COMMON LAW PRACTICE UPDATE 3

Section 34 *Motor Accidents Compensation Act 1999*

"In *Nominal Defendant v Wallace Meakes* [2012] NSWCA 66, the plaintiff crossed a main street in the Sydney CBD without checking the pedestrian signals. After he was hit by a car. the driver stopped, got out of the car and spoke to the plaintiff. As the plaintiff initially did not think his injuries serious and was in a hurry to get to his appointment, he failed to note the details of the car or driver before leaving the scene. He subsequently reported the accident to the police a few days later and returned to the scene to find witnesses. The car was not located. At first instance, Levy SC DCJ excused the plaintiff's failure on the basis that he did not think he was severely injured until sometime later. The Court of Appeal disagreed, finding that it is the plaintiff's duty to prove that due enquiry and search has been performed. The reasonableness of the plaintiff's actions depend upon the circumstances, and the plainitiff's enquiries must be as prompt and thorough as the circumstances will permit. The test can be satisfied if in the circumstances no search and inquiry is performed where such action would clearly have been ineffective anyway. A trial judge's finding that the identity of the vehicle's cannot be established should not easily be set aside on appeal.

The Court found the first instance judge had erred in simply finding the plaintiff's conduct understandable and excusable, noting that a reasonable person in his position would have taken down the offending vehicle's details. He was not so injured as to have being unable writing that information down, particularly given that he had a pen and paper in his briefcase. A test is what a reasonably informed member of the community such as the plaintiff should know about the right to claim.

Medical Negligence - Section 5O of the *Civil Liability Act 2002*

In *Coote v Dr Kelly* [2012] NSWSC 219 (Schmidt J), the plaintiff sued his former general medical practitioner for incorrect diagnosis and treatment of a lesion on his foot as a plantar wart. The plaintiff in fact suffered from an acral lentiginous melanoma (ALM). Despite ongoing treatment, the lesion was not correctly diagnosed for some time and when finally diagnosed and treated, it had by that time metastasised resulting in the plaintiff's death shortly afterwards. Schmidt J concluded that the busy GP was in breach of his duty of care in not observing indications which should have prompted the defendant to refer the lesion for a biopsy, which would have led to the earlier discovery of the ALM. Her Honour concluded that the plaintiff probably was suffering an ALM and not just a plantar wart when he was first seen by the defendant in 2009. This led to the conclusion that the defendant breached his duty of care. However, Her Honour found that the plaintiff failed on causation. She posed the question [137] whether it had been established on the evidence on the balance of probabilities that had a biopsy been taken in 2009 and treatment for ALM then followed, that the damage suffered by the plaintiff after the biopsy was undertaken in 2011, would not have been suffered. The plaintiff's case was that excision in 2009 would have preceded metastasis and would have been highly likely to prevent metastasis. Her Honour was not satisfied that it had been shown to be probable that the ALM was only 2mm thick in 2009 and not probable that the ALM had not already metastasised. She concluded that it had not been shown on the

balance of probabilities that the life expectancy of the plaintiff had been significantly reduced. Her Honour was sceptical of epidemiology being used to assess likely outcomes.

Whilst Her Honour's conclusion that the common law test of balance of probabilities is not satisfied by evidence which fails to do more than establish a possibility is undoubtedly correct; if, on the probabilities, the plaintiff's pain and suffering would have been diminished by earlier diagnosis or his life expectancy increased at all, then some probable damage is established and the loss of a chance is properly taken into account in establishing the extent of the damage. Her Honour does not appear to have examined that aspect but that may well be a consequence of the way in which the case was conducted before her.

