CLPU
COMMON LAW PRACTICE UPDATES

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Updates 1-10

Update 1

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568; 79 ALJR 1079

In *Allianz Australia Insurance v GSF Australia Pty Limited* a worker was told by his employer to roll heavy containers through the use of crowbars to the rear of a truck. The unloading mechanism on the trailer attached to the truck was defective. This constituted an unsafe system of work. The employee suffered a back injury. The employer was held to be negligent. The trial judge found that the injury fell within the definition of 'injury' in Section 3 of the *Motor Accidents Act 1988* (NSW). The Court of Appeal agreed. On appeal to the High Court, it was held that the injury was not the result of and caused by a defect in the vehicle and did not come within the definition of 'injury' – rather, the injury was caused by an unsafe system of work. The High Court held that there must be a connection between the defect and the injury. In this case there was no such connection.

Pandofli v Carlsund (2012) 61 MVR 132

In *Pandofli v Carlsund*, the Northern Territory Supreme Court considered the position of a plaintiff who was injured in the Northern Territory but had returned to the United Kingdom, where he resided. The plaintiff commenced proceedings in the Northern Territory but advised the insurer that he proposed to sue for damages in the United Kingdom. The plaintiff was not represented before Blokland J, who held that the Supreme Court of the Northern Territory was not a clearly inappropriate forum for the proceedings and orders should be made to protect the processes of the Northern Territory Supreme Court. His Honour noted that the plaintiff's damages would be likely to be significantly greater in the United Kingdom. He ordered that the respondent/plaintiff be restrained from instituting or continuing proceedings in the United Kingdom for damages arising from the same accident. Blokland J said that he had power to restrain proceedings in another court if the bringing of those proceedings involves 'unconscionable conduct, or is vexatious or oppressive'. The insurer argued that the uncertainty in respect of the bringing of another suit made the United Kingdom proceedings fall within that description. With respect to His Honour, it is not immediately clear why the plaintiff could not discontinue the proceedings in the Northern Territory and seek an extension of time to commence proceedings in England under a much more generous damages regime and where the evidence as to damages would no doubt be concentrated. It is also doubtful whether an English court would share Blokland J's view of the court's extraterritorial power and regard proceedings in England as being as stayed by His Honour's order.

Kable v State of NSW [2012] NSWCA 243

In *Kable v State of NSW*, the High Court struck down legislation under which allowed the plaintiff to be detained as a prisoner after his sentence had expired. The Act permitted a detention order if a judge was satisfied that the plaintiff was likely to commit a serious act of violence and that it was appropriate to hold him in custody. The High Court held that the Act was wholly invalid, as it was inimical to the exercise of judicial power, as were all the steps taken under the legislation. The plaintiff brought proceedings seeking damages for the six month period that he was detained under the invalid legislation. The claim alleged abuse of process, malicious prosecution and false imprisonment. At first instance, Hoeben J held there was no case to go to a jury in respect of any of the three causes of action. The Court of Appeal allowed the appeal in part, holding that there was a remedy in unlawful detention (though not under the other causes of action). The court remitted the action for assessment of damages.

Update 2

Self-induced prejudice

Tusyn v State of Tasmania (No. 3) [2010] TASSC 55 (Blow J) highlights the fact that a defendant cannot rely upon self-induced prejudice as a result of the State's failure to have the deceased plaintiff undergo independent psychiatric evaluation for a six year period prior to his death. In *Salvation Army (SA) v Rundle* [2008] NSWCA 347, a lack of openness with the court as to the information known as opposed to that which was not known counted adversely against the defendant's claim of prejudice.'

In *State of NSW v Plaintiff A* [2012] NSWCA 248 at [58], it was said:

> It must be accepted that the recollections of officers at the school at the relevant time will by now have faded. What is not revealed by the evidence tendered by the State on its strike-out motion is the extent to which it has obtained statements from potentially relevant officers, including those who have by now retired. That such steps were taken and that some potentially relevant material exists may be inferred from other evidence. The State's failure to provide a comprehensive account of the material it does have prevents this Court making the necessary full assessment of prejudice and must weigh against acceding to the State's application.

Update 3

Section 34 *Motor Accidents Compensation Act 1999*

In *Nominal Defendant v Wallace Meakes* [2012] NSWCA 66, the plaintiff crossed a main street in the Sydney CBD without checking the pedestrian signals. After he was hit by a car the driver stopped, got out of the car and spoke to the plaintiff. As the plaintiff initially did not think his injuries serious and was in a hurry to get to his appointment, he failed to note the details of the car or driver before leaving the scene. He subsequently reported the accident to the police a few days later and returned to the scene to find witnesses. The car was not located. At first instance, Levy SC DCJ excused the plaintiff's failure on the basis that he did not think he was severely injured until sometime later. The Court of Appeal disagreed, finding that it is the plaintiff's duty to prove that due enquiry and search has been performed. The reasonableness of the plaintiff's actions depend upon the circumstances, and the plaintiff's enquiries must be as prompt and thorough as the circumstances will permit. The test can be satisfied if in the circumstances no search and inquiry is performed where such action would clearly have been ineffective anyway. A trial judge's finding that the identity of the vehicle and driver cannot be established should not easily be set aside on appeal.

The court found the first instance judge had erred in simply finding the plaintiff's conduct understandable and excusable, noting that a reasonable person in his position would have taken down the offending vehicle's details. He was not so injured as to have being unable to write that information down, particularly given that he had a pen and paper in his briefcase. A test is what a reasonably informed member of the community such as the plaintiff should know about the right to claim.

Medical negligence - Section 5O of the *Civil Liability Act 2002*

In *Coote v Dr Kelly* [2012] NSWSC 219 (Schmidt J), the plaintiff sued his former general medical practitioner for incorrect diagnosis and treatment of a lesion on his foot as a plantar wart. The plaintiff in fact suffered from an acral lentiginous melanoma (ALM). Despite ongoing treatment, the lesion was not correctly diagnosed for some time and when finally diagnosed and treated, it had by that

time metastasised resulting in the plaintiff's death shortly afterwards. Schmidt J concluded that the busy GP was in breach of his duty of care in not observing indications which should have prompted the defendant to refer the lesion for a biopsy, which would have led to the earlier discovery of the ALM. Her Honour concluded that the plaintiff probably was suffering an ALM and not just a plantar wart when he was first seen by the defendant in 2009. This led to the conclusion that the defendant breached his duty of care. However, Her Honour found that the plaintiff failed on causation. She posed the question [137] whether it had been established on the evidence on the balance of probabilities that had a biopsy been taken in 2009 and treatment for ALM then followed, that the damage suffered by the plaintiff after the biopsy was undertaken in 2011, would not have been suffered. The plaintiff's case was that excision in 2009 would have preceded metastasis and would have been highly likely to prevent metastasis. Her Honour was not satisfied that it had been shown to be probable that the ALM was only 2mm thick in 2009 and not probable that the ALM had not already metastasised. She concluded that it had not been shown on the balance of probabilities that the life expectancy of the plaintiff had been significantly reduced. Her Honour was sceptical of epidemiology being used to assess likely outcomes.

