Carter Newell
LAWYERS

Injury Liability Gazette

2nd edition

Carter Newell LAWYERS

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- 2013 Winner ALB Australasian Law Awards – Brisbane Law Firm of the Year
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- 2011 Finalist ALB Australasian Law Awards – Brisbane Law Firm of the Year
- 2010 Finalist BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under $50M per year)
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- 2009 Independently recognised as a leading Brisbane firm in the practice areas of Insurance | Building & Construction | Mergers & Acquisitions | Energy & Resources
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- 2009 Finalist ALB Australasian Law Awards – Brisbane Law Firm of the Year
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- 2008 Independently recognised as a leading Brisbane firm in the practice areas of Insurance | Building & Construction | Mergers & Acquisitions | Energy & Resources
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- 2005 Winner ALPMA/Locus Innovation Awards for innovative CN|Direct
- 2005 Finalist BRW Client Choice Award for Best Law Firm in Australia (open to firms with revenue under $50M per year)

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From the Senior Partner

On 17 October 2013, the Queensland Government passed legislation into parliament which will affect the State's WorkCover scheme.

These changes place restrictions on workers recovering damages from negligent employers by requiring the worker to have a whole person impairment from the injury of at least 5.1% or more. The legislation also introduces a number of *'anti-fraud'* measures and requires employees to disclose pre-existing injuries and restricts recovery of damages if the employee fails to disclose.

The ultimate goal of the reform is to *'protect businesses from outlandish claims and skyrocketing premiums'*. There is much debate from employee groups that the introduction of a threshold is unfair and will restrict many claimants from legitimately recovering damages.

These changes may impact public liability insurers by restricting their rights to recover from WorkCover where an injury is assessed at 5% or below.

We will provide further updates as they develop.

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Case Note

Pasqualotto v Pasqualotto [2013] VSCA 21

Where employee sustained back injury while working as tobacco picker; whether breach of duty and contributory negligence.

The facts

The plaintiff suffered personal injuries on 17 March 2005 while working for his parents (**defendants**) on their tobacco farm. The plaintiff had previously suffered injuries to his lower back in 1994 following a car accident. He underwent back surgery at level L4/5 in 1997 and was advised by Dr Brazenor, neurosurgeon, not to work on the farm or perform manual work involving lifting and bending. There was conflicting evidence at trial regarding whether the plaintiff's mother attended these appointments and heard Dr Brazenor's warnings.

The plaintiff resumed work at his parents' farm in 1998. From 2000 the plaintiff worked on a tobacco harvesting machine which required him to continuously bend forward and twist from a seated position for 12 hours a day. On 17 March 2005, the plaintiff complained of back pain to his father, the first defendant, while working on the harvesting machine. The plaintiff's father directed him to continue working so as not to disrupt production. The plaintiff continued to work for a further hour and a half. During this period he experienced increasing pain. It was later discovered that the plaintiff's L3/4 disc collapsed rendering him significantly and permanently disabled.

At first instance

The plaintiff bought proceedings in negligence and breach of statutory duty against the defendants in respect of the injury suffered by him on 17 March 2005. The plaintiff's claim in negligence alleged that the respondents had breached their duty of care by:

- Failing to provide an ergonomically safe seat on the harvesting machine;
- Refusing the plaintiff's request to stop work on the harvesting machine when he was experiencing back pain; and
- Failing to exclude harvesting work from the plaintiff's duties.

The plaintiff's claim for breach of statutory duty relied on the obligation imposed on the defendants by Regulation 15 of the *Occupational Health & Safety (Manual Handling) Regulations 1999* (VIC) and Regulation 704 of the *Occupational Health & Safety (Plant) Regulations 1995* (VIC) to ensure that a risk assessment of any hazardous tasks was carried out

and any risk was eliminated or reduced as far as possible. The defendants conceded that they had not performed any risk assessment.

The defendant raised contributory negligence alleging the plaintiff failed to abide by specific medical advice not to engage in farm work but regardless, engaged in farm work when he knew or should have known that he was at risk of further injury to his back.

At first instance, the jury found the defendants were not negligent but had breached their statutory duties. The jury found the plaintiff was guilty of contributory negligence to the extent of 70%.

On appeal

On appeal, the plaintiff sought to have the jury verdict set aside and for the court to determine the issue of contributory negligence or have the matter remitted for retrial limited to issues of liability. The grounds of appeal were:

- The jury's finding that the defendants were not negligent was not open;
- The jury's finding that the plaintiff was contributory negligent was not open or the finding as to the extent of contribution (70%) was not open; and
- The trial judge had misdirected the jury in relation to contributory negligence.

The majority (Osborn JA and Tate JA) allowed the appeal, with Whelan JA dissenting.

Evidence and facts revisited

Osborn JA considered the evidence before the jury demonstrated:

- The plaintiff suffered a significant injury to his back on 17 March 2005;
- The defendants knew the plaintiff had previously suffered serous injury to his back and was susceptible to further injury;
- There was an agreement between the parties that the plaintiff was not required to do particular jobs which stressed his back, this included jobs involving lifting and bending or heavy lifting;
- The defendants had previously allowed the plaintiff to take a break when he experienced back pain during tasks other than picking and there was an agreement between the parties to this effect;
- No risk assessment was carried out to determine whether the plaintiff was at risk of injury during the tobacco harvesting;
- Tobacco harvesting was heavy and intense work, which required the plaintiff to bend and twist for 12 hours a day;
- The defendants knew that the work had the capacity to cause the plaintiff back pain;
- The plaintiff had previously requested a modified and more comfortable seat to reduce the stress on his back which was denied; and
- The plaintiff asked to be relieved of his work because of his back pain but his father directed him to continue working so that the harvest could continue at full capacity for the remainder of the day.

Negligence

The majority held that the jury's finding that the defendants were not negligent was not open. Osborn JA considered the jury was bound to conclude that the defendants breached their duty of care to the plaintiff by requiring him to continue working when he had asked to be relieved from his duties. Osborn JA thought the defendant's refusal to relieve the plaintiff of his duties, in light of the evidence above, was unreasonable and negligent. The order to continue working was an order that no reasonably prudent employer could have given as it was reasonably foreseeable that the plaintiff might suffer further injury to his back if he continued.

Accordingly, the jury was bound to conclude that the defendants breached their duty of care to the plaintiff by requiring him to continue working for the purpose of maintaining full production output. Although the plaintiff's own actions may support a finding of contributory negligence, Osborn JA did not believe this relieved the defendants of their non-delegable duty to provide a safe system of work.

Contributory negligence

Counsel for the plaintiff submitted that there could be no finding of contributory negligence because the conduct which caused the injury was performed pursuant to an express direction of the employer. However, Osborn JA did not consider that the direction by the defendant to continue working would necessarily exclude contributory negligence. The defendants alleged that the plaintiff was negligent in undertaking work on the farm in spite of Dr Brazenor's warnings and advice. For Osborn JA, the question of whether the advice of Dr Brazenor was overwhelmed by the actions of the defendants by employing the plaintiff, knowing the risk that further work posed to his back, was a question of fact for the jury. Accordingly, the Court of Appeal thought the issue of contributory negligence should be remitted for rehearing in accordance with law.

Case Note

Fraser (nee Butcher) v Burswood Resort (Management) Ltd [2012] WADC 175

Whether employer breached their duty of care to warn of increased risk of fatigue accident during nightshift roster.

The facts

The defendant managed and operated the Burswood International Resort Casino. The plaintiff was employed by the defendant as a nightshift dealer at the casino. The plaintiff began an eight hour night shift at 8:00pm on 9 December 2001 and finished her shift at 4:00am on 10 December 2001. The plaintiff left the casino at 4:10am and began her 45 minute drive home. The plaintiff was involved in a single vehicle accident at approximately 4:40am, after the plaintiff had been driving for 30 minutes. The plaintiff suffered personal injuries as a result of the accident.

