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Précis Paper

Non-Economic Loss Damages for Motor Accidents

A discussion of the case of *Dominice v Allianz Australia Insurance Ltd* [2017] NSWCA 171, with a particular focus upon cl 1.43 of the *Permanent Impairment Guidelines 2007* (NSW).

Discussion Includes

- Background to the case
- The facts
- Review sought by insurer
- Judicial review sought by claimant in Supreme Court
- Appeal to Court of Appeal by the Plaintiff
- Impact of the case on the new scheme

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Non-Economic Loss Damages for Motor Accidents

In this edition of BenchTV, William Fitzsimmons (Barrister - 9 Windeyer Chambers, Sydney) and Sarah Warren (Barrister - 9 Windeyer Chambers, Sydney) discuss the NSW Court of Appeal decision of *Dominice v Allianz Australia Insurance Ltd* [2017] NSWCA 171 which dealt with an appeal that arose out of a judicial review of the decision of the proper officer of the authority, regarding the 10% whole person impairment requirement for non-economic loss damages.

Background to the case

1. Under the *Motor Accidents Compensation Act 1999* (NSW) (the Act), a plaintiff is only entitled to non-economic loss damages, what used to be called pain and suffering damages, if they exceed 10% whole person impairment requirement. The Act does provide a regime whereby the parties can agree as to whether the plaintiff has exceeded the 10 percent whole person impairment in terms of a medical impairment. If there is no agreement between the parties, there is a process or regime under the Act where it can be referred to a medical assessor for assessment.

2. An assessment involves carrying out a medical examination. The assessor will also, as part of the medical examination, consider contemporaneous medical records and any medicolegal reports which the parties have put forward in support of their contention that either the plaintiff does, or does not, exceed the 10% whole person impairment. The medical assessor will then issue what is called a certificate under the Act, and the medical assessor is then obliged to provide a set of reasons as to why they reached that particular determination.

3. The decision of the medical assessor is amenable to review, and that review is undertaken by three separately appointed medical assessors, who form what is called a review panel. In order to have a medical assessment reviewed, pursuant to s 63 of the Act, a proper officer, being someone within the Authority, has to have made a determination that he or she has reasonable cause to suspect that the original medical assessment made by the assessor was incorrect in a material respect.

The facts

4. The plaintiff in this case suffered numerous injuries, including injuries to both shoulders. She went through various medicolegal assessments, including one on behalf of the insurer, conducted by Dr. Kenna. Dr. Kenna determined that there was 0% impairment of the Plaintiff's shoulders, based upon a determination of measuring each of the Plaintiff's shoulders and not finding any restriction on movement.

5. The insurer disputed that the Plaintiff had satisfied the 10% whole person impairment in order to qualify to receive non-economic loss damages. An application was made to the authority for the medical assessment to be undertaken by a duly appointed medical assessor. The assessor in this case was Dr. Ashwell.

6. Dr. Ashwell, as part of his assessment and in his statement of reasons, found a number of internal inconsistencies in the way the Plaintiff presented. For example, the Plaintiff was unwilling to make a fist with her right hand, as she stated that it would hurt the back of her head and neck, although there was nothing wrong with either hand or elbow. The Plaintiff also complained that movement of her right hand and wrist, as well as both shoulders and ankles apparently caused pain in her neck. Dr. Ashwell effectively noted that these types of inconsistencies were essentially inexplicable on medical grounds.

7. As part of the medical assessment, Dr. Ashwell had to undertake a review of the claimant's range of movement of the shoulders. Dr. Kenna, as part of the insurance company's assessments, had found that she had full range of movement. When Dr. Ashwell assessed the claimant some 10 months after Dr. Kenna's assessment, there was now restriction in the movement of both shoulders. Dr. Ashwell was at a loss to explain the apparent deterioration in the Plaintiff's condition over that 10 month period, from having full range of movement to now having a restriction in the range of movement of her shoulders.

8. Despite being unable to explain medically why there had been a deterioration in her condition, Dr. Ashwell proceeded to assess the whole person impairment as over 10%. A significant part of this assessment was the limited range of movement of both shoulders.

