COMMON LAW PRACTICE UPDATE 82

Non-party costs orders

The High Court upheld an appeal against a decision of the Full Court of the Federal Court of Australia applying the proportionate liability regime in Division 2A of the *Corporations Act* 2001 (Cth) in *Ronald Selig & Anor v Wealthsure Pty Ltd & Ors* [2015] HCA 18. The High Court held that the scheme did not apply. On the advice of the second respondent, the authorised representative of the first respondent, the appellants had invested finds in what in fact was a "ponzi" scheme. The appellants lost substantial sums. Although other parties may also have been responsible, the High Court held that this is not an apportionable claim within the meaning of Division 2A.

In the particular circumstances, an award of costs against a non-party - the first respondent's professional indemnity insurer - to the proceedings was justified. The insurer conducted the defence at trial and on the subsequent appeals. As the respondent's cover under the policy was capped, the monies which would otherwise have been available to pay the appellants would be diverted to meet the insurer's legal costs. Because the insurer was acting for itself in seeking to better its position in bringing an appeal to the Full Court of the Federal Court, there was no reason why a non-party costs order should not be made.

Obvious Hazard

The plaintiff appealed to the ACT Court of Appeal in *Brozinic v The Federal Capital Press Pty Ltd t/as The Canberra Times* [2015] ACTCA 8. The plaintiff had been injured when the respondent's servant opened a fire door from the other side. At issue was whether a window should have been built into the fire door in the light of a warning report, which had suggested the installation of "peephole" glass half door windows. Although the report had been considered by management, the view had been expressed that it was not possible to put glass in fire doors. The evidence indicated that fire doors with glass windows were in fact available. There was no evidence suggesting that dangerous collisions often occurred. The Master had concluded that opaque doors were an obvious hazard and therefore there was no negligence on the part of the respondent by failing to install a window in it. The Court of Appeal concluded that it was open to the Master to make the finding that he did. It was not sufficient that a risk of injury was present – any such risk must be a substantial risk. Accordingly, on the evidence, the Master was entitled to the conclusion that it was not a substantial risk, and the appeal was dismissed.

Section 43A *Civil Liability Act 2002* (NSW)

The defendant council appealed from a finding that the boom gate represented a "perceptual trap", so that the plaintiff could not detect it was closed in sufficient time to avoid a collision, in *Rockdale City Council v Simmons* [2015] NSWCA 102. Although there were traffic signs directing traffic away, the council was aware that cyclists regularly went through the boom gate. The Court upheld the trial judge's finding that the plaintiff had no reasonable or alternative exit.

It was also open to the trial judge to find that there was no particular arrangement between the council and the club regarding the operation of the boom gate and that the council owed a duty of care.

The plaintiff had exercised reasonable care for his own safety and the evidence supported the primary judge's findings as to the council's failure in respect of an adequate system for opening and closing the gate. The trial judge was correct in finding a causal connection between the council's failures and the plaintiff's injury.

Furthermore, the primary judge was correct in finding that the council was not exercising a special statutory power within the meaning of s 43A of the *Civil Liability Act 2000* (NSW).

The plaintiff had also cross-appealed against the club. In this respect, the Court of Appeal found that the trial judge was correct in refusing to find the club owed a duty of care. The club did not know of the risk and hence could not be expected to take reasonable precautions. However, the Court upheld the plaintiff's cross-appeal against the finding of contributory negligence, as, once it was accepted the plaintiff was keeping a proper lookout, there was no evidence that he did not react quickly enough in the circumstances. The Court of Appeal set aside the reduction of 20% for contributory negligence.

Fiduciary duty to act in best interests of wards of State

The plaintiffs in *Collard v The State of Western Australia [No. 4]* [2013] WASC 455 were Aboriginal wards of State. They alleged that the State of Western Australia owed a fiduciary duty to act in their best interests, including in respect of their maintenance and education, the provision of independent legal advice and psychiatric treatment. At first instance, these claims were dismissed. The plaintiffs had failed to make out the case for the existence of a fiduciary duty between the State of WA and all Aboriginal people in WA which would be necessary to found a fiduciary duty to act in the best interests of all Aboriginal people. Further, the first plaintiff was not in a fiduciary relationship by virtue of the wardship of the second to eighth plaintiffs and the duties alleged were not fiduciary duties. Even if such a duty had existed, no breach was established and, in any event, none of the plaintiffs had a right of action against the State of WA through failure to comply with the requirements of s 6(1) of the *Crown Suits Act 1947* (WA).

Assault/false imprisonment

The plaintiff in *Mohamed Zahidul Haque v State of Victoria* [2015] VSCA 83 was arrested, handcuffed and taken to a police station. He alleged causes of action in assault, battery, false imprisonment and defamation. His claim was dismissed at first instance, but that decision was subsequently overturned by the Victorian Court of Appeal. The claim was again dismissed by the second trial judge. The plaintiff sought leave to appeal.

The plaintiff was a taxi driver who had a verbal altercation with a potential passenger, who claimed the plaintiff ran over his foot and complained to nearby police. The plaintiff stopped his taxi, whereupon he was arrested and handcuffed, offering no resistance. He was not informed of the rationale for the warrant for his apprehension but merely told that a warrant was valid and needed to be acted upon. The charges leading to the issue of the warrant were subsequently

withdrawn. The warrant had in fact related to alleged theft of two mobile phones. The plaintiff argued that he behaved reasonably at all times and that the use of handcuffs was unjustified. He was not told why he was being arrested. The police witnesses gave evidence that the plaintiff was agitated and that he was told of an outstanding warrant. The police evidence was preferred, the trial judge's findings were upheld and leave to appeal refused.

Set off/carers payments

The issue in *Campton v Centennial Newstan Pty Ltd (No. 3)* [2015] NSWSC 410 was whether carer's payments under the *Social Security Act 1991 (Cth)* by the plaintiff's wife should be set off against claims for past or future domestic assistance. Hall J was of the view that, for the period that the carer's payment was being made, it should be offset against damages for gratuitous care. So far as future care was concerned, Hall J was of the view that there was no basis for accounting for the possible future receipt of carer payments and, in any event, no award of damages had been made for future care, against which any carer's payments could be offset.

Unsafe system of work

The plaintiff in *Paton v Bronzewing Bloodstock Pty Ltd* [2015] NSWDC 54 suffered severe injury after the horse she was riding at the direction of its trainer bolted and ran into a fence. The plaintiff, who was acting in the course of her employment with the defendant, took action alleging an unsafe system of work. The defendant admitted owing a duty of care but disputed liability, also alleging contributory negligence. The plaintiff, a female track work rider, had from time to time suffered injuries whilst riding. On this occasion, she was asked to use a racing pad instead of a saddle and expressed concerns about the horse, which she had never ridden before. The horse had a history of bad behaviour resulting in its suspension by Queensland racing authorities and was in remedial training. The trainer was aware of these facts. Despite the plaintiff's reluctance to ride the horse, particularly with a racing pad, she was reassured by the trainer and acquiesced.

The court heard evidence from a farrier and horse trainer that the plaintiff should not have been asked to ride the horse with racing pads, particularly given the absence of any rail in the paddock. There was a patent and high risk of injury to the plaintiff which was foreseeable. The defendant's duty of care to the plaintiff was breached by requiring her to exercise a thoroughbred horse with a known history of dangerous behaviour, in an open paddock and substituting a racing pad as a saddle. The horse should only have been ridden by a licensed jockey on a racetrack. The plaintiff was injured as a result, and there was no contributory negligence. Damages were assessed in accordance with the provisions of the *Workers Compensation Act 1987* (NSW).