COMMON LAW PRACTICE UPDATE 84

Section 5R *Civil Liability Act 2002* (NSW)/Contributory Negligence/Expert Evidence

The 12 year old plaintiff in *Verryt v Schoupp* [2015] NSWCA 128, with two other boys, was permitted by the defendant to "skitch" (i.e. be towed by a car whilst on a skateboard) in a suburban street. The plaintiff was not wearing a protective helmet. After a few hundred metres, while the defendant was not driving at more than 10 to 15 kph, the plaintiff appeared to wobble, then let go and fall backwards, striking his head on the bitumen, suffering brain damage as a result. Although the activity was unlawful, neither party relied upon that fact in the context of the assessment of contributory negligence. The plaintiff was awarded $2,204,150, with no reduction for contributory negligence, as the trial judge was not satisfied that the frontal lobe injuries would have been any different if he had been wearing a helmet. The plaintiff's lack of care was totally overshadowed by the defendant's overwhelming negligence, and at first instance it was found that it was just and equitable for the defendant to bear 100% of the responsibility. The defendant appealed.

Meagher JA noted that the onus in respect of contributory negligence remains on the defendant and accordingly that, in the absence of medical evidence to the contrary, the primary judge was not in error in concluding that it was a matter of speculation whether the plaintiff's frontal lobe injuries would have been any different if he had been wearing a helmet. In respect of the level of responsibility expected of a 12 year old boy, Meagher JA said that the primary judge's finding that the plaintiff's concession that what he was doing was "fairly dangerous" was one made with the benefit of hindsight and that this finding was not clearly wrong. There was however other evidence which indicated the plaintiff actually appreciated there was some danger. Although expert evidence from a psychiatrist was directed at how she thought an ordinary boy of 12 was likely to have acted and thought in the circumstances, that was not in a field of "specialised knowledge" in which she was expert by reason of her training, study or experience. See *Evidence Act 1995* (NSW) s 79(1) and *Dasreef Pty Ltd v Hawchar* [2011] HCA 21. Whilst opinion evidence might be given as to the characteristics or behaviour of a category of persons, the psychiatrist's views concerned matters of ordinary human experience. That evidence should not have been admitted, however, the admission did not result in any material error.

As in *McHale v Watson* [1966] HCA 13, a 12 year old boy is unlikely to perceive the risk of serious injury as a realistic prospect. The defendant was responsible for the safe operation of the vehicle and must be taken to have appreciated the significant risk of injury involved. As a result, the defendant must substantially bear the greater responsibility. The plaintiff's damages were reduced by 10%.

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

The primary issue in *Roads and Maritime Services v Grant* [2015] NSWCA 138 was whether there was evidence establishing that the plaintiff motor cyclist first collided with the nose of the median strip, despite some police evidence to the contrary. The defendant appealed, whereupon it was held that on the whole of the evidence the plaintiff did not establish that his expert's theory should be preferred to that of the defendant's expert. Nor did the defendant breach the duty of care it owed to road users. In any event, the defendant's failure to install a "Keep Left" sign on the median strip involved a failure to exercise a special statutory power within the terms of s 43A(2) *Civil Liability Act 2002*, which gave rise to the immunity granted to the RMS under s 43A. The appeal was upheld.

Liability of Government agencies/ duty of care/ sexual abuse

Each of the plaintiffs in *TB and DC v State of NSW & Anor* [2015] NSWSC 575 had a long history of sexual abuse and physical abuse from their stepfather since they were young girls. In April 1983, the eldest girl complained to the Department of Youth and Community Services YACS (YACS) about the abuse. After she, her sister and her mother were interviewed, the YACS District Officer concluded that the abuse had occurred. The girls were categorised as neglected children but the stepfather was not reported to police. In September of that year, the stepfather admitted the pattern of abuse to the YACS District officer. Although the YACS officer sought to avoid the stepfather seeing the girls alone he was aware that the stepfather was regularly doing so.

Subsequently the plaintiffs, now adults, sued in negligence, asserting that they suffered continuing abuse through the failure to report. The stepfather already had a history of sexually abusing children by the time of the original complaint, and was on bail for the sexual assault of his son's 15 year old girlfriend, an offence for which he was subsequently convicted. He was later charged and convicted in relation to sexual abuse of the two stepdaughters.

Campbell J found that the State of NSW, and the Department in particular, owed TB and DC an actionable duty of care. The YACS officer owed a different duty.

In failing to report the sexual abuse to police, the Department breached its duty. However, the YACS District Officer was not in breach of her duty for various reasons, including the fact that she would have expected that her superiors would have done so.

Despite findings that the stepfather was unlikely to change and despite his history, His Honour was not satisfied on the probabilities that TB and DC continued to be abused after the initial report in April 1983.

Accordingly, the plaintiffs' claims against the State of NSW failed on non-acceptance of their evidence that the abuse had continued in the absence of written evidence of complaints of continuing abuse at the time.