COMMON LAW PRACTICE UPDATE 85

Section 58 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff sought judicial review of the decision of the MAS Review Panel in *Francica v Allianz Australia Insurance Ltd* [2014] NSWSC 1962. At issue was whether the plaintiff's shoulder injury was caused by the motor accident. The Panel's view that the plaintiff's shoulder condition was caused by issues other than the relevant accident was pure conjecture. It had failed to determine all issues before it on the balance of probabilities, had not given proper weight to relevant factors of great importance and gave excessive weight to an irrelevant factor. Accordingly, the MAS Review assessment was quashed.

The plaintiff was injured when his stationary motor vehicle which was struck from behind by a vehicle driven by the defendant in *Rodger v de Gelder* [2015] NSWCA 211. The MAS assessment placed the degree of permanent impairment at 20%. When the insurer sought a review, the Review Panel certified permanent impairment at nil, whereupon the plaintiff applied for judicial review. The judge at first instance found that the Panel failed to take relevant considerations into account - in particular, it did not give due regard to evidence of the plaintiff's thoracic pain at the time of and following the accident. The Panel had misread a relevant report concerning the history of thoracic pain and had failed to respond to a substantive argument based on the evidence in this regard, which constituted judicial error in carrying out a statutory function under s 58 *Motor Accidents Compensation Act 1998*. The insurer appealed. The Court of Appeal agreed with the primary judge and dismissed the appeal with costs.

Sections 13 and 14 *Civil Liability Act 2002* (NSW) - Damages

The plaintiff sued for compensation to relatives as a result of the death of her husband in *Norris v Routley* [2015] NSWSC 883 (Harrison J). The deceased suffered from liver disease and it was accepted that he was suitable candidate for liver a transplant. Such a transplant would, in all likelihood, have saved and prolonged his life, however his death was caused by the defendant's negligent failure to arrange the operation in a timely fashion. The plaintiff's husband died at 52 years of age. The plaintiff herself was a medical specialist, the deceased having been a stay-at-home parent, who also occasionally performed casual work as a landscaper and gardener. The deceased was the full-time carer for their sons. He assisted in the establishment of the plaintiff's practice and the intention had been that he would become the plaintiff's practice manager.

There were three elements of the claim. The first element involved the loss of income to the household, which was confined to the earnings of the deceased. The second element was constituted by the notional value of domestic services provided by the deceased at the date of his death and the third involved the reasonable cost of funeral and testamentary expenses, an agreed amount.

Section 13 of the *Civil Liability Act* (NSW) provides that the court must award damages for future economic loss based on the claimant's most likely future circumstances if the injury had not occurred. This applied to compensation to relatives claims as well. The discount rate for future economic loss was 5% pursuant to s14 *Civil Liability Act*.

The parties agreed that the plaintiff's losses should be set off against any gains to the household (ie the plaintiff and her sons) consequent upon the death of the deceased.

The plaintiff claimed that the net effect upon household income after the death was the loss of both her husband's salary as her practice manager and the loss of his domestic services as homemaker and child care provider. However the defendant argued that the death of the deceased did not deprive the household of anything material at all, maintaining that his contribution to the household was exceeded by the cost of supporting him as one of its members.

Harrison J referred to the comments in Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed) that even though it is rare for relatives to profit from the deceased's death (in the sense that they would be in a better financial position than if the death had not occurred), where that is the case, the court must recognise this circumstance by not awarding damages. That approach is consistent with that adopted in the *Compensation to Relatives Act 1897*.

A question arose as to whether the Luntz schedules at table 9.1 concerning the deceased's likely consumption costs should be applied in this case. The relevant figures were 24% when there were two dependent children, 28.1% when one dependent child and 34% where there were none. However, it was acknowledged that the Luntz schedules were not inflexible rules and that they necessarily yielded to the evidence in a particular case. Here the evidence indicated that the deceased had frugal habits. Harrison J concluded that this household did not appear to be anything other than a normal one, and accordingly there was not sufficient evidence to justify a departure from the schedules.

The deceased's likely income minus his consumption costs could be calculated to age 65, the estimated date of death if the liver transplant had been performed. The value of the domestic services until the youngest son turned 18 must be added to that figure. The calculation on Harrison J's findings was to be 27 hours before the last child turns 18 and 21 hours thereafter.

Because these findings varied from the calculations on each side, the ultimate figures will need to be recalibrated. Accordingly the matter was relisted to enable those calculations to be undertaken. It does appear however that there will be a substantial verdict for the plaintiff, in spite of the fact that the calculation of the deceased's consumption will exceed his earnings, given the high value of his services to the family.

Section 45 *Civil Liability Act 2002* (NSW)

The plaintiff was wheeling a laden shopping trolley in a car park in *Cavric v Willoughby City Council* [2015] NSWCA 182, The front wheel of the trolley hit a pothole, causing it to tilt to one side and the plaintiff fell heavily while trying to stop the trolley from overturning. She sued the defendant council for negligent maintenance of the car park, and was found to be entitled to $336,371 in damages, subject to a deduction of 15% for contributory negligence. Although that finding was not in issue, what was in contention was the trial judge's finding as to liability. The trial judge held that the car park was a public road, and as a result, the council was entitled to the protection of s 45 *Civil Liability Act 2002* and the claim was dismissed.

The plaintiff appealed, arguing that the car park did not constitute a public road.

Section 45 restored the pre-*Brodie* non-feasance protection for road authorities. A road authority is only liable if it has actual knowledge of the particular risk. "Public road" is defined for the purposes of s 7 *Roads Act 1993* as:

> *"Public road:*
>
> *(a) any road that is opened or dedicated as a public road, whether under this or any other Act or law; and*
>
> *(b) any road that is declared to be a public road for the purposes of this Act."*

Because there was no evidence that the car park had been dedicated or declared to be a public road prior to 1962, the Council's defence depended upon the operation of s 249 of the *Roads Act*:

> *"249 Evidence as to whether a place is a public road*
>
> *(1) Evidence that a place is or forms part of a thoroughfare in the nature of a road, and is so used by the public, is admissible in any legal proceedings and is evidence that the place is or forms part of a public road.*
>
> *(2) This section is subject to section 178 of the Conveyancing Act 1919 (No way by user against Crown etc)."*

Although The Council did not hold the land in fee simple, s 232 *Local Government Act 1919* provides that every public road shall by virtue of that Act vest in fee simple in the Council. This contradiction stands against the proposition that using or making the land available for public car parking constituted a dedication of the land as a public road.

There was no other evidence supporting the establishment of the location as a public road. Accordingly the trial judge should have found that it had not been established as such and the Council was not entitled to the s 45 *Civil Liability Act* defence.

The only evidence before the court as to the title of the council was a transfer of land to the council in 1962, however, that transfer did not indicate that the land was subject to any reservation for the proposed road. The council did not seek to rely on the Certificate of Title - it could have tendered but that did not occur - and accordingly it could be inferred that no public road was disclosed on the Certificate of Title covering the area of the accident.

The plaintiff's appeal was upheld.