Costs and intentional torts

By Phillipa Alexander

As all PI practitioners know, where the amount recovered on a damages claim does not exceed $100,000, s337(1) of the *Legal Profession Act* 2004 (LPA) applies. This imports the definition of 'personal injury damages' from the *Civil Liability* Act 2002 (CLA) for its application of the maximum costs provisions.[1]

Damages for intentional torts are excluded from the operation of the assessment of damages provisions under Part 2 of the CLA. The intentional torts exemption in the CLA has not exempted claims from the maximum costs provisions in the LPA, as determined in *King v Greater Murray Area Health Service*.[2]

However, a recent decision to the contrary has been delivered. In *Gina Koh v Ja Kil Ku*,[3] her Honour Truss J has held that a plaintiff's costs are *not* subject to the maximum costs amounts in s338 LPA, where the personal injury results from an intentional tort. Following an eight-day hearing, the plaintiff in *Gina Koh* recovered damages of $63,870 for psychological injury (depression and post-traumatic stress disorder) as a result of the defendant subjecting her on four occasions to sexual assault and/or false imprisonment. The parties agreed that the plaintiff's claim was in respect of personal injury as opposed to injuries not involving a recognised psychological condition, such as injury to reputation.

The court was persuaded that legislative amendments to the LPA and CLA made in December 2002 had the effect of incorporating the intentional tort exemption into the definition of 'personal injury damages' such that it flowed through to the LPA. The plaintiff's costs were not therefore subject to the maximum costs restrictions.

In determining the issue, the court examined the legislative history of the provisions. The precursor to s337(1), s198C of the LPA 1987, originally provided that 'personal injury damages has the same meaning *as in* the *Civil Liability Act* 2002'. At that time, the definition of personal injury damages – being 'damages that relate to the death of or injury to a person caused by the fault of another person' – was contained in the 'Definitions' section in the CLA – s3 in Part 1. Intentional torts were excluded from the operation of Part 2 damages, by virtue of the excluded awards listed in s9 in Part 2.

Amendments to the CLA on 6 December 2002 omitted the definition of 'personal injury damages' from the s3 'Definitions' section and included a modified definition, excluding the words 'caused by the fault of another person', in s11 in Part 2 of the CLA. Section 9 was repealed and the list of excluded awards included in s3B. A new s11A in Part 2 provided that Part 2 applies to awards, except those excluded from the operation of the Part by s3B.

A consequent amendment to s198C of the LPA 1987 provided that 'personal injury damages has the same meaning *as in Part 2* of the *Civil Liability Act* 2002'. This is the definition contained in the current s337(1) of the LPA 2004.

The plaintiff managed to distinguish the decision of the Supreme Court in *King v Greater Murray Area Health Service*,[4] on the basis that King's claim was filed before 6 December 2002 when the amendments came into effect. Truss J considered that 'a significant distinction between the relevant provisions of the CLA in the two cases is that in this present case the definition of personal injury damages is contained in Part 2, whereas in *King* it appeared in the definition section in Part 1'.[5] In *King*, Harrison AJ had specifically rejected the plaintiff's argument that the intentional torts exemption applied on the basis that 's198C of the LPA 1987 defined "personal injury damages" as having the same meaning as in the CLA. It does not define personal injury damages as having the same meaning as that contained in Part 2 of the CLA.'[6]

The December 2002 amendments to the CLA – having moved the definition of 'personal injury damages' into Part 2 of the CLA and the LPA having added the words 'in Part 2' to the reference to the CLA – opened the way for the plaintiff in *Gina Toh* to argue successfully that the definition encompassed the intentional torts exemption. Truss J stated:

> '[I]n my view the critical matter is that s337(1) of the LPA defines personal injury damages by reference to the same meaning as in Part 2 of the CLA. Significantly, it does not define personal injury damages simply by reference to the CLA (as was the case with the original version of s198C). For this reason I consider that the meaning of personal injury damages in s337(1) ought not be determined by reference to s11 only and that regard must also be had to the entirety of Part 2, which includes s11A(1). It follows that the reference to personal injury damages in Part 2 of the CLA encompasses only personal injury damages awarded under that Part and not damages for personal injury which have been specifically excluded therefrom.'[7]

It remains to be seen whether this was intended by the legislature, or whether the reference in the LPA to Part 2 of the CLA was merely intended to facilitate locating the definition, once it was removed from the formal Definitions section in that Act.

