COMMON LAW PRACTICE UPDATE 40

Section 33 *Motor Accidents Compensation Act 1999* (NSW)

In *Maric v Nominal Defendant & Anor* [2013] NSWCA 190, the plaintiff appealed from a decision of the trial judge that he had failed to establish that injuries in coming off a trail bike were caused by the negligence of another trail bike rider on a road or road-related area. Dismissing the appeal, it was said the plaintiff had failed to establish the accident occurred on a road or that the area was open or used by the public and developed for the driving of motor vehicles. The appeal was accordingly dismissed.

Sections 34 and 73 *Motor Accidents Compensation Act 1999* (NSW)

In *Nominal Defendant v Browne & Anor* [2013] NSWCA 197, the plaintiff claimed she stepped backwards into a drain to avoid being struck by a large truck speeding up an adjacent driveway and injured her right ankle. She gave instructions to solicitors in 2009 and commenced proceedings against the occupiers of the premises in July 2011, and did not seek to join the Nominal Defendant until more than 2½ years after she was injured. At first instance, time was extended. The insurer appealed. The plaintiff claimed that she did not realise she had a claim against the driver or owner of the motor vehicle until receiving advice to that effect in 2011. She had made no relevant inquiry or search to identify the motor vehicle. Even after advice, there was a lengthy delay while she was moving house. Granting the insurer's appeal, the Court of Appeal said that the real issue was whether the respondent/plaintiff had shown that the identity of the vehicle would not be established after due inquiry and search. It was fanciful on the facts to suggest that earlier inquiry would have made a difference in this regard. However, in terms of delay, the explanation for the whole of the period was patently not full and the section was therefore not satisfied. In those circumstances, time should not have been extended.

Section 62 *Motor Accidents Compensation Act 1999* (NSW)

In *Mitrovic v Motor Accidents Authority of NSW* [2012] NSWSC 11231, the refusal of a review had previously been overturned by Harrison AsJ as vitiated by legal error. In *Mitrovic v Venuto and MAA of NSW* [2013] NSWSC 908, Fullerton J noted that despite that decision, the plaintiff's application for a further medical assessment was refused a second time, and the plaintiff claimed that that decision was also vitiated by legal error. The question at issue was whether the plaintiff's head injuries and psychological injury were caused by the motor accident. Whilst accepting that the medical material was indicated a deterioration in the plaintiff's condition, the Proper Officer took a view on causation which had previously been found to be the subject of error, failing to consider whether additional medical reports would have informed the decision on causation. The matter was again remitted to a different Proper Officer to be determined in accordance with law. The insurer was ordered to pay the claimant's costs.

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

In *Jaksic v Insurance Australia Ltd t/as NRMA* [2013] (before Rothman J), the claimant sought to set aside the certificate and medical assessment of a medical Review Panel allegedly made under ss 61 and 63 of *Motor Accidents Compensation Act*. Following an initial assessment under s 61, the NRMA applied for and obtained a review under s 63, which reduced the assessment of WPI from above 10% to below 10%. The Panel said that on re-

examination it found that there were discrepancies in physical findings between what had been observed and other medical reports. The question at issue was whether the claimant was given an adequate (or any) opportunity to respond to the perceived inconsistencies. Pursuant to the Guidelines, the purpose of dealing with inconsistencies is "to ensure accuracy and procedural fairness". It was not asserted the Panel decision was affected by error of law or jurisdictional error. It asked itself the right question, took into account all mandatory considerations, did not take into account any irrelevant consideration, did not utilise the wrong test and did not misapprehend the nature or limits of its powers or perform an act or make a decision not sanctioned by authority.

However, the Panel did not give the claimant an opportunity to explain any discrepancy and it was not clear that the degree and nature of the discrepancy was described to her. She did not have the opportunity to confirm the history and respond to the inconsistent observations as required by the Guidelines, and was accordingly denied procedural fairness. The certificate was quashed and a fresh review panel ordered to undertake a reassessment The insurer was ordered to pay the claimant's costs.

