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BAR ASSOCIATION

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Updates 31-40

Update 31

Causation/ sections 5D and 5G *Civil Liability Act 2002* (NSW)

The plaintiffs were seriously injured by the vehicle driven by the first defendant as they crossed a road in *Scott v Williamson; Picken v Williamson* [2013] NSWCA 124. The second defendant was the owner/driver of a minibus and parked the vehicle in a breakdown lane while waiting for the plaintiffs to cross. At first instance, it was held that neither defendant was negligent and the plaintiffs appealed. On appeal, the court held that the trial judge was in error in concluding that the first defendant had no chance of avoiding a collision and that crossing the road at that point was an obvious risk. Reliance on this provision (5G of the Civil Liability Act) was in fact in error because that risk relates to the duty to warn, which was not relevant here. The plaintiffs gave evidence that they looked before crossing. Given the evidence as to reaction time and the visibility, the first defendant should have seen the plaintiffs in sufficient time so as to avoid hitting them. It was established the first defendant was not keeping a proper lookout and had he done so, the collision would have been avoided. The second defendant was not at fault in bringing his minibus to a stop in the breakdown lane given that the plaintiffs made their own decision to cross the roadway. The situation would have been different if evidence suggesting the second defendant had been party to the decision to cross the road at that point had been accepted. In respect of one plaintiff, contributory negligence was assessed at 65% and in respect of the other, at 30%, affirming the trial judge's alternative conclusion in this respect.

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

In *Allianz Australia Insurance Ltd v Shamoun* [2013] NSWSC 579 (McCallum J), the insurer claimed review of an assessment by a CARS assessor in relation to the quantification of future economic loss at $150,000. The award of $300,000 for past economic loss was not challenged. Under s 94, the assessor must award the amount of damages that a court would be likely to award and under s 126, the assessment must be upon the basis of the claimant's most likely future circumstances but for the injury. In effect, the insurer was challenging the award of a buffer for future economic loss. In regard to the issue of buffers, there is a degree of inconsistency, McCallum J thought, in the Court of Appeal's approach in *Allianz Australia Insurance Ltd v Sprod* [2012] NSWCA 281 by comparison with a differently constituted Court of Appeal in *Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244 only a week earlier, in a decision not referred to in *Sprod*. McCallum J thought she was bound to apply the principle stated in *Cevantes* given that expressly dealt with the challenge to the award of a buffer and concluded that it was open to the assessor to adopt a buffer approach on the state of the evidence in the present case. Indeed, it was difficult to see what other approach he could have taken. Accordingly, the assessor did not fail to comply with the requirements of s 126. The CARS assessor's decision did not entail jurisdictional error and the insurer's summons for review was dismissed with costs.

Medical examination

The plaintiff claimed damages for injury whilst lifting at work in *Boral Transport Pty Ltd v Bulic* [2013] NSWCA 150. There was a history of previous injury to the back. The defendant applied for an order under UCPR 23.4 that the plaintiff submit to an MRI of the lumbar spine. This was refused at first instance. On appeal, it was held the plaintiff's medical condition was a live issue, examination was relevant resolving the dispute and the defendant was entitled to an MRI, so that leave to appeal was granted and the order made.

Update 32

Employment/ section 5D *Civil Liability Act 2002* (NSW)

The plaintiff was operating a mobile crane at Darling Harbour in *Baden Cranes Pty Ltd v Smith* [2013] NSWCA 136 when the entire upper deck of the crane, including the boom, cabin and counterweight, toppled off the base. The plaintiff was jolted from his position and fell, suffering significant injury. The plaintiff sued three parties in negligence: the first defendant, who originally owned the crane and employed the plaintiff; the second defendant, who had modified the crane to permit its transportation in one piece at the request of the first defendant; and the third defendant, who took over the business of the first defendant and ownership of the crane and was the plaintiff's employer at date of accident. At first instance, each defendant was found to have breached its duty of care primarily by failing to give adequate instructions in relation to the consequences of failing to release the slew lock before driving the crane with the boom on the dolly. There were cross-claims between the defendants. The third defendant employer was found liable at 20%, the second defendant 45% and the owner 35%.

The relevant harm which eventuated was the shearing of the pins which held the bayonet connector, which was caused by the driving of the vehicle without releasing the slew lock. The risk was foreseeable and not insignificant. The reasonable precautions which needed to be conveyed, but were not, concerned the risk of catastrophic failure if the slew lock was not released prior to commencing to move the crane. The Court upheld the findings of negligence on the part of all three defendants. The finding of no contributory negligence was correct. Causation was established within the meaning of s 5D of the Civil Liability Act. In respect of relative contribution, the court concluded that the former owner should bear 20%, the modifier 40% and the employer 40%.'

Medical negligence/Section 5D Civil Liability Act

In *King v Western Sydney Area Health Service* [2013] NSWCA 162, there was a failure to provide VZIG, the standard treatment for suspected contact by pregnant women with chicken pox. It was accepted at first instance and on appeal that there had been a breach of the duty to administer the standard treatment but the trial judge was not satisfied that on the probabilities a different outcome would have occurred for the child, who was born with a severe disability. The plaintiff argued on appeal that the breach of duty gave rise to an increased risk which materialised. Hoeben JA rejected that argument, noting the real difficulties in applying the 'but for' test to the concept of increase in risk. An attempt by the plaintiff to rely upon the exceptional case causation alternative in s 5D(2) Civil Liability Act was rejected because that alternative was not argued at trial (per Hoeben JA with Ward JA agreeing). Basten JA, dissenting, concluded that the case fell within s 5D(1)(a) of the Act but that, in the alternative, a remedy lay under s 5D(2), notwithstanding that the plaintiff eschewed reliance on it at trial:

> Questions of factual causation and scope of liability, as separately identified in section *5D*, do not readily fall into separate and independent watertight compartments. Valuable as it is to separate the 'factual' and 'policy' elements of causation, the separation is, to an extent, an artefact. It will be a triumph of form over substance to deny the plaintiff recovery on that basis.

Sections 5K and 5L Civil Liability Act

The plaintiff, a member of the defendant club, was injured when the glider he was flying collided with powerlines when coming in to land in *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516 (Davies J). The plaintiff sued the club in negligence. Damages were agreed at $750,000. On the day of the accident, the plaintiff had undertaken four flights. He was directed by radio to make 'a hanger landing', the purpose of which was to reduce the distance for towing the aircraft. The plaintiff had previously undertaken such landings. At the time of the incident, the plaintiff had approximately 38 hours total experience (150 takeoffs). He was aware of the existence and location of the powerlines. Davies J accepted the conclusion of the parties' experts that on the instructor's version, there was no breach of the duty of reasonable care in the club's instructions and training. The instructor's evidence, having been accepted, was that there was no breach of the duty of care owed by the club to the plaintiff. Although he did not need to do so, Davies J dealt with the issue as to whether this was a dangerous recreational activity within the meaning of s 5K of the Civil Liability Act. He ultimately concluded that it was, but that even if he was wrong in having regard to the more general activity of gliding, the act of performing a landing over the powerlines was a dangerous recreational

activity. The risk of striking the powerlines was an obvious risk of such an activity and s 5L would accordingly preclude recovery.

