COMMON LAW PRACTICE UPDATE 88

Section 63 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff in *AAI Ltd v Fitzpatrick* [2015] NSWSC 1108 was originally assessed at MAS at 5%, subsequently at 7% and ultimately at 21%. The insurer sought a review under s 63 *Motor Accidents Compensation Act 1998*, but that application was dismissed. The insurer then challenged the original assessment and later review decision, claiming that the assessor failed to consider relevant material and failed to provide adequate reasons. The assessor did not adhere to the statutory requirement to give reasons for his decision since he had to resolve the medical dispute lying between the parties. This included whether the condition of the neck and left shoulder had been caused by the accident. There was also evidence that the assessor failed to properly consider to all the relevant material. Accordingly, the Proper Officer erred in failing to permit review in these circumstances and the insurer's claim for review was upheld.

Intentional Injuries

The plaintiff in *"B" v Reineker* [2015] NSWSC 949 sued the defendant for multiple sexual assaults between 2001 and 2008 which took place when the defendant was the plaintiff's school teacher. The defendant was convicted of counts of aggravated indecent assault and unlawful sexual intercourse with the plaintiff when she was 14 and 15 years of age. The plaintiff also sued the relevant school but that claim was settled. The defendant chose not to defend the damages action against him.

As the *Civil Liability Act 2002* (NSW) did not apply, the principal judge awarded compensatory damages at common law (the CLA not applying), totalling $1,228,000, which included $350,000 for general damages.

In respect of the claim for aggravated damages, it was inevitable that the circumstances and manner of the wrongdoing would cause substantial hurt and damage. In these circumstances it was therefore unnecessary to separately identify any award for aggravated damages, as this element formed part of the general damages.

Her Honour noted that the purpose of exemplary damages is punishment rather than compensation. As the defendant had been convicted of six offences and was serving a substantial term of imprisonment, the award of such damages was unnecessary.

Contributory Negligence

The plaintiff was travelling on a motor cycle with his wife as pillion passenger in *Wynne v Davey & Anor* [2015] QSC 200. Ahead was a campervan being driven by the first defendant. The first defendant was driving a campervan on the road ahead of the plaintiff and went to perform a U-turn on the highway. During the course of this manoeuvre, the plaintiff's motor cycle travelled around a left-hand bend and collided with the campervan.

The primary judge concluded that after a previous near miss, the first defendant was attempted a second U-turn without keeping a proper lookout, being satisfied that he defendant did not check the position of the motor cycle before commencing the turn. Although the first defendant stated that he crossed a single continuous white line in attempting to execute the U-turn, the bulk of the evidence was that he crossed double white lines. The trial judge accordingly found that the evidence established an illegal U-turn.

The plaintiff was travelling at between 70 and 80 kph immediately prior to attempting evasive action. The plaintiff's only error was not to reduce speed so that if the campervan pulled out, he could avoid any collision. The appropriate apportionment was 85% in favour of the plaintiff, with a 15% reduction for contributory negligence.

Sections, 5L, 5M, 5N and 16 *Civil Liability Act 2002* (NSW)/ Damages Non-Economic Loss/ Sporting Injuries

The plaintiff was injured whilst riding a quad bike at the defendants' biking track in *Alameddine v Glenworth Valley Horse Riding Pty Ltd* [2015] NSWCA 219. She sued in tort for negligence as well as for alleged breach of guarantees regarding the supply of services under ss 60 and 61 of the *Competition and Consumer Act 2010* (Cth) pursuant to Schedule 2. The plaintiff had fallen off her quad bike whilst being led by an employee instructor back to the administrative office from the "purpose-built quad biking track". The trial judge found for the defendants. When the plaintiff appealed, the NSW Court of Appeal found the defendants to be negligent. The defendants' instructor caused the plaintiff to travel on her quad bike at an excessive speed. As the injury did not result from the materialisation of an obvious risk of a dangerous recreational activity, s 5L of the *Civil Liability Act 2002* provided no defence. The injury did not result from the materialisation of an obvious risk as the risk that materialised was not inherent in or an incident of the activity. Furthermore, s 5M did not preclude a duty of care being owed, as while a warning regarding the risks of riding a trail bike was given through signage and in the application form, the risk that materialised, ie the risk of injury resulting from the negligence of the instructor, was not inherent in or incidental to that activity.

