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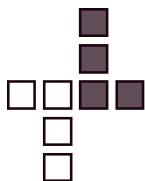
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From the Editor

Welcome to Total Legal, a newsletter designed to keep you abreast of recent developments in personal injury case law.

In each issue, we will highlight several cases which will impact on the practise of law in your area, and comment on their significance.

Should you require further information regarding any of the cases examined in Total Legal, please do not hesitate to contact the author of the relevant article.

We also welcome any suggestions or requests you may have regarding cases or issues to be included in the next edition of Total Legal.

Kind regards
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Recently gazetted

Motor Accidents Compensation Act 1999

Non Economic Loss figures

effective 1 October 2007

Section 134 Motor Accidents Compensation Act 1999 \$366,000 to \$381,000

Section 125 Motor Accidents Compensation Act 1999 \$3,362 to \$3,500

TLlawyers will be distributing 2007 personal injury tables very soon.

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Late claims and the effect of a section 96(1)(a) certificate

HAYEK v TRUJILLO [2007] NSWCA 139

TLlawyers acted for the Respondent in *Hayek v Trujillo* is an interesting matter, which morphed from a case regarding full and satisfactory explanation for delay, into an examination of the circumstances in which a claimant is entitled to commence proceedings and the nature of a certificate issued under section 96 of the *Motor Accidents Compensation Act, 1999* (“the Act”).

Background

On 10 March 2001, the plaintiff, Hayek, was involved in a motor vehicle accident. In May 2005, she commenced proceedings in the District Court pursuant to a certificate under s96(1)(a) of the Act. That certificate confirmed that the plaintiff was not permitted to make a late claim in accordance with section 73 of the Act.

The defendant, Trujillo, responded to the plaintiff’s Statement of Claim by seeking an order, pursuant to s 73(4) of the *Motor Accidents Compensation Act 1999* (NSW), that the proceedings be dismissed as the plaintiff did not have a full and satisfactory explanation for the delay in making her claim.

The plaintiff contended that the insurer had not, within the 2 month period required by section 73(3)(a), either rejected her late claim or asked her to provide a full and satisfactory explanation for the delay in making it, with the result that the insurer had lost the right to challenge the claim on the grounds of delay.

District Court decision

Justice Naughton in the District Court dismissed the plaintiff’s application on the basis that the defendant had not lost the right to challenge the plaintiff’s claim on the grounds of delay, and the plaintiff did not have

a full and satisfactory explanation for the delay.

Justice Naughton, of his own motion, also raised the issue of whether the certificate relied on by the plaintiff was sufficient to satisfy section 108(1) of the Act, which provides that court proceedings may only be commenced if a certificate has been issued under sections 92 or 94.

His Honour noted that the plaintiff’s certificate was issued, according to its terms, under section 96(1)(a) and in accordance with section 94 of the Act. Justice Naughton considered that a certificate issued “in accordance” with section 94 was not the same as a certificate issued “under” section 94, and therefore concluded that the plaintiff had filed her statement of claim in breach of section 108.

Court of Appeal decision

The Court of Appeal disagreed with the trial judge’s findings on the issue of delay, but upheld his finding that the plaintiff was not entitled to commence proceedings pursuant to section 108.

In relation to delay, the Court held that the insurer had lost its right to challenge the plaintiff’s claim on that ground, because it had not directed its request for a full and satisfactory explanation to the plaintiff, or a person authorised to act on his or her behalf. Instead, the request had been directed to solicitors whom Allianz knew were no longer acting on behalf of the plaintiff. Therefore, Allianz could not be said to have asked the plaintiff for a full and satisfactory explanation, with the result that Allianz’s right to challenge on the basis of delay was lost.

Accordingly, it was irrelevant whether the plaintiff in fact had a full and satisfactory explanation.

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The Court also held that, contrary to Justice Naughton's findings, the certificate issued to the plaintiff under section 96 (which confirmed the plaintiff was not permitted to make a late claim) did not affect the court's jurisdiction to deal with the question of whether the insurer had lost the right to challenge the claim on the ground of delay.

