COMMON LAW PRACTICE UPDATE 107

Judicial review – assessment of non-economic loss

The plaintiff in *Boyce v Alliance Australia Insurance Ltd* [2018] NSWCA 22 suffered a bladder injury in a motor accident which was assessed at 10%, whereupon the insurer was granted a review of this certificate. When the Proper Officer wrote to the plaintiff to advise of the review, the plaintiff's solicitor responded objecting to the panel proceeding without her being re-examined. The Proper Officer failed to advise the Review Panel of the objection, the reassessment was conducted by the Review Panel without any interview or examination of the plaintiff, the original certificate was revoked and the degree of impairment was reassessed at 2%. This in turn reduced WPI below 10% and therefore excluded the plaintiff from s 131 *Motor Accident Compensation Act 1999* damages for non-economic loss.

The plaintiff sought judicial review, offering to provide documentary material to the panel if given the opportunity.

The NSW Court of Appeal upheld the plaintiff's appeal. It was the Review Panel's responsibility to conduct a fresh assessment of WPI based on current information. Wherever possible, the WPI assessment should include an interview and clinical examination. Certainly the determination could not be properly made on a false premise in regard to the plaintiff's wishes and the panel should have determined the matter afresh. The plaintiff was deprived of her opportunity to put her case before the panel as to her objections to proceeding on the papers. There was sufficient evidence to demonstrate that the plaintiff would have taken further steps to persuade the panel however she had been denied that opportunity. The Review Panel certificates were set aside and an order made that the original certificate be referred for review to a fresh medical review panel. The insurer was ordered to pay costs.

Occupiers Liability/sections 5B and 5C *Civil Liability Act 2002* (NSW)

The plaintiff in *Bunnings Group Ltd v Giudice* [2018] NSWCA 144 injured her wrist when she tripped and fell at a shopping warehouse after trying to open a gate to a play area where her grandson was experiencing distress. The surface of the play area was a few centimetres higher than the floor with an inclined slope between them. The plaintiff argued however that the height of the shock absorbent matting effectively created a lip. The plaintiff succeeded whereupon the defendant appealed. Although the defendant conceded duty of care, it also argued that the trial judge had not complied with the requirements of ss5B and 5C(b) *Civil Liability Act 2002*.

The plaintiff argued on appeal although that the original oral judgment failed to expressly refer to these provisions, the trial judge had impliedly had done so. The NSW Court of Appeal however disagreed, holding that the findings of breach of duty could not stand. In the absence of any request for a retrial from the plaintiff, the defendant's appeal was allowed with costs.

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

The claimant in *The Nominal Defendant v Cordin* [2019] NSWCA 85 alleged that he was thrown from his mountain bike after being hit by an unidentified motor vehicle, and sued the Nominal Defendant pursuant to s 34 *Motor Accidents Compensation Act 1999*.

The defendant argued that the claimant's injury was caused by his bicycle hitting a pothole. The trial judge did not accept the defendant's argument and found in favour of the claimant, awarding $350,000 in damages.

On appeal from the defendant, the Court of Appeal ordered a new trial.

At the new trial, the Nominal Defendant argued that the claim was invented and that the claimant and other family members had deliberately given false evidence.

The judge however accepted the plaintiff's evidence that he been hit by a vehicle from behind and ordered the Nominal Defendant to pay $350,000 in damages, costs on an indemnity basis.

When the Nominal Defendant appealed once more, the NSW Court of Appeal accepted that a careful approach to the claimant's evidence is to be taken in relation to claims against the Nominal Defendant, before accepting the evidence of the plaintiff. The trial judge did take such an approach. In applying *Fox v Percy* [2003] HCA 22, the Court of Appeal found there was no indication that the trial judge primary judge's findings were wrong nor were they glaringly improbable or contrary to compelling inferences.

The Court of Appeal dismissed the appeal and confirmed the trial judge's award of damages.

Section 63 *Motor Accidents Compensation Act 1999*

The claimant in *Alam v Allianz Australia Insurance* Ltd [2018] NSWSC 1214 applied for relief from a decision by the Proper Officer to extend the time for the insurer to apply under 63(1) of the *Motor Accidents Compensation Act 1999* (NSW) for review of a medical assessment regarding whole person impairment.

