

COMMON LAW PRACTICE UPDATE 67

Sections 5B and 49 *Civil Liability Act 2002* (NSW)/ **Railway Injuries**

The plaintiff was struck and run over by a train in *Rail Corporation NSW v King* [2014] NSWCA 207. The incident occurred at Mortdale Railway Station, shortly after 3am on a Saturday morning. The plaintiff, who had consumed a considerable amount of alcohol had fallen on the line and was seriously injured. He subsequently had his left leg amputated. Damages were agreed at \$1.3 million.

The major issue was whether the train driver should have seen the plaintiff in enough time for him to effectively apply the emergency brakes. In this regard the critical distance to see the plaintiff was from between 102 and 105 metres away, depending on which of two experts was preferred. The experts agreed that the line of sight allowed visibility at 141 metres, and also on a reaction time. The plaintiff wore a white t-shirt and dark shorts at the time of the incident. Davies J concluded at first instance that the driver underestimated the distance from which he first saw the plaintiff on the line. If the driver failed to observe an object on the line when it was first within his line of sight or very soon after, Davies J was of the view that the driver was in breach of his duty in not keeping a proper lookout.

Davies J notes that the driver's main concern would be objects or people on the track, as the driver did not need to steer the train. The risk not only involved injury to individuals but also potential derailment. In those circumstances, the duty of care was breached. The risk of injury was foreseeable and not insignificant: *Civil Liability Act 2002* s 5B. His Honour also found that RailCorp had breached its duty of care by failing to provide clear instructions to drivers about the appropriate action to be taken in these circumstances. He was satisfied that the plaintiff was intoxicated and that this led to him falling on the line. Damages should be reduced by 50% [100]. On appeal, it was held that, on the evidence adduced, it was not reasonable to find there was sufficient time for the driver to both perceive and respond to the sight of the plaintiff's body lying on the line. Accordingly, a breach of duty in failing to respond to an object on the track was not causative of the injury. The appeal was upheld.

Employment

The plaintiff, a teacher, alleged that he sustained injury in the course of his employment in *Doullis v State of Victoria* [2014] VSC 395. The plaintiff's injury allegedly stemmed from being repeatedly exposed to highly stressful circumstances, of which the defendant was aware and failed to take adequate steps to control. Ginnane J found it was reasonably foreseeable that the plaintiff might suffer a recognised psychiatric injury and also that there was a duty to take reasonable care to avoid it. A reasonable person armed with the knowledge available to the authority would have realised there was a risk. The authority breached its duty by not taking reasonable steps in respect of the risk. That breach primarily involved the plaintiff's unduly heavy workload which the defendant knew he was struggling with. As a result, the plaintiff succeeded.

By way of contrast, the Western Australian Court of Appeal judgment in *O'Donovan v Western Australian Alcohol and Drug Authority* [2014] WASCA 4 is worth noting. There the Court upheld a trial judge's finding that inappropriate and unlawful conduct by an employer in respect of an employee's work roster, which along with other issues resulted in to psychological illness, was not a foreseeable consequence of the misconduct despite significant complaint from the plaintiff.