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2024 Personal Injury Decisions

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1. *Fisher v Shire of Denmark* [2024] WADC 1

- Russell DCJ, delivered 12 January 2024

Keywords

Negligence - Occupiers liability - Public authority - Coastal reserve - Obvious risk - Whether risk of slipping on gravel obvious - Turns on own facts

Facts

The Plaintiff pursued a claim for damages for personal injuries sustained when she slipped and fell on gravel stones whilst descending steps on a flight of stairs. The Plaintiff was trying to access "Black Hole Rock" and to do so, had to descend a set of limestone steps that led down to the beach. As she took the last step onto a landing, her foot slipped when she stepped on a group of small loose rocks and as a result she dislocated and fractured her right ankle. She required an open reduction and internal fixation. Quantum was agreed between the parties, leaving the issue of liability to be determined.

The crux of the Defendant's case was that there was an "obvious risk of slipping, it was not required to take precautions against the risk, and that the accident and the injury were caused by the Plaintiff's failure to keep a proper lookout and take care for her own safety."[1]

The Plaintiff disputed that the risk of slipping on gravel stones was obvious to her, or someone in her position, and alleged that the Defendant had a duty to prevent it from occurring.

Decision

Plaintiff's claim dismissed.

Ratio

As a general proposition, once a foreseeable risk of harm is identified or accepted, the law does not impose a duty on an occupier to remove everything that is a risk. Rather, the precautions to be implemented, if any, are those to be taken by a reasonable person in the defendant's position in response to the risk of harm. After determining the precautions to be taken, it then needs to be considered whether the injury would have been avoided if those precautions had been taken.

With respect to whether there was an obvious risk, it needs to be considered whether the risk is objectively obvious to a reasonable person and the objective circumstances at the time, or immediately before, the harm was suffered by the Plaintiff ought to be considered. Her Honour ultimately held the risk of injury from slipping on the gravel stones when stepping from the last step onto the landing area was an obvious risk and, as a result, the defendant did not owe a duty of care to the plaintiff to warn her of that obvious risk. In arriving at her decision, her Honour noted "it is a matter of common knowledge and experience that loose gravel can be

[1] [5].

unstable underfoot. It would be apparent and easily understood that stepping down onto such a surface carried a risk of slipping."[2]

Her Honour also held that the defendant was not required to take precautions against the risk of harm because, for example, it would not be reasonable or practicable "for steps or a landing area in such a location to be maintained or constructed to the same standards as a [commercial building]."[3] Her Honour concluded that the defendant did not breach the duty of care it owed to the plaintiff and the plaintiff had not, on the balance of probabilities, proven that the defendant was negligent.

[2] [143].
[3] See [146] – [172].

2. *Oxman v Raphael Road Pty Ltd* [2024] WADC 3

- Prior DCJ, decision delivered 24 January 2024

Keywords

Limitation of actions - Negligence - Occupiers' liability - Statutory duty - Contract - Causation - Injury from electric shock - Turns on own facts

Facts

On 3 November 2015, the Plaintiff suffered an electric shock after touching the shower rose in the house he was occupying as a tenant. The Defendant had purchased the property in December 2013 and the Plaintiff had entered into a lease agreement with the Defendant (for 30 months) commencing 1 October 2015.

When the Plaintiff first moved into the property there were two Residual Current Devices (**RCD**) on the Property switchboard but the power socket that the hot water system was connected to was not RCD protected. Additionally, at the time of the incident the electrical cable for the hot water system was cable tied to the hot water pipe. The Plaintiff claimed the electrical shock was caused by the electrical cable deteriorating next to the hot water pipe which allegedly caused the electric current to leak from the cable to the hot water pipe.

The Plaintiff claimed the Defendant breached certain regulations in the *Electricity Regulations 1947* (WA) (**Regulations**) and failed to comply with a requirement in the Australian/New Zealand Wiring Rules 3000:2007 (**the Wiring Rules**), that electrical cabling was to be at least 25 mm away from a hot water system's water pipe.

The Plaintiff also claimed the Defendant was negligent by breaching the duty it owed to him by failing to take reasonable steps to ensure that persons living in the property would not suffer injury due to the state of the property. Specifically, the Plaintiff alleged the Defendant breached its duty of care by:

- failing to ensure the hot water pipe and power cord supplying power to the hot water system were not tied together;
- failing to carry out adequate checks or inspections to detect dangers such as those which caused the incident;
- failing to ensure the power point where the hot water system was plugged in had adequate RCD protection; and

- failing to ensure adequate maintenance and repair was conducted on the property.

The Defendant denied all the allegations of negligence..

Decision

Plaintiff's claim was dismissed.

Plaintiff to pay the Defendant's costs to be agreed or assessed.

Ratio

In finding that the Defendant had not breached any statutory duties owed to the Plaintiff, reliance was placed on the wording of regulation 14(b) of the Regulations. That regulation required two RCDs to be installed in a property prior to a residential tenancy being commenced. As the parties agreed that two RCDs were installed in the property (notwithstanding the fact that an RCD was not installed on the power point connected to the hot water supply), the property was compliant with the statutory duty created by regulation 14(b) of the Regulations.

Both parties agreed that, at the time of the incident, the property was in breach of Wiring Rule 3.9.8.4(b) which required the electrical cabling was to be at least 25 mm away from a hot water system's water pipe. However, Judge Prior noted that a breach of a clause or provision in the Wiring Rules cannot be a breach of a statutory duty as the Wiring Rules are not a 'creature of statute'. Accordingly, there was no statutory duty imposed on the Defendant to comply with the Wiring Rules and the Plaintiff's claim for breach of statutory duty failed.

Judge Prior held that there is no 'general obligation' imposed on a landlord to arrange an electrical safety inspection or obtain a Certificate every time a property is leased. In finding that the Defendant had not breached its common law duty of care to the Plaintiff, Judge Prior noted the following:

- there was no evidence to support that it was routine practice for residential property owners to arrange for independent inspections of their properties to ensure they were safe other than by property agents preparing property condition reports at the commencement of a lease;
- there was no evidence that the Defendant had any knowledge of any damage to the electrical cable from the hot water system prior to the incident; and
- eyewitness accounts of their observations of the deteriorated electrical cable did not suggest it would be easy for a person to observe or discover.

Given the above, Judge Prior held that there was no aspect of the exterior of the property which ought reasonably to have suggested to the Defendant that it would have been appropriate to obtain an electrical inspection or undertake any works on the hot water system. There was no apparent danger of which the Defendant should have been reasonably expected to be aware.

3. *Star Aged Living Limited v. Lee* [2024] QCA 1

- Bowskill CJ, Bond and Flanagan JJA , decision delivered 25 January 2024

Keywords

Limitation of Actions Act 1974 (Qld) – extension of limitation period – knowledge of material facts of a decisive character – prejudice.

Facts

The respondent, Ms Lee, was employed by the appellant, Star Aged Living Limited as an Assistant in Nursing at an aged care facility controlled and managed by it. The respondent alleged that she suffered injury to her back on 19 December 2015, her first shift back from maternity leave, whilst assisting to move residents.

The respondent alleged that she was working with colleagues to care for residents on that day but there were no slide sheets available to assist in moving the residents, she did not know where the slide sheets were situated and accordingly she moved residents without a slide sheet and began to experience back pain whilst doing so.

The respondent was 30 years of age at the time of her injuries and had worked as an assistant in nursing at various aged care facilities from August 2007. She had worked for the appellant at the workplace where she was injured since April 2014.

The respondent had previously suffered from a disc protrusion at L4/5 in 2007 but did not make a WorkCover claim at that time. She suffered a flare up of back pain in 2010 for which she made a WorkCover claim for “about four months off work” and had a further short term flare up of her back pain in 2012 but did not apply for workers compensation benefits as that injury resolved.

The parties accepted that prior to the expiration of the respondent’s three year limitation period she knew:

- She had suffered a very serious spinal injury;
- She had undergone major spinal surgery for that injury;
- She believed that she had suffered that injury because the applicant employer had not provided proper equipment (slide sheets);
- She believed the system of work was inadequate because the beds were too low;
- She asserted she and her co-worker had not been properly trained in proper manual handling techniques;
- Due to her back injury she had not been able to work since the date of the injury;

- Due to her back injury her husband was required to act as her full time carer for herself and their child;
- She had been unable to return to work as an Assistant in Nursing or in any similar capacity and would not be able to do so in the future;
- She would have trouble retraining into other work because of her pre-existing narcolepsy condition;
- Her back injury had been accepted as a work related injury by WorkCover; and
- She was continuing to receive ongoing weekly compensation payments from WorkCover.

The respondent first made contact with a lawyer through a community Facebook page in December 2019 with urgent steps being taken by the lawyer to lodge a Notice of Claim for Damages in early January 2020.

The respondent's explanation for not seeking advice earlier was that she was "inexperienced with court processes, litigation and the law generally".

Decision

1. The appeal is allowed.

2. The Orders of the Primary Judge made on 10 March 2023 and 22 March 2023 (in relation to costs) are set aside.

3. The respondent's application to extend the limitation period is dismissed.

4. The respondent pay the appellant's costs of the appeal and of the proceedings below.

Ratio

In the leading judgment, Her Honour Chief Justice Bowskill (with whom Bond and Flanagan JJA agreed) found:

- There was insufficient evidence to support the Primary Judge's finding that the respondent first realised subsequent to back surgery undertaken on 27 March 2019 that it was unlikely that she would be able to work in any capacity;

- The respondent was aware of a "critical mass of information" prior to the expiration of her three year limitation period that she had a worthwhile right of action, if properly advised;

- Had the respondent sought advice prior to the expiration of her three year limitation period in December 2019 she would have been advised to take urgent steps to protect her legal rights;

- The medical reports obtained after the expiration of the respondent's three year limitation period did not establish a "material fact of a decisive character";

- Although not determinative given the findings outlined above, there was no prejudice suffered by the appellant given relevant investigations to ascertain evidence had not been exhausted by it;

- Despite recent decisions of the courts with respect to prejudice in historical sexual abuse claims, the notion of "presumptive prejudice by delay" remains a relevant consideration in matters where there remains a limitation period (unlike historical sexual abuse matters).

5. *Secretary, Department of Education v Dawking* [2024] NSWCA 4

- Gleeson, Mitchelmore and Kirk JJA, delivered on 31 January 2024

Keywords

Workers' compensation – Personal Injury Commission – appeal – employer liable to pay workers' compensation – psychological injury – employment substantial contributing factor to injury – causation of injury – reasonable action taken or proposed to be taken by employer – reasonable management action – discipline or dismissal of workers

Facts

On 27 August 2021, the Department of Education sent an email to all school-based staff, including Ms Dawking, advising that the Premier of New South Wales was expected to announce a mandate that school staff be double vaccinated against COVID-19 from 8 November 2021 (a Public Health Order was later issued to this effect). Ms Dawking claimed that the contents of the Department's email caused her to develop a psychological injury.

On 17 November 2021, Ms Dawking was notified that her employment as a teacher had ceased as of 8 November 2021 due to her failure to evidence a double vaccination status. Ms Dawking applied for workers' compensation benefits but was rejected. Ms Dawking appealed the decision to the Personal Injury Commission. A certificate of determination was issued by a Member stating Ms Dawking had sustained a psychological injury arising out of or in the course of her employment, her employment was the main contributing factor to her injury, the injury was not wholly caused by reasonable disciplinary action taken or proposed to be taken by the employer, and she was entitled to weekly workers' compensation benefits. The Department first appealed the decision to a presidential member of the Commission, and then to the Court of Appeal.

Decision

The appeal was dismissed. The Appellant was ordered to pay the Respondent's costs.

Ratio

The Court held that the test for causation that employment be "the main contributing factor to the injury" was instead a question of fact. The Court of Appeal found the Commission had not erred in law by deciding the evidence supported a factual finding that Ms Dawking's employment was the main contributing factor to her psychological injury (pursuant to sections 4 and 9A of the *Workers' Compensation Act 1987* (NSW)).

Their Honours confirmed the decision of the Commission that the Department was unable to rely upon section 11A of the Act as Ms Dawking's psychological injury was not caused wholly by reasonable action taken or proposed to be taken by the Department in respect of discipline.

Distinction was also made in this case between Ms Dawking's situation and the facts of *Bjekic v State of New South Wales* [2022] NSWPIC 214 as, in the latter, the injury was sustained due to the mandate itself (to wear a mask), rather than the notice (here, an email) of the mandate.

The Court of Appeal confirmed the Commission's decision that Ms Dawking was entitled to workers' compensation benefits.

6. ***Nathaniel Corbett by next friend Debra Todd v Town of Port Hedland*** **[2024] WASCA 9**

- Buss P, Mitchell JA and Vaughan JA, delivered 2 February 2024

Keywords

Negligence – occupiers' liability – child suffered crush injury while playing near unsecured gate

Facts

On the evening of 28 August 2015, Nathaniel Corbett ("the appellant"), who was almost three years old, was playing with a group of children at the Port Hedland racecourse. The group were playing on an unsecured metal gate and using the gate as a swing. As the children were playing, the appellant's left hand was crushed between the gate and the metal post where the gate was attached. As a result of the injury, the appellant had four fingers amputated, only leaving him with a thumb on his left hand.

Proceedings were commenced against the Town of Port Hedland, who occupied and controlled the racecourse premises ("the respondent").

At first instance, the appellant's claim was dismissed on the basis that the appellant had not proven, on the balance of probabilities, that the respondent had been negligent. This decision was the subject of an appeal.

Decision

The appeal was dismissed.

Ratio

On appeal, the appellant submitted that the primary judge erred in not characterising the gate as an "allurement" and "attraction" to children. The Court of Appeal held that although it may be "just a gate", when viewed objectively and without hindsight bias, the gate would be alluring to children if it was not secured by a padlock because it might be used in a manner where children could sit on the gate and be "whizzed" in an arc by other children pushing and pulling it. As a result, the Court of Appeal was satisfied that that the primary judge erred in this finding.

The Court of Appeal was also required to determine whether the risk of harm was foreseeable and not insignificant. It was undisputed that children were not ordinarily in the vicinity of the gate and did not routinely play on the gate. In fact, children were not frequently seen at the

racecourse premises. However, the racecourse was a public space and often used as a shortcut by a nearby Indigenous community. As a result, the Court of Appeal held it was reasonably foreseeable that one or more children might enter the racecourse and seek to entertain themselves on the racecourse premises. If that occurred, the unsecured gate (when used as a swing) presented a foreseeable risk of harm which the respondent ought to have known. The Court of Appeal also determined that the risk was not insignificant despite the gate typically being secured by a padlock. Instead, the Court of Appeal were satisfied that the risk of harm was not insignificant given the 'much higher' probability that a child using the unsecured gate as a swing might be harmed.

Despite these findings, the appellant failed to establish that a reasonable person in the respondent's position should have taken the precaution of ensuring that the gate was secured at all times (except when open to allow vehicle access). The Court of Appeal held that this would have imposed a significant burden on the respondent and while there was a risk of harm to a child playing on or around the gate, it was not a risk that a reasonable person in the respondent's position would have taken burdensome steps to avoid. This finding was sufficient of itself to sustain the order that the appeal be dismissed.

7. ***Allianz Australia Insurance Limited v Yu*** **[2024] NSWSC 31**

    - Weinstein J, decision delivered 2 February 2024

Keywords

Fraud – s 118 of the Motor Accidents Compensation Act 1999 – tort of deceit – state of mind of defendant – whether the defendant knowingly or recklessly made false representations to the plaintiff and others to obtain a benefit to the detriment of the plaintiff – whether the plaintiff was induced by the representations of the defendant - application of Briginshaw – tendency evidence – whether true value or settlement value theory applies

Facts

The defendant was involved in a motor vehicle accident on 31 July 2013. He made a claim in late 2013, which was settled in 2015. As a result of that accident, the defendant claimed that he suffered severe and debilitating depression. This was confirmed by doctors relying on the defendant's self-report. The claim was settled on 9 March 2015 for $750,000 inclusive.

After the settlement, the defendant's wife brought her own claim alleging that she suffered a psychological injury arising out of her husband's accident. She was assessed by a psychiatrist on 11 October 2017 and on the basis of what she informed the psychiatrist, the plaintiff formed the view that the defendant had misrepresented his condition, for the purpose of enriching himself.

The plaintiff's case was that the defendant's purpose was to achieve financial gain, with the intention that the plaintiff would be induced by and rely upon his representations. The plaintiff's view was that the defendant had knowingly made false and misleading representations with respect to his psychiatric condition.

Decision

1. Judgment for the plaintiff in the amount of $670,000.
2. I allow interest in a sum to be calculated by the parties. A schedule of interest is to be provided to my chambers within 7 days of the date of this judgment.
3. The defendant is to pay the plaintiff's costs on the ordinary basis.
4. If any other costs order is cavilled for, the parties are to contact my Associate within 7 days so that the matter can be listed for argument.

Ratio

The issue for determination was whether the representations were false and misleading and if so, what is the quantum of the plaintiff's loss.

The plaintiff relied on witnesses who were regularly in contact with the defendant prior to settlement, such as Mr Nehme, who was the contractor engaged to build the defendant's new home. Mr Nehme gave evidence that the defendant was intimately involved in the construction of the home and displayed behaviour entirely inconsistent with the representations made to the plaintiff.

The Judge was satisfied that that the representations made by the defendant to the plaintiff and doctors as to the nature and extent of his alleged psychiatric injury were knowingly false and misleading, that they were made with the intention of inducing the plaintiff to act upon

those representations, that they were made with the intention of obtaining a financial benefit in the form of personal injury damages greater than that to which he was entitled and that the representations were a material cause of the plaintiff agreeing to pay the defendant the settlement sum of $750,000.

The Judge conceded that the cause of action contained in s 118 of the *Motor Accidents Compensation Act 1999* (NSW) (MACA) is made out on the balance of probabilities bearing in mind s 140(2) of the Evidence Act. It was concluded that the evidence was sufficiently strong to prove fraud. It was also found that the elements of the tort of deceit were also made out on the same standard.

Damages were assessed on the basis that the defendant was entitled to the sum of $80,000 inclusive of costs, absent his false and misleading representations. The plaintiff had paid the defendant $750,000 and was therefore entitled to recover $670,000 plus interest.

8. *Fabbri v Masters Home Improvement Australia Pty Ltd* [2023] WADC 97 (S)

- Staude DCJ, delivered 2 February 2024

Keywords

Costs – offer of compromise – Calderbank offer – whether plaintiff's failure to accept offer was unreasonable – Eccles – offers more favourable to plaintiff than judgment – costs follow the event – Supreme Court Rules – indemnity costs – party and party costs

Facts

The plaintiff sustained a knee injury in a slipping incident at the defendant's premises, for which liability had been admitted by the defendant. The plaintiff then suffered two further incidents of injury. The matter proceeded to trial for an assessment of damages. At trial, the plaintiff was awarded $120,744.20 in damages in respect of the compensable loss from the original incident. Staude DCJ found no nexus between the injury caused by the initial incident and any further injuries caused by the subsequent incidents. Costs were to be decided on the papers. Relevantly, multiple offers of compromise were made, starting on 26 November 2019, which were more favourable to the plaintiff than the judgment. The defendant sought orders that the plaintiff receive his costs of the action up to 26 November 2019, but that the plaintiff pay the defendant's costs on an indemnity basis (or alternatively, a party and party basis) from 27 November 2019.

Decision

The plaintiff is entitled to his costs of the action up to the date of the first offer on a party and party basis and thereafter the plaintiff should pay the defendant's costs of the action on a party and party basis.

Ratio

Staude DCJ considered the rules under Order 24A of the *Rules of the Supreme Court 1971* (WA), in particular the cost consequence set out in r 10(5) which provides that, when a plaintiff obtains judgment not more favourable than an unaccepted offer from the defendant, the plaintiff is entitled to party and party costs up to the day the offer was made, and then the defendant is entitled to party and party costs thereafter. His Honour noted the consequence set out in r 10(7A), which entitles a defendant to its costs on an indemnity basis where the plaintiff's failure to accept an offer of compromise was unreasonable. A parallel was drawn to

the principles of a *Calderbank* offer, as detailed in *Ford Motor Company of Australia Ltd v Lo Presti* [2009] WASCA 115 and *Eccles v Koolan Iron Ore Pty Ltd* [2013] WASC 418. Staude DCJ held that 'care and circumspection' ought to be exercised by the court given the potential impact this consequence could have on an individual litigant. His Honour considered each offer of compromise, having regard to those principles:

1) The first offer was favourable to the plaintiff which warranted the plaintiff pay the defendant's costs on a party and party basis thereafter;
2) The *Calderbank* offer was found to be made at a time when the plaintiff was facing the prospect of a knee replacement, thus it was reasonable to await the outcome of procedure;
3) The final offer was made at a point where the plaintiff had no expert evidence to support the causal nexus between the initial incident and the subsequent incidents. Whilst the plaintiff's case may have been deficient from an evidentiary standpoint, he believed a causative nexus existed and was therefore entitled to have his day in court. The plaintiff's failure to accept the final offer was therefore not unreasonable.

9. ***SSABR Pty Ltd v AMA Group Ltd (No 2)*** **[2024] NSWSC 24**

- Rees J, delivered 2 February 2024

Keywords

Indemnity costs – commercial dispute – *Calderbank* offer – period of time for acceptance – genuine compromise.

Facts

The matter was heard over a four-day trial, commencing 16 October 2023. Judgment was awarded in favour of the defendant and the plaintiff was ordered to pay the defendant's costs of the proceedings. The defendant sought a special costs order for costs on an indemnity basis, given the plaintiff did not accept a *Calderbank* offer that was served on 12 October 2023, prior to the trial commencing.

Decision

Plaintiff to pay defendant's costs on an indemnity basis from *Calderbank* offer

Ratio

The defendant's submissions relied on *Earth Civil Australia Pty Ltd* [4] arguing their *Calderbank* offer was a genuine offer of comprise unreasonably rejected. The plaintiff's arguments were based around the fact that it was not a genuine comprise given the *Calderbank* offer was very much equivalent to a "walk-away offer" due to the previous costs orders made against the defendant from other applications in the proceeding.

Further, the plaintiff argued the timeline for acceptance of the *Calderbank offer* was neither sufficient nor reasonable time to assess the consequences of the offer made to allow the plaintiff to undertake a fair assessment of any outcome. Rees J relied on *Kooee Communications Pty Ltd* [5] to assess whether the timeframe for the *Calderbank* offer was reasonable and found that where an offer made shortly before trial it is reasonable to expect the legal representatives would be in a position to give their client an immediate assessment of any offer. In terms of the period for the *Calderbank* offer, Rees J found that it was reasonable given the plaintiff had also made a *Calderbank* offer earlier that same day.

Accordingly, Rees J found the defendant's *Calderbank* offer was a genuine compromise in the circumstances.

[4] *Earth Civil Australia Pty Ltd, RCG CBD Pty Ltd, Bluemine Pty Ltd, Diamondwish Pty Ltd and Rackforce Pty Ltd (all in liq) (No 2)* [2021] NSWSC 1161

[5] *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd (No 2)* [2008] NSWCA 85

10. *Hartnett v Trustees of the Roman Catholic Church Diocese of Wilcannia- Forbes* (No 2) [2024] NSWSC 98

- Campbell J, delivered 8 February 2024

Facts

Counsel for the plaintiff sought to call a Mr Haimes to give evidence in the proceeding before the court. The defendant's object on the basis of two grounds:

- that the tendency evidence Mr Haimes would give was not capable of supporting the plaintiff's tendency notice, which the judge expressed as "*a tendency to excessively, gratuitously and without any proper reason dispense corporal punishment by use of striking students with a wooden ruler at the school*".

- the discretion conferred by section. 135 of the *Evidence Act* to exclude evidence that would otherwise be admissible. The defendants argued that the probative value of Mr Haimes' evidence is substantially outweighed by the danger of it being unfairly prejudicial to the defendants.

The background provided was that Mr Haimes he was a student at a college in South Australia where a Sister Green (it is her conduct that is central to the case before the court) had taught for some time in the 1970's. Mr Haimes provided a statement regarding events which occurred when he was an infant at the school. His 'proposed evidence' was that Sister Green, or although a primary school teacher, would from time to time teach Mr Haimes in infants' class (usually when the usual teacher was absent). The basis of this evidence was that Sister Green was equipped with a wooden stick, which Mr Haimes says she would punish students with if they did not behave. Mr Haimes says that he was disciplined on at least one occasion and recalls seeing other classmates dealt with in a similar manner for minor infractions.

A statement from Sister Green was obtained and provided on 18 January 2024. In that she apparently acknowledges teaching at the school in 1975. In the second statement, Sister Green sought to respond to the proposed evidence of Mr Haimes, and referred to what were the important circumstances noting she was not a primary school teacher, that it was not the practice of the school for teachers assigned to one class to relieve an absent teacher of another, and that students were otherwise distributed among classes when a teacher was absent. The judge noted she didn't respond to the evidence about whether she used some wooden implement to discipline children in those days but says she did not have a ruler named

"Montgomery". The judge noting that she was *'… perhaps talking around the question rather than answering it*'. Mr Haimes didn't refer to "Montgomery" in his statement, but simply described a wooden stick being about a foot long and 1cm in diameter of light coloured timber. The judge simply noted that statement of Sister Green didn't directly respond to the evidence Mr Haimes had in his statement.

Decision

The defendant's objection to Mr Martin Gregory Haimes giving oral evidence is rejected.

Ratio

The judge deal with the first question relating to Sister Green's tendency to act in a particular way, that is, her use a wooden implement to discipline infant children as far back as 1975. The judge referred to the matter of *Hughes v The Queen* (2017) 263 CLR (at 16), in which it was said:

> "…*Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent. The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that person had particular state of mind, or acted in a particular way, on the occasion in issue. The capacity of the tendency evidence to be influential to proof of an issue on the balance of probabilities in civil proceedings may differ from the capacity of the same evidence to provide an issue beyond reasonable doubt in criminal proceedings*…"

The judge noted that the fact in issue which Mr Haimes' evidence, in conjunction with other evidence that might be heard, is put forward to prove whether or not she used a wooden implement, being one or more rules at different times while he was a young student in the infant's class at the school, on students. The judge was satisfied that Mr Haimes' evidence, considered in light of other evidence already heard, was sufficient to *"…have significant probative value when viewed through the prism of the civil standard of proof of the balance of probability, a much less stringent standard, as is well known, than the criminal standard of proof beyond reasonable doubt*."

As to the second question, the judge was able to deal with that in short compass. The judge noted that all effluxions of time in litigation create some prejudice. The question is whether or not the prejudice is unfair. The judge had to give consideration to section 6A of the *Limitation of Actions Act* 1969 (NSW), and the abuse of process considerations referred to in the majority

of the High Court in the recent decision of *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32. The judge was not satisfied that any prejudice of meeting Mr Haimes' evidence viewed in isolation is unfair. The judge noted that when the time comes any proof of evidence has to be evaluated, and if the judge is not satisfied then it should be excluded under Section. 135 of the *Evidence Act* (NSW).

11. *Erceg v Pizzichemi* [2024] QSC 13

- Henry J, decision delivered 9 February 2024

Keywords

Stay of civil proceedings, risk of prejudice, charges of fraud, balancing of justice

Facts

The plaintiff (the respondent) had brought a civil proceeding alleging fraudulent behaviour by the defendant (the applicant). The plaintiff then proceeded to also make a criminal complaint in relation to that fraudulent behaviour. The defendant was subsequently charged with offences based on the same factual allegations as the civil proceeding. The defendant in the civil proceeding made an application for the stay of the civil proceeding, pending the disposition of the criminal proceeding.

Decision

1. Proceeding stayed pending the final disposition of the charges of fraud pending in the criminal jurisdiction against the defendant;
2. Costs to be heard, if not agreed before 16 February 2024.

Ratio

It was noted by his Honour the mere fact a defendant in a civil proceeding is facing criminal charges will not in itself justify a stay of the civil proceeding. It instead requires a balancing of justice between the parties, i.e. whether the risk of prejudice to the plaintiff in having the proceedings stayed outweighs the risk of prejudice to the defendant.

His Honour considered the same reasoning in *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 ("*Zhao*") should apply to this matter, in that the risk of prejudice could be inferred where "the offences and the circumstances relevant to both proceedings are substantially identical" (*Zhao* at [59]).

It was noted that while, if correct, the plaintiff's case meant she has been deprived of significant assets, meaning she had suffered significant financial hardship, it was also her choice to file a complaint with police after filing the civil proceeding. In the absence of being able to substantiate the plaintiff was destitute until receiving an order for restoration of the assets, the jeopardising of the plaintiff's rights to the ordinary progressing of her civil claim was considered less concerning than the jeopardising of the defendant's rights in the criminal proceeding.

12. *Dickson v Hassum & Levitt Pty Ltd & Anor* [2024] QCA 15

- Mullins P, Boddice JA, Applegarth J, decision delivered 13 February 2024

Keywords - Limitation of actions – Extension or postponement of limitation periods in personal injuries – Knowledge of material facts of decisive character

Facts

Mr Dickson sustained a back injury on 01/06/2002 and knee injuries on 19/06/2002 and 04/07/2002 in the course of his employment with the employer. Dickson made a workers' compensation claim for the knee injuries, but not for the back injury. On 14/12/2022, Dickson lodged a notice of claim for damages with WorkCover Queensland (WorkCover) for all three injuries. On 11/08/2023 Dickson commenced legal proceedings in the Qld Supreme Court for personal injuries, along with an application seeking an extension of the limitation period pursuant to section 31(2) of the *Limitation of Actions Act 1974* (Qld) (**Act**). On 07/09/2023, the court at first instance (Muir J) dismissed the application and ordered Dickson to pay the costs of the application. Dickson appealed. Dickson self-represented at both the hearing of the application and the appeal.

Decision

Appeal dismissed and appellant to pay the respondents' costs of the appeal.

Ratio

The Court of Appeal (Court) noted that Dickson:

- received a Notice of Assessment dated 28/03/2018 assessing a nil work-related impairment due to the incident of 19/06/2002;
- successfully reopened his statutory claim for his 04/07/2002 knee injury and was assessed with a 5% left leg impairment as a result of that injury on 09/03/2018. Dickson rejected that assessment and went to the Medical Assessment Tribunal on 25/10/2022, which resulted in a lump sum offer of $12,371.75 being made on 03/11/2022. Dickson rejected this offer; and
- Having rejected WorkCover's lump sum offer, forwarded a draft statement of claim on 07/12/2022, followed by a Notice of Claim for Damages form on 14/12/2022.

WorkCover rejected the claim for the back injury contained in the Notice of Claim for Damages pursuant to section 273A of the 1996 version of the legislation. Mr Dickson then filed his proceedings and his application on 11/08/2023.

At first instance, in his affidavit supporting his application, Dickson referred to various disabilities and injuries occurring in the years following 2002, asserting that he was severely disabled and "unable" to litigate when the limitation period otherwise expired in 2005, had been quoted "large upfront sums to litigate", had sustained further injuries and been involuntarily detained in hospital in 2021.

In response, at first instance, the employer provided evidence that due to the effluxion of time and the ordinary process of destruction of archived records, the employer had no records or employee recollections extending back to the 2002 or 2003 alleged injuries. WorkCover's records were limited to the statutory files relating to the knees and recent claim interactions.

The primary judge questioned Dickson on what he identified as being the material fact or facts of decisive nature and when those facts came to his knowledge. In response, Dickson mentioned various facts and matters spanning from 2005 to 2019. As a result, Muir J found

that Dickson had not "*in any way overcome his onus of identifying a material fact, let alone one of a decisive nature*" nor established that he had learnt of some fact regarding the consequences of his knee injuries after 02/05/2022. Her Honour also found that the prejudice to the respondents in allowing the claim to proceed was significant and that the discretion to extend the limitation period should not be exercised in Dickson's favour in the circumstances.

On appeal, the Court did its best to extract clear grounds from Dickson's notice of appeal, prepared as a layperson. As best it could ascertain, the Court arrived at:

1. The questioning by the primary judge of Dickson during the hearing raised an apprehension of bias – which was not made out, as Muir J was simply attempting to clarify from Dickson whether there was any material fact of a decisive nature that had emerged since 2 May 2022 on which Mr Dickson could rely to seek the extension of the limitation period (and there was not);

2. The primary judge erred in her interpretation of s 31 of the Act by referring to "material facts" rather than "material fact of a decisive nature"- which was not made out, as it was clear from the transcript that any reference to the shorter phrase was merely a "shorthand" reference to the legal requirements of section 31(2) of the Act;

3. The Act should not be used to prevent the Court exercising jurisdiction where an indictable offence has been committed by one employee against another – While Dickson was now of the belief that his 19/06/2002 injury was a result of an unlawful act of another employee, and that it would be unfair for him to be deprived of a cause of action in relation to such an act; the Court found that Muir J was bound to apply the Act according to its terms and not by notions of "fairness"; and

4. The costs order should not have been made, as it restricts court access to those who have a genuine need for its remedies – the Court found that the fact that Dickson was now a disability pensioner was not a reason to depart from the usual costs order against an unsuccessful party.

13. *Tattersall v Dormakaba Australia Pty Ltd (No 2)* [2024] ACTSC 28

- Mossop J, decision delivered 14 February 2024

Keywords

CIVIL LAW – COSTS – Plaintiff purported to make offer of compromise pursuant to Pt 2.10 of the *Court Procedures Rules 2006* (ACT) – offer failed to set out terms of orders proposed – offer not an offer of compromise within the meaning of r 1002 – whether plaintiff's offer was instead a Calderbank offer – offer not capable of acceptance by one defendant on behalf of others – first defendant's offer of compromise to third and fourth defendants eminently reasonable – costs apportioned in line with liability for principal judgment up to date of first defendant's offer of compromise – third and fourth defendant to pay plaintiff's and first defendant's costs from date after first defendant's offer of compromise.

Facts

Following a four-day hearing, judgment was given in favour of the plaintiff against the first, third and fourth defendants on 14 December 2023 in the sum of $347,470.[6]

In the leadup to the hearing, the plaintiff made an offer of compromise to the defendants on 12 October 2023, and another offer to settle on 1 December 2023. On the same day, the first defendant made a Calderbank offer to the third and fourth defendants to settle with the plaintiff for $500,000 inclusive of costs, with the first defendant to bear $340,000, and the third and fourth defendants jointly bearing the remaining $160,000. This was rebuffed by the third and fourth defendant.

On 6 December 2023, the first defendant made a *Calderbank* offer to the third and fourth defendants. The offer outlined that the plaintiff would accept $575,000 inclusive of costs, with the first defendant to pay $400,000, and the third ad fourth defendants jointly paying $175,000.

Argument as to costs was heard on 15 December 2023.

Orders sought by the parties were as follows:

- The plaintiff submitted that all defendants should pay his costs on a solicitor and client basis for the entirety of the proceedings.
- The first defendant sought an order for its own costs to be paid by the third and fourth defendants from 1 December 2023 on an indemnity basis, and that the third and fourth defendants pay the entirety of the plaintiff's costs from 1 December 2023. This was based on the third and fourth defendants' non-acceptance of the *Calderbank* offer.

[6] *Tattersall v Dormakaba Australia Pty Ltd* [2023] ACTSC 390. Each defendant was entitled to a contribution from the other so that the first defendant bore 30% of the liability to the plaintiff, with the third and fourth defendants jointly bearing the remaining 70%.

- The third and fourth defendants submitted that all defendants pay the plaintiff's costs, that liability as to costs should be apportioned as per the judgment, and that there be no order as to costs between the first defendant and the third and fourth defendants.

Decision

- First, third and fourth defendants to pay the plaintiff's costs of the proceedings up to and including 1 December 2023 in the following proportions:
    - The first defendant to pay 30%;
    - The third and fourth defendants to pay 70%.
- The third and fourth defendants to pay the plaintiff's costs of the proceedings from and including 2 December 2023.
- The third and fourth defendants to pay the first defendant's costs of the proceedings from and including 2 December 2023, and there is otherwise no order as to the costs of the proceedings as between the third and fourth defendants and the first defendant.

Ratio

His Honour considered the offers made by the parties in the leadup to the hearing.

The plaintiff's basis the order sought was with respect to the offer of compromise made on 12 October 2023. The plaintiff submitted that the quantum of the offer – $245,000 plus costs – was reasonable in light of the judgment. Counsel for the third and fourth defendants submitted that it was not an offer of compromise within the scope of r 1002 of the *Court Procedures Rules 2006* as it did not identify the proposed orders for disposal of the claim. His Honour found that although the offer was one which could be read by inference as a joint offer requiring the participation of all defendants, the inference alone was not enough to turn an offer which did not comply with the rule into one which did.

His Honour then considered the attempts to resolve the matter by the first defendant in light of the offers on 1 and 6 December 2023. His Honour noted that both offers made by the first defendant would have resulted in a substantially more favourable outcome for the third and fourth defendants had they accepted either offer. His Honour found that the first defendant's offers had been eminently reasonable, and that the third and fourth defendants unreasonable refusal of the offers nevertheless reflected a willingness to go to trial and accept the costs consequences that would flow from the refusal of a reasonable offer of settlement.

14. *Cox v DAC Finance (NSW/QLD) Pty Limited & Anor* [2024] NSWDC 22

- Acting Judge Levy SC, decision delivered 16 February 2024

Keywords

Occupier's liability – lumbar spine injury – resolution of conflict of medical evidence

Facts

Mrs Cox was injured in her workplace on 4 July 2018. The first defendant was the owner of the premises. The second defendant operated the business of an aged care facility. Both were responsible for maintaining and testing the lifts. The plaintiff's employer was not party to the proceedings. The defendants ran a scheduled maintenance and testing programme of the lifts. On 4 July 2018, they intentionally cut off the power supply to the lift to test the backup generator and did so intentionally under load in normal operating conditions. They did not notify people within the building, nor did they isolate the lift to prevent use. The plaintiff was in the lift at the time and suffered a sudden, unexpected and abrupt jolting causing an injury to her lumbar spine.

There was conflicting medical evidence as to: whether or not an injury was suffered, the nature and extent of the injury. The defendants sought to apportion liability to the plaintiff's employer.

Decision

The plaintiff succeeded in negligence against both defendants and judgment in the sum of $925,435.42 plus costs was entered in her favour.

Ratio

The plaintiff was considered a credible witness and her evidence was heavily relied upon. The court was persuaded by evidence from an engineering technician with extensive experience in vertical mechanical transportation and elevators. That evidence identified the jolting from a sudden deceleration of the lift and reasonable precautions of isolating the lift or notification to users of the lift to allow them to brace. The Court applied the provisions of ss.5B and 5C of the *Civil Liability Act* (NSW) to hold the defendants liable for a foreseeable risk of injury from a sudden halting of the lift, when simple reasonable precautions were available to prevent such injury.

The Court refused to apportion any liability to the employer as they merely supplied labour, had no knowledge of the testing of the lift, and were not in a position to take precautionary steps.

The evidence of Dr Cleaver, treating Orthopaedic Surgeon, was accepted over Dr Michael Coroneos and Dr Vidyasagar Casikar, because the latter two specialists provided opaque and inadequate reasoning, and the defendants failed to tender in evidence numerous medical documents on which both relied to form their opinions. The Court noted the importance of Dr Cleaver's evidence differentiating between an aggravation (permanent worsening) and exacerbation (temporary increase of symptoms) and the finding of inflammation on imaging supporting that any pre-existing degeneration in the lumbar spine was aggravated and the cause of the plaintiff's symptoms. A full loss of earning capacity was awarded, together with future superannuation at 14.38%.

15. *Hunt v ALDI Foods Pty Limited trading as ALDI* [2024] QDC 15

- Sheridan DCJ, decision delivered 20 February 2024

Facts

The plaintiff alleged that she suffered injuries during her employment with the defendant (ALDI) between 2 and 8 November 2019, due to an increased workload and extended hours. During this period, she alleged to have worked seven consecutive days, averaging 7 to 13 hours daily, and spent between 7 and 8 hours on each of those days shelf stacking. As a store manager, the plaintiff was responsible for the roster, including her own. The defendant denied liability. Both the extent of the workload during the relevant period and the diagnosis were in issue.

Decision

The plaintiff's claim was dismissed.

Ratio

Injury

The plaintiff relied on the evidence of Dr Perkins who had diagnosed her with radial tunnel syndrome. As to causation, Dr Perkins considered that the weight and frequency of the lifting manoeuvres that the plaintiff was undertaking were significant, however at trial the plaintiff did not give any evidence as to the precise types of commodities stocked, nor their weight. Dr Allen, on the other hand, was of the view that the imaging studies of the plaintiff's elbow did not demonstrate any significant pathology to account for the symptoms reported.

The court found the plaintiff's evidence regarding her condition unconvincing, especially in light of contradictory video evidence that showed her lifting a bag of groceries from the floor with her left arm and holding a bag of groceries in her left arm whilst holding her phone in her right hand, and her ability to engage in physical activities, such as netball without apparent hindrance from pain.

The court concluded that the plaintiff did not suffer from the condition described by Dr Perkins, and any incapacity she experienced was not attributable to her conditions of employment.

Liability

The defendant called evidence from the director of store operations and the area manager regarding the normal amount of time spent stocking. Their evidence was that the aim was to complete stocking in the two and a half to three hours before the store opened with the need to simply restock a couple of times as the day progressed.

The court found that there was insufficient evidence to conclude that the defendant failed to provide adequate human assistance and no evidence was adduced to support the plaintiff's allegation that one of the factors that led to her increased working hours was underperforming staff. There was no compelling evidence that the lack of staff or closure of another store close by required the plaintiff to personally perform packing work for the unusual lengths of time, particularly because:

- The plaintiff knew of the closure of the store;
- The plaintiff was responsible for rostering; and
- The international audit was not concerned about stock levels in the store.

The court did not accept the plaintiff's evidence regarding the time she spent stacking in the context of her role and the existence of less senior staff who were also employed at the store. As a result, the plaintiff was found to be exaggerating the time spent stacking over the relevant period.

The warnings and education given by the defendant to its staff were found to be a reasonable response to the risk of repetitive tasks. Although the court considered that closer attention could have been given by the defendant to the risk of repetitive lifting tasks in particular, the court was not satisfied that the plaintiff spent the time she alleged stocking, or that she was required to do so, or that she suffered any injury as a result of the time she did spend stocking and restocking.

There was no compelling evidence to suggest that the plaintiff's injuries were caused by her conditions of employment or that the defendant failed to take reasonable precautions to prevent them, and as such her claim was dismissed.

TRAVIS
SCHULTZ
& PARTNERS

16. *Bishop v Compass Group Remote Hospitality Services Pty Ltd* [2024] QDC 14

- Rosengren DCJ, decision delivered 21 February 2024.

Keywords

Where the plaintiff claims damages for bilateral elbow injuries suffered in the course of her employment with the defendant – where both liability and quantum of damages are in issue - whether the plaintiff's bilateral elbow injuries were caused by the employer's negligence or breach of contract.

Facts

The plaintiff was employed by the defendant as a utility hand in the kitchen. She alleged that over a six-month period in 2019, she had to perform a range of repetitive duties which resulted in symptoms to her right elbow. She was then placed on modified duties, which required her to increasingly use her left arm, resulting in symptoms in her left elbow, also.

In dispute, was whether the plaintiff established a breach of duty and whether that breach was causative of the bilateral elbow condition.

Decision

Judgment for the defendant.

Ratio

Breach of duty

It was the plaintiff's case that: –

1) The defendant ought to have provided additional assistance when working in the dining area on the breakfast shift;
2) That a rotation of tasks system was implemented to ensure workers were not performing the same task (e.g. scrubbing pots) for more than 30 minutes; and
3) There was a system in place to ensure that workers took their designated 'smoko' breaks.

The Judge concluded that the defendant had a duty to implement systems whereby utility attendants were rotated out of pot washing every 30 minutes and routinely took their 'smoko' breaks and the defendant breached this duty. As to additional assistance, it was found that the defendant had systems in place to ensure sufficient staffing arrangements.

Causation

There was no dispute that the plaintiff had tennis elbow but there were differing opinions of orthopaedic surgeons regarding the causal relationship between the plaintiff's bilateral tennis elbow and her work duties.

The competing hypothesis was that the plaintiff's elbow condition can be explained by her age and constitution. This is in circumstances where many people develop it without exposure to any occupational risk factors. For the plaintiff to succeed, she was to demonstrate that the defendant's negligence was the more probable hypothesis for her elbow condition.

It was found that the physical nature of the plaintiff's work fell well below the group of occupations that have known risk factors for tennis elbow. Furthermore, neither epidemiology data nor studies have identified the type of work the plaintiff was doing as having known risk factors for tennis elbow. According to the AMA Causation Guide, it is only when a person is performing tasks which require both force and posture that they are exposed to the highest risk of developing tennis elbow. While high repetition has been shown to potentially be a risk factor, it is only when combined with one or more other risk factor, such as force and/or posture. The plaintiff was not exposed to a combination of risk factors, and in addition, she developed the same condition in her left upper limb, whilst on modified duties.

The Judge concluded that it is probable, or at least equally possible, that the plaintiff's bilateral tennis elbow can be explained by factors unrelated to her work duties, namely her gender, age and constitution. The plaintiff has not established any causal link between any act or omission of the defendant and her elbow condition.

17. *Macari v Snack Brands Foods Pty Ltd* [2024] NSWSC 139

- Cavanagh J, decision delivered 22 February 2024

Keywords

Occupier's liability – slip and fall – slip on metal steps – factual assumptions relied upon by experts

Facts

On 25 June 2028, the plaintiff sustained injuries at his workplace, being a potato chip factory operated by the defendant. At the time of the accident, the plaintiff was employed by a labour hire company and had been placed at the defendant's premises and was under their control. The plaintiff alleged that he sustained injury when he slipped down some metal steps in the potato preparation area.

Decision

Judgment for the defendant

Ratio

The metal steps were situated in close proximity to food processing equipment including a potato hopper which contained potatoes boiling in starchy water without a lid or cover. The plaintiff's case was that he slipped on starchy water which was present on the steps, and which had emanated from the adjacent potato hopper. The fact that the handrails did not extend to the bottom step was said to be causally significant.

The plaintiff faced two significant difficulties at trial – establishing what had caused him to fall and establishing that there were reasonable precautions which the defendant should have taken to prevent him from slipping.

The plaintiff relied upon an expert report from Denis Cauduro, a safety management expert who summarised his opinion as:

> The stairs were contaminated with potato starch from a potato hopper which was allowed to boil over and spill onto the stairs. The handrails of the stairs did not extend the full length of the stairs in accordance with Australian Standards or the Building Code of Australia. The Defendant knew the stairs would become contaminated from the boiling potato water and failed to eliminate or control this hazard.

The expert evidence was of little assistance however given that the factual assumptions relied upon by Mr Cauduro were not made out.

The plaintiff's evidence was inconsistent with his pleading. He stated that he was unable to say whether the water from the potato hopper was boiling at the time. He agreed that the steps were designed to be non-slip and he had not previously found them to be slippery when wet during the three months he had worked in the factory.

As such, the contention that there was boiling or starchy water on the steps at the time could not be supported. There was no evidence that the presence of coldwater on the steps rendered the steps slippery and unsafe to use either.

The court accepted evidence adduced by the defendant that the steps were used regularly throughout each day and had not been reported as slippery on earlier occasions. There were no earlier accidents or reports or complaints about the steps such that the defendant was on notice that it needed to do something to the steps to ensure that they were safe. There was no evidence of potato debris on the steps ever causing any earlier problem such that preventative measures should have been taken.

As to the handrail, the plaintiff's own evidence was that he was holding the handrails immediately before he fell and as such, the position at which the handrails ended was not causally relevant.

The court was satisfied that the plaintiff had fallen because his foot had slipped out from under him however, given that he could not establish why he slipped, his case must fail.

18. *Davis v Amaca Pty Ltd* [2024] NSWDDT 2

- Judge Russell SC, delivered on 22 February 2024

Keywords

Damages – mesothelioma – general damages – different assessments in different States – common law of Australia - assessment of need for care in the future – evidence of occupational therapists

Facts

The Plaintiff was diagnosed with mesothelioma on 14 July 2023 as a result of Asbestos exposure as a Carpenter between 1955 and 1968 in South Australia and between 1969 and 1983 in Queensland. The Plaintiff was 82 years of age at the date of the Hearing. He had a remaining life expectancy of 12 to 18 months.

It was accepted that the Plaintiff had sufficient exposure in South Australia alone to cause his mesothelioma and similarly he had sufficient exposure in Queensland alone to cause his mesothelioma. Given mesothelioma is an indivisible injury and because the exposure in both States made a material contribution to causing the disease, the governing law of both States (lex loci delicti - law of the place of the wrong) applied in relation to the determination of quantum. The main issues at trial primarily concerned the assessment of general damages and future care. The Plaintiff submitted that the appropriate award for general damages should be $485,000.00 whereas the Defendant submitted that an award of $340,000.00 was appropriate. In relation to the issue of care, the Plaintiff called Mr Stephen Hoey OT who gave evidence regarding hourly rates as follows:

- Weekdays $70 per hour
- Weeknights $75 per hour
- Saturday $95 per hour
- Sunday $120 per hour
- Public holiday $150 per hour
- Inactive sleep over $300.

The Defendant called Mr Stephen Woolley OT who relied on a 24-hour commercial care model which provided 8 hours of active care and 16 hours of inactive care per day (relying on the

Calvary Care website) at a cost of $733.20 per shift, Monday to Friday and $953.28 per shift Saturday and Sunday.

Decision

Judgment for the Plaintiff in the amount of $897,020.64 (being the higher of the assessments between the two States).

Ratio

There is no State common law but rather one indivisible common law of Australia – *Cable v Director of Public Prosecutions.*

When assessing damages for pain and suffering at common law, there is no "*grizzly table of catastrophes*" and the assessment "… *will involve questions of fact and degree and that is of opinion, impression, speculation, and estimation, calling for the exercise of common sense and judgment." - Del v Dalton*

General damages was assessed at $475,000.00 and was based on his Honours findings of fact, and matters of opinion, impression, speculation, and estimation, calling for the exercise of common sense and judgment. His Honour also had some regard to awards for general damages for mesothelioma made in the past 5 years. However, common sense, and a correct legal approach, mandates that each case must be decided on its own facts. The Tribunal preferred the evidence of Mr Hoey over that of Mr Woolley in relation to future care on the basis that; a) he had visited the Plaintiff's home whereas Mr Woolley had not; b) the hourly rates stated by both OT's were very similar however, the rates stated by Mr Hoey are published rates from the NDIS for home care; c) in Mr Hoey's considerable experience, the NDIS had created an enormous need for carers and the shortage of such workers meant that people were paying above the NDIS rates to obtain home care and the rates stated by Mr Hoey were "conservative"' in Mr Hoey's view; d) the "Calvery Care 24 hour rate" model stated by Mr Woolley was not suitable for someone with complex needs of a mesothelioma patient and this cheaper rate is for someone with more basic needs; and e) there was no allowance in the "Calvery Care 24 hour rate" model for OT home visit assessments regarding the suitability of care.

19. Doerr v Gardiner [No 2] [2024] QCA 21

- Morrison and Bond JJA and Livesey AJA, delivered 23 February 2024

Keywords

Procedure – Civil Proceedings in State and Territory Courts – Costs – Indemnity Costs

Facts

The appellant was unsuccessful in the substantive appeal. As a result, the respondent brought an application for costs.

Following the receipt of the appellant's outline, the respondent, pursuant to *Calderbank v Calderbank, "*offered to resolve the appeal on the basis that the appellant withdraw his appeal within 7 days, whereupon the respondent would not seek her costs of the appeal to the date of the offer". The appellant did not accept this offer.

Decision

The appellant to pay the respondent's costs.

Ratio

"Where an appeal is dismissed, the successful respondent will ordinarily recover the costs of the appeal on the standard basis."[7] "Before costs are awarded on an indemnity basis, something more than success or failure must usually be shown."[8] Usually, it will "be the case that something more than the failure to better an informal offer must be shown."[9] "The award of indemnity costs is usually reserved for those cases where, viewed in prospect before the hearing, the unsuccessful party should have recognised that it had "no chance of success".[10]

In this case, the issues of liability and quantum were distinct and the arguments for each did not depend on one another.

