# COMMON LAW PRACTICE UPDATE 32

## Employment/ Section 5D *Civil Liability Act 2002* (NSW)

The plaintiff was operating a mobile crane at Darling Harbour in *Baden Cranes Pty Ltd v Smith* [2013] NSWCA 136 when the entire upper deck of the crane, including the boom, cabin and counterweight, toppled off the base. The plaintiff was jolted from his position and fell, suffering significant injury. The plaintiff sued three parties in negligence: the first defendant, who originally owned the crane and employed the plaintiff; the second defendant, who had modified the crane to permit its transportation in one piece at the request of the first defendant; and the third defendant, who took over the business of the first defendant and ownership of the crane and was the plaintiff's employer at date of accident. At first instance, each defendant was found to have breached its duty of care primarily by failing to give adequate instructions in relation to the consequences of failing to release the slew lock before driving the crane with the boom on the dolly. There were cross-claims between the defendants. The third defendant employer was found liable at 20%, the second defendant 45% and the owner 35%.

The relevant harm which eventuated was the shearing of the pins which held the bayonet connector, which was caused by the driving of the vehicle without releasing the slew lock. The risk was foreseeable and not insignificant. The reasonable precautions which needed to be conveyed, but were not, concerned the risk of catastrophic failure if the slew lock was not released prior to commencing to move the crane. The Court upheld the findings of negligence on the part of all three defendants. The finding of no contributory negligence was correct. Causation was established within the meaning of Section 5D of the *Civil Liability Act*. In respect of relative contribution, the Court concluded that the former owner should bear 20%, the modifier 40% and the employer 40%."

## Medical Negligence/Section 5D *Civil Liability Act*

In *King v Western Sydney Area Health Service* [2013] NSWCA 162, there was a failure to provide VZIG, the standard treatment for suspected contact by pregnant women with chicken pox. It was accepted at first instance and on appeal that there had been a breach of the duty to administer the standard treatment but the trial judge was not satisfied that on the probabilities a different outcome would have occurred for the child, who was born with a severe disability. The plaintiff argued on appeal that the breach of duty gave rise to an increased risk which materialised. Hoeben JA rejected that argument, noting the real difficulties in applying the 'but for' test to the concept of increase in risk. An attempt by the plaintiff to rely upon the exceptional case causation alternative in Section 5D(2) *Civil Liability Act* was rejected because that alternative was not argued at trial (per Hoeben JA with Ward JA agreeing). Basten JA, dissenting, concluded that the case fell within Section 5D(1)(a) of the Act but that, in the alternative, a remedy lay under Section 5D(2), notwithstanding that the plaintiff eschewed reliance on it at trial:

> *"... Questions of factual causation and scope of liability, as separately identified in section 5D, do not readily fall into separate and independent watertight compartments. Valuable as it is to separate the 'factual' and 'policy' elements of causation, the separation is, to an extent, an artefact. It*

*will be a triumph of form over substance to deny the plaintiff recovery on that basis.""*

**Sections 5K and 5L *Civil Liability Act***

The plaintiff, a member of the defendant club, was injured when the glider he was flying collided with powerlines when coming in to land in *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516 (Davies J). The plaintiff sued the club in negligence. Damages were agreed at $750,000. On the day of the accident, the plaintiff had undertaken undertook four flights. He was directed by radio to make "a hanger landing", the purpose of which was to reduce the distance for towing the aircraft. The plaintiff had previously undertaken such landings. At the time of the incident, the plaintiff had approximately 38 hours total experience (150 takeoffs). He was aware of the existence and location of the powerlines. Davies J accepted the conclusion of the parties' experts that on the instructor's version, there was no breach of the duty of reasonable care in the club's instructions and training. The instructor's evidence, having been accepted, was that there was no breach of the duty of care owed by the club to the plaintiff. Although he did not need to do so, Davies J dealt with the issue as to whether this was a dangerous recreational activity within the meaning of Section 5K of the *Civil Liability Act*. He ultimately concluded that it was, but that even if he was wrong in having regard to the more general activity of gliding, the act of performing a landing over the powerlines was a dangerous recreational activity. The risk of striking the powerlines was an obvious risk of such an activity and Section 5L would accordingly preclude recovery.

