

## **REVIEW OF INTERESTING CASES DECISED BY THE COURT OF APPEAL DURING 2015**

This paper has been prepared for the Claims Discussion Group meeting on Tuesday 9 February 2016.

During the year there has been a number of common law cases heard and determined by the NSW Court of Appeal. I have selected a number of those cases and attempted to deal with them in topic specific areas.

### **USE OF EVIDENCE BY TRIAL COURTS**

#### **1. Use of CCTV**

*Coles Supermarkets Australia Pty Ltd v Bright (2015) NSWCA 17 – 5 February 2015 –*

Ms Bright slipped and fell on a wet floor in the Coles store at Banora Point after Ms Gilmore, an employee of a subcontractor to Coles, had completed stocking a flower stall that was next to where Ms Bright fell. The incident was captured on CCTV. There was no dispute that there was water on the floor after the fall as the plaintiff had knocked over a bucket of water when she fell. The CCTV showed a significant number of customers walking across the area where the fall occurred in the 10 minutes before the incident. The CCTV also showed the plaintiff herself walking in the area of her fall seconds before it occurred. There was no indication in the CCTV of water being on the ground before the fall. The plaintiff and her mother testified that they had each seen skid marks on the floor after the fall. Justice Basten, with whom the other members of the Court of Appeal agreed, said “*A finding of fact essential to a conclusion as to liability must be established on the balance of probabilities and not merely by guesswork or speculation where the evidence is effectively silent, as explained by Dixon CJ in Jones v Dunkel*” (see [17]). His Honour held that the plaintiff’s evidence of skid marks alone did not establish more than the possibility of water on the floor before the fall and that the Court could not be satisfied on the balance of probabilities that there was water present before her fall. Accordingly the plaintiff failed in her action.

#### **2. Witnesses evidence**

*Nominal Defendant v Mokbel (2015) NSWCA 3 –*

This case represents a triumph for the legal profession. The plaintiff suffered injury in a motor accident that occurred on 5 June 2000. He was driving along Stacey Street Bankstown when his vehicle left the road and collided with a power pole. He alleged an unidentified vehicle forced him to lose control of his vehicle. The trial judge found for the plaintiff but assessed contributory negligence at 30%.

The plaintiff was initially prosecuted by the police for a driving offence arising out of the accident. The plaintiff’s claim for damages was initially heard by Judge Levy but his decision was overturned on appeal. The re-trial before Judge Sorby was aborted and Judge Norton finally heard and determined the matter. Her decision was subject to the appeal. The earlier trials meant there was a transcript of the evidence of witnesses that had been called

on each occasion. There were 3 witnesses, one a youth of about 16 years who was a friend of the plaintiff, and the other 2 were independent witnesses. The plaintiff's friend was certain that another vehicle that could not be identified had caused the plaintiff to lose control of his vehicle. His evidence was challenged by the Nominal Defendant on the basis he had initially told the police that there was no other vehicle involved in the accident; that he had changed his name on a number of occasions which he had failed to reveal in his evidence; he had had 2 convictions for dishonesty and had falsely applied for a credit card. Further his evidence at the final hearing was inconsistent with the evidence he had given in the earlier trials. One of the other independent witnesses was certain that there was no other car involved in the incident. She had maintained that at the earlier trials and again at the final hearing. The 3<sup>rd</sup> witness had informed the police that he had no idea what caused the accident but that he did not consider another vehicle was involved. His evidence was consistent at trial. Her Honour accepted the plaintiff's claim that an unidentified vehicle had forced him off the road. The Court of Appeal said the only way Her Honour could have reached that conclusion was if she rejected the evidence of the other 2 witnesses each of whom supported the other (and also she had to reject the accident reconstruction expert). The Court held it could not be satisfied on the balance of probabilities that an unidentified vehicle was involved in the incident.

#### **DUTY OF CARE OWED BY HEAD CONTRACTOR TO SUBCONTRACTOR AND APPORTIONMENT OF LIABILITY**

*Central Darling Shire Council v Greeney (2015) NSWCA 51 –*

The plaintiff, Mr Greeney, was employed by Greg Wilkins Industries Pty Ltd to carry out road works for the Council in a remote area of NSW. His employer provided him with 3 vehicles. When it came time to move his worksite he coupled the vehicles together. One of the vehicles was a fuel tanker and on the day of the accident he was attempting to couple it to a caravan. The only person present on site with the plaintiff was a Mr Hocking who was employed by the Council. He was aware of the practice of coupling the vehicles together and in fact he directed the plaintiff to move the vehicles in that manner. The fuel tanker was meant to stand on a front jockey wheel but it had been missing for about 12 months. He had complained to his employer about the missing wheel but nothing had been done to rectify it. On the day of his accident the plaintiff was trying to move the fuel tanker when it struck a rock that resulted in the plaintiff losing control of the tanker and having to try and hold the full weight of it to stop it falling. He suffered injury to his low back.