Whilst Her Honour's conclusion that the common law test of balance of probabilities is not satisfied by evidence which fails to do more than establish a possibility is undoubtedly correct; if, on the probabilities, the plaintiff's pain and suffering would have been diminished by earlier diagnosis or his life expectancy increased at all, then some probable damage is established and the loss of a chance is properly taken into account in establishing the extent of the damage. Her Honour does not appear to have examined that aspect but that may well be a consequence of the way in which the case was conducted before her.

Duty of care – employees of sub-contractors

In *Miljus v Watpow Constructions Pty Ltd* [2012] NSWCA 96, the issue arose as to whether the occupier of a site owed a duty of care to the subcontractor's employees. The plaintiff was delivering concrete to a site but, whilst reversing down an access road, lost control of his vehicle and suffered physical and psychiatric injury in the ensuing accident. The critical question was whether there was a duty on the occupier to maintain a safe means of access. At first instance, Davies J found that *Sydney Water Corp v Abramovic* [2007] NSWCA 248 and *Leighton Contractors v Fox* (2009) 240 CLR 1 suggested that the duty of care was not owed to the employees of subcontractors. At [72], Whealy JA (with whom Bathurst CJ and McColl JA agreed) said that the duty of care owed is that of an occupier but not the higher duty of care which is owed by an employer to an employee. It was held that the High Court's decision in *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 was distinguishable. The majority in that case held a duty was owed because of the special role played by the defendant in supplying and setting up equipment, and directing and supervising the operators of that equipment. This contrasted markedly with the present case, where the defendant had no say at all in relation to the system of work. *Stevens v Brodribb* (1986) 160 CLR 16 was similarly distinguishable. Where the occupier engages an independent contractor to carry out all aspects of its enterprise, this does not give rise to a duty of care towards an employee of the independent contractor in the absence of special circumstances. The appeal by the plaintiff did not succeed.

Employment

In the *City of Prospect v Jaspers* [2012] SASCFC 85, the plaintiff suffered a significant back injury in lifting with a fellow employee an 85 kg compactor from the ground to the tray of a truck, which was approximately one metre high. At first instance, the plaintiff succeeded with no reduction for contributory negligence. The South Australian Full Court found that there had been no error in the trial judge's decision in this regard.'

Section 5L of the *Civil Liability Act 2002*

In view of the fact that there is no liability for the materialisation of an obvious risk in respect of a dangerous

recreational activity, there have been various decisions going in either direction. The judgments seem largely to turn upon what was the nature of the specific risk which was said to be obvious, and whether it was the same risk which materialised.

A fall from a horse at a horse-riding ranch was found to be caught by Section 5L in *Mikronis v Adams* (2004) 1 DCLR (NSW) 369,.

In *Fallas v Mourlas* (2006) 65 NSWLR 418, the majority held that an accidental shooting during spotlight shooting was not caught by Section 5L.

In *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, the court found that a non-contact sport was not caught by Section 5L.

In *Smith v Perese* [2006] NSWSC 288, section 5L did not apply to circumstances where spear fishermen were run over by another boat.

In *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200, a plaintiff injured by a rogue wave washing over the bow of a dolphin-watching boat was held to be not caught by Section 5L.

The court in *Jaber v Rockdale City Council* [2008] NSWCA 98 held that diving head first from a bollard 2 to 3 metres above the surface level was caught by Section 5L.

In *Verman v Albury City Council* [2011] NSWSC 39, BMX bike stunts on a Council bike ramp painted with non-slip paint were held to be caught by Section 5L.

In *Maher v Lidbury* (NSW DC unreported 18/3/2011) (Rolfe DCJ), it was held that social golf was caught by Section 5L.

Section 5M of the *Civil Liability Act 2002*

In *Belna Pty Ltd v Irwin* [2009] NSWCA 46, the court made it clear that the warning must be specific to the particular risk. A general warning about the risk of exertion did not absolve the gym in that case from liability for aggravation of an injury caused by the performance of lunges. In *Verman v Albury City Council* [2011] NSWSC 39 (Harrison J), a sign at the Council's skate park did not inform of any specific risk but merely said that users skated at their own risk. The sign was silent as to the nature of the risk and did not address BMX bike riding, the activity in question. A specific reference to the need for protective clothing usually worn by skateboarders did not afford any protection in these circumstances.

Damages/economic loss – work capacity

At issue in *Mead v Kearney* [2012] NSWCA 215 was an allowance by the trial judge for diminution of economic capacity. Having determined the plaintiff's theoretical work capacity, the judge at first instance then considered whether the plaintiff could utilise that capacity to actually obtain work in the geographic area in which it was reasonable for him to try and find it. He concluded that the plaintiff's residual earning capacity had no value in the absence of any evidence from the defendant as to the availability of suitable employment for a person of the plaintiff's significantly reduced theoretical work capacity. The parties accepted the principle set out in *Nominal Defendant v Livaja* [2011] NSWCA 121 that, notwithstanding a theoretical ability to perform certain jobs, there must be a practical assessment of the likelihood of actually obtaining work. The defendant also accepted an evidential onus as to whether the plaintiff is likely to exercise a residual earning capacity. There was no claim of failure to mitigate and the plaintiff had demonstrated a long and satisfactory work history prior to the accident. There was evidence that the plaintiff had tried to obtain employment for nearly four years before the hearing without success. There was no evidence that this situation would be any different in the future. Accordingly, the defendant's appeal was dismissed. A finding of a 40% residual earning capacity is merely a step in the reasoning process and the ultimate conclusion that that capacity could not be utilised effectively amounted to finding that the plaintiff did not have any residual earning capacity at all.

