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Sections 69 and 104 *Motor Accidents Compensation Act 1999* (NSW)

In *AAI Ltd v Josipovic* [2013] NSWSC 1524, the validity of a certificate of a CARS assessor was challenged by an insurer on the basis of alleged inadequate reasons and the failure to consider the merits of the insurer's case in respect of the assessment of future care. Dismissing the claim, Campbell J held that there was no inadequacy of reasons, that the insurer's case had been adequately considered and that the assessor was entitled to find that future care would be provided on a commercial basis.

Section 151D *Workers Compensation Act 1987* (NSW)

The plaintiff employee sought leave pursuant to s151D to commence proceedings for damages against the employer in *Merton v Menildra Energy Australia Pty Ltd* [2013] NSWSC 1482 (Hoeben CJ at CL). The employee's explanation for the delay in proceedings, a significant factor of which was psychiatric injury as a direct consequence of the accident, was satisfactory, and there was no evidence of any prejudice. The employer had known relatively early of the intention to bring proceedings. Exercising its discretion, the court allowed the extension of time.

Non-delegable duty of care - schools

The United Kingdom Supreme Court unanimously overturned the decision of the English Court of Appeal in *Woodland v Essex County Council* [2013] UKSC 66, which had held that a school did not owe a non-delegable duty of care. The question for the court was whether the duty was merely to take reasonable care in the performance of the functions entrusted to it only when those functions were undertaken itself through its own employees, or whether it was a duty to ensure that reasonable care was taken in the performance by whoever it may procure to perform them, that is, a non-delegable duty. The court held that the latter was the case, consistent with the longstanding approach in Australia. The duty is non-delegable only when it falls within the scope of the education authority's duty to pupils within its care, but in entrusting that duty to someone else in respect of those who are inherently vulnerable, an educational authority cannot escape liability because it could not control the negligence of the party to whom it delegated those responsibilities. The decision makes it clear that, whilst a non-delegable duty does not amount to strict liability, it goes significantly further than the High Court's interpretation of a non-delegable duty in *Lepore* in 2003.

Duty of care - subcontractors

A subcontractor claimed damages from a builder for injuries suffered whilst lifting concrete blocks in *Fischetti v Classic Constructions (Aust) Pty Ltd and Vero Insurance Ltd* [2013] ACTSC 210, alleging that the builder negligently breached his duty of care not to expose him to the risk of injury. The plaintiff was a concreter but the lifting task which led to the injury was one for an unskilled labourer. Master Harper was satisfied that the builder breached the duty of care owed to the subcontractor, as well as being in breach of the former occupational health and safety regulations. The injury was clearly foreseeable. Master Harper found that there was no contributory negligence.

Safe system of work/breach of duty

In *Cairns Regional Council v Sharp* [2013] QCA 297, the plaintiff was a gardener employed by Cairns Regional Council. His hand was injured when he was startled by a car horn whilst mowing grass on a medium strip. At first instance, the council was held to have breached its duty of care to provide a safe system of work. The council sought leave to appeal, whereupon the Queensland Court of Appeal

held the judge did not err in concluding there was a breach of duty. The judgment contained a brief but recent application of established legal principle to facts rightly found on the evidence. Leave to appeal was refused on the basis that the proposed appeal had no prospect of success.

Motor vehicles - inevitable accident

The plaintiff in British Columbia in *Tran v Edbrooke* [2013] BCSC 1802 (Williams J), sued when the vehicle driven by the defendant slid into an intersection and struck the plaintiff's vehicle. The conditions were slippery due to heavy snow. The defendant denied liability on the basis of 'inevitable accident', suggesting he had provided an explanation which was as consistent with no negligence as it was with negligence. Williams J held there was no inevitable accident. The defendant failed to establish he was met with a hazard of which he had no prior warning or indication and failed to conduct himself with appropriate caution. The plaintiff succeeded accordingly.

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

The MAS assessment concluded that none of the injuries were caused by the relevant accident in *Mitrovic v Venuto & Anor* (2013) 64 MVR 306 (Fullerton J). The plaintiff applied for a further medical assessment, which was refused, but then set aside as vitiated by legal error. It was then refused a second time after being referred back to the proper officer. The proper officer failed to identify all the material required to assess causation and was in error in limiting her assessment as to whether the deterioration in the plaintiff's injuries was capable of altering the previous finding of a lack of causal connection. Fullerton J held that this was a further error of law. The matter was remitted for a second time in order for it to be correctly determined according to law.

In *Miles v MAA of NSW & Ors* (2013) 64 MVR 327 (Hoeben CJ at CL), the MAS assessor found permanent impairment over 10 per cent. The insurer applied for a further assessment, which was rejected and subsequently made another application based on much the same material. The proper officer agreed to refer the matter for a further assessment. The MAS assessor then certified that the impairment was not greater than 10 per cent. The plaintiff claimant sought judicial review on the basis that the relevant medical reports had previously been available, that the proper officer's power had already been exercised and that the proper officer failed to have regard to one of the medical reports. In refusing judicial review, Hoeben CJ at CL found that there is no limit to the number of referrals for assessment which can take place and additional relevant information should not be given the narrow interpretation urged by the plaintiff. The proper officer was not functus officio and ignoring relevant material did not involve jurisdictional error.

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

The plaintiff was assessed as having a WPI of 19 per cent in *Moran v MAA of NSW* (2013) 64 MVR 380 (Harrison AsJ). On the insurer's application a review was granted, which concluded that the WPI for brain injury was 0 per cent. The plaintiff then sought judicial review, asserting the review panel erred in applying an incorrect test in assessing traumatic brain injury and in concluding that the plaintiff suffered no serious head injury where the evidence was overwhelmingly to the contrary. Harrison AsJ quashed the review panel's determination and remitted the matter to be dealt with according to law. Despite the fact that the guidelines required the panel to take psychometric testing into account, the review panel noted documentation in which there were references to that testing but did not specifically refer to the testing and its reasons.. It may have been that it was simply overlooked. If the panel had given genuine consideration to the test results, it should have ventilated its reasoning. In these circumstances, the only conclusion available was that the review panel failed to take into account a relevant consideration. Accordingly, its decision should be set aside.

Sections 81 and 94 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was injured in a motor accident and claimed compensation in *Allianz Australia Insurance Ltd v Anderson & Ors* (2013) 64 MVR 392 (Rothman J). The insurer filed a section 81 notice, admitting 'breach of duty of care in relation to the circumstances of the above accident'. The plaintiff stated that liability was not in issue and the insurer's response accepted that there was no dispute as to liability. The CARS assessor awarded damages. The insurer, despite its filing of a notice under s 81, then argued there had been no admission of liability and it was not bound by the CARS certificate of assessment. Rothman J held that, pursuant to s 94, the claimant was bound by the assessment and certificate and was required to pay the damages of nearly $3.5 million found by the CARS assessor. Although s 81 requires an insurer to admit or deny liability, it does not require the admission or denial to be in any particular form. Moreover, s 81 allows an insurer to amend a denial to an admission, and that, once made, the admission is binding. Whilst the original notice under s 81 admitted breach of duty but not damage, the subsequent admission by the insurer of a soft tissue injury having been occasioned amounted to an admission of some damage. This made the admission of liability complete and binding.

Sections 5F, 5G and 5L *Civil Liability Act 2002* (NSW)

In *Moore v Liverpool Catholic Club Ltd* [2013] NSWDC 93, the adult plaintiff was injured after losing her footing. She slipped and fell whilst descending a set of stairs wearing skating boots in order to access an ice-skating rink. The defendant was held not to have established that going down the stairs wearing skating boots was a dangerous recreational activity within the meaning of s 5L of the CLA. CCTV footage of her descent did not demonstrate any unreasonable conduct on the plaintiff's part. The defendant failed to establish the plaintiff had either actual or constructive knowledge that the descent of the stairs whilst wearing skating boots involved an obvious risk.

