COMMON LAW PRACTICE UPDATE 47

Section 3A *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff suffered minor physical injury from a motor vehicle accident in *Allianz Australia Insurance Ltd v Gonzalez* [2013] NSWSC 362 (Adams J), and also claimed to have sustained psychological injury from the conduct of the driver and his friends immediately following the accident and on the next day. The question was whether such psychological harm was caused by separate events, thereby breaking the chain of causation and thus falling outside the scope of the *Motor Accidents Compensation Act 1999*. The conduct of the other driver and his friends was said to be aggressive and threatening. Adams J concluded that the psychiatric injuries did not fall within the requirements of the Act.

Medical Negligence/Sections 5D and 5I *Civil Liability Act 2002* (NSW)

In *Paul v Cooke* [2013] NSWCA 311, the plaintiff underwent a scan however her radiologist negligently failed to diagnose an intercranial aneurysm. Three years later and following a further scan, the aneurysm was diagnosed and the plaintiff underwent an operation to remove it. During that operation and without any fault on the part of the surgeons, the aneurysm ruptured, causing her a stroke and serious injury. If she had undergone the surgery three years earlier she would have undergone a different procedure, being open neurosurgery, but that procedure bore the same level of risk of rupture, being about 1%. It was highly likely the plaintiff would have suffered no harm from the earlier surgery and it was alleged therefore that but for the defendant's failure to diagnose, she would not have suffered injury. At first instance, it was held under s 5D of the *Civil Liability Act* that it was not appropriate for the defendant's liability to extend to those injuries but the trial judge did not accept the defendant's contention that the injuries were suffered as a result of materialisation of inherent risk under s 5I of the Act.

Dismissing the appeal, the NSW Court of Appeal upheld the defendant's contention that the harm was suffered from materialisation of a risk which could not be avoided by the exercise of reasonable care and skill under s 5I. No error was shown in the trial judge's conclusion that the scope of a negligent defendant's liability normally does not extend beyond liability for the occurrence of harm which in one sense was an unavoidable consequence of the original condition. Accordingly, the plaintiff failed.

Sections 5F, 5L, 45 and 43A *Civil Liability Act 2002* (NSW)

In *Collins v Clarence Valley Council (No. 3)* [2013] NSWSC 1682 (Beech-Jones J), the plaintiff was riding her bicycle in an organised charity ride, which was held in an area along Bluff Bridge over the Orara River. The defendant council had the care, control and management of the bridge. As she rode over, the plaintiff's front wheel became stuck in a gap between planks on the bridge and she fell over the low guard rails on the side of the bridge with the bicycle still attached to her feet. She fell into a rocky ravine and suffered significant injury. The parties agreed on significant damages were agreed subject to any issue of contributory negligence. The plaintiff argued that the bridge was frequently used by cyclists, was in a poor state of repair and that the council knew or ought to have known that the bridge was unsafe and that steps were required to eliminate or minimise the risk. The council resisted the allegation of negligence and relied upon a number of defences under the *Civil Liability Act*. Beech-Jones J found for the defendant. The relevant risk of harm was the risk of injury to a cyclist if the wheels became stuck in gaps between the planks or holes in the

graded planks. He concluded this risk was foreseeable and not insignificant. However, in his view the risk was "an obvious risk" to a reasonable person in the plaintiff's position and the council therefore did not have a duty to warn by way of a sign, even though it was a reasonable precaution for the council to undertake in the view of Beech-Jones J and it was, in his view, unreasonable for it not to.

Beech-Jones J found that it had not been shown the council had actual knowledge of the particular risk, the materialisation of which resulted in harm to the plaintiff under s 45. He also found that given the council's limited resources, it was not reasonable to require the council to take the precautions of repairing the bridge in the way suggested by the plaintiff. Accordingly, there was a defence under s 42 and s 5C(a).

Beech-Jones J did accept the plaintiff's contention that she was not engaged in a "dangerous recreational activity" within the meaning of s 5L and he found no contributory negligence on her part. This finding seems on the face of it to be inconsistent with the finding that the risk was an obvious risk to a reasonable person in the plaintiff's position. However, the plaintiff's claim failed.

There was police evidence confirming a relatively high level of recreational use, including by cyclists on the weekends, and council officers would have been aware that cyclists used the bridge. An inspection of the bridge noted no safety issues for vehicles, but the inspector did not turn his mind to the issue of safety for cyclists and the possibility of an accident in the manner in which this one occurred. The council put forward significant evidence as to the resourcing restrictions in relation to maintenance and works.

