NSW Workers Compensation fight continues...

The New South Wales government has now passed legislation that will dramatically alter the system of workers compensation for statutory (no-fault) benefits. The legislation, which passed both houses of Parliament on 29 June is not expected to commence until late 2001 or early 2002, because of the large amount of work to be done in finalising medical assessment guidelines and setting up the new Workers Compensation Commission, which will take the place of the Compensation Court.

The campaign opposing the changes was difficult and long. But the fight is not yet over. There remains the possibility that access to and levels of damages at common law will also be altered in the future. Common law aspects of the scheme are presently the subjects of a judicial inquiry being conducted by Justice Terry Sheahan. A submission was made to the Sheahan Inquiry stating APLA's position in relation to various issues in the workers compensation common law area. A copy of APLA's submission can be viewed at www.apla.com. A report is expected to be handed down by Justice Sheahan in late August.

The Legislative Council has also commissioned a review and monitoring of the NSW workers compensation scheme. A submission is being prepared to assist the General Purpose Standing Committee in preparing its report to the House.

Members of the APLA workers compensation SIG email list will be kept informed of developments as they occur.

letters

In the June issue of *Plaintiff*, and I must say as also reflected in APLA News (01/06/01), there seems to be a misconception in relation to the decision in the High Court in *Brodie v Singleton Shire Council*. I appeared for Mr Brodie at first instance and in the Court of Appeal and was led by David Jackson QC in the High Court.

The note on page 16 in *Plaintiff* says, "Brodie would have succeeded in any event because the conduct of the road authority amounted to misfeasance." True it is that at first instance we won on the basis that the trial judge found that the defendant's actions constituted misfeasance. In the District Court we filed a reply to say that the nonfeasance rule was no longer good law. The Council's only defence was nonfeasance. It led no case against us.

In the Court of Appeal Brodie lost. He lost on the basis that the Court of Appeal said that the Council's defence was a good one, namely that they were protected by nonfeasance. This is acknowledged in the general article on the subject at page 14.

In the High Court we argued, inter alia, that the nonfeasance defence was no longer good law. It was on that point we succeeded.

To suggest that Brodie would have succeeded in any event is nonsense. It is not the High Court's role in the normal course of events to retry the case. It is its normal role to determine whether the intermediate appellate court was correct in law or to review the common law of Australia. This was not a case where if the High Court had determined that nonfeasance was no longer available, Mr Brodie would have won because, as the note states, the road authority's conduct amounted to misfeasance. It was a four/three decision in Mr Brodie's favour and from the majority judgments it is not at all clear that the court was prepared to intervene in circumstances where they would maintain the nonfeasance defence and yet have Mr Brodie succeed by determining that the trial judge was right and the Court of Appeal was wrong.

I am not at all sure as to why APLA in its various publications ought to maintain the fiction that Brodie somehow would have succeeded even if the High Court had not changed the law in relation to the availability of the nonfeasance defence.

ROBERT TONER SC

Reply

Thank you for the copy of the comments of Mr Toner SC. The information contained in the note was the subject of a brief telephone discussion and I did not see the result in print before it went to press.

Mr Toner SC criticises the sentence relating to misfeasance. I accept the criticism. More accurately the sentence could have read, "Brodie might have succeeded in any event because the conduct of the road authority amounted to misfeasance."

The issue of misfeasance was never determined in the High Court because the doctrine had been swept away. However, it should not be forgotten that the plaintiff had succeeded on the ground of misfeasance. We simply do not know what the High Court would have done.

Andrew Morrison SC