COMMON LAW PRACTICE UPDATE 58

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

One medical assessor found that physical injuries amounted to 0% WPI, while another concluded that psychological injuries amounted to 25% WPI in *Frost v Kourouche* [2014] NSWCA 39. The insurer applied for a review of the second assessment and the claimant was re-examined by the Review Panel, which found her version of events to be unreliable, her descriptions of pain exaggerated and bizarre and her presentation to be characterised by gross exaggeration, if not fabrication. The Panel found no psychiatric disorder that was referrable to the motor accident. The claimant then applied for judicial review on the basis that those adverse findings should have been the subject of an adjournment, providing the opportunity for legal advice to be sought and submissions made to the Review Panel. The Court of Appeal allowed the insurer's appeal and set aside the orders made by the trial judge, finding that procedural fairness did not require a specific warning, an adjournment, the opportunity for further legal advice or the opportunity to address the panel again. Accordingly, there was no breach of procedural fairness.

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

The first two MAS assessors concluded that the injuries of the claimant did not exceed 10% WPI in *Allianz Australia Insurance Ltd v Mackenzie & Ors* [2014] NSWSC. However, a third assessor concluded that the injuries to the claimant's shoulder and lower back amounted to 28% WPI. The insurer applied for a review and the application was granted. The Review Panel concluded that WPI exceeded 10%, although its percentages were different from the MAS assessment. The insurer then sought judicial review. Hoeben CJ at CL quashed the certificate of the Review Panel and ordered that the matter be reallocated to another Panel, to be determined according to law. The first Review Panel applied the wrong test as to proof of injury to the right shoulder, and although it made no error in respect of injury to the back, its reasoning process was sufficiently exposed. Although there was ample evidence available to support the Review Panel's ultimate finding, as the insurer had established the wrong test of causation in relation to the right shoulder, it was appropriate to convene a fresh Review Panel.

The claimant was assessed as having 16% WPI in *Henderson v QBE Insurance (Australia) Ltd* [2013] NSWCA 480. The insurer then lodged an application for a further medical assessment under section 62, which was declined by the Proper Officer on the basis that alleged additional relevant information had already in substance been taken into account and that causation had been addressed by the medical practitioner in the original assessment. The insurer sought judicial review, where the primary judge found that the additional information justified setting aside the decision of the Proper Officer. The claimant appealed. On appeal, the Court of Appeal noted that section 62 precludes a referral, unless additional information is capable of having a material effect on the previous assessment's outcome. Accordingly, the primary judge erred in not identifying any error of law on the part of the decision-maker. The question for the Proper Officer was whether on the application for reassessment there was additional information that was in substance capable of having a material effect. As the Proper Officer addressed those matters and found that the material would not have been likely to affect the outcome, it followed that the primary judge erred in setting aside the Proper Officer's determination. The decision of the Proper Officer was restored.

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

The medical assessor certified a WPI greater than 10% in *Goodwin v MAA (NSW) & Ors* [2014] NSWSC 40. However in the relevant calculations the assessor made errors inconsistent with the findings and scale. The insurer applied for a review and the Proper Officer granted the application, concluding there was reasonable cause to suspect the assessment was incorrect in a material respect. The Proper Officer concluded that this was not an obvious error which could be corrected by amendment of the certificate. After the claimant sought judicial review Bellew J held that the Proper Officer had erred in failing to realise that the calculation, being an obvious error, could be amended, rather than just the certificate. The error was one which went to the outcome rather than the process of assessment. Accordingly Bellew J set aside the Proper Officer's refusal to correct the certificate and remitted the matter to the Proper Officer for this purpose, with costs.

Contributory negligence /section 5B *Civil Liability Act 2002* (NSW)

The plaintiff was walking along a roadway in the early hours of the morning wearing dark clothing with his back to the oncoming traffic in *Marien v Gardiner* [2013] NSWCA 396. There was no natural light at the time. The one available street light provided no assistance. If the headlights had been on high beam the evidence indicated that the driver, who was travelling at about the 50kmh speed limit, could have seen and prevented the accident. Although the trial judge found for the plaintiff, his damages were reduced by 50%. On appeal, it was held that it was open to the primary judge to find as he did, that the driver was negligent in having the lights on low beam at the time and that whilst the test for contributory negligence under s 5B(1)(c) *Civil Liability Act* reflects the position at common law, the task of apportioning responsibility takes into account the fact that the plaintiff only owed a duty to himself. The apportionment of 50% for contributory negligence was within the discretionary range and not plainly wrong.

Occupiers Liability

In *Parker v City of Bankstown RSL Community Club Ltd* [2014] NSWSC 772 (Adamson J), the plaintiff fell whilst at a dance concert where her children were performing in a club. She claimed the defendant club failed to illuminate or otherwise indicate the step from which she fell. Adamson J accepted that the defendants owed a duty of care. She was satisfied that the plaintiff tripped when she fell near the step but was not satisfied that strip lighting was not illuminated. Her Honour found the plaintiff fell because she was not taking reasonable care for her own safety, and accordingly the claim failed."