CLPU
COMMON LAW PRACTICE UPDATES

NEW SOUTH WALES
BAR ASSOCIATION

VOLUME 2

Updates 11-20

Update 11

Section 5R *Civil Liability Act 2002*

In *Town of Port Hedland v Hodder [No. 2]* [2012] WASCA 212, the plaintiff was a 23 year old Aboriginal, who from birth had suffered from an intellectual disability, a physical disability through cerebral palsy, and was deaf and near blind. In company with some others, he entered the public swimming pool (Aquatic Centre) in South Hedland on 15 January 2006. He had little experience with swimming pools because until not long before he had had an open tracheotomy. The Town's public policy was that the pool was open to those with disabilities. The pool was managed at the time by the YMCA pursuant to an agreement with the Town. As a consequence of reviews by the Royal Life Saving Association and the YMCA, the Town was aware that the starting blocks at the shallow end were a danger. They were over height (approximately .75cm above water level) and the Town also knew that the water was only 1.1 metres deep at the shallow end. The Town had intended to remove the blocks, and had received funding for this purpose. However, for a reason that was not explained the Town had failed to remove blocks which they knew to be a danger to recreational users of the pool. When the plaintiff entered the pool he was observed by a YMCA employee to be suffering from some form of disability, to be making unusual noises and hopping up and down excitedly. Contrary to proper practice, that employee was at the front entrance re-filling a water bottle and there was no-one observing the main pool, which is where the plaintiff entered the water. He went in to about thigh deep and then with his limited vision appears to have seen the nearby starting blocks at the shallow end. He mounted one of those and dived head first into the pool at a steep angle, suffering spinal injury and becoming a quadriplegic.

At first instance, the trial judge held the Town of South Hedland liable and found that it had not delegated its duty of care to the YMCA as pool managers, not least because capital works over $1,000 required Town approval. Although there was a breach of duty of care in the absence of any supervision of the main pool and in the absence of any useful signage giving warning, the trial judge found that these failings were not causative of injury by the YMCA because it is unlikely that a lifeguard would have been sufficiently close (even if she had been where she should have been) to prevent the plaintiff acting as he did and this plaintiff would not have been capable of reading warning signs. The judge considered also that in respect of contributory negligence, Section 5K of the *Civil Liability Act 2002* (WA) (the equivalent to section 5R of the NSW Act) made the test wholly objective and the relevant question was what duty of care did the plaintiff as a 23 year old of full physical and intellectual capacity owe to himself in the circumstances. Given the block's presence and the absence of warning, he accepted that they were an obvious enticement to dive and allowed 10 per cent for contributory negligence.

The Town appealed against the finding adverse to itself, against the failure to make a finding against the YMCA and alleged inadequacy in the finding on contributory negligence. The plaintiff appealed against the YMCA finding and argued that there should have been no finding of contributory negligence.

The WA CA (Martin CJ, McLure P and Murphy JA) unanimously rejected the Town's appeal on liability, upholding the first instance findings in this regard. They also unanimously rejected the appeals against the YMCA, also on the basis found at first instance in respect of causation.

In respect of contributory negligence, Martin CJ in a lengthy review of the authorities found there was no binding authority at appellate level in Australia, either on the common law or on Section 5K of the Civil Liability Act (5R in NSW). He said that the dicta of McHugh J in the High Court suggesting the duty of care at common law in respect of contributory negligence was (except for infants) wholly objective was based on comments in *McHale v Watson* (1964) 111 CLR 384 by Kitto J but which ignored the contrary views supporting a subjective standard for someone with physical and intellectual idiosyncrasies, but objective in the sense of being reasonable conduct of someone in that position, espoused by the other members of the court (McTiernan ACJ, Owen and Menzies JJ). In any event, that case concerned the duty of care owed by a 12 year old defendant, not a case on contributory negligence.

There was nothing in the Ipp Report which suggested the position was any different. There was significant English authority, including at appellate level, suggesting a standard of care that required that which was reasonable for a person in the position of the plaintiff (i.e. with that plaintiff's physical and intellectual infirmities). There was also some Australian dicta to like effect. The other case referred to by McHugh J in the High Court in *Joslyn v Berryman* (2003) 214 CLR 552 was the decision in *Glasgow Corporation v Muir* [1943] AC 448 at 457, which suggested that the test for contributory negligence was a wholly objective one. However, that was not a case involving contributory negligence and in any event, was inconsistent with a line of earlier cases such as *M'Kibban v Corporation of the City of Glasgow* [1920] SC 590 and *Daly v Liverpool Corporation* [1939] 2 All ER 142. He ultimately concluded that there was no authority binding a court to find that a person in the position of the plaintiff required a wholly objective test.

At [156], he noted that the trial judge:

> ... assessed the issues associated with the claim of contributory negligence on the basis that Mr Hodder was a normal able-bodied 23-year-old man, with normal hearing and vision, and of normal intellectual ability. The harshness, injustice and unfairness in this approach is manifest. It assumes a miracle of biblical proportions and requires the court to assess the question of contributory negligence in some parallel universe in which the blind can see, the deaf can hear, the lame can walk or even run, and the cognitively impaired are somehow restored to full functionality.

Martin CJ found that even allowing for the physical deficiencies of the plaintiff alone, there should be no allowance or reduction for contributory negligence. He did not need to decide in this case whether the intellectual deficiencies should additionally be taken into account. In doing so, he applied the approach taken in a common law case in *Russell v Rail Infrastructure Corporation* [2007] NSWSC 402 (Bell J), earlier dicta by Jordan CJ in *Cotton v Commissioner for Road Transport and Tramways* (1942) 43 SR (NSW) 66 at 68-69, the majority dicta in *McHale v Watson* (1966) 115 CLR 199 and on Section 5R (in the NSW CLA similar though not totally identical to 5K of the WA CLA) in *Smith v Zhang* [2012] NSWCA 142, where it was said that it was 'necessary to have regard to the appellant's age, poor sight and physical infirmities'.

McLure P also upheld the plaintiff's appeal in respect of the finding of contributory negligence but on a different basis. The standard of care owed is not determined in a vacuum and physical characteristics within the normal (average) range may at times be relevant in determining what is a reasonable response to a risk. Whilst she did not think that the test was other than objective, in the particular circumstances a finding of contributory negligence was not open on the evidence given that the diving blocks constituted an invitation to dive or jump and it was common for males, both men and boys, to dive and jump from those blocks, notwithstanding that they were a hazard known to the pool but in respect of which there was no appropriate warning to those attending. It was within the range of risk that those attending the pool would include persons with little or no familiarity with diving or swimming and in those circumstances when such a person accepted the invitation constituted by the blocks, there was no contributory negligence.

Murphy JA dissented. He found that until the High Court orders otherwise, the court should follow the dicta of McHugh J in *Joslyn v Berryman* (2003) 214 CLR 552 and find that the test for an adult is wholly objective and

without regard to physical or intellectual infirmity. Although he thought the allowance of 10 per cent contributory negligence was at the lower end of the available range for the trial judge, it was within the range open to him and he would not interfere with it.

