COMMON LAW PRACTICE UPDATE 80

Sections 3, 7A and 7E *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was driving when a tree fell and struck the cabin of his truck in *Connaughton v Pacific Rail Engineering Pty Ltd (*Norton SC DCJ, unreported 12 February 2015). He lost control of the vehicle which then caused the plaintiff injury.

At issue was whether this was a blameless accident. Norton SC DCJ noted that section 7C contains a presumption that the motor accident is blameless. Section 7A defines a blameless motor accident as "not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use of operation of the vehicle and not caused by the fault of any other person." Her Honour also noted that, however, section 7E has the heading "No coverage for driver who caused accident" and contains a subsection which purports to deem causation by a driver even where the act or omission does not constitute fault by the driver. The section also, in the alternative, provides reference to the act or omission not being the sole or primary cause of the death or injury. Norton SC DCJ noted that a number of anomalies arise dependent on which view is taken of these sections.

Clearly, the accident fell within the definition of motor accident within section 3.

On the facts of the particular case, the plaintiff did not cause the accident. His driving was no more than a background detail which explained why he was at the scene. Looking at the relevant provisions, the accident in which the plaintiff was involved was properly categorised as a blameless accident. The plaintiff is entitled to recover damages accordingly.

It is understood that the third party insurer Zurich has lodged an appeal on behalf of the defendant.

Section 94 *Motor Accidents Compensation Act 1999* (NSW)

The CARS Assessor made findings partially accepting and partially rejecting the evidence of the claimant in *Allianz Australia Insurance Ltd ACN 000 122 850 v Moo Ok Park* [2015] NSWSC 122. A sum was awarded for economic loss. The insurer sought judicial review, asserting that inadequate reasons had been given in respect of the award of damages for past economic loss as required by s 94(5) of the *Motor Accidents Compensation Act*. Harrison AsJ found that it was not clear how the CARS assessor arrived at the particular figures or the retained earning capacity. As a result, she concluded that the reasoning was inadequate, the decision was quashed and the action remitted to be dealt with according to law.

Sections 10, 81 and 140 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff participated in a motor car rally which was held on a public road in a State forest in *Mordue v QBE Insurance (Australia) Ltd* [2015] NSWSC 98. The plaintiff, the front seat passenger, suffered injury when the driver, his son, lost control of the vehicle. An unregistered vehicle permit and a third party insurance policy from QBE had been issued for the vehicle.

The plaintiff claimed compensation. QBE admitted liability by way of a s 81 notice, which it subsequently purported to withdraw. Although QBE was on notice that this was a road race

when it accepted the premium and issued the policy, QBE denied indemnity based upon the fact that this was a road race which invalidated the policy of insurance.

When the plaintiff sought a CARS assessment, the Principal Claims Assessor decided to exempt the claim, determining that there was an arguable case, which should properly be heard in court. The plaintiff in turn sought administrative review of the Principal Claims Assessor's decision.

QBE argued that it was not reversing its s 81 admission but was instead denying indemnity to its client. This was said to differ from the admission made to the claimant plaintiff.

It was held that the admission was implicitly a concession of the obligation to indemnify. QBE should be bound for all purposes by its notice admitting liability. It followed that there was no room for the Principal Claims Assessor's decision to exempt the claim, as there was no basis for exemption in the absence of an indemnity. As a result, the PCA's decision was quashed, the MAA was prohibited from issuing a certificate of exemption and the plaintiff's claim was remitted to be determined by the MAA in accordance with the Act. QBE was required to pay the plaintiff claimant's costs.

Slip and Fall

The plaintiff entered a supermarket whereupon she slipped and fell, injuring her left ankle, in *Coles Supermarkets Australia Pty Ltd v Bright* [2015] NSWCA 17. The relevant CCTV footage failed to reveal precisely how the plaintiff came to fall, but the case against Coles rested on the proposition that a puddle of water had been left on a tiled area, which resulted in the plaintiff's fall. At first instance, Blanch CJ DC found for the plaintiff. Although the defendant did not dispute that there was water on the ground immediately after the incident, it was argued that the plaintiff's arm had struck and overturned a bucket containing water at an adjacent flower display. The plaintiff's case was that she had seen a skid mark in the water, consistent with her shoe having moved forward in the water, however there was significant evidence inconsistent with the slip being caused by the wet floor. The CCTV footage did not assist the plaintiff, who also had some difficulty in establishing the exact location where she slipped. The trial judge had only very limited advantages over the assessment being made by the Court of Appeal, and that Court could not be satisfied on the balance of probabilities that water lay on the floor before the plaintiff slipped. Accordingly, the appeal by Coles was upheld.

Sporting Injuries

In *Hamed v Mills and Tottenham Hotspur Football Club and Athletic Limited* [2015] EWHC 298 (QB) (Hickinbottom J), the 17 year old plaintiff signed a professional contract with Tottenham Hotspur Football Club. His ambition was become a successful professional footballer. Shortly thereafter he suffered a cardiac arrest while playing for the Club's youth team in Belgium, leaving him with catastrophic brain damage. The plaintiff by his litigation friend, sued Dr Mills, the cardiologist and first defendant who had screened the plaintiff, and the Club (second defendant). The Club joined Drs Cowie and Curtin, specialist sport physicians, as third defendants. They were employed by the Club and the Club was vicariously liable for their actions, however they had agreed to indemnify the Club in respect of any damages it might be ordered to pay the plaintiff.

By the end of the separate trial on liability, the first defendant had accepted liability and the Club accepted the plaintiff's claim with regard to causation subject to him proving a breach of duty. The Club also accepted that it owed a duty of care. As a result, the only remaining issue was whether the Club breached that duty of care and issues of apportionment. On examination, there had been an abnormal ECG.

The court concluded that Dr Cowie had been negligent in failing to follow up information provided by Dr Mills. It was accepted that had the plaintiff and his parents been properly informed of the risk, the plaintiff would have not played and the catastrophic event not have occurred.

The court found Dr Mills and the Club in breach of their respective duties to the plaintiff, and apportioned liability in the proportion of 30% against Dr Mills and 70% against the Club, with the third parties to bear the Club's portion.