Their Honours Justice Morrison and Livesay considered it was inappropriate to award indemnity costs on quantum as there were tenable arguments to be made about how the assessment of damages should be made. However, their Honours did consider it appropriate to award indemnity costs on liability. This was because there was overwhelming evidence in support of the trial judge and the prospects of success on any appeal would have been

[7] [17].
[8] [19].
[9] [19].
[10] [20].

“hopeless”. Had the appellant been properly advised, they should have known that there was no chance of success.

20. ***Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn & Ors v Wakefield (Chief Executive of Hospital and Health Services and Director General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service)* [2024] QSC 2**

- Martin SJA, decision delivered 27 February 2024

Keywords

Judicial review, declarations, mandatory vaccination, COVID-19, unlawful or invalid directions, human rights.

Facts

Three applications were before the Court. Two concerned directions (Direction No. 12 and Direction No. 14) given by the Commissioner of Police that each police officer or Queensland Police Service ("QPS") staff member had to receive doses of a COVID-19 vaccine (matters of *Johnston, Sutton*). The third concerned a similar direction given to the employees of Queensland Ambulance Service ("QAS") by the Director General of Queensland Health (matter of *Witthahn*).

It was asserted by each applicant the relevant decision-maker had acted unreasonably or contrary to statutory obligations in issuing the directions. The applicants had declined to comply with the directions. The Court was to determine whether each of the subject directions were made according to law at the time they were made.

Decision

In the *Johnston* matter (11254/21):

1. The Court declares that Instrument of Commissioner's Direction No. 12 issued on 7 September 2021 and the Instrument of Commissioner's Direction No. 14 issued on 14 December 2021 were unlawful under s 58 of the Human Rights Act 2019.
2. The Commissioner of Police be, and is, restrained from:
   (a) taking any steps with respect to enforcement of the QPS Directions; and
   (b) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QPS Directions.

In the *Witthahn* matter (11258/21):

1. The Court declares the Employee COVID-19 Vaccination Human Resources Policy is of no effect.
2. The Director-General of Queensland Health be, and is, restrained from:

(c) taking any steps with respect to enforcement of the QAS Directions; and

(d) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QAS Directions.

In the *Sutton* matter (12168/21)

1. The Court declares that Instrument of Commissioner's Direction No.12 issued on 7 September 2021 and Instrument of Commissioner's Direction No. 14 issued on 14 December 2021 were unlawful under s 58 of the Human Rights Act 2019.
2. The Commissioner of Police be, and is, restrained from:
   (a) taking any steps with respect to enforcement of the QPS Directions; and
   (b) taking any disciplinary proceedings against any of the applicants based upon the requirements of the QPS Directions.

Ratio

The Court found the QPS Directions and QAS Direction were unlawful, but for different reasons.

- The QPS directions were considered to be unlawful on the basis it was established at the time the Commissioner made the decision, she failed to consider the human rights that would be affected by the direction. This was required of her under the *Human Rights Act* 2019 (Qld).
- With respect to the QAS direction, the Director General of Queensland Health had not established the direction was 'reasonable' in the context of relevant employment arrangements.

At the time of the hearing each direction had been revoked and this meant the remedies were confined. The Court, however, considered the applicants were entitled to an order protecting them from any liability which might have arisen under those directions.

21. ***Palmer v. State of New South Wales*** **[2024] NSWSC 179**

- Garling J, delivered on 29 February 2024

Key Words

Trespass – battery – damages – historical child sexual assault – default judgment

Facts

The plaintiff commenced proceedings against three defendants for damages arising from historical child sexual assault. The plaintiff resolved her claim against the first defendant, being the State of New South Wales. The second defendant, who was the plaintiff's guardian after the plaintiff had been made a ward of the State, was deceased. The third defendant sexually assaulted and abused the plaintiff whilst living in the same house as her over a period of five years in the 70s. This judgment related to an assessment of damages against the third defendant.

Decision

Judgment for the plaintiff against the third defendant in the sum of $1,832,092.00

Ratio

The court was satisfied that the consequences of the sexual abuse were significant and were a material contribution to her inability to work on a full-time basis but that there were additional unrelated adverse impacts on her capacity for work including a motor vehicle accident, a traumatic divorce, a complex medical history, and chronic back pain. The plaintiff alleged that but for the sexual abuse, she would have trained to become a registered nurse and pursued that career until age 70. The court considered it was unlikely the plaintiff would have entered the full-time workforce prior to 30 years of age, once her children attended primary school. Further, the court considered her unrelated chronic back pain would have likely resulted in her inability to work as a nurse by 2019 given it was sufficient to result in her ceasing employment as a baker at that time.

The plaintiff's expert forensic accounting evidence in support of economic loss was not accepted because the assumptions relied upon by that expert with respect to when she would have entered and exited the workforce as a nurse were not made out. No allowance was made for future economic loss on the basis that her unrelated conditions would have led to her ceasing work by age 52 in any event. However, the court did rely on the plaintiff's expert forensic accounting evidence with respect to the assessment of past economic loss but applied a discount of 30% for vicissitudes to reflect unrelated stressors, interruptions and other factors that would have likely interfered with her ability to work to present. Past economic loss was assessed at $1 million inclusive of interest. In addition the court awarded $200,000.00 for past loss of superannuation and a lost opportunity to accumulate long service leave. General damages was assessed at $400,000.00.

22. *State of New South Wales v Madden* [2024] NSWCA 40

- Bell CJ, Leeming JA, Stern JA, decision delivered 29 February 2024

Keywords

Trespass to the person – battery – unlawful exercise of power pursuant to Section 21 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) – false imprisonment – wrongful arrest – Section 43A *Civil Liability Act* 2002 excluding liability arising from the conduct of the appellant – Section 3B(1)(a) applying to exclude the operation of Section 43A – intentional act done with intent to cause injury or death – malicious prosecution – award of damages including compensation for custody that was not a natural and probable consequence of the prosecution – where award of exemplary damage is excessive

Facts

The respondent was awarded damages for the conduct of certain police officers amounting to battery, false imprisonment and malicious prosecution, with the State of New South Wales being vicariously liable in tort for that conduct.

The respondent, who was on parole at the time, was stopped by police officers, whilst in the company of another person. Consequent upon a search being carried out of a bag, which had been carried by the other person, a knife was located.

The respondent was arrested for having custody of a knife in a public place as well as being charged with having custody of clothing reasonably suspected of being stolen (those clothes having been found in the bag).

The respondent denied knowledge of the knife at the scene, her acquaintance had been carrying the bag, one of the police officers had prior knowledge of the respondent's criminal history, and one of the officers, on creating a fact sheet for charging purposes, omitted from the fact sheet a number of relevant issues including the respondent's advice that she did not know the knife was in the bag and that the other party was in possession of the bag.

The respondent was refused bail and her parole was revoked resulting in her remaining in custody for almost 6 months.

On a subsequent bail application in mid-2020, bail was granted on the basis that the police case was weak, and the brief did not match the fact sheet. All charges against the respondent were consequently dismissed.

At first instance, the Judge made strongly adverse credit findings as to the police and specifically found:

- The initial stopping and detention on the respondent was an unlawful exercise of power pursuant to Section 21 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 ("LEPRA") such that all physical contact with the respondent in the context for that detention was battery;

- The respondent's arrest was unlawful pursuant to Section 99 of the LEPRA such that she was falsely imprisoned whilst she remained in custody;
- Section 43A of the *Civil Liability Act* 2002 (NSW) ("Civil Liability Act") did not exclude any civil liability arising from the conduct of the police officers as it was intentional conduct which excluded the Civil Liability Act under Section 3B of the Act.
- The respondent had been maliciously prosecuted in respect of the custody of a knife and resisting officer charges.

The State appealed the findings.

Decision

Appeal dismissed.

Appellant to pay the respondent's costs.

Ratio

The relevant findings of the Court of Appeal included, against the factual background, that:

a) The police initially stopping the respondent was the exercise of a power pursuant to Section 21 of LEPRA.

b) The respondent's arrest was not lawful.

c) Section 43A(3) of the Civil Liability Act excluding civil liability where in performance of a special statutory power was not applicable where Section 3B(1) applies relating to an intentional act (the State having conceded the torts pleaded were intentional acts).

d) The charges of custody of a knife and resist officer charge were brought without reasonable probable cause, and with malice.

e) It was correct for the award of damages for malicious prosecution to include compensation for the respondent being held in custody as it was the natural and probable consequence of the prosecution in circumstances where the police withheld facts, resulting in the respondent not being granted bail (which she subsequently was granted when further facts emerged) and where her parole was revoked due to the charges.

f) The award of exemplary damages was not excessive, in circumstances where it was clear there was misleading conduct on the part of the police officers in concealing information from the court, and the manner in which the police officers treated the respondent at the scene.

The primary Judge had determined the actions of the police were unlawful consequent upon which the police did not have the protection of the relevant legislation. By extension, the battery and false imprisonment/wrongful arrest claims succeeded. The police conduct at the arrest and subsequently amounted to malicious prosecution for which an award of exemplary damages. The Court of Appeal confirmed the primary Judge's decision in that regard with the appeal being dismissed.

23. *Islam v Linfox Pty Ltd & anor* [2024] NSWCA 39

- White JA, Simpson AJA, Basten AJA, decision delivered 29 February 2024

Keywords

Work injury

Facts

The Appellant (Plaintiff) claimed to have suffered a back injury on 13 November 2017, or alternatively over a period of time, as a delivery driver employed by Local Logistics and assigned to work with Linfox. He asserted that, on 13 November 2017, he was required to undertake a large volume delivery to a premises accessed by a stairway consisting of 75 steps, which he had to negotiate 11 times. He asserted contacting Linfox with his concern for his safety and being directed to complete the delivery. He also asserted prior to 13 November 2017 advising his employer of back pain. The key grounds of appeal related to the trial judge's findings on: refusing to accept the Plaintiff contacted Linfox and the employer; causation; contributory negligence; rejection of certain expert evidence.

Decision

The Plaintiff/Appellant lost the appeal and was ordered to pay the Respondent's costs.

Ratio

The trial judge found the Plaintiff/Appellant was not a credible witness, which was not disturbed by the Court of Appeal. Nor was the trial judge's finding as to the reliability of Linfox's and the employer's representatives disturbed. As to causation, the Court of Appeal did note some medical evidence as to causation, however found no error in the trial judge's preference of expert opinion. In relation to contributory negligence, as the Court of Appeal did not disturb the finding as to the credibility of the employer's evidence that there was no reporting of pain prior to 13 November 2017, this ground of appeal failed. The Court of Appeal provides a discussion as to the admissibility of expert evidence. In particular, that conclusions of law are not the expert's domain. It is for the court to make legal conclusions based on admissible and accepted factual evidence and/or expert opinion. The Court of Appeal also noted it was acceptable at trial to propose to experts alternative assumptions on which they are asked to consider their opinions.

24. *Davie v Manuel* [2024] WASCA 21

- Buss P, Vaughan JA, Seaward J, decision delivered 7 March 2024

Keywords

Negligence – factual causation – whether error in law failing to comply with rule in *Browne v Dunn* – procedural fairness

Facts

The Plaintiff (Appellant) appealed from a decision of the trial Judge (Petrusa DCJ) dismissing her action in negligence arising from a car accident on 26 June 2015. The Appellant was a backpacker and lived at a hostel performing farm work. The Respondent provided a car for the purposes of transporting the backpackers to and from various farms. At the time of the accident, the Appellant was the driver of a 1992 Toyota Corolla, driving on a gravel road, and whilst negotiating a sweeping right hand bend, the car began to slide and ultimately slid and rolled and came to a stop landing upside down on its roof. The appellant sustained significant injuries to C4, C5 and resulted in incomplete tetraplegia. The Trial Judge found that the respondent had breached his duty of care as the speedometer was not working, and that despite an absence of evidence about the speed of the car, she concluded that it was more likely than not that the appellant was driving too fast to maintain control of the car and safely negotiate the bend. The claim was dismissed as the Trial Judge was not satisfied that the lack of a working speedometer caused or materially contributed to the car being driven at a speed that was too fast for the conditions.

Decision

The appeal was dismissed.

Ratio

The legal principles regarding factual causation are governed by both the *Civil Liability Act* and the common law. The *Civil Liability Act* guides but does not displace the application of common law methodology on the issue of causation.

In order to satisfy the test for factual causation it was necessary for the appellant to establish, on the balance of probabilities, that if the car had a working speedometer the appellant would have:-

(1) been driving at a slower speed as she negotiated the right hand bend; and

(2) at the lower speed the accident would not have occurred and the appellant would not have suffered the injury she sustained in the accident.

25. *Lee v The Council of the City of Sydney* [2024] NSWDC 69

- Weber SC DCJ, decision delivered 15 March 2024

Keywords

Torts - Negligence – s 45 Civil Liability Act – Protection for road authorities – s 5F Obvious risk – s 45A Special Statutory Power

Facts

On 18 July 2019, the plaintiff sustained an avulsion injury to his right thigh after falling whilst on a run. The plaintiff was avoiding an oncoming cyclist and stepped to his right. In doing so, he said that he tripped on a raised paver. After being assisted by bystanders, the plaintiff first noticed the uplifted paver. He admitted in his evidence that he did not in fact know what had happened to cause the fall, and his belief that he tripped on the paver was an exercise in reconstruction. It was further noted that there was a tree root in very close proximity to the paver and there was a very real possibility that the plaintiff had in fact tripped on the root and not the raised paver.

The claim was brought against the defendant as the road authority who relied on s45 of the *Civil Liability Act* (NSW) 2002 which provides protection to road authorities from liability for failure to carry out road works unless at the time the authority had actual knowledge of the particular risk.

Decision

Judgment and verdict for the defendant against the plaintiff.

Ratio

The evidence regarding the mechanism of the fall was quite uncertain and the plaintiff could only speculate the reason for the fall and candidly admitted when giving evidence that he did not see the raised paver before falling. Accordingly, it was held that the plaintiff had not proved on the balance of probabilities that he tripped on the raised paver.

In relation to s45 of the *Civil Liability Act*, the Plaintiff's case was that the Council had actual knowledge of the raised paver in May 2018 by virtue of an asset inspector having identified the raised paver in an inspection and notifying the relevant works department to remedy the defect. Evidence by way of before and after(asset inspection) photographs was produced showing raised pavers in the area. The after photographs showed rectified pavers. The

Plaintiff submitted that the after photographs were taken in the wrong place and the pavers had not in fact been rectified following the inspection. His Honour did not accept this submission and accordingly, it was held that the Defendant did not have actual knowledge of the subject raised paver at the time of the fall in July 2019. In any event, even if the Council had actual knowledge of the raised paver, His Honour accepted that the height differential of the raised paver was minor and there was nothing obstructing its view and therefore any risk posed was obvious and there was no duty to warn.

26. ***Health Care Corporation t/as Wollongong Private Hospital v Cleary*** **[2024] NSWCA57**

Mitchell More JA, Stern JA and Harrison CJ, Decision delivered on 15 March 2024

Facts

The Respondent (Plaintiff) underwent spinal surgery at the Appellant's Hospital. Whilst being conveyed in his hospital bed by two RN's post-surgery, the Respondent's bed collided with a corridor wall. The collision dislodged a bone graft fragment which came to rest under the L5 nerve. During subsequent surgery to remove the bone graft fragment, the Respondent's L5 nerve was permanently damaged. The primary Judge found in favour of the Respondent and held that the Respondent's symptoms were caused by the bed hitting the wall and awarded damages in the sum of $583,711.00. The Respondent had a significant history of back injuries having had previous back surgeries and was in receipt of Workers Compensation (NSW) payments as at the date of the subject surgery.

The main issues on appeal were:

1. The primary Judge's factual findings regarding the bed hitting the wall and the effect of the incident on the Respondent;
2. The primary Judge's finding that the Appellant was negligent;
3. The primary Judge's findings on causation; and
4. The assessment of damages.

Decision

Liability – Appeal dismissed.

Damages – Appeal allowed in part – Damages reduced to $350,187.60

Ratio

1. The primary Judge did not err in relation to the findings of fact, regarding the Respondent's account of the incident, the effect of the collision of his body and his sensation of immediate pain and discomfort. The Respondent's evidence was supported by the evidence of one of the RN's whilst the other RN's evidence was not consistent with either the Respondent's evidence or the other RN.
2. The primary Judge did not err in finding that the Appellant was liable, having regard to the common ground that the bed collided with the wall and the primary Judge's acceptance of the Respondent's account of events, it was open to the primary Judge to find that the RN's had lost control of the bed at the time it hit the wall. The primary

Judge did not err in concluding that the risk was neither farfetched, fanciful nor insignificant.

3. The Primary Judge did not err in finding that the Respondent's symptoms were caused by the bed hitting the wall. This finding was supported by the Respondent's evidence regarding the lack of relevant pain prior to the incident and then sudden onset at and following the collision, together with the expert evidence.
4. As to damages, the main reduction was in relation to the award for future economic loss, which at first instance was in the sum of $214,174.00. The Respondent conceded that no award should have been made due to his receipt of "life" workers compensation payments by reason of his whole person impairment being assessed at over 20% - in addition to a reduction in respect to future medical expenses on the same basis. The reduction on gross damages by 30% having regard to *Malec v JC Hutton* principles in relation to the Respondent's pre-existing back condition was not challenged on Appeal.

27. *Youssef v Graham Raymond Eckersley & Allianz Australia Insurance Limited* [2024] QSC 35

- Wilson J, decision delivered 15 March 2024

Keywords
DAMAGES – ASSESSMENT OF DAMAGES IN TORT – PERSONAL INJURY – INCOME LOSS AND LOSS OF EARNING CAPACITY

Facts
On 22 December 2016, the first Defendant pulled out of a shopping centre carpark and drove in front of the Plaintiff who was riding his motorcycle. The Plaintiff was knocked off his motorcycle and was later diagnosed with fractured nasal bones together with a nasal breach and chin laceration.

The second Defendant as insurer accepted liability for the accident. The issue at trial was the assessment of the Plaintiff's damages.

Relevantly, the Plaintiff was a highly qualified university graduate with his education culminating in a Doctor of Philosophy from the Queensland University of Technology in March 2014. He was employed in various teaching roles from 2007 to 2016. The Plaintiff, however, also had a relevant criminal history which culminated in 11 offences substantially related to breaches of domestic violence and release conditions. Ultimately, the Plaintiff's teaching registration was not renewed in or around December 2017 by the Suitability to Teach Committee of the Queensland College of Teachers.

The Plaintiff's personal circumstances, including pre-existing mental health issues were of significant relevance.

In the claim, the Plaintiff (who was an unrepresented litigant) alleged that as a result of the accident, he suffered the following injuries:

(a) a head injury including post-concussive syndrome;
(b) a cervical spine injury; and
(c) facial injuries.

The Plaintiff's claim stated that in consequence of the injuries and the impediment which they caused to his working, social and recreational activities, the Plaintiff suffered a psychiatric condition diagnosed as depressive disorder.

The second Defendant accepted that the Plaintiff suffered a cervical spine injury and the facial injuries, however, submitted that the evidence did not support a finding that the Plaintiff suffered a post-concussive syndrome.

A significant issue at trial was whether the Plaintiff's psychiatric sequelae was causally linked to the circumstances of the accident involving the first Defendant or whether it was a pre-existing condition causally independent, not sounding in damages.

Decision

Judgment for the Plaintiff in the sum of $85,466.56.

Ratio

In her Judgment her Honour noted that the Plaintiff's pleaded case identified his psychiatric injuries as being the dominant injury. Her Honour disagreed finding that, on the evidence, the Plaintiff was not presently suffering from post-concussive syndrome and his present mental condition was not caused by the accident. However, her Honour was satisfied that the Plaintiff suffered, for a period of time after the accident, an exacerbation to his pre-existing mood condition.

An assessment from a Consultant Neurologist gave a 12% whole of person impairment which would accord an ISV of 12, however, her Honour further found that there should be a 25% uplift to reflect the level of adverse impact caused by the Plaintiff's multiple injuries, including his cervical spine injury, his facial injuries and the aggravation of his mental health issues, which resulted in an ISV of 15 and accordingly awarded general damages in the sum of $25,800.00.

The Plaintiff's past economic loss was assessed at a global figure of $40,000.00 (based off his 2015 taxable income) with interest calculated at $5,782.56. In doing so, her Honour found that, *inter alia*, the Plaintiff was not employed and there was no evidence that there was a job to go to at the date of the accident. Her Honour held that there may have been some incapacity to work for a period of time as a result of the accident, however, other stressors took over which led to the deterioration of the Plaintiff's mental condition. There was also a brief incapacity related to his physical injuries.

The Plaintiff's past loss of superannuation was assessed at $3,884.00. The Plaintiff pleaded future economic loss of $2,880,000.00, however, her Honour was not satisfied that there was any evidence to support this claim. Her Honour's preferred medical evidence stated that the Plaintiff's injuries did not have any effect on his employment other than for an immediate post injury phase.

The balance of the award of $85,466.56 was made up of past and future special damages/medical treatment.

28. Stewart v Metro North Hospital & Health Service [2024] QSC 41

- Cooper J, Decision delivered 20 March 2024

Keywords

Assessment of damages – life expectancy calculation – competing expert evidence – future care – cost of care – benefit to plaintiff's health – general damages – insight – impairment – future treatment and expense costs

Facts

The Plaintiff claims damages for personal injury arising from medical treatment, whilst he was a patient at the Redcliffe Hospital in early 2016, causing him to suffer bowel perforations, sepsis and ultimately cardiac arrest and stroke, leaving him with significant injuries, including brain damage. Whilst breach of duty, causation and liability to pay damages for injuries were admitted, quantum remained in dispute, the critical issues being:

1. The Plaintiff's life expectancy; and
2. Whether the Plaintiff's damages should be assessed on the basis that he will live independently, noting he had been residing in residential care facilities since late 2016.

Additional issues comprised:

1. The cost of the Plaintiff's care if assessed on the independent living scenario (as opposed to residential care);
2. The level of allied health (physiotherapy, speech therapy and occupational therapy) and other future treatment the Plaintiff requires and the cost of that treatment; and
3. Expenditure on miscellaneous items of equipment, identified in the special damages bundle at trial.

Decision

Judgment for the Plaintiff in the sum of $2,190,505.48, before management fees.

Ratio

After hearing evidence from a rehabilitation physician called by the Plaintiff, a general physician called by the Defendant and an expert in statistical calculation of life expectancy called by the Defendant, His Honour determined the Plaintiff had a life expectancy of 5 years from age 71 (late August 2023). In doing so, His Honour considered both statistical analysis and clinical assessment of the Plaintiff's individual health and circumstances.

His Honour did not accept the Plaintiff's submissions that an additional year should be added to his life expectancy (and associated damages calculations) to take into account the

possibility that if he was to be accommodated in his own home and receive comprehensive care and therapy, his stroke related disabilities would reduce from a level 5 to a level 4 on the modified rank and scale which is used to assess life expectancy.

In considering whether damages should be calculated based upon the Plaintiff residing in his own home, His Honour ultimately proceeded on the basis that the Plaintiff would prefer to live in his own home, rather than in residential care, despite His Honour finding that the Plaintiff did not appreciate all the potential difficulties such a move might pose for him. That conclusion was reached after a consideration of various evidence put forward by the parties, including video recordings of the Plaintiff supposedly expressing a desire to live in his own home.

His Honour not only considered the lay witness evidence as to the positive social benefits of the Plaintiff living in his own home, but also expert evidence with respect to the associated health benefits. He came to the conclusion that the provision of comprehensive care and therapy to the Plaintiff in his own home, would result in health benefits to him, which were not slight or speculative.

His Honour compared the respective costs, over the Plaintiff's life span of five years, between modifying and living in his own home with 10% discount to reflect the possibility his may deteriorate and need to return to living in an institution ($4,910,342.52) and the cost of providing care to the Plaintiff if he continued to reside at his residential facility with additional external care, the cost of which being discounted by 15% ($1,081,895.56). The difference between the two being $3,828,446.96.

Although His Honour found that living in his own home, with his son and a dog, would enhance the client's quality of life, in an overall sense, when compared to his continued residence at a care facility, he was not satisfied that the health benefits for the Plaintiff were significantly better than those likely to be achieved at a residential facility with additional therapy and a dedicated external care assistant and in those circumstances, he declined to order the "significant additional cost" for the Plaintiff to live in his own home.

His Honour considered the competing arguments with respect to the balance of the Plaintiff's claimed expenses, awarding damages as follows:

- General Damages (ISV of 85) $284,700.00;
- Refund to Medicare ($583,159.92);
- Past out of pocket expenses (including interest) $36,500.00;
- Future care (including additional therapy at residential care facility) $1,081,895.56;
- Future therapy $145,250.00;
- Aids and equipment (not allowance cost of motorised wheelchair) $14,500.00;
- Future medical expenses (general practitioner attendances) $9,500.00;
- Future transportation costs (maxi taxi costs only, not purchase of modified/wheelchair accessible vehicle) $35,000.00;
- Future rent and house modifications (not allowed)
- **TOTAL: $2,190,505.48, plus management fees to be determined and costs**

29. *Chopra v NSW Health Service – South Western Sydney Local Health District* **[2024] NSW 76**

- Judge: Gibson DCJ, Decision Delivered 22 March 2024

Keywords

Tort – Workplace Injury – System of Work – "Special" Nurse Allocated to Dementia Patient and Other Staff Leave Emergency Department Ward Nurse by Herself While the Patient is Agitated – Nurse Assaulted by Dementia Patient - Breach of Duty of Care – Damages

Facts

The plaintiff was working night shift as a nurse in the short stay section of the Emergency Department at Blacktown Hospital. She began her shift at 9:30pm on 25 December 2017.

One of the patients that night was a Mr Santos. Mr Santos was known to suffer from various mental health conditions. He also had a documented history of violence at the same hospital in 2014 and again in August 2017. Mr Santos presented to the hospital that night in an agitated state which, combined with his history, resulted in the medical staff assessing him as a high-risk patient. This necessitated the use for a "special" nurse to be deployed to provide one-to-one care for Mr Santos.

The "special" nurse arrived at 11pm but left shortly after one of the other nurses had gone for a meal break at around 11:45pm, leaving the plaintiff on her own.

Shortly after midnight, Mr Santos became increasingly agitated. The plaintiff, still on her own, attempted to contact other staff to assist, and made corresponding notes in the patient logbook. Mr Santos beckoned the plaintiff over to him and, when the plaintiff was about a metre away, grabbed her hair and repeatedly pounded her head against the wall and floor. The plaintiff activated her duress alarm but continued to be subjected to the assault by Mr Santos for about 15 to 20 minutes. Eventually, it took five staff members around five minutes to remove Mr Santos from the plaintiff. Mr Santos stated that he had been trying to kill the plaintiff.

In addition to the numerous physical injuries suffered by the plaintiff, she was assessed as suffering from chronic post-traumatic stress disorder and was likely never to return to work. The plaintiff's claim for damages totalled $1,795,234.00.

The defendant sought to challenge the plaintiff's claim, identifying issues of admissibility of evidence, liability, and quantum.

Decision

Judgment for the plaintiff

1. Liberty to the parties to bring in Short Minutes of Order reflecting the mathematically agreed sum for the damages awarded.
2. Defendant to pay the plaintiff's costs.
3. Liberty to apply concerning orders 1 and 2 and any application under s 151M of the Act.
4. Exhibits retained until further order.

Ratio

The defendant submitted, among other things, that the expert report of a Ms Whitby (a certified ergonomist and registered nurse specialising in manual handling) should not be tendered. Two reasons were submitted. Firstly, Ms Whitby's expertise restricted her to injuries concerning bending and twisting. This was rejected by her Honour on the basis that Ms Whitby's expertise involved reviewing of systems in hospital staffing, monitoring, and training. The second reason for the defence's submission was that Ms Whitby's report contained errors of fact. Specifically, a contention that the assault could have been avoided if Mr Santos had been transferred to the mental health unit. Her Honour acknowledged that little or no weight can be placed on Ms Whitby's conclusions in this regard.

Her Honour then addressed the issue of liability. The defence's submission was that the Mr Santos's attack could not have been foreseeable in any way, with a further submission that the presence of a "special" nurse would not have made any difference. The defendant, it was submitted, had therefore not breached its duty of care owed to the plaintiff. Her Honour rejected the defence's submissions and reiterated the well-established principles of *Wyong Shire Council v Shirt*[11] and *March v E & M H Stramare Pty Ltd*,[12] concerning breach of duty of care and determination of causation, respectively. Taking into account the plaintiff had been left on her own, the amount of time it took to respond to the plaintiff's duress alarm, lack of security guards on site, as well as the fact that potential for injury on hospital staff by patients is widely known knowledge, her Honour found that the defendant failed the plaintiff at every turn.

[11] (1980) 146 CLR at 47.
[12] (1991) 171 CLR 506.

The issue of quantum was also raised by the defendant who, notwithstanding multiple reports by relevant specialists providing consistent opinions as to the plaintiff's conditions, submitted that the plaintiff was exaggerating the severity of her injuries. This submission was largely underpinned by evidence comprising of various social media posts in which the plaintiff, who was a member of the Sikh community, was seen smiling and dancing at social functions in traditional Sikh dress. The plaintiff was challenged by the defence during cross-examination. The plaintiff's evidence was that she was largely pressured and encouraged by family to attend the social functions and was dressed as per the traditional cultural practices. Her Honour found that the photographs and videos were, at best, "*the flimsiest of evidence . . . when weighed against the opinions of all medical professionals consulted for reports in these proceedings . .* ."[13]

[13] *Chopra v NSW Health Service – South Western Sydney Local Health District* [2024] NSW 76, at 115, Gibson DCJ.

30. ***Peak v WorkCover Queensland*** **[2024] QCA 38**

- Bond Boddice, JJA and Burns, J, delivered 22 March 2024

Keywords

Workers' compensation – interpretation –whether the notice of non-compliance issued by the respondent, pursuant to s 278(2), was invalid because it failed to allow for non-compliance to be remedied – whether it was open to the primary judge to conclude that the written notice, given to the appellant by the respondent, was not invalid for non-compliance with s 278(2)(d)

Facts

The appellant (plaintiff) was injured on 25 February 2019. He was employed by Energex Limited as a high voltage lineman and suffered injuries to his spine and shoulder, as well as a psychiatric injury and traumatic brain injury after an object fell from above striking him on the head and shoulder while undertaking his duties. He provided a Notice of Claim to the respondent (WorkCover Queensland) on 29 December 2022, and on 31 December 2022 received written notice from the respondent that the Notice of Claim was not compliant, pursuant to Section 278 of the *Workers' Compensation and Rehabilitation Act* (2003) because the claimant had failed to provide earnings details, had not disclosed income, tax returns or his earnings or receipt of benefits between 1 July 2022 to date.

At the same time, the notice from the respondent required the applicant (plaintiff) to address the non-compliance by way of providing documents set out in the Notice and also a statutory declaration addressing the earnings in question 52 of the Notice of Claim for Damages. The court noted that before starting proceedings, the appellant (plaintiff) must give notice pursuant to Section 275 within a specified timeframe. In the primary decision, the judge had identified the critical issue for consideration in this particular application, and that was the proper construction of Section 278(2)(d), which says, "the insurer must, within 10 business days after receiving the notice, give the claimant written notice –

(d) If the insurer does not waive compliance with the requirements – allowing the claimant a reasonable period of at least 10 business days either to satisfy the insurer that the claimant has complied with the requirements or to take reasonable action to remedy the noncompliance".

The primary judge held that section did not prescribe "any invitation, offer or options for a response to the insurer's preliminary view that must be stated in the written notice such that

the failure to refer to both parts of that composite phrase in section 278(2)(d) renders the notice invalid or non-compliant".

The trial judge found that the subsection (d) did not use the word "stating", it used the word "allowing".

Decision

1. The appeal is dismissed.
2. The appellant to pay the respondents costs of the appeal, to be assessed on a standard basis.

Ratio

The Court of Appeal held that any consideration of section 278 in the context of the purpose of the WCRA supported a conclusion that the primary judge was correct. The primary judge's interpretation of the section was consistent with the plain and ordinary meaning of the words used and only required the insurer to give the claimant written notice stating whether the insurer is satisfied that notice was complying, and if not, identify the non-compliance and stating whether or not the insurer waives compliance with those requirements. Even if the insurer doesn't waive compliance, there is still an allowance for the claimant for a reasonable period of at least 10 days to satisfy the insurer that the claimant has complied or to take reasonable action to remedy any non-compliance. In any event, it is open for the applicant (plaintiff) to apply to the court to seek a declaration from the court about any non-compliance, or even in some cases to seek leave to commence proceedings notwithstanding non-compliance with the requirements of the WCRA. The court reiterated that there was nothing in section 278(2) "requires a specific statement that the claimant is allowed the specific period" either to satisfy the insurer that the claimant has complied with the requirements, or to take reasonable action to remedy the non-compliance, it was open to the primary judge to conclude the written notice, given to the appellant, was not invalid for non-compliance with section 278(2)(d) of the WCRA. Accordingly, there was no error of law on the part of the primary judge.

31. Jackson v Furner [2024] NSWCA 66

- Payne JA, Mitchelmore JA, Griffiths AJA, delivered on 27 March 2024

Key words

Negligence — slip and fall during an open house inspection — admission that driveway had recently been painted — whether non-slip paint was used — whether evidence was that driveway was slippery — whether primary judge erred in finding witness' evidence unreliable

Facts

On 18 January 2020, the respondent (plaintiff) slipped and fell on a sloped driveway during an open home inspection of a residential property. The first and second appellants (first and second defendants) were the owners of the property, and the third appellant (fourth defendant) was the real estate agency engaged to perform estate agency work with respect to the sale of the property.

The primary judge found in favour bof the respondent.

The main issues on appeal were as follows:

1. Had the primary judge erred in rejecting the evidence of the second appellant on the basis that it was contradictory and unreliable?
2. Had the primary judge erred in failing to find that, when the first appellant repainted the driveway, he used a non-slip paint recommended by experts?
3. Had the primary judge erred in finding that the appellants were aware or ought to have been aware of the risk of harm?
4. Was the availability of stairs to enter/access the property relevant to any ground of appeal?

Decision

Appeal dismissed. The appellants were ordered to pay the respondent's costs.

Ratio

The only evidence relied upon by the appellants regarding the type of paint used was the evidence of the second appellant. As the second appellant denied that the driveway was ever painted, it was found that her evidence that the type of paint used was "anti-slip" paint recommended by "professionals", was in truth no evidence at all. The respondent relied on expert evidence provided by Mr Cauduro. The essence of his opinion was that the slippery

quality of the painted driveway could be corrected by the installation of “a slip resistant paint over the existing surface”. The evidence that the driveway was slippery was found to be clear; the respondent and the real estate agent both slipped on the driveway before the Plaintiff’s fall. In the absence of cross-examination, it was found that the primary judge was entitled to accept Mr Cauduro’s evidence despite the inspection being conducted a year after the incident. Consequently, it was found that the primary judge did not reverse the onus of proof and was entitled to find that the driveway was not painted with a non-slip paint. As the second appellant’s evidence regarding the type of paint used contradicted with her clear position that the driveway had never been painted, her evidence was found to be plainly contradictory and unreliable.

It was found that, had a cursory examination of the driveway on the day been conducted, it would have revealed that the driveway was very slippery and, therefore, the appellants ought to have been aware of its condition.

There was no ground of appeal alleging that a reasonable person in the respondent’s position would not have walked up the driveway and the primary judge was not asked to make such a finding. In any event, the availability of the stairs did not obviate the need for the appellants to take reasonable care to prevent foreseeable risks caused by the recent painting of the sloping driveway.

32. ***Marmara v Kmart Australia Limited*** **[2024] NSWDC 89**

- Gibson DCJ, decision delivered 26 March 2024

Keywords

Public liability – retail store – oversized, large, bulky items

Facts

The plaintiff brought a claim for personal injuries suffered in a Kmart store in Woy Woy. The plaintiff was waiting in the "self-serve" checkout queue when a customer in another queue behind her, whose purchases were two mountain bikes, let go of his trolley while trying to manoeuvre these large items in the trolley through the checkout. The larger of the two bikes fell onto the plaintiff, striking her back.

Decision

Judgment for the plaintiff.

Ratio

The court found that the defendant had failed to implement a safe system within the store for customers to purchase, transport and remove large items or bulky items.

The defendant's submission that the risk that a customer might overload a trolley with bulky items was "relatively insignificant" was rejected and it was determined that:

> The self-checkout area in the Kmart store was thronged with customers concerned with their own transactions, rather than the safety of others, and who were putting their goods through the scanner at a great rate but without the benefit of the expertise of a trained check-out cashier. The possibility of items of 20 kg or more being mishandled by an untrained member of the public was not one that could or should have been treated as relatively insignificant.

Whilst there was some evidence that the defendant did have a system in place where customers could request large or bulky items be placed out in the loading dock and then delivered to them in their vehicle, the court found that the defendant had not implemented that system – it had not trained its staff in that system nor was the system advertised in store to customers.

The court found that the burden of taking precautions to avoid the risk of harm was small. All that was required was for staff to be trained to assist customers with large or heavy goods as

well as notices on the wall alerting customers, particularly in areas where large or heavy items were being sold, that assistance was available. It was found that it was not an uncommon practice for stores of this kind to have a system for collection of large items at the loading dock as well available flatbed trolleys for use by customers.

33. Kalecinski v Mercy Community [2024] QSC 49

- Crow J, delivered 28 March 2024

Keywords

Application for statutory benefits – WorkCover Queensland – rejected statutory claim – Workers' Compensation Regulator – Queensland Industrial Relations Commission – strike out statement of claim – *Workers' Compensation and Rehabilitation Act* 2003 – title to sue – *Limitation of Actions Act* 1974 – material fact of a decisive nature – set aside claim

Facts

The plaintiff alleged that he sustained a back injury on 18 May 2018 whilst lifting a heavy tent in the course of his employment with Mercy Community. He alleged he reported the injury to his supervisors days later, but they denied this. He lodged an application for statutory workers' compensation benefits, however WorkCover rejected the statutory claim. The plaintiff sought review of WorkCover's decision by the Regulator, who upheld the decision of WorkCover to reject the statutory claim and set out the plaintiff's rights of appeal to the Queensland Industrial Relations Commission. The plaintiff did not appeal the Regulator's decision as he stated he did not have the funds required by Splatt Lawyers to do so. In May 2022, the Plaintiff underwent imaging and specialist review, finding that he had permanent nerve damage and foot drop. He sought legal advice and was informed his time to appeal had expired. In October 2022, the plaintiff was provided specialist opinion that he had a permanent disability and that it was appropriate for him to go on the disability pension. In December 2023, the plaintiff filed a claim against the defendant in the Supreme Court seeking damages pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 (WCRA). The plaintiff's statement of claim did not plead material facts to constitute a cause of action in negligence, nor a duty of care or breach. The defendant opposed leave being granted to cure the deficiencies as the plaintiff had failed to comply with the requirements under the WCRA and the action is time barred pursuant to section 11 of the *Limitation of Actions Act* 1974 (LAA).

Decision

The plaintiff's claim is set aside.

Ratio

Considering the relevant principles in *Phipps v Australian Leisure and Hospitality Group Ltd & Anor* [2007] QCA 130 at 12-14, Crow J found the plaintiff's non-compliance with the WCRA made him incapable of pursuing any cause of action against his employer; he did not have

title to sue. Crow J found it would be inappropriate to grant the plaintiff leave to amend his claim and statement to cure the deficiencies given the time limitation issue was an ‘unsurmountable barrier’ to the plaintiff’s success. Crow J found the ‘new medical evidence’ relied upon by the plaintiff as a material fact of a decisive nature, being the reports from May 2022 and October 2022, had been received more than 12 months prior to the plaintiff commencing his action. Accordingly, the plaintiff would have been unable to rely upon that evidence to extend his time period under section 31 of the LAA, in any event.

TRAVIS
SCHULTZ
& PARTNERS

34. *Allianz Australia Insurance Limited v Eden [2024] QCA 49*

- Dalton JA, Boddice JA, Fraser AJA, decision delivered 3 April 2024.

Keywords

Contributory Negligence, *Transport Operations (Road Use Management – Road Rules) Regulation 2009,* Negligence, Pedestrian Injury, Appeal

Facts

In the primary judgment,[14] the Plaintiff, Mr Eden, was struck by a car when walking at night along a rural road which had no artificial lighting. Mr Eden had intended to cross to the eastern side of the road, however, soon after he began walking along the western side, he saw two bright lights coming towards him from the north on the other side of the road. Assuming the lights were car headlights, Mr Eden stayed on the western side, and it wasn't until the lights got closer that he realised they belonged to the headlights of bike riders. Soon after, the Plaintiff was hit from behind by a Hilux. The Judge found that the driver was negligent and there was no finding for contributory negligence.

On appeal, the only issue was whether Mr Eden contributed to his own injuries by walking on the western side of the roadway, in breach of a regulation.

Decision

The appeal is dismissed with costs.

Ratio

On appeal, the Appellant relied on s 238(2) of the *Transport Operations (Road Use Management – Road Rules) Regulation 2009*, specifically, that a pedestrian travelling along a road must, when moving forward, face approaching traffic that is moving in the direction opposite to which the pedestrian is travelling, unless it is impracticable to do so.

Consequently, the appellant contended that Mr Eden ought to have been walking on the eastern side of the road, being the side approaching oncoming traffic. The problem with the provision, as identified by the Judge, was that Mr Eden was doing what the literal words of the regulation provide, being that he was facing the approaching bicycles. However, in doing so, he had his back to the Hilux.

Despite this, the Judge found that it is not necessary to determine whether the provision ought to be interpreted as the appellant contends, because Mr Eden was only obliged to walk on the eastern side if it was not impracticable to do so.

The Judge determined that it was impracticable for Mr Eden to cross the road and begin walking on the eastern side of the road, where to do so, he would have crossed in front of what he thought was an oncoming car (being the bicycles), and it would have put him on the eastern side of the road, where he knew the verge fell away.

[14] Eden v Jamieson & Anor [2023] QSC 240

The primary Judge found that in walking on the western side of the road, Mr Eden took the safest course available. The Appellant did not challenge any factual findings made by the primary Judge, nor could they point to any facts, matters, or circumstances which would compel the Judge to come to different conclusion. Therefore, the appeal was dismissed.

35. *Bilson v Vatsonic Communications Pty Ltd* (CAN 093 786 004) [2024] QDC 42

- Coker DCJ, delivered 5 April 2024

Keywords

Apportionment of Liability - Contractual Indemnity – Section 6 (c) of the *Law Reform Act 1995* (Qld) – Section 236B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld)

Facts

The plaintiff was employed by Vatsonic Communications Pty Ltd ("Vatsonic") as a vacuum truck operator. Vatsonic had contracted with the Townsville City Council ("TCC") to provide services which would effectively clean concrete pits which form part of the TCC's storm and wastewater system.

The plaintiff and the TCC were left to determine their own system of work, without any SWMS in place by Vatsonic. The task of cleaning gross pollutant traps was completed on between 40 to 50 occasions without issue.

Whilst there was a factual dispute, the Court accepted the plaintiff's evidence that on 28 August 2017, employees of the TCC did not leave the hose laid flat as the plaintiff was disconnecting the hose from the outlet valve and reconnecting it to the inlet valve. Instead, the other end of the hose was lifted up by the crane and was dangling three and a half to four metres in the air. This caused energy to release from the hose when the plaintiff attempted to "wiggle" the hose off the outlet valve. The hose spun and released from the plaintiff's grip and struck him on the bridge of his nose and in the eye, resulting in loss of sight.

The plaintiff pursued claims for personal injuries against Vatsonic and the TCC. The TCC sought indemnity from Vatsonic based on an agreement entered into between them.

Decision

Liability was apportioned at 70% to Vatsonic and 30% to the TCC. Vatsonic however were taken to have breached their agreement with TCC and therefore were required to indemnify them. Damages were therefore only awarded against Vatsonic.

Ratio

WorkCover on the part of Vatsonic attempted to rely on Section 6 (c) of the *Law Reform Act 1995* (Qld) ("LRA") and Section 236B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) in that any argument for indemnity is void to the extent that it prevents WorkCover from pursing a contribution claim, because to find otherwise would render section 6(c) of the LRA ineffective.

The Court identified the TCC was not seeking to rely upon the indemnity to defeat a claim by WorkCover in contribution brought against them but rather, the plaintiff claimed directly against the TCC and they sought to rely on the terms of the agreement with Vatsonic. Section 236B was taken not to be applicable.

The wording of the agreement was such that Vatsonic was required to:

a) perform works in a diligent manner and with all necessary care and skill; and

b) supply any required additional personnel (including workers of the TCC) with the expectation that they would facilitate the safe, effective operation of the equipment.

Under the agreement, Vatsonic also acknowledged that the operators of the equipment, including workers of the TCC, were deemed to be the employees of Vatsonic, and not of the TCC.

It was concluded Vatsonic failed to meet its contractual obligations and hence were required to indemnify the TCC.

36. ***Patchett v Nichols and Nichols*** **[2024] QDC 45**

– Porter KC DCJ , decision delivered Monday 8 April 2024

Keywords

Torts – Interference with the person – Trespass to the person – Assault – Battery - Liability-only trial - Multiple wrongdoers, proportionate liability and contribution – Joint wrongdoers - Evidence – Admissibility – Hearsay

Facts

The Plaintiff was a long-standing licenced motor dealer and valuer and operated a wholesale car yard business. He was 68 years old at the material time and was 75 at the time of the hearing. The first Defendant was the son of the second Defendant.

The first Defendant purchased a used van from the Plaintiff's business in February 2017. The first Defendant encountered issues with the van despite at least 3 attempts at repairs over the months following the purchase.

In the lead up to one such occasion for repairs on 8 July 2017, the first Defendant again brought the car back to the business and the advice of the mechanic on this occasion was that there was a blown head gasket, and the cost of the repairs was in the order of $4,000. At all material times heretofore the first Defendant was dealing with a licenced motor dealer working within the business, Mr De Marco.

On 8 July 2017, which was a Saturday, the Plaintiff arrived at the yard for unrelated matters. De Marco arrived shortly thereafter followed by the Defendants' arrival. De Marco and the Defendants went to inspect the van together. De Marco then went over to the Plaintiff to ask for assistance and the Plaintiff came over to the van and introduced himself to the Defendants. There was no dispute that this was the first time the Plaintiff and the Defendants had ever met or spoken to each other.

At trial, the Plaintiff and De Marco gave evidence that the second Defendant became aggressive and that they were manhandled by the second Defendant in a tussle for the keys of the van and the Plaintiff was (on at least one occasion) pushed into a garage wall. De Marco gave evidence that he was pushed by the first Defendant.

The Defendants gave conflicting evidence that the Plaintiff was aggressive and fell to the ground in the process of grabbing the keys for the van.

After this initial confrontation, there was no dispute that the Plaintiff retreated to his nearby truck and that the second Defendant pursued him.

The second Defendant gave evidence that there was no physical confrontation at the truck, however, the Plaintiff gave evidence that he was pulled out of the cab of the truck to the ground and there was an extended assault.

The Plaintiff gave evidence that the injuries he suffered were as a result of the fall from the truck and the extended assault by the second Defendant.

The medical evidence was that the Plaintiff suffered a significant shoulder injury which ultimately required surgery and PTSD, anxiety and depressive mood following the entirety of the events of 8 July 2017.

Decision

His Honour found that the Plaintiff established that the Defendants committed the torts of assault and battery as described in the findings of the Judgment.

Ratio

The Court was satisfied that the actions of the second Defendant at the van (pushing the Plaintiff against a garage wall) amounted to a battery of the Plaintiff by the second Defendant. Further, the Court found that the physical altercation at the truck resulting in the Plaintiff being pulled out of the cab and onto the ground amounted to an assault and battery by the second Defendant of the Plaintiff.

The Court went on to consider the *accessory liability* of the first Defendant and considered the principles as enunciated in *Thompson v Australian Capital Territory Pty Ltd* (1996) CLR 574 and the guidance as to how these principles are to be applied in *Pringle v Everingham* (2006) NSWCA 195, concluding that it was established on the evidence that the first Defendant and the second Defendant participated in a common design to obtain the key from the Plaintiff and are jointly liable for that battery. His Honour was also persuaded that that common design extended to the second Defendant's battery of the Plaintiff by shoving him into the garage wall. His Honour accepted De Marco's evidence that the struggle for the key and the shoving of the Plaintiff, including into the wall on at least one occasion, was part of a single melee in which the first Defendant also came into contact with De Marco. Having embarked on the struggle for the key, and having continued involvement in it, at least by barging into De Marco

in the course of a single melee and not withdrawing from the scene to signal his abandonment of the struggle with the Plaintiff, his Honour found that the first Defendant was jointly liable with the second Defendant for the battery on the Plaintiff when he was pushed into the garage wall by the second Defendant.

Accordingly, the Court found the Defendants jointly liable for the assault and battery involved in the struggle for the key and subsequent pushing of the Plaintiff into the garage wall and the threatening words used by the second Defendant during that struggle. However, the Court found the second Defendant alone liable for the assault and battery comprised in his pursuit of the Plaintiff to the Truck and his actions there.

The Court found that the Plaintiff made out the liability of the Defendants with quantum and apportionment of damages and costs to be determined at a later date.

37. ***Paetzold v At Beach Court Holiday Villas Pty Ltd [2024] QDC 35***

- Sheridan DCJ, delivered on 10 April 2024

Key Words

Employer liability – negligence – defect – illegal receipt of Centrelink benefits – causation – economic loss.

Facts

The plaintiff was employed by the defendant as a caretaker. On 16 March 2020, the plaintiff was required to mow the lawn. The battery in the ride on mower was dead. The Plaintiff had previously complained about the dead battery to the defendant but it was not replaced until after his injury. The plaintiff used his car to jump start the ride on mower. In the course of mowing the lawn the mower became stuck next to a slope. Because of the state of the battery, the plaintiff had to leave the mower on while he alighted from it to push it forward. In the course of pushing the mower forward he tore his Achilles tendon. As a consequence of his pain, he rolled down a steep embankment which allegedly caused a knee injury. There was no contemporaneous record of him rolling down the embankment until after the damages claim was commenced. The Plaintiff had not previously lodged tax returns on time (having only done so for the purpose of the claim) and had not been declaring his full-time wage as a caretaker to Centrelink whilst receiving the age pension.

Decision

Judgment entered in favour of the plaintiff who was awarded damages of $41,076.88 less the WorkCover refund.

Ratio

Her Honour accepted that had the battery not been flat, which was a defect known to the defendant, the injury would not have occurred because the plaintiff would have turned off the mower and then used both hands to jiggle the mower out of the position before restarting the mower and resuming the work. The risk that the plaintiff might be injured in this way was foreseeable and not insignificant particularly given the mower was required to be used close to the slope. It appears Her Honour was prepared to make a finding of contributory negligence against the plaintiff but declined to do so because this allegation was withdrawn on the first day of trial.

Her Honour found that the knee injury was unrelated due to the absence of contemporaneous record about the knee and the absence of observable symptoms after the injury.

The assessment of economic loss was complicated by the fact that if a sum were awarded, he would receive higher income to which he was entitled because of his receipt of the age pension and failure to disclose income to Centrelink. In that regard Her Honour confirmed the approach set out by previous authorities was that the assessment ought to be done based on loss of earning capacity and not limited to income disclosed to the ATO. In any event, Her Honour found the Achilles injury had resolved and the ongoing incapacity was caused by the

unrelated knee injury. Consequently, no award was made for future economic loss or future special damages.

38. Warren by his litigation guardian Direlle Farr v District Council of the Lower Eyre Peninsula (No 3) [2024] SADC 37

- Burnett J, decision delivered 11 April 2024

Keywords

Torts – negligence - local government - liability for torts - as occupier – scope of duty and subsequent breach

Facts

The plaintiff was injured when he fell off a 10m cliff onto rocks at a beach on Eyre Peninsula on 18 December 2013. The plaintiff had parked his vehicle at the top of the cliffs and descended down an escarpment, towards the beach. Unbeknown to the plaintiff, the escarpment ended in a vertical cliff that could not be seen from where he had parked. The plaintiff claimed that the defendant (Council) was negligent in failing to erect signs and barriers that would warn of the danger posed by the cliff and direct visitors to proceed to the beach by a safe route. The plaintiff also claimed that the Council ought to have conducted a risk assessment of the area and that the breach of duty of care occurred where the Council, by creating and maintaining the road to the accident site and having created and maintained the car park near the top of the escarpment, had encouraged visitors to the site. The Council contended that the escarpment was obviously steep and dangerous and the route to the beach was not visible. The Council referred to the remoteness of the site, the visible cliffs to the north of the site and the fact that there were over 700kms of coastline in its area. The Council further relied on the defences under the CLA (SA), *Volenti*, and contributory negligence.