It was the plaintiff's submission that the cause of her accident was attributable to her momentarily falling asleep or having a *'micro-sleep'*, and it was the increased risk of sleepiness and fatigue, which is a risk identifiable among nightshift workers, which caused the plaintiff's accident.

Issues

The court was asked to consider whether the increased risk to nightshift employees of being involved in a motor vehicle accident while driving home in the pre-dawn hours of the morning was a foreseeable risk of which the defendant should have been aware, and whether the plaintiff's accident was wholly or partly attributable to the negligence of the defendant in failing to take all reasonable and practicable steps to guard against this risk or warn the plaintiff of it. The court was further asked to consider the cause of the plaintiff's accident and whether the accident was causally related to the alleged risk.

Decision

The court found that the increased risk of the plaintiff being involved in a motor vehicle accident while driving home in the pre-dawn hours of the morning, after completion of a nightshift, was a foreseeable risk which a reasonable employer in the defendant's position would have foreseen. The defendant's duty was owed to the classes of persons who work nightshifts for the defendant and it arose directly out of, and only because of, the plaintiff's conditions of work as a nightshift employee.

The court then considered the scope of the defendant's duty of care and found that this included a positive duty on the defendant to warn the plaintiff of the increased risk of having an accident while driving home in the pre-dawn hours of the morning. The warning should alert employees to the risk and provide information about the indicators of fatigue and sleepiness and how these may be masked in the workplace so that employees can make informed decision about their actions. However, the scope of the duty owed by the defendant did not, in the circumstances, include a requirement to adjust the finish time of the plaintiff's roster so that she finish at 6:00am or, alternatively, after sunrise.

'The court found the defendant breached its duty of care to the plaintiff by failing to warn her of the increased risk. However, the defendant's breach of duty was not causative of the plaintiff's accident.'

The court found the defendant breached its duty of care to the plaintiff by failing to warn her of the increased risk. However, the defendant's breach of duty was not causative of the plaintiff's accident. The critical issue was whether the accident was caused by the plaintiff falling asleep while driving and, in the event that it was, whether this was due to the defendant's failure to warn her of the identified risk. After consideration of the evidence, the court was not satisfied that on the balance of probabilities the accident was attributable to the plaintiff falling asleep while driving. In any event, the court did not consider that the failure of the defendant to warn the plaintiff of the identifiable risk was causative of the accident. The court determined that, in the circumstances, even if the defendant had warned the plaintiff of the increased risk, such a warning would not have prevented or minimised the risk of the occurrence of the plaintiff's accident as, by her own evidence, the plaintiff would not have adjusted her behavior accordingly.

Staff profile Insurance

Nola Pearce

Special Counsel

As a Special Counsel at Carter Newell, Nola handles a wide range of professional indemnity disputes, including claims and conduct enquiries against barristers, financial advisers, private certifiers and other professionals. She regularly acts on behalf of junior and senior members of the private Bar and members of the judiciary in defending civil and statutory claims.

In addition, in her role as internal counsel at Carter Newell, Nola reviews and settles court pleadings and interlocutory material in litigation across the firm's specialty areas. As a member of the Queensland Law Society's Ethics Committee, she works to assist the profession and the Law Society's members in the development and consideration of lawyers' ethical rules of conduct.

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Case Note

Transpacific Industrial Solutions Pty Ltd v Phelps [2013] NSWCA 31

Employer and host employer found not liable for labourer slipping down stairs while moving a cabinet up the stairs.

The facts

The plaintiff and two other workers were engaged as labourers by the appellant and, as part of their role, were asked to move office furniture (including a large steel cabinet) into a room which required navigation up two flights of stairs. There were handrails on both sides of the staircase and a sloping ceiling over the lower flight of stairs.

The labourers formulated a plan to undertake the removal work and prepared a safe work method document. The men then set about moving the steel cabinet, having strapped it on to a stair climbing trolley. The plaintiff was in front of (and therefore above) the trolley while it was being moved up the stairs and was tasked with guiding and stabilising the load with his hands while walking backwards up the stairs. A second worker was below the trolley and therefore taking all of the weight. The man below would indicate to the plaintiff when he was ready to push the trolley up a stair, who would then wait for the plaintiff's acknowledgment of that instruction and the cabinet would then be moved. The third worker was carrying other furniture and was not involved in moving the cabinet.

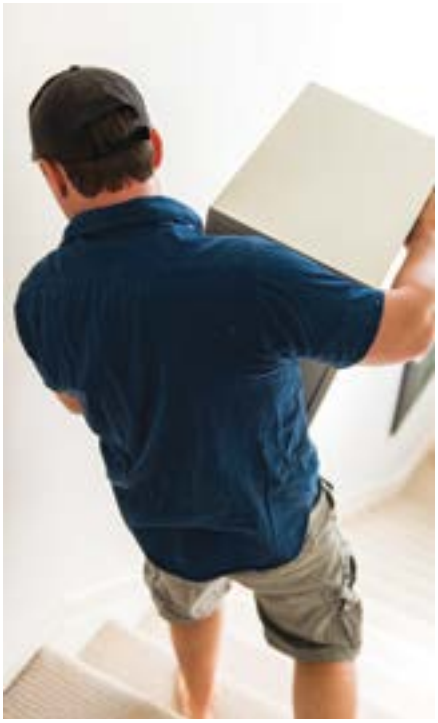
Immediately after the men negotiated a turn in the middle of the flight of stairs, the plaintiff lost his footing. The plaintiff fell down the stairs, landing heavily in a seated position. The cabinet came to rest on his lower legs. When his co-worker lifted the cabinet off the plaintiff's legs, the plaintiff complained of lower back pain. The plaintiff continued to work for the rest of the day, but only carried light weight items. However, the pain continued and he sought medical assistance a few days later. He later sought damages for injuries sustained during this task.

Issues

At trial, judgment was entered for the plaintiff against the Transpacific Industrial Solutions Pty Ltd (**Transpacific**), the first defendant and host employer and Workpac Newcastle Pty Ltd (**Workpac**), the

second defendant and employer apportioned on the basis of 75% and 25% of liability being borne by the defendants respectively. Transpacific appealed this decision, arguing that the primary judge had erred in finding that it had been negligent.

Workpac (who did not at first challenge the primary judge's findings but was listed as the second respondent on Transpacific's notice of appeal and made an application to cross-apply at the trial to similarly challenge the trial judge's findings) argued that, if Transpacific's appeal on liability was successful, the primary finding against it could similarly not be sustained.



Decision

The court of appeal stated that Transpacific, as a host employer, owed the plaintiff a duty of care in accordance with the principles of the law of negligence. In accordance with the longstanding principles in relation to host employers, the court of appeal held that, given the plaintiff was effectively at the disposal of Transpacific and that Transpacific controlled the work the plaintiff was required to do and the circumstances and manner in which that work was to be done, Transpacific owed the plaintiff either a duty corresponding with that of an employer or a duty very similar to an employer's duty.

That duty of care was framed by the court of appeal as a duty to exercise reasonable care for the safety of the plaintiff while he was carrying out the tasks allocated to him. The duty was said to include the obligation to warn the plaintiff of unusual or unexpected risks and to instruct the plaintiff in the performance of his work where such instruction might reasonably be thought to protect the plaintiff from danger or injury.

To determine if this duty had been breached, the court of appeal considered s 5B of the *Civil Liability Act 2002* (NSW). While we note the corresponding Queensland-based legislation (the *Civil Liability Act 2003* (Qld) would not apply to the circumstances of this case in light of the exclusion at s 5B for workers' compensation claims, we are of the view that consideration of the common law would have resulted in the same outcome if the claim had been brought in Queensland.

The plaintiff argued that Transpacific's failure to adequately warn him of the risk of tripping or slipping while ascending the stairs resulted in his injury. The court of appeal thought that this risk was both foreseeable and not insignificant, and that foreseeability and the potential significance were increased given the facts of this case (that is, given that the plaintiff was walking backwards up stairs whilst bending forward to guide a bulky piece of furniture).

