

COMMON LAW PRACTICE UPDATE 45

Section 108 *Motor Accidents Compensation Act 1999* (NSW)

In *Smalley v Allianz* [2013] NSWCA 318, the Court of Appeal held that wherever there was a deemed denial of liability or a general denial of liability (because of a late claim or argument about causation of injury) the Principal Claims Assessor must exempt it from the Claims Assessment and Resolution Service.

Sections 5I and 5L *Civil Liability Act 2002* (NSW)

The NSW Court of Appeal noted in *Paul v Cooke* [2013] NSWCA 311 that the *Civil Liability Act 2002* excludes liability if harm results from materialisation of an “inherent risk” or an “obvious risk” of “a dangerous recreational activity”. These provisions provide a complete answer to any claim. The defendant has no duty to exercise reasonable care and skill once s 5I is engaged, and it can never be appropriate under s 5D to extend scope of liability to circumstances included in s 5I.

In order for s 5I to apply however, a risk must be identified as being an “inherent risk”. This requires an analysis of the position before the risk materialised. A defendant must allege and prove that s 5I applies. Whilst the plaintiff is not obliged to prove the contrary, proof of s 5D causation will be likely to have that effect.

Legal professional privilege

In *Hannaford v The Royal Society for the Prevention of Cruelty for Animals NSW* [2013] NSWSC 1708 (Schmidt J), the plaintiffs sued for malicious prosecution. They sought access to documents over which the RSPCA claimed privilege under ss 118 and 119 of the *Evidence Act 1995*. The plaintiffs contended that there was no credible evidence that the solicitor and counsel (both of whom were RSPCA board members) were independent. Further, the RSPCA had not led evidence about the dominant purpose for which the disputed documents were created. Schmidt J held that the RSPCA did not meet the onus to establish privilege when it failed to adduce evidence from relevant witnesses but, in any event, privilege in the documents had been waived as a result of the RSPCA’s conduct. Accordingly, s 122(5) of the Act had no application. The plaintiffs were granted access to the disputed documents.