CLPU
COMMON LAW PRACTICE UPDATES

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Update 21

Section 3B *Civil Liability Act 2002*

In *Withyman v NSW and Blackburn; Blackburn v Withyman* [2013] NSWCA 10, the plaintiff (Withyman) sued his former school teacher (Blackburn) for a sexual relationship she had with him whilst he was a pupil in her class at a special care school in country NSW. The plaintiff turned 18 shortly after the relationship began. Blackburn was found liable to Withyman and appealed. Withyman failed against the defendant's employer (NSW) and appealed in this regard.

Withyman's claim against Blackburn was held to be a liability in respect of an intentional act that is other sexual misconduct so that the damages were assessed at common law under s 3B of the *Civil Liability Act*. Modest aggravated and exemplary damages were awarded.

Blackburn's appeal was held to fail, save for an error by the trial judge in failing to deal with a limitation defence. Accordingly, a new trial restricted to the question of a limitation defence/extension of time issue was ordered. The trial judge was entitled to treat this as a matter falling outside the *Civil Liability Act* damages provisions under s 3B. Accordingly, and despite Blackburn merely being negligent, she fell within the definition of 'other sexual misconduct'. No general new trial was justified. In respect of Withyman's appeal against NSW, leave was required and not granted. There was insufficient evidence of negligence by NSW. In respect of vicarious liability, it was assumed that the guiding principles were as set out in *NSW v Lepore* [2003] HCA 4; 212 CLR 511.

Section 5L *Civil Liability Act 2002*

The plaintiff was a student pilot in *Campbell v Hay* [2013] NSWDC 11 (Marks ADCJ). He flew a light aircraft owned by the defendant, who was instructing him. During the course of the lesson, the aircraft engine stopped and the defendant took over. It was alleged that as a result of a number of errors, including landing at an excessive speed and other decisions in relation to attempting to restart the engine, the defendant was negligent. The defendant succeeded with a defence that his negligence was an obvious risk of a dangerous recreational activity. That was so even though the chance of negligence occurring was said to be a 'low probability'. This is a somewhat surprising outcome in that, if correct, it would mean that fault on the part of a defendant, however unlikely, was always a risk and there could never be responsibility for it.

Limitation periods/extension of time

In *Baggs v University of Sydney Union* [2013] NSWSC 152 (Fullerton J) the plaintiff, employed by the University as a clinical psychologist, fell down a flight of stairs in the Wentworth Building during a fire drill whilst there for a scheduled medical appointment, suffering significant injuries. In her Workers Compensation Accident Report, the plaintiff said 'I believe the University Union was negligent - did not maintain a safe environment.'

The plaintiff subsequently received legal advice recommending against a common law claim against her employer. She accepted that advice at the time but ultimately, more than six years after the cause of action arose, gave instructions to proceed against the University. Her counsel submitted that the statement of belief in the initial accident form was nothing more than an unformed assertion as to what she believed and did not equate with actual knowledge of the identity of the defendant required for the purposes of s 50D(1)(b) of the *Limitation Act 1969*. Fullerton J held that the cause of action was not maintainable as being brought more than three years after the limitation period

expired, given that at the outset she identified the defendant and believed that defendant was at fault.

Treatment of witnesses

In *Bale & Anor v Mills* [2011] NSWCA 226, a new trial was ordered for making adverse credibility findings against a solicitor in circumstances where allegations of dishonesty had not been put to him in cross-examination. No complaint or submission, however, had been put to the trial judge that the rule in *Browne v Dunn* (1893) 6 R 67 had not been complied with. Allowing the appeal and ordering a new trial, it was said that there could be no waiver because of the overriding duty upon a judge to ensure a fair trial, including ensuring a witness is treated fairly in circumstances where the judge is asked to make a finding impeaching that witness's credit. The rule applies equally to the trial judge as it does to counsel. Any witness, not merely a lawyer and officer of the court, should be confronted with and afforded an opportunity of dealing with an allegation of dishonesty.

Multiple actions against tortfeasors

In *Newcrest Mining Ltd v Thornton* [2012] HCA 60 (2012) 87 ALJR 198, the plaintiff suffered an injury in a workplace accident in a mine site in Western Australia. He settled his claim against his employer by way of consent judgment for $250,000, which was then paid to him. The plaintiff then commenced proceedings against Newcrest Mining Ltd, which operated the mine site. The appellant moved for summary dismissal on the ground that the *Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947* (WA) s 7(1) bars multiple actions against tortfeasors. Initially, the claim was struck out by a registrar, which was reaffirmed by a judge. On appeal, the WA Court of Appeal quashed this order and restored the plaintiff's claim. By a majority, the High Court dismissed Newcrest's appeal for summary judgment. A consent judgment giving effect to an agreement to make payment does not enliven with the limitation in s 7(1)(b). The limitation is enlivened only by a judicial determination of damages on their merits and not by a consent judgment.

Update 22

Section 34 *Motor Accidents Compensation Act 1999*

In *Penrith City Council v East Realisations Pty Ltd (In Liquidation)* [2013] NSWCA 64, the parties were unable to establish which of eight buses owned by Westbus Pty Ltd was involved in an injury to a passenger on that bus. All of the buses were insured with Zurich Australia. The trial judge found that the vehicle was not identified. The lack of evidence of any alternate possibility (such as another type of bus or other insurance) led the Court of Appeal to conclude that the appropriate inference was that the vehicle in question was sufficiently identified and insured by Zurich Australia.

