COMMON LAW PRACTICE UPDATE 65

Sections 81 and 92 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was involved in an accident in 2005 and claimed damages in 2010 in *Smalley v MAA of NSW* (2013) 85 NSWLR 580; [2013] NSWCA 317, whereupon the claims assessor allowed the late claim under s 96. The plaintiff sought an exemption from assessment under s92 in order to allow court proceedings to commence, which was refused by the Principal Claims Assessor. The insurer then sent a letter to the plaintiff expressly denying liability for the late claim but admitting fault by the insured driver. That letter purported to be a s81 notice. Two further applications for exemption by the plaintiff were each refused on the basis that the insurer had not denied that the insured driver was at fault. The plaintiff sought judicial review, which was refused, and then appealed that refusal. Allowing the appeal, the NSW Court of Appeal held that the so-called admission of fault did not amount to an admission of liability. Accordingly it did not engage s 81 and therefore was not a s 81 notice. In the circumstances, and given the deemed denial of liability under the MAA Claims Assessment Guidelines, the claim was unsuitable for assessment. See *Gudelj v MAA of NSW* [2011] NSWCA 158 and *Nominal Defendant v Gabriel* [2007] NSWCA 52.

Medical Negligence/sections 5D and 5O *Civil Liability Act 2002* (NSW)

At issue in *Powney v Kerang and District Health* [2014] VSCA 221 was the question of whether a needle used to inject the plaintiff patient was sterile and, if not, whether this was negligent. The defendant hospital accepted that the injection was the source of the infection, however it argued that the injection was in accordance with accepted practice, and in any event, said that the infection was not caused by any departure from reasonable practice. The jury found in favour of the defendant. The plaintiff appealed.

Looking at the Victorian equivalent to s 5D(2) of the *Civil Liability Act 2002*, the Court of Appeal found that it was the trial judge's role to consider whether responsibility for the harm should be imposed on the party at fault and why, in accordance with established principle. It was not a matter for the jury, and the trial judge was correct in reserving this issue for himself. The appeal was dismissed. However, the Victorian Court of Appeal also commented more generally. The section was not intended as a fallback in a conventional case for a party who is unable to establish factual causation. Rather, it was intended to apply to extraordinary cases such as those where multiple exposures contribute to a disease and where factual causation cannot be attributed to a specific exposure. The provision was also reserved for cases where the scientific evidence may still be developing in identifying the level of exposure necessary to produce injury. The Victorian legislature's use of the word "appropriate" as distinct from "exceptional" did not justify the plaintiff's view that the provision could apply to simple case where causation could not otherwise be made out.

Expert evidence suggesting that there were reasonable precautions which might be taken to reduce the risk of injury was not sufficient to trigger the section's operation. The section did not assist in respect of "what was in truth a very weak case; the appellant was unable to prove his case beyond demonstrating a somewhat increased risk of injury arising out of a contentious single event".

The court also commented more generally on the fact that the increased risk of injury on its own is not enough to make out a case on causation. It is however relevant to the issue of factual causation.

Sections 5D and 5R *Civil Liability Act 2002* (NSW)/ Contributory Negligence

A seven year old plaintiff suffered serious head injuries in *Warth v Lafsky* [2014] NSWCA 94 after riding a scooter down a steep slope onto a roadway, where the defendant's vehicle collided with him. At the time of the accident – 3pm on a Monday - the defendant was driving at about 60 kph in the vicinity of a public school. There was evidence to indicate that at the time children were regularly walking or riding bicycles, scooters and skateboards along the roadway. The trial judge found that, in the circumstances, a person should not have been driving at more than 40 kph. Excessive speed caused the accident. The defendant appealed, arguing that even though the speed was excessive the accident was inevitable and unavoidable in the circumstances. The Court of Appeal dismissed the defendant's appeal. McColl JA said that what is reasonable must be judged by reference to the particular circumstances. Those circumstances must include the possibility of careless behaviour by pedestrians and regard must to be had to the fact that drivers are in charge of dangerous machines: *Derrick v Cheung* [2001] HCA 48. A greater standard of care applies when young children are in the vicinity or where they are reasonable expected to be in the vicinity. *Mobbs v Kain* [2009] NSWCA 301. Particular vigilance is required in the presence of other traffic and around intersections.

The establishment of causation turns on proof on the balance of probabilities and on application of the "but for" test, which in turn requires consideration as to what would have happened had the breach of duty not occurred. *Strong v Woolworths Ltd* [2012] HCA 5. Unlike duty of care and breach, causation is determined retrospectively. *Wallace v Kam* [2013] HCA 19. The advantages of the trial judge, who had conducted a viewing of the accident site, should not readily be overlooked. In this case the judge was correct in finding that there was a failure to keep a proper lookout in respect of a potential source of danger. *Manley v Alexander* [2005] HCA 79. Had the defendant been driving at 40 kph, a speed appropriate to the circumstances, he would have been able to halt his vehicle in time to avoid the impact with the plaintiff. The defendant did not appeal in respect of the trial judge's finding that the plaintiff was too young for contributory negligence.

Non-Delegable Duty

The plaintiff fell from the edge of a pool deck at a leisure centre in *Victorian YMCA Community Programming Pty Ltd v Nillumbik Shire Council and Victorian WorkCover Authority* [2014] VSCA 197. She was employed as a swimming teacher at the centre by the YMCA. The YMCA managed and operated the centre, which was owned by Nillumbik Council. Both the YMCA and the Council were sued by the plaintiff, the first as her employer and the second as the occupier. A jury verdict was entered against both defendants, however the judge held that the Council should be indemnified by the YMCA due to a contractual obligation to obtain insurance cover. Had it not been for this, each defendant would have contributed equally. Each defendant appealed. The Victorian Court of Appeal found that the YMCA was not in breach of its obligations in respect of insurance and that the Council could accordingly not claim any indemnity. Furthermore, the Council had not delegated its duty of care as the occupier and in those circumstances, the issue of contribution must be determined anew by a different judge.