Contributory negligence - Section 34 of the *Motor Accidents Compensation Act 1999*

In *Nominal Defendant v Rooskov* [2012] NSWCA 43 (20 March 2012), the plaintiff alleged he had been hit by a car when riding his bicycle in the street. He took action against the Nominal Defendant concerning the alleged unidentified motor vehicle. The plaintiff had told ambulance officers who arrived at the scene that he had been hit by a car. There was no obvious damage to the bicycle and the notes of the ambulance officers referred to the plaintiff's significant drinking following a meal. The hospital record also indicated that the cyclist had been hit by a car. Police noted that the plaintiff had said that he may have been hit by a car but uncertain when interviewed in hospital. The plaintiff gave other ambivalent accounts to medical practitioners. The plaintiff had also told a local newspaper that he had little recollection of what had occurred, other than being thrown through the air and landing in a ditch. He could not recall hearing a motor vehicle. However, almost 15 months later the plaintiff gave an account where he remembered a car approaching him from behind. There was evidence of some skid marks. The plaintiff was unconsciousness to a degree at the scene but later referred to having interludes of recall shortly after the accident. The plaintiff had a blood alcohol reading close to 0.2% at the time of the accident. Campbell JA (with whom Young JA and Garling J agreed) had some doubts as to whether he would have come to the same conclusion but, taking into account the advantages that the trial judge had, was not persuaded that the conclusion reached at first instance was wrong.

The plaintiff had not been wearing a bicycle helmet. The trial judge reduced his damages by 5% for contributory negligence. The court was not persuaded that this was an error of fact in relation to the type of damage incurred. There was no alternative place where the plaintiff could realistically cycle and in the circumstances, his alcohol consumption did not contribute - or at least was not established by the defendant to have contributed - to his accident or to his injuries.'

Availability of aggravated damages for purely psychiatric injury

Aggravated damages were not to be available for pure psychiatric injury in *Hunter Area Health Service v Marchlewski & Anor* (2000) NSWCA 294. Given that such damages are awarded for the mental distress arising from the manner of infliction of the injury, this seems to be logically correct.

Proportionality of damages

The High Court in *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR said in respect of an award of general damages:

> It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases.

In *TCN Channel 9 Pty Ltd v Ilvariy Pty Ltd* (2007) 71 NSWLR 323 at [22], Spigelman CJ noted that the Court of Appeal remained bound by what the High Court had said in respect of comparative verdicts in *Planet Fisheries*, but added:

> Although there is no tariff or standard, some understanding of the general scale of awards is appropriate.

This appears to remain the law in New South Wales.'

Occupier's liability

In *Grasso v SRA* (NSW CA unreported 26 April 1996) a 17 year old plaintiff, who tripped and fell and trapped his finger in an escalator, failed because the escalator met all reasonable standard requirements.'

See also *Dimitrelos v 14 Martin Place Pty Ltd* [2007] NSWCA 378, where the plaintiff failed in respect of a claim involving lift malfunctioning.

In *State of NSW v Oliver* [2006] NSWCA 124 the plaintiff prisoner succeeded when he slipped on a puddle of water and detergent on a tiled floor near a toilet cubicle and sustained injuries.

McDonald's Australia Ltd v Salameh (NSW CA unreported 22 May 1997) saw the plaintiff, a young mother, slip and fall on liquid soap on the floor of the bathroom and succeed in negligence.

In *Allen v Taylor* (NSW CA unreported 13/5/1999) the plaintiff was injured driving a 4-wheel motorbike across a paddock after being asked to look at some cows on the property. She was not told of the existence of any hole or gully, which was disguised by the long grass. The majority found in favour of the plaintiff. By contrast, in *Carlisle v Mullrai* (NSW CA unreported 13/8/2000), two teenage girls while paying a visit to a farm overturned a four wheel motorbike and suffered serious injuries. It was alleged that the owner had been negligent in leaving the key in the ignition of the vehicle prior to leaving the farm. The fact that the girls took the motorbike without permission was found not to be reasonably foreseeable.

Update 4

Sections 62 and 63 of *Motor Accidents Compensation Act 1999*

In *Nelkovska v MAA of NSW* [2012] NSWSC 819 before Harrison AsJ, the plaintiff sought a review of adverse determinations. The medical assessor, noted the plaintiff's history of multiple sclerosis (which according to the plaintiff was currently in remission) concluded that there were behavioural issues revealed in the clinical assessment and very limited prospects for a positive outcome from an active treatment plan. The assessor found that the motor vehicle accident was not materially contributing to the plaintiff's level of incapacity and did not have a causal relationship to the subject incident. Accordingly the assessor refused any domestic assistance. The plaintiff argued that the assessor failed to apply the correct test for causation and denied procedural fairness. Her Honour concluded that the medical assessor had applied a higher test, 'directly causally related', and had fallen into jurisdictional error by asking the wrong question. The test was not whether the request for domestic assistance was causally linked to the subject accident, but rather whether the plaintiff's injury was caused or materially contributed to by the motor accident and then assessing whether the proposed assistance relates to that injury and is necessary and reasonable. Accordingly, the decision to refuse a review of the medical assessor's conclusion was also an error. The medical assessor's decision was set aside with costs and the matter was remitted for a new medical assessment.'

Section 94 of *Motor Accidents Compensation Act 1999*

A CARS assessment of damages was set aside for failure to provide adequate reasons to support the award of damages for economic loss in *CIC Allianz Australia Ltd v Daniel Luke McDonald & Ors* [2012] NSWSC 887 The assessor's certificate was set aside and, after argument, Hidden J ordered that the re-hearing should be before a different assessor.

Medical negligence

A radiologist reviewed and reported upon an angiogram and negligently failed to detect and report on the presence of an aneurism in *Paul v Cooke* [2012] NSWSC 840 (Brereton J). The radiologist admitted a breach of duty but denied that his duty of care extended to taking reasonable care to avoid harm occasioned by treatment of a diagnosed condition. The defendant alleged that the loss and damage was not caused by the breach of duty, rather alleging that the rupture was an

inherent risk of the previous procedure, so that it was merely an inherent risk under Section 5I of the *Civil Liability Act 2002*. The plaintiff's argued that earlier diagnosis would have meant that there would have been an overwhelming likelihood that the plaintiff would have avoided the rupture and consequential injuries. On the probabilities His Honour concluded that the plaintiff would have sought and obtained treatment if properly diagnosed and therefore found that factual causation was established. As to scope of the duty, the harm suffered was not harm of the kind from which the relevant rule of responsibility was intended to protect her. The defendant's negligence created a risk which would otherwise have been avoided (spontaneous rupture of the aneurism) but his negligence did not create the risk of intra-procedural rupture which was associated with the necessity for treatment once the aneurism was diagnosed, no matter when it was diagnosed. Whilst delayed diagnosis did increase exposure to spontaneous rupture, it did not increase the risk of intra-operative rupture, which would have been incurred whenever the diagnosis was made and the procedure undertaken. As a result, the delay in diagnosis neither created nor materially increased the risk. Brereton J concluded that he did not need to decide the issue but had he been required to do so, he would have found that Section 5I did not preclude liability. Section 5I 'merely re-states the common law position that there is no liability in respect of a risk that materialises without negligence – except in the context of a breach of duty to warn of such a risk'. As a result, the plaintiff failed on causation.