The insurer had instructed its solicitor to apply for review of an assessment of WPI at 24%, however because of an oversight on the part of the solicitor, that application was not lodged within the statutory period.

The Proper Officer advised then claimant's solicitor of the application for an extension of time, however the claimant's solicitor was out of the office and did not see the email until his return. The Proper Officer had not been aware of his absence and in the absence of any opposition, the Proper Officer extended time and the insurer's application was then filed.

The claimant's solicitor contacted the Proper Officer on his return, arguing that an extension of time was not warranted in the circumstances, particularly as the solicitor had previously advised that email was not his preferred means of communication. The Proper Officer maintained that the decision was reasonable.

The trial judge accepted that although the Proper Officer had failed to accord procedural fairness in making the decision, the Proper Officer was not bound to quash her own decision, as the reasons given were sufficient to explain that decision. Accordingly, it was not necessary to decide whether the decision was open to judicial review and the claimant was ordered to pay costs.

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

The plaintiff in *Lightfoot v Rockingham Wild Encounters Pty Ltd* [2018] WASCA 205 purchased a ticket for a dolphin-watching trip. Whilst seated on the foredeck, the vessel entered shallow waters. The plaintiff was thrown in the air when an unusually large wave hit the vessel. She injured her back and suffered a substantial injury.

The ship's captain has recorded two previous similar injuries on earlier trips. Although he claimed that he gave a risk warning to passengers, as was his usual practice, in relation to sitting on the foredeck. At first instance the judge found that no such warning was actually given. Although the trial judge found that sailing in shallow water led to a risk of larger waves, it was found that no response was required by the skipper to this risk. When the plaintiff appealed, the WA CA was of the same view and accordingly dismissed her claim.

Sections 5F, 5I and 5L *Civil Liability Act 2002* (NSW); section139A *Competition and Consumer Act 2010 (Cth)*

The plaintiff in *Samahar Miski v Penrith Whitewater Stadium Ltd* [2018] NSWDC signed, but had not read, a document which warned of the inherent dangers in recreational white water rafting. The document included a waiver in relation to any claims. The plaintiff then took part in a white water rafting activity and broke her ankle, although the precise nature of the incident was never established.

The plaintiff sued in negligence and under the *Australian Competition and Consumer Act 2010* (Cth). Although the trial judge found that there had been an adequate warning regarding the risk, and that it was an obvious risk of a dangerous recreational activity, the defendant's case that such an injury was an inherent risk was rejected. Although the plaintiff's statutory warranty claim failed, there is no distinction in the between the position under the *Civil Liability Act 2002* and the *Australian Competition and Consumer Act 2010*. However, the fact that the details of the injury was never properly proved may explain the lack of clarity on this issue.

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

In Sparks v Hobson; Gray v Hobson [2018] NSWCA 29 the plaintiff required surgical intervention to permit him to breathe. It was proposed that the necessary surgery take place in two stages. Although the first operation was successful, the subsequent operation was prematurely terminated. The plaintiff became a paraplegic and took action against the principal surgeon and anaesthetist in attendance, both experienced specialists.

The trial judge found that blood gas readings in the course of the operation should have resulted in the earlier termination of the operation. If the procedure had been terminated earlier, the plaintiff would not have suffered a cardiovascular collapse which resulted in paraplegia. It was held that both specialists had breached duties of care owed to the plaintiff and that they were liable in negligence. Damages of $3,828,075 were awarded

Both defendants appealed, citing sections 5I and 5O *Civil Liability Act 2002*. The Court of Appeal dismissed the principal anaesthetist's appeal. The decision not to terminate the procedure at an earlier stage failed to take account of the serious and imminent intraoperative danger in circumstances where the risk of not proceeding lacked the same immediate threat. Although the decision to terminate the operation was not one for the principal anaesthetist alone, the principal anaesthetist's role was to advise the principal surgeon of the imminent risk.

