

## COMMON LAW PRACTICE UPDATE 4

### Sections 62 and 63 of *Motor Accidents Compensation Act 1999*

In *Nelkovska v MAA of NSW* [2012] NSWSC 819 before Harrison AsJ, the plaintiff sought a review of adverse determinations. The medical assessor, noted the plaintiff's history of multiple sclerosis (which according to the plaintiff was currently in remission) concluded that there were behavioural issues revealed in the clinical assessment and very limited prospects for a positive outcome from an active treatment plan. The assessor found that the motor vehicle accident was not materially contributing to the plaintiff's level of incapacity and did not have a causal relationship to the subject incident. Accordingly the assessor refused any domestic assistance. The plaintiff argued that the assessor failed to apply the correct test for causation and denied procedural fairness. Her Honour concluded that the medical assessor had applied a higher test, "directly causally related", and had fallen into jurisdictional error by asking the wrong question. The test was not whether the request for domestic assistance was causally linked to the subject accident, but rather whether the plaintiff's injury was caused or materially contributed to by the motor accident and then assessing whether the proposed assistance relates to that injury and is necessary and reasonable. Accordingly, the decision to refuse a review of the medical assessor's conclusion was also an error. The medical assessor's decision was set aside with costs and the matter was remitted for a new medical assessment."

### Section 94 of *Motor Accidents Compensation Act 1999*

A CARS assessment of damages was set aside for failure to provide adequate reasons to support the award of damages for economic loss in *CIC Allianz Australia Ltd v Daniel Luke McDonald & Ors* [2012] NSWSC 887 The assessor's certificate was set aside and, after argument, Hidden J ordered that the re-hearing should be before a different assessor.

### Medical Negligence

A radiologist reviewed and reported upon an angiogram and negligently failed to detect and report on the presence of an aneurism in *Paul v Cooke* [2012] NSWSC 840 (Brereton J). The radiologist admitted a breach of duty but denied that his duty of care extended to taking reasonable care to avoid harm occasioned by treatment of a diagnosed condition. The defendant alleged that the loss and damage was not caused by the breach of duty, rather alleging that the rupture was an inherent risk of the previous procedure, so that it was merely an inherent risk under Section 51 of the *Civil Liability Act 2002*. The plaintiff's argued that earlier diagnosis would have meant that there would have been an overwhelming likelihood that the plaintiff would have avoided the rupture and consequential injuries. On the probabilities His Honour concluded that the plaintiff would have sought and obtained treatment if properly diagnosed and therefore found that factual causation was established. As to scope of the duty, the harm suffered was not harm of the kind from which the relevant rule of responsibility was intended to protect her. The defendant's negligence created a risk which would otherwise have been avoided (spontaneous rupture of the aneurism) but his negligence did not create the risk of intra-procedural rupture which was associated with the necessity for treatment once the aneurism was diagnosed, no matter when it was diagnosed. Whilst delayed diagnosis did increase exposure to spontaneous rupture, it did not increase the risk of intra-operative rupture, which would have been incurred whenever the diagnosis was

made and the procedure undertaken. As a result, the delay in diagnosis neither created nor materially increased the risk. Brereton J concluded that he did not need to decide the issue but had he been required to do so, he would have found that Section 5I did not preclude liability. Section 5I “merely re-states the common law position that there is no liability in respect of a risk that materialises without negligence – except in the context of a breach of duty to warn of such a risk”. As a result, the plaintiff failed on causation.