

By Andrew Morrison SC

Injuries must be sustained 'during' a collision

Zotti v AAMI [2009] NSWCA 323

In *Zotti*, the plaintiff lost control of his bicycle on an oil slick, which remained on the road following a motor vehicle accident a little under two hours before.

On an application for leave to reinstate the claim under s110(5), Neilson DCJ dismissed the claim on the basis that although the applicant had a full and satisfactory explanation for non-compliance, the proceedings were futile because there was no temporal connection between the oil spillage and the bicycle accident and hence no injury within the meaning of s3, attracting the operation of the Act.

On appeal, it was held that in respect of the definition applying in 2005, the injury must be sustained during a collision, and the word 'during' creates a temporal criterion for defining injury. Injury must be a result of and be caused during the collision. The injury in this case was not caused during a collision, even if the collision was a proximate cause.¹

'Collision', however, does not refer only to the point of impact and while the vehicles remain in their post-collision positions, the collision is perhaps still in existence. However,

the submission that a collision continues until all the effects of collision have been removed should be rejected.

It was suggested that the decision in *Dominello v Dominello*² could not be reconciled with the *dicta* of the High Court in *Allianz* because, in *Dominello*, the Court accepted that an injury can be caused by a fault occurring during the activity, rather than the injury itself being sustained during the activity as required by *Allianz*.

Of course, although the Court did not deal with this consequence, the result of this decision is that the plaintiff is still entitled to sue the defendant and does not have to comply with the terms of the *Motor Accidents Compensation Act* procedures. However, the defendant is denied insurance cover for the injuries suffered by the plaintiff. This shows the danger of continually narrowing the cover provided by the policy, and the potentially catastrophic consequences for a negligent driver.

Special leave to appeal has been granted. ■

Notes: 1 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26; (2005) 221 CLR 568. 2 [2009] NSWCA 95 (2009) 52 MVR 292.

Tracked vehicle not a motor vehicle

Doumit v Jabbs Excavations Pty Ltd [2009] NSWCA 360

In *Doumit*, the plaintiff worker was injured when an excavator on a building site reversed over him. His supervisor (who had no one else to supervise) was nearby, but not watching. The plaintiff had been working for about two hours and the excavator made a beeping sound whenever it moved, whether backwards or forwards. The plaintiff said he had become inured to the sound.

The Court of Appeal held that a system in which the worker was told to keep out of the way of an excavator that was reversing blind (the driver having little sight to the rear) was a sufficient discharge of the employer's duty of care. It rejected an alternate submission that the running over was an act of casual negligence by the excavator driver.

The majority in the Court of Appeal held that a tracked excavator was not a motor vehicle within the meaning of s3 of the *Road Transport (General) Act* 2005, because it did

not have wheels. Although there was evidence that the tracks sat on a round 'steel wheel' on an axle that drags the tracks along the rollers, the majority held that this was not a wheeled vehicle and therefore not a motor vehicle within the definition. This must in turn mean that tracked vehicles operating upon public roads or road-related areas in NSW do not have to be registered or insured, despite a longstanding requirement by the RTA that they should be.

It will be interesting to see whether the insurers and the RTA reimburse the owners of tracked vehicles that have for many years been registered and insured.

Special leave to appeal has been sought. ■

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