Although the defendants' relied on an exclusion of liability clause, that defence failed because it was contained in a form that was signed after the contract was concluded. Accordingly there was no effective contractual exclusion clause pursuant to s 5N *Civil Liability Act*. In any event, the terms of the purported exclusion clause were not broad enough to escape liability.

The plaintiff was also entitled to compensation under the Australian Consumer Law. There was a failure to comply with a guarantee given to the plaintiff as a consumer under s 60 that the defendants would deliver their services with due care and skill. The entitlement to compensation under the *Competition and Consumer Act* did not prevent the award of damages for non-economic loss pursuant to s 16 *Civil Liability Act* as there was no relevant inconsistency between the two Acts.

Employment

A worker attended a party at her employer's premises in *Pioneer Studios Pty Ltd v Hills* [2015] NSWCA 222. When she was about to leave she fell over a balustrade in the stairwell and suffered significant injury. The Workers Compensation Commission ultimately held this to be a work injury. On appeal, the majority held that the evidence was insufficient to justify a finding that the injury occurred in the course of employment.

Negligence/Trespass to the Person/Self Defence

Two police officers responded to a violent home invasion in *State of NSW v McMaster*, *State of NSW v Karakizos*; *State of NSW v McMaster* [2015] NSWCA 228. The incident took in premises where Justin McMaster resided. Mr McMaster ran down the road towards a police officer, whereupon he was shot. Two relatives who lived at the premises and were present at the shooting sued, as well as Justin McMaster, who claimed in negligence and trespass to the person.

The primary judge found that there was no duty of care in negligence but held that the State was liable in battery. He awarded just over $500,000, along with sums for the other plaintiffs in nervous shock. The State's appeal succeeded. Police officers using force in the course of their duties are not excused from liability for battery because of an honestly belief based on reasonable grounds that force was necessary. Although there is no such common law principle, the trial judge erred in finding that Justin McMaster was not running towards either of the officers at that time. On the evidence he was 2 to 3 metres away from a police officer when he was shot. The trial judge also erred by finding that Justin did not pose a direct threat to the constable when shot. He was brandishing a metal rod and yelling. Self-defence is made out if the defendant subjectively believed on reasonable grounds that what he did was necessary for the protection of himself or another. Although proportionality is relevant, it is not determinative. On the proper construction of the facts self-defence was made out.

Mr McMaster was acting unlawfully by committing an assault at the time of the shooting. There was no wrongful act, and accordingly no liability to the other two plaintiffs arose.

Genetic predisposition/duty of care

The plaintiffs were the parents of Keeden Waller who was born profoundly disabled after suffering a stroke, requiring care for the rest of his life in *Waller v James* [2015] NSWCA 232. Keeden had been born with anti-thrombin deficiency ("ATD"). The plaintiffs alleged negligence in the provision of in vitro fertilisation because of the failure of the defendant, a gynaecologist who specialised in infertility, to inform of the genetic aspects of ATD, which was inherited from the father. At first instance it was found that although the duty of care extended to ensuring the provision of information on ATD and that the duty had been breached, causation had not been established because the scope of the defendant's duty did not extend to the harm suffered. The loss suffered was also too remote. The plaintiffs appealed.

The NSW Court of Appeal found there was no error in the findings of fact. The plaintiffs' right to plan their family was an interest which could give rise to a claim for economic loss, and the duty of care extended to providing relevant information and arguably following it up with them. There was a breach in failing to adequately explain the reason for the referral for genetic counselling.

However, there was no causal connection between the harm suffered and the breach. The risk of Keeden suffering a stroke was not a risk of the same kind as being born with ATD but was part of the normal risks of pregnancy and IVF that the plaintiffs were willing to accept. As a result, the harm suffered was not within the scope of the risk created by the defendant specialist's negligence. It was not relevantly foreseeable and too remote to be recoverable.