COMMON LAW PRACTICE UPDATE 46

Section 34 *Motor Accidents Compensation Act 1999* (NSW)

In *Workers Compensation Nominal Insurer v Nominal Defendant* [2013] NSWCA 301, the plaintiff was struck by another vehicle and injured in the course of his employment whilst driving. He received workers compensation. The employer then sought recovery from the Nominal Defendant in respect of the unidentified negligent vehicle. The primary judge found the employer was not entitled to a s 151Z(1)(d) *Workers Compensation Act 1987* indemnity. Dismissing the appeal, the NSW Court of Appeal held that the right of the employer (and its insurer) against the tortfeasor applied only where the "circumstances creating" liability for compensable injury also create a liability in the tortfeasor to pay damages. That right is independent of the worker's right, and is to be assessed at the time of the act or omission causing compensable injury.

Determining compensation the employer can recover from the tortfeasor under s 151Z(1)(d) involves proving five elements:

(a) that a worker was injured,

(b) that the injury was one for which compensation is payable under the *Workers Compensation Act* ,

(c) that it was caused under circumstances creating a legal liability in the tortfeasor,

(d) that the worker has recovered compensation under the *Workers Compensation Act* for that injury from that employer, and

(e) that the employer has paid the compensation so recovered. [67]

Section 34 of the *Motor Accidents Compensation Act 1999* requires as a condition precedent that there must have been due inquiry in respect of the identity of the negligent vehicle. There is no special rule exempting employers from this requirement. The primary judge was correct in considering whether due inquiry was pursued from when the cause of action arose and not from when indemnity proceedings were commenced. The plaintiff or those acting in the plaintiff's interest must show that the identity of the other vehicle could not be established, although this does not necessarily mean that the action need be taken by the plaintiff or on the plaintiff's behalf. Inquiries do not necessarily need to include the police. 'Due inquiry and search' means such inquiry and search as is reasonable and to be reasonable, must be as prompt and thorough as the circumstances permit. The plaintiff is not required to take steps which are no more than a ritual and unlikely to be productive or inquiries destined to be futile and see *Harrison v Nominal Defendant* (1975) 50 ALJR 330.

A plaintiff must show either there had been due inquiry and search and the vehicle identity had not been established or that where there had been no such inquiry, such an inquiry would not have established the identity of the relevant vehicle. See *Nominal Defendant v Meakes* [2012] NSWCA 66.

The ultimate inquiry is essentially a question of fact under s 34. On the facts of this case the plaintiff believed within a day or so he had been badly injured and within a week, knew the details of the other driver were lost. However, he knew what the other driver and his vehicle looked like and was able to give a good description of both at trial more than 11 years after the accident. A reasonable person in the plaintiff's position should have made prompt

inquiries, particularly where the accident occurred in a relatively confined area and where there was a reasonable prospect for obtaining useful information. Notwithstanding that the primary judge had identified areas of inquiry, such as CCTV film, when there was no evidence such facilities were available, his fundamental conclusion was open. In these circumstances, a key precondition for liability on the part of the Nominal Defendant was not established.

Sections 81 and 92 *Motor Accidents Compensation Act 1999* (NSW)

In *Smalley v MAA of NSW* [2013] NSWCA 318, the claimant was injured in an accident with a vehicle whose driver was insured by Allianz. The insurer had consistently denied liability and the claimant three times unsuccessfully sought an exemption from CARS which would enable court proceedings to be brought. Allianz had failed to comply with the time limit to admit or deny liability and was therefore deemed to have given notice that it had wholly denied liability pursuant to s 81(3). Allianz subsequently served a notice admitting fault but saying it denied liability. The precise legal effect of the original deemed notice and the subsequent notice was at issue. Each of the three refusals to exempt the matter from CARS were in error for varying reasons. The claimant sought relief and Rein J found the first decision was vitiated by legal error, although that error was only exposed by the subsequent decision in *Gudelj v MAA of NSW* [2010] NSWSC 436. The second and third decisions turned on the construction of s 81 of the *Motor Accidents Compensation Act*. Rein J accepted the insurer's submissions that an admission of part of the claim was available even after the denial of liability. He therefore thought the subsequent notice was compliant with s 81(4), so that the second and third decisions disclosed no reviewable error. Exemption from assessment under s 92 is pursuant to guidelines issued after s 69, when satisfied the claim involved the circumstance which relevantly required the Principal Claims Assessor to issue a certificate of exemption that "the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle is denied by the insurer of that vehicle in its written notice issued in accordance with s 81".

