COMMON LAW PRACTICE UPDATE 106

Sections 44 and 58 *Motor Accidents Compensation Act 1999*

The claimant in *Sadr v Alliance Australia Insurance Ltd t/as Alliance Insurance & Anor* [2017] NSWSC 1718 sought judicial review of a decision of the Proper Officer of SIRA to refer an insurer's application for determination of a treatment dispute to a medical assessor for assessment. Following a motor accident, the claimant requested the insurer pay for a spinal fusion. The insurer repeatedly refused to do so. The claimant applied for assessment of a permanent impairment dispute as to whether or not the 10% WPI was exceeded. The question of whether the insurer should pay for the surgery was not specifically raised. After the claimant underwent the surgery and the insurer lodged an application for assessment of a treatment dispute, the claimant responded by stating that there was no basis for the insurer's application because there was no present dispute or disagreement as to medical treatment.

The Proper Officer initially dismissed the insurer's application because there was no current claim for payment. The medical assessor's certificate found that there was 25% WPI and stated that the motor accident was a contributory cause and it is unlikely the fusion would have been required had the accident not occurred. A review sought by the insurer was then dismissed. The claimant then the cost of the surgery in seeking a CARS assessment. The insurer then lodged a fresh application for assessment of a treatment dispute and the dispute was referred the to a different medical assessor for assessment. The argument was whether the insurer was bound by the decision of the original medical assessor, which had not been subject to review. The claimant argued that that original assessment was binding and conclusive. The judge at first instance noted that there was no evidence that the cost of the next surgery was clearly claimed prior to the initial assessment. In those circumstances, the decision of the Proper Officer that the treatment dispute had never been resolved was consistent with the evidence and accordingly the summons was dismissed with costs.

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

The claimant in *Wolarczuk v NRMA Insurance Australia Ltd* [2017] NSWSC 1691 sought to set aside the certificate and reasons given by a review Panel of medical assessors where they certified that spinal injuries in a motor accident had resulted were below 10% WPI. This would have precluded any component for non-economic loss pursuant to section 131 *Motor Accidents Compensation Act 1999* (NSW). The claimant also applied for, and was granted, an extension of time to commence the proceedings.

The claimant argued a breach of section 63 *Motor Accidents Compensation Act* in that only two of the three members of the Panel undertook the physical re-examination which the Panel had agreed was necessary.

The Review Panel found the accident was a cause of injury to the lumbar spine but assessed the WPI at nought percent. The judge at first instance found that reasons given were inadequate, "illogical and contradictory", in breach of sections 61 and s.68 *Motor Accidents Compensation Act 1999*. The Panel had failed to meet its statutory obligation and effectively overturned a finding binding upon it, failing to explain how it arrived at the outcome.
The fact that the physical re-examination had been conducted by only two of the three examiners after they had found it to be necessary also constituted a breach of the Review

Panel's obligation under section 63. As a result, the certificate was set aside and the matter referred back to SIRA to be dealt with according to law, with an order for costs in favour of the claimant.

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

The plaintiff in *Bridge v Coles Supermarkets Australia Pty Ltd (No. 3)* [2017] NSWSC 1800 slipped and fell in an underground supermarket car park whereupon he claimed damages from the defendant in respect of a hip fracture and a total left hip replacement, together with related procedures.

The possibility of flooding of the car park was a known risk yet no attempt was made to provide a non-slip coating on the car park floor. There was evidence that the plaintiff could not avoid the wet surface. His wife gave evidence that she almost fell in the same vicinity when trying to assist her husband. Expert testing indicated that the area where the plaintiff fell was unduly slippery. There were relatively inexpensive products which could have been applied to give a non-slip coating. Coles argued that the risk was obvious and therefore it should not be liable. The trial judge however found that that the risk was not obvious because the finish of the car park was not consistent throughout the parking area and the plaintiff had walked through other parts of the area without incident. The trial judge found in favour of Mr Bridge and ordered the Defendant, to pay him the sum of $688,000.71.

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

The plaintiff in *Goode v Angland* [2017] NSWCA 311 was a professional jockey who fell from his horse during a race and suffered serious injury. He alleged that the injury was caused by the negligence of the defendant, another professional jockey riding in the same race. The judge at first instance found for the defendant. The plaintiff appealed, raising questions whether the trial judge erred in interpreting the photographic and video evidence, whether he made inconsistent findings and whether he erred in his finding that the injury occurred through the materialisation of an obvious risk of a dangerous recreational activity, thus disentitling the plaintiff under ss 5K and 5L Civil Liability Act.

