Recent developments in Common Law Claims

1. In the last twelve months the New South Wales Court of Appeal has delivered judgment in several cases that have important application to those practitioners practicing in the Common Law jurisdiction. Two were decided in 2013 and two were decided in 2014. The first of the cases I will discuss deals with expert evidence and pleadings, the next two cases I will consider deal with the need to properly identify the relevant risk within the terms of the Civil Liability Act 2002 (NSW) and the final case I will consider highlights the need for care in dealing with work place accidents that occur interstate.

Evidence and Pleading issues

2. The first case I wish to discuss is *Boral Bricks Pty Ltd v Cosmidis; Boral Bricks Pty Ltd v DM & BP Wiskich Pty Ltd (2013) NSWCA 443*.

3. The facts in this case were unremarkable and they are like many claims for personal injury involving a work place type accident. The plaintiff (Cosmidis) was a tanker driver employed by DM & Wiskich Pty Ltd to deliver fuel to Boral's premises at Badgerys Creek. He suffered injury when, whilst walking from the Boral office back to his tanker, he was struck by a forklift driven by an employee of Boral.

4. The action was heard by Judge Levy in the District Court and His Honour found for the plaintiff, made no finding of contributory negligence in the plaintiff and awarded him approximately $1,2m in damages which included a large component for care.

5. There were many issues raised on appeal but I want to draw attention to 2 being the evidence in support of the claim for care and the approach the court took to the pleading of the defence of S.151Z Worker's Compensation Act 1987 (NSW).

6. In his claim for care the plaintiff called a number of lay witnesses who gave evidence of what assistance they had provided to the plaintiff since his accident and an estimate of the amount of time it took them to provide that assistance. One witness gave evidence about assistance provided with gardening and another gave evidence on the assistance provided with housework. On the basis of the lay evidence the Court of Appeal concluded the time provided by those witnesses totalled 4 ½ hours per week, which fell below the threshold provided by S.15 (3) Civil Liability Act 2002 (NSW) (which provides for a minimum of 6 hours per week for 6 consecutive months before a claimant can claim damages for gratuitous care). Therefore based on that lay evidence alone the plaintiff was not entitled to past gratuitous care and his claim for future gratuitous care was difficult to support.

7. In order to overcome this problem His Honour Judge Levy referred to the medical evidence and in particular the evidence of Dr Giblin, orthopaedic surgeon who said in a medical report prepared by him *"domestic assistance is recommended; four hours a fortnight for gardening and four hours a week for home care"*. On the basis of that "expert" evidence the plaintiff was found to be entitled to 6 hours per week of care which overcame the threshold set by S.15(3) CLA.

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8. Justice Basten, who provided the substantive judgment, said of the trial judge's approach to that medical evidence *"On what basis the orthopaedic surgeon assessed the number of hours per week required to undertake domestic duties and gardening was not revealed. It is not the kind on "expertise" which is normally attributed to orthopaedic surgeons. The evidence was clearly inadmissible, although not objected to, and should be given no weight at all"* (see [93]).

9. It has become common practice for plaintiff's solicitors to pose a series of questions to the medical experts retained by them for medico-legal purposes and those questions often cover wide ranging topics. It has been my experience that medico-legal practitioners are often asked to quantify the level of care a plaintiff needs. The evidence offered by Dr Giblin comprised no more than a sentence or two in which the doctor said nothing beyond his estimate of the number of hours of domestic assistance he considered the plaintiff required. There was no evidence in the report that doctor had explored with the plaintiff the size and configuration of his home, the nature of the plaintiff's domestic environment prior to the accident or the basis on which doctor had made his assessment. No explanation was provided by doctor as to how he came to make his assessment of the number of hours he considered necessary.

10. The Court of Appeal in Boral Brick approached the evidence of Dr Giblin by initially considering S.79 Evidence Act which provides:

> *(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."*

11. The approach taken by the Court was consistent with the High Court's decision in *Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588* and with the New South Wales Court of Appeal's decision in *Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705* and in particular Justice Heydon at 743-744 commencing at [85] where he said:

> ***[85]*** *In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must*

explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.

12. Clearly a statement by a medical practitioner of his/her opinion on the plaintiff's domestic requirements will only be admissible if there is admissible evidence showing the medical practitioner had the requisite expertise to support the opinion, the basis (reasoning) for the opinion is disclosed by that practitioner and the factual basis for the opinion is disclosed and proven (if not agreed between the parties).

13. The form of the evidence by Dr Giblin on the issue of domestic assistance did not disclose a factual basis for the opinion and as such there was no evidence to support the opinion. Further doctor did not disclose in his report any relevant expertise underpinning his opinion on domestic assistance.