When considering what precautions a reasonable person would have taken in response to that risk, the trial judge accepted that the injury would not have occurred had Transpacific instructed the plaintiff to walk forwards up the stairs and guide the load using straps attached to the trolley. However, the court of appeal determined that the suggested alternate course of action was impractical and of no utility given that there was nothing to indicate that it would have reduced the risk of slipping. The Court of Appeal also noted that the trial judge had also found against Transpacific based on a risk of injury from heavy lifting, where the plaintiff was not actually doing any lifting.

The Court of Appeal was of the further opinion that there were no unusual or unexpected risks associated with either the task or the staircase that Transpacific should have warned the claimant about. On this point, the Court of Appeal went on to say that the act of moving furniture up stairs was one so commonplace in domestic life that an employer could not reasonably be expected to warn employees of the associated risks.

The court concluded that the plaintiff had not established that there were any precautions that a reasonable person in Transpacific's position would have taken against the risk of harm.

The primary judge's finding against Transpacific was overturned. Consequently, the primary finding against Workpac was also overturned.

Case Note

Coles Supermarkets Australia v Sharon May Mead & Ors [2013] QSC 37

Where the applicant sought a declaration excluding the operation of the PIPA where a claim fell under the MAIA and consequent indemnity from CTP insurer.

The facts

The claimant was injured during the course of her work as a delivery driver at the loading dock of a Coles Supermarket. She was crushed by a truck driven by a co-worker against the wall of the loading dock while she was delivering a parcel and consequently suffered personal injuries.

The claimant issued a notice of claim pursuant to the *Personal Injuries Proceedings Act 2002* (Qld) (**PIPA**) to Coles as the occupier of the loading dock and also served a notice of claim pursuant to the *Motor Accidents Insurance Act 1994* (Qld) (**MAIA**) to the driver of the vehicle.

Issues

Coles applied to the court seeking two declarations. The first was that, by virtue of s 6(2)(a) of the PIPA, because the claim fell under the MAIA, the PIPA does not apply to her claim for damages and the claimant was unable to pursue a claim against Coles.

The second declaration sought was that Coles should be indemnified for the claimant's claim by the driver's CTP insurer pursuant to s 5 of the MAIA.

Decision

Atkinson J declined to grant the first declaration sought on the basis that there was factual uncertainty surrounding the cause of the incident. Section 6(2)(a) excludes claims from being made under the PIPA when the MAIA applies. For the claim to be one to which MAIA applies, it would have to be a claim that satisfies both limbs of s 5 of the MAIA - that is, a claim that involves a motor vehicle and is wholly or partly caused by an act or omission in respect of the motor vehicle.

Clearly this claim involved a motor vehicle. What was unclear, in her Honour's opinion, was whether the injury was caused by the negligence of the motor

vehicle driver or by some other party. In the absence of pleadings, the factual circumstances or allegations of negligence and the cause of the personal injury were unknown. Atkinson J found that it was possible at the time of the application that the driver may be found wholly or partly negligent, but it was also possible that Coles or its contributors may be found wholly or partly negligent and therefore liable for the incident.

Because of this factual uncertainty, Atkinson J concluded that it was not possible to make a declaration that the claimant was prohibited from pursuing a claim against a PIPA respondent because the claim fell under the MAIA.

In relation to the second declaration sought, Atkinson J said that it would be impossible to make such a declaration because it would depend closely on findings of fact that would have to be made out at trial.

In the absence of receiving the orders sought, the applicant sought to join two contributors to the claim out of time (TNT Australia Pty Ltd and Bluestar Security Pty Ltd). The court granted that application.

This decision seems to bring greater certainty to the interrelationship between the PIPA and the MAIA. Being a procedural tool, PIPA is aimed at resolving claims without the significant costs of litigation. It does not intend to draw conclusions as to a claimant's ability to pursue damages from various potential tortfeasors in the event that there are prospective claims in negligence against them. The result of the application draws the parties back to the principles of the law of negligence in determining liability based on evidence deduced at trial rather than entertaining the possibility of apportioning blame at an early and uninformed stage of the proceedings based on semantics in procedural legislative provisions.

In practice, we expect the exclusion of the operation of the PIPA to a claimant's claim in such circumstances would simply result in the claimant pursuing the CTP insurer under the MAIA and then litigating against both the CTP insurer and any other potential respondents who the claimant may join as defendants to the proceedings. At that stage, the court would be at liberty to consider the respective liability of each of the defendants in consideration of the circumstances of the case. This would simply omit participation in the pre-court process against respondents usually managed under the PIPA and such claims could proceed directly to litigation (which is not a desirable procedure to adopt from a costs perspective).

Case Note

Ward & Ors v HCOA Operations (Australia) Pty Ltd and Anor [2013] QSC 92

Interest on judgments of sanctioned funds and application the *Civil Proceedings Act 2011* (Qld).

The facts

In April 2011, the court sanctioned a settlement of an infant's damages claim under s 59(1) of the *Public Trustee Act 1978* (Qld). The sanctioned settlement set out the obligations of a defendant to pay to the plaintiff damages into a trust within 21 days of the order. The defendant did not pay the amount of the damages immediately, but within the timeframe described by the order.

In October 2012, the Queensland Supreme court in the case of *Taylor v Company Solutions Australia Pty Ltd* [2012] QSC 309 (**Taylor's case**) held that under such an order as the one made in this case, s 48 of the *Supreme Court Act 1995* (Qld) entitles a plaintiff to claim interest from the date of the order until payment of the principal sum is made.

In January 2013, having become aware of that decision, the solicitors for the plaintiff sought payment of interest. The defendant claimed a declaration that no such interest was payable.

Decision

At the outset, counsel for the plaintiff queried the validity of the claim in circumstances where the parties had already discontinued proceedings. The court did not agree with the objection, and regarded the new claim a separate new proceeding.

Given legislative changes that had occurred in the intervening time between the decision in Taylor's case and this application, the correct section of legislation to be applied in this instance was s 59 of the *Civil Proceedings Act 2011* (Qld).[1] That section provides:

"Interest is payable from the date of a money order on the money order debt unless the court otherwise orders."

The court considered whether the order made in April 2011 could be characterised as a 'money order'. It was submitted for the defendant (the respondent to this application) that a sanction order was not a money order as it is not an order for the payment of money in that it was an order that was only concerned with

the destination of the sums to be paid. This was not accepted by the court because, in this case, the wording of the order in question obliged the defendant to make payment of certain sums. In the court's opinion, the order in question could be characterised as a money order and therefore, interest was payable from the date of the order unless the court orders otherwise. Thus, the declaration that no interest be payable was refused.

The Chief Justice considered that Taylor's case probably alerted the profession to an interest entitlement which had not earlier been properly recognised but that was consistent with the statutory scheme. He suggests that, if the parties had wanted to exclude the right to claim interest, they could have done so in the terms of the settlement. Given that they did not, His Honour suggested that it would be wrong to deny the plaintiff an entitlement on the basis of speculation that the parties may not have intended that interest be payable. He also suggests that compromising parties would be well advised to include in their settlement agreement whether they do or do not intend interest to be payable providing payment is made to the trustee by the due date.

This is a critical factor to keep in mind in sanctioning claims as the interest payable on a sanctioned sum

'if the parties had wanted to exclude the right to claim interest, they could have done so in the terms of the settlement. Given that they did not, His Honour suggested that it would be wrong to deny the plaintiff an entitlement on the basis of speculation that the parties may not have intended that interest be payable.'

could be quite substantial. In this case, interest of some $164,000 was payable for the period it took the defendant to pay the $6.6 million awarded to the trustee.

[1] *The Supreme Court Act 1995 (Qld) was repealed by s 211 of the Civil Proceedings Act 2011 (Qld). Section 108 of the Civil Proceedings Act 2011 (Qld), which commenced on 6 December 2011, provides that a reference in any Act or document to s 48 of the Supreme Court Act 1995 is, if the context permits, taken to be a reference to s 59 of the Civil Proceedings Act 2011 (Qld).*

Carter Newell presentations

23 October 2013

AKOLADE

Digital Privacy Law Seminar Series – Partner Tony Stumm discussed data breach, consumer notification protocols and appropriate responses to leaks of private information when reporting.

