COMMON LAW PRACTICE UPDATE 70

Section 62 *Motor Accidents Compensation Act 1998* (NSW)

In *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442, the claimant was diagnosed with post-traumatic stress and bipolar disorder after suffering injury in a motor accident. The insurer asserted this was unrelated to the motor vehicle accident. The MAS assessor determined that the claimant was suffering from a major depressive disorder, finding a WPI of more than 10%. The insurer sought a review but this was rejected by the Proper Officer on the basis that he was not satisfied that there was reasonable cause to suspect that the assessment was materially incorrect. The insurer subsequently applied for a further medical assessment under s 62, in light of evidence of depressive disorders and problems consistent with post-traumatic stress disorder, alcohol dependence and depression well prior to accident. The Proper Officer had not been satisfied that there was additional relevant information about the injury which was capable of materially affecting the outcome.

The insurer sought judicial review, which was dismissed at first instance. The insurer appealed, whereupon the NSW Court of Appeal granted leave but dismissed the appeal. As the decision of the Proper Officer affected legal rights, it was therefore reviewable. There was factual evidence capable of satisfying the Proper Officer, which provided powerful arguments in favour of his decision. The review proceedings were limited to determining whether the Proper Officer's opinion had been formed according to law. He was entitled not to be satisfied within the meaning of the section and the decision was not manifestly unreasonable or irrational and did not otherwise demonstrate an error of law. Accordingly, the Court of Appeal dismissed the appeal with costs.

Sections 5D and 5R *Civil Liability Act 2002* (NSW)/ Contributory Negligence

The plaintiff was driving behind a prime mover which billowed clouds of dust in its wake in *Nominal Defendant & Ors v Bacon* [2014] NSWCA 275. Driving in the centre of an unsealed road, she could see barely over a car length in front of her and kept slowing progressively. While veering slightly towards the left, the plaintiff saw the front of a semi-trailer driven in the opposite direction. They collided. As the other vehicle was unregistered and uninsured, the plaintiff sued the Nominal Defendant. The trial judge gave judgment for the plaintiff, reduced by 50% for contributory negligence. The Nominal Defendant appealed.

The Court of Appeal held that section 5D *Civil Liability Act* requires a determination that negligence caused the particular harm and that the plaintiff has successfully established that negligence was a necessary condition of the occurrence of the harm. Steering the uninsured vehicle into the centre of the road without a clear view of oncoming traffic was causative and accordingly there was no error on the part of the primary judge. The relevant question regarding contributory negligence was whether a reasonable person in the position of the plaintiff, knowing what she knew or ought to have known, was negligent. There are significant constraints upon appeal courts intervening concerning apportionment. It was open to the judge at first instance to find 50% contributory negligence. Accordingly, the appeal should be dismissed.

Section 5R *Civil Liability Act 2002* (NSW)/ Contributory Negligence

In *Allard v Jones Lang Lasalle (Vic) Pty Ltd* [2014] NSWCA 325, the plaintiff, who had slipped on the defendant's premises, succeeded at first instance. The defendant appealed, and focussed on the issue of contributory negligence and the award of a buffer for economic loss to the plaintiff, who had no recent history of employment and whose employment prospects were fraught with uncertainty. The Court of Appeal held that the award of a buffer was appropriate and that the buffer necessarily incorporated provision for the vicissitudes of life. However, the trial judge did err in the test applied regarding contributory negligence because 5R of the *Civil Liability Act* requires an enquiry not as to whether the plaintiff acted reasonably but whether the plaintiff's actions met the standard of a "reasonable person in the position of that person". As the plaintiff knew that cleaning was underway but failed to take precautions, her damages were reduced by 20%.

Occupiers Liability

The plaintiff slipped on a wet pavement when at a shopping centre in *Pavlis v Wetherill Park Market Town Pty Ltd* [2014] NSWCA 292. The defendant Centre and its managing agent accepted that a duty of care was owed but the question was whether reasonable precautions had been taken against the foreseeable risk of someone slipping. The pavement had been painted with a paint containing a non-slip additive some six months before the incident. The plaintiff argued that this measure was not sufficient, in that the pavement remained slippery when wet, and further steps could have been taken. However the trial judge found the application of the non-slip paint was a sufficient response - there was no evidence that anyone else had slipped in the area. On appeal from the plaintiff the NSW Court of Appeal found no error in the trial judge's conclusion that reasonable precautions had been taken. The appeal was dismissed with costs.

In *AF Concrete Pumping Pty Ltd v Ryan & Ors* [2014] NSWCA 346, the plaintiff, an employee and director of Reliance Pools, was injured whilst working on the construction of a swimming pool. The principal contractor contracted with Reliance Pools to construct the pool and AF Concrete Pumping to pump concrete up to the seventh floor of the building where the construction work was being carried out. Reliance Pools engaged C&J Concrete Sprayers to spray the concrete which would form the walls and floor of the pool.

When the spraying was largely complete, a C&J employee asked AF Concrete to commence clearing the concrete pipes by way of compressed air and a sponge ball. The plaintiff attempted to ask AF Concrete to secure an unfastened hose at the end of the concrete pumping pipe, however, unknown to the employees of Reliance Pools and C&J, AF Concrete had already commenced the clearing process. As the plaintiff stood at the edge of the pool, concrete burst out of the unsecured pipe. The sponge ball and concrete shrapnel hit him in the head. The plaintiff suffered traumatic brain injury and injuries to his face.

The trial judge found AF Concrete to be negligent and that Reliance Pools and C&J Concrete were not at fault. There was no finding of contributory negligence.

AF Concrete Pumping appealed. It was found that there was no fault by Reliance Pools in the discharge of its duty of care. Reliance Pools could not be held responsible for AF Concrete's failure to adopt a safe system of work. There was no error in the assessment of the degree of permanent impairment by the judge at first instance.

Employment

The plaintiff worked as a storeman at his employer's premises in *Grima v RFI (Aust) Pty Ltd* [2014] NSWCA 345. When the plaintiff and a co-worker opened the rear doors of a van two rolls of carpet underlay fell out and struck him, causing serious injury. Only three of the five bars which should have held the rolls in place had been positioned and as a consequence the plaintiff suffered injury. The plaintiff sued RFI, which was responsible for the carpet underlay in the vehicle. RFI joined the plaintiff's employer. Harrison J at first instance held that RFI had breached its duty of care to the plaintiff however he also found that the employer's instructions and system of work were sub-standard. RFI and the employer were equally responsible and there was no contributory negligence on the part of the plaintiff. The plaintiff appealed against the finding that his employer was at fault and complained of the apportionment. RFI and the employer also disputed the apportionment.

The Court of Appeal held that the absence of an instruction to check the position of the rolls from a safe vantage point breached the employer's duty of care. Therefore the employer was at fault. However, the trial judge's equal apportionment was unreasonable and RFI's conduct was of considerably greater significance. The apportionment was changed to 75% to RFI and 25% to the employer. It was open to the primary judge to conclude that there was no contributory negligence.