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Précis Paper

Seeking Judicial Review of Decisions Made Under the Motor Accidents Injury Scheme

A discussion of the recent decision in *Jake Thomas Burns v Insurance Australia Limited trading as NRMA Insurance* [2018] NSWSC 18

Discussion Includes

- Key facts
- Outcome of the case
- Costs
- Takeaways for practitioners
- An example of a successful judicial review application

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Seeking Judicial Review of Decisions Made Under the Motor Accidents Injury Scheme

1. In this edition of BenchTV, Eva Elbourne (Barrister, Maurice Byers Chambers, Sydney) and Manal Hamdan (Barrister, Maurice Byers Chambers, Sydney) discuss applications for judicial review of decisions made under the motor accidents injury scheme, and what practitioners should caution themselves against in the making of them.

Key facts

2. *Jake Thomas Burns v Insurance Australia Limited trading as NRMA Insurance* [2018] NSWSC 18 involved an application for judicial review of two decisions of the Motor Accidents Assessment Service, namely, that of a Medical Assessor, and of a Proper Officer refusing to refer that decision to a Medical Review Panel.

3. On 1 July 2013, the plaintiff, then aged almost 17 years, was a passenger in a motor vehicle that was involved in a serious accident. As a result, he suffered physical injury.

4. But more importantly, he suffered significant and chronic psychiatric damage. He was diagnosed with post-traumatic stress disorder and secondary major depressive disorder.

5. There was dispute over whether or not he was going to be entitled to non-economic loss.

6. He applied for a medical assessment by a medical assessor under s 60 of the *Motor Accidents Compensation Act 1999* (NSW) (MACA).

7. The assessment duly occurred in 2016, with the medical assessor providing a certificate pursuant to Part 3.4 of the MACA relating to the level of whole person impairment (WPI) suffered by the plaintiff.

8. The plaintiff's level of WPI was assessed at 9%, The plaintiff was not happy about this because pursuant to s 131 of the MACA, the plaintiff needed to be assessed as having suffered WPI of more than 10% or more in order to receive any damages for non-economic loss. (It is also important to note that impairment must be a result of injuries sustained in the accident.)

9. A person can only be assessed as having over 10% WPI on *either* physical *or* psychiatric grounds. The plaintiff applied to the proper officer for a review of the assessment of the medical assessor, pursuant to s 63 of the MACA, and for his claim to be referred to a Medical Review Panel.

10. The proper officer refused the application.

11. The plaintiff sought to impugn both decisions (of the medical assessor and of the proper officer) by way of judicial review in the Supreme Court.

12. He challenged the decisions on the basis of alleged inadequacy of reasons. In order to be entitled to damages for non-economic loss, the plaintiff had to show that his impairment rating fell into category 3 (mild impairment), rather than into category 2 (mild impairment).

13. The plaintiff's own expert medicolegal evidence suggested that he suffered at least moderate, if not severe, impairment.

14. The plaintiff only required one additional rating point from any category in order to achieve WPI of over 10% and thereby become entitled to damages for non-economic loss.

15. The medical assessor is required to make assessment at the time that they examine the plaintiff. The plaintiff's medical reports were significantly out of date at the time of his assessment. The medical assessor in conducting his assessment was entitled to also take into account his interview with the plaintiff and the plaintiff's mother, in which both reported recent improvement in the activities covered by all three of those categories.

16. So the medical assessor did acknowledge the seriousness of the plaintiff's problems, but proceeded to say that because of what had been revealed in the interview that was conducted significantly later, his problems were no longer as serious.

17. The intention of this scheme when it was introduced was to:
    - reduce premiums
    - simplify claims
    - reduce the cost of the scheme
    - ensure that the financial viability of the scheme was maintained, while still compensating seriously injured plaintiffs
    - cull requests for review of smaller claims
    - restrict damages to people who were significantly injured

18. There are those who argue that the 10% threshold in s 131 of the MACA is too harsh. This is, however, a matter for the legislature.

19. The court in this case held that the adequacy of reasons depends upon the whole context and circumstances of the decision.

20. Button J went on to say that 'questions of compliance with procedure should not trump questions of justice'. This comment arose from the fact that counsel for the plaintiff sought

to argue the medical assessor's assessment of the category of 'self-care and personal hygiene'.

21. This argument:
    - did not form part of the written application of the plaintiff to the proper officer
    - was not notified in the original summons
    - was not notified in the amended summons
    - was not discussed in the written submissions of counsel for the plaintiff

22. The argument was therefore was objected to by the defendant on this basis. His Honour said in relation to procedural fairness that parties are required to their opponents on notice of the precise bases upon which judicial review of an administrative decision is sought, and this had not occurred.