14. The other issue thrown up by this case to which I wish to direct attention is the issue regarding the pleading of the defence under S.151Z Worker's Compensation Act 1987 (NSW). It seems to me this point is relevant to any matter that is to be pleaded.

15. In the Boral case the defendant had pleaded in its defence:

> *"Further, and in the alternative, the First Defendant says that in the event it is liable to the Plaintiff (which is denied) then any damages so payable should be reduced by the Plaintiff's employer's negligence and the First Defendant relies upon S.151Z of the Worker's Compensation Act 1987 (NSW) as a defence to the Plaintiff's claim for damages".*

16. The plaintiff took issue with this pleading when evidence was sought to be adduced in support of it. It was correctly asserted that the defence raised only a general reliance on S.151Z and no particulars were provided of the alleged breach or breaches of duty by the employer in support of the claim. The trial judge ruled in favour of the plaintiff and did not allow the defendant to adduce the evidence. The defendant then sought leave to amend its defence but the trial judge refused leave. The end result was that, at trial the defendant was not permitted to rely on the S.151Z defence.

17. On appeal the Court of Appeal directed attention to what the Court had said in *Benton v Scott's Refrigerated Freightways (2008) NSWCA 143 per Campbell JA at [33]* where His Honour said:

"*The material facts that would need to be established for a claim under section 151(2)(c) would include identification of the person alleged to be the employer, the material facts by virtue of which the relationship of employment was alleged to exist, the material facts which showed that the worker had taken or was entitled to take proceedings independently of the Act to recover damages from the employer, and any material facts that entered into the quantification of the reduction that was sought in section 151Z (2)(c). As… the contribution that the non-employer tortfeasor could recover from the employer but for Part 5 of the Workers Compensation Act, and the contribution that the non-employer tortfeasor is entitled to recover from the employer under section 151Z(2)(d) both depend upon the relative causal efficacy and culpability of the actions of the employer and the non-employer tortfeasor, the facts material to those matters, and any special facts, that if not pleaded could take the other party by surprise, would need to be pleaded.*"

18. In the Boral case Justice Basten said (at [59]) *"…if the defendant wishes to rely upon the benefits it may derive from S.151Z(2) of the Workers Compensation Act, it should identify the material facts relied upon which, if not pleaded, could take the other party by surprise. What those material facts may be in a particular case will depend upon all the circumstances. Those stated in the first sentence at [33] in Benton should be understood as exemplifying the kind of facts which may be material, rather than as a checklist applicable to every case. For example, there will often be no doubt as to the identity of the employer. In Benton itself there could be doubt as to the identity of the employer …"*

19. The result in the Boral case was that because the defendant had not properly pleaded the allegations necessary to ground the S.151Z defence the defendant was not permitted to rely on that aspect of its defence.

Correctly identifying the risk of harm

20. The next two cases I will discuss deal with the need to properly identify the risk of harm within the terms of the Civil Liability Act 2002 (NSW). S.5B speaks of taking precautions *"against a risk of harm"* and Ss. 5C and 5D also refer to the risk of harm.

21. The two cases I will draw attention to demonstrate the need to properly identify the risk of harm in order to determine the terms of S.5B, 5C and 5D Civil Liability Act. The first case is the Court of Appeal's decision in *Jackson v McDonald's Australia Ltd (2014) NSWCA 162*. The facts in the case were briefly that in the early hours of the morning Jackson entered the McDonald's restaurant in George Street Sydney to buy some food. On entering he walked to a flight of stairs which he ascended and then walked along a passageway to the rear of the restaurant in order to access the service counter. After walking some distance along the passageway the plaintiff and his companion turned and walked back the way they had come. The floor had been recently cleaned which included mopping with a damp mop. The plaintiff said on first walking along the passageway he had to negotiate a pile of rubbish that had been swept into a position about 1 metre beyond the top of the flight of stairs and that from that pile of rubbish to the rear of the restaurant the passageway was wet. The

plaintiff said he had noticed cleaning in progress when he entered the restaurant and that he detected a strong chemical smell after he entered the restaurant. The plaintiff described a "thin film" of water on the floor of the passageway however the floor between the pile of rubbish and the top of the stairs he said was not wet. The wet floor area was only beyond the pile of rubbish. Having walked up the stairs, over the pile of rubbish and along the wet passageway the plaintiff then turned and walked back the same way. On his way back he stepped over the pile of rubbish and then proceeded to the top of the steps before he descended them. At the top of the steps there was a raised bubble area consistent with a nonslip area. The plaintiff said when he placed his first foot down on the step from the landing he slipped and fell down the stairs.