Sections 92 and 117 *Motor Accidents Compensation Act 1999*

The insurer admitted liability in respect of the injured plaintiff's claim in *Allianz Australia Insurance Ltd v Tarabay* (2013) 62 MVR 537 (Rothman J). The insurer relied on evidence which apparently contradicted the extent of the plaintiff's claim for economic loss. The insurer sought exemption from CARS, conceding that exemption was not mandated but arguing that the claimant had made a false and misleading statement within the terms of s 117. The insurer contended that this should be tested in court on oath. The assessor refused the insurer's application. Rothman J quashed the assessor's refusal of exemption and remitted the matter to another assessor to be determined according to law. This was not merely an ordinary assessment, but involved claims that some of the documents relied upon by the claimant were forged. The assessor had no power to require answers and the seriousness of the allegations should have been the primary consideration. The question posed and answered by the CARS assessor was whether the insurer had established fraud. That was the wrong question. Accordingly, her decision was vitiated by both jurisdictional error and error on the face of the record. However, the facts did not support the claim of apprehended bias.

Section 126 *Motor Accidents Compensation Act 1999*

A CARS assessor awarded a substantial buffer for future diminution of economic capacity in *Allianz Australia Insurance Ltd v Sprod* (2012) 81 NSWLR 626 [2012] NSWCA 281. Allianz, the insurer, sought relief under s 69 of the *Supreme Court Act 1970* against the award, arguing it did not comply with the requirements of s 126. The insurer then appealed from the refusal of relief at first instance. The Court of Appeal dismissed the appeal. An assessor had a duty to form an opinion in accordance with s 126 as to the likely future events and if the assessment was so fraught with uncertainty that a lump sum 'buffer' was appropriate, those obligations could be discharged by generalised statements of the assumption or events on which the award was based. The reasoning did not have to be elaborate but simply sufficient to ensure that an insight could be obtained into the content of the assumptions. It was held that the assessor had adequately discharged that task.

Sections 5B, 5D and 5E *Civil Liability Act 2002*

In *Wright v KB Nut Holdings Pty Ltd* [2013] QCA 66, the plaintiff suffered psychiatric injury as a result of a needle stick injury that occurred in an apartment rented from the defendant by her family. The apartment was unclean and in an unsatisfactory state on occupation. The plaintiff filmed the state of the apartment and asked that it be rectified. She did undertake however to do some cleaning herself because 'I'm not going to have the kids stay for the rest of the week in a place looking like it is'. Whilst cleaning, she suffered the needle stick injury. The primary judge held that the risk of harm to the plaintiff was not foreseeable or alternatively, a reasonable person in the defendant's position would not have taken any more precautions than engaging the cleaner it had expected to clean the apartment. However, the trial judge accepted the evidence (unsurprisingly in the light of the filmed footage) that the apartment was in an unsatisfactory state. The Court of Appeal held that this evidence was irreconcilable with the trial judge's findings on foreseeability and reasonableness. It was reasonable to draw an inference (notwithstanding the difficulty of seeing the needle) that appropriate cleaning would have obviated the risk. As a result, the plaintiff succeeded on appeal.

Foreseeability/duty of care

In *Penrith City Council v East Realisations Pty Ltd (In Liquidation)* [2013] NSWCA 64, the Court of Appeal agreed with the trial judge that merely because it was foreseeable that a vehicle might suddenly stop in front of a bus did not in turn make it negligent for the bus driver to stop suddenly to avoid a collision, giving rise to an injury to a passenger on that bus. In the circumstances, that was putting the duty of care too high and the trial judge was right to reject the allegation of negligence by the bus driver.

Offers of compromise

In *Bogle v Kasan* [2013] NSWSC 295 (Button J), an infant plaintiff ultimately accepted a sum in settlement slightly less than a previous offer which had expired. The defendant asked for an order in its favour in respect of costs from the date of the offer of compromise. Rejecting that proposition and ordering that the defendant pay the plaintiff's costs, it was noted that the defendant's medical evidence was not served until after the offer of compromise had expired and that in those circumstances it was not unreasonable for the plaintiff not to accept that offer. The defendant should pay the plaintiff's costs on a party/party basis. The settlement was approved on a plus costs basis.

False imprisonment

In *NSW v TD* [2013] NSWCA 32, the plaintiff was found to have committed an offence but under the *Mental Health (Criminal Procedure) Act 1990* ss 22 and 23, was referred to the Mental Health Review Tribunal and it was directed under s 24 that she be detained at Mulawa Correctional Centre. The tribunal determined she was suffering from a mental illness, and ordered under s 27 she be detained in hospital. Instead she was detained in a cell at Long Bay Prison Hospital and it was held that this was unlawful because it was not a hospital as defined. The state claimed that she was not unlawfully imprisoned because she was already deprived of her liberty under the court order. The NSW CA held the elements of the tort of false imprisonment were made out and that the State of NSW had failed to show it had lawful justification for the involuntary detention to which the plaintiff was subjected.

