COMMON LAW PRACTICE UPDATE 90

Section 60 *Motor Accidents Compensation Act 1999* (NSW)

The claimant sought judicial review of decisions made under s 60 *Motor Accidents Compensation Act 1999* by the MAS in *Scott v Insurance Australia Ltd* [2015] NSWSC 1249 (Campbell J). These decisions involved medical disputes as to whether voluntary attendant care services provided to the claimant were reasonable and necessary and whether they related to the motor accident. The claimant argued that voluntary care services did not constitute treatment under s 58 *Motor Accidents Compensation Act 1999* and therefore the MAS lacked jurisdiction and, in the alternative, that the MAS could not be satisfied that there was a dispute about these matters.

Voluntary care does not constitute treatment under s 58. Accordingly the MAS fell into jurisdictional error - it made determinations which lay wholly outside the limits of its function and powers. Similarly, Campbell J was not satisfied on the balance of probabilities that a genuine dispute existed in this case. His Honour granted the claimant relief with costs.

Section 5D *Civil Liability Act 2002* (NSW)

The plaintiff, a pedestrian, was hit by the defendant's vehicle in *Allen v Robbie* [2015] NSWCA 247. The accident occurred at relatively low speed when the defendant turned on to a roadway. The plaintiff's evidence indicated that she had seen the defendant's sedan before it came onto the roadway and the trial judge concluded that if the defendant could be seen by the plaintiff, the plaintiff should have been seen by the defendant. When the plaintiff succeeded at first instance the defendant appealed. Rejecting the appeal, it was found that it was open for the trial judge to have held as he did, that the reasoning was generally adequate and therefore the plaintiff succeeded with no reduction for contributory negligence. The appeal was dismissed with costs.

Occupiers Liability

The plaintiff in *Erickson v Bagley & Anor* [2015] VSCA 220 lived in a loft in the defendants' home. Access to the loft was available from a 30 metre driveway on a gentle slope. On the night in question it had been raining. As he returned from taking out the garbage to the main wheelie bin outside, the plaintiff stepped into a puddle, slipped and fell and suffered injury. The trial judge rejected the plaintiff's argument that the driveway was slippery, uneven and unsafe. No appeal from that finding was pursued, however the plaintiff did appeal on the question of whether there had been a failure on the part of the defendants to provide adequate lighting. This argument stemmed mainly from evidence that they had disconnected a sensor light which would otherwise have illuminated the area. The trial judge had found against the plaintiff as the probability of the risk materialising was so low that a reasonable occupier would not have been required to take any further steps. Further, it was held at first instance that, in a rural area such as this, the state of the driveway was not such as to require a permanent light source to be provided.

As occupiers, the defendants owed a duty to take reasonable care. The risk had to be foreseeable, not insignificant and in the circumstances, a reasonable person in the defendants' position would have taken the precautions proposed. In the view of the Victorian Court of Appeal, the primary judge did adopt an approach which was too narrow in defining the risk, as that risk was not confined to the specific circumstances of the plaintiff's injury. However on the evidence the probability of the risk materialising was so low that a reasonable occupier should not be required to take any further steps. As a result, the plaintiff's appeal failed.

Contributory Negligence

The passenger plaintiff in *Solomons v Pallier* [2015] NSWCA 266 was injured when the motor vehicle partly left the roadway and rolled after striking a culvert. The driver, the holder of a provisional licence, was mildly intoxicated, with a blood alcohol reading of 0.07. The defendant had offered the sixteen year old plaintiff and others a lift home from a party they had all attended. The question for the primary judge was whether the plaintiff had been contributorily negligent in accepting a lift from the defendant in circumstances where the plaintiff knew or should have known that the defendant's driving capacity was impaired by intoxication.

However, the trial judge found the defendant had deliberately driven the vehicle partly off the roadway, with the intention scaring his passengers. The plaintiff was not guilty of contributory negligence and even if he had been, it would not be just and equitable to make any reduction in that respect.

On appeal, a finding of contributory negligence was called for, on the basis that the plaintiff knew the defendant had consumed some alcohol and was a P plate driver. The plaintiff should have been aware of the risks that the presence of any alcohol in the defendant's system might significantly affect his ability to drive carefully. The court accordingly held that the primary judge had erred and that 10% constituted a just and equitable reduction in the circumstances.

Choice of Law

The plaintiff sued three defendants in respect of injuries sustained in a Perth workplace in *Di Paolo v Salta Constructions Pty Ltd & Ors* (92015] VSC 31. The plaintiff, a Victorian resident, was seconded to work in Western Australia at the time. The question at issue was whether the six year limitation period fixed by Victorian legislation or the three year period fixed by Western Australian legislation applied to the claims of negligence and breach of statutory duty against the second and third defendants. A claim was also brought against the first defendant for breach of contract. The plaintiff fell 8.5 metres to the ground from a flight of aluminium access stairs which dislodged from scaffolding and collapsed, resulting in severe injury. The plaintiff was employed by the first defendant, the scaffolding erected by the second defendant and was supplied by the third defendant. The first defendant was registered in Victoria, the second and third defendants in Western Australia.

The claims against the second and third defendants were governed by the substantive law and limitation periods of Western Australia. Damages against the second and third defendants were not in any event affected by the Western Australian Act and the substantive common law of Western Australia accordingly applied.

Appeal/review of alternative hypotheses

In *Fuller-Lyons v New South Wales* [2015] HCA 31, the plaintiff appealed from a decision of the NSW Court of Appeal, complaining that the Court had failed to properly review the evidence and the trial judge's reasons before concluding that alternative hypotheses were equally open. The appellant also contended that one of the alternative hypotheses identified was based on facts that were not in evidence. The High Court examined each alternate hypothesis on various bases but primarily because there was insufficient support for them in the evidence. The appeal was upheld with costs.