COMMON LAW PRACTICE UPDATE 25

Sections 60 and 62 *Motor Accidents Compensation Act 1999* (NSW)

A MAS assessor issued a certificate that impairment exceeded 10% in *Allianz Australia Insurance Ltd v Francica & Ors* (2012) 63 MVR 1 (Hall J). No reference was made to a causal connection between shoulder dysfunction and the accident and the basis for causation was not evident in the reasons. When the insurer sought a review it was refused by the Proper Officer because the reasons were "clear and self-explanatory". The insurer pursued judicial review. Upholding the complaint, Hall J concluded that the decisions were affected by error of law on the face of the record and/or jurisdictional error through inadequate reasons and inadequate reasoning in relation to causation. The original decision and the decision of the Proper Officer were set aside.

Section 63 *Motor Accidents Compensation Act 1999*

In *Currie v MAA & Anor* (2013) 63 MVR 37 (Adams J), the plaintiff was assessed at a WPI of 5%. He sought a review and the review panel revoked the original assessment, concluding that the plaintiff's injuries were unrelated to the motor vehicle accident after placing emphasis on the lack of "contemporaneous medical evidence".

Adams J held that even though the proceedings are not intended to be adversarial, the principles of natural justice nevertheless apply. The panel assumed the plaintiff had the opportunity to report his injuries and there were obvious reasons why he may not or may have otherwise desisted from doing so. The conclusion reached was not an obvious and natural evaluation and indeed, was far-fetched and unreasonable and was reached without giving the plaintiff an opportunity to deal with it. This amounted to procedural unfairness. The decision was quashed and remitted to be dealt with according to law.

Interstate Employment

In *Wickham Freight Lines Pty Ltd v Ferguson* (2013) 63 MVR 120 [2013] NSWCA 66, the plaintiff sued in the NSW District Court in respect of an injury incurred in the course of his employment in Victoria. Under Section 134AB of the *Accident Compensation Act* 1985 (VIC), actions were precluded in Victoria except in respect of a "serious injury", for which a procedure was laid down to obtain a certificate or a determination prior to the commencement of proceedings. That procedure had not been complied with but the defendant's strike-out motion was refused at first instance. On appeal it was upheld. The respondent submitted that even if the primary requirement was substantive (and it was accepted that Victorian substantive law applied), the subsections relating to the determination of a serious injury were procedural, which were not binding in NSW. The NSW CA rejected that proposition. It would be highly artificial and contrary to the clear legislative intent for characterisation of an injury as "serious" to be made other than by the means provided in the Victorian Act. *Hamilton v Merck & Co Inc* [2006] NSWLR 48 (CA) was distinguished.

Section 5B Civil Liability Act 2002

The plaintiff was injured while assisting an employee of the Council after a trench which had collapsed in *McDonald v Shoalhaven City Council* [2013] NSWCA 81. He was characterised as a volunteer and it was found that he was owed a duty of care. However, the trial judge held that he had not established a breach of the duty of care owed to him. The CA held that even if the duty of care owed to the employee was governed by a different standard under Section 3B(1)(f) relating to workers compensation, that was not a basis for finding that the same test had to apply to a volunteer to whom a duty of care was owed. His duty of care was governed by the *Civil Liability Act*. The trial judge erred in his finding under Section 5B(1)(b) that the harm that would occur if shoring up of the trench which collapsed was not significant. "Not insignificant" does not mean "significant". A test of "not insignificant" is more demanding but not by very much than a test of "not far-fetched or fanciful" as at common law in *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40. Accordingly, the verdict for the defendant at first instance was set aside and a re-hearing ordered.

Medical Negligence

In *Varipatis v Almario* [2013] NSWCA 76, the defendant's appeal was upheld. A General Practitioner may have a duty to recommend weight loss and to give advice as to how that may be achieved. There is no obligation to do more than that. The plaintiff's conduct did not suggest that the plaintiff would have acted on a referral to an obesity clinic or lost weight. Therefore, this finding of negligence was not causative of harm. The expert evidence did not support the conclusion that a reasonable practitioner would have referred a patient in the circumstances to a bariatric surgeon in 1998. Absent such a duty, this conclusion cannot stand. Whilst the GP should have disabused the plaintiff of the notion that his problem was due in part to exposure to toxic chemicals, nonetheless he was given the appropriate advice that he needed to lose weight to save himself. The plaintiff did not establish that he would have accepted a referral to an obesity clinic given that he had failed to act on a previous referral and did not establish that weight loss would have followed from a timely referral to a hepatologist. The primary judge found fault in failing to refer to a bariatric surgeon or to an obesity clinic. However, he upheld causation only in respect of the surgeon. Because the duty could have been satisfied by referral to an obesity clinic, but this would, on the evidence, have been unsuccessful, the first omission was not a necessary condition of the occurrence of the plaintiff's injuries.

Employer

The plaintiff sued in the Queensland Supreme Court for damages for injuries suffered in the course of her employment in *Weaver v Endeavour Foundation* [2013] QSC 93 (McMeekin J). The defendant employer provides employment for persons with intellectual disabilities and sometimes their clients become agitated or even violent. The instructions to staff were to retreat quickly in those circumstances. In doing so on this occasion, the plaintiff tripped and fell, suffering injury. McMeekin J held on the facts that this was a breach of the employer's duty of care and that a reasonably safe system of work through other instructions would have been likely to have obviated this risk of injury. The plaintiff succeeded without reduction for contributory negligence.