Binding admissions under the Motor Accident Insurance Act, 1994 (Qld)

John Costello

Till v the Nominal Defendant - Demack J No 73 of 1997

John Costello, Rockhampton

This application by summons raised the question of whether or not an insurer under the provisions of the ***Motor Accident Insurance Act 1994*** *("the Act") could withdraw an admission of liability given under Section 41(1)(b) of the Act where the admission was not induced by fraud.*

The Facts

The Plaintiff, Mr Till, alleged that he was injured by an unidentified motor vehicle on 10 May 1996.

On 31 July 1996 his solicitor wrote to the claims manager of the Nominal Defendant attaching a section 37 notice and canvassing the police report which made specific reference to the version of the accident provided by an independent witness. The solicitors challenged the reliability of that witness's version in no uncertain terms and requested the Nominal Defendant to advise whether or not it was prepared to admit liability.

On 17 September 1996, the Nominal Defendant wrote to the solicitors for the Plaintiff in the following terms:-

"I refer to your letter of 4 September 1996 and to our telephone conversation of 9 September 1996.

The Nominal Defendant accepts liability 100% and requests you forward any hospital/medical reports you may be holding in connection with your client's injuries. Also, please advise the amount of General and Special Damages being sought and in relation to your costs an assessment by Monsour Legal Costs would be appreciated."

Further letters were then sent by the Plaintiff's solicitors advising about the progress with respect to treatment of the Plaintiff's injuries.

On 4 December 1996, the solicitors for the Nominal Defendant wrote to the Plaintiff's solicitors in these terms:-

"We refer to previous correspondence and confirm that we now have instructions from our client to withdraw the admission of liability made by our client in correspondence to you of 17 September 1996. We are of the view that the issue of liability should be decided by a trial judge or such other method as the parties may agree.

Should your client institute proceedings, we have instructions from our client to file and serve an Entry of Appearance and Defence denying liability and, in the alternative, pleading contributory negligence against your client."

Proceedings were subsequently commenced and pleadings were exchanged. In the Defence and Counter Claim, it was alleged that the admission was induced by fraud.

That allegation of fraud was subsequently withdrawn by letter of 6 October 1998.

In view of the foregoing, the Plaintiff sought, inter alia, a declaration that the Nominal Defendant was bound by its acceptance of liability contained in its letter of 17 September 1996 and further, that relevant parts of the Defence be struck out along with the Counter Claim. At the hearing of the Plaintiff's application, it was agreed that the police report and the statement of the independent witness discussed in the Plaintiff's solicitors' letter referred to above were available to the Nominal Defendant when the admission of liability was made.

The Act

It is clear that the Act has introduced a new statutory scheme to address the consequences which follow motor accidents. The Act follows a scheme developed in New South Wales but, as pointed out by Demack J, it also departs from that scheme in significant ways. The part of the New South Wales legislation which has been generally followed is the requirement that a person who is injured in a motor accident must comply with certain statutory provisions before an action can be commenced. Consequently, the Court of Appeal in Young v Keong CA No 2202/97 (unreported) followed New South Wales, Court of Appeal decisions and held that the provisions in Section 39(1) and (5) of the Act were mandatory.

The Queensland scheme in respect of obligation cast on insurers (the judgements noted) is significantly different from the New South Wales scheme. Section 45(1) of the *Motor Accidents Act* (NSW) stipulates that it is the duty of an insurer to *endeavour* to resolve a claim, by settlement or otherwise as expeditiously as possible. Section 45(2) ten provides that "once liability has been admitted (wholly or in part) against the person against whom the claim is made, it is the duty of an insurer to make specified payments.

In *Ricketty v Callan* (1992) 15 MVR 220, noted Demack J, Master Greenwood had to consider the consequences of an admission of liability by an insurer which the insurer subsequently sought to withdraw and plead contributory negligence. In that case, he held that the admission did not create a contract between the injured person and the insurer and that it would be contrary to public policy to prevent an insurer withdrawing an admission when further information came to hand.

The common sense of that approach is borne out in *Leaf v Boral Transport* (1993) 35 NSWLR 592. In that case Nash DCJ expressed the view that fraud or misinformation could justify the withdrawal of an admission of liability. That would

have to mean misinformation subsequently coming to the attention of the insurer. The New South Wales Court of Appeal in *Government Insurance Office of New South Wales v Phillips* (CA 40245 of 1992), an unreported decision delivered on 27 August 1992, discussed estoppel and waiver in respect of the withdrawal of admission of liability. That was a case where the Defendant in the light of new information sought to please inevitable accident notwithstanding a pre-action admission of liability. The defence pleading denied liability and quantum. In those circumstances, the Court of Appeal held that the earlier orders striking out the defence should not stand.