Expert evidence

In *Cairns Regional Council v Sharp* [2013] QCA 297, it was said that expert evidence is only admissible as an exception to the hearsay rule if it meets two criteria. First, it must concern matters about which ordinary people are unable to form a sound judgment without the assistance of those with special knowledge or experience in the area and secondly, it must be the subject of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.

The expert's experience in mechanical engineering and his subsequent extensive study and practical experience in the field of workplace health and safety and accident prevention provided him with special knowledge and experience beyond that of ordinary people in this case. Workplace health and safety management and accident prevention is broadly recognised as a modern field of expertise. His evidence had been rightly admitted, although the judge was not obliged to accept it.

Diving injuries

In *Kelly v State of Queensland* [2013] QSC 106, a backpacker tourist suffered a C6 fracture when he entered the water of Lake Wabby on Fraser Island. The plaintiff and his friends were staying at a hostel, whose proprietors were required to show persons coming onto the island a video prepared by Queensland National Parks and Wildlife, which expressly referred to warnings about entering shallow lakes and streams, but made no reference to Lake Wabby. The plaintiff had watched the video.

When the plaintiff arrived at the lake with friends, there were other people jumping and diving into the lake. He thought the lake was deep and did not relate the depth of the lake to anything he had seen in the video, which had shown very shallow water. He dived into the water, suffering injury. The plaintiff succeeded on liability. In the trial judge's view the video should have warned of the significant risks involved.

Breach of duty

A taxi driver approached an intersection with a red light and slowed to about 10 kilometres per hour in *Dungan v Chan* [2013] NSWCA 182. When he was about 30 metres from the pedestrian crossing, the light changed green and he accelerated moderately. The plaintiff pedestrian crossed the road against a flashing red light. The defendant did not see the plaintiff and collided with the plaintiff, who suffered an injury. At first instance the plaintiff failed. The plaintiff

then appealed. Dismissing the appeal, the NSW Court of Appeal held that whilst as a general rule a person is entitled to assume that others will act in a non-negligent manner, the real question is whether in all the circumstances the driver exercises a degree of care that the circumstances required: *Wheare v Clarke* (1937) 56 CLR 715. Whilst a reasonable person would accept that it is not the duty of a driver to ensure there is no foreseeable risk of injury to others, it does not follow that risks may then be ignored. The damage a driver may do to a pedestrian is substantial and the inconvenience of driving at a slower speed must be measured against the severity of injury to a pedestrian. Pedestrians act carelessly with sufficient frequency that a prudent person needs to take account of the possibility. A prudent driver should foresee the possibility of careless behaviour by pedestrians and take it into account: *Stocks & McDonald Hamilton Co Pty Ltd v Baldwin* (1996) 24 MVR 416.

Drivers of motor vehicles, as frequently lethal machines, are under a duty to drive reasonably in the circumstances in which they find themselves. Merely driving within the speed limit and obeying green lights will not sufficiently discharge the duty in all circumstances: *Tsuji v Metromix Pty Ltd* (1998) 28 MVR 401. Where a motorist is aware that pedestrians are likely in certain circumstances to behave carelessly, the driver may be guilty of a breach of duty, even through driving at a pace and in a place that is lawful, once the driver has been put on notice by conduct of a particular risk: *Albert v Nominal Defendant* (1999) 29 MVR 107 (NSW CA). Whilst a motorist must always be conscious of the fact that the pedestrian may do something silly and must allow for that possibility, a motorist could hardly drive in such a way that he or she expects such accidents to occur all the time. It is not surprising that a driver may be looking straight ahead at a particular moment rather than to the left or right: *Stojanoska v Fairfax* (1999) 29 MVR 387 (NSW CA). To obtain a finding of breach of duty, the evidence must disclose some factor that would cause a motorist to reduce his or her speed below the applicable speed limit if keeping a proper lookout. If the motorist reasonably does not see the particular danger, there may be no breach of duty. The mere possibility of a pedestrian being on the road does not require a driver to slow to a speed where he or she could stop in any conceivable circumstances: *Mobbs v Kain* (2009) 54 MVR 179 (NSW CA). In all the circumstances, there was no error on the part of the primary judge and the collision between the defendant's taxi and the plaintiff was caused by the plaintiff's ill-advised conduct in attempting to cross several lanes of traffic after the pedestrian light turned red.

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Section 92 *Motor Accidents Compensation Act 1999* (NSW)

The claimant was injured in a car accident in *Insurance Australia Ltd v MAA of NSW* [2013] NSWSC 1439 (Hulme J). The insurer admitted fault. Insurance Australia (NRMA) applied to the CARS assessor three times for the proceedings to be determined as not suitable for assessment under the Act. On each occasion the CARS assessor rejected the application. NRMA then moved the Supreme Court in an attempt to force the claim to go to court. NRMA did not seek judicial review of either the first or second application for exemption. Under s 92, claims exempt from assessment are subject to guidelines as delegated legislation. An assessor can decide a claim is not suitable on his or her own assessment or on the application of either claimant or insurer at any time. The major issue is the complexity of each matter in relation to law or facts, including damages. The insurer submitted that there were complex issues as to damages and causation despite the fact there had been an admission of liability. The CARS assessor concluded that there was nothing in a further chiropractor's letter which accompanied the third application, which satisfied him as to the complexity argument. NRMA submitted to the court that the CARS assessor had made a jurisdictional error in refusing the application. Hulme J found that the chiropractor's letter accompanying the third application added little to the submissions made in the second application. This case can be distinguished on its facts from *Allianz Australia Insurance Ltd v Tarabay* [2013] NSWSC 141, where an assessor purported to determine for herself an issue of alleged fraud on the part of the claimant. That was not the case here. So far as the NRMA submissions argued for a merits review of the application, that was not permissible. Simply because

there is some complexity attached to a claim does not mean that exemption follows: *Insurance Australia Ltd t/as NRMA v MAA of NSW* [2007] NSWCA 314. The decision of the assessor was not attended by patent error, did not lack an evident or intelligible justification and was not manifestly unreasonable or plainly unjust. As a result, the insurer's summons was dismissed with costs.

Sections 62 and 63 *Motor Accidents Compensation Act 1999* (NSW)

In *AAMI Ltd v Cirevska* [2013] NSWSC 1438 (R A Hulme J), the insurer claimed judicial review of a decision of a CARS assessor. The relevant MAS assessment found the claimant's degree of permanent impairment was 30 per cent. However, her self-reported medical history was incorrect in one respect, in that it had not referred to the fact that she had been admitted to hospital because of her asthma before the accident. The insurer lodged a review application in respect of the assessor's assessment of psychiatric injury.

The review panel accepted that application and certified a 15 per cent permanent impairment on different psychiatric grounds. The insurer later became aware of the earlier admission regarding asthma, and so sought a further review. Although the Motor Accidents Authority pointed out that there was a current review application which had not yet been completed, the insurer did not re-lodge its review application. As a result, the claim proceeded to a general CARS assessment. The claimant pressed her claim at the hearing that, as a result of the accident, her asthma had become disabling and her quality of life had been significantly eroded. The insurer disputed that the asthma was aggravated by the accident, alleging that the claimant had sought to mislead various doctors about the seriousness of her pre-accident condition. The Assessor declined the insurer's submission intended to circumvent the MAS certificate, which was intended to be 'conclusive evidence of the matters certified' under s 61. On the basis of that certificate, the assessor concluded that it was not open to him to find that the claimant did not suffer an exacerbation of her asthma because of the accident. The certificate was conclusive evidence. The assessor accepted that the claimant was a witness of truth and therefore accepted that the previously manageable asthma was now disabling.

In addition, the assessor concluded that applying the 'common sense' test of causation and the 'but for' test, the claimant had demonstrated on the civil standard that the worsening of her asthma had been caused by the accident, based upon his acceptance of identified evidence.

The insurer had obtained its own evidence, which indicated that there was no basis for the suggestion that her asthma problems had been aggravated by the accident. Whilst the MAS report of Dr Burns did not have the benefit of knowing of the 2008 hospital admission, he had other information which suggested the substantial aggravation of her pre-existing condition. Hulme J held that, based upon the evidence before him, the assessor was entitled to accept the claimant's case on causation.