School bullying

In *Oyston v St Patrick's College* [2013] NSWCA 135, the plaintiff, a student at the defendant's school, alleged she had suffered psychological harm resulting from bullying, including physical violence, by other students. The plaintiff succeeded at first instance but appealed on the adequacy of damages awarded. The defendant cross-appealed on liability. This decision dealt only with the liability issue.

Tobias AJA (with whom Macfarlane and Barrett JJA agreed) noted that it was not in issue that the college owed a duty of care or that the risk of harm from bullying required the college to take active steps to protect its students. The plaintiff argued that the college failed to devise, implement and maintain an adequate anti-bullying program, that it failed to act upon the plaintiff's complaints of bullying and failed to adequately investigate and prevent the bullying by supervising, disciplining and counselling the perpetrators. The plaintiff alleged that there was a culture of bullying. The primary judge largely accepted evidence that the college policy against bullying simply was not implemented. It was clearly open to the primary judge to find that the plaintiff was regularly, if not relentlessly, bullied. There was little doubt that the college was aware of the plaintiff's claims that she was being bullied and that a staff member made responsible for investigating the claims clearly failed to do so.

Whilst it was true that the defendant was not required to ensure or guarantee the plaintiff was not bullied, it was obliged to take reasonable steps to protect her. The steps taken were not a reasonable response to the not insignificant risk of harm. The primary judge was correct to find the defendant was in breach of its duty of care.

The outstanding issues of causation, damages and costs are to be the subject of a further hearing.

Evidence

In *McGlashan v QBE Insurance Ltd* [2013] NSWSC 678 (Campbell J), the defendant sought to tender in re-examination of a witness a prior consistent statement pursuant to s 108(3) of the *Evidence Act* 1995 (NSW). The plaintiff opposed the tender and, in the alternative, argued it should be excluded as prejudicial under s 135. The witness in his evidence in-chief gave evidence of an admission he said the plaintiff made to him on the day of the accident as to the manner in which the accident had occurred. It was not put to the court that the witness was fabricating this evidence. It was put that he might well have been mistaken about what was said. The defendant then sought to tender a prior consistent statement. Given that the plaintiff's case was that the witness' evidence was a reconstruction, the condition for the application of the s 108(3) exception to the credibility rule was established. As to s 135, the objection was that the statement contained other prejudicial matters and that the whole of the statement should go in or none of it. Campbell J concluded that the probative value of the earlier statement was not outweighed by the danger that it might be unfairly prejudicial to the plaintiff. Although it might be prejudicial in one sense, it was not unfairly so. However, in order to meet any potential injustice, the plaintiff's counsel would be given a further opportunity to cross-examine the witness on the basis of the statement.

Relatives – duty of care

The infant plaintiff suffered personal injury in *Hoffmann v Boland* [2013] NSWCA 158 when his grandmother, who was carrying him, stumbled as she descended stairs. Multiple claims against designers and builders failed but the plaintiff succeeded at first instance against the grandmother. Her appeal was upheld and the plaintiff's case therefore failed against all defendants. Basten J was of the view that no duty of care was owed in circumstances analogous to parent and child, although this did not apply in circumstances where a child was subjected to violence or abuse. Sackville AJA was of the view that there was such a duty of care owed and Barrett JA held he did not have to decide this issue but merely said that there was much to be said for the view that courts should be slow to characterise as negligent gratuitous care bestowed on a child by a person exercising parental functions in a family or domestic setting. However, all three members of the court were of the view that even if there was a duty of care, there was no breach of that duty in the circumstances. The plaintiff's appeal against adverse decisions in respect of the other defendants was dismissed.

Update 33

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

In *GIO General Ltd v Passau* [2013] NSWSC 682, the insurer sought to overturn the Proper Officer's refusal to allow its application to refer a medical assessment for review. The purpose of the review was to restrain the Claims Assessor from proceeding with an assessment hearing. Harrison J was critical of the fact that the original decision had been made some two months earlier, and was not satisfied that it was clear that the decision was materially incorrect or that intervention by the court was in the interests of justice. The application was dismissed with costs to be the plaintiff's costs in the proceedings.

The insurer sought relief by way of judicial review from a determination of a review panel under s 63 *Motor Accidents Compensation Act* in *IAG Ltd v Riley* [2013] NSWSC 684 (Davies J). The MAS assessor had found 11% permanent impairment. The insurer then claimed a review of the Whole Person Impairment figure which had by then increased to 12%. The Proper Officer granted the review. The Review Panel then confirmed the 12% WPI. Davies J found that the Review Panel's Certificate was vitiated by error because of the approach of the Review Panel. The Panel had misapprehended the full extent of the dispute it needed to assess and failed to give adequate reasons for concluding the original decision was correct. Material relating to the plaintiff's head injury was not considered. The Review Panel's decision was quashed and the matter remitted for review according to law.

Intentional infliction of harm

The plaintiff was blackmailed into paying money to the defendant in *AS v Murray* [2013] NSWSC 733, before Ball J. He sought to recover that sum, along with orders that the defendant be restrained from communicating the information used for blackmail to anyone and exemplary damages. Investigations had traced the threats back to the defendant. The defendant was aware of the hearing but chose not to appear. The defendant had committed the tort of intimidation in the view of Ball J. As described by Denning MR in *Morgan v Fry* [1968] 2 QB 710 at 724:

> There must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes: and a person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances the person damnified by the compliance can sue for intimidation.'

See also Nagle J in *Latham v Singleton* [1981] 2 NSWLR 843 at 858 and the provisions of ss 249K and 249M of the *Crimes Act 1900* (NSW).

Ball J granted the plaintiff injunctive relief against the defendant, ordered repayment of the sum paid together with interest, in accordance with Practice Note SC Gen 16, and awarded $20,000 by way of exemplary damages. He ordered payment of the plaintiff's costs by the defendant on an indemnity basis.

Workplace Injury – duty of care

In *P & M Quality Smallgoods Pty Ltd v Leap Seng* [2013] NSWCA 167, a 47 year old female plaintiff worked in the defendant's smallgoods factory as a process worker. She was struck from behind and injured by a heavy trolley laden with goods which was being pushed by a fellow worker. The plaintiff succeeded at first instance against her employer (P & M) and the Homebush Unit Trust. The fellow employee was in fact employed by Kaybron No. 24 Pty Ltd, one of a number of such companies used because at that time such an employer paid lower workers compensation insurance premiums. Levy DCJ found that each defendant owed a duty of care: P&M as controller of the premises and employer of the negligent fellow employee and the Trust as an occupier and controller of the premises.

P & M and the Trust appealed on the question of liability. Barrett JA found in the circumstances that the fellow worker was employed by Kaybron No. 24. However, he rejected the submission by the appellants that they were merely occupiers and owed no duty of care for the system of work. The plaintiff was owed either a duty corresponding with that of an employer or something very similar. Whilst there was an attack upon the credibility of the plaintiff, in the view of Barrett JA it was open to the trial judge to accept the plaintiff's evidence as reliable. The system of work was unsafe, the risk of harm foreseeable and the risk was not insignificant. Challenges to the findings on the negligence of both defendants therefore failed.

