COMMON LAW PRACTICE UPDATE 89

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

The Proper Officer under the MAA referred the claimant's medical assessment to a panel of medical assessors for review in *IAG Ltd t/as NRMA Insurance v Gilshenen* (2015] NSWSC 1165. The insurer wished to uphold the certificates of a single medical assessor and claimed judicial review of the Proper Officer's decision. The medical practitioner appointed by MAS was aware that the plaintiff had suffered injury in two motor accidents. There were claims in respect of both incidents and different insurers were involved. The initial assessment put the impairment at not greater than 10% in respect of each injury. However, in the second assessment, the medical practitioner added a further 3% WPI, bringing the WPI up to 11%, entitling the claimant to non-economic loss in respect of the first accident. So far as the second accident was concerned, the fresh certificate found that none of the injuries referred for assessment related to the motor accident. The second insurer, GIO, then applied to refer the further certificate in relation to the first accident to a review panel. NRMA, the insurer with regard to the second accident, objected, as did the claimant. NRMA sought judicial review of the Proper Officer's finding that there was reasonable cause to suspect a material error. On appeal it was found that, contrary to GIO's submission, the manner by which the medical assessor assessed the claimant's physical impairment was correct in law. As a result, it was held that the Proper Officer erred in law in concluding there was reasonable cause to suspect the practitioner's assessment was incorrect, his decision was set aside and he was required to re-determine the application for referral in respect of other matters not considered by him, according to law. GIO was required to pay NRMA's costs.

Sections 5B and 5C *Civil Liability Act 2002* (NSW)

The plaintiff was riding his motor cycle in the early morning darkness in *Rankin v Gosford City Council* [2015] NSWCA 249 and came across a point where the defendant Council was undertaking repairs to the road. Under a traffic control plan, the Council had positioned some 60 hollow plastic barriers capable of being filled with water as ballast in the northbound lane of the roadway and put speed controls in place. However, earlier that morning, unknown persons had moved a number of the barriers, placing them across both lanes of the roadway. The plaintiff collided with the barriers and suffered serious injury. The judge at first instance found the Council did not owe the plaintiff a duty of care which extended to protecting him from the criminal conduct of third parties, whereupon the plaintiff appealed.

Section 5B of the CLA requires the risk to be foreseeable, not insignificant and that a reasonable person would take the precautions proposed. The Council's primary duty was to warn motorists of a temporary hazard. This had been done through the placement of the barriers and the imposition of the temporary speed limit. The plaintiff argued that the relationship between road authority and road user involved exceptional circumstances where there can be liability for a third party's conduct. See *RTA v Refrigerated Roadways Pty Ltd* [2009] NSWCA 263, where the RTA owed a duty to take reasonable steps to prevent material falling onto a freeway, whether by accident or criminal conduct. The distinction was drawn with the matter before the court, where there was no suggestion that the provision of the barriers and setting of a temporary speed limit were inappropriate. While there was evidence that concrete barriers could have been used if it was thought there was a risk of unauthorised persons tampering with the water-filled barriers, there was no evidence of the degree of risk in this particular case.

As a result, the Council's duty of care did not extend to plaintiff's injury.

Psychological Injury

The plaintiff suffered injury while working in a potato-packing plant operated by the defendant in *Anwar v Mondello Farms Pty Ltd* [2015] SASCFC 109. The plaintiff's hand was caught between a conveyor belt and a roller when moving a heavy bag of potatoes, he suffered serious injury and plastic surgery and a skin graft was required as a result. Thereafter the plaintiff initially suffered symptoms of stress and anxiety and had a psychotic episode which led to a diagnosis of schizophrenia. At first instance the trial judge found a causal relationship between the hand injury and the onset of schizophrenia, and the employer was held liable. However, the District Court judge found that there was no duty on the part of the defendant to take care to avoid causing the plaintiff mental harm under s 33 of the *Civil Liability Act 1936* (SA). As a result, the plaintiff's damages were therefore confined to the physical injury to the right hand. On appeal, the Full Court agreed that the plaintiff would not have suffered schizophrenia when he did if it had not been for the accident. The judge at first instance should not have focused on whether the plaintiff was a person of normal fortitude but instead should have considered whether a reasonable person in the defendant's position would have foreseen that a person of normal fortitude might suffer a psychiatric illness in the circumstances. The defendant owed a duty not to cause mental harm.

The Court also dealt with a complaint that the discounting of future loss by 30% for the risk of future schizophrenia without the accident was inadequate. Although the majority held that the discount should have been 50%, Gray J, dissenting on this issue, found the 30% discount sufficient.