Duty of Care – Employees of Sub-Contractors

In *Miljus v Watpow Constructions Pty Ltd* [2012] NSWCA 96, the issue arose as to whether the occupier of a site owed a duty of care to the subcontractor's employees. The plaintiff was delivering concrete to a site but, whilst reversing down an access road, lost control of his vehicle and suffered physical and psychiatric injury in the ensuing accident. The critical question was whether there was a duty on the occupier to maintain a safe means of access. At first instance, Davies J found that *Sydney Water Corp v Abramovic* [2007] NSWCA 248 and *Leighton Contractors v Fox* (2009) 240 CLR 1 suggested that the duty of care was not owed to the employees of subcontractors. At [72], Whealy JA (with whom Bathurst CJ and McColl JA agreed) said that the duty of care owed is that of an occupier but not the higher duty of care which is owed by an employer to an employee. It was held that the High Court's decision in *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 was distinguishable. The majority in that case held a duty was owed because of the special role played by the defendant in supplying and setting up equipment, and directing and supervising the operators of that equipment. This contrasted markedly with the present case, where the defendant had no say at all in relation to the system of work. *Stevens v Brodribb* (1986) 160 CLR 16 was similarly distinguishable. Where the occupier engages an independent contractor to carry out all aspects of its enterprise, this does not give rise to a duty of care towards an employee of the independent contractor in the absence of special circumstances. The appeal by the plaintiff did not succeed.

Employment

"In the *City of Prospect v Jaspers* [2012] SASCFC 85, the plaintiff suffered a significant back injury in lifting with a fellow employee an 85 kg compactor from the ground to the tray of a truck, which was approximately one metre high. At first instance, the plaintiff succeeded with no reduction for contributory negligence. The South Australian Full Court found that there had been no error in the trial judge's decision in this regard."

Section 5L of the *Civil Liability Act 2002*

In view of the fact that there is no liability for the materialisation of an obvious risk in respect of a dangerous recreational activity, there have been various decisions going in either direction. The judgments seem largely to turn upon what was the nature of the specific risk which was said to be obvious, and whether it was the same risk which materialised.

A fall from a horse at a horse-riding ranch was found to be caught by Section 5L in *Mikronis v Adams* (2004) 1 DCLR (NSW) 369,.

In *Fallas v Mourlas* (2006) 65 NSWLR 418, the majority held that an accidental shooting during spotlight shooting was not caught by Section 5L.

In *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, the Court found that a non-contact sport was not caught by Section 5L.

In *Smith v Perese* [2006] NSWSC 288, section 5L did not apply to circumstances where spear fishermen were run over by another boat.

In *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200, a plaintiff injured by a rogue wave washing over the bow of a dolphin-watching boat was held to be not caught by Section 5L.

The Court in *Jaber v Rockdale City Council* [2008] NSWCA 98 held that diving head first from a bollard 2 to 3 metres above the surface level was caught by Section 5L.

In *Verman v Albury City Council* [2011] NSWSC 39, BMX bike stunts on a Council bike ramp painted with non-slip paint were held to be caught by Section 5L.

In *Maher v Lidbury* (NSW DC unreported 18/3/2011) (Rolfe DCJ), it was held that social golf was caught by Section 5L.

Section 5M of the *Civil Liability Act 2002*

In *Belna Pty Ltd v Irwin* [2009] NSWCA 46, the Court made it clear that the warning must be specific to the particular risk. A general warning about the risk of exertion did not absolve the gym in that case from liability for aggravation of an injury caused by the performance of lunges. In *Verman v Albury City Council* [2011] NSWSC 39 (Harrison J), a sign at the Council's skate park did not inform of any specific risk but merely said that users skated at their own risk. The sign was silent as to the nature of the risk and did not address BMX bike riding, the activity in question. A specific reference to the need for protective clothing usually worn by skateboarders did not afford any protection in these circumstances.

Damages/Economic Loss – Work Capacity

At issue in *Mead v Kearney* [2012] NSWCA 215 was an allowance by the trial judge for diminution of economic capacity. Having determined the plaintiff's theoretical work capacity, the judge at first instance then considered whether the plaintiff could utilise that capacity to actually obtain work in the geographic area in which it was reasonable for him to try and find it. He concluded that the plaintiff's residual earning capacity had no value in the absence of any evidence from the defendant as to the availability of suitable employment for a person of the plaintiff's significantly reduced theoretical work capacity. The parties accepted the principle set out in *Nominal Defendant v Livaja* [2011] NSWCA 121 that, notwithstanding a theoretical ability to perform certain jobs, there must be a practical assessment of the likelihood of actually obtaining work. The defendant also accepted an evidential onus as to whether the plaintiff is likely to exercise a residual earning capacity. There was no claim of failure to mitigate and the plaintiff had demonstrated a long and satisfactory work history prior to the accident. There was evidence that the plaintiff had tried

to obtain employment for nearly four years before hearing without success. There was no evidence that this situation would be any different in the future. Accordingly, the defendant's appeal was dismissed. A finding of a 40% residual earning capacity is merely a step in the reasoning process and the ultimate conclusion that that capacity could not be utilised effectively amounted to finding that the plaintiff did not have any residual earning capacity at all.