Decision

Judgment for the defendant.

Ratio

The defendant, as occupier of the land where the accident occurred, owed a duty to visitors, including the plaintiff, to take reasonable care to protect those persons from physical harm, but what is required to discharge that duty depends on all of the circumstances of the case.[15] There was no duty to warn per se, the relevant question is whether the standard of care

[15] *Vairy v Wyong Shire Council* [2005] HCA 6.

required to discharge the respondent's duty of care required the erection of warning signs or a barrier.[16]

The proper assessment of the alleged breach of duty depends on the correct identification of the risk of injury because only then can an assessment be made as to what is a reasonable response to that risk.[17] The risk must be assessed from the perspective of a reasonable person in the position of the plaintiff. The risk facing the plaintiff was that he would descend down the escarpment, believing it to be a path to the beach and through inadvertence, speed or accident would be unable to stop when he came to the vertical cliff. That risk was not "an obvious risk" and the risk of harm was not insignificant for the purposes of the CLA. However, the defendant is only negligent if it failed to take precautions against the risk of harm that a reasonable person in its position would have taken. The court found that the area was remote, the probability of the risk materialising, although foreseeable, was low. The burden of taking precautions was significant, particularly taking into account the whole of the Council area.[18] The Court held that there was no reason why a sign or barrier would be placed at the point of descent as distinct from other places on the edge of the car park and the escarpment. In the circumstances of the case, reasonableness did not require any response to the foreseeable risk.

[16] *Nagle v Rottnest Island Authority* [1993] HCA 76.
[17] *Tapp v Australian Bushmen's Campdraft and Rodeo Association Ltd* [2022] HCA 11.
[18] *Romeo v Conservation Council of Northern Territory* (1998) 192 CLR 431.

39. *Purcell v Indigenous Land and Sea Corporation & Anor* [2024] QSC 58

- Crow J, decision delivered 12 April 2024.

Keywords

Limitation of actions, extension of time, material fact of a decisive character, reasonable steps to ascertain relevant facts, critical mass of information, prejudice.

Facts

The applicant was an employee of the second respondent who performed work at Mimosa Station (owned by the first respondent). The applicant suffered personal injury on 7 March 2013 while descending the steps of a cottage on Mimosa Station. The applicant described having slipped on the stairs, falling and landing awkwardly on the ground below, causing an injury to the right knee.

A claim was lodged by the applicant and accepted by WorkCover Queensland, with the applicant undergoing a revision right knee ACL reconstruction and medial meniscal repair on 12 June 2013.

In the eleven years since the injury, the applicant had some periods of difficulty with his right knee (including the reopening of his WorkCover Queensland claim). The applicant also had longer periods of good function. Importantly, he was able to remain in employment and continued to remain in employment as a butcher as at the date the matter was heard.

The applicant's evidence was that it was some time in 2021 that he again felt catching sensations in the right knee and which caused him to reattend on his treating surgeon and subsequently ask his claim be reopened again by WorkCover Queensland. The applicant was sent for an independent medical examination on 11 January 2022 and first sought advice from a lawyer on 1 February 2022. It was the applicant's position that it was not until receiving a supplementary report from the independent medical examiner on 27 June 2022 that he became aware the injury would cause him to be unlikely to continue with heavy work activities within a period of 7 to 10 years.

The most significant issue between the parties was the determination of the point in time there was a "critical mass of information" or sufficient information to reach the "tipping point" where

the information available to the applicant showed he had a worthwhile claim and he ought to pursue that claim.

Decision

The Plaintiff's application was successful, orders made as follows:

1. That pursuant to s 31(2) of the *Limitations of Actions Act* 1974 (Qld), the period of limitation for the Applicant's action in respect of personal injury arising from the incident of 7 March 2013 be extended so that it expires:
    a. in respect of the First Respondent, on 30 June 2023; and
    b. in respect of the Second Respondent, up to and including the date which is 60 days from the date the Applicant complies with s 295 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld.).
2. The Respondents pay the Applicant's costs of and incidental to the Application to be assessed on the standard basis.

Ratio

It was considered while the applicant was aware of having an arthritic right knee that would slowly deteriorate over time, he had not been made aware that he would be unable to continue working in his trade as a butcher or in any other occupation prior to 27 June 2022.

Prior to this time, it was his understanding his knee would "definitely support him in what he want[ed] to do". Absent receipt of that report, it was considered likely that the applicant would have been better to accept the lump sum WorkCover Queensland offer, given the risks and costs of pursuing a common law claim and extension application. Receipt of the supplementary report changed that position.

With respect to the issue of prejudice, the court found the presentation of the stairs within the expert report suggested it was highly improbable there had been any change to the stairs in the last decade. It was also noted the property was a training property, the respondent had kept records, and there were persons who could provide information as to the state of the stairs on the date of injury. On this basis, no prejudice was substantiated.

40. *Broadspectrum (Australia) Pty Ltd v Farmer* [2024] NSWCA 81

- Mitchelmore JA, Basten AJA and Griffiths AJA, delivered 17 April 2024

Keywords

Factual Causation – Breach – Foreseeability of Risk – Standard of Care

Facts

Mr Farmer was successful at trial where the primary judge accepted his evidence and concluded his fall down a flight of stairs at the Commonwealth's Regional Processing Centre in Nauru was caused by the presence of a raised lip on an aluminium frame which impeded the forward progress of his boot where it became caught on the unevenness.

The forefront of the appeal was whether the primary judge erred in finding the raised lip was 2 to 2.55mm in height, consistent with the expert evidence rather than 6.25mm (or so) in height, as the trial judge had found, consistent with the lay witness's evidence. The appellants submitted the primary judge ought to have found that neither appellant needed to take precautions in the circumstances, and that neither breached their duty of care to Mr Farmer.

Decision

Appeal dismissed with costs.

Ratio

The Court of Appeal concluded the claimed error by the appellants was not a material error where the height of the lip did not form the primary judge's central reasoning being: -

1. The presence of the raised lip impeded Mr Farmer's forward progress.
2. This constituted an obstruction which was sufficient to amount to a safety hazard
3. Mr Farmer's evidence was accepted that the cause of the fall was the height of the lip with the yellow strip missing from it.

41. *Manca v Teys Australia Beenleigh Pty Ltd* [2024] QCA 60

- Bowskill CJ, Fraser AJA and Applegarth J - delivered 19 April 2024

Keywords

Appellant slipped and fell on steps at employer's meat work and was injured – appellant alleged slip was the result of the steps being covered in blood, not the substances or because steps were damaged or worn – trial Judge found the appellant had not proved the cause of his fall – trial Judge made findings on fact about the state of the steps at the time of the fall and found the Respondent had not breached it's duty to the appellant in the respects that the appellant pleaded – appellant challenges several findings of fact by the trial judge – where appellants pleaded case alleged the steps were damaged, worn and covered in blood and other fluids/substances from recently slaughtered carcasses and that those matters gave rise to a breach of duty – the appellants pleadings at trial did not allege a necessary precaution was to instruct him when he came to undertake new work in a new and very different work location about carrying equipment on the steps.

Facts

The appellant was unsuccessful at first instance in a claim for injuries sustained during the course of the appellant's employment with the respondent. The appellant was injured when descending stairs, subsequent of completing his shift, where upon he slipped on the stairs and fell backwards. At the time, the appellant was carrying his knife pouch into his one hand, his sharpening steels and sharpening stone in the other hand, and had his apron draped over his arm, such that he was unable to use the handrail.

The evidence at trial did not support a finding that there was blood or water in any significant quantity on the steps where the appellant slipped and fell.

The respondent had added capping to the edge of the stairs subsequent to the incident in which the appellant was injured.

The trial Judge determined, on the evidence, it was not clear what had caused the appellant to fall, not being satisfied there was congealed blood in the tracks of his boots, nor, if and to the extent that there was, that any such blood was slippery. The trial Judge found there were no defects with regards to the steps which would have caused the appellant to slip and fall, and was not satisfied the steps at the time were wet or that there was fluid present on them when the appellant descended them.

The primary Judge found the respondent had taken reasonable steps to mitigate any risk that a person would slip on the steps, and that the appellant had not proven that he slipped due to any failure on the part of the respondent to take reasonable precautions against the risk of slipping, with the claim being dismissed.

On appeal, the appellant challenged the primary Judges finding of facts and raised a particular point that the respondent had been negligent in leaving the appellant to devise a system by

which he was to undertake the preliminary wash and then transfer his tools and apron to the cleaning room, asserting that specific allegation fell within general allegations in the Statement of Claim, that the respondent had failed to provide a safe system of work and encompassed that failure to instruct the appellant.

Decision

The appeal be dismissed with costs.

Ratio

The Court considered the threshold pleading point, as to whether part of the appellants pleaded case at first instance was that the respondent failed to provide a safe system of work, exposed him to a known risk of injury, and failed to take reasonable care to ensure the workplace was safe, because it failed to specifically instruct him about how to carry his equipment and the apron after a preliminary wash.

The Court determined that if the question was in the affirmative, the case took on a different complexion.

The Court accepted the respondent's submission that the appellant's case at trial was presented in two parts, concerning the structural integrity of the stairs and whether the stairs were covered with blood and other fluids from recently slaughtered carcasses.

The Court determined the function of pleadings was to define issues for trial and the requirements of the rules was to plead and particularise matters that, if not alleged, will take a party by surprise, it being fundamental to a fair trial. By extension the Court determined the appellant's pleaded case did not raise allegations that he should have been specifically instructed during his induction not to carry tools in both hands after the washdown and it was unfair to the respondent for it to face a basis of liability that was not pleaded or particularised.

The Court then determined the appellant's challenging to the findings of fact by the trial Judge.

The Court was of the view the primary Judge was entitled to be satisfied on the evidence that there was no congealed blood in the tracks of the appellant's boots (with it also being open to the primary Judge to be able to conclude that the tread of the boots would like have been adequate to ameliorate the slipperiness of blood in any event).

Additionally, the study of the evidence did not require the primary Judge to find that the physical state of the stairs caused the appellant to fall, with the primary Judge not finding that the appellant slipped because of the state of the edge of the second or third step.

In considering the additional metal capping, whilst the primary Judge referred that installation to an improvement, there was no finding that it would have avoided the appellants fall as there was no evidence on the part of the appellant that he fell because of the state of the edge of the steps.

On the evidence, the Court found it was a conclusion open to the primary Judge that if the risk of a person stepping on the steps has been injured was foreseeable, it was not significant,

that conclusion being based on a number of matters including the absence of a report of anyone slipping, there being a non-slip floor, a handrail being provided on the steps, signs being elected in the premises reminding employees to use handrails, and that the washdown procedure, before descending stairs, was designed to minimise the amount of blood that would be transferred on the worker's apron and boots.

In confirming the primary Judges determination on causation, the evidence did not show that the Judge erred in concluding that it was not clear what caused the appellant to slip and fall and that, therefore, the appellant had not proved that he slipped due to any failure on the part of the respondent to take reasonable precautions against the risk of slipping.

The Court confirmed the appellant failed to prove that any one of the causes alleged to be the cause of his fall were in fact the cause of the fall and therefore the appellant had failed to prove causation. The appellant had failed to overturn the findings of fact upon which he contended the primary Judge had erred, which findings of fact sufficient to allow the primary Judge to reach the conclusion that he did on foreseeability, significant risk, reasonable precautions and causation.

Lastly, when considering the issue of the additional issue of metal capping, which may have reduced the risk of slipping, the Court identified an emphasis that on what is required is the exercise of reasonable care and one must avoid hindsight with the Court having to consider the issue by looking forward to identify what a reasonable employer would have done, not backwards to identify what would have avoided the injury.

42. RJ bht RPC v State of New South Wales [2024] NSWDC 128

- Gibson DCJ, decision delivered 22 April 2024

Keywords

Negligence – prior knowledge and foreseeability of harm following earlier complaint and concerns of intellectually disabled boy to school grooming and sexual assault by an older boy

Facts

The Plaintiff is an intellectually disabled 13-year-old boy who was a student at a school offering special support unit for about 60 children with disabilities requiring additional supervision and assistance. On 23 September 2019, the Plaintiff was sexually assaulted by an older boy who was 17 years old. The facts indicated that well before the assault, the assailant had manifested a clear intention to pursue his sexual interests in a manner involving predatory behaviour and the school.

Decision

Judgment for the Plaintiff.

Ratio

The duty owed by the defendant was to ensure that reasonable care was taken to protect the Plaintiff from what the defendant concedes was a foreseeable risk which was not far-fetched or fanciful and not insignificant by taking reasonable precautions.

43. *Carey-Schofield v Hays & Civeo [2024] QSC 60*

Crow J, decision delivered 22 April 2024

Keywords
Torts – negligence – duty of care – where the plaintiff suffered a workplace injury while employed by the first defendant and labour hired to the second defendant – where liability for injuries is disputed – where quantum of damage is disputed – whether the defendants are liable in negligence

Damages – assessment of damages in tort – personal injury – income loss and loss of earning capacity – generally – where the plaintiff has returned to work since the date of injury – where the plaintiff has in the past had long periods of sporadic employment – where the plaintiff cannot undertake heavy physical work – what measure of damages for past and future economic loss and Griffiths v Kerkemeyer damages – how should the damages be apportioned between defendants

Facts
Aaron Carey-Schofield (**the Plaintiff**) was employed by Hays Specialist Recruitment (Australia) Pty Ltd (**Hays**). Hays labour-hired the Plaintiff to Civeo Pty Ltd (**Civeo**) to work at Civeo's accommodation village at Dysart.

On 24 February 2019, the Plaintiff was injured in the course of his labour-hire employment while disposing of full rubbish bags and changing the rubbish liners in large rubbish bins (240L wheelie bins). The Plaintiff was tasked with emptying wheelie bins at the rear of 'The Hub' (a pub gathering area). The Plaintiff drove his work utility just behind The Hub near the wheelie bins with the tray of his utility facing The Hub.

The Plaintiff stated that when he came to the first bin, he opened the lid, tied the bag at the top and realised it was too heavy to lift. He therefore put the bin on its side and tried to lift the bag on the back of his utility but failed to do so. The Plaintiff alleged he called out to a female colleague who was driving past in a golf buggy to assist him lift the heavy bags. However, the female colleague did not stop to assist and continued driving. The Court did not accept the Plaintiff's evidence in this regard, rather having found that a female colleague stopped to try and lift the bags with the Plaintiff only to say words to the effect of "These are heavy. We'll pick them up on the way back."

The Plaintiff alleged he returned to emptying the rest of the bins. The Plaintiff stated he removed the second bin bag when a wasp came towards him causing him to step backwards and fall over one of the bin bags he had removed and placed on the floor. The Court again did not accept the Plaintiff's injury occurred after he removed the second bin bag, rather, it was found the Plaintiff had emptied four bin bags onto the ground prior to a wasp appearing. The Plaintiff suffered an injury to his left elbow and a secondary psychiatric injury as a result of the fall.

Hays contested the Plaintiff's version of events by highlighting various inconsistencies in the Plaintiff's contemporaneous reporting of the incident. The inconsistencies included:

- the Plaintiff reporting to a manager that he had fallen swooshing a wasp away (with no mention of tripping on a garbage bag);
- hospital notes that mentioned the Plaintiff tripping on a garbage bag but not mentioning the Plaintiff stepping backwards towards the garbage bag;
- the Plaintiff reporting to a different colleague that he tripped over the garbage bag he was dealing with (not one that was placed on the ground behind him);

- the Plaintiff's report to WorkCover on 27 February 2019 that he had been stung be a bee/wasp while pulling a garbage bag and fell backwards; and
- Dr Boys recording the Plaintiff saying he overbalanced across the bag when a was flew at him.

There was significant disagreement between the Plaintiff and Civeo regarding the proper system of work for removing the bin bags and the training provided to the Plaintiff prior to the incident. Civeo alleged that it had a safe system of work for changing the bins at its facility. It alleged that workers were orally trained to open the lid of the wheelie bin, tie up the bin liner, pull the bag out, immediately place the bag in the back of a utility vehicle and then move to the next bin. Civeo emphasised that it ***did not*** train workers to place bin liners on the ground as that would create a trip hazard.

Civeo had a 'facilities work instruction' manual that described a process for changing the bins that was not the same as the safe system of work that workers were trained in orally. Importantly, the written work instruction ***did not*** include the direction that the bin liner bags when full were to be placed immediately into the rear of a utility and not placed on the ground. Civeo also described a 'buddy system' where new workers would be buddied with another worker to work as a team for the duration of the day. Civeo alleged that all new workers would have a buddy with them during rubbish collection.

The Plaintiff described being trained on a different system of work for emptying the rubbish bins. The Plaintiff alleged when he first commenced with Civeo he was trained by a male work buddy who instructed him to open the bin lid, tie the tops of the bags, lift the bags out, put them down, put the new liner in, go to the next bin, keep on going on and on until all the bins were emptied, then come back and collect the bags of rubbish off the ground and take them to the utility vehicle. The Plaintiff also alleged he was told if the bins were too heavy, to lie them on the ground, drag the bin bag out on its side, stand the bin up, put the new liner in and then put the full bag of rubbish in the utility vehicle. The Plaintiff alleged his buddy told him to take all the rubbish bags out before placing them in the utility to save time rather than walking back and forth.

The Plaintiff pleaded that both Defendants breached their respective duties of care to him by failing to take reasonable steps to mitigate the risk of injury of him suffering injury by tripping over bags of rubbish that had been emptied onto the ground from several 240L wheelie bins before transferring them into a work vehicle.

The Defendants argued that the risk of a plaintiff tripping on a bag which he had only just and temporarily placed on the ground was not a reasonably significant risk of injury so the Plaintiff's claim ought to fail. Civeo argued that the formulation of the relevant risk ought to be defined with respect to the presence of the wasp with the analogy of a worker placing down their toolbox, being frightened by a wasp and tripping on their own toolbox.

Decision
Judgment in favour of the Plaintiff against both Defendants.
Plaintiff awarded $503,595.51 (clear of the refund to Workcover) against Hays and $873,014.08 against Civeo.
Apportionment set at 75% against Civeo and 25% against Hays.
Form of order and costs to be heard.

Ratio

Justice Crow noted the inconsistencies in respect of the alleged mechanism of injury flagged by Hays but found these inconsistences were 'relatively minor'. Justice Crow accepted that

the Plaintiff's evidence regarding what occurred on the day of the incident was '*generally consistent with instructions he provided to his solicitors*'. Justice Crow explained that *'absolute precision in the description of how an incident occurred provided in a consistent manner of a period of time is not a pre-requisite for acceptance of how an incident occurred*'.

Similarly, Justice Crow accepted the Plaintiff's evidence in relation to the training he had received for emptying the rubbish bins. Importantly, this meant Justice Crow accepted the Plaintiff was not trained according to Civeo's 'safe system of work' that involved immediately placing full bags of rubbish into the utility vehicle.

Justice Crow did not accept Civeo's formulation of the relevant risk of injury stating that the analogy they had proposed (i.e. a worker placing down their toolbox and tripping on it) was not similar to the circumstances of the current case. Justice Crow referred to the fact that Civeo's premises were large, and they had numerous 240L wheelie bins throughout their complex. Therefore, emptying out the garbage bags was a frequent task, which performed in the way the Plaintiff was trained, created hundreds of potential tripping hazards.

Justice Crow found that the Defendants had breached their duty of care to the Plaintiff because the way the Plaintiff was trained to perform the task of rubbish removal was contrary to the proper and safe system of work. Specifically, the Plaintiff was not trained to immediately place the full garbage bags into the back of his utility to avoid the chance of a tripping hazard being created. Justice Crow opined that it would be reasonably expected that anyone performing the task of removing full rubbish bags from 240L bins should be assigned a co-worker because it *'ought reasonably be anticipated in the normal course of emptying wheelie bins that some wheelie bin liners may be extremely heavy and be beyond the capability of a one-person lift*'.

In relation to apportionment between the Defendants, Justice Crow rejected Hays' submission that it ought to be apportioned none of the awarded damages. Justice Crow noted that while Hays visited Civeo's premises from time to time and performed checks on the work being performed by Hays employees for Civeo, it failed to identify the anomaly between the oral safe system of work with the documented system of work that allowed garbage bags to be left on the floor and created a trip hazard. Overall, 75% was apportioned to Civeo on the basis it was responsible for the design, implementation and enforcement of the relevant system of work while 25% was apportioned to Hays.

44. *Rodgers v Chinsee* [2024] QDC 55

- Rosengren DCJ; decision delivered 22 April 2024

Keywords

Limitation of actions – extension or postponement of limitation period

Facts

This was an application to extend the limitation period in respect of a medical negligence claim. The Applicant alleged injuries arising from bilateral breast augmentation surgeries between 1 September 2017 to 14 August 2018. The limitation period had expired at the latest by 14 August 2021. Proceedings were filed 29 November 2023, with the subject application seeking to extend the limitation period until 30 November 2023.

The first surgery happened 1 September 2017, but due to ongoing pain and fluid leaking, she underwent revision surgery on 23 January 2018. A third surgery occurred on 20 February 2018 due to complications. The fourth, and final, surgery happened 14 August 2018, when the Respondent used an implant not yet registered by the Therapeutic Goods Administration and allegedly advised she would be a trial case. On 30 November 2022 the Applicant was informed the implants had still not been approved by the TGA, which caused her deep concern. On 25 February 2023, she lodged an Office of Health Ombudsman complaint. OHO referred her complaint to the Australian Health Practitioner Agency.

On 13 April 2023, the Applicant sought legal advice. A s.9A initial notice was served on 6 July 2023, relating only to the fourth operation, and also an expert was briefed by the Applicant's lawyer. The expert report was provided 3 October 2023 and was critical of the Respondent's treatment and management.

Decision

The application to extend the limitation period was granted.

Ratio

In order to prove a material fact has the requisite decisive character, it is necessary to show that without it the Applicant would not, even with competent medical, legal or other advice, have appreciated that she had a claim worth pursuing and should in her interests do so. It is

necessary to establish whether the Applicant should reasonably have taken steps at an earlier stage to find out the relevant material fact.

The Applicant had to prove the material fact of a decisive character was not within her means of knowledge before 30 November 2022. The material fact of a decisive character was the expert report which inferred the Respondent's negligence. She had been apparently advised some risks and complications that could occur, but not until the expert report could she have known that the complications which did eventuate were a result of alleged negligence by the Respondent. It is also the first time she found out that the Respondent, in the second operation, had reused the original implant. There was no reason for her to suspect ongoing complications were as a result of negligence, therefore a reasonable person in her position would not have considered seeking advice.

The prospects of the underlying claim were considered slim, but the Court noted the low threshold requirement, and weighed up the cost of producing more detailed evidence on such an application with the caution to be exercised when considering preventing an application from making a claim.

SUMMARY

1. Vicarious liability (in its true sense) is attributing liability. Because of the powers and duties of employment, and the connection between the employee's wrongful act and those powers and duties of employment, the employer is attributed liability . Elements:
    a. the tortious conduct was committed in the course or scope of the employment (i.e. a sufficient connection between the employment and the act);
    b. it is necessary to identify what the employee was actually employed to do and held out as being employed to do;
    c. for an act to be considered to be in the course or scope of employment, something more is needed than that the employment merely created the opportunity for the act to take place;
    d. features such as authority, power, trust, control and ability to achieve intimacy may point to a connection between employment and the act
2. When there is an attribution of acts, such that a defendant is liable because the acts of another are attributed to the defendant (i.e. defendant expressly or impliedly authorised or agency), that is agency not vicarious liability.
3. Vicarious liability (not true vicarious liability) describing a non-delegable duty, because of the nature of the relationship of proximity gives rise to a duty of care of a special,

more stringent kind. The nature of the relationship includes: care, supervision or control of another or their property.

45. *Hodson v Hurex Pty Ltd and Lederer Pty Ltd* [2024] NSW DC 143

- Fitzsimmons SC DCJ, Decision delivered 26 April 2024

Keywords

Liability for pure psychiatric injury – mental harm – normal fortitude test – liability of host employer – liability of employer – non-delegable duty of care – causation – calculation of damages

Facts

The Plaintiff commenced employment with the First Defendant labour hire company ("Hurex") in June 2020 and was immediately placed in a permanent role with the Second Defendant host employer ("Lederer") as a cleaner at the Corrimal Shopping Centre.

The Plaintiff routinely worked from 2pm to 10pm whilst his colleague Josh Brydon ("Brydon") performed the morning shift from 6am to 2pm.

On the morning of 26 October 2020, an elderly gentleman ("the Victim") was walking across the loading dock of the shopping centre when he was run over and killed by a semi-trailer. The Plaintiff was called by a Representative of Lederer that morning and requested to come into work due to the fatality. When he met the Representative of Lederer at the loading dock, he was directed towards Brydon who was situated towards the scene of the fatality.

The Plaintiff alleges that as a result of what he was told, saw and smelled at the accident he suffered from psychiatric injury for which he ceased work on 13 May 2021 and has not returned since.

Decision

1. Verdict and Judgement for the Plaintiff against the First and Second Defendant as per the calculations in the Judgement, less 10% for the Plaintiff's contributory negligence;
2. Verdict and Judgement for the cross claim by the Second Defendant against the First Defendant;
3. First and Second Defendant to pay the Plaintiff's costs of the proceedings.

Ratio

As against the First Defendant employer, Hurex, it was found:

- Hurex owed the Plaintiff a personal, non-delegable duty of care to take reasonable care to avoid a foreseeable risk of injury;
- It was foreseeable that a person employed to preform cleaning and other duties at a shopping centre, such as the Plaintiff including quasi-security type work could be confronted with a significant incident, including patrons of the shopping centre suffering life-threatening medical conditions or injuries, including within the shopping centres carparks or loading dock;
- It was reasonably foreseeable that a person such as the Plaintiff, by being exposed to such an incident could suffer psychiatric injury;
- Given the magnitude of the risk of such an injury and the probability of its occurrence, a reasonable response would have been to direct the Plaintiff not to attend such an incident, thereby exposing the Plaintiff to a risk of psychiatric injury;
- The failure of Hurex to direct the Plaintiff not to attend at the accident was a cause of the Plaintiff's psychiatric injury; and
- It was reasonably foreseeable that a person of normal fortitude might suffer recognised psychiatric illness if exposed to the aftermath of a fatal motor vehicle accident such as the one to which the Plaintiff was exposed.

As against the Second Defendant host employer, Lederer, it was found:

- Lederer through its representative was aware that at the time of the incident the Plaintiff was someone who was subject to emotional fragility;
- Given Lederer's knowledge of the potential for the Plaintiff to be emotionally fragile, it was reasonably foreseeable that he might suffer a recognised psychiatric illness if confronted with the fatal accident scene;
- Lederer as host employer, owed the Plaintiff a duty of care to avoid a foreseeable risk of harm;
- The risk of harm to the Plaintiff was foreseeable as it was one which Lederer knew or ought of known;
- The risk of a person such as the Plaintiff suffering a psychological injury from being exposed to the aftermath of the fatal accident was not insignificant;
- The precaution which should have been taken by Lederer was to prevent the Plaintiff being exposed to the aftermath of the accident (i.e. to direct him to stay away from the accident scene) and was a relatively simple one;
- Regarding Lederer, section 5D of the *Civil Liability Act* 2002 (NSW) restates the "but for" test of causation and relevantly but for the Plaintiff's attendance at the scene of the fatality, he would not have suffered the psychological condition that he has;

- It is appropriate for the scope of Lederer's liability to extend to the harm caused to the Plaintiff.

The Court apportioned liability 15% to the First Defendant employer, Hurex and 85% to the Second Defendant host employer Lederer, given Hurex's role was limited to placing the Plaintiff with Lederer and performing routine visits/inspections at the shopping centre, whereas Lederer was the Plaintiff's host employer from the commencement of his employment with Hurex, was responsible for the Plaintiff's initial training as well as his daily supervision, directed the Plaintiff in the performance of his duties at the shopping centre and progressively expanded those duties over time and directed the Plaintiff's attendance at the scene of the accident and with respect to assisting/replacing his colleague Mr Brydon on the morning of the accident.

Given the finding of liability against the employer Hurex, the host employer Lederer succeeded in its cross claim.

A further finding of contributory negligence on the part of the Plaintiff was assessed at 10% given the Plaintiff's evidence that he had reattended at the accident scene later on the date of the fatality was but limited to 10% on the basis that had be been instructed by the First and Second Defendant's not to attend the scene of the accident, it is likely he would not have returned as he did.

46. *Goodhew v WorkCover Queensland* [2024] QSC 66

- Henry J, Decision delivered on 29 April 2024

Keywords

Workers' compensation – Proceedings to obtain compensation – Preliminary requirements – Claims for compensation generally.

Facts

Mr Goodhew suffered injuries when he was passing roof sheets up to a co-worker on a roof. Mr Goodhew made an Application for Assessment of Permanent Impairment, pursuant to section 132A of the *Workers' Compensation & Rehabilitation Act* ('the Act'). WorkCover assessed his injuries and issued a Notice of Assessment for 22%. Following this, Mr Goodhew lodged his Notice of Claim for Damages, pursuant to section 275 of the Act.

In WorkCover's s281 liability response, issue was raised with Mr Goodhew's status as a 'worker' and liability was denied on the basis that Mr Goodhew was a contractor.

The matter was to proceed to a compulsory conference, however, WorkCover's solicitors advised they were not in a position to attend the compulsory conference because they had reached a final view that Mr Goodhew was not a 'worker' under the Act and as such, WorkCover did not have legal capacity to exchange final offers.

Mr Goodhew filed an Application seeking orders to have the compulsory conference set down at a fixed time and date. In response, WorkCover filed a cross-application seeking a Declaration that Mr Goodhew was not a worker and therefore the Act, did not apply to his claim for personal injuries.

Decision

1. WorkCover's Application for a Declaration is dismissed.
2. Mr Goodhew's Application for orders including the fixing of the time and place for the compulsory conference is granted.

Ratio

Henry J, noted that WorkCover's reasoning for baulking at the process at the last minute was that they did not have a legal capacity to make an offer as the Act required. Henry J noted that the reference to legal capacity in section 292(ii) only relates to legal capacity to exchange offers if the claim has not settled. He further noted that the term "legal capacity" is intended

to refer to persons who, because of their personal circumstances, such as youth or intellectual impairment, lack legal capacity. In that regard, he held that WorkCover had no such problem.

WorkCover was seeking a declaration in relation to whether Mr Goodhew was a worker. Henry J noted that, whilst such a declaration may have utility, it was not for the Court to intervene during the pre-proceeding stage to determine a discrete factual issue. He noted that the formulation of a written offer at a compulsory conference will almost always occur without the benefit of any advance court ruling about discreet issues in the case. Intervention by the Court during the pre-proceeding stage would be at odds with the very nature of the scheme calculated at promoting the resolution of cases, without a court proceeding.

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47. *Boothman v George* [2024] WADC 26

- Palmer DCJ, delivered 30 April 2024

Keywords

Medical negligence – breach of duty – causation – reasonable steps and precautions – minimise risk of harm – exercise the skill and diligence expected of qualified person

Facts

The plaintiff made a claim for damages as a result of an injury sustained when receiving chiropractic treatment from the defendant. The defendant was a qualified chiropractor.

The plaintiff had a history of lower back pain complaints and as a result started receiving treatment from the defendant in January 2019. On 18 May 2019 the plaintiff attended on the defendant for treatment of his lower back. He left the appointment feeling worse and the following morning woke to no feeling in his right leg and was unable to weight bear. The plaintiff had an MRI which revealed a central right disc protrusion at L4/L5 which required immediate surgery.

The plaintiff argued the rapid deterioration in his condition is as a result of the treatment performed by the defendant. The central issue was whether the defendant was negligent and breached a duty of care to exercise reasonable care in the treatment of the plaintiff.

Decision

Judgment for the plaintiff.

Ratio

The defendant was obliged to exercise the skill and diligence expected of a qualified chiropractor and to take reasonable steps and precautions to minimise the risk of harm to the plaintiff arising out of the treatment provided. The plaintiff argued a reasonable chiropractor in the defendant's position would not have performed any of the alleged manipulations on the date of accident, given the background of injury and symptoms given by the plaintiff. It was argued the defendant ought to have investigated the plaintiff's symptoms further before providing any manipulation treatment.

The judge found the risk of injury was foreseeable, the risk was not insignificant and, in the circumstances, a reasonable person in the position of the defendant would have taken precautions. The judge further found the expert evidence did not support the conclusion the plaintiff's underlying back pathology would have caused the plaintiff to suffer these injuries regardless of the treatment by the defendant.

The judge was satisfied it was more likely than not the plaintiff's symptoms were caused by the treatment from the defendant and found the plaintiff was able to establish the disc extrusion was caused by the defendant at the time of the treatment.

48. *Desmond-Bryzak v Lander* [2024] QSC 72

- Bradley J, delivered on 2 May 2024

Keywords

Limitations of Actions Act – extension of limitation date – material fact of a decisive character – medical negligence – pelvic mesh implant surgery

Facts

The Plaintiff underwent surgery involving the implanting of pelvic mesh by the Defendant on 28 November 2013. By 21 December 2018, the Plaintiff had commenced a Court action against the Defendant alleging negligence and claiming damages. It was accepted by the parties that the limitation date, with respect to the Plaintiff's claim, expired on either December 2016, or January 2017.

The court noted that the implanted mesh had caused the Plaintiff harm, she had persistent chronic pain since the operation, she had sought professional treatment in the hope that it would alleviate her symptoms, she had been told to be patient, she had undertaken the further recommended medical procedures (that did provide some relief) which required periods of recovery, and had more recently been diagnosed with post-traumatic disorder and received treatment and medication for that. The Plaintiff had also joined a class action against the manufacturer of the mesh. There was no evidence given to the Plaintiff by any of her treating specialists to suggest that the Defendant had been negligent, nor have she received advice from her class action lawyers on that issue either. There was evidence before the court that specialists, that the Plaintiff sought to rely on, considered the operations she underwent to be experimental at that time. Also, that the Plaintiff's ongoing problems were probably likely due to nerve entrapment, which was in fact a recognised complication of mesh surgery. It was the Plaintiff's case that the Defendant was under a duty to warn her about the nature of the operation and the risks involved and specifically, as noted by the court, that:

(a) The procedure he proposed to perform in the operation was experimental;
(b) That there were more traditional and non-surgical options open to her; and
(c) That there was a risk that the procedure would result in chronic pain.

The Plaintiff alleged that she would have tried non-surgical options or a more traditional surgery and would not have consented to the operation had she been warned about these things. The Plaintiff had deposed to the pain she had experienced with the operation and the practical and economic consequences of her predicament. The Plaintiff was seeking to have

the court extend the limitation date, with respect to her claim to 21 December 2018, the date upon which she filed her proceeding. She would need the court to extend the limitation date, pursuant to section 31 of the *Limitations of Actions Act*, on the basis that she was unaware of a material fact of a decisive nature at any point in time prior to 22 December 2017.

Decision

1. Pursuant to section 31 of the *Limitations of Actions Act 1974* (Qld), the period of limitation for the Plaintiff's action is extended, so that, for the purposes of proceeding 12240 of 2019, the limitation period expired at midnight on 21 December 2018.
2. The cost of the Application, up until 9 February 2024, excluding the costs thrown away by the adjournment are the parties' respective costs in the proceeding.
3. The Defendant pay the Plaintiff's costs of the Application and adjournment on 9 February 2024.

Ratio

The judge canvassed the power to extend, noting that there must be evidence to establish the right of action. There must be a 'material fact of a decisive character' that was not within the means of knowledge of the Plaintiff before 22 December 2017, and that it was the Plaintiff who bears the onus of persuading the court and that the justice of her case requires the extension.

The judge canvassed the history of the surgery, her further surgeries post the mesh implant, her involvement in the class action and all of the efforts undertaken by the Plaintiff to minimise the harm to herself post the mesh implant. The court noted that the plaintiff relied on four material facts, and they were:

> "(a) There was authoritative information available to medical specialists, including the defendant, that gave rise to a duty on the part of the defendant to warn her about the things set out in paragraph [11] above.
> (b) A person, qualified to give an opinion, had expressed a view that the operation was not medically appropriate for a person in her position, which gave rise to a duty to not advise her to have the operation and to not perform it.
> (c) The symptoms she experienced after the operation, were caused by the Defendant's negligence;
> (d) The symptoms she experienced after the operation would be permanent and sufficiently serious to prevent her continuing in full-time employment for the balance of her expected life."

The judge noted that:

> *"… a reasonable person, knowing the facts in listed in paragraph [19] above, and having taken appropriate advice on them, would regard them as showing that the plaintiff would have "reasonable and worthwhile litigation prospects" if she were to pursue a right of action against the defendant, and, if she did so, it would result in an award of damages sufficient to bringing the action.*"

The judge was satisfied that the above factors ((a), (b) and (c)), were not within the Plaintiff's means of knowledge until a date after 22 December 2017. The judge noted that as of the date of the operation in 2017, the Plaintiff had:

- been actively seeking treatment,
- had consulted many specialists and had followed their medical advice,
- had encountered specialists unaware or unwilling to listen to her and that were desensitised to her concerns and symptoms,
- the Defendant had directed her attention to the mesh product, and her own lawyers had then directed her to the manufacturer, rather than looking at the Defendant,
- throughout all of this time, the Plaintiff was maintaining fulltime employment and looking after her family responsibilities,
- she had taken all reasonable steps she was able to try to find out the cause or causes of her problems and remedies for her condition.

The judge noted that for more than 4 years, the Plaintiff had pursued measures to treat, alleviate and end her symptoms. The medical evidence, including after further surgery, was that there were prospects of curing her condition or at least alleviating some of her symptoms. Her persistence in that regard, was considered by the judge to be "not unreasonable". Importantly, the judge noted that *"… none of the treating specialists told the plaintiff that her injury was likely to be permanent, or that it would prevent her continuing to work full-time*". It was not until 28 February 2018, that the Plaintiff's GP, who had been treating her since the operation, said that she would have to cease paid employment indefinitely. It was then not until 31 May 2018 before the rehabilitation team advised her the condition was permanent. The judge said *"…it would not be reasonable to expect the plaintiff, before 22 December 2017, to have done anymore to find out whether her injury was permanent and whether it was likely to prevent her continuing to work*".

On that basis, the judge was prepared to find that the material fact in (d) above, was not within the Plaintiff's means of knowledge until 22 December 2017. The judge then considered the damages the Plaintiff was likely to receive at a time prior to 22 December 2017, and said *"... the facts, as they appear to the Court, do not establish the basis for finding that a reasonable person in the plaintiff's position before 22 December 2017, properly advised, would consider it be in her interest to sue the defendant for negligence."* That finding was based on the fact that had she proceeded with a damages claim prior to December 2017, there would have been a significant difference in a successful outcome for her in terms of quantum, compared to the risk of a negative outcome. The judge pointed out that any litigation would not have been risk free, and that the costs would be significant if the proceeding was unsuccessful. Accordingly, these risks outweighed the potential damages she may have been awarded from prosecuting a proceeding at that point in time. The judge noted that the Plaintiff's claim for substantial damages against the Defendant appeared to have been well founded.

49. Wang v Ford [2024] QCA 72

- Mullins P, Bond JA, and Crowley J, decision delivered 3 May 2024

Keywords

Appeal and new trial – procedure – powers of court – where the appellant irregularly commenced a proceeding by filing a claim and statement of claim in the Supreme Court before holding a compulsory conference as required by s 51A of the *Motor Vehicle Accident Insurance Act 1994* – whether the primary judge erred in the exercise of his discretion by not ordering the claim to be stayed pending compliance with s 51A

Facts

The self-represented appellant (plaintiff) was injured in a motor vehicle accident. He filed a claim and statement of claim in the Supreme Court seeking to recover damages for personal injuries against the first and second respondents (first and second defendants). The claim was filed before holding a compulsory conference as required by s 51A of the *Motor Vehicle Accident Insurance Act 1994*. The respondents had explained this error to the appellant before the claim was filed. Further, the respondents' position was that the appellant may recommence his claim without risk of being defeated by the *Limitation of Actions Act 1974*, so long as he did so within 60 days of a compulsory conference being held.

The primary judge ordered, on application by the second respondent, the claim to be set aside. The main issue on appeal was whether the primary judge erred in exercising his discretion by not ordering the claim to be stayed pending compliance with s 51A, rather than setting it aside.

Decision

The appeal is dismissed. The appellant to pay the respondents' costs on an indemnity basis.

Ratio

The Court held that the orders made by the primary judge were an orthodox response to the application; the application itself was founded on the appellant's failure to respond reasonably to a proper identification of his own procedural missteps. It was clear that the appellant was not at risk of being defeated by the *Limitation of Actions Act* 1974 in the event the claim was set aside. The appeal and applications were regarded as "an undue prolongation of a case which should never have been advanced by the making of groundless contentions, including groundless contentions of fraud". Consequently, costs were ordered to be assessed on an indemnity basis.

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50. *Alderson v Gause; Alderson (Compensation to Relatives) v Gause; Heafey v Gause; Heafey v Gause; Heafey v Gause; Heafey v Gause* [2024] NSWDC 152

- Montgomery DCJ, decision delivered 6 May 2024

Keywords

Negligence – personal injury – landlord's duty of care for smoke alarms – s 5B CLA breach – – s 5D causation – s 50 CLA intoxication – s 5R CLA contributory negligence – pure mental harm damages – s 31 CLA whether suffered recognised psychiatric illness – s 16 CLA assessment of non-economic loss damages.

Facts

The various plaintiffs who were the father, de-facto partner and children of Mr. Heafey ("the deceased"), who died in a residential house fire, instituted claims for personal injury resulting from the death of the deceased. The plaintiffs also made separate claims pursuant to the *Compensation to Relatives Act 1897* (NSW).

The premises in which the deceased, his partner and children lived (which was the premises where the fire occurred, and the deceased was killed) was owned by the defendant and rented by the deceased and his partner.

The judgment dealt with the question of liability in negligence in respect of all claims and non-economic loss and damages in the claims brought by the deceased children.

It was common ground that the smoke alarm in the lounge room of the premises where the deceased died had been tampered with and did not sound. The evidence was also that the deceased was asleep on the couch in the lounge room at the time the fire broke out and was, at some stage during the fire, awoken, however ultimately collapsed not far from the lounge room where he expired.

The main issue in respect of liability was whether or not the defendant was negligent for failing to have provided operational smoke alarms in the premises and the related issue of whether or not the defendant took reasonable care, when inspecting the smoke alarms, to determine whether or not they were operational. The main focus was directed to the smoke alarm in the lounge room of the premises, because that was the room in which the deceased died. The fire started in the kitchen, just off lounge room where the deceased was asleep.

Expert fire investigation opinion evidence was relied upon by both parties. His honour preferred the evidence of the plaintiff's expert. Crucially, his honour found that had the lounge

room ceiling smoke alarm been operational, it would have sounded at the very early stage of smoke at that ceiling, and before the smoke lowered to pass the lintel to the hallway, and before the deceased would have felt heat to the exposed parts of his body, and before the smoke layer was sufficiently deep from the ceiling to immerse his head when he stood up. Because the smoke alarm did not go off, the deceased likely woke in a confused and disoriented state due to the fumes and poor visibility and was unable to take the evasive action required before he collapsed and ultimately succumbed to the flames.

Decision

(1) Judgment for the Plaintiff, Tamara Alderson, against the Defendant in proceedings no. (2021/00080424) in the sum of $143,063.55.

(2) Judgment for the Plaintiff, Narelle Heafey, against the Defendant in proceedings no. (2021/00080450) in the sum of $59,520.64.

(3) Judgment for the Plaintiff, John Heafey, against the Defendant in proceedings no. (2021/00174019) in the sum of $52,500.00.

(4) Standover proceedings brought by Tamara Alderson no. (2021/00309993) on behalf of herself and Elijah Heafey and Kruz Heafey for the purpose of infant approval determination.

(5) Standover proceedings for damages brought by Elijah Heafey no. (2021/00080437) for the purpose of infant approval determination.

(6) Standover proceedings for damages brought by Kruz Heafey no. (2021/00080442) for the purpose of infant approval determination.

Ratio

His Honour found that the defendant's duty to exercise reasonable care by carrying out adequate inspection of the fire alarms was called into existence because of the foreseeability of the very risk that an alarm might not be operational. In order to satisfy his duty of care, the defendant was not entitled to simply not “bother" to press the test button (which was a standard test) because he assumed the smoke alarms were in operational working condition.

His Honour found that the probability that the harm would occur if reasonable care by inspection of the operational order of the smoke alarms was not undertaken, the very serious risk of harm likely, the minimal burden of taking the precaution of pressing the test button to avoid the risk of harm, and given the prevalence of smoke alarms in domestic premises in February 2019, means that the social utility of failing to take that simple precaution to avoid that significant risk of harm are each clear indicia of the defendant’s breach of duty.

His Honour went on to find, without difficulty, that the defendant's negligence was a necessary condition of the occurrence of the deceased's death.

The defence argued that there was contributory negligence on the part of the deceased, namely, that he was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired at the time of his death.

In dismissing this claim, his Honour found that there was no evidence upon which to find that the cause of the fire was the deceased having fallen asleep or entered a state of sleep whilst food was cooking on the stove top in the kitchen. While the fire investigation evidence did not identify the cause of the fire, his Honour found that there was no evidence that the deceased caused or contributed to the outbreak of the fire and the primary cause of the deceased's death was the nonoperation of the fire alarm in the lounge room.

51. *Duggan v Workers' Compensation Regulator* [2024] ICQ 13

- Davis J, President, decision delivered 7 May 2024

Keywords

Industrial law – workers' compensation – entitlement to compensation – where the appellant worked as a groundsman at a primary school – where the appellant was the subject of two complaints made by a teacher at the school –where the appellant suffered psychological injury as a result of being informed of the complaints – where the Queensland Industrial Commission found the date of injury was the date of diagnosis of injury – where the Commission found the injury was excluded pursuant to s 32(5) of the *Workers' Compensation and Rehabilitation Act* 2003

Facts

The appellant worked as a groundsman at a primary school. In or about October 2018, one of the teachers ("the teacher") made a complaint to the principal regarding comments the appellant had made to her, which she considered inappropriate. The appellant became aware of this complaint when the principal directed him not to approach or speak with the teacher except in an emergency. The appellant heard nothing further about any complaints until 27 June 2019, when the principal alerted him to a second complaint being received. From 27 June 2019, there were various communications between the appellant and the principal regarding the complaints, which included:

- An email from the principal to the appellant on 27 June 2019 advising of the availability of assistance through the Employee Assistance Program.
- Arrangements were made for the principal and the appellant to meet at the "Men's Shed" on 1 July 2019 to discuss the matter, but on 29 June 2019, the principal read the complaints to the appellant.
- On 1 July 2019, the principal emailed the appellant reminding him of the 2018 direction not to speak to or approach the teacher and to be professional towards her.

On 2 July 2019, the appellant consulted a general practitioner who certified him as suffering from a medical condition and as being unfit for work until 19 July 2019. The appellant subsequently applied for workers' compensation, asserting that he suffered a psychological or psychiatric injury as a result of the complaints made by the teacher. WorkCover rejected his application on the basis that any injury was excluded by section 32(5) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("the WCRA").

The Queensland Industrial Relations Commission found the date of injury to be the date of diagnosis of the injury (18 July 2019), and that the appellant's claim was excluded under section 32(5) of the WCRA.

The appellant appealed and argued that the date of injury was 2 July 2019, when his GP certified him as unfit for work. Further, he argued that the cause of the injury was the making of the second complaint, which was an action by the teacher, not the principal. Therefore, it was argued that the injury was not caused by management action by the principal. The respondent argued that the date of injury was 27 July 2019, when the appellant was issued

with a workers' compensation medical certificate. This distinction was important because the principal took management action in relation to the second complaint well after 2 July 2019.

Decision

The appeal is dismissed and there be no order as to costs.

Ratio

Date of injury

The appellant argued that the clinical notes of 2 July 2019 recorded him as "losing the plot," which was said to be synonymous with "suffering the injury" and therefore, the injury occurred no later than 2 July 2019. On 18 July 2019, the appellant consulted another GP, who diagnosed the appellant as depressed, prescribed him Zoloft, and referred him to a psychologist.

The Court observed that while the clinical notes of 2 July 2019 were consistent with upset and distress, they did not evidence a clinically definable psychiatric or psychological injury, unlike the notes of 18 July 2019. Therefore, it was found that the first evidence of a clinically observable psychological or psychiatric injury appeared in the notes of 18 July 2019, and the date of injury was found to be 18 July 2019.

Cause of injury

It was found that as the complaint was made to the principal, who then passed on the details to the appellant, the direct and proximate cause of the injury must have been the appellant learning of the second complaint from the principal. The actions taken by the principal after receipt of the second complaint were found to be unremarkable, and any reasonable interpretation of the email on 1 July 2019 was considered as the appellant being told no more than to maintain the status quo. The Court found that the management action taken by the principal following the second complaint was reasonable and undertaken in a reasonable way. It was found that the principal was required to alert the appellant to the making of the second complaint. He did so promptly and in a place and atmosphere (the Men's Shed) where he could speak confidentially and privately with the appellant.

52. *Xavier (a pseudonym) v Trustees of the Marist Brothers* [2024] ACTSC 141

- Judge: Baker J, decision Delivered: 9 May 2024

Keywords

Civil Law – Practice and Procedure – Application to set aside deed of release – Child sexual abuse – Potentially relevant documents not in the possession of the plaintiff at the time of the agreement – Whether the deed of release is a just and reasonable agreement – Deed of release set aside.

Facts

In 2009, the plaintiff, Claude Xavier (a pseudonym), initiated proceedings against Trustees of the Marist Brothers ("the defendant") seeking damages for psychiatric injuries suffered due to being sexually abused by a teacher while a student at Marist College Canberra between 1989 and 1990. On 26 August 2010, the plaintiff settled with the defendant by way of a Deed of Release for $50,000 inclusive of costs and disbursements ("Deed of Release"). A notice of discontinuance was subsequently filed on behalf of the plaintiff on 18 October 2010. On 6 May 2024, the plaintiff sought new orders by way of an application that the Deed of Release entered into between himself, and the defendant be set aside pursuant to ss 114K and 114L of the *Civil Law (Wrongs) Act 2002* (ACT) ("*Wrongs Act*"). The defendant initially opposed the relief sought by the plaintiff. However, following the plaintiff's submissions on 6 May 2024, the defendant's Counsel advised the Court that it would no longer oppose the relief sought.

Decision

- The deed of release between the Plaintiff and the Defendant dated 26 August 2010 to be set aside; and
- The costs of the application be costs in this cause.

Ratio

The grounds for the plaintiff's application arose from the ACT response to the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[19] The ACT's legislative changes were as follows:

- Limitation period for personal injury resulting from child sexual abuse removed.[20]

[19] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015).
[20] *Limitation Act 1985* (ACT), s 21C.

- Difficulty commencing proceedings against unincorporated bodies, institutions, and property trusts addressed.[21]
- Court empowered to set aside an "abuse settlement agreement" where the Court is satisfied of the matters specified in s 114K(3) of the Wrongs Act.

The plaintiff submitted that he had obtained documents submitted as evidence during the Royal Commission that were potentially relevant to both liability and quantum of damages. Documents which he was not in possession of at the time he entered into the Deed of Release with the defendant.

