COMMON LAW PRACTICE UPDATE 60

Sections 5D, 5O, 43 and 43A *Civil Liability Act 2002 (NSW)*

In *McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District* [2013] NSWCA 476, Stephen Rose had been concerned about the mental state of his friend, William Pettigrove. Mr Rose arranged arranged for Mr Pettigrove to be taken by ambulance to Manning Base Hospital in Taree, where he was detained under the *Mental Health Act* 1990. However, later Dr Coombes, a psychiatrist working at the hospital, discharged Mr Pettigrove into Mr Rose's custody so he could be transported by car to Mr Pettigrove's mother's home in Victoria. Mr Pettigrove subsequently strangled Mr Rose to death at a stop on the Newell Highway near Dubbo. There was clear evidence that he was having a psychiatric episode at the time. Mr Rose's mother and sisters sued the hospital for damages for psychiatric injury resulting from nervous shock. However the judge at first instance held that negligence had not been established and that, even if it had been established, he was not satisfied that there was a causal connection with Mr Rose's death and therefore the plaintiffs' psychiatric injuries.

On appeal, the majority (MacFarlane JA and Beazley P) held that:

1. Given that the hospital had direct dealings with Mr Rose, had released Mr Pettigrove into his care, and had control over the source of the risk to him, it owed Mr Rose a common law duty to take reasonable care to prevent Mr Pettigrove causing him physical harm. Garling J disagreed.

2. Dr Coombes and therefore the hospital had been negligent in discharging Mr Pettigrove. There was a foreseeable and not insignificant risk of serious harm being occasioned to Mr Rose, and a reasonable person in the hospital's position would have continued to detain Mr Pettigrove. Garling J disagreed.

3. The Area Health District was not entitled to the protection of s 5O *Civil Liability Act 2002* (NSW), as there was no relevant practice with which Dr Coombes had to conform in discharging Mr Pettigrove.

4. As the claims were not for breach of statutory duty or based on an exercise of or failure to exercise a special statutory power under the *Mental Health Act 1990*, the defendant health service was not entitled to the protection of ss 43 or 43A the *Civil Liability Act*. Garling J disagreed.

5. There was a causal connection between the injuries suffered by Mr Rose and therefore the plaintiffs and the negligence of Dr Coombes. The hospital's breach was a necessary condition of the harm for the purposes of s 5D of the *Civil Liability Act*, and it was therefore appropriate that liability extend to that harm.

Employment

The plaintiff injured her shoulder whilst attempting to connect a ground power lead to an aircraft in *Kay v Sydney Airport Corporation Ltd* [2014] NSWSC 744. She was a licensed aircraft maintenance engineer. The injury was sustained because of the difficulty of working overhead and because a bulge on the connector was on the wrong side. The plaintiff sued the contractor employed by the airport's occupiers along with their delegated contractor, which had engaged the plaintiff to undertake the relevant work. Adamson J held that the company contracted by the occupier was not liable. It was entitled to reasonably delegate its duties. However, its delegate did owe a duty of care, and had failed in that duty. Notwithstanding the longstanding usage and lack of complaint the risk of harm was reasonably foreseeable, and not insignificant. There would have been no great burden in putting the bulge on the other side of the connector. The delegated contractor was negligent as a result but as between it and the plaintiff's employer, relative contribution of the employer's was 75% and the delegated contractor 25%.