COMMON LAW PRACTICE UPDATE 23

Sections 5B and 49 of the *Civil Liability Act 2002*

The plaintiff was struck and run over by a train at Mortdale Railway Station, shortly after 3.00am in *King v RailCorp NSW* [2013] NSWSC 241 (Davies J). He suffered a number of injuries, including amputation of his left leg just below the knee. Damages were agreed at $1.3 million. The plaintiff had consumed a significant quantity of alcohol.

The major issue in the case was whether the train driver should have seen the plaintiff in the time available to him in which the emergency brakes could take effect. Including a reaction time of 1.15 seconds and a braking distance, the critical distance to see the plaintiff was between 102 and 105 metres, according to the expert evidence. The experts agreed that the line of sight (through curvature of the line) allowed visibility at 141 metres. The experts were agreed as to a reaction time of 1.15 seconds. It was noteworthy the plaintiff was wearing a white t-shirt and dark shorts. The plaintiff's left leg interrupted the bright line of the rail and Davies J concluded that the driver underestimated the distance at which he first observed the plaintiff on the line. If he did not observe the object on the line when it was first within his line of sight or very soon after, Davies J was of the opinion that the driver was in breach of his duty in not keeping a proper lookout.

Davies J noted that a train driver does not have to steer the train and the driver's main concern would be objects or people on the track. The risk was not only one of injury to people but also of potential derailment. In these circumstances, the driver breached the duty of care.

The risk of injury was foreseeable and not insignificant (Section 5B *Civil Liability Act*).

Davies J was also of opinion that RailCorp breached its duty of care in not issuing clear instructions to drivers about actions to be taken in these circumstances.

Davies J was satisfied the plaintiff was intoxicated and this led to him falling on the line. Accordingly, Davies J held that damages should be reduced by 50%.

Duty to upgrade premises

In *Smith v Body Corporate for Professional Suites Community Titles Scheme 14487* [2013] QCA 80, the plaintiff (significantly affected by alcohol) stumbled backwards into the glass wall, which broke into shards, severely cutting her, leaving her with scarring and resulting in psychological problems. The wall was constructed in 1971. Standards adopted in 1973 and revised in 1994 would have required safety or laminated glass but did not require the replacement of existing glass. An ordinary person could not identify whether the glass wall was safety glass. There was no safety audit conducted. In 2000 and 2001, the defendant had engaged architects to upgrade the building but the glass was not considered and no recommendation was made. The Court noted that Higgins J in *Cardone v Trustees of the Christian Brothers* [1994] ACTSC 85 and (1995) 130 ALR 345, had held that in a school situation failure to replace non-safety glass with safety glass after the introduction of revised standards was a breach of duty to the plaintiff student. That, however, was not this situation.

There was also some support for the plaintiff's case in *Tweed Shire Council v Hancomatic Music Pty Ltd* [2007] NSWCA 350. However, that case was distinguishable because the owner here was not the occupier and no breach of statutory or regulatory workplace health or safety scheme was established. Contrary to the plaintiff's submissions, it does not follow that when a safer product becomes available, an occupier or landlord or employer or the provider of a service is required to upgrade to utilise that safer product. McMurdo P was of the view that what was reasonable was a question of fact and in the particular circumstances, the glass should have been replaced. It did not follow that every single pane of glass that did not comply with current standards had to be replaced. Fraser JA was of the view that given the extraordinarily large number of people who entered and left the building over 30 years without a problem, the defendant had not acted unreasonably. Fryberg J agreed. By a majority, the plaintiff's appeal was dismissed.