COMMON LAW PRACTICE UPDATE 78

Section 5O *Civil Liability Act 2002* (NSW)/Medical Negligence

The plaintiff sued her general practitioner in *Mules v Ferguson* [2015] QCA 5, whom she had seen four times before subsequently being admitted to hospital. Once admitted, she was diagnosed with cryptococcal meningitis, which left her blind, deaf and with other major disabilities. The plaintiff claimed that the GP neither made a proper examination or proper enquiry and that her injuries would have been largely avoided had this occurred.

At first instance, the primary judge found that there had been a breach of the doctor's duty of care by not physically examining the plaintiff's neck and enquiring further about the symptoms of neck stiffness, headaches and facial flushing. Her condition continued to worsen between successive GP examinations. However, the trial judge did conclude that, had a physical examination properly been undertaken, then nonetheless the GP would have not detected anything suggestive of cryptococcal meningitis. The trial judge dismissed the plaintiff's claim after assessing the plaintiff's damages of $6.7 million.

The trial judge's conclusion as to the likely consequences of the GP acting in accordance with her duty was against the weight of the evidence. Had the doctor acted in accordance with good practice, the doctor would have referred the plaintiff for assessment by a specialist or to her local hospital, which would have avoided the catastrophic consequences.

The appeal was allowed by a majority.

Section 5R *Civil Liability Act 2002* (NSW)

In *Zheng v Wallace* [2015] NSWSC 3 (Price J), the plaintiff failed to give way at a give way line whilst making a right turn at a T-intersection in Western Australia. The plaintiff contended that the defendant driver of a prime mover towing two empty B-double trailers had a more than adequate opportunity to see her and took no steps to avoid the collision with the plaintiff's sedan. The plaintiff suffered severe traumatic brain injury. Damages of just over $3 million were agreed, along with fund management costs under Western Australian law.

The relevant provisions of the *Civil Liability Act* 2002 (WA) are materially similar to the NSW provision. The evidence indicated that the plaintiff's car had stopped momentarily on the white line and then started to roll forward. The defendant said that he braked as hard as he could.

It was not the defendant's case that the plaintiff's obligation to give way relieved the defendant of a duty of care. When the Camry moved off the give way line, the risk of harm to the plaintiff was foreseeable and not insignificant. Having witnessed the plaintiff's conduct, a reasonable driver in the defendant's position would have done more to avoid the risk of harm and would have sounded the prime mover's horn. Price J gave little weight to the fact that the defendant was driving the heavier vehicle and assessed contributory negligence at 80%.

Dust diseases/section 52 Workers Rehabilitation and Compensation Act 2007 (NT)

In *Zabic v Alcan Gove Pty Ltd* [2015] NTSC 1 (Barr J), the plaintiff was an elderly man man dying of malignant mesothelioma. He had a prognosis of only six months survival. Damages were agreed. On the balance of probabilities Barr J was satisfied that the plaintiff's mesothelioma was caused by unprotected exposure to asbestos dust and fibres whilst working for the defendant at Nhulunbuy Alumina Refinery between 1974 and 1977 and that the mesothelioma was caused by the defendant's negligence. The plaintiff was engaged in the regular task of removing asbestos lagging from pipes and sweeping up debris. There was a reasonably practical way of obviating or eliminating the risk on the information then available. However, the plaintiff's claim had to be dismissed, as it was statute-barred under s 52 of the *Workers Rehabilitation and Compensation Act* and not preserved by s 189 of that Act.