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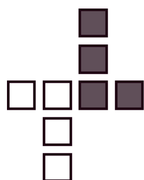

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In brief – preserving privilege over witness statements

In the matter of *Hughes v Van Eyk* [2008] NSWSC 525, an interlocutory issue arose regarding privilege. The question was whether the defendant had waived privilege in relation to:

- A letter of instruction to an expert, a copy of which had been given to the plaintiff by the defendant;
- A witness statement, which had allegedly been partly disclosed in the letter of instruction.

Letter of instruction: the Court noted that, when the defendant provided the letter of instruction to the plaintiff, no qualification or limitation was placed on its use, and no claim for privilege was made.

The defendant contended that it had not waived privilege by providing the plaintiff's solicitors with a copy of the letter, because the defendant was under a legal obligation to disclose the letter pursuant to the *Uniform Civil Procedure Rules*.

The Court did not accept that the Rules required the disclosure of the letter, and held that the letter had been voluntarily disclosed, without qualification, and therefore any privilege in the letter was waived.

Witness statement: the letter of instruction requested the expert to assume that the evidence given by a particular witness would include certain factual information. The factual information which followed commenced with quotation marks (although it did not end with quotation marks).

The plaintiff called for the statement of that witness to be provided, claiming that privilege in the statement had been waived, on the basis that the letter of instruction clearly disclosed part of the statement.

The Court disagreed, noting that the letter of instruction did not identify the source of information attributed to the witness, and did not refer to any statement. The Court held that the information was simply part of the assumptions given to the expert, and there was no waiver of privilege in the statement.

Comment: this decision confirms the importance of not referring directly to witness statements in letters of instruction to experts. Instead, the expert should be provided with assumptions as to the evidence the witness will provide, so that privilege over witness statements can be maintained.

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Full and satisfactory explanation ... of whose conduct?

HOWARD v WALKER [2008] NSWSC 451

Under section 109(3)(a) of the *Motor Accidents Compensation Act, 1999*, a claimant is not permitted to commence proceedings more than 3 years after the date of the motor accident unless the claimant is able to provide a full and satisfactory explanation to the court for the delay.

A full and satisfactory explanation is defined in section 66(2) as "a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation. The explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have failed to have complied with the duty or would have been justified in experiencing the same delay".

In *Howard v Walker*, the Court considered how the "full and satisfactory" requirement applies to a brain-injured claimant, who is incapable of managing his own affairs.

Background

As the result of a motor vehicle accident in July 2001, the claimant sustained serious brain damage and was unable to look after his affairs. In September 2001, his sister provided instructions to a solicitor, Mr Day, to investigate whether the claimant had a claim against anyone for the injuries he suffered.

Mr Day commenced investigating the claim, and formed the view that proceedings could not be commenced unless there was an expert's report on liability which supported such proceedings. Various delays arose in obtaining a report, including that the expert suffered a heart attack.

In November 2003, Mr Day advised the claimant's sister that an expert liability report would cost up to $10,000.00, and that he would be unable to proceed with the matter unless some funds for disbursements were provided.

The claimant's sister gave evidence that, at the time of Mr Day's request, she had recently separated from her husband and was caring for a small child, so she could not afford to pay for the report. The claimant's mother was also unable to fund any disbursements.

Thereafter, it appears the matter lapsed until some time between April and December 2005, when Mr Day apparently decided to continue funding the matter on the claimant's behalf. It was unclear why Mr Day made this decision.

An expert liability report was subsequently obtained, and the matter proceeded expeditiously from that point. In October 2006, the plaintiff sought an order permitting proceedings to be brought against the defendant, more than 3 years after the date of the accident. Explanations for the delay were provided by the plaintiff's solicitor, mother and sister.

The defendant submitted that there were a number of unexplained actions on the part of the plaintiff's solicitor, including why he ceased, and then later resumed, funding the matter. The defendant also contended that the explanations provided were unsatisfactory, in that much greater efforts should have been made to obtain an appropriate expert's report in a timely manner.