Accordingly, the plaintiff succeeded in overturning the finding of contributory negligence (Murphy JA dissenting) and the Town of South Hedland was ordered to pay all other parties' costs. The majority ratio was for no contributory negligence but the majority dicta was for a largely objective test.

Update 12

Occupiers liability

The plaintiff slipped on coloured liquid in a shopping centre operated by the defendant in *Lowe v AMP Capital Investors Ltd & Ors* [2011] QDC 267. Robin QC DCJ was satisfied that although the cleaning schedule required the floor to be cleaned every 26 minutes, there was an available inference (from non-acceptance of the cleaner's evidence) that the liquid had been there for a considerable period and in those circumstances, causation was established. The cleaner accepted that 26 minutes was too long for rotations even though this was the only contractual obligation.

In *Barnes v New Zealand Holdings Pty Ltd* [2011] WADC 208 (Davis DCJ), the plaintiff succeeded after suffering injury through being struck on the head by a falling ceiling panel on entering a department store in Perth. An apprentice electrician was putting electrical cable in the ceiling. The risk was foreseeable and easily avoided by removing the dangerous ceiling panels before carrying out the work. The plaintiff succeeded.

In *Smith v Body Corporate for Professional Suites* [2012] QDC 49 (Robin QC DCJ) the plaintiff stumbled or stepped into a panel of glass adjacent to the front door entry to the plaintiff's place of work. The glass panel accorded with the relevant standards when installed in 1971. In 2000/2001, work on the building entrance included replacing the glass doors with modern safety glass to comply with current Australian Standards. The plaintiff argued that the defendant should also have replaced the old glass panel at the same time. Robin QC DCJ held that when the glass was installed it complied with relevant standards and in the absence of any similar incidents or problems there was no duty on the occupier to replace the glass or undertake an enquiry or audit into its safety.

In *Li Fu v Owners of Strata Plan 75626* [2012] NSWDC 85 (P Mahoney SC DCJ), the plaintiff visited the defendant's premises to undertake maintenance. The security entrance included three glass panels, two of which had markings on them and the third of which did not. On leaving, the area was quite dark and the plaintiff walked into the unmarked glass door and suffered injury. It was held that there was a breach of the duty of care in failing to mark the glass door in circumstances where the lighting was dim and that the plaintiff was not guilty of any contributory negligence.

The plaintiff in *Kemble v Gate Gourmet Services Pty Ltd* [2012] NSWDC 52 (Gibson DCJ), was a labour hire worker employed by Blue Collar Airport Services Pty Ltd and undertaking duties for Gate Gourmet Services Pty Ltd when he attempted to move a heavily laden trolley. The trolley began to fall, the plaintiff grabbed the back of it to try and prevent it falling upon him and suffered a left hand injury. There was evidence that the trolleys were defective.

Gibson DCJ found for the plaintiff, with no reduction for contributory negligence. Liability was apportioned 90 per cent to Gate Gourmet and only 10 per cent to the employer.

The plaintiff in *Nemeth v Westfield Ltd and PT Ltd* [2012] NSWDC 76 (P Mahoney SC), sustained an ankle injury when she slipped and fell in a car park managed by the first defendant and owned by the second defendant. She was wearing sneakers when her left foot caught on a rubber strip attached to a speed bump, causing her to fall. She was walking with her family in the early evening, when it was dark and lighting was poor. The defendant admitted fault but alleged contributory negligence, primarily on the basis that the plaintiff was walking and talking to her children prior to the injury. The plaintiff did not agree that she was not looking where she was going. The onus was on the defendant to prove contributory negligence. Stepping onto a raised traffic speed hump in an area where pedestrians were expected to walk from their cars involved no breach of any duty the plaintiff had to take care for her own safety. It did not reach 'mere inadvertence', let alone constitute contributory negligence.

In *Welch v Graham & Anor* [2012] QDC 103 (Everson DCJ) the 76 year old aunt of the defendants was being escorted from the property by his sister when she slipped on gum nuts lying on steps at the defendants' property. She was using the stairs in a prudent manner and there was a foreseeable risk in that the presence of the gum nuts was known to the defendants but no steps had been taken to remove them. While the duty owed by home owners was not as high as that owed by occupiers of commercial premises, they had nevertheless breached their duty in failing to provide safe access and egress from the premises.

The plaintiff slipped and fell on a step separating a small landing in his employer's workshop area in *MR & RC Smith Pty Ltd T/A Ultra Tune (Osborne Park) v Wyatt [No. 2]* [2012] WASCA 110. There were two narrow steps and there was no handrail. The plaintiff had complained about the steps previously, but there was no significant history of any accident on them. The plaintiff succeeded at trial, where it was held that the stairs even if properly constructed inherently posed some danger. The defendant appealed. The stairs were relevantly compliant with the Building Code of Australia and in the absence of previous accidents, it was not reasonable to require any action by the occupier/employer. The plaintiff ultimately failed.

In *Mawdesley v The Owners of Careening Gardens being Strata Plan 3848* [2012] WADC 103 (Wager DCJ), the plaintiff became a paraplegic when he fell through a skylight of polycarbonate sheeting whilst inspecting a roof. He lived in a block of strata titled units and was asked by the chairman of the body corporate to get on the roof to have a look at the cause of a leak into one of the units. Before he walked across the beige metal sheeting, the plaintiff tested its strength by tentatively placing his weight on it but at some point it gave way and he fell a distance of 2.2 metres. The sheeting upon which he fell appeared similar to the earlier sheeting but was much weaker in strength. The plaintiff had not been on this part of the units before. The plaintiff succeeded on the basis that the chairman of the body corporate would have known of the presence of the skylight and would have been aware of its relative weakness. The plaintiff however, had sufficient experience and skill to know of the need to assess the risk and danger and failed to follow procedures which might have obviated the risk. The plaintiff succeeded with a 50 per cent for contributory negligence.

The plaintiff in *De Pasquale & Anor v Viet Thahn Bakery Pty Ltd* [2012] SADC 121 (Costello DCJ) was a customer in a bakery, who on leaving the store slipped and fell on a puddle which appeared to have been brought in by umbrellas in the rainy weather. There were no mats in place in the store. Contrary evidence by store employees was rejected and the plaintiff succeeded, given that the defendant should have been aware of the potential for the floor to become slippery through rainy weather outside and a non-slip mat and warning sign would have been a reasonable and appropriate response. The plaintiff was awarded damages.

