COMMON LAW PRACTICE UPDATE 93

Section 5R and 5B *Civil Liability Act 2002* (NSW)/section 138 *Motor Accidents Compensation Act 1999* (NSW)

The pedestrian plaintiff in *Steen v Senton by his litigation guardian The Public Advocate of the ACT* [2015] ACTCA 57 was struck by a motor vehicle in NSW and took action against the defendant driver. The defendant admitted fault but alleged contributory negligence. NSW law was applied and a finding made in favour of the plaintiff. However, damages were reduced by 30% for contributory negligence. The defendant alleged on appeal that a much higher finding of contributory negligence should have reached and also alleged error in the assessment of the period of future loss.

At first instance, citing inter alia *Pennington v Norris* (1956) 96 CLR 10, it was noted that the courts have consistently emphasised that the driver of a motor vehicle has far greater capacity to cause damage than a pedestrian and that if it had not been for this consideration there would be a temptation to equally apportion liability between the parties. The appellant insurer alleged s 5R *Civil Liability Act 2002* overrides that common law approach.

The ACT Court of Appeal noted that the parties at first instance had only relevantly referred to s 138(1) of *Motor Accidents Compensation Act 1999*, which acknowledged the position at common law - neither party had referenced s 5R. Accordingly the plaintiff objected to the point being raised on appeal, although the Court of Appeal allowed the point to be raised on the basis that issue had arisen on a number of occasions in NSW after the judgment at first instance.

By way of contrast with the approach in *Pennington v Norris* section 5R *Civil Liability Act* involves a consideration of whether a plaintiff fails to take precautions against the risk of harm which a reasonable person in the position of the plaintiff would have taken and of which they knew or ought to have known at the relevant time.

Recent NSW Court of Appeal judgments in *T and X Company Pty Ltd v Chivas* (2014) 67 MVR 297 indicate that that s 5R *Civil Liability Act* alters the position in *Pennington v Norris*. A similar approach was taken by the majority in *Boral Bricks Pty Ltd v Cosmidis (No. 2)* (2014) 86 NSWLR 393.

The ACT Court of Appeal, in concluding that comity with the NSW Court of Appeal was appropriate, increased contributory negligence to 50%. There was a minor adjustment as to quantum and no order was made for the costs of the appeal.

Sections 7A and 7E *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff in *Melenewycz v Whitfield* [2015] NSWSC 1482 was a motor cycle rider on route from South West Queensland to Bourke via a red dirt road when he was struck by a kangaroo, suffering significant injury. The plaintiff alleged that this was a blameless accident, while the insurer argued that recovery was not permitted and that he was guilty of contributory negligence. The insurer in particular argued that the collision "was caused by an act or omission of that driver" pursuant to s 7E *Motor Accidents Compensation Act 1999*. Hamill J, noting that the Second Reading Speech was relevantly ambiguous, found in favour of the plaintiff. He observed that s 7A defines a blameless motor accident as meaning a motor accident not caused by the fault of the owner or driver of any motor vehicle involved

in the accident. His Honour also noted that Section 7E is headed "No coverage for driver who caused accident" and provides that there is no entitlement to recover if the motor accident was caused by an act or omission of that driver, even in circumstances where the act or omission did not constitute fault in the use or operation of the vehicle or was involuntary.

Hamill J referred to *Connaughton v Pacific Rail Engineering Pty Ltd* [2015] NSWDC 89, where a plaintiff successfully established blameless accident when a tree fell on the roof of the cabin of his vehicle, causing injury, and *Hossain v Mirdha* [2015] NSWDC 108, where the plaintiff taxi driver swerved and applied the brakes when a dog ran in front of his vehicle and collided with a truck, sustaining injury. In the latter case fact that the plaintiff had steered the vehicle, even though he was not at fault, meant that there had not been a blameless accident.

Hamill J found that these judgments do not stipulate that a driver can never rely on blameless accident. His Honour also noted the judgment of the Court of Appeal in *Axiak v Ingram* [2012] NSWCA 311, where a s 7K claim succeeded despite the fact that the pedestrian child was at fault when they ran across a road into the path of the defendant's car, suffering horrendous injury. The judgment of Tobias AJA in that matter effectively defined blameless accident as one which did not involving negligence on the part of the driver. That analysis also accorded with the view of Hoeben CJ at CL in *Nettleton v Rondeau* [2014] NSWSC 903 at [87-88]. The fact that there has been fault on the part of a plaintiff does not amount to fault on behalf of any other person so as to prevent it being a blameless accident for the purposes of s 7A. It is merely relevant to contributory negligence.

His Honour concluded that the blameless accident provisions do not exclude drivers involved in single car accidents. In this case any failure to observe the kangaroo earlier and therefore take evasive action was not established. On balance, it could not be said that a slower speed would have prevented the collision. Accordingly, His Honour was satisfied that no act or omission of the plaintiff caused the collision or injuries and the plaintiff succeeded for the purposes of s 7A.

Section 58 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was involved in a motor accident in *Claps v Insurance Australia Ltd t/as NRMA Insurance* [2015] NSWSC 1881. The defendant's insurer, NRMA, admitted liability, however a dispute arose as to the nature and extent of injury with the result that the NRMA sought a MAS assessment. After the subsequent orthopaedic assessment set WPI at 16%, the insurer then sought a further assessment, which was granted. That second assessment placed WPI at 6%. The plaintiff then in turn applied for review, and then, when that was refused, applied for a further assessment in respect of a separate traumatic brain injury. This resulted in a WPI of nil. When the plaintiff sought a review of that nil assessment, it was granted and the matter referred to a medical review panel, which confirmed the assessment of WPI at nil in respect of psychological and/or psychiatric injury.

