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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

protect those insured vehicles and drivers against liability to pay damages for common law and statutory causes of action which the law defines as a tort or other civil wrong.
- If the QLD Parliament had intended a gap to exist so that a QLD driver would be liable for damages for 'special entitlements' personally under MACA, it would have been expressed within the words of the statute or elsewhere.

The QLD statutory policy was accordingly held to respond to s7J MACA claims.

The same principle would presumably apply to 'blameless accidents' under s7B of MACA, where a claim is also founded on 'deemed fault'.

This decision has avoided the potential liability of all drivers of QLD-registered vehicles entering NSW for driving uninsured and unregistered vehicles. Under s10 of MACA, to be recognised in NSW, a policy must cover liability in any part of the Commonwealth. If the QLD policy did not, then the vehicle would be uninsured in NSW. If uninsured, then the registration is also invalidated. NSW has clearly lost a large potential source of revenue! ■

Case changes lifetime care and support scheme

Re *Thiering v Daly* [2011] NSWSC 1345

In this case, at issue was whether a plaintiff who was a permanent member of the Lifetime Care and Support Scheme (LTCS), and who had been assessed as requiring sleepover care from his mother, was entitled to compensation for the mother's services.

The plaintiff was an accepted lifetime participant in the LTCS Scheme, intended to provide lifetime care and support of catastrophically injured individuals. The LTCS Authority decided that it would expect his mother to provide at least eight hours of care each day uncompensated to meet the assessed need. Section 128 of MACA entitles an injured plaintiff to damages for gratuitous services but limits the amount recoverable. Section 130A provides that:

> 'No damages may be awarded to a person who is a participant in the Scheme ... for economic loss in respect of the treatment and care needs ... that relate to the motor accident injury in respect of which the person is a participant in that Scheme and that are provided for or are to be provided for while the person is a participant in that Scheme.'

Garling J drew attention to the obligation under the *Motor Accidents (Lifetime Care and Support) Act* 2006 s6(1) '... to pay the reasonable expenses incurred by or on behalf of a person while a participant in the Scheme in providing for such as the treatment and care needs of the participant as related to the motor accident injury ... and as are reasonable and necessary in the circumstances'.

However, clause 6 of the LTCS Scheme Guidelines expressly prohibits compensation for family members or friends who may be employed to provide services only in exceptional circumstances, and then only through an employment contract with a provider. The Guidelines gratuitously add:

> 'The Authority will not fund attendant care services that are provided by family or friends ... where the Authority has not approved the need for care ... The Authority will not fund a family member or friend to provide inactive sleepovers.'

Garling J said there were three possible interpretations of the position:

(a) Gratuitous damages remain outside the LTCS Scheme and are recoverable from the CTP insurer in the usual way.
(b) Gratuitous damages are wholly subsumed by the LTCS Scheme and are no longer available to a claimant who is a lifetime participant.
(c) Gratuitous damages are available, but only up to the date of judgment or assessment and thereafter are not recoverable as damages once the services are to be provided under the LTCS Scheme.

After considering the purposes of the Scheme, including the Second Reading Speech, Garling J concluded that although the Guidelines are generally valid [131], the guideline representing Part 8 that prevents compensation for gratuitous services by family members or friends cannot be supported because it is inconsistent with the requirements to meet the participant's needs, particularly where the plan to meet those needs expressly refers to those particular services [138].

Garling J concluded that the appropriate approach was option (c) [144-6]. This means that the plaintiff is entitled to sue for compensation for gratuitous services provided (and such services will not be limited by s128 in terms of quantum [153]) up until the date when damages are awarded or assessed. However, for the future, there will be no compensation for gratuitous services but the obligation lies with the LTCS Authority to provide that which is reasonable and necessary.

In respect of services that have been provided in the past, a claim may be made for them on a *quantum meruit* basis. The sum recoverable will not be restricted in the manner provided in s128 of MACA.

The right to damages for past gratuitous services has now been removed by legislative amendment. ■