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Section 3A *Motor Accidents Compensation Act 1999* (NSW)

The plaintiff was accidently shot in the head by a bullet during a hunting expedition and injured in *Bayon v Bayon* [2014] NSWCA 434. A motor vehicle was used as a mobile shooting platform when the accident took place. In the view of the trial judge, the use of the vehicle was merely incidental to the accidental discharge of the weapon and not related to causation. On appeal the Court of Appeal concluded that the situation was not caused by the driving of the vehicle.

Extension of time – section 60G *Limitation Act 1969* (NSW)

The plaintiffs claimed an extension of time under s 60G of the *Limitation Act 1969* (NSW) in *Eastbury v Genea Genetics* [2014] NSWSC 1793 (Hall J). The plaintiff's action was concerned alleged that the defendant had negligently performed genetic screening before the birth of the plaintiffs' children. Their parents sued for economic and non-economic loss, particularly in respect of future care, as it was unlikely that either of the children would be able to live independently as adults. Although the children were born in 2008 and 2011, proceedings were not brought until 2014, so that time would have expired in respect of the first child but not for the second. However Hall J was not satisfied that the defendant had established that the discretion should be exercised against an extension of time or that a fair trial was unlikely. An extension of time was therefore ordered.

Genetic testing

The plaintiff's mother was bearing the unborn plaintiff in *Zraika v Walsh* [2014] NSWSC 1774 when she was involved in a motor accident allegedly caused by the defendant's negligence. After the plaintiff's birth, the diagnosis of microcephaly and developmental delay was made. At issue was whether these conditions were due to trauma or genetic causes. The plaintiff's treating paediatrician recommended that a number of genetic tests be undertaken, but this course of action was refused by the plaintiff's mother. Davies J however took the view that the justice of the case required that the genetic testing be conducted and, on the defendant's motion, made orders accordingly.

Causation

In Cowen v Bunnings Group Ltd [2014] QSC 301 the plaintiff developed pneumococcal meningitis encephalitis and septicaemia while in the defendant's employ, alleging that these conditions were the result of sweeping up spilled fertiliser and hence inhaling fertiliser dust. The defendant pointed to the plaintiff's pre-existing respiratory illness, her cigarette smoking and the presence of atmospheric sulphur dioxide, arguing that these factors meant the plaintiff was unable to prove it more probable than not that her inhalation of the fertiliser dust was causative. The defendant did admit a breach of duty of care but however strongly contested causation. The trial judge accepted the plaintiff as a witness of truth.

Although there was a degree of equivocality to the expert medical evidence, the temporal connection between substantial exposure and commencement of the problem could not be easily dismissed in the absence of any other potential cause.

Bunnings argued there were a number of other possible causes which were at least equally possible, of which two - her pre-existing respiratory illness and history of smoking - precluded recovery.

However, taking into account the timing of the illness and the relative unlikelihood of the other potential causes, Wilson J was satisfied on the probabilities that the exposure during employment to the fertiliser dust was substantially the most plausible of the potential causes and accordingly held that causation was established.

Death by negligence

In *O'Reilly v Western Sussex NHS Trust (No. 6)* [2014] NSWSC 1824 the plaintiff alleged that her husband's death was caused by the negligence of the defendants and claimed damages as well for nervous shock. The claim in negligence was brought in NSW under the *Fatal Accidents Act* 1976 (UK).

The deceased, Dr O'Reilly, suffered blood loss and attended the colorectal surgical unit, where his problem was assessed. Eventually an endoscopy was undertaken and ultimately the defendants conceded that the procedure was not undertaken completely or properly. Had it been undertaken properly, a lesion which was subsequently identified would have been discovered earlier. A CT scan was only undertaken after significant further symptoms. It showed multiple metastases throughout the deceased's liver. The plaintiff claimed that Dr O'Reilly died of complications attributable to his obstructed bowel and the emergency operations to deal with the obstruction consequent upon the late diagnosis. The defendants however argued that he died due to terminal cancer. In their joint report, the UK experts agreed that had the tumour been detected and removed earlier, the bowel obstruction would not have occurred, or at least not at the time when it did. Had the appropriate treatment taken place in 2003, the metastases would not have escaped into the bowel as they had done by the time they were discovered in 2006. The trial judge found that the plaintiff proved the necessary causal connection between the bowel obstruction and Dr O'Reilly's death.

In respect of damages, he found that loss of financial support was limited by the likelihood that the tumour would ultimately have killed the deceased and there was therefore a closed period until the otherwise estimated likely date of death in 2008. The plaintiff was entitled to a loss of services by the deceased regarding their son, who had a disability. Under UK law damages were available for bereavement. The plaintiff's nervous shock claim was determined under English law. His Honour was not satisfied that the plaintiff had shown that she was unaware of the material cause within the limitation period and accordingly she was not entitled to an extension of time in respect of her nervous shock claim.