The insurer also raised an issue of procedural fairness based upon the lack of submissions by either party as to the conclusiveness of s 62 and the MAS certificate. It had been up to the insurer to raise this and there was no merit in the insurer's complaint. Ultimately, his Honour found that the assessor had been in error in regarding himself as bound by the MAS certificate in relation to causation but nonetheless, in any event there was material upon which he was entitled to and did independently decide causation in favour of the claimant. What the Act mandates under ss 62 and 63 is that the certificate is conclusive in respect of causation of non-economic loss but it is not conclusive otherwise.

Ultimately, having formed the view that the assessor did not err in his independent conclusion on causation, any error on a finding of conclusiveness did not entitle the insurer to a remedy.

In respect of a number of other complaints on the assessment of damages, his Honour held that the CARS assessor had material which entitled him to reach the conclusion that he did and accordingly he dismissed the insurer's summons.

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

In *Cara Hyam v Dallarooma Pty Ltd t/as CPD Chauffeured Transport* [2013] ACTSC 200 (Master Harper), the plaintiff was travelling on a minibus operated by the defendant, which was transporting her along with other airline staff to their accommodation. As the plaintiff alighted, her uniform caught on the back seat lever of the bus, causing her to fall down the stairs and onto the ground, suffering injury. The contract was between the airline and the defendant,

so the plaintiff only pursued a claim in negligence. There was evidence that the risk of catching clothing on the lever was foreseeable, albeit low, and that good practice was to avoid catchpoints in exit areas of vehicles. The cost of suitable modification to avoid the risk would have been under $100 for each vehicle. The ACT Civil Liability Act provisions applied, requiring that the risk be foreseeable, not insignificant and in circumstances a reasonable person would have taken precautions. In respect of causation, the negligence must be a necessary condition of the occurrence of the harm and it would be appropriate for the scope of the defendant's liability to extend to the harm so caused.

Master Harper found that the defendant owed a duty of care, having purchased the minibus as a shell and fitted it out. Whilst there was no previous record of any such injuries, they may have occurred but not necessarily have been recorded. In the view of Master Harper, the risk of injury was not insignificant and modification was cheap. The defendant should have known about the risk of harm and whilst it was low, the potential harm was serious, while the burden of taking precautions was not particularly onerous. Master Harper was satisfied of breach of duty of care and causation, and also satisfied that it was appropriate for the defendant's liability to extend to the harm caused to the plaintiff, particularly given that the defendant was a commercial operator of passenger transport. Master Harper was not satisfied that there was any contributory negligence. Substantial damages were awarded to the plaintiff.

Sections 5D, 5G, 5L, 5S, 42 and 43A *Civil Liability Act 2002* (NSW)

The plaintiff was riding his bicycle through a car park adjacent to the St George Sailing Club in *Simmons v Rockdale City Council* [2013] NSWSC 1431 (Hall J). He struck a boom gate that had been closed across a motor vehicle entrance to the car park and suffered very serious injuries, leading to an amputation of the left leg below the knee. Damages were agreed and only liability was in issue. The plaintiff sued both Rockdale City Council and St George Sailing Club Ltd as first and second defendants respectively. The club's car park was enclosed by the council by the construction of the boom gate and other structures some years earlier in order to restrict night-time access. The boom gate was painted white and there was evidence of daily regular usage by cyclists of the route through the area. Police had proposed daily opening of the boom gate at 5.00am, but the council subsequently gave the club have a discretion as to when to open and close it. The evidence of a number of cyclists was that in their experience it was relevantly always open.

The route amounted to a de facto extension of a popular cycle route in use on weekdays and weekends. Even after the car park modifications in 2004, it was the usual practice of cyclists to continue to use the boom gate entrance area as they previously had, a practice which was well-known to the council. Whilst there were no exit signs, and it was suggested in cross-examination that the plaintiff had breached them, council staff reviewing the accident did not suggest that the plaintiff contravened the no exit signs which had been erected for other purposes. There was evidence of at least three incidents involving the boom gate having been left closed early in the morning.

It does not appear that the council had considered how the modifications to the car park area might impact upon cyclists or any consideration as to what would happen should the club's cleaner be unavailable or happen not to open the boom gate. Following the plaintiff's accident, a chevron sign was placed on the boom gate to make it more visible. However, there was no enquiry into the arrangements or system for the opening and closing of the boom gate. No steps were taken to redirect cyclists. The previous inspections of the scene of a previous accident did consider the closure of the boom gate.

Hall J was critical of the defendant's expert, whose opinion was said to be based to a significant extent upon assertion only. Little weight was accorded to his views. Hall J said the real question was not whether the gate was observable but the ability of an approaching cyclist, expecting the gate to be open, to discern that it was in a closed position in enough time to stop. A similar criticism was made of another defendant's expert, Mr Joy. Hall J preferred the evidence of other experts that the plaintiff's perception was affected by visual ambiguity as to the actual position of the gate until it was too late to avoid it. The fact that this was the third accident involving the boom gate and a cyclist was significant.

Hall J found that the council owed a duty of care, failed to provide a safe system and was responsible for the system or lack of it in relation to the opening and closing of the boom.

The risk was reasonably foreseeable and the failure to have the boom gate open was causative of the plaintiff's injury within s 5D(1) of the Civil Liability Act. There was a failure to properly investigate the previous accidents with the gate.

Hall J found that collision with the boom gate unexpectedly left closed was not an obvious risk of cycling for the purposes of the ss 5F and 5G defences of obvious risk concerning recreational activities. The risk must be determined objectively having regard to the particular circumstances in which the injury occurred: see *Fallas v Mourlas* [2006] NSWCA 32 The council relied upon ss 5K and 5L of the Civil Liability Act, being the defence of dangerous recreational activity. The council initially argued that all cycling was a dangerous recreational activity but later narrowed its claim to cycling in the particular circumstances. Having considered the evidence, Hall J concluded that he did not consider that the plaintiff was engaged in a dangerous recreational activity and those provisions had no effect.

The council also relied on s 42 of the Civil Liability Act, concerning the allocation of resources by public authorities, where the council bore an evidentiary onus. However, in view of the fact that the council did not incur any expense in relation to having the gate manned, opened or closed and in those circumstances, the s 42 defence failed. The council relied on a s 43A defence in relation to special statutory powers. The *Transport Administration Act 1988* defines traffic control facility and traffic control work as being steps 'intended to promote safe or orderly traffic movement on roads'. Traffic control work includes construction, maintenance and like activities. Since the case put was not of negligent construction but of negligent operation of the boom gate, the plaintiff did not plead the exercise or failure to exercise a statutory power, special or otherwise. The boom gate was not a device for the movement of traffic, particularly in view of the fact that since no traffic movement could occur once it was closed. It was not intended to promote safe or orderly traffic movement, but rather was intended to stop all entry to a car park late at night. It was never intended as a traffic control facility. The plaintiff did not complain about the gate being closed at night, he complained about the unexpected failure to open it during the day. In any event, it was not established that opening the gate was pursuant to special statutory warrant or authority. The purpose was to stop misuse of the car park late at night, not traffic regulation.

The council relied on a defence under s 115(2)(e), namely that the decision to erect the boom gate was taken in order to protect vehicles or other property on public roads from damage. The evidence was to the contrary. It was solely intended to prevent unauthorised individuals accessing the car park.

If, contrary to his finding, the council did exercise a statutory power under s 87(3) of the *Roads Act 1993* (NSW), the question was whether then the s 43A defence was available because the act or omission was 'so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise'. Given that the cycleway was heavily used, there was a positive need to ensure it was opened at an early hour every day and no reasonable authority could properly have considered that it was a reasonable exercise to have the gate closed by day. This was something which was never intended. It would not constitute a reasonable exercise of power within that section.