Leeming JA disagreed with Rein J. An admission of liability gives rise to obligations under the Act to make payments, a reasonable offer of settlement within a specified time period and to engage in settlement efforts. Second, the insurer's construction that it was a partial admission is inconsistent with its assertion that it is not required to pay anything under the policy. Third, the insurer's construction was contrary to the express words in *Nominal Defendant v Gabriel* [2007] NSWCA 52; (2007) 71 NSWLR 150 at [85]. Accordingly, the correct construction of the subsequent letter is that it was not an admission of liability, so that accordingly it was not a notice answering the description of s 81. It merely contained an admission of part of the claim. That left the deemed s 81 notice which wholly denied liability. This brought 8.11.1 of the Guidelines into play, so that all three decisions were wrong in law. The orders of the primary judge were quashed as were the first, second and third decisions. The applications were remitted to the MAA for determination according to law, with an order against Allianz for costs.

Sections 5B and 45 *Civil Liability Act 2002*

The NSW Court Of Appeal upheld an appeal by Botany Council against the plaintiff, who had succeeded at first instance, in *Botany Bay City Council v Latham* [2013] NSWCA 363. The plaintiff and her partner were walking on a shady and mossy section of footpath during daylight hours in the vicinity of some trees. The footpath was comprised of brick pavers, and there had been a history of written complaints to the Council about the footpath at that point being uneven and potentially dangerous to walk on. The evidence was that the pavers had

been lifted by the growth of tree roots. The trial judge found it more probable than not that the plaintiff tripped on a paver or pavers raised in this manner and the Council has known in general terms of the problems with the footpath in this vicinity.

On appeal, the Council's concern was that the trial judge had not identified precisely where the plaintiff tripped. That, it was said, meant the judge did not address the particular risk of which the Council was required to have actual knowledge for the purposes of the s 45 defence. Adamson J (with whom Ward and Leeming JJA agreed) upheld this complaint on the basis that if the tripping point could not be identified, the height differential or unevenness could also not be identified and therefore it could not be said whether a reasonable inspection would have revealed it as needing action. However, the Court of Appeal also went on to say that the Council had to know of the specific and not merely of the general risk in that area, as section 45 requires knowledge of the "particular risk". The Court of Appeal seems suggest that the Council needed to be aware of the risk created by the specific paver which caused the plaintiff to trip.

Section 3B *Civil Liability Act 2002*

In *Dean v Phung* [2012] NSWCA 223, the Court of Appeal affirmed that a dentist treatment was "inexcusably bad and completely outside the bounds of what any reputable practitioner might prescribe or perform". Could this constitute an intentional act giving rise to common law damages under s 3B of the *Civil Liability Act*? There are equivalent provisions in other states and territories, save for Queensland, where intentional torts are not expressly excluded. Basten JA at said that the critical question was whether in the particular circumstances the medical procedure was one done "with intent to cause injury". Basten JA at said that even where the conduct was objectively capable of constituting therapeutic treatment, if in fact it was undertaken solely for a non-therapeutic purpose not revealed to the patient, there will be no relevant consent. He would draw the necessary inference that the dentist was at least reckless. In the circumstances, per Macfarlan JA (Basten JA agreeing), the procedures constituted a trespass to the person and therefore an intentional act. Basten JA (Beazley JA agreeing) held that the test is an objective one and not dependent upon the practitioner's subjective intentions. It is what a reasonable person in the position of the practitioner knew and how that practitioner should have acted in the circumstances.