<u>Review sought by insurer</u>

9. The insurer sought a review of the assessor's determination on the basis that it was incorrect in a material respect. The primary ground for review by the insurer was that the medical assessor had failed to apply relevant provision of the *Permanent Impairment Guidelines 2007* (NSW) (the Guidelines). These guidelines are issued by, or under, the authority of the *Motor Accidents Compensation Act 1999* (NSW).

10. Traditionally these guidelines are viewed as delegated legislation, meaning they have significant force and effect. This was challenged by Leeming J in *AAI Limited v Ali* [2015] NSWCA 1068, where he questioned whether the guidelines are, in fact, delegated legislation, which questions a long line of authority labelling these guidelines as delegated legislation.

11. In any event, in the current case the insurer relied upon clause 1.43 of the Guidelines. This clause essentially provided that where there were inconsistencies disclosed on the medical examination, the medical assessor is required to bring those inconsistencies to the plaintiff's attention so the plaintiff may be given an opportunity to provide some explanation for those inconsistencies. The whole intent of cl 1.43 was to not only provide procedural fairness, but to ensure an accuracy in the medical assessment.

12. The insurer argued that although the assessor had found clear inconsistencies on the examination, the assessor failed to bring those inconsistencies to the attention of the plaintiff. The insurer's basis of argument was that in circumstances where there was an inconsistency in range of movement, it was incumbent upon the medical assessor to bring these inconsistencies to the plaintiff's attention. The primary ground of review for the insurer was that there was a failure to apply, or even consider at all, the provisions of cl 1.43 of the Guidelines.

13. The proper officer granted the application for review, and referred that review to a panel of three medical assessors. While the case was referred to the panel for review, the Plaintiff appealed to the Supreme Court for judicial review of the proper officer's decision. Whilst the judicial review was in process in the Supreme Court, the medical review panel were undertaking their review. By the time the matter came before Fagan J in the Supreme Court to consider the proper officer's decision, the review panel had already determined the Plaintiff's claim, and had overturned the original decision of the medical assessor. The medical review panel made their decision on the basis that there was an error in the manner in which Dr. Ashworth had performed the medical assessment.

<u>Judicial review sought by claimant in the Supreme Court</u>

14. The Plaintiff's primary contention for judicial review was that cl 1.43 of the Guidelines did not apply in this case, meaning there was no obligation on the medical assessor at all to consider cl 1.43. Essentially, the Plaintiff was arguing that cl 1.43 had no relevance in this case, and therefore the proper officer was in error in effectively finding that there was reasonable cause to suspect the original determination was erroneous.

15. Another ground of review put forward by the Plaintiff was that of Wednesbury unreasonableness. Wednesbury unreasonableness, derived from the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, provides that an administrative decision could be overturned if the decision was so unreasonable, that no reasonable decision maker would make it. In this case, the Wednesbury unreasonableness ground of review depended upon whether cl 1.43 applied.

16. The Plaintiff also sought judicial review on the basis that there was a jurisdictional fact, which is a precondition to the exercise of the proper officer's determination, that there was a jurisdictional fact that had to be overcome which enlivened the proper officer's power. The plaintiff argued that jurisdictional fact had not been satisfied, and therefore the proper officer should not have been granted the application.

17. Fagan J of the Supreme Court of NSW rejected all grounds of judicial review and the summons was dismissed.

Appeal to the Court of Appeal by the Plaintiff

18. The Plaintiff then appealed the decision of Fagan J to the NSW Court of Appeal. The Court of Appeal dismissed the appeal, with each of the three justices delivering their own reasons for doing so.

19. Emmet AJA stated that clearly cl 1.43 was not only there to provide procedural fairness to the plaintiff, but it was clearly also there to provide accuracy in the assessment. The original medical assessor had not considered cl 1.43 and had not raised the inconsistencies with the plaintiff, therefore the proper officer's determination was correct.

