COMMON LAW PRACTICE UPDATE 57

Section 82 Civil Procedure Act 2005 (NSW)/ Interim Damages

In *Zraika v Walsh (No. 2)* [2014] NSWSC 655 Schmidt J ordered that the defendants pay $400,000 by way of interim damages, to be credited against any verdict or otherwise repaid, and that the defendants bear the costs of the motion pursuant to s 82 *Civil Procedure Act*. Schmidt J noted that s 82(3)(c) required that the plaintiff show it is more probable than not that they would succeed at the hearing. Although the application was opposed on the basis that the first and second defendants had not had an adequate opportunity to obtain medical reports as to causation of the plaintiff's condition, this proposition was rejected given the history and the medical enquiries that the defendants had undertaken without obtaining any reports that they chose to rely upon.

Administrative Review

The plaintiff visited a nightclub and was shot in the head after a fight broke out in *Quintano v Minister for Finance and Deregulation* [2014] FCA 531. As a result the plaintiff was wheelchair-bound and partially paralysed, having lost an eye and sustained other injuries. He was awarded over $4 million in damages having sued the nightclub. The nightclub's company went into liquidation during the proceedings and its insurer and Australian arm were both subsequently wound up, meaning that the plaintiff could recover nothing from them. The plaintiff sought an act of grace payment and when declined, claimed administrative review. It was held there was no entitlement to such a payment and the very broad discretion given to the Minister was not open to administrative review in these circumstances.

Damages

In *Hall v State of NSW* [2014] NSWCA 154, the plaintiff argued that a finding on non-economic loss at first instance should have been 40% and not 25%. The appeal was dismissed. The primary judge made no error in finding the plaintiff would be greatly assisted by the ending of litigation. There was no suggestion that 25% was outside a sound discretionary range.

Liability of Local Councils

The plaintiff was walking home at sunset along an unlit gravel footpath in *Port Macquarie Hastings Council v Mooney* [2014] NSWCA 156. The path had been recently completed by the Council as a temporary measure pending construction of a new welded footpath. As it became dark, the plaintiff strayed from a sharp deviation in the path and fell into a nearby stormwater drain. She suffered injury. She succeeded against the Council in negligence for not providing lighting or barriers in the vicinity of the deviation near the park. The relevant question was what precautions would be taken by a reasonable person in the position of the Council. The risk was found to be foreseeable and not insignificant. The evidence in the present case, however, was not sufficient to establish that the Council, acting reasonably, ought to have taken the precautions that would have been required to guard against hazards encountered by pedestrians attempting to walk on the path in complete darkness. As a result the defendants' appeal was upheld.

Employment

In *Thomas Borthwick & Sons (Australia) Pty Ltd v Ataera* [2014] QCA 123, the plaintiff packed products of the meatworks into boxes for shipment, developing carpal tunnel syndrome first in the right hand and subsequently in the left hand. At first instance she succeeded in alleging an unsafe system of work and the defendant appealed. The Queensland Court of Appeal held that the findings of the trial judge were open to him and in the circumstances, it refused leave to appeal.

The plaintiff slaughterman suffered a workplace injury at the appellant's an abattoir in *Kemp Meats Pty Ltd v Tompkins* [2014] QCA 125. The plaintiff succeeded at first instance, with no reduction for contributory negligence. On appeal the defendant argued that the employer had instructed employees to use gloves, which would have prevented the injury. However, an earlier trial of the gloves had actually found that they impeded the employee's work and the employer had simply left them in a cupboard. As a result, the initial finding was upheld, with some change in the assessment of damages.