ISSN 1328 - 9330

Journal of

APLA

Australian Plaintiff Lawyers Association

Plaintiff

Issue 21

June 1997

$8M verdict in Motor Accident Act claim

Thomas v Eyles, Supreme Court of New South Wales, Simpson J

Leonard Levy SC, Sydney

Facts

The plaintiff was injured in a motor vehicle accident on 26 April 1989 in which he was rendered quadriplegic from the level C4/5. He was aged 36 at the time of injury and was aged 44 at the time the verdict was delivered. Proceedings were filed on 7 March 1990. Liability was ultimately admitted and the action proceeded to an assessment over 14 hearing days in three main periods. The last hearing date took place 8 weeks after evidence closed following the exchange of detailed written submissions. The first five hearing days involved an historic sitting of the Supreme Court in the southern NSW town of Eden.

The plaintiff was a highly qualified deep sea welder and saturation diver by profession. In the few weeks immediately before his injury he commenced employment as an abalone diver at Mallacoota off the eastern coast of Victoria. The evidence disclosed that the abalone industry was productive of very high earnings. This employment was initially effected through a complex and unusual trust arrangement because of the particular licensing provisions of the *Victorian Fisheries Act, 1968* which required the owner of the abalone licence to personally dive to harvest the licence quota of abalone. At the time the plaintiff started exploiting the licence he had not actually bought the licence although legal ownership had been transferred to him to satisfy regulatory requirements.

Following his injury the plaintiff continued to derive income from the abalone licence although he was no longer able to work. He derived this post-accident income through a complex series of corporate and trust structures which were put in place and prepared by financial consultants. In order to mitigate his loss of earning capacity the plaintiff transferred his abalone licence to another diver and the effect of this was to enable the other diver to exploit the licence in partnership with the plaintiff. The claim for loss of earning capacity had to be assessed by peering through a complex web of arrangements and documents. The interpretation the defendant sought to place on this material was a major focus at the trial.

Continued on page 30...

Contents

...continued from page 1

Assessed Damages

The following heads of damage were assessed:-

Non-economic loss	$247,000
Past loss of earning capacity	$1,030,283
Future loss of earning capacity	$1,667,397
Past gratuitous services (s. 72 of Motor Accidents Act)	$165,614
Past *Griffiths v Kirkemeyer* damages	$130,216
Home modifications past and future	$385,000
Future landscaping	$57,415
Future additional home maintenance and running costs	$178,445
Future home maintenance - handyman	$135,773
Future therapeutic equipment and supplies	$131,506
Future maintenance of therapeutic equipment	$3,406
Future computer requirements	$200,540
Future motor vehicle expenses	$48,514
Future medical and hospital expenses	$257,634
Future pharmaceutical expenses	$21,305
Future care	$2,327,550
Future paramedical expenses	$26,355
Future additional vacation costs	$80,000
Out-of-pocket expenses	$927,811
Total	**$8,021,764**

The *Griffiths v Kirkemeyer* damages related to the services of five of the plaintiff's diving colleagues who each voluntarily donated a few days worth of their time to harvest the plaintiff's remaining abalone quota before the impending close of the harvesting season would have caused the plaintiff's quota entitlement to lapse pursuant to licensing conditions. The plaintiff's contention that these services were provided outside the scope of section 72 of the *Motor Accidents Act* and therefore subject to ordinary common law principles of assessment was accepted. These services were valued at $130,216.

History of Settlement Negotiations

The GIO, through its *nom de guerre*, the New South Wales Ministerial Corporation waited for the plaintiff to make the first offer of settlement. The history of negotiations is summarised below:-

11.4.95	Plaintiff's offer to defendant $8,500,000 plus costs
30.6.95	Defendant's offer to plaintiff $5,000,000 plus costs
3.8.95	Defendant's offer to plaintiff $5,500,000 plus costs
4.8.95	Plaintiff's offer to defendant $8,600,000 inclusive of costs
4.8.95	Defendant's offer to plaintiff $5,500,000 inclusive of costs
7.8.95	Plaintiff's offer to defendant $8,500,000 inclusive of costs
5.10.95	Defendant's offer to plaintiff $6,500,000 inclusive of costs
6.10.95	Plaintiff's offer to defendant $7,600,000 inclusive of costs and clear of payments
20.11.95	Defendant's offer to plaintiff $6,500,000 inclusive of costs and payments
27.5.97	Verdict $8,021,764 plus costs

Plaintiff's claim for interest unsuccessful

Following the verdict and before judgment was entered, the plaintiff made a claim for interest pursuant to section 73(4)(iv) of the *Motor Accidents Act, 1988*. In rejecting this claim for interest the trial judge found that whilst it was evident that the difference between the actual verdict and the defendant's highest written offer of settlement was by a factor of 26.3% the defendant's highest offer was not unreasonable at the time it was made. (See section 73(4)(b)) In order to enable an analysis of the offer for the purpose of the interest argument there was agreement as to the extent of the cost component in the defendant's last inclusive of costs offer.