19 November 2013

legalwise SEMINARS

Partner James Plumb chairing the *Securing Access to Land* seminar which examines land access, managing the negotiation process and creating equitable compensation agreements.

20 November 2013

legalwise SEMINARS

Special Counsel Stephen Hughes chairing a core session covering practical legal ethics, professional skills and practice management and business skills.

28 November 2013

Queensland Law Society

Brett Heath, Special Counsel and Nola Pearce, Special Counsel presenting a *Litigation Masterclass: Perfecting the art of drafting and advocacy*.

Case Note

Oyston v St Patrick's College [2013] NSWCA 135

Student bullied by other students. Appeal against decision that the college had failed to implement adequate bullying policies.

The facts

Background

Jazmine Oyston (**plaintiff**), a student of St Patrick's College (**college**), brought a claim against the college for psychological harm she allegedly sustained as a result of continuous bullying from other students.

The plaintiff said that she was verbally bullied by a group of girls at her college (**perpetrators**) between 2002 and 2004. Although she was referred to the college's counsellor for a potential eating disorder in 2002, the evidence suggests the plaintiff did not bring the bullying to the college's attention until 2004, which she claimed was the year she experienced the most severe bullying.

In February 2004, the plaintiff sought medical attention for panic attacks suffered during and outside of school. During a meeting on 6 February 2004, the plaintiff's mother reported the plaintiff's condition to the principal, who made a note that the plaintiff had an anxiety attack at school due to feelings of isolation and an incident where she was verbally taunted by one of the girls in the group of perpetrators, which required further investigation. The incident was referred to Mrs Ibbett, the year coordinator, but no investigation was undertaken.

The plaintiff subsequently reported a further incident in April 2004 where she was allegedly hit on the arm and threatened by the perpetrators. Mrs Ibbett obtained a statement from the plaintiff and contacted her parents. Ms Ibbett stated that she had referred the matter to the grade coordinator responsible for the perpetrators, but there was no evidence that the grade coordinator had investigated the matter or reported back to Mrs Ibbett.

On 11 May 2004, a teacher wrote a letter to Mrs Ibbett expressing concern about the appellant's absence from class due to emotional problems. On 14 May 2004, the plaintiff cut her wrist with a compass after she initiated a rumour about one of the perpetrators. Mrs Ibbett subsequently warned the perpetrators about their behaviour and contacted their parents.

On 15 June 2004, Mrs Ibbett requested that teachers read a statement to all year 9 students during roll call regarding the school's policies on bullying.

'The risk of psychological harm to the plaintiff was both foreseeable and not insignificant, and the college was required to take reasonable action to prevent that risk from eventuating. Whilst reasonable steps to alleviate the risk were outlined in the college's policy, they were not followed by its staff members.'

On 23 August 2004, one of the perpetrators entered into a behaviour contract with the college. When she breached her behaviour contract in September she was advised that a further breach would result in expulsion. When she breached it again a few weeks later she was given the same warning once more. It wasn't until November 2004 that she and another perpetrator were suspended temporarily.

The college's student conduct policy identifies what constitutes unacceptable behaviour and specifies the procedures to be undertaken in response to misconduct. The policy identifies the year coordinator as the most appropriate staff member to deal with bullying and harassment and outlines specific steps to address incidents of bullying which include interviewing the perpetrators, mediation and disciplinary action. The policy gives the year coordinator discretion to vary the procedures to reflect the circumstances of the incidents.

Primary judgment

The plaintiff alleged that the college's responses to the bullying were inadequate. Pursuant to its policies, once receiving a bullying complaint, the college must undertake certain procedures including investigating the incident, interviewing the perpetrators, completing an incident report, convening a mediation, counselling the perpetrators, notifying the perpetrator's parents and counselling the victim. However, many of these steps were not taken in Ms Oyston's case.

Mrs Ibbett contended that she was not able to identify the emergence of a bullying pattern until late November 2004, which was rejected by Schmidt J. The primary judge held that the college was aware of the earlier incidents of bullying and its failure to respond to them and to carry out its threat to expel one of the perpetrators constituted an inadequate response to a continuing risk of harm.

Expert evidence adduced by both parties agreed that the college's policy was an acceptable anti-bullying program. However, the experts did not agree on the effectiveness of the policy's implementation in these circumstances. Her Honour found that the policy envisaged the teachers and the year coordinators would exercise reasonable discretion when responding to incidents of bullying or harassment, but in these circumstances, their discretion was exercised such that an effective written policy was not put into practice. Here, the court said, the college had overemphasized the support of the students responsible for the bullying at the cost of failing to ensure the plaintiff was protected from harm. Merely counselling the victim did not satisfy its duty of care to ensure the bullying ceased.

Her Honour held that, in circumstances where the college was aware of persistent bullying amongst its students, and the plaintiff was a particularly vulnerable student who was a victim to ongoing bullying, the college did not take the necessary steps to control the bullying. Her Honour awarded damages in the sum of $116,296.60 plus interest to the plaintiff.

The plaintiff brought an appeal against the award and the college cross-appealed on liability regarding the issue of breach of duty.

Decision of the Court of Appeal

On cross-appeal, the college submitted there was no basis for the primary judge to have concluded that the plaintiff's bullying was ongoing. Rather, the college's records documented specific, isolated episodes of dispute which were all sufficiently addressed by the college. It alleged that the plaintiff was not a reliable witness as the extent to which she was bullied was never brought to the college's attention. In fact, there was a question of whether the appellant was bullied at all.

Further, the college alleged the primary judge had erred in finding that the steps taken by the college were inadequate to ensure she was protected from ongoing bullying. It argued that a school was required

to take reasonable care to prevent harm, not to ensure a particular outcome was procured.

The court rejected the college's submissions that the bullying was not continuous, ruling that the evidence clearly indicated the plaintiff had been bullied regularly, if not relentlessly, by the perpetrators in question. The court rejected the college's argument that it was not on notice with respect to the ongoing bullying, and found they were aware of the bullying as early as February 2004. The court agreed with the primary judge that the actions of Mrs Ibbett were inconsistent with the clear terms of the school's policies.

The Court of Appeal held that the college was obligated to take reasonable steps to ensure the plaintiff was protected from bullying, including taking steps to identify the perpetrators and prevent further misconduct on their part. The college knew that the plaintiff was suffering from anxiety and panic attacks. Regardless of whether the condition arose from the bullying, the college should have known that the plaintiff was susceptible to psychological harm caused by the bullying. The risk of psychological harm to the plaintiff was both foreseeable and not insignificant, and the college was required to take reasonable action to prevent that risk from eventuating. Whilst reasonable steps to alleviate the risk were outlined in the college's policy, they were not followed by its staff members. The college did not adequately investigate the plaintiff's complaints, or take steps to bring the bullying to an end (by expelling one of the perpetrators when she breached her behaviour contract).

For the above reasons, the court considered the primary judge was correct to conclude the college had breached its duty of care to the plaintiff.

The outstanding matters of causation, damages and costs were remitted to be reheard.

Award of damages

Subsequent to the decision of the Court of Appeal, the parties reached agreement as to the amount of damages and interest to which the plaintiff was entitled. The Court of Appeal then made orders setting aside the award of the Primary Judge and substituting it with an order for the amount of $162,207.34, including $25,480 for past economic loss and $50,000 for future economic loss.

The Injury Scale Values and Costs Thresholds pursuant to the *Civil Liability Act 2003* (Qld) and the *Personal Injuries Proceedings Act 2002* (Qld) have been updated as at 1 July 2013. If you would like a copy of this publication please contact us on newsletters@carternewell.com

Case Note

Vourvahakis v Marrickville Shopping Centre Pty Ltd [2013] NSWDC 73

Plaintiff fails in claim against shopping centre caused by slipping on a wet car park expansion joint.