Update 5

Sections 62 and 63 of the *Motor Accidents Compensation Act 1999*

An insurer sought judicial review of two decisions made by the proper officer in *AAMI Ltd v Ali* [2012] NSWSC 969 The first decision denied the insurer a further medical assessment of the plaintiff's neurological injuries and the second denied review of a certificate concerning those injuries by the medical review panel. Beech-Jones J concluded that there was no error in refusing a review of a decision that the plaintiff's injury exceeded 10% WPI. However, he also found that the CARS assessor had erred in interpreting his powers so that he was only able to refer injuries for further assessment under Section 62 on the grounds of deterioration or available additional relevant information. In this regard the court granted declaratory relief.

Occupiers liability

In *Upper Lachlan Shire Council v Rodgers* [2012] NSWCA 259, the 65 year old plaintiff tripped over a log and suffered injury after returning to a darkened car park operated by the defendant Council. The plaintiff succeeded at first instance without reduction of contributory negligence. The appeal was dismissed. The court found that the plaintiff's approach was reasonable. The lack of lighting was a breach of the duty of care and there had been no failure by the plaintiff to take reasonable care for his own safety.

In *Curtis v Harden Shire Council* [2012] NSWSC 757 (Fullerton J), the deceased skidded on rural roadworks which had rendered the road slippery through loose gravel. There were warning signs, but they related only to chip hazard. Following her death, the driver's spouse and children sued the Council for compensation to relatives. There was no signage restricting the 100 kph speed limit. Fullerton J was satisfied that a speed reduction sign in combination with a pictorial slippery road sign should have been put in place before the roadworks commenced, and at appropriate intervals thereafter, to alert users to the potentially hazardous conditions, and that it would be neither burdensome nor onerous for the Council to have

taken these precautions. The Council relied on the statutory defence under 43A of the Civil Liability Act, whereby the Council would not be liable in the exercise of a statutory power unless the act or omission was so unreasonable that no authority could properly consider the act or omission to be a reasonable exercise of or failure to exercise its power. This is a Wednesbury unreasonableness test, requiring the conduct to be so devoid of plausible justification that no reasonable body of persons could have reached it. Fullerton J said that the fact that minds might differ as to the need for the signage and restriction of speed meant that Wednesbury unreasonableness was not met. Her Honour was not satisfied that a Section 44 non-feasance defence was made out, and, in any event, was not satisfied that it was established on the evidence that the road condition caused the accident.

In *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239, the female plaintiff fell at a hotel in Darlinghurst after slipping on some liquid on the stairs. The plaintiff sued the occupier, the licensee and the manager, along with the firm of architects which undertook refurbishment of the hotel. Although it was obvious that patrons and staff would carry drinks up and down the stairs and that spillage would present a hazard, the architect did not consider this. The trial judge held the risk foreseeable under section 5B of the Civil Liability Act. Causation was established under Section 5D and there was no evidence to establish a defence under Section 5O, in that it was not established that the architect's work was in accordance with widely accepted peer professional practice. There was no response by the occupiers to the foreseeable risk of harm. The appeals of the occupiers and the architect were dismissed. An appeal from the finding that the plaintiff was exercising reasonable care for her own safety and was not guilty of contributory negligence also failed.

Section 3B of the *Civil Liability Act 2002*

A plaintiff underwent dental treatment in *Dean v Phung* [2012] NSWCA 223, in relation to which a specialist gave evidence that no reputable dentist could hold a particular belief that the treatment was appropriate or necessary. The trial judge upheld a claim in negligence only. On appeal, it was found that, in this regard, he was in error. Consent to treatment is vitiated by deception or fraud and intent to cause injury can be constructive intent caused by a lack of reasonable belief in the efficacy of the treatment given. As a result, the plaintiff succeeded not just in negligence but in trespass to the person and was entitled to an award of exemplary damages of $150,000 in addition to common law damages in accordance with Section 3B of the Civil Liability Act.

Product liability - Sections 68 and 68B of the *Trade Practices Act 1974*

In *David Kelly v Motorcycling Events Group Australia Pty Ltd* (Curtis DCJ unreported 6 July 2012) the plaintiff was struck by another motorcyclist at high speed while engaged in motorcycle cornering skill training on a circuit. It was conceded that although the injury was foreseeable, it was also alleged that the collision was wholly the plaintiff's own fault. The plaintiff relied upon the TPA Section 74 warranty in relation to supply of services and argued that the defendant's exclusion and indemnity clauses were prohibited by Section 68. Section 68, however, is modified by Section 68B in respect of the supply of recreational services. It was submitted for the plaintiff that because he used his motorcycle for work and the skill improvement related to this, the activity in which he was engaged was not recreational. Curtis DCJ rejected this argument. Curtis DCJ held however, that because the release was not limited to liability for death or personal injury but purported to also exclude liability for property damages, the necessary condition for the operation of Section 68B was not satisfied, Section 68 applied and the release was void. As a result, the plaintiff succeeded with a 30% reduction for contributory negligence.

Product liability

In *Nicholls v Elgas Ltd & Woolacott* (ACT SC, Master Harper unreported 25 July 2012), the first defendant supplied to Woolacott, the third party, a gas cylinder which had been overfilled. As a consequence, escaping gas was accidentally ignited and the resultant explosion caused injury to the plaintiff. This was a breach of the defendant's duty of care, but there was no fault on the part of the third party/home occupier.

Allianz Australia Insurance Ltd v Cervantes [2012] NSWCA 244

In *Allianz Australia Insurance Ltd v Cervantes* an insurer appealed to the Court of Appeal. It was held that refusal to accept a medical practitioner's opinion based upon disbelief of the claimant's history when the CARS assessor accepted that history was not an error of law. It was open to award damages by way of a lump sum or buffer and there was no error even when that buffer was substantial, being in this case $75,000 for past economic loss and $400,000 for future economic loss. The assessment was impressionistic or evaluative but was not arbitrary and capricious. The appellant insurer had failed to demonstrate error and the appeal was dismissed. This was a case in which anything approaching precision in calculating future economic loss was difficult, if not impossible, and the buffer was entirely justified.

Update 6

There are effectively four hurdles to pursuing a claim against the Nominal Defendant where injury has been caused by an unregistered motor vehicle. These hurdles are:

1. The usual issue of establishing fault on the part of the driver of the unregistered vehicle;
2. Establishing that the accident occurred on a road (s.33(1) *Motor Accidents Compensation Act 1999* ('MAC Act'));
3. Demonstrating the injured party was not a trespasser (s.33(1)(3A) MAC Act); and
4. Establishing that the vehicle concerned was a 'motor vehicle' within the scope of s.33(5) MAC Act.

