PHILIP G. MISSO, VIC

Serious injury: A need to take it *seriously*

Reprint No. 11

Accident Compensation Act 1985

Act No. 10191/1985

Reprinted incorporating amendments as at 1 June 20

TABLE OF PROVISIONS

Section — Page

In this article, Philip Misso examines applications for serious injury made under the *Accident Compensation Act* (Vic) and offers some practical solutions to some of the problems such applications inevitably attract.

Philip G. Misso is a Barrister at Owen Dixon Chambers
PHONE 03 9225 7123 **EMAIL** pmisso@vicbar.com.au

When applications for serious injury are made pursuant to s 135A of the *Accident Compensation Act 1985* (Vic) where the degree of impairment of the worker is less than 30%, the plaintiff has two remaining alternatives to obtain serious injury under sub-section (4)(a) and (b). These are where the Authority is satisfied that the injury is a serious injury and issues the worker with a certificate in writing consenting to the bringing of the proceedings, or failing that, on application to the court for leave to bring proceedings.

In work process cases where the certificate pursuant to 4(a) is drafted narrowly, this may restrict the way in which the plaintiff can plead a cause of action in breach of duty.

Austin v Colonial State Bank

In *Austin*, the worker was employed by Colonial State Bank in early 1996 as a Business Development Manager. Due to her lack of experience and the failure of Colonial to train her, she found application to her work difficult. She was unable to meet the high expectations of Colonial, and together with an increasing workload, lack of support and serious harassment by a manager, she suffered a severe anxiety state on 1 November 1996.

An application for serious injury was made pursuant to s 135A(2BA). The worker's degree of impairment was less than 30%, but a certificate was granted pursuant to sub-section (4)(a) in the following terms:

"Allianz Australia Workers' Compensation (Victoria) Limited is satisfied that the claimed injury is a serious injury within the meaning of s.135A(19) and consent is given pursuant to s.135A(4)(a) of the Act for Jennifer Austin to bring proceedings for the recovery of damages in relation to the injuries sustained as a result of an incident which occurred on ▶

1 November 1996 subject to compliance with the provisions of ss.(2DE)."

By its defence, and at trial before Pannam J, Colonial submitted that the certificate entitled the plaintiff "... to recover damages solely for injuries sustained on 1 November 1996"[1] and confined the plaintiff to the negligence which occurred on that date. This denied the plaintiff the opportunity to rely upon her work between early 1996 and the 1 November 1996 as the period in which the defendant had been negligent, and which ultimately caused the plaintiff's breakdown on 1 November.

Pannam J followed *Arandt v State of Victoria*[2] finding in favour of the defendant. Part of the plaintiff's Statement of Claim was struck out with leave to replead in accordance with the conclusions which she reached.

Issues Arising Out of *Austin*

Austin raises the issue that in every work process case the consent given needs to be perused very carefully to ensure that it conforms to the way the worker intends to plead his or her cause of action. Furthermore, it signals that the mere grant of a certificate does not entitle the plaintiff to plead a cause of action inconsistent with the substance of the consent, but rather in conformity with it.

The issue in *Austin* may not be as much a problem in applications made pursuant to s 134AB because paragraph 5.4(c) of the Ministerial Directions provide for a Statement of Claim to be attached to the application for serious injury. Nonetheless, the necessity to carefully peruse the consent remains.

In another application for serious injury in which I have had recent involvement, the trial judge granted leave pursuant to findings of fact where the findings of fact are open to interpretation. This led to a Summons in the Practice Court being filed by the defendant in an attempt to have the leave granted interpreted in a narrower way than the pleadings relied upon by the worker revealed. Care must be taken, after the win in a serious injury application is over, to ensure that either the judge identifies what leave is given for, or there are terms of settlement identifying the ambit of the leave in terms of what is to be pleaded in a Statement of Claim.

The *Austin* Appeal

The worker applied by Summons to the Court of Appeal seeking leave to appeal from the ruling and orders of Pannam J.

In support of the Summons, the worker filed the following documents:

- A Notice pursuant to s 52(2) of the *Accident Compensation Act 1985* (Vic).
- A draft Notice of Appeal using Form 64AA.
- A lengthy Affidavit of the Solicitor for the worker exhibiting, inter alia, transcript of the proceeding before Pannam J.
- An Outline of Submissions.