The basis for the defendant's opposition to the plaintiff's application related to the proper construction of s 114K(3) of the *Wrongs Act*, which provides as follows:

The court may set aside abuse settlement agreement if the court is satisfied that–

> *(a) when the agreement was made there were legal barriers to the person being fully compensated through a legal cause of action; or*
>
> *(b) when the application is made to set aside the agreement, the agreement is, in all the circumstances, not a just and reasonable agreement.*

The defendant referenced the decision of Acting Justice Curtin in the matter of *Walsh (a pseudonym) v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn*[22] in which the following submissions were made regarding the proper construction of s 114K(3):

- Whether the term "legal barriers" in s 114K(3)(a) referred to *actual* or *potential* legal barriers.
- Whether the "or" in s114K(3) should properly be read as an "and". The upshot being that the plaintiff must demonstrate both requirements in 114K(3)(a) and 114K(3)(b).

In *Walsh*, his Honour concluded that the phrase "legal barriers" referred to *any* potential legal barriers, and that the word "or" should be read literally so that either 114K(3)(a) or 114K(3)(b) will suffice to enliven the provision.

In the current matter, the Counsel for the defendant stated that the defendant would be submitting that the decision in *Walsh* was incorrect. However, as the submission was not developed further, her Honour did not need to consider the correctness of his Honour's conclusions in *Walsh* regarding proper construction of s 114K. Her Honour stated that that

[21] *Civil Law (Wrongs Act) 2002* (ACT), ss 114C–114E.
[22] [2024] ACTSC 81 ("*Walsh*").

proper assessment of whether a Deed of Release is “just and reasonable” is to be made at the time the agreement is entered into. The absence of the relevant documents in 2010 impacted the plaintiff’s ability to negotiate an appropriate settlement, making the Deed of Release an agreement which was not a “just and reasonable” agreement in the circumstances. Her Honour concluded it was not necessary to make findings as to why the documents were not in the plaintiff’s possession in 2010.

53. ***Kucinskas v Lane (No 2)*** **[2024] NSWSC 544**

- Elkaim AJ, decision delivered 10 May 2024

Keywords

Damages, intentional torts, child sexual assault

Facts

On 11 April 2024, judgment was given to the plaintiff with damages to be assessed.[23] The defendant had taken no part in this judgment and his trustee in bankruptcy also failed to appear in the defendants' interests.

By way of background, the plaintiff was sexually assaulted by the defendant when she was six and seven years of age. The defendant, who was aged over 40 at the time, was her babysitter. Subsequent to this assault, the plaintiff was sexually abused when she was 12 and 13 years old, there was unlawful touching by a teacher when she was at school, she became involved with drugs and alcohol from a young age and there were suggestions that her previous partner was abusive and manipulative.

Decision

1. Judgment for the plaintiff in the sum of $808,690.
2. The defendant is to pay the plaintiff's costs.
3. The parties have liberty to apply on three days' notice for any variation of the costs order.
4. The judgment is to be served on the defendant and on the trustee in bankruptcy within seven days of the date of these orders.

Ratio

The assessment of damages was not governed by the *Civil Liability Act 2002* (NSW) because the acts of the defendant were those "done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person".[24] Therefore, caps were not applied to non-economic loss and future losses were calculated at a 3% discount rate.

The Judge adopted the approach taken by Chen J in *Van Haren v Van Ryn*[25] for aggravated damages, being that aggravated damages are given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing. However, "as aggravated damages, like compensatory damages, are directed towards injury to feelings, the Court must take care not to "double count"." This is particularly relevant in a case whether the injury relied upon to justify an award of damages is psychiatric, rather than a physical injury. This means that, if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be

[23] Kucinskas v Lane [2024] NSWSC 373.
[24] CLA s 3B(1)(a).
[25] [2023] NSWSC 776.

for the difference justified by this approach; that is, an award of so much as is necessary to bring the damages up to the upper end of the available range".[26]

Similarly to Chen J, the Judge adopted the same approach to exemplary damages, reinforcing that an award of exemplary damages is justified to fulfil the objectives of punishment, deterrence and condemnation, and for the disgraceful and reprehensible sexual abuse of a child.

As such, general damages, including compensatory, aggravated and exemplary damages (to eliminate the risk of overcompensation or double punishment) were assessed at $350,000.00, with 40% attributed to the past. A claim of $140,000.00 was awarded with $44,800.00 for interest.

As to future economic loss, the plaintiff was diagnosed with chronic PTSD, which the Judge accepted was a lifelong condition which would have an ongoing impact on her earning capacity. As such, future economic loss was assessed at $300,000.00, which is an ongoing loss of roughly $300.00 per week.

[26] *Van Haren v Van Ryn* [2023] NSWSC 776 at [128]

54. *Kennedy v Malhotra* [2024] NSWSC 576

- Cavanagh J, delivered on 15 May 2024

Keywords:

Negligence – medical negligence – general practitioner and patient – failure to advise – failure to follow up – causation – loss of chance of a better outcome

Facts

The 42-year-old plaintiff suffered from cervical cancer. She sued her general practitioner (the defendant) in relation to alleged failures to advise or inform her to undertake preventative screening by way of pap smears or cervical screening tests over the period 2014-2019. The plaintiff alleged she was wrongly advised by the defendant that she did not require preventative screening because she was not sexually active. This was in dispute. The plaintiff contended that the scope of the duty of care owed by the defendant involved an obligation on the defendant to be proactive in reminding, urging, and even arranging for the plaintiff to undergo preventative cervical screening. The defendant denied the scope of the duty extended in that manner, but in any event, alleged the defendant did everything that was required and appropriate in raising the issue with the plaintiff. By the time of trial, the plaintiff suffered from incurable cervical cancer which limited her life expectancy.

Decision

Judgment for the defendant.

Ratio

His Honour referred to prior case law (including *Kite v Malycha* (1998) 71 SASR 321 and *Tie v Hatziztavrou* [1999] NSWCA 306) in which courts have accepted the scope of duty owed by a doctor can include an obligation on the doctor to follow up in circumstances in which the doctor was treating the patient for a potentially serious health problem that was known or suspected by the doctor. The distinguishing factor here was that the case involved a failure to provide advice about preventative screening and the plaintiff did not present with symptoms at any time until it was too late. In determining whether a GP might be required to follow up a patient, repeat advice or make further recommendations, His Honour identified this will depend on the particular doctor/patient relationship, having regard to a number of factors including:

- Whether the doctor is the patient's regular GP, or the patient consults the doctor generally on a range of health issues;
- Whether it should be apparent to the doctor that the patient is seeing the doctor for specific women's health issues;
- Whether there is something about the patient that would suggest to the doctor the patient may be symptomatic or vulnerable, or the patient may not have understood advice or demonstrated an unwillingness to follow the advice;
- Whether there is a standard, guideline or accepted medical practice which suggests that certain advice should be communicated in a particular way or followed up;
- What information is provided to the doctor by the patient in terms of what the patient had done or intended doing or did not want to do.

His Honour ultimately preferred the evidence of the defendant that appropriate advice about preventative screening was given, as this was consistent with the defendant's extensive contemporaneous records and the plausibility of what actually transpired. Even if a breach of duty had been established, causation was not proven because the plaintiff had a history of not following advice by the defendant, providing the defendant with incorrect information and the plaintiff's failure to action a previous referral for a cervical screening test by the defendant.

TRAVIS
SCHULTZ
& PARTNERS

55. *Lewis v Martin & Ors* [2024] QSC 81

- Sullivan J, decision delivered 17 May 2024

Keywords

Procedure – Civil Proceedings – where first and third defendant sought to strike out and disallow amendments contained in amended Statement of Claim

Facts

The Plaintiff is a former patient of the first defendant (a general surgeon) and the third defendant is a public hospital where the Plaintiff received medical care and at which surgery was undertaken by the first Defendant.

The Plaintiff filed a Statement of Claim generally alleging a failure to act upon and investigate signs and symptoms of an infection, (oesophageal perforation) in a timely manner and failing to consult a cardiothoracic surgeon upon recognition of oesophageal perforation, mediastinal collection and bilateral pleural effusions and a failure to transfer the Plaintiff's care to a cardiothoracic surgeon upon recognition of those conditions.

The Statement of Claim was amended to include allegations: -

(i) Failing to recognise that the mediastinal collection, by virtue of both its size and location, was such that it required drainage via thoracotomy at first instance;

(ii) Failing to warn, inform, and/or advise the Plaintiff and/or the Plaintiff's husband as her nominated decision maker, of the treatment options available for mediastinal collection, namely early/primary thoracotomy and the risk associated with such treatment options.

Four applications were made generally to strike out these paragraphs of the Plaintiff's amended Statement of Claim and cross-applications by the Plaintiff for leave to amend. The issues were:-

(i) Whether or not the amendments were a new cause of action arising out of facts already pleaded in respect of the unobjected to causes of action; and

(ii) If the first issue is answered affirmatively, whether it is appropriate for the Court to exercise its discretion to allow the amendments.

The Plaintiff accepted that the failure to warn amendments give rise to new causes of action, but submitted that the amendments are of facts which arise substantially out of the facts already pleaded in support of an existing cause of action.

Decision

Application of the first and third defendant be dismissed, and Plaintiff given leave to make amendments.

Ratio

The causation counterfactual does not materially change. The unobjected to pleading is premised on the fact that the alternative surgery should have been undertaken instead of the second surgery. The unobjected counterfactual is that the collection would have healed in a timely manner and the complications from the second surgery would have been avoided.

The new objected to facts operate on the same counterfactual.

56. *Gomez v Woolworths Group Limited* [2024] NSWCA 121

- Bell CJ, Gleeson JA, and Adamson JA decision delivered 21 May 2024

Keywords

Slip and fall, supermarket, periodic inspection, failure to implement systems, reasonable precaution, factual causation.

Facts

The appellant suffered personal injury following a slip and fall incident at 5.11 pm at the respondent's store, due to slipping on a piece of fruit which had been dropped on the floor of the store entrance.

Primary Court Findings

The respondent conceded it owed a duty of care to the appellant and admitted that a customer had dropped the piece of fruit at approximately 5:02pm. However, argued that it had reasonable inspection and cleaning systems in place at the time of the incident, including:

- The "sweep log" conducted three times a day;
- The "clean as you go" system; and
- The "service zero" system of hourly calls for inspection and cleaning.

The primary judge found that the respondent had breached its duty of care by failing to conduct the "service zero" inspection at 5:00pm as well as by the additional failure of the respondent to ensure the hourly "service zero" system included the front of store area. However, it was held the breaches were not causative of the appellant's injuries, because the fruit was dropped at 5:02pm, after the scheduled inspection. It was further rejected by the primary judge that employees of the respondent (Mr Cheong, the coffee-counter person, and "Stanley") should reasonably have seen the piece of fruit between the time it was dropped and the time the appellant slipped.

Appeal Issues

The Appellant challenged the primary judge's findings on two main grounds:

- Whether the primary judge erred in not finding additional breaches occurred due to two employees failing to identify and remove the fruit between 5:02pm and 5:11pm under the “clean as you go” system; and
- Whether the primary judge erred in failing to find that the breaches of duty caused the appellants injuries.

Decision

(1) Appeal dismissed.

(2) Appellant to pay the respondent’s costs.

Ratio

The Court of Appeal agreed the respondent had reasonable systems of inspection and cleaning, including the “service zero” hourly inspections and the “clean as you go” policy. The Court also found that the primary judge was correct in not finding additional breaches, as Mr Cheong was off duty at the time, Stanley was not responsible for the front of the store area, and there was no evidence as to the field of sight and quality of sight at the time of the accident for the coffee-counter employee. As such, it was considered there was no failure in their duties under the “clean as you go” system.

The Court further agreed with the primary judge that while the respondent failed to conduct the scheduled 5:00pm “service zero” inspection, this breach did not necessarily translate into a failure to detect the hazard that caused the appellants fall, as the fruit was dropped at 5:02pm, after any “service zero” inspection was to occur. As such, the breach did not cause the injury.

57. *Karzi v Toll Pty Ltd* [2024] NSWCA 120

- Leeming JA, Adamson JA and Basten AJA, decision delivered 22 May 2024

Keywords

Negligence – duty of care – foreseeability – risk of psychiatric harm to employee – where employee was verbally harassed by co-workers - where the employee made complaint to employer and employer took reasonable steps to address risk of psychiatric harm – where employee did not indicate to employer that psychiatric harm was being suffered - causation

Facts

Mohd Karzi (the Appellant) was employed as a dockhand by Toll Pty Ltd (the Respondent) at their depot in Erskineville. Between September 2014 and January 2015, he was subjected to offensive and racist remarks by another employee of the Respondent, Joseph Johnpulle. The relevant events occurred as follows:

- Between September 2014 and 7 January 2014, Mr Johnpulle made repeated unwanted remarks to the Appellant in relation to Al Qaeda and the Taliban. The Appellant initially told Mr Johnpulle that the comments were offensive and unwelcome and asked him to not talk to him about it. When the remarks continued, the Appellant reported Mr Johnpulle's beahviour to his team leader (Mr Fath) in early November 2014 and subsequently to the Operations Manager (Mr Hewlett) on 7 January 2015.
- Mr Hewlett spoke to both the Appellant and Mr Johnpulle and asked them to put their positions in writing. Mr Hewlett then liaised with the Respondent's Human Resources department and investigated Mr Johnpulle's conduct. On 16 January 2015, the Respondent wrote a 'show cause' letter to Mr Johnpulle and subsequently dismissed him on 9 February 2015.
- On 17 February 2015, members of the Transport Workers' Union (**TWU**) protested about the Appellant's presence at the Erskineville depot, claiming he was a risk to their health and safety. The Respondent gave evidence that the TWU was prohibited from taking industrial action in response to the dismissal of one of its members (Mr Johnpulle), and therefore chose to protest in a way that made it appear legitimate. The Respondent could not order the TWU not to take action, so it referred the matter to the Fair Work Commission.
- In Mid-February 2015, the Respondent transferred the Appellant to work in its Mascot depot. A position was created for the Appellant.

- On 16 March 2015, the Appellant was transferred back to the Erskineville depot, but the TWU reiterated its complaints against the Appellant. The Appellant was subsequently moved into a different team within the Erskineville depot.
- From April 2015, the Appellant continued to work in the alternative team within the Erskineville depot without complaint or time off until he injured his lower back on 9 November 2015 and stopped work entirely.
- On 21 November 2015, the Appellant lodged a workers' compensation claim for a psychiatric injury.

The Appellant initially commenced proceedings in the District Court of NSW seeking damages on the basis that the Respondent owed him a duty of care to protect him from the risk caused by the conduct of his colleague and had breached that duty of care. The primary judge rejected the Appellant's claim and found that (1) the Respondent owed a duty of care to its employees; (2) the risk of harm that an employee might suffer a psychological condition was not reasonably foreseeable; (3) the Respondent was not in breach of the duty of care which it owed the Appellant.

The Appellant appealed, challenging a number of the primary judge's findings. The key issues on appeal included that the risk of psychiatric harm was not reasonably foreseeable and that the Respondent had not breached its duty of care to the Appellant.

Decision

Appellant's claim was unanimously dismissed.

Ratio

Adamson JA opined that there was nothing in the nature and extent of the Appellant's work itself that gave rise to a risk of psychiatric harm. Accordingly, in line with *Koehler v Cerebos (Australia) Pty Ltd* (2005) 222 CLR 44, her honour stated that whether the Respondent ought to have foreseen that the Appellant would suffer psychiatric harm depended on whether the Appellant gave any indication of this effect. Adamson JA stated that the primary judge was correct to find that in circumstances where the Appellant did not complain, or exhibit any signs, of psychological harm, that it was not reasonably foreseeable there was a risk of psychological harm.

Basten AJA found differently in relation to whether there was a foreseeable risk of psychological harm. His Honour stated that the primary judge should have inferred that that

the Respondent took the steps that it did (relocating the Appellant and disciplinary action against Mr Johnpulle) to avoid a risk of harm which its officers were self-evidently aware.

However, the Court of Appeal was unanimous in its opinion that the evidence demonstrated that the Respondent did not breach its duty of care to the Appellant. The Court of Appeal explained that the Respondent acted reasonably by dismissing Mr Johnpulle and referring the issue with the TWU to mediation in an expeditious manner. Accordingly, the Appeallant's appeal was dismissed.

58. Stewart v Metro North Hospital & Health Service (No 2) [2024] QSC 95

- Cooper J, decision delivered 22 May 2024

Keywords

procedure – civil proceedings in state and territory courts – costs – offers of compromise, payments into court and settlements – offer of compromise or offer to settle or consent to judgment pursuant to rules – what constitutes valid offer

Facts

This was a determination of appropriate costs orders. Judgement for the Plaintiff was given in the substantive proceedings in the sum of $2,190,505.48 before funds management fees.

The Defendant had made a UCPR offer for $3,000,000.00 plus "the Plaintiff's reasonable fund management and administration fees to be agreed following resolution of primary damages".

The Plaintiff argued that the UCPR offer did not comply with the requirements of the rule, so that the Plaintiff ought not be ordered to pay the Defendant's costs from the date of the offer.

The Plaintiff had also made a UCPR offer, in similar terms. The Plaintiff sought the Court exercise its discretion under rule 681 for a costs order in the Plaintiff's favour.

Decision

The Defendant's UCPR offer failed to comply with the rules and the Court exercised its discretion to make no order as to costs from the date of the UCPR offer.

Ratio

An offer under rule 353 of the UCPR may offer to settle a particular cause of action among several in a proceeding, or one of several elements of the relief claimed. However, a UCPR offer will not be compliant under rule 353 if it seeks to offer to settle part of a cause of action or part of a claim for relief.

The Plaintiff's cause of action was in negligence. The Plaintiff claimed three forms of relief: (i) damages for personal injury arising from the negligence; (ii) interest; and (iii) costs. The Plaintiff's entitlement to damages in respect of fund management and administration fees arose from the cause of action in negligence. Such damages are but one head of damage of the overall damages claimed as a relief. Thus, the Defendant's offer only offered to settle part of the Plaintiff's cause of action for negligence, as it only offered to settle part of the damages claimed. Acceptance of the offer would still have left one part of the heads of damages to be

agreed. As such, the Defendant's offer was not an offer pursuant to rule 353 and did not enliven the costs consequences under rule 361.

In relation to the Court's discretion, the Court considered the success of the parties by reference to *units of litigation*, or success on certain issues, being: (i) life expectancy; (ii) whether damages should have been awarded that the Plaintiff would reside in his own home or in a care facility; and (iii) the overall assessment of damages. The Plaintiff succeeded on the life expectancy issue and had greater success overall on damages based on the pleadings. The Defendant succeeded on the second issue, which had a material contribution to the award of damages. The Court considered therefore that each of the parties successes were about 50% of the costs of trial. On this basis, costs cancelled out and no order for costs was made after the date of the Defendant's UCPR offer.

59. *Comensoli & Trustees of the Christian Brothers v WQA (a pseudonym)* [2024] VSCA 104

- Beach, Kennedy and Walker JJA - delivered 23 May 2024

Keywords

Damages – personal injuries damages – matters to be considered in reduction of damages – disability support pension payments – New Start Allowance payments – "preclusion period" – whether payments made outside preclusion period required to be taken into account in assessment of common law damages – cardinal principle that injured person cannot recover more than has been lost.

Facts

The respondent had commenced a proceeding claiming damages for injuries alleged to have been suffered as a result of sexual abuse that took place between 1959 and 1961 with the claim including a claim for damages for past loss of earnings from January 1964 until October 2015 (the date on which he would have commenced employment and the date on which he would have reached retirement age).

The matter settled subject to the question of whether certain social security payments (the disputed amount) received by the respondent, between 1997 and 2015, should be deducted from the settlement sum agreed by the parties. The appellant's contention was that social security payments paid to the respondent, which were not repayable by him, should be taken into account in calculation of the respondent's damages for past economic loss and thus deducted from the settlement sum. The respondent's position was that notwithstanding those payments were not repayable he was entitled to retain them and the whole settlement sum was therefore payable to him by the appellant.

At the time of settlement, the parties had agreed the disputed amount may be the subject of recovery provisions under the *Social Security Act*, with it also being agreed that under the repayment formula contained in the Act there would be no liability to repay any part of the disputed amount. The authority confirmed that to be the case, resulting in the application being brought.

At first instance the Trial Judge determined those payments, which were amounts paid to the respondent past the preclusion period, should not be taken into account in the calculation of damages for past economic loss and as such the disputed amount was payable to the respondent.

The appellant appealed that determination.

Decision

Appeal dismissed.

Ratio

The court considered the settled principle that the injured party, in a claim in tort, should receive compensation in a sum which, so far as money can do, would put that party in a

position as he or she would have been if the tort had not been committed. Accordingly, the injured party cannot recover more than he or she has lost.

The application of the principle was considered to suggest that payments made to an injured plaintiff which were paid for a condition that resulted from the claimed injuries, should be taken into account in the assessment of the plaintiff's damages, otherwise the plaintiff would be "double dipping".

The court however also identified there are particular types of payment which might be made to injured person in respect of their injury claims and which are not to be taken into account later in the assessment of damages, such payments (including benefits paid under an insurance policy, and amounts raised by families and friends) being considered to have the "distinguishing characteristic" of being conferred on a plaintiff independently of the existence of any right to damages.

The court considered therefore to resolve the issue in dispute between the parties it was necessary to examine the relevant provisions pursuant to which the respondent received the social security payments paid to him.

The court identified the relevant provision of the legislation has the effect that the appellant's lump sum preclusion period began on the day on which his loss of earnings or loss of earning capacity began and ended at the number of weeks worked out using the relevant formula. In this instance the respondent's lump sum preclusion period ended before he received any of the payments making up the disputed amount.

The court confirmed from the Trial Judge's observations that there was no dispute that any compensation affected payments made during the preclusion period were to be ignored in the assessment of damages for loss of earning capacity. The court also noted the Trial Judge's comments that the calculation of the preclusion period necessarily takes place after damages have been assessed, indicating an intention that damages should be capable of being assessed without first having to consider what the preclusion period would be.

The Trial Judge had identified a clear intention in the legislation to remove the benefit that a wrongdoer would otherwise obtain from the provision of the Commonwealth of certain social security payments such as unemployment benefits to the injured party. The court identified that the majority of cases where the factual circumstance created the issue, were likely to be cases where compensation affected payments had been made through the preclusion period and then continued beyond the end of that period, and that it was really only the abolition of the limitation defence in cases of the present kind that gave rise to a small cohort of cases where the preclusion period ends before the compensation affected payment is made.

In rejecting the appellant's argument that the disputed amount should be deducted the court identified that to do so would create a smaller settlement sum, which would then reduce the preclusion period, which would then result in a further reduction of a lump sum compensation payment creating a further reduction in the preclusion period and so on.

Whilst the court accepted the cardinal principle governing the assessment of compensatory damages that an injured party cannot recover more than he or she has lost the authorities also demonstrate that, if it can be established, in the case of statutory benefits, there was a legislative intention that such benefits be enjoyed independently of and cumulatively upon the right of damages, that a plaintiff, by the receipt of such benefits, may permissibly be compensated for more than he or she has lost.

60. *Forostenko v Springfree Trampoline Australia Pty Ltd* [2024] QSC 1

- Hindman J, decision delivered 28 May 2024

Keywords

S138 of the Australian Consumer Law, safety defect, causation, consumer law, liability, quantum

Facts

The plaintiff alleged to have suffered a foot injury while jumping on a Springfree Trampoline on 25 December 2017. The plaintiff, who purported to be an avid trampoline user, suffered the injury when his right foot 'came down near the edge of the mat, on the webbing, where a cleat was installed underneath'. The plaintiff alleged he landed on a 'cleat' under the webbing of the mat. The plaintiff suffered what is commonly referred to as a 'dancer's fracture'.

Liability and quantum were in issue.

The plaintiff brought an action pursuant to section 138 of the *Australian Consumer Law* ("ACL") (safety defect) and an action in negligence. The defendant denied liability for both causes of action. Quantum was also in issue, the plaintiff made a claim to damages in the amount of $3.92 million, and the defendant contended the claim was no greater than $160,000.

Decision

- Judgment for the plaintiff against the defendant in the amount of $744,175.
- The parties were to make any written submissions on costs within 14 days.

Ratio

Her Honour held the following:-

1. The trampoline did suffer from a safety defect as defined by section 9 of the ACL. The presence of the cleat under the mat along with the lack of warning about the fact, together can be held to be 'a matter in which users were entitled to expect would be drawn to their attention.' Her Honour considered the relevant principles of *Robinson Helicopter Co v McDermott* [2016] HCA 22 in that a product may be defective in the absence of a proper warning. Her Honour concluded that a warning to the effect of what may happen if a user weighing more than 60kg is to land on the mats above the cleats on the edge of the trampoline should have been included. Her Honour concluded

that including a warning about the risk of ‘foot inversion’ on the edges of the trampoline mat’ would have been sufficient to rectify the safety defect.

2. The safety defect caused the plaintiff to suffer an injury in respect of which loss and damage was sustained. Causation was established on the basis that there was no discernible evidence to conclude that had a warning been present, the plaintiff would not have read it, as was submitted by the Defendant. Her Honour also gave little weight to the Defendant’s submission that the Plaintiff’s jump was accidental and therefore a safety warning would not have prevented the injury. She instead concluded that the place on the mat where he landed, intentional or unintentional was ‘simply not the point’.
3. The plaintiff was entitled to compensation pursuant to section 138 of the ACL;
4. The claim in negligence also succeeded on the same basis
5. The assessed amount of compensation was $744,175.00.
6. In regards to quantum, Her Honour concluded that whilst the plaintiff has suffered a serious foot injury, he was ‘prone to exaggerate’.

61. *BYM v. Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (No 2)* [2024] QSC 106

- Williams J, decision delivered 30 May 2024,

Keywords

torts – vicarious liability – non-delegable duty – negligence – allegations of child sexual abuse on school grounds – where the plaintiff claims damages for psychiatric injury from an alleged assault on the basis of vicarious liability and/or negligence – where the alleged assault constitutes a serious criminal offence against a child – whether the assault occurred as alleged – whether the defendant is at law vicariously liable for the conduct of alleged perpetrator – whether the alleged perpetrator was acting in the course of his employment – whether the assault, if found to

Facts

The plaintiff alleged, in 1999 (when she was approximately eight years old) that she was sexually assaulted by another child in the female toilets of the school she was attending. The facts of the case, of which much has been redacted, suggest that it was a cleaner or other employee of the school that entered the cubicle in which the plaintiff was going to the toilet before sexually assaulting her. The plaintiff did not tell anyone of the assault. The plaintiff continued schooling, and into high school due to some bullying she commenced home schooling halfway through Grade 9 and completed Grade 10.

When she was in her late teens her mother suggested she see a counsellor because she says her anxiety and depression were pretty bad. When she first saw a doctor she did not discuss the incident that occurred in 1999. The doctor she saw had been her GP since she was an infant, and she ultimately saw a psychologist in 2013. She had discussions with her about having anxiety and depression. She did not tell the psychologist about the incident in 1999.

She saw a different psychologist in 2014/2015, but did not tell that psychologist about the incident of 1999. She eventually told her mother what happened when they were having an argument, and that her mother wanted her to go to the police, but she did go and see her family GP and was referred to a further psychologist (Ms Martin). The plaintiff had apparently told Ms Martin partially about what happened in 1999.

The plaintiff underwent some studies in education through TAFE, and her evidence was that she wanted to be a Teacher's Aide, and she eventually obtained casual Teacher's Aide work with a State School in about 2019. In 2020 she enrolled in a Bachelor of Arts but did not continue with that.

Evidence in support of the plaintiff's claim was given by her family members, including her father, her mother and brother. The defendant in the matter maintained a view that the assault

did not occur. The alleged perpetrator gave evidence in the matter, as did other staff members of the school and the students from the school in 1999. The alleged perpetrator was a groundsman, not a cleaner, and said that should he have the need to enter toilets he would engage another staff member to go in and check that there were no persons in them. He said that may have happened twice in 20 years.

There was other evidence called by the school to support the fact that the alleged perpetrator was seen doing groundsman work. The defendants argued that the plaintiff was prepared to be misleading or untruthful when it suits her, and pointed to the fact that she withheld information from her own female general practitioner and psychiatric treaters (Ms Howie, Dr Quinn and Ms Martin). The defendant said that the disclosure of the assault to Ms Martin by the plaintiff was inconsistent with the evidence she gave at trial (and at trial went into great detail about what happened).

A significant portion of the judgment delves into the specifics of the evidence given by the plaintiff, with the defendant ultimately submitting that the plaintiff's … evidence is "riddled with inconsistencies and incredulity, let alone being physically impossible".

Decision

1. The plaintiff's claim is dismissed.
2. The parties be heard further in relation to costs.
3. The parties are provided with a confidential not to be published version of the Reasons and after agreeing a schedule identifying any further information to be redacted in a version of the Reasons to be published, to be emailed to the Associate of Williams J, by 13 June 2024.

Ratio

The judge, in giving further consideration to the matter and conclusion said that:-

"Given the particular nature of this case, for the plaintiff to succeed on the claim, the plaintiff's evidence must not only be accepted as to the alleged assault, but it also must provide the necessary level of persuasion to meet the threshold in authorities previously discussed."

The judge pointed out that the plaintiff had lied in respect to statements made to psychologists, she exaggerated statements made to psychologists, and that those lies and exaggerations suited her at the time. She admitted that she didn't fully disclose the alleged assault despite having a full memory and giving a partial disclosure to Ms Martin. The plaintiff had made no disclosure of the assault in 1992 until the partial disclosure to Ms Martin (the psychologist) in 2017. The first real full disclosure by the plaintiff was not made until she did so in her Notice of Claim in August 2019.

The plaintiff's evidence at trial was very detailed, and given in a chronological sequence despite occurring some 24 years ago when the plaintiff was nine years of age. The judge noted that there were issues that impacted on the probability of the plaintiff's account, including how easy it was or wasn't to unlock the toilet doors from the outside, her absence from class for a period of time where the teacher had said for her to be quick in going to the toilet, where the assault would have included penile penetration and the effects that would have had on a nine year old child at that time, with all these factors impacting on the plaintiff's ability to prove on the balance of probabilities, taking into account the seriousness of the alleged assault (the court referred to the fire burden under the Briggenshaw test) which were in effect serious criminal acts being committed and the ability to cause the court to feel persuaded of the occurrence of the assault.

The judge noted other hurdles for the plaintiff, including having to find that the alleged perpetrator in giving evidence, intentionally have false evidence, the judge said that there was "… no basis to make a finding that CD was dishonest and/or intentionally lying. I do not make any such findings." The judge found the alleged perpetrator to have been honest, credible and gave reliable evidence despite the intervening 24 years. The judge accepted the evidence that the doors were not easily unlocked from the outside, preferring the fact that teachers would often have to send students under the doors so as to unlock them from the inside if they had been locked beforehand by a student.

The court accepted evidence of the defendant's witnesses supporting a finding that "… management of this school was proactive and "hands on"." The court found the teaching staff caring and supportive. The judge noted that the allegation of penile penetration was a significant part of the alleged assault, and the probability of it occurring was diminished by the suggestion that it could be hidden from the plaintiff's mother and a teacher where such would have had a "… significant affect on the plaintiff physically, mentally and emotionally."

The judge concluded that the plaintiff had lied and exaggerated her evidence. It had been the efflux of time, the fact that the alleged perpetrator was accepted as a witness of truth denying the assault and various factors making the alleged assault more improbable and unlikely, combined with the inconsistencies of the plaintiff's account of the alleged assault as if the plaintiff has not proved on the balance of probabilities that the assault occurred, taking into account particularly the seriousness of the allegations.

On the issue of vicarious liability the judge noted "… an employer will be liable for authorised acts as well as unauthorized acts that are "so connected" with authorised acts that they are in effect "modes" of doing them." The judge noted that if the assault had occurred, the defendant could be vicariously liable if the plaintiff had established that the perpetrator was acting in the course of his employment and placed in a position of "authority, power and trust" to the extent that he was able to achieve a degree of intimacy with the plaintiff.

With respect to the third issue for determination, the plaintiff contended that the work undertake by the alleged perpetrator included work in the children's toilet. The court was

satisfied that the alleged defendants role was that of a groundsman, not as a cleaner. The judge held that in the course of his employment he was not in a position of intimacy with students. If the alleged assault was found to have occurred the evidence did not satisfy that the alleged perpetrator was acting in the course of his employment and as such was placed in a position of "authority, power and trust … such that he was able to achieve a substantial degree of intimacy" with the plaintiff with the alleged assault.

The judge concluded that:-

"Consequently, if the alleged assault is found to have occurred, the defendant would not be vicariously liable for the alleged assault."

62. *Watt v Redman* [2024] NSWSC 638

- Garling J, delivered 31 May 2024

Keywords

Torts – trespass to the person – battery – sexual assault – aggravated and exemplary damages

Facts

The plaintiff commenced a claim for damages arising out of the historical child sexual abuse perpetrated by her brother ("the defendant").

In her adult years, the plaintiff made a formal report to police and the defendant subsequently pled guilty to several charges involving abuse to the plaintiff. He was sentenced to 7 ½ years of imprisonment.

As an adult, the plaintiff was diagnosed with post-traumatic stress disorder and her work capacity was impaired as she did not want to work while she raised her children due to the fears that something would happen to her children.

Decision

Judgment for the plaintiff.

Ratio

The plaintiff was awarded damages including aggravated damages.

The Judge was satisfied that a claim for aggravated damages in the sum of $50,000.00 was reasonable due to the "egregious" and "callous" conduct of the defendant. The abuse occurred to the plaintiff when she was young and vulnerable, and in her home where she was entitled to feel safe.

The plaintiff's claim for exemplary damages was unsuccessful. Prior to this proceeding, the defendant had been convicted for his offences against the plaintiff and was currently serving a substantial sentence of imprisonment. Counsel for the plaintiff accepted that punitive measures had already been imposed through the criminal justice system. As a result, the Court did not make an award for exemplary damages.

63. Muller v. Mt Arthur Coal Pty Ltd [2024] NSWSC 677

Harrison ASJ, delivered on 3 June 2024

Facts

The plaintiff alleged she suffered psychiatric injuries as a result of being bullied and harassed by co-workers in the course of her employment at various times in 2015 and 2016. During the relevant periods the plaintiff was employed at separate times by Mt Arthur (who was also the owner and occupier of Mt Arthur Mines, and TESA and Chandler who were labour hire companies). The plaintiff ceased work in August 2016 because of her injuries.

The plaintiff sought leave to proceed against all defendants on the basis that the time for commencing proceedings was suspended by reason of her disability and that her claim was not discoverable until April 2021. The Limitation Act 1969 (NSW) provides for a three year limitation period which commences from the date on which the cause of action first accrues. Additionally, a cause of action can be commenced within three years after the date on which the cause of action is discoverable by the plaintiff, which requires consideration of when the plaintiff knew, or ought to have known, of the fact an injury had occurred or the injury was caused by the defendant, or the injury was sufficiently serious to justify the bringing of the action. However, under that Act a cause of action can be suspended for the period the plaintiff is under a disability which relates to a period of 28 days or more where the plaintiff is incapable of, or substantially impeded in, the management of their affairs in relation to the cause of action.

Between 2016 and 2018 the plaintiff engaged Shine Lawyers, during which time she had one teleconference with them and was informed she had a good case. The plaintiff said she did not act on that advice because of her psychiatric incapacity and then later engaged Carroll & O'Dea Lawyers between February 2019 and 30 July 2019. The plaintiff was again initially informed she had a good case but following a teleconference with a barrister on 30 July 2019 she was advised her prospects were poor. The plaintiff gave evidence that she took a Valium to cope during that teleconference and afterwards signed an election not to proceed with common law proceedings and confirming she was aware her limitation period was expiring two days later on 2 August 2019. The plaintiff subsequently engaged RMB Lawyers who initially assisted her with legal issues following a relationship breakdown which transitioned to advice given in respect of the current proceedings.

Decision

The plaintiff was granted an extension of time to commence proceedings against all defendants.

Ratio

His Honour found the initial legal advice given by Shine Lawyers was incomplete and the plaintiff was unable to comprehend the advice she was given during the conference with Carroll & O'Dea on 29 July 2019 because she lacked capacity as a consequence of her

psychiatric injury. In any event, His Honour found that up until the plaintiff engaged her current solicitors, she was incapable of managing her affairs in relation to the cause of action in that she was unable to consider legal advice and give instructions by reason of her psychological injury.

The next issue for consideration was whether the cause of action was discoverable prior to April 2021. In this regard His Honour accepted the injury was known as early as September 2016, but it was not until she was advised by her current lawyers in May 2021 that she first became aware the injury was sufficiently serious to justify bringing the action, particularly given the conflicting advice she had previously been given about her prospects.

His Honour otherwise accepted the plaintiff's psychiatric injury provided a satisfactory basis for the delay of some two years and ten months in bringing the cause of action after the limitation period had expired.

The defendants' argument about prejudice in the event the application was granted were dismissed as His Honour found that while there was some presumptive prejudice it did not amount to actual or significant prejudice because there was sufficient documentary evidence (including witness statements, contemporaneous documents, policies and procedures and investigation documents) that would allow a fair trial to proceed.

64. ***Al Haje v Elassaad*** **[2024] NSWSC 689**

- Elkaim AJ, delivered 6 June 2024

Keywords

Personal injuries – intentional tort – common law damages – aggravated and exemplary damages – s 3B(1) *Civil Liability Act* – intent to cause injury - self defence

Facts

The defendant had a history with the plaintiff prior to the incident on 24 January 2021, where the defendant assaulted the plaintiff which is the subject of this claim. On the day of the incident, the defendant attended on the plaintiff's property, making threatening remarks, and ultimately striking the plaintiff twice. The defendant does not deny the assault occurred, rather argues that he was acting in self defence.

There was CCTV footage on the day of the incident however the CCTV footage only captured the interactions outside the home. The assault happened inside the home.

Decision

Judgment for the plaintiff.

Ratio

In relation to the CCTV footage, the trial judge found the CCTV footage shows the defendant's actions outside the home are a continuation of the aggressive behaviour of the defendant and as a result, preferred the evidence by the plaintiff. Further, the trial judge rejected the self defence argument raised by the defendant given the defendant did have ample opportunity to leave the property but continued his aggressive behaviour towards the plaintiff and his father.

The trial judge also found the actions of the defendant were regarded as having the intention to cause harm against the plaintiff, and without a finding of self-defence, the defendant's intentional actions enlivened s 3B(1) of the *Civil Liability Act*, and damages were awarded at common law.

The trial judge also considered *Zrieika*[27] to make an allowance for both exemplary damages and aggravated damages. Given the principles in *Zrieika,* the trial judge made a combined allowance for both heads of damage to avoid an overcompensation to the plaintiff and double punishment against the defendant.

[27] *State of New South Wales v Zreika* [2012] NSWCA 37.

65. *WorkCover Queensland v Perkins* (District Court of Queensland, Jarro J, 11 June 2024)

Key Words

Workers Compensation and Rehabilitation Act – Compulsory Conference – Compliance – Liability Response – Statutory Interpretation

Facts

The claimant suffered physical injuries at work on 23 February 2023 for which she had an accepted WorkCover claim and had commenced a damages claim. Separately, the claimant suffered psychiatric injuries as a result of a work related event on 13 March 2023 for which there was an ongoing WorkCover statutory claim but for which she anticipated pursuing a damages claim once she had an entitlement to do so.

On 30 January 2024 a Notice of Claim for Damages was served upon WorkCover with respect to the first event. On 2 February 2024 WorkCover delivered a s 278 response stating the Notice of Claim was non-compliant and proposing a compulsory conference for 19 February 2024. Then, on 7 February 2024 WorkCover issued a s 281 response denying liability despite not having attended to any disclosure and reiterating the Notice of Claim remained non-complaint. WorkCover again requested a compulsory conference on 19 February 2024. Subsequently, compliance was confirmed from 4 March 2024 and on 15 March 2024 WorkCover attended to substantial disclosure which comprised some 1200 pages.

WorkCover filed an Application to fix a date for the compulsory conference for the first event to 24 June 2024. WorkCover's contention was that the parties were required to convene a compulsory conference by 7 May 2024 because the s 281 response was delivered on 7 February 2024. The claimant resisted the Application on the basis the s 281 response was premature and invalid and that any compulsory conference for the first event ought to be deferred until the second event had caught up with it.

Decision

WorkCover's Application was dismissed with costs to follow the event.

Ratio

His Honour accepted the claimant's submissions that the s 281 response delivered by WorkCover on 7 February 2024 was premature and invalid because at that time WorkCover was still complaining that the Notice of Claim was not compliant, the s 281 response was not accompanied by all other material in WorkCover's possession that may help the claimant to properly assess the offer and it was issued before WorkCover had provided any disclosure (specifically the disclosure of 1200 pages of documentation) to the claimant.

His Honour additionally held that the Application ought to fail because the Orders sought by WorkCover were inconsistent with the objects of the Act and the overriding obligations of the

parties regarding the pre-court procedures as set out in ss 273 and 274 of the *Workers Compensation and Rehabilitation Act*.

66. *Wood v Safe Places Community Services Ltd* [2024] QDC 92

- Coker DCJ, decision delivered 14 June 2024

Keywords

Limitation of actions – extension or postponement of limitation periods – personal injury claim – knowledge of material facts of a decisive character.

Facts

The applicant claimed for psychological injuries as a result of various events she alleged occurred during the course of her employment with the respondent as care worker, specifically incidents on 15 May 2018, on or about 10 July 2018, in or about late January/early February 2019, on 2 September 2019 and various other incidents which occurred between 15 May 2018 and 15 September 2019.

The applicant lodged an application for compensation with WorkCover Queensland on 30 September 2019 which, following delay, was accepted by WorkCover on 21 May 2020.

The applicant ceased employment with the respondent shortly thereafter and subsequently worked in other roles between roughly late 2019 and late 2021 when she was admitted to hospital for psychiatric in patient treatment. Whilst admitted to hospital, the applicant was advised by her treating psychiatrist not to return to her most recent employment as a disability employment consultant. The applicant's evidence (which was supported by the facts) was that she had never contemplated not being able to return to full-time work until that time.

The applicant was further admitted for psychiatric inpatient treatment for a month in February/March 2022 and it was again emphasised to her that she would be unable to work in the future.

The applicant has not worked since her first psychiatric inpatient treatment in November 2021 and applied for an extension of her limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 (Queensland) (the "LAA") to 22 November 2022, that date being twelve months after the date her mental health deteriorated, necessitating the first inpatient psychiatric hospitalization.

Decision

1. Limitation period for the applicant to bring a claim for damages for personal injuries against the respondent be extended to expire on 22 November 2022; and
2. The applicant's cost of the application be reserved to the final determination of the proceedings.

Ratio

The matter involved a consideration of the interpretation outlined within s 30 (1) (b) and 30 (2) of the LAA. The court referred to those factors identified by His Honour Crow J in *Ferrier -v- WorkCover Queensland* [2019] QSC 11 to extend a limitation period pursuant to S 31 of the LAA, specifically that the applicant bears the onus of showing:-

(a) That a material fact;
(b) Of a decisive character;
(c) Was not within his or her means of knowledge until a date no more than twelve months prior to the date to which the extension is granted;
(d) There is evidence to establish a right of action; and
(e) That no prejudice, in the relevant sense, would be occasioned to the respondent that would justify disallowing the application.

The court considered each of those elements, relevantly finding:

1. The consequence of injury including economic consequences can potentially be a material fact, noting there was "very clear evidence" of the applicant's continued desire to work noted by her persistence in working until advised by her treating psychiatrist that she could not continue to do so;
2. The consequences that flowed as a result of the applicant being unable to continue working in any form of employment came to her knowledge after the discussions with her treating psychiatrist (when admitted for psychiatric inpatient treatment) and can be characterised as a material fact;
3. Despite having previously obtained advice from another firm of lawyers in or about mid-April 2021, that was not of a decisive character, noting the applicant continued to work at that time;
4. It was not until the information conveyed to her directly by her treating psychiatrist during the inpatient psychiatric hospitalisations in November/December 2021 or February/March 2022 that she could not work became of a decisive character;
5. The means of knowledge that she would not be able to continue working was not directly available to her until the advice of her treating psychiatrist during her inpatient psychiatric admissions in November/December 2021 or even perhaps the subsequent

admission in February/March 2022 and as such the material fact of a decisive character was not within the applicant's means of knowledge until a date no more than twelve months prior to the date on which the limitation extension was sought and there is evidence which establishes a right of action.

6. The court rejected the respondent's submissions to the contrary for the reasons outlined above.

67. *Forostenko v Springfree Trampoline Australia Pty Ltd (No. 2)* [2024] QSC 126

- Hindman J, decision delivered 19 June 2024

Keywords
Procedure – Costs – General rule – Costs follow the event – Offers to settle

Facts
The Plaintiff claimed damages in relation to a foot injury suffered by him on 25 December 2017 while jumping on a Springfree trampoline. The Defendant was the manufacturer of the Springfree trampoline.

After a contested trial where both liability and quantum were in issue, on 28 May 2024 judgment was given for the Plaintiff against the Defendant in the sum of $744,175.00. The parties were then directed to provide written submissions on costs. This is the decision on costs.

Decision
The Defendant pay the Plaintiff's costs of the proceeding but only on the standard basis and assessed on the District Court scale.

Ratio
The Plaintiff sought that the Defendant pay his costs of the proceeding on the indemnity basis relying in particular upon 2 facts:

(a) The Plaintiff at trial had beaten his mandatory final offer made on 15 July 2019 of $500,000.00 plus costs assessed on the District Court scale;
(b) The Plaintiff at trial had beaten his formal UCPR offer made on 23 May 2022 of $250,000.00 plus costs.

The Defendant sought a relatively complex order, summarised in the following terms:

(a) The Plaintiff pay the Defendant's costs thrown away by reason of the amendment of the Statement of Claim on 4 occasions;
(b) The Plaintiff pay the Defendant's costs of or related to factual matters pleaded in the Statements of Claim which were ultimately abandoned by the conclusion of the trial;
(c) The Defendant pay the Plaintiff's standard costs of the proceeding but reduced by 50 percent of the costs relating to liability exclusive of the costs referred to in the preceding orders.

His Honour saw merit in the submissions by the Defendant in respect of the first two orders sought by it. The submissions in respect of the third order sought by the Defendant were more complex and were summarised by his Honour as follows:

(a) That the case upon which the Plaintiff ultimately succeeded was one notified/pleaded only shortly before or at trial;
(b) Because of the preceding subparagraph, the rejection of the Plaintiff's offers was not unreasonable;
(c) Significant parts of the Plaintiff's case that the Plaintiff did press at trial were not successful;

(d) That the Plaintiff only succeeded on quantum to the value of about twenty percent of his claim made.

The Court accepted generally these submissions, however moderated them in circumstances where:

(a) The Defendant's liability expert appeared to appreciate a significant liability factor put forward (albeit belatedly) by the Plaintiff;
(b) It is not unusual that a party's case will develop and change over time, particularly where expert evidence is required. It is consistent with rule 5 UCPR that a party run its true case at trial. Therefore, there should be some leniency in allowing a party's case to develop without severe adverse cost consequences;
(c) The Plaintiff pointed to late disclosure and late sought delivery of expert evidence by the Defendant as being at least part of the reason for late developments in the Plaintiff's case;
(d) Had the Plaintiff's final mandatory offer been accepted, none of the costs associated with the proceeding would have been incurred, including in respect of matters pleaded then abandoned, matters upon which the Plaintiff was not successful, unnecessary case management conferences, etc;
(e) The Plaintiff pointed to the overall conduct of the Defendant's case (including denying liability and putting the Plaintiff to proof for the most part), including in respect of the Defendant's response to a notice to admit facts.

His Honour considered it undesirable to make a complex costs order as suggested by the Defendant in order to avoid adding to the cost and complexity of the costs assessment process and preferred to make one order and taking all matters into account he considered it just and fair.

That the Defendant achieved judgment within the jurisdiction of the District Court was also taken into account.

68. *PG v State of Queensland* [2023] QDC 109

- Smith DCJA, delivered 20 June 2023

Keywords

Disclosure of documents relating to allegations of sexual abuse - r 223(1) of the *Uniform Civil Procedure Rules* 1999 ('UCPR') - breach of statutory duty – vicarious liability

Facts

The plaintiff was allegedly sexually assaulted during while detained at the Brisbane Youth Detention Centre ('BYDC') during June 2004 through to September 2004. It is alleged he was required to undergo a strip search, and while being strip searched, the plaintiff alleges an officer of the defendant digitally penetrated the plaintiff, pushed him to the ground and raped him. The plaintiff argued the defendant was responsible for the operation and management of the BYDC, and due to the officer's alleged acts, the defendant had breached its duty to the plaintiff. Further or in the alternative, the plaintiff argued the defendant was vicariously liable for the conduction of the officer.

The plaintiff filed an application requiring disclosure of certain documents relating to allegations of sexual abuse occurring at the BYDC between 1999 and 2009, pursuant to r 223(1) of the *Uniform Civil Procedure Rules* 1999 ('UCPR'). The defendant argued the plaintiff was not entitled to unredacted copies of some 52 claim forms, due to legal professional privilege.

Decision

1. Leave granted to the plaintiff to make the application;
2. Defendant ordered to make disclosure of documents.

Ratio

In determining whether the defendant breached its duty of care to the plaintiff, the court must consider whether there was risk of the abuse occurring, and whether that risk was reasonably foreseeable. In relation to the request for disclosure, the plaintiff argued the documents were directly relevant as the existence of previous incidents would bear upon the probability of the alleged sexual abuse acts occurring towards the plaintiff. Smith DCJ agreed with the plaintiff and opined the existence of any other acts of sexual abuse is directly relevant to the duty of care and the extent of any such duty of care owed to the plaintiff.

In relation to whether the plaintiff was entitled to unredacted copies of claim forms, the defendant argued these forms were protected under legal professional privilege, however, Smith DCJ was of the opinion that these claimants were aware their information contained in the claim forms would be made available to third parties during the course of their claim, and accordingly, found that they could not be covered by legal professional privilege.

69. Greentree v Nominal Defendant [2024] QDC 99

Sheridan DCJ, decision delivered 27 June 2024

Keywords

Erratic driving of an unidentified vehicle – discreditable conduct

Facts

On 3 April 2017, the plaintiff was travelling north in the left lane on the Bruce Highway at Sippy Downs. Just prior to the accident, the plaintiff noticed a headlight appear in his rear-view mirror. He observed it moving very fast and "bouncing around". He thought it may be a motorcycle.

After observing the headlight approaching him for around 10 seconds, the plaintiff alleged that the vehicle abruptly veered to the righthand side to overtake him. He said that he got a view of the vehicle, and it was a white sedan. The vehicle then swerved infront of the plaintiff and braked suddenly. The plaintiff took evasive action by swerving to the right, ultimately losing control of the vehicle and colliding with a concrete convert. The white sedan did not stop and could not be later identified.

Decision

Claim dismissed.

Ratio

The plaintiff called Mr Marc Moulds who he said was first on the scene following the accident. Mr Moulds had been travelling south on the opposite side of the highway. Mr Moulds said that immediately before the accident, he had observed a couple of sets of headlights approximately 500 to 600 metres ahead of him, travelling north. He was uncertain what lanes the vehicles were in, but he thought that the rear vehicle seemed to be travelling faster than the one in front. Mr Moulds said that he passed both vehicles and then when he looked in his rear-view mirror, he saw a pile of dust and a vehicle off the road.

Under cross-examination, Mr Moulds was asked when he saw the dust and the vehicle off the road, was it the first or the second vehicle and Mr Moulds responded, "to be honest, I really couldn't tell you."

The defendant called Mr Black who was an operations manager employed by Traffex Traffic Management Services who were undertaking road works on the Bruce Highway in the vicinity of Sippy Downs. Mr Black's evidence was that he came across the plaintiff's vehicle on the side of the highway and called the emergency services. He said that he noticed the plaintiff walking around "dazed and confused". He said that in discussion with the plaintiff, the plaintiff told him that he had fallen asleep at the wheel. Mr Black maintained under questioning that he was the first person on the scene and did not remember another truck driver being present.

The court found the evidence of Mr Moulds and Mr Black of limited assistance – Mr Moulds did not see anything occur between the two vehicles which he said he saw approaching him, and Mr Black gave evidence as to the events he observed after the plaintiff's vehicle left the road. Consideration then turned to whether the plaintiff was a reliable and credible witness.

