# COMMON LAW PRACTICE UPDATE 72

**Sections 61 and 131 *Motor Accidents Compensation Act 1998* (NSW)**

A MAS assessor found psychological injury in *Frost v Kaourouche* [2014] NSWCA 39 which amounted to 25% impairment. The insurer sought a review, which determined nil WPI. In the District Court it was found that procedural fairness had been denied because the Review Panel should, before reaching its conclusion, have provided the plaintiff with an opportunity to consult and make further submissions. The insurer appealed to the Court of Appeal. Allowing the appeal, it was held that, although procedural fairness extended to confronting a party with inconsistencies and giving an opportunity to respond, it did not ordinarily require the exposure of thought processes or the provision of views for comment. The plaintiff was ordered to meet the insurer's costs.

**Section 138 *Motor Accidents Compensation Act 1998*/ Section 5R *Civil Liability Act* 2002**

In *Allen v Chadwick* [2014] SASCFC 100, the plaintiff was driving a motor vehicle in which her de facto partner and another were passengers. She stopped to go to the toilet. Although drunk, the plaintiff's partner changed to the driver's seat and the plaintiff sat in the back seat. He drove away quickly, giving the plaintiff no opportunity to fasten the seat-belt, and crashed. The plaintiff was left a paraplegic. The de facto's blood alcohol reading was 0.22. The first instance judge found for the plaintiff, but reduced her damages by 25% for the failure to wear a seat-belt. The defendant appealed, arguing there should have been a further finding of contributory negligence in that she knew or should have known the defendant was intoxicated. The plaintiff cross-appealed the finding in respect of seat-belt.

Section 47 *Civil Liability Act 1936* (SA) bears similarity to s 138 *Motor Accidents Compensation Act 1998* (NSW) in reversing the onus of proof in respect of intoxication. Section 49 *Civil Liability Act 1936* (SA) makes a mandatory 25% reduction in respect of seat-belt unless the injured person establishes on the balance of probabilities that they could not reasonably be expected to have avoided the risk. There is no direct equivalent to this in s 138 *Motor Accidents Compensation Act*.

The majority, Gray and Nicholson JJ, set aside the reduction of 25% for contributory negligence on the basis the vehicle was moving as she entered it and she had no opportunity to fasten the seat-belt before it crashed. They also rejected the argument for contributory negligence in respect of the driver's intoxication. It was open to the primary judge on the evidence to conclude on balance that the plaintiff could not reasonably have been expected to avoid the risk.

By a majority, there was no reduction for contributory negligence"

**Sections 5F and 5H *Civil Liability Act* 2002 (NSW)/section 151Z(1)(b) *Workers Compensation Act 1987* (NSW)**

The plaintiff fell on a travelator in a shopping centre in *Glad Retail Cleaning Pty Ltd v Alvarenga & Anor* [2013] NSWCA 482. The travelator was slippery because of recent cleaning. She received weekly compensation and medical expenses under the *Workers Compensation Act* from her employer. She sued the occupier's cleaning contractor and the occupier of the centre in the District Court, succeeding in both cases. The cleaning contractor

appealed, while the occupier paid part of the judgment sum to the plaintiff's solicitors. The employer then stopped paying benefits and demanded reimbursement of the benefits it had paid. As a result, the occupier then applied for an extension of time in which to appeal on the same issues. The motion and appeal were heard together.

The NSW Court of Appeal held that the payment was a partial discharge of liability to pay damages under s 151Z(1)(b) *Workers Compensation Act 1987*, which applied where a worker recovered some but not all damages payable by a third party tortfeasor. A finding that there is an obvious risk of harm does not automatically prevent a defendant from being held liable for breach of duty, as it only eliminates the common law duty to warn (see ss 5F and 5H of the *Civil Liability Act 2002*). Although the test of what constitutes "obvious" is objective, the plaintiff's evidence is relevant to establishing what a reasonable person would know about the risk. The fact that the plaintiff was not asked about his or her subjective appreciation of the risk was not necessarily fatal to a finding that the risk was obvious but the absence of evidence on that point was a factor to be taken into account. The primary judge's apportionment of 10% contributory negligence was left in place and the plaintiff retained her verdict with costs.

**Section 151Z *Workers Compensation Act* 1987 (NSW)/limitation periods**

The plaintiff fell from scaffolding in June 2002 but did not commence proceedings until June 2010 in *Gallaher Bassett Services NSW Pty Ltd v Murdock* [2013] NSWCA 386. He took action against the head contractor and a scaffolding company, but did not seek to make his employer a defendant at that time. In August 2012, McCallum J heard applications for an extension of the common law limitation period against the head contractor and scaffolder. The plaintiff also sought leave under s 151D(2) Workers Compensation Act 1987 in respect of his insurer. When the trial judge extended time in respect of both applications, the employer appealed. The employer asserted that there was error in the finding that it was not prejudiced and also in putting the onus on the employer to justify the circumstances in which he asserts prejudice.

The person seeking the extension must show the relevant delay is not likely to make the proceedings unfair or cause real prejudice to the proposed defendant. The policy enunciated in *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25 remains relevant.

There was an issue as to whether the inability to recover workers compensation paid more than six years earlier under s 151Z(1)(d) *Workers Compensation Act* amounted to prejudice. The fact that the WorkCover Authority formerly investigated the circumstances of the plaintiff's injury, prosecutions ensued and guilty verdicts were entered was relevant. The employer was aware of these matters.

Either an employer has a good cause of action against one or more third party tortfeasors or does not. If the employee does not, no prejudice accrues to the employer under s 151Z(1)(d) because the indemnity would be unproductive. If the employee does have such a cause of action, then damages will be wholly recoverable by the employer under s 151Z(1)(b). The employer's cause of action accrues at the point of which the employee receives the damages and only then does the limitation period of six years begin to run because of s 14(1)(d) *Limitation Act 1969* and its relationship to s 151Z(1)(b). There was no prejudice on these counts.

Section 151D(2) prescribes a fixed limitation period for the bringing of proceedings "except with the leave of the court", which allows the court to displace the time bar. In the view of Barrett JA, this does not amount to a limitation period in law. It follows that there is a time bar

which only commences under s 26 of the *Limitation Act* two years after any judgment or agreement. No prejudice flows to the employer from this.

There was no error of law by the trial judge.

**Non-Delegable Duty**

The plaintiff was a minor, who was detained on Christmas Island and subsequently in the Northern Territory, in *AS v Minister for Immigration and Border Protection* [2014] VSC 593. He was part of a group action by other detainees, claiming injury for want of reasonable health care. The defendants argued for striking out parts of the Statement of Claim and some limited parts were struck out. The Commonwealth relevantly conceded that it owed a non-delegable duty to provide reasonable health care to detainees and also that it was arguable that the Minister similarly owed a non-delegable duty of care.

**Animals /Failure to Call a Witness**

In *Mamo v Surace* [2014] NSWCA 58, a driver collided with a cow, which moved onto the road as the driver had taken his eyes off the road to change the CD player. The passenger sued for personal injury, failing at first instance and appealed. On appeal, the passenger also sought to raise blameless accident.

In the circumstances, the accident was unavoidable. No adverse *Jones v Dunkel* (1959) 101 CLR 298 inference should be drawn from the failure to call a witness where the evidence of both parties was substantially consistent. It was not open to raise a new argument on appeal in respect of blameless accident.