from the wording of the clause so as to make the advice effectively non-compliant.

Issues encountered in relation to contracting out include:

1. Failing to make disclosure before, or as soon as practicable after, the law practice is retained in the matter.
2. Failing to disclose all the information required by s309 of the LPA – in particular relating to an estimate of the total legal costs payable by the client. The definition of 'costs' in s302 includes 'fees, charges, disbursements, expenses and remuneration'. Disclosure of professional fees alone does not satisfy the estimate requirement.
3. Failing to update an estimate.
4. Failing to define adequately a 'successful outcome' in a conditional costs agreement.
5. Failing to obtain the client's signature on a conditional costs agreement.
6. Including a premium in a conditional costs agreement.
7. Failing to provide any advice under clause 11(c).
8. Providing advice under clause 11(c) that was arguably obscure to the point of not disclosing the required information.
9. Providing advice under clause 11(c) which is incorporated into the costs agreement rather than in a separate document.
10. Failing to establish that the advice under clause 11(c) was provided prior to the client entering into the costs agreement.

While some of the requirements may be seen as technical rather than substantive, in the writer's experience once there is a non-compliance with any of the requirements under clause 11, a practitioner is likely to be regarded by a costs assessor as not having contracted out of the maximum costs provided by Schedule 1 to the MACR. This can result in substantial non-recovery of costs that would otherwise be regarded as fair and reasonable. ■

Notes: **1** See Clause 10, *Motor Accidents Compensation Regulation* 2005. **2** The reference to Division 3 of Part 11 in the LPA 1987 is a reference to Division 5 of Part 3.2 in the LPA 2004. **3** Section 323(3)(a) of the LPA. **4** Section 323(3)(c)(iii) of the LPA. **5** Section 323(3)(d) of the LPA. **6** Section 323(3)(e) of the LPA. **7** [2011] VSC 292.

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Please explain: what constitutes sufficient reasons?

CIC Allianz Australia Ltd v Daniel Luke McDonald & Ors [2012] NSWSC 887

By Brendan Jones

This case involves a successful claim by an insurer for administrative relief on the basis that a Claims Assessment and Resolution Service (CARS) assessment did not contain sufficient reasons for the award of damages. The insurer's application was heard by Hidden J of the NSW Supreme Court, who set aside the CARS assessor's certificate and remitted the matter to be re-determined by another assessor.

On 1 May 2007, Daniel McDonald (the claimant) was injured in a motor vehicle accident. Liability was admitted by the insurer and a claim was made in the CARS. On 1 December 2010, the CARS assessor issued an award of damages in the amount of $535,000. The insurer sought judicial review in the NSW Supreme Court on the basis that the assessor erred in a number of respects in arriving at that assessment.

Section 94 of the *Motor Accidents Compensation Act* 1999 (NSW) (the MACA) states that a claims assessor must attach a brief statement to the Certificate of Assessment setting out the reasons relevant to the award of damages.

The insurer's principal argument was that the assessor's reasons were inadequate for the purposes of s94, and submitted four grounds for relief:

1. Treatment of the insurer's forensic accountant's report;
2. Evaluation of the medical evidence;
3. The future economic loss award; and
4. The future commercial care award.

Addressing the forensic accountant's report first, Hidden J concluded that the assessor dismissed the report without providing adequate reasons for doing so. For example, the assessor stated that the author of the report *'made some erroneous assumptions'*, but did not disclose what those

assumptions were.

The insurer submitted that the assessor gave no adequate reasons for rejecting the evidence from the insurer's medico-legal experts, and appeared simply to accept the diagnoses of the claimant's medico-legal experts where they conflicted with the insurer's experts. Hidden J considered that while the assessor's reasons were sparse in respect of the medical evidence, the opinion when read as a whole was likely adequate.

The assessor awarded approximately $352,000 for future economic loss. The insurer submitted that there was an internal inconsistency in the figures relied upon by the assessor, and a failure to comply with s126 of the MACA, in that the assessor failed to provide reasons to justify the assumptions made in arriving at the future economic loss figure. The court indicated that the insurer's argument had merit.

Lastly, in respect of future commercial care, the insurer submitted that the assessor had failed to identify or apply any of the principles concerning future commercial care, and submitted that the assessor's care finding was not adequately explained. The court suggested that the reasons provided as to future commercial care were *'barely adequate'*.

In the previous matter of *Allianz Australia Insurance Limited v Ward* [2010] NSWSC 720, Hidden J held that although an assessor's reasons need not be lengthy and should avoid undue formality and technicality, they must still demonstrate that the issues in the case have been determined. This decision goes further and creates authority for the principle that a failure to give proper reasons is sufficient to establish a jurisdictional error invalidating the assessor's certificate and requiring it to be set aside. ■

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The nominal defendant and unregistered motor vehicles

Zerella Holdings Pty Ltd v Williams 2012 [SASCFC 100] and *Nominal Defendant v Uele* [2012] NSWSC 271

By Andrew Stone

For motor accidents occurring in NSW, there are effectively four hurdles to pursuing a claim against the Nominal Defendant where injury has been caused by an unregistered motor vehicle. For other states, at least the first two are usually relevant. These hurdles are:

(i) the usual issue of establishing fault on the part of the driver of the unregistered vehicle;
(ii) establishing that the accident occurred on a road (s33(1));
(iii) demonstrating that the injured party was not a trespasser (s33(1)(3A); and
(iv) establishing that the vehicle concerned was a 'motor vehicle' within the scope of s33(5).

While these issues may appear straightforward at first sight, the reality is that the definitions of 'road' and 'motor vehicle' can give rise to significant complexity. Two recent decisions (one from the Full Court of the Supreme Court of South Australia and one from the NSW Court of Appeal) have addressed these issues.

A ROAD

Section 3 of the *Motor Accidents Compensation Act* 1999 (NSW) defines a road as being a road or road-related area within the meaning of the *Road Transport (Vehicle Registration) Act* 1997. That legislation defines a road as incorporating a road-related area. This includes median strips, footpaths, nature strips, areas open to the public and designated for use by cyclists or animals, a road shoulder and 'an area that is not a road and that is open to or used by the public for driving, riding or parking vehicles'.

This latter provision has given rise to numerous cases to determine whether a Woolworths car park, Stockton Beach, Sandgate Markets, a wharf, a nature park and a closed speedway are open to and used by the public for driving. Such cases invariably end up being determined in accordance with their facts. In *Zerella Holdings Pty Ltd v Williams*,[1] the majority provided useful guidance as to the principles to be applied.

In *Zerella*, the plaintiff was injured in the loading dock area of a fruit and vegetable processing plant. The company that controlled the premises had signage on internal roads, stating that visitors to the premises were not permitted to proceed directly to the loading dock area. There was a pre-booking system for delivery vehicles. There was a gate at the entrance to the property that was closed at night, but open and unguarded by day. Despite these systems, some casual visitors still drove to the loading dock area. >>