COMMON LAW PRACTICE UPDATE 99

Section 78 *Motor Accidents Compensation Act 1999* (NSW)

In *Buses and 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017, Buses was the registered owner of a bus rented by Oz Snow to carry passengers to the Snowy Mountains. Twenty one passengers were injured when the bus crashed, whereupon they sued Buses in negligence. There were various cross-claims involving the condition of the bus. The relevant CTP insurer – Zurich - had a right to take proceedings on Buses behalf pursuant to s 78 *Motor Accidents Compensation Act 1999*, but Buses alleged that Zurich was irreconcilably conflicted in relation to its involvement in the various cross-claims between the parties. In those circumstances the primary judge granted leave to Buses to have separate legal representation.

Sections 94 and s 126 *Motor Accidents Compensation Act 1999* (NSW)

The insurer claimed a judicial review of a SIRA claims assessor's decision regarding damages made under s 94 *Motor Accidents Compensation Act 1999* in *IAG Limited t/as NRMA Insurance v Rahif Adhami* [2016] NSWSC 1117.

The insurer alleged that that the assessor failed to state the assumptions on which his assessment of damages for diminished economic capacity was based and accordingly that he did not comply with s126 *Motor Accidents Compensation Act*. The assumptions required by the section must reflect the claimant's most likely future circumstances if the injury had not occurred. It was found that the reasons of the assessor were not sufficiently transparent to provide an insight into how the buffer for economic loss had been determined. Accordingly the decision was subject to jurisdictional error and the matter remitted to SIRA to be determined in accordance with law and costs followed the event.

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

The child plaintiff in *Afoa BHNF Christine Taylor v McBride* [2016] NSWSC 1415 ingested a corrosive substance at a barbecue held at the defendant's premises. The plaintiff alleged that the defendant had left caustic soda in a clear glass on a window ledge, which was given to the plaintiff in the mistaken belief it contained water. It was contended that the caustic soda was intended to clean a blocked sink in the kitchen. If the allegations were made out, the plaintiff would have established negligence under ss 5B and 5D *Civil Liability Act 2002*.

There were also suggestions that the liquid involved may have been hydrochloric acid, possibly used to clean the barbecue, and the defendant argued that the plaintiff had drunk from a glass outside next to the barbecue. Hospital records suggested that the treating physician had been told that the plaintiff had ingested hydrochloric acid. There were marked inconsistencies between the plaintiff's witnesses and between the accounts of the presented on the plaintiff's behalf and that of the defendant.

It was ultimately found that the defendant did not bring caustic soda onto the property, and that it was most likely that the substance ingested by the plaintiff was hydrochloric acid. In the circumstances, the onus of proof had not been discharged and the plaintiff failed to establish negligence on the part of the defendant.

Section 5O Civil Liability Act 2002

The patient in *Coote v Kelly*; N*ortham v Kelly* [2016] NSWSC 1447 consulted the defendant medical practitioner regarding pain and discomfort in his left foot in September 2009. At the time, the defendant treated the defendant for a plantar wart. Over the next year the patient returned to be treated by the defendant on a few occasions and also saw another doctor in the same practice during that time, who reached the same conclusion. A few months later, the patient went to a medical centre after continuing to experience discomfort, where yet another medical practitioner again diagnosed a plantar wart. However, this practitioner also asked a senior practitioner in the same practice to consider the case and the patient was subsequently referred for a biopsy, which resulted in the diagnosis of a melanoma in March 2011. The patient commenced proceedings against the defendant, which were expedited because of his short life expectancy. At first instance judgment was given against the plaintiff. The plaintiff died shortly thereafter. Proceedings by the deceased wife and executor were commenced for compensation to relatives and nervous shock.

At issue was whether the evidence given by the deceased and his wife about the description of the lesion was accepted. That evidence, although not wholly consistent, suggested that the dark lesion contained signs that should have warned the defendant that this was not a plantar wart. The defendant took issue with this evidence and also suggested that all the deceased lost was a chance of a better outcome, which was not sufficient to establish liability in negligence.

The experts for each side agreed that the majority of peer professionals would refer a patient displaying these signs for a specialist's opinion or at least for a biopsy to secure a definite diagnosis. They did however differ regarding the extent to which it was necessary to record features of the lesion.

The judge at first instance found that, over the period of time that the relevant doctors examined the lesion, it had the appearance of a plantar wart. The trial judge accepted the notes of the doctor who ultimately referred the deceased for the biopsy over the other witnesses' evidence, enabling the court to conclude that there was no breach of the standard of care encapsulated in section 5O *Civil Liability Act 2002*. As a result, the plaintiff's claim was rejected and costs followed the event.

