COMMON LAW PRACTICE UPDATE 52

Section 94 *Motor Accidents Compensation Act 1999* (NSW)

An insurer sought review of a CARS award for future commercial care in *AAI Ltd v Josipovic* [2013] NSWSC 1524. The review was sought on the basis that the assessor failed to apply proper principles, failed to give adequate reasons and failed to give adequate attention to the insurer's case. Campbell J, in dismissing the insurer's claim, noted that the assessor had given some reasons for allowing care on a commercial basis in the future, made factual findings to support it and noted that the obligation under s 94(5) to give reasons is more limited than that which falls upon a judge."

Section 7 *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW)

The plaintiff, who had suffered below knee amputations of both legs, sought to avoid remaining in the Lifetime Care and Support scheme in *Cruse v LC and SA & Anor* [2013] NSWSC 1546 (Harrison J). The insurer's application for him to become a lifetime member was accepted and the plaintiff sought judicial review. Noting that there was nothing to preclude more than one application being made in respect of lifetime participation, it was held that there was no error in the determination that the plaintiff be admitted to the scheme as a lifetime member."

Medical Negligence/sections 5O, 43, 43A and 5D *Civil Liability Act 2002* (NSW)

In *McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District* [2013] NSWCA 476, Stephen Rose was concerned about the mental state of his friend, William Pettigrove. He arranged for Mr Pettigrove to be taken by ambulance to Manning Base Hospital. There, Mr Pettigrove was detained under the *Mental Health Act* 1990. Subsequently, a psychiatrist working at the hospital, Dr Coombes, discharged Mr Pettigrove into the custody of Mr Rose so he could be transported by car to Mr Pettigrove's mother in Victoria. Mr Pettigrove strangled and killed Mr Rose near Dubbo in the course of that journey. There was clear evidence that he was suffering from psychiatric illness at the time. Mr Rose's mother and sisters sued the hospital for damages for psychiatric injury resulting from nervous shock. The primary judge held that negligence had not been established and that in any event, he was not satisfied that there was a causal connection with Mr Rose's death and therefore, the injuries that the plaintiff suffered were causally related to the alleged negligence.

On appeal, Macfarlan JA (Beazley P agreeing and Garling J dissenting) held that:

1. The hospital owed Mr Rose a common law duty to take reasonable care to prevent Mr Pettigrove causing physical harm to Mr Rose. The duty was owed given the fact that the hospital had direct dealings with Mr Rose, including releasing Mr Pettigrove into his care, and had control over the source of the risk to him. Garling J disagreed.

2. There was negligence on the part of Dr Coombes and therefore the hospital in discharging Mr Pettigrove, as there was a foreseeable and not insignificant risk of serious harm being occasioned to Mr Rose. A reasonable person in the hospital's position would have continued to detain Mr Pettigrove. Again, Garling J disagreed.

3. The Health Service was not entitled to the protection of s 5O *Civil Liability Act 2002*.

4. As there was no relevant practice with which Dr Coombes had to conform in discharging Mr Pettigrove, the Health Service was not entitled to the protection of ss 43 or 43A *Civil Liability Act* as the claims were not for breach of statutory duty or based on an exercise of or failure to exercise a special statutory power under s 35 of the *Mental Health Act* 1990. Garling J disagreed.

5. The injuries that Mr Rose and the plaintiff suffered were causally related to Dr Coombes' negligence. For the purposes of s 5D *Civil Liability Act*, the hospital's breach was a necessary condition of the harm and it was appropriate that liability extend to this harm.

Damages/section 15B *Civil Liability Act 2002* (NSW)

In *State of NSW v Perez* [2013] ([2013] NSWCA 149), the Dust Diseases Tribunal had originally awarded significant damages in respect of a mesothelioma employment victim who lost the capacity to care for his young grandchildren for whom he had provided gratuitous care whilst the parents of the children were working. Allowing his employer’s appeal, the NSW Court of Appeal held that the factual findings were inadequate to support the award and there was an overlap in respect of services between the grandchildren and in other respects. The issue was remitted to the Tribunal for reconsideration, with each party to bear its own costs of the appeal.