20. Simpson JA found that not only was cl 1.43 there effectively to be beneficial to the claimant, but the purpose was much greater than that. Simpson JA accepted the contention of the insurer that clearly cl 1.43's scope and application was much wider than that being argued by the Appellant on appeal. As the medical assessor had found a restriction in the range of movement which was inexplicable on medical grounds, given the earlier unrestricted range of movement, it was incumbent upon the assessor to effectively look behind the inconsistencies found and provide the injured person an opportunity to explain the discrepancies. Effectively, Simpson JA rejected the plaintiff's contention that cl 1.43 didn't apply.

21. The plaintiff also argued that the proper officer had to be satisfied that there was an error in the original decision of the medical assessor, however all that was required was that the proper officer had a reasonable cause to suspect that there was an error. Simpson JA found that all the proper officer was required to do, was have a reasonable cause to suspect that the assessment was incorrect in a material respect. Her Honour, having found that cl 1.43 did apply in the circumstances, found that the Wednesbury unreasonableness argument essentially fell away, as it relied upon the premise that cl 1.43 was not applicable to this case.

22. For a medical assessor to have satisfied cl 1.43 in this case, the assessor would have had to properly consider the inconsistencies in terms of range of movement over the 10 month

period, afford the plaintiff an opportunity to explain the inconsistencies, and therefore by applying his own medical knowledge, come to his own view as to where those explanations were appropriate.

23. Basten JA effectively agreed with the judgements of Emmet AJA and Simpson JA, but challenged the assumption inherent in the appeal that judicial review was available in relation to the decision of the proper officer to refer an application for review.

24. If the basis that the decision was incorrect in a material respect had been misconceived, then such a misconception could obviously be picked up by the review panel when it determined for its own purposes whether the review should be upheld and the original certificate overturned. A trial judge faced with a judicial review application in those circumstances would have strong reasons for rejecting the review application on discretionary grounds. Those discretionary grounds being, amongst other things, that the review panel had gone on and determined that the original assessment was incorrect.

25. The insurer sought to have admitted into evidence before Fagan JA the decision of the review panel. The insurance company argued at first instance that Fagan JA should have the decision of the review panel to consider whether, on discretionary grounds, the application should otherwise be refused. Fagan J provisionally admitted the review panel decision for the purposes of determining the matter, but ultimately didn't consider it material and dismissed it for other reasons. This is interesting as the Court of Appeal considered that the determination of the review panel was important and was relevant, and that the decision from the review panel essentially provided a grounds for refusal of the application on discretionary grounds.

26. The plaintiff sought to contend that if the proper officer's decision would be set aside, then essentially the consequences of that determination should similarly be set aside. Effectively, the subsequent determination of the review panel is impugned if the plaintiff was able to establish that the referral to the review panel by the proper officer was beyond power and amenable to judicial review.

27. Basten JA considered that even if the grounds for judicial review had been made out, that in itself did not invalidate the review panel's decision. The Plaintiff had argued, at first instance and on appeal, that the proper officer had essentially applied the wrong test. In her statement of reasons given to allow the review by the panel, the proper officer referred to a statement by Campbell J in *Elliott v Insurance Australia t/as NRMA Insurance* [2014] NSWSC 1848, in which he stated that the test required under s 63 of the Act, 'a reasonable cause to suspect', essentially required nothing more than what he called a 'state of unease' about the decision.

28. On this point, Basten JA stated that the use of such expressions, or seeking to use some other sort of expression for what is actually contained in the Act should be deprecated. There are circumstances where if a decision maker sought to essentially use some words other than those contained in the Act that could potentially give rise to grounds for judicial review. However in this case, his Honour found that the proper test had been applied.

29. There was then an application for special leave to the High Court, but that was dismissed.

Impact of the case on the new scheme

30. A new scheme for Motor Accident Compensation commences on December 1, 2017. For cl 1.43, there will be essentially the same wording, except ultimately this clause will now be stronger. This is because now it is not that the claimant may have the opportunity to respond, but the medical assessor must raise any inconsistencies, and the injured person must give an explanation for the inconsistencies.

