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A DIFFERENT PERSPECTIVE

Our CTP partners offer their recap of the key CTP developments in 2016

The ever-evolving CTP landscape experienced another year of gradual change and challenging developments. In our 2016 CTP Year In Review, we provide a comprehensive overview of the changes that have taken place in the CTP space and delve into the key legal decisions that will influence case management going forward.

With an overview of the key elements of the new Motor Accident Guidelines, an update on the proposed CTP scheme reform and links to Curwoods' Case Notes on recent CTP case law throughout, this update serves as a practical guide to what you need to know.

The new Motor Accident Guidelines

The Motor Accident Guidelines: Claims handling and medical (treatment, rehabilitation and care) (**the Guidelines**) apply to all open claims as at 1 January 2017. The Guidelines supersede the State Insurance Regulatory Authority's (**SIRA**) previous Claims Handling Guidelines and Treatment, Rehabilitation and Attendant Care (TRAC) Guidelines. This means the Guidelines are now a 'one-stop shop'.

The five principles

The Guidelines are split into five overall principles that are binding on insurers. Each principle contains several general conduct standards and these reflect key common and recurring activities in a claim. The principles are:

- Principle one: The insurer will always act to resolve the claim justly and expeditiously
- Principle two: The insurer will handle the claim proactively to support the injured person to optimise their recovery
- Principle three: The insurer will act objectively and openly, with honesty and professionalism at all times in its handling of the claim
- Principle four: The insurer will act on each claim in a manner that promotes the integrity of the claim
- Principle five: The insurer will keep the injured person informed at all times of the status and progress of the claim.

Joint medical examinations

If a claimant is legally represented, the insurer will nominate three suitably qualified independent health professionals. The claimant has the opportunity to nominate his or her three choices however the insurer must respond within 10 days pursuant to cl 10.5 of the Guidelines.

Financial hardship

The insurer must make payment of economic loss under s 84A to avoid financial hardship within five days of receipt of a request and relevant documents.

If the insurer declines or partially declines the request, the insurer will, within 10 days of the request, provide reasons for its decision and advise as to further documents required.

Whole person impairment (WPI) disputes

If the claimant has sufficiently recovered to enable the claim to be quantified, and the insurer is unable to determine whether permanent impairment exceeds 10 per cent, the insurer will refer the matter to the Medical Assessment Service for assessment.

CTP legislative reform

Proposed CTP reforms suggest we may be on the cusp of an overhaul of how CTP claims are processed in New South Wales (NSW).

Proposed changes emerged in early 2016 following the NSW Government's publication of an Options Paper. Following extensive consultation, in June 2016 the NSW Government released a Position Paper, in which its intention to introduce a hybrid no-fault, defined benefits scheme with common law damages for certain claim categories was signalled. Under the NSW Government's proposed scheme, common law damages and the duration of treatment, care and economic loss would be contingent on impairment.

In November 2016, the NSW Government released two Discussion Papers, which invited feedback on additional legislative changes intended to reduce insurer profits to a reasonable level and the issue of claims handling procedures and independent dispute resolution services. Submissions are now closed and the NSW Government has established an expert reference panel as well as technical working groups to assist SIRA to design the new scheme.

Amended costs regulations

In 2016, the existing costs regulations were amended by the *Motor Accidents Compensation Amendment (Claims) Regulation 2016 (NSW)*. This instituted four key changes:

- A solicitor cannot contract out of maximum solicitor-client costs for claims or awards less than $50,000
- There is protection of at least $50,000 of any settlement sum or award from solicitor-client costs
- Legal costs for infant claims that resolve for less than $25,000 are capped at $5,000

- Legal costs for infant claims that resolve for between $25,000 and $50,000 are capped at $10,000.[1]

The amended regulation applies only to claims lodged after 1 November 2016.

Breach of duty of care

In *Dent v Calcagno*,[2] the New South Wales Court of Appeal (**Court of Appeal**) found that the test for factual causation, the 'but for' test, should explain how the act or omission caused the injury or harm. To establish liability, a plaintiff must demonstrate that any breach of duty of care by a defendant caused the plaintiff's injury, loss or damage. Mere breach of duty of care is insufficient. Causation must also be established.