The appeal of the principal surgeon however was upheld.

So far as the principal surgeon's appeal was concerned, he was entitled to rely upon the advice of the principal anaesthetist regarding any the immediate danger and no there was no evidence that such advice was provided. Accordingly, the principal surgeon's appeal succeeded. Allegations that there were errors at trial regarding the application of sections 5O and 5I *Civil Liability Act 2002* failed in both appeals.

Section 5O *Civil Liability Act 2002* (NSW)/Medical Negligence

The defendant in *South Western Sydney Local Health District v Gould* [2018] NSWCA 69 was found liable in negligence regarding treatment of the plaintiff's injured thumb. The evidence indicated that the relevant medical staff involved acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice.

In those circumstances the defendant did not incur liability under s 5O *Civil Liability Act 2002* unless the relevant conduct could be regarded as irrational. The judge at first instance had interpreted 'irrational' as meaning unreasonable.

On appeal, the Court of Appeal found that the application of s 5O would only be rejected if the court can be satisfied on the evidence that there is no rational basis for the relevant conduct. There is an evidential burden on the plaintiff which is not satisfied by evidence simply justifying an alternative approach. The relevant evidence in this case only met that standard.

As a result, the claim should have been dismissed in view of the evidence that the conduct of the defendant was in accordance with widely accepted peer opinion, and the defendant's appeal was upheld.

Interrogatories

In Hickson v Mid North Coast Local Health District [2018] NSWSC 1826 the plaintiff sought a review of an order permitting interrogation of the plaintiff on certain matters relating to the

limitation period of the cause of action in medical negligence proceedings. The trial judge accepted the plaintiff's argument that this was not an issue in the proceedings as the defendant had not pleaded a limitation defence and dismissed the defendant's motion for interrogatories with costs.

Choice of Law

In Hardaker & Ors v Mana Island Resort (Fiji) Limited & Anor [2018] NSWSC 1863 the plaintiff's father and husband was killed in a collision between vessels off the shore of a Fijian resort. The plaintiffs sought damages and commenced the proceedings in NSW. The defendants applied for a stay of proceedings, arguing that NSW was a clearly inappropriate forum. The defendant, in order to succeed would have had to demonstrate that a trial in NSW would bring about injustice because it would be oppressive in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious or in the sense of productive of serious and unjustified trouble and harassment (*Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55). Great care or extreme caution nee3ds to be exercised in considering whether to grant a stay in these circumstances. In this case NSW was not a wholly inappropriate forum and hearing the matter in NSW would not be oppressive and vexatious. Accordingly, the defendants' notice of motion was dismissed with costs.

Motor accidents/employment

The plaintiff in *Raper v Bowden* [2016] TASSC 35 was a 24 year old British backpacker employed on the defendant's property. She fell from a quad bike while trying to move cattle and suffered serious head and facial injuries and afterwards had been returned to the UK in a vegetative state.

The plaintiff had not received adequate training to ride the quad bike and was allowed to ride without a helmet. Under Tasmanian law, the trial judge found that the claim should be treated as an employment claim, not a motor accident.

The judge at first instance found that the inadequate instruction was given to the plaintiff, that it would not have been costly or difficult to provide proper instruction, and that the risk was high. Further, the evidence established that the bike's rear brakes were inoperative at the time. The trial judge found for the plaintiff, awarding damages which were assessed at £6,970,426.

Section 60 of *The Australian Consumer Law*

The plaintiff was injured when surfacing too rapidly while on a dive in *Lets Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243, suffering decompression sickness. The defendant had organised and paid for the dive. The plaintiff argued that the defendant should have known that the plaintiff had hit his head underwater, which gave rise to the risk of a fast ascent. The plaintiff also alleged that he was lifted out of the water negligently, which exacerbated his injury. The plaintiff also argued that the defendant had been negligent in not ensuring that there was a pure oxygen supply on the boat, which would have assisted the plaintiff's condition.

There had been a waiver of liability to the plaintiff as a consumer but s 64 of the *Australian Consumer Law* renders this inoperable.