The court found that the plaintiff had been untruthful as to his physical condition. In his Notice of Accident Claim Form, his consultations with independent examiners and in his evidence in chief, the plaintiff had failed to disclose the prior back and neck symptoms he had complained of when consulting with a chiropractor prior to the accident. In a new patient form completed in July 2016, the plaintiff had stated:

> *back pain, 15 + years, 75 per cent of the time (pain is present), and is getting worse;*
>
> *migraines since a child 50 per cent of the time, getting worse;*
>
> *aches and pains, 15 + years, 85 per cent of the time, getting worse."*

The court found that the plaintiff's evidence that the emotional consequences of the accident had rendered him an anxious driver and comfortable to drive only in local areas inconsistent with the two speeding fines he received following the accident. Further, his evidence as to his avoidance of people was considered at odds with his attendances at music concerts and various theme parks.

The plaintiff admitted that he had not lodged tax returns in the three years prior to the accident; he said that a lot of the concreting work that he had been doing at that time was paid in cash. No documents were produced nor independent witnesses called to provide support for the contention that the plaintiff was a self-employed concreter at the time of the accident.

Ultimately, her Honour Sheridan DCJ held:

> *None of the particular matters to which I have directed my attention, in particular the chiropractor form, the attendances at entertainment venues and the driving by themselves would have led me not to accept Mr Greentree as a witness of truth but collectively, and together with the lack of any independent evidence as to his economic loss claim, mean that I am unable to rely on anything that Mr Greentree says about the collision or his circumstances generally. The claim is dismissed.*

70. *Hornsby Shire Council v Salman* [2024] NSWCA 155

- White JA, Adamson JA and Basten AJA, decision delivered 27 June 2024

Keywords

Negligence – breach – foreseeability of risk – whether height differential between surface in a playground gave rise to a reasonably foreseeable risk of harm – whether height differential was readily discernible – where the Australian playground maintenance standards applied – where council was independently advised to take steps to mitigate risk – where council did not take reasonable precautions advised – obvious risk – formulation of risk

Facts

Ms Salman sustained injury when she fell in a children's playground in Lessing Park on 28 February 2021. This playground was under the control of the Hornsby Shire Council ('Council'). Under the swings in the playground was a blue wet pour surface which created an artificial spongy surface area. This blue wet pour area sloped down on the edges. The area surrounding the blue wet pour area was filled with mulch/bark. Ms Salman was walking towards swings where her nephew was playing when she fell stepping from the mulch area to the blue wet pour area. Ms Salman's right ankle rolled outwards. To recover her balance, she put her left foot down, with the consequence that her left ankle rolled as well and she lost her balance, falling forward. There was a height differential between the two surfaces that she was unaware of. At trial she conceded that if she had taken a proper look, she would have seen the height differential between the two surfaces.

At first instance, the primary judge found in favour of the respondent and awarded damages in the sum of $283,200.00. The plaintiff was found to be contributorily negligent, resulting in a 15% reduction in damages.

Decision

1. Dismiss the appeal
2. Order the appellant to pay the respondent's costs of the appeal

Ratio

Council appealed the primary judgment on several grounds relating to liability. There was no appeal against either the discount for contributory negligence or the quantum of damages.

Council submitted that the primary judge erred in:

- identifying the relevant risk of harm;
- finding the Australian Standards addressed the relevant risk;
- finding the height differential was not readily discernible;
- failing to find that risk was obvious; and
- concluding that there was a causal relationship between the level of the mulch/bark and the respondent's injury

The majority (White JA and Adamson JA) held the following grounds for appeal were not established:

Relevant identification of the risk of harm

The risk of harm as identified by the primary judge was *the risk of someone, in the course of walking between the mulch/bark surfaced area and the artificial ('spongy') surface area in the playground, falling and sustaining injury.* On appeal, Council attempted to reformulate the risk of harm differently than what was presented at trial. Council submitted the true risk of harm, was the risk associated with a person rolling their ankle on a sloping surface and, as such, the bark/mulch is irrelevant to this risk and to what happened. Notwithstanding that it is not open to the Council to formulate the risk of harm differently on appeal, the majority held that this ground must also fail because the risk formulated by the Council on appeal was too specific as it incorporated the precise mechanism of the fall.

Application of Australian Standards

Ms Salman led expert evidence of Mr Cauduro who concluded that the area was unsafe, posed a risk of trip/fall and was not maintained in accordance with the Australian Standards. In addition to Mr Cauduro's evidence, the Council had commissioned two reports prior to the incident from Playfix. Both reports relied on the Australian Standards for playgrounds and identified that the mulch/bark area needed to be built up to be level with the blue wet pour area. The relevant standards that apply to children's playgrounds say that the level of the mulch area and the level of the blue wet pour should be even to avoid trip hazards. The Council submitted that, as Ms Salman did not trip, the standards referred to by Playfix and Mr Cauduro were inapplicable. The majority concluded that by hiring Playfix to inspect the playground and report on the results, it can be inferred that the Council acknowledged the applicability of the Standards.

Discernibility of height differential

The primary judge, having seen and heard the respondent's testimony (as the sole witness to the condition of the playground at the time of her fall) and considering photographic evidence taken later, accepted her account that the height differential was not easily noticeable. The majority held that it would be improper to overturn this finding based solely on the later photographic evidence.

Obvious risk

The majority held that whether a risk is obvious must be assessed in light of all the circumstances. The primary judge had the discretion to determine that the risk was not obvious, considering it was foreseeable that pedestrians approaching the playground would be focused on a child, as the respondent was. Allowance must be made by the Council for inadvertence of people using a children's playground.

Causal relationship between the level of the mulch/bark and the respondent's injury

In relation to factual causation, the primary judge found that, had the Council taken the recommended precautions detailed within the reports of Playfix, Ms Salman would not have lost her balance. The majority held that if Council followed the advice from Playfix, they would have reduced the risk of "tripping" (in the narrow sense) and also mitigated the broader risk of harm as identified by the primary judge.

Basten AJA (in dissent) held that the change in surface was obvious and that different levels in adjoining surfaces in a playground does not give rise to a risk against which precautions ought to be made.

71. *Akgun v Stockland Property Management Pty Ltd & Anor* [2024] NSWDC 253

- Newlinds SC DCJ, decision delivered 28 June 2024

Keywords

Torts – slip and fall – risk of harm – reasonable precautions – ameliorating risk – causation – contributory negligence – obvious risk – damages

Facts

On 4 September 2020, the Plaintiff fell on a travelator at Stockland Mall in Merrylands, NSW, and sustained injuries. He sought damages from Stockland (First Defendant), the mall's occupier and manager. The claim against the Second Defendant, Assetlink, who were responsible for the Mall's cleaning services, resolved before trial.

The mechanics of the Plaintiff's fall was in dispute. The Plaintiff alleged that he slipped and fell due to water (or another liquid) on the travelator. Stockland argued that CCTV footage depicted no issues with the travelator's surface before or after the incident, and there was no evidence of wet marks left by the Plaintiff's shoes.

Decision

Judgment for the Plaintiff.

Ratio

The Court accepted the Plaintiff's assertion that liquid on the travelator caused his fall, despite inconsistencies in witness testimony and gaps in CCTV footage. While recognising that the Plaintiff's intellectual disability may impact his credibility, the Court found that his account was largely consistent on two key points: that he slipped and that he perceived the travelator surface as wet after the fall.

Expert evidence from Dr Cooke, who opined that the travelator would be slippery when wet, was significant. The Court considered the rainy conditions on the day of the incident and possible water ingress from nearby entrances, made it likely that the Plaintiff slipped due to water (or some other liquid) on the travelator.

The Court also considered the presence of mats at mall entrances and the usual placement of "slippery when wet" signs (absent on the day) as indicators of Stockland's awareness of the risk. Additionally, the cleaning contract between Stockland and its service provider, Assetlink outlined procedures during wet weather conditions to mitigate slip risks, highlighting that the risk associated with a wet travelator was foreseeable.

Stockland’s post-incident decision to apply a slip-resistant solution (Chemrex) to certain travelators was found to be irrelevant, as it occurred after the Plaintiff’s fall. However, the Court found that Stockland had been aware of multiple slip incidents on travelators in the years leading up to this incident and failed to take adequate precautions, such as applying Chemrex beforehand. The Court held that Stockland’s failure to implement preventive measures such as the application of Chemrex (or equivalent), substantially contributed to the Plaintiff’s injuries.

The Court also rejected Stockland's argument that a wet travelator was an obvious risk. Although wet floors are generally understood to be slippery, the specific hazard posed by the presence of water (or any other liquid) on the surface of the travelator would not be obvious to a reasonable person.

The Court also dismissed Stockland’s claim of contributory negligence, noting that other pedestrians captured in the CCTV footage did not consistently use the travelator handrails before or after the incident. Further, the Court accepted that the Plaintiff was unaware of any water on the travelator and could not have reasonably anticipated the risk it presented.

72. *Emde v State of New South Wales* [2024] NSWDC 268

- Andronos SC DCJ, decision delivered: 28 June 2024

Keywords

Torts – Trespass to the person – Assault – Battery – False imprisonment – Wrongful arrest – Defences – Suspicion on reasonable grounds – Whether satisfied arrest reasonably necessary.

Facts

The plaintiff's daughter had sought an Apprehended Domestic Violence Order (ADVO) against him after he attended Woolworths in Richmond "almost daily" where she was employed. The ADVO was served on the plaintiff on 3 April 2023. The ADVO ordered, amongst other things, that the plaintiff must not go into any place where his daughter lives or works. Further, the ADVO ordered that the plaintiff must not go into Woolworths Richmond, Richmond Market Place, Paget Street and Lennox Street, Richmond NSW 2753. The plaintiff attended the shopping centre on two occasions following service of the ADVO. He did not see or speak with his daughter; however, his daughter had noticed him and informed the NSW Police. The plaintiff was arrested by officers of the NSW Police on 21 April 2022 for breaching the ADVO. The plaintiff pled guilty to two counts of breaching the ADVO. No convictions were recorded.

The plaintiff, who was 78 years old at the time of the arrest, sued the defendant for wrongful arrest, false imprisonment, assault, and battery. The plaintiff sought damages in a global sum of $140,000.00 arguing that there were alternatives available to the NSW Police and his arrest was not reasonably necessary.

Decision

5. Judgment for the defendant.

6. Direct the parties to liaise and seek to agree on an order for costs.

7. In the event the parties have not reached agreement on an order with respect to costs by 2pm on 4 July 2024, hearing for question of costs to be part heard 5 July 2024.

Ratio

His Honour considered that the plaintiff had not made out any claim for assault, battery, wrongful arrest or false imprisonment.

His Honour first dealt with the tort of battery, a trespass to the person and an actionable tort which does not require proof of damage to the person, merely the physical contact of the person. The plaintiff alleged that the NSW Police Officers (Senior Constable Newbould and Police Constable Warren) attempted to lift him into the back of their police vehicle during the arrest. His Honour found that the plaintiff had not established that either SC Newbould or PC Warren made physical contact with him and "*expressly reject[ed] the allegation that they tried to lift him into the back of the police wagon*."

His Honour then turned to the tort of assault, an intentional offer or threat of force or violence to the person of another which causes a plaintiff reasonably and immediately to apprehend contact with his or her person. His Honour found there was no evidence directed to any of these elements. Further, it was not put to either SC Newbould or PC Warren that they had the requisite intention for the tort to be made out.

His Honour then considered the tort of false imprisonment, a tort of strict liability in which lack of fault is not relevant. Both parties in the matter treated wrongful arrest and false imprisonment as the same course of action, which was the approach also taken by His Honour. In response to the plaintiff's argument that the arrest was not reasonable, the defendant relied upon the two limbs of s 99(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002*: that the officers suspected on reasonable grounds that the plaintiff had committed an offence; and that the officers were satisfied that the arrest was reasonably necessary. Each limb required the officers to have a particular state of mind. His Honour stated that the question of whether an offence had been committed "*largely turned on the question of whether the ADVO, properly construed, prevented Mr Emde from lawfully entering Richmond Marketplace at all or whether it merely prevented him from entering Woolworths at the Marketplace*." His Honour found that the Court's task was not to choose a single correct construction of the ADVO, and that both constructions would have been reasonably available to the officers when they became aware of orders of the ADVO. Accordingly, it was reasonable for the officers to suspect that the plaintiff had committed an offence. His Honour considered the question of whether the arrest was reasonably necessary. His Honour found that the conduct of the officers in arresting the plaintiff was not unreasonable in the circumstances given that there had been a repetition of breaches of the ADVO, and there was active concern for the welfare of the plaintiff's daughter.

His Honour briefly considered the damages payable had the torts been made out. In relation to compensatory damages for the torts of assault and battery, His Honour stated that the

plaintiff need not establish economic loss or personal injury in order to recover compensatory damages. In the current matter, had the plaintiff made out the allegations of tort and battery, the damages would have been nominal, and the plaintiff would have been awarded damages of $500.00. Turning to damages for false imprisonment, His Honour highlighted that the damages are assessed by reference to the duration of the deprivation of liberty, and to the hurt of injury to the plaintiff's mental suffering, disgrace, and humiliation. In the current matter, although His Honour acknowledged the plaintiff was 78 years old, and likely suffered a degree of mental suffering, disgrace and humiliation as a result of being arrested in front of his acquaintances, the plaintiff had been held for no mother than three hours, was allowed to drive himself to the police station, was not handcuffed or physically restrained, and was not transported in a police van to the police station. His Honour concluded with the view that had the plaintiff's arrest been found as unlawful, compensatory damages of $5,000.00 would have been awarded.

73. Fuller v Australian Capital Territory [2024] ACTCA 19

- McCallum CJ, Baker and Taylor JJ, decision delivered 5 July 2024

Keywords

Appeal, medical negligence, caesarean, administration of spinal anaesthetic, broken needle, necessary care and skill, vicarious liability

Facts

On 22 February 2020, the appellant underwent a planned caesarean at The Canberra Hospital. A spinal needle was used to administer spinal anaesthetic but broke into two pieces, with one piece remaining in the appellant's back and requiring surgical removal. The appellant brought a claim against the respondent for psychological, neurological, and physical injuries due to the failed attempt to administer the spinal anaesthetic, by anaesthetic registrar, Dr. Abeygunasekara and consultant anaesthetist, Dr. Stephens. She alleged the respondent was vicariously liable the medical professionals involved and argued the anaesthetists failed to exercise the necessary skill and care in administering the spinal anaesthetic, leading to the needle breaking and causing subsequent injuries.

Initial Decision

On 22 December 2022, Robinson AJ dismissed the appellants claim, finding the duty of care owed to the appellant had not been breached and ordered her to pay the defendant's costs.

Appeal

The appellant argued the primary judge made several errors in factual findings, particularly regarding the standard of care and the expert evidence provided. The appeal essentially contended that:

1. Dr. Stephens should have replaced the spinal needle when she took over from Dr. Abeygunasekara.
2. The primary judge erred in preferring Dr. Stephens' evidence over Dr. Abeygunasekara's.
3. The primary judge failed to draw appropriate inferences against the respondent for not calling certain witnesses.
4. The failed administration of the spinal anaesthetic by Dr Stephens caused the appellant to suffer a neurological injury, namely radiculopathy.

The respondent also filed a Notice of Contention, disputing causation between the neurological injuries and the alleged breach of duty.

Decision

(1) Appeal allowed.
(2) Orders made on 22 December 2022 were set aside and judgement was entered for the appellant.
(3) Remittance of the proceedings to the Supreme Court for an assessment of damages on the basis the scope of liability includes radiculopathy.

Ratio

The Court considered the failure of the primary judge to take account of concessions made in the factual findings had resulted in an incomplete assessment of the circumstances in which the decision was made not to replace the spinal needle. Based on that incomplete assessment, the primary judge determined the respondent was not negligent.

The Court considered a reasonable anaesthetist in Dr. Stephen's position should have replaced the spinal needle after the initial unsuccessful attempts, as continuing with a potentially compromised needle fell below the standard of care expected in such circumstances. The Court further noted the ease with which the precaution could have been taken in circumstances where the risk was not insignificant, and the likely seriousness of the harm was significant. Additionally, the Court highlighted the necessity of properly evaluating expert testimony and ensuring all relevant witnesses are called to provide a comprehensive understanding of the events and their impact.

The Court considered the evidence established the appellant was suffering radiculopathy as a result of the spinal needle event. The evidence from Dr Patrick as to the significance of the presentation of the appellant's great right toe, as well as to the possibility of parathesis "often not" presenting immediately proximate to the nerve damage occurring, were factors directly relevant to the question of whether the scope of liability should include radiculopathy. Neither factor had been directly addressed in the report of Dr Gorman and Dr Patrick was preferred.

74. ***Reis v Emil Gayed [2024] NSWDC 269***

- Newlinds SC DCJ, decision delivered 5 July 2024.

Keywords

Torts – Medical negligence – Claim under Civil Liability Act – Alternate claim under Common Law based on operation of s 3B of Civil Liability Act – Intentional act – Causation – Meaning of "intention to injure" in medical context – Limitations defence s 50D Limitation Act – Discoverability – Subjective and objective – Damages

Facts

In 2014, the Plaintiff, who was then 46 years old, underwent a routine Pap smear on the recommendation of her GP which returned an abnormal result. The GP referred the Plaintiff to a gynaecologist, the Defendant ("Dr Gayed"), whom she consulted. The plaintiff underwent a radical ablation of her cervix with a diathermy device on 18 July 2024, as recommended by the defendant. When she returned for review following this procedure, the defendant recommended the plaintiff undergo a further procedure, being endometrial diathermy to remove a benign but abnormal endometrial pathology.

On 10 October 2014, the Plaintiff underwent an endometrial ablation with diathermy and ablation of fibroids with diathermy. The plaintiff did not consent to, nor did she receive any advice about ablation of fibroids.

In 2018, the plaintiff saw Dr Nigel Roberts, the Director of Obstetrics and Gynaecology at Manning Base Hospital. Dr Roberts had contacted various patients who had been treated (and had unnecessary procedures performed) by Dr Gayed at Manning Base Hospital. Dr Roberts told the Plaintiff that the ablation of the Plaintiff's cervix component of the First Procedure and the entire Second Procedure were not necessary and had no possible therapeutic benefit to her.

Following this news, the plaintiff went into a downward spiral and developed a psychological condition.

In late 2018, the plaintiff completed a questionnaire relating to a class action by Slater and Gordon against the defendant. The plaintiff did not seek out legal advice, nor did she retain them. In 2020, a redress scheme was established and made available for patients treated by the defendant in a public hospital. As the plaintiff was treated in a private hospital, she could not participate in the redress scheme. In November 2020, Slater and Gordon sent the plaintiff forms to commence the process and she responded in April 2021. Proceedings were filed on 11 May 2023.

Decision

(1) Judgment for the Plaintiff in an amount to be agreed or assessed consistent with these reasons.

(2) Order the Defendant pay the Plaintiff's costs.

(3) Direct the parties to bring in short minutes as to the quantification of the judgment consistent with these reasons, and if they cannot agree I shall hear further argument.

Ratio

The plaintiff claimed damages under the Common Law, alleging that both procedures, but in particular the second procedure, were intentional acts and were done with the intent to cause injury for the purpose of s 3B of the *CLA*, in that Dr Gayed knew or was reckless as to whether there was no reasonable therapeutic intent to treat, prevent, or ameliorate a disability, pathology, condition, or medical emergency.

Dr Gayed did not have consent of the plaintiff to carry out the procedures, however in the context of a medical procedure, lack of consent does not engage section 3B. The requirement is that it be proved that there be an "intent to cause injury". In the medical context, this requires actual knowledge as to a lack of therapeutic benefit.[28] The Judge concluded that it was not part of the plaintiff's case that the defendant knew that there was no therapeutic benefit at the time of the procedures and was only satisfied that the defendant was reckless as to the question of therapeutic benefit to the plaintiff. Consequently, this finding is not sufficient to engage the carveout from the CLA provided in section 3B as recklessness does not amount to knowledge. On this basis, the plaintiff's claim under Common Law failed.

As the defendant's attitude towards the plaintiff's wellbeing as a medical practitioner fell so far short of the level of skill that ought to be expected of any doctor, the Judge made an award for exemplary damages of $50,000.00.

The only substantive defence to liability under the *CLA* aspect of the claim, as put forward by the defendant, is that the claim brought by the plaintiff is barred by operation of the s 50D of the *Limitation Act 1969 (NSW)* ("*Limitation Act*"), because the plaintiff either knew of her cause of action or that her cause of action was "discoverable" before three years prior to the commencement of those proceedings. Dr Gayed's case is that the plaintiff had sufficient knowledge about her cause of action against him the moment Dr Roberts advised her in 2018 that, in his opinion, the procedures were not necessary.

The Judge concluded that the plaintiff took all reasonable steps, and it was not unreasonable for someone in such circumstances to fail to appreciate that she might have a recognisable psychiatric injury as a result of Dr Gayed's conduct, any earlier than she did. Therefore, her decision to not consult solicitors and/or doctors earlier was reasonable. The defendant's defence failed.

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[28] *White v Johnson* [2015] NSWCA 18 and *Dean v Phung* [2012] NSWCA223 at [30].

75. *DAC Finance (NSW/QLD) Pty Ltd v Cox* [2024] NSWCA 170

- Ward P, Leeming JA, Mitchelmore JA decision delivered 16 July 2024

Keywords

Negligence – workplace injury – occupier's liability – plaintiff suffered jolt when descending elevator stopped without warning during planned power interruption – power testing conducted by other employees at the workplace – no steps taken to ensure lifts were not being used – no warnings given – litigation conducted on basis that plaintiff's employer was not sued – plaintiff sued two related companies which owned the land and operated the business – whether related companies liable in negligence as occupiers – whether evidence capable of sustaining findings of breach attributable to related companies, as opposed to attributable to plaintiff's employer – appeal allowed and judgments entered in favour of defendants

Facts

Mrs Patricia Cox (**the Respondent**) was employed as an Assistant in Nursing at a residential aged care facility known as 'Opal Florence Tower', in Tweed Heads. On 4 July 2018, the Respondent was inside an elevator at her normal place of employment when the elevator suddenly stopped during its descent due to a test of an emergency power supply from a backup generator. The Respondent suffered an injury to her lumbar spine because of the sudden stopping of the elevator. The testing was conducted by two gentlemen named Mr Hyndes and Mr Garner. No notice was given to staff within the Opal Florence Tower that testing was going to occur.

The retirement village involved three related companies, 'DAC Finance', 'DAC (NSW/QLD)' and 'DPG Services'. DAC Finance operated the business name 'Opal Aged Care', it did so on land owned by its wholly owned subsidiary DAC (NSW/QLD), while DPG Services (another subsidiary) owned the business name 'Opal Florence Tower' and employed the Respondent.

The Respondent successfully brought proceedings against DAC Finance and DAC (NSW/QLD) (**the Appellants**) in the NSW District Court before Acting Judge Levy SC, alleging that both entities were liable as owners/occupiers of the land where the incident occurred and breached a duty of care to her. The Respondent did not commence proceedings against her employer, DPG Services, because her incident related injury had been assessed with 8% whole person impairment (**WPI**) which did not overcome the 15% WPI hurdle imposed by s151H of the *Workers Compensation Act 1987* (NSW) (**the Act**).

The following pertinent points are noted from the primary decision of Acting Judge Levy SC:

- The primary judge did not make an explicit finding about the employment of Mr Hyndes or Mr Garner, despite being asked to do so by the parties.
- The primary judge considered the Appellants were both relevant occupiers of the premises where the Respondent was injured. The duty of care was held to extend to *'consideration of matters of safety with regard to scheduled maintenance of fixtures within the premises, including passenger elevators*'. The liability of DAC (NSW/QLD) was purported to turn on its ownership of the lift and the power generator as fixtures of the premises. While the liability for DAC Finance turned on a concession it 'may have' contracted with third party service providers to maintain the lift.

The Appellants appealed, challenging a number of the primary judge's findings. The key issue on appeal was who caused the breach of duty and what entity (if any) was liable for the breach.

Decision

Appeal allowed.

Orders 1 and 2 made in the District Court were set aside and judgment entered in favour of the Defendants.

The Parties to be heard on costs.

Ratio

Leeming JA noted that the two people ultimately responsible for turning off the power supply to the lift at the time of the incident were Mr Hyndes and Mr Garner (neither of which were a party to the proceeding). Both men provided statements to the workers' compensation factual investigator in which they stated they were employed by 'Opal Florence Towers'. Leeming JA noted that while there is no entity named 'Opal Florence Towers', DPG Services owned the business name 'Opal Florence Tower'. Leeming JA noted that none of the parties tendered any evidence to displace the inference that both Mr Hyndes and Mr Garner were also employed by DPG Services.

Leeming JA then explained that it was Mr Hyndes and Mr Garner that failed to warn staff and residents that the power was to be tested and therefore failed to take a reasonable step that would have avoided the not insignificant risk of harm. Accordingly, DPG Services was

vicariously liable for the negligent acts of its employees. However, DPG Services was not a defendant to the claim.

The critical issue identified by Leeming JA in relation to the primary judge's decision is that both the findings of the nature of the duty of care and the alleged breach of duty with both Appellants was 'divorced' from what actually occurred on the day of the incident. The Court explained that the breach of duty that caused the Respondent's injuries was not some failure to repair or maintain the lift, or failure of electricity to the building due to a poorly maintained power supply. Rather, it was the positive act of two employees of DPG Services.

Ultimately, Leeming JA explained that the only conduct that was relevant towards the breach of duty to the Respondent was the conduct of Mr Hyndes and Mr Garner and the only vicarious liability available based on their conduct is the vicarious liability of their employer, DPG Services.

76. *Sawyer v. Steeplechase Pty Ltd* [2024] QSC 142

- Crowley J - delivered 10 July 2024

Keywords

Negligence – standard of care – scope of duty and subsequent breach – damage and causation – civil liability legislation

Facts

The plaintiff was employed as a concreter for a business named Cretek Concreting ("Cretek") which was contracted to undertake concreting work for the first defendant, SWC Constructions ("SWC") at a residential property in Ascot.

The plaintiff asserted he sustained injury whilst lifting, carrying and laying steel mesh sheets.

The Plaintiff, when giving evidence, identified a Safe Work Method Statement (SWMS) of his employer, which was a generic document and not specific for the work done on the jobsite. The leading hand for SWC had agreed, in evidence, that he had control over the site, and that part of his role was to ensure that subcontractors produce the appropriate paperwork, before starting work on site, but could not recall whether a SWMS had been provided to him by Cretek. That employee agreed that part of his role was to look at the documents to ensure they were realistic, and they demonstrated that people coming onto the site were going to do their work in a safe way and that part of his obligation was to watch workers on site to ensure they were complying with the SWMS. That witness also agreed the jobsite was not big and that he could see the activities of the Cretek workers from where he was working.

The mesh in question was not commonly used with the SWC leading hand agreeing that using only two people to lift that heavier mesh (than the mesh normally is) would raise a safety issue. The sole director of SWC, accepted he did not warn Cretek that the heavier mesh was to be used, but also identified Cretek had been supplied with the plans and specifications for the job, giving evidence that Cretek knew that mesh was being used and it was their responsibility to have enough labour on site to get that installed safely.

The plaintiff continued to work for Cretek, before asserting a second injury was sustained in an incident in 2017 whilst performing work for a company which had taken over the running of Cretek and was then his employer (being the third defendant which at the time of trial, was in liquidation).

The plaintiff's case, with respect to the first incident, and resulting injuries, was to the effect that it was caused by SWC and Cretek breaching the duty of care they each owed to him, to ensure a safe system of work and to not expose him to unnecessary risks of injury. The plaintiff argued as an alternative that he sustained the initial injuries as a result of the first incident, which was then aggravated or exacerbated over a period of time, due to the further work duties performed, culminating in injuries sustained as a result of the second incident.

Relevant issues were:

- The duty of care owed to the plaintiff by SWC as a principal contractor in occupation and control of the job site;
- Causation, with respect to the prolapsed L5/S1 disc condition (with the second defendant admitting it owed the plaintiff a duty of care which was breached);
- The alternative claim against the second and third defendants and the alleged over a period of time injury claim to be sustained;
- The extent of the liability of SWC.

Decision

1. Judgment for the plaintiff against the second defendant for the amount of $781,082.09;
2. The plaintiff's claim against the first defendant and the third defendant are dismissed.

Ratio

The court considered authorities whereby a principal contractor would be under a duty to take reasonable care to ensure a safe system of work for independent contractors, identifying that whether a duty arises is to be determined by considering the nature of the relationship between the parties in the totality of the circumstances.

Having undertaken that exercise the court did not consider the circumstances that existed in this instance was such that a duty of the kind and scope asserted by the plaintiff should be imputed. The relationship between SWC and Cretek was contractual. SWC was the principal contractor engaged by the owner of the residential premises to undertake a residential renovation project with SWC engaging Cretek to perform a particular part of the renovation works, namely the installation of a polished concrete slab.

SWC had engaged the plaintiff's employer to perform a particular job, with the employer (Cretek) competent to devise and control its own system of work. SWC had worked with Cretek in the past, with Cretek considered a reputable and competent concreter capable of performing the work it had been engaged to carry out. In the particular circumstances, it was not necessary for SWC to retain and exercise a supervisory power over Cretek's system of work.

It was not found to be a scenario where SWC retained control over Cretek's work systems because of its status as an occupier of the site or because of its duties under workplace health and safety legislation or Australian Standards or by reason of its contractual obligation.

The court was satisfied, on the balance of probabilities, that the plaintiff sustained an L5/S1 disc injury as a result of performing work duties at the Ascot job site on 22 August 2016.

Having formed that view the court determined it was the substantial cause of the subsequent disc prolapse of 3 July 2017, with the ongoing back and nerve pain and associated symptoms and complications found to have all been caused by the 22 August 2016 injury.

With those findings being made it, was not necessary to consider the alternative over a period of time injury claim against Cretek and the third company (Cretek Pty Ltd in liquidation).

It followed that the third defendant was not liable.

In applying the provisions of the WCRA to the second defendant's liability, the court was satisfied that Cretek's breach of duty was a necessary condition of the occurrence of the injuries, and had it taken measures identified by the plaintiff, the incident would not have occurred and the plaintiff would not have sustained injuries. The court was satisfied that it was

appropriate for the scope of Cretek's liability to extend to each of the injuries its breach of duty caused.

***77. Ruvuta v Jaderberg & Anor* [2024] QDC 107**

- Morzone KC DCJ decision delivered 12 July 2024

Keywords

Motor vehicle accident, credit, nature and scope of injury, assessment of damages

Facts

The plaintiff was struck on his left side by a four-wheel drive utility, driven by the first defendant, while riding his bicycle at a pedestrian crossing. The force of the impact pushed the plaintiff two to three metres before he was thrown to the ground on his bike, landing heavily on his right side. Liability for the accident was admitted, however, the extent and cause of the plaintiff's injuries, particularly the meniscal tear, were in contention. The second defendant, being the insurer of the first defendant, took the position the injuries sustained in the subject accident were minor and that the meniscal tear was sustained playing soccer 14 weeks later, while the plaintiff was playing soccer.

Decision

1. Judgement for the plaintiff against the defendants for $124,456.89 plus interest on the amount for past economic loss.
2. The defendant to pay the plaintiff's costs of the proceeding, unless either party applied for, or otherwise agreed to, a different costs order within 14 days of the judgement.

Ratio

The Court considered there was sufficient evidence to link the collision and the meniscal tear, which was aggravated later during the soccer game. The decision was heavily influenced by the credibility of the plaintiff as a witness. The Court found him to be honest and reliable, considering his limited English proficiency and the challenges he faced in reporting his injuries accurately.

78. *Greenall & Anor v Amaca Pty Ltd* [2024] QCA 132

- Morrison JA & Fraser AJA and Kelly J, decision delivered 26 July 2024

Keywords

Appeal and new trial – where the deceased was employed by the first respondent and during the course of employment inhaled asbestos fibres – whether s 237 of the Workers' Compensation and Rehabilitation Act 2003 (Qld) abolished the right of the first appellant to bring a wrongful death claim for benefit of the second appellant in relation to domestic services lost by the widow as a result of the deceased's death

Facts

The Appellant (the widow of a former employee of the First Respondent – Amaca) claimed damages, through her personal representative, against Amaca in relation to a wrongful death claim for loss of services lost by her as a result of her husband's death. The Appellant's husband died of mesothelioma from his employment with Amaca and liability was admitted. At the time of her husband's death, the Appellant was not completely or partially dependent on the deceased earnings or, but for the death, would have been so dependent. Accordingly, she was not a "dependent" pursuant to s27 of the *Worker's Compensation and Rehabilitation Act* 2003 ("the WCRA"). However, she was dependent on the deceased's gratuitous support. The question was whether the Appellant could bring a wrongful death damages claim (for loss of gratuitous services) against Amaca when she was not a "dependent" pursuant to s27 WCRA or whether such a claim was prevented by s237 WCRA. Section 237(1) WCRA relevantly provides that the only persons entitled to seek damages for an injury sustained by a worker include:

a) The worker; or
b) a dependent of the deceased worker, if the injury results in the worker's death and;
    (i) compensation for the worker's death has been paid to, or for the benefit of, the dependent; or
    (ii) A certificate has been issued by the Insurer to the dependent under s132B.

The Appellant did not satisfy either of these provisions as she was not defined as a "dependent" pursuant to s27 WCRA.

However, the Appellant argued that because a claim for "damages" was defined by s10 WCRA to include a claim for damages brought by a "dependent" and because she was not a "dependent" as defined by s27 WCRA, she was not prevented from proceeding by reason of s237 as that section did not in fact apply to her claim.

Decision

Appeal dismissed.

Ratio

The Court of Appeal sighted with approval the observations of Thomas J, in considering the relevantly indistinguishable scheme of the 1996 Act in *Hawthone v Thiess Contractors Pty Ltd*[29] that:-

> *"It is quite clear that the worker's compensation scheme and associated common law damages scheme covered by compulsory insurance were intended to be the sole avenue of claim against employers in respect of injuries sustained by workers in their employment".*

The Court of Appeal held that upon the proper construction of the WCRA, in a case in which a worker sustains an injury that results in the worker's death, the definition of "dependent" in s27 does not apply to that word in s10 of the definition of "damages" in its application to s237(1) and s237(5).

Whilst the word "damages" in s237 takes its defined meaning from s10, the word "dependent" in s237 does not, in turn, take its meaning from the definition of "dependent" in s27. Accordingly, whilst the Appellant was a "dependent" (in the ordinary sense) for gratuitous services, she was prevented from pursuing a claim as she was unable to satisfy one of the "gateway" provisions of s237 (given she had not been the beneficiary of the past payment of compensation or had received a s132B certificate).

It was held that s237(1) disentitles the Appellant from making the wrongful death claim and s237(5) confirms that s237(1) abolishes any entitlement of the Appellant to make such a claim.

[29] [2002] 2 Qd R 157 at [16]

79. *TT v The Diocese of Saint Maron Sydney & SS (No. 3)* [2024] NSWSC 943

- Elkaim AJ; decision delivered 1 August 2024

Keywords

Intentional tort – child sexual abuse – vicarious liability in church context where no employment relationship – assessment of damages

Facts

The Plaintiff brought a claim for damages for psychiatric injury arising from an event of child sexual abuse occurring in October 2005 and grooming leading up to then. As at October 2005, the Second Defendant was an ordained Deacon at St Joseph's Maronite Catholic Church in Croydon; he was not employed then by the First Defendant.

There was detailed evidence by numerous lay witnesses, who stated the Plaintiff revealed the sexual abuse to them. The Defendant's sought to discredit the Plaintiff as giving inconsistent versions.

The Plaintiff's school records pre-October 2005 showed numerous bad behaviours. Post-October 2005, he had destructive behaviours including alcohol and drug abuse, gambling addiction, and reckless and dangerous behaviours on the road, with multiple hospitalisations. Medical evidence diverged as to whether his addictions later in life were caused by pre-existing susceptibility.

Decision

Judgment for the Plaintiff against both Defendants in the sum of $1,480,251.65, with the money paid to the court and further submissions to determine how the funds should be managed.

Ratio

The allegations of grooming were not accepted as these were considered an unconscious recreation, not being raised in early reporting. The sexual abuse event in October 2005 was accepted as occurring. The Court noted that minor inconsistencies in versions over time did not necessarily affect the core allegations (they were not major inconsistencies). The Court accepted complaints made by the Plaintiff can be persuasive and give substance to the proof

of the alleged facts. The core details of the event of abuse remained consistent and the Plaintiff's mental health thereafter was consistent with ongoing suffering from the abuse.

The First Defendant was not negligent as the church hierarchy was not aware of any misconduct. However, the First Defendant was held to be vicarious liable for the conduct, despite there being no employment relationship. The Court followed the decision in *Bird v DP* [2023] VSCA 66, which is on appeal to the High Court. There it was held that vicarious liability is not confined solely to employment relationships. Where the work performed by the tortfeasor and the business of the principal are so interconnected that the tortfeasor represents the principal, the tortfeasor can be considered to be conducting the business of the principal. The Second Defendant was volunteering as part of his path to priesthood, was subject to the directions of the First Defendant, living in the presbytery, involved in all aspect of church life, interacted with youth in the church community, was trusted by the community. He held a trust position giving opportunity to abuse the Plaintiff, and was treated as if he was an employee of the church.

Given the Plaintiff's addictions, the court considered it necessary for further evidence to be presented as to how funds ought to be managed.

80. *Gairns v Pro Music Pty Ltd* [2024] QDC 118

- Rosengren DCJ, delivered on 2 August 2024

Key words:

Employer liability – psychiatric injury – reasonable foreseeability of injury – duty of care – risk of psychiatric injury – performance management – disciplinary meeting

Facts:

The Plaintiff was employed by the Defendant as an internal sales supervisor, having worked for the Defendant in internal sales between 1997 and 2003, and then from 2005 onwards. The Plaintiff psychiatrically decompensated as a consequence of attending a meeting with the Defendant's managing director in February 2019 during which the Plaintiff was told that his supervisory role was to be relinquished and his salary would be reduced.

Prior to the meeting, the Defendant knew the Plaintiff was an emotional person who could become quite easily stressed and anxious. In the weeks prior to the meeting, the Plaintiff had been observed crying and visibly distressed at work because of personal issues.

The Defendant contended that over the two years prior to the meeting, the Plaintiff was aware the Defendant considered his work performance to be below standard (which was denied by the Plaintiff). The meeting was initiated by the Defendant late on a Friday. The Plaintiff was not given any prior notice of the meeting or what was to be discussed. During the meeting, the Plaintiff asked for a job description of his demoted role but was not provided with one. The meeting was held in an open-plan office which meant the discussions could be heard by others in the workplace.

Decision:

Judgment for the Plaintiff in the sum of $395,767.00

Ratio:

Her Honour rejected the Defendant's submissions that, based on the decisions in *Paige* and *Govier*, no duty of care was owed in these circumstances. Instead, Her Honour found a duty of care was owed because the conduct of the managing director in convening the meeting was not something to which the Plaintiff had contractually agreed, and the meeting was not undertaken as part of any disciplinary process or investigation. Her Honour held that there were clear signs that ought to have alerted the Defendant to the Plaintiff's psychological vulnerability and that it was irrelevant whether prior observations of the Plaintiff's distress in the workplace were related to personal rather than work issues. The demotion of a long-term employee was considered to be a serious matter which would inevitably cause any employee disappointment, unhappiness and distress, but against the Defendant's awareness of the Plaintiff's psychiatric vulnerability, a reasonable person in the position of the Defendant was on notice that a failure to address perceived performance deficiencies prior to the meeting would risk psychiatric injury. Her Honour otherwise considered that even in the absence of the

Plaintiff's pre-existing vulnerability, the circumstances in which the meeting occurred was sufficiently unreasonable as to give rise to the risk of psychiatric injury, which would have been very distressing for any employee.

Her Honour held that a reasonable person in the Defendant's position ought to have provided the Plaintiff with prior written notice of its concerns about his performance, given the Plaintiff proper opportunity to respond to such allegations prior to the meeting, ensured the meeting was conducted in a confidential and calm manner and provided the Plaintiff with the opportunity to bring a support person. A failure to undertake these reasonable steps each constituted a breach of the duty of care owed.

Causation was not established regarding the failure to bring a support person, but the remainder of the breaches were considered to have materially caused the psychiatric injury, notwithstanding his pre-existing vulnerability.

81. ***Jones v Central Queensland Hospital and Health Service*** **[2024] QSC 165**

- Sullivan J, decision delivered 8 August 2024

Keywords

Extension of limitation period – knowledge of material facts of a decisive character

Facts

The background was that the plaintiff had received radiation treatment for a tumour which she said caused the bone in her sacrum to effectively die.

This matter involved an application brought by the plaintiff primarily seeking an extension of time for limitation period to a claim for damages brought in relation to allegations of medical negligence arising in the period June 2011 to March 2012. She commenced the proceeding on 24 February 2021. She argued that she didn't have the means of knowledge of certain material facts until receipt of an expert report from Dr Pendlebury, which confirmed that she had been given a dose of radiation therapy higher than the literature recommended which substantially increased the risks of insufficiency fracture and bone necrosis of the sacrum and more likely than not had she not been given the radiation therapy at the levels she had, more likely than not, she would not have sustained the fractures.

Decision

The application was successful, and time extended to 26 February 2021. There was also an order pursuant to r.69 of the UCPR to substitute the State of Queensland as the sole defendant in place of Central Queensland Hospital and Health Service.

Ratio

Whilst the Plaintiff had a suspicion about inappropriate radiation dosage and targeting of the sacrum, that suspicion was not knowledge of such facts. The plaintiff was not a medical doctor, and multiple relevant specialists in the treating area had a failed to provide opinions to support the existence of such facts.

The mere holding of this state of mind by the plaintiff as a lay person was not admissible evidence of the underlying truth of the facts which were suspected or believed. The suspicion, or such a belief, could not have supported a person in the plaintiff's particular circumstances forming a view that they had an action with a reasonable prospect of success, and which could

reasonably be regarded as one which would result in an award of damages sufficient to justify the bringing of an action.

82. Griffin v Brisbane City Council [2024] QCA 157

- Bond, Flanagan and Boddie JJA, delivered 9 August 2024

Keywords

FACT-FINDING – APPEAL – FUNCTION OF APPELLATE COURT – WORKCOVER – REASONABLE PRECAUTIONS – PSYCHIATRIC INJURY – REASONABLY FORESEEABLE – REMITTED TO DISTRICT COURT

Facts

The appellant (plaintiff) alleged psychiatric injury during the course of her employment at a call centre operated by the Brisbane City Council. The plaintiff was required to take calls from the general public and was subject to a number of calls by a caller who was known the respondent (defendant) as a 'regular abusive caller'.

In December of 2017, the plaintiff took a call from this regular caller (a man known as Mr Wes O'Connor). As a result of the call, the plaintiff suffered a psychiatric injury. This was not in dispute at trial.

The matter was tried before the primary judge (Richards DCJ) in November of 2023.

At trial:-

- The defendant accepted it owed a duty of care;
- Disputed liability on the basis that breach, nor causation were not made out on the facts;
- Quantum was agreed at an amount of $251,000.00 clear of the WorkCover refund.
- On 8 December 2023, her Honour delivered her judgment of the matter.

Decision

Appeal is allowed;

Orders made 8 December set aside;

Matter remitted to District Court further reasons, with a further hearing of the parties, in relation to:-

- Findings of fact and law relevant to the foreseeability of a risk of injury;
- Findings of fact and law relevant to the content of the duty of care owed;
- Findings of fact and law relevant to the breach of duty;
- Findings of fact and law relevant to causation.

Ratio

His Honour, Bond JA, made specific reference to the role of the appellate court in this instance, noting 'it is not for this Court to perform for the first time substantial tasks of primary fact finding which should have been performed.' His Honour continues on in his reasons to establish the key issues that should have been considered at first instance by the District Court, namely breach and causation. At first instance, Her Honour had

dismissed the claim on the basis that the injury sustained by the plaintiff was not reasonably foreseeable. It was not a basis that the defendant had submitted that claim should be dismissed on. His Honour, Bond JA, found that this finding was made in error.

As such, it was held on appeal that ‘the primary judge was not justified in dismissing the appellant’s claim on the basis she did. The fact finding at trial miscarried.’ The matter is remitted to the District Court for further reasons.

83. *Sinclair v Coles Supermarkets Australia Pty Ltd* [2024] QSC 175

- Martin SJA, decision delivered 21 August 2024

Keywords
CCTV footage, scope of sec. 27 *PIPA*, explanation v verification of information, request for information, records v information, provision of records, prior similar incidents, pre-trial obligations under *PIPA*.

Facts
The Applicant, Mr Sinclair, brought an application against the Respondent, Coles Supermarkets ('Coles'), under s27 of the *Personal Injuries Proceedings Act* 2002 (Qld).

Mr Sinclair, in his application, requested that under the obligation of sec. 27, a "*statutory declaration from Mitch*[30]*, Sam*[31] *and any other individual involved explaining how the CCTV went from being seen and marked by Mitch on 13 February 2024*[32] *to no longer existing"* be provided.

Further in his application, Mr Sinclair requested information regarding *"all records regarding any previous and/or similar incidents and complaints made about safety at the Coles, Hope Island store;".*

Decision
1. Within 14 days of today's order, the respondent is to provide information that is in its possession about previous incidents at the Hope Island store which are similar to the incident alleged by the applicant.
2. The respondent is to pay 20% of the applicant's costs on the standard basis.

Ratio
CCTV Footage & Statutory Declaration
His Honour upheld the Respondent's objection to providing the statutory declaration, concluding that it was a request for an explanation rather than a verification of information previously provided and therefore did not fall into the scope of sec. 27(3). Mr Sinclair was making a request for an explanation to what he considered was 'missing' CCTV footage, this did not fall within the scope of sec. 27(3) given that the matter was not about the "the circumstances of, or the reasons for, the incident". In doing so, His Honor considered *SDA v Corporation of the Synod of the Diocese of Rockhampton*[33]

It was also noted by His Honour that the applicant does not have the right under sec. 27 to demand a statutory declaration be provided by a particular person, in this instance Mitch and Sam, but rather the Respondent entitled to provide a statutory declaration by any 'authorised person'.

Request for Information
Coles contended that there was a key distinction to be made in the Applicants request for 'records', stating that a request for records was not captured by the scope of sec. 27(1)(a)(i). However, His Honour concluded that 'records' was captured under the scope of 'other

[30] Assistant Store Manager
[31] Store Manager
[32] Date of Accident
[33] [2021] QCA 172

documentary material' and as such the Respondent must provide this information to the Applicant. His Honour also concluded, however, that a request for 'complaints made at the store' was broader than the disclosure obligations of sec. 27 and that Coles was not required to provide this information to the Applicant. In making his decision, His Honour considered *Day v Woolworths Ltd*[34], concluding that a request for records of *"prior, similar incidents, may be information about the circumstances or reasons for the incident…include(ing) that the Respondent was on notice of the risk."*

[34] [2016] QCA 337

84. *Khodor v Murphy* [2024] NSWDC 364

- Waugh SC DCJ , decision delivered 26 August 2024

Keywords
Trespass to person – Assault – Battery – Self Defence - *Civil Liability Act* sections 52 and 53

Facts
Mr Khodor, the plaintiff, claimed damages from Mr Murphy, the defendant, for assault following an altercation between the parties as a result of a road traffic incident. Mr Murphy conceded that he punched Mr Khodor, but says that he only hit him once, in self-defence. The facts about what happened at the time of the alleged assault were heavily contested. The only witnesses to give evidence at the hearing were Mr Khodor and Mr Murphy. They each gave diametrically opposed accounts of the critical events. Each claimed that the other was the aggressor.

Decision
1. Judgment for the defendant.
2. Plaintiff to pay the defendant's costs.

Ratio
The Court found that Mr Murphy was a more credible witness. In examining Mr Khodor's version of events, the Court found that Mr Khodor's claim that Mr Murphy was speeding was implausible based on the objective, physical evidence, being, the condition of Mr Murphy's vehicle, the road conditions and the traffic. Mr Khodor's admission to following Mr Murphy in anger supported Mr Murphy's account that Mr Khodor was the aggressor. The Court held that Mr Khodor initiated the confrontation, yelling threats, spitting, and punching. In applying sections 52 and 53 of the *Civil Liability Act 2002* (NSW), the Court held that Mr Murphy's single punch was a reasonable act of self-defence.

His Honour stated at 145:

"*I find that it was a reasonable response in the circumstances as Mr Murphy perceived them for Mr Murphy to have punched Mr Khodor once. I have already found that Mr Murphy attempted to get back into his van to leave in order to get himself out of the situation when confronted by Mr Khodor. It was reasonable to respond with force once Mr Khodor had thrown maybe 5 or 6 punches at him. Whilst his punch was forceful enough to knock Mr Khodor to the ground, the hospital records show that it was not so forceful as to cause a fracture*."

Despite holding in favour of the Defendant the Court went on to consider quantum stating the following:

"*The practice of judges of this Court who propose to find for the defendant in personal injury cases is to assess damages in order to avoid the cost and expense, as well as the*

inconvenience in taking up valuable court time and resources, of a new trial limited to the issue of damages should there be a successful appeal on the issue of liability: Nevin v B & R Enclosures [2004] NSWCA 339 at [74]. 149 I therefore proceed to assess damages on a contingent basis."

85. *BEK v BEL* [2024] QCA 154

- Morrison and Dalton JJA and Brown J, decision delivered 27 August 2024

Keywords

APPEAL AND NEW TRIAL – APPEAL – LIMITATION OF ACTIONS – GENERAL MATTERS – STATUTES OF LIMITATION GENERALLY – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIALS FACTS OF DECISIVE CHARACTER

Facts

The appellant and respondent were married and in the course of their marriage the appellant raped the respondent on three occasions in 2001. The respondent made a preliminary complaint in 2016. In 2017 she went to the police and on 3 October 2019 the police arranged for a pretext call with the appellant during which the appellant made some partial admissions to the rapes in 2001. This recording failed. The respondent then gave a statement on 13 April 2020 of her recollection of the phone call. On 18 February 2020 the police interviewed the appellant and during this interview the appellant made various admissions about the sex being non-consensual. The record of this interview was not provided to the respondent however, the police indicated to her those admissions had been made. Following this interview, on 20 February 2020, the appellant was charged with three counts of rape.

On 18 May 2021, the police told the respondent that the appellant had indicated that he intended to plead guilty. On the same day, the respondent sought legal advice regarding compensation from the appellant. The advice received at that time was that she had a common law claim for her personal injuries but there was a real risk she would fail to discharge the evidentiary onus on the absence of any corroborating evidence. Her lawyer advised that if the appellant actually entered a plea of guilty or was convicted, then her prospects of establishing liability significantly increased and, in those circumstances would recommend pursuing the claim.

On 17 August 2021 the respondent instructed her solicitors to commence proceedings against the appellant in anticipation of the appellant's guilty plea which ultimately took place on 6 September 2021. The Part 1 Notice of Claim was served on 17 January 2022.

On 29 March 2023, the respondent made an application pursuant to s31(2) of the Limitation of Actions Act to extend her limitation period until 6 September 2022 on the basis that the plea of guilty was a material fact of a decisive character. Judge Lynham DCJ made orders granting the extension of time. Those orders are the subject of this appeal.

Decision

1. The applicant have leave to file the notice of appeal,
2. The appeal be dismissed.
3. The appellant pay the respondent's costs of the appeal to be assessed on the standard basis if not agreed

Ratio

The appellant submitted that the plea of guilty was not a material fact because the respondent was aware of the material facts sufficient to plead a cause of action from 2001 when the rapes occurred, or shortly thereafter. Further it was argued by the appellant that the pretext call, the admissions made to police by the appellant and the advice from the police that the respondent intended to plead guilty formed a sufficient combination of facts for the respondent to appreciate that she had a worthwhile action to pursue. The appellant argued that the plea of guilty strengthen her position but that it was not a material fact of a decisive character.

In a split decision, Brown J, with whom Morrison JA agree, concluded that the term "material fact" in section 30(1)(a) is broader than just the essential elements of a cause of action. It includes facts necessary to prove those elements. The reasoning is supported by the language of the section, which isn't limited to facts that establish the cause of action but also includes facts related to proving it. Additionally, in assessing whether a fact is "material" and has a "decisive character," it's important to evaluate how these facts affect the success of the claim, noting these two requirements must be established separately.

