

COMMON LAW PRACTICE UPDATE 35

Section 5B *Civil Liability Act 2002*

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

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

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

Personal Injury – failure to warn of risk

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

warning was given. In the circumstances, both the Australian Rail Track Corporation and the driver were liable in equal proportions.

Duty of care to employees of independent contractors

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

Res ipsa loquitur

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

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

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

Liability of Councils to employees

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

Liability for tortious actions of spouse

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