COMMON LAW PRACTICE UPDATE 68

Section 63 *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was injured in a motor accident in *Bugat v Fox* [2014] NSWSC 888, and was referred to a medical review panel after undergoing a series of medical assessments. The panel concluded that a number of the plaintiff's injuries were not caused by the accident in view of the lack of contemporaneous evidence to confirm causation. The plaintiff sought judicial review largely on the basis that the wrong test of causation had been applied.

RS Hulme AJ set aside the review panel's certificate and remitted the matter to be dealt with according to law by a differently constituted panel. His Honour noted that although the presence or absence of contemporaneous evidence of injury was relevant, it was not determinative. That was particularly the case in circumstances where there was other evidence to support the plaintiff's complaints. Whilst it is not appropriate to subject the panel's reasoning to minute and detailed contextual criticism, the panel had erred as they perceived the absence of contemporaneous evidence as being determinative of causation.

Section 95 *Motor Accidents Compensation Act 1999* (NSW)

Following her injury in a motor accident, the plaintiff's damages were assessed by a CARS Assessor in in *Bastic v Allianz Australia Insurance Ltd* [2014] NSWSC 887. The Claims Assessment Guidelines required written notification of the other party by the plaintiff as to whether the assessor's decision is accepted or rejected under section 95 *Motor Accidents Compensation Act* and, if accepted, that decision is binding on the insurer. The plaintiff's solicitors informed the Motor Accidents Authority in writing that their client accepted the certificate of assessment, but no written notice of this was provided to the insurer. The insurer claimed that the award had not been accepted and that this was clear from the breach of clause 18.9 of the Guidelines. The plaintiff claimed declaratory relief, which was granted by RS Hulme AJ, finding that s95 merely refers to acceptance of an assessment without specifying the method of notification of that acceptance. Notifying the MAA was sufficient and the insurer was bound by the CARS Assessor's decision. Guideline 18.9 should not be regarded as mandatory in respect of the procedure for compliance.

Section 126 *Motor Accidents Compensation Act 1999* (NSW)/Damages/Future Economic Loss

The claimant in *QBE Insurance (Australia) Ltd v Volokhova & Ors* [2014] NSWSC 726 had qualified as a lawyer overseas and had worked in her own legal practice. She was enrolled in legal studies in Australia but alleged that she could not continue those studies because of injuries sustained in a motor accident in NSW. She was not working at the time of the accident. The CARS assessor awarded $500,000 as a buffer in respect of future economic loss. The insurer sought judicial review on the basis that this amount was excessive and there had been non-compliance with s 126 the *Motor Accidents Compensation Act 1999.* In particular, it was said the assessor's reasons were inadequate.

Harrison AsJ, in dismissing the insurer's summons, held that it was appropriate to award damages by way of a buffer in circumstances where it is difficult to quantify the impact on earning capacity. In the circumstances the Assessor's approach was appropriate. The assessor had identified future earning capacity prior to the accident and a diminution in that capacity,

and this constituted sufficient compliance with s 126. The insurer's claim for relief was dismissed.

Employment/Extension of Time

The plaintiff employee in *Unilever Australia Ltd v Petrevska* [2013] NSWCA 373 gave her former employer notice of a hearing loss claim some 14 years after she had ceased employment with the organisation. Although 261 of the *Workplace Injury Management and Workers Compensation Act* 1998 provided a six month period in respect of such notice, the plaintiff sought an extension of time under that section because, although she was aware of the gradual onset diminished hearing and may have believed that it was caused by her employment, it was not until she obtained medical evidence confirming the cause of her hearing loss that she was aware of the injury for the purposes of s 261(6). The plaintiff sought and was granted the extension of time. The employer appealed. Rejecting that appeal, the NSW Court of Appeal said that her belief was not sufficient and that awareness would ordinarily involve expert advice.