429, otherwise leave is required.
- Oral evidence in chief may be given by the expert only:
  - (a) in response to the report of another expert; or
  - (b) if directed to issues that first emerged in the course of the trial; or
  - (c) if the court gives leave.
- The expert's report is now required to be addressed to the court and, as usual, signed by the expert.
- Rule 428(2) sets out the information that the report must contain. It will be necessary to draw that to the attention of the expert.
- Rule 428(3) requires that the expert confirm, at the end of the report, five matters and again it will be necessary to ensure that the expert is familiar with this requirement and complies with it.
- A report is required to be disclosed under Rule 429 within 90 days after the close of pleadings by the plaintiff or within 120 days of the close of pleadings by a defendant or otherwise within 90 days after the close of pleadings for a party neither a plaintiff nor a defendant.

125. Rule 429B empowers the court to direct that experts meet and identify matters on which they agree and disagree and identify why they disagree and

attempt to resolve any disagreement. This is known as "hot tubbing". The court has power to set the agenda and to specify matters that they must discuss. I have not yet had the experience of having such a direction made nor do I know of such a direction being made in a personal injury case.

126. Of more particular concern is the Practice Direction that was issued on 12 April 2005 – Practice Direction No. 2 of 2005 – [2005] 1 Qd.R. 407.

127. The point of the direction is to force parties to consider the appointment of a single expert witness. There are two important directions and they read as follows:

> "*4. Either before commencement of any such proceeding, or soon afterwards, a party intending to call expert evidence on a substantial issue should raise with all other parties the prospect of their jointly appointing an expert, who would become the only expert to give evidence on that issue (unless the court otherwise ordered) (r. 429G(1), r. 429H(6)).*
>
> *5. As soon as it is apparent to a party that expert evidence on a substantial issue in a proceeding will be called at the trial or hearing, that party must file an application for directions. On the hearing of that application that party must inform the court of steps taken or to be taken to conform with these rules.*"

128. The provision contained in paragraph 5 of the Practice Direction does not apply to a proceeding for a claim to which the *Motor Accident Insurance Act,* the *Workers' Compensation and Rehabilitation Act* 2003 or the repealed *WorkCover Queensland Act* 1996 applies.

129. I will be surprised if these expert evidence rules work in a practical sense. In a standard dispute over medical evidence only rarely will a plaintiff agree to a panel put up by defendant and vice versa

130. I gave a paper recently at the CQLA conference at Yeppoon. I discussed the expert evidence rules there. After the paper, I was approached by a Family Court judge visiting from Melbourne. He indicated that provisions of this type have been in place in the family law jurisdiction for some time. He said his own personal experience was that they were unworkable. He said the end

result often was that only one expert was called, that both sides attacked that expert's opinion, leaving the judge in doubt as to the validity of the opinion yet with no other expert evidence to guide him as to the outcome of the case.

131. A further point to note is that the rules regarding the appointment of experts (as opposed to the giving of expert evidence) apply only in relation to proceedings in the Supreme Court (Rule 429E).

132. The right of the parties to cross examine the expert is expressly preserved in Rule 429H(7). That rule applies to an expert appointed by the parties, presumably under Rule 429G(1).

133. The court has power to appoint an expert either on application of the parties or on its own initiative (Rules 429G(2) and (3)). Under Rule 429N where the court appoints an expert then the expert will, usually, be the only expert to give evidence in the proceeding on the issue. The court has the power to appoint another expert only if it is satisfied:

- There is expert opinion different from the first expert's opinion that is or may be material to deciding the issue; or
- The other expert knows of matters not known by the first expert that are or may be material to deciding the issue; or
- There are other special circumstances.

134. It appears that there is no automatic right to cross examine an expert appointed by a court. Rule 429M(1)(d) provides that the court may make an order permitting cross examination of the expert before an examiner out of court or before the trial starts. Apart from the general power to give directions, I cannot see any other provision that provides even implicitly for a right to cross examine such an expert.

135. The rules that I have been discussing apply to experts appointed after a proceeding has started (Division 3 of Part 5 of Chapter 11). Experts can be

appointed before the proceeding starts under the provisions of Division 4. Again, the rules apply only to the Supreme Court.

136. In relation to an expert appointed before a proceeding starts, again the expert is to be the only expert, in the usual case, who may give evidence on the issue (Rule 429R(6) and Rule 429S(11)).

137. If the expert is appointed by the court on an application, then Rule 429S(13) empowers the court to give directions as to the right to cross examine the expert. There is no similar right under Rule 429R – an expert appointed by the disputants jointly.

138. Part 5 was inserted into the Rules on 2 July 2004 but applies to all proceedings, including those commenced prior to that date. The only exception is in relation to an expert appointed before 2 July 2004: see Rule 996.

VIDEO SURVEILLANCE

139. Rule 393(2) of the *UCPR* requires the parties to disclose matters, including reports and videos, to other parties at least 7 days before the trial or hearing.

