COMMON LAW PRACTICE UPDATE 33

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

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

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

Intentional infliction of harm

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

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

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

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

Workplace Injury – Duty of care

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

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

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