COMMON LAW PRACTICE UPDATE 73

Sections 7B and s 138 *Motor Accidents Compensation Act 1999* (NSW)

The pedestrian plaintiff was injured in in *Davis v Swift* [2014] NSWCA 458 when a vehicle ran over her foot while she attempted to cross the road. The plaintiff sued the driver in negligence and in the alternative on the basis of a blameless motor accident. Although the primary judge (Gibson DCJ) found that it was a blameless accident, contributory negligence was assessed at 100%.

The NSW Court of Appeal found that the evidence did not support a finding that the driver must have seen the plaintiff in time to avoid running over her foot if she had taken the precaution of looking forwards, backwards and forwards, as she asserted. This was therefore a blameless accident. However, the trial judge erred in relation to contributory negligence by asserting that the plaintiff was the "sole cause of the accident". The accident was the combined result of the plaintiff's conduct in walking into the path of the vehicle and the defendant's conduct in driving from the kerb. The plaintiff's conduct was the single cause solely in terms of causation, which is not the appropriate test. The reduction of damages for contributory negligence is to be determined by assessing the extent to which the plaintiff departed from a standard of care he or she was required to observe in the interests of his or her safety. That test, from *Axiac v Ingram* [2012] NSWCA 311, should have been applied. Given the significant departure from the standard of care expected, the appropriate finding was that the plaintiff's damages should be reduced by 80%. Adamson J dissented, indicating that she, like the trial judge, would have found 100% contributory negligence.

Section 73 *Motor Accidents Compensation Act 1999* (NSW)

In *Karambelas v Zaknic (No. 2)* [2014] NSWCA 433, the plaintiff appealed from the trial judge's decision that she was not satisfied the plaintiff had a "full and satisfactory explanation" for her delay in making her claim outside the six months permitted in the statute.

After the accident took place in March, the plaintiff consulted solicitors in June of the following year and notice was then not given to the insurer until the following August, some 10½ months after the six-month period had expired. Although a dispute under s 96 *Motor Accidents Compensation Act* was determined in the plaintiff's favour, that decision did not bind the insurer once the plaintiff declined to accept the award of damages and commenced District Court proceedings.

On appeal it was conceded the primary judge had erred in finding the length of delay in the case to be 4 years and 9 months in the context of the defendant insurer's strike out motion in the District Court. In the light of this conceded error, the Court of Appeal was left to decide whether the plaintiff had a satisfactory explanation, particularly in circumstances where there had been no findings at first instance as to the plaintiff's credibility. The evidence was that the plaintiff was unaware of the need to give notice within six months and first became realised this in June of the year following the accident. The plaintiff was told by an osteopath that she could obtain treatment expenses from the insurer and notice was given for this purpose and provisional liability was accepted by the insurer in this regard, the insurer responding by acknowledging receipt but failing to make reference to the need to complete a

separate notice of claim. Allianz advised that "provisional liability" had been admitted and reasonable and necessary medical expenses up to $5,000 would be paid. The plaintiff's evidence was that she thought that this was sufficient notice to Allianz, and the Court of Appeal agreed that a reasonable person in the plaintiff's position would have been justified in acting in the way she did following receipt of the insurer's correspondence. Accordingly, the plaintiff was held to have provided a full and satisfactory explanation and the plaintiff's appeal was upheld with costs.