COMMON LAW PRACTICE UPDATE 18

Duty of Care/Intentional Injury

Police pursued the plaintiff from the street onto hospital grounds, where he fell and injured himself in *Dowse v NSW* [2012] NSWCA 337. At issue was whether there was any proper basis for the pursuit and whether there had been negligence on the part of the police involved. The police did not intend to arrest the plaintiff, however the Court of Appeal concluded that the plaintiff's flight was a choice he made in the absence of any unlawful threat and that, after he had entered upon enclosed lands, there was then a basis for pursuit. The plaintiff's appeal was dismissed.

Sections 73, 81 and 96 of *Motor Accidents Compensation Act 1999*

In *Gudelj v MAA of NSW* (2011) 81 NSWLR 245 (NSW CA), the plaintiff gave notice of claim to his insurer almost 2½ years after the accident. Section 72 required notice to be given within six months, but Section 73 provided that a late claim could be made if a claimant gave a full and satisfactory explanation for the delay. The insurer rejected the claim on the basis that it was late and that there was no full and satisfactory explanation. However, it gave no notice under Section 81, which required the insurer to give written notice as expeditiously as possible whether the insurer admits or denies liability for the claim within three months after notice of the claim was given. If the insurer fails to comply, the insurer is taken to have wholly denied liability for the claim. Under Section 96, the claimant applied for a special assessment of the question whether a late claim could be made under Section 73. Section 96 relevantly provides that a dispute over whether Section 73 has been satisfied is to be referred to a claims assessor. A CARS assessor decided that the claimant was not entitled to make a late application as his explanation was not full and satisfactory. Before this, the claimant had made an application for general assessment, seeking exemption from assessment because the insurer had denied liability. The principal claims assessor concluded that the claim could not be exempted as the insurer had not issued a Section 81 notice. At first instance, the claimant's application for judicial review was dismissed. The claimant then sought leave to appeal against that dismissal. Granting leave to appeal and allowing the appeal, the Court of Appeal held that where an insurer had not lost the right to reject a late claim, a claimant who is subject to an adverse determination under Section 96 was not prevented from having the issue of whether he or she had given a full and satisfactory explanation for the delay in making a claim determined by the court.

The duty of an insurer to comply with Section 81 applied in respect of late claims and not merely claims in time.

As a result, the insurer should have complied with Section 81 and the failure to do so meant that the insurer was deemed to have rejected the claim. That meant that a certificate of exemption could have been issued.

The intention of the legislature was that claimants should as a last resort have recourse to the courts to determine their rights under the Act and they should not generally be shut out of an arguable claim before the courts by reason of an assessment under Section 96.

The decision of the principal assessor was quashed and mandamus required the MAA to exercise its power according to law. The insurer was ordered to pay the claimant's costs of the proceedings below and on the appeal, and the Court dismissed the insurer's application for leave to cross-appeal.

Res Ipsa Loquitur

In *Mansi v O'Connor & Ors* (2012) 62 MVR 143 (Ann Lyons J) [2012] QSC 336, a cement truck discharged a quantity of slurry as it went around a corner. The plaintiff, following on a motor cycle, slid in the concrete, which caused him fall and suffer injury. Whilst he identified the vehicle as a ready mix truck, he was unable to ascertain the particular vehicle. He sued a number of potential defendants from that company. It was held that the plaintiff was injured in the manner he described and, by a process of elimination, Her Honour was satisfied that on the balance of probabilities the first defendant was the more likely vehicle to have been involved. There was judgment against the first defendant.