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Sections 5B and 49 of the *Civil Liability Act 2002*

The plaintiff was struck and run over by a train at Mortdale Railway Station, shortly after 3.00am in *King v RailCorp NSW* [2013] NSWSC 241 (Davies J). He suffered a number of injuries, including amputation of his left leg just below the knee. Damages were agreed at $1.3 million. The plaintiff had consumed a significant quantity of alcohol.

The major issue in the case was whether the train driver should have seen the plaintiff in the time available to him in which the emergency brakes could take effect. Including a reaction time of 1.15 seconds and a braking distance, the critical distance to see the plaintiff was between 102 and 105 metres, according to the expert evidence. The experts agreed that the line of sight (through curvature of the line) allowed visibility at 141 metres. The experts were agreed as to a reaction time of 1.15 seconds. It was noteworthy the plaintiff was wearing a white t-shirt and dark shorts. The plaintiff's left leg interrupted the bright line of the rail and Davies J concluded that the driver underestimated the distance at which he first observed the plaintiff on the line. If he did not observe the object on the line when it was first within his line of sight or very soon after, Davies J was of the opinion that the driver was in breach of his duty in not keeping a proper lookout.

Davies J noted that a train driver does not have to steer the train and the driver's main concern would be objects or people on the track. The risk was not only one of injury to people but also of potential derailment. In these circumstances, the driver breached the duty of care.

The risk of injury was foreseeable and not insignificant (section 5B Civil Liability Act).

Davies J was also of opinion that RailCorp breached its duty of care in not issuing clear instructions to drivers about actions to be taken in these circumstances.

Davies J was satisfied the plaintiff was intoxicated and this led to him falling on the line. Accordingly, Davies J held that damages should be reduced by 50%.

Duty to upgrade premises

In *Smith v Body Corporate for Professional Suites Community Titles Scheme 14487* [2013] QCA 80, the plaintiff (significantly affected by alcohol) stumbled backwards into the glass wall, which broke into shards, severely cutting her, leaving her with scarring and resulting in psychological problems. The wall was constructed in 1971. Standards adopted in 1973 and revised in 1994 would have required safety or laminated glass but did not require the replacement of existing glass. An ordinary person could not identify whether the glass wall was safety glass. There was no safety audit conducted. In 2000 and 2001, the defendant had engaged architects to upgrade the building but the glass was not considered and no recommendation was made. The court noted that Higgins J in *Cardone v Trustees of the Christian Brothers* [1994] ACTSC 85 and (1995) 130 ALR 345, had held that in a school situation failure to replace non-safety glass with safety glass after the introduction of revised standards was a breach of duty to the plaintiff student. That, however, was not this situation. There was also some support for the plaintiff's case in *Tweed Shire Council v Hancomatic Music Pty Ltd* [2007] NSWCA 350. However, that case was distinguishable because the owner here was not the occupier and no breach of statutory or regulatory workplace health or safety scheme was established. Contrary to the plaintiff's submissions, it does not follow that when a safer product becomes available, an occupier or landlord or employer or the provider of a service is required to upgrade to utilise that safer product. McMurdo P was of the view that what was reasonable was a question of fact and in the particular circumstances, the glass should have been replaced. It did not follow that every single pane of glass that did not comply with current standards had to be replaced. Fraser JA was of the view that given the extraordinarily large number of people who entered and left the building over 30 years without a problem, the defendant had not acted unreasonably. Fryberg J agreed. By a majority, the plaintiff's appeal was dismissed.

Update 24

Section 63 *Motor Accidents Compensation Act 1999*

The plaintiff in *Currie v MAA* [2013] NSWSC 83 (Adams J) was a rescuer who tried to lift a dashboard in order to free a driver trapped in an accident before the vehicle might catch fire. The driver was freed but died on the way to hospital. The plaintiff suffered a sudden onset of pain after he returned home. The injury was assessed as soft tissue and at less than 10%. The plaintiff applied for a review. The insurer alleged that the injuries were not related to the motor accident. The Review Panel accepted the insurer's submission, and found that there was 'no contemporaneous medical evidence in support of the claimant's claim'.

Adams J found that the suggestion there was no contemporaneous record was not squarely raised by the insurer's submissions either to the assessor or to the panel and in those circumstances the panel's conclusion was unreasonable and far-fetched. By failing to give the plaintiff an opportunity to deal with the issue, the panel acted unfairly, denying the plaintiff procedural fairness. The decision of the panel was quashed and the claim remitted to the MAS to be dealt with in accordance with law. The insurer was ordered to pay the plaintiff's costs.

Section 94 *Motor Accidents Compensation Act 1999*

The claimant suffered injuries in a motor accident in *Insurance Australia Group Ltd (t/as NRMA) v MAA* [2013] NSWSC 318, The insurer claimed a declaration that the CARS Assessor's certificate should be set aside for jurisdictional error. NRMA claimed that the assessment of past and future care lacked adequate reasons and that the insurer was denied procedural fairness. The CARS assessment was inconsistent with the MAS assessor's rejection of the need for assistance, the certificate from MAS being conclusive under s 61(2). As a result, the CARS assessment was vitiated by error of law and the matter was remitted to the MAA to be determined in accordance with law.