In *Sibraa v Brown* [2012] NSWCA 328, the plaintiff tripped over some welded wire mesh that was lying on the front lawn of the defendant neighbour's house. The plaintiff was in the dark at the time and going barefoot. At first instance the plaintiff succeeded in negligence. The defendant appealed. The plaintiff had been asked to keep an eye on the defendant's children whilst he was working late and it was in doing so that the accident occurred. The plaintiff did not use the concrete pathway but walked on the lawn, forgetting that the steel mesh was there. It was held that the

risk was not insignificant within the meaning of Section 5B of the *Civil Liability Act 2002* (NSW). However, the trial judge was in error in holding that a reasonable person in the defendant's position would have taken the precautions that he identified. See *Neindorf v Junkovic* [2005] HCA 75. See also *Jaenke v Hinton* [1995] QCA 484. Relevant was the fact that whilst the risk of harm was not insignificant, there was a fairly low probability that harm would result. It was relevant that the risk was located on private property and not on the ordinary means of access from the front gate. Most visitors would not use this route. Whilst the plaintiff suffered fairly serious harm, the likelihood was that injury would be much less serious. The burden of taking precautions was fairly slight. The social utility of the activity which created the risk of harm was quite slight. On balance, the defendant did not fail to take reasonable care by leaving the mesh where it was and unlit.

Occupiers liability/prisons

In *Nudd v State of Queensland* [2012] QDC 64 (McGill DCJ), the plaintiff was an inmate at a correctional centre, whose crutch was found to have slipped on water in circumstances where there was no system of inspection of the common area whatsoever. It was held that any system of inspection would have picked up the problem and that the defendant was liable for the plaintiff's injury.

Product liability

In *Drake v Mylar Pty Ltd & Anor* [2011] NSWSC 1578 (Adamson J), the plaintiff was constructing a car port when the joist he was steadying his right foot on failed. The plaintiff said that the joist was labelled Machine Graded Pine 10, which had a particular strength under the Australian Standard 1748. He claimed breach of Sections 52 and 53 of the *Trade Practices Act 1974* (Cth) (TPA) and under Section 75AD of that Act, alleging that the labelling of the beam was misleading and deceptive in that graded pine 10 should not have broken with just his weight on it. Adamson J accepted that the joist had a defect and was in breach of Sections 52 and 53, and the plaintiff succeeded for the purposes of a damages claim under Section 82 of TPA. There was no contributory negligence. The claim under 75AD failed because the defendants were able to satisfy the defence under 75AK that the state of scientific or technical knowledge as at March 2005 meant the defect was not discoverable. Had contributory negligence been available, the trial judge would have reduced the damages by 60 per cent for the plaintiff's failure to take reasonable care for his own safety.

Section 15 *Civil Liability Act 2002*

In *Coles Supermarkets Australia Pty Ltd v Haleluka* [2012] NSWCA 343, Allsop P notes that whether the services are being provided by a gratuitous carer, the hours are to be assessed on the reasonable basis for such a carer and not on the reasonable basis for a paid carer. Thus, where here the husband took seven hours per week but paid care would have taken 5 hours per week, the allowance is calculated on the 7 hours and not as if the 6 hour minimum had not been reached.'

Evidence/costs

In *Egan v Mangarelli & Ors (No. 2)* [2012] NSWSC 1226 (Hoeben JA), it was held that the words 'plus costs as agreed or assessed' made an offer exclusive of costs and therefore effective under UCPR 42.13A. Referring to the conflict on this point between *Old v McInnes and Hodgkinson* [2011] NSWCA 410 and *Vieira v O'Shea (No. 2)* [2012] NSWCA 121, he preferred the latter interpretation, particularly given a number of other decisions in which the latter decision was preferred. If however, he was wrong on that point, then the offer would not amount to a *Calderbank* offer because it did not express itself in those terms.

However, Hoeben JA refused indemnity costs in favour of the defendant because he was satisfied that as at the time it was made and expired, it was most unlikely it would have been approved by the court, being only about 10 per cent of the full value of the plaintiff's claim and given that the weakness in the plaintiff's case only became evident in evidence during the hearing. Given the unlikelihood of approval, this amounted to exceptional circumstances and a special costs order in favour of the defendants was accordingly declined. The defendants were ordered to pay the plaintiff's costs of this application.

Intentional torts - damages

In *WAQ v Di Pino* [2012] QCA 283, the 13 year old female plaintiff was helping out in a barber shop business when she was sexually fondled on two occasions. She attempted

to dissuade the defendant from doing so. She was awarded substantial compensatory damages totalling nearly $150,000, including interest plus costs. On appeal the plaintiff sought aggravated and exemplary damages, which had been refused by the trial judge. The trial judge had found the plaintiff did not suffer psychiatric injury but elsewhere found the plaintiff suffered post-traumatic stress disorder and these findings were irreconcilable. The plaintiff had an unfortunate history, including a disordered home life and she had been the victim of a past sexual assault. It was argued that the trial judge, on issues related to the seriousness of her problems, did not accept the plaintiff as a reliable witness unless corroborated, despite the fact she was not cross-examined on the issue and the material upon which the trial judge relied was of limited weight. The Queensland Court of Appeal was of the view that the issues were sufficiently put and the documentary evidence was a sufficient basis for reservations about the plaintiff's credibility. In respect of aggravated damages, there was no evidence showing increased suffering through the egregiousness of the defendant's conduct. In respect of exemplary (punitive) damages, one of the incidents had resulted in a criminal conviction, and exemplary damages were sought only in respect of the other. However, the law remains that exemplary damages can be awarded only if the sum awarded as compensation was inadequate to punish the defendant. In the circumstances, the appeal was dismissed with costs.

Education/ bullying – section 5D of the *Civil Liability Act 2002* (NSW)

In *State of NSW v Mikhael* [2012] NSWCA 338, the plaintiff was assaulted by a fellow student while attending a State high school. He suffered a serious injury resulting in brain damage. The plaintiff's case was that the school breached its duty of care in failing to provide teachers with information as to the fellow student's propensity to violence, even if provoked by a minor incident. The fellow student had been involved in another serious incident about six weeks before this assault in which he had assaulted another student. The plaintiff succeeded in negligence at first instance. The State of NSW appealed.

Upholding the appeal (Allsop P, Beazley JA and Preston CJ of LEC) accepted that the school failed to comply with its own procedures in failing to disseminate information on the nature and extent of the first incident, and this constituted a breach of its duty to take reasonable care for the safety of the student. However, the onus was on the plaintiff to prove factual causation, which required a determination under Section 5D of the Civil Liability Act of the probable cause of events had the teacher been informed of the fellow student's propensity to violence. It was held that in the case of negligent omissions, 'but for' causation is not made out by the suggestion of a possible outcome should some alternate course have been taken. See *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48. The court had to be satisfied that on the balance of probabilities the precautional relevant step that ought to have been taken would have averted the risk of harm. Even where there is no direct evidence of the necessary causation connection between breach and harm, a court is not precluded from drawing appropriate inferences if the underlying evidentiary basis for doing so is established. However, in this case the plaintiff did not establish that factual causation. The defendant's appeal was upheld with costs.

Update 13

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

In *Sneddon v State of NSW* [2012] NSWCA 351, the plaintiff alleged she was bullied, victimised and harassed by a State Member of Parliament whilst working in his office. She sued the State of NSW. The Speaker of the Legislative Assembly was found liable for modified common law damages under the *Workers Compensation Act 1987* as an employer but the State of NSW was not liable for the conduct of the MP. In the circumstances where there was a default judgment the conclusion was irresistible that the MP's conduct constituted an intentional act done with intent to cause injury for the purposes of s3B of the Civil Liability Act.