Supreme Court decision

One of the major issues considered by the Court was whether the conduct of the claimant's solicitor, mother and sister was to be attributed to the claimant, so that if their actions were not satisfactory, then the claimant's application would fail.

The Court noted that in *Smith v Grant* (the only previous appellate decision on this legislative provision), it was accepted that, to some extent, the claimant's conduct must be taken to include

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the conduct of the claimant's authorised agent, his solicitor.

In this matter, however, the Court considered that it was by no means clear that the claimant's solicitor was his authorised agent. The claimant had no capacity to retain a solicitor, given his brain injury. Further, it was unclear whether the claimant's mother or sister had the capacity to retain a solicitor on his behalf, as neither had a power of attorney or any other legal right to do so.

In light of the uncertainty as to whether the claimant did or did not have any authorised agents, the Court considered both scenarios in relation to each limb of the "full and satisfactory" test.

The Court held that, if the claimant's solicitor, mother and sister were not his agents, then the nature of the claimant's injuries alone provided a "full" explanation for the delay.

Even if the claimant's solicitor was his agent, the focus of section 109 still remained on the conduct of the claimant, rather than his solicitor. Therefore, what was relevant was whether the claimant could reasonably rely upon the conduct and advice of his solicitor, not whether the claimant's solicitor's conduct was blameworthy or otherwise.

In this case, the claimant's solicitor's explanation was held to be "full", in the sense that it was "complete", despite the unanswered questions as to his motivation.

If the claimant's sister and mother were to be regarded as his agents, then their inability to pay thousands of dollars to obtain an expert liability report was also regarded as a "complete explanation".

Perhaps the more difficult issue for the Court to resolve was whether the explanation was "satisfactory". According to section 66(2), whether the claimant's explanation is satisfactory is to be judged from the perspective of a reasonable person "in the position of the claimant". The question was whether the phrase "in the position of the claimant" required the Court to look only at the claimant personally, having regard to his specific circumstances, or whether the Court was to have regard to the actions of those acting as his agents as well.

In the earlier case of *Blackburn v Allianz Australia Insurance Ltd* [2004] NSWCA 385, it was not necessary for the Court to determine this issue, but there was clearly a difference of opinion in the Court of Appeal as to the meaning of the phrase. In the subsequent case of *Smith v Grant*, the Court was again not required to determine the issue, but noted that a "cautious approach" ought to be applied in doing so, because legislation other than the *Motor Accidents Compensation Act, 1999* also utilised the test of a "reasonable person in the position of the claimant".

In the present matter, the Court took the view that "some meaning" had to be given to the phrase "in the position of the claimant". The Court referred with approval to the "tentative opinion", previously expressed by Hodgson JA in *Blackburn*, that one looks at the particular position of the claimant with his or her special characteristics.

Applying this proposition to the present case, a reasonable person in the position of the claimant would be a person with brain damage. Since there could be "no personal criticism of the claimant's actions in such a situation", the explanation must be regarded as satisfactory.

The Court derived support for this approach by considering the following illustration: if the claimant in this case had no relatives and had been left in a nursing home, there could be no difficulty in him subsequently satisfying section 109 for the reasons specified. Therefore, why should the claimant be disadvantaged because his relatives took some, albeit desultory, steps on his behalf and retained a solicitor?

The Court stated: "In legislation which deals with motor accidents where serious injury from high speed impacts is a common occurrence, it would be surprising if brain damaged persons, with no control over what actions were or were not taken on their behalf, were in a worse position that persons whose injuries are such that they can instruct solicitors and evaluate the actions of those solicitors".

The Court concluded that section 66 was not to be interpreted to expand the concept of "in the

position of the claimant" to include agents and representatives of the claimant. It was noted that, even if this approach was not correct, the explanation provided by the claimant's solicitor, sister and mother was in any case satisfactory.

Comment

This case highlights the difficulty of applying the "full and satisfactory" test to a brain-damaged claimant, or indeed to any claimant who lacks capacity to instruct a solicitor (such as an infant).

