COMMON LAW PRACTICE UPDATE 71

Section 3 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff was injured whilst working as a painter at Garden Island in *Eptec Pty Ltd v Alaee* [2014] NSWCA 390. He and a co-worker were working from a cherry picker while painting a ship in dry dock. The co-worker was responsible for operating the controls. The cherry picker was on wheels, and could be driven backwards or forwards from the controls, which could also be used to move the enclosed platform (or bucket). At first instance it was found that injury occurred when the co-worker attempted to move the vehicle so that the bucket shook. The plaintiff hit a pipe and suffered serious injury. The trial judge found that the shaking occurred as a result of attempted driving of the vehicle, even though the vehicle had in fact not moved.

On appeal, it was held that whilst an attempt at driving was sufficient to bring it within s 3 *Motor Accidents Compensation Act 1998*, the evidence did not support a finding of attempted driving. The plaintiff had given evidence, through an interpreter which was consistent with the first instance findings. However, the Court of Appeal found the attempted driving was not made out. Accordingly, the claim was dismissed with costs. It is not entirely clear why the claim was dismissed because, even if the incident could not be categorised as a motor accident, there may have been a right in any event for common law work injury damages. However, it may be that the threshold and preliminary requirements such an action had not been made out.

Section 61 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff underwent a MAS assessment in *Sadsad v NRMA Insurance Ltd & Ors* [2014] NSWSC 1216. The assessor found in respect of the plaintiff's restricted shoulder movement (amongst other injuries) that there was no injury related to his accident. The plaintiff sought judicial review, arguing that inadequate reasons had been given and that, in particular, the assessor's conclusion that the restricted movement must be attributed to age-related changes was not explained. The relevant medical assessment guideline allowed for reduction only in circumstances where there is a reasonable expectation that the injured joint would have had similar findings to the uninjured joint before the injury and specified that the impairment valuation report should contain the rationale for any such decision. Hamill J found that the relevant question was whether the reasons revealed the reasoning process behind the application of the relevant guideline. His Honour held that this rationale was not apparent. Although reasons need not be comprehensive and every step of the reasoning need not be explained explicitly, where more than one conclusion is open the decision-maker does need to provide an explanation for why one conclusion is preferred. The assessment certificate was set aside and the insurer ordered to pay the claimant's costs.

Section 63 *Motor Accidents Compensation Act 2002* (NSW)

The claimant sought relief against the insurer, MAA and Proper Officer In *Huni v Allianz Australia Insurance Ltd* [2014] NSWSC 1584. The complaint was in respect of the Proper Officer's refusal to refer the claim to a review panel of three medical assessors under s 63, on the basis that the assessor thought there were no features to identify a separate soft tissue injury in the left shoulder and therefore no reasonable cause to suspect the medical assessment was incorrect in a material respect. The assessor said that any separate calculation in the left

upper limb was impossible, given the inconsistent degrees of movement in that shoulder during repeated testing. The plaintiff argued that the assessor failed to follow the guidelines regarding issues of consistency. The substance of the claimant's complaint was the finding there was no contribution from the left shoulder to the 5% WPI. The lack of any assessment, it was submitted, amounted to error.

The medical records showed that an injury to the neck resulted in symptoms in the left shoulder. Although there was no separate injury to the left shoulder, the decision of Hall J in *Nguyen v MAA* [2011] NSWSC 351 means that the left shoulder still had to be taken into account. Garling J could not agree with the suggestion that the assessor's conclusion was reasonably open. A medical assessor cannot be excused from making any assessment and should give reasons. In this case the medical assessor failed to do so. As a result, the Proper Officer's determination was erroneous. The claimant was granted an order setting the Proper Officer's decision aside and returning it to another to determine according to law.

In *Rutland v Allianz Australia Insurance Ltd* [2014] NSWSC 1583, also before Garling J, the claimant sued the insurer and Medical Review Panel for relief. It was claimed that the Review Panel failed to address all matters afresh in respect of WPI. It was also alleged that the Panel failed to accord procedural fairness in coming to adverse conclusions and failed to give the claimant the opportunity to respond. In addition, it was said that the reasons were inadequate.