It was held that whilst the evidence of the admissions was material because it proved the occurrence of the sexual assaults, this evidence was not decisive because the admissions were not in a form that could be proved independently. It was only once the plea of guilty was entered that the respondent could then rely on s79 of the *Evidence Act 1977* (Qld) which permits a conviction to be admissible in evidence when proving an offence in a civil proceeding.

86. *Apelu v Lusty Tip Trailers Pty Ltd* [2024] QCA 158

- Bond and Boddice JJA and Crowley J, decision delivered 30 August 2024

Keywords
Workers' compensation – psychiatric injury – post-traumatic stress disorder – notice of assessment - where schizophrenia was not specifically raised as a work-related injury until it was pleaded in the amended statement of claim

Facts
The plaintiff was a boilermaker who sustained a head injury at work. He lodged a workers' compensation claim for a laceration injury and post-traumatic stress disorder. The two injuries were accepted by WorkCover. The plaintiff was subsequently diagnosed with schizophrenia.

In the Notice of Assessment, the Medical Assessment Tribunal outlined the plaintiff's schizophrenia was not work-related. The schizophrenia condition was not included as an injury in the plaintiff's Notice of Claim for Damages or Statement of Claim.

After proceedings had been commenced, the plaintiff obtained a report from Professor McFarlane who opined that there was a link between the accident and the onset of the plaintiff's schizophrenic illness. The plaintiff amended the Statement of Claim to include the schizophrenia as an accident-related injury. The defendant pleaded in its Defence that the plaintiff was precluded from seeking damages for any aggravation or development of schizophrenia because WorkCover has not decided that his schizophrenia was an "injury" under the *Workers' Compensation and Rehabilitation Act 2003* (Qld), nor had it issued a Notice of Assessment for that condition.

The plaintiff brought an application to strike out the relevant paragraphs of the defendant's Defence. The primary judge dismissed the application.

The plaintiff appealed that decision on two grounds.

Decision
Appeal dismissed with costs.

Ratio
The plaintiff submitted that the primary judge erred in finding that the Notice of Assessment for the PTSD did not also encompass an assessment of the plaintiff's schizophrenia. The plaintiff alleged that he had one "psychiatric injury" for which he had received a Notice of Assessment. The Court of Appeal held that there was no evidence suggesting that the plaintiff's PTSD and schizophrenia were one and the same condition or disorder. Further, the Court of Appeal, relying on the decision of *Costello v Queensland Rail*, determined that an insurer is required to refer all psychiatric or psychological injuries for assessment. As a result, the plaintiff's Notice of Assessment only covered his PTSD injury.

As an alternative argument, the plaintiff submitted that if his schizophrenia condition was not covered by the Notice of Assessment, it was instead a “secondary injury” to either his laceration injury or his PTSD. The plaintiff relied on the *Barraclough v WorkCover Queensland* authority, whereby Durward DCJ held that a subsequent development of a condition is not a new injury when there is a progression of symptomology that has manifested itself in a developmental way and in a continuum. The Court of Appeal, in agreement with the primary judge, were not satisfied on the evidence that the plaintiff’s schizophrenia could be regarded as a consequence of the laceration injury or PTSD.

87. *Greenall & Anor v Amaca Pty Ltd [No 2]* [2024] QCA 169

- Morrison JA and Fraser AJA and Kelly J, decision delivered 10 September 2024

Keywords: civil proceedings in state and territory courts, Costs, Procedure

Facts

The Court dismissed the first and second plaintiffs' appeal against the primary judge's orders.[1] The first and second respondent were separately represented in the appeal. The second respondent did not seek any order about costs and no order for costs is sought against it. The first respondent sought an order that the appellants pay its costs of the appeal. The appellants sought an order that the first respondent pay their costs of the appeal or, if that submission is not accepted, that there be no order as to costs.

The appellants were wholly unsuccessful in their appeal and the first respondent was wholly successful.

Decision

The appellants pay the first respondent's costs of and incidental to the appeal.

Ratio

The first respondent relied upon the principle that the unsuccessful party is usually ordered to pay the successful party's costs. The appellants submitted that a departure from the usual order is appropriate based on the appellants bringing their appeal *bona fide,* because the right for the first appellant to bring wrong death claim for the benefit of the second appellant was abolished by s 237 of the *Workers' Compensation and Rehabilitation Act* 2003 had not been determined previously. The appellants also relied upon *CSR Ltd v Eddy*,[2] in the circumstances that the first respondent is likely to continue to be a frequent defendant for claims result to asbestos exposure and therefore, the first respondent has benefited from the appeal. In *CSR Ltd v Eddy*, the successful party was ordered to pay the costs of an appeal because the successful party benefitted from the precedent established by the appellate court's decision upon the relevant question of law.

The Judge held that there are substantial differences between this case and *CSR Ltd v Eddy,* and while the circumstances naturally engage sympathy for the position of the second appellant, the matters upon which the appellants rely do not justify a departure in the appellants' appeal from the usual order that costs follow the event.

TRAVIS
SCHULTZ
& PARTNERS

88. *Manhattan Homes Pty Limited v Burnett* [2024] NSWCA 219

- Leeming JA, Harrison CJ, Price AJA, decision delivered 11 September 2024

Keywords

Contributory negligence - apportionment of damages

Facts

Mr. Burnett was seriously injured at a construction site when he stepped onto temporary flooring that partially covered a void for a stairwell, causing the flooring to collapse and resulting in his fall to the ground floor.

Manhattan Homes Pty Ltd ("Manhattan") was the principal contractor for the site and had subcontracted some work to Griswold's Outdoor Xmas Pty Ltd ("Griswold's"). Mr Burnett was employed by Griswold's and was also the sole director and shareholder of the company.

Prior to his fall, Mr Burnett became aware that the steel bars supporting the boards covering the void had been removed, leaving the temporary flooring unsupported.

At first instance, both Manhattan and Griswold's were found liable, with an 80/20 split of responsibility in favor of Griswold's. Furthermore, it was found that the fall was the result of Mr Burnett's inadvertence rather than his own negligence, and therefore, contributory negligence was not established.

Manhattan appealed, *inter alia*, on the following grounds:

- The primary judge erred in failing to find that Mr Burnett was guilty of contributory negligence.
- The primary judge erred in finding that Manhattan was 80% culpable for the accident.

Decision

Allow the appeal in part.

Ratio

<u>Contributory negligence</u>

Mr Burnett argued that the absence of contemporaneous physical cues alerting him to the danger was an important consideration when considering whether he failed to take proper care for his own safety.

The Court found that the absence of cues to remind Mr Burnett of the danger was relevant to the assessment of the extent to which, when compared with Manhattan, he contributed to his

own harm, but not to the question of whether he could escape entirely the consequences of failing to take proper care for his own safety in the first place.

The Court took guidance from the decision in *Caswell v Powell Duffryn Associated Collieries Ltd*, and noted that once it was accepted that Mr Burnett knew of the danger created by the missing steel supports, he could only avoid the consequences of failing to utilise that knowledge if he was otherwise distracted by long hours and fatigue or by failing to give due regard to what has been referred to as "the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety".

The Court observed that the task Mr Burnett was performing at the time of his fall (taking tiles from upstairs to downstair) was neither technically complicated nor conceptually difficult. Further, the task was not repetitive in any relevant sense, physically taxing, or performed in a noisy or distracting environment. The Court found that while Manhattan could have refreshed Mr Burnett's recollection or reminded him of what he knew by a warning sign or a physical barrier on the first floor, Mr Burnett was found to have negligently contributed to his own loss and damage by failing to employ his recent knowledge of the risk.

Apportionment of damages

Manhattan, as the principal contractor and occupier, was responsible for construction of the residence and for the safety of all personnel engaged by it for that purpose either as its employees or as independent contractors. Manhattan was also presumably responsible for controlling site access and for allocating, if not supervising, the work to be performed. Although it would not appear to have been a complex or complicated job, Manhattan would also presumably have been in charge of the scheduling of works and the interaction between, and programming of, various trades.

In contrast, Griswold's arrived on-site for the first time on the day Mr Burnett was injured. Its knowledge and appreciation of the risk was informed by Mr Burnett's observation of the unsupported boards as he ascended the stairs. The hazardous state of the unsupported boards was only indirectly or incidentally related to the task that Mr Burnett was required to perform as opposed, for example, to some hazard that was inherent in the performance of the actual work of stripping the tiles in the bathroom. Responsibility for maintaining a safe means of access Mr Burnett's work area fell squarely upon Manhattan as the occupier of the site while Griswold's responsibilities were much more limited.

As such, the primary judge's findings regarding the apportionment of damages between Manhattan and Griswold were not disturbed.

89. *Smith v Workers' Compensation Regulator* [2024] QIRC 223

- O'Connor VP, decision delivered 10 September 2024

Keywords: appeal against review decision, entitlement to compensation, workers' compensation

Facts

On 2 August 2021, the Appellant, a maintenance planner at Mount Isa Mines working for Glencore, sustained injuries while exiting a bus at a deployment area. The bus door malfunctioned due to a faulty alternator and failed to open properly. As the Appellant stepped off, he realised mid-step that there was no lower step causing him to fall approximately 50 cm to the ground. The lower step had failed to extend due to the faulty alternator. The Appellant gave evidence that he landed on both knees and both wrist and his right elbow. He sustained a fracture to his right elbow and only notice pain in his right knee after his right elbow pain began to settle.

XtraCare ultimately accepted a claim for a "right radial head fracture and left patellar contusion." However, on 16 March 2022, XtraCare rejected the Appellant's application for a right knee injury under section 32 of the WCR Act. On 19 October 2022, the Workers' Compensation Regulator upheld XtraCare's decision to reject the application for compensation in relation to his right knee injury. This decision was appealed to the QIRC.

Decision

1. Pursuant to s 558(1)(c) of the *Workers' Compensation and Rehabilitation Act* 2003:

(a) the review decision of the Respondent is set aside; and

(b) another decision is substituted, namely, that the Appellant suffered an injury within the meaning of s 32 of the *Workers' Compensation and Rehabilitation Act* 2003.

Ratio

The Appellant's first report of right knee pain was on 11 October 2011, some two months after the subject incident.

The medical evidence as to the cause of his right knee complaints differed. The MRI scan showed some pre-existing changes in the Appellant's knee as well as a clear non-displaced tear in the posterior part of the medial meniscus. Dr Shooter opined that the tear was degenerate in that it was more than likely to be pre-existing and relating to arthritis. Dr Wilkinson believed the meniscus tear would require twisting and impact forces, not a direct fall as described by the Appellant. He suggested the Appellant likely aggravated or injured his patellofemoral joint rather than the meniscus, as the injury mechanism aligned more with patellofemoral damage.

The Respondent's case primarily focused on whether the Appellant experienced pain in his right knee immediately after the fall. The Respondent argued that this lack of immediate reporting should be a key factor for the Commission in deciding whether the Appellant's right knee injury was related to his employment.

In relation to reporting in clinical notes, His Honour took guidance from the decisions in *Container Terminals Australia Ltd v Huseyin* and *Mason v Demasi* regarding the treatment of clinical notes. These cases highlight that clinical notes are often created for purposes other than legal proceedings, do not include the specific questions asked by the health professional, and are typically summaries rather than exact records of the patient's responses. Additionally, they may be influenced by factors like language fluency and the patient's understanding of the questions being asked.

His Honour also noted that, immediately following the subject incident, the Appellant was prescribed drugs which had both pain and anti-inflammatory properties. It was not put to the medical experts what effect these drugs may have had on the Appellant and the presentation of right knee pain.

Despite the differing opinions of the medical experts, His Honour concluded that the Appellant did sustain a work-related injury, specifically, an aggravation of pre-existing degenerative changes to the patellofemoral joint, arising out of or during his employment, for which the Appellant's employment was a significant contributing factor.

90. *Bilson v Vatsonic Communications Pty Ltd; Vatsonic Communications v. Bilson* [2024] QCA 171

- Bowskill CJ, Bodice JA and Henry J, delivered 13 September 2024.

Facts

Mr Bison ("the plaintiff") worked for Vatsonic Communications and operated a hydro-vac truck (used to remove water and debris from drainage pollution traps/pits). Vatsonic had a contract with the Townsville City Council to provide the truck, vacuum hose and an operator. The plaintiff was required to work in cooperation with workers employed by the Council, who used a Council truck that had a crane and sling fitted to move the hose in and out of the pits.

The plaintiff's truck had a large tank on the back of it, with a set of valves. A large hose was used to vacuum or suck out water and silt from the gross pollutant associated with stormwater drains. Water was vacuumed out so that silt in the trap/drain could be removed.

The plaintiff and the Council workers had been working at this particular pit for about five days in the week prior to the incident. The plaintiff had a truck and the Council workers had another truck, to which was attached the crane. The pit was about 4.2m deep. In getting the hose into the pit the plaintiff would organise the vacuum hose, connect it to his truck and the other end would then be placed in the pit for the Council workers to attach to the crane. The Council workers would put a sling around the hose and then lift it up and lower it down into the pit, and thereafter the plaintiff would commence the vacuuming with the Council workers lowering the hose further into the pit with the plaintiff to guide the hose. At the end of the process the vacuum would be stopped, and the hose raised from the pit by the Council workers. The crane would then be disconnected from the hose.

The injury occurred when the plaintiff went to disconnect the hose at the truck and it flayed, striking him in the face (nose and left eye). He then observed that the hose was in the air, still on the sling, and the crane and hose had not been lowered to the ground.

The plaintiff suffered an injury to his eye and brought a claim pursuant to the *Workers Compensation and Rehabilitation Act 2003* against Vatsonic, and a claim at common law against the Council, asserting vicarious liability of its employees.

The Trial Judge found that Vatsonic had breached its duty of care by not appropriately assessing the risks of injury for the particular task, and that it had failed to prepare a Safe Work Method Statement.

The Trial Judge also found a breach by the Council in that its workers failed to follow the informal system of work established by the plaintiff.

The Trial Judge apportioned liability 70% against the employer and 30% against the Council on the basis of the actions of the Council's workers.

The Trial Judge also found that the Council was entitled to be indemnified, through a contract, by Vatsonic for any damages awarded against it and s 236B of the *Workers Compensation and Rehabilitation Act* did not operate to void that agreement.

The plaintiff appealed on three grounds:

1. The Trial Judge erred not ordering judgment against the Council;
2. The Trial Judge erred in failing to assess damages against the Council; and
3. The Trial Judge erred in not providing the plaintiff an opportunity to be heard on costs.

Both Vatsonic and WorkCover also appealed arguing the Trial Judge:

1. Erred in finding that Vatsonic had breached its duty of care;
2. Erred in finding causation was established;
3. Erred in apportioning liability 70% against Vatsonic, when it ought to have been 100% against Council;
4. Erred in construction of Clause 1.39 of the agreement between Vatsonic and the Council;
5. Erred in making findings that it did about the breach of other clauses in the agreement;
6. Erred in his conclusions regarding s 236B of the *Workers' Compensation and Rehabilitation Act 2003*;
7. Erred in not giving judgment for the plaintiff against the Council.

Decision

Appeal allowed.

Judgment for the plaintiff against Vatsonic and Townsville City Council.

Ratio

Expert evidence was led in the trial with controversy between the experts as to the force in the hose at the time the plaintiff was disconnecting it from the truck. In that regard the court preferred the evidence of Mr Contoyannis, and his view that the stored energy in the hose was more readily explained because of it being connected to the sling and in the air, rather than the version put forward by Mr Kahler. The court was satisfied that the system of work between the plaintiff and the Council workers included that the hose was not to be moved while the plaintiff was in the process of changing it over (from one valve to the other). That instruction had not been followed, and the hose was moved as identified by the plaintiff after the incident, with the court accepting his evidence.

Vatsonic argued that the informal system of work established by the plaintiff, with the Council workers that the hose would lay flat upon the ground when emptying the tank was all that was required because everyone knew what to do. Vatsonic argued that any risk assessment would not have identified other precautions to be taken, and that the system of work that was ultimately adopted was part of training given to the plaintiff by Vatsonic. While it was the plaintiff's understanding that the hose would lay flat on the ground, the court was satisfied that there was no evidence of any training, and no evidence of an explanation about why the hose would and should remain flat on the ground.

The Trial Judge accepted the plaintiff's expert that a review or audit of the risks would have led to the development of a safe operating procedure. Had such a risk assessment been taken and a Safe Work Method Statement prepared, it would have identified the reason why the hose remaining flat on the ground during changeover would be required. If there is a reason for why something has to be done, the greater the degree of likelihood that it will be done. It was for similar reasons that Vatsonic failed in its argument in causation on the basis that a risk assessment which would have informed a safe operating procedure that was documented and communicated to the plaintiff and the Council workers meant it would have been unlikely they would have moved the hose contrary to that procedure, and the plaintiff would not have been injured.

The Court of Appeal was also satisfied with the apportionment of liability of the Trial Judge at 70% to Vatsonic and 30% to Council, with the Chief Justice making the comment that:

"It may have been arguable that each Vatsonic and the Council ought to bear equal responsibility, so that a 50/50 apportionment would be appropriate. However, in my view, the position of Vatsonic as the employer, as well as the specialist contractor, is such that it ought to bear a greater proportion of the liability. For that reason, I find no error in the conclusion reached by the Trial Judge."

On the issue of the indemnity clause, the court was satisfied that Vatsonic was required to indemnify the Council against the plaintiff's claim.

The Council appealed a number of factual findings as to liability, arguing that the Trial Judge ought to have found the Council did not cause or contribute to the plaintiff's injury, and therefore Vatsonic should be held 100% liable.

As to the s 236B point, the court said that the Judge had erred and that it does apply in the circumstances. That section made Clause 1.39.1 of the contract between Vatsonic (the employer) and the Council (the third party) void, where it tried to have the employer (Vatsonic) indemnify the Council with respect to the contribution claim brought against it by WorkCover (for Vatsonic) against the Council. The Chief Justice referred to explanatory notes regarding that section, stating that *"… statutory intent is reinforced by other statements in the explanatory notes, for example the reference to the effect of the amendment being to "prohibit the contractual transfer of liability from principals to contractors" … furthering the objects of the Act by, among other things, "ensur[ing] reasonable cost levels for employers and provid[ing] for the protection of employers, interests in relation to claims for damages for workers' injuries".*"

91. *Bartlett v De Martin & Gasparini Pty Ltd* [2024] NSWSC 1172

- Elkaim AJ, decision delivered 17 September 2024

Keywords

Concreter injured on building site. First defendant vicariously liable for unidentified worker. Civil Liability Act 2002 (NSW), Workers Compensation Act 1987 (NSW).

Facts

The plaintiff's employer was a labour hire company which had contracted its services to the first defendant.

The plaintiff was a concreter and was directed by the first defendant to move a 50 kg, 10-meter-long empty concreting hose to another location on the job site with another worker. Without warning, and before the plaintiff was ready, the other worker picked up the hose and started walking quickly. This unexpected action caused the plaintiff to be jolted forward, resulting in immediate pain in his lower back.

The other worker was not identified either as a labour hire worker or direct employee of the first defendant.

The plaintiff alleged:

a. that the injury had been caused by the casual negligence of the other worker, who failed to coordinate the lifting process and was under the control of the first defendant; and
b. that the labour hire company had owed a non-delegable duty of care.

Decision

Judgement for the Plaintiff with a 90/10 split of responsibility as between the defendants (in favour of the second defendant). Defendants are to pay the plaintiff's costs of the proceedings.

Ratio

The Court concluded that the distinction on whether the other worker was identified as either a labour hire worker or direct employee of the first defendant, was not pertinent to the case in circumstances where the first defendant exercised control over him.

The Court accepted the plaintiff's evidence; that the plaintiff and the other worker were moving the pipe under the direction of the first defendant and was satisfied that the plaintiff and unidentified worker were working under the supervision and direction of the first defendant.

The Court found that the weight of the pipe required at least two people to lift and once two people are involved, there is a need for coordination. The failure of the other worker to coordinate the lift and carry of the pipe, constituted negligence, and as a result, the first defendant was vicariously liable either as the actual or deemed employer of the unidentified worker[35].

In relation to causation, the Court held that once it is accepted that the plaintiff hurt his back as a result of the other worker's failing to coordinate the movement of the pipe, causation naturally flows [36].

In relation liability of the second defendant, the defendants had agreed that if a verdict was found against the first defendant, then there would be a 90/10 split of responsibility between the defendants.

As the incident occurred very quickly and the plaintiff was not to know of the other worker's actions nor have an opportunity to intervene to prevent the other worker's actions, the Court held that there was no basis to find contributory negligence on the part of the plaintiff.

[35] At paragraphs 41-42
[36] At paragraph 48

TRAVIS
SCHULTZ
& PARTNERS

92. *Miller v WorkCover Queensland* [2024] QDC 156

- Loury KC DCJ, decision delivered: 18 September 2024

Keywords

where evidence of the Plaintiff's earnings is unreliable, Where the Plaintiff contends she was strangled in the workplace resulting in her suffering PTSD, where the Plaintiff experienced other events contributing to any loss or impairment alleged to have been suffered, whether allegations of criminal conduct were established to a reasonable satisfaction, whether the Plaintiff suffered PTSD and if so whether the events of 20 February 2019 were a significant contributing factor, whether the Plaintiff was a de facto director, whether the Plaintiff was a worker under the workers' compensation and rehabilitation act 2003 (Qld)

Facts

The Plaintiff and her husband, Mr Starling, owned and operated the business Wet Fix Pty Ltd ('Wet Fix'). Mr Starling and the Plaintiff acted as sole director and general manager, respectively. Following the breakdown of their marriage, on 20 February 2019, the Plaintiff alleged she was strangled and thrown against the walls and a filing cabinet by Mr Starling at the Wet Fix office following an argument over a laptop. Mr Starling accepted there was an argument but denied strangling the Plaintiff and claimed that the Plaintiff threw herself against the walls and filing cabinet. The Plaintiff sued WorkCover, claiming she developed post-traumatic stress disorder ('PTSD') from the incident on 20 February 2019 and was no longer able to work. The Defendant contended that: The Plaintiff was not a worker pursuant to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('WCRA') but rather was a director; Mr Starling did not strangle the Plaintiff during the incident on 20 February 2019; the Plaintiff did not develop PTSD; and, if the Plaintiff did develop PTSD, the incident on 20 February 2019 was not a significant contributing factor to its development.

Decision

1. The Plaintiff's application to re-open her case is refused.
2. The Plaintiff's claim is dismissed.
3. Parties directed to file and serve submissions as to costs by 4:00pm 25 September 2024. Issue of costs will then be decided on the papers.

Ratio

The matter proceeded by way of a trial from 24 to 29 July 2024. Her Honour's determination of the issues at trial turned on an assessment of the reliability of the Plaintiff's evidence. Ultimately, her Honour found the Plaintiff's evidence to be "*devoid of credit*"[1] and dismissed the Plaintiff's claim.

Whether Mr Starling Strangled the Plaintiff

Her Honour noted that in a civil proceeding the Plaintiff bears the onus of proof to the civil standard of the balance of probabilities. That is, the Plaintiff would not succeed unless, on the whole of the evidence, she established to a reasonable satisfaction that Mr Starling strangled her. The Plaintiff (who was self-represented) conducted herself throughout the proceedings in such a way that "*thoroughly undermine[d] the credibility of all her evidence.*"[2] Such conduct included: Downloading an image off the internet showing neck bruises and tendering it as evidence of her own injuries; altering and re-disclosing her Queensland Police Service statement following inconsistencies raised during cross-examination; and blaming her accountant when cross-examined on the issue of invoicing entities through a de-registered business. In contrast, her Honour found that Mr Starling was a reliable and truthful witness. Her Honour was satisfied that the incident on 20 February 2019 occurred as per Mr Starling's evidence in that the Plaintiff was the aggressor, she was not strangled by Mr Starling, and she threw herself against the filing cabinet and walls.

Was the Plaintiff a Worker Under the WCRA?

The Defendant accepted that the Plaintiff was not a director. However, it was contended by the Defendant that the Plaintiff's position meant that Wet Fix was under her direction or instruction at the time of the incident. The Plaintiff contended that Wet Fix was a company and not a corporation, so schedule 6 of the *WCRA* did not apply and she was therefore a worker under the Act. Her Honour noted that the definition of director under the *WCRA* is consistent with the common law concept of the de-facto director, which is codified in the *Corporations Act 2001* (Cth) and is dependent upon the nature of the duties, functions and powers which are exercised.[3] Further, the Plaintiff's own evidence was that she intended to take the laptop from Mr Starling on 20 February 2019 because it belonged to the company and she intended to reverse payments previously made by Mr Starling. Her Honour found that on the balance of probabilities, the Plaintiff was not a worker pursuant to section 11 of the *WCRA*.

What Injury did the Plaintiff Sustain as a Result of The Events on 20 February 2019?

The Defendant engaged Dr Watt to assess the Plaintiff. The Plaintiff relied on the evidence of Dr Grant Blake and Dr Lucas Murphy. Dr Blake noted that his opinion on the Plaintiff's capacity for work was based on impairments the Plaintiff reported arose after 20 February 2019. However, Dr Blake noted that what the Plaintiff did not tell him would also be relevant, and that his opinion would have been re-formulated had he been aware of her prior history. Further, Dr Murphy opined that the Plaintiff's mental state deteriorated in the year prior to the incident due to the breakdown of her marriage. He further opined that the events of 20 February 2019 were a significant contributing factor, but not the major substantial contributing factor. Dr Watt opined that the incident on 20 February 2019 did not result in symptomatology consistent with PTSD as it lacked the character of horror or helplessness and carried a character of grief being in a situation of physical conflict with her husband of 15 years. Further, Dr Watt opined that the domestic difficulties in the context of the marriage prior to the incident likely resulted in an adjustment disorder, and that the Plaintiff's presentation to Dr Watt was suggestive of narcissistic personality traits. Accordingly, her Honour found there was no causal

connection between the events of 20 February 2019 and any psychiatric injury sustained by the Plaintiff.

93. ***Middleton v Hyett t/as Phoenix Rising Café*** **[2024] NSWSC 1201**

- Mitchelmore J, delivered 25 September 2024

Keywords

Complex regional pain syndrome ("CRPS") – degree of permanent impairment – assessment of body parts not listed in referral

Facts

Dr Kwong, Consultant Physician and Rheumatologist had diagnosed the Plaintiff with work-related "repetitive right wrist and right thumb injuries with tenosynovitis documented objectively by ultrasound and MRI-complicated by CRPS". In the alternative, orthopaedic surgeons Dr Haig and Dr Kinny did not consider the Claimant suffered from CRPS.

An Application to Resolve a Dispute was lodged by the Plaintiff however, there was a dispute between the parties as to the scope of the referral to the medical assessor. The President's delegate ultimately expressed the scope of the referral as *"right upper extremity (chronic pain to right thumb, right wrist, right elbow) CRPS - to be determined by the Medical Assessor."*

The medical assessor assessed the Plaintiff with a 37% WPI without a diagnosis of CRPS however, included the assessment of the Plaintiff's right shoulder and right medial, ulnar and radial nerves.

The Defendant lodged an appeal to the Appeal Panel as the medical assessor had assessed body parts not listed in the referral. The Appeal Pannel revoked the medical assessment certificate issued by the medical assessor and issued a new certificate that assessed the Plaintiff's WPI as 14%.

The Plaintiff sought an order quashing the Appeal Panel's decision and remitting the matter to the President of the PIC to be dealt with by a different Appeal Panel according to law.

Decision

Summons dismissed with costs.

Ratio

The Plaintiff submitted:

1. Assessment of the right shoulder did not exceed the referral where it formed part of the “right upper extremity”; and

2. Where Dr Kwong assessed sensory deficits and pain, the medical assessor had not exceeded the scope of the referral in relying on injury to the medial, radial and ulnar nerves.

The Court noted Dr Kwong did not identify a right shoulder injury, nor an injury to the medial, radial and ulnar nerves outside of the assessment of CRPS and therefore, the medical assessor relied on conditions not within the scope of the referral.

The Plaintiff also submitted where the referral referred to “chronic pain” it was necessary for the Appeal Panel to assess the permanent impairment that flowed from that chronic pain. However, such submission was not consistent with the 4th edition of the NSW Workers’ Compensation Guidelines for the Evaluation of Permanent Impairment which expressly exclude the chapter in AMA5 on pain.

94. *Cagney v. D&J Building Contractors Pty Ltd* [2024] QDC 162

- Horneman-Wren SC, DCJ, decision delivered 26 September 2024

Author: Michael Callow, Special Counsel

Keywords

Where the Plaintiff was a trade-qualified self-employed carpenter who alleges he was engaged to perform ad hoc work for the Defendant as a construction worker – where the Plaintiff alleges he was a "worker" as defined by the *Workers Compensation & Rehabilitation Act 2003* – whether a relationship or contract of employment existed between the Plaintiff and the Defendant – where WorkCover accepted the Plaintiff's application for statutory compensation - where the Plaintiff contends the elements of an estoppel are satisfied to estopp the Defendant from denying the Plaintiff was a "worker" in proceedings for damages – where no estoppel

Facts

The Plaintiff was a trade-qualified carpenter for almost forty years, during which period he was mostly self-employed, contracting his services to others.

The Plaintiff sustained injury whilst working for the Defendant on Easter Saturday, 2018, alleging that he was performing work on the building site as a construction labourer.

The Plaintiff alleged he was a "worker" as defined by the *Workers Compensation & Rehabilitation Act 2003*. WorkCover Queensland accepted the Plaintiff's application for compensation. The Defendant applied for a review of that decision, with the Workers Compensation Regulator confirming the initial decision of WorkCover to accept the Plaintiff's application. Inherent in the confirmation of that decision was the confirmation of a finding that the Plaintiff was a "worker". The Defendant did not appeal that decision to the Industrial Relations Commission.

The submissions on liability were structured in such a way to restrict the submissions solely to the provisions of the *Workers Compensation & Rehabilitation Act* 2003.

The Plaintiff sustained injury when, on attending the job site, he fell from a ladder, provided by the Defendant, whilst endeavoring to access a roof to undertake work on the roof. The Plaintiff gave evidence that he was to undertake the work for cash, instead of an hourly rate, or wages.

The Defendant pleaded that the Plaintiff was not a "worker" as part of its Defence.

Decision

1. Claim dismissed.
2. The parties to file written submissions in respect of costs, if not agreed within 14 days.

Ratio

The court determined there was no estoppel preventing the Defendant from denying the Plaintiff was a "worker" in proceedings for damages. The decision of the Regulator was not considered, by the court, to have a judicial nature or quality, so as to satisfy one of the elements for an estoppel to arise. The court, in reliance on an early decision of SS Family Pty Ltd, the WorkCover Qld [2018] QCA296, identified that it was never intended that an employer or WorkCover, because of WorkCover's earlier acceptance of a statutory claim for compensation, with its inherent acceptance that the injured person was a "worker", be denied the ability to deny the common law proceedings that the injured person was a "worker".

To the extent that the decision of WorkCover that the Plaintiff in this case was a "worker" was final (the finality of a determination also being an element relevant to estoppel) it had the quality of finality only in respect of that part of the Act to which the decision was relevant, being compensation under Chapters 3 and 4. Accordingly, the Defendant was not estopped from denying the Plaintiff was a "worker".

In then considering the factual background, the court determined that the Plaintiff was not a "worker", noting he provided his services to those contracting to him at an hourly rate, he charged GST to those who contracted his services and PAYG taxation instalments were not withheld by those who engaged his services.

The court construed the relationship between the Plaintiff and the Defendant as the Defendant offering work in respect of the contracted work to the Plaintiff, knowing the Plaintiff to be a building and trades person, with the Plaintiff accepting the offer to work on the building site. The Plaintiff determined for himself how the work was to be performed and was considered to be performing work engaged in his own business of subcontract carpentry, such that there was a contract for services between the Plaintiff and the Defendant, not a contract of service.

The court noted the relationship the Plaintiff tried to assert in the proceeding was the very relationship he deliberately sought to avoid when engaged by the Defendant (by being paid cash).

With the Plaintiff limiting his liability submissions to being a "worker" (it being observed that there was potential separate action under the *Personal Injuries Proceedings Act)* and with the court finding the Plaintiff was not a "worker" ,such finding led to the claim being dismissed.

In considering the circumstances of the accident, with the Defendant providing inappropriate equipment to the Plaintiff for his task, the court found that had the Plaintiff been a worker, the Defendant would have been liable for his injury.

95. *Hoe v Kode* [2024] TASSC 51

- Daly AsJ, decision delivered 30 September 2024

Keywords

Evidence – Client legal privilege - Whether the defendant doctor's responses to Australian Health Practitioner Regulation Agency complaint by the plaintiff attract privilege – Advice privilege - Litigation privilege. Aust Dig Evidence [1173-1178]

Procedure – Evidence Act 2001, s 131A extends the application of Part 10, Div 1 to the pre-trial stage of civil proceedings – Part 10, Div 1 applies to the determination of objections arising during pre-trial discovery. Aust Dig Procedure [1245-1265]

Facts

Kelly Hoe (the Plaintiff) commenced a claim for personal injuries suffered as a result of the negligent medical treatment she received from Dr Gary Kode (the Defendant) during surgery on 20 June 2019. On 25 May 2022, the Plaintiff submitted a complaint to the Australian Health Practitioner Regulation Agency (**AHPRA**) regarding the Defendant's treatment of her.

AHPRA subsequently provided the complaint to the Defendant and invited his written response with any information he considered relevant. Importantly, AHPRA notified the Defendant that any response he provides may be made available to the Plaintiff.

The Defendant provided an initial response to AHPRA (**the first response**). The first response was disclosed to the Plaintiff during the discovery process for the underlying medical negligence claim, on or around 17 April 2024.

On 19 April 2024, the Plaintiff was notified by AHPRA that they had received a supplementary response from the Defendant (**the second response**). The Plaintiff subsequently requested the Defendant disclose a copy of the second response. This request was refused on the basis that the second response was allegedly privileged.

The Plaintiff and Defendant each brought interlocutory applications relating to the first and second responses to AHPRA. The issue on each application relates to whether each document attracts legal privilege, and in the case of the first response, if it was privileged, whether the privilege was lost when the Defendant's solicitor disclosed it to the Plaintiff.

The Plaintiff's application sought disclosure from the defendant of the second response. The Defendant's application sought orders giving the first response, that had already been disclosed, the status of a privileged document.

Decision

The Plaintiff's application was granted. The Defendant's application was dismissed.

Ratio

Daly AsJ ultimately found that the first response was not confidential on the basis that AHPRA were not under any obligation not to disclose the contents of that response to the Plaintiff. The first response was a 'first person narrative' by the Defendant, directly addressing the Plaintiff's complaints against him. AHPRA's privacy police governed the exercise of its functions under the *Health Practitioner Regulation National Law Act 2009* (**the national law**). AHPRA informed the Defendant that in accordance with its policy, AHPRA was free to disclose his response and invited the Defendant to advise them about any information he wished to keep confidential. The Defendant made no such request.

Conversely, Daly AsJ found that the second response was confidential. The second response was prepared by the Defendant's solicitors and written on their letterhead. The second response was a communication or document recording what the Defendant instructed his lawyers to communicate with AHPRA. Daly AsJ found that AHPRA was under an obligation not to disclose the contents of the second response with such an obligation being either express or implied.

Daly AsJ noted the evidence failed to establish that either of the responses were brought into the existence for the dominant purpose of a lawyer providing legal advice to the Defendant. The Court accepted the Plaintiff's submission that the purpose for which each response was brought into existence was to communicate with AHPRA, with the intention of persuading it that the Defendant treated the Plaintiff with all due care and should not uphold the Plaintiff's notification of complaint.

In relation to the first response, the Court also noted that the Defendant's knowing and voluntary disclosure to the plaintiff of that response was inconsistent with his subsequent

application to give that document the status of privileged. The Court noted it was within the Defendant's solicitor's ostensible authority to waive privilege on their client's behalf.

96. *Stanberg v State of NSW* [2024] NSWDC 462

- Newlinds SC DCJ, decision delivered 4 October 2024

Keywords

Negligence – personal injury - school student – long jump – athletics

Facts

The Plaintiff was injured on 24 July 2019, as a then 11 year old school student at Neutral Bay Public School. He was participating in a before school long jump selection activity for the purpose of selecting students to qualify for the school athletics carnival. The activity was being supervised by two teachers. The long jump pit was also used as a playground sand pit and was lined with "soft fall" material commonly used in playgrounds. Whilst there was some dispute as to the depth of sand in the pit, it was found that it was approximately 30cm in depth. There were approximately 50 students undertaking the activity and the Plaintiff had 6 to 9 jumps and on his last jump he landed feet first and perceived his feet to impact not just the sand, but the surface underneath causing his feet to slip forward. He fell backwards onto his buttocks and sustained an injury to his lower back. Essentially it was the Plaintiff's case that there was not sufficient sand in the pit, either per se or because the sand was not raked after each jump rather than every few jumps.

Decision

Judgment for the Defendant.

Ratio

The Plaintiff led evidence from a Mr Wiliams that a standard depth of sand in long jump pits in competition, which, Mr Willimas applies from the Olympic Games to young children at school. The Court did not accept this universal opinion but in any event the Court held that the sand was probably about 30cm deep. Sand was delivered to the school for each athletic season and it was found that sand had been delivered approximately a month (20 June 2019) before the date of incident. The Court was not satisfied that the Defendant failed to take adequate precautions against the risk of harm. In particular, the Court was not satisfied that there was inadequate sand in the pit, so as to lessen the chance of the Plaintiff being injured, nor was the Court satisfied that the use of the "soft fall" material would, itself, have been insufficient. In reaching this conclusion, the Court took into account that whilst the risk of primary school children being injured in some way by engaging in the long jump activity is foreseeable and

whilst the risk of some minor injury is not insignificant, the risk of serious injury is remote. The Court was satisfied that the school took reasonable precautions against that risk by obtaining a new supply of sand so as to put further sand in the pit, having the activity of the children supervised by teachers, who formed an opinion as to the safety on the day, and supervised the event, including the raking of the sand, so to ensure the sand was raked after every second or third jump.

[51] *"I do not think the standard is expected of teachers at Neutral Bay Public School, when supervising a preliminary long jump event before school to work out which children should compete in the school carnival, should, or can sensibly, be compared to what a person in charge of an international athletics meeting might do. Taking into account that the probability of serious harm being occasioned to a child is highly unlikely and, whilst there are no particular burdens in the school taking a precaution to avoid the risk, I do think that if some counsel of perfection is required of the school, so as to mimic the standard of a high- level athletics carnival. To expect such a standard would ultimately have the effect of reducing the likelihood of schools providing athletics opportunities for children, which would have a significant diminution in their social utility of ensuring that school children engage in competitive or non-competitive sport and games"*

97. Cook v Riding for the Disabled Association (NSW) & Anor [2024] NSWSC 1332

- Fagan J, delivered 22 October 2024

Keywords

Personal injury – breach of duty – failure to take that reasonable precaution– reasonable care required – obvious risk – dangerous recreational activity – non-delegable duty of care - school-pupil relationship

Facts

The plaintiff was a ten year old student who was injured (suffering a right femoral neck fracture) after falling from a horse during a horse riding activity undertaken through the first defendant.

The plaintiff had severe intellectual and physical disabilities. She attended the Hunter River Community School which was operated by the New South Wales Department of Education. The School arranged for the plaintiff and other students to attend one hour riding sessions at the first defendant's premises. This was coordinated by a teacher from the school. The school staff took the plaintiff and other students to the first defendant's premises and handed her over to the first defendant's coaches and volunteers.

The plaintiff had undertaken the activity on previous occasions in previous months. On other occasions, the plaintiff had been assigned two side walkers and one horse leader. On the date of the accident, however, the coach engaged by the first defendant determined that the plaintiff was able to sit on the horse and had good balance and only required the assistance of one side walker and one lead walker.

Decision

1. Verdict for the plaintiff against the first defendant and verdict for the second defendant against the plaintiff's claim.
2. Cross claims of the first and second defendant dismissed.
3. First defendant to pay plaintiff's costs and plaintiff to pay second defendant's costs.

Ratio

In relation to the first defendant, the Court was not satisfied Ms Sharp's explanation for assigning only one side walker was sufficient for the plaintiff. The Court found on the evidence that was provided, the plaintiff's behaviour was "unpredictably inconsistent" and found the first defendant ought to have assigned two side walkers at all times. The first defendant submitted

that the fall occurred “so quicky that side walkers would not have moved to arrest it”. But given the plaintiff’s unpredictable and inconsistent behaviour, the Court found that the side walkers ought to have been at arms’ length of the plaintiff at all times. Ultimately, the Court’s finding was that the plaintiff’s injury was caused by the failure of the first defendant to take that reasonable precaution.

In so far as the second defendant was concerned, the Court found that the school did not owe a non-delegable duty of care once its student was handed over to the first defendant. The Court confirmed that the non-delegable duty of care owed by a school to its student, only applies whilst the child is in the school’s care, usually on school premises.

98. *Bald v Hesford* [2024] WADC 87

- Troy DCJ; decision delivered 10 October 2024

Keywords

Motor vehicle accident – liability – contributory negligence – apportionment.

Facts

The Plaintiff suffered injuries when attempting to overtake a prime mover and trailer when it has turned right into a side road on 19 March 2020. The Plaintiff's stated he was travelling at 110kph along the Coolgardie-Esperance Highway and saw the Defendant's vehicle enter the Highway from a side street about 2km ahead. Further, that the Defendant did not indicate his intention to turn right until the Plaintff's vehicle was already overtaking and that the Defendant failed to keep a proper lookout. The Defendant asserted he was braking to slow down and indicating right from about 100m before his turn. Further, that he checked his mirrors twice, once when he started to indicate and once just before making the right turn. The Defendant's evidence was at the first mirror check he considered the Plaintiff to be moving fast towards him.

The Plaintiff's passenger, Mr Hotker, gave evidence that he did see the brake lights and a right turn indicator, and it was then that the Plaintiff has attempted overtaking the Defendant on the right side.

Decision

Judgment for the Plaintiff, but damages reduced by 80% for contributory negligence.

Ratio

The decision was fact sensitive, with credit being a major factor as there was no expert reconstruction evidence. Credit was predominantly determined by inconsistencies between the evidence provided by the Plaintiff and Defendant and their earlier statements. Mr Hotker was a credible witness.

The judge determined that the Plaintiff had the Defendant under observation and appreciated the slower moving vehicle for a considerable period of time. It was accepted that the Defendant had braked and indicated right about 100m prior to the turn, and that the Plaintiff was negligent in failing to observe this or simply ignoring it. However, the judge also found that the Defendant was well aware of the Plaintiff's vehicle fast approaching from behind, and that the Defendant only checked his mirrors once, when he first started braking and indicating. Given this, it was held that the Defendant ought to have checked his mirrors a second time just prior to the turn, at which time he would have seen the Plaintiff overtaking and thus been able to stop his turn. The Defendant was held 20% liable and the Plaintiff 80% contributorily negligent.

99. *Byrnes v Burdekin Shire Council* [2024] QDC

- Lynham DCJ, decision delivered 15 October 2024

Keywords

Negligence, occupier's liability, public places, torts, where duty of care owed by the Defendant to users of the park, where liability is in issue, where quantum agreed, where the Plaintiff attended a park controlled and maintained by the Defendant, where the Plaintiff stepped into a concealed hole causing her to suffer injury to her right foot and ankle, whether Defendant breached its duty of care to the Plaintiff

Facts

On 17 April 2016, the Plaintiff and her husband visited a park situated at Alva Beach Esplanade. The Plaintiff and her husband were walking their dog along a concrete footpath when a woman came towards them carrying a large bag of rubbish. To allow the woman to pass by them unimpeded, the Plaintiff and her husband moved to the right and off the concrete footpath and onto the grass beside the path. After walking a few steps on the grass, the Plaintiff alleged that her left foot and then her right foot stepped into a hole concealed by the grass which caused her to lose her balance and suffer injury to her right foot and ankle. The parties in advance of the trial, had reached agreement as to the quantum of damages at $550,000, the liability to pay those damages was in issue.

Decision

1. The Plaintiff's claim was dismissed,
2. Judgment for the Defendant,
3. Any submission on costs if the parties are not agreed to be filed by 1 November 2024.

Ratio

- **Duty of Care:**

The Court found that it was of little controversy that the Defendant, as occupier and local authority exercising control over the park where the Plaintiff suffered injury, owed a duty of care to the Plaintiff as a user of the Alva Beach Park. The park was open for use by members of the public. The Plaintiff attended the park on many occasions prior to the incident to enjoy its amenities. The Court found that the duty imposed upon the Defendant can be expressed

as a duty to exercise reasonable care to avoid a foreseeable risk of injury to users of the park, such as the Plaintiff.

Existence, dimensions, and characteristics of the hole:

A critical issue in dispute between the parties was as to the existence of a hole (the Plaintiff pleaded that she had stepped into a hole, however, in her outline of submissions and evidence, the Plaintiff acknowledged that the term is used to describe the feature not in any particular technical sense, the feature equally capable of being described as a depression or irregularity). In her evidence, the Plaintiff described the hole as being about 30cm wide and about 50cm long. She indicated that the top of the grass was about 2cm above her lateral malleolus bone on the outside of her ankle as a reference point. The Plaintiff's husband however, who was following about 5m behind the Plaintiff walking their dog when the accident occurred, stated that he observed the grass extended between 20-30cm up the Plaintiff's leg, measured from ground height. He estimated the hole as being about 30cm wide and 50cm long.

The Defendant's case was that, following several inspections of the incident site, they could not locate a hole, whatsoever. The Defendant's witnesses also gave evidence that the grass was approximately 5cm high at the time of the incident.

An employee of the Council gave evidence that he found what he described as an undulation when he carried out his inspection, which he said abutted up against the footpath and extended out. However, when closing off the written incident report, he recorded "…has been filled in. Hole was located 2m from edge of path".

The Plaintiff submitted these inconsistencies in the Council employee's evidence, were significant and material and would provide a basis for finding his evidence as unreliable.

Despite this discrepancy in the Defendant's evidence, the Court was not persuaded on balance that the undulation that was "filled in" was the same hole the Plaintiff stepped into.

The Court considered photographs taken of the Plaintiff in 2018 at the incident site, standing in the hole that she alleged that she stood in, in April 2016. The Court was satisfied that these photographs did show the Plaintiff standing in what appeared to be a depression in the ground, in an area consistent with the location of the hole the Plaintiff says she stepped into. The Court was also satisfied that the photographs captured a darker shaded area of grass which appeared to be of a similar length and width as the hole the Plaintiff described stepping into. The importance of that evidence, in the Court's view, was that it lended support to a finding that in 2018, when the photographs were taken, there existed a depression in the

ground which was of similar dimensions in terms of length and width as the hole which the Plaintiff described she stepped into, causing her injury in 2016.

In considering the depth of the depression, the Court did not accept the evidence of the Plaintiff's husband, which was in contrast with the evidence of the Plaintiff herself, which was that the depth of the hole could be referenced against the height of the grass to be anywhere between 15-25cm deep from bottom to ground level. The Court found that the Plaintiff herself was in the best position to feel how deep the hole was, that she stepped into, given that she was the one experiencing it. The Court accepted on balance the Plaintiff's evidence and found as follows:

A. On 17 April 2016, when walking across a grassed area at Alva Park, the Plaintiff suffered injury after stepping into a hole or depression in the ground which caused her injury;

B. The hole or depression was bowl shaped and approximately 30cm wide, 50cm long and 5cm deep, measured from bottom to ground level;

C. The hole or depression was positioned approximately 1m from the edge of the concrete footpath, in the area, described by the Plaintiff in her evidence;

D. Grass had grown over the hole or depression, meaning that it was concealed.

Liability:

The Court then went on to consider whether the Defendant should be liable for the injuries suffered by the Plaintiff and went on to consider what hazards a local authority ought to be responsible for and what is reasonably required of a local authority in terms of a system of inspection in place directed towards locating such hazards. The Court noted that the hole or depression was concealed by the grass, and it was a concealed hazard which was neither obvious nor observable from a visual inspection. The Court also noted that Alva Beach Park is 3.03 hectares in size. The Court considered for the purposes of Section 35 and 36 of the *Civil Liability Act 2002 (Qld)*, whether the failure by the Defendant to maintain the park to ensure the park was safe and unlikely to cause injuries to users, constituted a lack of reasonable care, having regard to the Council responsibilities for all of its park areas which covered some 36.42 hectares.

The Court noted that there was a large body of uncontested evidence produced on behalf of the Defendant relating to the system of inspection and maintenance of Alva Beach Park. The Court heard evidence from the park's supervisor, who stated that he would visit parks controlled by the Council and undertake inspections weekly or fortnightly or when following a report made to Council. He gave evidence that his visits to Alva Beach Park usually lasted

15-20 minutes. Another Council employee gave evidence that prior to the date of the accident, he had for a number of years been responsible for the whipper snippering of Alva Beach Park, which he undertook weekly or fortnightly, depending on growing conditions. He gave evidence that he would whipper snip either side of the footpath by standing about half a metre from the edge of the footpath and prior to 2016, he had not observed any hazards which he believed required attention. He stated that it was part of his role to always be on the lookout for hazards and that his role was divided between whipper snippering and maintaining the grassed area looking for hazards. Another Council employee stated that he was responsible for mowing the grass at Alva Beach Park, usually every fortnight. He had been employed by Council for a number of years. He said he would become aware of hazards through operating the mower, if the mower jolted from side to side, that would indicate the existence of a hazard, such as a hole. He said that his responsibilities included mowing the area identified by the Plaintiff as being where the hole she stepped in was located. He gave evidence that at no time did he feel any jolting when mowing that area. He also gave evidence that had he encountered such a hazard, he would have reported it. Another Council employee, described as the Parks Co-ordinator, gave evidence that during the growing season, the Council would mow Alva Beach Park once a week on a Friday during the growing season and during non-growing season, it would be once a fortnight. The Defendant introduced into evidence a service manual which prescribed the types of inspections, intervention levels and frequency of inspections and maintenance of its various parks. He gave evidence that staff were required to keep an eye out for any potential hazards as they carried out their work in the area and if there were any dips, hollows, or holes located in the grass surface, they were required to report the matter so that arrangements could be made to repair the site. He gave evidence that following the notification of the incident by the Plaintiff, he had arranged for staff to attend the park to conduct an inspection.

The Court found that there was no evidence upon which a finding could be made that the Defendant was aware of the existence of the hole which the Plaintiff stepped into. The Court found that the evidence demonstrated that reasonable inspections of the park of the kind described by the Defendant did not, and could not, detect the hole or depression the Plaintiff stepped into, which was sufficiently shallow and highly concealed and that it could only have been detected by a person stepping into it. The Court was satisfied that a local authority in the position of the Defendant ought not to have to arrange for a person to step on every part of the park adjacent to a concrete pathway at Alva Beach and other parks under the control of the Defendant used by the public in order to detect holes. In the Court's view, in terms of Section 9 (2)(c)(d) *Civil Liability Act 2003 (Qld)*, given the area of parks under the control of the Defendant, such a burden would be too high to place on the Defendant.

In all of the circumstances, the Court was not satisfied that the Defendant breached its duty of care to the Plaintiff and accordingly, her claim for damages for negligence, was dismissed.

100. *Cagney v. D&J Building Contractors Pty Ltd (No 2)* [2024] QDC 171

- Horneman-Wren SC, DCJ – delivered 17 October 2024

Keywords: Civil Procedure – Civil Proceedings in State and Territory Corts – Costs – Costs for proceeding initiated under the Workers' Compensation and Rehabilitation Act 2003 (QLD)

Facts
The plaintiff's claim was dismissed on the basis that he was not a "worker" within the meaning of that term as found in section 11(1) of the *Workers' Compensation and Rehabilitation Act* 2003 ("WCRA").

The Plaintiff submitted that had his allegation that he was a "worker" been established, that *"would [have] provided the basis for the WCRA to govern the claim generally, in relation to both procedural and substantive aspects of the claim"*. He further submitted that the Court having rejected the allegation that he was a "worker" meant there was no other basis on which the WCRA could apply to the proceedings and therefore no foundation to a claim in relation to costs.