Contributory Negligence - Section 34 of the *Motor Accidents Compensation Act 1999*

In *Nominal Defendant v Rooskov* [2012] NSWCA 43 (20 March 2012), the plaintiff alleged he had been hit by a car when riding his bicycle in the street. He took action against the Nominal Defendant concerning the alleged unidentified motor vehicle. The plaintiff had told ambulance officers who arrived at the scene that he had been hit by a car. There was no obvious damage to the bicycle and the notes of the ambulance officers referred to the plaintiff's significant drinking following a meal. The hospital record also indicated that the cyclist had been hit by a car. Police noted that the plaintiff had said that he may have been hit by a car but uncertain when interviewed in hospital. The plaintiff gave other ambivalent accounts to medical practitioners. The plaintiff had also told a local newspaper that he had little recollection of what had occurred, other than being thrown through the air and landing in a ditch. He could not recall hearing a motor vehicle. However, almost 15 months later the plaintiff gave an account where he remembered a car approaching him from behind. There was evidence of some skid marks. The plaintiff was unconsciousness to a degree at the scene but later referred to having interludes of recall shortly after the accident. The plaintiff had a blood alcohol reading close to 0.2% at the time of the accident. Campbell JA (with whom Young JA and Garling J agreed) had some doubts as to whether he would have come to the same conclusion but, taking into account the advantages that the trial judge had, was not persuaded that the conclusion reached at first instance was wrong.

The plaintiff had not been wearing a bicycle helmet. The trial judge reduced his damages by 5% for contributory negligence. The Court was not persuaded that this was an error of fact in relation to the type of damage incurred. There was no alternative place where the plaintiff could realistically cycle and in the circumstances, his alcohol consumption did not contribute - or at least was not established by the defendant to have contributed - to his accident or to his injuries."

Availability of Aggravated Damages for Purely Psychiatric Injury

Aggravated damages were not to be available for pure psychiatric injury in *Hunter Area Health Service v Marchlewski & Anor* (2000) NSWCA 294. Given that such damages are awarded for the mental distress arising from the manner of infliction of the injury, this seems to be logically correct.

Proportionality of Damages

The High Court in *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR said in respect of an award of general damages:

> "It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to

> those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases."

In *TCN Channel 9 Pty Ltd v Ilvariy Pty Ltd* (2007) 71 NSWLR 323 at [22], Spigelman CJ noted that the Court of Appeal remained bound by what the High Court had said in respect of comparative verdicts in *Planet Fisheries*, but added:

> "Although there is no tariff or standard, some understanding of the general scale of awards is appropriate."

This appears to remain the law in New South Wales."

Occupier's Liability

In Grasso v SRA (NSW CA unreported 26 April 1996) a 17 year old plaintiff, who tripped and fell and trapped his finger in an escalator, failed because the escalator met all reasonable standard requirements."

See also *Dimitrelos v 14 Martin Place Pty Ltd* [2007] NSWCA 378, where the plaintiff failed in respect of a claim involving lift malfunctioning.

In State of NSW v Oliver [2006] NSWCA 124 the plaintiff prisoner succeeded when he slipped on a puddle of water and detergent on a tiled floor near a toilet cubicle and sustained injuries.

McDonald's Australia Ltd v Salameh (NSW CA unreported 22 May 1997) saw the plaintiff, a young mother, slip and fall on liquid soap on the floor of the bathroom and succeed in negligence.

In *Allen v Taylor* (NSW CA unreported 13/5/1999) the plaintiff was injured driving a 4-wheel motorbike across a paddock after being asked to look at some cows on the property. She was not told of the existence of any hole or gully, which was disguised by the long grass. The majority found in favour of the plaintiff. By contrast, in *Carlisle v Mullrai* (NSW CA unreported 13/8/2000), two teenage girls while paying a visit to a farm overturned a four wheel motorbike and suffered serious injuries. It was alleged that the owner had been negligent in leaving the key in the ignition of the vehicle prior to leaving the farm. The fact that the girls took the motorbike without permission was found not to be reasonably foreseeable.