COMMON LAW PRACTICE UPDATE 63

Sections 61 and 133 *Motor Accidents Compensation Act 1999* (NSW)

It was held in *De Gelder v Rodger* [2014] NSWSC 872 that where a court rejects a MAS certificate on the grounds that procedural fairness has been denied, the ordinary course is to refer back for further assessment under s 62 and stay the proceedings until that further assessment has been undertaken. In very exceptional cases however the court has the power, pursuant to s 61(6), to assess for itself the degree of WPI in accordance with s 133, where it is appropriate to do so.

Section 73 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff appealed from a refusal of an extension of time in respect of notice of claim in *Brierley v Ellis* [2014] NSWCA 230. The appeal, which was within the six months required under s 72 *Motor Accidents Compensation Act,* was in respect of the finding that the explanation was not full and satisfactory. Part of the explanation was given by way of hearsay evidence (which was not objected to), while part was given by way of by statutory declarations. In the circumstances, the NSW Court of Appeal upheld the appeal. It considered that the plaintiff had given a full and satisfactory explanation in that a reasonable person in the plaintiff's position would have experienced the same sort of delay. The trial judge erred in concluding otherwise.

Slip and Fall

The plaintiff slipped on a soapy residue when walking in the common area of a shopping centre in *Woolworths Ltd v Ryder* [2014] NSWCA 223. The defendant's supermarket was adjacent to the common area, and the soap had come from a child blowing bubbles from a bottle of soapy liquid sold to her parents at the supermarket. A Woolworths employee had opened the bottle whilst the parents were at the checkout counter. It was held at first instance that (a) the defendant owed the plaintiff a duty to take reasonable care to prevent a danger created by the use of products purchased at the supermarket and (b) that there was a breach of this duty in failing to warn parents against allowing their children to blow bubbles in the common area. However, on appeal by the defendant, it was found that the duty of care had no basis in principle or policy, as it conflated reasonable foreseeability with the existence of a duty and posed an exorbitant burden on owners and occupiers of retail premises. If indeed a duty of care existed, the Court of Appeal found that the first instance judge had erred in finding a breach of that duty.

Employer's duty to warn of risk

The plaintiff was employed as a croupier at the defendant's casino in *Fraser v Burswood Resort (Management) Ltd* [2014] WASCA 130. She finished her 8-hour shift She drove towards home when she finished her 8 hour shift after 4am. She ran off the road, suffering significant injury. The plaintiff argued that the employer should have warned of the risk of falling asleep whilst driving home or suggested she wait until it was light before leaving. If the plaintiff had been so warned, she might have asked to be placed on a more appropriate shift. The trial judge found that the plaintiff had not established the accident was caused by her falling asleep at the wheel and that, even if warned, that would have had no effect on her actions or the consequences. However, the judge at first instance had accepted that the

employer should have been aware of the heightened risk of injury to nightshift workers driving home in the early hours of the morning.

It was held on appeal that it was open to the trial judge to find that it was less likely that the cause of her vehicle leaving the road was her falling asleep than some other cause, such as inattention, and accordingly the plaintiff's appeal failed. However, the court also found there was no logical connection between any duty to warn of the risk of falling asleep and whether or not as a fact the risk had eventuated. It was also open to the trial judge to conclude that even if warned, she would not have changed her departure time.

Sexual harassment - compensation

In *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, the plaintiff sued her employer and a second defendant, a fellow employee, alleging that the latter had sexually harassed her in the course of her employment contrary to s 28B(2) of the *Sex Discrimination Act* 1984 (Cth). The plaintiff succeeded in the Federal Court at first instance and obtained a declaration that the first defendant was vicariously liable for the conduct of the second defendant under s 106 of the Act. A compensation order for $18,000 was made. The plaintiff appealed against the inadequacy of the damages for pain and suffering. With damages for economic loss, the total was increased to $130,000.

Actions Against Prison Authorities or Police

The plaintiff claimed damages from the defendant for the loss of items of personal property confiscated by police officers in *Jianwei Liu v State of NSW* [2014] NSWSC 933. The items, which included a watch, necklace, pendant, belt, shoes and car keys, were destroyed whilst being held in the custody of the NSW Police Force. No explanation for the destruction was forthcoming, and the items were unrelated to any offence. The defendant was liable to compensate the plaintiff for the reasonable value of the items.

The plaintiff sued the police for negligence following a night out in Nottingham in *Smith v The Chief Constable of Nottinghamshire Police* [2012] EWCA Civ 161. A police patrol received a call to attend an incident where three men were involved in an altercation with another. The police driver, responding urgently, engaged the blue lights and claimed that he used the siren. Some pedestrians appeared to run out without looking and the police driver saw the young female plaintiff pause in front of the car, look straight at him and then run forward again directly into his path. The plaintiff succeeded at first instance with a reduction in damages for contributory negligence of 75%. Both parties appealed.

The accident had taken place in a residential area which was not well-lit. The police driver's duty to take reasonable care remained undiminished by the emergency. While the plaintiff had crossed the road when it was unsafe, she did not show the reckless disregard attributed to her at first instance. In the circumstances, the police vehicle was travelling at an excessive speed - at 40 mph, it could have stopped and avoided the plaintiff. Despite the police driver's evidence that the vehicle was only travelling at 10mph, it was obviously going much faster. The plaintiff succeeded with a reduction of one-third for contributory negligence.