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THE YEAR IN REVIEW – 2018

I have selected a number of cases from 2018 with all but two being decisions of the NSW Court of Appeal. One exception is a decision of the High Court and the other is a decision of the NSW Supreme Court.

The topics I will cover are:

1. Insurance – construction of policy terms
2. Medical negligence – application of S.5O Civil Liability Act
3. Worker's Compensation – extension of time – S.151D Worker's Compensation Act
4. Occupier's Liability – S.5B and 5D Civil Liability Act
5. Professional negligence – Assessing damages for loss of opportunity
6. Damages – Assessing present value of a future loss
7. Competition and Consumer Law – Liability and assessing damages
8. Application for leave to appeal
9. Exemplary damages and the Civil Liability Act
10. Civil Liability (Third Party Claims Against Insures) Act 2017

1. Insurance – construction of policy terms

Pacific International Insurance Co Ltd v Walsh (2018) NSWCA

Ms Doosey and her daughter, sued Complete Building Inspection

Services Pty Ltd (Complete) and its principal, Mr Walsh, for negligence in respect to a building inspection report provided by them on a property purchased by Ms Doosey. Complete and Walsh cross claimed against Pacific, the insurer, claiming an indemnity under a policy of insurance issued by Pacific.

Prior to Ms Doosey purchasing the home in December 2014, she arranged for Complete to undertake a building inspection and to report on the condition of the home. Walsh provided the report in which he stated the timber verandah appeared to be secure and structurally adequate.

On 17 December 2014, Ms Doosey was working in her garden while her 7-year-old daughter, Evangeline, was playing with friends on the verandah. One of Evangeline's friends came to Ms Doosey to report Evangeline had fall from the verandah. Ms Doosey ran to her daughter and found she had fallen 2.5m onto a concrete path. Ultimately Ms Doosey commenced two actions, one claiming damages for her nervous shock and one, claiming damages, on behalf of Evangeline. The defendant's, Complete and Walsh, joined the insurer because it had denied indemnity under the policy of insurance. All actions came on for hearing with only liability being determined in Evangeline's action.

The insurer had issued two separate policies, one being a General & Public Liability policy and the other being a Professional Indemnity policy. Both were current at the time of the incident.

The Professional Indemnity policy contained an exclusion that excluded liability for any claim in any way connected with personal injury or property damage. The Public Liability policy contained an exclusion that excluded liability for any claim in any way connected with the provision of any professional advice or services or advice given in any way

connected with Professional Liability/Business Activities. The effect of the endorsements meant the insured was not covered if it produced a negligent Building Inspection that caused damage or personal injury however, the very business of the insured was to produce Building Inspection reports.

The Court of Appeal upheld the trial judge's finding that the reference in the exclusion clause to "*any professional advice or service*" was to be read as extending to professional advice other than activities required for the Business Activities.

Leeming JA noted that "*From the perspective of an insured, the possibility of liability for personal injury or property damage was a central component of the risk against which insurance has been taken*". Further, His Honour said *"...Pacific permitted its insured to hold out that it had granted professional indemnity cover in the amount of $1,000,000 and general and public liability cover in the amount of $5,000,000. It would be troubling if, on a proper construction of the insurance cover, the $5,000,000 cover was not available whenever a building inspection report contained negligent advice which caused personal injury or physical dam*age" (see [83] and [84]).

Justice White held that to read the policy terms as propounded by the insurer would leave the policy with no work to do and that the cover provided was therefore very limited in its scope (see [88]).

Macfarlan JA referred to what Kiby P said in *Legal & General Insurance Australia Ltd v Eather (1986) 6 NSWLR 390* where His Honour said "*If one construction strikes fundamentally at the purpose of the policy, which is to spread the risk insured against, whilst another construction that is reasonably available would effect that purpose, the latter will be*

preferred…" Macfarlan JA also referred to what McHugh J said in the same case "*It would defeat the commercial purpose of the contract of indemnity if the wording of the condition operated so as to take away an important part of the basis of the indemnity itself*". Justice Macfarlane determined the exclusion clause ought to be read down so as not to exclude liability for injury or damage resulting from third parties relying on advice or services provided by the insured (see [4]).

All three judges limited the operation of the exclusion clauses to give effect to avoid ambiguity and to give effect to the intent of the insured in obtaining insurance.

2. Medical negligence – application of S.5O Civil Liability Act

South Western Sydney Local Health District v Gould (2018) NSWCA 69

S.5O Civil Liability Act (CLA) provides:

> *(1) A person practicing a profession…does not incur liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.*
>
> *(2) However, peer professional opinion cannot be relied on for the purpose of this section if the court considers that the opinion was irrational.*
>
> *(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purpose of this section*
>
> *(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.*

The case concerned a young boy, then aged 8, who presented to Campbelltown Hospital with an open fracture of his thumb which occurred when he slipped whilst running on wet cement. After being treated with antibiotics at Campbelltown Hospital he was transferred to Liverpool Hospital. He was given antibiotics at Liverpool Hospital but was not operated on until the following day. After discharge from hospital gangrene developed in his thumb and it was later amputated. The case concerned whether the Liverpool Hospital ought to have treated the boy with additional antibiotics when his operation was to be delayed.

