COMMON LAW PRACTICE UPDATE 101

Section 3A *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff in *Toll Pty Ltd v Harradine* [2016] NSWCA 374 was injured while unloading packages from an unsecured metal stand into a trailer, when the stand slid sideways off the tines of the forklift and struck the plaintiff's left arm. He sued Toll, his employer. There was no question that the forklift operator had been negligent in using the unsecured metal stand to load the trailer, so it was not in dispute that the Toll was in breach of its duty of care. The question at issue was whether the worker could establish that his injuries fell within s 3A *Motor Accidents Compensation Act 1999*. Although s 3A(1)(a) covers negligence during the driving of a vehicle, the term "driving' is not defined. The trial judge held that the plaintiff's injuries were caused as a result of the driving of the vehicle or arose during a dangerous situation caused by the driving of the vehicle. That conclusion enabled damages to be assessed under the more generous motor accidents regime.

On appeal it was noted that unless the injury was sustained during the driving of the vehicle, it is not an injury within s 3A(1). This interpretation follows from what was said in the NSW Court of Appeal in *Zotti v Australian Motor Insurers Ltd* [2009] NSWCA 323 and from the guidance given by the majority in the High Court in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26. As the forklift was stationary during the unloading process, it could not be said to be driven within the meaning of s 3A(1). The slight movement of the forklift backwards or forwards during unloading or loading did not constitute "driving" at the time.

The Court of Appeal found that damages were to be determined pursuant to the *Workers Compensation Act 1987*. The plaintiff was ordered to pay the employer's costs of the appeal.

Sections 63, 58 and 131 *Motor Accidents Compensation Act 1999* (NSW)

The claimant sought damages in respect of injuries suffered during a motor accident in *AAI Limited v SIRA of NSW (formerly MAA)* [2016] NSWCA 368. At the time of the accident she was a passenger in a vehicle driven by her ex-partner. AAMI was the relevant insurer. The claimant's injuries were medically assessed at 14% WPI, whereupon AAMI sought a review under s 63, which was rejected by the Proper Officer. The trial judge, in dismissing the insurer's application for judicial review, found that the Proper Officer's determination neither demonstrated jurisdictional or non-jurisdictional error. The insurer then sought leave to appeal, contending that s 58 and s 131 of the *Motor Accidents Compensation Act 1999* required a medical assessor to determine what elements of the incident resulting in an injury involved a "motor accident" within the meaning of s 3 of the Act.

The Act, on its proper construction, does not require a medical assessor to determine what elements of the incident constituted a motor accident under s 3. The Proper Officer was not in error and the appeal was dismissed with costs.

Sections 5F, 5K and 5L *Civil Liability Act 2002* (NSW)

Both the plaintiff and defendant in *Goode v Angland* [2016] NSWSC 1014 were jockeys riding horses in the same race at Queanbeyan Racecourse. The plaintiff's horse fell and he was thrown clear. He was rendered paraplegic. The plaintiff alleged that the defendant's horse had shifted into his path and caused the two horses' hooves to collide before the fall, an allegation denied by the defendant. After viewing footage of the race and considering expert opinions, the trial judge concluded that the fall was caused by the plaintiff's lack of control of his horse, which had then collided with the defendant's horse.

The trial judge also referred to s 5L *Civil Liability Act 2002*, which provides there is no liability in circumstances involving the materialisation of an obvious risk regarding a dangerous recreational activity. His Honour was of the view that professional sport could constitute a recreational activity for the purposes of the Act. As a result, any liability on the defendant's part was excluded in any event.

Interrogatories

The plaintiff in *Horsnell v Allworth Constructions* [2016] NSWSC 1700 fell through a gap in the floor while delivering building materials at a construction site for a two storey house. He suffered catastrophic injury, but had no recollection of the circumstances surrounding the accident, and so obtained an order for interrogatories. The plaintiff was unsatisfied by the answers received and subsequently sought an order for examination under UCPR 22.4(1)(b). Rather than make an order for examination, Adamson J accepted that some responses were inadequate and made an order requiring further answers to particular interrogatories pursuant to UCPR 22.4(1)(a). The plaintiff was also allowed to amend certain interrogatories for the purposes of clarification.

Breach of duty – access to business premises

The 88 year old plaintiff went on to the defendant's property to pick up a chair being repaired for him by the defendant in *Scott v Wanklyn* [2016] VSC 382. While walking across the gravel driveway on the property the plaintiff was injured when his foot slid into a trench. The defendant said that the trench had been freshly dug and that its existence should have been obvious to a person walking across the driveway. The Court concluded there were reasons why the trench might not have been obvious to the plaintiff and found that it was foreseeable that customers might come to the defendant's business premises. The trial judge concluded that the injury had been caused by a breach of duty. The plaintiff succeeded without any reduction for contributory negligence.

Transfer to interstate jurisdiction

An action was taken regarding an injury to the first named plaintiff and nervous shock to the second and third plaintiffs in *Davies bhnf McRae v Body Corporate for the Phoenician* [2016] NSWSC 973. The plaintiff, an infant, alleged her serious injury took place when her hair was sucked into an underwater grate in the swimming pool at the defendant's resort in Queensland.

The defendant sought to transfer the matter to Queensland in view of the fact that not only was it located in that State, but the injury took place there and most of the witnesses were located there. The judge at first instance decided that it would be in the interests of justice for a Queensland court to apply Queensland law in the matter.

Illegality/contributory negligence

The plaintiff in *Hendricks v El-Dik (No.4)* [2016] ACTSC 160 was left a quadriplegic when the defendant when reversed across a shared pedestrian and bicycle path and collided with his electric bicycle. Damages were agreed at $12 million. The bike's had an output of more than 200 watts, which meant that it should have been registered and should not have been travelling on a shared bike and pedestrian path. The plaintiff however was unaware that his bicycle motor exceeded the legal limit. The defendant alleged that the plaintiff was travelling at an excessive speed and did not brake or deviate from his course before the collision. After extensive expert debate, the trial judge found that the best estimate of the plaintiff's speed was approximately 18 kph. The reasonableness of the plaintiff's actions should not be determined by the legality or illegality of his bicycle. Illegality as such is not relevant although it is relevant to the question of whether reasonable care was taken. In these circumstances the defendant driver was clearly obligated to give way and did not appear to understand that obligation, as he appeared to think that it was the plaintiff who should have given way. The defendant could, for example, have exited via another driveway or sounded his horn. Accordingly, the defendant driver was found to be negligent.

So far as contributory negligence was concerned, whilst illegality of itself does not equate to negligence, the plaintiff was at fault in failing to obtain information in relation to the speed of the bicycle. However the defendant could not establish that a less powerful electric bike or even a pedal propelled bike would have travelled more slowly and thus could not establish a causal link between the fault and the suffering of damage. Accordingly, the illegality in this case did not give rise to contributory negligence. The plaintiff was travelling at a speed consistent with other users of the cycle path, which was not unreasonable conduct in the circumstances. However, it was found that the plaintiff failed to keep a proper lookout as the plaintiff had enough time to see the defendant's vehicle and avoid the collision, but he perceived it too late to react. As a result, liability was accordingly apportioned 75% against the defendants and 25% against the plaintiff.