The Australian courts have considered this issue on only two occasions: see the judgment of Mohr J at first instance in F v R (1982) 29 SASR 437 (overturned on appeal) and Pratt J in Dahl v Purnell, unreported, Queensland District Court, 24 September 1992 but it has yet to be considered by a superior court. In the present case, Newman J made no remarks at all concerning quantum of damages presumably due to his conclusions on the liability issue.

Ultimately, liability was determined in the defendants' favour on the question of illegality. It was raised in the context of CES' wish to discontinue the pregnancy and although not specifically pleaded by the defendants, was raised as a defence. It was said that it could not be shown that CES, at the relevant time, could have obtained an abortion that would have come within the law. This was the illegality. Newman J accepted this proposition and said that on the basis of the High Court decision in Gala v Preston (1991) 172 CLR 243, he could not award damages for the loss of an opportunity to perform an illegal act.

The law in NSW regarding abortion in NSW is essentially that which was set down in Levine J in R v Wald (1971) 3 DCR (NSW) 25. Known as the "Levine ruling", it has not been the subject of appellate scrutiny. It is there stated that for an abortion to be lawful, the doctor performing it must have an honest belief on reasonable grounds that the termination is necessary to preserve the woman from serious danger to her life, or physical or mental health. It is clear that economic or social grounds may be taken into account by the doctor when assessing the potential danger to a woman's physical or mental health: see Wald at 29.

In the present case, evidence was given by two doctors as to the stage of CES' mental health during the early stage of her pregnancy. One had diagnosed the pregnancy. The other, the Director of Family Planning in NSW, had been asked to give her opinion as to the lawfulness of an abortion in the circumstances of CES based on certain assumptions. Newman J found that the evidence did not satisfy the Levine ruling and, accordingly, that had the termination proceeded, it would have contravened the relevant provisions of the NSW Crimes Act.

The Newman decision is now the subject of an appeal to the NSW Supreme Court, Court of Appeal and can expect to be heard in the first half of 1996.

Total And Permanent Disablement Clauses In Insurance Policies: How Strictly do the Courts Interpret Them?

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In the recent case of Edwards v. The Hunter Valley Co Op Dairy Co Ltd (unreported decision of the NSW Supreme Court, delivered 22nd June 1992), McLelland J considered the interpretation of a "total and permanent disablement" clause in a life insurance policy. At its broadest, this term is defined in the policy so as to require the assured to be unable to engage in "any profession, business, or occupation whatsoever". This raises a question of interpretation - just how extensive must the assureds disablement be before he/she can claim under the policy? Duffy v. City Mutual General Insurance Ltd [1977] QdR 94 3, demonstrates the strict approach taken by the Courts in interpreting such a clause. In Duffy. the plaintiff was rendered a paraplegic as a result of personal injuries. He was clearly unable to continue his usual occupation as a carpenter. However, the Court held there was no "total and permanent disablement" as required by the insurance policy. Kneipp J noted at 96 that :

"despite the seriousness of [the plaintiff's] injuries, I do not think that I can assume that he is disabled from engaging in any profession, business or occupation. It is well known that paraplegics .. engage in permanent occupations."

Therefore, it is sufficient that the plaintiff can theoretically gain ANY type of employment based on his current condition.

It must be stressed that the "total and permanent disablement" clause in Duffy was defined very broadly, with no apparent limitations. However, many insurance policies do contain a limitation as to when alternative employment is available to the assured. These policies require that the alternative employment must be "reasonably open" to the assured based on his/her "education, training or experience".

Fox v. National Mutual Life Association (1990) 6 ANZ Insurance Cases 60-974 is an example of where the clause included the "reasonableness" limitation. In that case, the plaintiff, a heating and ventilator engineer, injured his shoulder in a motorcycle accident. As a result, he was unable to continue his normal occupation. However, medical evidence indicated that he would be able to resume working in a job with lighter duties. On a construction similar to Duffy, the Court held there was no total and permanent disablement because of the alternative work available. Prima facie therefore, the reasonableness limitation did not affect the Court's interpretation of the clause.

However, in Edwards, there is an indication that the Courts will not accept such a strict interpretation where the clause contains a reasonableness limitation. In that case, the insurer was of the opinion that the assured was not totally and permanently disabled. Although the assured was unable to perform work of a heavy physical nature, the insurer maintained that work of a more sedentary nature was within his capabilities. McLelland J held that this was the incorrect approach to take. The insurer did NOT consider the reasonableness limitation placed upon the definition at page 12 of the unreported judgement:

"In other words, they appear to have considered [the plaintiff's] capacity for engaging in an occupation by reference solely to his physical condition, and without regard to his qualification by knowledge or training."

As a result, it was held that the plaintiff was totally and permanently disabled. It is arguable whether Edwards effects any significant change in the law. Despite the decision in that case, it is clear however that the Courts' strict interpretation of these types of clauses will almost always favour the insurer.

Infants and the Motor Accidents Act 1988 (NSW)

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Acting for infants in claims pursuant to the Motor Accidents Act 1988 (NSW) ("the Act")has been somewhat confusing to date.

Practitioners will recall the strict time limits applying to notification of the accident to Police, lodging of Claim Forms and in commencing proceedings.

The position prior to the Act was clear. An infant was not able to act on his own behalf and the limitation period did not commence until the 18th birthday.

Section 52(5) of the Act specifically excludes the operation of the Limitations Act, 1969, which caused most commentators and practitioners to assume that the time limits strictly applied to infants.

Commonly, injured parties do comply with the strict time limits. However, it is inevitable that in a percentage of cases, for a large variety of reasons, the claims will not be lodged in time nor proceedings commenced when appropriate. Where this has occurred in infants matters, explanations for delay were given to the Court and applications for extension of time sought, on the assumption that the strict time limits applied.

In the matter of Telecician -v- Pursehouse & Ors, an unreported NSW District Court decision of McLaughlin J. ,a Plaintiff argued that the infant was not Sui Juris and therefore the strict time limits could not apply. This argument was a return to the pre Motor Accidents Act 1988 (NSW) position. No authority could be found for this argument.

After argument on the capacity of infants generally the Court ultimately decided that an infant was not bound by the limitation provisions of the Act.

The Court observed however, that it was desirable that an infant would comply with the Act, but could not be compelled to do so. Further, upon reaching the