benchtv
a benchmark production

Presenter Paper

Trends in Public Liability Personal Injury Cases

Prepared by Dr Tim Channon for BenchTV

This presentation examines a number of interesting and important decisions in the High Court and NSW Court of Appeal in the common law personal injuries area.

Discussion Includes

- Trends in personal injury litigation
- Causation issues
- Liability for criminal acts of a third party
- Slip, trip and fall cases
- Industrial accidents
- Liability of Road Authorities

Presenter Paper

Trends in Public Liability Personal Injury Cases

1. In this edition of BenchTV, Dr Tim Channon (Partner, Hicksons Lawyers, Sydney) and Louise Mathias (Barrister, Elizabeth Street Chambers, Sydney) discuss recent developments in public liability personal injury law.

2. In general, defendants have been more successful than plaintiffs, but the changes in personnel in the NSW Court of Appeal bench have meant that in some respects, it is less certain that a defendant will be successful in a case in this area.

High Court Cases

Robinson Helicopters Inc v McDermott [2016] HCA 22

3. In this case, the plaintiff was injured, and the pilot was killed, when a helicopter crashed in Queensland. The cause of the crash was a bolt which had been incorrectly installed coming loose. The helicopter had been serviced not long before the crash and inspected by the pilot immediately before. The bolt should have had a "torque stripe" on it which, if it operated correctly, should have indicated that the bolt had come loose and needed fixing. Nobody who serviced or inspected the helicopter could remember if there was a "torque stripe" in place.

4. The plaintiff argued Robinson Helicopters was negligent as the service manual for the helicopter provided that at the time the helicopter was serviced, the torque stripes on the bolts, rather than the bolts themselves, should have been checked. It was argued that the torque stripes could be wrongly applied and be misleading, and that on other makes of helicopter the bolts themselves, rather than the torque stripes, were checked on servicing.

5. The Trial Judge found that there were five possible causes of the crash which were:
   - no torque stripe was applied when the bolt was incorrectly assembled;
   - the torque stripe was misaligned and this should have been picked up on inspection;
   - there was an incorrectly applied torque stripe, with paint on only one side of the bolt;
   - there was a deteriorated torque stripe;
   - the torque stripe had been applied to a dirty or greasy surface and had slipped, giving the appearance that the bolt had not come loose.

6. The Trial Judge found that the first four possibilities all should have resulted in the bolt being inspected at service. He discounted the last possibility, finding that it was unlikely that a torque stripe would have been applied to the bolt when it was dirty or greasy and

thus stayed in place when the bolt had rotated. Therefore, if those inspecting the helicopter had followed the manual, any of situations "(i)-(iv)" would have led to the bolt being inspected, which would have led to the discovery of its faulty installation. Therefore, Robinson was not negligent.

7. The Queensland Court of Appeal reversed this finding, and controversially rejected the Trial Judge's factual findings. They held that the fifth situation above was the only likely one, and therefore the manual should have specified that an inspection of each bolt should be carried out whether or not an intact torque stripe was in place.

8. The High Court reversed this finding, holding that there was no reason to reject the Trial Judge's findings of fact. If none of the possible situations was more likely than any other, and in particular if the possibility that the torque stripe was applied to a dirty or greasy surface and thus deceptively rotated with the bolt was unlikely, then the plaintiff must fail on causation as he had not proved that it was the inadequacy of the service manual which caused the accident. The High Court therefore held that the manual was not negligently put together. The case suggests that it is difficult to establish causation where there are multiple causes involved.

Prince Alfred College v ADC [2016] HCA 37

9. In this very important case, the High Court brought Australian law into line with UK and Canadian law in respect of the vicarious liability of employers for the criminal acts of employees, particularly in sexual abuse cases. In the past, it has been very difficult to succeed where the plaintiff is alleging that the defendant is liable for someone else's criminal acts (see, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; 205 CLR 254). Whilst the plaintiff failed on a technicality, the court set out its reasoning on vicarious liability in depth to give guidance to the lower courts in such cases. Although this case deals specifically with the sexual assault of a student of a private school by a boarding house master, it may be that eventually its principles will have wider application outside the context of sexual abuse.

10. The Court said that the relevant approach in sexual assault cases is to examine the role given to the employee and the nature of the employee's responsibilities, and to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account including authority, power, trust, control and the ability to achieve intimacy with the victim. Where, in such circumstances, an employee takes advantage of his or her position with respect to the victim, that may suffice to

determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicarious liable.