The facts

On 13 February 2008, the plaintiff was walking through the rooftop car park of the first defendant's shopping centre towards the entrance to the shops. It had been recently raining and the surface of the car park was wet. The claimant saw on the car park surface in front of her a metal structure that extended fully across her path and that protruded somewhat from the surrounding surface. This structure was later identified as an expansion joint cover common not only to shopping centres but also to other types of commercial premises of similar construction. The plaintiff approached the expansion joint cover and stepped onto its far side with her right foot. Her foot slipped forward down the sloping surface of the far side of the expansion joint cover, which caused her to fall heavily onto her hands and knees. The plaintiff allegedly sustained injuries as a result.

The first defendant was the owner and occupier of the shopping centre. The second defendant was a contractor to the first defendant, whose role it was to ensure that the first defendant had in place in each of its shopping centres, a system to ensure that things 'ran smoothly' and that all statutory and other obligations of the occupier of a shopping centre were carried out. The role was identified not as one in which the second defendant was required to identify every risk in a shopping centre, but as one to ensure that each shopping centre had a system which would identify risks by regular inspection and reporting and, would remedy such risks within a time-frame appropriate to the gravity of the risk.

Issues

The plaintiff alleged the first defendant breached the duty of care it owed to her as occupier of the shopping centre. The second defendant was alleged to have breached a duty owed to identify any risks of injury to visitors and to report those risks to the first defendant.

Decision

Liability of the first defendant

Neilson DCJ began his analysis by first considering if the expansion joint covers complied with relevant legal requirements at the time they were installed. Expert evidence was led to the effect that the combination of the metal surface of the covers and the gradient of their slope were such as to create a surface that was inherently slippery when wet. At the time the shopping centre in question was constructed (1987), the relevant Australian Standards or other such standards that required pedestrian surfaces to meet slip resistance requirements were relevant and adhered to. With this in mind, his Honour concluded that the expansion joint cover did not fail to comply with relevant building standards.

He did note, however, that such structures could be unacceptably slippery when wet, but that this danger could be avoided by the pedestrian simply stepping over the cover. There was evidence led that the centre had been visited by some six million persons in the three years prior to the incident, but there was no evidence that the harm that befell the plaintiff befell any of them. Thus, despite the risk being present, it was not one that had recently materialised.

His Honour then turned to the matters required to be considered by the *Civil Liability Act 2002* (NSW) (**Act**). In order for the first question to be answered, the foreseeability of the risk, his Honour thought that must be answered in the affirmative. The fact that the plaintiff had earlier conceded that the danger of slipping on the expansion joint covers was obvious, his Honour thought it must be doubly so to the first defendant through its servants and agents, given they regularly traverse the rooftop car park.

His Honour then concluded that the risk in question was not insignificant. Aside from the injuries suffered by the plaintiff, his Honour thought that a fall of this type, if suffered by an elderly person, could result in serious injury, as could such a fall by any person should the fall occur in the immediate vicinity of a moving vehicle.

With a mind to earlier evidence and observations about previous instances of this type of incident, his Honour considered that the probability of the harm occurring was so low as to be remote. No-one had slipped on the covers in the three years prior to the plaintiff's incident, and no-one had slipped on them in the five years between that incident and the trial.

Turning to the seriousness of the harm, Neilson DCJ opined that the harm suffered by the plaintiff was not a good example of the possible harm that could be suffered should the risk in question materialise. This was due to the fact that the plaintiff suffered pre-existing injuries to all of the parts of her body that she alleged she injured in her fall at the first defendant's premises.

In relation to social utility of the activity that caused the risk, his Honour concluded that the presence of shopping centres and their attendant car parks were of great utility in urban society.

The next consideration was the sections of the Act relevant to obvious risks. The risk of slipping on a sloped, wet metal surface was not only thought to be an obvious one, but also one of common knowledge. Given that the plaintiff herself said in evidence that she saw the raised expansion joint cover, she saw it was metal, and because she knew it was wet and it would have been slippery, she was thought to be aware of the risk. Thus, the first defendant did not owe the plaintiff a duty of care to warn her of the obvious risk. In relation to the allegation that the second defendant should have erected signs warning of the risk, his Honour wondered if the plaintiff, who remained oblivious to an obvious risk, would have remained oblivious to a warning sign.

The last matter considered was the burden of taking precautions to avoid the risk. The plaintiff and her expert made various suggestions as to how the risk could have been avoided. These included things such as making the expansion joint covers flat instead of raised, replacing them with a different, less hazardous type of cover, coating the existing covers with a non-slip coating, covering the car park with non-slip matting in wet weather and building an elevated walkway that traversed the car park upon which shoppers could walk in safety. In each case, these suggestions were dismissed as being either unsupported by evidence, inappropriate in the circumstances, unduly prohibitive or all of the foregoing. In reference to the fact that the expansion joint covers met standards at the time they were installed but not those of today, his Honour also noted that structures of yesterday cannot be measured by standards that exist today.

Ultimately, his Honour was not persuaded on the balance of probabilities that a reasonable person in the position of the first defendant would have taken any precautions to obviate the risk of a person slipping on a wet, sloping surface of the expansion joint covers in its car park when the pedestrian in question was wearing rubber thongs which she knew to be slippery in wet conditions.

Despite finding no negligence on the part of the first defendant, his Honour thought that, had he found liability, damages for the plaintiff would have been reduced by 100%. This was due to the fact that the plaintiff was aware of all the factors that combined to cause the incident (that is, she was aware that the sloping metal surface would be slippery when wet, as would her thongs), and that she simply did not turn her mind to them.

Liability of the second defendant

His Honour then turned to the allegations of negligence against the second defendant. It was alleged by the plaintiff that the second defendant owed her and every other visitor to the centre a duty to identify risks of injury to which members of the public were exposed. In his Honour's opinion, no such duty existed. The duty to identify risks and obviate them remained with the first defendant, even under the arrangement between the first and second defendants. The second defendant's role was merely to make sure that there were systems in place that were being maintained so that all such risks could be properly managed. Further, there was no evidence that the second defendant carried out his role negligently. Thus, no duty of care was owed to the plaintiff.

The plaintiff's claims against both defendants were dismissed.

Case Note

Irena Alat v Franklins Pty Ltd [2012] NSWDC 104

16 minute cleaning rotations found to be insufficient in fridge aisle at supermarket.

The facts

On Friday 11 April 2008, Irena Alat (**plaintiff**) was shopping at a supermarket operated by Franklins Pty Ltd (**defendant**) in Liverpool. Whilst walking in the refrigeration aisle, the plaintiff slipped on thickened cream that had spilt onto the floor and sustained injury to her left leg. The plaintiff slipped between approximately 5:41pm and 5:45pm and subsequently lay on the floor for three to four minutes before she was discovered by an employee of the defendant.

Prior to the plaintiff's fall, the defendant had conducted a floor inspection at 5:25pm.

Issues

Whether the defendant breached its duty of care by failing to implement a reasonable floor inspection system?

Decision

At trial, the defendant did not present any evidence in respect of the frequency of its floor inspections or the manner in which they were conducted. The plaintiff was found 16 to 20 minutes after the defendant's inspection at 5:25pm. Based upon the presumption that the employee who found the plaintiff was conducting a floor inspection at the time, the Court inferred from the available evidence that the minimum frequency of inspections at the defendant's supermarket was every 16 minutes.

When determining the appropriate frequency of the inspections for the subject area, the court took into account section 5B of the *Civil Liability Act 2002* (NSW), which provides that a person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable and not insignificant, and a reasonable person in the person's position would have taken those precautions

The court found that slipping in a supermarket was a foreseeable and significant risk. It was held that a

reasonable inspection system for the subject area would entail floor inspections at 15 minute intervals given that the refrigeration aisles stored numerous liquid products. This case was distinguished from *Strong v Woolworths Ltd* [2012] HCA 5 (where the High Court held that it was sufficient for Woolworths to inspect and remove slipping hazards every 20 minutes) on the grounds that the incident in Woolworths occurred outside of the store and not inside an aisle containing liquid products. The presence of liquids in the subject area gave rise to a higher chance of spillage and therefore more frequent inspections were required.