Section 5D *Civil Liability Act 2002*

In *Kingi-Rihari v Millfair Pty Ltd t/as The Arthouse Hotel* [2012] NSWSC 1592 (Schmidt J), the plaintiff seriously injured his knee when slipping on the wet floor of the bar in the defendant's hotel. If the floor had been dry as the hotel system envisaged, the plaintiff would not have slipped and accordingly, the requirements of s 5D(1) of CLA were satisfied. Other members of the plaintiff's group did not slip - the risk was one which materialised only in the plaintiff's case. Contributory negligence of 8% was held against the plaintiff.

Admissions

Admissions were wrongly and inadvertently made due to a misunderstanding of the law in *In the Matter of Dymocks Book Arcade Pty Ltd* [2013] NSWSC 298 (Brereton J). Leave should be granted to withdraw the admission rather than to have a hearing on a false legal basis. However, the defendant's opposition was not unreasonable and since the plaintiff needed an indulgence, the appropriate order was that each party bear its own costs.

Contributory negligence

In *Robbins v Skouboudis v Suncorp Metway Insurance Ltd* [2013] QSC 101 (Martin J), the intoxicated plaintiff was a pillion passenger on a motorcycle ridden by the intoxicated first defendant, who lost control, causing the plaintiff to be thrown from the motorbike and thereby being injured. Damages were reduced by 50% for contributory negligence, both in respect of the plaintiff's intoxication and the plaintiff's knowledge of the first defendant's intoxication.

Employer's liability

In *Darren Boaden v The Trustee for Shade Unit Trust t/as Clever Shade* [2013] ACTSC 52 (Sidis AJ), the plaintiff was injured when he fell from a roof because his ladder slipped out from under him. The plaintiff was unaware of regulations that required ladders to be fixed in place or held by a second person, having not been notified in this regard. The defendant conceded that it had given its employee no training. This was a breach of the defendant's duty of care and, given that the plaintiff did not know of any other way it could have been done, there was no basis for a finding of contributory negligence.

Update 25

Sections 60 and 62 *Motor Accidents Compensation Act 1999* (NSW)

A MAS assessor issued a certificate that impairment exceeded 10% in *Allianz Australia Insurance Ltd v Francica & Ors* (2012) 63 MVR 1 (Hall J). No reference was made to a causal connection between shoulder dysfunction and the accident and the basis for causation was not evident in the reasons. When the insurer sought a review it was refused by the proper officer because the reasons were 'clear and self-explanatory'. The insurer pursued judicial review. Upholding the complaint, Hall J concluded that the decisions were affected by error of law on the face of the record and/or jurisdictional error through inadequate reasons and inadequate reasoning in relation to causation. The original decision and the decision of the proper officer were set aside.

Section 63 *Motor Accidents Compensation Act 1999*

In *Currie v MAA & Anor* (2013) 63 MVR 37 (Adams J), the plaintiff was assessed at a WPI of 5%. He sought a review and the review panel revoked the original assessment, concluding that the plaintiff's injuries were unrelated to the motor vehicle accident after placing emphasis on the lack of 'contemporaneous medical evidence'.

Adams J held that even though the proceedings are not intended to be adversarial, the principles of natural justice nevertheless apply. The panel assumed the plaintiff had the opportunity to report his injuries and there were obvious reasons why he may not or may have otherwise desisted from doing so. The conclusion reached was not an obvious and natural evaluation and indeed, was far-fetched and unreasonable and was reached without giving the plaintiff an opportunity to deal with it. This amounted to procedural unfairness. The decision was quashed and remitted to be dealt with according to law.

Interstate employment

In *Wickham Freight Lines Pty Ltd v Ferguson* (2013) 63 MVR 120 [2013] NSWCA 66, the plaintiff sued in the NSW District Court in respect of an injury incurred in the course of his employment in Victoria. Under s 134AB of the *Accident Compensation Act 1985* (VIC), actions were precluded in Victoria except in respect of a 'serious injury', for which a procedure was laid down to obtain a certificate or a determination prior to the commencement of proceedings. That procedure had not been complied with but the defendant's strike-out motion was refused at first instance. On appeal it was upheld. The respondent submitted that even if the primary requirement was substantive (and it was accepted that Victorian substantive law applied), the subsections relating to the determination of a serious injury were procedural, which were not binding in NSW. The NSW CA rejected that proposition. It would be highly artificial and contrary to the clear legislative intent for characterisation of an injury as 'serious' to be made other than by the means provided in the Victorian Act. *Hamilton v Merck & Co Inc* [2006] NSWLR 48 (CA) was distinguished.

Section 5B *Civil Liability Act 2002*

The plaintiff was injured while assisting an employee of the Council after a trench which had collapsed in *McDonald v Shoalhaven City Council* [2013] NSWCA 81. He was characterised as a volunteer and it was found that he was owed a duty of care. However, the trial judge held that he had not established a breach of the duty of care owed to him. The CA held that even if the duty of care owed to the employee was governed by a different standard under s 3B(1)(f) relating to workers compensation, that was not a basis for finding that the same test had to apply to a volunteer to whom a duty of care was owed. His duty of care was governed by the Civil Liability Act. The trial judge erred in his finding under s 5B(1)(b) that the harm that would occur if shoring up of the trench which collapsed was not significant. 'Not insignificant' does not mean 'significant'. A test of 'not insignificant' is more demanding but not by very much than a test of 'not far-fetched or fanciful' as at common law in *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40. Accordingly, the verdict for the defendant at first instance was set aside and a re-hearing ordered.