The club as second defendant disputed that the council had effectively delegated the power to open and close the boom gate to it. It argued that it owed no duty of care. It was contended that the club should have known the gate was extensively used by early morning cyclists. There was no evidence that the club had given any consideration to relevant issues in relation to the opening and closing arrangements. Furthermore, the club cleaner knew that an earlier cyclist had collided with the boom gate, and the club was fixed with the cleaner's knowledge as to this history. The risk created was clearly not insignificant within s 5B and the risk of harm was not low. The plaintiff argued that the burden of taking straightforward measures to avert the risk was not too great. However, his Honour noted that the club's task was limited to the daily opening and closing and the mere fact that the cleaner was known on occasions to be late was not of itself sufficient. Hall J concluded that a limited physical task was assumed by the club devoid of other specified or identifiable responsibilities and concluded that the plaintiff had not established that the club failed to exercise reasonable care.

As to contributory negligence under ss 5R and 5S of the Civil Liability Act, the council argued for 100 per cent. Hall J concluded at that the plaintiff's failure to have seen the closed gate in time could not be considered a major

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departure from the standard of care required for his own safety given the difficulties of expectation and perception and reaction time. Accordingly, the plaintiff succeeded against the council and failed against the club. Hall J held that the plaintiff's damages should be reduced by 20 per cent for contributory negligence.

Duty of care - employers

In *Suncorp Staff Pty Ltd v Ian David Larkin* [2013] QCA 281, the employer appealed from a verdict for the plaintiff at first instance. Whilst employed in the employer's call centre, the plaintiff struck his right knee on the metal handle of a cupboard under a workbench on which the telephone he was using rested. There was evidence that over the years a steady stream of employees had used the workbench without injury and there was an identical workbench on another floor with the same handles. The primary judge had accepted the risk of injury was obvious despite the absence of prior incidents. The issue on appeal was whether the primary judge erred in focussing excessively on the modest expense of taking alleviating action and failed to consider the magnitude of the risk or the degree of probability of its occurrence. On appeal it was held that a reasonable employer would not have foreseen that a failure to remove the handles or take other remedial action would have involved a risk of any injury more severe than minor bruising. The duty as an employer was to take reasonable care for the plaintiff's safety, not to safeguard him completely from all perils. The chance of injury by this mechanism was slight and the employer's appeal was upheld.

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Duties of Landlords

The plaintiff was assaulted and seriously injured by a barman employed by the defendant outside the defendant's bar in *Lamble v Howl At The Moon Broadbeach Pty Ltd* [2013] QSC 244 (Douglas J). The employee struck the plaintiff with a metal rubbish collector with a long handle. The employee should not have held any security position and a major issue in the case was whether the defendant was vicariously liable for the assault. Douglas J referred to *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 and noted that there is no vicarious liability in circumstances where the employee's act is done to gratify private spite or to achieve revenge. The best test is the *Salmond* test, which states an employer is liable even for unauthorised acts if they are so connected with authorised acts 'that they may rightly be regarded as modes - although improper modes - of doing them.' The employer is not responsible if it is not so connected with the authorised act as to be a mode of doing it, but is rather an independent act. See *NSW v Lepore* (2003) 212 CLR 511 per Gleeson CJ, who said:

> ... it is the connection between the employee's duties and his wrongdoing which, if close enough, brings the wrongdoing within the scope of his employment ...

Douglas J held there was a sufficiently close connection between the employee's employment and the assault to make it just that the defendant should be liable for the plaintiff's injury.

It was common ground that contributory negligence was not available as a defence to a common law action for assault. Douglas J was not satisfied that there was direct fault on the part of the landlord other than vicarious liability. If there had been, contributory negligence would have been assessed at 15 per cent. He awarded damages of close to $1.4 million.

Legal professional privilege

In *RinRim Pty Ltd Deutsche Bank Australia Ltd* [2013] NSWSC 1654, Darke J held that the disclosure of counsel's recommendation did not amount to a disclosure of the substance of counsel's advice. Accordingly, the disclosure did not amount to a waiver of legal professional privilege over that advice.

Employment

In *McCauley v City Steelfixing (ACT) Pty Ltd and Australian Post Tensioning Systems Pty Ltd* [2013] ACTSC 185, the plaintiff sued for an injury in the course of his employment whilst lifting sheets of mesh on a building site. Whilst carrying with a fellow worker, the fellow worker tripped, causing a sheet of mesh to fall on the plaintiff so that the whole sheet fell on top of him. He felt pain in his lower back.

Master Mossop was satisfied the defendant was negligent in failing to undertake an inspection of the site and identify hazards, including the particular tripping hazard, and both in respect of this incident and in respect of an assault on the site held the employer liable.

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Section 108 *Motor Accidents Compensation Act 1999* (NSW)

In *Smalley v Allianz* [2013] NSWCA 318, the Court of Appeal held that wherever there was a deemed denial of liability or a general denial of liability (because of a late claim or argument about causation of injury) the principal claims assessor must exempt it from the Claims Assessment and Resolution Service.

Sections 5I and 5L *Civil Liability Act 2002* (NSW)

The NSW Court of Appeal noted in *Paul v Cooke* [2013] NSWCA 311 that the *Civil Liability Act 2002* excludes liability if harm results from materialisation of an 'inherent risk' or an 'obvious risk' of 'a dangerous recreational activity'. These provisions provide a complete answer to any claim. The defendant has no duty to exercise reasonable care and skill once s 5I is engaged, and it can never be appropriate under s 5D to extend scope of liability to circumstances included in s 5I.

In order for s 5I to apply however, a risk must be identified as being an 'inherent risk'. This requires an analysis of the position before the risk materialised. A defendant must allege and prove that s 5I applies. Whilst the plaintiff is not obliged to prove the contrary, proof of s 5D causation will be likely to have that effect.

Legal professional privilege

In *Hannaford v The Royal Society for the Prevention of Cruelty for Animals NSW* [2013] NSWSC 1708 (Schmidt J), the plaintiffs sued for malicious prosecution. They sought access to documents over which the RSPCA claimed privilege under ss 118 and 119 of the *Evidence Act 1995*. The plaintiffs contended that there was no credible evidence that the solicitor and counsel (both of whom were RSPCA board members) were independent. Further, the RSPCA had not led evidence about the dominant purpose for which the disputed documents were created. Schmidt J held that the RSPCA did not meet the onus to establish privilege when it failed to adduce evidence from relevant witnesses but, in any event, privilege in the documents had been waived as a result of the RSPCA's conduct. Accordingly, s 122(5) of the Act had no application. The plaintiffs were granted access to the disputed documents.

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

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

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

(a) that a worker was injured,

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

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

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

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

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

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

The ultimate inquiry is essentially a question of fact under s 34. On the facts of this case the plaintiff believed within a day or so he had been badly injured and within a week, knew the details of the other driver were lost. However, he knew what the other driver and his vehicle looked like and was able to give a good description of both at trial more than 11 years after the accident. A reasonable person in the plaintiff's position should have made prompt inquiries, particularly where the accident occurred in a relatively confined area and where there was a reasonable prospect for obtaining useful information. Notwithstanding that the primary judge had identified areas of inquiry, such as CCTV film, when there was no evidence such facilities were available, his fundamental conclusion was open. In these circumstances, a key precondition for liability on the part of the Nominal Defendant was not established.

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

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

Leeming JA disagreed with Rein J. An admission of liability gives rise to obligations under the Act to make payments, a reasonable offer of settlement within a specified time period and to engage in settlement efforts. Second, the insurer's construction that it was a partial admission is inconsistent with its assertion that it is not required to pay anything under the policy. Third, the insurer's construction was contrary to the express words in *Nominal Defendant v Gabriel* [2007] NSWCA 52; (2007) 71 NSWLR 150 at [85]. Accordingly,

the correct construction of the subsequent letter is that it was not an admission of liability, so that accordingly it was not a notice answering the description of s 81. It merely contained an admission of part of the claim. That left the deemed s 81 notice which wholly denied liability. This brought 8.11.1 of the guidelines into play, so that all three decisions were wrong in law. The orders of the primary judge were quashed as were the first, second and third decisions. The applications were remitted to the MAA for determination according to law, with an order against Allianz for costs.