The plaintiff also managed to refute the defendant's submissions that, as the LPA contains its own list of matters exempted from the maximum costs provisions in s337(2) – such as work injury damages claims or motor accident claims – had the intention of the Parliament been to exclude intentional torts from the provisions, it could have been included in the listed exemptions. The plaintiff's counsel >>

argued that the purpose of the list of excluded matters was to avoid any confusion of overlap otherwise created by reason of the fact that all of the Acts referred to contained their own independent cost-capping provisions. While Truss J did not comment on this issue, it is noted that claims for damages for dust diseases that are exempted from the maximum costs provisions do not contain their own independent capping provisions.

This is an important case for plaintiffs, particularly where a lengthy trial is involved, as the difference between recovering party:party costs on a deregulated basis or under the maximum costs provisions could equate to several hundred thousand dollars. ■

Notes: **1** Section 338, *Legal Profession Act* 2004. **2** *King v Greater Murray Health Service* (2007) NSWSC 914; and see *Andrews v New South Wales* (2004) 1 DCLR (NSW) 230. **3** *Gina Koh v Ja Kil Ku* [2009] NSWDC 264 (9 October 2009). **4** *King v Greater Murray Health Service* (2007) NSWSC 914. **5** *Gina Koh v Ja Kil Ku* [2009] NSWDC 264 (9 October 2009) per Truss J at [20]. **6** *King v Greater Murray Health Service* (2007) NSWSC 914 per Harrison AJ at [30]. **7** *Gina Koh v Ja Kil Ku* [2009] NSWDC 264 (9 October 2009) per Truss J at [29].

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WINDMILLS OF MY MIND

An eggstreme reaction to ras malai

By Andrew Stone

I recently saw a brief note regarding a claim in the UK against a caterer following an anaphylactic reaction. I was intrigued that such a case could be litigated to an appellate level. My initial thought was that (subject to factual disputes) the legal obligations were obvious. I couldn't see how any liability could rest on a caterer unless they were notified by the consumer as to the potential allergy. I couldn't see how, once the consumer had advised the caterer of their allergy, the caterer could then avoid liability. I looked up the case.

The facts in *Bhamra v Dubb* [2010] EWCA Civ 13 were intriguing. Mr Bhamra was one of 500 guests at a wedding at a Sikh temple at Forest Gate in North West London. Mr Dubb (also a Sikh) who carried on business under the business name, *Lucky Caterers*, had provided the wedding feast.

Mr Bhamra was highly allergic to eggs. However, this allergy caused him no inconvenience, provided he observed strict religious practice. The Sikh religion forbids the consumption of meat, fish or eggs. Indeed, it is contrary to the rules of the temple for any meat, fish or eggs to be brought into the temple.

Mr Bhamra died several days after consuming a dish of ras malai at the wedding. Mr Dubb denied that the dish contained eggs, but the trial judge found to the contrary. The challenging issues involved the scope and breach of any duty of care:

1. Should the defendant have foreseen that food with eggs in it might fatally injure a guest who was allergic to egg?
2. Would a guest allergic to eggs reasonably anticipate that food served in a Sikh temple by a Sikh caterer at a Sikh wedding would not contain eggs (and thus not warn about his allergy)?
3. Did the caterer take reasonable care to ensure that there was no egg in the food served?

The trial judge had answered yes to all three of these questions.

The Court of Appeal found that there was no general duty on the part of restaurateurs or caterers to warn that a dish contains eggs. Expert evidence indicated that only 0.1 per cent of the adult population had an egg allergy. (The court avoided the question of whether there may be a different obligation in respect of nut allergies, which are more prevalent.)

The Court of Appeal upheld the trial judge's findings in relation to the existence of a duty of care. The court noted that it was only the 'very unusual combination of circumstances' that created any duty of care in the particular case.

On the issue of breach, the case was again finely balanced. The trial judge had rejected Mr Dubb's evidence that he had made all the ras malai himself and served it fresh. There was a factual finding that some of the ras malai had been purchased from an outside source (the guests thought some of the ras malai had been frozen!). Having denied that he had purchased ras malai, Mr Dubb could not argue that he had made specific enquiries to ensure there was no eggs in the purchased ras malai.

The court found it significant that Mr Dubb was aware that some Pakistani recipes for ras malai (from predominantly Islamic regions, where there is no religious restriction on the consumption of eggs) could contain eggs. In those circumstances, it was held that it was incumbent upon Mr Dubb to check with his supplier that there was no Pakistani-influenced egg in the dish being served at the Sikh wedding. This was a breach of the unusual duty owed. The trial judge's verdict in favour of Mr Bhamra's widow was upheld.

I suspect that there are not that many cases involving egg poisoning at Sikh weddings. If any do come along, there is now excellent authority on point. What I do remain curious about is whether Mr Dubb of *Lucky Caterers* is now in breach of trade practices legislation in retaining his trading name! ■

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