Medical negligence

In *Varipatis v Almario* [2013] NSWCA 76, the defendant's appeal was upheld. A general practitioner may have a duty to recommend weight loss and to give advice as to how that may be achieved. There is no obligation to do more than that. The plaintiff's conduct did not suggest that the plaintiff would have acted on a referral to an obesity clinic or lost weight. Therefore, this finding of negligence was not

causative of harm. The expert evidence did not support the conclusion that a reasonable practitioner would have referred a patient in the circumstances to a bariatric surgeon in 1998. Absent such a duty, this conclusion cannot stand. Whilst the GP should have disabused the plaintiff of the notion that his problem was due in part to exposure to toxic chemicals, nonetheless he was given the appropriate advice that he needed to lose weight to save himself. The plaintiff did not establish that he would have accepted a referral to an obesity clinic given that he had failed to act on a previous referral and did not establish that weight loss would have followed from a timely referral to a hepatologist. The primary judge found fault in failing to refer to a bariatric surgeon or to an obesity clinic. However, he upheld causation only in respect of the surgeon. Because the duty could have been satisfied by referral to an obesity clinic, but this would, on the evidence, have been unsuccessful, the first omission was not a necessary condition of the occurrence of the plaintiff's injuries.

Employer's duty of care

The plaintiff sued in the Queensland Supreme Court for damages for injuries suffered in the course of her employment in *Weaver v Endeavour Foundation* [2013] QSC 93 (McMeekin J). The defendant employer provides employment for persons with intellectual disabilities and sometimes their clients become agitated or even violent. The instructions to staff were to retreat quickly in those circumstances. In doing so on this occasion, the plaintiff tripped and fell, suffering injury. McMeekin J held on the facts that this was a breach of the employer's duty of care and that a reasonably safe system of work through other instructions would have been likely to have obviated this risk of injury. The plaintiff succeeded without reduction for contributory negligence.

Update 26

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

In *QBE Insurance (Australia) Ltd v MAA of NSW* [2013] NSWSC 549 (Rothman J), the insurer sought judicial review of a refusal by the acting proper officer to agree to a review of an assessment in MAS of over 10% WPI. The Acting Proper Officer had not been satisfied that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect. The insurer alleged there were additional facts 'capable of having material effect on the outcome of the previous assessment'. It was alleged that those were 'jurisdictional facts'. Rothman J noted that the NSW CA in *Rodger v De Gelder* [2011] NSWCA 97 at [70] said:

> The task of the Proper Officer involves making a decision that affects rights, as it is the outcome of the medical assessment that determines whether or not a person has an entitlement to damages for non-economic loss. True it is that it is the outcome of the further medical assessment (if any) that determines the legal rights of the party. However, the decision of the Proper Officer as to whether the further information or deterioration in the injury is capable of having a material effect on the outcome of the previous assessment, 'sufficiently determines' or is connected' with that decision and ... is amenable to an order in the nature of certiorari'.

The reasons of the acting proper officer demonstrated that she understood the question she was asked to determine. All relevant considerations were taken into account and she did not fail to take into account any required consideration. Nor were irrelevant considerations taken into account. The distinction between merit review and judicial review must be considered. Rothman J was of the view that the content of notes not previously provided was additional material but would not have altered the proper officer's decision and, in those circumstances, the insurer was refused relief.

Section 3A(1)(a) *Motor Accidents Compensation Act 1999*

The plaintiff was employed by the defendant in *RG and KM Whitehead Pty Ltd v Lowe* [2013] NSWCA 117. The plaintiff was injured when a metal discharge chute separated from a wood chipper machine and struck the plaintiff while standing on the machine, causing him to fall. He suffered serious injury. A director of the defendant company was operating a front-end loader and attempting to position the chute, and ordered the plaintiff to mount the cage to position it. It was at this point that the injury took place. At first instance Robison DCJ found that the injury arose from a motor accident within the meaning of s 3A(1) of MACA. He found the injury was caused by the fault of the driver of the loader and occurred during the driving within the meaning of s 3. The NSWCA affirmed the trial judge's findings, albeit with some hesitation on the facts. It was the movement of the chute by operating the tines of the loader that caused it to separate from the sleeve and strike the plaintiff. Manoeuvring the chute while the plaintiff was standing close by placed him at risk. However, the vehicle was not being driven, in that it was stationary at the time, although its articulated section was being operated. Accordingly, s 3A(1)(a) was not met. Because the chute was not relevantly part of the loader, the collision between the chute and the respondent also did not fall within 3A(1)(b). The earlier driving of the vehicle did not create the dangerous situation resulting in the respondent's injury. The fact that the vehicle was stationary was not determinative. What was, was the fact that the injury arose through the instruction given for the plaintiff to mount the chipper. The manoeuvring of the articulated part of the vehicle was what created the dangerous situation and not driving of the loader per se.

Accordingly, and whilst the trial judge was correct in finding fault on the part of the driver and that the injury was in the use or operation of the loader, he was in error in finding that injury was the result of and caused by any of the matters referred to in subparagraph (a), (b) or (d) of s 3A(1). As a result, the defendant's appeal was upheld.

