COMMON LAW PRACTICE UPDATE 98

Section 58 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff in *AAI Ltd t/as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229 was injured in a motor vehicle accident, which took place in September 2008. Over a year later, in December 2009, the plaintiff experienced an acute onset of pain in the lower back, which the insurer disputed. The claim was referred for a MAS assessment pursuant to s 58 *Motor Accidents Compensation Act 1999*. The assessor determined that none of the injuries referred for assessment related to the motor accident, whereupon the plaintiff sought a review. When the review panel issued a certificate confirming the original MAS assessment, the claimant then sought judicial review. The judge at first instance found that both the assessment and review were affected by jurisdictional error and/or error of law and quashed each certificate. The findings of both assessments that that there was no contemporaneous evidence to indicate injury to the thoracic or lumbar spine were factually incorrect. The claimant had experienced tenderness over the lumbar-thoracic spine on admission to hospital on the day of the accident. Furthermore, neither MAS nor the review panel gave consideration to the longer term effects of the accident, as opposed to its immediate effects. The insurer appealed. The NSW CA dismissed the appeal with costs, finding that the judge at first instance was correct and that both the assessment and subsequent review involved error regarding causation. The insurer's appeal was dismissed with costs.

Section 62 *Motor Accidents Compensation Act 1999* (NSW)

The insurer in *Insurance Australia Ltd t/as NRMA Insurance v Asaner* [2016] NSWSC 1078 challenged the Proper Officer's refusal to refer a claim for further medical assessment under s 62 *Motor Accidents Compensation Act 1999*.

The Proper Officer had not been satisfied that surveillance footage and a further specialist report constituted additional relevant information about the injury as required by s 62. The judge at first instance found that the Proper Officer interpretation of "additional relevant information" as involving "opinions" dealing with "issues" which had not been previously considered was an error of law constituting jurisdictional error, and set aside the decision with costs.

In *Jubb v Insurance Australia Ltd* [2016] NSWCA 153, the Proper Officer referred a medical dispute for further assessment as requested by the insurer. The claimant sought judicial review of that decision, and also objected to the subsequent assessment and WPI finding. The claimant's case for review was rejected at first instance whereupon the claimant appealed. At issue was whether the Proper Officer had applied the correct test in finding that there was "additional relevant information" pursuant to s 62. The claimant also argued that the Proper Officer had failed to take into account a relevant consideration in exercising the discretion to refer.

The NSW Court of Appeal noted that, in order to satisfy s 62, the additional information must be capable of having a material effect on the outcome of the previous assessment. The test is a

subjective one for the proper officer, not the determination of the court, although it is subject to judicial review and a residual discretion. The claimant had adopted a too narrow interpretation of s.62 and the discretion involved, and as a result the appeal was dismissed with costs.

Section 15 *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW)

The claimant was severely injured in a motor accident in *Insurance Australia Ltd t/as NRMA Insurance v Milton* [2016] NSWCA 156 and was made an interim participant in the lifetime care and support scheme. Once the two year interim period expired the insurer, which would be liable in damages for the claimant's care if he was not covered by the scheme, asserted that the claimant satisfied the criteria for eligibility. That contention was resisted by the claimant. Despite the insurer's position, the Lifetime Care and Support Authority concluded that the claimant was not eligible. The insurer sought judicial review but the application was rejected by the judge at first instance, whereupon the insurer appealed to the NSW Court of Appeal, arguing that the Review Panel had failed to deal with and determine a significant part of the case and had failed to adequately set out its reasoning.

The Court of Appeal noted that the insurer's detailed submissions to the Review Panel and the plethora of attached documents raised real difficulties for the unrepresented claimant:

> *"The possibility that any lay person, let alone someone suffering from catastrophic injuries, could reasonably be required to submit himself or herself to such a process, let alone comprehend it, tests the imagination."*

Accordingly, the insurer's first submission was rejected. So far as the requirement to provide reasons was concerned, the principal complaint was that inadequate consideration had been given to inconsistencies in the claimant's various accounts. The Court of Appeal was satisfied that all relevant issues, including credit, were adequately dealt with by the Review Panel. The Panel had given lengthy reasons and it was under no obligation to be more specific and dismissed the appeal with costs.

Sections 5D and 5R *Civil Liability Act 2002* (NSW)

The plaintiff suffered significant head injury when she slipped and fell while descending steps at the defendant's church in *Alzawy v Coptic Orthodox Church Diocese of Sydney, St Mary and St Merkorious Church (No. 2)* [2016] NSWSC 1123. The trial judge found that the plaintiff fell when her left foot stepped on a broken tile on the sixth step and that that broken tile caused her to fall. Both causation under s 5D *Civil Liability Act 2002* and breach of duty were established. So far as contributory negligence under s 5R *Civil Liability Act* was concerned, a breach of the plaintiff's duty occurred in that she failed to use the handrail and or keep proper lookout for the broken tile. Liability was equally apportioned between the parties, reducing the plaintiff's damages by 50%.