Whilst these issues may appear straightforward at first blush, the reality is that the definitions of 'road' and 'motor vehicle' can give rise to significant complexity. Two recent decisions (one from the Full Court of the Supreme Court of South Australia and one from the NSW Court of Appeal) have addressed these issues.

A road

Section 3 of the MAC Act defines a road as being a road or road-related area within the meaning of the *Road Transport (Vehicle Registration) Act 1997*. That legislation in turn defines a road as incorporating a road-related area. That in turn incorporates median strips, footpaths, nature strips, areas open to the public and designated for use by cyclists or animals, a road shoulder and 'an area that is not a road and that is open to or used by the public for driving, riding or parking vehicles'.

This latter provision has given rise to numerous cases to determine whether a Woolworths car park, Stockton Beach, Sandgate Markets, a wharf, a nature park and a closed speedway are open to and used by the public for driving. Such cases invariably end up being determined in accordance with their facts, but in *Zerella Holdings Pty Ltd v Williams* [2012] SASCFC 100 the majority provided useful guidance as to the principles to be applied.

In the particular case, the plaintiff was injured in the loading dock area of a fruit and vegetable processing plant. The company that controlled the premises had signage on internal roads, directing that visitors to the premises were not permitted to proceed directly to the loading dock area. There was a pre-booking system for delivery vehicles. There was a gate at the entrance to the property that was closed at night, but open and unguarded by day. Despite these systems, some casual visitors still drove to the loading dock area.

In the particular circumstances of the case, a 2-1 majority held that the loading dock area was not open to and used

by the public. Of interest to those addressing Nominal Defendant claims in NSW were the principles set out in determining whether a road or area was 'open to or used by the public'.

The court stated [from 40]:

1. It is not necessary that the land be publically owned or that there be a public right of access of use. Different considerations apply to private land compared to public land in this sense.

2. In the case of private land, the composite phrase 'open to or used by the public' encompasses legal entitlement to entry by the public (de jure) as well as actual use by the public (de facto). The words 'open to' are more apposite to the former and the words 'used by' are more apposite to the latter.

3. In the case of private land, the phrase 'open to…..the public' refers to an invitation or licence expressly or impliedly extended to members of the public by the private occupier. The question is not whether the land is physically open to the public, although the existence or non-existence of a physical barrier to entry may be one factor in assessing whether an invitation is extended to the public.

4. For this purpose, there is a distinction between a general invitation extended without discrimination to the public and a series of invitations restricted to specific invitees for the purpose of transacting business with the occupier or otherwise. Much will depend on the circumstances, including the restrictions upon those eligible for entrance and the scope of the permitted use on gaining access.

5. The mere fact that a fee is charged or that the area is used only by members of the public with a particular interest (for example swimming or natural history in the case of public pools and museums respectively) does not of itself establish that it is not 'open to the public'.

6. In the case of private land, the phrase 'used by the public' refers to actual use (even without the permission of the occupier) by the public, but not to mere use by specific invitees or to an isolated use by a member or members of the public.

The court went on to comment with regards to car parks [at 41]:

> if an occupier does not enforce the limitation of use of a car park to his or her customers, and the car park is, in fact, habitually used by members of the public for their own purposes the car park will usually be found to be a public place….On the other hand, use by members of the public who ignore the occupier's express or objectively implied conditions of use in which the occupier could not reasonably be expected to control, will not constitute use by the public.'

In summary, each case depends upon its facts, requiring consideration of the degree of access and circumstances of access to the area in question.

A motor vehicle

Section 33(5) MAC Act defines a 'motor vehicle' for the purposes of the Nominal Defendant provisions as being either:

a) Exempt from registration, or

b) Required to be registered, and:

i) At the time of manufacture, capable of registration, or

ii) At the time of manufacture, with minor adjustments, capable of registration, or

iii) Was previously capable of registration, but is no longer capable of registration because it has fallen into disrepair.

It is noted that Section 33(5) was amended in 2006. Previously the requirement had been that the vehicle be capable of registration immediately prior to the subject accident (with 'minor repair'). The focus was on the specific vehicle involved in the accident. This created some particular difficulties for plaintiffs. The plaintiff may have no idea as to the state of the vehicle that ran them down and may be in no position to prove whether or not it was capable of registration immediately prior to the accident.

The amended Section 33(5) shifts the focus back to the state of the vehicle at the time of manufacture.

An issue then arises as to vehicles that are not capable of regular on-road registration, but are capable of registration

under some special provisions. This includes the issuing of an UVP (Unregistered Vehicle Permit) and Conditional Registration. The issuing of Conditional Registration has largely taken over from the issuing of UVPs (since about 2004). A wide variety of vehicles can be issued with Conditional Registration to be used on public roads. The Conditional Registration comes with a CTP policy (currently issued by QBE) as part of the price of registration. The CTP coverage only applies whilst the vehicle is being used on a road or road-related area and not whilst the vehicle is being used on private property.

There may be specific restrictions on conditional registration (such as 'not at night').

Examples of vehicles that can be issued with Conditional Registration include:

- Agricultural motorbikes (when used on roads between farm properties);
- Forklifts;
- Golf carts;
- Motocross motorbikes (for recreational riding on Stockton Beach);
- Cranes and other mobile industrial machinery.

The Roads and Maritime Services website (the RTA having been subsumed into the RMS), identifies the various categories of Conditional Registration that can be issued.

In *Nominal Defendant v Uele* [2012] NSWSC 271, the NSW Court of Appeal considered whether the test as to a vehicle being capable of Conditional Registration at the time of manufacture was objective or whether it required an enquiry into the history of use of the specific subject vehicle.

The plaintiff in this case was run down by an unregistered motocross motorbike on Cobar Reserve. The subject motorbike had been manufactured by Yamaha in 2000, although the accident did not occur until 2008. At the time of manufacture, the motocross motorbike was not capable of being registered for regular on-road use – it lacked essential items such as indicators and brake lights.

However, the class of motocross motorbikes could have been issued with an Unregistered Vehicle Permit (now Conditional Registration) for either agricultural use or for recreational riding on Stockton Beach. There was no evidence that the particular bike had ever been used for such purposes.

It would not have been possible to obtain a UVP in 2000 (or indeed now), such that would have permitted the use of the bike on Cobar Reserve.

The Nominal Defendant argued at trial and again on appeal that it was necessary to look back through the user history of the specific motorbike to determine whether it ever in fact had been put to a use such that Conditional Registration (or a UVP) would have been issued.

This approach was rejected by the trial judge and the Court of Appeal. The Court of Appeal held that the test was purely objective – whether the class of bike/vehicle was theoretically capable of being issued with a UVP or being conditionally registered as at the time of manufacture.