The Court of Appeal held that the approach taken at first instance to the video and photographic evidence was consistent with authority. The appellant plaintiff was unable to establish that the defendant intentionally moved his horse into the plaintiff's path and therefore could not establish negligence.

The s 5K definition of "recreational activity" does not distinguish between amateur and professional sport, and thus horse racing is a recreational activity for the purposes of s 5K. It followed that the s 5L defence was available. The plaintiff's appeal failed**.**

Medical Negligence / sections 3B and 5O *Civil Liability Act 2002* (NSW)

The plaintiff sued for injury suffered as a consequence of complications of surgery at a regional base hospital in *Tinnock v Murrumbidgee Local Health District (No. 6)* [2017] NSWSC 1003 After

initial surgery to repair a hernia, further surgery was conducted to deal with complications which had arisen. A month later, the plaintiff was admitted to hospital in Canberra following a severe infection requiring urgent surgical intervention which was associated with the initial hernia procedure. The plaintiff took action for trespass to the person and battery, alleging she did not consent to the registrar performing the surgery and claimed in negligence in the alternative.

The plaintiff's allegation involving intentional injury was based on her claim that she was mistaken as to the identity of the person who would undertake the surgery, although she was not mistaken as to the nature of the procedure proposed or its intended benefit. Given that the procedure was conducted by a qualified practitioner under the direct supervision of a specialist, the trial judge found that, despite any confusion regarding the protagonists, the plaintiff did consent to the procedure. Accordingly section 3B of the *Civil Liability Act* did not apply.

The allegation of negligence ultimately relied upon expert opinion to the effect that the infection was a foreseeable and not insignificant risk. At issue was whether a surgeon of ordinary skill and competence would been able to avoid the infection.

The trial judge was persuaded that the standard of care in this case required additional measures which were not taken given the complexity of the surgery involved. The treatment fell short of the standard of a surgeon of ordinary skill and competence in the original repair of the plaintiff's hernia and in the failure to detect and treat the infection at an earlier point. He then turned to causation. Campbell J was satisfied on the balance of probabilities that had additional measures been taken the outcome would have been very different and the infection and its consequences avoided. , in that the massive mesh infection and its consequences would have been avoided. Damages in negligence of over one million dollars were awarded, plus costs.

Occupiers Liability

The plaintiff took action for an injury sustained after a fall in the walkway of the tower block in which she lived in *Robinson v The Owners of Reflections Waterfront Apartments West Tower Strata Plan 58085* [2017] WASCA 190, alleging a negligent failure to regularly clean the walkway and a failure to erect a warning sign alerting residents to the slipping hazard. The plaintiff's evidence identified a stain on the floor of the walkway, which, it was argued was the cause of her slip and fall. At first instance the judge was not satisfied that the stain, which had been photographed after the incident, was the cause of her fall nor that the defendant materially contributed to the plaintiff's injury. The plaintiff sought leave to appeal out of time but failed as she did not establish any error on the part of the trial judge.

The plaintiff in *Holland v City of Botany Bay Council* [2017] NSWSC 1120 suffered a serious injury to her back when she tripped and fell at an intersection. She alleged a failure to maintain the road and sued the Council, which denied that the injury was caused by the fall.

The plaintiff argued that the road was in a dangerous state of disrepair at the relevant time, however the judge at first instance was not satisfied that there was sufficient evidence to established that the state of the road caused the plaintiff's fall. Further, there was some uncertainty about where the plaintiff actually fell and inconsistencies in the plaintiff's evidence.

The uneven surface at the intersection was physically obvious - in the circumstances, the Council had no duty to warn pedestrians and it was by no means obvious that the Council breached the duty of care it owed. In any event, the non-feasance defence under s 45 *Civil Liability Act* 2002 (NSW) would have succeeded. There was no evidence as to Council being aware of deficiencies at the intersection and no evidence of previous incidents involving injury in that location.

Had the plaintiff succeeded contributory negligence would have been assessed at 80% however, the plaintiff's claim was dismissed with costs.

Insurance

The plaintiff in *Amaca Pty Ltd v Latz* [2017] SASCFC 145 took action in negligence regarding his diagnosis of mesothelioma, which had significantly reduced his life expectancy. Total damages were assessed at $1,062,000, including components for future economic loss, loss of capacity to perform domestic services and for exemplary damages. The future economic loss involved loss of a superannuation pension and of the age pension. There was no deduction on account of the value of a reversionary superannuation pension payable to the plaintiff's spouse, but a deduction was made for the cost of the plaintiff's living costs during the lost years. The defendant appealed, arguing that loss of a pension is not a recoverable head of loss or alternatively that there should have been a deduction regarding the value of the reversionary pension. The plaintiff cross-appealed, arguing that the award for domestic services was insufficient and that the allowance of $30,000 for exemplary damages was manifestly inadequate.

