COMMON LAW PRACTICE UPDATE 53

Section 7B *Motor Accidents Compensation Amendment Act 1999* (NSW)/Blameless Accidents

In *Mamo v Surace* [2014] NSWCA 58, the defendant was driving within the speed limit in a semi-rural area. When he fleetingly took his eye off the road to light a cigarette and subsequently struck a cow which was on the road and which he had not seen. Delaney DCJ found the defendant did not breach his duty of care. Even if he had, his breach was not causative. The plaintiff appealed, seeking leave to raise the issue of blameless accident which was not raised at first instance. Having regard to the low risk of encountering such an object on the road, it was not a breach of duty to quickly take his eyes off the road. The plaintiff had not established the exceptional circumstances necessary to permit it to raise a new point on appeal, given that the decision in *Axiak v Ingram* had been handed down and counsel had expressly eschewed reliance on it at trial. The plaintiff was accordingly bound by the conduct of the case.

Section 61 *Motor Accidents Compensation Amendment Act 1999* (NSW)

The plaintiff obtained a certificate for 25% WPI in *Frost v Kourouche* [2014] NSWCA 39. On the application of the insurer, a review panel substituted a certificate which found nil WPI. At first instance the review panel certificate was set aside for denial of procedural fairness. On appeal, that decision was overturned because the replacement certificate was not supported by the insurer's medical reports. There was no denial of procedural fairness as the issue was squarely put to the plaintiff by the review panel, even though the plaintiff was not entitled to be assisted by legal representation at that time.

***Civil Liability Act 2002 (NSW)*/Children**

A nine year old child rode a bicycle into an unfenced concrete drainage channel in *Holroyd City Council v Zaiter* [2014] NSWCA 109. The channel was, with the surrounding area, under the care and control of the Council. The presence of the channel was not obvious from the adjacent cycleway but the Council was aware of the risk that an unfenced channel would pose to children. The plaintiff succeeded at first instance. The defendant Council's appeal was dismissed. The test here was not what a reasonable council might or might not have known, rather that this council specifically knew of the risk and knew that remedial action in the form of a fence should be undertaken. Children are more inherently more vulnerable and foreseeability must encompass their potential conduct. The resources defence did not apply because the expense of rectifying the known risk would not have been great. A nine year old riding an unfamiliar bike down a grass slope cannot be objectively categorised as a dangerous recreational activity. Nor was the risk obvious to a nine year old.

Workplace Psychiatric Injury

The plaintiff employee suffered psychiatric injury in *Larner v George Weston Foods Ltd* [2014] VSCA 62. At first instance it was held, inter alia, that the employer was not on notice, the employee was at risk and the employer was entitled to assume the employee was capable of

performing his contract in the absence of warning signs. It was held on appeal that these findings were open to the trial judge and the plaintiff's appeal was dismissed.

Occupier's Liability

A balustrade failed in *WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors* [2014] NSWCA 127, causing injury to the plaintiff. The plaintiff sued the builder and two subcontractors. At first instance, the plaintiff succeeded and the defendants appealed. Dismissing the appeal except as to apportionment, the Court of Appeal otherwise upheld the findings at first instance.

In *Caruana v Darouti* [2014] NSWCA 85, the plaintiff slipped and fell on the driveway of a Seaforth property. The defendant was the occupier of the property. The plaintiff arrived for a visit and picked up a copy of a local newspaper near the top of the driveway, which descends from the street to the residence. After taking about four or five steps down the drive, the plaintiff slipped and continued to slide until his left knee hit the ground. The defendant said, "She's sorry and that due to the rain the driveway is very slippery". Although the driveway had been resealed, at first instance it was held that a more effective sealant and/or a handrail would have reduced the risk significantly. Given the acceptance of the quoted conversation, the risk was foreseeable and accordingly the appeal was dismissed.

Employment

In *Verney v The Mac Services Group Pty Ltd* [2014] QSC 57 (North J), the plaintiff was wheeling a wheelbarrow when the bracket snapped and he suffered injury in the course of his employment. There was sufficient evidence of previous problems with it to justify the conclusion that the employer had breached his duty of care and the plaintiff should succeed in damages.