Justice Meagher (with whom Justices Macfarlan and Sackville concurred) stated that Section 33(5)(b)(i) [at 28]:

> directs attention to the characteristics and specification of the vehicle when manufactured.

Justice Meagher continued [at 29]:

> Each of paragraphs (B)(i),(ii) and (iii) is concerned with the physical characteristics of the vehicle as distinct from the identity or purpose of the owner or operator of the vehicle at any relevant point in time.

Justice Meagher concluded:

> The application of those criteria should yield the same answer for all vehicles which have the same physical characteristics irrespective of their use or proposed use by any owner or driver at any time before the motor accident.

The decision in *Nominal Defendant v Uele* means that any motorised vehicle capable of Conditional Registration at the time of manufacture or subsequently will be covered by the Nominal Defendant scheme whilst being used on a road or road-related area, subject to the other criteria identified above (establishing breach of duty, no trespassing).

This is irrespective of whether the specific vehicle was ever put to any use such that Conditional Registration would in fact have been issued.

Given that there may have been instances in the past of the Nominal Defendant or insurers acting as agents for the Nominal Defendant rejecting claims caused by vehicles such as unregistered motocross motorbikes on public roads, those who have advised in such cases are encouraged to review their files. *Nominal Defendant v Uele* makes clear that the Nominal Defendant scheme covers injuries involving unregistered motocross motorbikes where such accidents occur on areas that are open to and used by the public for riding.

Further, given that the Lifetime Care and Support scheme uses similar entry criteria to the motor accidents scheme (eliminating the element of fault), the LTCS scheme should be accepting as members the at fault riders/operators/drivers of vehicles and machinery such as motocross motorbikes, forklifts and golf carts. This is when the operators of such machinery are catastrophically injured and subject to the vehicle involved being used on a road or road-related area at the time of injury. [The LTCS scheme does treat work-related injuries differently].

Update 7

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

In *Nominal Defendant v Uele* [2012] NSWCA 271, the plaintiff was struck by an unregistered motocross motorbike on the Cobar Reserve. The plaintiff brought an action under Section 33 of *Motor Accidents Compensation Act 1999* (MACA), asserting it was an uninsured motor vehicle being used on a road-related area within the meaning of Section 4 of the *Road Transport (Vehicle Registration) Act 1997* and accordingly, a road for the purposes of Section 33. The Nominal Defendant admitted that the injury was caused by the fault of the rider and that the Cobar Reserve was a road-related area and accordingly, a road. The only issue was whether the motorbike came under the definition of 'motor vehicle' in Section 33(5). The plaintiff argued that the motocross motorbike was capable of registration because it could have been the subject of an unregistered vehicle permit issued by the RTA within the meaning of 'registration' in Section 3 of MACA. It was agreed in 2000 the RTA had issued unregistered vehicle permits for motocross motorcycles for agricultural use or for use as recreational vehicles. In such case, there had to be evidence of the user being involved in agriculture or the application had to be for use in a designated recreation vehicle area, such as Stockton Beach. The RTA would not have issued a permit allowing the use of a motorbike on Cobar Reserve. The primary judge held that the motorbike as manufactured was able to be the subject of an unregistered vehicle permit and it was irrelevant whether such a permit would have enabled the lawful use of a motorbike on the road or road-related area where the accident occurred or for the recreational purpose for which it was used. The Nominal Defendant appealed. Counsel for the respondent was not called upon. It was noted that the third party policy will respond even if the vehicle is being used on a road or for a purpose which is not permitted. *Applin v The Nominal Defendant* [2004] NSWCA 217 at [25]. It was sufficient that an unregistered vehicle permit could have been issued. See also Nominal Defendant v Lane [2004] NSWCA 405. Accordingly, the primary judge correctly concluded that the motorbike was at the time of manufacture capable of registration. The appeal was dismissed with costs.

In *Zerella Holdings Pty Ltd & Anor v Williams & Anor* [2012] SASCFC 100, the plaintiff was injured in an accident in a loading bay due to the operation of a forklift, which was not insured. The Nominal Defendant was joined, alleging the loading bay was a road, which is defined to include areas 'open to or used by the public'. The trial judge held that the loading bay was not a road. The Full Court agreed and dismissed the appeal. Applying *Schubert v Lee* (1946) 71 CLR 389, the word 'road' includes 'open to or used by the public'. In this case, the transport operators and their drivers were not members of the public and the use of the loading bay for its intended purpose of loading carrier vehicles did not make it an area that was open to or used by the public. The plaintiff's appeal failed as a result (per Kourakis CJ and Blue J, Gray J dissenting). Gray J considered that the degree of public access and the fact that members of the public drove in and walked around the loading bay was sufficient to meet the established test.

Section 63 *Motor Accidents Compensation Act 1999*

The plaintiff sought review of a certificate of a Review Panel in *Owen v MAA & Anor* [2012] NSWSC 650 (SG Campbell J). The Review Panel had concluded that the evidence did not support a finding that lumbar spine injury was causally related to the accident or that a left shoulder injury was causally related to the accident. There was a failure on the part of the Review Panel to take into account relevant material and in particular, the panel was in error in regarding the question of whether there was a contemporaneous record of the plaintiff's symptoms as decisive. The plaintiff was entitled to relief for jurisdictional error and the Review Panel's certificate was set aside and the action remitted for referral to a Review Panel with an order for costs.

Section 126 *Motor Accidents Compensation Act 1999*

A CARS assessor awarded $200,000 by way of a buffer for future economic loss in *Allianz Australia Insurance Ltd v Kerr* [2012] NSWCA 13. The insurer sought review for jurisdictional error, arguing lack of adequate reasoning and complaining that buffers were too readily awarded. Hislop J found no error in the CARS assessor's approach. The NSW Court of Appeal held that Section 126 does not preclude the award of a buffer for future economic loss in appropriate cases and that the CARS assessor gave sufficient reasons, albeit brief, to justify the award in this case. Where the evidence enables a more certain determination of the difference between the economic benefits the plaintiff derived pre-accident and post-accident, recourse should not ordinarily be made to a buffer but each case must turn on its own facts.