The trial judge was correct in principle to award damages for loss of the pension, although there was an error in not deducting the net present value of the reversionary pension.

The plaintiff's cross-appeal regarding loss of domestic services failed. There was no error in the assessment of damages in this regard. However the allowance of $30,000 for exemplary damages was manifestly inadequate. The head of damages was reassessed at $250,000.

Limitation Periods

The plaintiff obtained an extension of time in which to sue in *AAI Ltd t/as Suncorp Insurance v Birch* [2017] QCA 232. The relevant limitation period under Queensland law could be extended if a decisive material fact involving the right of action which the applicant was unaware of comes to his or her attention. At first instance the plaintiff was found to be medically unfit to continue employment as a previously existing psychiatric condition had been aggravated subsequent to the expiration of the limitation period. This circumstance was held to be a material fact of a decisive character.

The Queensland Court of Appeal upheld the trial judge's findings.

The plaintiff in *Gower v State of NSW* [2018] NSWCA 132 was employed as a casual teacher at a high school. He suffered a depressive disorder as a result of being hit by a football thrown by a student. More than ten years after the incident he received a medical assessment certificate finding his degree of WPI was at least 15%, whereupon he commenced proceedings within two years. The defendant employer argued that claims must be brought within three years of the injury except with leave pursuant to s 151D *Workers Compensation Act 1987*. The judge at

first instance struck out the proceedings, noting that a deliberate decision had been made to allow the limitation period to run its course and there was evidence of actual prejudice regarding absent missing witnesses and documents. On appeal it was noted that plaintiff had wrongly assumed that he could not commence proceedings until an assessment had found at least 15% WPI. A claim can be brought before the injury stabilises and WPI assessed. However, contrary to the finding of the trial judge, was no deliberate plan on the plaintiff's behalf to deliberately allow the limitation period to expire was established. Nor was there a failure to fully explain the reasons for the delay. However, there would be real prejudice if the matter proceeded and the plaintiff's case was unsustainable. Accordingly, the appeal was dismissed with costs.

Medical Negligence

In *State of Queensland v Roane-Spray* [2017] QCA 245 the plaintiff suffered injury when one end of the stretcher she was lying on collapsed when she was being moved by paramedics from an ambulance. She successfully established vicarious liability on the part of the State of Queensland as the paramedic's employer at first instance.

The defendant appealed, arguing that there was a statutory defence available under s 27 *Civil Liability Act 2003* (Qld) for prescribed entities, including the Ambulance Service.

The issue on appeal was whether the defence available to the Ambulance Service could apply to the State of Queensland.

The State of Queensland was not listed in the relevant regulation under the *Civil Liability Act*, which did not apply to the State's vicarious liability for its employee's actions in any event and accordingly the appeal failed and costs were awarded against the defendant.

Employment

The defendant in *Southern Colour (VIC) Pty Ltd v Parr and Knight Frank (VIC) Pty Ltd* [2017] VSCA 301 employed the plaintiff as a printer's assistant. In order to reach his workplace from the most convenient car park it was necessary for the plaintiff to cross a high fence which blocked direct access. After knocking on a door next to the fence to attract attention the plaintiff intended to climb the fence, however as he prepared to do so, his left foot went through a piece of chipboard covering a drainage pit and as a result suffered significant injury. Although he had climbed the fence previously (as had other employees of the defendant), the plaintiff had not then noticed the chipboard. Furthermore, there was nothing to indicate any threat to safety. Other employees had also climbed the fence on occasion. The trial judge found that there was a relevant risk of injury in these circumstances. The employer had known that employees were scaling the fence in order to reach their workplace and had a duty to inspect and maintain safety in the area. Had any inspection been conducted it would have revealed the hazard. On appeal, the Victorian Court of Appeal noted the non-delegable duty of care to employees enunciated by the High Court in *Czatyrko v Edith Cowan University* (2005) 214 ALR 349, which requires an employer to "take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or careless ness, particularly in a case of repetitive work."

The risk inherent in climbing the fence was known to the defendant, yet there was no inspection of the route that employees used to access their workplace. The defendant's appeal was dismissed.