In its defence, the defendant pleaded S.5B, 5D and 5O of the Civil Liability Act (CLA). In respect to the S.5O pleading the defendant claimed the treatment provided by the Liverpool Hospital meant it had acted in a manner "*widely accepted in Australia by peer professional opinion as competent professional practice*". Of significance, the plaintiff did not file a reply to that pleading.

Justice Leeming JA noted the following propositions were uncontroversial:

1. It is settled law that the defendant bears the onus of establishing the elements of S.5O
2. In conformity with S.5O (3) there may be inconsistent bodies of peer professional opinion each of which is widely accepted within Australia.
3. In conformity with S.5O (4) the peer professional opinion may be widely accepted without being universally accepted
4. If S.5O (2) is made out then the defendant is not liable in negligence.
5. If the court determines the opinion is irrational, then the section

does not apply

6. By reason of the fact that S.5O (3) and (4) envisage competing peer professional opinion, one of those competing opinions cannot be irrational merely because a body of peers does not share the opinion.

In the case, four doctors gave evidence being; Associate Professor Raftos, Dr Mansour, Associate Professor Gatus and Dr Haertsch. Drs Gatus and Haertsch were called by the defendant. The trial judge held the opinions expressed by Drs Gatus and Haertsch (the defendant's qualified doctors) to be irrational and therefore, determined S.5O was not engaged.

Interestingly, at trial, the plaintiff made no submissions on S.5O (2) and it was not raised by His Honour despite communicating with the parties after judgment was reserved. The Court of Appeal considered the finding, by the trial judge, that the evidence of Dr Haertsch was irrational, would have come as a complete surprise to both parties given the issue was not raised by His Honour earlier.

Professor Gatus said that at the time of injury the Australian publication on antibiotics did not recommend the administration of alternate antibiotics in the circumstances of this case and he gave further reasons for his opinion.

It was not put to either of the defendant doctors that their opinion was irrational. The trial judge appeared to determine the evidence of both defendant doctors to be irrational on the basis that he favoured the evidence of the plaintiff's experts over the defendants.

At a preliminary level Justice Leeming held that if the plaintiff wanted to contend the defendant's expert evidence was irrational within the meaning of S.5O (2) the plaintiff should have filed a reply to the defence raising, in the reply, a pleading that the defendant's expert evidence was irrational. Justice Leeming held that as S.5O (2) was not pleaded by the plaintiff, was not mentioned throughout the trial and it was not put to any of the defendant's experts that their opinion was irrational therefore, the trial judge was wrong to reject the evidence of the defendant's doctors as being irrational.

Further, Justice Leeming held that even if the trial judge had been procedurally fair, his test of irrationality under S.5O (2) was wrong. Without giving reasons for so deciding the trial judge held irrational meant "*illogical, unreasonable or based on irrelevant considerations*". Further, the trial judge then substituted "*unreasonable"* for "*irrational*" saying that "*unreasonable*" meant "*without sound or logical reasons, or not endowed or guided by reason*". The trial judge took that meaning from a dictionary.

Justice Leeming said that the legal meaning of statutory terms was rarely assisted by dictionary definitions ([78]). The task of the court is to "*identify, from text, context and purpose, the particular meaning that a statutory provision bears…It must be borne in mind that the meaning of any word used in a statute depends on the context and purpose of the legislation in which it appears*" ([79]).

His Honour held that S.5O must be read as a whole and that S.5O (2) must be read with subsections (3) and (4). Further, the section

envisages there may be "*more than one widely held body of peer professional opinion, each inconsistent with the other, but none of which is necessarily irrational. Adherence to any of those bodies of peer professional opinion – so long as it is widely accepted in Australia – would render a professional defendant not liable"* (see [85]). He went on to say the test of irrationality imposed under S.5O is distinct from the test of admissibility. He said "…*it is a seriously pejorative and exceptional thing to find that a professional person has expressed an opinion that is "irrational" and even more exceptional if the opinion be widely held. To consider a body of opinion to be "irrational" is a stronger conclusion than merely disagreeing with it, or preferring a competing body of peer professional opinion"*.

Justice Leeming considered both bodies of medical opinion were not "*irrational*". Therefore, the defendant had established that there was a practice which was widely accepted in Australia by peer professional opinion as competent thus making out its S.5O (1). As the plaintiff had not established that that body of opinion was "*irrational*" within the terms of S.5O (2), the defendant's defence was upheld.

In order to succeed, the defendant must prove the elements of S.5O (1) namely, that the defendant was practicing as a profession and in a manner that…was widely accepted in Australia by peer professional opinion as competent professional practice. If the defendant proves those elements then S.5O (1) is satisfied and if not, then S.5B and 5C apply. The plaintiff carries to onus of proving the opinion is irrational.

Justice Basten said that "irrational" in the S.5O sense was to be read as meaning that the court can see no "*process of logical reasoning by which the decision could be reached*" ([4]). His Honour went on to say "*It will only be if the court can, on the evidence, be satisfied that there is no rational basis for it that it can properly be rejected*" ([7]).