Damages - economic loss

The defendant appealed from a judgment of Garling J in respect of the assessment of economic loss in *Mead v Kearney* [2012] NSWCA 215. The trial judge had found that the plaintiff had a theoretical earning capacity of 40% but that capacity was of no value because there was no prospect of him obtaining work. By Notice of Contention, the defendant contended in the alternative the plaintiff had no residual earning capacity. The plaintiff cross-appealed against the finding of any residual capacity and against the assumed retirement age of 65 instead of 67 in the calculation. The Court of Appeal said that in light of the arduous physical nature of the plaintiff's pre-accident employment, no error had been shown in the assumption of retirement age of 65 rather than the relevant statutory age of 67. Rejecting both appeal and cross-appeal, the court noted that His Honour had calculated future loss by reference to the entirety of the net wages likely to have been earned but for the accident, subject to a discount of 15% for adverse vicissitudes. The defendant submitted no useful evidence as to the likelihood of employment for the plaintiff in Mudgee and the defendant bore an evidential onus. The plaintiff had a good work history. Accordingly, the appeal should be dismissed. The defendant's Notice of Contention was correct in that effectively, the plaintiff had no residual earning capacity but, given the approach of the trial judge, this made no difference to the calculation. As to the cross-appeal, the finding of a theoretical 40% residual earning capacity was not in error because it was merely a step along the way to the ultimate finding that the plaintiff had suffered total loss through inability to exercise any residual capacity. The defendant's appeal was dismissed with costs.

Compensation to relatives

In *Grosso v Deaton* [2012] NSWCA 101, infant plaintiffs claimed compensation arising from the death of their mother. No allowance was made for loss of support on the basis that the boys' respective fathers provided care and their income exceeded that of the deceased mother. On appeal, the court held that children who have survived through the fulfilment of a basic moral obligation by a person stepping into the shoes of the deceased mother are not deprived of their right to recover compensation. It may be that such recovery would be precluded where the person who stepped in had a legal obligation to do so, although not where that person failed to meet their obligation. That flows from the underlying assumption that compensation is not available where there is an existing relationship of dependency. The gratuitous provision of services by relatives or friends or the provision of such services at small cost or as a benevolent gesture does not preclude the recovery of the true value of those services from the tortfeasor. The prospect of remarriage may reduce compensation, but the suggestion that the fathers took over the care responsibilities of the mother was manifestly erroneous in circumstances where each of the fathers was in full-time employment. Damages

were accordingly assessed for each of the boys' financial loss and domestic care.

Section 5D *Civil Liability Act 2002*

The plaintiff succeeded in a claim for medical negligence arising from a failure to give advice following termination of anticoagulent medication treatment in *Sullivan Nicolaides Pty Ltd v Antoinette Papa* [2011] QCA 257. The plaintiff's counsel did not ask the plaintiff what the plaintiff would have done had appropriate advice been given. The trial judge nonetheless found that the plaintiff would have followed appropriate advice. On appeal, the majority held that there was a sufficient basis for the trial judge's conclusion that an intelligent and educated person would have been likely to follow proper advice, and dismissed the appeal.

Sections 13 and 16 *Civil Liability Act 2002*

In *Clifton & Ors v Lewis* [2012] NSWCA 229, the appellant challenged an assessment of non-economic loss at 33% of a most extreme case. There was also a challenge to a buffer for future economic loss of $120,000. The appellant's only contention in respect of the non-economic loss was that the percentage was too high. No irrelevant considerations were taken into account. There was no error in the medical assessment. Although the award might be considered to have been at the high end of the range it was not outside that range, particularly having regard to the loss of the plaintiff's recreational boxing activities. In respect of the buffer for future economic loss, the court accepted that Section 13 permits the award of a buffer in appropriate cases. The trial judge's reasoning was unexceptionable and he was entitled to find an interference with earning capacity notwithstanding that there had been no loss of income up to time of hearing. The appeal was dismissed with costs.

Evidence – Section 118 *Evidence Act 1995* (NSW)

In *ECS Services Pty Ltd v DGA Holdings Pty Ltd* [2012] NSWSC 1058, a plaintiff made application to cross-examine a defendant on insufficient discovery pursuant to Rule 21.2 of UCPR. Harrison AsJ noted that under Section 118 *Evidence Act 1995*, the onus is on a party claiming privilege to establish the claim and there is no onus on a party seeking production to exclude privilege (*ASIC v Rich* [2004] NSWSC 1089).

Costs

In *Australian Competition and Consumer Commission v Metcash Trading Limited (No 2)* [2012] FCAFC 55 an application for indemnity costs based upon failure to accept an offer of compromise was rejected. The offer of compromise had required the Commission to completely abandon its case. The Commission's case was not unarguable, merely ultimately unsuccessful. The Commission' rejection of the offer was not unreasonable in all the circumstances. Indemnity costs were not awarded.

Expert evidence and causation

In *Allianz Australia Ltd v Sim*; *WorkCover Authority (NSW) v Sim* etc [2012] NSWCA 68, the plaintiff had worked with asbestos for many years in the employ of a number of employers. He contracted asbestosis and lung cancer, and subsequently died. His estate took action against four of the employers and the WorkCover Authority on behalf of the defunct insurer of two of them in the Dust Diseases Tribunal. The Tribunal admitted expert evidence, which asserted that it could not be established that the tortious exposure during employment with each employer was a necessary causal element in the chain of events leading to lung cancer. The Tribunal nevertheless held that the employer's negligence had caused the deceased's lung cancer. On appeal, the court reviewed the admissibility of the expert evidence and held there was a sufficient basis to justify evidence as to the cumulative theory of causation and that the challenge to the admissibility of expert evidence should be rejected. Whilst increase in risk is not to be equated with factual causation, nonetheless circumstances in which the negligence of each defendant was insufficient to effect the damage but the combined force was sufficient, each should be held liable in respect of an invisible outcome. Under general law principles, the counter factual satisfaction of the 'but for' test is not essential. There was no error of law shown in the Tribunal's conclusion that the plaintiff made a valid offer of compromise and was entitled to indemnity costs.

Update 8

Section 7A *Motor Accidents Compensation Act 1997* (NSW)

In *Axiak v Ingram* [2012] NSWCA 311, an infant plaintiff sought damages for personal injury which incurred when she ran across the road after alighting from a school bus. She was struck by a vehicle heading in the opposite direction at about 40 kph. At issue was whether the plaintiff was entitled to damages under the blameless motor accident provisions s7A of Motor Accidents Compensation Act (MACA). The Court of Appeal overturned the first instance decision, and found that the plaintiff succeeded with a 50% reduction for contributory negligence.

Intentional injury/exemplary damages

In *Norberg v Wynrib* [1992] 2 S.C.R. 226, the plaintiff sued for general and punitive damages against the defendant doctor on the grounds of sexual assault. The plaintiff was addicted to drugs, which were obtained from the defendant in exchange for sexual relations.

On appeal, the plaintiff succeeded in the Canadian Supreme Court. The plaintiff's consent to sexual assault was vitiated by the disparity in the relative positions of the parties, and her drug dependence meant she lacked capacity to genuinely consent. As a matter of public policy *ex turpi causa non oritur actio* was not a bar to recovery. The court held that battery was actionable without proof of damage and liability is not confined to foreseeable consequences. The plaintiff was entitled to aggravated and punitive damages. The minority in the court was also of the view that the plaintiff should succeed but primarily on the basis of a breach of fiduciary duty.

