COMMON LAW PRACTICE UPDATE 69

Section 62 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff, who was injured in a motor accident, was examined for medico-legal purposes and then by a medical assessor appointed by MAS in *El-Kazzi v Allianz Australia Insurance Ltd* [2014] NSWSC 927. A certificate of assessment was issued. The plaintiff then underwent a second examination for medico-legal purposes, which was conducted by the same practitioner who undertook the first examination. After receiving the medico-legal report from the second medico-legal examination, the plaintiff applied for a further medical assessment under s 62. This application was rejected by the Proper Officer, on the basis that the second medico-legal report was not capable of having a material effect upon the outcome of the previous assessment undertaken by the MAS assessor. The plaintiff sought judicial review.

Hamill J His Honour said that, in order to overturn such a decision, it was necessary for the plaintiff to establish jurisdictional error, a constructive failure to exercise jurisdiction or legal unreasonableness. In this case, the Proper Officer's reasons contained contradictory statements which could not be reconciled. Moreover, the Proper Officer had made erroneous reference to legal authority. The Proper Officer's decision was neither logical nor rational. It was unsupportable to refer to relevant passages of a case which had been overruled. The decision was therefore quashed and the matter remitted for proper assessment by another Proper Officer under s 62 and the insurer ordered to pay the plaintiff's costs.

Section 73 *Motor Accidents Compensation Act 1998* (NSW)

In *Brierley v Ellis* [2014] NSWCA 230, the plaintiff was injured in a motor cycle accident and lodged a claim for damages more than six months after the accident. The insurer applied to have the proceedings dismissed as out of time. Section 73(7) requires that proceedings be dismissed unless the court is satisfied that there is "a full and satisfactory explanation for the delay in making the claim". The claimant then filed various affidavits, none of which were from him but which annexed copies of statutory declarations by the claimant which sought to explain the delay. The insurer did not object to this course, and the deponents of the affidavits were not required for cross-examination. The trial judge was not satisfied that a full and satisfactory explanation had been given.

On appeal, it was held that leave to appeal should be granted and the insurer's motion seeking the dismissal of the proceedings rejected. A full account of the conduct, including the actions, knowledge and belief of the claimant from the date of the accident until the date of providing the explanation is required. It would be satisfactory if the reasonable person in the applicant's position would have experienced that delay and that this would have been justified in the circumstances. Although the statutory declarations were hearsay, they were not challenged and could be used. The weight to be given to such evidence was a question of fact. However it was also relevant that it the respondent could have objected to admission of the hearsay evidence required the evidence to be adduced in admissible form. However, the respondent chose not to challenge that evidence. In the circumstances, there was a full and satisfactory explanation, and the claimant's appeal was allowed with costs.

Section 43A Civil Liability Act 2002 (NSW)

Council road works left gravel on a corner in a 100 kph area with no warning sign in *Curtis v Harden Shire Council* [2014] NSWCA 314. The plaintiff's vehicle went off the road and hit a tree. The trial judge found that there was a breach of duty in failing to erect adequate signage. However Fullerton J was not satisfied that that failure was causative - there was no evidence of side slippage in the gravel and other possible explanations, such as loss of concentration, could not be dismissed. In addition, Her Honour was not satisfied that the breach of duty met the relevant standard required by s 43A *Civil Liability Act 2002*. The plaintiff successfully appealed.

The NSW Court of Appeal was satisfied that the failure to erect signage was a decision that could not reasonably have been made by anyone with the special statutory powers in question. As a result, it held that s 43A was satisfied. The majority, Bathurst CJ and Beazley P, found that there was no positive evidence of another cause and accordingly found that, on the balance of probabilities, that causation was established. Basten JA dissented in this regard.

Costs of Fund management

In *Gray v Richards* [2014] HCA 40, the plaintiff appealed to the High Court against adverse findings in the NSW Court of Appeal. The High Court unanimously found the plaintiff was entitled to the cost of fund management on the basis that it was not open to challenge these charges, which had been found to be "entirely reasonable" in the Court of Appeal. The expenses were an integral part of the cost of fund management and should be allowed as a result. The appeal, however, did not succeed in respect of fund management on future fund income. No assumption could be made as to what would happen in this regard in respect of the fund, nor as to whether any income from the fund would equate with the discount rate.

The consequence is that on an agreed verdict of $10 million plus fund management, the damages for fund management allowed in the NSW CA of $1,495,000 are increased by $539,000 to $12,151,000 in total. The amount not allowed for fund management on income into the fund would have been a further $117,000 or 18% of the additional sum claimed in the High Court. Accordingly, the plaintiff/appellant succeeded as to the overwhelming bulk of the additional damages claimed for fund management.

Astute negotiators for such plaintiffs and astute fund managers will no doubt in the future ensure that there is 100% recovery of the cost of managing the allowance for fund management by it being levied only on the decreasing capital of the fund and not on the income but at a rate which produces the same or similar ultimate charges. Accordingly, it is likely that the whole of fund management will be recoverable if this course is pursued. It is noted that both the NSW Trustee and Guardian and private fund managers have shown themselves willing in the past to negotiate in respect of the regime of future charges and indeed, to offer discounts to those for whom very large sums of money are being invested and managed, such as this severely disabled plaintiff.