3. Worker's Compensation – extension of time – S.151D

Gower v State of New South Wales (2018) NSWCA 132

In this case Gower was a casual teacher employed by the defendant at West Wallsend High School when, on 12 September 2003, he was struck on the head by a soccer ball thrown by a student. The blow broke his nose for which he required surgery. Gower also developed a major depressive disorder. On 13 May 2014, more than 10 years after the incident, a medical panel established under S.328 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) issued a medical certificate in which it assessed Gower's permanent impairment at 15%, thereby entitling him to bring a Work Injury Damages claim. On 23 March 2016, less than 2 years after the certificate issued, Gower issued proceedings for damages.

S.151D Worker's Compensation Act provides:

> (2) A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect to the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received except with leave of the court in which the proceedings are to be taken.

The plaintiff filed a motion seeking leave to commence proceedings and

the defendant applied to have the proceedings dismissed. The matter came before Judge Gibson DCJ who dismissed the plaintiff's claim on the following basis:

1. The plaintiff had been advised of the limitation period and had deliberately allowed it to expire
2. The plaintiff had not provided a full and satisfactory explanation for the delay and, the explanation provided was not persuasive.
3. The plaintiff's case was very weak which mitigated against leave.
4. There was evidence of actual prejudice in that witnesses and documents were no longer available.

The three judges of appeal differed on the basis for their decision but the majority agreed the appeal should be dismissed. Justices White and Simpson each considered the judge had acted on a wrong principle in determining the case and found it was not unreasonable for the plaintiff to wait until he had reached 15% before commencing action. Justice Basten disagreed. Justice White said that whilst the claim was weak it should not be dismissed summarily. Justice Simpson said the judge was correct to take into account the weakness of the case but that alone did not justify dismissal. As to prejudice, Justice White found the defendant's evidence only established prejudice in respect to one witness. Justice Simpson found no actual prejudice. Justice Basten found no error in the trial judges reasoning or orders. On the issue of whether the court should exercise its discretion in favour of the plaintiff

Justice White held the weakness of the case, the prejudice caused by the delay and the absence of any earlier notice to the defendant justified refusing the order sought by the plaintiff. Accordingly, Justices Basten and White dismissed the appeal and the plaintiff's case was dismissed.

S.322 WIMA (Workplace Injury Management Act) provides for the assessment of the degree of permanent impairment of an injured worker for the purpose of the Worker's Compensation Act. It provides in subsection 4 for an approved medical specialist to decline to make an assessment of the degree of permanent impairment until the assessor is satisfied the impairment is permanent and that the degree of impairment is fully ascertainable.

S.254 WIMA provides that no compensation or work injury damages are recoverable until the injured worker has given notice of the injury to his employer as soon as possible.

S.151DA WC Act provides for time not to run under S.151D whilst a medical dispute as to whether the degree of permanent impairment is at least 15% is fully ascertainable and has been referred for determination by the Commission or referred for assessment under WIMA.

Justice Basten said the plaintiff had assumed he could not commence proceedings until his permanent impairment was assessed at 15% or more. The plaintiff said that that process could not occur until his degree of permanent impairment was fully ascertainable. Basten JA noted the plaintiff had to first give notice to his employer under S254 and then had to take the second step of making a claim. The plaintiff

had not given notice under S.254 WIMA until 2 September 2014, almost 11 years after the injury.

Basten JA said a determination of permanent impairment could not occur until a claim had been made, a dispute identified and a dispute referred for medial assessment. Where the degree of permanent impairment could not be determined in the opinion of the medical specialist then the claim remained on foot – time did not run by reason of S.151DA.

4. Occupier's Liability – S.5B and S.5D Civil Liability Act

Bunnings Group Ltd v Giudice (2018) NSWCA 144

The case involved an appeal from the decision of Judge Wilson DCJ, who delivered judgment for the plaintiff and found 20% contributory negligence. The appeal was only as to primary liability.

The plaintiff had taken her grandson to Bunnings and had left him in a play area whilst she inspected furniture. The play area was within a gated/fenced area. The floor surface of the play area was covered with a shock-absorbent matting. The matting surface of the play area was slightly higher than the surrounding concrete floor. At the junction of the matting and concrete floor there was a slight "*lip*" but that was of no consequence. Once inside the play area the height of the matting increased over a distance and the plaintiff alleged that as she walked over the matting it continued to incline as she walked from the gate and that she tripped on the inclined surface.

At the edge of the matting there was a broad yellow painted line clearly delineating the end of the concrete floor and the beginning of the play area and matting. When the gate was closed the yellow line was under the bottom edge of the gate and was less easily seen. There were also prominent yellow hatched lines on the concrete floor leading up to the gate.

The plaintiff said in her evidence that she did not see any warning and that she "*just opened the gate and stepped. As I stepped, I just tripped, tripped and fell on my right wrist…*"

The defendant called evidence to say that in the preceding 4 years there had not been any other person fall in the area where the plaintiff fell.

The Court of Appeal determined that the height differential was about 2 inches along the inclined slope of the safety matting adjacent to the gate (see [20]).