Section 10 MACA

In *Suncorp Metway v Wickham Freight Lines and Butler and Weston* [2012] QSC 237 (Applegarth J), an infant plaintiff (Weston) sued in the NSW Supreme Court for damages following a motor accident in NSW that included a claim under s7J of MACA (NSW) for 'special entitlements' for children on a no-fault basis.

The defendant driver was in a Qld registered motor vehicle, and the Qld CTP insurer denied indemnity on the basis that the Qld policy only responded to accidents caused by a 'wrongful act or omission' of a person other than the injured person. (s5(1)(b) *Motor Accident Insurance Act 1994* (Qld)).

'Special entitlements' under s7J MACA include hospital, medical, pharmaceutical and rehabilitation costs and apply where a:

- child is injured as a result of a motor vehicle accident;
- that is not caused by the fault of the owner or driver of that vehicle in the use or operation of the vehicle; and
- that vehicle has motor accident insurance to cover the accident.

In these circumstances, the accident is 'deemed to have been caused by the fault of the owner or driver'.

The insurer claimed a declaration in the Qld Supreme Court on the basis that the Queensland policy did not respond to the claim for 'special entitlements' under s7J of MACA. It argued there was no actual fault by the driver and liability should be real and not fictional. The Queensland scheme should not be burdened by exposure to cases where fault is deemed.

Applegarth J found the liability required by s7J MACA was real.

- 'Fault' under the NSW Act is defined as 'negligence or any other tort'. The form of liability created by the NSW Act was found to be within the meaning of 'wrongful act or omission' under the Queensland Act.
- If a statute creates a right to damages where a party was deemed to be at fault and so negligent or to have committed a tort, then the cause of action would still be one that involved a 'wrongful act or omission'.
- As a matter of public policy, it was noted that many people travel interstate and one purpose of the Qld policy is to protect those insured vehicles and drivers against liability to pay damages for common law and statutory causes of action which the law defines as a tort or other civil wrong.

- If the Queensland Parliament had intended a gap to exist so that a Queensland driver would be liable for damages for 'special entitlements' personally under the MACA, it would have been expressed within the words of the statute or elsewhere.

The Queensland statutory policy was accordingly held to respond to s7J MACA claims.

The same principle would presumably apply to 'blameless accidents' under s7B of MACA, where a claim is also founded on 'deemed fault'.

This decision has avoided the potential liability of all drivers of Qld registered vehicles entering NSW for driving uninsured and unregistered vehicles. Under s10 of MACA, to be recognised in NSW, a policy must cover liability in any part of the Commonwealth. If the Queensland policy did not, then the vehicle would be uninsured in NSW. If uninsured, then the registration is also invalidated.

Update 9

Barclay v Penberthy [2012] HCA 40

In *Barclay v Penberthy,* the High Court treated a claim per quod servitium amisit for compensation in respect to the death of employees as subject to the traditional restrictions on recovery of pure economic loss and enunciated the principles governing the assessment of damages in a per quod action.

Actone Holdings Pty Ltd v Gridtek Pty Ltd [2012] NSWSC 991

In *Actone Holdings Pty Ltd v Gridtek Pty Ltd* Harrison J held that reference in one expert report to an unserved expert report, which was neither relied upon for the opinion expressed nor was necessary to explain the conclusion, did not amount to a waiver of privilege.

Sections 94, 106 and 126 *Motor Accidents Compensation Act 1997*

In *Allianz Australia Insurance Ltd v Sprod* [2012] NSWCA 281, the insurer sought review (initially and unsuccessfully before Hoeben J and subsequently on appeal before the NSW CA) of an assessor's decision in relation to future economic loss. The court accepted that the Assessor's statement of reasons did not conform to the statutory requirements involving an error of law on the face of the record. This does not mean that assessors must prepare elaborate statements of reasons and explanations of assumptions. Nor does it mean that in an appropriate case an assessor cannot award a buffer. Section 126 merely requires that the assumptions be set out and accord with the plaintiff's likely future circumstances. The action was remitted for re-hearing according to law.

Update 10

Evidence - legal professional privilege

In *Liu v Fairfax Media Publications Pty Ltd* [2012] NSWSC 900 (Harrison AsJ) it was made clear that simply because a communication is headed 'without prejudice', that heading is not conclusive as to whether or not that communication is actually privileged. In the matter there was a dispute between ASIC and the plaintiff about the propriety of the plaintiff's conduct and the documents were properly characterised as an attempt to negotiate the settlement of an anticipated criminal proceeding. Accordingly, they were not privileged documents under Section 131(1) of the *Evidence Act 1995* (NSW).

Section 109 *Motor Accidents Compensation Act 1997* (NSW)

In *Eades v Gunestepe* [2012] 61 MVR 328 (NSW CA) the plaintiff was one day out of time in commencing proceedings. The primary judge found however that the plaintiff's explanation was full and satisfactory. On appeal that finding was not challenged. However, there remained the issue as to whether or not the threshold had been passed. The first instance judge concluded that he should take into account contributory negligence, which was assessed at 10%. On that basis, the plaintiff satisfied the threshold under Section 109(3)(b) of the *Motor Accidents Compensation Act 1997*. The insurer, seeking leave to appeal, alleged that a higher level of contributory negligence should have been awarded and this would have meant that the plaintiff would not satisfy the threshold. The plaintiff filed a notice of contention as to whether or not non-economic loss should be taken into account notwithstanding that there had been no assessment of whole person impairment. The NSW Court of Appeal granted leave to appeal but ultimately dismissed the appeal. The trial judge was not required to assess contributory negligence but simply to decide whether there was a real and not remote chance or possibility that contributory negligence would prevent the threshold being reached. The plaintiff carried the onus. On the evidence, there was a real and not remote chance that the plaintiff would obtain more than the threshold and therefore leave to pursue the claim was appropriate. The appeal was dismissed with costs.

Occupier's liability

In *NSW Land & Housing Corporation v Dia* [2012] NSWCA 321, the 12 year old plaintiff was injured when he fell from stairs in a unit block owned and managed by the NSW Land & Housing Corporation. The stair railing capping he was holding dislodged when he was descending the stairs quickly. At first instance, Delaney DCJ found for the plaintiff on the basis that the lack of a secure capping was the cause of the fall. The defendant appealed, alleging that its expert had said that given the plaintiff's height he could not have fallen in the way suggested. Dismissing the appeal, the NSW Court of Appeal noted that the primary judge was entitled to prefer the plaintiff's expert and that the defendant's expert lacked expertise as to the manner of falling and accordingly, the defendant's appeal was dismissed with costs.