Sections 5B and 45 *Civil Liability Act 2002*

The NSW Court Of Appeal upheld an appeal by Botany Council against the plaintiff, who had succeeded at first instance, in *Botany Bay City Council v Latham* [2013] NSWCA 363. The plaintiff and her partner were walking on a shady and mossy section of footpath during daylight hours in the vicinity of some trees. The footpath was comprised of brick pavers, and there had been a history of written complaints to the council about the footpath at that point being uneven and potentially dangerous to walk on. The evidence was that the pavers had been lifted by the growth of tree roots. The trial judge found it more probable than not that the plaintiff tripped on a paver or pavers raised in this manner and the council has known in general terms of the problems with the footpath in this vicinity.

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

Section 3B *Civil Liability Act 2002*

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

Sections s 5D and 5I *Civil Liability Act 2002*/ medical negligence

In *Paul v Cooke* [2013] NSWCA 311, the plaintiff underwent a scan to determine whether she had an intracranial aneurysm in 2003, however the defendant radiologist negligently failed to diagnose it. A later scan in 2006 led to the diagnosis of the aneurysm. The plaintiff then underwent an operation to remove it. However, during that operation and through no failure of care or skill on the part of surgeons, the aneurysm ruptured, causing her to have a stroke and suffer serious injury. The endovascular procedure she underwent in 2006 was different to the procedure she would have undergone in 2003 (open neurosurgery), however the overall risk of stroke following rupture during either procedure was less than one per cent. The plaintiff argued that it was highly likely she would have suffered no harm had such a procedure been performed in 2003 and therefore would have avoided the risk of harm in 2006. However, the delayed diagnosis did not of itself increase the risks associated with surgery and the aneurysm did not change during those three years. In those circumstances,

the primary judge held that causation was not made out. The NSW Court of Appeal came to the same conclusion in dismissing the appeal. Section 5I requires identification of the particular risk that cannot be avoided with the exercise of reasonable care and skill. In the alternative, the absence of any relationship between the negligent act and the harm suffered meant it was not appropriate to impose liability on the defendant. It was held that this was an appropriate case for the application of the limiting principle that the scope of a negligent defendant's liability normally does not extend beyond liability for the occurrence of such harm, the risk of which was the duty of that defendant to exercise reasonable care and skill to avoid.

Medical negligence / assessment of damages

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

Education - liability for one pupil injuring another - bullying

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

Product liability

In *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361, the plaintiff took part in a motorcycle training course organised by the defendant at Eastern Creek Raceway. Whilst on a circuit, he suffered serious injury after being hit by a rider travelling at a higher speed in a more advanced training session. He claimed damages for breach of an implied warranty in the contract between them that the training would be conducted with due care and skill and alternatively alleged negligence by the defendant. The plaintiff succeeded in contract and the defendant appealed. The contract claim relied upon s 74(1) of the *Trade Practices Act 1974* (Cth). There was an exclusion clause in the

contract, which s 68 of the TPA invalidated. The appellant defendant also relied upon s 5M of the *Civil Liability Act 2002* (NSW), which provides no duty of care is owed if the recreational activity is the subject of a risk warning in respect of the risk of the activity. Section 5M of that Act clearly applies only to torts and in any event, would be in conflict with the TPA provision. It is also clear that it does not apply to contract because 5N of the Civil Liability Act deals with contract and on its terms did not assist the defendant. The defendant's appeal was dismissed with costs.

Employment

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

Fund management

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

In *Australian Winch and Haulage Company Pty Ltd v Collins* [2013] NSWCA 327, the issue arose as to whether damages should have been awarded for fund management. The trial judge had agreed to allow fund management over objection despite some change in the particulars. The joint neuropsychological report stated that although the plaintiff was generally capable of managing his day-to-day finances, he should not be entrusted with responsibility for managing large financial assets, no doubt including a large award of damages. This was attributable to 'some degree of organic brain damage'. In these circumstances the Court of Appeal rejected the argument that there was any error in the primary judge's conclusion that the plaintiff's damages in a workplace injury should include a component for the cost of fund management.

Contributory negligence

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

intoxication was weak. In the circumstances, there was no reduction for contributory negligence.

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

Employment

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

> In such a situation it is not an acceptable answer to assert that an employer has no control over an employee's negligence or inadvertence. The standard of care expected of the reasonable man requires him to take account of the possibility of inadvertent and negligent conduct on the part of others.

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

Damages - additional accommodation costs

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

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Section 3A *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff suffered minor physical injury from a motor vehicle accident in *Allianz Australia Insurance Ltd v Gonzalez* [2013] NSWSC 362 (Adams J), and also claimed to have sustained psychological injury from the conduct of the driver and his friends immediately following the accident and on the next day. The question was whether such psychological harm was caused by separate events, thereby breaking the chain of causation and thus falling outside the scope of the *Motor Accidents Compensation Act 1999*. The conduct of the other driver and his friends was said to be aggressive and threatening. Adams J concluded that the psychiatric injuries did not fall within the requirements of the Act.

Medical negligence/sections 5D and 5I *Civil Liability Act 2002* (NSW)

In *Paul v Cooke* [2013] NSWCA 311, the plaintiff underwent a scan however her radiologist negligently failed to diagnose an intercranial aneurysm. Three years later and following a further scan, the aneurysm was diagnosed and the plaintiff underwent an operation to remove it. During that operation and without any fault on the part of the surgeons, the aneurysm ruptured, causing her a stroke and serious injury. If she had undergone the surgery three years earlier she would have undergone a different procedure, being open neurosurgery, but that procedure bore the same level of risk of rupture, being about one per cent. It was highly likely the plaintiff would have suffered no harm from the earlier surgery and it was alleged therefore that but for the defendant's failure to diagnose, she would not have suffered injury. At first instance, it was held under s 5D of the Civil Liability Act that it was not appropriate for the defendant's liability to extend to those injuries but the trial judge did not accept the defendant's contention that the injuries were suffered as a result of materialisation of inherent risk under s 5I of the Act.

Dismissing the appeal, the NSW Court of Appeal upheld the defendant's contention that the harm was suffered from materialisation of a risk which could not be avoided by the exercise of reasonable care and skill under s 5I. No error was shown in the trial judge's conclusion that the scope of a negligent defendant's liability normally does not extend beyond liability for the occurrence of harm which in one sense was an unavoidable consequence of the original condition. Accordingly, the plaintiff failed.

Sections 5F, 5L, 45 and 43A *Civil Liability Act 2002* (NSW)

In *Collins v Clarence Valley Council (No. 3)* [2013] NSWSC 1682 (Beech-Jones J), the plaintiff was riding her bicycle in an organised charity ride, which was held in an area along Bluff Bridge over the Orara River. The defendant council had the care, control and management of the bridge. As she rode over, the plaintiff's front wheel became stuck in a gap between planks on the bridge and she fell over the low guard rails on the side of the bridge with the bicycle still attached to her feet. She fell into a rocky ravine and suffered significant injury. The parties agreed on significant damages subject to any issue of contributory negligence. The plaintiff argued that the bridge was frequently used by cyclists, was in a poor state of repair and that the council knew or ought to have known that the bridge was unsafe and that steps were required to eliminate or minimise the risk. The council resisted the allegation of negligence and relied upon a number of defences under the Civil Liability Act. Beech-Jones J found for the defendant. The relevant risk of harm was the risk of injury to a cyclist if the wheels became stuck in gaps between the planks or holes in the graded planks. He concluded this risk was foreseeable and not insignificant. However, in his view the risk was 'an obvious risk' to a reasonable person in the plaintiff's position and the council therefore did not have a duty to warn by way of a sign, even though it was a reasonable precaution for the council to undertake in the view of Beech-Jones J and it was, in his view, unreasonable for it not to.

Beech-Jones J found that it had not been shown the council had actual knowledge of the particular risk, the materialisation of which resulted in harm to the plaintiff under s 45. He also found that given the council's limited resources, it was not reasonable to require the council to take the precautions of repairing the bridge in the way suggested by the plaintiff. Accordingly, there was a defence under s 42 and s 5C(a).