The Court of Appeal's decision in *Bankstown City Council v Zraika; Roads and Maritime Services v Zraika*[3] demonstrated and underscored the protection provided by the *Civil Liability Act 2002* (NSW) (**the CLA**) to statutory bodies, such as the RMS and local councils.

Blameless accidents

The Court of Appeal handed down its decision in *Whitfield v Melenewycz*[4] on 31 August 2016. The scope of what constitutes a blameless accident in a single vehicle accident was affected.

The mere act of driving will not be considered an act or omission for the purposes of s 7E of the *Motor Accidents Compensation Act 1999* (NSW) (**the MACA**), because this is no more than an explanation as to why the driver was in the position that he was at the time injury was occasioned.

Where there is no use or operation of the vehicle by the owner, s 7B of the MACA cannot apply to deem fault on the part of the owner. If the driver was driving in the course of his employment and the vehicle was owned by his employer, it could be open to a court to find use and operation by the owner and therefore deem fault.

Economic loss

In *IAG Limited t/as NRMA Insurance v Rahif Adhami* ,[5] the claimant was awarded a buffer of $15,000 for future economic loss by a claims assessor. The insurer filed a summons in the Supreme Court of New South Wales (**the Supreme Court**) for a judicial review of that award. The Supreme Court held that the claims assessor provided insufficient reasons explaining how he arrived at the $15,000 figure and breached s 126 of the MACA. This case demonstrates that administrative decision makers must clearly state their reasons and assumptions when assessing a buffer for future economic loss.

In *NRMA Insurance Limited v Buckley*[6] it was found that a claims assessor's conclusions on economic loss need to show the 'actual path of reasoning'. This means that where there is more than one conclusion, a preference for one conclusion is required.

A precise calculation and a buffer could co-exist for future economic loss so long as they compensate different loss, for example, 50% loss of earning capacity (precise calculation) plus a buffer for the potential of early retirement.

In *Allianz Insurance Limited v Larriera*,[7] the Supreme Court found that a claims assessor may prefer a claimant or insurer's submissions on economic loss over the other, provided

they explain why they accepts those submissions, without having to expressly engage with the rejected submissions.

As far as s 151z recovery proceedings are concerned, in *State of NSW (NSW Police) v Wenham*[8] it was determined that workers' compensation insurers are entitled to indemnity from a driver deemed at fault in a 'blameless accident'. Section 151Z(1) does not strictly require a tortfeasor or wrongdoer, which is otherwise absent in cases of blameless accident.

Finally, in *Insurance Australia Ltd t/as NRMA Insurance v Pate*[9] it was held that a claims assessor cannot base economic loss calculations on a WPI assessment. Instead, the claims assessor must assess the economic loss the injury caused.

Lifetime Care and Support Scheme (the Scheme)

In *Nominal Defendant v Adilzada*,[10] the Court of Appeal confirmed that while s 86 of the MACA does not confer power in a court to order the claimant to undergo a medical assessment, there are sanctions available to the insurer. A claimant can be required to undergo assessment for eligibility into the Scheme. The claimant cannot elect to receive a lump sum payment if eligible to participate in the Scheme. Further, if the claimant resists assessment for participation in the Scheme on cultural grounds, an insurer may rely on pt 18 of the Lifetime Care and Support Guidelines which permits the Lifetime Care and Support Authority's (the Authority) consideration of payment to a non-approved provider of attendant care services.

In *Insurance Australia Ltd t/a NRMA Insurance v Milton*,[11] the Court of Appeal held that the function of the Review Panel of the Authority is to use its professional judgment by giving reasons for its own findings and it is not required to explain why it did or did not accept findings made by other parties.

Contributory negligence

In *O'Connor v Insurance Commission of Western Australia*,[12] the Western Australia Court of Appeal concluded that when apportioning liability, the courts will look to the actual contribution of each party and their respective behavior in the context of risks involved.

This case was a compensation to relatives claim involving a deceased fatally struck by a bus whilst walking at night on a road with his back to oncoming traffic. He was wearing black and had a blood alcohol concentration of 0.127%. The trial judge found that the deceased was *"significantly more to blame"* than the defendant and liability was apportioned two-thirds to one-third against the deceased.

