

COMMON LAW PRACTICE UPDATE 55

Sections 5R and 43A *Civil Liability Act 2002* (NSW)

The plaintiff motorcyclist collided with a median strip and/or pedestrian barrier designed and built by the defendant, the Roads and Traffic Authority, in *Grant v RTA of NSW* [2014] NSWSC 379. The plaintiff lost his left leg and sustained other serious injuries. The plaintiff alleged that the placement of the median strip and the lack of a warning sign was in breach of the duty of care owed to him.

Rothman J concluded that the plaintiff was travelling at about 80 kph. The experts were agreed that there was no attempt to draw attention to the median strip by reflectors, high intensity lighting, high contrast markings or signposting. There was no keep left sign, and the presence of a right-hand turn lane added to the danger. Rothman J found that, although the installation of the median strip/fence was not negligent of itself, it was negligent not to have placed a sign upon it warning of its location. With sufficient notice of the placement of the median strip, the plaintiff would not have clipped it and hit the fence.

The defendant relied upon the defence in s 43A. However, this defence did not apply because this was not a special statutory power. A special statutory power must be one of a kind that most defendants in this position could not exercise. The power granted to the RTA in respect of signage was no different to that of members of the public over their own property. The defendant's conduct was manifestly unreasonable in any event, and as a result, the s 43A defence was not available.

In respect of contributory negligence, Rothman J found that the relevant speed limit was 60 kph but the plaintiff by travelling at 80kph was not greatly in excess of a safe speed. His Honour found a fair reduction was 30%.

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

The plaintiff was struck from behind by a forklift in *Boral Bricks v Cosmidis (No. 2)* [2014] NSWCA 139. The vehicle was being driven by an employee of the occupier of the premises he was visiting. The Court considered the state of the law in respect of contributory negligence in the light of s 5R *Civil Liability Act* and found it necessary to query the status of the principles laid down in *Talbot-Butt v Holloway* (1990) 12 MVR 70. On the basis that the plaintiff was aware, or ought to have been aware, of the presence of a large forklift and that the forklift driver was aware, or should have been aware, of the likely presence of pedestrians, and if each were equally careless, liability should be shared equally. A purposive approach to the operation of s 5R and s 5B requires this approach be adopted.

Contributory Negligence

The plaintiff was injured in *Aitkenhead v Kaufline (No. 3)* [2014] ACTSC 83, when the car he was driving collided head-on with the vehicle driven by the defendant at the crest of a hill. The defendant admitted breach of duty of care however alleged contributory negligence on the part of

the plaintiff. Master Mossop accepted evidence that the defendant's vehicle was on the wrong side of the road as it approached the crest. Master Mossop was also satisfied that the plaintiff failed to take reasonable care when approaching the crest by driving near the centre of the road. However, he concluded that this fault was not causative of either the collision or of injury. Driving closer to the centre of the road did not increase the likelihood of an accident, which was unavoidable because of the defendant's negligence. Master Mossop was not satisfied that the defendant had proved that the plaintiff's negligence increased the likelihood of the accident or increased the severity of the consequences and accordingly found that there was no contributory negligence.

Choice of Law

The plaintiffs suffered personal injury whilst passengers on a small sailing boat in *Wilson v Addu Investments Pty Ltd* [2014] NSWSC 381. The injuries were sustained in the Republic of the Maldives as a result of a collision with a power boat. The defendants alleged that the Supreme Court of NSW was an inappropriate forum for the hearing and determination of the proceedings. Neither defendant was Australian or had an office in Australia. The plaintiffs were Australian residents visiting the Maldives and both underwent significant treatment back in Australia. Garling J did not accept that a company owning most of a large resort could not afford to bring witnesses to Australia. The test remains whether New South Wales is a clearly inappropriate forum (*Oceanic Sun Line*). Although the proceedings involved questions of the application of both Australian and Maldivian law, there was no reason to think that the application of Maldivian tort law would be unduly complex. If there were difficulties with witnesses, it would be possible to take evidence by appointment of a commissioner or by using audio-visual link or telephone evidence. Garling J was wholly unpersuaded that NSW was a clearly inappropriate forum. The motion of each defendant was dismissed.

Occupiers Liability

The plaintiff had succeeded in establishing negligence in tort but failed in contract in *WB Jones Staircase & Handrail Pty Ltd v Richardson & Ors* [2014] NSWCA 127. The defendants appealed. Reasonable inspection would have revealed that the defective balustrade had been inadequately constructed. Save as to apportionment between defendants, The defendants' appeal was dismissed in respect of liability, as was the appeal as to damages, with the appellants to pay the plaintiff respondent's costs.

Expert Witnesses

The plaintiff applied for an order that the requirements for adherence to the ACT Expert Witness Code of Conduct in respect of certain medical reports be dispensed with in *Aitkenhead v Kaufline (No. 2)* [2014] ACTSC 82. The medical practitioners in question had expressly adhered to the NSW Code of Conduct although they had not been provided with the ACT Expert Witness Code of Conduct, which was in substance the same.

In the circumstances, the requirements were dispensed with and the reports admitted.