Beech-Jones J did accept the plaintiff's contention that she was not engaged in a 'dangerous recreational activity' within the meaning of s 5L and he found no contributory negligence on her part. This finding seems on the face of

it to be inconsistent with the finding that the risk was an obvious risk to a reasonable person in the plaintiff's position. However, the plaintiff's claim failed.

There was police evidence confirming a relatively high level of recreational use, including by cyclists on the weekends, and council officers would have been aware that cyclists used the bridge. An inspection of the bridge noted no safety issues for vehicles, but the inspector did not turn his mind to the issue of safety for cyclists and the possibility of an accident in the manner in which this one occurred. The council put forward significant evidence as to the resourcing restrictions in relation to maintenance and works.

Whilst *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 supported the existence of a duty of care, there remained the defences available under the Civil Liability Act. In addition to the resources defence, the council also relied upon the non-feasance defence reinstated by s 45, which requires actual knowledge of the particular risk. Beech-Jones J at believed he was bound by the majority view in *North Sydney Council v Roman* [2007] NSWCA 27 that it was insufficient for a junior officer of the council to have knowledge. What had to be proven was that someone in authority had actual knowledge. This was so despite subsequent doubts upon the correctness of the majority view. Moreover, he took the view that the particular risk of which the council had to have knowledge was in accordance with *Botany Bay City Council v Latham* [2013] NSWCA 363. In that case the plaintiff was required to establish that knowledge of the particular paver that was uneven or irregular lay with the council and not merely general knowledge that there were pavers which were irregular or dangerous in the area. Beech-Jones J, however, noted that the plaintiff's case here was that the bridge was riddled with dangers and that therefore the particular risk corresponds with the risk of harm identified. Beech-Jones J seems to imply that this may be sufficient despite the decision in *Latham*. He noted that the council chose not to call the officer with authority to indicate what his state of knowledge was, but said that the inference that arose would only permit the court to more confidently draw inferences if there was other evidence to support them. There was no evidence as to how often the senior officer drove on this road or whether the bridge was ever inspected on his occasional travels over it. The consequence is that the s 45 non-feasance defence was upheld. In any event, the cost of repair work was unreasonable given the financial resources available to the council.

The council also relied upon the s 43A defence in relation to an authority's exercise of or failure to exercise a special statutory power conferred on it. Beech-Jones J was not satisfied that the s 43A(3) defence was established except in respect of signage, for which specific statutory authority was required. However, he went on to comment that there was no rational reason for the inspection undertaken of the bridge to confine itself to the risk of motor vehicles and exclude the risk concerning motorcycles and bicycles, noting that a cursory inspection of the bridge at that time would have revealed that it was a potential danger for cyclists. This meant that even given the application of s 43A to signage, the council's conduct was so manifestly unreasonable that the defence was not available.

In the light of his other findings, Beech-Jones J expressed no concluded view on causation but expressed doubt as to whether the plaintiff could satisfy s 5D of the Act.

He concluded by rejecting the idea that there were any further steps for her own safety that the plaintiff could reasonable have taken.

Sections 5F, 42 and 43 of the *Civil Liability Act 2002* (NSW)/ Section 3 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff was an 8 year old boy travelling with two older brothers on a city train bound for Newcastle in *Fuller-Lyons v State of NSW (No. 3)* [2013] NSWSC 1672 (Beech-Jones J).. He fell from the train after leaving Morisset Station and suffered significant injury. He sued, alleging that he became accidently trapped in the doors of the train when they closed upon departure from Morisset Station, so that a substantial portion of his body protruded from the train. This should have been noticed by railway staff at the station. It was then alleged he fell from the door as he struggled to break free while the train rounded a bend at high speed. It was alleged that the defendant, which owned the train, was negligent in failing to utilise technology known as a 'traction interlock' which was fitted to the train and which, if operational, would have prevented the train from departing the station

whilst the doors were prevented from closing. Beech-Jones J was uncertain whether the plaintiff became unwittingly trapped in the doors or deliberately impeded their closing before departure or during transit. However, he rejected the defendant's proposition that the plaintiff's brothers either assisted or witnessed the fall. He found that the plaintiff was owed a duty of care but was not satisfied that the defendant was in breach of that duty in failing to commission the traction interlock system. However, he was satisfied that negligence was established by the failure of staff at Morisset Station to observe the plaintiff's body protruding from the gap in the door before signalling for the train to leave the station. He was not satisfied that contributory negligence was made out.

The accident was a deemed motor accident under s 3 of the Motor Accidents Compensation Act.

A s 43 Civil Liability Act defence failed because no relevant statutory duty was identified. Section 42 of the Civil Liability Act does not appear to apply to a motor accident under s 3B(2) of that Act. Reference was made to the decisions in *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 (where the High Court held that leaning out of a window of a tram to throw up and striking a pole in breach of relevant bylaws did not preclude recovery) and *Rundle v SRA of NSW* [2002] NSWCA 354 (where a 15 year old boy was injured whilst spraying graffiti on the roof of the train after squeezing through an upper window to gain access). The claim in *Rundle* failed. However, Beech-Jones J said that this did not indicate that no duty of care was owed in that case or in this.

There was evidence that the plaintiff had a low IQ, significant developmental issues and a degree of cognitive impairment prior to the accident. Beech-Jones J concluded that the plaintiff's impaired intellectual functioning should be taken into account in determining the standard of care required 'of a reasonable person in the position of that person', but ultimately did not have to decide this because the defendant did not discharge its onus in showing fault on the part of an unsupervised 8 year old with no previous experience of train doors or trains.

Section 16 *Civil Liability Act 2002* (NSW)

In *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370, the issue on appeal was whether the award of 33 per cent of a most extreme case was correct. The appellant contended it should have been in the vicinity of 25 per cent, which would have resulted in a 80 per cent reduction in the award for non-economic loss. The question was whether the figure could be regarded as outside a reasonable range of assessment. The Court of Appeal held that it was not demonstrated that there was an erroneous assessment in this regard.

Limitation periods /workplace injuries

The plaintiff worked as a process worker in the defendant's ice-cream factory in *Unilever Australia Ltd v Petrevska* [2013] NSWCA 373, and claimed that she suffered hearing loss in the old and now closed factory. She gave notice of claim and lodged a claim under s 260 of the *Workplace Injury Management and Workers Compensation Act 1998*. The defendant contended the claim was lodged long after the expiration of the six-month limitation period after the injury or accident happened. The plaintiff said her claim was made within time because under s 261(6), the time for lodgement of a claim did not commence to run until she first became aware she had received the injury. The plaintiff did not become aware of it until 2009, when she first received medical advice concerning her hearing loss and its causes. The Court of Appeal upheld the plaintiff respondent's contention, dismissing the defendant's appeal with costs.

Vicarious liability for intentional tort

In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250, the plaintiff was a patron at the defendant hotel in 2008 when the manager concluded that she was intoxicated and instructed a security guard to remove her, who did so by pulling out a stool from under the plaintiff, causing her to fall to the ground and suffer injury. At first instance, the primary judge found the security guard had committed an assault and battery on the plaintiff, for which his employer Checkmate was vicariously liable. However, because Checkmate no longer existed, the plaintiff also pursued his claim against the hotel and licensee. Dismissing

the plaintiff's appeal, the NSW Court of Appeal held that nothing made the hotel or licensee vicariously liable for the security guard's tort - the security guard was not expressly authorised to commit the assault and battery and was not supervised in his actions. Furthermore, the guard was not an agent of the hotel and had no authority to bind it. Nor was the licensee directly liable under s 91 of the *Liquor Act* 2007. In any event, in Australia there is no role for dual vicarious liability, whereby two different defendants can be liable for the tortious act of a third person: *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 641, 646 and 685.

