COMMON LAW PRACTICE UPDATE 102

Section 7 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was found lying on a footpath in Sydney's Inner West in *Nominal Defendant v Dowedeit* [2016] NSWCA 332. He alleged he was hit by an unidentified vehicle when stepping onto the road and was thrown onto the footpath, and at first instance established liability as a "blameless motor accident" on the part of the Nominal Defendant. The trial judge had found that on the balance of probabilities it was more likely he was hit by a motor vehicle than the alternative theories that he fell from a balcony awning or that he was assaulted. The damages against the Nominal Defendant were however reduced by 50% for contributory negligence as the plaintiff had been affected by alcohol at the time of the incident. The Nominal Defendant appealed and the plaintiff cross-appealed in respect of contributory negligence. Neither succeeded.

The finding of contributory negligence was within the discretionary range open to the trial judge, and the findings of fact were open to the trial judge in respect of causation. The Nominal Defendant was ordered to pay 90% of the costs of appeal and cross-appeal.

Section 62 *Motor Accidents Compensation Act 1999* (NSW)

The insurer challenged a decision of a MAS Review Panel in *QBE Insurance (Australia) Ltd v Edwards* [2016] NSWSC 1664. The decision had increased the original assessment of WPI over the 10% threshold. Although the judge at first instance found that the Panel was not in error by not conducting its own clinical assessment, it did not adequately explain the reasoning that led to the conclusion that there was impairment to the right knee attributable to the accident or the calculation of the degree of impairment to both knees. The Review Panel it failed to adequately deal with the competing evidence and submissions in the matter by giving reasons for coming to the conclusions it did. That failure constituted jurisdictional error and the matter was remitted for assessment by a new Review Panel.

Section 86 Motor Accident Compensation Act 1999 (NSW)

The plaintiff in *Nominal Defendant v Adilzada* [2016] NSWCA 266 was catastrophically injured in a motor accident, sustaining serious brain injury. He commenced proceedings against the Nominal Defendant for damages, including treatment and care services. The Nominal Defendant asked the claimant under s 86 *Motor Accident Compensation Act 1999* to undergo a medical examination to determine his eligibility for the Lifetime Care and Support (LTCS) Scheme, which would then disentitle him to recover damages for those services. An application to become a LTCS Scheme participant can be made by the injured person or by the insurer. The Nominal Defendant requested that the plaintiff undertake an independence measure assessment, which in these circumstances was required for admission into the LTCS Scheme. However the plaintiff did not undertake the relevant assessment. The Nominal Defendant asked that the claimant driver be compelled under s 86, however at first instance, it was held that s 86(1) had no application to the LTCS Scheme. The Nominal Defendant's appeal was upheld by the Court of Appeal which

observed that that if a claimant fails without reasonable excuse to comply with such a request, court proceedings cannot be commenced or continued in respect of the claim while the failure continues.

Section 5R *Civil Liability Act 2002* (NSW)/ Duty of Care to Independent Contractors

The plaintiff in *Bosevski v Avopiling Pty Ltd; The Workers Compensation Nominal Insurer v Avopiling Pty Ltd* [2016] NSWSC 1893 was injured on a construction site when a steel wire rope attached to a mast broke, showering the site with debris. The plaintiff was on the site in his capacity as an employee of Professional Contracting, which was joined by Avopiling in a cross-claim.

There was no argument as to the cause of the accident – the steel rope had broken under the load of 28 tonnes, when its safe working capacity was 5 to six tonnes. The trial judge found that Avopiling was clearly negligent, that the risk was foreseen and that it had been inadequately safeguarded. Although it was suggested that the plaintiff was too close to the location of the accident, he and another worker were departing the scene when the injury occurred and the inference was that the operators of the machinery knew he was there, but did not wait until he was out of the danger zone. Accordingly, there was no contributory negligence. The plaintiff's employer and its employees on site lacked the requisite knowledge of the particular risk, and accordingly the all fault was attributable to Avopiling.