Slip, trip and fall cases

Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114

11. In this case, the plaintiff was a Nurse Facilitator at the Blue Mountains Anzac Memorial Hospital at Katoomba. On the day in question, she entered the staff toilets on one of the wards. After using the facilities and whilst walking towards the basin, she slipped and fell to the ground, suffering injury.

12. There was evidence that the floor had been cleaned not long before and also evidence that those using the toilets often used too much hand wash from the wall dispenser, resulting in residue being left on the floor. The plaintiff gave evidence that the floor was very slippery and even though she was taking care (because there were signs inside and outside the toilet saying "beware of wet floor") she still fell. Those who came to her aid described the floor as "very slippery", whereas evidence given on behalf of the defendant was to the effect that the floor was not slippery.

13. The Trial Judge was not addressed as to the effect of the *Civil Liability Act 2002* (NSW) on the analysis of liability in the case, and made no mention of the Act in deciding the matter, only being asked to decide on "causation" by both parties. The defendant argued that the plaintiff may have fallen because of a pre-existing vertigo problem, and had not discharged the onus of proving that any negligence of the defendant caused the accident. However, the Trial Judge accepted the plaintiff's evidence, finding that it was likely that there was soap residue on the floor which caused the fall. The Judge said that the defendant owed the plaintiff a duty to take reasonable care to avoid a foreseeable risk of injury and that duty had been breached, causing the plaintiff's damage.

14. On appeal, the defendant argued that the failure to refer to the *Civil Liability Act* regarding breach of duty of care led the Judge into error in terms of failing to elaborate the duty of care and failure to make any findings as to how any breach of duty caused the plaintiff's injury. The defendant also challenged the findings of fact.

15. The Court of Appeal roundly rejected the defendant's arguments. As the Primary Judge accepted the plaintiff's evidence that she slipped on the floor not long after it had been cleaned, the inference was open that the cleaning had not removed the slippery substance from the floor, the evidence being that soap would be spilled from the dispenser when staff washed their hands.

16. In relation to the failure to address the provisions of the *Civil Liability Act*, the court said that, whilst the High Court had warned that this could lead to error (*Adeels Palace Pty Limited v Moubarak* [2009] HCA 48), in this particular case the parties did not raise the *Civil Liability Act* at trial, and there was no doubt the defendant owed the plaintiff a duty of care in the circumstances. As the plaintiff was taking reasonable care for her own safety, the Trial Judge did not miscarry in finding that there had been a breach of the duty of care which caused the plaintiff's accident and injuries and the appeal was dismissed.

Kitoko v Mirvac Real Estate Pty Limited [2016] NSWCA 201

17. In this case, the plaintiff was walking through the Broadway Shopping Centre in Sydney towards the car park. As he went to cross from the shops to the car park, he collided with a glass exit door panel. This panel was next to the glass sliding door at the exit. According to the plaintiff, who represented himself, the panel was well marked with the word "MIRVAC" on it.

18. When asked how he had come to collide with the panel (which he alleged had shattered after the collision) he claimed that he examined the floor and saw that there was a transparent slippery substance on it. This caused him to "move quickly" into the panel.

19. There was CCTV of the incident, and this was shown at trial and admitted into evidence. This showed the plaintiff simply walking into the glass panel. The Trial Judge said that he preferred the version depicted in the CCTV over the plaintiff's evidence and found for the defendants.

20. On appeal, the plaintiff argued that the Trial Judge should not have preferred the CCTV over his own factual account. He also argued that the CCTV did not contradict his factual account.

21. The Court of Appeal was invited to, and did, view the CCTV. After doing so, they found that the CCTV contradicted the plaintiff's version of events, that the panel did not shatter as alleged and that no negligence on the part of the centre or its cleaners was demonstrated in the video. The plaintiff's appeal was therefore dismissed.

Kelly's Property Management Services Pty Limited v Anjoshco Pty Limited t/as McDonalds BP Chinderah [2016] NSWCA 341

22. In this case, the plaintiff was a worker in a roadhouse. When moving through the food court area to go to the toilet, she saw "cleaning in progress" signs in relation to the main toilets.

She then went to another toilet, where she slipped and fell. There were no signs in this area. There was expert evidence that the colour of the tiles made it difficult to see water on the floor, and CCTV footage showed a cleaner having pushed a cleaning machine down the corridor a few minutes earlier.