Occupiers liability

The plaintiff slipped and fell on grease and oil on the concrete floor of the second level of the car park in Australia Square Tower in *Jones Lang LaSalle (NSW) Pty Ltd v Taouk* [2012] NSWCA 342. The grease and oil had escaped from a container inside a grease trap room at one end of the car park. The plaintiff was walking to his car on a Saturday night. The plaintiff succeeded at first instance before Delaney DCJ against property management services and the car park manager. Both appealed. Delaney DCJ had found that a reasonable inspection regime on a Saturday night would have involved an inspection at least once every 30 minutes and that the property manager was in breach of its duty of care. He also found that the manager of the car park was in breach of duty in failing to require the property management service to have such a system. It appears that the property manager was aware that the alarm system for grease overflow was defective. There was evidence suggesting that, on the probabilities, the spillage occurred between 8.00 pm and 10.00 pm rather than between 10.00 pm and when the accident occurred at about 10.45 pm. In those circumstances, the primary judge was entitled to conclude that a system of inspection of at least once every hour would probably have prevented the accident. A reasonable person in the position of the car park manager would have required such an inspection regime. Accordingly, the appeals failed, as did a complaint about the apportionment, 70 per cent to the property manager and 30 per cent to the car park manager.

Choice of law

In *Strike v Fiji Resorts Ltd & Anor* [2012] NSWSC 1271 (Beech-Jones J), the plaintiff was a guest in a Fijian resort. She slipped on terracotta tiles in light rain while wearing thongs when walking down a stairway outside the hotel complex. She weighed about 125 kilos. Following the accident, rubber mats were put on the steps and plastic signs put up saying, 'Slippery when wet'. The plaintiff denied a suggestion she had been consuming alcohol and asserted that she was being careful and using the handrail. Both parties were content to apply the law of NSW rather than prove the applicable law of Fiji on liability or damages. Beech-Jones J accepted the plaintiff's version of events and found a verdict for the plaintiff under the NSW CLA with no reduction for contributory negligence.

Dust diseases

In *Jones v Southern Grampians Shire Council* [2012] VSC 485, the plaintiff died in 2012 as a result of contracting mesothelioma from dust from the work clothes of her husband. He had been employed by James Hardie, and the plaintiff had settled her claim against that firm. James Hardie sought contribution against her husband's employer, the Shire of Dundas. In the Victorian Supreme Court, J Forrest J found there was fault on the part of the employer, which through inertia had no actual knowledge of the risks posed to family members but did know (because it supplied protective clothing) that there was a risk to workers. Advice should have been given to protect family members. It was held that liability should be apportioned 65 per cent to James Hardie and 35 per cent to the Shire Council.

Occupiers liability and section 42 *Civil Liability Act 2002* (NSW)

In *Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserves Trust v Thompson* [2012] NSWCA 340, the plaintiff sued for damages after a serious fall while descending steps on a Victorian era rotunda in a park in Bathurst. The plaintiff succeeded and was awarded damages before Nicholson SC DCJ. The Council appealed. Whilst the rotunda was a heritage item, the trial judge held that it had not been established that measures could not have been taken to make a worn and slippery step safer. The appeal also complained of a failure to apply s 42 of the Civil Liability Act

in respect of the cost and means of the Council. However, no evidence was adduced to support that proposition and the proposition that a judge should find that there were limitations in respect of financial and other resources could not be established without an evidentiary basis.

The mere fact that there was no evidence of previous injuries did not establish that there had or had not been a history of such injuries but was merely neutral on the subject. An anti-skid strip on the nosing of the step and maintaining the tread in an appropriate condition would have been likely to inhibit the skidding left foot which led to the fall. The appeal on liability was dismissed subject to a minor variation on damages.

Sections 3 and s 4 *Motor Accidents Compensation Act 1999* (NSW)

In *Cobcroft v Aggcon Pty Ltd & Anor* [2011] NSWSC 1287; (2012) 61 MVR 391 (Fullerton J), the plaintiff was employed by a civil construction and earthworks company (first defendant). The second defendant was a subcontractor of the employer. In the process of constructing an evaporation pond, a front-end loader was hired by the employer and modified by the second defendant by fitting a forklift. The plaintiff was driving the forklift transporting rolls of plastic on a bank when the loader tipped on its side, causing the plaintiff to collide heavily with the cabin wall. He sued both defendants. The employer denied that it was an owner and said even if it was a deemed owner, it was not the use of the vehicle that caused the injury but the second defendant's modification and an unsafe system of work from the second defendant. As to the second defendant, the plaintiff said he was given inadequate instruction and the system of work was therefore unsafe. Fullerton J found for the plaintiff against the first defendant under the *Workers Compensation Act 1987*. The vehicle was not owned by the first defendant and it was not a deemed owner under s4 (three months hiring). However, the employer had breached its non-delegable duty of care by the acceptance of the second defendant's choice of an inappropriate vehicle to conduct the work and the first defendant was aware of the modification. The second defendant's choice of vehicle and failure to provide any instruction in its use resulted in a foreseeable and not insignificant risk of injury, which came to fruition. In the circumstances, the second defendant was 75 per cent liable and the first defendant/employer was 25 per cent liable. The claim did not arise out of the use of a motor vehicle within the meaning of s3 of *Motor Accidents Compensation Act 1999*.

Trip and Fall – s 45 of the *Civil Liability Act 2002* (NSW)

In *Pamela Latham v Botany Bay City Council* (E Olsson SC DCJ unreported 8 November 2012), the plaintiff and her partner were walking along a street in Botany when she tripped on a footpath surface comprising bricks or brick pavers. It was 4.00pm and daylight, although part of the footpath was in the shade. She says that without warning she tripped on a raised paver and fell heavily, suffering injury. It was noted the next day that there was a line or lines of yellow paint on the pavers around the tree where she fell. The Council's files revealed a number of letters and emails of complaint in the general vicinity, to the effect that the footpath in numerous places was uneven and potentially dangerous to walk on. The accident occurred on 12 April 2011 and the range of complaints was from 2004. The complaints included a number of reports of people tripping on lifted or broken footpaths. An arborist indicated that several pavers appeared to have been lifted by street tree roots. The Council's main defence was the non-feasance defence under s45 of the Civil Liability Act. This requires that the authority have actual knowledge of the particular risk. The plaintiff bears the onus. The defendant relied on *Roman v North Sydney Council* [2007] NSWCA 27, arguing that the person responsible for repair of the works had to have personal knowledge of the risk or potential of the harm, and in this case the person responsible was the works manager. The absence of evidence from the Council suggested that it had not been proactive in relation to inspections or maintenance. The Council led no evidence on the question of its budget or the cost but the trial judge was satisfied that a reasonable person would consider that the taking of precautions was fundamental to the provision of safe footpaths. Olsen SC DCJ rejected the contention that the works manager had to have personal knowledge of the precise paver and its danger. The Council knew of the general risk and knew of pavers in this vicinity that presented

a danger and in respect of which there had been falls and complaints over many years. This accident was the result of the materialisation of that risk. The defendant did not establish that the plaintiff was not keeping a proper lookout and the mere fact that she did not see the raised paver was not evidence of such a failure. The defence based on obvious risk failed. If, however, the plaintiff had been looking at the footpath with greater care, she would probably have noticed it, and it was held a reduction of 15 per cent for contributory negligence was therefore appropriate.