The present proceedings arose when the plaintiff then sought review of the panel's decision in the Supreme Court, alleging that the review panel did not consider his substantive case, failed to give appropriate reasons, failed to apply the correct test regarding causation and also failed in its major statutory task - to determine what injury was suffered.

The plaintiff complained that both his physical and psychiatric or psychological issues were not properly dealt with and that he had not been afforded natural justice or procedural fairness.

Harrison J found that the review panel did not deal with evidence as to thoracic pain and failed to respond to a substantive argument involving causation which was based on that evidence. On the face of its reasoning, it had misread a significant medical report.

In particular, although it gave reasons, the panel failed to address the argument that the plaintiff's psychiatric presentation was a response to pain which could not be explained by unrelated causes. Although the review panel was not obliged to say what injury the plaintiff had suffered, it had in the circumstances failed to accord natural justice through a lack of procedural fairness. The review panel's certificate was set aside and the insurer ordered to pay costs.

Sections 60 and 60G *Limitation Act 1969* (NSW)/ Section 82 *Civil Liability Act 2002* (NSW)

The boys of the parent plaintiffs were alleged to have been injured by the negligence of the defendant in *Eastbury v Genea Limited (formerly known as Sydney IVF Limited)* [2015] NSWSC 1834. They claimed the additional costs of raising, caring and maintaining the children which were related to their disabilities. An order to extend the relevant limitation period had been made. The amended statement of claim included additional allegations of failing to screen for the genetic syndrome Fragile X and the failure to use molecular methods of analysis in testing for Fragile X, and that these failures constituted a breach of appropriate standards of care. Both sons suffer from substantial disabilities and it is unlikely that they will be able to live independently as adults. The defendant cross-claimed against Dr Curtotti and the plaintiff in the amended statement of claim sought to add Dr Curtotti as second defendant. Counsel for Dr Curtotti submitted that although that the indicia in s 60(1) of the *Limitation Act* 1969 was met, it was not just and reasonable to extend time under s 60G.

It was held that there was an arguable case against Dr Curtotti, who had already been joined to the proceedings and accordingly there was no actual prejudice involved which would prevent a fair trial. As a result, it was just and reasonable to extend time.

The relevant test to be applied in assessing the need for interim damages is that under s 82 of the *Civil Procedure Act* - whether it is more probable than not that the plaintiff will succeed at trial in obtaining substantial damages. On the basis of the medical reports tendered the test was met on the probabilities. It was appropriate to order an interim payment of $100,000. That order was made against the first defendant and both defendants were ordered to pay the plaintiff's costs.

Intentional Injury/Exemplary Damages

At first instance it had been found in *MacDougal v Mitchell* [2015] NSWCA 389 that the plaintiff was found had been assaulted in a hotel bar by both defendants, the first of whom chose not to appear. The plaintiff appealed regarding the lack of allowance for future economic loss and aggravated and/or exemplary damages. Section 3B(1)(a) of the *Civil Liability Act 2002* (NSW) meant that that legislation did not apply.

The leading authority regarding aggravated damages is the judgment of Hodgson JA (Sheller JA and Nicholas J agreeing) in *State of NSW v Riley* [2003] NSWCA 208. That case involved assault and false imprisonment by police officers. As the level of general damages awarded at first instance was at the lower end of the spectrum, that amount could not have made sufficient allowance for hurt feelings. Consequently a further $10,000 was allowed for

aggravated damages. Furthermore, an allowance for exemplary damages should have been made in view of the defendant. The defendants had not been charged, let alone convicted, over the incident, a relevant consideration as to punishment. Accordingly a further allowance of $20,000 should be made for exemplary damages. However the plaintiff had returned to work and there was insufficient evidence adduced to support any allowance for future economic loss. In the circumstances the plaintiff's appeal succeeded, with the resultant increase of $30,000 to damages of $110,500 plus costs.

Conflict of Laws

The plaintiff in *McGowan v Hills Limited & Anor (Ruling No. 1)* [2015] VSC 674 took action in Victoria, alleging that in the course of his employment he fell from a defective ladder in Deniliquin, NSW. The ladder had been manufactured in Queensland and purchased in Victoria. At issue was the applicable law. At first instance it was noted that:

(a) In tort, the place of the tort determines the governing law;

(b) The place of the tort will be where the act that gave rise to the cause of action occurred; and

(c) The court will examine where, in substance, the cause of action arose and it is the location of the negligent conduct that must be examined, not the consequences.

The substantial arguments here related to defective manufacture and as a result Queensland law should apply.

Consumption of alcohol/slip and fall

In *Schuller v S J Webb Nominees Pty Ltd* [2015] SASCFC 162 an inebriated plaintiff fell from a chair on which she was dancing at a hotel, sustaining serious injury to her leg, and sued the proprietors in negligence and for breach of statutory duty. The relevant allegation was that the defendant sold her too much alcohol and failed to prevent her dancing on the chair. At first instance it was held that the defendant did not owe a duty of care in this context and that, in any event, there was a voluntary assumption of risk on the part of the plaintiff. On appeal, the Full Court held that the duties of proprietors and licensees do not extend to monitoring and minimising the effect of alcohol that patrons chose to consume. Accordingly there was no error at first instance in finding no duty of care existed. Even if there had been a duty of care, there was no breach. A finding of voluntary assumption of risk was open in the circumstances. The appeal failed.