Employment

In *Roussety v Castricum Brothers Pty Ltd* [2016] VSC 466 the plaintiff worked in the defendant's abattoir. He was required to work long hours and was on-call 24 hours a day. Undertaking stressful duties without necessary assistance or support resulted in psychiatric injury, including major depression. The issues before the court involved duty and breach of duty. Issues of causation and damages were deferred.

The evidence revealed that the plaintiff had complained of staff shortages on many occasions. The trial judge had a wide-ranging and demanding role as manager of the plant. He worked long hours under continual stress, faced significant maintenance issues and there were indications that the demands of the job were having adverse effects on his personality. The management of the operation should have known that there would be an impact on the plaintiff's mental health. Furthermore, the plaintiff had made his concerns known to management. He plaintiff argued that a reasonable employer would have reduced his workload.

An employer owes an employee a duty to take all reasonable steps to provide a safe system of work, which includes the duty to avoid foreseeable risks of psychiatric injury. Whether or not signs of distress to the employer had been given is clearly critical, although those signs could be express or implicit through, for example, uncharacteristic absences from work. A reasonable person managing the plaintiff would have realised that he was at significant risk of sustaining a recognisable psychiatric illness, both before and after his eventual collapse. The defendant's duty in this case extended to taking steps to minimise the risk of harm, including modifications to workload and working hours. There was foreseeability, a duty of care and a breach of that duty. A further hearing awaits in relation to causation.

The plaintiff in *Deal v Father Pius Kodakkathanath* [2016] HCA 31, worked as a primary teacher in the school represented by the defendant. While remove papier mache displays from a classroom pin board, the plaintiff fell from a stepladder injuring her knee. The trial judge ruled that the evidence was incapable of supporting a finding the plaintiff was engaged in a hazardous manual handling task within the Victorian regulations. The majority of the Victorian Court of Appeal held that, although the evidence was capable of supporting a finding that the plaintiff's activity constituted a hazardous manual handling task, the association between the generic nature of the task and the risk of injury was not sufficiently close to fall within the regulations. The plaintiff appealed to the High Court.

The High Court held that it would have been open to find that the risk of falling from the stepladder in the course of carrying out a hazardous manual handling task was sufficiently associated with the task being carried out by the plaintiff to fall within the regulations. Accordingly, the plaintiff's appeal succeeded and the matter was remitted to the Victorian Court of Appeal to be dealt with according to law.

The plaintiff sued for common law damages in respect of an injury sustained at the defendant's retail premises in *Vo v Tran* [2016] NSWSC 1043. The plaintiff had slipped while crossing the floor of the shop, which was wet and slippery, and caught her hand in a juicing machine,

resulting in partial amputation of one of her fingers. Although the plaintiff was a casual employee of the defendant, she was not rostered to work on the day the accident took place. The plaintiff was at the defendant's premises that day for personal reasons only. The defendants argued that the plaintiff was an employee or a deemed worker. Recovery of work injury damages was precluded in the circumstances and workers compensation had been paid.

The trial judge found that on the day of the accident the plaintiff was not an employee. The plaintiff's evidence was accepted and it was found that that the harm was likely to be of a serious nature under s 5B *Civil Liability Act 2002* (NSW) and that the precautions taken were minimal. Causation was established under ss 5D and 5E *Civil Liability Act*. There was no evidence to support a finding of contributory negligence.

Evidence

In *Hayward (Respondent) v Zurich Insurance Company plc (Appellant)* [2016] UKSC 48 at issue was the remedy available in circumstances where an action was settled by consent but subsequent evidence came to light indicating that the claimant gave a dishonestly exaggerated account of the consequences of the injuries sustained. The judge at first instance ordered the repayment of the sum already paid to the claimant less the damages to which he was actually entitled. The evidence before the trial judge indicated that the insurer was aware of the possibility of fraud on the part of the claimant but settled the matter nevertheless. Relying upon deceit, the insurer appealed to the English Supreme Court. The claimant argued that any remedy should be denied in view of the insurer's state of mind. The fact that the insurer had pleaded exaggeration by the claimant only established that Zurich was suspicious of the claimant but was not in a position to make clear allegations. There was no dispute that the insurer had done as much as it reasonably could to investigate the position before settlement, and, in those circumstances, the insurer should have a remedy because mere suspicion that a claim is fraudulent does not prevent overriding a settlement when fraud is subsequently established.