In respect of the plaintiff's employer, Kaybron No. 24, Levy DCJ had found that there was no liability. It was appropriate to accept that the employer owed some liability even though Kaybron No. 24 had no ability to control or influence activities or the way in which they were performed. The reduction of 10% was appropriate, being an alternative figure fixed upon at first instance. The appeal was dismissed with costs, apart from an aspect of damages (Hoeben JA and Tobias AJA agreeing).

Update 34

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

The plaintiff was injured in *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727 (Beech-Jones J) when she could not properly access a ski lift as the safety bar was down when it arrived. The lift operator had attempted to lift the bar out of the way. The risk in accordance with s 5B of the Act was the risk of physical harm resulting from the chair arriving at the loading station in a state not suitable for boarding. This was a foreseeable and not insignificant risk, which led to a reasonably realistic prospect of physical harm. The burden of taking the identified precaution was significant. As a result, the defendant resort operator was negligent and that negligence was causative of the plaintiff's injuries whilst attempting to board the chairlift. The condition set out in s 5D(1)(a) was satisfied.

Update 35

Section 5B *Civil Liability Act 2002*

In *Wooby v Australian Postal Corporation* [2013] NSWCA 183, the plaintiff was a subcontractor undertaking a mail delivery run for a contractor for the respondent, Australia Post. She injured her back lifting a parcel in order to place it in her van. The injury took place on Australia Post premises and she sued Australia Post in negligence. She argued at first instance that Australia Post owed her a duty of care equivalent to that of in an employer/employee relationship. At first instance, Balla DCJ rejected that submission, characterised the duty of care as that of an occupier and found Australia Post not liable. On appeal, the Court of Appeal referred to the principles set out in *Stevens v Brodribb Sawmilling Co* Pty Ltd (1986) 160 CLR 16 at 24 and *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1 at [20], which noted that although the general position that subcontractors are not to be treated as owed the duty of care to employees, there are some exceptions. More directly relevant was *Thompson v Woolworths* (2005) 221 CLR 234, where the relationship between the parties included the status of Woolworths as an occupier, which gave it a measure of control not only over the physical condition of the premises but also with respect to business operations carried out there. See also *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132 and *Sydney Water Corporation v Abramovic* [2007] NSWCA 248. Applying the principles, it was noted that although the plaintiff was required to wear an Australia Post uniform and drive a van with Australia Post logos, this was not the relevant relationship. She was contracted to work solely for Australia Post and did not exercise any independent skill or specialised expertise. She was not comparable to a qualified tradesperson. Australia Post knew of the precise risk and had a limit on the weight of parcels. In the absence of other considerations, Australia Post should have been held to owe a duty of care to a contractor. The risk was foreseen and other issues raised went only to contributory negligence. Accordingly, the appeal was upheld and the case remitted for a rehearing, limited to contributory negligence and damages.

Sections 5F and 5G *Civil Liability Act 2002*

In *Watson v Meyer*, [2013] NSWCA 243, Gibson DCJ had allowed defences based on ss 5F and 5G, even though they were not expressly pleaded, on the basis that the common law defence of volenti non fit injuria had been pleaded. On appeal, the Court of Appeal said that cases are to be determined on the issues raised in the pleadings, and, in circumstances where there was objection taken to the pleading, and no application to amend the pleading, Mr Meyer should have been held to his pleaded case. The defence was not open. On this and other grounds, the case was remitted for a re-hearing.

Personal Injury – failure to warn of risk

An unladen grain train collided with an overturned semi-trailer at a level crossing in southern NSW in *Perry and Bell v Australian Rail Track Corporation Ltd & Ors* [2013] NSWSC 714 (before Campbell J). The train crew sued for personal injury and mental harm. The semi-trailer which had overturned was carrying 133 wool bales. There was clear evidence of excessive speed leading to the semi-trailer overturning. There was evidence that Australian Rail Track Corporation had 5 mins and 45 secs after receiving notice of the danger to warn the train staff of the risk so as to permit the train to be halted before impact, yet no such warning was given. In the circumstances, both the Australian Rail Track Corporation and the truck driver were liable in equal proportions.

Duty of care to employees of independent contractors

In *Miljus v Watpow Construction Pty Ltd* (2012) 82 NSWLR 597 (NSW CA), a building company contracted with an experienced concrete pourer, who established a site adjacent to the building site. A supplier then subcontracted with a delivery company to supply concrete to the pour site. A subcontractor lost control of the delivery vehicle on a narrow public road some distance from the building site, causing an employee to suffer physical and psychiatric injury. It was held that a head contractor on a building site owed no duty of care to an employee of an independent contractor working at the site where the employee was injured in an accident which occurred at a position relatively well-removed from the site. Obligations under Regulation 73(2) of the *Construction and Safety Regulations 1950* only applied at the working site in the construction process.

Res ipsa loquitur

The plaintiff sued for personal injury suffered whilst coming to the rescue of the defendant and his vessel in *Blackney v*

Clark [2013] NSWDC 144 (Neilson DCJ). The defendant called for assistance from his vessel near Evans Head, when he was in the midst of breaking waves. The defendant specifically requested the assistance of the vessel upon which the plaintiff was a passenger. When the plaintiff's vessel arrived, the defendant's vessel had capsized and the defendant was clinging to the bow. The plaintiff entered the water holding a rope and swam towards the defendant, hoping to tie the rope to the bow of the defendant's vessel but was unable to do so and was ultimately washed onto the beach in an unconscious state, suffering injury.

There was no clear evidence that the defendant's vessel unexpectedly broke down. The defendant chose not to give evidence. The defendant allowed his vessel to get so close to the breakers that his vessel was dragged into shore by them and that alone 'bespeaks negligence' [28]. Res ipsa loquitur applies. As was pointed out in *White v the Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 498F by Lord Steyn, where a rescuer is injured in a rescue attempt, a plea of volenti non fit injuria will not avail a wrongdoer. Contributory negligence will usually be rejected. A rescuer's act in endangering himself will not be treated as a novus actus interveniens.

The Court held that the plaintiff entered the water to assist a defendant who was in personal danger, as was his property. The plaintiff was entitled to recover damages.

Liability of councils to employees

The plaintiff employee of a council slipped on the step of a truck in *Cross v Moreton Bay Regional Council* [2013] QSC 215, before Jackson J. The plaintiff failed in his action against the manufacturer but succeeded against the employer council for failing to maintain a non-slip surface on a rung of the step, which materially contributed to the slip. The plaintiff succeeded with no reduction for contributory negligence.

Liability for tortious actions of spouse

In *Lloyd v Borg* [2013] NSWCA 245, a husband gave his wife general unsupervised use of a vehicle who, whilst in the vehicle, permitted a third party to drive it on the family property. A passenger, another visitor, was injured in an accident. The passenger sought to fix the husband with liability for the alleged tort of his wife. The husband had given his wife not merely the right to use the motor vehicle but also the right to allow other people to drive it. There was no economic or other tangible interest of the husband in his wife's exercise of that right. His supposed interest in having visitors inspect and admire his rural estate was not such an interest. Nothing in the circumstances warranted any implication of responsibility of the husband for the actions of his wife in exercising the rights in respect of the vehicle gratuitously conceded by him to her. The principle in *Soblusky v Egan* (1960) 103 CLR 215 is a narrow one which should not be extended. For the owner to be responsible, There would have to be an appointment, engagement or request by the owner not of a merely domestic or social nature in order for the owner to be responsible. Additionally, there must be the reality of actual power of control, the exercise of which is likely to be effective. Note in respect of road use of vehicles, the statutory agency imposed under s 10 *Motor Accidents Compensation Act 1999*.