22. The plaintiff's claim was that the bottom of his shoe/s had become wet from walking over the wet floor and that caused him to slip when he tried to descend the otherwise dry stairs.

23. The plaintiff sued McDonald's and the cleaner (Holistic). The plaintiff also joined CGU Insurance Ltd as that insurer insured the cleaner which had ceased to exist after the proceedings commenced.

24. The trial judge, Judge Gibson, found for the defendants and the plaintiff appealed.

25. The following statements of principle can be taken from the judgment of Justice McColl:

    1. McDonald's owed a duty to take reasonable care to avoid a foreseeable risk of injury to the plaintiff arising from the physical state of its land, on the assumption that the plaintiff used reasonable care for his own safety (see [7]).

    2. An occupier's obligation is not so broad as to require an occupier to take reasonable care to make the premises as safe as "reasonable care and skill on the part of anyone can make them" (see [9]). The duty is only to take such reasonable care as is required by the circumstances of the case.

    3. Foreseeability of risk of injury is not determinative of breach of duty of care.

    4. In considering breach of duty it is important to consider what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk. The determination of what a reasonable person would do must be made by looking forward at the prospect of injury and not retrospectively from a point in time after the accident (see [13]-[14]).

26. However the significant error the Court of Appeal identified the trial judge had made in the case was the identification of the risk of harm which Judge Gibson stated as being *"the risk of harm that a plaintiff might slip"*. Her Honour Justice McColl JA agreed with Justice Barrett JA who said the relevant risk of harm was that *"a person would slip on the wet floor or soon after walking through"* the wet floor (see McColl JA at [17] and Barrett JA at [88]). The distinction, whilst subtle was significant to the case.

27. The need to properly identify the relevant risk of harm was also at issue in *Port Macquarie Hastings Council v Mooney (2014) NSWCA 156*. In that case Mrs Mooney had set out from

her home to walk to the supermarket and to do so she walked along an unlit path recently completed by the council as a temporary measure pending construction of a permanent lit path. On her way home from the shop it became "pitch black" and she did not see a bend in the path and as a result she strayed from the path and fell into a stormwater drain. The matter was heard before Judge McLoughlin who identified the risk as *"that a pedestrian might become disoriented in complete darkness and fall directly from the edge of the footpath into the stormwater drain".*

28. Justice Sackville AJA said at [52]:

> *"in order to apply both S.5B and S.5C of the Civil Liability Act it is necessary, just as it was under the pre-existing general law, to identify the relevant 'risk of harm'….it is only through the correct identification of the risk of injury that a court can assess what a reasonable response to the risk might be."*

29. Whilst His Honour said the relevant risk of harm for the purpose of S.5B is the risk which materialised when the plaintiff was injured (in this case slipping and falling into the drain) it was nevertheless necessary to identify what that risk was.

30. His Honour said the risk of harm in that case was:

> *"The risk of harm that materialised in this case was not, as the primary Judge's formulation perhaps implies, that a pedestrian might become disoriented in complete darkness and fall directly from the edge of the footpath into the stormwater drain. Nor was the risk of harm simply that a pedestrian unable to follow the path would inadvertently leave the footpath as it deviated sharply near the particular crossover traversing the stormwater drain and suffer injury as a consequence. The relevant risk of harm created by the construction or completion of the footpath was that in complete darkness a pedestrian might fall and sustain injury by reason of an unexpected hazard on the path itself (such as an unsafe surface or variation in height) or by unwittingly deviating from the path and encountering an unseen hazard (such as loose gravel, a sloping surface or a sudden drop in ground level). The risk of harm created by the construction of the footpath no doubt included a risk that a person would deviate from the footpath near the crossover and slip on loose gravel on the edge of the stormwater drain. But the risk of harm created by the construction of the footpath was not confined to the particular hazard that caused the respondent to suffer an injury." (see [67])*

31. When the risk of harm was analysed as explained by Justice Sackville, it can be seen that the risk of harm could have occurred at any point along the path and not just at the point where the plaintiff left the path. The consequence of this is that if the council had to take some alternate action at the bend where the plaintiff became disorientated then it would have been necessary to have taken similar action for the whole length of the path.

32. Once again the Court of Appeal directed attention to the nature of the duty owed, namely to take reasonable care for the safety of a pedestrian against foreseeable risk of harm provided the pedestrian was exercising reasonable care for his or her own safety. Justice Sackville

expressed doubt as to whether the Council should have foreseen that a pedestrian, exercising reasonable care for her own safety would attempt to negotiate the entire path in complete darkness without the aid of some artificial light. In addition His Honour expressed reservation as to whether the risk of harm was "not insignificant" within the terms of S.5B CLA.