The plaintiff twice consulted the defendant medical practitioner in *Gulab Khan v Rathjen* [2016] NSWDC 139 after having been assaulted in the course of his employment at a petrol station by a man wielding a knife. He suffered injuries to his left hand. According to the plaintiff, the defendant failed to properly assess those injuries and did not refer him either to a relevant surgeon or to a hospital emergency department for further investigation. The plaintiff alleged that as a result he suffered significant loss of function in one finger, chronic pain syndrome and

related depression and anxiety. The court noted that the defendant's clinical notes were inadequate, an assessment which the defendant accepted. The defendant had concluded that the plaintiff had simply suffered superficial cuts. The Court found that it would have been a straightforward matter to refer the plaintiff to a surgeon or emergency unit. The defendant's evidence regarding the examination was unreliable and the failure to refer constituted a breach of the duty under section 5B *Civil Liability Act 2002*. Causation was established under section 5D *Civil Liability Act* - it is likely that, in the event of suitable medical intervention, the plaintiff's middle finger and hand function would have been retained. The defence under section 5O regarding widely accepted practice in Australia was not made out.

Estoppel

The plaintiff's claim for weekly compensation and medical expenses in *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213 had been resolved, and a consent finding and orders made. The consent finding was to the effect that the plaintiff was "fully recovered" from the effects of any psychological injury. However the plaintiff then claimed for lump sum compensation in respect of the same injury. The employer argued that the plaintiff was precluded from denying that she had fully recovered and that it had the benefit of an issue estoppel. That contention was initially upheld in the Workers Compensation Commission, before the plaintiff's appeal was upheld by the Deputy President and her claim was remitted to the Registrar for referral to an approved medical specialist. The employer sought leave to appeal the interlocutory ruling.

Although the NSW Court of Appeal granted leave, it refused the appeal. Issue estoppel does not extend to mere evidentiary facts. In order to establish an estoppel, a judicial decision must be final. The dispute between the parties was a medical dispute. Estoppel cannot have the effect of denying the existence of an underlying dispute nor can it prevent a medical dispute from arising. As a result, the appeal was accordingly dismissed and each party paid their own costs in accordance with a pre-existing agreement.

Independent contractors/contributory negligence

The married defendants in *Hendrex v Keating* [2016] TASSC 20 owned and occupied their home. They asked friends to assist in the task of removing and replacing roof cladding at the front their building, and a number of them, including the plaintiff, agreed to help. The plaintiff provided a ladder to allow access to and from the roof via a carport. The plaintiff fell from the ladder and suffered serious injury. The plaintiff had attempted to descend the ladder while facing away from it rather than towards it. He subsequently sued in negligence.

The trial judge found no breach of statutory duty, however a duty of care did exist for the safety of an independent contractor and a there had been a breach of that duty of care. The ladder should have been secured to the roof. If this had been done, the plaintiff would have descended the ladder in a conventional way, facing the ladder as he descended – the fact that he had descended the ladder in an unconventional manner did not derogate from the fact that the duty of care had been breached, and the plaintiff succeeded against the defendants as a result. As the

ladder provided by the plaintiff was too short for purpose and not secured, the plaintiff departed from the standard of care applicable to him, and damages were reduced by 60% for contributory negligence.

Occupier's liability

The plaintiff in *Chandler v Silwood* [2016] QSC 90 put her arm through a glass door panel after slipping on a step at the front door of the defendant's house. Although damages were agreed, liability was in dispute. The stairs were wet and slippery and there was little light – accordingly there was a breach of the duty owed by the occupier to the plaintiff. A reasonable person in the position of the defendant would have ensured the stairs were dry, or at least warned the plaintiff of their condition, and ensured the light was on.

Psychological injury/employment

The plantiff ceased work as a security officer in the defendant company in *Taseska v MSS Security Pty Ltd* [2016] VSC 252 (J Forrest J), claiming that this was a result of a psychological injury suffered during her employment. The plaintiff had worked screening domestic passengers at Melbourne Airport. She had undergone a liver transplant and regularly took the anti-rejection steroid, prednisolone.

In the course of her duties the plaintiff complained of a knee injury whilst lifting luggage, psychological and physical trauma from altercations with more than one passenger and alleged bullying and harassment by fellow workers whenever she returned after periods off work.

The judge at first instance found for the plaintiff in respect of the knee injury, finding that the prednisolone did not play a meaningful part in the development of the knee condition. In respect of the two alleged incidents involving passengers the trial judge was not satisfied the defendant had breached its duty of care concerning these altercations.

So far as the complaint of bullying by co-workers was concerned, the evidence of supervisors was preferred to that of the plaintiff and no bullying or harassment was established. Accordingly, there was no breach of duty.

Damages were awarded regarding the knee injury but the plaintiff did not succeed in respect of the other alleged incidents.