Section 73 Motor Accidents Compensation Act 1999 (NSW)

In *Nominal Defendant v Browne & Anor* [2013] NSWCA 203, the plaintiff was in an accident in which he was a passenger in a car where both he and the defendant driver had consumed alcohol. The plaintiff suffered serious injury. The defendant was convicted of a number of criminal offences arriving out of the accident. It was conceded that the damages involved exceeded the threshold. At first instance, the explanation for the delay was found to be full and satisfactory in view of the serious injury suffered by the plaintiff and his lack of memory of the accident. Dismissing the insurer's application for leave to appeal, it was said that leave should only be granted in such cases where there were substantial reasons to allow an appellate review. These reasons could include an error of principle which, if uncorrected, would result in substantial injustice. In the absence of such a question of principle, leave to appeal will usually be refused. The ultimate question on discretion is whether the chance of a fair trial remains likely. The primary judge did not apply the wrong principles and whilst the lack of evidence might make it difficult for the plaintiff to claim, it did not demonstrate there would be substantial injustice if an extension of time was permitted. The insurer's application was dismissed with costs.

Section 3B *Civil Liability Act 2002* (NSW)

A hotel's duty manager asked a security guard to remove the intoxicated plaintiff in *Day v The Ocean Beach Hotel Shell Harbour Pty Ltd* [2013] NSWCA 250. The guard went behind the plaintiff and pulled the stool out from under her. The plaintiff fell to the floor and claimed she suffered injury. At first instance the judge found that this was an assault and battery for which the security guard's employer was vicariously liable, his actions being incidental to his employment in the sense referred to by Latham CJ in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 78, Basten JA in *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106 at [21] and by Ipp JA in *Sprod bnf v Public Relations Oriented Security Pty Ltd* [207] NSWCA 319 at [79-83].

The Court of Appeal affirmed that the security company was vicariously liable, however the security guard was not acting as the agent of the hotel or the duty manager in the requisite sense so as to create vicarious liability in them. The legal duties on licensees do not create vicarious liability and dual vicarious liability is not permissible at law.

Section 5R *Civil Liability Act* 2002 (NSW)/Contributory Negligence

The question at issue in *Stafford v Carrigy-Ryan and QBE Insurance (Australia) Ltd* [2013] ACTSC 99 (before Sidis AJ) was whether there should have been a finding of 100% contributory negligence. The defendants alleged they owed the plaintiff no duty of care given that the driver had a reading of .155 and the evidence was that the plaintiff passenger and the first defendant driver were drinking together. The defendants relied on the views of McHugh J in *Joslyn v Berryman* (2013) 214 CLR 522 at 563, in which he referred to the judgment in *Gala v Preston* (1991) 172 CLR 243 at 254, suggesting that in special and exceptional circumstances participants could not have had any reasonable basis for expecting that a driver of a vehicle would drive it according to ordinary standards of competence and care. Of this, McHugh J said that "The plea of no breach of duty of care - perhaps even a plea of no duty in an extreme case - is still open in the case of a passenger who accepts a lift with a driver known to the passenger to be seriously intoxicated." However, the High Court in *Imbree v McNeilly* (2008) 236 CLR 510 rejected the notion of a variable standard of care according to the driver's competence. On the other hand, in *Miller v Miller* (2011) 242 CLR 446, the court at 470-471 maintained the views expressed in *Gala v Preston.*

Sidis AJ concluded that there were no special and exceptional circumstances that warranted a finding that the defendant owed no duty of care. There was no joint illegal conduct. Although the defendant committed the crime of driving when intoxicated, the plaintiff committed no crime in going with him as a passenger. The plaintiff's uncontested evidence was that he felt obliged to go with the defendant because of concern for his state of mind. For the same reasons, this was not a case where the plaintiff's contributory negligence should be assessed at 100%. Ordinarily Sidis AJ said she would have held both the plaintiff and first defendant equally responsible, as they were equally aware of the extent to which alcohol had been consumed and of the risk involved. However, there was an added element in that it was the first defendant who initiated the proposal to drive the Subaru and the plaintiff accompanied the first defendant due to his genuine but misplaced apprehension of the need to support his friend. In these circumstances, the plaintiff's contributory negligence was assessed at 35%.

Failure to plead statutory defences

In *Watson v Meyer* [2013] NSWCA 243, Gibson DCJ had allowed defences based on ss 5F and 5G of the CLA even though they were not expressly pleaded, because the common law defence of volenti non fit injuria had been pleaded. The Court of Appeal said that cases are to be determined on the issues raised in the pleadings and that, in circumstances where there was objection taken to the pleading, and no application to amend the pleading, Mr Meyer should have been held to his pleaded case. The defence was not open. The case was remitted for a re-hearing.