Contributory Negligence

In *Cheng v Geussens* [2014] NSWCA 113, the plaintiff was a cyclist on a footpath and the driver was a motorist on the road. The trial judge was unable to decide which had the green light. Although he found for the plaintiff, he reduced the damages by 80% for contributory negligence. On appeal, it was held that a finding that the plaintiff had not proven that he had the green light did not amount to a finding that the defendant had proven that he had the green light. On primary liability, the plaintiff bore the onus, but the defendant did so far as contributory negligence was concerned. On the basis that there was no evidence as to who had the green light, contributory negligence had to be reassessed. Had both been on the road, then a 50/50 apportionment might have been appropriate. However, the cyclist was on the footpath and the driver in the circumstances had no reason to suppose that someone would come out onto the road. In the light of these considerations, contributory negligence was reassessed at 67%.

Estoppel

It was noted in *Tiufino v Warland* [2000] NSWCA 110 that the judgment or order of an inferior court within jurisdiction can create an issue estoppel binding on a superior court. However an issue estoppel may also arise as a result of the determination of a tribunal which has final jurisdiction on an issue arising between the parties. It is not necessary that the rules of evidence in other legal procedures apply. The original decision is final unless and until disturbed on appeal.

The plaintiff submitted on appeal that there were special circumstances so that the issue estoppel which arose from the findings in the Local Court ought not bind the proceedings in the District Court. The plaintiff argued that in *Arnold v National Westminster Bank PLC* [1991] 2 AC 93, Lord Keith stated that there may be special circumstances where an issue estoppel does not operate. Three examples were given: circumstances where there had been a

default judgment; where there might be further evidence which could not by reasonable diligence have been produced in the earlier proceedings; or where there might have been a decision which a subsequent superior court had concluded in an unrelated case was not correct in law. However, there was High Court authority for the proposition that *Arnold v National Westminster Bank* "rests on an uncertain foundation (see Brennan J in *O'Toole v Charles David Pty Ltd* [1991] HCA 14). The plaintiff argued that the decision in *Tiufino v Warland* could be distinguished because there the action below had been conducted on an adversarial basis and in the present case, the Small Claims Division of the Local Court dealt with the matter informally. The court pointed out that the plaintiff, appearing as defendant in the Small Claims Division, could have sought to have the matter transferred to the General Division of the Local Court or transferred to the District Court be heard with the personal injury claim. Although the plaintiff was self-represented in the Local Court and indicated to the assessor she did not understand the processes, her defence had been prepared and filed by a solicitor and the Court of Appeal concluded the absence of legal representation was not a relevant factor. Leeming JA, agreeing with the other members of the court, noted that where a subrogated insurer was conducting the initial litigation a different situation may arise (see *Linsley v Petrie* [1998] 1 VR 427). However, that issue did not arise in the present case and the Court of Appeal held the plaintiff's personal injury claim was correctly dismissed on the basis of judgment estoppel.

Occupiers Liability

The plaintiff slipped on a mat and fell in a dwelling occupied by the defendants in *Dylan v Hair* [2014] NSWCA 80. At first instance she obtained a verdict against the defendants in the District Court for $213,764. The defendant appealed from the orders of the District Court.

The plaintiff was invited onto the defendant's premises and as she entered she put her left foot on a mat which slid from underneath her. She lost her balance and fell on her hands and knees, injuring herself. It appears that the defendant had put the mat in place. The allegation in negligence was of putting the mat on a polished wooden floor near an entrance without providing any warning that the mat would be slippery and dangerous. The Court of Appeal was of the view that it was open for the trial judge to find in favour of the plaintiff and dismissed the defendants' appeal with costs.