The Court of Appeal identified the risk of harm as required by S.5B as being - that the plaintiff may fall due to the surface at the entry to the play area.

The Court of Appeal stated that S.5B (1) (a) and (b) CLA are directed to the risk of harm whereas S.5B (1) (c) is directed to precautions, the failure to take which is alleged to be a breach of duty. S.5B (1) (c) states a person is not negligent in failing to take precautions unless a "*reasonable person in the person's position would have taken those precautions*". It is for the plaintiff to prove not merely that there were precautions available to address the risk, but also that a reasonable

person in the defendant's position would have taken those precautions. "*The onus of demonstrating that rests with the plaintiff, whose action must fail if this cannot be shown*" (see [34]). Further, the court said the finding on S.5B (1) (c) that the defendant would have taken those precautions is only to be made after the court has considered each of the matters in S.5B (2). The matters to be considered under S.5B (2) include:

1. The probability that the harm would occur if care were not taken
2. The likely seriousness of the harm
3. The burden of taking precautions to avoid the harm
4. The social utility of the activity that creates the risk of harm

One of the matters to be considered by S.5B (2) is the cost of taking the step/s that are said ought to have been taken. In this case there was no evidence as to the cost of levelling the floor so that the matted area would be on the same level as the surrounding concrete floor. Further, there was no evidence as to whether Bunnings could take that step or that council would have permitted it. The trial judge failed to consider the four elements stated in S.5B (2) before turning to a consideration of S.5B (1) (c).

In respect to S.5D dealing with causation, the defendant had a sign on the gate that read "*Watch your step*" and brightly painted markings on the floor. The trial judge accepted the plaintiff's evidence that she did not see the sign or the markings however, the Court of Appeal held it was "*for the plaintiff to show, positively and to the civil standard of proof, that if the precaution had been taken, then the injury would not*

have been suffered". The plaintiff accepted that as she did not see the markings on the floor or the sign on the gate, she would most likely not have seen a warning sign on the inclined surface if it had been there. Therefore, the plaintiff could not show that if a sign had been on the raised surface the plaintiff would have avoided the injury.

The court of appeal also considered the risk of harm was not insignificant within the terms of S.5B (1) noting the following:

1. It was obvious the floor in the play area was raised
2. It was obvious the floor in the play area was different to the surrounding floor area
3. No person had fallen before the plaintiff in the play area
4. Up to 10 children used the play area every day
5. The floor surface was designed to protect persons who may fall
6. A person stopping to open the gate was less likely to suffer serious injury if that person fell than if he/she was moving faster.

For those reasons the court determined the risk of harm was insignificant. The Court concluded that a reasonable person in the position of Bunnings would not have done more than it had already done and therefore the plaintiff failed in her case.

5. Professional Liability – assessing loss of opportunity

Gulic v Angelovski (2018) NSWCA 161

On 2 February 2004 the plaintiff was injured in a motor accident and, in August 2013, commenced proceedings against two firms of solicitors alleging each was negligent in failing to institute proceedings with the

limitation period against the responsible driver. His case proceeded before Judge Gibb who dismissed the claim against one solicitor and found the second solicitor liable as that solicitor had admitted breach of duty of care. The sole question before the trial judge really was the value of the chance the appellant lost by reason of that solicitor not instigating proceedings in time. The plaintiff was not entitled to non-economic loss and his claim was limited to economic loss/loss of earning capacity and domestic assistance.

The plaintiff had been involved in three prior accident; one in 1998, one in 2002 and the other in 2003 when he fell from a roof. It was common ground that he was wholly disabled to work as a brick cleaner because of his 2004 motor accident.

In relation to his claim for economic loss the plaintiff claimed that in the three months before the 2004 motor accident, he had been employed as a contract brick cleaner working for Mr Djakovic earning $1,000 per week.

The plaintiff relied only on his evidence and that of his son who gave evidence on domestic assistance. However, the plaintiff's son was only aged between 11 and 13 at the relevant time.

The plaintiff did not call Mr Djakovic at hearing, but the defendant did call him. In evidence, Mr Djakovic said he had never offered the plaintiff employment and that the plaintiff had instructed him to write the letter that was tendered by the plaintiff.

The trial judge found the plaintiff was a dishonest person who should not be believed as he was willing to lie, fabricate evidence and cause others to also lie. The trial judge awarded $25,000 for past economic loss because the defendant conceded that amount, but she made no allowance for future economic loss and made no allowance for domestic assistance.