31. Cl 1.43 of the Guidelines appears on first glance to really only protect the plaintiff in circumstances where there are some inconsistencies or credit issues, and they should be brought to the plaintiff's attention in the medical assessment in order to afford the plaintiff procedural fairness. However, as has been demonstrated by this case, cl 1.43 emphasises that it is not only a clause relating to procedural fairness for the plaintiff, but to ensure accuracy in the medical assessment. The case of *Dominice v Allianz Australia Insurance Ltd* [2017] NSWCA 171 is important because it displays a broader application of cl 1.43 which will continue to apply in the future, making this case important for all parties to keep in mind.

32. Depending upon which party finds favour in the medical assessment, that party will often seek to tender or put into evidence the medical assessment in a court case. What that means is, there is more often than not a debate as to whether or not the medical assessment should be admitted. The debate over whether to admit the medical assessment essentially centres on the fact that a medical assessor, firstly, does not have to comply with the code of conduct, and secondly, is not amenable to a subpoena and therefore cannot be cross-examined in court on the opinion.

33. Clause 1.43 imposes upon a medical assessor in these circumstances to properly consider all of the material. A medical assessor must consider if there are discrepancies, and if there are, properly consider them with the plaintiff in the medical examination. Depending upon whatever responses the doctor receives from the plaintiff, to then consider it in a medical context as to the significance of those inconsistencies.

34. Cases such as *Dominice* provide the framework for which a review must be sort of these decisions. A lot of these decisions will be moved within the authority under the new scheme. There is speculation as to how many further judicial review challenges will be made in the future, to both the Supreme Court and the Court of Appeal, given that the new legislation creates more disputes.

35. This case is an important decision as it essentially provides some further structure and further guidelines to parties who are considering reviewing the decision of a proper officer as to whether it is amenable to judicial review. If the review process has already started and is moving forward, and ultimately the review panel comes to the conclusion that there was an error, and has overturned the original certificate, that then really supports the decision of the proper officer, who only has to have reasonable grounds to suspect an error, not actually come to the conclusion that there was an error. One can't simply stop at the proper officer's decision, if there are consequences from that proper officer's decision and the consequences flow through before any judicial review is determined, then they certainly may become very relevant and probative, ultimately in the context of any discretionary grounds.

BIOGRAPHY

William Fitzsimmons

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William was admitted as a barrister in 1990. In his early years at the bar, he focused on criminal law jury trials in the District and Supreme Court, as well as conducting civil trials in insurance law (particularly in respect to matters arising under the Insurance Contracts Act and fraud related claims). William has since maintained his interest in criminal law having undertaken prosecution work on behalf of the DPP. William has also developed significant practice in public liability and CTP litigation. He is regularly retained on behalf of most CTP insurers in all claims, including significant liability dispute and major/catastrophic claims. In the common law/insurance field, he specialises in fraud related claims, drawing upon his criminal law background and experience. Doyle's Guide 2017 lists William as one of the state's Leading Insurance Law Barristers. In 2017, he was appointed as a Claims Assessor by the ACT Government.

Sarah Warren

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Sarah was admitted to practice in 2008 and was called to the bar in 2015. Prior to being called to the bar, Sarah worked in-house for a national insurer, practicing in insurance litigation. Sarah is a member of the NSW Bar Association Common Law Committee and an Executive Councillor of NSW Young Lawyers. Sarah was previously the Chair of the NSW Young Lawyers Civil Litigation Committee between 2015 - 2017. She was also a member of the Law Society of NSW Injury Compensation Committee in 2011-2012.

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Focus Case

Dominice v Allianz Australia Insurance Ltd [2017] NSWCA 171

Benchmark Link

Dominice v Allianz Australia Insurance Ltd [2017] NSWCA 171

Judgment Link

Dominice v Allianz Australia Insurance Ltd [2017] NSWCA 171

Cases

AAI Limited v Ali [2015] NSWCA 1068
Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223
Elliott v Insurance Australia t/as NRMA Insurance [2014] NSWSC 1848

Legislation

Motor Accidents Compensation Act 1999 (NSW)
Permanent Impairment Guidelines 2007 (NSW)