COMMON LAW PRACTICE UPDATE 97

Section 94 *Motor Accidents Compensation Act 1999* (NSW)

The insurer in *Allianz Australia Insurance Ltd v Sleiman* [2016] NSWSC 851 sought orders to set aside the award of damages by a claim assessor on the basis of jurisdictional error and errors of law in reaching her conclusions.

The insurer's principal complaint regarded the adequacy of reasons given. There was a significant credit issue. Although the assessor had noted that the majority of doctors agreed that the claimant had continuing work restrictions, they were not identified. Nor did the assessor explain her conclusion that the claimant had only a 25% residual earning capacity, although that figure was used to calculate future economic loss. The primary judge found that the assessor simply failed to state the assumptions made about future earning capacity or identify the reasoning which led to the conclusion regarding residual earning capacity. As a result, the insurer's complaint was upheld with costs and the matter remitted for a fresh assessment by another assessor.

Sections 57, 58 and 60 *Motor Accidents Compensation Act 1999* (NSW) and section 15B *Civil Liability Act 2002* (NSW)

Although the insurer of the at fault driver in *Insurance Australia Ltd t/as NRMA Insurance v Scott* [2016] NSWCA 138 admitted liability, they disputed the plaintiff's claim for domestic care provided gratuitously and for care she had provided to her daughter. The insurer contended that this was a medical dispute and applied to MAS for assessment.

Under section 58 *Motor Accidents Compensation Act 1999* medical assessment relevantly includes issues relating to whether treatment is reasonable and necessary and whether it relates to the injury. MAS decided the matter should assessed three medical assessors provided certificates which did not favour the claimant, whereupon she sought review. When the primary judge found in the claimant's favour and set aside the certificates, the insurer appealed. The claimant argued that determination of the hours of attendant care services was not an issue involving medical assessment matter capable of referral under section 58.

The Court of Appeal found that judge at first instance erred in finding that treatment was confined to treatment being professionally provided and that attendant care services were not excluded from the concept of treatment.

The Proper Officer's decision to refer the care issues for medical assessment should not have been set aside. There was no justification for excluding gratuitous services from the matters that can be dealt with by way of medical assessment.

Gleeson JA (obiter) observed that a medical assessment dispute under section 58 does not extend to a claim covered by s15B(2) *Civil Liability Act 2002* for the loss of services given by the claimant to dependants.

Section 5D *Civil Liability Act 2002* (NSW)/Employment/Causation

While serving as a police officer, the plaintiff in *Carangelo v State of NSW* [2016] NSWCA 126 suffered psychiatric injury. He argued that the Commissioner did not offer pastoral care and support nor refer him to a private psychiatrist, thus failing to take reasonable precautions against the risk of psychiatric injury. The plaintiff alleged that he would not have suffered chronic adjustment disorder, anxious and depressed moods and other psychiatric disorder had this failure not occurred.

The trial judge found that the alleged breaches of duty had occurred, but that the plaintiff had not established that those breaches caused or contributed to the psychiatric injury, whereupon the plaintiff appealed.

The Court of Appeal found that causation under s 5D *Civil Liability Act 2002* merely requires that, according to the course of common experience, the more probable inference appearing from the evidence is that the injury or harm is caused by the defendant's negligence. It does not require certainty. However causation is not established merely because the act or omission increased a risk of injury.

It is sufficient for the plaintiff to prove the negligence caused or materially contributed to the injury. However, as the evidence and the medical evidence did not support the conclusion that it was more likely than not that there would have been a different outcome had the breaches of duty not occurred, the plaintiff's claim failed.

There were no exceptional circumstances justifying the imposition of vicarious liability regarding the conduct of the Commissioner. The plaintiff's appeal was dismissed, with costs.

Sections 45 and 43A *Civil Liability Act 2002* (NSW)

The plaintiff in *Coffs Harbour City Council v McLeod* [2016] NSWCA 94 sued Coffs Harbour Council successfully in respect of a slip and fall and obtaining judgment for close to $100,000. The Council sought leave to appeal.