Employment

In *Wolters v The University of the Sunshine Coast* [2013] QCA 228, the plaintiff sued her employer for personal injury damages relating to a debilitating psychiatric illness caused by the conduct of a fellow employee. The claim of vicarious liability for negligence on the part of the fellow employee was dismissed and the judge was not persuaded that that employee owed the plaintiff a duty to take reasonable care to avoid causing psychiatric injury or that, if he did, he had breached that duty. Generally, the trial judge accepted the plaintiff's version of events involving aggressive language and conduct by the fellow employee. The trial judge

accepted that the University owed its female employees a duty to take reasonable care to avoid psychiatric injury, and found that the University's response was not reasonable – the plaintiff's complaints were not investigated and no appropriate action was taken. However, he was not convinced that the fellow employee would have acted differently if reprimanded and accordingly whether the incident could have been avoided. The Queensland Court of Appeal was of the view that the hypothetical enquiry as to whether a reprimand would have been effective miscarried as it failed to identify the content of the reprimand and counselling that ought to have been given (and therefore its consequent effect). This failure deprived the ultimate conclusion of its legitimacy. The conclusion that it was more probable than not that the fellow employee would have acted in the same way even if reprimanded and counselled should be set aside. The reprimand and counselling should have been at a level likely to be effective. This led to the ultimate conclusion that it is more likely than not that, had appropriate action to reprimand and counsel been taken, the incident which led to the injury would not have occurred. The plaintiff's appeal was allowed with costs.

Product Liability

The plaintiff was injured at work by the collapse of an office chair in *Downie & Anor v Jantom Company Pty Ltd & Anor* [2013] ACTSC 171, causing her to suffer a low back injury and undergo surgical fusion. The chair was manufactured and imported from China by the first defendant, which supplied it to the second defendant, which assembled it and sold it to the employer. Master Harper accepted that there was a history of these chairs malfunctioning. The chair failed during what could be described as normal use. The claim succeeded against the supplier and its insurer (given that it was insolvent). The employer also claimed under s 74B *Trade Practices Act 1974* (Cth). However, those claims were not available to the employer because those rights arose only for goods ordinarily acquired for personal, domestic or household use or consumption, not for a business. However, the supply of the chair to the employer included a contractual term that the chair would be reasonably fit for its purpose as an office chair and, as this had been breached, the employer was entitled to recover for breach of contract.

Occupiers Liability

In *Panther v Pischedda* [2013] NSWCA 236, the plaintiff and her husband arrived at a self-contained flat in the Blue Mountains which they had rented from the appellant for two nights. The only access to the flat was down a steep driveway from the street. During their stay, the plaintiff and her husband left to go for a walk, during which it began to rain. As they descended the driveway, the plaintiff fell and broke her ankle. The plaintiff said she understood at the time that the driveway might be slippery and therefore walked with care, but her left foot slipped forward and she fell. The plaintiff was wearing shoes designed to be reasonably slip-resistant, and was found to be walking carefully. The primary judge found that the state of the driveway created a risk which was not insignificant, and that that risk was foreseeable. The defendants acted unreasonably in failing either to install a handrail or taking remedial action to allow alternate access on existing stairs. The cost of these alternatives would have been modest. On appeal, it was held these findings were open to the trial judge, as was the inference that the plaintiff would have used handrails or an alternate means of access if one was available. Accordingly, the defendants' appeal was dismissed with costs."

Expert Evidence

Beech-Jones J had to consider the appropriate directions in respect of expert witness conclaves in *Avery v Flood* [2013] NSWSC 996. The plaintiff sued a surgeon and anaesthetist

in medical negligence. The parties disagreed over the composition of expert conclaves on questions relating to breach and causation. The plaintiff contended that there should be one combined conclave involving all nine experts who had provided reports on breach and causation. The defendant asserted there should be two conclaves of seven and four experts respectively. Beech-Jones J thought that the costs and logistics of each exercise made little difference either way.

The causation issue related to whether the plaintiff suffered a loss of vestibular function as a result of something that occurred during the operation.

The more significant argument was that if the conclave included the discreet causation issue, it would mean some experts participating in a conclave in respect of the matter on which they had expressed no opinion. Having regard to this, the appropriate order was that the nine witnesses who have expressed any view generally on liability should confer together and the four witnesses who have expressed a view on the causation issue should separately confer.