23. The defendant argued that the plaintiff should have been made aware of the fact that there was water on the floor because cleaning was in progress in other areas, with signs in place. However, the Court found that there no signs in the relevant area. The plaintiff had successfully negotiated those areas where there were signs, the colour of the floor meant that the water could not easily be seen, and there was no reason to expect the floor to be wet. On this basis, the plaintiff was successful.

Harrington Estates (NSW) Pty Limited t/as Harrington Grove Country Club v Turner [2016] NSWCA 369

24. In this case, the plaintiff was injured when, after placing the remains of his daughter's wedding cake into the boot of his car (which was parked rear to kerb) he stepped backwards into the garden bed behind the car which, although it contained plants growing to approximately the level of the car park, was actually quite deep (between 720-810 millimetres) as a result of which he suffered serious injury. It was quite dark at the time and he was not familiar with how deep the garden bed was. He commenced proceedings against both the Club and its landscape architect. He alleged that the Club should have barricaded or otherwise enclosed the garden bed, which should have been better lit. Against the landscape architect (which had designed the area more than two years before the fall) he alleged a failure to design a car park which was reasonably safe for its use.

25. The Trial Judge found that the Club was liable to the plaintiff as the risk of injury to him was foreseeable and not insignificant and that the cost of installing a balustrade was relatively insignificant. This failure caused the plaintiff's injuries and causation was therefore made out under s 5D of the *Civil Liability Act*.

26. As against the landscape architect, the Trial Judge said that the architect could not have known the precise plantings and foliage which were in the area at the time of the accident, and therefore a reasonable person in the architect's position would not have taken steps to erect a balustrade. He also found that there was no evidence that the design of the garden bed caused the plaintiff's injury. In terms of contributory negligence under s 5R of the *Civil Liability Act*, he found that the plaintiff should have taken steps to satisfy himself of the safety of stepping back into the garden bed and deducted 15% from the judgment.

27. The Court of Appeal reversed the finding against the landscape architect, holding that the car park was in a Club where it could be expected that there would be numerous patrons unfamiliar with the car park area attending the Club at night, and who might have consumed alcohol. The landscape architects had inspected the car park approximately one year before the incident, knew of the condition of the plants and the drop from the car park, and even though there was no breach of the *Building Code of Australia* in the way in which the car park was constructed, the architect should have foreseen that the plants would grow as they did. In addition, there was a balustrade in a nearby area protecting a drop, and the failure to include one in the subject area meant that the sunken garden was a deceptive design. However, the court said that the responsibility of the Club for the incident was appreciably greater than that of the architect and apportioned liability 75:25 to the Club. The court did not interfere with the finding of contributory negligence.

Schneider v AMP Capital Investors Limited; *Schneider v Kent Street Pty Limited* [2016] NSWSC 333

28. In this matter, the plaintiff was injured when she stumbled as she stepped out of a lift in the building that she worked. She took an action against the owners of the building alleging that the lift was defective in that there was a discrepancy between the level of the floor of the lift and the level of the foyer into which she was stepping.

29. It was not in dispute that she tripped as she left the lift. The plaintiff also accepted that a degree of difference in the floor levels was to be expected, however, her evidence was that there was as much as 25-30 mm difference in the level between the lift and the floor outside.

30. The court at first instance found that there was no evidence that the discrepancy in the level between the lift and the floor was any greater than 10-12 mm which was the accepted tolerance level for the lift. The court found that the scope of the duty of care owed by the building owner to persons such as the plaintiff was to select with reasonable care an appropriately qualified and experienced lift servicing company with thorough knowledge of the type of machinery installed. Reasonable care required that the service company selected should be engaged to carry out regular periodic inspection and maintenance at a frequency and in a degree of detail approved by the service company itself. It was also necessary that the building owner should institute both a system of verifying the regular maintenance was performed and that the performance of the lifts was monitored and the service company called out in the event of any malfunction. The court found that this duty of care had not been breached by the building owner which had arranged such a contractor and monitored the lifts (there was some suggestion that the plaintiff herself was responsible for monitoring the lifts).

31. The plaintiff argued that the duty of care of the building owner extended to an obligation to replace lift mechanisms if so advised by the independent contractor. The plaintiff alleged that the contractor had told the building owner in 2006 to replace the lift. However, the trial judge did not accept this and also did not accept that failure to replace the lift was causative of the plaintiff's alleged injuries as she could not establish that the gap between the lift floor and the outside floor was outside tolerance levels. The plaintiff therefore failed.