Update 27

Evidence - strike out

In *Kingsman v NSW Trustee and Guardian* [2013] NSWSC 487 (Schmidt J) it was said, reaffirming the tests laid down in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 and *Agar v Hyde* (2000) 201 CLR 552 that the proper test on a strike out application is that discussed by Barrett JA in *Shaw v State of NSW* [2012] NSWCA 102 , where it was said, referring to *Dey*, *General Steel* and quoting *Agar v Hyde* (2000) 201 CLR 552:

> Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'

In *Shaw* at Schmidt J said:

> The question is therefore whether the claims in question are so obviously untenable or groundless that there is 'a high degree of certainty' that they will fail if allowed to go to trial; and whether this is one of the 'clearest of cases' in which the court may accordingly intervene to prevent the claims litigated.'

In this case, it was claimed that the NSW Trustee and Guardian held monies as trustee for the infant plaintiff and that the trustee transferred the money to his mother and stepfather for no consideration, with a loss of that money in breach of the trustee's duty of care to the plaintiff. It was not apparent that the plaintiff's case would fail and, as a result, that the trustee's application to strike out should fail.

See also *NSW v Spearpoint* [2009] NSWCA 233 and *DC v NSW* [2010] NSWCA 15.

Update 28

Compromises

In *Vagg v McPhee (No. 2)* [2013] NSWCA 126, the Court of Appeal held that a walk away offer involved a sufficient element of compromise to justify an award of indemnity costs from the date of the offer.

Sections 94 and 126 of the *Motor Accidents Compensation Act 1999* (NSW)

Hall J held in *NRMA Insurance Ltd v Pham* [2013] NSWSC 468 that the assessment of the CARS assessor was not supported by the evidence or by the reasoning required under s 126 as to the most likely course of future events but for the accident. In the circumstances, the insurer was granted relief, the certificate was set aside and the matter remitted to the principal claims officer to reallocate the matter to a different claims assessor for a fresh assessment according to law.

Compensation for relatives

At issue in *Logan v Hankook Tire Co Ltd* [2013] NSWSC 450 was whether it was mandatory to include in a claim for compensation to relatives infants who, although theoretically entitled, found being joined unattractive because of repayment issues in circumstances where there was no tutor available to act on their behalf. Garling J noted the apparent ability of the plaintiff to determine who might be included or excluded in the claim (without reaching any final determination) but held that the plaintiff should not be given leave to add the children as that there was no tutor available to act for them.

Update 29

Medical negligence

Waller v James [2013] NSWSC 497 (Hislop J) concerned Keeden Waller, who was born in 2000 by IVF. About four days later he suffered a stroke, leaving him with profound disability. His parents alleged that a factor leading to the stroke was an anti-thrombin deficiency (called ATD), which was inherited genetically from his father. The plaintiff's case was that the defendant gynaecologist was in breach of contract and negligent in failing to inform the plaintiffs of the hereditary aspects of ATD and that had they been properly informed, they would not have gone ahead to conceive a child using the father's sperm. They sought damages for the involvement in the IVF procedure, for psychiatric and physical injury and for the cost of caring for the injured child. Keeden's own claim failed in *Waller v James* [2006] HCA 16 (2006) 226 CLR 136, where the High Court held that the child's life disabilities was not actionable damage. The proceedings predated the *Health Care Liability Act 2001* (NSW) and *Civil Liability Act 2001* (NSW) and therefore were at common law. The gynaecologist at some point gave the mother a post-it note with the name and phone number of a genetic counsellor and there was a conflict as to the degree of discussion, although it seems apparent the gynaecologist was told about the history of ADT. The experts disagreed as to the standard of care of an obstetrician and gynaecologist in 1999. The view of the plaintiff's expert was that it was appropriate for the defendant to ensure that parents understood the nature and risk of the inherited condition whilst the defendant's expert either thought there was no such duty or that he could not say what the duty was in 1999. Both were critical of the absence of a proper referral for genetic counselling. They were both of the view that the alternative of donor sperm should have been offered. It was acceptable to proceed with IVF providing the parents had been adequately informed and understood the risks involved concerning inherited conditions.

Hislop J found a duty to ascertain if the parents were aware that ATD was potentially inheritable, explain the risks and provide an appropriate referral. The defendant should also have followed up whether such consultation had occurred and reemphasised the desirability of obtaining such advice from a genetic consultant or geneticist. His Honour did not accept that there was a duty to give advice in relation to sperm donation. Hislop J also found that to a significant degree the recollection of the parent plaintiffs were unreliable. Hislop J also found that the provision of a post-it note rather than a formal referral did not in itself constitute a breach of the duty of care. The defendant should have given more information to the plaintiffs. The plaintiffs with the benefit of the further explanation would, in Hislop J's view, have attended the proposed specialist consultation.

Had the plaintiffs been properly informed, they would have had the choice of continuing with IVF, doing so with donor sperm, fostering or adopting a child or choosing not to have a child. Hislop J did not give great weight to the parents' evidence, given with hindsight, that they would not have continued with the child's birth through IVF. His Honour concluded that notwithstanding the 50% risk, it was probable that most reasonable people when faced with some years delay before appropriate tests might become available and the desirability of fathering his own child made it likely that such reasonable people would have elected to proceed with the pregnancy as planned. However, the concern which the plaintiffs had demonstrated in seeking opinion as to ATD was sufficient to persuade Hislop J that properly informed, these plaintiffs would have elected not to have had Keeden. He then examined the question of causation.