**School Bullying**

"In *Oyston v St Patrick's College* [2013] NSWCA 135, the plaintiff, a student at the defendant's school, alleged she had suffered psychological harm resulting from bullying, including physical violence, by other students. The plaintiff succeeded at first instance but appealed on the adequacy of damages awarded. The defendant cross-appealed on liability. This decision dealt only with the liability issue.

Tobias AJA (with whom Macfarlane and Barrett JJA agreed) noted that it was not in issue that the college owed a duty of care or that the risk of harm from bullying required the college to take active steps to protect its students. The plaintiff argued that the college failed to devise, implement and maintain an adequate anti-bullying program, that it failed to act upon the plaintiff's complaints of bullying and failed to adequately investigate and prevent the bullying by supervising, disciplining and counselling the perpetrators. The plaintiff alleged that there was a culture of bullying. The primary judge largely accepted evidence that the college policy against bullying simply was not implemented. It was clearly open to the primary judge to find that the plaintiff was regularly, if not relentlessly, bullied. There was little doubt that the college was aware of the plaintiff's claims that she was being bullied and that a staff member made responsible for investigating the claims clearly failed to do so.

Whilst it was true that the defendant was not required to ensure or guarantee the plaintiff was not bullied, it was obliged to take reasonable steps to protect her. The steps taken were not a reasonable response to the not insignificant risk of harm. The primary judge was correct to find the defendant was in breach of its duty of care.

The outstanding issues of causation, damages and costs are to be the subject of a further hearing.

**Evidence**

In *McGlashan v QBE Insurance Ltd* [2013] NSWSC 678 (Campbell J), the defendant sought to tender in re-examination of a witness a prior consistent statement pursuant to Section 108(3) of the *Evidence Act* 1995 (NSW). The plaintiff opposed the tender and, in the alternative, argued it should be excluded as prejudicial under Section 135. The witness in his evidence in-chief gave evidence of an admission he said the plaintiff made to him on the day of the accident as to the manner in which the accident had occurred. It was not put to the Court that the witness was fabricating this evidence. It was put that he might well have been mistaken about what was said. The defendant then sought to tender a prior consistent statement. Given that the plaintiff's case was that the witness' evidence was a reconstruction, the condition for the application of the Section 108(3) exception to the credibility rule was established. As to Section 135, the objection was that the statement contained other prejudicial matters and that the whole of the statement should go in or none of it. Campbell J concluded that the probative value of the earlier statement was not outweighed by the danger that it might be unfairly prejudicial to the plaintiff. Although it might be prejudicial in one sense, it was not unfairly so. However, in order to meet any potential injustice, the plaintiff's counsel would be given a further opportunity to cross-examine the witness on the basis of the statement.

**Relatives – Duty of Care**

The infant plaintiff suffered personal injury in *Hoffmann v Boland* [2013] NSWCA 158 when his grandmother, who was carrying him, stumbled as she descended stairs. Multiple claims against designers and builders failed but the plaintiff succeeded at first instance against the grandmother. Her appeal was upheld and the plaintiff's case therefore failed against all defendants. Basten J was of the view that no duty of care was owed in circumstances analogous to parent and child, although this did not apply in circumstances where a child was subjected to violence or abuse. Sackville AJA was of the view that there was such a duty of care owed and Barrett JA held he did not have to decide this issue but merely said that there was much to be said for the view that courts should be slow to characterise as negligent gratuitous care bestowed on a child by a person exercising parental functions in a family or domestic setting. However, all three members of the court were of the view that even if there was a duty of care, there was no breach of that duty in the circumstances. The plaintiff's appeal against adverse decisions in respect of the other defendants was dismissed.