COMMON LAW PRACTICE UPDATE 62

Section 7A *Motor Accidents Compensation Act 1999* (NSW)/ Section 5R *Civil Liability Act 2002* (NSW)/ Contributory Negligence

The plaintiff was riding his cycle when the defendant drove out from a garage and driveway on his left In *Nettleton v Rondeau* [2014] NSWSC 903. The evidence indicated that the defendant had little or no sight of oncoming vehicles because of parked motor vehicles to her right. As was her usual practice, the defendant had pushed slowly out into the lane of traffic contrary to her obligation to give way in the hope that oncoming vehicles would be able to see and avoid her. The defendant was found negligent. In respect of contributory negligence, it was found that the plaintiff cyclist was not keeping an adequate lookout and his damages should be reduced by 25%. In determining the level of contributory negligence, Hoeben Chief Judge at Common Law found that the "causal potency of the defendant's negligence" was greater than that of the plaintiff, as was her "moral culpability". He applied the test of contributory negligence considered by Basten JA in *Gordon v Truong; Truong v Gordon* [2014] NSWCA 97 at [13-18]. Alternatively, even if the plaintiff had not succeeded on liability, it would have been a blameless accident. According to the defendant at least one of the vehicles parked to the defendant's right was parked illegally. However, the road markings and Council signage would not have indicated to the driver of the parked vehicle that he or she might technically have been in breach of the rule relating to the distance from a bus stop. In these circumstances, his conduct was not negligent and, had it been necessary, the case would have been dealt with as a blameless accident.

Section 5R *Civil Liability Act 2002* (NSW)/ Section 34 *Motor Accidents Compensation Act 1999* (NSW)/ Contributory Negligence

The plaintiff was injured in *The Nominal Defendant v Ross* [2014] NSWCA 212 when a minibus collided with him outside a Terminal at Mascot Airport. He was at the airport to collect a visitor and had stepped off the footpath immediately before being struck. The minibus driver stopped immediately and asked after the plaintiff's welfare, to which the plaintiff replied that he was alright. The driver left the scene and no details were noted. The plaintiff did not appreciate that he had been seriously injured and so proceeded to collect his visitor and drove from the airport. Subsequently he discovered that he had serious injuries to his right leg, including a fractured foot, which led to ongoing problems. The Nominal Defendant denied fault and, in the alternative, alleged a high degree of contributory negligence and asserted that the plaintiff had failed in his duty of due inquiry and search. The trial judge found the driver of the minibus to be negligent, contributory negligence was assessed at 20% and it was found that the duty of due inquiry and search pursuant to section 34 *Motor Accidents Compensation Act* had been met. The Nominal Defendant appealed. The appeal against liability was dismissed, the Court of Appeal concluding that, if the plaintiff should have seen the unidentified vehicle, its driver should have seen him. The Court of Appeal applied the interpretation of Basten JA in *Gordon v Truong; Truong v Gordon* [2014] NSWCA 97 at [15]:

> *"... where the plaintiff is a pedestrian and the defendant a driver of a vehicle, the negligence of the defendant is to be assessed against the risk of harm to the plaintiff, while the contributory negligence of the plaintiff, is, generally, to be assessed the risk of harm to him - or herself."*

Hoeben JA noted that:

> *"... A failure by a pedestrian to keep a proper lookout might result in injury to himself. A failure by a driver of a large vehicle, such as a minibus, might result in not only injury to himself, but serious injury or death to an innocent party. In that regard, moral culpability weighs more heavily against a driver than against a pedestrian, even though their actions may, to a similar degree, have contributed to the accident. That has been the approach traditionally adopted by the courts."*

See *Pennington v Norris* [1956] HCA 26; 96 CLR 10 at 16.

Applying that standard, the Court apportioned 65% liability against the Nominal Defendant and 35% against the respondent. In respect of due inquiry and search, there were two elements. One was the plaintiff's failure to obtain the details of the driver or vehicle at the time. The second element involved the failure to request the CCTV footage taken in the area before it was deleted. The evidence was that it was not until after the plaintiff had embarked on a subsequent overseas trip that the seriousness of his injury became apparent. His solicitors requested the relevant CCTV footage only to find that it had been wiped after 28 days. It was found that due inquiry and search did not require the plaintiff to take steps at the time of the accident whilst he was groggy and in shock and when he did not realise he had suffered anything other than a minor abrasion.

Further, it is not clear that a member of the public should have known that CCTV footage would be removed within 28 days or that in the circumstances the plaintiff could have been reasonably expected to instruct solicitors to apply for its retention within that period, particularly given that he was overseas. Nor was it established that the relevant CCTV footage would have covered the accident and have been of any particular use. Accordingly, the complaint about due inquiry and search failed. The plaintiff's verdict was upheld with the minor adjustment in respect of contributory negligence.

Section 78 *Evidence Act 1995* (NSW)

In *Zraika v Walsh (No. 4)* [2014] NSWSC 895 objection was taken to the tender of part of a statement by a police officer under s 78 *Evidence Act 1995*. The officer had investigated a motor accident, and had said that she had observed a left turn only sign within private property from which the defendant's vehicle emerged immediately prior to the collision. However, she added that the sign was not erected so that it was clear for drivers to see.

Campbell J heard argument that the evidence was explicable without that element of opinion, which was not broken down to explain its content. On the other hand, there is something about the sign which fell within that category of evanescence which is part of the purpose of the second condition established by paragraph (b), which made it hard for an ordinary lay witness to break down into its component parts. In those circumstances, and particularly given the importance of the impression of a lay person (which the police officer was in these circumstances), the sign's effectiveness in conveying information was of real significance in the case. Accordingly, the opinion of the police officer fell within the exception created by section 78 and was therefore admissible.