In relation to the plaintiff's entitlement to commence proceedings, the Court agreed with Justice Naughton that a certificate issued under section 96 and pursuant to section 94 could not satisfy the requirements of section 108. The Court pointed out that if such a certificate did satisfy section 108, a claimant would be entitled to commence court proceedings without having to go through the assessment procedure and without falling within the specific categories of exemption set out in section 92. This was held to be contrary to the objects and scheme of the Act.

The Court also had regard to the plaintiff's submissions that, unless a certificate issued under section 96(1) and in accordance with section 94 was regarded as satisfying section 108(1), a party dissatisfied with such a certificate would have no right to take court proceedings to challenge the certificate.

The Court accepted that, if this was correct, that would "not be a desirable result". However, the Court concluded that this would not be the result, because an assessment as to a matter in sections 96(1)(a), (b) and (c) was not binding on the parties. Therefore, a party who received an unfavourable certificate under section 96(1)(a) was nevertheless entitled to require the claims assessor to undertake an assessment as to liability and damages, and to issue a certificate under section 94. Thereafter, the claimant would be entitled to commence court proceedings despite the unfavourable section 96 certificate, because the certificate was not binding on the parties.

Comment

From the defendant's perspective, the outcome of the appeal in this matter was positive, with the plaintiff being prevented from bringing proceedings at this time. However, the Court's decision also raises concerns in light of the finding that a certificate under sections 96(1)(a), (b) and (c) is not binding, and that a claimant who has been issued such a certificate is nonetheless entitled to require the claim to be assessed. This has the result that a claimant who has been precluded from making a late claim will nevertheless be able to proceed to general assessment. Thereafter, the claimant will presumably be able to force the insurer to pay the award assessed by the Assessor on the basis of section 95(2) of the Act. If the Court of Appeal's findings are held to constitute good law, it would appear that an insurer has no means of preventing a claimant from having a late claim assessed by CARS.

Epilogue

The Court of Appeal's problematic characterisation of section 96 certificates in *Hayek* has been addressed by the draft *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2006*. The Bill includes a provision confirming that an assessment of a dispute under section 96 is binding on the parties. If the Bill is passed, it will prevent a plaintiff from relying on *Hayek* to circumvent an unfavourable section 96 certificate and proceed to General Assessment.

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When costs consequences of Offers of Compromise don't apply

VALE v EGGINS (NO.2) [2007] NSWCA 12 **and** ***EGGINS v VALE [2007] HCA Trans 410***

Generally, a plaintiff who does not accept an Offer of Compromise and then obtains a judgment which does not better that offer will face adverse costs consequences. However, the now-repealed Pt 39A r 25(6) of the District Court Rules permits the Court to order otherwise in "an exceptional case and for the avoidance of substantial injustice".

The meaning of this phrase was considered by the NSW Court of Appeal recently in *Vale v Eggins (No 2)*, with TLlawyers acting for the Respondent. The judges in the Court of Appeal were split 2:1 on the issue, and the guidance of the High Court was subsequently sought in *Eggins v Vale*. The High Court did not accept that a question of principle was involved, and leave to appeal was refused.

Background

The pedestrian plaintiff, Vale, suffered serious injuries when he was struck by a motor vehicle driven by the defendant, Eggins.

Prior to the hearing of the matter in the District Court, the defendant served 2 Offers of Compromise. The first offer was to compromise the issue of liability, and the second was to compromise damages. Neither offer was accepted by the plaintiff, and the matter proceeded to hearing in the District Court and subsequently in the Court of Appeal. When judgment was eventually given by the Court of Appeal, the plaintiff was left in a less favourable position than he would have been had either Offer of Compromise been accepted.

The defendant therefore sought an order for costs in his favour from the day after the Offers of Compromise were made. The order was

resisted by the plaintiff, on the grounds that this was an exceptional case and for the avoidance of substantial injustice.

Court of Appeal decision

Justices Beazley and McColl found for the plaintiff, with Justice Bryson in dissent.