Decision
The Plaintiff to pay the insurer's costs on the standard basis from 28 July 2021 being the date of the final written offer.

Ratio
His Honour found the plaintiff's submissions to be misconceived, if not disingenuous.

The proceeding was brought by the Plaintiff on the sole and express basis that the WCRA applied to and governed it. His pleading as to his compliance with the procedural requirements of the WCRA demonstrated that.

His Honour found[37] that the acceptance of the Plaintiff's claim for statutory compensation under Chapters 3 and 4 of the WCRA established him, pursuant to s 237 (1)(a)(i) of the *Act*, as a person entitled to seek damages for an injury by a worker. As such, he was a "claimant" within the meaning of s 233. That status as a claimant, however, did not absolve him of the need to prove in the proceeding for damages that he was a "worker". He was entitled under the WCRA to bring the proceedings; but he failed in the proceeding he brought.

The Plaintiff also objected to "the conduct, representation and appearance" of "the defendant's purported representatives". Again, the submission was based on an assertion (now) that the WCRA did not apply because of the court's determination that the plaintiff was not a "worker". It was submitted that the appearance by senior counsel for the defendant, but instructed by WorkCover Queensland, depended upon s 300(5) of the WCRA which, it was contended, did not apply given the court's finding. Again, this submission was rejected.

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[37] As explained by Fraser JA in *SS Family Pty Ltd v WorkCover Queensland [2018] QCA 296 at [22]-[34].*

His Honour found that the WCRA applied to the proceeding and that costs for the proceeding were governed by s 316 of the WCRA. His Honour noted that once it is understood that the costs are governed by s 316, the plaintiff's further submissions fall away. The terms of s 316 are mandatory. There was no residual discretion which might be exercised on the basis of matters now raised by the plaintiff such as the conduct of WorkCover Queensland, or that the plaintiff succeeded on issues other than whether he was a "worker".

101. ***Kmart Australia Limited v Marmara*** **[2024] NSWCA 249**

- Kirk JA, McHugh AJA, Griffiths JA decision delivered 21 October 2024

Keywords

Occupiers liability – precautions reasonably required to be taken by occupier of retail store – whether a reasonable person would have implemented such a system requiring collection of large oversized boxes at loading dock – whether lack of such a system was a necessary condition of the occurrence of harm

Facts

The respondent (Rita Marmara), was injured when a heavy oversized box containing a mountain bike fell on her from another customers' standard size shopping trolley at a Kmart Store in Woy Woy.

She brought proceedings in the NSW District Court for damages in negligence against Kmart and the primary judge found that Kmart had breached its duty and caused Ms Marmara to suffer personal injury.

Kmart appealed the primary judgment on 4 issues: -

(i) Whether the trial judge was in error in admitting into evidence a report of an expert in occupational health and safety;
(ii) Whether the trial judge found that the appellant had not implemented a system to assist customers with large or heavy purchases and this was an error;
(iii) Whether the trial judge was in error in finding that the appellant breached its duty of care;
(iv) Whether the trial judge was in error in that the appellant's negligence caused the respondent to suffer injury loss and damage.

Decision

The Appeal was dismissed.

Ratio

(i) The mere fact that an opinion is based in part on a process of reasoning that involves common or ordinary knowledge is not a bar to admissibility under s.79

[*Evidence Act 1995* (NSW)], provided that the opinion is substantially based on specialised knowledge.

(ii) The relevant risk of harm was the risk of physical injury by heavy, oversized items such as mountain bikes in boxes tipping or falling from customer's shopping trolleys and the system Kmart had in place which had to be initiated by customers, was not drawn to their attention and was not mandatory.

(iii) There was a substantial probability that if care were not taken, customers would continue to use standard size shopping trolleys to transport heavy oversized items and thereby expose others to risk of harm.

(iv) The primary judge had implicitly found that it was probable harm would occur, the likely seriousness of harm was high and Kmart acknowledged that it would not have been burdensome to take such items to the dock, therefore the burden of taking precautions was not excessive.

(v) In the circumstances, a reasonable person in Kmart's position would have implemented a system at its Woy Woy stores that prohibited customers from using standard size shopping trolleys to transport heavy oversized items and required customers to collect such items from the loading dock, and put up signs informing customers of the system and trained staff appropriately.

(vi) If Kmart required customers to collect them from the loading dock, on the balance of probabilities, the respondent would not have been injured, and thus Kmart's negligence was a necessary condition of the occurrence of the harm

102. *Hyland v Transport Accident Commission* [2024] VSC 641

- The Honourable Justice Forbes, delivered 22 October 2024

Keywords

Nominal Defendant – Vehicle and Cyclist – Reasonable inquiries – Definition of at fault unidentified vehicle – liability only – Good Samaritan

Facts

The plaintiff was on a bike ride when she alleged that a vehicle brushed her thigh on a bend in the road, causing her to ride onto the gravel and fall, subsequently breaking her leg. The unidentified vehicle failed to stop at the accident scene.

The Plaintiff's husband (Troy) gave evidence that at the time of the accident he chased after the vehicle however; he did not recall the registration. He said he was more focused on catching the vehicle than remembering the registration.

When the plaintiff was taken to hospital, the three children, whom she was on a ride with, were taken to her mother's house which was a short distance from the accident scene by an unidentified Good Samaritan. It was put to the Plaintiff's mother in cross-examination that this Good Samaritan delivered the children by car, but this was denied. The plaintiff's mother gave evidence the lady walked her grandchildren to the house, and she was unable to recall any vehicle. It was alleged by the defendant that the driver of the unidentified vehicle and the Good Samaritan were in fact one and the same.

Decision

These matters gave rise to the following questions:-

(a) Is the vehicle alleged to be at fault an unidentified vehicle within the definition of sec. 96(8) of the Act;

(b) If so, has the plaintiff complied with s96(2) of the Act such that she is able to recover against TAC pursuant to sec. 96(1)?

Her Honour found the answer to (a) and (b) is yes.

Ratio

Her Honour considered the following factual matters in dispute:-

(a) Whether the unidentified vehicle passing at the time of the accident caused the plaintiff's fall from her bicycle;

(b) *If so, whether there was negligence on the part of the driver of that vehicle that was a cause of the plaintiff's injury, loss and damage;*
(c) *Whether the good Samaritan vehicle was the same car as the unidentified vehicle.*

Her Honour was not satisfied that the plaintiff was actually or physically hit by the unidentified vehicle however, she was satisfied that the unidentified vehicle was negligent in driving close enough to the plaintiff so as to cause the plaintiff to veer from the bitumen road onto the gravel where she lost balance and fell thus causing the plaintiff's injury, loss and damage. Her Honour also found, on balance, that the unidentified vehicle and the Good Samaritan were not the same vehicle and accordingly, there was no further opportunity that the unidentified vehicle could be identified on the day of the accident.

With respect to further inquiries undertaken by the Plaintiff in an attempt to identify the unidentified vehicle, her Honour was satisfied that given the lack of eyewitness accounts, CCTV and statement by the Plaintiff's husband and his reporting to Mildura Police Station, Her Honour was not persuaded that any further inquiry would have been reasonable. It was suggested by the Defence at trial, that the Plaintiff should have undertaken some form of public appeal, however, Her Honour dismissed this allegation. Her Honour made specific note that the obligation to undertake inquiry of an unidentified vehicle does not fall solely to the Plaintiff.

Her Honours reasons are consistent with the Queensland decision of *Ford v Nominal Defendant* in which, the Court of Appeal found that '*searches and inquiries that are not realistically likely to produce results are not a requirement of "proper inquiry and search" and further "proper inquiry and search" does not require a person to undertake steps that have only a faint possibility of being productive.'*

103. T2 (by his tutor T1) v State of New South Wales [2024] NSWSC 1347

- Harrison AsJ, delivered 25 October 2024

Keywords
Negligence – duty of care – school student – bullying – assault not on school premises – after school hours

Facts
On 16 October 2017, a 14-year old student ("the plaintiff") was attacked by 12 fellow students in an unprovoked, aggressive and lengthy attack.

The students had positioned themselves so the plaintiff was prevented from boarding the school bus and then led him to a park across from the school where the assault occurred.

The "ringleader" of the attack had recently returned to the school following a suspension for violent conduct and was also known to enlist the assistance of other students to carry out attacks on vulnerable students.

The plaintiff commenced proceedings against the State of New South Wales ("the defendant") as occupiers of the school and for having the care, management and control of the school where the plaintiff and his attackers were students.

It was alleged by the plaintiff that the defendant owed him a duty as a student, and had breached that duty of care by failing to monitor students as they were going home at the end of a school day.

At trial, there were a number of issues for the Court to consider including the nature and scope of the school's duty, whether there was a breach of the duty of care, causation and quantum.

Decision
The plaintiff's claim was successful. Damages and costs were awarded.

Ratio

Duty of care

The defendant submitted that its duty of care did not extend to preventing incidents which took place outside of its operating hours and off school grounds. It also submitted that it should not be responsible for the criminal acts of third parties.

The Judge considered the Department of Education guidelines which provided that the duty of care owed to high school students extends beyond school hours and beyond school grounds. The principal of the school was also aware that prior violent altercations had occurred in the park where the plaintiff was attacked.

Justice Harrison held that the school owed a duty of care to:-

1. Vulnerable students who have physical or psychological issues;
2. Keep students safe from being bullied and assaulted from other students;
3. Perform a proper risk assessment for school students who have been suspended for a lengthy period before allowing them to return to school;
4. Keep the administrative office open at the end of day so that students who find themselves in difficulty can seek help and safety there; and
5. Provide supervision in and around the school for the safe passage of students for their journey to home from school.

Breach of duty and causation

The Judge concluded that the school breached its duty of care in several respects, including by failing to conduct a proper risk assessment of the student who coordinated the attack before allowing him to return to the school from a previous suspension. The school was aware of this problematic student's tendencies towards violence and ought to have monitored his behaviours more closely.

Additionally, the school was aware that the plaintiff had been bullied in the past and was a vulnerable student given his psychiatric disorders, and as a result there was a higher risk that he would be bullied.

The school also failed to have any teachers on bus duty who could act as a deterrent or to intervene when the attack occurred. Further, the school's administration office was closed so the plaintiff could not seek assistance.

These various breaches enabled the assault to occur in the manner in which it did and justified a finding of causation.

Damages were awarded in a sum to be determined after further calculations were made by the parties.

104. *Kemp v Gold Coast Hospital and Health Service* (2024) QSC 259

- Sullivan J, delivered 30 October 2024

Keywords

Duty of care - scope of duty of care - internal investigation of a complaint to a third party - confidentiality of the complainant - psychiatric injury - workplace injury

Facts

The plaintiff worked at the Gold Coast University Hospital as a radiographer and sonographer. He lodged a complaint with the Office of the Health Ombudsman (OHO) on 12 December 2017 regarding the conduct of various medical imaging assistants (MIA) working for the hospital at the time. The OHO, it was alleged, erroneously advised the defendant about the plaintiff's complaint. It had passed the details of the complaint on to an employee of the defendant, Ms Dolkens. The plaintiff alleged that there were a number of events following the disclosure by OHO to the defendant of his complaint, and that was in the form of behaviour from staff within the department that amounted to "*…victimisation, retribution, bullying, harassment and abuse" ("the offending behaviour")*". The plaintiff alleged that the defendant had made it known to MIAs that he was the complaint to the OHO, and that the defendant was vicariously liable for the various staff involved in the alleged offending behaviour.

Decision

The plaintiff's claim was dismissed.

Ratio

The Trial Judge noted that the duties and breaches of duty had been "extremely broadly pleaded", and that remained the nature of plaintiff's case.

The Judge held that any duty of care owed to the plaintiff was only in respect of the foreseeable risks of injury, being a risk which the defendant either knew of or could have reasonably known of, with such response to the risk only needed to be that of a reasonable person in the position of the defendant having regard to the magnitude of the risk, the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities. That duty did not include any duty to stop gossiping, to stamp out rumours in the workplace or that workers greet one another or are generally nice to each other.

The defendant denied any inappropriate conduct had occurred towards the plaintiff, and noted it maintained a HR department and that the plaintiff had made no complaint to that department. The defendant also had grievance and complaint procedures which were available to all workers, but the plaintiff had not availed himself of those procedures and that the plaintiff had made no contemporaneous complaint in regard to the offending behaviour. In cases like these, the Judge noted, that knowledge by management of any of the offending behaviour may influence the formulation of what the scope of the duty at any particular time might be, and that it is for the plaintiff to prove their case.

The Judge was satisfied that Ms Dolkens, employed by the defendant, had not disclosed or identified the defendant to any of the staff who the plaintiff had complained about, and had

also adopted a reasonable and pragmatic approach to dealing with the referral from OHO. The Judge found that most of the people that the plaintiff had complained about to OHO had their own views on who had made those complaints.

The Judge worked through the various events said to have given rise to the plaintiff's workplace injuries, and found that many of those allegations, particularly those that were allegations of inappropriate conduct towards the plaintiff by some of the MIAs were unsubstantiated. The Judge heard evidence from the parties alleged to have acted inappropriately in their conduct towards the plaintiff, for example, by not greeting him or not speaking to him, were accepted and their evidence was contrary to the very vague and unparticularised allegations made by the plaintiff in his Statement of Claim. The Judge was critical of lack of precision with those allegations, with some of them not supported by the plaintiff's own evidence, and contrary to the evidence given by the witnesses for the defendant whom the Judge accepted as witnesses of credit.

As to the specific complaint against Ms Dolkens, noting that her evidence was at odds with the pleaded allegations of the plaintiff and also the evidence given by the plaintiff. The Judge preferred the evidence of Ms Dolkens as to what occurred at meeting held with the plaintiff soon after the referral from the OHO. The Judge found that she had adopted a sensible approach to investigating the plaintiff's complaints, and she had done that after consultation with the HR department of the hospital. The procedure she adopted was consistent with the HR policy and allowed procedural fairness for both the plaintiff and those people who were subject of the complaint. The Judge did not agree that Ms Dolkens had behaved in the way alleged (full of rage, abusive of the plaintiff etc.), and was inconsistent with the procedure she had put in place, and the evidence given by other parties as to Ms Dolkens demeanour and interactions between her and the plaintiff within the department.

As to further complaints about Ms Dolkens by the plaintiff, which were of general inappropriate conduct between April and August 2018, the Judge favoured the evidence given by Ms Dolkens in that regard. There was evidence given by other parties at the trial consistent with the evidence of Ms Dolkens, with the Judge noting little credit could be given to the reliability of the plaintiff's evidence given the findings against the plaintiff with respect to the allegations against the other staff which the Judge did not accept.

The Judge did not accept the plaintiff's evidence regarding the allegations that he was physically confronted and threatened by a Mr Adams, who was one of the MIA's at the hospital. The plaintiff had alleged that there was a student in the room at the apparent interaction between Mr Adams and the plaintiff, but that student had not been identified or called, and there was inconsistent evidence of the plaintiff and that of Ms Dolkens regarding any mention of this incident in his bidding with Ms Dolkens about his complaint to OHO. The evidence given by Mr Adams was inconsistent with the facts pleaded by the plaintiff, and that the plaintiff had not made out his allegations as and against Mr Adams.

As to further allegations of general inappropriate conduct by Dr Adams towards the plaintiff, including using offensive language towards him, ignoring his instructions and not doing anything he was asked including brazenly abusing him in front of patients and doing things that he had been specifically asked not to do. Mr Adams denied these allegations when he gave evidence. The Judge found that it was more probable than not that Mr Adams would have had a level of a negative feeling to the plaintiff because of the OHO complaint but

preferred the evidence of Mr Adams regarding these allegations. The Judge was not satisfied with the plaintiff's reliability, given his findings with respect to the allegations made against other MIA's, the fact that these allegations weren't raised with Ms Dolkens whom the Judge found to be a reliable witness and accepted her evidence. The Judge said, "*It would have been extraordinary for a person in her management position not to have document the raising of such issues, if in truth they had been raised."*

The Judge noted the lack of documentation put before the court raising any such complaints, and they certainly would have been raised at the May 2018 meeting between Ms Dolkens and the plaintiff. The allegations against Mr Adams were serious and related to abusive and grossly negligent actions by an employee over an extended period of time. It is alleged that this conduct was to have occurred in front of students and patients, and accordingly, there would have been many witnesses to what had occurred. On balance, the Judge thought that those sorts of persons would have been called to give evidence or have raised such conduct some shape or form. The Judge noted that it was the plaintiff who had made general negative statements complaining about his treatment by Queensland Health to various MIA's prior to April 2018. It was these types of statements which would have caused suspicion to have been raised by the MIA's as to the nature of the complaints against them.

The Judge made findings about the plaintiff's pre-existing condition (psychiatric), but did find that sometime after 11 April the plaintiff had further decompensated. However, the Judge was not satisfied and did not find that this decompensation was caused by the conduct of Ms Dolkens or any of the MIA's, finding that no such inappropriate conduct had occurred. The Judge preferring to find that on the balance of probabilities any decompensation was related to the plaintiff not having his complaints accepted by Ms Dolkens, and also his erroneous belief there had been disclosure of his complaint to the OHO to the MIA's. The Judge did not accept that the complaint being forwarded by OHO to MS Dolkens for investigation was a contributing factor to his decompensation.

The Judge accepted that there was a duty of care owed by the defendant to the plaintiff to take reasonable care to avoid exposing him to unnecessary risk. The Judge noted the first scope of the general duty was an obligation on the employer to "*…not to cause, permit or allow the fact that the plaintiff having made a complaint to the OHO to become common knowledge within the department in circumstances in which the defendant ought to have kept that information confidential."* Taking into account the facts of the case, the Judge was not satisfied it was reasonably foreseeable that the plaintiff would have been exposed to a risk of psychiatric injury had his identity been disclosed to the MIA's. The Judge cited the decision in *Koehler v Cerebos*, noting that *"…the central inquiry remains whether, in all the circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful.*" While it would be reasonably foreseeable that a person wanting anonymity about a complaint would be upset, stressed or angry by its disclosure, however it *"…would be far-fetched or fanciful to say that it would be reasonably foreseeable that a recognised psychiatric illness may result solely from a person such as Ms Dolkens or Mr Bennetts making such a disclosure to others in the Department*." The Judge also held that there was no scope of the duty that required the employer to prevent employees from *"…subjectively wondering, suspecting or musing on things such as who may have made a complaint against them."*

The Judge also held that there was no scope, within the duty of the employer to the plaintiff, to say anything affirmative to the MIA's in the meetings held to placate them so that they would presumably take less offense (if any) of being the subjects of complaints to the OHO. There was no evidence led by anyone at the trial that such types of statements should be employed to achieve a particular result as alleged. Thanking a person for making a complaint was likely to irritate, and making affirmative statements that there was nothing for the MIA's to be concerned about at the beginning of an investigation would also be inappropriate.

As to the fourth scope of the general duty that was put forward, and that was an obligation to quell any gossip or rumour that the plaintiff was the complainant, the Judge held that there was no such duty, and that didn't extend to a duty to provide a happy workplace either. The plaintiff never informed the defendant that any gossip was occurring, and they were under no obligation to stamp it out if they weren't aware of it. In any event, the Judge found that there was no inappropriate behaviour engaged in by the MIA's or Ms Dolkens.

The Judge accepted that it would be within the scope of the duty of care for the employer to *"…devise, implement and supervise a proper and adequate procedure for dealing with complaints of victimisation, retribution, bullying or harassment of an employee by other employees.*" It would be accepted that that could give rise to psychiatric injury and that would be not farfetched or fanciful. However, again, the Judge was not satisfied that there had been a breach of duty, because the defendant had in place clear procedures and processes that were appropriate for the conduct of a workplace complaint and investigation. The HR policy reflected that, and Ms Dolkens acted consistent with the HR policy and there was no breach of duty in that regard.

105. ***Gilmour v Blue Care* [2024] QDC 189**

- Loury KC DCJ, decision delivered 1 November 2024

Keywords

Torts – negligence – personal injury – workplace injury – PTSD – duties undertaken at an external site not operated by the employer –criminal behaviour of a third party – a risk assessment of the external site – where the plaintiff did not receive training directed at the risk of sexual assault in the workplace

Facts

The plaintiff was employed by Blue Care as a personal carer. Blue Care directed the plaintiff to attend at Lilliput Caring, a hostel accommodating 57 residents, with the vast majority being men with mental health and/or addiction problems. The plaintiff was to provide personal care to a Blue Care client who resided in the facility. Whilst undertaking her duties, another man who was not a client of Blue Care, asked the plaintiff to assist him to make his bed. The plaintiff agreed to assist him and entered his room. He then sexually assaulted her.

The plaintiff claimed that Blue Care had breached their duty of care by failing to undertake a risk assessment of Lilliput Caring, failing to require the Blue Care employees to work in pairs, failing to warn or instruct the plaintiff as to the dangers associated with undertaking her work duties at the hostel and failing to provide a duress alarm.

Decision

Judgment for the plaintiff against the defendant in the amount of $239,272.98

Ratio

Her Honour firstly considered what was the risk of harm. She held that the relevant risk needed to be formulated to reflect the type of harm that eventuated, a risk that persons visiting the hostel to provide care would suffer a sexual assault committed by a resident of the hostel.

Blue Care ought to have known that Lilliput Caring provided accommodation to people with mental health difficulties, some of which were subject to treatment authorities and to people with addiction problems. Her Honour noted that, in today's society, there was a genuine risk of sexual assault to a young woman working alone in a hostel accommodating men with mental health and addiction problems. As such, the risk was foreseeable and not insignificant.

Whilst Blue Care had undertaken risk assessments of their clients and limited risk assessment of the facility including lighting, ensuring clear pathways, and hazards, there was no assessment of the hostel as a whole and the risk other non-Blue Care clients posed to Blue Care workers. It was noted that Blue Care workers had to access and enter communal areas when performing their duties and, as such, Blue Care ought to have completed a risk assessment of the Lilliput Caring facility. Her Honour held that Blue Care breached their duty

of care to the plaintiff by failing to perform its own risk assessment of the hostel when it required the plaintiff to work at the hostel.

The defendant, Blue Care, recognised potential safety risks to employees when working with clients and provided various training modules, including orientation, lone worker, and conflict awareness training. This training emphasised dynamic risk assessments to mitigate physical violence and conflict by promoting safe practices, such as maintaining exit strategies and engaging in positive communication. However, the training mainly focused on preventing physical altercations and failed to address the specific risk of sexual violence, particularly relevant to women working alone in male-dominated or high-risk environments. The definition of workplace violence used in the training covered threats and physical assault but did not adequately encompass sexual assault. Blue Care's training also lacked focus on the unpredictable behaviours associated with severe mental illnesses or chronic addictions, and the facility's general risk assessments did not extend to assessing the danger posed by the facility itself. Consequently, Her Honour found that Blue Care failed to provide adequate training or warnings to prepare employees for the dangers present at Lilliput Caring.

The plaintiff argued that a duress alarm should have been provided as a potential deterrent against sexual assault. However, the court found that such an alarm would not prevent or deter an assault in unpredictable situations involving residents with serious mental illnesses or addictions, who may act irrationally. As duress alarms could not summon immediate assistance in time to prevent an assault, the court concluded that Blue Care did not breach its duty of care by failing to provide one.

The plaintiff also argued that Blue Care should have implemented a system requiring two workers to attend and work in close proximity to one another, enhancing safety, especially when working with clients in communal areas with unpredictable residents. After the assault, Blue Care adopted this practice, pairing workers for safety. Although Blue Care initially argued that prior incidents hadn't justified this precaution, the court found that, given the risks present in the environment, a two-worker system should have been in place to help guard against foreseeable risks of violence or assault.

Overall, the court was satisfied on balance that the defendant's breach of duty caused the plaintiff's injury and there was no reduction for contributory negligence as she had not acted contrary to any instructions she was given – at most her conduct was inadvertence.

Quantum was assessed at $239,272.98. Relevantly, she had her first child after the subject incident and was pregnant with her second at the trial. It was accepted that she would have taken time off work to care for her children. Her Honour noted that she would unlikely return to work as a personal carer but, with time, she could return to full-time employment with a potential loss of $100.00 per week. Accordingly, she allowed $120,000.00 on a global basis for future economic loss.

106. Grapes v AAI Limited [2024] QSC 267

- Copley J, decision delivered 6 November 2024.

Keywords
Limitation of actions – extension of time – personal injuries – motor vehicle accident – workers' compensation – CTP insurance – PTSD

Facts
The applicant was employed as a paramedic with the Queensland Ambulance Service. On 2 September 2018, she attended the scene of a single motor vehicle accident and provided assistance to the young injured male passenger, whose arm had been almost completely amputated in the accident.

Following this event, the applicant's ability to cope at work deteriorated and she would, from time to time, be unable to attend work due to panic attacks and nausea.

In January 2019, the applicant was issued a medical certificate to take time off work. She used 100 hours of sick leave and eventually returned to work, however, her psychological condition continued to worsen and there were periods where she was unable to work.

On 20 January 2021, the applicant was diagnosed with PTSD caused from work. The applicant lodged an application for workers' compensation.

It was not until approximately 31 March 2021 that the deterioration in the applicant's psychological functioning was linked to the motor vehicle accident that occurred on 2 September 2018. It was during her psychological treatment that it had become obvious that the accident was the "catalyst for her demise". As a result, she applied to have the date of injury on her workers' compensation claim amended from 20 January 2021 to 2 September 2018. This was refused, so the applicant submitted a review of the decision.

The applicant consulted a law firm about her claim, but the firm declined to act and advised her of the relevant time limitations. On 31 May 2022, the applicant consulted Ms Denning who declined to act on a speculative basis and also advised the applicant that she had a potential compulsory third-party claim and for that, she would need a police report number and the vehicle registration number. At the time, the applicant said she was not in a fit mental state to find out the registration numbers.

In early 2023, the applicant consulted Ms Denning who said the firm would act for her in the workers' compensation common law claim and a CTP claim. A number of enquiries were made to determine the registration and identity of the driver involved in the accident on 2 September 2018. These details, along with the CTP insurer of the vehicle, were not obtained until 8 November 2023.

The applicant sought an order that the time limit for her personal injuries claim against the respondents be extended.

Decision
Application dismissed.

Ratio
The Judge was required to consider whether any of the material facts were of a decisive character.

The applicant submitted that it was not within the means of her knowledge that the accident caused the PTSD until a medico-legal report was obtained in December 2022 which provided that the accident caused the PTSD, her condition was permanent, and she would never return to her career as a paramedic.

Judge Copley did not accept this submission as the applicant was aware of these facts from March 2021 (when her psychologist first linked the accident to her psychological injury) and concluded that the applicant did not take reasonable steps to ascertain the nature and extent of her psychological injury in the period after this material fact.

Another submission put forward by the applicant was that her solicitor only became aware of the identity of the at-fault driver and CTP insurer on 8 November 2023. The Judge held that a reasonable step to discover the at-fault driver's identity would have been to instruct solicitors to pursue the issue with a view to commencing an action. The applicant did this in March 2023 – two years after the accident was first linked to her psychological injury.

Judge Copley concluded that had the applicant instructed a solicitor by the middle of 2021, even with the hurdles involved to ascertain the identity of the respondents, the applicant would have discovered their identity by early 2022 and the delay would have been avoided.

107. *Vivian v Gameover Pty Ltd* [2024] QSC 263

- Williams J, delivered on 6 November 2024

Keywords

Limitation of actions – extension or postponement of limitation periods – extension of time in personal injuries matters – knowledge of material facts of a decisive character – evidence to establish right of action

Facts

By way of an originating application, the Applicant sought an order that his period of limitation to commence proceedings against the Respondent be extended so that it expired on 8 December 2023 pursuant to s 31(2) of the Limitations of Actions Act 1974 (Qld) (LA Act). The Applicant contends that a material fact of a decisive character was not within the means of his knowledge until 8 December 2022, being the date of an expert report, when he was advised that his injuries would preclude him from working.

The Respondent contended that at least by early 2022, and most likely earlier, a reasonable man appropriately advised would have brought an action on the facts in his possession at that time, and that the Applicant has not established that he has an action on the right of action, for the purposes of s 31(2)(b) of the LA Act.

Decision

1. The application is dismissed.

2. I will hear further from the parties as to costs.

Ratio

On 21 January 2018, the Applicant allegedly suffered a physical injury at work when he was employed by the Respondent and about a month later, he lodged a WorkCover claim, which was accepted. On 1 March 2019, WorkCover accepted a secondary psychological injury. The Applicants physical injury ceased on 13 May 2021, but his psychological injury continued.

On 10 March 2022, the Applicant made two TPD applications. The Applicant was assessed by numerous doctors during this period. On 8 December, Dr Don Todman, Neurologist, provided a report outlining that the Applicant had no prospect of return to any employment, unless there was some breakthrough treatment.

On 1 June 2023, the Applicant served a Notice of Claim for Damages, with compliance confirmed on 14 August 2023, at which point time stopped running by operation of s 302 of the WCR Act. Accordingly, the Applicant was to establish a material fact of a decisive character occurred no earlier than 14 August 2022.

The Applicant's evidence was that it was only on 8 December 2022, when he received the report of Dr Todman, that he became aware of a material fact of a decisive character.

The Judge concluded that on the balance of probabilities, that in early 2022, when the Applicant lodged his application for TPD, he did not intend to return to work. This was consistent with him having knowledge that he was unable to return to work as a result of the injuries sustained in 2018. As such, the Applicant already had within his means of knowledge, a "critical mass of information" which was sufficient to justify bring the action prior to 14 August

2022. Further, a reasonable man with the means of knowledge of the Applicant and appropriately advised would have brought an action on the facts in his possession at that time.

As a precaution, the Judge also considered the second issue, being that the Applicant has a right of action in negligence for the purposes of s 31(2)(b) of the LA Act. Based on the evidence, the Judge concluded that the Applicant has an action on the right of action. Furthermore, the discretion to extend the limitation period would not result in any prejudice to the Respondent.

108. ***Carusi v St Mary's Anglican Girls School Inc*** **[2024] WASCA 137**

- Justice Mitchell, decision delivered 8 November 2024

Keywords

Occupier's liability - identification of risk of harm - whether risk of harm was foreseeable and 'not insignificant' - causation

Facts

The appellant fell when descending steps in a theatre aisle during a dance competition at the Lady Wardle Performing Arts Centre (PAC) and injured her right ankle on the last step. Damages were claimed against the first respondent as occupier of the PAC. The first respondent made a third-party claim against the second respondent which used the PAC for dance competitions pursuant to a hire agreement.

At Trial

The trial judge dismissed the plaintiff's claim on the basis that she had not established on the balance of probabilities that her injuries were caused by the negligence or breach of statutory duty of St Mary's. The trial judge identified the relevant risk of harm as being the 'risk of a person misplacing a step or tripping and falling when descending the aisle in the PAC and sustaining personal injury'. The trial judge held that the risk was neither foreseeable nor 'not insignificant' and was also not satisfied that a reasonable person in St Mary's position would have added an intermediate step or increased the illumination as a precaution against the risk of harm. Even if St Mary's did breach their duty by failing to install the said step or lighting, the trial judge found that the plaintiff had not established that either alleged breach caused the injury.

Appeal

The Applicant appealed on 6 grounds that the trial judge had erred in:

1. Formulating the relevant risk of harm as being risk of a person misplacing a step or tripping irrespective of height differences in change of levels. The applicant contended that the relevant risk of harm was the anomalous height of the last step and dim light which created the (increased) risk.
2. Failing to assess and determine whether the relevant risk was a risk that was objectively and prospectively reasonably foreseeable.
3. Determining whether the risk of harm ought to have been known to St Mary's on the basis of whether there had been any prior falls at the step. The applicant contended that foreseeability is determined by the foresight of a reasonable occupier having regard to the class of persons who might negotiate the steps in those situations.
4. Determining that the risk of harm was 'not insignificant' without reference to the height of last step, the absence of an intermediate step, the lighting conditions and class of persons using the stairs.
5. Assessing whether there had been a reasonable response to a foreseeable risk by reference to the facts of this accident rather than what a reasonable occupier would have done in the exercise of reasonable foresight in response to foreseeable risk of harm.

6. Failing to determine causation by way of factual inference and should have found by inference that the absence of an intermediate step and/or lightening, more probably than not caused or materially contributed to the fall.

Decision

The appeal was dismissed. The COA found that the trial judge was correct to conclude St Mary's did not breach its duty of care and any alleged breach of duty had not been shown to be a cause of Mrs Carusi's injury.

Ratio

Identification of Relevant Risk

The COA held that the trial judge correctly formulated the relevant risk of harm[38] and was not too broad. The COA referred to the decision of *Coles Supermarkets Australia Pty Ltd v Bridge*[39], where Leeming and Payne JJA identified the following matters in relation to the formulation of risk of harm:

1. It should identify the true source of potential injury, and the general causal mechanism of the injury sustained;
2. The risk must be defined taking into account the particular harm that materialised and the circumstances in which the harm occurred;
3. Avoid unduly narrowing the formulation of risk of harm, which then distorts the reasoning.

The COA said (at paragraph 73) "too narrow a focus risks the court underestimating the burden of taking precautions to avoid the risk of harm, by looking to the cost of dealing with a specific issue rather than the precautions required to remove or reduce a broader risk. Further, too narrow a focus can detract from the required prospective assessment of what a reasonable person would have done before the accident occurred".

Foreseeability and Significance of Risk

The COA found the trial judge did err in failing to find that the risk of harm which her Honour identified was foreseeable and not insignificant. The risk of a person misplacing a step or tripping, and falling, when descending the aisle in the PAC and suffering personal injury was both reasonably foreseeable and not insignificant. The injury does not need to be likely to occur or exceptional for the risk of that injury to be foreseeable and not insignificant.

The COA agreed with the trial judge that in considering the issues of contributory negligence and the need for a warning, the risk of a person descending the aisle and falling if they lost their footing is an obvious one.

Precautions which a Reasonable Person Would Take

The applicant contended that the first respondent as a reasonable person would have installed an intermediate step and localised lighting. The COA found that the evidence did not establish that a reasonable person would have taken either precaution and the fact that an intermediate step was added after the incident during substantial renovations does not significantly inform

[38] The trial judge's formulation of the relevant risk of harm was "a risk of a person misplacing a step or tripping, and falling, when descending the aisle in the PAC and suffering personal injury".
[39] *[2018] NSWCA 183*

the assessment of the precautions which a reasonable person acting without hindsight, would have taken.

Causation

Despite the trial judge rejecting Ms Carusi's account of the accident as it was unreliable, the COA found that it was necessary for the trial judge to consider what inferences could be drawn as to the circumstances of the fall from the evidence her Honour did accept. The trial judge erred in failing to determine the issue of causation by factual inference.

The COA considered it necessary to consider an inference which should be drawn, on the balance of probabilities, from the established primary facts and found that the evidence did not establish, on the balance of probabilities, that the absence of an intermediate step or additional lighting materially contributed to Mrs Carusi's injury.

109. Willmot v Queensland [2024] HCA 42

- Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ, decision delivered 13 November 2024

Keywords

Historical sexual abuse – permanent stay of proceedings

Facts

In June 2020, Ms Willmot brought proceedings against the State of Queensland seeking damages for sexual abuse and serious physical abuse she alleged that she had suffered more than 50 years ago.

The primary judge granted a permanent stay of the proceedings. The Court of Appeal dismissed Ms Willmot's appeal against the stay.

Decision

Appeal allowed in part.

Ratio

A majority of the court found that the approach taken by the primary judge and the Court of Appeal in treating Ms Willmot's four separate allegations as being "inextricably intertwined" was erroneous. Each of the allegations concerned different time periods, different allegations, different actors and therefore different evidence.

The relevant inquiry is whether any prospective trial will be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process. The State was required to identify what it said would make the trial of each set of allegations raised by Ms Willmot unfair. The answer in each case turns on its own facts and requires separate consideration of each allegation – its nature, content, and the available evidence.

In considering each of the four allegations made by Ms Willmot, the permanent stay was partially set aside. The court found that two of Ms Willmot's allegations "so vague that they are incapable of meaningful response, defence or contradiction" and upheld the stay in relation to those matters.

With respect to Ms Willmot's allegations of sexual abuse by her foster parents and an Uncle "NW", the Court held that the State had failed to demonstrate that the matters were "an exceptional case which ought not proceed" and the stay was lifted allowing the two allegations to be tried. The Court found that there were witnesses available to give evidence on these matters and it was for a trial judge to determine whether or not that evidence could be accepted. The State's submission that disentangling causation regarding all four allegations could not be undertaken was rejected as wrong both factually and legally.

110. ***Paetzold v At Beach Court Holiday Villas Pty Ltd*** **[2024] QCA 227**

- Flanagan and Brown JJA and Freeburn J, decision delivered 15 November 2024

Keywords

Appeal and new trial – general principles – interference with judge's findings of fact – functions of appellate court - applicant suffered an injury in his duties as a caretaker for the respondent – whether the trial judge erred in finding no causation to the knee injury – failure to report any income while working full time and receiving age pension - whether the trial judge erred in making adverse credit findings

Facts

This matter was an application for leave to appeal from a judgement of the District Court

On 10 April 2024, the District Court gave judgment for Mr Paetzold (the applicant), as plaintiff, in the sum of $41,076.88 less the statutory refund. Leave to appeal was required because the judgment given was less than the Magistrates Court jurisdictional limit.

The applicant successfully established at trial that he had suffered an injury in the course of his employment as a caretaker with the respondent on 16 March 2020, and the respondent had breached a duty of care to him which caused an injury to his Achilles tendon. The applicant claimed to have also suffered a left knee injury as a result of the incident, but the trial judge found the evidence did not satisfy her that the knee injury was caused by the negligence of the respondent. The trial judge also made adverse findings of credit against the applicant stating if it were not for the claim, he would not have lodged any tax returns and that he had failed to declare income to the Australian Tax Office and that he knowingly failed to declare his income to Centrelink while in receipt of the age pension.

The applicant challenged the trial judge's findings that his knee injury was not caused by the workplace incident and argued the trial judge erred in her adverse credit finding concerning his declarations to Centrelink.

Decision

Leave to appeal was refused. The applicant failed to show any error in the reasoning of the trial judge.

Ratio

The Court noted that the trial judge's reasons for refusing to find the knee injury was caused by the respondent's negligence was a finding of fact. The trial judge had listed six reasons for why she refused to find that the knee injury was caused by the workplace incident, including:

(a) "*the absence of any actual evidence of any action on 16 March 2020 that might have cause the injury to the knee*";

(b) "*the absence of any complaint about pain in the knee until the Achilles injury was essentially healed*";

(c) "*the absence of any swelling in the knee*" – either at the time or shortly after;

(d) "*the clear evidence of degeneration in the knee*";

(e) the expert medical opinion that the degeneration in the knee was enough to "*explain the condition of the knee*"; and

(f) The applicant's work history - he was back at work when the knee symptoms arose.

The court noted that the trial judge was not obliged to accept the applicant's version of the incident, and its aftermath, or to find some alternative explanation as to how the incident occurred. The six reasons listed above meant the trial judge's finding of fact was open on the evidence.

In relation to the Centrelink controversy, the court explained that the matter was fairly put to the applicant who gave various, often equivocal, answers. The court noted that the trial judge had the advantage of seeing the applicant give his evidence on this issue and was entitled to make her own assessment of the evidence in assessing the applicant's credibility.

111. *Stewart v Metro North Hospital & Health Service* [2024] QCA 225

- Mullins P, Boddice JA and Ryan J, delivered on 15 November 2024

Keywords

Independent living v care facility – reasonableness of additional costs of therapy and care to be provided in own residence

Facts

The primary judge was not satisfied that the health benefits for Mr Stewart in seeking therapy and care assistance at his own home were significantly better than those likely to be achieved at a residential facility. The primary judge declined to order the "significant additional cost".

One of Mr Stewart's grounds for appeal contented error in that the primary judge should have awarded damages on the basis of him receiving care and therapy in his own residence given his expressed wishes and the associated health, psychological and emotional benefits in moving into his own residence.

Decision

Appeal dismissed where no error established in primary judge's findings and orders. Cross appeal was also dismissed however, there was an agreed miscalculation as to the assessment of damages in the primary judgment.

Ratio

The Court of Appeal considered expenses which may be reasonably incurred by a plaintiff, in the nature of medical and nursing expenses, are recoverable, subject to a touchstone of reasonableness.

Evidence of Dr Rotinen Diaz and Ms McCorkell addressed the health benefits derived from receiving additional care and assistance. Dr Rotinen Diaz accepted that the enhanced therapy and care could be provided to Mr Stewart, either at his own residence or at the care facility.

The Court of Appeal concluded it was not reasonable to require Metro to pay the significant additional cost of Mr Stewart moving home where the health benefit of moving into his own home or remaining at the care facility were substantially the same.

112. Dodd v Workers Compensation Regulator [2024] QIRC 273

- Pidgeon IC, delivered on 25 November 2024

Keywords

Psychological injury – pre-existing condition – significant contributing factor – multiple stressors

Facts

The appellant had an accepted worker's compensation claim for a right shoulder injury suffered in the course of her employment as a visual merchandise planogram builder in early 2021. After a few months that claim was closed and a fresh statutory claim was accepted for a neck injury. By 19 October 2021, the plaintiff sustained a psychiatric injury, or alternatively, an aggravation of a preexisting psychiatric condition. The appellant contended that employment was a significant contributing factor to the psychiatric injury because it was secondary to her accepted neck injury and was associated with her ongoing pain and functional restrictions in that regard. Around that time, the appellant was also exposed to additional unrelated stressors including frustration in her dealings with Workcover and a marriage breakdown.

The respondent submitted that the only significant contributing factors to any psychiatric injury were the unrelated stressors associated with the marriage breakdown and her dealings with the Workcover and Regulator such that the injury ought to be rejected.

Decision

The appellant's psychiatric injury was an injury within the meaning of Section 32 of the Act.

Ratio

Industrial Commissioner Pidgeon found that of the three identified stressors, two significantly contributed to the injury being relationship difficulties and the impact and consequences of the neck injury and pain. The third stressor, being difficulties with the Workcover process, is a common complaint and, without more, ought not mean the injuries should be excluded under section 32(5)(c) of the WCRA. Industrial Commissioner Pigeon, in adopting a beneficial construction of the WCRA, held that where it was accepted that employment was a significant contributing factor to a secondary psychological injury, it was incompatible with the object of the WCRA to then exclude the injury under section 32(5)(c) where the worker has aired grievances about Workcover with treating health practitioners.

113. Stable v Workers' Compensation Regulator [2024] QIRC 274

- Power, IC, decision delivered 26 November 2024

Keywords

Workers entitlements to compensation – whether injury excluded under s.32 (5) WCRA – where injury arising from management action and if management action is reasonable

Facts

The Appellant is a teacher (Grade 1) and was advised towards the end of Term 4, 2020 of the composition of her class for 2021 which included Student A, B and C who had each previously displayed challenging behaviours. The Appellant taught her class from 27 January 2021 to 12 April 2021, but provided a medical certificate diagnosing adjustment disorder with depressed and anxious mood which was described as being caused by "exposed to marked traumatic experiences in the workplace due to students' aggression, without sufficient extra measures/support being put in place by school management for her/others safety'

It was common ground that the stressors related to both management action and non-management action. The non-management action stressors were related to having the said Students in the class, and the management stressors were related to the Appellant's perception of support being provided by the employer to assist her in managing the challenging behaviour of those students.

Decision

Appeal dismissed.

Ratio

If it were not for the existence of the stressors arising out of management action, the injury would be one for acceptance, however the existence of s. 32 (5) requires consideration of whether the injury arose out of reasonable management action taken in a reasonable way. The medical evidence supported a determination that management action was a significant contributing factor, along with the other non-management action stressors.

114. Milne v SDN Children's Services and BRC Recruitment Pty Ltd [2024] NSWSC 149

- Walton J, delivered 27 November 2024

Author: Isabella Blunt, Lawyer

Keywords

Slip and fall – commercial kitchen – labour hire agreement – non-delegable duty - pre-existing condition

Facts

The plaintiff alleged she slipped on a cellophane noodle (similar to a glass noodle – transparent) whilst preparing meals in a commercial kitchen at a childcare centre.

The first defendant was the childcare centre where the plaintiff carried out her duties. The second defendant was the labour hire agency that facilitated the employment. The plaintiff submitted that both defendants owed her a non-delegable duty of care as the respective occupier and employer.

Ratio

The first defendant alleged that they did not owe the plaintiff a duty of care as an occupier in circumstances where the incident occurred due to an alleged failing by the plaintiff to take reasonable care for her own safety. His Honour held that the first defendant did owe a duty of care to the plaintiff in circumstances where the risk was reasonably foreseeable. The system of work involving the plaintiff to prepare multiple meals under a time pressure created a reasonably foreseeable risk that a containment on the floor may be undetected by the plaintiff. Further to this, His Honour made specific note to the translucent nature of the noodle – exacerbating the Plaintiffs hindered ability to detect the noodle.

His Honour largely focussed on the allegation by the plaintiff that had the first defendant provided mats for the kitchen, it may have prevented the accident. The first defendant alleged that in order to provide mats, it would have to predict areas in which contaminants may fall which was unreasonable. Notably, and with reference to sec, 5C of the *Civil Liability Act*[40], His Honour noted that mats were installed into the kitchen after the plaintiff's accident – '*thereby constitute*(ing) *an admission of the failure to take a precaution that a reasonable person in the position of the first defendant would have taken.*'

The second defendant acknowledged that they owed the plaintiff a non-delegable duty of care but submitted that their duty was discharged in circumstances that a '*safe system of work and place was, and it had no reason, in the absence of complaint, to intervene and protect the plaintiff from a risk that it was not aware of*'. This was not accepted by His Honour who concluded that the second defendant failed to ensure reasonable care was taken of its employee, particularly that the second defendant breached its duty of care to ensure that reasonable care was taken. Specific note was made to the failure to ensure that mats were in place where contaminants may arrive on the floor.

Decision

Both the first and second defendant owed the plaintiff a duty of care and had breached that duty. The Plaintiff is to submit Short Order Minutes quantifying her claim to damages for consideration by His Honour.

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[40] *Civil Liability Act* 2002 NSW

115. MTH v State of New South Wales [2024] NSWSC 884

- Cavanagh J, delivered 28 November 2024

Keywords
Vicarious liability – sexual assault – failure to exercise reasonable care – non delegable duty of care to a ward of the state – abuse of process – high degree of satisfaction

Facts
The plaintiff, who was self-represented at the time of the trial, alleged that she sustained personal injuries as a result of being sexually abused by Mr Croft (the second defendant) while she was placed in foster care with him and his wife, the third defendant. The plaintiff also alleges that as a ward of the State of New South Wales at that time, the first defendant, was vicariously liable for the actions of Mr Croft. The plaintiff was a ward of the state from age 4, from 1966. The plaintiff had been in the care of a previous family but in 1979 was sent to live with the second and third defendants at their family farm.

The first defendant was convicted of the conduct in a criminal trial and the plaintiff attempted to rely on that conviction as an admission in the civil case.

Decision
Judgment for the first, second and third defendants, Plaintiff to pay defendant's costs, all cross-claims dismissed and no order as to costs on the cross-claims.

Ratio
The central issue in this case relates around whether or not the plaintiff was in fact abused by the second defendant. Given the serious criminal conduct alleged, the onus on the plaintiff to proof the civil standard was required to a high degree of satisfaction (*Briginshaw v Briginshaw)*[41]*.* The court stated that even with a defendant being convicted of a criminal defence, the civil proceedings may in fact be struck out as an abuse of process.

The plaintiff attempted to rely on the transcript of the criminal trial to be used as evidence in this particular case. The court rejected that based on s 91 of the *Evidence Act* 1995 (NSW) which precludes admission into evidence of a decision or finding of fact.

Given the amount of time that had passed since the plaintiff's alleged assault and the trial, the court relied on the comment from McLelland CJ in Eq in *Watson v Foxman*[42]*,* where it was stated that:

> "… human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience."

[41] (1938) 60 CLR 336.
[42] (1995) 49 NSWLR 315.

Ultimately, the court could not find the plaintiff to be a credible witness and found the plaintiff gave inconsistent statements. The court was satisfied that the plaintiff was unable to persuade, to the high degree of satisfaction, that the alleged abuse occurred.

116. *Macari v Snack Brands Foods Pty Ltd* [2024] NSWSC 282

- Mitchelmore JA, McHugh JA, Griffiths AJA delivered 28 November 2024

Keywords

Causation – Appellant slipped on steps in respondent's factory – cause of slip alleged to be either potato debris on steps or slipperiness of steps

Facts

The Appellant was injured when he slipped on a set of metal steps at his workplace, a potato chip factory which was operated by the Respondent.

The Appellant claimed that at the time of his accident, there was a potato hopper near where he was working and which contained potatoes boiling in starchy water. He alleged that this would splash out from the potato hopper, and onto the nearby landing and steps which would become contaminated with a slippery substance (starchy water). He alleged that he stood on this contaminant while descending the steps, causing him to slip and fall.

The Appellant had given different versions about the cause of his fall, and evidence was led by the respondent, that the hopper did not contain boiling water and this created a change in the appellants case where he alleged to have slipped either due to potato debris or because of the steps being slippery when wet (despite them being non-slip when installed) due to wear and tear.

The primary judge had found that there was no evidence that the steps were defective or inherently unsafe, or had become unsafe through lack of maintenance when the accident occurred, and further found that there was no evidence to support the pleaded case that there was boiling or starchy water on the steps, nor any evidence that the presence of cold water on the steps rendered them slippery and unsafe to use.

Decision

The Appeal was dismissed.

Ratio

In circumstances where the primary judge was not satisfied that the Appellant had established either of the alternative hypotheses as to the cause of his slip and fall, there was no discernible

error in the primary judge taking the further step of not inferring that the cause was some other reason which was within the responsibility of the respondent. It was not erroneous of the primary judge to point to a range of possible causes while pointing out that the plaintiff had failed to establish the actual causes.

117. Ritchie James Edward Lowe v Greenmountain Food Processing Pty Ltd [2024] QDC 204

- Horneman-Wren SC, DCJ, decision delivered 29 November 2024

Keywords

Negligence – workers' compensation – meat processing plant – finger injury – breach of duty – failure to mitigate loss

Facts

On 1 April 2019, the plaintiff was working at a meat processing plant and suffered a significant hand injury (partial amputation of his finger) when his finger came into contact with the blade of a bandsaw while he was cutting small portions of meat.

The plaintiff made a good recovery and was certified as fit to return to his usual employment from his treating orthopaedic specialist from 3 September 2019. However, the plaintiff did not return to work and his employment was eventually terminated.

The plaintiff commenced proceedings against his former employer and claimed a range of damages including past and future economic loss.

Decision

The plaintiff's claim was unsuccessful.

Ratio

The defendant accepted that a duty of care was owed to the plaintiff, however, it was submitted that there was no breach of the duty of care. His Honour was satisfied that the employer had provided adequate training and instructions, there were no issues with the rate of production on the day or the plaintiff's inability to keep up, the blade and equipment were positioned correctly, the risk of cutting small pieces of meat had been identified and assessed adequately in the employer's risk assessments, and the plaintiff had not been concerned about his personal health or safety when he started to cut the portions of meat.

As a result, the Court concluded that:-

> "… the defendant had assessed the risk posed by the necessity for an operator of the bandsaw to pass their fingers within close proximity of the, necessarily, exposed blade. It developed systems of work to mitigate against that risk. It trained the plaintiff in those systems. The plaintiff was competent to perform the work safely. In those respects, the defendant did what was reasonably practicable to protect the plaintiff against the risk of injury."

His Honour also held that the plaintiff failed to mitigate his loss. Despite receiving a medical clearance from his treating doctor, the plaintiff failed to return to his employment or seek alternative employment. His employment was subsequently terminated on the basis that the plaintiff had "abandoned his employment". As a result, His Honour opined that if the plaintiff's claim was successful, any award to past economic loss would be constrained to the difference between his usual weekly earnings and the benefits paid to him by WorkCover up until he ceased employment.

