COMMON LAW PRACTICE UPDATE 108

Section 58 *Motor Accidents Compensation Act 1999*

The claimant in *AAI Limited t/as AAMI v Phillips* [2018] NSWSC 1710 suffered injuries from three separate motor accidents. The insurers were respectively Zurich, NRMA and AAMI. The claimant alleged neck and shoulder injuries resulting from each of the accidents. After a neurosurgeon recommended spinal surgery, the assessor found the surgery proposed was not causally related to the first accident, but only the second and third accidents. That finding was challenged by AAMI. AAMI alleged to the Review Panel that an incorrect test for causation had been applied, inadequate reasons given and that the insurer's argument on causation had not been given sufficient weight.

The trial judge accepted that there had been an error in causation. The Review Panel had suspected that the subsequent accidents had not substantively affected the claimant's condition and did not of themselves warrant the recommended surgery. There was accordingly an error of law. The matter was remitted to the regulatory authority to be dealt with in accordance with law.

Section 60 *Motor Accidents Compensation Act 1999* (NSW)

The relevant issue in *Insurance Australia Ltd v Kong Lai Kai* [2018] NSWSC 958 was whether SIRA was correct in referring part of a medical dispute rather than the whole for medical assessment. The trial judge held that under section 60 *Motor Accident Compensation Act 1999*, the whole dispute had to be referred and ordered accordingly.

Employment/Evidence

The plaintiff in *Beaven v Wagner Industrial Services Pty Ltd* [2017] QCA 246 alleged that he had suffered injury as a result of inadequate training regarding the correct posture in undertaking activity at work. He had suffered a prolapsed disc in his lumbar spine after reaching out to open a jammed lock in the passenger door while in his truck. Although the trial judge found the plaintiff was honest, and that the injury was caused as he described, the claim was dismissed as there was no breach of duty by the employer. On appeal, there had been an attempt to rely upon the plaintiff's description of the training that he had undertaken given to an ergonomic expert, who provided an opinion to the court. However, the Queensland Court of Appeal held that the plaintiff's hearsay statement to the expert did not establish evidence which should have been given directly by the plaintiff. As a result, there was no evidence of the state of the plaintiff's training and the plaintiff's appeal was dismissed with costs.

Medical Negligence

The plaintiff in *LC by his litigation guardian KS v Australian Capital Territory* [2017] ACTSC 324 had been taken to Canberra Hospital by police after an unsuccessful suicide attempt. After the plaintiff later jumped from a Canberra Hospital building, his guardian sued in damages. After being taken to the Emergency Department, the plaintiff had been placed in a bed in a ward with other patients. He later escaped and, after being chased by a security guard, jumped from an elevated car park and fractured both legs. It was alleged that the defendant knew or ought to have known of the plaintiff's psychosis and tendency towards self-harm, but failed to

put in place procedures to prevent that harm. An expert specialist in emergency medicine, Associate Professor John Raftos, stated that the hospital's failure did not accord with widely accepted professional opinion in Australia of competent professional practice. He stated that the defendant's handling of the plaintiff departed from an acceptable state of care. The defendant's witness Dr David Spain stated that there was no indication that the plaintiff required any actual physical restraint.

The trial judge concluded that the hospital was obliged to detain the plaintiff, who manifested clear signs psychosis while in the Emergency Department. The expert evidence of Dr Raftos was accepted. Accordingly, the hospital's duty of care was breached, and there was a causative link with the injury. The plaintiff succeeded and damages were awarded as assessed.

Product Liability – section 55 *Australian Consumer Law*

In *Bamber v Hartman Pacific Pty Ltd* [2017] NSWSC 1318, the plaintiff sought damages for physical and psychological injuries after falling 6 metres while descending a ladder when it collapsed, allegedly on the first occasion it was used after purchasing it. The plaintiff's wife also sued for psychological injury. Action was taken against the defendant, manufacturer and importer of the ladder under the Australian Consumer Law of the *Competition and Consumer Act* 2010 (Cth).

However, the trial judge found that it had not been established that the relevant defect in the ladder, loose bolts, was caused in the manufacturing process, and the plaintiffs failed accordingly. A costs order was entered in the defendants' favour.

Employment

The plaintiff truck driver in *Clarricoates v JJ Richards & Sons Pty Ltd* [2017] QSC 214 suffered a back injury when the seat in his cabin collapsed. He alleged that the defendant breached its duty of care by instructing him to drive back to the depot with a defective seat, which did not have working air suspension. The defendant argued that injury was sustained when the seat collapsed, not because the plaintiff has been required return the vehicle after the incident.

The plaintiff was prone to exaggeration, and the trial judge would not accept his evidence unless it was inherently probable or otherwise corroborated. The trial judge was not satisfied that the employer breached their duty of care by directing the driver to take the vehicle back to the depot, and also found that the injury was more likely to be caused by the initial collapse of the seat than any subsequent driving. As a result the plaintiff's claim was dismissed.

Employment/Evidence

The plaintiff in *McGrory v Medina Property Services Pty Ltd* [2017] QCA 234 was employed by the defendant as a room attendant. As part of her duties she was required to lift an ice bucket. This activity caused her pain and she eventually had to cease working in the position due to her ongoing pain and an inability to perform her duties. The plaintiff and two other witnesses gave evidence that supported a finding that she had suffered a significant disability. However one doctor gave evidence that was inconsistent with the three witnesses' testimony, while another gave evidence which was consistent with that testimony. Although the trial judge accepted the credibility of the three witnesses, the evidence of the first doctor was preferred over the second.

On appeal, it was held that the trial judge erred by preferring the testimony of a doctor whose version was inconsistent with the lay evidence.

Damages were increased accordingly, leave to appeal was granted and the appeal upheld.