32. The Court of Appeal agreed with the trial judge, finding that there was no error in the Judge's analysis of the duty of care pursuant to s 5B of the *Civil Liability Act*.

Industrial Accidents

Gulic v Boral Transport Limited [2016] NSWCA 269

33. In this case the plaintiff was the sole shareholder and director of a company which owed a prime mover and subcontracted the plaintiff's services as driver of that prime mover to Boral Transport Limited ("Boral").

34. Boral supplied a trailer for installation on the prime mover for the purposes of transporting building materials. The trailer remained the property of Boral at all times and no alteration or modification of the trailer was permitted. The trailer had three gates on each side, separated by movable posts. They were hinged horizontally at the level of the tray and the gates could be released down from their upright position to afford access to the tray. There was evidence that there were alignment problems with the gates which made them difficult to close. There was some evidence that Boral knew of this problem. The plaintiff suffered an injury to his shoulder when he lost control of a gate he was attempting to close and lock. The gate fell on him, striking him on the head and left shoulder.

35. The plaintiff failed in his claim at first instance, with the Trial Judge finding that there was no negligence in relation to the relevant gate or post on the part of Boral.

36. The Court of Appeal, whilst being critical of the paucity of the judgment below, upheld the finding. Whilst the plaintiff had informed Boral of problems with the gates on the trailer, and Boral had subcontracted rectification works on the gate prior to the accident, the court found that the plaintiff had not complained to Boral of the gates as being unsafe or an injury risk. The court said that in examining the risk posed by the faulty gates, that risk should be defined narrowly. The plaintiff described the accident as having occurred when he attempted to slam the gates into an upright position because of the distortion of one of the posts. Whilst Boral knew that the posts could become distorted, it had delegated the maintenance of the trailer to its subcontractor Barker, who in turn subcontracted the

maintenance to another company. These subcontractors were apparently competent. There was no evidence that Boral should have done anything else other than delegate the maintenance of the trailer to others, and so the plaintiff failed to establish that Boral had breached a duty of care to him.

Jurox Pty Limited v Fullick [2016] NSWCA 180

37. In this case the plaintiff was a labour hire employee working at the defendant's premises. She was engaged in emptying 25kg bags of dextrose into the hopper of a machine in the "powder room" which produced pet food. She would obtain the bags from a pallet, using an electric lifter. She was then supposed to use the lifter to place the bags next to the hopper and slit open the bag. The contents would then empty by force of gravity into the hopper, there being no need to lift the bag until it was almost empty.

38. However, the plaintiff gave evidence that she was instructed to lift the end of the bag after opening it and tipped the contents into the hopper. She alleged that as a result of lifting the bags, she injured her back, and was unable to work. There was evidence given by the defendant of the training given to the plaintiff which did not include lifting the bag.

39. The Trial Judge accepted that the plaintiff had been performing the task by lifting the bags as she described, however found that this was not how she was instructed to perform the task. The Trial Judge found that for the plaintiff to have developed a practice of lifting the bags, she must have been inadequately supervised by the defendant's supervisor, who was working in the same area and who was not called to give evidence by the defendant.

40. On appeal, the findings of the Primary Judge regarding liability were upheld, with the court finding that there was an available inference that the plaintiff consistently performed the emptying task in a manner other than what she was instructed to do, and that reasonable supervision would have prevented the injury to the plaintiff from occurring. As the risk of harm from lifting the bags was foreseeable and significant, a reasonable response to that risk was to ensure that the task was being carried out correctly. Breach under s 5B of the *Civil Liability Act* was therefore made out. Lack of proper supervision led to the erroneous method of work being used by the plaintiff not being discovered, and so causation under s 5D was also made out. The court also said that, as the failure to properly supervise was exclusively the defendant's fault, and that the plaintiff did not know that the technique she was using was incorrect, contributory negligence was not made out.

Penrith City Council v Healey; GIO General v Healy [2016] NSWCA 161

41. In this case, the plaintiff had been employed by Usshers Pty Limited ("Usshers") which contracted to empty rubbish bins for the Penrith City Council. These rubbish bins were often very heavy and occasionally damaged, bent and with missing handles which made them difficult to empty.