Update 14

Vicarious liability – intentional torts

In *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56, at issue was who if anyone was liable for alleged acts of sexual and physical abuse of children at a residential institution for boys in need of care operated by the De La Salle Institute known as Brothers of the Christian Schools and operating as St William's School. The appeal to the English Supreme Court required a review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse alleged to occur between 1958 and 1992. 'The Middlesbrough Defendants' took over the management of the school in 1973 and inherited the previous liabilities. They contracted four Brother teachers as employees. They were held vicariously liable for acts of abuse by those teachers and did not challenge this in the Supreme Court. However, they challenged the judge's finding that the De La Salle Defendants were not vicariously liable, a position confirmed in the Court of Appeal.

A similar issue had arisen in *McE v De La Salle Brothers* [2007] CSIH 27; 2007 SC 566, where a test case was brought against a De La Salle brother in respect of alleged abuse at a school in Scotland. The Court of Session held there was no basis upon which the allegation of vicarious liability on the part of the De La Salle Institute could succeed and the claim was dismissed.

After control of St William's was handed over by De La Salle to the Middlesbrough Defendants, the latter continued to use a diminishing number of De La Salle brothers as teachers and to allow the De La Salle Institute to designate a brother to act as headmaster. One such headmaster, Brother James, was expelled from the post of headmaster in 1990 due to systematic sexual abuse of the boys in his care. Ultimately, the Institute disengaged from the school and it finally closed in 1994.

Lord Phillips (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed), noted the views on vicarious liability expressed by the Court of Appeal in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 and the 'impressive leading judgment of Ward LJ'. [19]. The following propositions were said by Lord Phillips to be well-established.

- It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.
- One defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.
- Vicarious liability can even extend to liability for a criminal act of sexual assault. *Lister v Hesley Hall* [2001] UKHL 22; [2002] 1 AC 215.
- It is possible for two different defendants to be each vicariously liable for the single tortious act of another defendant.

There were two issues in the case before the Supreme Court. The first was whether the relationship between the De La Salle Institute and the brothers teaching at St William's was one capable of giving rise to vicarious liability. The second was whether the alleged acts of sexual abuse were connected to that relationship in such a way that gave rise to vicarious liability.

At first instance and in the Court of Appeal, it was held

that the relationship was sufficiently close to make the Middleborough Defendants liable but the De La Salle Defendants not. The Middleborough Defendants' case was that this was in error and the De La Salle Institute should also have been held vicariously liable. The Middleborough Defendants argued that the closeness of the relationship between the brothers and the Institute and the fact that the brothers were sent out to further the object of the Institute, namely to teach boys and the associated risk of sexual abuse, sufficed to make the Institute vicariously liable.

Lord Phillips said that it seemed more realistic to view the brothers of the Province who were from time to time responsible for the area in which St William's operated as a relevant unincorporated association rather than the order as a whole, but doubted it made any practical difference.

The relationship that gives rise to vicarious liability is overwhelmingly that of employer and employee, and there is no difficulty in identifying policy reasons why such a relationship gives rise to vicarious liability when the criteria are satisfied:

- The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
- The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
- The employee's activity is likely to be part of the business activity of the employer;
- The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
- The employee will, to a greater or lesser degree, have been under the control of the employer.

However, the brothers who taught at the school were not contractually employed by the De La Salle Institute, rather they were employed by the Middleborough Defendants.

> [47] Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'. That was the approach adopted by the Court of Appeal in JGE.

In *JGE*, Ward LJ (Davis LJ concurring) concluded that the relationship of the Bishop and the priest was so close in character to one of employer/employee that it was 'just and fair to hold the employer vicariously liable'. He was accountable to the Bishop and the Roman Catholic Church relevantly looked like a business. [50].

The relationship between teaching brothers and the Institute had 'many of the elements, and all the essential elements, of the relationship between employer and employees':

- The Institute had a hierarchical structure and acted as if it were a corporate body.
- The teaching activity was undertaken because the Provincial directed the brothers to undertake it.
- The teaching activity was in furtherance of the objectives/mission of the Institute.
- The brother teachers were obliged to conduct themselves as teachers in accordance with the Institute's rules.

However, the relationship differed, as:

- The brothers were bound not by contract but by their vows.
- Instead of the Institute paying the brothers, the brothers were by deed obliged to transfer all their earnings to the Institute and the Institute then catered for the brothers' needs.

Lord Phillips said that neither of those differences was material and indeed, they rendered the relationship between the brothers and the De La Salle Institute closer than that of an employer and employee. Accordingly, Lord Phillips held that the relationship between the teaching brothers and the Institute was sufficiently akin to that of employer and employees to satisfy stage one of the test of vicarious liability.

The second stage relates to the connection between the brothers' acts of abuse and the relationship between the

brothers and the Institute. Here it was argued that sexual abuse can never be a negligent way of performing duties under an employment-like relationship. Lord Phillips referred to the close connection test in *Bazley v Currie* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* (1999) DLR (4th) 71 in the Canadian Supreme Court. That court returned to the issue in *John Doe v Bennett* [2004] 1 SCR 436, where a Roman Catholic priest had sexually assaulted boys in his parishes. At issue was whether the Diocesan Episcopal Corporation Sole was vicariously liable given the priest was not employed by the Corporation Sole or the bishop. The relationship was held 'akin to an employment relationship' on the basis that the bishop provided the priest with an opportunity to abuse his power, this opportunity being incidental to the functions of a parish priest. In *Blackwater v Plint* (2005) 258 DLR (4th) 275, the Supreme Court held the Government of Canada and the United Church of Canada vicariously liable for sexual assaults committed by a dormitory supervisor in a school which they jointly managed and controlled.

In *Lister v Hesley Hall Ltd* [2002] 1 AC 215, the House of Lords took a similar view, applying the close connection test and noting the sexual abuse was 'inextricably interwoven' with the warden's duties at the school. In a commercial context, the House of Lords took a similar view in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, where dishonest conduct by a solicitor was held to involve the firm in liability because such conduct was part of the risk of the business.

A similar view was taken by the Privy Council in *Bernard v Attorney General for Jamaica* [2004] UKPC 47; [2005] IRLR 398. A different Privy Council Board in *Brown v Robinson* [2004] UKPC 56, considered that risk, while it might be a strong policy consideration, was not a criterion of vicarious liability. However, the House of Lords in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34 stressed that the creation or augmentation of risk was relevant to the doctrine of vicarious liability.

In *Maga v Archbishop of Birmingham & Anor* [2010] EWCA Civ 256; [2010] 1 WLR 1441, the Court of Appeal held the Birmingham Archdiocese of the Roman Catholic Church vicariously liable in respect of sexual abuse committed by a priest 'employed' by the Archdiocese upon a boy who was not a Catholic, although the grooming which preceded the abuse occurred in the course of youth work for the benefit of Catholics and non-Catholics alike.