The Court of Appeal said that it was necessary to pay close attention to the principles applying where a plaintiff who claims damages for loss of earning capacity by reason of the defendant's negligence suffered from pre-existing injuries or disabilities prior to the date of the negligent occurrence. In considering this issue the Court of Appeal drew attention to S.5D CLA noting that the section provided that in determining that negligence caused particular harm required the negligence to be a necessary condition of the relevant harm. S.5E CLA states the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The Court of Appeal said that:

> "*A plaintiff is entitled to damages for any diminution in his or her earning capacity resulting from injuries sustained by reason of the defendant's negligence. But the plaintiff is not entitled to damages for the degree of incapacity that arose from conditions pre-existing the defendant's negligence*" (see [37]).
>
> Further, the Court said:

> *"The plaintiff must adduce evidence that the injuries sustained in consequence of the defendant's negligence are or may be associated with his or her post-accident inability to exploit fully his or her earning capacity. Evidence of this character ordinarily establishes a prime facie case that the defendant's negligence caused the plaintiff's diminished earning capacity. If the defendant contends that the plaintiff's current diminished earning capacity is due in whole or in part to a pre-existing injury or condition, the defendant has the burden of adducing evidence to that effect. The evidence must be such as to enable the court to draw an inference as to the consequences for the future of the pre-existing condition. If evidence of this kind is adduced, the plaintiff retains the burden of proving that the loss of earning capacity was caused by the injuries sustained as a consequence of the defendant's negligence"*.

In applying these principles, the court said that allowance may need to be made for a deterioration in the plaintiff's earning capacity occurring independently of the defendant's negligence and also take account of the chance that his earning capacity would increase but for the injuries sustained in the motor accident.

The Court of Appeal held that it was open to the plaintiff to lead evidence demonstrating that despite his pre-existing injuries and his inability to work in his previous occupation, at the date of the motor accident he was capable of gaining remunerative employment. It was also open to the plaintiff to adduce evidence that even if he had no residual earning capacity as at the date of the motor accident, his

circumstances might have changed thereafter and his chances of gaining employment improved. The plaintiff did not adduce any such evidence.

6. Damages - Assessing the present value of future losses

Amaca Pty Ltd v Latz: Latz v Amaca Pty Ltd (2018) HCA 22

The plaintiff, Latz, was a retiree who was dying from malignant mesothelioma, which resulted from Latz inhaling asbestos dust between 1976 and 1977 while cutting and installing asbestos fencing manufactured by Amaca. There was no issue that Amaca was negligent. The mesothelioma became symptomatic in 2016 and his condition was diagnosed as terminal in October 2016. At that time, he had retired from his employment in the public service and was then receiving an aged pension under the Social Security Act as well as a superannuation pension under the Superannuation Act (SA).

By reason of his medical condition Latz's life expectancy was reduced by about 16 years.

The issue before the High Court was whether Latz is entitled to damages from Amaca for the loss of his superannuation pension and his age pension for the 16 years beyond his pre-injury life expectancy and, if so, whether any reversionary pension that might be payable to his partner should be taken into account in the assessment of his damages.

The majority commenced by noting that an award of damages was to compensate for actual loss (either loss that has already been suffered or loss that will probably be suffered). Further their Honours noted that personal injury caused by negligence traditionally resulted in damages

for non-pecuniary loss, loss of earning capacity and actual financial loss. In relation to loss of earning capacity it was noted that a person's earning capacity has been described as a capital asset (being the capacity to earn money from the use of personal skills). In *CRS Ltd v Eddy*, Gleeson CJ, Gummow and Heydon JJ said damages for loss of earning capacity were awarded "*only to the extent that the loss has been or may be productive of financial loss*". The majority in Latz said that meant "*a claimant is compensated not merely because the capacity to earn has been diminished but because the diminution is or may be productive of financial loss. If the diminution is productive of financial loss, it is compensable*."

If a claimant suffered personal injury through negligence during his/her working life, and, as a result, suffered a reduction in income and their life expectancy, then that person is entitled to a sum of money that will, as nearly as possible, put the claimant in the same position as if they had not sustained the injury. The majority considered superannuation benefits were like wages and were the product of the exploitation of the claimant's capital asset.

The majority held "*On his retirement, what Mr Latz had, as a result of the exploitation of his capital asset, was a superannuation pension …On retirement, Mr Latz had access to that fund and, but for his injury, would have continued to receive the superannuation pension from that fund for the whole of his pre-illness life expectancy. Mr Latz will now not receive the superannuation pension for the full duration of his pre-illness life expectancy because of the negligence of Amaca*" (see [102].

The majority determined that the plaintiff has lost the net present value of the benefit of the converted capital asset for the remainder of his pre-illness life expectancy being a further 16 years. They determined that "*As a result of (his) injury, caused by Amaca, (the plaintiff) will suffer an economic loss in respect of his superannuation pension. That loss is both certain and able to be measured…*"

The plaintiff's statutory superannuation scheme also provided an entitlement to his spouse in the form of a pension on the plaintiff's death. Accordingly, his wife would receive a benefit under the superannuation policy after the plaintiff had died. The majority held that that benefit had to be offset against the plaintiff's claim as it was a collateral benefit.

In relation to the claim for damages relating to the age pension the majority said that did not arise as part of remuneration, was not a capital asset and was not "*intrinsically connected to, a person's capacity to earn*" and therefore, the plaintiff was not entitled to any damages for his loss of future age pension benefits.

7. Competition and Consumer Law

Bamber v Hartman Pacific Pty Ltd (2018) NSWCA 248

The case concerned an extension ladder that, when rested against a wall, could be extended by pulling on a rope. Once extended there was meant to be a gravity fed locking mechanism that would fall into place as the ladder was extended. The locking mechanism was meant to prevent the extended section of the ladder from sliding back down. The ladder had been manufactured by the defendant and supplied to a retailer who sold it to the plaintiff.

