COMMON LAW PRACTICE UPDATE 61

Section 126 *Motor Accidents Compensation Act 1999* (NSW)

The claimant operated a dry-cleaning business in *Pham v NRMA Insurance Ltd & Ors* (2014) 66 MVR 152 (NSW CA). The CARS assessor found that the business had made little or no profit and the income exceeded the amount shown in tax returns, and ultimately assessed the claimant's loss on the basis that the average weekly earnings of a laundry worker were a fair measure. The Court of Appeal set aside the orders of Hall J and restored the CARS assessment. The assessor's conclusion that the earnings of a salaried worker were an appropriate guide to the claimant's loss was not irrational, nor was her indication as to the amount the claimant might have been able to earn in the future from his business if uninjured. In accordance with well-established authority the assessor was, acknowledging that the evidence was limited, required to do the best she could to estimate that loss.

Section 5D *Civil Liability Act 2002* (NSW)

The plaintiff was seriously injured when struck by a motor vehicle driven by the defendant in *Lyons v Fletcher* [2014] NSWCA 67. The defendant was travelling after midnight through a built-up area at between 55 and 60 kph and changed from high beam to low beam. He glanced down at his dashboard and diverted his eyes from the roadway for "a number of seconds". The plaintiff affected by illicit drugs and wearing dark clothing, climbed over a barrier between a pedestrian walkway and the road. She was struck by the defendant's vehicle. The defendant gave an explanation for failing to stop, which was accepted. The trial judge found that although there was a breach of duty in the defendant diverting their gaze from the road and failing to keep a proper lookout, there was no breach in failing to illuminate the high beam lights when crossing the overpass. In any event, the trial judge was not satisfied that the high beam lights would have made a difference in any event. He thus found against the plaintiff in respect of factual causation under s 5D of the CLA.

Dismissing the appeal, the NSW Court of Appeal found that even if the defendant's lights had been on high beam and he had not glanced at his dashboard, the accident would not have been avoided. The Court, however, was unanimous in holding that there was a breach of duty in the particular circumstances in failing to illuminate the headlights on high beam. The plaintiff's appeal was dismissed.

Failure to Mitigate Effects of Injury

In *ECS Group (Australia) Pty Ltd v Hobby* [2014] NSWCA 193 the plaintiff slipped and fell in premises occupied by the defendant. At first instance, the plaintiff succeeded and was awarded damages. The trial judge did however find that the plaintiff had unreasonably refused to undergo surgery that could ameliorate the effects of the injury. The defendant appealed on damages, and the plaintiff cross-appealed regarding the finding of unreasonableness. Sackville AJA (Gleeson and McDougall J agreeing) noted that the onus remained on the defendant to establish that the plaintiff had failed to mitigate her loss by unreasonably refusing to undergo the suggested surgery. The defendant should have specifically pleaded the failure to mitigate pursuant to UCPR 14.14(2)(a), (c), however the defence was clearly at issue in the proceedings, was squarely addressed by both parties and was understood by both parties to be at issue.

Whether the plaintiff's refusal to undergo surgery was reasonable depended on her knowledge of the benefits and risks of surgery at the time of the refusal, and the trial judge had erred in not taking her state of knowledge into account. The defendant failed to adduce evidence that the her doctors had indeed explained the benefits and risks of the surgery to the plaintiff. In these circumstances, the defendant failed to discharge its burden of proof, so that the primary judge's finding of unreasonableness had to be set aside. See *Fazlic v Milingimbi Community Inc* [1982] HCA 3; 150 CLR 345.

Choice of Law

The plaintiff worker sued in the NSW Supreme Court for an injury sustained in Western Australia in *Russo v BHP Billiton Nickel West Pty Ltd & Anor* [2014] NSWSC 794. The defendant, his employer, sought to have the action transferred to the WA Supreme Court on the understanding that it would then be transferred to the District Court in accordance with the usual practice in that State for hearing personal injury cases. The plaintiff was domiciled in NSW and all his medical treatment had relevantly occurred in NSW. The issue on liability was relatively straightforward and it was not apparent that there was any real disadvantage for the NSW Supreme Court. The majority of witnesses (largely medical) would be from NSW. The argument that cross-vesting legislation did not empower the presiding judge to transfer to another Supreme Court for purposes of passing the case on to a court to which he could not transfer directly (the WA District Court) was rejected. The test was the balance of convenience, and the defendant pointed to the likelihood of an earlier trial and the plaintiff to the fact that the majority of witnesses would come from NSW and Queensland. The case involved the failure of a rung of a ladder manufactured in Queensland and although Western Australian law would apply, there was no obvious difficulty in the case proceeding in NSW. The location of the witnesses, the second defendant (Queensland) and the location and the likelihood that the relevant negligence was occasioned by manufacturing in Queensland outweighed the necessity to apply Western Australian law in the circumstances. Cross-vesting was refused with costs.

Costs

In *McGlashan v QBE Insurance (Australia) Ltd (No. 4)* [2014] NSWSC 882, it was held that the defendant's failure to serve all of its evidence at the time of service of the offer did not of itself make the rejection of the offer reasonable. However, a reference in the offer to interim payments rendered the offer non-compliant with UCPR 20.26, so that the offer was not inclusive of all or any interim or other payments made to or on behalf of the plaintiff by the defendant, with the consequence that there was no entitlement on the part of the defendant to indemnity costs.