COMMON LAW PRACTICE UPDATE 100

Section 33 *Motor Accidents Compensation Act 1999* (NSW)

The 15 year old plaintiff in *Morgan v Nominal Defendant* (NSWDC, unreported, 11 November 2016, O'Connor QC ADCJ) suffered a serious injury when his unregistered motorcycle collided with another motorcycle, which was also unregistered. The plaintiff alleged fault on the part of the other rider and claimed damages from the Nominal Defendant. The question at issue was whether the Nominal Defendant could be liable in the circumstances surrounding the collision.

The plaintiff was lawfully entitled to be at the scene of the accident, which was Crown Land, and therefore was not a trespasser. In order to sue the Nominal Defendant under s 33(5)(b)(ii) of MACA, the motorbike of the negligent party had to be registered or registrable (by way of conditional registration) which would permit recreational riding of motorcycles in these circumstances. The cost of the new parts required to meet the requirements for registration would in 2016 have been $635 and the motorbike would then have been eligible for conditional registration for recreational purposes off-road. That cost would have been likely to have been less if the parts were secured second-hand. A qualified mechanic would have taken 3 to 4 hours at between $67 and $100 per hour to do the work.

The Nominal Defendant submitted that the adjustments required could not be described as minor.

The court noted that in the 1995 amendments to the Act, "motor vehicle" for the purposes of limiting claims against the Nominal Defendant was limited, inter alia, to including a vehicle which:

> "... immediately before the motor accident occurred was capable, or would, following the repair of minor defects, have been capable of being so registered."

Nominal Defendant v Lane (2004) NSWCA 405 provided some guidance as to what was meant by "repair of minor defects". In that case, the cost of the minor repairs probably exceeded the value of the vehicle but was still deemed 'minor defects'. The fact that some of the defects affected the safety of that vehicle was found to be irrelevant.

Having regard to the work, its cost and the relatively low level of the alterations required, the trial judge was satisfied within the meaning of s 33 that conditional registration would have only involved minor alterations or minor adjustments to the motorcycle. Accordingly, the plaintiff could successfully claim against the Nominal Defendant.

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

NRMA, the insurer, claimed judicial review of a decision of the Proper Officer under s 62 *Motor Accidents Compensation Act 1999* (NSW) in *Insurance Australia Ltd t/as NRMA Insurance v*

Cornish [2016] NSWSC 1583. The Proper Officer decided not to seek a further referral regarding the original medical assessment on the basis of additional relevant information being available from the insurer. That additional information involved video footage of the claimant surfing, an activity on its face inconsistent with the findings of the original assessor. There was also the question of whether the new material was capable of materially affecting the claim, given that the claimant had been assessed at 25% WPI and the additional information was only relevant to assessments involving no more than 14%.

The insurer alleged that the Proper Officer failed to give proper reasons for rejecting submissions and that the footage was entirely new and should have been considered both by the Proper Officer and by the assessor. The judge at first instance found that the footage did constitute additional relevant information.

However, noting that, even if the insurer's argument was accepted, WPI would still exceed the 10% plus threshold, His Honour found that there would be no point in quashing the Proper Officer's decision. The insurer's application therefore failed and it was ordered to pay costs.

Employment/sections 5B and 5E *Civil Liability Act 2002* (NSW)

The plaintiff in *Nepean Blue Mountains Local Health District v Starkey* [2016] NSWCA 114 worked at a hospital as a nurse facilitator, where she suffered a severe injury after slipping and falling over in the staff toilets. A warning sign was in place regarding the wet floor however although the plaintiff exercised care, she slipped and fell. The evidence indicated that the floor was extremely slippery at the time largely due to soap residue left on the floor after cleaning. This constituted a breach of the duty of care. The defendant appealed, complaining in particular that the trial judge failed to refer to the relevant provisions of the *Civil Liability Act 2002* (NSW), including s5B in particular. The NSW Court Appeal held that the only issue between the parties was causation and referred to s 5E in this regard. In the circumstances, the fact that the trial judge failed to address issues said by the parties not to have arisen did not constitute judicial error, and accordingly the appeal was dismissed with costs.

Duty of care/causation

The plaintiff suffered serious injury in *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22 when the helicopter he was travelling in crashed, killing the pilot. The crash was caused by a mechanical defect. The question at issue was whether the aircraft's maintenance manual contained adequate information to enable detection of the defect which caused the crash. The plaintiff's claims both in negligence and under the *Trade Practices Act 1974 (Cth)* were initially dismissed, the trial judge finding that the manual provided adequate instructions in this regard. The NSW Court of Appeal however held that the instructions were inadequate and the plaintiff was entitled to recover under either claim. The High Court on appeal found no error in the trial judge's reasoning and that the Court of Appeal's majority criticisms of the first instance findings were in error. The appeal succeeded and the first instance judgment was reinstated.

