COMMON LAW PRACTICE UPDATE 92

Section 62 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was injured in a motor accident and the insurer admitted liability under s 81 *Motor Accidents Compensation Act 1999* in *Jubb v Insurance Australia Ltd (NRMA)* [2015] NSWSC 1617. The plaintiff's psychiatric injuries were found by a MAS assessor to be 13% WPI at which point the plaintiff elected to go to CARS. The NRMA lodged an application for a further assessment pursuant to s 62 *Motor Accidents Compensation Act* and the Proper Officer agreed, whereupon the further assessment found the plaintiff's WPI to be less than 10%. The plaintiff then applied to set aside the decision of the Proper Officer and the further assessment, in substance complaining that the Proper Officer erred by concluding that there was additional relevant information.

Harrison AsJ noted the views expressed in *Henderson v QBE Insurance* [2013] NSWCA 480 s 62 precludes a referral unless the additional information is capable of having a material effect on the outcome of the earlier assessment.

What constitutes additional relevant information, however, is a matter for the Proper Officer rather than determination by a court. Issues such as whether the determination was irrational, illogical and not based on findings of inferences of fact supported by logical grounds or whether it took into account irrelevant considerations or misconstrued the relevant legislation were all relevant considerations. On the material available, the Proper Officer's decision was open to her. So far as the further assessment was concerned, the plaintiff had been afforded procedural fairness. Accordingly, that ground of judicial review also failed and the plaintiff's application for relief was dismissed.

Causation/Foreseeability/Employment

The plaintiff was an employee of the first defendant, which provided disability services to young people in *Digby v The Compass Institute Inc & Anor* [2015] QSC 308 (Atkinson J). The second defendant employed a police officer who attended the Institute to give a presentation to clients in the care of the second defendant. During that presentation the police officer turned on a police vehicle siren, which startled one of the first defendant's clients and caused her to fall. The plaintiff suffered an injury to her right shoulder while trying to prevent the disabled client from falling over. There was evidence to the effect that the first defendant was aware of the disabled person's propensity to fall unexpectedly and also knew that she was easily startled by loud noises. By contrast, the police officer was not aware of the client's propensity in this regard. On that basis it was held that the employer was in breach of its non-delegable duty of care to take reasonable care to avoid exposing its employees to the risk of injury. On the facts before the court, the employer of the police officer was held not to be liable.

Occupiers Liability/sections 5B and 5F *Civil Liability Act 2002* (NSW)

The plaintiff in *Schultz v McCormack* [2015] NSWCA 330 was injured when she slipped on a towelled surface on the top step of the veranda at the defendants' home. The surface had become wet with rain and the plaintiff slipped and fell while in the process of walking down the steps, having made her farewells to the defendants at around midnight. She suffered significant injury from the fall. The primary judge found that although the risk of slipping on

wet steps was foreseeable and not insignificant, the fall and injury constituted the materialisation of an obvious risk. As a result, there was no duty to warn her of that risk. Notional contributory negligence was assessed at 80%.

On appeal it was held that it was unrealistic to attribute knowledge of an obvious risk to the plaintiff or a reasonable person in her position. The plaintiff had proceeded from a dry area and there was no evidence to indicate that she was or should have been aware of the difference between that area and the slippery zone. By contrast, the defendants ought to have realised that the tiles would be slippery and a reasonable person in their position would have taken some precautions through either by providing dry matting or a warning to the plaintiff. As a result, the defendants breached their duty of care. It was not appropriate to attribute contributory negligence in this case, as the plaintiff was unaware of the risk, and the plaintiff's appeal was therefore upheld with no reduction for contributory negligence.

Sections 5F, 5L and 5M *Civil Liability Act 2002* (NSW)

In *Sharp v Parramatta City Council* [2015] NSWCA 260, the plaintiff was injured after she jumped from a 10 metre diving platform at a Council public swimming pool. She claimed the defendant should have prevented her from running and jumping, or alternatively that she should have been properly instructed. A supervisor was present on the diving platform and a sign advising that "Patrons using the platforms and springboards do so at their own risk" had been placed adjacent to the stairs. The NSW Court of Appeal found this warning to be adequate. The sign would have been seen by a reasonable person in the plaintiff's position and jumping off the springboard was clearly a "dangerous recreational activity" within the meaning of s 5L. Accordingly the risk would have been obvious to a reasonable person in the plaintiff's position (s 5F).

Jurisdictional limit/transfer of claim

In *Lazare v City of Sydney Council & Ors* [2015] NSWSC 1546 the plaintiff sought to transfer her claim to the Supreme Court in view of concerns that her damages would exceed the District Court's jurisdictional limit. There had been a substantial delay on the part of the plaintiff in bringing the application in the first instance and various failures to comply with orders for service of medical evidence and particulars. Bellew J, after examining the procedural history of the matter and reaching the view that the plaintiff's damages were unlikely to exceed the District Court's jurisdictional limit, exercised discretion to refuse the application with costs.

Amendment of Statement of Claim

The plaintiff in *Zhang v Popovic* [2015] NSWSC 1593 sought leave to amend the statement of claim for a sixth time to add a further complaint against one of the defendants. As the essential facts relied upon were the same, there was no fault on the part of the plaintiff's lawyers or the plaintiff, as there was no new cause of action arising and the hearing date was many months away, the application to amend was allowed, with the costs of the plaintiff's application to be the plaintiff's costs in the cause.