Update 36

Section 3 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff worked as a labourer and was assisting in attaching a chute to a chipper using a loader in *RG and KM Whitehead Pty Ltd v Lowe* [2013] NSWCA 117 (2013) 63 MVR 375. The loader was an articulated vehicle which was stationary but which had projecting prongs which were in motion at the time. The plaintiff suffered injury when he was knocked from the chipper. The question was whether this fell within the meaning of s 3A(1) of the Motor Accidents Compensation Act. Overturning the finding of the primary judge, the Court of Appeal found the fact that the vehicle was stationary and being used as a loader meant that at the relevant time it was not being driven nor was there any collision caused by the driving. This was to be distinguished from cases where a vehicle was only temporarily stopped, such as at traffic lights. Operating a vehicle is not the same as driving it.

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

In *QBE v MAA* [2013] NSWSC 549 (2013) 63 MVR 470 (Rothman J), a medical assessor concluded that the claimant had as a result of an accident suffered a major depressive disorder with a whole person impairment of 18%. The insurer sought review, which as rejected by the Proper Officer because she was not satisfied that there was reasonable cause to suspect the medical assessment was incorrect in a material respect. QBE then applied for a further medical assessment based upon medical evidence, including clinical notes said to be inconsistent with the assessor's findings. The Proper Officer considered the matter should not be referred for further assessment because she was not satisfied there was additional relevant information about the injury. QBE sought judicial review. Dismissing the application, Rothman J said the Proper Officer did not fail to take into account any consideration required by law or take into account any relevant consideration. Pre-existing psychological issues were matters the Proper Officer found had been considered by the relevant assessor. She was in error in finding that the notes were not additional relevant information but given the claimant's pre-existing symptoms were known to the assessor, a finding of lack of materiality was open to the Proper Officer and her error did not constitute an error of law. That error had no effect on the outcome of the referral and accordingly, relief was refused to the insurer.'

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

The claimant asked for declarations that a Review Panel Certificate disclose errors of law on the face of the record and an order setting aside the Assessor's Certificate and remitting the matter for referral to the Review Panel for determination according to law in *Moran v MAA of NSW* [2013] NSWSC 1135. Noting that the Guidelines required results of neuropsychometric testing to be taken into account by the Panel, Harrison AsJ said the Panel was required to expose the reasons as to why it disregarded results or explain why those results were considered irrelevant. By failing to do, the Panel failed to take a relevant consideration into account. The claimant was granted the declaration and orders sought.

Section 126 *Motor Accidents Compensation Act 1999* (NSW)

In *Allianz Australia Insurance Ltd v Shamoun & Ors* [2013] NSWSC 579 (2013) 63 MVR 498 (McCallum J), an assessor awarded buffers of $300,000 for past loss of earnings and $150,000 for future loss of earnings, concluding that it was not possible to correctly forecast or quantify the extent of the claimant's economic loss. The insurer appealed, relying on s 126 Motor Accidents Compensation Act and alleging that the claimant had failed to satisfy the assessor that the assumptions about future earning capacity were based on the claimant's most likely future circumstances but for the injury. Dismissing the insurer's claim for relief with costs, McCallum J found that such an application must be grounded upon jurisdictional error or error of law on the face of the record. It was open to the assessor to adopt a buffer approach in the present case and in fact it was difficult to see what other course could have been taken.

Contributory negligence

In *Robbins v Skouboudis & Anor* [2013] QSC 101 (2013) 63 MVR 307, before Martin J, the plaintiff was a passenger on a motorcycle being ridden by the first defendant. When the first defendant lost control of the motorbike, the plaintiff was

thrown off and suffered severe injuries. She had consumed a significant amount of alcohol and had made admissions that she had been drinking with the first defendant for 'a fair while', having been out 'on a bender' with him. There was evidence the motorcycle was being ridden irresponsibly prior to the loss of control. Martin J held that the damages should be reduced by 50%. The contention that the plaintiff's claim should be defeated entirely by a finding of 100% contributory negligence was rejected.

Vicarious liability/duty of care

The plaintiff subcontractor was injured whilst plastering at a home being constructed by the defendant in *Herbert v Clarendon Homes (NSW) Pty Ltd* [2013] NSWSC 1158 (before Beech-Jones J). One of the defendant's employees opened a door behind which the plaintiff was working, resulting in the injury. The plaintiff succeeded against the defendant as being vicariously liable for the employee's negligence and also on the basis that the defendant was negligent in failing to take reasonable steps to properly co-ordinate actions and interactions between persons coming onto the site. In the circumstances, principal contractor owed a duty to the subcontractor's independent contractor. There was no contributory negligence.

Uniform Civil Procedure Rules - Costs – offer of compromise

In *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188, the defendant offered to pay the plaintiff a sum plus costs as assessed or agreed, with the proceedings dismissed. This offer was described as an offer of compromise. Subsequently, a slightly increased offer was made in similar terms. Neither offer was accepted. The defendant did better than its first offer and sought indemnity costs. That was rejected by a magistrate on the basis that the offer to pay the plaintiff's costs as agreed or assessed was inconsistent with Rule 20.26 UCPR and the offer could not operate as a *Calderbank* offer either. That decision was reversed on appeal but before the Court of Appeal handed down its decision in *Old v McInnes & Hodgkinson* [2011] NSWCA 410, where it was said that an offer to pay costs as agreed or assessed was not compliant with r 20.26 because it was not exclusive of costs. On appeal, it was argued that *Old* was incorrectly decided. Rule 20.26 requires that an offer must be exclusive of costs in most circumstances. Because the scheme provides for costs on non-acceptance, it is inconsistent with the scheme for provision to be made in respect of costs in an offer. Accordingly, the Court of Appeal found that the conclusion reached in *Old* was correct. An offer which is silent as to costs is exclusive of costs and there is no inconsistency between *Old* and *Vieira v O'Shea (No. 2)* [2012] NSWCA 121. Accordingly, the primary judge was in error and the offer was one not compliant with r 20.26. An offer expressly made under r 20.26 will not of itself take effect as a *Calderbank* offer unless there is something in it or the surrounding circumstances to indicate it is proposed to be relied upon on costs irrespective of r 20.26. That did not apply here. It was not a *Calderbank* offer.

Update 37

Section 33 *Motor Accidents Compensation Act 1999*

The plaintiff sued the Nominal Defendant for injury suffered when riding a trail bike in *Maric v Nominal Defendant* [2013] NSWCA 190. The injuries were caused by another trail bike rider, who had negligently overtaken him and cut him off. The plaintiff failed as against the Nominal Defendant, as it was found that the accident did not occur on a road as defined in s 4 of the *Road Transport (Vehicle Registration) Act 1997*, namely:

> Road means an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles.