Contributory Negligence

The plaintiff injured his ankle and knee whilst delivering sheets of plasterboard to a construction site in Kiama in *Hutchison Construction Services v Fogg* [2016] NSWCA 135. The plaintiff succeeded against the company conducting the refurbishments but not against the principal contractor or his employer. The plaintiff's award was reduced by 15% for contributory negligence. Multiple appeals and cross-appeals ensued. Apart from a modest increase in damages, all appeals and cross-appeals were eventually rejected and the finding of 15% contributory negligence stood. Each party bore their own costs.

Nervous Shock

The plaintiffs' child suffered acute injury during his birth as a result of oxygen deprivation in *Sorbello v South Western Sydney Local Health Network; Sultan v South Western Sydney Local Health Network* [2016] NSWSC 863. The incident left the child severely disabled, with a significantly shortened life expectancy. He requires lifetime care. After the child's claim was settled, the parents took action for nervous shock. Prior to the hearing, the defendant admitted that it owed the parents a duty of care and that there had been a breach of those duties that had resulted in damage. The point at issue was the extent of those damages. The parents both suffered from depressive conditions as a result of the defendant's negligence and had subsequently divorced. The judgment sets out the relevant principles and the parties will consider the calculation before final judgment is handed down.

Estoppel

The plaintiff worked at the respondent's abattoir in *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, and then subsequently was employed by a third party organisation which provided labour services to the respondent. The plaintiff made a complaint to the Fair Work Ombudsman regarding the non-payment of entitlements upon termination, whereupon the Ombudsman commenced proceedings in the Federal Court. That Court held that the respondent, not the third party, was the plaintiff's employer. The plaintiff however commenced proceedings against the third party for personal injury. The respondent argued the third party, not the respondent, was the employer. The question therefore was whether the plaintiff/appellant was issue estopped by reason of the Federal Court proceedings, to which plaintiff, employer and third party were all parties. Estoppel was refused by the trial judge, however the NSW Court of Appeal upheld an appeal on the point, whereupon the plaintiff appealed to the High Court.

The High Court held that the Court of Appeal erred in finding the Fair Work Ombudsman was the appellant's privy and allowed the appeal, remitting the matter to the Court of Appeal to determine who was the relevant employer at the time.

Causation/employment by independent contractor

An independent contractor employed the plaintiff to empty garbage bins in the Council's precincts in *Penrith City Council v Healey*; *GIO General Ltd v Healey* [2016] NSWCA 16. The Council owned the bins and was responsible for their maintenance. The independent contractor

was insured with the GIO. In the course of lifting a damaged bin the plaintiff suffered a shoulder injury, which although incapacitating, did not meet the 15% WPI required by the *Workers Compensation Act* 1987. The plaintiff could not sue his deregistered employer and he brought proceedings against the Council, arguing that the Council had a duty to repair damaged bins. The Council accepted that duty but said it had an adequate system for this. He also sued the GIO, but that claim was limited to a period when he was technically employed by another employer ('Solid Waste'), but the deregistered employer had been responsible for the system of work.

At first instance it was held that both the Council and the deregistered employer were liable for the plaintiff's injuries. The Council had failed in its duty to provide an adequate system in respect of damaged bins.

On appeal, it was found that the primary judge erred in finding that the injuries were mainly caused by damaged bins. On the basis of the medical evidence, the general nature and conditions of work (including the damaged bins) were the cause of his ongoing condition. The Council was not responsible for the conditions of his work other than the problems caused by the damaged bins. No relevant breach of duty was found on the part of the Council. The particular injury could not be said to be caused by an unreasonable failure of the Council to repair damaged bins, the Council had no obligation to the independent contractor's employees and therefore the Council did not breach the limited duty it owed to the plaintiff. Further, the majority held that the GIO's appeal on liability should succeed.

Duty of care - fatigue

The plaintiff in *Kerle v BM Alliance Coal Operations Pty Ltd & Ors* [2016] QSC 304 was injured in a single vehicle accident on his way home from work after four consecutive 12-hour night shifts, suffering significant brain injury. He sued, claiming that the accident occurred because he was fatigued as a result of the rostering of his job as a dump truck operator at a coal mine. There was no evident reason for the vehicle to have left the road on the journey home and excessive speed seemed unlikely. The coalmine operator breached the duty it owed, as did his host employer and his true employer. There was no reduction for contributory negligence. The actual employer being indemnified, liability was apportioned between the other defendants.