COMMON LAW PRACTICE UPDATE 105

Section 126 *Motor Accidents Compensation Act 1999* (NSW)

An insurer sought judicial review of an administrative decision made under section of the *94 Motor Accidents Compensation Act 1999* regarding the assessment of damages by the second defendant, a SIRA assessor in *IAG Limited v Sleiman* [2017] NSWSC 1346. The insurer complained that the assessment was not in accordance with s 126 of MACA and s 122(3), which together provide that assessors must apply the same process regarding the award of damages for future economic loss as a court and the nature of that process. The insurer's complaint related to the alleged failure by the assessor to record findings regarding the likely course of events had the injury not occurred. Without that path of reasoning in respect of future economic loss, the assessor's assumption of $1,000 per week was 'strikingly and demonstratively unreasonable'. It was also held to be inconsistent with other evidence accepted by the assessor. Accordingly, an order pursuant to section 69 *Supreme Court Act* 1970 (NSW) was made quashing that part of the assessor's decision for jurisdictional error so that it could be reallocated to another assessor.

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

The insurer sought judicial review of a claims assessor's finding in *QBE Insurance (Australia) Ltd v Polorotov* [2017] NSWSC 1266. At issue was whether the claims assessor had adequately explained the path of reasoning by which he concluded that a claimant had no exercisable residual earning capacity and whether he had taken account of the insurer's argument. The insurer alleged that this raised procedural fairness considerations.

The assessor had not been convinced by the insurer's submissions to the effect that there was exercisable residual earning capacity, and there was no evidence to suggest that there was any other realistic employment in which the claimant could realistically engage. The defendant's expert's opinion was rejected by the assessor, due to its inconsistency with contrary medical and lay evidence.

It was held that the assessor did engage with the insurer's but he was not obliged to accept it given the evidence. The assessor demonstrated his path of reasoning and his reasons complied with the requirements of section 94(5) *Motor Accidents Compensation Act 1999*.

On the basis of those circumstances, there was no lack of procedural fairness and no legal or jurisdictional error. The insurer's application was dismissed with costs.

Judicial review of an assessor's decision to award damages, citing a failure to give adequate reasons, was sought in *Insurance Australia Group Ltd t/as NRMA Insurance v Abboud* [2017] NSWSC 1571.

The insurer relied on surveillance footage to attack the claimant's credit in the course of the assessment hearing and had also brought the medical evidence into question.

Although a claims assessor's obligation to give reasons is not equivalent to that of a judge, the assessor must still demonstrate their path of reasoning in assessing the amount of damages. In this

case, the reasons provided no adequate explanation for how the sum of $50,000 per annum as the basis for calculating past loss of earnings was arrived at, nor could any reasoning be inferred from that figure. Neither was there an explanation for the allowance of future treatment costs. In addition, although there was a finding that the claimant's injuries were 'not particularly disabling' and there was no reason that he could not work, a buffer of $350,000 for future economic loss was set. There was no explanation for this anomaly. Accordingly the assessor had failed to comply with his obligations in respect of economic loss under s 126 of the *Motor Accidents Compensation Act 1999*. The damages award was set aside and the matter remitted for determination by another assessor.'

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

The plaintiff's motorcycle collided with another being ridden by his friend in *The Nominal Defendant v Buck Cooper* [2017] NSWCA 280. He was injured as a result. Both motorcycles were unregistered, His action proceeded against the Nominal Defendant, as neither motorcycle was registered at the time. Both riders had consumed alcohol at the time of the accident. The Nominal Defendant appealed after the plaintiff had succeeded at first instance, the trial judge having found that the other riders' responsibility for the accident was the greater at 67%. Apportionment required that their respective share of the responsibility for damage be determined by comparing the degree of departure from the standard of care of the reasonable man and the relative importance of their acts in causing the damage. On that basis the Court of Appeal found that the trial judge's findings were broadly acceptable. The defence however argued that the accident was a materialisation of an inherent risk under section 5L. Such a defence failed as the risk could have been avoided by the exercise of reasonable care and skill, and as such it was not inherent. Similarly, a defence of joint criminal enterprise involving the two protagonists' consumption of alcohol was not made out on the authorities. The Court of Appeal upheld the first instance decision that the plaintiff's contributory negligence was 33% and the appeal was dismissed with costs.'

