

Motor accident claims – interim payment of damages

Stubbs v NRMA Insurance Ltd

In *Stubbs v NRMA Insurance Ltd* (unreported, NSW Supreme Court, Dowd J, 18 December 1996), the infant plaintiff was left quadriplegic, brain damaged and severely disabled when his parents were killed in a motor accident. The infant plaintiff was cared for by a relative. The insurer made some payments for medical expenses but refused to make payments for the considerable on-going costs of 24 hour care of the infant. The plaintiff sought orders by way of notice of motion that the defendant pay for those ongoing costs, pending final determination of the matter. There was no dispute as to the liability of the insurer.

Dowd J confirmed that no interim damages are available in motor accident cases under Pt V, Div 2 of the Supreme Court Act 1970, due to the provisions of s 76H. That section states that Div 2 does not apply to an award of damages under Pt 6 of the Motor Accidents Act 1988. Consequently, the plaintiff sought to

enforce the insurer's obligation to make payments under s 45 of the MAA, which is contained in Pt 5 of the MAA. This section imposes a duty on the insurer to pay the reasonable hospital, medical, pharmaceutical and rehabilitation expenses of the claimant once liability is admitted.

Dowd J held that the duties of the insurer under s 45 are not justiciable by the plaintiff. Compliance with s 45 is a condition of the grant of the insurer's licence, leaving the Motor Accidents Authority as the only body with power to enforce compliance. His Honour made a declaration that the court was without power to make orders under s 45.

An application for leave to appeal to the Court of Appeal is pending, but if this case is upheld, it would seem that injured persons are left entirely at the charity of insurers even in respect of basic medical and pharmaceutical needs until their case is determined.

No fault schemes and the Trade Practices Act

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Pritchard -v- Racecase & Ors 135 ALR 717 held that damages were not available under the *Trade Practices Act* for death alleged to be the result of deceptive and misleading conduct on the part of the organiser of the Northern Territory's Cannonball Run in circumstances where the no fault highway liability scheme of the local jurisdiction also applied. The Federal Court, per O'Loughlin J, ruled that it was not the intention of the Trade Practices Act that s.52 would by a "side-wind" effectively prevent the States and Territories from legislating to control and contain causes of action and the quantum of damages flowing as a consequence of motor vehicle accidents. His Honour also said that "the TPA was never intended to have general application to road accidents or (again generally speaking) to personal claims arising out of such accidents."

An Appeal bench (Spender,

Olney and Branson JJ Federal Court, 4 February, 1997, Darwin) however unanimously reversed the decision of the primary Judge ruling that personal injuries or death caused by misleading and deceptive conduct of a corporation, in trade and commerce, will be actionable under s.82 of the Trade Practices Act even though the injury or death occurs in circumstances where traditional tortious remedies may be barred by local law as is the case in the Northern Territory for motor accident claims.

Concrete Constructions (NSW) Pty Limited -v- Nelson (1990) 169 CLR 594 was explained on the basis that in that case the relevant conduct did not occur in trade and commerce. This recognition of the validity of the Plaintiff's theory of liability in *Nelson's* case clarifies that the "side-wind" theory will not invariably be a bar to the use of Federal law as a remedy in fact situations which have

been traditionally the province of tort.

Commenting on the rule in *Baker -v- Bolton* (1808) 1 CAMP 493 that in "a civil court, the death of a human being could not be complained of as an injury" the Full Court said that it has no application to claims brought pursuant to the TPA and is no basis to "read down the plain words of" sections 82 and 87. Whilst recognising that the dependants of the deceased victim of contravening conduct would have rights of action pursuant to ss. 82 and 97 the Court said "the estate of the deceased cannot satisfy the statutory requirement of s.82 of the TP Act of being a "person" who suffers loss or damage". The principle that a deceased person is not a person for the purposes of the TPA sharply contrasts with the innovative spirit of the remainder of the judgment.

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