Association guidelines with one Orthopaedic Surgeon stating that he had never heard of them.

In a final report Dr Giblin stated:-

"My impairments do not follow the American standards but rather as an assessment on my personal experience as a treating orthopaedic specialist in the area of spinal damage. The percentage disability I have given for his lumbar spine is taken from a pro forma questionnaire which is standardised and gives a reasonable assessment of a person's disabilities. Percentages are assessed on this questionnaire."

Accordingly, at the trial, His Honour had to contend with two Orthopaedic Surgeons giving an extremely high percentage disability and Dr Anderson questioning whether anything was in fact wrong with Mr Gunduz and if there was, his permanent impairment based on the AMA guidelines was extremely low.

His Honour was therefore asked to decide between a disability percentage of the whole body as opposed to an impairment percentage of the whole body.

The Orthopaedic Surgeons also differed in their view of Mr Gunduz's injuries with Dr Roebuck and Dr Giblin stating that the Plaintiff suffered a lumbo-sacral lesion in the incident with Dr Anderson stating that the problem with the lumbo-sacral disc was as a result of degeneration rather than any rupture. This led to great debate between the Orthopaedic surgeons as to whether a disc could rupture in any event.

When looking at the Orthopaedic Surgeons His Honour stated:-

> "Although both are very experienced Orthopaedic Surgeons, in the circumstances of this case, I accept the evidence of Dr Roebuck in preference to that given by Dr Anderson. Dr Roebuck has the advantage of seeing the Plaintiff on a number of occasions and is better placed in my view to make a reliable assessment of the true extent of the Plaintiff's injuries."

His Honour then awarded the Plaintiff $152,121.25, a significant increase on the Defendant's submission to His Honour of $30,000.00 for damages in their entirety.

Accordingly, this case highlights the extreme differences in assessing a person's injury in relation to permanent impairment as opposed to permanent disability. As Dr Roebuck said in evidence, "One cannot say that a 65 year old retired person has the same impairment through the same injury as an 18 year old ballarina when their disabilities are completely different." ■

Darren Moore is an Associate at Carter Capner Lawyers in Brisbane. **Phone** (07) 3221 1833. **Fax** (07) 3221 6058

Litigation explosion

Johnson Tiles & ORS v Esso

Lisa Nicholls, Melbourne

As every Victorian will recall, on 25 September last year an explosion and fire occurred at Esso's gas production and processing facilities at Longford, near Sale in Victoria. As a result of that explosion two workers were killed, a number of others injured and the gas supply to the State of Victoria was interrupted for about ten days. As a result of the interruption to supply many businesses, particularly manufacturers solely dependent upon gas for production, sustained heavy financial losses.

Royal Commission

A Royal Commission was proclaimed to investigate the causes of the Longford incident and Sir Daryl Dawson was appointed Chair. The Commission sat for four months and received some 600 exhibits. Thirteen parties appeared, including four onsite unions, represented by Slater & Gordon and Maurice Blackburn & Co. Despite Esso's attempt to shift blame to its workers (and in particular, Jim Ward, an employee of 19 years and the panel operator on shift at the time of the incident), the recently published Report of the Commission was strongly critical of Esso's operation of the Longford Plant. It found that the ultimate cause of the incident was the failure of Esso to properly equip and train its employees. The report also identified other causes including inappropriate plant design, a failure by Esso management to monitor and supervise operations and non-compliance with the *Occupational Health and Safety Act*. In short, the report identified in the clearest terms, systemic failure by Esso in the implementation of basic procedures required within a hazardous industry. Esso has not responded publicly to the Commission's findings.

Federal Court Proceedings

In late September 1998 proceedings were issued against Esso in the Federal Court on behalf of consumers who had suffered financial loss as a result of the interruption to the gas supply. Slater & Gordon and Maurice Blackburn Cashman are acting jointly on behalf of the class, which is the largest in

Australian legal history. Esso has repeatedly sought to strike out the proceedings. The first strike out application was brought on the basis that the circumstances of the case did not meet the requirements of the Part IVA of the Federal Court Act for the commencement of representative proceedings, or alternatively that the proceedings were unsuitable to be prosecuted as a class action. In short, Esso argued that the circumstances of each of the class members did not concern a 'substantial common issue', despite the fact that in each case it was required to establish the cause of the explosion, and whether there was any negligence on the part of Esso. This application was rejected and on 12 May the Full Bench of the Federal Court refused leave to appeal. The judgment considered the requirements of Section 33C of the Federal Court Act, and can be found at (1999) FCA 636. Esso has recently filed its Defence and has cross-claimed against eighteen parties including the State of Victoria. The basis of the cross claim is that Esso was not the party responsible for the supply of gas to consumers, and that that responsibility was owed by the State and its various instrumentalities. Under its contract with the Victorian Government, Esso is the monopoly producer of gas supplied to the State of Victoria.

Esso has not given any indication that it will admit to the findings of the Royal Commission. It is anticipated that the trial stage will be reached within 12 to 18 months. ■

Lisa Nicholls of Slater and Gordon can be contacted on
phone (03) 9602 6877, **fax** (03) 9600 0290