COMMON LAW PRACTICE UPDATE 87

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

The claimant was injured in a motor accident in *Rodger v de Gelder* [2015] NSWCA 211 and commenced District Court proceedings. The dispute was referred back for further assessment by the MAS under s 62 *Motor Accidents Compensation Act 1999*. Although the single medical assessor's certification of WPI was 20%, the Review Panel certified nil percent. The claimant sought judicial review. At first instance, Hamill J found the Review Panel failed to take into account a body of evidence directly relevant to the question of a contemporaneous complaint of pain in the thoracic region, a relevant consideration. Hamill J also found that the Panel failed to take a further relevant consideration into account, through its failure to engage with the referring judge's conclusion that causation was established. The insurer then appealed, arguing that the Panel did not fail to take relevant considerations into account.

The NSW Court of Appeal held that natural justice applies to review panels exercising powers under s 63 *Motor Accidents Compensation Act*. The failure to accord natural justice is a jurisdictional error. The Panel's reasons disclosed that it did fail to take relevant considerations into account by not considering the claimant's evidence of the onset of thoracic pain at the time of and continuing after the accident. The Panel also misread a doctor's report that recorded a contemporaneous history of pain in the thoracic region. The Panel made a jurisdictional error when it failed to respond to a substantial argument based on evidence as to causation of the claimant's injury. Failure to exercise jurisdiction amounts to jurisdictional error, in this case a failure to exercise the statutory function under s 58(1)(d).

Although the reasons of the referring court are not a mandatory consideration for the Review Panel, it could be expected that a medical assessor or review panel could and would take into account those reasons.

The insurer's appeal was dismissed with costs as a result.

The plaintiff sought judicial review of the certificate and reasons issued by a review panel in *Bradley v Insurance Australia Ltd (NRMA)* [2015] NSWSC 950 (Adamson J). The plaintiff's first complaint was that the finding on review that the back, left hip and right knee injuries were not caused by a motor accident constituted jurisdictional error. Second, the plaintiff argued that the Review Panel delegated its functions on examination to two members, which it did not have the power to do. Although the claim form referred only to neck injuries, the plaintiff said this was completed by his solicitors and sent to him for signing. Even though others, including his spouse, gave evidence about contemporaneous complaints, his GP's notes did not, although the GP later provided a supportive letter to the Review Panel. The Panel noted that the GP "doesn't explain why [the plaintiff's] recollection of events are to be accepted."

Despite subsequent support from the GP, the Review Panel found there was no objective medical evidence of any lower back, left hip and right knee complaints for a very long time after the subject accident, despite numerous GP appointments. The Panel concluded that if there had been trauma to these regions, there would have been some evidence of complaint. Accordingly, the Review Panel

took the view that causation was not established with regard to the back injury, thus reversing the original assessor's decision.

Adamson J was of the view that the finding that the motor accident was causative only of the neck injury was open to the Review Panel, and that it was entitled to give weight to the reliability of contemporaneous clinical records.

As to the question of only two of the three members of the Review Panel conducting the examination, Adamson J held that both Act and Guidelines permitted a re-examination to be conducted by two of the three assessors with the consent of the Panel. The request for judicial review was refused with costs.

The MAS assessment found the plaintiff to have an 11% WPI in *AAI Limited v Ali* [2015] NSWSC 1068. This entitled the plaintiff to non-economic loss under s 131 *Motor Accidents Compensation Act.* The Proper Officer declined the insurer's request for a review on the basis that she was not satisfied there was reasonable cause to suspect the medical assessment was incorrect in any material sense. The insurer then sought judicial review. The MAS assessor did not appear to have significantly dealt with surveillance footage apparently inconsistent with the plaintiff's presentation during assessments. Evidence suggesting malingering was not taken into account. The assessment was invalidated by these failures which in turn invalidated the decision of the Proper Officer. The matter was remitted for reallocation to a different medical assessor.