The Court of Appeal noted that had the plaintiff been employed by the Council it would have owed him a non-delegable duty of care that included "*devising a method of operation for the performance of the task that eliminated the risk, or by the provision of adequate safeguards*" ([26]). However it said "*The law does not however impose a duty of that type upon a principal in favour of independent contractors or employees of independent contractors such as Mr Greeney*". The Court referred to *Leighton Contractors Pty Ltd v Fox*

(2009) 240 CLR 1 and to *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and in particular the observations of Justice Brennan at 47-48 where His Honour said:

*“An entrepreneur who organizes an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organizing the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur’s duty arises simply because he is creating the risk (Sutherland Shire Council v Heyman)... and his duty is more limited than the duty owed by the employer to an employee. The duty to use reasonable care in organising an activity does not impose a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury”.*

The Court referred with approval to the statement by Basten JA in *Sydney Water Corporation v Abramovic* (2007) NSWCA 248 where His Honour stated factors potentially relevant to determining whether a principal owed a relevant duty of care to an employee of a subcontractor they being:

1. the principal directs the manner of performance of the work;
2. the work requires the co-ordination of activities of different contractors
3. the principal has or ought to have knowledge of the risk and the employer does not and cannot reasonably be expected to have such knowledge
4. the principal has the means to alleviate the risk and the employer cannot reasonably be expected to do so
5. although the employer has or should have the relevant knowledge and can be expected reasonably to take steps to alleviate the risk, it does not, to the knowledge of the principal

In *Wooby v Australian Postal Corporation* (2013) NSECA 183 Basten JA emphasised that that list was a non-exhaustive list. In that case His Honour emphasised the importance of the *“degree of control in fact exercised by the principal”* as against the mere existence of a right to exercise a degree of control.

In the Greeney case Hocking directed Greeney to move camp knowing that the jockey wheel on the fuel tanker was defective.

In dealing with considering S.5B Civil Liability Act (“CLA”) His Honour said it was unnecessary *“for the plaintiff to show the precise manner in which his injuries were sustained”* but rather all that was necessary was to show there was a prospect of injury arising from the defective fuel tanker.

The Council was found to owe a duty to the plaintiff because:

1. Hocking exercised control over the plaintiff

2. The plaintiff was vulnerable because he had no choice but to obey Hocking's direction
3. it was reasonably foreseeable that if the foreseeable risk eventuated that the plaintiff might suffer injury
4. it could be inferred that the method of changing camp adopted was to the Council's financial advantage as by coupling the vehicles together it would save time in moving camp.

In determining causation with the terms of SD of the CLA His Honour approached it by asking:

*"If the negligence had not occurred, and the direction had therefore not been given, the incident and injury in question would have been avoided. The Council's negligence was thus a 'necessary condition of the harm' and there is no reason why, in accordance with S.5D(1)(b), its liability should not extend to the harm so caused..."*

He further said the *"To establish causation where negligence is constituted by an omission, it is necessary for the plaintiff to prove, on the balance of probabilities, that had the omission not occurred the plaintiff's injury would have been avoided or lessened"*. In determining this the enquiry is concerned with *"probabilities"* and therefore it was more probably than not that the presence of the missing wheel on the fuel tanker would have removed what was a low risk of harm.

On the question of apportionment of liability the trial judge had found the Council 60% responsible and the employer 40%. The Court of Appeal referred to *Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALJR* where it was said:

*"The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man... and the relative importance of the acts of the parties in causing the damage...It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination"*.

The Court said it was appropriate for appellant courts to restrain from disturbing *"the evaluative determination of primary decision makers"* because the apportionment decision relates to questions of *"proportion...balance and relative emphasis, and of weighing different considerations"* all of which involve an individual choice or discretion. Hence appeals on apportionment are difficult to mount.

### **PATIENT'S CONSENT, ASSAULT AND BATTERY AND EXEMPLARY/PUNITIVE DAMAGES**

*White v Johnston (2015) NSWCA 18 –*

The plaintiff, Ms White, had consulted Jasmine White, a former dentist, for dental treatment and over a 6 month period she alleged she had seen the dentist on 28 occasions

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and had undergone 102 dental procedures. Ms White was entitled to a pension from the Department of Veterans Affairs and that department met the cost of the dental treatment. Part of the dental treatment provided included building up Ms White's lower teeth however the effect of doing so was to cause cracking in her upper dental plate due to the fact the teeth had been overbuilt.