As the store was not busy at the time of the incident, the burden of taking such precautions were not high. Accordingly, a reasonable person in the defendant's position would have conducted inspections at 15 minute intervals.

The District Court ruled in favour of the plaintiff and held although the defendant carried out floor inspections, it had breached its duty to implement an adequate inspection system as the inspections were not frequent enough to establish a sufficient standard of care.

In relation to causation, the court was satisfied that '*factual causation'* had been established pursuant to s 5D (1)(a) of the *Civil Liability Act 2002* (NSW), as, on the balance of probabilities, the plaintiff would not have slipped had it not been for the defendant's failure to implement a system of 15 minute floor inspections.

Finally, the court allowed a reduction of 20% in damages for contributory negligence on the basis that the plaintiff ought to have detected the thickened cream on the floor and avoided injury as the aisles were wide and free of other shoppers at the time of the incident.

Staff profile Insurance

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Andrew Persijn specialises in professional indemnity claims ranging from defamation and fidelity claims to general property and injury liability claims. Andrew works closely with insurers and brokers providing advice with respect to policy interpretation and indemnity, as well as advising in relation to liability and quantum.

In the real estate industry, he has defended claims involving allegations of misleading and deceptive conduct, breaches of the *Property Agents and Motor Dealers Act 2000* (Qld), the mismanagement of properties in Queensland, New South Wales and the Northern Territory and disciplinary action taken against real estate agents. In addition he has extensive experience defending personal injury claims in Queensland, liaising with both insurers and the insured throughout all stages of a claim.

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Case Note

Kingi-Rihari v Millfair Pty Ltd t/as The Arthouse Hotel and Nicholas John Austin [2012] NSWSC 1592

Hotelier liable for slip and fall where it failed to completely dry up a spill or place a 'wet floor' sign out.

The facts

On 19 February 2010 the plaintiff attended the Arthouse Hotel (**hotel**) with two workmates for a drink. Soon after arriving, the plaintiff slipped and fell on the polished wooden floor near the bar and sustained an injury to his right knee. The first defendant was the occupier of the premises while the second defendant was the licensee of the premises. Both defendants carried on a business from the premises.

Issues

The parties agreed that the defendants owed the plaintiff a duty to take reasonable care to avoid a foreseeable risk of injury. The defendants also accepted that the risk of someone suffering injuries from slipping on the wet floor was foreseeable and not insignificant.

The parties agreed that if the floor where the plaintiff fell was clean and dry immediately prior to the plaintiff's fall, the condition of the floor did not materially contribute to the plaintiff's injuries, whereas if the floor where the plaintiff fell was wet immediately prior to the plaintiff's fall, the condition of the floor materially contributed to the plaintiff's injuries. Therefore, the crucial issue between the parties was whether or not the floor where the plaintiff fell was wet and had been recently mopped.

Decision

The court considered the defendants' duty required it to take reasonable precautions for the safety of its patrons while walking across the polished wooden floor. On the evidence, the risk of patrons slipping and falling on a spill was one foreseen by the defendants and the cleaning system the defendants had in place was designed so that spills were either dried completely, or a 'slippery when wet' sign was put in place.

The court was satisfied that, on the balance of probabilities, the floor of the bar was wet when the plaintiff slipped. Although the defendants had detected the floor was wet and attempted to mop up the water (albeit inadequately) the court reasoned that the floor

had not been mopped completely dry nor a warning sign put out to warn patrons of the slippery conditions. In these circumstances, the court considered that reasonable care required the spill to be dried completely using a sufficiently dry mop and/or cloth or putting out a warning sign. The failure of the defendant to do either was the result of a failure to exercise the requisite reasonable care and skill.

The court considered that because the floor was wet immediately prior to the plaintiff's fall, the condition of the floor materially contributed to his fall. The plaintiff would not have slipped and fallen as he did if the floor had been completely dried, as envisaged by the defendant's cleaning system, or at least if a warning sign was in place.

The court assessed contributory negligence at 8%. The court believed that, while it is fairly obvious a highly polished floor in a bar might be slippery when wet, patrons attending a bar with such a floor might reasonably contemplate that the hotel would know of the risk and take necessary steps to deal with it. However, the court accepted that in such circumstances, a person must also keep a lookout for spills which have not yet been wiped dry and accordingly, it found some limited contributory negligence on behalf of the plaintiff.

Quantum

The plaintiff was employed as a scaffolder at the time of the incident. He made submissions to the court that he wanted to work in the mining industry where he would achieve higher earnings.

It was submitted by the defendants that the plaintiff had only looked at mining work online, he not applied for any jobs in the industry and the evidence showed that he was likely to ultimately want to settle in Sydney with his partner.

The court however, considered that the plaintiff, but for his injury, would have pursued mining work where more lucrative earnings were available, for some years and such mining work should be taken into account for both past and future economic loss. The court assessed future economic loss to include five years in mining work.

Case Note

Rossi v Westbrook & Anor [2013] QCA 102

Court of Appeal dismisses plaintiff's appeal against no award for past or future economic loss.

The facts

Mrs Rossi, the appellant (who was 18 at the time of the incident) suffered an injury to her cervical spine as a result of a motor vehicle accident in 2003. Mrs Rossi attended her GP on the day after the incident and was referred to a physiotherapist. At the date of the trial she had not had any physiotherapy and McMurdo J noted she had received very little professional assistance for her injury.

At the time of the incident Mrs Rossi lived with her then boyfriend (Mr Westlake) and his mother (Mrs Banfield). She started working at a jewellery store shortly after the incident until 2004. She then went to work at a service station owned by her new husband, Mr Rossi. Mrs Rossi gave evidence that, had she not been injured, she would have sought another job as a shop assistant after leaving the jewellery store. The Rossi's started a sign writing business in 2006. Mrs Rossi gave evidence the couple started this business because she needed an occupation where she could work from home and limit her hours of work, so as not to exacerbate her neck pain and headaches. Mrs Rossi initially worked four hours per day for five days a week but as the business grew her hours increased to 10 - 12 hours per day.

Mrs Rossi alleged she was in constant pain as a result of the incident and this gave rise to a need for domestic assistance and also affected her earning capacity. The respondent submitted that Mrs Rossi had no significant impairment and she misrepresented the existence or extent of her symptoms.

McMurdo J accepted that Mrs Rossi suffered an injury following the motor vehicle accident and awarded her $22,144 in damages. However, he was not persuaded that Mrs Rossi's symptoms were serious enough for her to require domestic assistance or affected her earning capacity. He did not make an award for past or future economic loss.

Issues on appeal

Mrs Rossi argued that McMurdo J erred in finding there should be no award for past or future loss of earning capacity and she did not require care and assistance.

Decision

The Court of Appeal dismissed the appeal.

Economic loss

The trial court heard evidence from Mrs Rossi and two physiotherapists retained by the respondent (Mr Mitchell and Mr Hayter) with regards to the extent of Mrs Rossi's injury. Mrs Rossi gave evidence that she was in constant pain and any repetitive, constant movements led to a gradual increase in her pain. Mr Mitchell reported Mrs Rossi's alleged symptoms were not consistent with his objective findings and she appeared to be exaggerating her symptoms. Mr Hayter examined Mrs Rossi and gave evidence that she was able to work an eight hour day in an occupation of light-medium physical demand and did not require assistance around the home. Mrs Rossi submitted that McMurdo J erred in preferring the evidence of Mr Mitchell and Mr Hayter over the appellant's evidence as to the extent of her disability. The Court of Appeal was satisfied it was open for McMurdo J to accept the evidence of the physiotherapists that Mrs Rossi's symptoms were exaggerated and her symptoms were not causative of any economic loss.

McMurdo J did not make an award for past or future economic loss. He did not consider Mrs Rossi's income at the jewellery store had been affected by her injuries. Furthermore, she was unable to show that her work history following the injury resulted in less income than she would have earned had she not suffered an injury. Mrs Rossi alleged that she would have continued to work in a shop but for her injuries however, McMurdo J dismissed this submission on the basis she worked in a shop for a year following the incident when her injuries presumably would have been at their worst.

