COMMON LAW PRACTICE UPDATE 103

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

The unlicensed plaintiff in *O'Connor v Motor Accidents (Compensation) Commission* [2017] NTSC 36 was learning to ride a motorbike under instruction. While seated on the stationary motor cycle at the side of the road a driver under the influence of alcohol ran off the road and collided with her, causing injury. The defendant argued that the plaintiff was not entitled to compensation as she was unlicensed and was driving the motor cycle. The trial judge found that, although the incident was a motor accident for the purposes of the Act, the plaintiff was not driving at the time as she was not seeking to guide or direct the movement of the vehicle. Driving must occur at the moment of injury. The fact that the plaintiff was unlicensed was therefore irrelevant. The plaintiff was entitled to statutory compensation.

Section 94 *Motor Accidents Compensation Act 1999* (NSW)

The insurer challenged a CARS assessor's findings concerning economic loss in *Insurance Australia Ltd t/as as NRMA Insurance v O'Rourke* [2017] NSWSC 494. The assessor, in the course of accepting medical opinion which found the claimant was not fit to work, found that she had no residual earning capacity and noted that although she might be able to undertake part-time office work, there were no employment opportunities in the area in which she lived. The claimant received a carer's pension in respect of her mother, which involved more than 20 hours of physical support and care per week. The insurer sought judicial review, arguing that the carer's pension was evidence of earning capacity and should have been taken into account in assessing economic loss. The insurer also noted that access to further information from Centrelink had been sought and the claimant's solicitor at the time indicated that that request would be opposed, suggesting that the CARS assessor should have awaited that information. However, the insurer did not submit to the CARS assessor that this material could be used in relation to credit or to evaluate work capacity. In those circumstances, the failure to wait was not a denial of procedural fairness based upon lack of an authority to Centrelink to release the information. The claimant also submitted that she had an obligation to repay money to Centrelink and be subject to a preclusion period if damages were awarded. In these circumstances, the assessor was correct to disregard the carer's allowance. The insurer's challenge was dismissed with costs.

Aggravation of existing condition

The plaintiff in *Pierce v Metro North Hospital and Health Service* [2016] NSWSC 1559 suffered from epilepsy and underwent testing at the defendant's hospital to determine whether her condition would benefit from neurosurgery. As part of the testing process, the hospital induced a seizure by sleep deprivation and withdrawing medication. The hospital later conceded that its actions caused a prolonged period of seizure activity. The plaintiff alleged that this led to permanent and serious disabilities. The defendant however argued that the plaintiff's condition was likely to worsen in any event and that this was the likely explanation for her deterioration after the testing. The plaintiff took an action was brought in NSW under Queensland law.

Campbell J accepted that the plaintiff's epilepsy was a debilitating condition before the testing at the defendant's hospital and that it would probably have got worse over time. The plaintiff adduced evidence that the frequency, length and intensity of her seizures increased following the testing. The trial judge concluded on the balance of probabilities, post the event that, following the procedure, there was a significant increase in the severity of her epilepsy. The damages award of over $1,672,000 was assessed in accordance with Queensland law, and included discounts for the plaintiff's existing disabilities, and the defendant was ordered to pay her costs.

Failure to serve medical reports

In *Van Kleef v Tran* [2016] ACTSC 316 the plaintiff was seriously injured whilst playing football and alleged that the defendant had failed to diagnose the injury. The plaintiff sought to rely upon medical reports of a general practitioner, despite the fact that they had not been served prior to the commencement of proceedings. The plaintiff's solicitor said that he had intended to serve the GP reports jointly with a specialist's report, to which the GP's reports referred, but due to an oversight that had not happened. There was no indication that the failure was deliberate and the GP's reports supported the plaintiff's case so there was no incentive not to serve them.

In the circumstances, the judge at first instance found that the defendant was not significantly prejudiced and that the appropriate course was to allow the plaintiff to rely on the medical reports. In the circumstances it was also appropriate for the plaintiff's solicitor to personally pay the costs.

Criminal assault/exemplary damages

In *Cheng v Farjudi* [2016] NSWCA 316 the plaintiff was assaulted by the respondent in a club gaming room and suffered significant injury. The defendant was charged with assault and was ultimately given a good behaviour bond after pleading guilty. The plaintiff was awarded $10,000 in exemplary damages at first instance, where it was found that self-defence did not apply. On appeal, it was held that self-defence had been correctly rejected and that, in respect of the award of $10,000 for exemplary damages, the usual rule was that where a criminal penalty has been imposed, exemplary damages are normally not appropriate in view of the fact that criminal sanction has been applied. However, there are exceptions. While the criminal sanction in this case amounted to "substantial punishment", the way in which the civil proceedings were conducted by the defendant provided a separate reason for exemplary damages to be awarded. The trial judge did not err in the award of exemplary damages. The appeal was dismissed with costs.

