COMMON LAW PRACTICE UPDATE 54

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

A MAS assessor issued a certificate for greater than 10% WPI in *Miles v MAA of NSW & Ors* [2013] NSWSC 927. The insurer, with additional medical evidence, made an application for a fresh assessment, which was refused by the Proper Officer. The insurer then made another application accompanied by two of the multiple reports which had been previously provided, whereupon the Proper Officer decided to refer the application for further medical assessment. In her reasons the Proper Officer did not refer to one of those reports. The resultant MAS assessment gave rise to a further certificate of not greater than 10% WPI. The plaintiff then commenced proceedings in the Supreme Court challenging the decision to refer the matter again to the medical assessor on the basis that the two reports were not "additional relevant information", that the Proper Officer was functus officio, that reasons for the decision were not provided and that the failure to refer to one of the two reports constituted jurisdictional error.

Hoeben CJ at CL held that additional relevant information was additional to the original assessment, not to the previous application for reassessment. The concept of functus officio did not apply because s 62 envisaged multiple applications, and there was no requirement for brief written reasons to refer to every piece of evidence. No jurisdictional error had been committed by the Proper Officer in failing to refer to a medical report where the Proper Officer had identified a document satisfying the gateway provisions of s 62. Accordingly, the plaintiff's application was dismissed.

Section 54 Civil Liability Act 2002 (NSW) / Occupiers Liability

The plaintiff was injured by an electric shock in *Austin v The Electricity Networks Corporation* [2014] WASCA 89. He sustained the injury in a disused quarry while trying to remove electrical wires from overhead power lines to sell as scrap metal. He alleged negligence and breach of the *Occupiers Liability Act* (1985) (WA) against the owner of the electricity network for failing to disconnect the electricity to the quarry or provide adequate warning that the power lines were still live. At first instance, it was held the plaintiff was engaged in criminal conduct and the defendant had a statutory defence under s 5(1) of the *Offenders (Legal Action) Act* 2000 (WA). On appeal, it was noted that the owner of the quarry had asked the defendant to disconnect the electricity supply at the time its operations ceased. The defendant failed to completely do so. On appeal, it was argued that the trial judge erred in finding the necessary criminal intent on the part of the plaintiff, however the Court of Appeal unanimously rejected that proposition. The Court of Appeal held that it was open to the trial judge to find as he did on the evidence. Accordingly, the appeal was dismissed.

Liability of Highway Authorities/section 43 *Civil Liability Act 2002* (NSW)

In *Pillinger v Lismore City Council* [2014] NSWSC 447 (Button J), the motorcyclist plaintiff came off his motor cycle on a road. He sued both Lismore City Council and Boral - the Council had undertaken some work on the road, as had Boral. The road was then open to traffic, without any lines being marked, without warning signs indicating new work or any signs to suggest there was loose material on the road. The speed limit was 80 kph. Prior to the accident there had been very heavy rain in the area. The evidence indicated that loose gravel had built up and was the cause of the accident. The plaintiff was travelling at or

slightly below the speed limit. The Council was liable for leaving road base in a position that could wash onto the road, and Boral was liable for not warning of the build-up of gravel which led to the accident. Button J held that the failure to erect the signs was not so unreasonable as to obviate the s43A(3) defence. The Council's negligence was, as a result, confined to the leaving of a quantity of road base in such a position where it could wash onto the road. The plaintiff was entitled to succeed against both defendants, with a 10% reduction for contributory negligence. His Honour apportioned liability at 60% to Boral and 40% to the Council.

Intentional Infliction of Harm/Psychiatric Injury

In *Clavel v Savage* [2013] NSWSC 775 and *Clavel v Savage (No. 2)* [2013] NSWSC 463 (Rothman J), it was held that there is currently in Australia a tort of intentional infliction of harm, including psychiatric injury. The requisite elements are:

(i) a deliberate act;

(ii) intent, including reckless indifference to cause physical or psychiatric harm;

(iii) the occasioning of harm, including psychiatric injury but not mere distress;

(iv) the harm is to a person intended to be injured or a person in the immediate vicinity;

(v) circumstances where the conduct was reasonably likely to cause harm in a normal person, and

(vi) the tortfeasor has engaged in the conduct without justification or lawful exercise.

On the facts, the plaintiffs failed to establish intent to cause psychiatric injury.