Whilst *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512 supported the existence of a duty of care, there remained the defences available under the *Civil Liability Act*. In addition to the resources defence, the council also relied upon the non-feasance defence reinstated by s 45, which requires actual knowledge of the particular risk. Beech-Jones J at believed he was bound by the majority view in *North Sydney Council v Roman* [2007] NSWCA 27 that it was insufficient for a junior officer of the council to have knowledge. What had to be proven was that someone in authority had actual knowledge. This was so despite subsequent doubts upon the correctness of the majority view. Moreover, he took the view that the particular risk of which the council had to have knowledge was in accordance with *Botany Bay City Council v Latham* [2013] NSWCA 363. In that case the plaintiff was required to establish that knowledge of the particular paver that was uneven or irregular lay with the council and not merely general knowledge that there were pavers which were irregular or dangerous in the area. Beech-Jones J, however, noted that the plaintiff's case here was that the bridge was riddled with dangers and that therefore the particular risk corresponds with the risk of harm identified. Beech-Jones J seems to imply that this may be sufficient despite the decision in *Latham*. He noted that the council chose not to call the officer with authority to indicate what his state of knowledge was, but said that the inference that arose would only permit the court to more confidently draw inferences if there was other evidence to support them. There was no evidence as to how often the senior officer drove on this road or whether the bridge was ever inspected on his occasional travels over it. The consequence is that the s 45 non-feasance defence was upheld. In any event, the cost of repair work was unreasonable given the financial resources available to the council.

The council also relied upon the s 43A defence in relation to an authority's exercise of or failure to exercise a special statutory power conferred on it. Beech-Jones J was not satisfied that the s 43A(3) defence was established except in respect of signage, for which specific statutory authority was required. However, he went on to comment that there was no rational

reason for the inspection undertaken of the bridge to confine itself to the risk of motor vehicles and exclude the risk concerning motorcycles and bicycles, noting that a cursory inspection of the bridge at that time would have revealed that it was a potential danger for cyclists. This meant that even given the application of s 43A to signage, the council's conduct was so manifestly unreasonable that the defence was not available.

In the light of his other findings, Beech-Jones J expressed no concluded view on causation but expressed doubt as to whether the plaintiff could satisfy s 5D of the Act.

He concluded by rejecting the idea that there were any further steps for her own safety that the plaintiff could reasonable have taken.

Sections 5F, 42 and 43 of the *Civil Liability Act 2002* (NSW)/ Section 3 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff was an 8 year old boy travelling with two older brothers on a city train bound for Newcastle in *Fuller-Lyons v State of NSW (No. 3)* [2013] NSWSC 1672 (Beech-Jones J).. He fell from the train after leaving Morisset Station and suffered significant injury. He sued, alleging that he became accidently trapped in the doors of the train when they closed upon departure from Morisset Station, so that a substantial portion of his body protruded from the train. This should have been noticed by railway staff at the station. It was then alleged he fell from the door as he struggled to break free while the train rounded a bend at high speed. It was alleged that the defendant, which owned the train, was negligent in failing to utilise technology known as a "traction interlock" which was fitted to the train and which, if operational, would have prevented the train from departing the station whilst the doors were prevented from closing. Beech-Jones J was uncertain whether the plaintiff became unwittingly trapped in the doors or deliberately impeded their closing before departure or during transit. However, he rejected the defendant's proposition that the plaintiff's brothers either assisted or witnessed the fall. He found that the plaintiff was owed a duty of care but was not satisfied that the defendant was in breach of that duty in failing to commission the traction interlock system. However, he was satisfied that negligence was established by the failure of staff at Morisset Station to observe the plaintiff's body protruding from the gap in the door before signalling for the train to leave the station. He was not satisfied that contributory negligence was made out.

The accident was a deemed motor accident under s 3 of the *Motor Accidents Compensation Act*.

A s 43 *Civil Liability Act* defence failed because no relevant statutory duty was identified. Section 42 of the *Civil Liability Act* does not appear to apply to a motor accident under s 3B(2) of that Act. Reference was made to the decisions in *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 (where the High Court held that leaning out of a window of a tram to throw up and striking a pole in breach of relevant bylaws did not preclude recovery) and *Rundle v SRA of NSW* [2002] NSWCA 354 (where a 15 year old boy was injured whilst spraying graffiti on the roof of the train after squeezing through an upper window to gain access). The claim in *Rundle* failed. However, Beech-Jones J said that this did not indicate that no duty of care was owed in that case or in this.

