COMMON LAW PRACTICE UPDATE 104

Sections 63 and 65 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff in *Dominice v Allianz Australia Insurance Ltd* [2017] NSWCA 171was assessed by MAS at 18% WPI after being injured in a motor accident. The insurer sought a review by the Proper Officer. In order to initiate a review the Proper Officer had to be satisfied that there was "reasonable cause to suspect that the medical assessment was incorrect in a material respect" pursuant to section 63. The matter was referred to a review panel. The plaintiff in turn sought judicial review which was refused at first instance, whereupon the plaintiff appealed to the Court of Appeal. The Court of Appeal found that the Proper Officer had given brief but sufficient reasons for the decision to review. Once such a review is granted, if the suspicion of the Proper Officer was misconceived, it was to be expected that the review panel would confirm used the original certificate of assessment. Accordingly, in these circumstances the appeal was refused. The review proceeded and the panel reduced the WPI to less than the more than 10% threshold for non-economic loss.

Section 109 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff in *Codazzi v Bangura* [2017] NSWSC 1082 commenced proceedings more than 4 years after suffering a serious accident, which was outside the 3 year limitation period. In order to obtain an extension of time, the plaintiff had to establish that total damages were not less than 25% of the maximum amount and that they could be awarded for non-economic loss, as well as provide a full and satisfactory explanation for the delay.

The plaintiff claimed that that he was told by his counsel that he had six years in which to bring a workers compensation claim under a third party policy. The plaintiff subsequently moved to Canada, and later received notice from the workers compensation case manager about a claim by the workers compensation insurer against the CTP insurer for contribution/recovery. After taking legal advice he commenced proceedings, the matter for determination being the plaintiff's motion for an extension of time. The trial judge found that, once the plaintiff was aware of his right to bring these proceedings after being advised by the workers compensation insurer, he had acted with all appropriate expedition. The plaintiff, who had had had his left leg amputated below the knee and had been assessed for workers compensation purposes as 31% WPI complied with the monetary limitations. The defendant did not attempt to argue that the delay caused a disadvantage. Leave for the extension of time was granted.

Slip and fall/ employer's duty of care

The plaintiff in *Woolworths Limited v Grimshaw* [2017] QCA 274 was employed at a Woolworths store in Townsville. During a break from her duties as a checkout operator, she slipped on loose grapes on the floor in the fruit and vegetable section while walking to the lunchroom and fell. The evidence indicated that were no mats around the grape display, despite the fact that there was readily safety vinyl available that could have been used as a non-slip floor surface. The trial judge found that a mat should have been placed adjacent to the grape counter and that this would have been

likely to prevent her fall. Accordingly, the defendant Woolworths was liable. On appeal it was found that the trial judge was entitled to accept the evidence. On appeal, the defendant alleged an element of contributory negligence, arguing that that the plaintiff should have kept a lookout for loose grapes. The Queensland Court of Appeal held that the defendant could not expect passing employees to constantly watch out for fallen grapes. Woolworths' appeal was dismissed with costs.

Educational Institutions/ Duty of Care

In *Sanchez-Sidiropoulos v Canavan* [2016] NSWCA 221, the 10 year old plaintiff was a student at the defendant's school. The plaintiff fell and injured her wrist in a collision with another student while playing tag played on an asphalt basketball court. The game was a warm-up session for a PE class. When the plaintiff failed at first instance she appealed, arguing that the class teacher failed to pay attention and that this constituted a breach of the duty of care. The Court of Appeal found that there was insufficient evidence relating to the teacher's oversight of the children and that the plaintiff failed to establish how the accident could have been averted even if the teacher had been closely observing them. Accordingly, even if the teacher had been negligent in not paying attention, that negligence was not causally significant, and the plaintiff's appeal failed.

Adequacy of warning signs/contributory negligence

The plaintiff in *Lennon v Gympie Motel* [2016] QSC 315 struck her head while diving into the pool at the defendant's motel and was rendered tetraplegic. She was 12 years 9 months of age at the time. Although the sign at the pool required adult supervision, there were no signs prohibiting diving or indicating the shallowness of the pool. At issue was whether this failure constituted a breach of the duty of care and whether the failure was causative, as well as the question of contributory negligence. The injury occurred in 1998, predating the civil liability legislation, so common law principles applied. The judge at first instance accepted that, on the balance of probabilities, the injury arose through the plaintiff striking her head after diving into the pool. The risk was foreseeable and the signage was inadequate. The defendant motel should have provided for depth markers and "no diving". The pool was less than 4 feet deep for at least half of its length, which should have put the defendant on notice. If there had been appropriate signage, the plaintiff would not have dived. The plaintiff succeeded, although damages were reduced by 15% for contributory negligence. The plaintiff understood the dangers associated with diving, even though she believed she was diving into the deeper end of the pool.