The Nominal Defendant had conceded that the Old Western Road was a public road but not that it met the definition above. The trial judge criticised the failure to establish precisely where the accident occurred and whether it had taken place was on the Old Western Road. The plaintiff had simply asserted that he had found out the name from somewhere. In these circumstances, the trial judge was not in error in dismissing the claim. The alternative argument was that the road was being used by the public. There were photographs of a short stretch of a rough road in the country, but the lack of identification as to where the accident occurred and the absence of corroboration from any reliable independent source meant that the photographs did not establish that the road was open to or used by the public. In any case, the trial judge had erred in finding fault on the part of the other motor bike rider given the clear inconsistencies in the plaintiff's case. The plaintiff's appeal failed.'

Sections and 95 *Motor Accidents Compensation Act 1999* (NSW)

The insurer issued a notice under s.81 admitting breach of duty of care in *Allianz Australia Insurance Ltd v Anderson* [2013] NSWSC 1186 (Rothman J) Although the insurer conceded this was an admission, it maintained that it never admitted liability for the purposes of s 95. It was held that by the issue of the s 81 Notice and a subsequent document admitting soft tissue injury, on a proper construction of the insurer's statements and conduct, the insurer had admitted both breach of duty of care and damage, thereby admitting liability. The insurer also made an admission that liability was not in issue. The insurer was bound by that admission as well. Accordingly the insurer was bound by the assessment made under CARS and required to pay damages to the claimant. Rothman J said there are no formal requirements for an admission of liability, which was a matter for construction of the various acts of and written documents from the insurer.

Sporting Injuries/Sections 5B, 5D and 5F of the *Civil Liability Act 2002* (NSW)

The plaintiff suffered C6 tetraplegia whilst wakeskating behind a speedboat on the Tweed River in *Hume v Patterson* [2013] NSWSC 1203 (before Campbell J). He sued the driver of the boat which towed him. The plaintiff was relatively inexperienced and it was accepted that falling off was an inevitable aspect of the sport. However, the risk of injury was said to be very low. At issue in the case was whether the driver of the boat left the deep water channel and went outside the navigable waters to cross a sandbar, where it was said the plaintiff came off and suffered his injuries in the shallows. Campbell J found that the plaintiff fell off in water between 1.1 and 1.3 metres in depth with between a high and substantial risk of catastrophic injury in those circumstances. Within the channel, the water was considerably deeper. Campbell J was comfortably satisfied on the balance of the probabilities that the plaintiff suffered his injury on the sandbar outside the channel and that accordingly there was a breach of the duty of care owed by the driver of the boat. The relevant precaution called for navigation within the channel. The risk was not insignificant. (s 5B Civil Liability Act). Causation was established under 5D. There was a defence under s 5L of the Act regarding the materialisation of an obvious risk of a dangerous recreational activity. The onus is on the defendant. It was not suggested that wakeskating in deep water in the main channel was a dangerous recreational activity. Campbell J was not persuaded that the defendant had established that waterskating was a dangerous recreational activity. Even if it were a dangerous recreational activity, the question is whether the risk was obvious. (s 5F). There is no necessary correlation between the significant risks which make an activity dangerous and the obvious risk that materialises. However, given that the activity undertaken was wakeskating in the channel, the risk of injury on a sandbar outside the channel was, in the

circumstances, not an obvious risk. Defences in volens and contributory negligence were not pressed and the plaintiff succeeded.

Causation

In *Shoalhaven City Council v Pender* [2013] NSWCA 210, the plaintiff slipped and fell on a ferry ramp and succeeded at first instance. The Council appealed. The Court of Appeal held that the evidence did not raise a more probable inference in favour of the respondent's case and he accordingly failed to establish why he slipped, let alone that he established that any omission on the Council's part caused the injury. The appeal was upheld.

In *Coles Supermarkets Australia Pty Ltd v Meneghello* [2013] NSWCA 264, the plaintiff sued for injury from a fall in the respondent's supermarket and alleged that the store was negligent in allowing two small pieces of cardboard to lie on the floor. The trial judge found that the cardboard was the probable cause and awarded the plaintiff damages. Whilst the plaintiff could not definitely say that the cardboard was the cause, the plaintiff had observed the cardboard in the immediate vicinity after the fall. In the Court of Appeal it was said there were two possibilities, of which only one was that the cardboard was the cause of the fall. There was therefore an insufficient basis for an inference to be drawn, and in any event there was insufficient evidence to support the inference that cardboard reduced the grip between the floor and the plaintiff's thong footwear. Accordingly, whilst the supermarket was under a duty to take reasonable care to avoid foreseeable risk, the plaintiff had failed to prove that the two small pieces of cardboard were such a risk or that her foot came into contact with them. The appeal was upheld.

Workplace bullying/psychiatric illness/breach of duty of care

In *Swan v Monash Law Book Co-operative* [2013] VSC 326 (Dixon J), the plaintiff complained of psychiatric illness due to bullying conduct in the workplace by another employee/manager, and as a result of the employer failing to act on complaints. Dixon J preferred the plaintiff's evidence and accepted the plaintiff's complaints. The fellow employee/manager's conduct damaged the mental health and well-being of the plaintiff throughout the course of her employment. This breached the duty of care and was a foreseeable consequence of the employer's failure to protect employees. If the defendant had acted prudently and appropriately, it is likely that the plaintiff would not have suffered any or any significant psychological injury. Substantial damages were awarded.

Update 38

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

The insurer sought an order setting aside a claims assessment under s 94 of the *Motor Accidents Compensation Act 1999* in *Allianz Australia Insurance Ltd v Harrison* [2013] NSWSC 1211 (Hoeben CJ at CL). The insurer argued that the assessor had erred in refusing to permit cross-examination about an abandoned claim for past economic loss and past paid care in circumstances where a claim was made for future paid care. The insurer also asserted that it only partially admitted liability and was not obliged to pay the damages as assessed. Hoeben CJ at CL held that the insurer was entitled to more than the mere opportunity to put submissions at the conclusion of evidence in circumstances where submissions could not be properly acted upon by the assessor. There was a denial of procedural fairness and natural justice and the certificate was quashed. However the assessment of damages would have been binding on the insurer if it had not been for this defect.

Personal injury caused by animals/*Companion Animals Act 1998* (NSW)

In *Sarkis v Morrison* [2013] NSWCA 281, the plaintiff was riding his motor cycle when a dog owned by the defendant ran out of a driveway and collided with the motor bike. The dog did not attack the plaintiff. At first instance, the defendant was found strictly liable under s 25 of the *Companion Animals Act 1998*, notwithstanding the wounding did not result from any act of aggression. The NSW Court of Appeal upheld the defendant's appeal, finding the expression 'caused

by the dog wounding or attacking that person' should be limited to conduct involving an element of aggression or other deliberate conduct directed towards the person by the dog. Inaction on the dog's part is insufficient. Where the dog caused bodily injury without aggressive or other deliberate intent, there would be no liability in the owner under s25 of the Act.