There was a conflict in the expert evidence and Hislop J concluded that the plaintiffs had failed to establish that the stroke was caused or materially contributed to by the ATD. At most, it contributed to the risk, but this was insufficient to establish the cause of the stroke. In any event, the plaintiffs had not established that the stroke was related to the ATD. He distinguished the High Court decision in *Kattanach v Melchior* [2003] HCA 38 (2003) 215 CLR 1 on the basis that failed sterilisation was not the same as the desire for a child without ATD. In Hislop J's view, *Kattanach* does not establish that a negligently born child entitles the parents to the costs of having, raising and caring for that child. [256]. He accepted the defendant's submissions that the plaintiffs had not established their loss was so connected with the defendant's fault that as a matter of ordinary commonsense and experience it should be regarded as a cause of it. In any event, the plaintiffs' harm was not within the scope of the overall duty alleged and was too remote. As a result, the action of the plaintiff did not succeed.

Section 5D *Civil Liability Act 2002* (NSW)

The High Court dismissed the plaintiff's further appeal

in *Wallace v Kam* [2013] HCA 19. While the duty of a medical practitioner is to exercise reasonable care and skill in the provision of professional advice and treatment, which includes warning the patient of material risks (risks to which a reasonable person in the position of the patient would be likely to attach significance) different questions arise when the patient would have chosen not to undergo treatment if warned of all material risks but would have undergone treatment in respect of the risk which manifested.

From the analysis of s 5D of the CLA, it would now seem that no distinction is to be drawn between the common law position and that under the Civil Liability Act. The High Court appears to have adopted the American approach that a non-disclosed risk must manifest itself into an actual injury in order for the plaintiff to establish proximate causation so that in the absence of the occurrence of the undisclosed risk, the doctor's omission is legally inconsequential.

The plaintiff was prepared to accept the risk of neurapraxia had he been properly warned of it. The defendant was not responsible for the negligent failure to warn the patient of an unacceptable risk of catastrophic paralysis.

Section 5L *Civil Liability Act 2002*

(This is a revised version of the casenote which appeared in Common Law Update 24 published in *In Brief* on 4 April 2013)

In *Campbell v Hay* [2013] NSWDC 11 (Marks ADCJ) the plaintiff was a student pilot. He flew a light aircraft owned by the defendant, who was his flight instructor. During the course of the lesson, the aircraft's engine stopped and the defendant took over the controls of the aircraft. The defendant conceded that a prudent pilot would have headed for the nearest airstrip (there were several available) but he did not do so. The defendant could have reached such a strip when the second set of vibrations leading towards engine failure occurred. He was assessed to be evasive in his evidence. Marks ADCJ was satisfied that the defendant had failed to exercise reasonable care for the plaintiff in the manner in which he flew the aircraft.

However, the defendant succeeded on the basis that what occurred was an obvious risk of a dangerous recreational activity, even though the chance of negligence occurring was said to be a 'low probability'. His Honour said that 'as a matter of common knowledge and commonsense, there was a risk that the defendant might be negligent in the manner in which he operated the aircraft ... [and] this is sufficient to result in these risks being characterised as obvious for the purpose of s 5F, albeit that there was a low probability of them occurring.'

In finding that fault on the part of the pilot was an obvious risk of a dangerous recreational activity, the court ultimately concluded that the defendant was not responsible, and could not be held responsible, for his breach of his duty of care to the plaintiff. The case depends upon how the risk is characterised. If the risk had been engine failure and the accident was unavoidable, that might be one thing. To find that fault on the part of the instructor pilot was an obvious risk is something quite different and a somewhat surprising outcome. If correct, it would mean that fault on the part of a defendant, however unlikely, was always a risk and there could never be responsibility for it in respect of a dangerous recreational activity.

5G, 5H and 5M *Civil Liability Act 2002*

The plaintiff in *Action Paintball Games Pty Ltd (in Liquidation) v Barker* [2013] NSWCA 128 attended her 12 year old brother's birthday party at an outdoor games facility. She was one day short of 10 years of age. The facility offered action paintball and laser tag. In the latter game, each player was equipped with a laser gun and attempted to tag other players and avoid being tagged themselves. The game area consisted of two bunkers and an area of bushland with some rough tracks, fallen branches and debris. The plaintiff tripped on a tree root and fell, and suffered a significant fracture to her left elbow. On the basis of the plaintiff's evidence it was accepted that she was aware of the general risks of running through bushland. Reasonable care did not require the defendant to remove the tree root. The trial judge erred in not finding that this was a materialisation of a risk of a dangerous recreational activity. In any event, there was a risk warning and therefore no breach of the duty

of care. As there was no fault on the part of the defendant in the circumstances, the defendant's appeal was upheld.