140. It has become, at least on my understanding, usual practice for defendants to apply to the court, under Rule 393(3), for a direction that the video be sealed up and not disclosed until the hearing. I am not entirely sure why this is done as Rule 393(5) specifically provides that non-compliance with the disclosure rule does not affect the admissibility of the video but merely goes to costs.

141. It is worth noting the decision of the Court of Appeal in *Coster v. Bathgate* [2005] QCA 210 confirming the decision of a trial judge who dismissed the application of the defendant to be exempted from compliance with Rule 393(2).

142. The Court of Appeal judgement pointed out that the application ought to have been brought under both *UCPR* Rule 224 as well as Rule 393. Rule 224 provides that a court may order a party to be relieved from the duty of disclosure. If not so relieved, then the party is not permitted to tender the document without the court's leave; it is liable to contempt for not disclosing the document; and may be ordered to pay the costs of the proceedings: Rule 225. The Court of Appeal held that *UCPR* Rule 393(2) "implicitly abolishes the common law right of a party to claim privilege for video recordings of the type under consideration on the grounds that the recording was brought into existence for the purposes of the litigation".

143. Whilst it is plain that medical reports brought in existence and based on such videos are not privileged (Rule 212(2) *UCPR*) it is by no means plain that videos fall into the same category. At its highest, I would have thought the rules only waived the privilege to the extent of the requirement to disclose at

least 7 days before the trial or hearing starts. And so perhaps, in that sense, Rule 224 must be engaged. It is debateable that even that much is right.

144. The factors that the Court of Appeal thought relevant to the exercise of the discretion included:

- There is a trend towards ensuring that there is full and timely disclosure by the parties of their respective cases and even of the evidence to be relied on in support of those cases.
- The provision of statements of loss and damage (Rule 547), the disclosure requirements and an increasingly common requirement that evidence in chief be contained in statements or affidavits served evidence that trend.
- Undisclosed video film of the plaintiff's activities can waste a great deal of time at trial.
- The extent to which the evidence suggests the plaintiff's claim is exaggerated or involves misrepresentation.
- The role surprise plays in unmasking exaggeration, deception or fraud.
- The forensic value of the ability to confront a witness in cross examination with evidence previously undisclosed which conflicts with their sworn evidence.
- The importance of the plaintiff's credibility to the outcome of the case.

CONCLUSION

Professor Luntz has pointed out (in a paper entitled "Turning Points in the Law of Torts in the Last 30 Years" (2003) 15 Insurance Law Journal 1) that there has been a significant turnaround in the decisions of the High Court of Australia commencing from the end of 1999. On Professor Luntz' count from the time of Sir Anthony Mason ascending to the Chief Justice's position on the High Court near the beginning of 1987 to the end of 1999 there had been 40 cases before the court dealing with liability or damages for personal injury. Of these 32, or 80%, resulted in decisions that favoured plaintiffs and only 8 (20%) favoured defendants.

In 2000, there were 8 such cases of which 2 went in favour of the plaintiffs (25%) and 6 (75%) were decided in favour of the defendant. In the 2½ years to the date of publication of his paper of 22 personal injury cases, 8 (36%) were pro plaintiff in the law that they laid down and 14 (64%) were pro defendant.

My own review of the decisions in 2005 indicates that the trend suggested by Professor Luntz continues. I have noted 14 cases decided in 2005 by the High Court concerning actions involving personal injury. Of those, only 4 have gone in the plaintiff's favour (29%) and 10 for the defendant (71%).

One conclusion that could be drawn from these statistics is that the legislative reform, so called, of tort law was not needed.

Another point worth noting is that the factors that separate a successful case from an unsuccessful one are difficult to determine. Two of the cases that resulted in judgments favouring the defendant were *Vairy v. Wyong Shire Council* [2005] HCA 62 and *Mulligan v. Coffs Harbour City Council* [2005] HCA 63. Each involved an action for damages for negligence brought by young men who suffered serious injury as a consequence of diving or plunging into water and striking their heads or necks on the sand below. Each sued public authorities complaining of a failure to warn of the risk which materialised. The decisions in those 2 cases can

be contrasted with *Swain v. Waverley Municipal Council* [2005] HCA 4 where the plaintiff dived into a sandbank at Bondi Beach and held the judgment given to him by the jury, liability being based upon the inappropriate positioning of the flags on the beach. The difference in the outcomes might be no more than that *Swain* was a jury case and the inscrutable nature of a jury's verdict was not to be interfered with on appeal where normative standards are in issue.

Essential to the task of the lawyer is to determine the existence and nature or scope of the duty of care. In *Sullivan v. Moody* (2001) 207 CLR 562 at 579-580 the High Court said at paragraph [50]:

> "*Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limited. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of factors which tend for or against a conclusion, to be arrived at as a matter of principle.*" (footnotes omitted)

All these factors that impinge on the finding of the existence of a duty of care, and which depend very much on individual notions of appropriate standards, are likely to be determined in a more restrictive way. For those pushing the boundaries of the existing law it seems that you will get only limited assistance from the High Court of Australia, and less from the legislature.