The plaintiff's claim was for psychological injury resulting from the death of her younger sister in a motor cycle accident. The initial MAS assessment found 14% WPI. When the insurer applied for a review, no additional factual material was supplied. The insurer merely contended that there were three errors in the MAS certificate. The Proper Officer determined that the application for review should be granted. The three practitioners wrote to the claimant to indicate that they proposed to conduct the review without an examination of the claimant but inviting any reasons why such examination might be required. The claimant did not respond and the Review Panel revoked the original certificate and issued a new certificate, placing WPI at 6%.

The Review Panel noted in its reasons that there was no dispute as to the original diagnoses and no dispute as to causation or permanent impairment. It merely found a different level of disability.

Garling J referred to the decision in *McKee v Allianz Australian Insurance Ltd* [2008] NSWCA 163, where it was said that there was no basis for restricting the review by the panel. The review is not limited to the grounds of incorrectness raised - it does not only consider error. Moreover, the Panel is required to accord procedural fairness and consult the claimant on inconsistencies and provide an opportunity to respond.

Here, it was impossible for the Review Panel to conduct the assessment and form an opinion without consultation and examination. Its failure to do so demonstrated a clear error as to the nature of the exercise in which the Review Panel was engaged. This constituted jurisdictional error on the face of the record and the claimant was entitled to relief. There was also a lack of procedural fairness concerning the redetermination of work capacity whereby these issues were not put to the claimant. The Panel had no new evidence to support the changed conclusion, but simply worked on the basis of assumed facts. Accordingly, there was also a failure of procedural fairness. The orders of the Review Panel were set aside and the matter referred to a new Panel to undertake an assessment in accordance with law.

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

The plaintiff went snorkelling in a popular diving and fishing spot in *Du Pradal & Anor v Petchell* [2014] QSC 261. The plaintiff was then struck by a boat piloted by the defendant in excess of the speed limit of 6 knots whilst within 30 metres of anchored boats, suffering serious injury. Although the defendant had seen the first plaintiff's orange dive float, he failed to slow down and navigate away from the site. The defendant claimed there was contributory negligence on the part of the plaintiff. The plaintiff's employer also made a claim per quod servitium amasit by the plaintiff's employer.

It appeared likely that the boat was travelling at 13 mph and accordingly in excess of the maximum speed under the regulations. The plaintiff was spear fishing in a popular dive spot and using a common dive float. He was entitled to act on the basis that any boat navigated would travel in accordance with the regulations and avoid the dive float. Negligence was thus established and no contributory negligence was found.

However, the claim for replacement labour per quod servitium amasit failed. The claim made was for loss of profits, which is not the true measure of damages for loss of services. The proper claim would have been for the cost of replacement labour but no such labour was in fact employed. As a result, the first plaintiff succeeded and the second plaintiff failed accordingly.

Sections 5G and 5R Civil Liability Act 2002 (NSW)/Contributory Negligence

In *Franklin v Blick* [2014] ACTSC 273 the plaintiff and the defendant were riding their bicycles in the same direction around Capital Circle in Canberra. The defendant's bicycle hit a piece of wood, causing the defendant to lose control and collide with the plaintiff. The plaintiff fell off the bike and was struck by a motor vehicle on the road, suffering significant injury. The driver of the motor vehicle was not at fault. The plaintiff claimed damages from the defendant in negligence. Although it was dark at the time of the incident, there was good street lighting and the weather was fine. The defendant stated to his insurer that the bicycles were fitted with illuminated lights and both cyclists were wearing safety helmet and appropriate high visibility clothing.

Burns J was satisfied the defendant was riding to the left of and slightly in front of the plaintiff and that the street lighting was good. There was additional illumination from cars. Both cyclists were travelling at a moderate speed of about 25 to 27 kph. Burns J was satisfied that given the lighting and speed, the defendant could and should have seen the piece of wood in sufficient time to take evasive action. The accident would have avoided with reasonable care. Accordingly, contributory negligence was not made out. The plaintiff was awarded damages and costs.