Lord Phillips referred to the leading Australian authority of *NSW v Lepore* [2003] HCA 4; 212 CLR 511, where the issue was whether a school authority could be vicariously liable for sexual assault committed on a pupil by a teacher and described this as having 'shown a bewildering variety of analysis'. Only Gleeson CJ and Kirby J clearly followed the Canadian and English approach.

Lord Phillips said that:

> Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
>
> …..These are the criteria that establish the necessary 'close connection' between the relationship and abuse.'

Lord Phillips did not think that risk was merely a policy consideration and not one of the criteria. Creation of risk is insufficient of itself but is always likely to be an important element in the facts giving rise to such liability.

In this case, both the necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school were made out. The relationship between the brothers and the Institute was closer to that of employment than that between the priest and bishop in *JGE* and the relationship between the Institute and brothers allowed the Institute to place the brothers in the positions they held in the school where there were 'vulnerable boys'. They were vulnerable because they were children at school, vulnerable because they were virtually prisoners in an approved school and vulnerable because their personal histories made it unlikely that they would be believed if they complained. Abusing the boys in their care was diametrically opposed to the objectives of the Institute but paradoxically, that fact was a part of the necessary close connection between the abuse

and the relationship between the brothers and the Institute that gave rise to vicarious liability.

In the end:

> This is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesbrough Defendants vicarious liability for the abuse committed by the brothers.

Reconsideration of the relevant Australian law in this area and the issues raised in *Lepore*, *Ellis* and *PAO* would seem only to await a suitable test case.

Update 15

Section 26B *Civil Liability Act 2002* (NSW)

The plaintiff was assaulted whilst in prison and the defendant admitted both duty of care and breach in *Michael v State of NSW* [2011] NSWSC 231 (2011) 81 NSWLR 1. However, the defendant alleged that the plaintiff's neurological and psychiatric condition had resulted from drug abuse and his past injuries. The defendant also relied upon the s 26C Civil Liability Act defence, limiting recovery by an offender in custody.

As to the threshold, the plaintiff was assessed by two approved medical specialists under s 26D of the Civil Liability Act and the defendant appealed against the medical assessments. An appeal panel revoked both certificates and issued new certificates, finding a WPI of 28 per cent. Section 326 of the *Workplace Injury Management and Workers Compensation Act 1998* relevantly provided that a medical assessment certificate was to be presumed to be conclusively correct in any court proceedings as to the degree of permanent impairment. However, it was held by Fullerton J that the issue of factual causation in s 5D was reserved for determination by the court and the conclusive effect of the medical certificate under s 328 of the *Workplace Injury Management and Workers Compensation Act 1998* was limited to the specific matters set out in s 326(1) of that Act. The assessment of permanent impairment was only conclusive upon a finding of liability by a court or as agreed by the parties and for the purpose of establishing the threshold requirement of s 26C of the Civil Liability Act. A medical assessment certificate will be conclusive as to the cause of relevant impairment only if the court is satisfied that the injuries were caused by the defendant's breach of duty of care. The appeal panel's findings did not give rise to an estoppel in respect of the issues it was required to determine, including causation, as the court is not bound by a medical assessment certificate if it makes findings which differ from those upon which an appeal panel has relied in preparing its certificate.

Update 16

Nervous shock/employment

In *Winbank v Casino Canberra Ltd* [2012] ACTSC 169 (before Master Harper) the plaintiff was employed by the defendant as a croupier. As a result of misconduct by clients, which should have been anticipated by the employer given the plaintiff's known history, the plaintiff suffered nervous shock and the employer was held liable.

Choice of law

In *Pocock v Universal City Studios LLC* [2012] NSWSC 1481, the plaintiff was on a tour of Universal Studios in California when she slipped and fell. She commenced proceedings in New South Wales and without filing a defence, the defendant moved to set aside the proceedings on the basis that they should be conducted in California. The plaintiff returned to Sydney shortly after her injury and the vast majority of the medical evidence was in Sydney. The defendant alleged that it would need to call between four and five lay witnesses domiciled in California and an expert in Californian personal injury law, who was also domiciled in the United States.

Finding that the claim was partly founded on damage suffered in the State, Hulme J held that New South Wales was not a clearly inappropriate forum merely because a New South Wales court would need to apply Californian law.

Offer of compromise/ Calderbank Letters/ costs generally

The appeal in *NSW v Williamson* [2012] HCA 57 concerned the question of cost fixing law in New South Wales in certain personal injury damages matters. The questions which arose were 'does the claim for personal injury damages include a claim for personal injury damages based on an intentional tort?' and 'does this include a claim for damages for false imprisonment?' Division 9 of Part 3.2 of the *Legal Profession Act 2004* (NSW) applies to restrict plaintiff's costs if damages do not exceed $100,000. The High Court held that whether the claim is framed in negligence or as an intentional tort, the restrictions on recovery of damages apply, contrary to the conclusion reached in the NSW Court of Appeal (Section 338(1)).

However, the Court of Appeal was right to hold that the costs limiting provisions did not apply in this case because the damages were both for trespass to the person and false imprisonment. As no part of the lump sum settlement could be attributed to one or the other, it is not possible to say of the amount recovered that it was recovered on a claim for personal injury damages and accordingly, because of the false imprisonment element, the restrictions on costs recovery had no application. See also *Certain Lloyds Underwriters Subscribing to contract No. IHOOAAQS v Cross* [2012] HCA 56, which was heard at the same time.

Evidence and procedure

The plaintiff in *Barden v Seric* [2012] NSWSC 1480 sued for damages for personal injury suffered in a motor accident. As there was unlimited jurisdiction in the District Court, the defendant contended that there were no complex legal issues and the case should be transferred from the Supreme Court to the District Court. The plaintiff however argued that there were complex legal issues in the assessment of damages for economic loss. The assessment of damages between the plaintiff and his wife in a partnership, including a claim for lost opportunity, did not, in the view of Hulme J, involve any complex legal issues and in the circumstances, the case should be transferred to the District Court with an order against the plaintiff for the costs of the application.

In *Jones Lang Lasalle (Vic) Pty Ltd v Korlevski* [2012] VSCA 305, an appeal from the decision of the trial judge was dismissed in favour of the plaintiff in a stair-slipping case. It was said that on the appeal the appellant attempted to run a new case and should not be permitted to do so, as there were no exceptional circumstances to justify it.

Duty of care and liability of police

The ACT Court of Appeal held in *ACT v Jonathan Anthony Crowley and the Commonwealth of Australia and Glen Pitkethly* [2012] ACTCA 52 that police did not owe a duty of care in circumstances where the plaintiff conceded that the police officer was not negligent in the discharge of a weapon, overturning the decision at first instance, There is a helpful summary of the cases limiting the liability of police officers as a matter of public policy commencing at [274-301]. When the constables came upon the plaintiff, they owed him no duty of care in apprehending him. While there is authority for the proposition that in certain circumstances the police will be liable if they assume responsibility for a

particular member of the public or a special relationship arose, that was not the case here. In any event and on the facts, it was held that, even if there was a duty of care, it was not breached in this case.

