COMMON LAW PRACTICE UPDATE 41

Sections 69 and 104 *Motor Accidents Compensation Act 1999 (NSW)*

In *AAI Ltd v Josipovic* [2013] NSWSC 1524, the validity of a certificate of a CARS assessor was challenged by an insurer on the basis of alleged inadequate reasons and the failure to consider the merits of the insurer's case in respect of the assessment of future care. Dismissing the claim, Campbell J held that there was no inadequacy of reasons, that the insurer's case had been adequately considered and that the assessor was entitled to find that future care would be provided on a commercial basis.

Section 151D *Workers Compensation Act* 1987 (NSW)

The plaintiff employee sought leave pursuant to s151D to commence proceedings for damages against the employer in *Merton v Menildra Energy Australia Pty Ltd* [2013] NSWSC 1482 (Hoeben CJ at CL). The employee's explanation for the delay in proceedings, a significant factor of which was psychiatric injury as a direct consequence of the accident, was satisfactory, and there was no evidence of any prejudice. The employer had known relatively early of the intention to bring proceedings. Exercising its discretion, the court allowed the extension of time.

Non-delegable duty of care - schools

The United Kingdom Supreme Court unanimously overturned the decision of the English Court of Appeal in *Woodland v Essex County Council* [2013] UKSC 66, which had held that a school did not owe a non-delegable duty of care. The question for the court was whether the duty was merely to take reasonable care in the performance of the functions entrusted to it only when those functions were undertaken itself through its own employees, or whether it was a duty to ensure that reasonable care was taken in the performance by whoever it may procure to perform them, that is, a non-delegable duty. The court held that the latter was the case, consistent with the longstanding approach in Australia. The duty is non-delegable only when it falls within the scope of the education authority's duty to pupils within its care, but in entrusting that duty to someone else in respect of those who are inherently vulnerable, an educational authority cannot escape liability because it could not control the negligence of the party to whom it delegated those responsibilities. The decision makes it clear that, whilst a non-delegable duty does not amount to strict liability, it goes significantly further than the High Court's interpretation of a non-delegable duty in *Lepore* in 2003.

Duty of care - subcontractors

A subcontractor claimed damages from a builder for injuries suffered whilst lifting concrete blocks in *Fischetti v Classic Constructions (Aust) Pty Ltd and Vero Insurance Ltd* [2013] ACTSC 210, alleging that the builder negligently breached his duty of care not to expose him to the risk of injury. The plaintiff was a concreter but the lifting task which led to the injury was one for an unskilled labourer. Master Harper was satisfied that the builder breached the duty of care owed to the subcontractor, as well as being in breach of the former occupational health and safety regulations. The injury was clearly foreseeable. Master Harper found that there was no contributory negligence.

Safe system of work/breach of duty

In *Cairns Regional Council v Sharp* [2013] QCA 297, the plaintiff was a gardener employed by Cairns Regional Council. His hand was injured when he was startled by a car horn whilst mowing grass on a medium strip. At first instance, the Council was held to have breached its duty of care to provide a safe system of work. The Council sought leave to appeal, whereupon the Queensland Court of Appeal held the judge did not err in concluding there was a breach of duty. The judgment contained a brief but recent application of established legal principle to facts rightly found on the evidence. Leave to appeal was refused on the basis that the proposed appeal had no prospect of success.

Motor vehicles - inevitable accident

The plaintiff in British Columbia in *Tran v Edbrooke* [2013] BCSC 1802 (Williams J), sued when the vehicle driven by the defendant slid into an intersection and struck the plaintiff's vehicle. The conditions were slippery due to heavy snow. The defendant denied liability on the basis of "inevitable accident", suggesting he had provided an explanation which was as consistent with no negligence as it was with negligence. Williams J held there was no inevitable accident. The defendant failed to establish he was met with a hazard of which he had no prior warning or indication and failed to conduct himself with appropriate caution. The plaintiff succeeded accordingly.