

## COMMON LAW PRACTICE UPDATE 48

### Section 62 *Motor Accidents Compensation Act 1998* (NSW)

At issue in *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442 was whether the refusal by the Proper Officer of the insurer's application for a further assessment (having been dissatisfied with the WPI of more than 10%) gave rise to a jurisdictional question so as to invoke the intervention of the Supreme Court. Noting that there were particular considerations in favour of the view that Parliament did not intend questions of relevance and materiality to be determined by the Supreme Court, the NSW Court of Appeal rejected the insurer's claim. The Court upheld the assessment of the primary judge that the Proper Officer's finding could not be described as manifestly unreasonable or irrational. Furthermore, it did not otherwise demonstrate error of law. Leave to appeal was granted but the appeal was dismissed with costs.

### Multiple Causation

The defendant appealed from a decision awarding damages to the plaintiff to compensate her for injuries she suffered in a motor accident in *Salkeld v Cocca* [2013] SASCFC 138. The plaintiff had been crossing a main road when knocked down by the defendant's vehicle. Neither party saw the other until impact. Liability and apportionment were strongly disputed. The first instance judge found the defendant liable but reduced the damages by 10% for contributory negligence. The defendant argued on appeal that the apportionment should have been higher against the plaintiff.

Following the accident, the plaintiff returned to work and shortly after was the victim of a violent armed robbery. As a result she suffered from post-traumatic stress disorder and psychiatric injuries. The trial judge held that both the motor accident and the robbery were contributing causes to an impairment of her earning capacity and assessed damages accordingly. The defendant submitted the judge erred by conflating the two separate incidents as contributing to psychiatric injury, and thus in awarding an excessive sum in damages for non-economic loss, past economic loss and future economic loss.

On all issues, the South Australian Full Court rejected the defendant's appeal. The apportionment by the trial judge was fair and reasonable and the damages as calculated were proper in law and not erroneous. The motor accident was clearly a cause of the plaintiff's psychiatric condition or illness and the accident rendered her vulnerable. The defendant's negligence was a necessary condition of the occurrence of harm which resulted.

### Intentional Injury

In *Sharon Whitehead v Michael Moon* [2013] ACTSC 243, the plaintiff sued in relation to sexual assault by the defendant whilst the parties were in Sydney. The defendant alleged that the sexual activity was consensual. The plaintiff had reported the matter to Canberra Police, who advised that the matter would have to be raised with NSW Police. After being interviewed by an NSW police officer, the plaintiff did not want the matter taken further. The plaintiff brought a civil action. She had attended a rape crisis centre and had had a psychiatric admission to hospital. The plaintiff had received significant psychiatric treatment and had had psychiatric symptoms in all probability since her adolescence. She had attempted suicide. The defendant's evidence was in a number of respects inconsistent with his statement

to an insurance investigator. Master Harper preferred the plaintiff's evidence, and was satisfied that there was no consent to the sexual relationship and that the defendant committed a trespass to the plaintiff's person, entitling her to damages. Damages were calculated in accordance with NSW common law and a 3% discount rate. A small amount of some \$10,000 was awarded by way of aggravated damages but no award was made for exemplary damages in circumstances where the defendant was not aware of the effect of his physical behaviour on the plaintiff's psychological state. The total damages awarded amounted to \$668,856.