On the day of accident, the plaintiff unwrapped the new ladder and extended it so that he could use it to access a part of the roof of his home. He, and a person with him, each said they had inspected the ladder when they had assembled it and were certain the locking mechanism was engaged.

Each party engaged an expert on liability. In a joint expert report the experts agreed the locking mechanism did not operate freely and that it had a propensity to stay open or partly open rather than being fully locked. They said the fault came about because the hauling rope was too short causing too much tension on the locking mechanism thereby impeding it to close fully. A second fault they identified was held to be irrelevant. The experts said by not fully engaging the locking mechanism the upper section of the ladder, when extended, could slide down during operation.

The defendant's expert said that with a "*modicum of care*" on the part of the plaintiff he would have easily identified, either when he extended the ladder or, as he was ascending, that the locking mechanism was not engaged and he should have corrected it.

The defendant called evidence that was not challenged, on how the ladder was manufactured including how the ropes were cut and that it could not be cut short and, also called evidence on the quality checks that were made of the finished product. The evidence on the production of the ladder was unchallenged.

Given the defendant's expert's evidence that it would have been plainly obvious to the plaintiff that the locking mechanism had not engaged as against the plaintiff's evidence that he checked to ensure the locking mechanism was engaged the trial judge concluded, by reason of that, and other evidence, that the plaintiff was not a witness of truth. She found for the defendant.

The plaintiff abandoned his claim in negligence and only proceeded on his claim under S.138 of the Australian Consumer Law ("ACL") which is in Schedule 1 to the Competition and Consumer Act 2010 ("CCA").

S.138 provides:

(1) A manufacturer of goods is liable to compensate an individual if:
  (a) The manufacturer supplies the goods in trade or commerce; and
  (b) The goods have a safety defect; and
  (c) The individual suffers injury because of the safety defect.
(2) The individual may recover, by action against the manufacturer, the amount of loss or damage suffered by the individual.
(3) …

S.9 ACL defines "*safety defect*" in goods as "*if their safety is not such as persons generally are entitled to expect*".

S.137A of the CCL (not the ACL) provides:

(1) If the loss or damage to which a defective goods action under S.138 or 139 of the Australian Consumer Law relates was caused by both:

(a) an act or omission of:

(i) the individual who suffers the injuries referred to in that section; or

(ii) a person for whom that individual is responsible; and

(b) a safety defect of the goods to which the action relates:

the amount of the loss or damage is to be reduced to such extent (which may be to nil) as the court thinks fit having regard to that individual's share in the responsibility for the loss or damage.

(2)…(relates to a defective goods action under S.140 or 141 ACL)

Therefore, in the Bamber case, the plaintiff had to show the manufacturer of the ladder:

1. Supplied it with a safety defect in it at time of supply

2. That the plaintiff suffered injury and

3. There is a causal connection between the defect and the injury.

The trial judge found:

1. That there was, on the evidence, only a very slight chance of the rope being cut to the wrong size during the manufacturing process.

2. If the rope had been cut to the wrong size it would have been detected by the defendant's quality control process

3. That there had been no other complaints about the manufacturing process

When she took all those three matters into account, she determined the plaintiff had not established his case on the balance of probabilities.

The Court of Appeal noted the plaintiff carried the onus of proving the elements of S.138; namely that the ladder had a safety defect at time of supply and that that defect caused injury to the plaintiff. The Court noted it was not for the defendant to disprove the elements of the section. The Court noted the experts agreed that in their opinion the defect most probably did exist at time of supply and no other explanation was provided for the defect ([88]). Whilst noting it was a difficult matter to determine the Court found, on the balance of probabilities, the defect (being a short rope) did exist at time of supply.

The Court, in applying S.137A CCL, found the plaintiff had failed to observe the locking device had engaged and they rejected his evidence that he had indeed checked the locking mechanism before ascending the ladder. On that point the plaintiff had said that "*only an outright idiot*" would climb a ladder without checking the locking device and that he was no idiot. The Court assessed his contribution at 30%.

On damages, the trial judge had assessed damages under the CLA however, S.87E CCL provides in respect to proceedings under Part 3-5 of

the ACL (which includes S.138) for damages to be assessed under Part VIB of the CCL. The Court then assessed the plaintiff's non-economic loss at 30% and, applying S.87R CCL, determined his entitlement at $79,180 for non-economic loss. S.87P provides for the maximum amount of non-economic loss damages to be awarded in the most extreme case. S.87Q provides for the court to award the percentage of non-economic loss damages to be awarded if the assessment of a most extreme case is between33% and 100% and S.87R provides for a scaled award of non-economic loss somewhat like the assessment under S.16 CLA when the assessment of the most extreme case is between 0% and 30%.

The plaintiff's total damages were assessed at $105,044.95 which was reduced by 30% reason of his contributory action, and therefore, he obtained a judgment of $73,531.47. He was ordered to pay his own costs of the trial and obtained an order the defendant pay 50% of his appeal costs.