The majority placed considerable weight on the fact that, at the time the Offers of Compromise were served, the defendant had not served all the medical evidence which he had in his possession, and had not served any reports relating to liability.

In relation to the failure to serve medical reports, the majority held that "*when the defendant already had material in his possession which he did not serve, and which was relevant to an assessment of the offer made, he ought not to be entitled to the favourable costs provisions under the Rules*".

The main issue, however, was in relation to the expert report as to liability, which the defendant commissioned after the Offers of Compromise had expired, and served just over a month prior to trial. The majority held that this report had a profound effect on the conduct of the trial, such that the plaintiff was required to meet a quite different case at trial than that which was under consideration at the time that the offer was made. This was held to constitute "exceptional circumstances" within the meaning of the District Court Rules.

The majority concluded that a different costs order ought to be made so as to "avoid substantial injustice", and ordered that the defendant pay the plaintiff's costs at trial and on the appeal.

Bryson JA, on the other hand, disagreed that the present case was "exceptional", stating that it was "routine and unremarkable" that when a case goes to trial parties have more information, more expert reports, more or

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different witnesses than those available months earlier, and a different view of each side's prospects. His Honour stated:

It is not a substantial injustice that the offeror should turn out to have had or later to obtain better evidence or better prospects than were known to the offeree at the time. If it were a condition of entitlement that the offeror had first made full disclosure of its expert evidence, the Rule would say so.

High Court application

Justices Kirby and Gummow dismissed the application for Special Leave to Appeal, on the basis that it was unlikely the High Court could ever "lay down some great principle" regarding the meaning of the expression "exceptional case". Rather, what was an exceptional case was to be evaluated from case to case.

Comment

In light of the High Court's comments regarding the impossibility of formulating rules to govern what constitutes an "exceptional case", it appears that the precedential value of *Vale v Eggins (No 2)* must be limited. If the meaning of an "exceptional case" is to be determined on a case by case basis, then *Vale v Eggins (No 2)* cannot be regarded as providing any binding principle to be applied in future cases.

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Consequences of the instructor/inexperienced driver relationship

MCNEILLY v IMBREE [2007] NSWCA 156

The decision of the High Court in *Cook v Cook* (1986) 162 CLR 376 confirmed that the relationship between a driving instructor and an inexperienced driver is a special one, which affects the standard of care owed by the driver to the passenger. In these circumstances, the standard against which the inexperienced driver's actions are measured is that of an unqualified and inexperienced driver, rather than the ordinary standard of a competent and experienced driver. The application of these principles was tested in the recent decision of *McNeilly v Imbree*, in which TLlawyers acted for the Appellants.

Background

The accident occurred on an unsealed road in the Northern Territory progressively signposted warning drivers to be careful and as to the condition of the road. The defendant driver, McNeilly, was sixteen years old and had no driving licence and very limited driving experience at the time of the accident. The plaintiff passenger, Imbree, was sitting next to the defendant, and acting as his driving supervisor.

The accident occurred as the defendant attempted to avoid tyre debris on the road, swerving to the left, overcorrecting to the right, and then swerving again to the left, before losing control of the vehicle. The vehicle rolled, and as a result of the accident, the plaintiff was left a tetraplegic.

The trial judge found in favour of the plaintiff and assessed his damages at over \$11 million, with contributory negligence being assessed at 30%.

Court of Appeal decision

On appeal, the principal issues were in relation to liability and contributory negligence. Each of the three justices in the Court of Appeal

delivered separate judgments, with their Honours generally in agreement as to the existence of a duty of care and the relevant standard of care, but differing in their assessment of whether the defendant was negligent, and the degree of the plaintiff's contributory negligence.

