# COMMON LAW PRACTICE UPDATE 64

## Sections 3A and 33 *Motor Accidents Compensation Act 1999* (NSW)

There was a minor collision between a Holden Commodore and a Mitsubishi in which the plaintiff was a passenger in *Leach v the Nominal Defendant (QBE Insurance) Australia Ltd)* [2014] NSWCA 257. Gunshots were then fired from the Holden into the Mitsubishi which seriously wounded the plaintiff. The Holden fled the scene and was subsequently discovered abandoned and burnt out. The vehicle was uninsured and the driver never identified.

The trial judge found that the plaintiff's injuries were not caused by the fault of the driver of the Commodore during either the driving of the Holden or during a collision with the Commodore within the meaning of s 3A *Motor Accidents Compensation Act 1999*, and entered a verdict in favour of the defendant. The plaintiff appealed. The trial judge had found that the driver of the Commodore was complicit in an enterprise designed to shoot the plaintiff. Both parties referred to *Nominal Defendant v Hawkins* [2011] NSWCA 93, where a cyclist went off the road and suffered injury consequent upon an object thrown from a car which had been harassing him for sometime. In *Hawkins* it was said that if "the throwing of the object can be properly considered as part of or incidental to the harassing driving of the vehicle" the Act would be engaged but not if it was in a "substantial way distinct from or independent of this harassing driving of the vehicle". McColl JA was not satisfied that the plaintiff's injuries were "caused by the fault ... of the driver in the use or operation" of the vehicle. Nor were his injuries sustained as a consequence of those events, gunfire being the dominant, proximate or real effective cause. The fault of the Commodore in colliding with the Mitsubishi was the mere occasion of the injury. The shooting was therefore distinct, unlike in *Hawkins*. Gleeson JA and Sackville AJA agreed.

## Section 34 *Motor Accidents Compensation Act 1999* (NSW)

The issue in *Nominal Defendant v Ayache* [2014] NSWCA 253 was whether the plaintiff had made due inquiry and search in respect of the vehicle which caused him to fall from his motor cycle. The trial judge found that due to the shock and pain that ensued, he did not realise the need to identify the vehicle causing the accident and make the obvious enquiries. The Nominal Defendant appealed. In rejecting that appeal, the Court of Appeal found that the first instance findings on due inquiry and search were open on the evidence. Whilst the plaintiff made three telephone calls and received one at the scene of the accident while the other vehicle was there, these were calls to obtain assistance because of his injuries.

## Sections 5B, 5R *Civil Liability Act 2002* (NSW)/Contributory Negligence

The deceased pedestrian was the third person in succession to run across the road at a pedestrian crossing contrary to a red pedestrian light despite oncoming traffic in *T & X Company Pty Ltd v Chivas* [2014] NSWCA 235. The defendant driver of a taxi saw the first two but failed to slow down and struck the third. The plaintiff, the mother of the deceased, succeeded, with however a 40% reduction for contributory negligence. The Court of Appeal held that the trial judge correctly applied the principles in s 5B *Civil Liability Act* to hold the driver negligent for failing to reduce his speed in the circumstances. See *Mobbs v Kain* [2009] NSWCA 301 and *Knight v Maclean* [2002] NSWCA 314. However, the majority held that the unpredictable actions of the deceased in the circumstances should have resulted in a much higher percentage for contributory negligence, and they arrived at 75% in this regard.

**Section 15B *Civil Liability Act 2002* (NSW)**

The defendant conceded that the plaintiff's wife needed 24 hour care and would likely have to enter a nursing home once the plaintiff was unable to care for her in *Amaca Pty Ltd v Phillips* [2014] NSWCA 249. The defendant argued on appeal that the expected cost of the nursing home care was relevant to the measure of damages. The Court of Appeal in rejecting this argument noted that s 15B was silent on this issue, apart from its reference to an hourly cap. It is the plaintiff's loss (in respect of the ability to care for his wife) that is the subject of the award of s 15B damages, so accordingly the defendant's appeal was rejected.

**Non-delegable Duty/Liability of Schools/Vicarious Liability**

The question to be resolved in *JK v State of NSW* [2014] NSWSC 1084 was whether a school could receive indemnity or contribution from a teacher in circumstances where the school entered into settlement with a student following that teacher's criminal misconduct towards the pupil. The plaintiff alleged that she suffered psychiatric injury as a result of a number of sexual assaults. Harrison AsJ identified three issues. First, whether the settlement was reasonable, second whether the teacher should indemnify the education authority and third, whether the teacher should contribute to the education authority and if so, to what degree. The consent judgment was for $525,000, of which $208,630 was for solicitor/client costs. Having regard to the medical evidence, Harrison AsJ was of the view that the settlement including costs was reasonable in the circumstances. Section 5(2) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) provided for contribution between joint and several tortfeasors, having regard to the relative responsibility of the concurrent tortfeasors.

Her Honour referred to *State of NSW v Lepore* (2003) 212 CLR 511 and also noted ss 3 and 5 of the *Employees Liability Act* 1991 (NSW), which provides that an employer can only recover from an employee in cases of "serious misconduct" or "conduct not related to employment". The plaintiff was a 13 year old girl when the defendant commenced a sexual relationship with her, knowing he was engaging in criminal conduct. Because the sexual assaults took place off school premises and outside school hours, it was unlikely that the education authority was vicariously liable for the teacher's behaviour. However, in the circumstances, it was just and equitable to require the teacher to pay 90% of the judgment sum to indemnify the State of NSW having regard to the fact that "nearly all of the fault can be attributed to the actions of" the teacher.

The cross-defendant teacher was ordered to pay the education authority's costs.

**Contributory Negligence**

In *Tinworth v Haydon and Insurance Australia Ltd* [2014] QCA 183, the plaintiff was involved in a motor vehicle accident after there had been an extended period of heavy rain and flooding across south-east Queensland. After hitting a patch of water on the Cunningham Highway he lost control of his vehicle, which skidded into a ditch. The plaintiff had reduced his speed to between 80 and 85 kph when the speed limit was 100 kph because of the wet conditions. Another driver travelling at a similar speed also skidded off the road while he was watching, although other vehicles did not. While he was talking to the second driver, a third vehicle also slid off the road and injured the plaintiff. The question was whether the third driver was at fault and at first instance the judge had found for the defendant. On appeal, the majority found that the trial judge's conclusion was open to him. Morrison JA, dissenting,

was of the view that there should have been a verdict for the plaintiff and no finding of contributory negligence.