IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S115 of 2013

BETWEEN:

JOHN DALY
Appellant

and

ALEXANDER THIERING
First Respondent

ROSE MATILDA THIERING
Second Respondent

LIFETIME CARE & SUPPORT AUTHORITY OF NEW SOUTH WALES
Third Respondent

APPELLANT'S SUBMISSIONS

Part I:

I certify that this submission is in a form suitable for publication on the Internet.

Part II:
[*A concise statement of the issues*]

1. This Appeal concerns the construction of s.130A of the *Motor Accidents Compensation Act* 1999 (NSW) [the **MAC Act**] in its own right and in the context of the legislation with which it was introduced, namely the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) [the **LCS Act**].

2. The Appellant contends that the New South Wales Court of Appeal erred in construing s.130A of the MAC Act so as to permit a participant in the Lifetime Care and Support Scheme [**the Scheme**] (such as Mr Thiering) to obtain damages for past attendant care services from a third party tortfeasor (and the compulsory third party insurer) where the Authority managing the Scheme [the **LCS Authority**] has not paid, and is not liable to pay, for those services.

3. The Appellant contends that the New South Wales Court of Appeal erred in construing s.130A of the MAC Act contrary to its express terms, and contrary to the clear legislative purpose underlying s.130A, namely that the Scheme is to provide for all treatment and care, including attendant care, required by participants, for as long as such treatment and care is necessary, on an individually assessed basis.

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4. The Appellant contends that the approach of the New South Wales Court of Appeal to construction of s.130A of the MAC Act contradicts established principles of statutory construction, in circumstances where the ordinary and natural meaning of the words of s.130A is consistent with, and gives effect to, the evident legislative purpose.

5. Section 130A of the MAC Act was repealed and replaced by s.141A in June 2012. However, the amendments to the MAC Act (and the LCS Act) in June 2012 are not retrospective. The result is that, if the decision of the Court of Appeal stands, compulsory third party insurers in New South Wales face an unfunded liability for damages for past attendant care services exceeding **$40,000,000**.

Part III:

I certify that the Appellant has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act* 1903, and I consider that no such notice is required.

Part IV:

The Internet citations of the decisions of the Primary Judge, Garling J, and of the New South Wales Court of Appeal are as follows:

Thiering v Daly [2011] NSWSC 1345 (Garling J)

Thiering v Daly (No. 2) [2011] NSWSC 1585 (Garling J)

Daly v Thiering [2013] NSWCA 25 (New South Wales Court of Appeal)

Part V:
[*A narrative statement of the relevant facts*]

6. Alexander Thiering sued two Defendants in the Supreme Court of New South Wales for damages arising from catastrophic injuries suffered by Mr Thiering in a motor accident on 28 October 2007.

7. The Appellant, John Daly, was the driver of the vehicle allegedly at fault. QBE Insurance (Australia) Ltd [**QBE**] was the compulsory third party insurer of Mr Daly's vehicle.

8. Mr Thiering suffers tetraplegia as a result of the accident on 28 October 2007. As such, there is no question about his eligibility to participate in the Scheme.

9. Despite Mr Thiering being a permanent participant in the Scheme, the LCS Authority, has paid for only part of the care he has required and received. A significant part of Mr Thiering's care has been undertaken by his mother, Rose Thiering; she has not been paid for her services.

10. Mrs Thiering was not pressed into service by the Authority. Mrs Thiering offered her services out of concern for her son. The LCS Authority agreed to Mrs Thiering meeting part of the care needs identified by the Authority itself.

11. Mrs Thiering was included, by name, in various care plans produced by the LCS Authority. Three exemplar care plans were before Garling J. In those care plans the Authority specifically "allocated" to Mrs Thiering many hours of Mr Thiering's care.

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12. Ultimately, Mrs Thiering demanded payment for her services from the LCS Authority. The Authority refused, and continues to refuse, to pay for Mrs Thiering's services.