Sections 5B and 5F *Civil Liability Act 2002* (NSW)

The elderly plaintiff in *Bruce v Apex Software Pty Ltd t/as Lark Ellen Aged Care* [2018] NSWCA 330 tripped outside the entrance to the defendant's aged care facility. The surface consisted of concrete slabs bordered by brick pavers, which had been in place for over a decade, and there was no record of previous complaints. The trial judge rejected the claim at first instance, finding no breach of the duty of care. The appeal to the NSW Court of Appeal was dismissed, the Court finding that the risk of tripping was "insignificant" pursuant to section 5B *Civil Liability Act 2002* – it was a remote and obvious risk. The brick pavers were a different colour from the concrete slabs and the height difference between the slabs and brick pavers was obvious - no warning pursuant to s 5F of the *Civil Liability Act* was required. No action could be reasonably required of the defendant to address the areas, particularly in view of the fact the defendant frequently inspected the area and it had been used for many years without incident.

Duty of Care/section 5R *Civil Liability Act 2002* (NSW)

The plaintiff in *Lim v Cho* [2018] NSWCA 145 suffered a catastrophic injury after jumping from a vehicle moving at approximately 50 kph. The plaintiff argued that the defendant, who was driving, was negligent by failing to stop or slow down when she saw that the plaintiff was about to exit the vehicle. The trial judge held that the defendant's duty of care did not extend to a duty to prevent the plaintiff from injuring himself. The evidence also did not establish that it would have made any difference if the defendant had braked in time. The NSW Court of Appeal dismissed the appeal.

Sections 5 and 15 *Motor Accidents (Lifetime Care and Support) Act 2006*; sections 131, 133 *Motor Accidents Compensation Act 1999* (NSW); Clause 2.3 Lifetime Care and Support Guidelines

The claimant suffered a severe motor accident injury in *Allianz Australia Insurance Ltd v Benjamin Ridge* [2018] NSWSC 1239, leaving him with little function in his right shoulder, arm and hand. Although he was initially accepted as an interim patient by the lifetime care scheme, the assessment panel found that he still had some function in this right arm, and issued a certificate that he was not eligible to participate in that scheme. When the insurer applied for a review of that decision, the review panel confirmed the assessment panel's finding. The review panel's decision did not refer to the insurer's submission that clause 2.3 of the LCS Guidelines required the panel to apply the provisions of the *Motor Accidents Compensation Act 1999* in the course of considering whether the plaintiff had suffered a sufficiently serious impairment to qualify for the scheme.

The insurer took action in the Supreme Court, alleging legal error and seeking a further review. The judge at first instance found that the review panel had not been in legal error - impairment is not defined in either the *Motor Accidents (Lifetime Care and Support) Act 2006* or the *Motor Accidents Compensation Act,* and the two Acts are not related for this purpose. There was no

authority to suggest that the *Motor Accidents Compensation Act* process has a direct impact upon lifetime care assessments.

As a result, the review panel had not committed any legal error and the insurer's claim was dismissed with costs.

Sections 94 and 126 *Motor Accidents Compensation Act 1999*

The defendant insurer in *Mulcahy v NRMA Insurance Ltd & Ors* [2018] NSWCA 189 admitted liability after the claimant brought an action for damages arising from a motor accident. After the claim was allocated to a claims assessor, damages were assessed at over $1.5 million. The insurer alleged jurisdictional error. The judge at first instance found no error of law regarding past economic loss but did find an error of law in relation to future economic loss, on the basis that the claims assessor had not incorporated an accountant's report and provided no reasoning in this regard. The Court of Appeal allowed the claimant's appeal. The reasoning for the award of future economic loss had been adopted in the schedule and was consistent with the statutory obligation to state reasons briefly and explain the assumptions on which it was based. There was no error of law on the face of the record, and the claimant's appeal was upheld with costs.

Sexual abuse/economic loss

The 51-year-old plaintiff in *Hand v Morris & Anor* [2018] VSC 437 claimed damages against the first defendant, a teacher at a primary school run by the second defendant, the Victorian Government, regarding sexual abuse committed more than 40 years previously. The second defendant accepted it was liable in damages, although it did not concede vicarious liability. The first defendant had pleaded guilty to indecent assault of another student and did not defend the plaintiff's allegations. The trial judge had accepted the evidence of the plaintiff and his mother as truthful witnesses. Although the plaintiff had married, had children, had been in employment and actively participated in various activities, he had still suffered a substantial psychological injury and had been diagnosed with a moderate to severe generalised anxiety disorder. The trial judge assessed general damages at $260,000.

The trial judge concluded that, but for stress-related causes, the plaintiff would have been promoted further at work and would he would take early retirement. A total award of damages was assessed at $717,000, including past loss, future economic loss, future medical expenses and loss of superannuation and pension entitlements, plus interest and costs.

Nervous shock/duty of care

The plaintiffs in *Fuller-Wilson v State of NSW* [2018] NSWCA 218, were family members of the deceased who allegedly suffered nervous shock when they visited the scene of the accident where the deceased had died in a motor vehicle accident. They claimed to have suffered psychological injury upon finding body parts and clothing of the deceased at the scene, and commenced proceedings for nervous shock in the District Court. The judge at first instance found that the police officers owed no duty of care of the kind pleaded and dismissed the proceedings summarily. When the plaintiffs appealed, the point at issue was whether the police could be liable in negligence in circumstances where they allegedly failed to properly search the accident scene and did not warn that remains might still be there.

The NSW Court of Appeal noted that there is some uncertainty regarding the circumstances in which police owe a duty of care and that a claim should not be summarily dismissed without close examination of the terms, scope and purpose of the relevant statutory regime. The appeal was upheld. The proceedings should be heard in court.