On appeal Mrs Rossi submitted that some allowance should be made for economic loss even if a precise calculation was not possible. The Court of Appeal stated the absence of evidence allowing a precise calculation does not generally disqualify a plaintiff from recovering a nominal amount, however no such allowance will be made when the Court is not satisfied that a loss has been suffered. In this case, the Court found the appellant could show no evidence to prove her symptoms were productive of any economic loss and consequentially McMurdo J did not err in finding that there should be no award for economic loss.

Gratuitous care

To satisfy s 59 of the *Civil Liability Act 2003* (Qld) a plaintiff must establish not only that gratuitous services were needed following personal injury but they were

in fact provided. Mr Westlake gave evidence that he did not recall himself or his mother assisting Mrs Rossi with domestic activities following the incident. While McMurdo J acknowledged Mr Westlake's memory may have been affected by the lapse of time he concluded it likely Mr Westlake would have been able to recall providing substantial assistance of the order of some hours per week if that had in fact happened. Mrs Banfield gave evidence that she did not provide Mrs Rossi with any assistance. McMurdo J was conscious of the need to assess Mrs Banfield's evidence in light of her attitude towards the appellant but he accepted her evidence. Accordingly, McMurdo J was not persuaded Mrs Rossi required assistance following the incident to meet the threshold under the *Civil Liability Act 2003* (Qld).

The Court of Appeal thought this finding was open to McMurdo J on the evidence. The finding depended in part on his assessment of the credibility of the witnesses and the Court did not think there reason to believe McMurdo J erred in making that assessment.

Failure to call evidence

Mrs Rossi did not call her husband to give evidence in respect of care provided to her and her employment history and needs. McMurdo J thought the decision strange given Mr Rossi lived and worked with Mrs Rossi for at least seven years. He would have been able to give evidence as to her need for domestic assistance and according to her evidence, the decision to start their own business was made because of her impaired capacity and Mr Rossi had to restructure the sign writing business when she was unable to work. McMurdo J applied *Jones v Dunkel*[1] to infer that Mr Rossi's evidence would not have assisted the appellant's case.

The Court of Appeal thought McMurdo J correct in his application of *Jones v Dunkel.* The issues on which Mr Rossi could have given evidence were not issues upon which there was direct evidence from Mrs Rossi. The Court found the appellant's failure to call Mr Rossi could be taken into account in determining whether the appellant proved her case to the requisite standard.

Quantum

Quantum was assessed by McMurdo J as follows:

General damages	$11,000
Future therapy	$2,100
Past cost of medication	$5,000
Interest on that sum	$1,044
Future medication cost	$3,000
Total	$22,144

[1] *(1959)101 CLR 298.*

Case Note

Campbell v Hay [2013] NSWDC 11

Whether flight instructor liable to student for failure to take over control of aircraft earlier. Whether flying was a dangerous recreational activity.

The facts

On 15 May 2007, the plaintiff received his second flying lesson from the defendant, who was an experienced flying instructor. The plaintiff was in control of the aircraft for most of the flight.

About 45 minutes into the flight the defendant felt faint engine vibrations which disappeared when the defendant instructed the plaintiff to increase the engine revolutions. When the vibrations started for a second time the defendant took control of the plane. The engine started to shudder and then stopped completely. The defendant navigated the plane in gliding mode and landed in a paddock.

The plaintiff sustained injuries in the landing.

Issues

The court was asked to consider the following issues:

- The cause of the engine failure;
- Whether the defendant's conduct in becoming aware of problems with the plane's engine on two occasions and failing to take control of the aircraft at an earlier stage constituted a failure to take reasonable care; and
- Whether the plaintiff was injured as a result of the materialisation of an obvious risk of a dangerous recreational activity in which he was engaged in at the time (s 5L of the *Civil Liability Act 2002* (NSW) (**Act**).

Decision

The court heard evidence from four experts as to the possible causes of the engine malfunction. Marks ADCJ was satisfied the engine failure was the result of one of two causes advanced by the experts but he did not consider it necessary to the matters before him to make a finding as to the precise cause of the engine failure.

There was a general consensus amongst the experts that the defendant was not required to warn the plaintiff at the time of the initial vibrations of the possibility of the problem, but the defendant should have ensured that he kept the aircraft within reach of a possible landing area. The defendant gave evidence that he did not commence looking for any suitable landing area until after the engine stopped as he thought he would be able to get back to the airbase. The expert witnesses

agreed that at the time of the second set of vibrations the defendant should have kept within reach of a possible landing area and the defendant's conduct in continuing to fly towards the airbase (away from the landing area) was unsatisfactory.

Based upon the expert opinions and the evidence of the defendant, Marks ADCJ was satisfied that the defendant failed to exercise reasonable care for the safety of the plaintiff in not ensuring that the aircraft was flown towards an appropriate landing strip after the second set of vibrations started and instead continuing to fly towards the airbase.

However, the court held that the defendant was not liable in negligence for the plaintiff's injuries by reason of s 5L of the Act.[1] In applying s 5L, the court considered it necessary to consider the following five matters:

1. Was the plaintiff engaged in a recreational activity?

Marks ADCJ answered this in the affirmative.

2. Was the recreational activity dangerous?

For the purposes of the Act, a dangerous recreational activity is defined in s 5K of the Act as *'a recreational activity that involves a significant risk of physical harm'.* In determining whether a recreational activity involves a significant risk of harm, the court considered it necessary to apply a common sense approach and consider all the relevant circumstances that bear upon the activity.

Marks ADCJ determined that, prima facie, there is a risk of something going wrong in the operation of any aircraft, both in flight and in landing it safely. These include pilot incapacity or error, engine failure, mechanical problems, fuel leaks, impact with other objects and weather conditions. He was of the opinion that the risk of something going wrong in the operation of an aircraft is not trivial, and even if the risk occurs infrequently, it nevertheless remains a real risk. Furthermore, if something was to *'go wrong'* with the operation of an aircraft in flight and during landing, common sense dictates that there is a significant risk of physical harm. Consequentially, the court concluded that the recreational activity in which the plaintiff was engaged was dangerous for the purposes of section 5L of the Act.

3. Was there an obvious risk of the dangerous recreational activity?

An obvious risk is defined in section 5K of the Act as a risk that, in the circumstances, would have been obvious to a reasonable person in the position of the person who suffers harm. Marks ADCJ stated that, *'as a matter of common knowledge and common sense, there was a risk [albeit, a low risk] that the defendant might be negligent in the manner in which he operated the aircraft after the second set of vibrations occurred, and that the aircraft engine might fail in flight and the defendant would be compelled to conduct a forced landing.'* The court considered this was sufficient to result in this risk being characterised as obvious for the purpose of s 5F.

4. Did the plaintiff suffer harm?

Marks ADCJ answered this in the affirmative.

5. Was the harm suffered by the plaintiff the result of the manifestation of the obvious risk?

The court considered it obvious that the injuries suffered by the plaintiff resulted from the materialisation of the obvious risk.

The court concluded that the defendant could not be held liable in negligence for the injury sustained by the plaintiff by reason of s 5L and accordingly, dismissed the plaintiff's claim.

[1] That section provides that there is no liability for harm suffered from the materialisation of an obvious risk of a dangerous recreational activity.

Case Note

Action Paintball Games Pty Ltd (in liq) v Barker [2013] NSWCA 128

Whether defendant paintball company was liable to 10 year old who tripped on tree roots on outdoor paintball course.

The facts

On 16 February 2008, the respondent, a 10 year old girl, attended an area of land occupied by the appellant to participate in a game of laser tag.

The game was played in an area of bushland. There were rough tracks formed by nothing more than use which traversed the site. There was also the usual debris associated with bushland. Prior to the game commencing, a staff member spoke to the participants in the presence of the respondent's father. The staff member warned the participants that there were a lot of sticks and obstacles in the way and they should not *'run full out'* because they might trip and hurt themselves.