It appears that, in order to be "full", an explanation must also address the actions of the claimant's authorised agent or representative (if the claimant in fact has any).

However, the question of whether the explanation is "satisfactory" is to be answered only from the perspective of a reasonable person in the claimant's position, not a reasonable person in the position of the claimant's agent or representative.

On the basis of this decision, it is difficult to see how any claimant who is incapable of providing instructions, whether due to brain damage or infancy, will fail to satisfy the full and satisfactory test. Even in such a case, however, the Court would still have a discretion, and will grant the extension only if the interests of justice require it.

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In brief – when judicial review proceedings are an "exercise in futility"

Munro v Motor Accidents Authority of New South Wales [2008] NSWSC 366 involved an application for judicial review of an interlocutory-type decision made by a CARS Assessor.

The claimant had made application for assessment of damages by CARS, and the insurer admitted the claimant exceeded 10% whole person impairment. The matter was subsequently listed for General Assessment on 11 December 2007.

In November 2007, the insurer indicated it now wished to make a further application to MAS, disputing the claimant exceeded 10% whole person impairment. An emergency further Preliminary Conference was held, and the CARS Assessor granted the insurer's application for an adjournment, and vacated the date for the General Assessment.

On 24 December 2007, the claimant applied for judicial review of the Assessor's decision, on the basis that the Assessor had erred in the exercise of his discretion. The claimant sought an order setting aside the Assessor's decision to vacate the 11 December 2007 Assessment Conference date.

The hearing of the claimant's application for judicial review took place on 30 April 2008. The Court was unimpressed by the claimant's application:

The Court is now asked to set aside a decision that saw in effect the vacation of a hearing date. The vacated date is now a relic of the past and cannot be reinstated. There is no utility whatsoever in the setting aside of the decision of the Assessor.

The Court held it was unnecessary to consider whether there had been any error of law, as the claimant's application would fail on discretionary grounds in any case. The Court concluded that the proceedings were "an exercise in futility".

Comment: this decision emphasises that there are very limited grounds on which to successfully seek judicial review of an interlocutory-type decision of a CARS Assessor.

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Amending an allegation of contributory negligence within CARS

QBE INSURANCE v MOTOR ACCIDENTS AUTHORITY [2008] NSWSC 434

In *Nominal Defendant v Gabriel* [2007] NSWCA 52, the Court of Appeal held that an Insurer was not prevented from filing a Defence denying negligence, where it had previously issued a section 81 notice admitting liability. However, the Court was not required to determine whether a section 81 notice could be departed from while a matter remained in CARS.

In the recent matter of *QBE Insurance v Motor Accidents Authority* [2008] NSWSC 434, Associate Justice Harrison considered whether an insurer was able to amend its allegation of contributory negligence, after a section 81 Notice had been issued. TL lawyers acted on the insurer's behalf.

Background

The claimant was injured in a motor vehicle accident in August 2003. In March 2004, QBE issued a section 81 Notice admitting breach of duty of care and alleging contributory negligence of 20%.

In September 2006, QBE advised the claimant that it maintained the admission of breach of duty of care, but alleged contributory negligence of 40%.

Thereafter, the insurer applied for an exemption from CARS on the basis of the allegation of greater than 25% contributory negligence. That application was rejected by the Principal Claims Assessor ("PCA"), who took the view that QBE was bound by its original section 81 Notice, which alleged 20% contributory negligence.

QBE subsequently applied for judicial review of the PCA's decision not to exempt the claim.

Supreme Court decision

Both the insurer and the claimant sought to derive support from the decision of *Nominal Defendant v Gabriel*, and accordingly, Harrison AsJ conducted a review of the judgments in that matter.

Her Honour drew two conclusions from the leading judgment of Campbell JA: on one hand, that a section 81 Notice can "never be withdrawn and treated as if it never existed in the first place", and on the other hand, that an insurer is not necessarily bound to the position it takes in its section 81 Notice.