Sections 61 and 94 *Motor Accidents Compensation Act 1999* (NSW)

The insurer sought judicial review of the CARS assessment in *Insurance Australia (NRMA) v MAA* (2013) 63 MVR 203 (Harrison AsJ). Judicial review was sought on the basis that the assessment failed to have regard to a MAS assessment inconsistent with it in respect of care and failed to give appropriate reasons. Harrison AsJ granted the insurer relief and set aside the assessment. It was held that the CARS assessor fell into jurisdictional error as her reasons did not disclose how she dealt with the earlier conclusive certificate, which she was bound to take into account.'

Transfer of jurisdiction

In *Simmon v Globe-Tech International Pty Ltd* [2013] NSWSC 658 (Harrison J), the plaintiff sued in the District Court in respect of injury from equipment manufactured in Taiwan. The defendant sought to transfer the proceedings from the District Court to the Supreme Court in order to effect service of a cross-claim overseas. This was held to be one reason justifying transfer, as was the fact that the District Court had no jurisdiction to enforce any judgment against a manufacturer outside Australia. The proceedings were accordingly transferred to the Supreme Court.

Foreseeability

In *Gangi v Boral Resources (NSW) Pty Ltd (No. 2)* [2013] NSWSC 569 (Schmidt J), the plaintiff drove a truck to its concrete plant, pursuant to his contract with the defendant. A bin at the plant collapsed without warning, damaging the back of the truck and injuring the plaintiff. Schmidt J found that the risk ought to have been foreseen and precautions should have been taken which would have prevented the bin from collapsing. The plaintiff succeeded without reduction for contributory negligence.

Choice of law

In *Marshall v Flaming* [2013] NSWSC 566 (Harrison J) the duty owed by New York lawyers when advising on a question of Pennsylvania law was at issue. Pursuant to the Memorandum of Understanding between the chief justice of NSW and the chief justice of the State of New York, a member of the New York Panel of Referees is to be appointed to act as a referee for inquiry and report on questions of foreign law raised.

Contributory negligence

In *Kucera v Lemalu* [2013] NSWCA 127, the plaintiff pedestrian left the footpath when the pedestrian lights were flashing red, then lost and turned around to retrieve a shoe. The plaintiff then continued across the road before being hit by the defendant's motor cycle. The defendant was found to have failed to keep a proper lookout. The plaintiff's damages were reduced by 20% for contributory negligence at first instance and the defendant appealed as to the adequacy of this percentage. The CA held that on the evidence a 40% reduction was appropriate. In particular, the plaintiff was at fault in failing to use the median strip as a refuge, after her crossing was delayed by collecting her shoe.

Damages

In *Dang v Chea* (2013) 63 MVR 240 (CA), the primary judge allowed the cost of home care for the plaintiff in suitable rental accommodation with appropriate nursing care and assistance for 24 hours per day rather than accommodation and care in an aged care facility, which was a significantly cheaper option. Allowing the appeal, the court noted that the plaintiff was entitled to her reasonable but not ideal requirements and that the primary judge had erred in overstating the benefits of home care. The benefit of the plaintiff being cared for in rental accommodation was slight and the cost differential was substantial. Balancing these issues, the court found that the exercise of discretion of the primary judge had miscarried and the award of damages was manifestly excessive.

Update 30

Sections 3 and 33 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was injured when struck and injured by an unregistered Motocross motor cycle on a public reserve in *Nominal Defendant v Uele* (2012) 82 NSWLR 308 [2012] NSWCA 271. The only issue on liability was whether the motor cycle was a motor vehicle within the meaning of s 33 of the *Motor Accidents Compensation Act 1999*. It was held at first instance that it was. The Nominal Defendant appealed - the sole issue on appeal was whether the motor cycle was 'at the time of manufacture capable of registration' within the meaning of s 33(5)(b)(i) of the Act. Registration includes the concept of an unregistered vehicle permit. The Court of Appeal granted leave to appeal but ultimately it was dismissed. Section 33 was satisfied if a vehicle could have been the subject of an unregistered vehicle permit and was the proposed or intended use of the vehicle was irrelevant.

Sections 3B, 11A and 16 of the *Civil Liability Act 2002* (NSW)

In *State of NSW v Stevens* (2012) 82 NSWLR 106 [2012] NSWCA 415, the plaintiff sued the state for an admitted breach of a deed, seeking personal injury damages for non-economic loss involving anxiety and stress. The trial judge found that the anxiety and stress had not been caused by the breach and that in any event, the plaintiff did not meet the threshold in s 16 of the *Civil Liability Act 2002* for such a claim, which under s 11A governed 'an award of personal injury damages'. Nominal damages of $10,000 were nevertheless awarded to the plaintiff for the breach.

The state appealed against the decision, arguing no damages for non-economic loss could be awarded as the s 16 threshold had not been met and that, in the alternative, if nominal damages could be awarded, their quantification was misconceived. The NSW Court of Appeal held that Nominal Defendants were vindicatory not compensatory, so that Part 2 of the Act and s 16 did not apply to such an award and nominal damages did not fall within the definition of damages in s 3. Nor did nominal damages fall within the meaning of 'an award of personal injury damages'.

However, whilst quantification of nominal damages was discretionary, only a token sum was to be awarded for the establishment of an infraction of a legal right which caused no loss. The award of $10,000 took into account matters properly forming part of compensatory damages, was more than a token award and was therefore the assessment was wholly erroneous. The nominal damages were reduced to $100 accordingly, with each party to bear its own costs.