Section 5R *Civil Liability Act 2002* (NSW)/Contributory Negligence

The plaintiff was a passenger in a vehicle driven by the first defendant in *Stafford v Carrigy-Ryan & Anor* [2014] ACTCA 27. The vehicle ran off of the road and overturned several times at a corner, after the plaintiff and first defendant had consumed alcohol together for several hours. The first defendant's blood sample two hours after the accident showed a blood alcohol reading of .155. There was independent evidence that shortly time prior to the accident they were both quite drunk. After the accident they appeared to remain intoxicated.

There was also evidence that the plaintiff knew or ought to have known that the first defendant driver was intoxicated. At trial, it was held that the first defendant owed a duty of care and had breached it, but damages were reduced by 35% for contributory negligence. On appeal, it was held on the evidence that a finding of contributory negligence was inevitable. The finding of 35% was not so high as to demonstrate error and could be seen to have been generous to the appellant plaintiff.

Sections 42, 43, 43A and 44 *Civil Liability Act 2002* (NSW)

In *Lee v Carlton Crest Hotel (Sydney) Pty Ltd* [2014] NSWSC 1280, the plaintiff was a passenger in a car driven by her husband, which he was parking in a multi-level commercial car park. She stepped out of the car while her husband attempted to reverse into a car space. It reversed slowly and then went through a thin railing and fell from the second level. The plaintiff found her husband fatally injured. Her husband had not been grossly reckless in his control of the vehicle. Only one end of the wheel stop at the rear of the car space was affixed - it therefore rotated and gave way on contact. The car was only travelling at about 5 kph when it struck the inadequate perimeter railing, which did not comply with the design standard. The plaintiff sued the owner and occupier of the car park for nervous shock through witnessing her husband's death and also claimed for compensation to relatives. Beech-Jones J found that the owner of the car park and the Council, who approved a non-compliant arrangement, were both negligent. The damages should be reduced by 20% for the deceased's contribution.

The Council relied on s 42 *Civil Liability Act 2002*, but the plaintiff's case was not dependent upon asserting a duty to ensure a particular outcome. The Council also relied upon s 43, however, this was not an action for breach of statutory duty. The Council relied upon a defence under s 43A. This was a case of the Council exercising special statutory powers but Beech-Jones J found that no council possessing the functions and powers of the Council in this case could reasonably have concluded that the building conformed with the relevant ordinance and this defence also failed. The Council relied on s 44 in respect of regulatory functions, but Beech-Jones J found that s 44 did not apply as this was not truly a non-feasance case. It was proper to apportion responsibility 75% to car park owner and 25% to the Council.

Damages - Life Expectancy

In *RACQ Insurance Ltd v MAA (NSW) & Ors (No. 2)* [2014] NSWSC 1126, the plaintiff suffered severe injury in a motor accident. Her claim for damages was assessed at CARS at a little over $650,000. In respect of life expectancy, the assessor noted she was 72 at date of the accident and 77 at date of assessment. When the medium life expectancy tables were applied, she had a life expectancy of a further 13.3 years. The insurer brought evidence that, because of a lengthy history of cigarette smoking and cardiac disease, she was unlikely to survive beyond 7 to 9 years. However, the plaintiff had specialist respiratory physician opinion following lung function tests, suggesting that life expectancy was not reduced. When the assessor preferred the latter evidence the insurer claimed judicial review, suggesting the finding as to life expectancy amounted to jurisdictional error or error on the face of the record, the reasons were inadequate and the conclusions manifestly unreasonable. In dismissing the proceedings, Campbell J noted the assessor was entitled to choose between competing medical opinions and his reasons did not suggest he acted on an incorrect principle or took irrelevant matters into consideration or lacked appropriate justification. The insurer's application for administrative review was dismissed with costs.