Employment/cross claims

In *Grima v RFI (Aust) Pty Ltd* [2013] NSWSC 1199 (Harrison J), the plaintiff was injured in the course of his employment whilst unloading goods from a truck which was loaded at the defendant's premises. The plaintiff alleged that the truck had been loaded incorrectly and unsafely by the defendant. The defendant cross-claimed against his employer, alleging it failed in its duty to provide a safe place of work and failed to properly instruct the plaintiff. The defendant's failure to provide a restraining brace to prevent the fall of goods was a breach of duty, as was the employer's failure to formulate an adequate system and instructions for unloading. The defendant and employer were found to be equally at fault and responsibility was apportioned at 50% each with no finding of contributory negligence.

Amendment of statement of claim

The plaintiff sought leave to file an amended statement of claim in *Weston v Wickham Freight Lines Pty Ltd* [2013] NSWSC 867 (Schmidt J). The plaintiff sought to plead an alternative claim on the basis of a blameless accident as defined in s 7A of *Motor Accidents Compensation Act 1999*. The defendant opposed the proposed amendment. Schmidt J was of the view that there was no difficulty in pleading a claim in the alternative and no prejudice flowed from the proposed amendment. Leave to amend was granted together with an order for costs of the motion in favour of the plaintiff so that the real issues in the case could be addressed appropriately.

Update 39

Section 118 *Motor Accidents Compensation Act 1999* (NSW)

Hall J, on a detailed comparison of the original settled damages and his own assessment concluded that the proper settlement value of the claim as at 20 October 2006 required an adjustment downwards of $115,000 in *Checchia v Insurance Australia Ltd t/as NRMA Insurance* [2013] NSWSC 674. That adjustment reduced the verdict inclusive of costs from $1,225,000 to $1,031,981 inclusive of costs. In doing so, he noted 'purpose' within s 118 means the subjective intention of the claimant, the purpose or intention is to be inferred from the whole of the evidence, the false and misleading conduct must be engaging for the purposes of obtaining a financial benefit and the consequence is that the court must engage in a comparison between the amount awarded (or settled) and the amount which should have been awarded in the absence of that conduct.'

Compensation to relatives/Sections 11 and 12 *Civil Liability Act 2002* (NSW)

In *Taylor v The Owners - Strata Plan No. 11564 & Ors* [2013] NSWCA 55, the issue was whether a claim by a widow was subject to the restrictions in s 12 of the Civil Liability Act, in circumstances where her late husband's weekly income noticeably exceeded the limit imposed by that section. Whilst s 11 defined personal injury damages as 'damages that relate to the death of or injury to a person', s 12(2) did not apply on the face of it because the deceased was neither the person who made the claim nor the person entitled to do so. However, having regard to the purpose of the legislation, McColl and Hoeben JJA (Basten J dissenting) gave a purposive interpretation extending the section notwithstanding the apparent inconsistency.

Occupiers liability - shops

The plaintiff slipped and fell on the supermarket floor in *Fitzsimmons v Coles Supermarkets Australia Pty Ltd* [2013] NSWCA 273, which was wet from deliberate mopping by a member of the supermarket staff. Efforts to dry the floor with a mop had been unsuccessful and one of the staff members had directed another to obtain absorbent material to dry it. While this was being done, the plaintiff slipped and sustained injury. At the time there were three bright yellow 'wet floor' signs in a rough triangle around the area where the plaintiff slipped. The first instance judge dismissed the plaintiff's claim on the basis that the defendant had taken adequate precautions to warn customers of the slippery condition of the floor and thus had discharged its duty. Upholding the plaintiff's appeal (per Basten JA and McDougall J - Emmett JA dissenting) the precautions taken by the defendant were inadequate. The warning signs were not readily within the line of site of a shopper looking at goods on display, instead being placed at the end of aisles. It would have been simple for an employee to stay on or by the wet area for the short period that it took the other employee to obtain absorbent material to dry the floor. That would have imposed a minimal burden on the defendant and was likely to be far more effective than the three 'wet floor' signs. That precaution would almost certainly have prevented this accident. Emmett JA, dissenting, was of the view that the three 'wet floor' signs were clearly visible and constituted an adequate response.

Vicarious liability – trespass to the person

In *Lamble v Howl at the Moon Broadbeach Pty Ltd* [2013] QSC 244 (Douglas J), the plaintiff patron was assaulted by a barman employee of the nightclub. The barman was not authorised to perform security duties. Douglas J held the nightclub to be vicariously liable for the barman's actions. The nightclub was not independently or directly in breach of its duty. Contributory negligence was not available as a defence to an action for trespass to the person. Accordingly, The plaintiff succeeded against the nightclub.

Update 40

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

In *Maric v Nominal Defendant & Anor* [2013] NSWCA 190, the plaintiff appealed from a decision of the trial judge that he had failed to establish that injuries in coming off a trail bike were caused by the negligence of another trail bike rider on a road or road-related area. Dismissing the appeal, it was said the plaintiff had failed to establish the accident occurred on a road or that the area was open or used by the public and developed for the driving of motor vehicles. The appeal was accordingly dismissed.

Sections 34 and 73 *Motor Accidents Compensation Act 1999* (NSW)

In *Nominal Defendant v Browne & Anor* [2013] NSWCA 197, the plaintiff claimed she stepped backwards into a drain to avoid being struck by a large truck speeding up an adjacent driveway and injured her right ankle. She gave instructions to solicitors in 2009 and commenced proceedings against the occupiers of the premises in July 2011, and did not seek to join the Nominal Defendant until more than 2½ years after she was injured. At first instance, time was extended. The insurer appealed. The plaintiff claimed that she did not realise she had a claim against the driver or owner of the motor vehicle until receiving advice to that effect in 2011. She had made no relevant inquiry or search to identify the motor vehicle. Even after advice, there was a lengthy delay while she was moving house. Granting the insurer's appeal, the Court of Appeal said that the real issue was whether the respondent/plaintiff had shown that the identity of the vehicle would not be established after due inquiry and search. It was fanciful on the facts to suggest that earlier inquiry would have made a difference in this regard. However, in terms of delay, the explanation for the whole of the period was patently not full and the section was therefore not satisfied. In those circumstances, time should not have been extended.

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

In *Mitrovic v Motor Accidents Authority of NSW* [2012] NSWSC 11231, the refusal of a review had previously been overturned by Harrison AJ as vitiated by legal error. In *Mitrovic v Venuto and MAA of NSW* [2013] NSWSC 908, Fullerton J noted that despite that decision, the plaintiff's application for a further medical assessment was refused a second time, and the plaintiff claimed that that decision was also vitiated by legal error. The question at issue was whether the plaintiff's head injuries and psychological injury were caused by the motor accident. Whilst accepting that the medical material was indicated a deterioration in the plaintiff's condition, the proper officer took a view on causation which had previously been found to be the subject of error, failing to consider whether additional medical reports would have informed the decision on causation. The matter was again remitted to a different Proper Officer to be determined in accordance with law. The insurer was ordered to pay the claimant's costs.