33. With some hesitation His Honour concluded the risk of harm was foreseeable and was "not insignificant" however His Honour said, having correctly identified the risk of harm it was then necessary to determine if a reasonable person in the position of the Council would have taken precautions against that risk. His Honour said that question must be determined prospectively and without the wisdom of hindsight (see [75]).

34. There is no doubt the Council could have taken some steps at the point where the plaintiff left the path to improve safety at that particular point. It could have for instance erected barriers or installed flashing lights or even installed artificial lighting. However the risk of harm being *"that a pedestrian, in complete darkness, might fall and sustain injury by reason of a hazard on the pathway itself or by reason of deviating unwittingly from the pathway and coming to grief on a hazard nearby"* was not confined to the point where the plaintiff had her accident but rather along the whole length of the path over which she might encounter the identified harm (see [76]).

35. The Court concluded that the evidence did not establish that a reasonable person in the position of the Council would have taken precautions against the identified risk of harm.

36. In the Jackson case the 3 Justices of Appeal agreed the risk of harm as stated by Justice Barrett was foreseeable and was "not insignificant". Justice McColl differed from Justice Ward and Justice Barrett in that Justice McColl considered that the plaintiff had not established that McDonald and the cleaner failed to take the precautions a reasonable person would have taken to avoid the risk.

37. Justice Barrett, with whom Justice Ward agreed, considered the circumstances in Jackson were similar to those in *Glad Retail cleaning Pty Ltd v Alvarenga (2013) NSWCA 482*. In Alvarenga the plaintiff walked past a cleaner mopping the floor and thereby walked through a wet area before she stepped onto a metal travelator on which she slipped and fell due the fact her feet were wet from walking through the area being cleaned. In Alvarenga the Court of Appeal found the cleaning could and should have been carried out outside of the hours the centre was open to the public. It was argued in Alvarenga that the risk of harm was obvious however the Court of Appeal said for it to have been obvious the evidence would need to have established that:

    1. An accumulation of moisture on shoes is capable of creating a tribological effect

    2. The surface of the pallets of the travelator were hydrophilic rather than hydrophobic

    3. The plaintiff had accumulated sufficient moisture on the shoes to create the tribological effect

4. The risk was exacerbated because of the incline of the travelator.

38. In Alvarenga the court did not find the risk of harm was obvious. However in Jackson the plaintiff knew the floor to be wet and knew he had walked over the wet floor before he attempted to walk down the stairs. The Court of Appeal concluded that it was "common knowledge" to a reasonable person in the plaintiff's position that the soles of his shoes might still be wet when he began to descend the stairs and that it was common knowledge to such a person that descending stairs with wet shoes carried with it a risk of slipping. Accordingly the Court found the defendants did not owe a duty of care to warn of the risk as it was obvious within the terms of S.5H Civil Liability Act.

39. In Jackson the Court of Appeal considered causation within the terms of S.5D Civil Liability Act. In particular that *"the negligence was a necessary condition of the occurrence of the harm"*. The court said that the plaintiff had to prove two discrete propositions they being:

    1. That there was water on the soles of his shoes when he fell and

    2. That the presence of that water caused him to fall (per Barrett JA at [112]).

40. No expert evidence was led on these issues and the plaintiff did not say he noticed water on his shoe after his fall but rather said he surmised that his shoe was wet (see Barrett JA at [119]).

41. His Honour Justice Barrett said:

> "*But there is nothing in common experience that tells us that someone with wet shoes who traverses a floor having the particular characteristics of the McDonald's floor is more likely to slip because of water on their shoes than for any other reason, such as inattention (because engaged in conversation or for any other reason), excessive speed or failing to take advantage of a handrail. People wearing dry shoes walk on wet stairs every day and do not slip. People wearing wet shoes walk on dry stairs every day and do not slip. People wearing dry shoes slip on dry stairs every day…. (S)tairs are, in any event inherently, but obviously, dangerous".*

42. McDonalds had led evidence as to the non-slip characteristics of the stairs and therefore it was for the plaintiff to prove that water on his shoes would have caused slipping on the stairs and that slipping would not have occurred if no water was present. Accordingly the Court of Appeal held the plaintiff had not proved causation.

43. The cases of Mooney, Jackson and Alvarenga each establish the importance of correctly identifying the risk of harm when considering the terms of the Civil Liability Act.

