

The following three case notes are written by Dr Andrew Morrison RFD SC. He is a barrister at 16 Wardell Chambers, Sydney.

## Due search and enquiry (MACA, s34)

### *Nominal Defendant v Wallace Meakes* [2012] NSWCA 66

In *Nominal Defendant v Wallace Meakes*, the plaintiff was crossing Park Street in the Sydney CBD and did not check the pedestrian signals before crossing. He was hit by a car. The driver stopped, got out of the car and spoke to him. The plaintiff initially did not think his injuries were serious and he was in a hurry to get to an appointment. He did not take down details of the car or driver before leaving. A few days later, he reported the accident to the police and returned to the scene to find witnesses. The car was not located. At first instance, Levy SC DCJ excused the plaintiff's failure on the basis of his belief that he did not think he was severely injured until sometime later. The Court of Appeal disagreed. It is the plaintiff's duty to prove that due enquiry and search has been performed. What is reasonable depends upon the

circumstances. It must be as prompt and thorough as the circumstances will permit. The test can be satisfied if in the circumstances no search and inquiry is performed, but it would clearly have been ineffective anyway. A trial judge's finding that the vehicle's identity cannot be established should not easily be set aside on appeal.

The Court found that the first instance judge had erred in simply finding the plaintiff's conduct understandable and excusable. A reasonable person in his position would have taken down the offending vehicle's and the driver's details. The plaintiff was not so injured as to have prevented him from writing that information down, given that he had a pen and paper in his briefcase. The relevant test turns on what a reasonably informed member of the community such as the plaintiff should know about the right to claim. ■

## Are QLD drivers insured and registered in NSW?

### *Suncorp Metway v Wickham Freight Lines and Butler and Weston* [2012] QSC 237

In *Suncorp Metway v Wickham Freight Lines and Butler and Weston*, the infant plaintiff (Weston) sued in the NSW Supreme Court for damages following a motor accident in NSW that included a claim under s7J of MACA (NSW) for 'special entitlements' for children on a no-fault basis.

The defendant driver was in a QLD-registered motor vehicle, and the QLD CTP insurer denied indemnity on the basis that the QLD policy was invoked only by accidents caused by a wrongful act or omission of a person other than the injured person (s5(1)(b) *Motor Accident Insurance Act* (QLD)).

Special entitlements under s7J MACA include hospital, medical, pharmaceutical and rehabilitation costs and apply where:

- a child is injured as a result of a motor vehicle accident;
- that accident is not caused by the fault of the owner or driver of that vehicle in the use or operation of the vehicle; and
- that vehicle has motor accident insurance to cover the accident.

In those circumstances, the accident is 'deemed to have been caused by the fault of the owner or driver'.

The insurer claimed a declaration in the QLD Supreme Court on the basis that the QLD policy did not respond to the claim for 'special entitlements' under s7J of MACA. It argued that there was no actual fault by the driver and liability should be real and not fictional. The QLD scheme should not be burdened by exposure to cases where fault is deemed.

Applegarth J found the liability required by s7J MACA was real.

- 'Fault' under the NSW Act is defined as 'negligence or any other tort'. The form of liability created by the NSW Act was found to be within the meaning of 'wrongful act or omission' under the QLD Act.
- If a statute creates a right to damages where a party was deemed to be at fault and so negligent (or to have committed a tort), then the cause of action would still be one that involved a 'wrongful act or omission'.
- As a matter of public policy, it was noted that many people travel interstate and one purpose of the QLD policy is to