

## COMMON LAW PRACTICE UPDATE 15

### **Section 26B *Civil Liability Act 2002***

The plaintiff was assaulted whilst in prison and the defendant admitted both duty of care and breach in *Michael v State of NSW* [2011] NSWSC 231 (2011) 81 NSWLR 1. However, the defendant alleged that the plaintiff's neurological and psychiatric condition had resulted from drug abuse and his past injuries. The defendant also relied upon the s 26C *Civil Liability Act* defence, limiting recovery by an offender in custody.

As to the threshold, the plaintiff was assessed by two approved medical specialists under s 26D of the *Civil Liability Act* and the defendant appealed against the medical assessments. An appeal panel revoked both certificates and issued new certificates, finding a WPI of 28%. Section 326 of the *Workplace Injury Management and Workers Compensation Act 1998* relevantly provided that a medical assessment certificate was to be presumed to be conclusively correct in any court proceedings as to the degree of permanent impairment. However, it was held by Fullerton J that the issue of factual causation in s 5D was reserved for determination by the court and the conclusive effect of the medical certificate under s 328 of the *Workplace Injury Management and Workers Compensation Act* was limited to the specific matters set out in s 326(1) of that Act. The assessment of permanent impairment was only conclusive upon a finding of liability by a court or as agreed by the parties and for the purpose of establishing the threshold requirement of s 26C of the *Civil Liability Act*. A medical assessment certificate will be conclusive as to the cause of relevant impairment only if the court is satisfied that the injuries were caused by the defendant's breach of duty of care. The appeal panel's findings did not give rise to an estoppel in respect of the issues it was required to determine, including causation, as the court is not bound by a medical assessment certificate if it makes findings which differ from those upon which an appeal panel has relied in preparing its certificate.