The Court made the following unanimous findings:

- **Joint illegal enterprise:** in view of the fact that the defendant was unlicensed at the time of the accident, he sought to rely on the doctrine that where a plaintiff and defendant are engaged in a joint illegal enterprise, the plaintiff will be precluded from recovering against the defendant in negligence. The Court held that, where the illegality consists of a breach of a statutory provision (as in this case), the issue is whether it is the intention of the relevant statute to affect civil responsibility. No such intention was identified, and the joint illegal enterprise argument was dismissed;
- **Voluntary assumption of risk:** the defendant also sought to rely on the defence of voluntary assumption of risk (*volenti non fit injuria*), arguing that the plaintiff had willingly and knowingly placed himself in a position where harm might result. The Court held that the doctrine did not provide a complete defence, but instead operated to reduce the standard of care owed by the defendant to the plaintiff; and
- **Duty and standard of care:** the Court confirmed that, in accordance with the principles set out in *Cook v Cook*, the defendant owed the plaintiff a duty of care, although the standard of care to which the defendant was to be held was significantly reduced to reflect the nature of the instructor-pupil relationship.

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The points on which their Honours differed were as follows:

- **Was the defendant negligent:** both Beazley and Basten JJA considered that the defendant had breached his duty of care to the plaintiff, although the actions which they identified as negligent were different to those identified by the trial judge. The trial judge had held that the defendant was negligent in accelerating while steering sharply towards the centre of the road. Beazley and Basten JJA, on the other hand, held that swerving off the road, instead of steering around the obstruction, was an act of carelessness over and above what could be attributed to inexperience. Beazley JA further considered the defendant was negligent in accelerating out of the soft edge of the road. Tobias JA, in dissent, held that the defendant was not negligent, and that all of his actions were consistent with those of an inexperienced driver; and
- **Assessment of contributory negligence:** all of the judges agreed that the plaintiff's failure to give appropriate instructions to the defendant contributed to the accident. However, Basten and Tobias JA considered the plaintiff's failure "significantly" contributed to the accident. They considered that it was difficult to justify a conclusion that, as between an instructor and pupil, the

pupil must bear a greater proportion of responsibility than the instructor. Accordingly, they assessed contributory negligence at 66%. Beazley JA considered that the plaintiff and the defendant were equally culpable, and assessed contributory negligence at 50%.

High Court application

The plaintiff has lodged an application for Special Leave to Appeal to the High Court, and an application in response has been filed by the defendant.

Comment

McNeilly v Imbree confirmed that an inexperienced driver owes their instructor a duty of care, although the standard of care will be modified so that the test of negligence is whether the driver's actions were consistent with those of an unqualified and inexperienced driver. The decision also represents authority for the proposition that an instructor who fails to provide adequate instruction will, as a general proposition, be considered more responsible for an accident than the careless pupil.

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Plaintiff's obligation to provide particulars in section 151Z recoveries

ALLIANZ INSURANCE LIMITED v NEWCASTLE FORMWORK CONSTRUCTIONS PTY LIMITED [2007] NSWCA 144

In *Jawa Group Pty Ltd v Tatana* (Garling DCJ, 12 April 2005, unreported), Garling GCJ held that in a claim for indemnity under section 151Z of the *Workers Compensation Act, 1987*, the plaintiff must "advise the defendant, in a manner similar to the particulars pursuant to Part 9 of the District Court Rules, as to what they anticipate the worker's case will be to allow the defendant to prepare their defence, in relation to the case the worker would have brought as a plaintiff". The ambit of the plaintiff's obligation to provide particulars was explored in the recent case of *Allianz Insurance Limited v Newcastle Formwork Constructions Pty Limited* in which TLlawyers acted for the claimant.

Background

A worker employed by Newcastle Formwork was injured in a motor vehicle accident on his way to work, allegedly as a result of the negligence of the other driver. Allianz was the CTP insurer of the other driver.

Newcastle Formwork paid workers compensation entitlements to the worker, and sought to recover those payments from Allianz pursuant to section 151Z(1)(d).

Allianz requested further and better particulars, but Newcastle Formworks rejected the request on the basis that it had no obligation to provide particulars in a section 151Z claim.

Allianz subsequently filed a Notice of Motion seeking an order that the particulars be provided. At the instigation of the presiding judge, Hughes DCJ, the parties conferred and the plaintiff provided answers to 4 questions.