13. Both Mr and Mrs Thiering have sued the LCS Authority for damages for the value of care undertaken by Mrs Thiering.

14. Mr Thiering sued Mr Daly (indemnified by his insurer, QBE) for damages under s.128 of the MAC Act for the value of Mrs Thiering's services.

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15. Mr Daly (and QBE) deny that he is liable in damages for the value of Mrs Thiering's services, by reason of s.130A of the MAC Act.

16. Because the proceedings brought by Mr Thiering involve novel questions of general importance to the administration of the motor accidents scheme in New South Wales, the parties requested a preliminary hearing as to certain questions of law, so that the obligations of the Mr Daly/QBE and the LCS Authority could be clarified, and so that Mrs Thiering's standing to bring proceedings against the Authority could be determined.

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17. In the Supreme Court of New South Wales, Garling J decided that Mr Daly (and QBE) is liable to Mr Thiering for damages under the MAC Act for the value of the care provided by Mrs Thiering up to the date of settlement or judgment in the proceedings brought by Mr Thiering, but not for the future. (His Honour also decided that Mrs Thiering does have standing to sue the LCS Authority in her own right.)

18. Mr Daly sought leave to appeal from the decision of Garling J.

40 19. The LCS Authority did not participate in the Appeal, filing a submitting appearance.

20. Leave to appeal was granted by the New South Wales Court of Appeal. The Appeal was dismissed.

21. Mr Daly sought special leave to appeal to this Court. Special leave to appeal was granted on 7 June 2013.

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Part VI:
[*Argument on the Appeal*]

22. While the Appellant contends that the New South Wales Court of Appeal erred in its construction of s.130A of the MAC Act, the Appellant does not assert that the Court was unaware of the relevant legal principles.

23. Many of the relevant principles of statutory interpretation were identified by Garling J without contradiction by the Court of Appeal (as to which see *Thiering v Daly* [2011] NSWSC 1345 at [50]). His Honour might also have referred to the so-called "literal approach" to interpretation (and to the remarks of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [384]).

24. Nor does the Appellant assert that the Court failed to identify the purpose of the legislation of which s.130A of the MAC Act was part.

25. Garling J accurately identified the purpose of the legislation (as to which see *Thiering v Daly* [2011] NSWSC 1345 at [85]). The Court of Appeal did not demur as to the purpose of the legislative package, which the Court noted with apparent approval (at [47]).

26. Because the legislative purpose underlying s.130A of the MAC Act is critical, the relevant part of the judgment of Garling J is set out in full:

> [85] It seems tolerably clear that it was the intention of the Government to introduce legislation which would establish a scheme with these features:
>
> (a) It would cover those who, as a consequence of a motor vehicle accident, were catastrophically and permanently injured;
>
> (b) The injuries were such that the individuals would require treatment and care for the whole of their lives.
>
> (c) The LCS scheme would provide for all of that treatment and care, including attendant care, for as long as it was necessary on an individually assessed basis;
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> (d) Because the LCS scheme would attend to the provision of lifetime treatment and care, an injured person would not need, and would not be entitled to, compensation by way of damages for any treatment and care needs, including attendant care;
>
> (e) The only limitation on the provision of treatment and care was that it was reasonable in the circumstances and that the injury was caused in a motor vehicle accident.
>
> [Emphasis added]

27. The Appellant contended, both at trial and before the New South Wales Court of Appeal, that the purpose and effect of the LCS Act and s.130A of the MAC Act is to render the concept of motor accident damages for gratuitous care redundant, for participants in the Scheme.

28. Garling J referred to damages for gratuitous care as "GvK damages" (after *Griffiths v Kerkemeyer* (1977) 139 CLR 161). His Honour said:

> [93] Nowhere in either of the Acts is there a clearly expressed intention to abolish *G v K* damages. Rather, the expectation seems to be that the attendant care services will be provided as part of the LCS scheme and that there will be no need for *G v K* damages to be assessed and paid."
>
> [Emphasis added]

29. Again, the Court of Appeal referred to that part of his Honour's judgment with apparent approval (at [48]).

30. But Garling J and the Court of Appeal proceeded, for different reasons, to construe s.130A of the MAC Act in a way inconsistent with the legislative purpose their Honours had themselves identified.