The trial judge found the dental work was totally unnecessary and had been carried out to obtain money from the Department. The trial judge concluded the patient had not given a valid consent to the dental work and therefore the dentist had carried out an assault on the patient. He entered a verdict for the plaintiff which included an amount for exemplary damages (\$150,000).

Whilst the pleading alleged the dental work constituted a trespass and an assault there was no pleaded claim for aggravated or exemplary damages.

It seems the trial judge was influenced by "tendency evidence" admitted showing Dr White had, in the past, billed for work she did not perform.

The Court said that "*The general principle of the common law is that non-consensual medical treatment involves an assault, thus constituting both a criminal offence and a tort*". Consent can be oral, expressed or implied (see [55-56]). The Court said that generally defects in obtaining consent went to negligence rather than to establishing assault and battery (see also *Rogers v Whitaker* (1992) 175 CLR 479 at 490). However consent obtained by fraud is but one example of where the consent may be vitiated. Therefore consent obtained fraudulently in order to obtain a non-therapeutic purpose (such as fees) is to be contrasted with consent obtained through a failure to properly inform a patient on the procedure. The Court said that a patient's consent may be vitiated where it was obtained solely for non-therapeutic purposes (noting that most medical practitioners went to work in part to earn income).

There seems to be two schools of thought in the Court of Appeal as to whether "non-therapeutic" purpose is sufficient to vitiate consent. One school of thought is that it is sufficient if the treatment was not capable of constituting a therapeutic response to the patient's condition (per Beazley P and Basten JA in *Dean V Phung* (2012) NSWCA 223). The competing view is that for consent to be vitiated the treatment must not only be non-therapeutic but the practitioner must be shown to have acted fraudulently (with intent or with reckless indifference) (per MacFarlan JA in *Dean's case*). In *White* the Court did not resolve this issue.

In contrast to the facts in *Dean V Phung* where the Court found the treatment provided was unnecessary and unwarranted the Court found in *White's case* that some of the dental work (fillings and building up of teeth) was therapeutic and necessary. It followed that the Court found the findings of the trial judge that underpinned his conclusion the plaintiff's consent was invalid were not supported as all the dental work was not "wholly" unnecessary and not done "exclusively" for non-therapeutic purposes.

The Court considered the application of S.3B CLA which provides in (1)(a) for the CLA not to apply in respect to an intentional act done by a person with intent to cause injury or death. The important words of the section the Court focused upon were “intentional act” done with “intent to cause harm”. It is not necessary in proving assault and battery to show the defendant intended to injure the plaintiff (see *Cowell v Corrective Services Commission of New South Wales (1988) 13 NSWLR 714 at 743*). In an assault and battery the act must be intentional but there does not have to be an intent to cause injury. In the White case the Court found no evidence that the dentist intended to cause injury to the plaintiff and therefore the exclusion of the CLA did not apply. Because the CLA did apply to the plaintiff’s case the Court could not award exemplary, punitive or aggravated damages (see S.21 CLA). Therefore the trial judge’s award of exemplary damages had to be set aside. The Court said that the “*objectives of punishment, deterrence and condemnation which inform an award of exemplary damages are distinct from the considerations applicable to compensatory damages*”. Further the Court said that compensatory damages should be determined before deciding whether or not exemplary damages were warranted and, if so, the amount (see [146]).

In considering the assessment of exemplary damages the Court pointed to factors relevant to such an assessment being:

1. The extent of the damage sustained by the victim.
2. The culpability of the offender. In Dean the evidence was the treatment provided was “*inexcusably bad and completely outside the bounds of what any reputable dental practitioner might prescribe or perform*”.
3. The continued practice of the offender. In Dean the dentist was still practicing whereas White has ceased to practice.
4. The defendant’s financial situation. In White there was evidence she was impecunious and in fact she represented herself at trial.

### **DAMAGES IN TORT V DAMAGES UNDER THE TRADE PRACTICES LEGISLATION**

*Perisher Blue Pty Ltd v Nair-Smith (2015) NSWCA 90 –*

The appellant operated a ski field at Perisher. Dr Nair-Smith and her family were skiing there in July 2003 when she suffered injury when boarding a chair forming part of the appellant’s chairlift. She sued claiming damages pursuant to the Civil Liability Act and also sued for breach of S.74 Trade Practices Legislation. The trial judge found for the plaintiff and assessed damages both under the CLA and at common law (on the basis of a breach of S.74). CLA damages were assessed at \$411,956.81 and common law damages were assessed at \$1,192,597.50. The trial judge entered judgment in the sum of \$1,368,700.00 which represented the common law damages plus interest.