Unsurprisingly, Allianz were not satisfied with this response and the hearing continued.

Hughes DCJ gave ex tempore reasons, during which he described Allianz's request for particulars as wide-ranging, in that they sought particulars which were in the province not of Newcastle Formwork, but of the worker. He concluded that such a wide-ranging request for particulars should not be allowed, and dismissed the Motion.

Allianz appealed.

Court of Appeal decision

In a unanimous decision, the Court noted that the general purpose of particulars is to assist in defining the issues at the trial, so that the opposite party knows the case it has to meet and will not be taken by surprise. The Court also reviewed the requirements set out in rule 15.12 of the *Uniform Civil Procedure Rules 2005* in relation to the provision of particulars in personal injury matters. It was noted that the provisions of this rule go further, in the detail and documents provided, than the particulars necessary for the defendant to know the case it has to meet.

The parties agreed that the rule 15.12 does not apply to a claim for indemnity under section 151Z, as a section 151Z recovery is not a personal injury claim. The Court also referred to the decision of *Jawa*, and confirmed that, although the plaintiff in a section 151Z recovery is not required to provide particulars to the extent required by rule 15.12, there is nevertheless an obligation to provide particulars "whereby the claimant would know the case it had to meet in relation to, amongst other things, the damages the worker would have obtained in proceedings against the other driver".

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The Court noted that a plaintiff is obliged only to provide the best particulars it can, so in a section 151Z claim, the particulars which a plaintiff will be able to provide will depend on the circumstances, including whether the worker is co-operative towards the plaintiff.

In relation to Allianz's request for particulars in this particular case (which included asking for other names by which the worker was known, details of all health absences prior to the accident including reasons given and all medical certificates, the names and addresses of all persons claimed to have provided domestic assistance, and a host of documents unrelated to the worker's injury in the relevant accident), the Court held that it went far beyond what was necessary for the claimant to know the case it had to meet.

On this basis, the Court held that the trial judge had not committed an error in not ordering the opponent to answer the request for particulars, and the application for leave to appeal was dismissed.

Comment

This decision stands as authority for the proposition that a plaintiff in a section 151Z recovery, while not obliged to comply with rule

15.12, is nevertheless required to provide such particulars as will enable the defendant to know the case it has to meet.

It follows that if a plaintiff rejects a reasonable request for particulars, an insurer will be able to rely on that rejection in relation to the issues of interest and costs.

Where a plaintiff does provide a response to the request for particulars, and the insurer is considering whether a proper answer has been provided, it must be borne in mind that the plaintiff's obligation is only to provide the best particulars it can in the circumstances of the particular case.

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Damages for gratuitous care and the relevance of "fair give and take of family life"

TEUMA & ANOR v CP & PK JUDD PTY LIMITED [2007] NSWCA 156

In the previous decisions of *Roads & Traffic Authority (NSW) v Lolomanaia* (2001) 34 MVR 338 and *Matchan v Lyons* [2003] NSWCA 384, Hodgson JA expressed the view that there should be no compensation in respect of domestic care that is given as part of the fair give and take of family life. In *Matchan v Lyons*, his Honour stated that a plaintiff seeking compensation for unpaid domestic care should prove "what domestic tasks he or she previously did and does not now do, that this is due to the relevant injuries and disabilities, and that these tasks are now done for the plaintiff otherwise than as part of the fair give and take of family life".

In the recent case of *Teuma*, in which TLlawyers acted for the Appellants, the Court of Appeal considered Hodgson JA's views in light of the High Court authority of *Van Gervan v Fenton* (1992) 175 CLR 327.

Background

A worker employed by CP & PK Judd Pty Ltd was injured in a motor vehicle accident, allegedly caused by the negligence of Mr Teuma. CP & PK Judd Pty Ltd paid workers compensation entitlements to the worker, and sought to recover those payments from Teuma pursuant to section 151Z(1)(d).

At trial, McGrowdie ADCJ held that Teuma had been negligent and assessed damages at \$679,217.00.