There was evidence that the plaintiff had a low IQ, significant developmental issues and a degree of cognitive impairment prior to the accident. Beech-Jones J concluded that the plaintiff's impaired intellectual functioning should be taken into account in determining the

standard of care required "of a reasonable person in the position of that person", but ultimately did not have to decide this because the defendant did not discharge its onus in showing fault on the part of an unsupervised 8 year old with no previous experience of train doors or trains.

Section 16 *Civil Liability Act 2002* (NSW)

In *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370, the issue on appeal was whether the award of 33% of a most extreme case was correct. The appellant contended it should have been in the vicinity of 25%, which would have resulted in a 80% reduction in the award for non-economic loss. The question was whether the figure could be regarded as outside a reasonable range of assessment. The Court of Appeal held that it was not demonstrated that there was an erroneous assessment in this regard.

Limitation Periods /Workplace Injuries

The plaintiff worked as a process worker in the defendant's ice-cream factory in *Unilever Australia Ltd v Petrevska* [2013] NSWCA 373, and claimed that she suffered hearing loss in the old and now closed factory. She gave notice of claim and lodged a claim under s 260 of the *Workplace Injury Management and Workers Compensation Act 1998*. The defendant contended the claim was lodged long after the expiration of the six-month limitation period after the injury or accident happened. The plaintiff said her claim was made within time because under s 261(6), the time for lodgement of a claim did not commence to run until she first became aware she had received the injury. The plaintiff did not become aware of it until 2009, when she first received medical advice concerning her hearing loss and its causes. The Court of Appeal upheld the plaintiff respondent's contention, dismissing the defendant's appeal with costs.

Vicarious liability for intentional tort

In *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250, the plaintiff was a patron at the defendant hotel in 2008 when the manager concluded that she was intoxicated and instructed a security guard to remove her, who did so by pulling out a stool from under the plaintiff, causing her to fall to the ground and suffer injury. At first instance, the primary judge found the security guard had committed an assault and battery on the plaintiff, for which his employer Checkmate was vicariously liable. However, because Checkmate no longer existed, the plaintiff also pursued his claim against the hotel and licensee. Dismissing the plaintiff's appeal, the NSW Court of Appeal held that nothing made the hotel or licensee vicariously liable for the security guard's tort - the security guard was not expressly authorised to commit the assault and battery and was not supervised in his actions. Furthermore, the guard was not an agent of the hotel and had no authority to bind it. Nor was the licensee directly liable under s 91 of the *Liquor Act* 2007. In any event, in Australia there is no role for dual vicarious liability, whereby two different defendants can be liable for the tortious act of a third person: *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 641, 646 and 685.

Animals

In *A Woodley Osteopathic Services Pty Ltd v TAC and Brendan Woodley* [2013] VSCA 350, a horse escaped from a paddock because the paddock gate was open and went onto the highway, colliding with a car. The plaintiff's wife was killed and his daughter injured in the collision. The TAC paid compensation in respect of the death and injury and sought

indemnity from the owner and occupier of the property where the horse was kept. At first instance, the TAC succeeded to the extent of 90% of its payments. Both the occupier and TAC appealed. The horse was agisted and there were multiple users of the gate, including unauthorised strangers. The occupier conceded it owed a duty to highway users to take reasonable care to prevent the escape of the horse. There was no evidence upon which it could have been found that the latching mechanism was relevantly defective and in any event, whilst the defendant was occupier of the property, he was not relevantly the occupier of the particular horse paddock at the time. He lacked the requisite control of the gate and therefore had no responsibility for the care or containment of horses in the paddock. He was effectively the occupier of an adjacent property. The TAC's claim failed as a result.

Contributory negligence

In *Egan v Mangarelli* [2013] NSWCA 413, the NSW Court of Appeal upheld the first finding at first instance that there was no fault on the part of the driver of a bus who collided with the plaintiff cyclist, who had suddenly merged at speed into the bus's path from a pathway obscured by a fence. The court upheld the hypothetical assessment of contributory negligence at 70% had the plaintiff succeeded."