The chairlift comprised a series of chairs each suspended from an overhead cable that ran around a “bullwheel” at the top and bottom of the chair station. Each chair was capable of

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carrying 3 persons. The skiers intending to take a chair had to position themselves at the loading point to enable them to sit down on the chair after it passed around the bullwheel. Each chair was fitted with armrests and a safety bar. The safety bar had to be raised to allow passengers to join the chair. On the day of accident the plaintiff, with 2 friends, waited to join a chair and as one approached she noted the safety bar was down. Seeing the bar down the plaintiff called to the defendant's operator who was standing nearby to raise the bar. He did so but in circumstances where either the plaintiff or the chair got out of alignment so that the armrest on the chair came into contact with the plaintiff causing her injury. The Court found the chair itself had not gone out of alignment but rather the plaintiff had moved her position as the chair approached and thereby the chair came into contact with her.

The Court of Appeal dealt with multiple issues including the identification of the relevant "risk of harm" within the terms of the CLA. The Court said that "*Under the general law relating to the tort of negligence it is well established that it is unnecessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable*" (quoting *Chapman v Hearse* (1961) 106 CLR 112 at 120-121 – see [100]). Further the Court said it was equally unnecessary to determine the precise source of the plaintiff's potential injuries when identifying the relevant risk for the purpose of determining negligence under the CLA. In identifying the risk of injury the Court said it was "*that a skier might sustain injury as a result of his or her reaction to the manner in which a lift operator responds to a down bar situation. There is a foreseeable and not insignificant risk of chairs arriving at the loading station with their safety bars down. This presents a risk of physical injury because of the potential for such chairs to collide with skiers waiting at the load point*" ([104]).

In determining breach of duty the Court said "*In order to identify whether a breach of duty has occurred one has to identify 'with some precision, what a reasonable person in the position of the defendant would do by way of response to the reasonably foreseeable risk'*" (quoting *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540). The trial judge found that the defendant's lift operator had not been standing where he ought to have stood at the time the chair arrived for the plaintiff. The Court of Appeal did not disturb that finding.

The difficulty for the plaintiff was in proving the lift operator could have raised the bar earlier had he noticed it sooner. The evidence disclosed that there was only seconds between the chair arriving at the loading platform and the injury occurring. The Court identified the issue as "*What is not explained is how action earlier than that in fact taken would have avoided some risk that was presented by the circumstances that in fact pertained – or, to put this another way, how some reasonable precaution that was not operative in the events that happened would have been operative if Mr Lofberg had realised at an earlier time that the bar was down*" ([134])."

The Court of Appeal found the lift operator had breached his duty in not standing where he could direct his attention to the incoming chair earlier than he in fact did.

The Court then went on to determine causation within the terms of S.5D CLA. The Court said that *“Causation is concerned with whether the injuries for which a plaintiff seeks damages are referable to the breach of the defendant’s duty of care”* (see [149]). Further it said the plaintiff had the onus of proving the delay in observing the bar was down produced panic or apprehension in the plaintiff that caused her to move out of the correct position and alignment such that she was struck by the chair. The Court found the plaintiff had not proven that point and therefore the appeal was determined against the plaintiff.

On the question of damages Perisher argued it was not subject to S.74 of the Trade Practices Act (which section implied a warranty into a contract for services that the services will be provided with *“due care and skill”*) because of the terms of the exclusion clause printed on the back of the ticket provided to the plaintiff. S.68 of the Trade Practices Act provides that any term of a contract that excludes, restricts or modifies certain parts of the Act (including S.74) is void. Perisher said that S.68 did not apply because S.68B of the Act permitted exclusionary terms in a contract for the supply of *“recreational services”*. The trial judge found S.68B did not apply because the service of *“suppling”* the chairlift was not the supply of recreational services but rather was only the provision of transport services up the ski slope and between ski slopes.

Perisher raised several other grounds to support its contention that S.74 did not apply however each was rejected. The end result was that had the plaintiff succeeded in her claim she would have been entitled to damages as assessed at common law and not restricted by the operation of the CLA because of the operation of the Trade Practices Act.