Section 60 of the *Australian Consumer Law* - product liability

The defendant in *Archibald v Powlett* [2017] VSCA 259 was contracted to supply two relocatable houses pursuant to two separate agreements, but failed to do so. The judge at first instance, in addition to damages for breach of contract, awarded $30,000 in compensation for the plaintiff's 'distress, anxiety and depression'. The defendant sought leave to appeal, in part challenging that head of damages. The Victorian Court of Appeal stated the general rule that such damages cannot be recovered by way of a breach of contract action, subject to an exception where the object of the contract is the provision of enjoyment and the like. Otherwise, a plaintiff would have to bring an action in tort, which was not the case here. Accordingly, the head of damages could not be awarded in these circumstances.

Cross vesting – removal of matter interstate

The State of Queensland, the defendant sought cross-vesting of a NSW action to the Supreme Court of Queensland in *Henderson BHNF Sullivan v State of Queensland* [2017] NSWSC 1313 The alleged wrong, negligent misdiagnosis of the plaintiff as having lung cancer, took place in

Queensland. The plaintiff alleged the misdiagnosis caused her to undergo chemotherapy and a course of antipsychotic medication. The defendant suggested that its witnesses would be located in Queensland and noted that the plaintiff resided close to the Queensland border. By contrast, it was not clear whether there would be any advantage in hearing the matter in Brisbane or in Sydney. In either case, the plaintiff would have to travel some distance for the hearing. As a result, the transfer application was dismissed with costs following the cause.

Rescue at sea – duty of care

The defendant in *Ibrahimi &Ors v Commonwealth of Australia (No. 9)* [2017] NSWSC 1051 was carrying out maritime patrols off the coast of Christmas Island in inclement conditions when it intercepted a suspected illegal entry vessel carrying a number of people. The other vessel subsequently foundered on the coast of the island. Actions were brought on behalf of the passengers for physical and psychological injuries and the loss of material possessions and also by relatives of passengers who suffered psychological injury as a result of the accident. It was alleged that HMAS Parie had failed to act properly and assist the other vessel at an earlier stage, thus avoiding the accident. The question was whether a duty of care was owed. The defendant had no control over the risk of foundering. It only had control over the response to the risk of harm, which was not created by the defendant. Furthermore, nothing done by the defendant in the course of assisting with the rescue increased the risk of harm. The existence of a duty of care in these circumstances was inconsistent with public and legislative policy and the action failed. On the facts, there was no cause of action for breach of statutory duty.

Medical negligence

The plaintiff in *Jambrovic v Day* [2017] NSWSC 1468 took action regarding the catastrophic effects of brain surgery, alleging that the advice to have surgery was inappropriate. The defendant neurosurgeon had never performed the operation before and failed to disclose this fact to the plaintiff. The plaintiff succeeded in the action against the defendant in negligence. Damages were assessed.

The plaintiff sued in connection with an alleged injury sustained during surgery conducted by the first defendant at the second defendant's hospital in *Holcombe v Hunt and Numurkah Hospital District Health Service* (2017) VSC 666. As there had been a delay of 13 years, at issue was the extension of the relevant limitation period. However, the inordinate delay militated against the granting of the extension, and the fact that a fair trial could still be conducted was not an overriding consideration. It was held that, in the circumstances, an extension of the limitation period extension would not be reasonable in the circumstances.

Intentional injury

The plaintiff took action for personal injury after being physically assaulted by the three defendants in *Brook v Kempton & Ors* [2017] VSC 661. It was alleged that the defendants punched the plaintiff repeatedly in the head, fracturing to his face and skull and causing brain damage as well as other injuries. The defendants had pleaded guilty to criminal charges regarding the assault. The plaintiff was awarded substantial damages, including a component of aggravated damages.

Damages

The plaintiff in *Smith v Alone* (2017) NSWCA 287 suffered injury when hit by a vehicle driven by the defendant. While the defendant admitted liability, it was agreed that damages should be reduced by 60% for contributory negligence. The plaintiff appealed against the trial judge's assessment of damages, particularly regarding the delay in awarding future damages for economic loss two years to allow for pain management and substance abuse withdrawal treatment plus a discount of 35% for vicissitudes due to the plaintiff having an alcohol addiction. There was also no award any damages for future domestic care and assistance. On appeal it was noted that the defendant bore an evidentiary burden in respect of the likelihood of suitable future employment and that, in the circumstances, it could not be confidently assumed that treatment would be effective within a period of two years. The discount of 35% for vicissitudes was excessive. Damages should also have been available in respect of commercial care and assistance. As a result the plaintiff's appeal succeeded.

Medical negligence

Actions were brought were brought in medical negligence by the deceased's estate and his surviving spouse in *Coote v Kelly; Northam v Kelly* [2016] NSWSC 1447 after he died from a melanoma. At issue was whether what was originally observed by the defendant should have given rise to the possibility that it was a melanoma. On the evidence the trial judge found that he could not be satisfied that there was anything to warn the defendant practitioner that that a melanoma existed. Accordingly the plaintiffs failed on the issue of causation.