On appeal, Buss JA acknowledged that the Western Australian position was identical to that of NSW. His Honour explicitly stated that "*Section 5R [NSW CLA] is, relevantly for present purposes, identical to s 5K of the Western Australian Civil Liability Act"*. The Court of Appeal held that the trial judge was correct in considering the respective contributions of harm by each party.

Self-responsibility is now a primary point of reference when managing pedestrian claims and considering contributory negligence issues. Case managers and lawyers should consider the *"whole conduct of the driver and the pedestrian in relation to the accident"* and undertake a *"comparative examination of each party's conduct, including the relative importance of each party's conduct, in causing the damage".*

While there is no equivalent to s 5R of the CLA in the ACT, in *Hendricks v El Dik (No 4)*[13] the Supreme Court of the Australian Capital Territory upheld the principles of self-responsibility for cyclists sharing the road with larger vehicles, notwithstanding the potential of larger vehicles to cause greater harm. In this case, the fact that the defendant was operating what could be considered a lethal weapon (a Jeep), while the plaintiff was riding an electric bicycle, was irrelevant. The Tasmanian perspective does not value self-responsibility to the same extent, with the Supreme Court of Tasmania finding in the case of *Chu v Russell*[14] that a vehicle is still construed as a 'lethal weapon' in Tasmania.

Applications for further medical assessment

In *Insurance Australia Ltd t/as NRMA Insurance v Asaner*,[15] the insurer challenged a Proper Officer's refusal to refer for a further medical assessment. The Proper Officer was not satisfied that surveillance footage and a further specialist report commenting on it were additional relevant information. The Supreme Court found that the Proper Officer should have given weight to the opinion of the specialist, who expressed her view on the relevance of the surveillance footage, instead of relying on his own lay impression of the surveillance. In this case, the Supreme Court affirmed that the specialist's opinions constituted further evidence.

In *Jubb v Insurance Australia Ltd*,[16] the Court of Appeal held that additional relevant information and the capacity for new information to have a material effect are not to be construed narrowly. The fact that a medical assessor has already considered certain information will not preclude a conclusion that the information is additional. 'Material effect' is also not a high threshold – it is enough that the information is capable of having a material effect, not that it would do so.

In *AAI Limited t/as GIO v Cooley*,[17] the Supreme Court held that referral of a matter to a Review Panel for fresh determination does not always mean that a clinical investigation and examination of the claimant will be conducted. The Review Panel can determine if a new clinical examination is required. The outcome may be a decision based on the analytical or academic appraisal of the medical assessor's certificate.

Miscellany

Nominal Defendant – due search and inquiry

The barrier posed by due search and inquiry operates differently in NSW versus Queensland. In *Nominal Defendant v Vikki Ann Smith*,[18] the Supreme Court of Queensland determined that due search and inquiry is merely a part of a claimant's cause of action in Queensland whereas in NSW, it is a pre-condition to commencement of proceedings.

Issue estoppel

In *Spratt v Perilya Broken Hill Ltd; Spratt v Rowe*,[19] the Court of Appeal confirmed that a medical assessor is not bound by the findings of the Workers Compensation Commission on issues such as causation. Claims assessors are also free to make findings which may contradict what has already been found in the workers' compensation jurisdiction. While insurers should have regard to what has occurred in a claimant's concurrent workers' compensation claim – and the Claims Assessment and Resolution Service may give weight to the findings made by a Workers Compensation Commission arbitrator – no issue estoppel arises.

You will thank us for this…

Curwoods First Glance provides an index, categorisation and overview of most (if not all) key CTP cases. Our website also links to our Ready Reckoner, which includes actuarial tables and costs regulations that are updated each year.

For further information or to discuss seminar opportunities, please contact:

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[2] [2016] NSWCA 289.
[3] [2016] NSWCA 51.
[4] [2016] NSWCA 235.
[5] [2016] NSWSC 1117.
[6] [2016] NSWSC 475.
[7] [2016] NSWSC 441.
[8] [2016] NSWCA 336.
[9] [2016] NSWSC 278.
[10] [2016] NSWCA 266.
[11] [2016] NSWCA 156.
[12] [2016] WASCA 95.
[13] [2016] ACTSC 160.
[14] [2016] TASFC 1.
[15] [2016] NSWSC 1078.
[16] [2016] NSWCA 153.
[17] [2016] NSWSC 434.
[18] [2016] QSC 227.
[19] [2016] NSWCA 192.