COMMON LAW PRACTICE UPDATE 51

Section 5R *Civil Liability Act 2002* (NSW), section 50 *Motor Accidents Compensation Act 1998* (NSW)

The plaintiff was struck by a motor vehicle in the car park of a tavern in *AAI Limited & Anor v Miles* [2014] QCA 22. He had been consuming alcohol at the premises. The plaintiff's brother and a friend had abused, spat at and thrown a projectile into a stationary vehicle near the driveway to the bottle shop. As the vehicle accelerated away, it ran over the plaintiff's legs, causing him serious injury. The driver went immediately to the police to report the incident. At trial, the judge accepted that the plaintiff had not been involved in the altercation and was not standing in the path of the vehicle. Based on the testimony of independent witnesses, His Honour preferred the evidence that the plaintiff was at an angle from the vehicle and that the vehicle it did not need to drive over him in leaving the scene. The trial judge also did not accept that the plaintiff was relevantly impaired by alcohol. The defendant and his insurer appealed. The evidence indicated that the plaintiff's blood alcohol reading would have been .04 at the time of injury. It was therefore unlikely that it would impair the ability of an individual to make a decision to any great extent. It was open to the trial judge to find that the plaintiff was not in the path of the vehicle and should not have been run over, and in fact the weight of the evidence supported that proposition. As a result, the appellants failed to establish that the trial judge's finding was glaringly improbable, and their complaint about the absence of a finding of contributory negligence was accordingly dismissed with costs.

Evidence- Appeals

In *Wingfoot Australia Partner Pty Ltd & Anor v Jovevski* [2014] VSCA 21, the Victorian Court of Appeal affirmed that, as a general rule, a party is bound by the case it ran below and cannot run a new case on appeal. There are however exceptions, for example, where the issue is purely one of law. See, for example, *Lepore v NSW & Anor* [2001] NSWCA 112. On the question of when an appellate court can interfere with factual findings, much depends upon whether those findings were on issues of credit or not. If a credit finding was open to the trial judge, then it will not be interfered with unless it was glaringly improbable. In respect of non-credit findings, an appellate court is often in as good a position as the trial judge (whilst paying due regard to his advantages) to substitute its own opinion and correct findings as appropriate. *Fox v Percy* [2003] HCA 22.