COMMON LAW PRACTICE UPDATE 95

Section 3 *Motor Accidents Compensation Act 1998*

The plaintiff in *Zhang v Popovic* [2016] NSWSC 407 suffered injury whilst assisting a truck driver in lifting a trailer ramp. The driver knew the ramp was defective and that there was a risk of harm to anyone assisting in this regard. Ultimately the ramp fell on the plaintiff as a result of a defective weld and caused serious injury. The driver had breached his duty of care to the plaintiff, and the owner was also negligent in relation to the failure to properly maintain and prepare the trailer. The driver's employer was vicariously liable for his negligence and was also directly negligent in failing to instruct the driver regarding the risk.

The insurer which had issued the fleet motor policy argued that it was not liable under s 6 *Law Reform (Miscellaneous Provisions) Act* 1946 and alleged it was not liable under exclusion clauses, arguing that the policy was limited to Queensland and only applied whilst the vehicle was being driven. The trial judge rejected these contentions as to the exclusion clauses and the insurer was found liable to indemnify in the circumstances.

Limitation Periods

The plaintiff, on her own behalf and that of her two daughters, took action under the *Compensation to Relatives Act* 1897 (NSW), arising from the death of her husband in *Smith v Hunter New England Local Health District* [2016] NSWSC 248.

The deceased was found at home attempting to hang himself, and was subsequently admitted to James Fletcher Psychiatric Hospital, which was run by the defendant. He was assessed as suffering from agitated depression with psychosis and being a high risk for suicide. However, a few days later he was discharged from hospital without proper psychiatric assessment and with the therapeutic benefit of prescribed medication having yet take effect. Although he committed suicide on 9 February 2004, the statement of claim was not filed until 5 December 2013, nearly 10 years later. The defendant pleaded the limitation defence and the plaintiff gave evidence that she did not read the relevant doctor's report to the Coroner in 2005 or the defendant's response until she saw a further report dated 11 March 2013, commissioned by her solicitor. It was only when she saw that report, that she became aware of substantial criticisms of the conduct of the hospital. By 2007 she thought that all available options in respect of the cause of death had been exhausted and it was not until 2010 that she obtained useful legal advice about the possibility of commencing proceedings.

The judge at first instance said the issue was whether the plaintiff knew or ought to have known of the defendant's fault in relation to her husband's death, and was satisfied that until she received advice from her solicitor in December 2010, the plaintiff did not know she had a claim under the *Compensation to Relatives Act*. The plaintiff took all reasonable steps in the circumstances and the proceedings were commenced within the limitation period. The relevant section of the defence was struck out and the defendant ordered to pay the plaintiff's costs of the motion on this issue.

Employers – breach of duty and causation

The plaintiff in *Stokes v House with No Steps* [2016] QSC 79 (Jackson J) worked for the defendant not-for-profit organisation, being employed to care for a client with a severe disability at a residential facility. The client exhibited violent behaviours. While the plaintiff was the only employee present, the client attacked and injured the plaintiff. At issue was whether the defendant was negligent and whether the plaintiff's loss had been caused by any breach of duty of care.

The defendant was aware of the relevant risk, which was not insignificant. The plaintiff argued that the defendant failed to take reasonable care by not employing a second carer, by failing to install an emergency alarm system or to make arrangements to limit client access to the plaintiff's office and through its failure to replace crockery with safer plastic plates and bowls. The court accepted the defendant's argument that the cost of a second carer was not reasonable. It was however accepted that the defendant should have provided a duress alarm and that its failure to do so was a breach of duty, although it was not shown that the provision of a duress alarm in the particular circumstances would have avoided this injury. The defendant could and should also have provided a swipe access card restricting access to the plaintiff's office. However, as the attack did not take place in the office, this breach of duty was not causative. In these circumstances, the plaintiff established breach of duty but failed on causation and the action was dismissed.

In *Dunnage v Randall and UK Insurance Ltd* [2015] EWCA Civ 673, the plaintiff suffered serious burns while unsuccessfully attempting to prevent his uncle from pouring petrol over himself when the petrol ignited. The plaintiff's uncle died at the scene. The plaintiff took action against the deceased's estate as first defendant and the deceased's insurer as second defendant. The deceased's household insurance policy provided cover for "all sums which you become legally liable to pay as damages for…accidental bodily injury…to any person".

The deceased was diagnosed post-mortem as having suffered from florid paranoid schizophrenia. The plaintiff argued that the deceased's actions were involuntary and that the injury was accidental as a result, however the insurer's case was that the deceased acted deliberately and/or wilfully and/or malicious or, in the alternative, recklessly. The plaintiff's argument was that the standard of care was objective rather than subjective.

Expert evidence indicated that the deceased was incapable of rationally intending to cause harm or indeed of forming such an intention.

Arden LJ noted at that the only exception to the objective standard of care is in respect of children of an appropriate age. In those circumstances, it was appropriate to find the deceased negligent. However, so far as the insurer was concerned, the injury was accidental because the deceased had no control over his actions and therefore could not have intended to cause injury. Furthermore, the deceased could not be said to be wilful or malicious. The English Court of Appeal held that the deceased's estate was liable in negligence and, additionally, that the insurer was bound to indemnify for "accidental" injury.

Costs of Fund Management

The plaintiff, who was born in September 2011 sought compensation for the death of her parents in *Maggs v RACQ Insurance Ltd* [2016] QSC 41. Her parents were killed in a motor vehicle accident in December 2012. At issue was whether the plaintiff was entitled to the cost of fund management fees as a component of damages arising from her parents' death. It was held at first instance that the cost of fund management likely to be incurred did not constitute compensation for the loss of material benefits in a *Lord Campbell's Act* claim and as a result could not be included in the damages awarded.