Sections s 5D and 5I *Civil Liability Act 2002*/ Medical Negligence

In *Paul v Cooke* [2013] NSWCA 311, the plaintiff underwent a scan to determine whether she had an intracranial aneurysm in 2003, however the defendant radiologist negligently failed to diagnose it. A later scan in 2006 led to the diagnosis of the aneurysm. The plaintiff then underwent an operation to remove it. However, during that operation and through no failure of care or skill on the part of surgeons, the aneurysm ruptured, causing her to have a stroke and suffer serious injury. The endovascular procedure she underwent in 2006 was different to the procedure she would have undergone in 2003 (open neurosurgery), however the overall risk of stroke following rupture during either procedure was less than 1%. The plaintiff argued that it was highly likely she would have suffered no harm had such a procedure been performed in 2003 and therefore would have avoided the risk of harm in 2006. However, the delayed diagnosis did not of itself increase the risks associated with surgery and the aneurysm did not change during those three years. In those circumstances, the primary judge held that causation was not made out. The NSW Court of Appeal came to the same conclusion in dismissing the appeal. Section 5I requires identification of the particular risk that cannot be avoided with the exercise of reasonable care and skill. In the alternative,

the absence of any relationship between the negligent act and the harm suffered meant it was not appropriate to impose liability on the defendant. It was held that this was an appropriate case for the application of the limiting principle that the scope of a negligent defendant's liability normally does not extend beyond liability for the occurrence of such harm, the risk of which was the duty of that defendant to exercise reasonable care and skill to avoid.

Medical Negligence / Assessment of Damages

In *Patterson v Khalsa (No. 3)* [2013] NSWSC 1331 (Garling J), the plaintiff sued the defendant midwife by his tutor for injury suffered at birth. He complained that the defendant was negligent in recommending home birth and as a consequence of her negligent performance of duties as a midwife, he suffered hypoxia during birth and was left with cerebral palsy. In *Patterson v Khalsa* [2013] NSWSC 336, the defendant had ceased to participate in the court process and her defence was struck out, leaving damages to be assessed. The plaintiff was born a number of hours after the midwife arrived and the birth was protracted and complex. The plaintiff required oxygen therapy, was slow to breathe and was taken by ambulance to the Royal Hospital for Women, where it was immediately evident that he had suffered diffuse hypoxic brain injury. The plaintiff was assessed as a most extreme case and was entitled to the maximum award for non-economic loss. Life expectancy was assessed on the prospective actuarial life tables (*Golden Eagle International Trading Pty Ltd v Zhang* [2007] HCA 15 (2007) 229 CLR 498). Given the plaintiff's cerebral palsy, it was said that the plaintiff had a 90% chance of survival to age 15. Thereafter he might expect to have a 70-80% normal life expectancy. Garling J allowed a further 59 years of life expectancy based on the plaintiff's current age of 6½ years. He allowed $365,000 for lost future earning capacity, being a deferred sum between age 21 and age 61, and allowed $40,105 for superannuation on this sum. He also allowed $4,247,311 for future care and would have made a substantial allowance for past gratuitous care had the parents pressed this claim, which they however did not. His Honour also allowed fund management of $1,419,177 based upon an invested fund of $5 million. The total award of damages was $6,606,583. The trial judge would have allowed but the plaintiff's parents did not pursue a claim for past out-of-pocket expenses.