31. The approach adopted by the New South Wales Court of Appeal involved the Court in construing words in s.130A as having a completely different meaning from their ordinary and natural meaning, in circumstances where the ordinary and natural meaning of the words gives unqualified and unambiguous effect to the legislative purpose identified in the passages cited above.

32. In reaching its conclusion as to the proper construction of s.130A of the MAC Act, the Court of Appeal allowed itself to be distracted from the overriding purpose and effect of the legislation and, the Appellant submits, misapplied the principles of statutory interpretation, and/or misunderstood the manner in which those principles, properly applied, complement each other so as to give the legislation coherent meaning and effect.

33. Section 130A of the MAC Act provides:

> **130A No damages for expenses covered by Lifetime Care and Support Scheme**
>
> No damages may be awarded to a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006* for economic loss in respect of the treatment and care needs (within the meaning of that Act) of the participant that relate to the motor accident injury in respect of which the person is a participant in that Scheme and that are provided for or are to be provided for while the person is a participant in that Scheme.
>
> [Emphasis added]

34. The failure of the New South Wales Court of Appeal to give effect to the literal meaning of the words "provided for", or to construe s.130A in a manner that gave effect to the legislative purpose it had identified, arises from the Court's concern with the words of s.6 of the LCS Act, which provides, so far as is relevant, as follows:

> **6. Scheme participant's treatment and care needs to be paid for by Authority**
>
> (1) The Authority is to pay the reasonable expenses incurred by or on behalf of a person while a participant in the Scheme in providing for such of the treatment and care needs of the participant as relate to the motor accident injury in respect of which the person is a participant and as are reasonable and necessary in the circumstances.
>
> (2) For the purposes of this Act, the "**treatment and care needs**" of a participant are the participant's needs for or in connection with any of the following:
>
> (a) Medical treatment (including pharmaceuticals),
>
> (b) Dental treatment,
>
> (c) Rehabilitation,
>
> (d) Ambulance transportation,
>
> (e) Respite care,
>
> (f) Attendant care services,
>
> (g) Domestic assistance,
>
> (h) Aids and appliances,
>
> (i) Artificial members, eyes and teeth,
>
> (j) Education and vocational training,
>
> (k) Home and transport modification,
>
> (l) Workplace and educational facility modifications,
>
> (m) Such other kinds of treatment, care, support or services as may be prescribed by the regulations.
>
> (3) ...
>
> (4) ...
>
> [Emphasis added]

35. Mrs Thiering's services in meeting part of Mr Thiering's care needs fall squarely within s.6(2) (in particular the terms "*Attendant care services*" and "*Domestic assistance*"); as such, the Authority has a statutory obligation to provide for that part of Mr Thiering's care needs. It did so (and continues to do so) by entering into a consensual arrangement with Mrs Thiering.

36. Indeed, it is arguable that the words of s.6(1) and s.6(2) are sufficient in themselves to enliven the exclusion in s.130A of the MAC Act, whether or not the Authority actually fulfils its statutory obligation in a particular case. But here, that is not in question – with Mrs Thiering's participation, all Mr Thiering's care needs are met.

37. The problem, so far as the Court of Appeal was concerned, is that s.6(1) of the LCS Act only requires the LCS Authority to pay expenses incurred by or on behalf of a participant. There was and is no formal agreement between the LCS Authority and Mrs Thiering for payment for her services. Moreover, the Authority denies any liability to pay.

38. The Court of Appeal concluded that [67]:

> The provision of gratuitous services by a family member or friend to the participant in circumstances where there was no agreement or other legal obligation on the part of the participant to pay that person for those services could not amount "expenses incurred" as referred to in s.6(1). This was the effect of the language used, even though it may not have been what Parliament intended.

39. The Appellant contends that, even if the value of Mrs Thiering's services cannot be described as an "expense incurred" by or on behalf of Mr Thiering, it does not follow that the Appellant or QBE should compensate Mr Thiering for the value of those services under s.128 of the MAC Act.