The plaintiff's evidence indicated that the footpath was "very slimy and wet". The judge at first instance found that the risk of harm was reasonably foreseeable and that the risk was not insignificant and could readily have been obviated by barriers or warning lights without any great expense.

The Court of Appeal refused the Council's application for leave to appeal, even the question of leave and the hearing were listed together. It was open for the first instance judge to find on the evidence that the footpath was a slip hazard. The trial judge had rejected a defence under section 43A *Civil Liability Act 2002* and that purported defence was unsuccessful again before the Court of Appeal. The council had also unsuccessfully raised a defence under section 45 of the Act at first instance. The Court of Appeal found that that defence had correctly failed at first instance,

as section 45 is dependent upon "carrying out roadwork" and the definition of roadwork does not include a traffic control facility.

Duty of Care Owed to Children

A child born with foetal alcohol syndrome, as a result her mother's excessive drinking during pregnancy, was unable to access criminal injury compensation in *CP v First Tier Tribunal* [2015] 1 QB 459; [2014] EWCA Civ 1554. This decision was in part based upon the fact that harm inflicted upon a foetus in the mother's womb had not been committed against "any other person". The Court of Appeal confirmed that there is no duty of care in tort owed by a mother to an unborn child and that no criminal liability should attach to what a mother does or does not do during pregnancy.

Occupiers Liability

A university employee fell and suffered injury while walking along a pathway through a garden bed in *VWA v Monash University* [2016] VSC 178. The Victorian WorkCover Authority took a common law action against the university after paying the claim. At issue was whether it was reasonable for the university to take no precautions in relation to the potential harm constituted by the commonly used pathway. The trial judge found that the university owed a duty to take reasonable care, but also found that, although foreseeable, the probability was that the risk of injury was low. There was no concealed danger and the claimant could not clearly verify what she slipped on. The evidence suggested that the path was used as a safe and convenient shortcut used by many people to reach their vehicles. It was not alleged that Monash made the pathway. The trial judge found that, as at the date of the incident involving the claimant, a reasonable person in the position of Monash would not have taken any action to prevent access to the pathway.

Obvious risks/late pleadings

The plaintiff was injured while working as a trainee with the defendant bank in *ANZ Banking Group Ltd v Haq* [2016] NSWCA 93. The plaintiff caught her foot on a bunch of wires while working at a computer station whereupon she tripped and fell, sustaining a knee injury. At first instance the trial judge upheld her claim against and damages were assessed at $713,532. The plaintiff was technically not employed by the bank but by a recruiting agency. However, the bank had failed to plead the reduction due under s 151Z of the *Workers Compensation Act 1987* (NSW). Leave to raise that point was sought but it was made too late and refused. The defendant then appealed, arguing that the risk was obvious, despite the fact it had not adduced any useful evidence to support that argument at first instance. The Court of Appeal rejected the appeal on liability.

In respect of contributory negligence, there had been a at first instance and, by a majority, The Court of Appeal upheld the finding that there was no contributory negligence. There was some adjustment to heads of damage which reduced the overall figure to $582,000The defendant bank was ordered to pay 75% of the plaintiff's costs on appeal.

Employment

In *Vincent v Woolworths Ltd* [2016] NSWCA 40, the plaintiff's was employed by Counterpoint to check product placements in Woolworths supermarkets. Woolworths had provided her with a safety step of about half a metre in height for this purpose. The plaintiff stepped back into a customer's trolley, falling and suffering injury, and she took action against Woolworths and Counterpoint. Her claims were rejected at first instance, whereupon she appealed. The NSW Court of Appeal agreed with the first instance judge in finding that Woolworths owed her a duty of care to avoid unnecessary risks, the relevant risk being the risk of appreciable personal injury. The trial judge was correct in finding a not insignificant risk but also correctly found that, after considering common supermarket practice, a reasonable person in Woolworths' position would not have taken precautions in relation to that risk of harm.

So far as the employer Counterpoint was concerned, the duty to take account of the possibility of inadvertence or thoughtlessness by an employee does not affect the employer's entitlement to expect that their employees exercise care in carrying out straightforward duties.

Accordingly the plaintiff's appeal against both defendants was dismissed.