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

In *Jaksic v Insurance Australia Ltd t/as NRMA* [2013] (before Rothman J), the claimant sought to set aside the certificate and medical assessment of a Medical Review Panel allegedly made under ss 61 and 63 of Motor Accidents Compensation Act. Following an initial assessment under s 61, the NRMA applied for and obtained a review under s 63, which reduced the assessment of WPI from above 10% to below 10%. The Panel said that on re-examination it found that there were discrepancies in physical findings between what had been observed and other medical reports. The question at issue was whether the claimant was given an adequate (or any) opportunity to respond to the perceived inconsistencies. Pursuant to the guidelines, the purpose of dealing with inconsistencies is 'to ensure accuracy and procedural fairness'. It was not asserted the Panel decision was affected by error of law or jurisdictional error. It asked itself the right question, took into account all mandatory considerations, did not take into account any irrelevant consideration, did not utilise the wrong test and did not misapprehend the nature or limits of its powers or perform an act or make a decision not sanctioned by authority.

However, the Panel did not give the claimant an opportunity to explain any discrepancy and it was not clear that the degree and nature of the discrepancy was described to her. She did not have the opportunity to confirm the history and respond to the inconsistent observations as required by the Guidelines, and was accordingly denied procedural fairness. The certificate was quashed and a fresh review panel ordered to undertake a reassessment The insurer was ordered to pay the claimant's costs.

Section 73 *Motor Accidents Compensation Act 1999* (NSW)

In *Nominal Defendant v Browne & Anor* [2013] NSWCA 203, the plaintiff was in an accident in which he was a passenger in a car where both he and the defendant driver had consumed alcohol. The plaintiff suffered serious injury. The defendant was convicted of a number of criminal offences arriving out of the accident. It was conceded that the damages involved exceeded the threshold. At first instance, the explanation for the delay was found to be full and satisfactory in view of the serious injury suffered by the plaintiff and his lack of memory of the accident. Dismissing the insurer's application for leave to appeal, it was said that leave should only be granted in such cases where there were substantial reasons to allow an appellate review. These reasons could include an error of principle which, if uncorrected, would result in substantial injustice. In the absence of such a question of principle, leave to appeal will usually be refused. The ultimate question on discretion is whether the chance of a fair trial remains likely. The primary judge did not apply the wrong principles and whilst the lack of evidence might make it difficult for the plaintiff to claim, it did not demonstrate there would be substantial injustice if an extension of time was permitted. The insurer's application was dismissed with costs.

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

A hotel's duty manager asked a security guard to remove the intoxicated plaintiff in *Day v The Ocean Beach Hotel Shell Harbour Pty Ltd* [2013] NSWCA 250. The guard went behind the plaintiff and pulled the stool out from under her. The plaintiff fell to the floor and claimed she suffered injury. At first instance the judge found that this was an assault and battery for which the security guard's employer was vicariously liable, his actions being incidental

to his employment in the sense referred to by Latham CJ in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 78, Basten JA in *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106 at [21] and by Ipp JA in *Sprod bnf v Public Relations Oriented Security Pty Ltd* [207] NSWCA 319 at [79-83].

The Court of Appeal affirmed that the security company was vicariously liable, however the security guard was not acting as the agent of the hotel or the duty manager in the requisite sense so as to create vicarious liability in them. The legal duties on licensees do not create vicarious liability and dual vicarious liability is not permissible at law.

Section 5R *Civil Liability Act 2002* (NSW)/ contributory negligence

The question at issue in *Stafford v Carrigy-Ryan and QBE Insurance (Australia) Ltd* [2013] ACTSC 99 (before Sidis AJ) was whether there should have been a finding of 100% contributory negligence. The defendants alleged they owed the plaintiff no duty of care given that the driver had a reading of .155 and the evidence was that the plaintiff passenger and the first defendant driver were drinking together. The defendants relied on the views of McHugh J in *Joslyn v Berryman* (2013) 214 CLR 522 at 563, in which he referred to the judgment in *Gala v Preston* (1991) 172 CLR 243 at 254, suggesting that in special and exceptional circumstances participants could not have had any reasonable basis for expecting that a driver of a vehicle would drive it according to ordinary standards of competence and care. Of this, McHugh J said that 'The plea of no breach of duty of care - perhaps even a plea of no duty in an extreme case - is still open in the case of a passenger who accepts a lift with a driver known to the passenger to be seriously intoxicated.' However, the High Court in *Imbree v McNeilly* (2008) 236 CLR 510 rejected the notion of a variable standard of care according to the driver's competence. On the other hand, in *Miller v Miller* (2011) 242 CLR 446, the court at 470–471 maintained the views expressed in *Gala v Preston*.

Sidis AJ concluded that there were no special and exceptional circumstances that warranted a finding that the defendant owed no duty of care. There was no joint illegal conduct. Although the defendant committed the crime of driving when intoxicated, the plaintiff committed no crime in going with him as a passenger. The plaintiff's uncontested evidence was that he felt obliged to go with the defendant because of concern for his state of mind. For the same reasons, this was not a case where the plaintiff's contributory negligence should be assessed at 100%. Ordinarily Sidis AJ said she would have held both the plaintiff and first defendant equally responsible, as they were equally aware of the extent to which alcohol had been consumed and of the risk involved. However, there was an added element in that it was the first defendant who initiated the proposal to drive the Subaru and the plaintiff accompanied the first defendant due to his genuine but misplaced apprehension of the need to support his friend. In these circumstances, the plaintiff's contributory negligence was assessed at 35%.

Failure to plead statutory defences

In *Watson v Meyer* [2013] NSWCA 243, Gibson DCJ had allowed defences based on ss 5F and 5G of the CLA even though they were not expressly pleaded, because the common law defence of volenti non fit injuria had been pleaded. The Court of Appeal said that cases are to be determined on the issues raised in the pleadings and that, in circumstances where there was objection taken to the pleading, and no application to amend the pleading, Mr Meyer should have been held to his pleaded case. The defence was not open. The case was remitted for a re-hearing.

Employment

In *Wolters v The University of the Sunshine Coast* [2013] QCA 228, the plaintiff sued her employer for personal injury damages relating to a debilitating psychiatric illness caused by the conduct of a fellow employee. The claim of vicarious liability for negligence on the part of the fellow employee was dismissed and the judge was not persuaded that that employee owed the plaintiff a duty to take reasonable care to avoid causing psychiatric injury or that, if he did, he had breached that duty. Generally, the trial judge accepted the plaintiff's version of events involving aggressive language and conduct by the fellow employee. The trial judge accepted that the university owed its female employees a duty to take reasonable care to avoid psychiatric injury, and found that the university's response was not reasonable – the plaintiff's complaints were not investigated and no appropriate action was taken. However, he was not convinced that the fellow employee would have acted differently if reprimanded and accordingly whether the incident could have been avoided. The Queensland Court of Appeal was of the view that the

hypothetical enquiry as to whether a reprimand would have been effective miscarried as it failed to identify the content of the reprimand and counselling that ought to have been given (and therefore its consequent effect). This failure deprived the ultimate conclusion of its legitimacy. The conclusion that it was more probable than not that the fellow employee would have acted in the same way even if reprimanded and counselled should be set aside. The reprimand and counselling should have been at a level likely to be effective. This led to the ultimate conclusion that it is more likely than not that, had appropriate action to reprimand and counsel been taken, the incident which led to the injury would not have occurred. The plaintiff's appeal was allowed with costs.

