COMMON LAW PRACTICE UPDATE 49

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% for contributory negligence. As between Glad Cleaning and Mirvac, Glad Cleaning was 80% 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%. 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.