Failure to inspect and maintain

The plaintiff in *Kalos v Goodyear and Dunlop Tyres (Aust) Pty Ltd & Anor* [2016] VSC was injured when he tripped on a protruding metal plate in his workplace. The metal plate was usually secured by a screw which had worked loose, causing one end of the plate to rise above floor level. Although there had been workplace renovations, the metal plate had remained despite that process and there was no subsequent regular inspection and maintenance of the workplace. The judge at first instance found that the employer, the first defendant, had knowledge of the missing screw in sufficient time to fix the problem before the incident involving the plaintiff. The employer was liable as a result.

Architect's liability/contributory negligence

In Harrington Estates (NSW) Pty Ltd t/as Harrington Grove Country Club v Turner [2016] NSWCA 369 the plaintiff attended the wedding of his daughter at the defendant's premises and fell backwards into a garden bed at the edge of a parking bay at the wedding venue, a club. While closing the boot of his car at the end of the evening he stepped back into the garden bed and fell a substantial distance through plants, suffering significant injury, whereupon the plaintiff sued the club and its architect. It was found at first instance that the drop ranged from 720 to 810mm from the bottom to the top of the kerb. The plaintiff argued that a barricade should have been in place at the edge of the parking area. The defendant however argued that a balustrade was only required where the drop was over one metre and was reasonably detectable. The trial judge found for the plaintiff against the club only and a *Sanderson* order was made against it. There was a foreseeable and not insignificant risk of injury and the cost of preventative action was not prohibitive. Contributory negligence was assessed at 15%. There was no finding against the architect. Both the club and the plaintiff appealed against the finding of contributory negligence and the verdict in favour of the architect.

The trial judge had found for the architect because it was not established that he should have foreseen that foliage would have grown to such an extent that to the depth of the area was obscured. Nor was it established that the drop would have been observable unless the foliage had not grown to obscure the extent of the drop. The Court of Appeal disagreed. The plants in the garden bed were intended to grow, and they made the drop far less detectable than was the case at construction. Expert evidence indicated that there was insufficient space for a person to comfortably stand between the back of a vehicle and the drop. As the club's failure to install a barricade was at trial found to be causative, that finding was inconsistent with the conclusion that the architect's failure to include a balustrade was not causative. Accordingly the Court of Appeal upheld the plaintiff's cross-appeal against the architect.

The club argued that contributory negligence should have been assessed at around 50% rather than 15%, however the plaintiff argued that there was no failure to take reasonable care. Ultimately the Court of Appeal found that the 15% assessment should stand. Responsibility between the club and the architect at 75% and 25% respectively.

Employment

The plaintiff in *Alan Donald v Rail Corporation of NSW (No. 11)* [2016] NSWSC 1897 sustained a severe back injury following labouring work for his employer Staff Innovations Pty Ltd, the second defendant. He sued his employer and RailCorp, to whom his labour was hired under RailCorp's supervision and system of work. The plaintiff had complained of back soreness before eventually breaking down.

There were questions as to whether to whether the injury occurred at work, given that the plaintiff had subsequently been assaulted. While Staff Innovations acknowledged that it had a non-

delegable duty of care, claimed it had delegated its responsibility. RailCorp for its part denied fault. Both defendants alleged contributory negligence.

The trial judge found that the plaintiff suffered the lower back injury in the course of employment and not due to the assault. Although an employer may be obliged to provide a safe system of work, this does not preclude a duty on the part of others to take reasonable care in their dealings with the worker. Such a duty may arise from the degree of control or direction exercised. In these circumstances that RailCorp was in effective control and owed a duty analogous to that owed by an employer.
The plaintiff had been teamed with a partner who effectively was incapable of operating a jackhammer, meaning that he had to do that work, and was expected to operate the jackhammer for longer periods and with fewer breaks than was appropriate. RailCorp had no rotation system for tasks and the plaintiff could not take the breaks that would otherwise have resulted if both team members were capable of undertaking this heavy labour. The risk of repetitive strain injury was reasonably foreseeable and not insignificant, although not an obvious risk. The plaintiff should have been paired with someone able to share the work. On the balance of probabilities, but for the negligence of RailCorp the plaintiff would not have received the injury. Both defendants were negligent and responsibility was apportioned 90% to RailCorp and 10% to Staff Innovations.