Product liability

The plaintiff was injured at work by the collapse of an office chair in *Downie & Anor v Jantom Company Pty Ltd & Anor* [2013] ACTSC 171, causing her to suffer a low back injury and undergo surgical fusion. The chair was manufactured and imported from China by the first defendant, which supplied it to the second defendant, which assembled it and sold it to the employer. Master Harper accepted that there was a history of these chairs malfunctioning. The chair failed during what could be described as normal use. The claim succeeded against the supplier and its insurer (given that it was insolvent). The employer also claimed under s 74B *Trade Practices Act 1974* (Cth). However, those claims were not available to the employer because those rights arose only for goods ordinarily acquired for personal, domestic or household use or consumption, not for a business. However, the supply of the chair to the employer included a contractual term that the chair would be reasonably fit for its purpose as an office chair and, as this had been breached, the employer was entitled to recover for breach of contract.

Occupiers liability

In *Panther v Pischedda* [2013] NSWCA 236, the plaintiff and her husband arrived at a self-contained flat in the Blue Mountains which they had rented from the appellant for two nights. The only access to the flat was down a steep driveway from the street. During their stay, the plaintiff and her husband left to go for a walk, during which it began to rain. As they descended the driveway, the plaintiff fell and broke her ankle. The plaintiff said she understood at the time that the driveway might be slippery and therefore walked with care, but her left foot slipped forward and she fell. The plaintiff was wearing shoes designed to be reasonably slip-resistant, and was found to be walking carefully. The primary judge found that the state of the driveway created a risk which was not insignificant, and that that risk was foreseeable. The defendants acted unreasonably in failing either to install a handrail or taking remedial action to allow alternate access on existing stairs. The cost of these alternatives would have been modest. On appeal, it was held these findings were open to the trial judge, as was the inference that the plaintiff would have used handrails or an alternate means of access if one was available. Accordingly, the defendants' appeal was dismissed with costs.

Expert evidence

Beech-Jones J had to consider the appropriate directions in respect of expert witness conclaves in *Avery v Flood* [2013] NSWSC 996. The plaintiff sued a surgeon and anaesthetist in medical negligence. The parties disagreed over the composition of expert conclaves on questions relating to breach and causation. The plaintiff contended that there should be one combined conclave involving all nine experts who had provided reports on breach and causation. The defendant asserted there should be two conclaves of seven and four experts respectively. Beech-Jones J thought that the costs and logistics of each exercise made little difference either way.

The causation issue related to whether the plaintiff suffered a loss of vestibular function as a result of something that occurred during the operation.

The more significant argument was that if the conclave included the discreet causation issue, it would mean some experts participating in a conclave in respect of the matter on which they had expressed no opinion. Having regard to this, the appropriate order was that the nine witnesses who have expressed any view generally on liability should confer together and the four witnesses who have expressed a view on the causation issue should separately confer.

Admissibility of expert report

In *RTA of NSW v Barrie Toepfer Earthmoving and Land Management Pty Ltd (No. 4)* [2013] NSWSC 1420 (Price J), the plaintiff sought to tender on expert report. The insurer defendants objected to the tender of the expert report on

the basis that the expert had not identified key assumptions and had insufficient expertise in the relevant areas of dispute pursuant to s 79 of the *Evidence Act 1995* (NSW).

A close analysis of the report revealed facts and reasoning upon which the expert's opinions rested, and Price J held the expert had demonstrated specialised knowledge in the relevant area. As a result, objections in respect of expertise and identification of key assumptions failed. A further objection that the probative value of the expert's evidence was outweighed by the danger the evidence might be unfairly prejudicial to the insurers under s 135 of the *Evidence Act* 1995 (NSW) was also rejected.

Vicarious liability for act of spouse

In *Lloyd v Ryan Borg by his tutor NSW Trustee and Guardian* [2013] NSWCA 245, at issue was whether the owner of an unregistered vehicle being driven off road could be vicariously liable for the alleged tort of his de facto wife , an inexperienced driver. In the context of an exclusively domestic relationship and transport on a rural property, no question of de facto employee arose and the case could be distinguished from *Soblusky v Egan* (1960) 103 CLR 2015, where the owner was present but asleep in the car. In *Scott v Davis* (2000) 204 CLR 333, this concept was not extended, so that the owner of an aircraft was not liable for the pilot's negligence in respect of an injured passenger, the owner of the aircraft not being present. The wider view of vicarious liability taken in England that if the owner has a right to control and if the driver is using the vehicle at the owner's request and for the owner's purposes this is sufficient, is not the law in Australia.

Duty of educational authorities

In *Walker v Canberra Institute of Technology* [2013] ACTSC 193 (Higgins CJ), the plaintiff was enrolled in the defendant institute undertaking a course to become a personal trainer. During a squat activity designed by a fellow student, the plaintiff injured a knee. A qualified instructor was present and supervised the exercise. The plaintiff claimed that the defendant, through the instructor, failed to exercise reasonable care for the plaintiff's safety. The Court held that instructors had a duty to students to ensure any exercise prescribed by another student did not represent any undue risk or was not executed in an unsafe manner. The activity was found to be unsafe and exposed the plaintiff to unnecessary and unreasonable risk. Accordingly, the plaintiff succeeded, and defences based upon a disclaimer and voluntary assumption of risk failed.

Privilege

In *Hancock v Rinehart* [2013] NSWSC 1402 (Bergin CJ in Eq), the plaintiffs subpoenaed accountants, who provided advice to the first defendant which included reference to a legal advice. The defendant objected to the plaintiffs obtaining access to those portions of the documents. The trustee's state of mind at the time she sent a letter, which included reference to taking legal advice, was of relevance to the case. Bergin CJ in Eq held that the first respondent had waived her privilege in redacted parts of documents by a positive assertion in the pleadings and the issue as to trustee's beliefs and the content of the letter was inconsistent with the holding back of the content of advice as it appeared in the documents. They were required to be produced and made available subject to an appropriate undertaking as to confidentiality.

Dust diseases – choice of forum

In *Robinson v Studorp Ltd* [2013] QSC 238 (Jackson J), the plaintiff sued for damages in Queensland for asbestos-related disease caused by the defendant's negligence in New Zealand. The defendant sought to stay proceedings under r16.1 UCPR 1999 (Qld) on the basis that Queensland was a clearly inappropriate forum, arguing there were significant matters of New Zealand legal principle or application of principle involved. Noting the effect of other proceedings in the Dust Diseases Tribunal in NSW and the effect of the *Trans-Tasman Proceedings Act 2010* (Cth), Jackson J held that the applicant failed to demonstrate that the court was a clearly inappropriate forum, applying the principles in *Voth v Manildra Flour Mills Pty Ltd* (1990) 170 CLR 538.

Employer's duty of care

A truck driver sued his employer for injury incurred when changing a tyre using a spanner provided by the employer in *Thompson v Cranetrans Pty Ltd* [2013] QSC 250 (Applegarth J). As the spanner was worn and there was no adequate system of inspection, it was held there was a reasonably foreseeable risk of injury from using the spanner. It was unreasonable for the employer to require the plaintiff to perform his task with the tools provided, and as a result the employer breached its duty of care and was held liable.