Section141B(3) *Motor Accidents Compensation Act 1999* (NSW)

The NSW Court of Appeal considered the appropriate mechanism for assessing damages where one plaintiff sued in respect of injuries from two motor vehicle accidents in *Falco v Aiyas; Falco v Falzon* [2015] NSWCA 202. Applying *SGIC v Oakley* (1990) Aust Torts Reports 81-003 the Court accepted the following principles for determining the causal connection between the negligence of the defendant and the subsequent injury:

> *Where the further injury results from a subsequent accident that would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by the negligence of the defendant;*
>
> *where the further injury results from a subsequent accident that would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of the aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the negligence of the defendant;*
>
> *where the further injury results from a subsequent accident that would have occurred had the plaintiff been in normal health and the damage sustained includes no element of aggravation of the earlier injury, the subsequent accident and further injury should not be treated as caused the negligence of the defendant.'*

The trial judge did not apparently turn his mind to identifying the additional damage resulting from aggravation caused by the second accident. Accordingly the simple assessment that the damages should be divided equally between the two accidents should be set aside and the damages were reassessed and reapportioned. The position may have been different had the primary judge found the two defendants concurrently liable for the same damage suffered by the plaintiff. There a need for seven hours a week gratuitous services, however the reapportionment of 50% to each accident brought each allowance under the minimum six hours per week, so as to disentitle the plaintiff under s 141B(3). As the plaintiff's appeal did not seek a finding that the defendants should be held concurrently liable for the need for gratuitous care services, the plaintiff's claim on this head of damages failed. Damages were reassessed.

Sections 5B and s 5R *Civil Liability Act 2002* (NSW)/Contributory Negligence at 1.220

The 57 year old plaintiff was a frequent visitor to her neighbour's house in *Stenning v Sanig* [2015] NSWCA 214. Her visits were to assist the elderly defendant and his wife, who suffered from pancreatic cancer. Well over a year before the accident, the defendant installed steps on a path leading from his home to the street. Three steps were made from a material ("Caesarstone") which became slippery when wet. The defendant had himself slipped on them and had attached squares of carpet to the top of the steps in an attempt to overcome the problem. Although a single carpet square was placed on each of the steps, the carpet did not cover the entirety of any of the steps. When the plaintiff visited she would customarily use a side entrance, however on the day of the accident, she could not do so due to the fact that there was firewood stacked there. The plaintiff had previously avoided the Caesarstone steps as she knew that the defendant had slipped on them. It was raining heavily. The plaintiff, carrying an umbrella in her right hand and not using the handrail on the right-hand side, slipped on a part of the top step not covered by a carpet square, and was injured.

A few days later, Department of Veterans' Affairs staff attended the site and installed attended non-slip strips across the steps and a second railing on the left-hand side.

The defendant was found negligent at first instance, then challenged this on appeal, along with the absence of a finding of contributory negligence. The defendant's appeal regarding primary liability was rejected, as the risk was known and the response inadequate. On causation, there was overwhelming evidence that the plaintiff would not have fallen but for the slippery nature of Caesarstone. However, so far as contributory negligence was concerned, the plaintiff was aware of the slippery nature of the steps and the strong inference was that she was not paying sufficient attention and failed to take reasonable care for her own safety. That failure went beyond mere inadvertence. Reference to the difficulties in assessing contributory negligence identified by Beazley P (with whom Barrett and Gleeson JJA agreed) in *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72 was made. In that case the President noted the conceptual difficulties in applying the general principles in ss 5B and 5C *Civil Liability Act 2002* to the determination of contributory negligence in circumstances where 5R requires a reduction appropriate to the breach of the standard of care owed by a reasonable person in the position of the plaintiff on the basis of what that person knew.

The court concluded that the moral culpability of the defendant, who had actual knowledge of the risk but failed to adequately respond, was much greater than that of the plaintiff, who after all did not create the risk and, when faced with dimming light and heavy rain, placed her foot in the wrong spot. Contributory negligence was assessed at 15%. The defendant's appeal was upheld to a limited extent in respect of contributory negligence. Each party was ordered to pay its own costs.