42. The plaintiff first suffered an injury on 29 November 2004 whilst lifting and emptying a heavy and damaged bin. At this stage, he was employed by Usshers, however after 1 December 2004 the plaintiff, who continued to work, was employed by a related company, Usshers Solid Waste Pty Limited ("Solid Waste"). He worked until 29 April 2005 in a limited capacity, after which time he ceased employment.

43. As it was found that his injuries did not exceed the relevant workers' compensation threshold, the plaintiff was unable to bring common law proceedings against his employer. He commenced negligence proceedings against the Council and against the insurers of Usshers (which had been de-registered). He alleged that the Council's involvement in the way the collection services were to be provided by Usshers and Solid Waste made it a "quasi-employer" which owed him a duty of care which it breached by not repairing bins and also by insisting that every bin be emptied every night, regardless of weight or content, and also by failing to ensure that independent contractors had sufficient employees allocated to the emptying task.

44. Against Usshers the plaintiff alleged that whilst he worked for Solid Waste after his initial injury, Usshers continued to have the contract with the Council and maintained direction and control over how he worked. He argued that therefore Usshers still owed him a duty of care analogous to that of an employer which it had breached in the circumstances.

45. The Trial Judge found that both the Council and Usshers were liable for the plaintiff's injuries. He found that the plaintiff's injuries were mainly caused by lifting damaged bins which the Council had a responsibility to repair, and that Council had retained sufficient control over the emptying process to render it liable. In relation to the claim against Usshers' insurer, the Trial Judge found that Usshers maintained a measure of involvement in supervision of the contract to empty the bins and the manner in which the contractual obligations were performed such that it owed the plaintiff a duty of care which it breached by exposing him to an unreasonable risk of injury by the nature and conditions of his work.

46. The Court of Appeal overturned the finding in relation to the Council. They held that the evidence did not establish that the plaintiff's injuries were "mainly" caused by damaged bins. The injuries were caused by the general nature and conditions of the plaintiff's work. In relation to the Council, as it was not responsible for the nature and conditions of the plaintiff's work other than any problems caused by damaged bins, there was no relevant

breach of the duty of care by the Council. Further, whilst his original injury was caused by a damaged bin, the plaintiff could not show that the Council knew or ought to have known of the damage to that particular bin, and in fact the plaintiff's own descriptions of where the bin was located varied.

47. As against Usshers' insurer, the court held that the plaintiff failed on a technicality. The court was prepared to find that after the plaintiff's employment past to Solid Waste, Usshers maintained a degree of control over the contract and thus owed the plaintiff a duty of care which was breached in the circumstances by requiring him to empty all bins regardless of their weight and whether they were damaged, and in not providing sufficient resources to carry out the job safely. However, as there was an exclusion clause in the relevant liability policy (Usshers having been deregistered) the insurer was able to exclude indemnity to Usshers on the basis that the policy did not cover liability to employees of businesses which supplied labour to Usshers, which Solid Waste did. The plaintiff therefore failed.

Liability for Criminal Acts

Optus Administration Pty Limited v Glenn Wright by his tutor [2017] NSWCA 21

48. In this case, the plaintiff and Mr Nathanial George were labour hire employees on a training course at the premises of Optus. The two did not know each other prior to attending the course. On the third day of the course, Mr George formed the intention of killing someone, and settled on the plaintiff as his victim. On the fourth day of the course, Mr George left the training course on the ground floor and was found on the roof balcony on the fourth floor. Optus employees who attended on the balcony found him to be in a "trance-like" state, and repeatedly asking for the plaintiff by name while pacing up and down the roof balcony near the waist high-railing.

49. When asked by Optus employees, the plaintiff reluctantly agreed to go to the roof balcony. He approached Mr George, watched by two Optus employees, whilst another Optus employee went to seek further instructions. Mr George then attempted to throw the plaintiff over the balcony, whilst hitting him. One of the Optus employees then intervened and restrained Mr George. As a result of this incident the plaintiff suffered severe post traumatic stress disorder.

50. At trial, the court found that the relationship between Optus and the plaintiff was analogous to that of employer and employee, even though both the plaintiff and Mr George were employed by labour hire companies. The Trial Judge found that Optus owed the plaintiff a duty of care to take reasonable steps to protect him from the criminal acts of others in the

workplace. The Judge found that it was foreseeable by Optus employees, before they asked the plaintiff to go to the roof top balcony, that Mr George may cause him injury, including mental harm, and that a reasonable person in the position of Optus would not have put the plaintiff in harm's way by exposing him to Mr George's aberrant behaviour.