Reasonable Foreseeability

The plaintiff suffered serious injury when he tripped on a stormwater pit at a council reserve in *Greater Shepparton City Council v Clarke* [2017] VSCA 107, suing for negligence and breach of statutory duty. The plaintiff succeeded at first instance, establishing negligence at common law by the council and a breach of statutory duty, whereupon the defendant sought leave to appeal.

The stormwater pit stood around eleven centimetres above the surrounding ground level and was estimated to be at least fifty years old. The plaintiff had been walking across the reserve to go to a shop when he saw the headlights of an oncoming car and picked up his speed. He tripped on the

concrete manhole cover in the dark and fell. He was generally familiar with the reserve, having driven past it regularly, although he had never previously walked across it. It was accepted that, given the inadequate lighting, the pit would have been hard to see and the evidence indicated that it would constitute a tripping hazard at night. The council contended that there were a large number of pits in its area and that, although it aimed to inspect them all every year, this was not always done.
It was not in issue that the reserve was part of a public road. However the trial judge found that the reserve fell within the definition of 'pathway' in the *Road Management Act* 2004 (Vic) and thus did not attract the defence in section 107 of that Act regarding roadsides. The defendant council had options through for example simple signs or painting the pit lid would have been likely to provide warning in the limited light. Although it was reasonable to use the reserve at night, the judge at first instance also found that the plaintiff failed to take reasonable care for his own safety and set contributory negligence at 15%. On appeal, the Victorian Court of Appeal found the reserve did not constitute a pathway as defined in the Act and that council did not have a statutory or common law duty in respect of the reserve.

However, as the stormwater pit was non-road infrastructure and the council was the infrastructure manager, the statutory defence did not apply in any event.

The council argued that the trial judge had impermissibly assessed the risk with the wisdom of hindsight rather than prospectively. The defendant council argued that the trial judge had incorrectly not given sufficient weight to the evidence that there were no known previous complaints regarding the pit.

The Court of Appeal agreed with the plaintiff's contention that there was insufficient evidence to establish that there had been no previous complaint. The trial judge was correct in not being satisfied in this regard, particularly in view of the fact that the council had not adduced evidence regarding the lack of complaint. The risk was real and a significant hazard. It was likely that people would cross the reserve at night. It was open to the trial judge to find as he did and the appeal was accordingly dismissed.

Fund Management

The plaintiff's claim in *Jones v Warwick Total Security Service Pty Ltd* [2017] QDC 114 was settled, along with costs and administration fees for fund management. QCAT appointed National Australia Trustees Limited as the administrator for the damages award, having regard to the plaintiff 's impaired capacity to manage his financial affairs. The trustees sought fund management for the normal term of the plaintiff's life expectancy, which was a further 61 years. The defendant suggested that there should be a 10% discount for contingencies, a suggestion inconsistent with the High Court's decision in *Sharman v Evans* that there should be no discount for the ordinary vicissitudes of life on any head of damages other than economic loss.

At issue before the trial judge was the question of whether the allowance for fund management should be for the rest of his life or for a shorter period. The plaintiff submitted there should be no discount for the vicissitudes of life and no restriction on the period of fund management. The

defendant submitted that a 10 year management period would be appropriate on the basis that the plaintiff had not sufficiently demonstrated the need for ongoing management over the 61 year period.

The judge at first instance held that it had not been established that the plaintiff's condition warranted continuing financial management for an indefinite period. His Honour opted to discount the amount under management by 33%, essentially being the 10-year period.

Attribution of psychological injury

The defendant in *White v Hertz Australia Pty Ltd* [2017] QSC 82 employed the plaintiff as a vehicle services attendant and leading hand. The plaintiff's duties included cleaning out hire cars. While doing so, the plaintiff suffered a needle stick injury to his hand from a needle left in a vehicle. The plaintiff experienced psychological issues, including PTSD, major depressive disorder, general anxiety and an adjustment disorder, as a result. In the circumstances it was held that the subsequent problems were directly or indirectly attributable to the original injury, and the plaintiff was awarded over $300,000 in damages.