Her Honour stated it was also important to consider the dissenting judgment of Basten JA, as his Honour considered the effect of a section 81 Notice within CARS. Basten JA concluded that the *Motor Accidents Compensation Act, 1999* did not provide an option for the insurer to resile from its section 81 Notice, other than pursuant to section 118 (which deals with claims induced through fraud or misleading conduct).

Harrison AsJ concluded that, within CARS, an insurer is bound by an admission of liability contained in a section 81 Notice. In reaching this conclusion, the "most important" factor relied upon by her Honour was the fact that section 81 permits an insurer to *admit* liability after having denied liability, but does not contain any reciprocal power for an insurer to *deny* liability after it has previously been admitted. As Her Honour noted, that this was an argument raised by Basten JA in his dissenting judgment.

Her Honour also rejected the insurer's contention that the wording of clause 7.1.2 of the Claims Assessment Guidelines mandated the exemption of the matter from CARS, in view of the fact that the insurer had "made an allegation" of contributory negligence of greater than 25%, as "at the time of the assessment".

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Her Honour held that, where the Guidelines refer to “an allegation”, this must be a reference to an allegation in the original section 81 Notice, not any new allegation of contributory negligence. Harrison AsJ stated that to read the Guidelines otherwise would be “a departure from section 81 of the Act”, although she did not elaborate upon the reasons why this would be the case.

Her Honour did not address the meaning of the term “at the time of the assessment”, as used in clause 7.1.2.

Her Honour concluded that the PCA’s decision not to grant the exemption was correct, and the insurer’s application was dismissed.

Comment

QBE has filed an Application for Leave to Appeal the decision of Harrison AsJ. Clearly, the question of whether an insurer is able to alter its position on contributory negligence, and the associated issue of the proper interpretation of clause 7.1.2 of the Claims Assessment Guidelines, are both matters of significant concern to insurers. We will keep you informed as to the outcome of the insurer’s leave application.

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In brief – a different test for gratuitous care damages

As a result of the recent decision of the Court of Appeal in *Harrison v Melhem* [2008] NSWCA 67, there has been a major change in the interpretation of section 128(3) of the *Motor Accidents Compensation Act, 1999*. This section provides:

No compensation is to be provided if the services are provided, or are to be provided:

(a) for less than 6 hours per week; or

(b) for less than 6 months.

The 2002 case of *Geaghan v D'Aubert* had previously been regarded as authority for the proposition that, pursuant to section 128(3), a plaintiff was only entitled to compensation if the plaintiff could establish that gratuitous assistance was required both for more than 6 hours per week and more than 6 months.

By a majority of 4:1, the Court of Appeal concluded that *Geaghan* ought to be overruled. Mason P, who delivered the leading judgment, drew attention to the fact that section 128(3) is an exclusionary provision, which sets out the circumstances in which a plaintiff is **not** entitled to receive compensation, rather than the circumstances in which a plaintiff **is** entitled to receive compensation.

His Honour stated that the "literal and plain meaning" of the words was that a plaintiff was excluded from receiving compensation if, and only if, both limbs were satisfied, i.e. if the services were to be received for less than 6 hours per week and for less than 6 months. His Honour emphasised that the subsection "does **not** state that a plaintiff has to show the provision of services for more than six hours per week and for more than six months in order to **qualify** for damages".

Accordingly, the Court held that the section entitled a plaintiff to damages for gratuitous care where the plaintiff could show **either** that the gratuitous services were to be provided for more than six months, **or** that the services were to be provided for more than 6 hours per week.

Mason P suggested that the six months were required to run together as a six month period, and the requirement could not be satisfied by aggregating a series of lesser periods.

Comment: as a result of this decision, a plaintiff no longer needs to establish a requirement for both more than 6 months of care and more than 6 hours of care per week, in order to receive damages for gratuitous care.

Now, the plaintiff will only need to meet one of these thresholds in order to be entitled to damages. It remains to be seen whether this decision will be the subject of appeal, or whether it will provoke parliamentary intervention.

For a more detailed discussion of the reasoning in this decision (including the dissenting judgment of Basten JA), please contact TL lawyers to obtain a full case note.

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