51. The Court of Appeal overturned this finding. They held that the Trial Judge impermissibly aggregated the knowledge of individual Optus employees and then attributed that aggregated knowledge to the corporate employer. They also held that Optus did not owe a duty of care directly to the plaintiff with respect to mental harm satisfying the requirements of s 32 of the *Civil Liability Act*. There was no finding below that an assault of the severity inflicted by Mr George was something which should have been foreseen by Optus and which it should reasonably have foreseen might cause a person of normal fortitude to suffer a psychiatric illness. Optus was therefore under no duty to take reasonable care to protect the plaintiff against mental harm. The court also found that it was not probable that any of Optus' staff knew or should have known that Mr George might attempt to kill or seriously assault the plaintiff in a way that might cause a person of normal fortitude to suffer a psychiatric illness, and thus the test under section 32 of the Act was not satisfied. Optus was therefore not liable, nor vicariously liable for any negligence of its employees, and the plaintiff therefore failed.

Exceptional circumstances and the "but for" test

Carangelo v State of New South Wales [2016] NSWCA 126

52. In this matter, the plaintiff suffered psychiatric injury whilst employed as a Police Officer. He argued that the Police Commissioner breached their duty of care to him and the State of New South Wales was therefore vicariously liable. He said that the Commissioner failed to take reasonable precautions against the risk of his suffering psychiatric injury at two significant points (one of which was whilst he was under investigation by the Police Integrity Commission). He said that appropriate care would have involved offering pastoral care and recommending him to a private psychiatrist.

53. At first instance the Trial Judge found that the Commissioner had a duty of care to the plaintiff which was breached in the two instances he complained of, but this had not caused or contributed to his psychiatric injury, which arose generally out of his experience as a Police Officer.

54. The plaintiff appealed on the basis that the Trial Judge misapplied s 5D of the *Civil Liability Act* and that his case was an exceptional one within the meaning of s 5D(2) of the Act. The Court of Appeal disagreed, finding that there were not various factors, all of which may

have contributed to the injury, which would cause a Court to find that there were exceptional circumstances in this case. Section 5D(2) cannot be called in aid simply because there is no evidence to support a contention as to the causation of injury. This was not an exceptional case such that vicarious liability should be imposed on the State. The medical evidence clearly supported the conclusion that the plaintiff's psychiatric injury arose out of his experiences as a Police Officer generally, and there would not have been a different outcome should the breach of duty not have occurred.

55. Notably, the court also found that the "but for" criteria of causation can be troublesome in different situations in which multiple acts or events lead to an injury of a plaintiff. What must be established is that by its negligence, the defendant's conduct was responsible for an "adverse difference" in the plaintiff's general condition.

Liability of Road Authorities

Mansfield v Great Lakes Council [2016] NSWCA 204

56. In this case the plaintiff was injured when driving a fully laden water truck along a single lane track of Greens Crossing Road near Stroud. On crossing over a culvert, the left hand side of the bank gave way, resulting in his truck rolling over into the water course injuring him. The defendant was the roads authority responsible for the care and maintenance of the road.

57. At the trial, the plaintiff alleged that the Council, as the responsible authority, had failed to build a sufficiently large culvert with head walls which could have prevented the erosion and collapse of the embankment. The Council, in its defence, relied on ss 43A and 45 of the *Civil Liability Act* as providing immunity from liability.

58. The plaintiff also alleged that the Council failed to put in place a warning sign about the culvert in an attempt to get around the s 43A defence.

59. At trial, the plaintiff failed as the judge found that ss 43A and 45 operated in the defendant's favour to exclude liability on its part. In relation to the pleadings regarding warning signs, the trial judge found that there was no evidence to support the need for signs or any evidence to support a conclusion that the sign would have led to the driver abandoning his journey.

60. There was evidence that there had been some complaints about the subject culvert and a council employee gave evidence that he had driven over the culvert and marked it as being of medium priority for remedial work. However, this was not because of any safety

concerns. There was also evidence that after the incident, the culvert was substantially re-built.