After the plaintiff succeeded at first instance the NSW Court of Appeal held that the trial judge erred by finding that the defendant ought to have been aware that the plaintiff needed oxygen. Further, the plaintiff did not establish the absence of available oxygen on the boat, and it was highly improbable that the physical problems suffered by the plaintiff resulted from the way in which he was lifted into the boat. Finally, there was no evidence to suggest that the defendant knew of the plaintiff's head injury. The defendant's appeal was upheld.

Employment/Contributory Negligence

The plaintiff in *Atherden v Caldipp* [2019] ACTSC 29 was a motor mechanic who was injured at work. Although the employer admitted liability it was argued that the level of damages should be reduced due to the plaintiff's contributory negligence.
The plaintiff and his supervisor could not identify a knocking noise apparently being made by a vehicle being repaired in their workshop. They drove the vehicle to a park, then, in an attempt to find the cause of the noise, removed the bonnet. First, the supervisor lay on the front of the car whilst the plaintiff drove, then they swapped places. At this point the plaintiff lost his grip on the vehicle and was seriously injured.

The trial judge accepted that the particular system of work was devised or implemented by or on behalf of the employer and was not the plaintiff's initiative. Given that the relevant activity was suggested by the supervisor nor done in the plaintiff's own interest, there was no contributory negligence, and the defendant's argument failed.

The plaintiff fell from an aerial sling during an exercise class and broke both her wrists in *Cornwall v Jenkins as trustee for the iSpin Family Trust* [2019] ACTSC 34, whereupon she took an action in negligence.against the defendant. The trial judge found that the plaintiff had failed to establish that the conduct of the defendant involved any breach of duty, and that there was no evidence of any similar previous accidents. The plaintiff did not recall details around how she fell, and the action failed.

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

The plaintiff in *O'Connor v GEO Group Australia Pty Ltd* [2019] NSWSC 202 was seriously injured after being assaulted on remand at Parklea Correctional Centre while awaiting sentencing for a number of offences including sexual assault causing grievous bodily harm. Senior staff had been aware of inmates discussing a plan to assault the plaintiff a week before the attack. A week before the assault, information was provided to at Parklea that inmates had been overheard discussing a plan to attack the plaintiff because of the nature of the plaintiff's crimes, which had been found out by those inmates. The plaintiff was not warned of the threat and was required to sign a form preventing his segregation from other inmates. Although the defendant admitted that it had become aware of a rumour regarding the potential possible assault, it denied any negligence.

The trial judge noted that a prison authority was in a special relationship with an inmate that included a duty to take reasonable care to prevent harm from others' unlawful activities.

A nursing unit manager had been told of the possible assault by a staff member who had overheard a group of inmates planning the attack. When she brought the information to the attention of the Operations Manager, that Manager then identified the plaintiff and raised the threat with him. The surprised plaintiff said he had had no problem with any of the other inmates. No information had been provided to corrections officers on the wing about the threatened assault.

The trial judge concluded that the plaintiff had not been told of the reasons behind the threatened assault and that he was not made appropriately aware of the risk. If necessary, the plaintiff could have been segregated for his own protection without his consent.

Section.5B(1) of the *Civil Liability Act 2002* applied. The defendant was negligent in failing to take adequate precautions against a foreseeable risk of a harm. The defendant had options available to address the risk – the plaintiff could have been segregated and transferred to another prison. Causation was established under s 5D of the Act. As the plaintiff was not informed of the nature of the risk of harm, there was no element of contributory negligence. The plaintiff succeeded.

Workers Compensation/Contributory Negligence

The plaintiff truck driver in *Harford v Hallmark Construction Pty Ltd* [2019] NSWSC 371 fell into a concealed pit while moving concrete blocks, after moving a wooden pallet which was obstructing the area in which he was directed to unload them. He was awarded workers compensation after making a claim against his employer. The insurer brought its own proceedings against the employer. The employer cross-claimed against the occupiers of the premises.

The Judge at first instance found that, although there had been no contributory negligence by the plaintiff and the employer was not at fault, the occupiers were liable, and apportioned contributions between them at 50/50.