Outcome of the case

23. His Honour did not accept that the reasons of the medical assessor were inadequate in any way, rather, he held them to be 'soundly adequate', because they were 'detailed, comprehensive and coherent', and correctly analysed the past, present and future circumstances of the plaintiff.

24. His Honour also rejected the submissions made by the plaintiff that the proper officer had misunderstood her role by:
    - not acting as a 'gateway' in assessing whether the reasons of the medical assessor were inadequate, and
    - purporting to determine the definitive question herself (evidenced by the fact that her reasons were too detailed and indicating that she had failed to engage correctly with her statutory role)

Costs

25. The defendant sought an indemnity costs order to be made with regard to at least some aspects of the matter as a result of unnecessary costs having been incurred in accordance with s 99 of the *Civil Procedure Act*.

26. The defendant sought this order on the basis that a voluminous bundle of documents was served on the defendants, of which only four were actually needed for His Honour to make the application.

27. The authority upon which the defendant relied was *Insurance Australia Ltd t/a NRMA Insurance v Milton (No 2)* [2016] NSWCA 173.

28. Button J, while acknowledging that he was bound by the decision of the Court of Appeal, declined to make an indemnity costs order, stating that a special costs order should only be made when one is firmly and affirmatively satisfied that there are unusual circumstances calling for such an order to be made.

Takeaways for practitioners

29. The key takeaway for practitioners is that judicial review applications are not the time to argue the merits of a claim.

30. Judicial review, like an appeal, requires demonstration of an error by the decision maker. The types of decisions that are reviewable are those that fall into error by reason of a decision-maker's failure to exercise his or her proper statutory function and power under the relevant act. This can take many forms, including:
    - exceeding jurisdiction
    - absence of jurisdiction
    - taking into account matters which should not have been taken into account
    - not taking into account matters which should have been taken into account
    - any denial of procedural fairness

31. The purpose of judicial review is always to rectify an error that is going to cause an injustice to a party. So it is essential that practitioners:
    - firstly establish what the error is, and
    - secondly ensure that the evidence produced in support is only evidence that is relevant

An example of a successful judicial review application

32. *Boyce v Allianz Australia Insurance Ltd* [2018] NSWCA 22 is a recent example of a judicial review application that was successful.

33. In this case, the plaintiff appealed the dismissal of the unsuccessful application for judicial review of the certificate of the medical assessment review panel. She did so on the basis that the panel was not informed of her objection to assessment solely on the papers without re-examination. So the basis of the appeal of the decision at first instance in this case was denial of procedural fairness.

34. The plaintiff was successful in this case. The court found that as the appellant was not advised that the review assessment would occur without re-examination, she was deprived of the opportunity to put her case before the panel as to why she objected to the panel proceeding on the papers. Further, the court found that the respondent could not demonstrate that the appellant was not deprived of the possibility of a successful outcome.

BIOGRAPHY

Eva Elbourne

Barrister, Maurice Byers Chambers, Sydney

Eva was admitted to the NSW Bar in 2007. Prior to this, she was a Partner at Abbott Tout and Hunt & Hunt Lawyers working in insurance litigation. Her primary areas of practice are professional and medical negligence, equity and coronial inquests. Eva has conducted matters in a variety of jurisdictions in NSW and in the Supreme Court of the ACT.

Manal Hamdan

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Manal was admitted to the NSW Bar in 2014. Before coming to the Bar, she was a Senior Associate at Holman Webb Lawyers, working in general insurance and litigation. Over the past 10 years, Manal has gained extensive experience in the areas of professional negligence, commercial litigation, abuse survivor law and administrative law.

BIBLIOGRAPHY

Focus Case

Jake Thomas Burns v Insurance Australia Limited trading as NRMA Insurance [2018] NSWSC 18

Benchmark Link

Jake Thomas Burns v Insurance Australia Limited trading as NRMA Insurance [2018] NSWSC 18

Judgment Link

Jake Thomas Burns v Insurance Australia Limited trading as NRMA Insurance [2018] NSWSC 18

Cases

Insurance Australia Ltd t/a NRMA Insurance v Milton (No 2) [2016] NSWCA 173

Boyce v Allianz Australia Insurance Ltd [2018] NSWCA 22

Legislation

Motor Accidents Compensation Act 1999 (NSW)

Civil Procedure Act 2005 (NSW)