### **ASSAULT ON HOTEL PREMISES – WHETHER CCTV NECESSARY**

*Tilden v Gregg (2015) NSWCA 164 –*

Tilden and Gregg knew each other before the day of the incident. Both were members of a darts club and there had been an ongoing dispute between both men over a period of time regarding the loss of funds from the club. On the day of the accident both men were at the Ettalong Memorial Bowling Club and during their time there both men had been verbally abusive to each other. At one point the plaintiff said to the defendant *“just fuck off Rolly. I’ve had enough. Go away”*. The defendant then stood up and the plaintiff thought the defendant was going to approach him so he also stood up. Further words were exchanged and then the plaintiff said to the defendant *“You only hit disabled people or women”*. With that the defendant hit the plaintiff causing him to fall down.

The evidence showed that Gregg had been argumentative before the day in question but it was insufficient to support a finding the club ought to have taken disciplinary action against Gregg or that Gregg was known to be aggressive or violent.

At trial the plaintiff succeeded against Gregg but failed in his action the club and he appealed against that decision.

The Court of Appeal said that *“Whilst it can be accepted that in some circumstances the exercise of reasonable care may require that the occupier of licensed premises inform its staff of some specific concern about a patron based on his or her past behaviour, the evidence in the present case is not shown to have required such action”* (see [24]).

S.5D CLA provides in respect to causation. It provides that a plaintiff must establish on the balance of probabilities that but for the defendant’s negligence, the harm suffered would not have occurred (see [29]). The Court held that more frequent patrols of the area would not have identified anything that would have led a reasonable person to believe Gregg was to hit Tilden. The Court found the appellant’s case was no higher than more inspections “might” have resulted in a staff member intervening. That was insufficient to discharge the onus on the plaintiff. The Court also found that the provision of CCTV “might” have deterred conduct like that displayed by Gregg but that did not discharge the plaintiff’s obligation to establish that fact on the balance of probabilities.

### **ALCOHOL AND CONTRIBUTORY NEGLIGENCE**

*Solomons v Pallier (2015) NSWCA 266 –*

The plaintiff was a 16 year old boy who suffered significant injuries when the vehicle he was travelling in left the road and struck a concrete culvert causing the car to rotate and roll. He was thrown from the vehicle and he sustained a brain injury.

The plaintiff knew the driver had been drinking and that his ability to drive was impaired by reason of being intoxicated. The driver held a P plate license and therefore his blood alcohol level ought to have been zero. Further there was evidence the driver deliberately drove the vehicle off the road to scare the boys sitting in the back of the vehicle.

The trial judge found that whilst the plaintiff knew the driver had been drinking he did not know he had drunk to excess. He made no finding of contributory negligence.

The Court of Appeal said in determining whether the plaintiff’s conduct contributed to his injuries it was necessary for the court to apply S.5R Civil Liability Act. In *Joslyn v Berryman (2003) 214 CLR 552* McHugh J said:

*“...whether an ordinary reasonable person – a sober person – would have foreseen that accepting a lift from the intoxicated driver was exposing him or her to a risk of injury by reason of the driver’s intoxication. If a reasonable person would know that he or she was exposed to a risk of injury in accepting a lift from an intoxicated driver, an intoxicated passenger who is sober enough to enter the car voluntarily is guilty of contributory negligence. The relevant conduct is accepting a lift from a person whose driving capacity is known, or could reasonably be found, to be impaired by reason of intoxication.”*

Whether the plaintiff had been contributorily negligent by failing to reject the defendant’s offer of a lift was to be determined by looking at the situation prospectively. The Court said:

*“Here the risk which presented itself was the risk of injury as a result of travelling in a vehicle with a mildly intoxicated driver. From the perspective of a reasonable person in the respondent’s position, that risk fell to be considered as a whole. It could not be dissected into the risk of the appellant driving carelessly and the risk of his doing so deliberately and dangerously, if in each case the risk was a result of his intoxication. Also, as Macfarlan JA observed in Shaw v Thomas [2010] NSWCA 169 at [43], neither under the general law nor under s 5B is it necessary to formulate the risk of harm, for the purpose of inquiring whether it was reasonably foreseeable and not insignificant, by reference to the precise manner in which the injuries were sustained.”*

The trial judge fell into error by considering the risk of harm was the risk the driver would deliberately drive off the road. The Court of Appeal said His Honour had erred in too narrowly formulating the risk of harm and that the proper analysis of the risk was that the plaintiff may suffer injury by travelling in a vehicle driven by an intoxicated driver. The Court of Appeal assessed contributory negligence at 10%.

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