61. The Court of Appeal found that s 43A created a high hurdle for a plaintiff in establishing liability against a council. Section 43A is as follows:

> ***43A Proceedings against public or other authorities for the exercise of special statutory powers***
> *This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.*
> *(2) A "special statutory power" is a power:*
> *(a) that is conferred by or under a statute, and*
> *(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.*
> *(3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.*
> *(4) In the case of a special statutory power of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.*

62. The Court of Appeal said that the plaintiff needed to establish that inspections of the area carried out by the Council's employers were so "manifestly defective that no roads authority could properly have thought them adequate" which the plaintiff failed to do. In relation to the later replacement of the culvert the court said that the plaintiff had to establish that the failure of the Council to replace the culvert with a larger pipe and a "head wall" was an omission which was so unreasonable that no roads authority could properly have considered it to be a reasonable failure to exercise its power. Once again, the plaintiff failed to establish that.

63. In relation to s 45 of the *Civil Liability Act*, the court said that there was no evidence that the relevant council officers had "actual knowledge" of the relevant risk although there was some evidence that complaints about the culvert had been made in the past. Interestingly, the plaintiff in this case had attempted to argue that the inspections carried out as a result of the complaints were negligent and that this was the reason why the council did not have "actual knowledge" of the problems with the culvert. The court said that to treat a system of inspection which fails to identify the particular risk (and thus leaves the council without actual knowledge of the risk) as a negligent inspection for which the authority is liable

tends to undermine the purpose of the requirement of actual knowledge. The plaintiff's argument therefore failed in this regard.

64. In relation to the failure to erect signs, the court agreed with the trial judge that the plaintiff had not identified the basis on which such signs would have prevented the accident. They also agreed with the trial judge who had analysed the signage question in terms of the elements of s 5B of the Civil Liability Act and concluded that he was not satisfied that putting in place sign was a precaution which would have been taken by a reasonable person in the position of the council. The plaintiff therefore failed on all grounds in the appeal.

Conclusion

65. There have been a number of very interesting cases in the higher courts over the past year in the area of public liability personal injury law.

66. The NSW Court of Appeal in particular is no longer such a "black letter" court as it was a few years ago and is certainly not quite as harsh an environment for plaintiffs as it has been. It will be interesting to see how the court deals with personal injury matters over the next few years and whether there is any legislative intervention if members of the court are seen as trying to circumvent the spirit of the *Civil Liability Act*.

BIOGRAPHY

Dr Tim Channon

Partner, Hicksons Lawyers, Sydney

Dr Tim Channon was admitted to the profession in 1989. Tim has specialised in litigating numerous insurance and general commercial disputes. He is a NSW Law Society Accredited Specialist in Commercial Litigation (Insurance), a LEADR/IAMA accredited mediator and holds a Doctor of Juridical Science. He has acted in a full spectrum of insurance disputes. Dr Channon delivers frequent seminars on personal injury and insurance matters, and is a co-author of the LexisNexis Practical Guide to Personal Injury in NSW.

Louise Mathias

Barrister, Elizabeth Street Chambers, Sydney

Louise Mathias is a barrister and Accredited Mediator, providing advice and advocacy in family law, medical negligence and personal injury matters. In addition to assisting leading firms to implement effective dispute resolution strategies, Louise has lectured in law at the University of Sydney, and developed the Family Law Masters Parenting Masters course for the College of Law Australia. She has been widely published, including in the Law Society Journal and Commercial Law Quarterly, and has contributed content to The Laws of Australia encyclopaedia. Louise regularly writes on diverse topics on her blog at http://www.sydneybarrister.net.au.

BIBLIOGRAPHY

Cases

Robinson Helicopters Inc v McDermott [2016] HCA 22
Prince Alfred College v ADC [2016] HCA 37
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61; 205 CLR 254
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114
Adeels Palace Pty Limited v Moubarak [2009] HCA 48
Kitoko v Mirvac Real Estate Pty Limited [2016] NSWCA 201
Kelly's Property Management Services Pty Limited v Anjoshco Pty Limited t/as McDonalds BP Chinderah [2016] NSWCA 341
Harrington Estates (NSW) Pty Limited t/as Harrington Grove Country Club v Turner [2016] NSWCA 369
Schneider v AMP Capital Investors Ltd [2016] NSWSC 333
Gulic v Boral Transport Limited [2016] NSWCA 269
Jurox Pty Limited v Fullick [2016] NSWCA 180
Penrith City Council v Healey; GIO General v Healy [2016] NSWCA 161
Optus Administration Pty Limited v Glenn Wright by his tutor [2017] NSWCA 21
Carangelo v State of New South Wales [2016] NSWCA 126
Mansfield v Great Lakes Council [2016] NSWCA 204

Legislation

Civil Liability Act 2002 (Cth)