118. *Eaves v Dr Allan Bond & Associates Pty Ltd (No. 2)* [2024] QSC 299

- Cooper J; decision delivered 2 December 2024

Keywords

Calderbank and *UCPR* offers – determination of costs

Facts

This was a determination of legal costs following the granting of declaratory relief to the Plaintiffs in relation to the termination of a contract of sale under the *Land Sales Act 1984*. The Plaintiffs succeeded in recovering their deposit ($46,850.00) and accrued interest, and a counterclaim by the Defendant was dismissed. The Plaintiffs and Defendant each made offers purportedly under Chapter 9, Part 5 of the *Uniform Civil Procedure Rules* ("*UCPR*") and under Calderbank principles.

The Plaintiffs' offer was for the recovery of the deposit and costs, with no interest, but it was conditional on the parties "entering into a suitably worded deed of settlement". The Defendant's offer was for repayment of the deposit and interest, and no order as to costs. Each party argued their offer complied with the *UCPR* and ought to determine the costs order. The Defendant also argued, if costs were award to the Plaintiff, it ought to be on the District Court scale.

The Court considered whether rr.360 or 361 of the *UCPR* were engaged by either offer, and the appropriate scale. It was agreed that the Plaintiffs owed the Defendant standard costs thrown away as a result of late amendments to their Statement of Claim.

Decision

The Defendant to pay the Plaintiff's standard costs on the Supreme Court scale, with the standard costs owning to the Defendant being set off against the Plaintiff's costs.

Ratio

An offer which demands nothing less than all the relief sought in a claim is not in truth an offer to settle for the purposes of Chapter 9, Part 5 of the *UCPR*. However, the Plaintiffs' offer did not seek recovery of the accrued interest which was estimated at $3,300.00, being a not insignificant proportion of the overall claim, and so was a genuine offer. However, the Court held that making an offer conditional on execution of a deed, on undisclosed terms, would not resolve the proceeding and, therefore, the Plaintiffs' offer did not engage r.360 of the *UCPR*.

The Plaintiff's success on the proceedings was considered not less favourable than the Defendant's offer, because had they accept the Defendant's offer, they would have foregone

the whole of their costs of the proceeding. The Court considered, even accounting for the Defendant's costs the Plaintiffs were liable to pay, their standard costs would exceed this figure. Thus, r.361 of the *UCPR* was not engaged and costs were to be determined by the Court's discretion under r.681 of the *UCPR*.

The general rule being that costs follow the event and would only be departed from in exceptional circumstances. It was not unreasonable for either party to reject the offers made as the proceeding raised a complex statutory construction on which there was no binding authority. This justified the Plaintiffs being awarded standard costs, and further such costs on the Supreme Court scale.

119. Hardy v Eclipse K9 Security Pty Ltd [2024] NSWDC 602

- Waugh SC DCJ, delivered on 3 December 2024

Author: Karla Macpherson, Associate Lawyer

Keywords

Assessment of damages – Future economic loss

Facts

The Plaintiff was 55 years old at the time of judgment and sustained injuries to his left elbow and right knee caused by a dog attacking him whilst riding his motorcycle along a public road. The Plaintiff obtained default judgment against the Defendant and damages were to be assessed by the Court.

Decision

Judgment for the Plaintiff in the sum of $460,998.99 plus costs of the proceedings.

Ratio

At the time of the incident, the Plaintiff was working for Coca-Cola Amatil as a warehouse manager which required him to walk a minimum of 10,000 steps per day. After sustaining his injuries, his employer effectively created a new role for him being a systems and inventory lead which did not require him to use the stairs or walk as much.

The Plaintiff in his affidavit submitted the skills of his new role are specific to Coca-Cola only, whereas had he been able to continue as a warehouse manager, his skills would have been more transferable on the open labour market.

The Plaintiff further submitted had he remained in the warehouse manager role, he could have been promoted to supply chain manager role that would have seen an increase in earnings of about $50,000 per annum. The supply chain manager role was described by the Plaintiff as a "*very dynamic role requiring a significant amount of travel"*.

There was no further evidence before the court aside from the Plaintiff's affidavit surrounding his potential career advancement opportunities. The Court accepted the Plaintiff's evidence however, needed to assess the claim objectively.

Rehabilitation specialist, Dr Mohammed Assem gave evidence about the likelihood of the Plaintiff finishing work five years earlier than he might have otherwise because of his ongoing disabilities.

The Plaintiff's Counsel submitted the Court should allow a buffer of $200,000 for future economic loss to allow for the likelihood of the Plaintiff retiring five years earlier and it being more likely than not he has lost the prospect of becoming a supply chain manager either with his present employer or other similar employer. The Court however allowed $100,000 in damages for future economic loss.

120. Tabloid Pty Ltd v Pringle [2024] WASCA 152

- Vaughan JA, Totle J and Vandongen JA, decision delivered 5 December 2024

Keywords

Personal injury – damages – assessment of damage – past loss of earning capacity – future loss of earning capacity – appellate restraint – where trial judge failed to use or palpably misused advantage as trial judge by mischaracterising or misunderstanding effect of expert evidence

Facts

The appellant conducted a fast-food outlet in Bunbury, WA. The respondent attended the appellant's establishment on 22 May 2013 with her then 9-year-old son. The respondent purchased meals for herself and her son. The purchase included servings of fried chips that had been contaminated with caustic soda. After eating the chips, the respondent experienced tingling and burning sensations in her mouth. The primary judge (Lonsdale DCJ) found for the respondent and delivered written reasons assessing the respondent's damages in an amount of $1,126,045.39. That amount included $449,312 for past loss of earning capacity, $145,386 for interest on past economic loss and $350,000 for future loss of earning capacity. This decision is an appeal against the assessment of damages by Lonsdale DCJ. There were three grounds of appeal:

1. The primary judge erred in law and in fact by awarding the respondent $494,513.45 (excluding interest) on account of past loss of earning capacity.

2. The primary judge erred in awarding the respondent $145,386.82 interest on past loss of earning capacity. The appellant says the correct amount is $120,760.21. The respondent concedes this ground.

3. The trial judge erred in fact and in law in awarding the respondent future economic loss of $350,000.

Decision

The appeal was allowed.

Paragraph 1 of the order of the District Court of Western Australia made 24 February 2023 was varied by deleting the sum of $1,126,045.39 and substituting the sum of $516,683.79.

Ratio

Assessment of Past Loss of Earning Capacity

The primary judge provided for a 6% discount for contingencies when assessing the award of damages for future loss of earning capacity due to the respondent's prior history of mental illness. However, there was no allowance for a 6% discount for contingencies when calculating the award of damages for past loss of earning capacity. It was found that the primary judge inadvertently omitted to give effect to the finding that a deduction of 6% should be made.

It was also found that the primary judge mischaracterized or misunderstood the effect of Dr Piirto's evidence as to the respondent's capacity to work. The primary judge's finding that the respondent suffered a total loss of earning capacity from mid-January 2015 until delivery of judgment was based on a mischaracterization or misunderstanding of the effect of Dr Piirto's evidence as to the respondent's capacity to work. The primary judge should have found, conformably with Dr Piirto's evidence, that in terms of past loss of earning capacity, the respondent had a partial capacity to engage in employment of the kind the respondent was previously engaged in. It was not the case that, as a result of the respondent's psychiatric injury, the respondent was psychologically totally incapable of working at all from the time that respondent accepted a voluntary redundancy in mid-January 2015.

The Court was satisfied that they could assess the damages, despite not having seen or heard the witnesses. They noted that there were no outstanding issues of credibility or reliability that could not be resolved by the court. They were of the view that any gaps in the evidence were deficiencies that existed at trial and this court was in as good a position as the primary judge to decide how to assess the damage given those deficiencies. The court accepted the 50% past loss of earning capacity figure put forward by the appellant.

Assessment of Future Economic Loss

Their Honours were satisfied that an error was made by the trial judge by assessing the future loss of earning capacity at 40%. While that conclusion was said by the primary judge to be based on acceptance of Dr Piirto's evidence, it was self-evident that her Honour's conclusion could not be reconciled with Dr Piirto's evidence. The primary judge's conclusion would be understandable if she rejected Dr Piirto's evidence. But rather than rejecting Dr Piirto's evidence, the primary judge expressly accepted related aspects of Dr Piirto's evidence.

It was found, on the balance of probabilities, that the respondent's psychiatric condition was not such that she had a residual incapacity affecting her future employment which would subsist for the remainder of her working life. In adopting a global approach, the Court allowed a period of three years having regard to the evidence of Dr Piirto and, to a lesser extent, the evidence of Dr Risbey to the effect that a committed approach to psychotherapy would lead to a good prognosis in the long-term.

An amount of $90,000 was allowed for future loss of earning capacity, including loss of future superannuation.

121. *Adani Mining Pty Ltd v Pennings* [2024] QSC 302

- Brown J, decision delivered 6 December 2024

Keywords

Torts – miscellaneous torts – conspiring to injure – general principles - intimidation – intentional interference with contract – generally – equity – equitable remedies – injunctions – interlocutory injunctions – relevant considerations –procedure – civil proceedings in state and territory courts – costs – interlocutory proceedings – ending proceedings early

Facts

Originally initiated in 2020, the Plaintiff alleged that the Defendant, through his involvement with the protest group Galilee Blockade, engaged in unlawful conduct to harm their business by disrupting the operations of its Carmichael coal mine in central Queensland, including threatening contractors which caused them to withdraw from negotiations. The claims included accusations of intimidation, conspiracy, and intentional interference with contractual relations. The case involves several tortious claims, including unlawful and lawful means conspiracy, intimidation, and intentional interference with contracts.

The Plaintiffs sought an injunction to prevent future breaches of confidentiality by the Defendant. In this application, the Defendant sought to have the proceedings permanently stayed or struck out, or otherwise seeks to strike out parts of the Further Amended Statement of Claim (FASOC). The Defendant also sought to set aside or permanently stay costs orders, and to discharge injunctive orders.

Decision

1. The following paragraphs of the FASOC are struck out with liberty to replead:
   (a) [46] to [57A];
   (b) [63], [65] and [66];
   (c) [67] to [73A]; and
   (d) [78] to [82].
2. The plaintiffs are to file and serve a second further amended statement of claim by 14 February 2025.
3. The plaintiffs' solicitor is to file and serve an affidavit deposing that it has made any necessary investigations required to replead [63] and [66], and is satisfied that there is a reasonable cause of action in relation to Downer and that they have provided the second further amended statement of claim to their clients to provide instructions that they have reviewed the second further amended statement of claim and have instructed that it can be filed in that form.
4. The enforcement of:
   (a) paragraph [7] of the Orders made in this proceeding by Brown J dated 29 July 2021; and
   (b) paragraphs [11(a)], [11(b)] and [11(c)] of the Orders made in this proceeding by Callaghan J dated 8 March 2022,

is stayed until the determination of the proceeding or earlier order.

5. The amended application is otherwise dismissed.
6. The parties have liberty to apply for any further order that may be required to give effect to Order 4.
7. The parties are to provide submissions as to costs by 31 January 2025.
8. The Resolution Registrar, in consultation with the supervised case list manager, is to list this matter for review at the earliest available date after 14 February 2025 before a supervised case list judge for directions.

Ratio

The court did not find that the proceedings were an abuse of process and held that various parts of the FASOC were to be struck out. The circumstances, however, had not materially changed to justify setting aside the injunction, and the proceedings could not be permanently stayed or struck out. This application, as one of many, highlighted the need for the parties to be set on the pathway of getting the matter to trial as soon as possible.

122. Bryden (By His Litigation Guardian Sarah Bryden) v INA Operations Pty Ltd Trust No 4 (t/a Igenia Holidays Riverhouse) [2024] QMC 23

– Magistrate Pinder, delivered on 9 December 2024.

Keywords

Sanction – Child – Litigation Guardian

Facts

The Claimant was injured whilst using a waterslide when he was 10 years old. He pursued a claim against the Respondent with his mother as his litigation guardian. The litigation guardian gave instructions for the claim for damages to be settled when the Claimant was 15 years old and sought orders for the sanction of compromise. Supreme Court – Practice Direction 15 of 2018 was followed despite the matter being within the jurisdiction of the Magistrates Court which was taken to be correct.

Decision

The Court was satisfied the proposed compromise of the claim was reasonable and for the benefit of the Claimant and made orders accordingly.

Ratio

The Court found the estimates of the Claimants solicitors' professional costs to be concerning however was comforted where the proposed order allowed the Public Trustee to assess, negotiate and pay legal costs on behalf of the Claimant.

123. Daher v Gold & Eagle Constructions Pty Ltd [2024] NSWSC 1575

- Harrison CJ, decision delivered 9 December 2024.

Keywords

Civil Liability Act 2002 (NSW), ss 5B, 5D, 5F, 5G, 5H, 5I, 5R, 5S - *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5 - *Workers Compensation Act 1987* (NSW), s 151Z - Negligence – Duty of care by head contractor - timber cover removed – replaced with plastic sheet - fall risk – lack of adequate fall protection - Contributory negligence – Plaintiff's removal of timber cover and fall due to inattention.

Facts

Mr Daher, a carpenter, was working under a subcontract between his company, CDM Contractors Pty Ltd, and Gold & Eagle Constructions Pty Ltd (trading as Renovate8) ("Gold & Eagle"). The property was owned by Mr Steven Miller, who had engaged Gold & Eagle to manage renovations which included, inter alia, works above a cellar with flooring three metres below the area of work.

Access to the cellar was provided via a stairwell opening, initially covered by a wooden plank, timber, and plywood slab. This opening was intended to facilitate access to the cellar upon completion of the renovations.

Mr Daher alleged that Gold & Eagle and Mr Miller removed the plywood cover and replaced it with plastic sheeting. On 20 August 2019, while performing his contracted work, Mr Daher stepped onto the plastic sheeting, fell three metres into the cellar, and sustained a significant fracture to his left ankle, requiring surgery and the insertion of screws.

Decision

Judgment in favour of Mr Daher against Gold & Eagle, reduced by 30% for contributory negligence. The claim against Mr Miller was dismissed.

Damages were deferred, pending calculations of Mr Daher's past and future loss of superannuation, *Fox v Wood* adjustments, and Section 151Z considerations under the *Workers' Compensation Act 1987*.

Ratio

<u>Competing Versions – Who Removed the Plywood Cover?</u>

The Court examined conflicting evidence regarding the removal of the plywood cover, which had been bolted over the penetration as a secure method of minimising the risk of falls.

Mr Miller denied removing the plywood cover and provided a credible explanation, asserting that the plywood protected his wine collection in the cellar from debris. His evidence was supported by his physical limitations, stemming from a prior injury, which made it implausible for him to affix plastic sheeting to a concrete slab with nails.

In contrast, Mr Daher, an experienced carpenter, was capable of performing the task. The Court noted inconsistencies in his evidence during cross-examination. For instance, he failed to coherently explain how Mr Miller removed the plywood or what tools were used. Ultimately,

the Court rejected Mr Daher's account and concluded that he had likely removed the plywood cover and replaced it with plastic sheeting.

Negligence

The Court held that Gold & Eagle had breached its duty of care to Mr Daher by failing to take reasonable precautions to guard against the risk of falls at the worksite, which it controlled and managed. Specifically, it failed to ensure that the unguarded penetration in the slab was adequately secured.

While Mr Miller was the owner and occupier of the premises, the Court noted that he was not in control of the worksite. The Court found that Mr Miller had no obligation to cover the penetration and was entitled to rely on Gold & Eagle to do so.

Contributory Negligence

Whether Mr Daher removed the cover or witnessed its removal, the Court held that he knew the penetration was only covered by plastic. Further, Mr Daher did not misjudge a risk he had assessed but was momentarily inattentive when stepping onto the plastic instead of the surrounding slab.

The Court found no credible evidence that Mr Daher was distracted by his work, overwhelmed by repetitive tasks, or affected by fatigue at the time of the incident. Instead, the Court determined he failed to take reasonable care to avoid a known danger, such as walking around the penetration.

The Court held that Mr Daher's inadvertence or inattention did not shield him from a finding of contributory negligence, which was assessed at 30%.

Obvious Risk – Sections 5F, 5G, and 5H

The Court found the risk of stepping into the penetration to be an obvious one but concluded that Mr Daher's fall did not result from him ignoring or consciously taking that risk.

Inherent Risk – Section 5I

The Court determined that the risk of falling through an unguarded penetration in a suspended concrete slab and sustaining injuries from a three-metre fall was not an inherent risk. The risk could have been mitigated through the installation and maintenance of a physical barrier, such as a handrail

Damages

Section 151Z

The Court held CDM Contractors Pty Ltd liable to Mr Daher as his employer, despite his dual role as sole director and his contributory negligence. This finding was consistent with the High Court's reasoning in *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28, confirming that an employer's liability is not negated by the employee's dual roles or negligence.

Liability was apportioned under *Section 5 of the Law Reform (Miscellaneous Provisions) Act 1946* as: 12% to CDM Contractors and 88% to Gold & Eagle, reflecting their respective contributions to the injury.

TRAVIS
SCHULTZ
& PARTNERS

124. Agrigrain Pty Ltd v Rindfleish [2024] NSWCA 295

- Ward P, Kirk JA and Stern JA, decision delivered 9 December 2024

Keywords

EMPLOYMENT AND INDUSTRIAL LAW – Contract terms – Which of two entities in same corporate group is true employer of respondent – What reasonable person in position of all persons potentially party to contract would understand as to which entity was party as employer – Post-contract conduct relevant where contract unwritten – Factors still relevant in employee/independent contractor characterisation context may shed some light on issue – Question of control and direction significant though not definitive

CIVIL PROCEDURE – Pleadings – Admission contrary to subsequent argument not withdrawn – Pleadings and particulars define issues for decision – Primary judge entitled to determine issue based on admission

LIMITATIONS OF ACTIONS – Discoverability – Personal injury – Knowledge of fault of defendant – When plaintiff "ought to know" facts – No requirement that plaintiff knows capacity in which putative defendant might be liable – Reasonable steps to be taken by plaintiff, not plaintiff's lawyers – Lawyers' omissions not to rebound on plaintiff where he had taken all reasonable steps

Facts

In 2007, Mr. Rindfleish commenced work for the Agrigrain business at Narromine without a written employment contract. He left in 2011 but later returned in 2012 as site foreman at the Coonamble site. On 18 January 2016, he was injured while repairing a grain auger without adequate maintenance support.

In October 2018, Mr. Rindfleish sought legal advice from Slater & Gordon. Initially, he pursued a claim against Plum Grove Pty Ltd, mistakenly believed to own the Coonamble site. Subsequent investigations revealed Agrigrain Pty Ltd (Agrigrain) employees were responsible for site safety. In 2022, after subpoenaing documents from SafeWork NSW, Mr. Rindfleish's solicitor identified Agrigrain as the appropriate defendant. Proceedings were amended accordingly. It was pleaded that his employer was Agrigrain (Coonamble) Pty Limited (Agrigrain Coonamble), a wholly owned subsidiary of Agrigrain. Admissions were made (and never withdrawn) by Agrigrain that Agrigrain Coonamble were Mr Rindfleish's employer.

The primary judge held in favour of Mr Rindfleish and awarded him $521,134 in damages.

Decision

1. Appeal Dismissed
2. The appellant is to pay the respondent's costs

Ratio

The grounds for appeal focussed on the following:

1. **Employer Identification and Procedural Compliance**: Agrigrain contended that it was Mr. Rindfleish's employer at the time of his injury and not Agrigrain Coonamble. If accepted that Agrigrain was the employer, then Mr. Rindfleish's claim must fail as he had not complied with the statutory procedural prerequisites under the relevant Workers' Compensation Acts to bring the claim against Agrigrain.

2. **Time-Barred Claim**: Agrigrain argued that Mr. Rindfleish's claim was barred under the Limitation Act 1969 (NSW) since it was filed more than three years after the injury occurred. The primary judge determined that the cause of action was not discoverable by Mr. Rindfleish until shortly before filing in November 2022, a finding Agrigrain challenged on appeal.

3. **Damages Award**: Agrigrain contested the amounts awarded for non-economic loss, future economic loss, out-of-pocket expenses, and past domestic assistance, claiming the primary judge erred in assessing these damages.

The issue of which entity was Mr. Rindfleish's employer ultimately centred on common law principles, with the primary judge concluding that Agrigrain Coonamble, not Agrigrain, was Mr. Rindfleish's employer.

The primary judge based this conclusion on evidence that Agrigrain Coonamble paid Mr. Rindfleish's wages and superannuation, managed his workers' compensation policy, withheld taxes, issued his PAYG Summary, and granted leave entitlements. Agrigrain Coonamble also made a lump sum injury payment and admitted in its defence that it was the employer. Agrigrain did not seek to withdraw this admission, further supporting the judge's finding.

Agrigrain contended that the primary judge employed the wrong legal test, gave undue weight to administrative factors, and failed to consider the totality of the employment relationship, including its control over Mr. Rindfleish's work. However, these arguments did not overturn the primary judge's reasoning, which relied on substantial evidence to support Agrigrain Coonamble's role as the employer.

In relation to the limitation issue, the Court of Appeal held that Mr. Rindfleish could not have been expected to identify any omissions by his lawyers in investigating the responsible entity, as he reasonably relied on their expertise and provided timely instructions. Consequently, Agrigrain failed to show that Mr. Rindfleish knew or should have known of its involvement before November 2022, meaning his claim was not time-barred under the Limitation Act.

Finally, in relation to the award for damages, Agrigrain failed to demonstrate any compelling error in the primary judge's well-reasoned findings on damages, including awards for non-economic loss, reduced earning capacity, future out-of-pocket expenses, and past domestic assistance. The evidence supported the judge's conclusions, and Agrigrain's challenges were deemed trivial and without merit.

125. *Elisha v Vision Australia Ltd* [2024] HCA 50

- Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, Beech-Jones JJ, decision delivered 11 December 2024

Keywords

Damages – breach of contract – scope of contractual duty – negligence – discipline and termination of employment

Facts

The plaintiff, Adam Elisha had been employed by Vision Australia Limited. His employment was terminated in circumstances which the trial judge found were "unfair, unjust and wholly unreasonable". The employer's primary complaint centred on allegations of the way in which the plaintiff had behaved when staying at a hotel on business for the employer. It was suggested that he had intimidated and humiliated a hotel staff member. The trial judge awarded damages of $1,442,404.50 for the psychiatric injury suffered by the plaintiff, and its consequences. The trial judge found breaches of the employment contract in how the employer investigated the alleged misconduct.

An appeal to the Victorian Court of Appeal was successful however, as the Court of Appeal found that damages for psychiatric injury were not available for breach of contract other than where the psychiatric injury was consequent upon physical injury, caused by the breach of contract or where the very object of the contract was to provide enjoyment or relaxation. Reliance was placed on a range of precedents which went back over 100 years to the English decision in *Addis v Gramophone Company Ltd* [1909] AC 488.

The plaintiff applied for and obtained leave to appeal to the High Court.

Decision

Appeal allowed.

Ratio

The plurality (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ) considered that an employee can succeed in a claim against an employer for damages for breach of contract, provided it is not too remote and where there is an express prescriptive provision in the contract which sets out the process that the employer must go through to undertake disciplinary action against an employee.

The Court found that it was not necessary for the precise manner in which the breach by the employer would cause psychiatric injury to have been contemplated by the parties but "an important element in the causal sequence by which Mr Elisha's psychiatric injury occurred was that without Vision Australia's breach, Mr Elisha would not have been dismissed for alleged misconduct. This causal element was entirely predictable in light of the nature of Vision Australia's breach" [at 67].

The Court observed that it was not necessary to go further to consider other grounds of appeal, including the tort of negligence, but noted that to decide this issue would require full argument and consideration of the relevant legislation. The Court said:-

> “The duty of care alleged by Mr Elisha was upon employers to provide "a safe system of investigation and decision-making with respect to discipline and termination of employment". Unlike the duty that arose from the 2006 Contract by agreement between Vision Australia and Mr Elisha, a duty that is imposed by law can be shaped by, and must be coherent with, relevant legislation.” [at 74].

Observations

The decision does not recognise a duty of care being owed in all circumstances – but certainly recognises a contractual duty where the contract of employment will imply it either because of the written terms of the contract or Fair Work legislation. Given the view of the plurality, it does seem highly likely that a duty of care will often be found in tort to avoid foreseeable risk of psychiatric injury during a disciplinary or termination process, provided there is coherence with the legislative regime that applies to the employee’s circumstances.

126. Dean v Central Highlands Regional Water Corporation [2024] VSCA 315

- Macaulay JA, Gorton AJJA & J Forrest AJJA, decision delivered 12 December 2024.

Keywords

Negligence – dog attack – meter reader – workplace accident - appeal

Facts

The Plaintiff was a meter reader for the Central Highlands Regional Water Corporation (CHRWC). In July of 2018, he was attacked by an American Pitbull x Staffy dog while attempting to read a meter. The attack left the Plaintiff with severe lower left leg injuries, that required surgery and a skin graft, and also a psychiatric injury.

At the time of the attack, the Plaintiff had with him a meter reading device, and also a screwdriver. Neither of these implements were effective in stopping the dog from attacking him. The Plaintiff alleged he had not been provided with any dog training or other means of stopping a dog attack, for example a citronella spray or similar.

The matter went to a jury trial, with the jury finding no liability for the CHRWC. In closing submissions (at trial), the Plaintiff's counsel submitted that had the dog training and the citronella spray been provided, then the Plaintiff would have suffered no injury, or alternatively, that his injuries would have been less severe.

The trial judge refused to allow the alternative proposition to go to the jury, that is, that the Plaintiff's injuries would have been less severe. The trial judge only permitted the one option to be put, and that was that the plaintiff would have suffered ‘no injury’. That decision resulted in a direction to the jury that it was, in effect, only to consider ‘whether or not the training and provision of the spray would have resulted in no injuries to the plaintiff’. During its deliberations, the jury had a question for the judge. It related to clarification on her direction that the jury was ‘not considering the issue of a reduction in the severity of injury, that is, it was not to consider whether the spray and training (if provided), would have meant less severe injury’.

Decision

The application for leave to appeal was granted and the appeal allowed. The judgment of the County Court was set aside and the proceeding remitted to that Court to be retried.

Ratio

On appeal the CHRWC submitted that the Court should deny the leave to appeal even if the appeal had a real prospect of success. The CHRWC argued that there would not have been any different result/outcome, because if properly instructed the jury could not conclude that the CHRWC’s negligence caused the Plaintiff to suffer anymore injuries than he would suffered. Also, even if leave was granted, a new trial should not be ordered because no substantial wrong or miscarriage had been occasioned by any error. The CHRWC argued that the evidence rose no higher than suggesting that proper precaution, such as dog safety

training or citronella spray, might possibly have resulted in the Plaintiff suffering less severe injuries than he otherwise would have suffered. CHRWC argued that the Plaintiff had to establish that on the balance of probabilities, the precautions would have prevented him from suffering more severe injuries than he would otherwise have suffered.

The Court of Appeal agreed that the evidence established that there was a sequence of related steps during the dog attack. There were a number of different injuries sustained by the Plaintiff, with the worst of those being his lower left leg, on top of which he sustained PTSD of some severity. The expert called by the Plaintiff, Dr Ley, provided evidence about potential effectiveness of strategies to deal with aggressive dogs, including what to do when first confronted by a dog and then what to do once under attack. These were designed to prevent or escape an attack, and then to reduce the duration of any attack and the severity of any injuries flowing from it. Dr Ley detailed some measures that could be taken. The Court agreed that such safety training, and the supply of the citronella spray, could not guarantee their use by the Plaintiff, and also that at some point (during a dog attack) some of the strategies' effectiveness would be reduced.

There are many variables regarding the possibility that the provision of the training and the spray would have reduced the duration and severity of the attack, including the level of agitation of the dog, the speed with which events occurred and unfolded, the likelihood that the person being attacked would have the presence of mind to adopt the training and use the spray and the likely response of the dog after such measures were taken.

The Court was of the view that it was difficult to say that the judge's direction did not deprive the Plaintiff of at least the possibility of a successful outcome if the jury was directed that they were permitted to consider whether the CHRWC's breach caused the Plaintiff to suffer injuries or 'more severe injuries'.

It was at least possible that the jury may have concluded that the breach would not have prevented the Plaintiff from suffering some injury, but also would have avoided him suffering the full extent of the injuries sustained in the attack. The jury would then have proceeded to assess the appropriate amount of damages to compensate the Plaintiff for the pain and suffering he sustained by reason of those additional or more severe injuries.

The Court concluded that such an outcome was available as a matter of law, and at least as a possibility on the evidence given at trial. The Court concluded that there was a material misdirection by the judge at trial, and that in line with the Court's power, it set aside the judgment and ordered a retrial.

The question then for the Court was what the retrial would involve, and who should hear that. The Court of Appeal ultimately decided that the judge erred in directing the jury not to consider the less severe injury case, and that error occasioned a substantial wrong or miscarriage in the trial, and that there should be a new trial by a jury in the County Court on all of the issues joined in the proceeding.

127. WorkCover Queensland v. Lismore City Council [2024] QSC 292

– Muir J, decision delivered 13 December 2024

Keywords

Practice and procedure – no step in the proceeding for over two years – renewal of claim – dismissal of proceedings for want of prosecution – where the applicant seeks leave to take a step in the proceeding and a renewal of a stale claim.

Facts

The claim concerned the recovery of statutory compensation paid by WorkCover to Barry Priestly, who contracted mesothelioma, allegedly in part attributable to his exposure to asbestos during his work for the Lismore City Council (the Council) for a two-year period in the late 1970s.

WorkCover accepted Mr Prestly's claim for compensation in June 2016 and paid $761,267.00, before then, in July 2016, writing to the Council (by its solicitors) of its intention to recover the statutory compensation paid to Mr Priestly.

WorkCover's solicitors forwarded the correspondence by post and email, with the solicitors, on the same day, receiving an email from a Customer Contact Coordinator from the Council advising the correspondence had been forwarded to iCare, the NSW government body dealing with workers' compensation for dust disease.

In October 2016 the solicitors for WorkCover received a response from the NSW Dust Diseases Care Scheme advising that the documents did not relate to their scheme.

Over five years later, on 26 November 2021, WorkCover's solicitors filed a Claim and Statement of Claim in the Supreme Court at Brisbane and on 30 November 2021 purported to serve the documents by posting them to the registered office of the Council.

WorkCover's explanation for the delay was that it was awaiting a decision from the Queensland Court of Appeal about its rights of recovery.

After chasing a Defence, the solicitors for WorkCover threatened, then filed an application for, default judgment.

As the solicitors for WorkCover had failed to comply with the correct manner of service under the UCPR, the default judgment application was rejected. Eighteen months later the solicitors for WorkCover made an application to renew the claim, which was rejected on the basis the proceeding had gone stale as no steps had been taken for over two years.

Three months later, the application, the subject of this decision, was filed, seeking relief for an Order for continuation of proceeding after delay (Rule 309(2) of the UCPR) and under Rule 24 of the UCPR (duration and renewal of claim).

The plaintiff's application was adjourned by consent initially with directions made including the filing and hearing of the defendant's application for dismissal of the proceedings.

Decision

1. The application filed 28 June 2024 is dismissed;
2. The proceedings are dismissed pursuant to Rule 280 of the Uniform Civil Procedure Rules.

Ratio

The relevant legal principles were considered including:

- Under UCPR Rule 24 the starting point to enliven the discretion to renew a claim is that the applicant must show that a reasonable effort was made to serve the claim before it expired or there is another good reason to renew the claim;
- The overriding principles of the UCPR Rule 5 form part of the statutory context against which the discretion needs to be exercised;
- Whether the plaintiff's delay in serving the claim has been satisfactorily explained;
- Whether any limitation period to the pleaded causes of action have expired and if they have that bodes against renewal;
- The strength of the plaintiff's case;
- Any prejudice to the defendant.

The court identified WorkCover deliberately chose to refrain from serving the claim for some time, and that the litigation had been commenced two years and seven months before the application had been made but had not progressed apart from the filing of the Claim and Statement of Claim.

The court accepted the Council's assessment that due to a number of deficiencies in the pleading and evidentiary issues, liability was far from clear. In response to considerations as to whether litigation had been characterised by a period of delay, the party to whom the delay was attributable, and whether there had been a satisfactory explanation of the delay, the court considered the delay had not been properly or satisfactorily explained, after WorkCover's submissions conceded there was no excuse for the delay.

WorkCover's solicitor had accepted responsibility for delay however the court formed the view that it was reasonable to assume WorkCover would have established internal processes for case management and supervision over the conduct of litigation from its panel firms, and that in this instance the only evidence was that the designated panel firm was given free reign, in which case WorkCover could not then hide behind the skirts of its solicitors conduct.

Lastly the court accepted the Council pointed to significant areas of possible prejudice arising from the delay had not been sufficiently answered by WorkCover.

The court concluded that the proceedings could have and ought to have been commenced in July 2016, that WorkCover made a deliberate decision to delay the proceedings and then failed to properly serve them before then failing to then act promptly when the fact was realised. There was no satisfactory explanation for the delay of eight months in bringing this application and there was further prejudice to the Council because of the delay.

Whilst the court considered that refusing leave may or may not bring an end to the proceedings, the main factor in allowing the matter to proceed was the fact that WorkCover had some prospects of success, the degree of which was impossible to discern at such an early stage.

The court, in balancing all the matters, was not satisfied that WorkCover had showed a good reason for exempting the proceedings from the general prohibition with the appropriate exercise of discretion being that orders for leave to proceed and for the renewal of the claim should be refused.

TRAVIS
SCHULTZ
& PARTNERS

128. ***Ewan v Miskin Hill CTS 29107 & Anor [2024] QSC 306***

– Sullivan J, decision delivered 13 December 2024

Keywords
PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – where the first respondent served a contribution notice under the Personal Injuries Proceedings Act on the second respondent – where the applicant served a Part 1 notice on the second respondent under the Act – where the second respondent submits that the contribution notice was served out of time – where the second respondent submits that, as a result, the applicant's attempt to add the second respondent to the claim did not comply with the Act – where the time limitation for the applicant to commence personal injuries proceedings expires on 4 March 2025 - whether the second respondent has properly been made a respondent to the claim.

Facts

The applicant owned a unit in Miskin Street, Toowong. The first respondent was the Community Titles Scheme established for the unit block property. The second respondent was the body corporate management company which had been engaged by the first respondent by a written agreement on 1 July 2021.

On 4 March 2022, the applicant suffered personal injuries as a result of slipping and falling in the common area of the unit block. This application centred on a dispute between the parties regarding whether the second respondent was properly made a respondent to a claim pursuant to the *Personal Injuries Proceedings Act 2002* (Qld) (**the act**).

The following relevant chronology is noted:

- 4 March 2022 – the incident occurred.
- 13 September 2023 – the applicant served a Part 1 Notice of Claim on the first respondent.
- 15 July 2024 – the first respondent served a contribution notice on the second respondent.
- 30 July 2024 – the applicant served a Part 1 Notice of Claim on the second respondent.
- 27 August 2024 – the second respondent's solicitors sent an email to the solicitors for the first respondent and the solicitors for the applicant stating that the contribution notice had been served out of time and therefore the attempt to add the second respondent to the claim was ineffective pursuant to section 14(1) of the act.
- 29 August 2024 – the applicant sent an email to the second respondent's solicitors stating that the Part 1 notice had been validly served under section 14(1) of the act.
- 30 August 2024 – the second respondent's solicitors wrote to the applicant's solicitors and the first respondent's solicitors stating that as the second respondent had not been added as a respondent due to the invalid contribution notice, the second respondent would not respond to the Part 1 notice of claim.

Decision
Judgement in favour of the applicant against the second respondent.

The applicant was entitled to a declaration that the second respondent was conclusively presumed to be satisfied that the Part 1 notice was compliant (pursuant to section 13 of the

act) and the second respondent's response pursuant to section 20(1)(b) of the act was due on or before 30 January 2025.

The parties were to be heard as to costs of the application.

Ratio

Justice Sullivan determined that the first respondent did not issue a valid contribution notice pursuant to section 16 of the act because it was served on the second respondent well outside requisite the 3 month time period. Accordingly, the second respondent was not validly added as a contributor to the proceeding.

The applicant served its Part 1 notice on the second respondent within the timeframe of doing so after receiving a copy of the first respondent's contribution notice served on the second respondent. However, Justice Sullivan found that the applicant was not empowered by section 14(1) of the act and regulation 7(1)(c) to add the second respondent to the proceeding because the contribution notice was not valid.

Notwithstanding the above, Justice Sullivan found that the applicant's service of the Part 1 notice was effective in adding the second respondent to the proceeding by the operation of sections 9, 10 and 13 of the act. By refusing to respond to the notice pursuant to section 10 of the act (on the basis that it contended the applicant was not empowered to serve the notice), the second respondent was presumed to be satisfied that the notice was compliant pursuant to section 13 of the act.

129. *Springfree Trampoline Australia Pty Ltd v Forostenko* [2024] QCA 255

- Bond and Boddice JJA and Davis J, delivered 13 December 2024

Keywords

Appeal – counter-appeal - safety defect – failure to counterfactual proposition - *sine qua non* – costs – rehearing

Facts

The respondent (plaintiff) suffered a foot injury after landing on the cleat underneath the mat of the trampoline whilst jumping. He was awarded judgment in the amount of $744,175.00.

The appellant (defendant) challenged Her Honour's finding on the basis that the plaintiff did not suffer an injury **as a result** of a safety defect.

The defendant argued that the plaintiff had failed to prove that his injuries would have been avoided had the trampoline come with a sufficient safety warning (as was Her Honour's finding in the original decision). The plaintiff argued that it was not necessary for him to prove the counterfactual.

The plaintiff also cross-appealed the order for costs made by the primary judge, contending that Her Honour's discretion was miscarried by rejecting his claim for indemnity costs.

Decision

1. Appeal allowed.
2. Cross appeal dismissed.
3. Set aside the judgment dated 28 May 2024 and the costs orders dated 19 June 2024.
4. Judgment entered for the defendant.
5. The plaintiff must pay the defendant's costs of the proceeding in the Court of Appeal and of the proceeding.

Ratio

The Court of Appeal found that the defendant's argument that the plaintiff must prove the counterfactual must be accepted.

They found that Her Honour had erred in her finding for a number of reasons.

1. It was held that Her Honour had erred by not phrasing her enquiry such that the plaintiff was required to his establish his case on the balance of probabilities.
2. It was also found that Her Honour was in error with respect to causation stating '(her finding) *is not a finding which could justify an affirmative answer to the necessary enquiry, or to the ultimate question of causation.'*
3. Thirdly, the primary judge erred by failing to analyse the primary facts in issue such that the '*plaintiff has failed to prove that his injury would have been avoided had an appropriate warning been given…the plaintiff failed to satisfy his onus of proving causation.'*

Of note, the Court found that the plaintiff's alternative cause of action (negligence), which Her Honour accepted "*was established essentially adopting a similar reasoning process"* should have also failed at first instance.

Their Honours noted the Plaintiff's defence to the appeal (being that he was not required to prove the counterfactual) would have required the Court of Appeal to not follow the decision of the Full Court of the Federal Court.

The court said:

[insert paras 52 – 55 of the judgemet]

Their Honours found that given the plaintiff should have failed at trial, there was no need to consider his counter-appeal with respect to costs as costs would have followed the event.

130. State of New South Wales v. Cullen [2024] NSWCA 310

- *Gleeson and Kirk JJA, and White JA – delivered 20 December 2024*

Keywords

Duty of care – public authorities – police officers owe duty to take reasonable care to avoid risk of harm to class of persons in immediate vicinity of operational response during protest march – risk of harm in police actions inflicting physical injury on identified class of person – s43A of Civil Liability Act 2002 (NSW) inapplicable - breach – regard to be had to police obligations to take actions to prevent breaches of the peace even in crowded situations – reasonable to effect arrest in the way done – no breach made out - causation – novus actus interveniens – third party actions leading to respondent's injury not occurring in ordinary course of events which might flow from police action – distinct and significant criminal action of third party led to arrest leading up to injury – chain of causation broken – trespass to the person – battery – police utterly without fault in colliding with the respondent – battery not made out.

Facts

The respondent was a bystander to an invasion day rally. After a participant in the rally, addressing the crowd, appeared to prepare to set an Australian flag on fire, police officers (from the Operational Services Group or "OSG") responded by pushing through the crowd to extinguish the fire. A police officer, LSC Lowe, was videoing the event when she was struck by another rallygoer by the name of Williams. Another officer, LSC Livermore, witnessed the assault and, in attempting to arrest the Williams, fell with him, knocking down the respondent who sustained injury. Those parties were approximately 15 metres away from where the initial police officers had first entered the crowd to prevent the fire being lit.

At first instance the respondent was successful in an action in negligence but was unsuccessful in the action in assault and battery. The State appealed the decision.

The respondent alleged that officers of the OSG had breached a duty of care extending to her when they rushed into the crowd to prevent the flag being set alight. The respondent further alleged that Livermore breached such a duty of care in the manner in which he sought to arrest Williams and committed the tort of battery against her.

A number of issues were determined on appeal, including:

- *Whether provisions under the Civil Liability Act (s43A) with respect to a public authority exercising a special statutory power applied;*
- *The identification of the risk of harm;*

- *Whether the OSG Officers owed a duty of care and if so whether it was breached;*
- *Whether LSC Livermore in effecting the arrest, owed the respondent a duty of care and if so whether it was breached;*
- *Whether there was a break in the chain of causation;*
- *If there was a duty that was breached, whether the actions were legally causative of the injury;*
- *Whether the respondent's claim in assault and battery should be upheld on the grounds that the officer arresting the rally goer was not utterly without fault.*

Decision

1. *Appeal upheld.*

2. *Set aside Orders (1) and (2) made in the Common Law Division on 15 June 2023, along with Orders (a) and (b) made on 21 June 2023, and in lieu thereof Order as follows:*

   (a) The Amended Statement of Claim is dismissed;

   (b) The plaintiff is to pay the defendant's costs;

   (c) The respondent is to repay the sum of $103,000.00 paid by the appellant in part payment of the respondent's costs and disbursements of the proceedings below, or the respondent is to pay the appellant's costs of the appeal.

Ratio

The majority concluded that:

- *s 43A of the Civil Liability Act did not apply;*
- *whilst the OSG Officers and Livermore may have owed a duty of care to a class of persons which included the respondent, it was not in the terms found by the Primary Judge;*
- *any duty that was owed was not breached;*
- *Even if the Primary Judge had been correct on the issues of duty and breach, the causal chain would have been broken as regards liability relating to the actions of the OSG Officers;*
- *The claim in battery was not made out.*

The majority determined that s 43A of the Civil Liability Act was not applicable. This provision excluded civil liability for any act or omission involving the exercise of, or failure to exercise, a special statutory power, unless the act or omission was in the circumstances so unreasonable that no authority having special statutory power in question, could properly consider the act or

omission to be a reasonable exercise of, or failure to exercise its power. The basis for that determination was that the actions of the OSG Officers were not actions undertaken operating a special statutory power (being one conferred by or under a statute, and of a kind that persons are generally not authorised to exercise without specific statutory authority). Similarly Livermore was not exercising a specific statutory authority when arresting Williams such that s 43A was found not apply to the respondent's claim.

In considering the alleged breach of duty by the OSG Officers the majority first identified the risk of harm as being the risk of the OSG Officers' actions inflicting physical injury on persons in the immediate vicinity of an operational response during the protest march. In identifying the risk, the majority then identified the duty of care owed by the OSG Officers was a duty to take reasonable care to avoid the risk of harm to the class of persons in the immediate vicinity of an operational response by OSG Officers during the protest march, thereby linking the identified class to the relevant risk.

In then rejecting the Primary Judge's finding that the actions of the OSG Team were reckless and out of proportion to the danger, the Court identified the obligations on the part of the OSG Officers to prevent breaches of the peace and rejected suggestions by the Primary Judge of alternative precautions as being impracticable. The majority determined the finding of a breach on the part of the OSG Officers was incorrect and must be set aside, there being no breach of the duty which was articulated.

As regards the alleged breach by Livermore, the court on appeal identified that the Primary Judge erred in finding that Livermore breached a duty to bystanders, or as the court preferred to state, persons to whom any duty might be owed, being the class of persons in the immediate vicinity of the arrest of Williams.

The court in then considering causation, identified that even if the Primary Judge was correct in terms of finding a duty of care and on the issue of breach, the causal chain between the actions of the OSG Officers and the injuries to the respondent was broken by the action of Williams. Williams' conduct was to impede Lowe gathering evidence, he was not part of the crowd into which the officers rushed, was some 15 metres away, and was not participating in the melee arguably provoked by the OSG Officers' actions. The court identified that it did not accept that a decision by a person, who was outside the relevant crowd, to commit a criminal assault in order to impede the gathering of evidence of possible offences, to be in the same class as someone who may suffer an injury being by pushing and shoving and so forth which the duty might be intended to avoid.

The court did not consider it appropriate that the scope of liability arising from a duty of care of the kind found by the Primary Judge to extend to harm caused by the actions of another adult person in the crowd, some 15 metres away from the conduct found to be in breach, undertaking a free and deliberate act of assaulting a police officer in order to impede her gathering evidence in the execution of her duty. It was the distinct and significant criminal action of Williams that led to Livermore undertaking the arrest. It was the difficulty of effecting

that lawful arrest which led to the respondent being injured. The chain of causation from the actions of the OSG Officers to the respondent's injuries was accordingly broken.

The court also determined the primary judge erred in finding that Livermore breached any duty to bystanders, or as the court preferred to state, the persons to whom any duty might be owed, being the class of persons in the immediate vicinity of the arrest of Williams.

Lastly, in considering the claim in battery, the court identified that Livermore was not conscious of the presence of the respondent and that he did not intend to make any contact with her. He was undertaking a lawful arrest and pursuant to the relevant legislation, was entitled to use such force as was reasonably necessary to make the arrest. The court considered that Livermore, in lawfully exercising his power to arrest Williams, could not possibly have prevented the impact with the respondent by the exercise of ordinary care and caution. His actions were considered utterly without fault with the court upholding of the dismissal of the respondent 's claim for battery.

131. *Gause v Alderson* [2024] NSWCA 312

- Mitchelmore JA, Stern JA, Price AJA, decision delivered 20 December 2024

Keywords

Landlord's duty of care, smoke alarms, breach – discrete or hidden risk, intoxication, exercise reasonable care and skill.

Facts

Bradley Heafey (deceased) died in a fire at a single-story home that he was renting from James Gause. The deceased partner, Ms Alderson, their two children and deceased's parents brought proceedings against Mr Gause for personal injury for discovery of the death of the deceased and for Ms Anderson, a claim under *Compensation to Relatives Act 1897* (NSW).

Prior to the house fire, the smoke alarm in the loungeroom had been tampered with and did not sound an alarm. This resulted in the deceased, who was asleep in the loungeroom at the time of the fire, not becoming aware of the fire.

The autopsy of the deceased found that he had a BAC of 0.051%, and that there was a presence of cannabis and prescribed medications.

At Trial

The primary judge found Mr Gause negligent because he breached his duty to check that the smoke alarm was operational. The primary judge also found that at the time of the fire the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired, resulting in the damages awarded to the respondents being reduced by 25% under Section 50 *Civil Liability Act 2002 (NSW) ("CLA")*[1] .

Appeal

The Applicant appealed against the order finding him liable and the Respondents cross-appealled against the reduction in damages.

The primary issues in the appeal were, did the primary judge err in:

1. finding that the appellant did not check that the smoke alarm was working by pressing the test button;

2. finding that the smoke alarm had been tampered with;

3. finding that the appellant had breached the duty of care, because reasonable care did not require the appellant to press the test button on the smoke alarm in the circumstances?

4. finding that the deceased was intoxicated to the extent that his capacity to exercise reasonable care and skill was impaired?

Decision

The appeal was dismissed, and cross appeal allowed.

Ratio

The primary judge properly placed weight on the fact the appellant did not at any time during his evidence suggest that he pressed the test button on the smoke alarm. The COA did not overturn the primary judge's findings of fact. The expert evidence, together with the evidence of the appellant and Ms Alderson, strongly suggested that there was either no battery in the smoke alarm or it was depleted and the speaker on the smoke alarm must have been removed prior to the commencement of the deceased's tenancy. The COA found that there was no error in the primary judge's conclusion that a reasonable inference should be drawn that the smoke alarm was tampered with before the start of the deceased's tenancy.

The risk that the smoke alarm may not operate properly in the event of a fire was foreseeable and highly significant. If it occurred, serious harm would likely be caused. The COA found that pushing the test button on the smoke alarm was not onerous. The appellant knew that there was a simple and easy check that he could perform to ensure that the smoke alarm speaker was working and without performing that check, he could not be sure either that the speaker was not working or functioning.

The COA agreed with the primary judge's finding that the nature of the risk of the faulty smoke alarm meant it was discrete or hidden, which made the appellant's duty to perform the inspection more onerous, compared to the level of care required for an obvious and less dangerous risk.

In relation to the application of s50 CLA, the COA found that for that purpose, the act or omission that caused the death of the deceased, was the failure of the smoke alarm to operate as it should have after the fire started, which had the effect that the deceased could not escape from the premises. The application of S50(1) of the CLA requires as a preliminary step,

characterisation of the conduct or activity in which a plaintiff is engaged in the relevant circumstances, which is consistent with the approach in *Amanda's On the Edge* and *Payne v Liccardy* (at paragraph 101).

The deceased had no reason to suspect that there would be a house fire, still less that the smoke alarm would not sound. The deceased did not undertake an activity which required any particular degree of skill or judgement; he simply went to sleep on the sofa after attending a friend's birthday celebration having had some drinks, cannabis and prescription medication. The deceased's need to navigate his house to escape the fire did not form part of the conduct or activity in which he was engaged but was rather a superimposed danger which he had no reason to suspect. The COA concluded that the primary judge erred in concluding that that the deceased's intoxication impaired his capacity to exercise reasonable care and skill and held that s50 CLA was not engaged.

132. Nominal Defendant v Gibb [2024] ACTSC 418

Taylor J, delivered 27 December 2024

Keywords

Nominal Defendant – reasonable search and inquiry – whether plaintiff appreciated the extent of injuries – collision between motor vehicle and cyclist – unidentified vehicle

Facts

On 20 December 2019, the plaintiff was riding his bike along the footpath. As he crossed a driveway he was struck by a vehicle on his left side. The driver exited the vehicle and offered to call an ambulance and two other bystanders offered assistance. The plaintiff declined their offer, abandoned his bicycle in nearby bushes and walked home without recording any details of the vehicle.

On 4 February 2020, police notified the plaintiff they were unable to identify the vehicle. The plaintiff's injuries persisted, and he subsequently sought legal advice on 22 September 2020.

The issue at trial was whether the vehicle was an "unidentified motor vehicle" for the purposes of Section 62 of the *Road Transport (Third Party Insurance) Act 2008* (ACT). This required the trial judge to determine whether the vehicle could have been identified after reasonable inquiry and search. The plaintiff was successful at trial. The trial judge was prepared to find that his failure to record the number plate details or otherwise identify the driver immediately after the accident was because he was experiencing an emotional shock, did not appreciate the extent of his injuries and due to his own peculiar personality traits, which caused him to react poorly to what had occurred.

The Nominal Defendant appealed on the basis that the plaintiff remained capable of reasoning and decision making at all relevant times, that the plaintiff had not proven the identity of the vehicle could not be identified after reasonable inquiry and search, and that the trial judge erred by finding that it was understandable and excusable for the plaintiff not to have recorded the registration details in the circumstances.

Decision

Appeal dismissed.

Ratio

Taylor J held that the plaintiff's actions immediately after the accident (including getting up off the road, refusing assistance, making observation of people around him, abandoning his bicycle and answering a phone call) did not undermine the evidence that established that he did not appreciate the extent of his injuries. The plaintiff did not realise his thumb was bleeding and his right hand was not functioning until 3-4 minutes later, and when he returned to the scene 8 minutes later, the vehicle was gone. There was therefore no error in finding the plaintiff did not appreciate the extent of his injuries in the time between the accident and his realisation the vehicle was gone. While the plaintiff appreciated he was hurt or in pain immediately after the collision, this did not mean he appreciated he had suffered anything other than minor or trivial injuries, as was observed in *Ford v Nominal Defendant* [2023] QCA 83. Taylor J went on to find that reasonable inquiry and search, in these circumstances, did not require the plaintiff to record the registration of the vehicle or identify information of the driver in the period until he realised his hand was not working and the driver had left the scene.

133.