The Summons was returnable on 17 May 2002, but on the afternoon before, the Authority settled with the worker essentially on the following basis:

- The application was dismissed by consent.
- Colonial agreed to pay the worker's costs of the application for leave.
- The Authority agreed to issue the plaintiff with a fresh certificate in writing in conformity with the way in which the plaintiff pleaded her cause of action in the Statement of Claim in the first place.
- Colonial agreed not to enforce the order for costs in its favour made by Pannam J.
- Colonial agreed to pay the plaintiff's costs thrown away before Pannam J.

One may question why Colonial seemingly capitulated the settlement of the application for leave. The first possible reason is that Colonial considered that the plaintiff had good grounds for obtaining leave to appeal and a real chance of success in the appeal itself. Alternatively, Colonial may not have wanted the judgment of Wodak J in *Arandt* to be compromised and is therefore prepared to pay the price in the short-term to leave things as they are.

In its Outline of Submissions in the course of this appeal, Colonial raises a number of points of law which I consider to be a very real problem to a worker who obtains a consent

similar to the consent given in *Austin*, as detailed following:

- In paragraph 8, Colonial argued that it is legitimate for a consent to be given relating to "... an injury narrower in scope than the injury asserted in the worker's application ...", referring to *Arandt*.
- If the worker is aggrieved by the consent relating to an injury narrower than the injury asserted in the worker's application, then there is no inhibition to the worker either making an application pursuant to sub-section (4)(b) or requesting the Authority to revisit its exercise of power under sub-section (4)(a).
- Alternatively, "... it may also be open to the worker to seek administrative review of the decision ...with respect to the consent relating to an injury narrower in scope than the injury asserted in the worker's application ...".
- There is no power in the County Court to administratively review the grant of the consent so the attack upon it by *Austin* could not succeed because it amounted to an administrative review.
- In any event, no substantial injustice results because the worker could have and should have attacked the defects in the consent by any one of the means already referred to.

A New Approach

Regardless of the correctness or otherwise of the points of law raised by Colonial, it is suggested that the experience in Austin crystallises the approach that must be taken by solicitor's working in such cases who should be ever wary to examine the content of a consent to avoid the kind of problem faced by this plaintiff.

An application for serious injury or the hearing of an application for serious injury should contain a draft consent so that there is no doubt about what the plaintiff wants. This can be achieved easily by drafting same into the Particulars of Injury which is a document required to be filed with the court prior to the hearing of the present batch of serious injury applications.

No doubt some of the current batch of serious injury applications will be resolved by the grant of a certificate where there may be no particulars of injury filed. If it suffers from some defect which may see the worker face an *Austin* type situation, then reference must be made to the Outline of Argument of Colonial, and particular, paragraph 9 where, presumably on instructions from the Authority, Counsel who settled the Outline were instructed to submit that either the worker make an application pursuant to sub-section (4)(b), or alternatively, request the Authority to revisit its exercise of power pursuant to sub-section (4)(a). I think it would be safer for an Originating Motion to be filed within time, and at the same time request the Authority to revisit its exercise of power. This is because the request to revisit its exercise of power may take more time than the window of opportunity to file an Originating Motion permits. This might in turn see the worker out of time for filing the Originating Motion with a refusal by the Authority to revisit the exercise of its power.

Conclusion

As has been demonstrated above, there is more than initially meets the eye in the provisions of s 135A. On examination of sub-section (4)(a) and (b), one sees that they are separated by the conjunction "or". One could therefore interpret this as meaning that seeking the leave of the court is only available where the consent is not given under sub-paragraph (a) which might then lead a court to conclude that if a consent has been given, then it is without jurisdiction. I do not know whether this is the intention of the Authority or not, however they do seem to be keeping a few steps ahead of workers making these types of applications. The contrary argument that can be put forward by plaintiffs in such cases is that in *Austin* there was a grant of a certificate for only part of the injury, that is, the injury which occurred on 1 November 1996. Thus, bringing an Originating Motion is legitimate because the plaintiff seeks leave of the court to bring proceedings for the injury incurred during the whole of the period said by the plaintiff to be a cause of her ultimate injury. PL

Footnotes:

1 para. 5 of the Defence.

2 Unreported, 12 November 2001.