COMMON LAW PRACTICE UPDATE 74

Workers Compensation Act 1987 (NSW) - Precondition for bringing claims in negligence against employer

"In *Opoku v P & M Quality Smallgoods Pty Ltd & Ors* [2012] NSWSC 478, Adamson J said at [62-63]:

> *By reason of s 151H of the Workers Compensation Act 1987, the plaintiff could not bring a claim for damages in negligence against his employer unless and until he had met the threshold requirement that he suffer a permanent impairment of at least 15%, which was a matter that needed to be assessed. This assessment was not resolved until October 2008 (by a Complying Agreement under s 66A of the Workers Compensation Act ... Accordingly, the cause of action against the plaintiff's employer did not accrue until that date.*
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> *The plaintiff's claim against [the employer] was brought within time because it was brought within three years of the assessment of his permanent impairment, being the date on which his cause of action against [the employer] accrued.*

Recently, in *State of Queensland v Moon* [2014] NSWSC 1698, Button J expressed some doubts regarding Adamson J's approach but expressed no concluded view, as he exercised the discretion to extend time in that case in any event. The plaintiff was entitled to the exercise of the discretion in view of the fact that there was a reasonable explanation for the delay and a fair trial could be held.

Product Liability/ sections 75AD, 75AE and 75AC *Trade Practices Act 1974* (Cth)

The plaintiff was seriously injured in a helicopter accident in *McDermott & Ors v Robinson Helicopter Company Incorporated* [2014] QCA 357. The plaintiff sued the aircraft manufacturer, alleging that the maintenance manual failed to specify an adequate inspection procedure, which, if implemented, would have led to the accident being avoided. However the trial judge at first instance found the manual to be adequate. Overturning the first instance decision, the Queensland Court of Appeal found the trial judge erred in finding that the manual provided adequate instructions regarding inspections. Had those instructions been adequate, it was likely that they would have been followed and the accident avoided. The plaintiff succeeded and the matter was remitted for the assessment of damages.

Section 135 *Evidence Act 1995* (Cth)

In Unilever Australia Ltd v Revlon Australia Pty Ltd (No. 6) [2014] FCA 1409 (Gleeson J), Unilever objected to evidence being on behalf of Revlon which suggested that hydrogen peroxide in Revlon's products is "encapsulated and in a stabilised form" without any supporting research and evidence being produced. Gleeson J refused to admit the evidence, finding under s 135 of the *Evidence Act* that the danger of unfair prejudice to Unilever if the evidence was admitted substantially outweighed its probative value.

Liability of Educational Institutions

At the age of twelve the plaintiff in *Miller v Lithgow City Council* [2014] NSWSC 1579 (R.S. Hulme AJ) suffered tetraplegia after diving into the shallow end of a public swimming pool run by the Lithgow City Council (first defendant). The injury occurred during an activity held by her school (the second defendant) at the venue. The plaintiff was an experienced and competent competitive swimmer. She was undertaking swimming training for the NSW State Age swimming championships when the accident occurred.

The plaintiff's commenced practicing racing dives at the deep end of pools using blocks and then she began to perform them at the shallow end. At no stage was she was advised of the risks of diving at the shallow end or of incorrectly performing her dive. It appears that the plaintiff slipped on the tiled edge as she dived. There was a "no diving" warning painted on the pool surrounds close to where her foot was likely to have been but she was instructed to train, which included some form of dive prior to commencing laps. The pool was about 1.1 metres according to the signage and may have been as much as 1.3 metres deep. There was extensive evidence that diving at the shallow end of the pool was generally common and witnesses had never seen staff attempt to prevent the practice. The type of dive attempted by the plaintiff was described as a "track start dive", where one foot is placed behind the other, leaving the swimmer at risk of severe injury if the rear foot slips during the dive. No diving block was involved at the shallow end.

Button J concluded that the immediate cause of the accident was the slipping of the plaintiff's rear foot and did not think there was anything unreasonable in the Council permitting such diving in the circumstances of training despite the "no diving" sign. However, the second defendant was the plaintiff's school and the incident occurred in the context of a school-regulated activity. Button J held that it was unreasonable for the school to encourage the plaintiff to use a track start dive with the lack of appropriate gripping facilities on the poolside. Although it would have been unreasonable to fail to warn of the particular risk, in this case the plaintiff was actively encouraged in her behaviour. The risk to the plaintiff was foreseeable, not insignificant and a reasonable person would have given warning of the nature of the risk. As a result, the plaintiff failed against the Council but succeeded against the school, with damages to be assessed.

Estoppel

At issue in *Sheraz Pty Ltd v Vegas Enterprises Pty Ltd* [2015] WASCA 4 was the question of whether an alleged attempt to re-litigate a matter which had previously been determined by a federal court gave rise to a res judicata estoppel. The claimant in the earlier proceedings controlled the company in the present action, however because of the requirement for identity of parties to establish privity, there was no res judicata estoppel. Despite that, this was clearly an attempt to re-litigate a matter that had already been determined and there was a substantial shared identity between the parties and between issues in the past and current proceedings. The action was unfairly burdensome and oppressive and accordingly, the proceedings were an abuse of process.

Common Law Rights

The plaintiff appealed from the decision of Balla DCJ in *Howley v Principal Healthcare Finance Pty Ltd* [2014] NSWCA 447. The trial judge had refused an application for leave under s 151D of the *Workers Compensation Act 1987* to commence workers compensation proceedings out of time. The proceedings were brought more than three years after the

plaintiff was injured whilst in the defendant's employ. The plaintiff alleged a back injury in the course of her duties, which led to gradually worsening back pain and led her to eventually seek legal advice outside the time period, after which, there was no delay. A broad discretion to grant leave to sue after expiry of the limitation period exists and the appropriate question is, "What does the justice of the case require?". The issue of prejudice is always relevant.

The plaintiff's explanation of the deterioration in her condition which eventually led her eventually to consult a surgeon was credible. The trial judge had not attempted to analyse whether a fair trial was possible in the circumstances and in that regard was also in error. The Court of Appeal unanimously granted the appeal and extended the time in which to proceed.

Intimidation

A union appealed from a decision that the tort of intimidation forms part of the common law in *Construction, Forestry, Mining and Energy Union v Boral Resources (VIC) Pty Ltd & Ors* [2014] VSCA 348. The Victorian Court of Appeal unanimously held that the cause of action (causing loss by unlawful means) is available at common law in this country. The tort of intimidation provides a common law right of redress against the wrongdoer. The union's appeal was dismissed.