



Précis Paper

Justifiable Delay in Motor Vehicle Accidents Compensation

A consideration of *Hunter v Roberts [2019] NSWCA 116*, which concerned justifiable delay in a motor accident compensation claim.

Discussion Includes

- Facts in the case
- Take-aways
- Legal strategy

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Justifiable Delay in Motor Vehicle Accidents Compensation

1. In this edition of BenchTV, Adam Casselden SC (Barrister, Greenway Chambers) and Jarryd Malouf (Barrister, Greenway Chambers) discuss *Hunter v Roberts [2019] NSWCA 116*, which concerned justifiable delay in a motor accident compensation claim.

Facts in the case

2. This case concerned a claim for a motor vehicle accident that the Plaintiff made late by a period of 4 months and 14 days.
3. The claim was ultimately denied in the District Court.
4. The claim was made late because the Plaintiff was recovering and had a poor memory of the motor vehicle accident.
5. Furthermore, she had no idea about the claims process or limitation period.
6. The Plaintiff also says she was harassed and intimidated by the Defendant
7. The Defendant filed notice to dismiss the claim due to its lateness.
8. The District Court Judge said it was not reasonable for the Plaintiff to put her recovery over the making of enquiries about the claims process.
9. The accident involved a single vehicle on a dark country road.
10. The Plaintiff has no memory of what actually occurred, but it is known that the vehicle rolled.
11. The test that should have been applied is whether a reasonable person, in the position of the Plaintiff, would have been justified in experiencing the same delay.
12. *Section 66 (2) Motor Accidents Compensation Act No 41 (NSW)* sets out the relevant test.
13. The primary Judge accepted that the Plaintiff had significant injuries that required her attention, that she was focussed on her recovery, had prioritised her health above any claim for legal rights, did not think to push a claim, and that the Plaintiff was ignorant of their legal rights.
14. The primary Judge also found that the Plaintiff did not know that there was a limitation period.
15. Notwithstanding those critical findings of fact, the primary Judge, the Plaintiff contended, erroneously proceeded to find that the fact that Plaintiff had prioritised her recovery over taking any attempts to inquire about a claims process was not of itself a full and satisfactory explanation for her delay, and that it was unreasonable that the Plaintiff took no steps prior to the end of 2013 to find out what the claim process was.
16. The Plaintiff, while she was at a family gathering, had told her uncle why she was not making a claim.

17. The primary Judge found that, in circumstances where the Plaintiff was aware of a process in which to make a claim, she was unreasonable in not making immediate enquiries into the claims process.
18. The Court of Appeal found that this was an error and that following the reasonableness test the Plaintiff was justified.

Take-aways

19. If a practitioner is acting for a plaintiff injured in a motor vehicle accident, and that plaintiff has no knowledge of the claims process or the existence of the 6 month limitation period, or is unaware of that if they fail to lodge their claim, then there is a reasonable prospect that it may amount to a full and satisfactory explanation.
20. Practitioners acting for insurers should be mindful that they ought to explore with the plaintiff their knowledge of the claims process.
21. The inquiry shouldn't be on why something happened when it did, but rather why was it done late and whether or not that explanation was reasonable.

Legal strategy

22. Following the drafting of written submissions, it appeared that the appeal had very strong prospects of success, and it was determined that strategically it was sound to make a Calderbank offer at the same time that the Plaintiff served her written submissions
23. The offer was made that the decision made by the trial Judge should be set aside, that the appeal be allowed, and that each party bear their own costs.
24. The offer was open up to and including the time that the respondent Defendant was to serve his written submissions. The offer was not accepted.
25. Following the unanimous decision of the Court of Appeal in favour of the Plaintiff, an application was made by her for indemnity costs.
26. The Court of Appeal acceded to that request and the Plaintiff received her costs, in the Court below and in the Court of Appeal, up until the date that the Calderbank offer was made.
27. Thereafter the Defendant was ordered to pay the Plaintiff's costs on an indemnity basis.
28. If a respondent or an appellant to an appeal receives a Calderbank offer at the same time as they receive their opponent's submissions, deep thought should be given to their prospects of success.
29. In this case, the Court of Appeal found that the insurer was unreasonable in not accepting the Plaintiff's Calderbank offer.