Education - Liability for one pupil injuring another - Bullying

In *Oyston v St Patrick's College (No. 2)* [2013] NSWCA 310, the NSW Court of Appeal dealt with the outstanding issues in this bullying case. The plaintiff was required to prove it was more probable than not that but for the failure of the college to deal with the students who were bullying her, she would not have suffered psychological injury. The school argued that nothing it could or should have done would have relevantly made a difference. However the plaintiff argued that had the college's policy on bullying been implemented as the Court of Appeal found it should have been in the earlier judgment, the bullying of the plaintiff would probably have ceased. The court noted on the appeal that the bullying during 2004 was regular and continuous, the response was insufficient , evidence of retaliation was irrelevant, there was medical evidence to explain a lack of evidence of complaint by the victim and ultimately commonsense led to the conclusion it is more probable than not that but for the failure of the college to actively implement the policy, the psychological injury to the appellant would not have occurred or would at least have been minimised. The Court held that this was the case notwithstanding some pre-existing causes and contributions. The Court awarded a modest increase in the damages awarded. The plaintiff succeeded on appeal with costs.

Product Liability

In *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361, the plaintiff took part in a motorcycle training course organised by the defendant. at Eastern Creek Raceway Whilst on a circuit, he suffered serious injury after being hit by a rider travelling at a higher speed in a more advanced training session. He claimed damages for breach of an implied warranty in the contract between them that the training would be conducted with due care and skill and alternatively alleged negligence by the defendant. The plaintiff succeeded in contract and the defendant appealed. The contract claim relied upon s 74(1) of the *Trade Practices Act* 1974 (Cth). There was an exclusion clause in the contract, which s 68 of the TPA invalidated. The appellant defendant also relied upon s 5M of the *Civil Liability Act 2002* (NSW), which provides no duty of care is owed if the recreational activity is the subject of a risk warning in respect of the risk of the activity. Section 5M of that Act clearly applies only to torts and in any event, would be in conflict with the TPA provision. It is also clear that it does not apply to contract because 5N of the *Civil Liability Act* deals with contract and on its terms did not assist the defendant. The defendant's appeal was dismissed with costs.

Employment

In *Schonell v Laspina, Trabucco & Co Pty Ltd* [2013] QCA 324, the plaintiff was a block layer injured in the course of his employment. He was working from a platform comprising aluminium planks set on trestles and stepped from that platform onto an adjacent ladder, which gave way. The brace on the ladder was defective, resulting in it suddenly dropping or partially collapsing. The claim failed at first instance because the trial judge found the defendant had sufficiently checked the ladder before use. Before ascending the ladder, the plaintiff tested it by giving it a shake to make sure it was secure. The checking undertaken by the defendant did not disclose that the ladder in fact had a defective brace, which was found to be broken after the incident. There was no evidence of any regular inspection of equipment by the defendant. The Court of Appeal held that the finding that no reasonable inspection would have disclosed the defect was open to the trial judge and accordingly dismissed the plaintiff's appeal.

Fund Management

In *Richards v Gray* [2013] NSWCA 402, a five-member Full Bench of the NSW Court of Appeal noted there were four issues to be determined on the appeal. The first was whether the plaintiff was entitled to fund management on the amount allowed for fund management. The second was whether fund management should be allowed on income into the fund. The third was whether any amount should be taken from the corpus on the assumption that it would be spent prior to investment. The fourth was whether the plaintiff was entitled to private fund management, which was more expensive rate than provided by the NSW Trustee and Guardian. The court found that the plaintiff was not entitled to the cost of fund management on fund management or fund management on income into the fund. The corpus, however, should not be reduced because it was not clear when monies could or would be expended by the trustee. It was open to the trial judge on the evidence to conclude that the private trustee was reasonable in the particular circumstances even though it was not the cheapest solution.

In *Australian Winch and Haulage Company Pty Ltd v Collins* [2013] NSWCA 327, the issue arose as to whether damages should have been awarded for fund management. The trial judge had agreed to allow fund management over objection despite some change in the particulars. The joint neuropsychological report stated that although the plaintiff was generally capable of managing his day-to-day finances, he should not be entrusted with responsibility for

managing large financial assets, no doubt including a large award of damages. This was attributable to "some degree of organic brain damage". In these circumstances the Court of Appeal rejected the argument that there was any error in the primary judge's conclusion that the plaintiff's damages in a workplace injury should include a component for the cost of fund management.

