COMMON LAW PRACTICE UPDATE 16

Nervous Shock/Employment

In *Winbank v Casino Canberra Ltd* [2012] ACTSC 169 (before Master Harper) the plaintiff was employed by the defendant as a croupier. As a result of misconduct by clients, which should have been anticipated by the employer given the plaintiff's known history, the plaintiff suffered nervous shock and the employer was held liable.

Choice of Law

In *Pocock v Universal City Studios LLC* [2012] NSWSC 1481, the plaintiff was on a tour of Universal Studios in California when she slipped and fell. She commenced proceedings in New South Wales and without filing a defence, the defendant moved to set aside the proceedings on the basis that they should be conducted in California. The plaintiff returned to Sydney shortly after her injury and the vast majority of the medical evidence was in Sydney. The defendant alleged that it would need to call between four and five lay witnesses domiciled in California and an expert in Californian personal injury law, who was also domiciled in the United States.

Finding that the claim was partly founded on damage suffered in the State, Hulme J held that New South Wales was not a clearly inappropriate forum merely because a New South Wales court would need to apply Californian law.

Offer of Compromise/ Calderbank Letters/Costs Generally

The appeal in *NSW v Williamson* [2012] HCA 57 concerned the question of cost fixing law in New South Wales in certain personal injury damages matters. The questions which arose were "does the claim for personal injury damages include a claim for personal injury damages based on an intentional tort?" and "does this include a claim for damages for false imprisonment?" Division 9 of Part 3.2 of the *Legal Profession Act 2004* (NSW) applies to restrict plaintiff's costs if damages do not exceed $100,000. The High Court held that whether the claim is framed in negligence or as an intentional tort, the restrictions on recovery of damages apply, contrary to the conclusion reached in the NSW Court of Appeal (Section 338(1)).

However, the Court of Appeal was right to hold that the costs limiting provisions did not apply in this case because the damages were both for trespass to the person and false imprisonment. As no part of the lump sum settlement could be attributed to one or the other, it is not possible to say of the amount recovered that it was recovered on a claim for personal injury damages and accordingly, because of the false imprisonment element, the restrictions on costs recovery had no application. See also *Certain Lloyds Underwriters Subscribing to contract No. IHOOAAQS v Cross* [2012] HCA 56, which was heard at the same time.

Evidence and Procedure

The plaintiff in *Barden v Seric* [2012] NSWSC 1480 sued for damages for personal injury suffered in a motor accident. As there was unlimited jurisdiction in the District Court, the defendant contended that there were no complex legal issues and the case should be transferred from the Supreme Court to the District Court. The plaintiff however argued that there were complex legal issues in the assessment of damages for economic loss. The assessment of damages between the plaintiff and his wife in a partnership, including a claim for lost opportunity, did not, in the view of Hulme J, involve any complex legal issues and in the circumstances, the case should be transferred to the District Court with an order against the plaintiff for the costs of the application.

In *Jones Lang Lasalle (Vic) Pty Ltd v Korlevski* [2012] VSCA 305, an appeal from the decision of the trial judge was dismissed in favour of the plaintiff in a stair-slipping case. It was said that on the appeal the appellant attempted to run a new case and should not be permitted to do so, as there were no exceptional circumstances to justify it.

Duty of Care and Liability of Police

The ACT Court of Appeal held in *ACT v Jonathan Anthony Crowley and the Commonwealth of Australia and Glen Pitkethly* [2012] ACTCA 52 that police did not owe a duty of care in circumstances where the plaintiff conceded that the police officer was not negligent in the discharge of a weapon, overturning the decision at first instance, There is a helpful summary of the cases limiting the liability of police officers as a matter of public policy commencing at [274-301]. When the constables came upon the plaintiff, they owed him no duty of care in apprehending him. While there is authority for the proposition that in certain circumstances the police will be liable if they assume responsibility for a particular member of the public or a special relationship arose, that was not the case here. In any event and on the facts, it was held that, even if there was a duty of care, it was not breached in this case.