Admissibility of expert report

In *RTA of NSW v Barrie Toepfer Earthmoving and Land Management Pty Ltd (No. 4)* [2013] NSWSC 1420 (Price J), the plaintiff sought to tender on expert report. The insurer defendants objected to the tender of the expert report on the basis that the expert had not identified key assumptions and had insufficient expertise in the relevant areas of dispute pursuant to s 79 of the *Evidence Act 1995* (NSW).

A close analysis of the report revealed facts and reasoning upon which the expert's opinions rested, and Price J held the expert had demonstrated specialised knowledge in the relevant area. As a result, objections in respect of expertise and identification of key assumptions failed. A further objection that the probative value of the expert's evidence was outweighed by the danger the evidence might be unfairly prejudicial to the insurers under s 135 of the *Evidence Act* 1995 (NSW) was also rejected.

Vicarious liability for act of spouse

In *Lloyd v Ryan Borg by his tutor NSW Trustee and Guardian* [2013] NSWCA 245, at issue was whether the owner of an unregistered vehicle being driven off road could be vicariously liable for the alleged tort of his de facto wife , an inexperienced driver. In the context of an exclusively domestic relationship and transport on a rural property, no question of de facto employee arose and the case could be distinguished from *Soblusky v Egan* (1960) 103 CLR 2015, where the owner was present but asleep in the car. In *Scott v Davis* (2000) 204 CLR 333, this concept was not extended, so that the owner of an aircraft was not liable for the pilot's negligence in respect of an injured passenger, the owner of the aircraft not being present. The wider view of vicarious liability taken in England that if the owner has a right to control and if the driver is using the vehicle at the owner's request and for the owner's purposes this is sufficient, is not the law in Australia.

Duty of educational authorities

In *Walker v Canberra Institute of Technology* [2013] ACTSC 193 (Higgins CJ), the plaintiff was enrolled in the defendant institute undertaking a course to become a personal trainer. During a squat activity designed by a fellow student, the plaintiff injured a knee. A qualified instructor was present and supervised the exercise. The plaintiff claimed that the defendant, through the instructor, failed to exercise reasonable care for the plaintiff's safety. The Court

held that instructors had a duty to students to ensure any exercise prescribed by another student did not represent any undue risk or was not executed in an unsafe manner. The activity was found to be unsafe and exposed the plaintiff to unnecessary and unreasonable risk. Accordingly, the plaintiff succeeded, and defences based upon a disclaimer and voluntary assumption of risk failed.

Privilege

In *Hancock v Rinehart* [2013] NSWSC 1402 (Bergin CJ in Eq), the plaintiffs subpoenaed accountants, who provided advice to the first defendant which included reference to a legal advice. The defendant objected to the plaintiffs obtaining access to those portions of the documents. The trustee's state of mind at the time she sent a letter, which included reference to taking legal advice, was of relevance to the case. Bergin CJ in Eq held that the first respondent had waived her privilege in redacted parts of documents by a positive assertion in the pleadings and the issue as to trustee's beliefs and the content of the letter was inconsistent with the holding back of the content of advice as it appeared in the documents. They were required to be produced and made available subject to an appropriate undertaking as to confidentiality.

Dust diseases – choice of forum

In *Robinson v Studorp Ltd* [2013] QSC 238 (Jackson J), the plaintiff sued for damages in Queensland for asbestos-related disease caused by the defendant's negligence in New Zealand. The defendant sought to stay proceedings under r16.1 UCPR 1999 (Qld) on the basis that Queensland was a clearly inappropriate forum, arguing there were significant matters of New Zealand legal principle or application of principle involved. Noting the effect of other proceedings in the Dust Diseases Tribunal in NSW and the effect of the *Trans-Tasman Proceedings Act* 2010 (Cth), Jackson J held that the applicant failed to demonstrate that the court was a clearly inappropriate forum, applying the principles in *Voth v Manildra Flour Mills Pty Ltd* (1990) 170 CLR 538.

Employer's duty of care

A truck driver sued his employer for injury incurred when changing a tyre using a spanner provided by the employer in *Thompson v Cranetrans Pty Ltd* [2013] QSC 250 (Applegarth J). As the spanner was worn and there was no adequate system of inspection, it was held there was a reasonably foreseeable risk of injury from using the spanner. It was unreasonable for the employer to require the plaintiff to perform his task with the tools provided, and as a result the employer breached its duty of care and was held liable.