Animals

In *A Woodley Osteopathic Services Pty Ltd v TAC and Brendan Woodley* [2013] VSCA 350, a horse escaped from a paddock because the paddock gate was open and went onto the highway, colliding with a car. The plaintiff's wife was killed and his daughter injured in the collision. The TAC paid compensation in respect of the death and injury and sought indemnity from the owner and occupier of the property where the horse was kept. At first instance, the TAC succeeded to the extent of 90 per cent of its payments. Both the occupier and TAC appealed. The horse was agisted and there were multiple users of the gate, including unauthorised strangers. The occupier conceded it owed a duty to highway users to take reasonable care to prevent the escape of the horse. There was no evidence upon which it could have been found that the latching mechanism was relevantly defective and in any event, whilst the defendant was occupier of the property, he was not relevantly the occupier of the particular horse paddock at the time. He lacked the requisite control of the gate and therefore had no responsibility for the care or containment of horses in the paddock. He was effectively the occupier of an adjacent property. The TAC's claim failed as a result.

Contributory negligence

In *Egan v Mangarelli* [2013] NSWCA 413, the NSW Court of Appeal upheld the finding at first instance that there was no fault on the part of the driver of a bus who collided with the plaintiff cyclist, who had suddenly merged at speed into the path of the bus from a pathway obscured by a fence. The court upheld the hypothetical assessment of contributory negligence at 70 per cent had the plaintiff succeeded.

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Section 62 *Motor Accidents Compensation Act 1998* (NSW)

At issue in *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442 was whether the refusal by the proper officer of the insurer's application for a further assessment (having been dissatisfied with the WPI of more than 10 per cent) gave rise to a jurisdictional question so as to invoke the intervention of the Supreme Court. Noting that there were particular considerations in favour of the view that Parliament did not intend questions of relevance and materiality to be determined by the Supreme Court, the NSW Court of Appeal rejected the insurer's claim. The court upheld the assessment of the primary judge that the proper officer's finding could not be described as manifestly unreasonable or irrational. Furthermore, it did not otherwise demonstrate error of law. Leave to appeal was granted but the appeal was dismissed with costs.

Multiple causation

The defendant appealed from a decision awarding damages to the plaintiff to compensate her for injuries she suffered in a motor accident in *Salkeld v Cocca* [2013] SASCFC 138. The plaintiff had been crossing a main road when knocked down by the defendant's vehicle. Neither party saw the other until impact. Liability and apportionment were strongly disputed. The first instance judge found the defendant liable but reduced the damages by 10 per cent for contributory negligence. The defendant argued on appeal that the apportionment should have been higher against the plaintiff.

Following the accident, the plaintiff returned to work and shortly after was the victim of a violent armed robbery. As a result she suffered from post-traumatic stress disorder and psychiatric injuries. The trial judge held that both the motor accident and the robbery were contributing causes to an

impairment of her earning capacity and assessed damages accordingly. The defendant submitted the judge erred by conflating the two separate incidents as contributing to psychiatric injury, and thus in awarding an excessive sum in damages for non-economic loss, past economic loss and future economic loss.

On all issues, the South Australian Full Court rejected the defendant's appeal. The apportionment by the trial judge was fair and reasonable and the damages as calculated were proper in law and not erroneous. The motor accident was clearly a cause of the plaintiff's psychiatric condition or illness and the accident rendered her vulnerable. The defendant's negligence was a necessary condition of the occurrence of harm which resulted.

Intentional injury

In *Sharon Whitehead v Michael Moon* [2013] ACTSC 243, the plaintiff sued in relation to sexual assault by the defendant whilst the parties were in Sydney. The defendant alleged that the sexual activity was consensual. The plaintiff had reported the matter to Canberra Police, who advised that the matter would have to be raised with NSW Police. After being interviewed by an NSW police officer, the plaintiff did not want the matter taken further. The plaintiff brought a civil action. She had attended a rape crisis centre and had had a psychiatric admission to hospital. The plaintiff had received significant psychiatric treatment and had had psychiatric symptoms in all probability since her adolescence. She had attempted suicide. The defendant's evidence was in a number of respects inconsistent with his statement to an insurance investigator. Master Harper preferred the plaintiff's evidence, and was satisfied that there was no consent to the sexual relationship and that the defendant committed a trespass to the plaintiff's person, entitling her to damages. Damages were calculated in accordance with NSW common law and a three per cent discount rate. A small amount of some $10,000 was awarded by way of aggravated damages but no award was made for exemplary damages in circumstances where the defendant was not aware of the effect of his physical behaviour on the plaintiff's psychological state. The total damages awarded amounted to $668,856.

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Section 62 *Motor Accidents Compensation Act 1998* (NSW)

The proper officer of the MAA had declined an insurer's request to refer a matter for further medical assessment on the basis of additional medical evidence capable of altering the outcome of the dispute in *Henderson v QBE Insurance (Australia) Ltd* [2013] NSWCA 480. QBE sought judicial review and Rein J at first instance set aside the proper officer's decision, after which the claimant then appealed. The NSW Court of Appeal noted that in *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442 it was made clear that s 62 is not concerned with jurisdictional facts. Accordingly, the only question that remained was whether there was error of law in the proper officer's determination in rejecting the application. It was not clear upon what basis Rein J approached his task and, more importantly, he did not identify any error of law. The court held that the proper officer used the appropriate test, and it therefore followed that Rein J had erred in setting aside the proper officer's determination.

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

In *Taboas v Abigroup Contractors Pty Ltd* [2014] NSWSC 13, the plaintiff, a carpenter with Abigroup, sued for injury suffered in the course of his employment. He was required to perform work involving repetitive lifting of heavy objects. As a result he suffered a serious injury to his lumber spine which required surgery and became unfit for his pre-injury employment. The plaintiff complained he was not warned of the danger and not trained in safe methods of performing the work. Neither was he provided with suitable equipment or other assistance. He also sued VSL Australia Pty Ltd, a civil engineering and construction consultant and contractor retained by Abigroup, alleging that alleged VSL directed and supervised him during the course of his

work and was also in breach of a duty of care. The system of work was unsafe and dangerous and a involved a breach of Abigroup's non-delegable duty of care. VSL accepted it knew or ought to have known of the risk of harm associated with the repetitive lifting of heavy weights and Harrison J held that the particular risk was not insignificant under s 5B of the CLA, finding that both Abigroup and VSL owed a duty of care and were in breach of it. Responsibility was apportioned equally between the two defendants. There being no basis for a finding of contributory negligence, the plaintiff succeeded against both defendants.

Occupiers liability/s 5F *Civil Liability Act 2002* (NSW)

The plaintiff was injured in *Glad Retail Cleaning Pty Ltd v Alvarenga* [2013] NSWCA 482 when she slipped on a travelator at a shopping centre managed and occupied by Mirvac. She sued Mirvac and Glad Cleaning, which had been engaged to perform cleaning services at the centre. The plaintiff, who was employed by at a store in the centre, arrived at the time the complex was open to the public. She had walked over an area which appeared to be wet and soapy. She subsequently slipped on the travelator when the wet soles of her shoes came into contact with the metal surface. The trial judge found Glad Cleaning breached its duty of care by allowing water to accumulate near the travelator. Further, Mirvac had breached its duty of care as an occupier in failing to require cleaning to be done outside public hours and by failing to exercise reasonable care and skill in selecting Glad Cleaning to do the work. The plaintiff's damages were reduced by 10 per cent for contributory negligence. As between Glad Cleaning and Mirvac, Glad Cleaning was 80 per cent responsible. Glad Cleaning appealed and Mirvac sought leave to appeal out of time but was refused leave because an extension of time could cause irremediable prejudice to the plaintiff.

Although the trial judge found the risk was not obvious, the Court of Appeal noted that even if a risk is obvious, it does not automatically prevent a defendant being held liable for breach of duty - it merely eliminates the common law duty to warn. 'Commonsense' did not provide a sound basis for overturning the primary judge's finding that the risk was not obvious within the meaning of s 5F(1) of the Civil Liability Act.

