COMMON LAW PRACTICE UPDATE 94

Section 126 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff in *Allianz Australia Insurance Ltd v Zein* [2016] NSWSC 196 was awarded $685,000 by a CARS assessor for total economic loss. The insurer sought administrative review, arguing that the damages had not been calculated with the requisite precision and a small buffer of $50,000 including superannuation should instead have been awarded.

The issue was whether assessment by way of a capitalised sum constituted an error of law. Whilst the concept of a buffer was open to the assessor, that approach may have resulted in less detailed reasoning. The assessor's reasons were comprehensive, detailed and sufficient. The insurer in these circumstances failed to make out any grounds for administrative review and their action was dismissed with costs.

Section 5B *Civil Liability Act 2002* (NSW)

The plaintiff tripped on a footpath in *Rankilor v City of South Perth* [2016] WASCA 29. The path had been raised a few centimetres by tree roots. Although conditions were sunny when the incident took place, there was an area of shadow on the path. Despite the fact that there was a not insignificant risk, the trial judge found that ordinary use of a pathway leads to an expectation of unevenness and did not accept that the raised paver could not have been seen. As a result, despite the fact the Council had no system for finding and dealing with such risks, the judge at first instance found that the Council was not required to do anything in these circumstances. A subsequent appeal by the plaintiff was rejected on the basis that the findings were appropriate and open to the trial judge.

Section 45 *Civil Liability Act 2002* (NSW)

The plaintiff in *Nightingale v Blacktown City Council* [2015] NSWCA 423 stepped into a sunken area of footpath in the early hours of the morning and was injured. He alleged that the Council failed to barricade the area, keep the footpath in serviceable condition, to provide adequate lighting or to warn of the damage. The trial judge gave judgment for the council, finding immunity from suit by reason of s 45 *Civil Liability Act 2002*, on the rationale that the plaintiff did not establish actual knowledge of the danger on the part of the Council. The majority held that the NSW Court of Appeal decision in *North Sydney Council v Roman* [2007] NSWCA 27 remained binding so that a plaintiff must prove not just that someone from the council knew of the hazard but that the person with knowledge had the actual capacity to carry out the necessary repairs. Dissenting, Simpson JA said that *Roman* was plainly wrong and should not be followed. The majority held that a road authority's negligent inspection still entitled it to the protection of the s 45 defence, Beazley P and Simpson JA dissenting as to this conclusion. Given the remarks in the High Court when special leave was granted in *Roman v North Sydney Council* (the case then promptly settled) an application for special leave to appeal to the High Court is likely to follow.

Slip and fall/liability of Councils

The plaintiff suffered injury in *Hornsby Shire Council v Viscardi* [2015] NSWCA 417 whilst on a property which the Council owned and occupied, having fallen over a depressed section of patched bitumen in a Council car park. That section had been the subject of restoration work regarding a previous opening in the pavement. The trial judge found that the previous repair work had been negligently carried out and awarded damages against the Council, which then appealed. The NSW Court of Appeal found that there was no doubt that the Council carried out the work, and that a finding of liability against the Council was not precluded by the fact that there were other causes of injury. In any event, the Council failed to adduce any evidence regarding other possible causes. The Court of Appeal found that the trial judge's assessment that the plaintiff was a witness of credit was open to him, as was, equally, the assessment of damages, though it was perhaps generous. Accordingly, the Council's appeal was dismissed with costs.

Expert Evidence

In *Kiely v AAT Port Kembla* [2016] NSWSC 66 an expert witness advised of a change of opinion after a conclave had been held and the joint report issued, but shortly before they were due to give joint evidence. The Court had to consider the appropriate course of action. Campbell adjourned the proceedings to enable the experts to re-confer and produce a supplementary joint report.

Privilege/Medical Evidence

The Court in *Tinnock v Murrumbidgee Local Health District* [2016] NSWSC 89 held that service and reliance upon an evidentiary statement from the treating surgeon does not waive privilege over earlier versions of that statement, which were edited before service. The fact that the surgeon was called to give evidence did not change this position.

Fund Management

An issue arising in *Casey by her manager The National Australia Trustee Ltd v Pel-Air Aviation Pty Ltd* [2016] NSWSC 212 was whether fund management damages should be calculated by reference to the charges of a private trustee or by the significantly less expensive charges of the NSW Trustee and Guardian. A simple, unexplained preference for a more expensive manager, in the absence of other evidence, could not justify the additional costs involved in private fund management. If the NSW Trustee and Guardian could also properly perform the work, then this was the appropriate basis for assessment of damages, provided there was no evidence that this would be inappropriate in the particular case.

Employer negligence

The UK Supreme Court, sitting in its Scottish jurisdiction, considered an employee's claim in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6. The appellant's job involved visiting elderly and disabled persons for the purpose of providing them with personal care. The employer was

aware of the severe winter conditions involving snow and ice in central Scotland. The appellant at the time of the incident was wearing flat boots with ridged soles when she slipped and fell on snow and ice on a sloping footpath, thereupon injuring her wrist. There had been a very limited and inadequate risk assessment by the employer Council. There was evidence that the appellant would have worn anti-slip attachments to her footwear if she had been provided with them.

The appellant succeeded at first instance, lost on appeal and then appealed to the Supreme Court. Upholding the appeal, the Court held that the employer was negligent in failing to provide the appellant with the footwear attachments, given the known and significant risk to visiting home carers in these conditions.

Failure to implement safe system of work

The plaintiff in *McGreevy v Cannon Hill Services Pty Ltd* [2016] QSC 29 worked as a labourer and meat bonder at a meat processing facility operated by the defendant. He and other workers had complained that they were unable to keep up with the pace of the production line, as a result of defective equipment and because of the particular hardness of the carcasses. The defendant failed to act on these complaints, and subsequently, as a consequence, the plaintiff suffered serious spinal injury.

The trial judge found that the injury was consequential upon the defendant's failure to properly implement its system of work, which was itself a breach of the duty of care owed to the plaintiff. Damages were assessed accordingly.