Occupiers liability

In *Plaskitt v Pittwater Council* [2012] NSWSC 1356 the plaintiff fell on the uneven surface of concrete footpath and sued Pittwater Council (which was responsible for the repair of the footpath) and the owners of the land on which the footpath was situated for damages. The extent of the height difference between slabs was not clearly established but there was some evidence of repair work by the Council, even though this occurred on someone else's land. The risk was foreseeable and not insignificant. However, a reasonable person in the position of either defendant would not have taken precautions because the risk was obvious in respect of the assumed 25mm height differential. In any event Rothman J was not satisfied that the Council repairs were a cause of the problem and the injury.

In *Bathurst Regional Council as Trustee for the Bathurst City Council Crown Reserve Trust v Thompson* [2012] NSWCA 340, the Court of Appeal (other than for a modest change in respect of damages) rejected an appeal against the liability of Bathurst Council in respect of an injury to the plaintiff, who slipped on steps on the rotunda in a Council park.

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

The plaintiff suffered injury on a gravel track on a farm in *Chen v Caldieraro* [2012] NSWSC 1409. The gravel track was wholly within the farm but there were no fences, gates, grits or signs restricting access. It was submitted that the farm was open to the public for delivery trucks and that people would use the track for access from time to time. Price J held that there was no invitation to the public to access the area and that members of the public did not enter the farm or use the gravel track, and that accordingly it was not 'opened to or used by the public' so as to constitute a road or road-related area pursuant to section 33 (3A).

Costs

In *Orcher v Bowcliff Pty Ltd* [2012] NSWSC 1429, Harrison J held that there was no conflict between a requirement that an offer must be made exclusive of costs and an offer that is expressed in terms of a particular sum plus costs as agreed or assessed. Unless an offer is otherwise expressed to take effect as a *Calderbank* offer, it does not have that effect.

Interrogatories

Davies J considered an argument by counsel that interrogatories allowed by the Registrar were excessive and went further than the pleaded matters in dispute in *Lee v Carlton Crest Hotel (Sydney) Ltd* [2012] NSWSC 1392. Davies J was satisfied that special reasons for permitting interrogatories were justified and that they were 'necessary' in the interests of a fair trial. Some interrogatories were allowed and others refused. Each party was ordered to pay its own costs.

Expert evidence

In *Barescape Pty Ltd v Bacchus Holdings Pty Ltd & Anor* [2011] NSWSC 1002 it was noted that UCPR 31.26 provides for a joint report between experts which 'may be tendered at trial as evidence of any matters agreed'. A party sought to tender two 'joint reports' together with two memoranda, each prepared by one of the experts. In response, it was argued that their conclusions were inadmissible. The tendering party contended that UCPR 31.26 made the material admissible regardless. Rejecting the tender, Black J said that in his view UCPR 31.26 is permissive and not mandatory and the material in them which emanated from one of the expert's report was upon its face likely to be wholly or substantially inadmissible in its present form.

Fund management

In *Workers Compensation Nominal Insurer v Luke* [2011] NSWCA 251, an award of damages was made which fell within Section 151G of the *Workers Compensation Act* 1987. That section relevantly provides that the only damages that may be awarded are 'damages for future economic loss due

to the deprivation or impairment of earning capacity'. In the District Court the sum awarded included the cost of managing the fund, including after the plaintiff's retirement age. Section 151IA provides, 'The court is to disregard any earning capacity of the injured worker after age 65'. The insurer appealed against any award of fund management, against the award of fund management after the age of 65 and against the amount awarded for managing the fund, including the cost of management itself.

The Court of Appeal held that s151IA did not prohibit fund management after a person reached 65 as the award was not based on earning capacity after that date. An award of lump sum by way of compensation was due to the deprivation of earning capacity, and fund management was available on it. There should be no allowance after a person's life expectancy on the appropriate tables.

Update 17

Medical negligence

In *Almario v Varipatis (No. 2)* [2012] NSWSC 1578, Campbell J extended time in which to sue and found for the plaintiff. The plaintiff is suffering from terminal liver cancer. It was argued that his general practitioner should have been more proactive in treating the early stages of liver disease by emphatically addressing the plaintiff's morbid obesity. The defendant had a particular interest in nutritional and environmental medicine, and it was argued that the GP wrongly represented to the plaintiff that his problems related to toxic exposure in the workplace.

Campbell J, quite independently of any advice from the defendant, found that the plaintiff developed the belief that many of his problems related to industrial toxin exposure. Significant parts of the plaintiff's evidence were rejected not because they were intentional falsehoods but because he was subjectively unreliable. Although the initial contact with the doctor related to toxic exposure, the relationship soon developed into the ordinary doctor/patient relationship.

When the plaintiff first saw his doctor he knew he was heavily obese with attendant complications of diabetes and hypertension. The defendant knew the plaintiff had fatty liver disease and diabetes with the possibility of cirrhosis and liver cancer. Those risks were reversible if the patient lost weight. Campbell J accepted that it was incumbent on a GP to do more than merely point out the risks and counsel weight loss. The alternatives were referral to a clinic, such as an obesity centre, or bariatric surgery. Campbell J was satisfied that a reasonable general practitioner would refer a patient in this plaintiff's position to a bariatric surgeon for consideration of surgery. It would be negligent not to do so. It was also negligent not to have referred him to a specialist in obesity management and assist in making an appropriate appointment. The plaintiff should also have been referred to a hepatologist or similarly qualified physician in relation to treatment of his liver condition.

The surgeons were in agreement that had the plaintiff successfully undergone bariatric surgery in time, it was more likely than not that he would have avoided progression to cirrhosis, liver failure and liver cancer. Campbell J was satisfied that had surgery been offered, it would have been accepted and he would then not have progressed to cirrhosis and liver cancer. However, because of the plaintiff's history of inability to maintain weight loss in the past, Campbell J thought that reference to an endocrinologist or even a specialised obesity clinic would have been unlikely to be successful. The plaintiff succeeded therefore on one ground only.

In regard to the known risk through obesity, Campbell J found contributory negligence to the extent of 20 per cent in failing to adhere to the opportunities presented to lose weight.

Campbell J was satisfied that the plaintiff was not aware of the nature and extent of his injury, entitling him to an extension of time, given that he only received the diagnosis of liver cancer in 2011. In any event, he was unaware of the connection between his personal injury and the defendant's act or omission until he received legal advice in March 2012.

The assessment of damages was reduced both for severely diminished life expectancy and for some significant risk from the surgery which should have been undertaken. Damages of almost $365,000 plus costs were awarded. It is understood that an appeal is likely.