Contributory Negligence

In *McAndrew v AAI Limited* [2013] QSC 290 (McMeekin J), the plaintiff was seriously injured when struck by the defendant's motorcycle when walking across the road. Liability was admitted but contributory negligence was in issue. The defendant alleged the plaintiff alighted from a taxi and failed to notice a loud revving motorcycle approaching. The defendant also alleged that the plaintiff was intoxicated. However, there was no evidence as to the location of the motorcycle until it was virtually on the plaintiff and another witness only became aware of the motorcycle noise when it was too late to avoid it. There was no evidence that the plaintiff's insobriety made any difference or that a reasonable pedestrian would have been able to avoid injury. The defendant also alleged that it was negligent to alight from a taxi in the right turning lane of a road. However, it was around 2.30am in a small provincial town, and there no evidence of any traffic in the vicinity. In those circumstances, what occurred was perfectly reasonable. It is not inherently unsafe for pedestrians to be on the trafficable surface of the roadway and "a pedestrian has every right to walk on the road surface if he wishes" providing he exercises "ordinary care and prudence". In any event, the evidence of intoxication was weak. In the circumstances, there was no reduction for contributory negligence.

In *Kiriwellage v Best & Less Pty Ltd* [2013] VSCA 355, a worker was injured when she struck her back in the course of employment. A jury found for the plaintiff on the issue of negligence but reduced the damages by 20% for contributory negligence. The system of work followed by the worker did not involve inadvertence or any positive misjudgement or negligence. No reasonable jury could make a finding of contributory negligence and there was no evidence of any failure by the worker to take reasonable care for her own safety. The plaintiff's appeal from the finding on contributory negligence was upheld and she recovered in full.

Employment

In *Heywood v Commercial Electrical Pty Ltd* [2013] QCA 270, the plaintiff was employed by the defendant as a trainee electrician. He was required to adopt a system of work where a piece of u-shaped scrap metal was attached to fix framing to protect electrical cables. The plaintiff, as he stepped from a ladder, cut himself on the sharp edge of an off-cut of the u-shaped framing. He knew that it was sharp. The first instance judge found that the defendant did not breach its duty to the plaintiff as he knew the off-cut was sharp and created a hazard by placing it close to the ladder he was using. On appeal, the plaintiff argued the defendant failed to prescribe and implement a safe system of work and any appropriate system of instruction as to how and where to place the sharp off-cut pieces. It was noted at that it is not an answer to an allegation that an employer has breached its duty of care to establish that the risk of injury was obvious and known to the employee. See the words in *McLean v Tedman* (1984) 155 CLR 306:

> *'In such a situation it is not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard*

> *of care expected of the reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others.'*

The plaintiff's inexperience was relevant. The primary judge had been in error in finding that the employer was not in breach of its duty to provide the plaintiff with a safe place of work and this breach resulted in the injury and loss.

Damages - Additional Accommodation Costs

The plaintiff suffered a traumatic brain injury which left him with impaired communication skills, among other things in *Rogers by his Litigation Guardian Rogers v Suncorp Metway Insurance Ltd* [2013] QSC 230; (2013) 64 MVR 533 (Boddice J). There was evidence of difficulty for him, fellow residents and carers in the facility in which he was being accommodated. Rehabilitation care included access to sex workers on specified conditions. The plaintiff however, sought provision of a purpose-built residence for the purposes of rehabilitation. Medical opinion was split as to whether or not this was appropriate and desirable. Bodice J held that it was neither reasonable nor appropriate for the plaintiff to be accommodated in a purpose-built residence and the shared accommodation in a rehabilitation facility was reasonable and appropriate in the circumstances.