30. One matter that influenced the Court's discretion was that, at one hearing of the motion, Counsel for the Defendant at the time did make a submission to the Court that the reasons provided by the Plaintiff are reasons that are often regarded as being satisfactory in applications of the same kind. The Court of Appeal made reference to that submission.

BIOGRAPHY

Adam Casselden SC

Barrister, Greenway Chambers, Sydney

Adam Casselden was appointed Senior Counsel in October 2016.

Adam advises and appears in the areas of Commercial Law, Common Law and Transportation Law. He is highly regarded in Inquests and Sports Law. Adam appears in the Supreme Court, the Federal Court, the District Court, the Coroner's Court and various Tribunals. Adam's clients have included Australia's leading Banks and Insurers, State and Commonwealth Departments and Agencies, ASX-listed Companies, Domestic and International Shipping Lines and Airlines, and Small to Medium Enterprises.

In the field of Coronal Law, Adam appears as Counsel Assisting the Coroner in complex and high-profile Inquests. Adam also appears in the Coroner's Court for interested parties, including for Families and Government Departments.

Adam represents high-profile sporting clubs, associations and athletes. Adam has acted as legal counsel for Australian Rugby Union, Football Federation of Australia, NSW Rugby Union, Western Sydney Wanderers FC, Central Coast Mariners FC, Department of Sport & Recreation and NRL players. Adam is a SANZAAR Judicial Officer for Super Rugby and The Rugby Championship, and in 2015 Adam was appointed by World Rugby as a Judicial Officer to the Rugby World Cup in England and Wales. He has been appointed by The NSW Minister for Sport and Recreation to sit on the Combat Sports Authority and in 2016 Adam was appointed to sit on a number of National Sporting Federation Olympic Appeals Tribunals.

Adam has a clear and concise approach to the resolution of legal issues. With extensive litigation experience at the Bar and as a solicitor, he is keenly aware of how to achieve the best outcomes for his clients with a thorough and rigorous analysis of their case. His focus is on diligent preparation, detail and concise communication. He is a proven litigator with a high level of knowledge across a broad range of legal issues.

Adam is passionate about the arts. As an Arts Law 'Guardian Angel', he supports artists and creative organisations to ensure they receive sound advice regarding their rights and responsibilities.

Whenever possible, Adam accepts pro bono briefs referred by Legal Centres.

Jarryd Malouf

Barrister, Greenway Chambers, Sydney

After qualifying as a solicitor in 2011, Jarryd Malouf's keen and long-standing interest in advocacy and litigation led him directly to the Bar in 2012. Since that time, he has developed into an outstanding Personal Injury advocate. Whilst willing to accept briefs in all practice areas, he has acute knowledge of all aspects of personal injury claims, including medical negligence, workers compensation, motor vehicle accidents and public liability matters. Appearing for both plaintiffs and defendants, Jarryd has developed a rounded understanding of the details of such matters.

Jarryd respects the input of both solicitors and clients. He maintains a responsive working relationship and exercises unfailing diligence with regard to ensuring all parties are updated as a case evolves. He also makes time to answer queries and speak to clients whenever possible.

In addition to an extremely disciplined approach to detail, Jarryd's ability to deliver outstanding advocacy is the cornerstone of his practice. A consummate professional, he has an immersive approach to preparation and remains 'across the brief' at all times. Through organisation and adept knowledge of the requirements of the court, he makes the legal process seamless.

BIBLIOGRAPHY

Focus Case

Hunter v Roberts [2019] NSWCA 116

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_insurance/benchmark_24-05-2019_weekly_insurance_law_review.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5ce1cba0e4b0196eea407047>

Cases

Karambelas v Zaknic (No 2) [2014] NSWCA 433

Russo v Aiello [2001] NSWCA 306

Legislation

Motor Accidents Compensation Act No 41 (NSW)