Sections 43A and 45 *Civil Liability Act 2002* (NSW)

The plaintiff in *Mansfield v Great Lakes Council* [2016] NSWCA 204 was injured while driving his water truck along a single lane track when part of the bank gave way. The truck rolled off the track into the water and he was injured. The plaintiff took action against the council responsible for care and maintenance of the road, whereupon the council relied on ss 43A and 45 *Civil Liability Act 2002*. The trial judge found for the Council. On appeal, the issue was whether the Council roadworks were "so unreasonable" that no road authority could consider the omission to be a proper exercise of its statutory powers, in accordance with s 43A. Further issues for determination involved whether the Council could be said to be immune from liability in the absence of "actual knowledge" of its officers within the meaning of s 45 and whether appropriate road signage could have prevented the injury.

The Court of Appeal was not satisfied that the council's failure to maintain the track was so "unreasonable" that no road authority could properly consider the omission to be a reasonable failure to exercise its statutory powers under s 43A.

In respect of s 45, the Court observed that views differed as to the relevant officers of a council who must have "actual knowledge" of the particular risk. In this case, there was no evidence of a negligent inspection and it was not established establish that any relevant Council officer had actual knowledge of the particular risk which materialised. Finally, so far as causation was concerned, it was unlikely that a sign indicating the narrowness of the culvert or warning of a weight limit would have acted as a deterrent for the plaintiff from using the road and such as sign would not have prevented the harm which materialised. The plaintiff's appeal failed.

Sections 5F, 5L, 5M and 43A *Civil Liability Act 2002* (NSW)

The plaintiff in *Hodgson v Sydney Water Corporation* [2016] NSWDC 361 stepped on a concrete drain cover which was slippery and covered with moss when walking along a beach. She alleged that there had been a failure to adequately inspect, maintain or repair. The evidence showed that the Sydney Water Corporation had considered removing the concrete cover and subsequently did so. The plaintiff did not see any warning sign (although there was one on the seaward side of the drain carrying the words "danger, slippery surface" with a visual representation of a person slipping) but said that if she had she probably would not have attempted to cross the drain, particularly given that it was covered in barnacles and other shells. There was evidence of previous correspondence warning the defendant of the risks more than 12 months earlier and evidence that a number of visitors had previously fallen on the concrete crossing and been injured, some seriously.

It was found that there was an obvious risk of slipping and no duty to warn by sign or otherwise (*Civil Liability Act 2002* section 5F) and there was no liability due to the materialisation of an inherent risk (section 5L). However, this was not an inherent risk in this case because that is something which cannot be avoided by the exercise of reasonable care and skill. The defendant could have taken interim measures to avoid a foreseeable risk whilst awaiting a solution to the problem from their engineers, thus avoiding the accident. The existence of the sign did not enable the defendant to successfully employ the s 5M defence, as the sign faced the sea and was not apparent to persons walking in the direction of the plaintiff. A defence under s 43A was also not available because a public authority with knowledge of previous accidents would not have waited for so long for an engineering solution. The plaintiff succeeded. There was no reduction for contributory negligence.

Sections 54 and 5R *Civil Liability Act 2002* (NSW)

The 14 year old plaintiff in *Captain v Wosomo & Anor* [2017] QSC 86 was in the front seat of a stolen vehicle driven by the 16 year old defendant. Two other teenage boys were travelling in the back seat of the vehicle. The plaintiff suffered severe head injuries when the vehicle crashed into a light pole. The defendant relied upon s 45 of the Queensland *Civil Liability Act* 2003 (the equivalent of s 54 *Civil Liability Act 2002* (NSW)). The plaintiff argued that he had effectively withdrawn from the joint criminal activity at the time of the accident and, in the alternative, that in the circumstances the application of the section would operate unjustly and the Court should order an assessment of damages. One of the witnesses, a back seat passenger, said that no-one in the vehicle were wearing seat-belts. Immediately before the accident the occupants of the car were yelling out and the driver was confused, losing control and crash at high speed. The High Court decision in *Miller v Miller* (2011) 242 CLR 446 was applied, which held no duty of care arose. It was alleged that some passengers, including the plaintiff, shouted "slow down" just before the accident, and that amounted to an attempt to withdraw. The trial judge held this to be a request to stop speeding but not a withdrawal from the joint criminal enterprise. The suffering of personal injury was foreseeable consequence of the illegal conduct which the plaintiff had participated in. Furthermore, he was of sufficient age to bear legal responsibility for the criminality of the conduct. Accordingly the statutory defence precluded recovery. It was the plaintiff's complicity in the unlawful use of the vehicle which invoked the statutory exclusion. In the circumstances, there was no duty of care owed and the plaintiff failed accordingly.