Medical negligence – privilege

The defendant in medical negligence litigation claimed privilege over subpoenaed documents in *Kaye v Woods (No. 2)* (2016) ACTSC 87. The plaintiff in the matter had sued a surgeon and hospital and the defendants agreed to rely on the evidence of a Dr Hudson, an infectious disease specialist. The defendant served three of Dr Hudson's reports. The surgeon's solicitor subsequently requested a further report from Dr Hudson, which was provided on about 22 August 2014, although they told the hospital's solicitor that they had decided not to get another report. The surgeon's solicitor subsequently served that 22 August 2014 report on the plaintiff and on the hospital's solicitors. The surgeon applied to rely upon the report notwithstanding late service, however the hospital resisted that application and sought documents regarding the procuring of the fourth report. Although some documents were produced, privilege was claimed over others. Given that the surgeon's lawyers had represented to the hospital's solicitors that the fourth report did not exist when it did, had falsely asserted that this failure was due to an oversight, had submitted a false affidavit to that effect and had falsely submitted to the court that the failure to serve was an oversight, in the circumstances, the claim for legal privilege failed.

Claims against police

Four serving officers in the Metropolitan Police Service were alleged to have seriously assaulted a terrorist suspect whilst in custody in *James-Bowen & Ors v Commissioner of Police for the Metropolis*

[2016] EWCA Civ 1217. The suspect sued for assault and the Commissioner of Police on advice subsequently settled the claim on terms which admitted the vast majority of the numerous allegations of gratuitous violence. The officers were all charged with but acquitted of various criminal offences. The officers then initiated proceedings against the Commissioner to recover damages for reputational, economic and psychiatric harm. An application by the Commissioner to strike out the officers' claims was granted at first instance and judgment entered for the Commissioner.

The officers appealed, principally alleging that the Commissioner had failed to defend the claims in a robust and efficient manner, and that incorrect public statements admitting and condemning their behaviour had caused the alleged harm. The appellants argued that an employment-like relationship existed with Commissioner.

Although most grounds of the appellants' case were struck out, a claim for economic and reputational harm based upon a breach of a duty of care at common law should be allowed to go to trial.

Employment

The plaintiff in *Souz v CC Pty Ltd* [2018] QSC 36 sued for a neck injury which allegedly took place in the course of employment with the defendant. The plaintiff was driving a 23 tonne loader vehicle underground at a colliery. The plaintiff was unaware that the canopy above the operator's chair extended vertically and could collide with the roof of the mine. The canopy did collide with a steel beam installed in the roof and the plaintiff, although wearing a seatbelt provided, was injured. Subsequently a guard was constructed which prevented the accidental raising of the canopy. There was no dispute that the plaintiff was had no idea of the existence of the lever and there was no evidence that the plaintiff had been given any notice or training in this regard. Employers are liable for thoughtlessness or inadvertence by a worker and there was accordingly no contributory negligence. As a result the employer was held liable.

The independent contractor plaintiff in *Tsoromokos v Australian Native Landscapes Pty Ltd* [2018] NSWSC 321 sustained serious injury when a 200kg plate fell on his arm when repairing the fuel tank of a loading vehicle owned and operated by the defendant. The plaintiff's casse was that the defendant had failed to provide a suitable place of work and plant and equipment which would have allowed the safe removal of the bash plate.

In dispute was the question of whether the plaintiff had been directed how the work should be carried out. Although the plaintiff accepted that he was not owed an employer's duty of care to their employee, he instead submitted that that the level of interference by the defendant's staff gave rise to a duty of care. As the defendant knew or ought to have known that the bash plate was at risk of separating from the loader there was a duty of care in existence. There was a real likelihood of serious harm and the burden of avoiding that risk fell on the defendant. However, given the plaintiff's independent role, a 40% reduction for contributory negligence was appropriate.

Occupiers liability

The plaintiff injured her shin in *Korda v Aldi Foods Pty Ltd* [2018] ACTCA 6 when a mechanical gate at a supermarket failed to open. The plaintiff expected the gate to automatically open as it was intended but it did not do so. There was CCTV footage of the event. At the trial the plaintiff obtained a verdict which was reduced by 50% for contributory negligence. The plaintiff ultimately appealed to the ACT Court of Appeal, arguing that there was no warning given regarding the defective gate. The Court of Appeal found that there was insufficient evidence to establish that a warning would have been effective in changing the plaintiff's behaviour and accordingly the appeal was dismissed.