The court had no difficulty in upholding the primary judge's finding that Glad Cleaning was in breach of its duty to the plaintiff by failing to clean the rubber tiles before the centre opened. The risk of injury was foreseeable. The submission on behalf of Glad Cleaning that there was no evidence that the plaintiff's fall was caused by moisture on her shoes sat uneasily with the submission that the risk of slipping on the travelator was obvious. There was ample evidence to support the primary judge's finding in this regard. No error had been shown to justify the court altering the apportionment of responsibility to the plaintiff of 10 per cent. Glad Cleaning's appeal was dismissed with costs.

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

It was said in *Mikaera v Newman Transport Pty Ltd* [2013] NSWCA 464 that s 5R(2)(a) *Civil Liability Act 2002* reflects the position under the common law as stated by McHugh J in *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552 at [32-33]. The correct legal formulation is:

> Whether a reasonable person in the position of the respondents, i.e. having the knowledge which the respondents had or ought to have had, was negligent. (per McColl JA at [33-36]).

Intentional torts – duty of owners of licensed premises

The defendant's appeal in *QBE v Orcher*; *Bowcliff v Orcher* [2013] NSWCA 478 was upheld by the Court of Appeal. The plaintiff, a hotel patron, was assaulted by an employee of the hotel licensee, the first defendant. The plaintiff had left the pub and was engaged in an argument across the street with another person when the second defendant intervened and punched him. The trial judge found the plaintiff succeeded against both defendants. On appeal, Tobias AJA (with whom McColl JA agreed) upheld the appeals by the licensee and the insurer of its security company (in liquidation). The Court of Appeal was in as good a position as the trial judge to draw inferences from CCTV footage, which, along with the police interview (ERISP) did not sit well with the trial judge's findings of fact.

Occupiers of licensed premises were under a duty to take reasonable care to prevent injury to a hotel patron from the violent, quarrelsome or disorderly conduct of other patrons. The boundary of that duty cannot always necessarily be

confined to the boundaries of the licensed premises but may extend beyond them. However, the duty to be derived from *Adeels Palace* is only to take reasonable care for the avoidance of injury in controlling the conduct of other patrons. Tobias AJA did not agree with the trial judge's finding that the disturbance across the road amounted to a disturbance to the neighbourhood, justifying appropriate intervention. Although there was a duty of care, Tobias AJA found that there had been no breach of that duty by the hotel licensee. He determined that the trial judge erred in finding the security company was in breach of any duty of care it owed based upon the inaction of its employee when there was insufficient indication that the licensee's employee would intervene inappropriately and dangerously in the dispute across the road.

Macfarlan JA agreed with the upholding of the appeal but disagreed with the view expressed by Tobias AJA that it would have been the security company rather than the licensee which was potentially liable. On the evidence, the security staff was integrated into the licensee's business in a manner that entitled the licensee to direct the security officer not only as to what he was to do but how he was to do it. In those circumstances, vicarious liability could arise in respect of the security officer's conduct on the part of the licensee. However, Macfarlan JA was of the view that the security company's staff member was not at fault and accordingly supported the appeal being upheld.

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Section 63 *Motor Accidents Compensation Act 1998* (NSW)

The issue in *Allianz Australia Insurance Ltd v Mackenzie & Ors* [2014] NSWSC 67 was whether a decision of the review panel should be set aside. The initial MAS assessment was less than 10 per cent WPI, and a later assessment was similar. However, a third assessment found more than 10 per cent WPI. The insurer applied for and was granted a review. Once the review panel found greater than 10 per cent WPI, the insurer complained that inadequate reasons were given for finding that the attribution of particular complaints was associated with the motor accident. Hoeben CJ at CL said the most recent statement of the duty to give reasons was *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43 [27]. It was apparent from the way in which the review panel expressed itself that it had incorrectly reversed the onus of proof and its finding was consequent upon this. That applied only to the finding in relation to the right shoulder, whereas the finding in relation to the low back injury used the correct approach in law. A complaint about the adequacy of reasons was not made out and another complaint of unreasonableness based upon overwhelming evidence was rejected. Accordingly, the complaint succeeded in respect of only one proposition but the appropriate order was to quash the review panel's certificate and order reallocation to another review panel.

The plaintiff underwent a medical assessment at the request of the MAA in *Goodwin v MAA of NSW* [2014] NSWSC 40. The assessment resulted in a certificate which, when issued, lacked numbers in regard to shoulder movements. However, those numbers were somehow added after the event. The insurer applied under s 63 for a review of the assessment that the injuries exceeded 10 per cent WPI. The proper officer thought there was reasonable cause to suspect the assessment was incorrect in a material respect and it was referred to a medical review panel. The claimant argued that that decision was incorrect. There was no clear error on the face of the certificate justifying the proper officer's decision. In any event, what must be incorrect in a material respect is the medical assessment, not the certificate from the assessment. Both of these errors justified the setting aside of the proper officer's referral to a medical review panel.

Sections 130A and 128 *Motor Accidents Compensation Act 1998* (NSW)

The High Court overturned a NSW Court of Appeal decision in *Daly v Thiering* [2013] HCA 45 (2013) 88 ALJR 67. The Court of Appeal had held that s 130A *Motor*

Accidents Compensation Act did not preclude the claim for damages for the value of care and treatment provided by his mother which was not covered by the Lifetime Care and Support Scheme. On the proper construction of s 130A, the plaintiff had no entitlement to damages for gratuitous attendant care services in accordance with s 128 from either the defendant or his insurer.

Occupiers liability/sections 5F, 5K and 5L *Civil Liability Act 2002* (NSW)

The plaintiff in *Benjamin Alan Ackland v Patrick Joseph Stewart, Beryl Ann Vickery and Michael Patrick Stewart* [2014] ACTSC 18 was a 21 year old undergraduate resident at Austin College of the University of New England in Armidale, studying Arts/Law. He and other students were taken on a mystery bus tour to local farm, which offered a number of attractions, including a 'jumping pillow' comprising a large inflatable pillow designed to allow visitors to jump up and down in a similar fashion to a trampoline. The plaintiff suffered a severe spinal injury while attempting a back flip. The injury rendered him an incomplete quadriplegic.

The trial judge found that although the manufacturer had recommended erecting warning signs prohibiting somersaults and similar moves, but contrary to the evidence adduced by the defendants, this did not happen until after the accident. He accepted that the recreational activity was a dangerous one within the meaning of s 5K Civil Liability Act in that it involved a significant risk of physical harm. However, in circumstances where, to the knowledge of the owners, many people, including children, were performing somersaults and flips over a period of several hours, he did not accept that, on the evidence given by the plaintiff, the outcome was an obvious risk of a dangerous recreational activity within the meaning of s 5F. In the light of the manufacturer's warnings which were not acted upon by the owners until after the accident, he found a breach of the duty of care which was causative of the injury. The defendants were negligent in failing to prohibit back flips or somersaults, failure to provide any signs and failing to warn the plaintiff either before he got on the device or after he commenced attempting flips or somersaults. The plaintiff was awarded just over $4.6m in damages plus costs.

Employment

The plaintiff carpenter sued his employer in respect of back injury suffered in the course of his work in *Thom v Carle* [2014] ACTSC 4. He was required to carry large sheets of ply, sometimes carrying two sheets which each weighed 23kg. He was also required to nail kickboards at ankle level. It was held this was an unsafe system of work for which the employer was liable. There was no reduction for contributory negligence.

Employment/occupiers liability

The plaintiff was employed by ISS as a cleaning supervisor in *Brozinic v ISS Facility Services Australia Ltd & Anor* [2014] ACTS 8. In the course of his employment he entered the second defendant's premises to deliver supplies to cleaners. On entering the building he was struck by a fire door being opened by an employee of the second defendant, who was attempting to leave the building. The plaintiff alleged that the second defendant was negligent in not providing a fire door with a window through which persons approaching might be viewed. Fire doors with glass inserts were available at the time at a cost of approximately $750.00. It was held that the risk was foreseeable and not insignificant and the burden of replacing the door or doors was modest. However, the lack of a history of problems with this or similar doors justified a finding that a reasonable person in the occupier's position would not have replaced the fire door at the time. As a result, the claim against the occupier failed. The claim in respect of the employer was settled.