Update 18

Duty of care/intentional injury

Police pursued the plaintiff from the street onto hospital grounds, where he fell and injured himself in *Dowse v NSW* [2012] NSWCA 337. At issue was whether there was any proper basis for the pursuit and whether there had been negligence on the part of the police involved. The police did not intend to arrest the plaintiff, however the Court of Appeal concluded that the plaintiff's flight was a choice he made in the absence of any unlawful threat and that, after he had entered upon enclosed lands, there was then a basis for pursuit. The plaintiff's appeal was dismissed.

Sections 73, 81 and 96 of *Motor Accidents Compensation Act 1999* (NSW)

In *Gudelj v MAA of NSW* (2011) 81 NSWLR 245 (NSW CA), the plaintiff gave notice of claim to his insurer almost 2½ years after the accident. Section 72 required notice to be given within six months, but Section 73 provided that a late claim could be made if a claimant gave a full and satisfactory explanation for the delay. The insurer rejected the claim on the basis that it was late and that there was no full and satisfactory explanation. However, it gave no notice under Section 81, which required the insurer to give written notice as expeditiously as possible whether the insurer admits or denies liability for the claim within three months after notice of the claim was given. If the insurer fails to comply, the insurer is taken to have wholly denied liability for the claim. Under Section 96, the claimant applied for a special assessment of the question whether a late claim could be made under Section 73. Section 96 relevantly provides that a dispute over whether Section 73 has been satisfied is to be referred to a claims assessor. A CARS assessor decided that the claimant was not entitled to make a late application as his explanation was not full and satisfactory. Before this, the claimant had made an application for general assessment, seeking exemption from assessment because the insurer had denied liability. The principal claims assessor concluded that the claim could not be exempted as the insurer had not issued a Section 81 notice. At first instance, the claimant's application for judicial review was dismissed. The claimant then sought leave to appeal against that dismissal. Granting leave to appeal and allowing the appeal, the Court of Appeal held that where an insurer had not lost the right to reject a late claim, a claimant who is subject to an adverse determination under Section 96 was not prevented from having the issue of whether he or she had given a full and satisfactory explanation for the delay in making a claim determined by the court.

The duty of an insurer to comply with Section 81 applied in respect of late claims and not merely claims in time.

As a result, the insurer should have complied with Section 81 and the failure to do so meant that the insurer was deemed to have rejected the claim. That meant that a certificate of exemption could have been issued.

The intention of the legislature was that claimants should as a last resort have recourse to the courts to determine their rights under the Act and they should not generally be shut out of an arguable claim before the courts by reason of an assessment under Section 96.

The decision of the principal assessor was quashed and mandamus required the MAA to exercise its power according to law. The insurer was ordered to pay the claimant's costs of the proceedings below and on the appeal, and the Court dismissed the insurer's application for leave to cross-appeal.

Res ipsa loquitur

In *Mansi v O'Connor & Ors* (2012) 62 MVR 143 (Ann Lyons J) [2012] QSC 336, a cement truck discharged a quantity of slurry as it went around a corner. The plaintiff, following on a motor cycle, slid in the concrete, which caused him fall and suffer injury. Whilst he identified the vehicle as a ready mix truck, he was unable to ascertain the particular vehicle. He sued a number of potential defendants from that company. It was held that the plaintiff was injured in the manner he described and, by a process of elimination, Her Honour was satisfied that on the balance of probabilities the first defendant was the more likely vehicle to have been involved. There was judgment against the first defendant.

Update 19

Section 5D *Civil Liability Act 2002* (NSW)/ liability for the acts of third parties/ occupiers liability/acts of third parties

In *Bainbidge v James* [2013] VSCA 12, the plaintiff was employed by the first defendant in a shopping centre operated by the second defendant to play the role of Santa Claus. Whilst returning to his rooms to change, he was assaulted by a teenager. At first instance, he succeeded against the employer but not against the occupier. The employer appealed, as did the plaintiff. The Victorian Court of Appeal found that, in the absence of a history of danger, the risk of being assaulted was 'far-fetched and fanciful', the Victorian CA found against the plaintiff in respect of both defendants. Even as regards the higher duty owed by an employer, the duty was still only to 'exercise reasonable care, not to warrant safety'.

Sections 5B and 5D *Civil Liability Act 2002* (NSW) / duty of care for acts of third parties / occupier duty to third parties

The plaintiff was a customer approaching automatic sliding doors at the entry to a Harvey Norman store in *Lesandu Blacktown Pty Ltd v Gonzalez* [2013] NSWCA 8. As the doors opened, two young men rushed through, one of them knocking the plaintiff over, causing significant injury. The youths were fleeing after attempting to obtain electrical goods with false identification papers after the falsehood had been detected. The plaintiff relied upon two additional circumstances to support his claim in damages. A member of staff in the electrical department, suspecting the fraud, activated a mechanism locking the doors. A salesman in the furniture department, seeing the plaintiff standing outside the door and not knowing why it had been locked, released the device so he could enter, allowing the youths to escape and knock the plaintiff over. At first instance, Charteris DCJ found for the plaintiff and awarded him damages.

On appeal, the plaintiff failed. The possibility of fraud in a retail store may readily be foreseen. No relevant duty of care was established. Even if there were a relevant duty, the plaintiff failed to establish steps which would have reduced the risk of injury in a practical sense. The relationship was not one giving rise to a duty so as to distinguish it from *Modbury Triangle*. It was distinguishable from the duty owed in *Adeels Palace*, where the occupier of licensed premises owed a duty to take reasonable care, including the prevention of injury to patrons from others' violent or disorderly conduct. There were no such features in the present case, nor was there evidence of previous similar incidents in this or other stores. Accordingly, what occurred was not highly likely, foreseeable or predictable. There was no evidence of a more appropriate 'security system' and what it would have achieved.

In *Orcher v Bowcliff Pty Ltd* [2012] NSWSC 1088, before Harrison J, the plaintiff was a patron at a hotel, where he was assaulted by the second defendant, an employee of the hotel licensee, the first defendant. The plaintiff had left the hotel and then engaged in an argument across the street with another person. The second defendant intervened and punched the plaintiff. The plaintiff succeeded against both defendants. Relevantly, the first defendant breached its duty by failing to take steps to intervene in the disturbance or prevent the second defendant from doing so. The first defendant's security employees had the capacity to control the second defendant and prevent him from assaulting the plaintiff. Their failure to control the second defendant was the foundation of the breach of the duty of care.

Update 20

Section 109 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was injured whilst visiting Australia from South Korea in *Lyu & Anor v Jeon* (2012) 62 MVR 409 [2012] NSWCA 446. The defendant accidentally drove over her right foot and lower leg, causing her significant injury. To protect him, she told everyone and made an insurance claim on the basis that the injury occurred while falling down stairs. The defendant's family paid some of her expenses. When those payments ceased, she sought leave to give notice under Section 72 outside the six-month period and to then commence proceedings outside the three-year period under Section 109. The primary judge found her explanation was full and satisfactory. Allowing the appeal, the Court of Appeal said that the 'conclusion involved an evaluative judgment. It remained one of fact to which the need to demonstrate errors of a discretionary kind did not apply'. A reasonable person in the plaintiff's position would not have persisted in the untruth and delay and would have notified the insurer.