COMMON LAW PRACTICE UPDATE 22

Section 34 *Motor Accidents Compensation Act 1999*

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

Sections 92 and 117 *Motor Accidents Compensation Act 1999*

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

Section 126 *Motor Accidents Compensation Act 1999*

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

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

In *Wright v KB Nut Holdings Pty Ltd* [2013] QCA 66, the plaintiff suffered psychiatric injury as a result of a needle stick injury that occurred in an apartment rented from the defendant by her family. The apartment was unclean and in an unsatisfactory state on occupation. The plaintiff filmed the state of the apartment and asked that it be rectified. She did undertake

however to do some cleaning herself because "I'm not going to have the kids stay for the rest of the week in a place looking like it is". Whilst cleaning, she suffered the needle stick injury. The primary judge held that the risk of harm to the plaintiff was not foreseeable or alternatively, a reasonable person in the defendant's position would not have taken any more precautions than engaging the cleaner it had expected to clean the apartment. However, the trial judge accepted the evidence (unsurprisingly in the light of the filmed footage) that the apartment was in an unsatisfactory state. The Court of Appeal held that this evidence was irreconcilable with the trial judge's findings on foreseeability and reasonableness. It was reasonable to draw an inference (notwithstanding the difficulty of seeing the needle) that appropriate cleaning would have obviated the risk. As a result, the plaintiff succeeded on appeal.

Foreseeability/duty of care

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

Offers of compromise

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

False Imprisonment

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