Psychiatric Illness/foreseeability

The plaintiff was a family support worker employed by the defendant service in *Beven v Brisbane Youth Service Inc* [2016] QSC 163. She was sexually assaulted at work by a client of the service and consequently suffered serious psychiatric illness. The judge at first instance considered that, in the circumstances, resultant psychiatric illness was clearly foreseeable. The risk was not far-fetched or fanciful. The defendant was aware of the risk and should not have provided further services to the youth who sexually abused the plaintiff. An employer can be liable in these circumstances and there was no public policy reason why the employer should not be held liable. The plaintiff succeeded and was awarded very substantial damages in excess of $1.5million plus costs.

Duty of Care/Reporting Abuse

On appeal in *DC v State of NSW* [2016] NSWCA 198 and *TB v State of NSW* [2016] NSWCA 198, the Court of Appeal agreed with the the trial judge's finding that there had been a failure to report abuse to the police. The Court also agreed that a duty of care was owed to the plaintiffs, and the majority found that failure to report to the police was a breach of that duty of care.

The majority were of the view that the trial judge erred in failing to find that the abuse continued for about a year after April 1983, when the older plaintiff reported the abuse to the Department. That evidence did not exclude apportionment between pre-existing causation and further injury after that time and there was room for debate as to how damages should be assessed in these circumstances. The first instance draft assessment of damages was upheld, subject to some minor changes to deal with interest. The plaintiffs succeeded on appeal against the State of NSW.

Duty of Care/harassment/psychiatric injury

The plaintiffs were managers at a regional Disability Services Queensland residential care office in *Hayes & Ors v State of Queensland* [2016] QCA 191. They provided a 24 hour service to people with significant intellectual disabilities in the community. Staff at the office made formal workplace harassment complaints against them. A Departmental investigation and rejected the complaints. The four plaintiffs alleged a breach of duty resulting in psychiatric injury, however the trial judge found there was no duty of care arising from the requirement to investigate. On appeal, it was held that that a duty of care was owed to three of the plaintiffs but not to the fourth plaintiff. However, there was an absence of causation in relation to those three plaintiffs. As a consequence, all the appeals were dismissed with costs.

Duty of care/subcontractors

The plaintiff suffered a back injury when employed by a subcontractor of the defendant In *Lee v Wickham Freight Lines Pty Ltd* [2016] NSWCA 209, when he was moving pallets of soft drink cans in the back of his semi-trailer. At the time the vehicle was being unloaded at a depot owned and operated by Combined Distribution Management. The defendant had itself contracted with Woolworths to transport goods to a store. The parties did not dispute that a system of work

requiring the plaintiff to undertake restacking by himself carried a foreseeable risk of injury. At first instance it was held the defendant was not responsible for the system of work and did not owe a duty of care.

The Court of Appeal dismissed the plaintiff's appeal. Although there may be particular circumstances where a principal owes a duty of care to a subcontractor's employee, in general such a duty should not be compared with the employer's duty of care (*Fox v Leighton Contractors Pty Ltd* [2008] NSWCA 23). In this case the necessary criteria for such a duty of care were not present here. Unloading did not take place on the defendant's premises and the defendant had no active control or co-ordination role regarding the activities. There was evidence that where as in this case there had been a dislodgement of boxes on a pallet during a journey, it was the driver's responsibility to restack the pallets so they could be unloaded.

Negligent failure to warn of risk

In *Morocz v Marshman* [2016] NSWCA 202, the plaintiff underwent a sympathectomy performed by the defendant at Royal North Shore Hospital. She subsequently suffered various health issues and side effects, and took action alleging the negligent failure to warn her of the material risks of the procedure.

The trial judge found that the plaintiff had received adequate warnings and dismissed the claim, whereupon the plaintiff appealed, appearing on her own behalf and complaining about the refusal to admit various expert reports that had been tendered at first instance. The Court of Appeal found that there was no error in this regard at first instance and dismissed the appeal.