Intentional Injuries

The plaintiff was a passenger in a vehicle being driven by a friend in *Cooper v Neubert* [2017] TASSC 33 when she who approached by the defendant while stopped at a red traffic light. The defendant had a gun which he proceeded to point through the window at the driver and shot her, leaving her bleeding. When the plaintiff leaned over to try to help the driver, she was shot through the hand. The vehicle then moved forward and collided with a barrier, at which point the plaintiff fell down into a creek while trying to escape. She was rescued some time thereafter. She suffered significant injury, including partial loss of a finger.

The plaintiff sued the defendant for trespass, negligent trespass and negligence and claimed damages, including aggravated damages. Although the defendant stated that he only intended to shoot the driver, the court accepted the plaintiff's evidence that she looked into the defendant's eyes and pleaded with him not to shoot. Accordingly it was established that the injury to the plaintiff was intentional. In addition to her physical injury, the plaintiff also claimed for psychological injury. General damages were assessed at $175,000 and past and future economic loss (including superannuation) came to about $400,000. Aggravated damages were allowed in the sum of $75,000 and past and future attendant care exceeded $1.5 million. Total judgment for the plaintiff was in the sum of $2,312,284.20, which included components for general damages, past and future economic loss, aggravated damages and past and future attendant care. No claim was made for exemplary damages.

Employment cases

The plaintiff in *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103 was a community support worker employed by the defendant. One night she was working

alone with a 15 year old boy with a history of drug use and aggressive behaviour which had been directed toward support workers in the past. The boy behaved in a verbally and physically aggressive fashion, brandishing a large shard of glass in a threatening manner and attempting to steal her car keys. The plaintiff contacted her supervisor, who failed to take any action to help or relieve her and advised against calling the police. After spending the night alone with the boy the plaintiff was subsequently diagnosed with post-traumatic stress disorder. At first instance it was found that the defendant was negligent in its response to the telephone calls from the plaintiff. An issue also arose as to causation. The medical evidence suggested that while the original threat was a cause of the PTSD, the plaintiff's reaction may not have been as severe if the employer had been more responsive to her situation. The judge at first instance found that the employer's negligence was a cause of the injury.

On appeal, the Queensland Court of Appeal was not satisfied on the trial judge's findings that without the breach of duty which was established, the plaintiff would not have suffered PTSD, and overturned the trial judge's verdict for the plaintiff.

Occupiers Liability

In *Ratewave Pty Ltd v BJ Illingby* [2017] NSWCA 103, the plaintiff tripped over a raised timber platform in a hotel lobby and took action against the occupier. At first instance it was found that the plaintiff's visual awareness was affected by glare from a window in the area. The risk, although not an obvious one involving a duty to warn, was nevertheless foreseeable and not insignificant. There was a breach of care and the occupier was found liable with no reduction for contributory negligence. On appeal the NSW CA found that the glare was not, on the evidence, so intense to justify the plaintiff's failure to see the platform. However the risk of tripping was foreseeable, not insignificant and not likely to have been anticipated by persons walking across the lobby, who might reasonably be expected to be distracted or inattentive. A reasonable occupier would have sought to warn of the risk of tripping in these circumstances. A warning sign on the platform would have been sufficient to alert persons to the danger. The appeal was dismissed with costs by the majority.

Duty to independent contractor

The plaintiff in *Love v North Goonyella Coal Mines Pty Ltd* [2017] QSC 140 was injured while undertaking roof bolting at a mine under the control of the first defendant. The plaintiff was not an employee of the first defendant. His services, along with those of a co-worker, were provided by the second defendant to the first defendant. The co-worker accidentally caused an air pressure hose to strike the plaintiff's helmet, causing him injury. The judge at first instance accepted that this was caused by an interruption to the air supply by the first defendant. It was noted that the relationship with an independent contractor does not of itself give rise to a common law duty of care, however host employers can owe a duty of care to employees of labour hire companies analogous to those of the employer depending on the degree of control exercised over the workforce, workplace and systems of work. In the present case, the first defendant owed a duty analogous to that of an employer in respect of the failure by one subcontractor which interrupted the supply of air and its consequences for other subcontractors (ie the plaintiff and his co-worker).

On the facts the first defendant was responsible for co-ordination of tasks at the mine and the mine owner and operator was vicariously responsible for the failure of another independent contractor. As a result, the plaintiff succeeded.

Transfer of jurisdiction

An application to transfer jurisdiction from the District Court to the Supreme Court was made in *Sue v Chep Australia Pty Ltd* (92017] NSWSC 781. It was noted that the power to transfer is discretionary under s140(1) *Civil Procedure Act 2005* and an order was refused as the plaintiff had not established on the balance of probabilities that it was likely that an award would exceed the District Court jurisdiction.