40. The Appellant contends that damages for the value of those services are excluded by s.130A, whether or not the LCS Authority is obliged to treat the value of those services as an "expense incurred".

41. The relevant words in s.130A are, *"treatment and care needs ... that are provided for ... while the person is a participant in"* the Scheme.

42. By including Mrs Thiering's services in its care plans, the LCS Authority *provided for* such of the care needs of Mr Thiering as were met by Mrs Thiering, whether or not the Authority intended to pay for her services.

43. The Appellant contends that this construction of the words "provided for" is exactly what Parliament intended and, furthermore, accords with the ordinary and natural meaning of the words "provided for".

44. In other words, whether a "literal approach" is adopted to the meaning of the words *"are provided for"*, or whether a "purposive approach" is taken to s.130A in the context of the MAC Act and the LCS Act, the outcome is the same: the words "provided for" should be given their ordinary and natural meaning (Pearce and Geddes, *Statutory Interpretation in Australia* [7th Ed] at pp. 27 – 32).

45. Consideration of the statutory context produces the same outcome.

46. From beginning to end, the LCS Act is clearly designed to ensure that the Scheme provides for all of a participant's care and treatment needs, subject only to the qualifications that those needs must be reasonable and necessary, and must have been caused by the motor accident that gave rise to the participant's eligibility to participate in the Scheme.

47. Giving "context" a wider meaning, extrinsic materials such as Second Reading Speeches may also be considered, and were considered by Garling J, whose use of such materials was apparently adopted by the Court of Appeal: see *Thiering v Daly* [2011] NSWSC 1345 at [82] – [84], [86], [90] (Garling J); *Daly v Thiering* [2013] NSWCA 25 at [46].

48. The Second Reading Speech delivered by Mr Watkins on 9 March 2006 (the relevant parts of which are extracted by Garling J at [84]), is entirely consistent with the purpose of the legislative package identified by Garling J at [85] and acknowledged by the Court of Appeal at [46] – [47].

49. The context includes the fact that, on the introduction of the LCS Scheme, compulsory third party insurers in New South Wales were required to reduce their premiums, because the responsibility for the treatment and care needs of participants in the Scheme was taken over by the separately funded LCS Authority.

50. Under the LCS Act, compulsory third party insurers are required to collect and remit to the Authority, a levy, separate and distinct from their own premiums, to fund the Scheme.

51. There is no doubt that the Scheme is to be fully funded by the levy imposed on motorists in New South Wales.

52. Although not extracted in the judgments, the Court was referred both at trial and on appeal to the part of the Second Reading Speech on 9 March 2006 dealing with the funding of the Scheme.

53. Mr Watkins said:

> Part 7 deals with funding of the scheme which is to be provided through a special levy to be paid by motorists when they purchase a compulsory third party green slip insurance policy. The levy will be collected on behalf of the Authority by licensed insurers when a green slip policy is issued.

> The bill explicitly provides that levy contributions must be set so as to fund the full cost of providing lifetime care and treatment to scheme participants and meet other scheme expense. The fully-funded requirement is consistent with requirements on licensed CTP insurers under the motor accidents scheme. The bill further provides that the Authority's determination of the levy contributions must be made in accordance with independent actuarial advice as to the funding amount required to meet the full funding test.
>
> [Emphasis added]

54. That the Scheme is to be fully funded by the separate levy is embodied, in terms, in s.49 of the LCS Act.

55. The amount of the "Fund levy" is determined by the LCS Authority (s.50). Compulsory third party insurers may not issue a third party policy to a motor vehicle owner in New South Wales unless the Fund levy has been paid and collected by the insurer, and remitted to the Authority (s.51).

56. On the Court of Appeal's construction of s.130A, the Scheme is not "fully funded" at all; rather, compulsory third party insurers are left to bear a liability in damages for part of the care needs of participants, up to the date of judgment or settlement of each participant's damages claim.