8. Applications for leave to appeal

NRMA Insurance for the Nominal Defendant v Al-Bayati (2018) NSWCA 258

The application for leave concerned a decision given in a claim for damages arising from a motor vehicle accident in which the plaintiff maintained she had been forced off the road by an unidentified vehicle. The defendant called three witnesses who testified they each did not see another vehicle near the plaintiff's vehicle when she lost control. The trial judge found for the plaintiff and awarded $60,898.56 in damages which was below the threshold entitling the defendant to an automatic appeal and therefore, the defendant needed leave to appeal.

In considering whether to grant leave to appeal the Court said:

> "*In Nguyen v Tran (2018) NSWCA 215 at [4], Beasley P referred with approval to the following summary by Bathurst CJ in Lee v*

New South Wales Crime Commission (2012) NSWCA 262…of the principles relevant to the grant of leave:

'The principles upon which leave to appeal is granted are well established. Ordinarily it is only appropriate to grant leave concerning matters that involve issues of principle, questions of general public importance or where it is reasonably clear there has been an injustice in the sense of going beyond it being reasonably arguable that the primary judge was in error…'"

The Court also referred to the rational for imposing a monetary limit on a right to appeal saying the imposition was to:

1. Discourage unnecessary litigation in small amounts where public costs are involved such as with court time, court officers, judges etc

2. A recognition that in small claims, costs may be disproportional to the amount recovered.

3. The need to conserve the time of the Court of Appeal to questions of general public importance, issues of principle or cases where injustice is reasonably clear.

Leave was refused.

9. Exemplary Damages, Intentional harm and S.3B Civil Liability Act

Fede v Gray by his tutor New South Wales Trustee and Guardian (2018) NSWCA 316

The plaintiff, a police woman serving at Gulargambone, found the defendant, Wally Gray, behaving oddly and arrested him believing he was mentally ill. Gray was taken to hospital where he became aggressive and, whilst being restrained, charged at Officer Fede and bit her on the inner thigh through her clothing. Fede commenced proceedings for damages for battery. The trial judge dismissed the claim on the basis the defendant was delusional and unable to form the necessary intent to harm or injury Ms Fede.

The trial judge assessed damages at $35,000 and therefore, the plaintiff needed leave to appeal. The plaintiff sought aggravated damages but the trial judge refused that application.

The Court agreed that the case raised an issue of general importance being the availability of a defence of mental illness to the tort of battery.

The Court of Appeal (Basten and Meagher JJA) referred to *Carrier v Bonham ((2001) QCA 234)* which dealt with a case involving a patient who escaped from a hospital intending to commit suicide by stepping in front of a bus. The driver of the bus was unable to stop, struck the defendant and, as a consequence, developed mental harm. In the Queensland Court of Appeal, it was said the defendant's "*mental condition had no effect on the standard of care owed by him to the plaintiff, which, on the contrary, is to be judged by the standard of the ordinary and reasonable person, and it did not diminish or reduce his liability in negligence to the plaintiff*". Basten and Meagher both adopted that statement.

In relation to the tort of battery Basten and Meagher said that the tort of battery contained a number of elements being:

1. The act must be voluntary, that is it is directed by the defendant's conscious mind

2. The defendant need not intend the plaintiff harm

3. If the act is voluntary and the defendant meant to contact the plaintiff then it will be intentional

4. It may also be intentional if it was "*substantially certain that the act will result in contact with the plaintiff*"

Therefore, a person will not commit a battery if contact is made, for instance, during sleepwalking as it would not be a voluntary act.

The Court then turned to the question of whether the Civil Liability Act (CLA) governed the assessment of damages, given Justices Basten and Meagher held the defendant's act of biting the officer was intentional. The question of the application of the CLA turns on whether, within S.3B (1) (a), the intentional act was done *with intent to cause injury*. Justices Basten and Meagher determined that whilst the act of biting the officer was intentional being a voluntary act, the fact that the defendant was affected by drugs at the time and therefore did not have the capacity to form the specific intent to cause injury, meant S.3B (1) (a) was not engaged and the CLA applied to the determination of damages. As such S.21 CLA precluded the awarding of exemplary, punitive and aggravated damages and non-economic loss damages were to be assessed under S.16 CLA.

10. Civil Liability (Third Party Claims Against Insurers) Act 2017

This Act replaced S.6 Law Reform (Miscellaneous Provisions) Act 1946 which provided a mechanism, albeit one cloaked in mystery, for recovering a judgment against an insured from the insured's insurer.

The Civil Liability (Third Party Claims Against Insurers) Act 2017 (CLTPCAI) provides in S.4:

> (1) If an insured person has an insured liability to a person (the Claimant), the claimant may, subject to this Act, recover the amount of the insured liability from the insurer in proceedings before a court.
>
> (2) The amount of the insured liability is the amount of the indemnity (if any) payable pursuant to the terms of the contract of insurance in respect of the insure person's liability to the claimant.
>
> (3) In proceedings brought by a claimant against an insurer under this section, the insurer stands in the place of the insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. Accordingly (but subject to this Act), the parties have the same rights and liabilities, and the court has the same powers, as if the

proceedings were proceedings brought against the insured person.