Whilst participating in the game, the respondent tripped and fell on an exposed tree root while running from another participant. She suffered a significant fracture to her elbow. She sued in negligence and was successful at first instance.

Findings at first instance

At trial, Hungerford ADCJ accepted that the appellant owed the respondent a duty of care to prevent foreseeable injury. Taking into account the characteristics of the respondent, the risk of harm was identified as *'tripping over a significant obstacle such as an exposed tree root lying across a designated path within an area where children are playing a game that encourages activity such as running to chase another contestant or attempting to avoid another chasing them'*.

In relation to scope of this duty, his Honour thought it was reasonable to prepare the site by removing and keeping removed trip hazards on formed pathways but otherwise leaving the vegetation for effect. His Honour was also of the opinion that there was insufficient social utility in conducting a laser tag game in bushland to justify allowing a trip hazard to exist. He was also of the opinion that the element of causation was established because, but for the appellant's failure to remove the tree root, the plaintiff would not have fallen and been injured.

The provisions of the *Civil Liability Act 2002* (NSW) (**Act**) that relate to obvious risk, inherent risk and recreational activity were also considered.

It was accepted that the respondent was engaged in a recreational activity.

Despite the respondent admitting in her evidence that she was aware from prior experience that bushland can contain branches and the like that might cause you to trip and fall if you were not keeping adequate lookout, his Honour concluded that the tree root that caused the plaintiff to fall was not an obvious risk.

Inherent risk, although considered at trial, was not considered on appeal because (in the Court's opinion) its consideration was not necessary.

In relation to the warning that had been given, his Honour concluded that it was insufficient to discharge the appellant's duty. The warning that had been given prior to the commencement of the game did not qualify because the appellant's employee did not warn of any specific obstacles such as tree roots, and the warning was not that there should be no running, only not to *'run full out'*.

Issues

The appellant appealed liability on numerous grounds including a challenge to the finding as to how the respondent came to injure herself, the content of the duty of care, the nature of the alleged breach and the finding as to causation.

Decision

In the opinion of the Court of Appeal, the provision in the Act (s 5M of the Act) which provides that no duty of care is owed in respect of a risk of a recreational activity, if the risk was the subject of a risk warning, provided a straight forward path for disposing with the appeal.

At trial, Hungerford ADCJ held that the warning that had been given was insufficient, but inappropriately used hindsight in doing so. The suggestion that children should be told not to run at all would be disproportionate to the risk and would greatly diminish the attractiveness of a game, if the instruction were followed. The Court was also of the opinion that it was possible to warn of a risk without instructing the recipient of the warning as to all the steps necessary to avoid the risk. Further, adequate warning can be given, at least in some circumstances, by reference to the general kind of risk involved without precise identification of each separate obstacle or hazard which may be encountered.

With the forgoing in mind, the Court of Appeal thought the appellant was entitled to rely on s 5M of the Act. Consequently, there being no duty of care in respect of the activity in which the harm was suffered and hence no liability, the appeal was allowed and the judgment in favour of the respondent was set aside.

For completeness, the trial judge's other findings were considered.

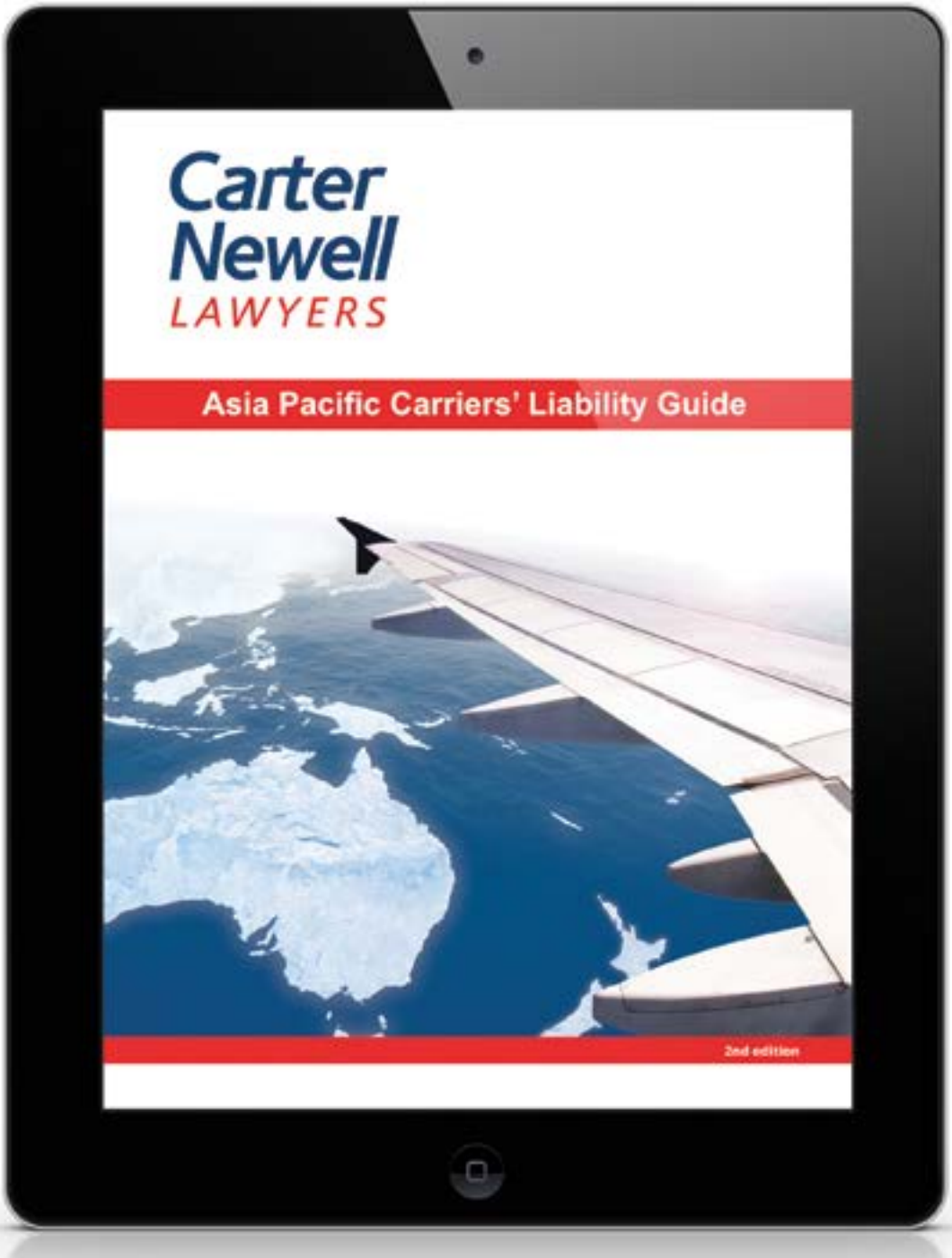
The Court thought that the findings of breach at trial involved potential inconsistencies. If the appellant were obliged to remove the hazard, no issue of a warning would have arisen. If there were a duty to warn, it would seem that there was no absolute duty to remove the hazard.

At trial it was suggested that the appellant should have removed all risks of the kind that resulted in the respondent's harm. The Court opined that the duty to take reasonable care suggested by Hungerford ADCJ identified the duty at too high a level. In relation to the duty to warn and the content of any such warning, the Court thought that the warning given was succinct and spoke of general risks. Had it been longer and more detailed, it may have lost the attention of the younger participants.

In considering the trial judge's finding on causation, the Court noted the importance of avoiding hindsight and focussing on the specific circumstances which gave rise to harm. The questions of duty and breach they said, must be assessed by reference to the perspective of the reasonable person in the shoes of the defendant, viewing the matter before the harm arose.

As to the burden of taking the precaution suggested, the Court thought that removal of all the obstacles that might be encountered in bushland would be impractical and unreasonable in the circumstances.

As to the Hungerford ADCJ's comments about the social utility of the game, the Court suggested that there is social utility in providing physical activity for children in a natural environment.



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