Dealing with an Interstate Workplace Accident

44. The final case I wish to address is the District Court matter of *Motha v Mountain H2O Pty Ltd and JJ Richards & Sons Pty Ltd* heard and determined Judge Robison sitting in Albury in June 2014. This case in turn called for a consideration of a number of earlier cases including *Wickham Freight Lines Pty Ltd v Ferguson (2013) NSWCA 66* in which the plaintiff, a truck

driver, was injured in the course of his employment at premises in Victoria. These cases enliven *S.150A Worker's Compensation Act 1987 (NSW)* which provides:

> *(1) If compensation is payable (whether or not it has been paid) under the statutory workers compensation scheme of a State in respect of an injury to a worker, the substantive law of that State is the substantive law that governs:*
>
> *(a) Whether or not a claim for damages is respect of the injury can be made, and*
>
> *(b) If it can be made, the determination of the claim.*

45. The Parliament of Victoria enacted a similar provision in *S.129M Accident Compensation Act 1985*. I understand other States have also passed legislation in similar terms clearly to create uniformity between the States.

46. In Motha the plaintiff was employed by the second defendant, a Victorian based company, as a truck driver. His work included driving into the first defendant's premises in Albury NSW to collect waste paper stored in bins. He had been to the first defendant's premises before and had noted the bins of waste paper were often overfilled and he had complained about that fact. On the day of accident when he arrived at the first defendant's premises the bin was again overfilled and he had to force the load into the bin in order to cover it before driving it away. He climbed onto the pile of waste paper to force it down and in doing so it collapsed under him and he fell thereby sustaining injury. He sued both defendants the first being the occupier of the premises and the second being his employer.

47. His employer's business was in Victoria and the plaintiff obtained compensation from that employer for the injuries he suffered in the accident. It did not really matter that he had actually obtained compensation in Victoria for both the Victorian and New South Wales legislation become applicable when compensation is payable (whether or not it is actually paid).

48. At the hearing before Judge Robison both defendants moved the court to strike out the plaintiff's claim for breach of S.134AB Accident Compensation Act 1985 (Vic), which provides a detailed regime to be followed in bringing a claim. Sub-section 12 prohibits the bringing of a claim unless certain steps have been followed within the time period stipulated, which steps had not been followed in this case within the relevant time period. The Victorian legislation is quite draconian and has been criticized by the Victorian Court of Appeal in several decisions but has not been amended. The time periods set are very short and the court cannot extend them.

49. The plaintiff argued he was entitled to bring the proceedings against both defendants and particularly the NSW defendant. One argument advanced was that Victorian Law could not bind a NSW court.

50. In the Wickham Freight case (Supra) the plaintiff, Ferguson, was employed by Cohuna Freighters Pty Ltd, a NSW company and his work involved driving into Victoria to deliver an empty motor vehicle trailer to Wickham Freight and, in the course of doing that work, he suffered injury.

51. The NSW Court of Appeal held that because S.134AB (1) and (2) were concerned with the kinds of damage or amount of damages that might be recovered, they were substantive provisions constituting substantive laws of Victoria. Further the Court held that S.134AB was an integral part of the scheme enacted by the Accident Compensation Act to limit the common law entitlements to damages and therefore was substantive law and thus binding on NSW courts (per *John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503*).

52. As the plaintiff had not complied with the steps required by S.134AB he was not entitled to maintain his action. In both Motha and Wickham the claims were dismissed.

53. In Motha the claim against the NSW occupier was dismissed because the provisions of S.134AB are enlivened where the worker is "entitled" to compensation under the Victorian scheme. It is the entitlement to compensation that activates S.134AB.

54. Therefore in claims involving interstate workplace accidents considerable care should to be applied to ensure strict compliance with the relevant State legislation, for those provisions will impact on claims not only against the employer. These types of cases will most often arise with residents of towns or cities near a state border who work in the adjoining state or with workers who travel interstate for an employer with an interstate business.

Conclusion

55. When properly understood these cases re-enforce the need to analyse each common law claim to ensure:

    1. The expert evidence in support of a claim is admissible and that means ensuring the expert is appropriately qualified and that his opinion is based on facts that will be proven at trial.

    2. That claims or defences are properly pleaded so that the opposing side is aware of the issues to be raised,

    3. That the risk of harm is identified so that proper consideration can be given to the terms of S.5B, 5C and 5D CLA for it is only when the risk of harm is properly identified that consideration can be directed to what a reasonable person in the defendant's position would have done, and

    4. That with accidents that occur interstate that proper attention is directed to the applicable legislation for the place of the accident.

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