A number of the trial judge's findings were the subject of an appeal, including the assessments of past and future domestic assistance.

The worker's evidence in this regard was that, prior to the subject accident, she had performed almost all the domestic duties in the

household. Following the subject accident, the worker's husband shared in the washing up, the laundry and the vacuuming, did all the "heavy stuff" outside, and also cared for the worker's pets. He gave evidence during cross-examination that he was providing domestic care for his wife as part of their relationship and because he cared for her.

Court of Appeal decision

The Court of Appeal returned to the High Court authority of *Van Gervan v Fenton* for guidance on the issue of determining damages for domestic care. Ipp JA examined the views expressed in that decision, and concluded that the majority view was that the true basis of a claim for damages with respect to gratuitous services is the need of a plaintiff for those services. The majority held that damages for domestic care should not be reduced by notions of mutual obligations that are part of marital or family life, or by reference to services provided as part of the mutual give-and-take of marriage that would have been performed in the same way and to the same extent in any event. Ipp JA held that this view was binding on the Court, despite the contrary views expressed by Hodgson JA in *Lolomanaia* and *Matchan v Lyons*.

Hodgson JA agreed that the views he expressed in *Lolomanaia* and *Matchan v Lyons* were inconsistent with *Van Gervan v Fenton*, and concluded that the fact that services needed by a plaintiff are provided as part of the fair give and take of family life should no longer be a circumstance that reduces damages for domestic assistance.

Basten JA also agreed with the judgment of Ipp JA, and added that there were only two questions raised by a claim for domestic services: whether the need for such services was created by the accident, and the commercial value of those services.

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In relation to the first question, Basten JA considered that the fact such services were being provided prior to the accident, on either a commercial or gratuitous basis, was irrelevant. Rather, the issue was whether there was a "need" related to the subject accident.

In relation to the concept of need, Ipp JA noted that "need" involves more than a mere desire, and that services would not be needed unless they were "reasonably necessary for the plaintiff's well-being". In relation to the present matter, his Honour considered the plaintiff had failed to present any evidence that she "needed" the services provided by her husband in caring for her pets.

The Court of Appeal did not consider the meaning of Section 72(3) of the Motor Accidents Act 1988 (as amended).

Comment

At general law, the *Van Gervan* concept of a need for services is that which is to be compensation, even if they would have been provided in any event.

This case should not have any impact on the assessment of damages for domestic assistance under the *Motor Accidents Compensation Act 1999*, as the Court of

Appeal failed to deal with section 128(2) of that Act, which states: "No compensation is to be awarded if the services would have been provided to the person even if the person had not been injured by the motor accident".

Teuma should also not apply to the application of Section 15(2)(c) of the Civil Liability Act 2002.

The Court failed to have regard to the previous Court of Appeal decision of *Mortimer v Burgess* 25 MVR 463, which unanimously held that Section 72(3) of the Motor Accidents Act 1988 was applied by reference to the minority decision in *Van Gervan* and therefore provided it a prohibition on claims for services which would have been provided in the ordinary "give and take of family life". Given that *Mortimer* was not overruled or displaced by *Teuma*, it remains appropriate to apply section 128(2) (as interpreted in *Mortimer*) to future cases involving the assessment of gratuitous care.

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Revisiting the conclusivity of causation findings in a MAS Certificate

TALBOT v DEAMER [2007] NSWDC 174

The conclusive nature of a certificate as to whole person impairment issued under section 61(2) of the *Motor Accidents Compensation Act, 1999* was considered by the Court of Appeal in *Pham v Shui* [2006] NSWCA 373. More recently, the issue was revisited by Judge Sidis in the District Court decision of *Talbot v Deamer*.

Background

The plaintiff, Talbot, a former police officer, suffered psychological and physical injuries after facing a life threatening situation in which the defendant, Deamer, deliberately drove his motor vehicle at him a number of times at high speed.

When the matter came before Judge Sidis, one of the issues to be determined was whether the plaintiff's cardiovascular disease, which manifested in the form of an angina attack some 2.5 years after the subject accident, was caused by the subject accident, or whether the attack was the result of the progression of a pre-existing condition.