Occupiers Liability

In *Plaskitt v Pittwater Council* [2012] NSWSC 1356 the plaintiff fell on the uneven surface of concrete footpath and sued Pittwater Council (which was responsible for the repair of the footpath) and the owners of the land on which the footpath was situated for damages. The extent of the height difference between slabs was not clearly established but there was some evidence of repair work by the Council, even though this occurred on someone else's land. The risk was foreseeable and not insignificant. However, a reasonable person in the position of either defendant would not have taken precautions because the risk was obvious in respect of the assumed 25mm height differential. In any event Rothman J was not satisfied that the Council repairs were a cause of the problem and the injury.

In *Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserve Trust v Thompson* [2012] NSWCA 340, the Court of Appeal (other than for a modest change in respect of damages) rejected an appeal against the liability of Bathurst Council in respect of an injury to the plaintiff, who slipped on steps on the rotunda in a Council park.

Section 33 *Motor Accidents Compensation Act 1999*

The plaintiff suffered injury on a gravel track on a farm in *Chen v Caldieraro* [2012] NSWSC 1409. The gravel track was wholly within the farm but there were no fences, gates, grits or signs restricting access. It was submitted that the farm was open to the public for delivery trucks and that people would use the track for access from time to time. Price J held that there was no invitation to the public to access the area and that members of the public did not enter the farm or use the gravel track, and that accordingly it was not "opened to or used by the public" so as to constitute a road or road-related area pursuant to section 33 (3A).

Costs

In *Orcher v Bowcliff Pty Ltd* [2012] NSWSC 1429, Harrison J held that there was no conflict between a requirement that an offer must be made exclusive of costs and an offer that is expressed in terms of a particular sum plus costs as agreed or assessed. Unless an offer is otherwise expressed to take effect as a *Calderbank* offer, it does not have that effect.

Interrogatories

Davies J considered an argument by counsel that interrogatories allowed by the Registrar were excessive and went further than the pleaded matters in dispute in *Lee v Carlton Crest Hotel (Sydney) Ltd* [2012] NSWSC 1392. Davies J was satisfied that special reasons for permitting interrogatories were justified and that they were "necessary" in the interests of a fair trial. Some interrogatories were allowed and others refused. Each party was ordered to pay its own costs.

Expert Evidence

In *Barescape Pty Ltd v Bacchus Holdings Pty Ltd & Anor* [2011] NSWSC 1002 it was noted that UCPR 31.26 provides for a joint report between experts which "may be tendered at trial as evidence of any matters agreed". A party sought to tender two "joint reports" together with two memoranda, each prepared by one of the experts. In response, it was argued that their conclusions were inadmissible. The tendering party contended that UCPR 31.26 made the material admissible regardless. Rejecting the tender, Black J said that in his view UCPR 31.26 is permissive and not mandatory and the material in them which emanated from one of the expert's report was upon its face likely to be wholly or substantially inadmissible in its present form.

Fund Management

In *Workers Compensation Nominal Insurer v Luke* [2011] NSWCA 251, an award of damages was made which fell within Section 151G of the *Workers Compensation Act* 1987. That section relevantly provides that the only damages that may be awarded are "damages for future economic loss due to the deprivation or impairment of earning capacity". In the District Court the sum awarded included the cost of managing the fund, including after the plaintiff's retirement age. Section 151IA provides, "The court is to disregard any earning capacity of the injured worker after age 65". The insurer appealed against any award of fund management, against the award of fund management after the age of 65 and against the amount awarded for managing the fund, including the cost of management itself.

The Court of Appeal held that s151IA did not prohibit fund management after a person reached 65 as the award was not based on earning capacity after that date. An award of lump sum by way of compensation was due to the deprivation of earning capacity, and fund management was available on it. There should be no allowance after a person's life expectancy on the appropriate tables.