This finding highlights the high legislative hurdle which plaintiffs must overcome in order to establish an entitlement to interest on damages assessed in *Motor Accident Act* cases.

On behalf of the plaintiff it was argued that since the 20% differential threshold found in section 73(4)(iv) between the defendant's last written offer and the verdict was established, this gave rise to an entitlement to interest to be calculated from the date on which the loss arose. (Section 73(5))

It was submitted that this provision in the legislative scheme was one of the few remaining weapons left in the armoury of plaintiffs which operated to encourage insurers to resolve such claims out of court at an early stage. In dealing with this submission Simpson J held:-

"This may be so, but it does not mean that the requirement that unreasonableness be demonstrated should be read down, or given anything other than its every day meaning; and it is a factor that has little bearing on the present application, in which the offers on which reliance was placed were made at such a late stage that little or nothing in the way of the costs and stress of litigation would have been avoided."

In dismissing the plaintiff's claim for interest it was found that the defendant's highest offer was not unreasonable having regard to the information available at the time it was made. The defendant's highest offer of settlement was made 45 days after final argument had taken place and whilst the court considered its decision.

In dealing with the question of reasonableness of the defendant's highest offer Simpson J dealt with the difficulty of assessing a claim for interest:-

"The defendant pointed to the complexities in the matter, and the wide variety of heads of damage, each of which required individual assessment, and in respect of many of which there was legitimate argument. In particular, reference was made to the plaintiff's claim for future and past loss of earning capacity, and future care and home modifications. In respect of each of these, as is the case with many of the other heads under which damages were claimed, there was room for different views and different conclusions.

A different court may have taken a view more favourable to the defendant in relation to many of these items. One factor which had a considerable impact on the end result concerned the assessment of the plaintiff's diminution in life expectancy. Because so many of the substantial items of damages require provision for his future needs, the determination of that diminution had a significant bearing on the result.

It was not unreasonable for the defendant to base his quantification, which, in terms of the negotiations, is really a forecast of the outcome, on the evidence which most favoured his case. Nor was it unreasonable for the defendant to do the same in relation to other heads of damage. It would be an ill-advised defendant, generally speaking, who formulated offers on an assumption that judgment on each head would fall at the lower boundary of the legitimate range. To do so,

particularly in the case where damages are claimed under many heads, we invite a conclusion that the necessary give and take, and the necessary realism in prediction, was absent, and therefore a conclusion of unreasonableness. But that is not what happened here. I think the defendant made proper, if tending to low, assessments of the outcome."

The Court's approach to the task of assessing interest in this case highlights obstacles in the path of plaintiffs seeking an award of interest under this statutory scheme. The legal policy theory underpinning an award of interest on damages is that the defendant has had use of funds to which the plaintiff was entitled and the plaintiff should be compensated for being deprived of the funds.

Section 45 of the *Motor Accidents Act* imposes a duty on insurers to endeavour to resolve claims as expeditiously as possible including by settlement. This section has already been considered as having no coercive effect in another case. (*Stubbs v NRMA Insurance Limited*, unreported, NSW Supreme Court, Dowd J, 18 December 1996)

In Mr Thomas' case the defendant's first offer of settlement was made more than 6 years after the plaintiff's injury. Until the *Motor Accidents Act* is amended to provide an appropriate mechanism there is no way plaintiffs or their representatives can require an insurer to make an offer.

Section 76E of the *Supreme Court Act 1970* provides for interim awards of damages but this does not apply to *Motor Accidents Act* claims. (Section 76H) This case also highlights the need for amendment to s76E to include motor accident claims.

In the meantime, plaintiffs waiting for an offer of settlement simply have to wait patiently.

On 12 June 1997 the defendant applied for and was granted a stay pending appeal on condition that a payment of $4.25M was made within 28 days.

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