In referring to the foregoing cases His Honour said:-

"11. Thus by the time Queensland legislation was before Parliament in 1994, the sparse words of s.45(2) of the Motor Accidents Act (NSW) had nourished a modest but expanding jurisprudence. It is not necessary to discuss how this endeavour has flourished, but the curious will find a useful article "Admissions of liability - Can CTP insurers withdraw them?" in (1996) 54 Law Society Journal 53.

12. As one of the purposes of the Act was "to encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents" (s.3), it is reasonable to expect that the drafting of the Act would avoid, if possible, unhelpful legislation that merely fostered forensic debate. If s.41 is read in the light of the New South Wales' experience, its purpose is clear:-

"Insurer must attempt to resolve claim

41.(1) within 6 months after an insurer receives notice of a motor vehicle accident claim under this Division, the insurer must -

(a) take reasonable steps to inform itself of the circumstances of the motor vehicle accident out of which the claim arises; and
(b) give the claimant written notice stating -
  (i) whether liability is admitted or denied; and
  (ii) if liability is admitted - whether it is admitted in full of in part; and
  (iii)if liability is admitted in part - extent (expressed as a percentage) to which liability is admitted; and
(c) if the claimant made an offer of settlement in the notice of claim, inform the claimant whether the insurer accepts or rejects the offer or, if the claimant did not make an offer of settlement in the notice, invite the claimant to make a written offer of settlement."

His Honour considered the use of the word "must" referred to above in relation to a power meant that the power was required to be exercised. (See *Acts Interpretation Act* 1954, Section 33CA(2))

As to the letter of December 4 1996, Demack J was of the view that as the decision expressed therein was "based on the material which the insurer had been able to gather, it must follow that the admission was a responsible and binding one. To take any other view would be to destroy the reforms introduced in the Act."

Section 41(6) and the Act provides:-

"(6) an admission of liability by an insurer under this section -

(a) is not binding on the insurer on another claim arising out of the same motor vehicle accident; and
(b) is not binding on the insurer at all if it later appears the admission was induced by fraud."

Section 41(6)(b) had made it abundantly clear that fraud destroys the binding nature of an admission of liability. The words "is not binding..if" meant that in the absence of a later discovery that the admission was induced by fraud, the admission is binding. As to judgements which already suggested the answer to the question raised here Demack J said:-

"Generally, the judgments do not refer to the significant differences between the New South Wales and the Queensland legislation. Consequently, I do not think it is helpful or necessary to refer to them. The issue is solely one of statutory construction."[1]

There was a second issue raised in this application and that concerned the legal consequences that flows from the admission of liability. Did it mean only that a breach of duty was admitted or did it mean that in addition to the breach of duty it was admitted that damage flowed from the breach. Once again, Demack J did not consider cases particularly helpful, because it was a matter of statutory interpretation. He considered that the admission of liability was an admission that the insurer was liable to pay damages. It was an admission of elements of the tort of negligence or of breach of statutory duty and what remained was the assessment of damages. In this respect, Demack J relied upon section 42 of the Act. Section 42(3) merits particular attention. A mechanism is provided here for the insurer to recover medical expenses paid by it on the foot that liability is admitted in circumstances in which it later appears that the admission of liability was induced by fraud. If the argument is that an insurer can withdraw an admission of liability, why is it that the Act's recovery mechanism is limited to cases of fraud?

As no fraud was alleged, the paragraphs in the Defence and Counter Claim which sought to deny negligence, plead contributory negligence and to deny damage and loss was struck out as was the counter claim. However, the Defendant was given leave to re-plead to deny the particular damage and loss if so advised.

It follows from the above that a declaration was made that the Nominal Defendant was bound by its acceptance of liability contained in its letter of 17 September 1996. It was ordered to pay the Plaintiff's costs of and incidental to the counter claim and the Plaintiff's costs of and incidental to the application on a solicitor and client basis as agreed or failing agreement to be taxed.

There is no doubt that this decision will arouse some interest on legal circles in view of the reported and unreported decisions to date. An appeal has been lodged. ■

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Note:

[1] For Judgements generally on this point see:-
(a) *Dimitri v Cotter*, No 314 of 1997, Forde DCJ, delivered 10 March 1997;
(b) *McConnell v Di Bartolomeo*, No. 147 of 1997, Forde DJC, delivered 10 march 1997;
(c) *Coyne v Coyne*, No. 4560 of 1996, Helman, J, delivered 12 June 1997.
Note in this case , the insurer did not comply strictly with S41 because it did not state whether it admitted liability in full or in part only as required by the section.