District Court decision

The fundamental question, as identified by Judge Sidis, was whether the certificate of Dr Johnson, MAS Assessor, was conclusive not only in respect of the degree of whole person impairment, but also as to whether the relevant injury was caused by the subject accident.

Her Honour reviewed the certificate provided by Dr Johnson, which confirmed that the plaintiff's whole person impairment was greater than 10%. The accompanying reasons indicated that Dr Johnson was of the view that the subject accident contributed to the progression of the plaintiff's pre-existing coronary artery disease and the reappearance

of angina earlier than would otherwise have been expected.

Judge Sidis also referred to the decisions of the Court of Appeal in *Brown v Lewis* (2006) 65 NSWLR 587 and *Pham v Shui*, which she stated were authority for the proposition that the conclusive effect of a certificate is limited to matters relating to non-economic loss, and that it has a very limited application in dealing with economic loss.

However, her Honour rejected the defendant's argument, based on the above cases, that an assessor's finding (presumably, as to causation) is non-conclusive, both for the purposes of assessing economic and non-economic loss, concerning the injury that was caused by the accident. She stated:

In my view, a finding that an injury was caused by the accident must be fundamental to a determination of the degree of whole person impairment of the injured person as a result of the injury caused by the accident.

Comment

Her Honour appears to take issue with the notion that an entitlement to non-economic loss (based on a finding of whole person impairment of greater than 10%) can be separated from the Assessor's findings regarding the injuries sustained by the claimant (and, by implication, the causation of those injuries). She stated, in relation to the relevant MAS assessment:

Were I to reach a decision different to Dr Johnson in respect of the injuries for which he is to be compensated for his non-economic loss, I would undermine the whole basis upon which his assessment of the whole person impairment was arrived at.

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This statement suggests that it is not possible to accept an entitlement to an award of non-economic loss without also accepting the assessor's findings as to the claimant's injuries. Such an approach treats the MAS assessor's certificate as conclusive, not only in terms of the entitlement to non-economic loss, but also in terms of the injuries which should be considered in quantifying non-economic loss.

This, it would appear, is a misinterpretation of both the relevant legislation and the case law. Section 61(2) of the *Motor Accidents Compensation Act, 1999* states that a certificate is conclusive evidence as to "whether the degree of permanent impairment of the injured person is greater than 10%". The legislation makes no reference to the certificate having any conclusive effect as to the injuries upon which the assessment of whole person impairment was based.

Consistently with this provision, the Court in *Pham v Shui* stated was that the conclusive effect of the certificate was limited to the bare finding that the degree of permanent impairment was greater (or not) than 10%. However, Judge Sidis referred to this case as authority for the proposition that "the conclusive effect of the certificate was limited to **matters relating to non-economic loss**" (emphasis added).

Clearly, this was not the conclusion reached by the court in *Pham* at all. The conclusive effect of the certificate was specifically stated, in that decision, not to extend to matters outside section 61(2), such as the degree of

permanent impairment of the injured person as a result of the injury caused by the motor accident. Accordingly, Judge Sidis' statement that the conclusive effect of the certificate extends to "matters relating to non-economic loss" appears to be an over-extension of the conclusive effect of the certificate.

Epilogue

As you will recall, the court in *Pham* stated that the non-conclusive aspects of a MAS Certificate may be evidence as to the matters certified, but "extreme caution" was required in admitting such evidence in relation to damages for economic loss. It appears that an attempt has been made to strengthen the evidentiary value of the non-conclusive aspects of a MAS Certificate in the draft *Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2006*. The Bill proposes that section 61(3) of the Act be amended so that the non-conclusive aspects of a MAS Certificate are "accepted as persuasive evidence in the absence of compelling evidence to the contrary". The practical effect of this provision is questionable, in light of the use of ambiguous, qualitative terms such as "persuasive" and "compelling". We anticipate that the provision will be further revised and refined before the Bill is passed.

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