paragraph 1(c) above to the trustee within twenty-one (21) days of their assessment or prior agreement between the defendant and the trustee as to their amount.

8. The plaintiff's costs of and incidental to this application be assessed on the indemnity basis ("the indemnity costs").
9. The trustee pay the indemnity costs to the plaintiff's solicitors from the monies received under paragraph 6 of this order within twenty-one (21) days of their assessment or prior agreement between the plaintiff's solicitors and the trustee as to their amount.
10. The registrar of the court provide a copy of this order and copies of the affidavits read on this application to the principal registrar of the Queensland Civil and Administrative Tribunal forthwith.
11. The registrar of the court place the opinion of counsel read on this application in a sealed envelope marked "Not to be opened within an order of the court".
12. Each of the parties, the trustee and the plaintiff's solicitors, have liberty to apply in respect of these orders.'

CONCLUSION

In other jurisdictions, provision is made for payment of interim/advance payments. In the writer's opinion, interim payments are undoubtedly of enormous benefit to a plaintiff, particularly when remaining issues of quantum or life expectancy will delay final resolution of any claim.

In the writer's experience, interim payments can be of significant assistance to a plaintiff and their family, providing funds to assist with the provision of care, equipment and/or other therapy needs.

Although there is no direct provision within the *Uniform Civil Procedure Rules* 1999, the order made by Justice McMurdo in this case indicates that the court will be prepared to sanction a *'partial compromise of a proceeding'* should it be possible for the parties to negotiate and agree on the payment of an advance sum. In this case the plaintiff was fortunate that the defendant was agreeable to making this voluntary advance payment. Defendants should be asked to agree to advance payments in appropriate cases, given the overwhelming benefits of such payments to plaintiffs. ■

Note: **1** *Supreme Court of Queensland Act* 1991 - *Uniform Civil Procedural Rules* 1999.

Vicki Holmes *is a Senior Associate at Maurice Blackburn, Maroochydore, QLD, and specialises in medical negligence.*
PHONE *(07) 5430 8700* **EMAIL** *VHolmes@mauriceblackburn.com.au.*

Failure to mark hazards costs $1.4 million

Williams v Twynam Agricultural Group Pty Ltd & Anor [2011] NSWSC 1098 (16 September 2011)

By Paul Byrne

The plaintiff, Mr Rodney Williams, was seriously injured in a motor vehicle accident that occurred while he was working on a property owned and operated by Twynam Agricultural Group (TAG). At the time of the accident, Mr Williams was employed by Inland Watering (IW), the company contracted by TAG to provide irrigation services on its property. The accident occurred when Mr Williams was driving along one of the property's internal roads. The topography of the road meant that the approach to the junction where the accident occurred was obscured, as the junction was lower than the approaching section of road on which Mr Williams was travelling. An additional hazard was a deviation in the road immediately before the junction, where there was a concrete drop box. Mr Williams collided with the drop box, and sustained serious neck injuries when his vehicle overturned.

It was accepted in evidence that the junction was a hazard but was not marked as such by any warning signs or other hazard-markers. It was also accepted that speed limits on the property were regularly exceeded and that the requirement to wear seat belts was routinely ignored, as the nature of the work involved getting in and out of vehicles frequently.

LIABILITY

As the owner of the property at the time of the accident, TAG had a duty of care to those using its internal roads and to exercise reasonable care for their safety. TAG was aware that contractors such as the plaintiff regularly exceeded the speed limit and also knew that a failure to clearly identify hazards increased the likelihood of serious accidents occurring. In an earlier accident on the property, a vehicle had collided with a drop box, resulting in the death of a worker. In referring to the decision in *Australian Safeway Stores,*[1] the court found that the duty of care owed by TAG was clearly evident. Mr Williams was a lawful entrant to the property and had an established relationship with TAG, and this gave rise to a duty to take reasonable care to avoid a foreseeable risk of injury to him.[2]

In considering TAG's liability, the court made reference to the decision in *Stevens* and found that although an employer is obliged to provide a safe system of work, this obligation is not only confined to that employer.[3] In considering TAG's argument that it had no duty to the plaintiff, the court also found that:

> 'where an independent contractor is engaged to do work where there is risk to them being injured as a consequence of that work and there is a need for direction as to when and where that work is to be done and co-ordinate those activities, there is an obligation to prescribe a safe system of work. The fact that they are not employees, or that there is no right to control them in the manner in which the contractors carry out their work, should not affect the existence of an obligation to prescribe a safe system.'[4]

Under Australian Standards, the marking of hazards such as the drop boxes on the property should have occurred. Given the risk of harm created by the junction and the drop box, the court considered that the risk was foreseeable, and therefore within the contemplation of TAG, as not everyone using the roads was familiar with them, particularly as IW would seasonally increase its workforce. The absence of hazard-markers therefore contributed to the foreseeability of the risk.[5] This was not considered to be the application of 'impermissible hindsight reasoning in determining foreseeability', as TAG had already accepted the need to identify hazards at this location. If it had followed its own procedures, it is probable that Mr Williams would have had some, if not adequate, warning of the potential danger when approaching the junction.[6]

TAG was negligent in not marking the drop box as a hazard, and it was unacceptable to argue that agricultural machinery using the internal road would have damaged or removed signage or other hazard-markers. The markers already in use on the property were designed in such a way as to, at least in part, deal with this issue.[7] The cost of taking precautions was minimal and within the resources of TAG to do so, and it should have taken into account any inadvertence or miscalculation on behalf of those using the road.[8]

INLAND AND NON-DELEGABLE DUTY

As Mr Williams was an employee of IW, it owed him a duty to provide him with a safe system and safe place of work. This duty is non-delegable. In considering non-delegable duty, the court referred to the decision in *Lepore*,[9] in which this issue was considered. Where a person owes a duty of care, they must ensure that any third party exercises reasonable care and are liable if the third party does not do so. In negligence, non-delegable duty of care is imposed on categories of persons regardless of fault, but the plaintiff must prove that the damage was caused by the defendant within the scope of the relevant duty.[10] While the employer may be liable, it can be so without fault and it was noted that this duty is not to take care but rather a 'mechanism for responsibility for someone else's failure to take care'.[11] This is a well-established legal principle and has been the basis for a number of decisions of the High Court. In this case, IW's duty to provide a safe place and safe system of work was breached by TAG's failure to mark hazards. IW was not able to delegate its responsibility and therefore TAG's negligence became IW's negligence.

The court found in favour of Mr Williams and he was entitled to damages in excess of $1.4 million against both TAG and IW. ■

Notes: **1** *Williams v Twynam Agricultural Group Pty Ltd & Anor* [2011] NSWSC 1098 (16 September 2011) at [106]; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488. **2** *Williams,* see above note 1. **3** *Ibid* at [107]; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31. **4** *Ibid.* **5** *Ibid,* at [112]. **6** *Ibid,* at [118]. **7** Hazard-markers used on the property were on flexible metal rods that allowed them to bend rather than break or be knocked out of the ground when hit by vehicles or agricultural machinery. **8** *Williams,* see above note 1 at [125-127]. **9** *Ibid,* at [146]; *Lepore v State of New South Wales & Anor* [2001] NSWCA 112; [2001] 52 NSWLR 420 at 426 [28]-[32]. **10** *Ibid.* **11** *Ibid.*

Paul Byrne *works in the Quality and Reviews Unit at the University of Adelaide and is a part-time law student, also at the University of Adelaide.* **PHONE** *(08) 8303 4016* **EMAIL** *paul.byrne@adelaide.edu.au.*