(4) This section does not entitle a claimant to recover any amount from a re-insurer under a contract or arrangement of re-insurance.

In order to engage S.4 a party seeking to proceed against the insurer must obtain leave of the court under S.5 which provides:

(1) Proceedings may not be brought, or continued against an insurer under section 4 except by leave of the court in which the proceedings are to be, or have been, commenced.

(2) An application for leave may be made before or after proceedings under section 4 have been commenced.

(3) Subject to subsection (4), the court may grant or refuse the claimant's application for leave.

(4) Leave must be refused if the insurer can establish that it is entitled to disclaim liability under the contract of insurance or under any Act or law.

It is also relevant to note that proceedings to recover from an insurer under section 4 must be commenced within the same limitation period that applies under the Limitation Act 1969 or other Act to the claimant's cause of action (see S.6).

Further, in respect to proceedings under section 4 the insurer may rely on any defence or other matter in answer to the claim or in reduction of its liability to the claimant that the insurer could have relied upon in reply to a claim by the insured under the policy or the insured person could have relied upon if the claim had been made against the insured.

In Mrdajl v Southern Cross Constructions (NSW) Pty Ltd (in Liq) (2018) NSWSC 161 Justice Walton dealt with an application by the plaintiff to join the insurer of Calcono Pty Ltd to the proceedings. Calcono was an existing party to the action but it was no longer a legal entity. The

plaintiff did not tender into evidence the insurance policy but, instead relied on other documents in support of its application.

Justice Walton determined that S.4 and S.5 must be read together. Further, he stated that by reason of S.5 (3) the court retained a discretion to grant leave. His Honour held that S.4 may be divided into four elements:

1. An entity must exist, namely the relevant insurer
2. The insurer has issued an insurance policy with the defendant named as an insured
3. The policy must cover the particular risk and,
4. The policy must have been in place at the time of the loss.

The plaintiff carries the onus of proving these four elements. The insurer carries the onus of proving that leave should be refused by reason of S.5 (4).

In this application, His Honour was not satisfied that the plaintiff had established the elements of S.4 as the plaintiff had not established a policy existed that covered the particular risk. He dismissed the application.

One of the other defendants to the action was then prompted to make its own application to join the same insurer (**Mrdalj v Allianz Australia Insurance Ltd (2019) NSWCA 101**). This application was heard and determined by Justice Lonergan on 15 February 2019. This time the relevant policy was tendered by the applicant to the summons. On this application the insurer against whom leave was sought initially argued that the policy of insurer did not respond and therefore, it was entitled to disclaim liability under the policy and, as such S.5 (4) was engaged.

The brief facts were Calcono, the insured company against whom relief was sought, had accepted a policy of insurance which contained an exclusion clause stating that the insurer would not insure for building works over the value of $250,000. Calcono had entered into a contract to perform building works to a value in excess of $3m and the accident that befell the plaintiff occurred on that building site. Further, the potential liability to the plaintiff was a liability, at least in part, that was contingent upon a contractual liability by Calcono and the policy of insurance specific excluded liability in respect to contractually assumed liability.

In order to obtain relief, the applicant carried the onus of showing:

1. There was an arguable case as to the liability of the insured company

2. There was an arguable case that the policy issued by the insurer of the insured company would respond to the claim and

3. There was a real possibility that the insured company would not be able to meet the judgment if obtained (see Oswald v Bailey (1987)11 NSWLR 715).

In Zaki v Better Buildings Constructions Pty Ltd (2017) NSWSC 1522 Campbell J said that "*Given the interlocutory nature of the leave application, it is appropriate that contestable issues as to the liability of the insured person and the availability of cover under an insurer's policy should be determined at the ultimate hearing*". Further, His Honour said "*Obviously in clear cases, as S.5 (4) indicates, where the entitlement to deny or to disclaim liability under the contract of insurance is beyond argument, leave must be refused. Likewise, where it is clear beyond argument that a claim against an insured person is out of time, leave would be refused, but that is because there would be no arguable case of liability against the insured person*".

From these authorities the following issues may be identified that may arise for determination on any application for leave to join an insurer:

1. Whether there is an arguable case against the insured entity

2. Whether there is an arguable case that the policy issued by the insurer to the insured entity responds to the claim

3. Whether there is a real possibility that the insured entity will not be able to meet the judgment, and

4. Whether the insurer is able to establish that it is entitled to disclaim liability under the contract of insurance or any other Act or law.

In the case before Justice Lonergan, Her Honour determined that, the first three steps had been established by the applicant and, whilst there was merit in the insurer's case on disclaimer, it was an issued that was contestable and therefore, ought to be left to the trial judge. Therefore, Her Honour granted leave to join the insurer but the grant of leave did not prevent the insurer arguing its denial point at final hearing.

A similar decision was reached by Justice Hammerschlag in Murphy, McCarthy and Associates Pty Ltd v Zurich Australian Insurance Limited (2018) NSWSC 627.

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