Medical Negligence

The plaintiff in *East Metropolitan Health Service v Martin* [2017] WASCA 7 alleged negligence on the part of two hospitals who successively failed to diagnose and operate on an injury to his arm. He argued that the delay in treatment caused injury, and succeeded at first instance. The defendant appealed, arguing that there was a lack of evidence to establish that earlier surgery would have made a difference or, in the alternative, to establish the extent of that difference. There were also issues in respect of the award of damages.

However, the Court of Appeal found that there was expert evidence to support the proposition that earlier surgery would have made a difference. A minor adjustment reducing damages was allowed but otherwise The appeal was dismissed, subject to a minor adjustment to the award of damages art first instance.

Workplace Assault – vicarious liability

The Court of Appeal in *Optus Administration Pty Ltd v Glenn Wright by his tutor James Stuart Wright* [2017] NSWCA 21 found that the trial judge erred in attributing the knowledge of various employees to the employer. The employer did not owe a direct duty of care to the plaintiff in respect of mental harm. There was no finding that an assault of this severity should have been reasonably foreseen by the employer, and consequently the employer was under no duty to take reasonable care to protect the plaintiff against mental harm. Further, there was no probability that any of the employer's staff should have known there was a possibility that Mr George might attempt to kill the plaintiff, causing a person of normal fortitude to suffer psychiatric illness. In those circumstances none of them owed a duty of care with respect to mental harm. Accordingly, no vicarious liability followed.

The plaintiff in *Govier v Unitingcare Community* [2017] QCA 12 had been employed for Around ten months as a disability worker she was violently attacked by a co-worker, suffering physical and psychiatric injury. The basis of her claim was an alleged breach of the duty on the part of her employer to provide a safe system of work. Prior to the assault she had given her supervisor a letter which expressed concerns about the co-worker but no changes had been made to her work roster.

The judge at first instance had found that the plaintiff had failed to prove that the employer should have reasonably foreseen the risk of physical assault and psychiatric injury if left in contact with the co-worker and accordingly the plaintiff failed at first instance, whereupon she appealed.

The Court of Appeal found that the plaintiff's letter set out concerns but did not refer to past violence or the possibility of physical aggression on the part of the co-worker.

The trial judge was correct in finding that it was not reasonably foreseeable that continuing contact with the co-worker would result in any recognised psychiatric illness. Accordingly the failure to change the roster was not a breach of the employer's duty of care. The employer had subsequently responded to the plaintiff with correspondence which was inaccurate and had been found by the trial judge to have caused a sense of injustice and betrayal in the plaintiff and to have aggravated a psychiatric injury. Although this was reasonably foreseeable, the Court reaffirmed the employer did not owe the plaintiff a duty of care to avoid injury to her in sending the letters. The appeal was dismissed with costs.

Limitation Periods – sexual assault

The plaintiff in *Goodenough v State of Victoria* [2017] VSC 12 he alleged he was raped by other prisoners while serving a two month sentence for driving offences in 1993. Some 20 years after the original offence, the plaintiff received a pardon in respect of the conviction which had led to the imprisonment.

The plaintiff complained of rape whilst imprisoned from late 1993 and throughout 1994 and subsequently. He received advice about the six-year limitation period in 1995 and having applied for a pardon in respect of the conviction (following a subsequent Supreme Court decision indicating that he should not have been convicted), was ultimately granted a royal pardon in 2013.
The plaintiff explained the delay by saying that he received advice in 1995 to seek an ex-gratia payment upon expungement of his conviction and believed that he would not be eligible for compensation before a pardon was granted. He had sought to overturn his conviction from an early time. It was also submitted that the psychiatric injury he had suffered as a result of the assault impeded his ability to bring a common law claim.

Although the psychiatric injury could not be regarded as the sole explanation for the delay, it was a relevant factor. The plaintiff was obsessed with clearing his name. Whilst the defendant was likely to suffer prejudice through his delay, the fact is that the assault at Morwell Prison was documented, the assailant identified and the defendant accepted that the assault had occurred. The Court

concluded that the prejudice was not fatal and that as a result the trial would not be unfair and allowed the extension of time application.