57. The Appellant contends that s.130A of the MAC Act clearly has as its primary purpose, the exclusion from the damages regime under the MAC Act of participants in the Scheme insofar as damages for treatment and care needs are concerned, where those treatment and care needs are provided for or are to be provided for by the Scheme.

58. Section 23 of the LCS Act provides as follows:

> **23 Assessment of treatment and care needs of participants**
>
> (1) The Authority is to make an assessment of the treatment and care needs of a participant in the Scheme.
>
> (2) The assessment is an assessment of the participant's treatment and care needs that are reasonable and necessary in the circumstances, and as relate to the motor accident injury in respect of which the person is a participant in the Scheme.
>
> (3) An assessment of treatment and care needs is to be made in accordance with the LTCS Guidelines.
>
> (4) The Authority is to certify in writing as to its assessment of the treatment and care needs of the participant including its reasons for any finding on which the assessment is based, and is to give a copy of the certificate to the participant.

59. The LCS Authority was and is required by s.23 of the LCS Act to make assessments from time to time of the treatment and care needs of Mr Thiering. And it has done so, formulating treatment and care plans based on assessments by qualified persons appointed by the Authority.

60. Section 23 clearly requires the Authority to assess all of the treatment and care needs of a participant, subject only to the prerequisites in s.23(2) that those treatment and care needs must be "reasonable and necessary in the circumstances", and must relate to injuries suffered by the participant in the motor accident giving rise to his or her participation in the Scheme. The treatment and care needs in question must also fall within one of the categories listed in s.6(2) of the LCS Act.

61. The care needs of Mr Thiering met by Mrs Thiering's services satisfy all of these prerequisites.

62. Participants in the Scheme must cooperate with the Authority in making its assessment of the participant's treatment and care needs (s.27). The LCS Authority is empowered under the LCS Act to make and issue guidelines in connection with assessments, including the intervals at which such assessments are to be carried out for any particular participant (s.28).

63. In Mr Thiering's case, the assessments made by the Authority under s.23 of the LCS Act, encompassed (as they were required to do) **all** of Mr Thiering's treatment and care needs.

64. The Authority then arranged to pay commercial suppliers to meet part of Mr Thiering's total care needs, having agreed with Mrs Thiering that she would meet the balance of Mr Thiering's total care needs.

65. By these means, the LCS Authority *provided for* all of Mr Thiering's care needs in its Care Plans; the fact that the Authority did not intend to pay Mrs Thiering for her services, does not alter the outcome that by making these arrangements, the Authority ensured that all of Mr Thiering's care needs were provided for.

66. The Court of Appeal accurately summarised the Appellant's argument (at [70] – [71]), before explaining why it preferred the "contrary interpretation" of s.130A of the MAC Act, for which the Respondents contend:

> [72] The contrary interpretation is that s.130A of the MAC Act excludes recovery of damages under s.128 only to the extent that the participant's needs "are provided for or are to be provided for" while in the Scheme. This means that for the exclusion to operate, the participant must be entitled to compensation for those needs under the Scheme. Otherwise what is apparently a provision to prevent the double recovery of damages, would have the effect of depriving the participant of compensation in certain circumstances. Explicit language would have to be used to achieve that result.

> [73] The submission proceeds that for the reasons already indicated, if the participant is not liable to pay a family member or friend for the attendant care services provided, there are no relevant expenses under the Scheme to be reimbursed by the Authority to him or her. The needs fulfilled by the friend or family member are thus not ones "provided for under the Scheme" and are not excluded by s.130A of the MAC Act from a damages claim. This would require that the words "are provided for" or "are to be provided for" as used in s.130A be given the meaning "are paid for or are to be paid for".
>
> [74] I prefer the latter interpretation of the words "provided for". Such an interpretation fits more easily with a provision to prevent double recovery of damages. It also fits more easily with a provision which is specifically referring to "damages", i.e a monetary amount.

67. These three paragraphs are the nub of the Court of Appeal's reasons. But close analysis reveals defects in logic and principle in each of them.

68. The Appellant submits that the second sentence of paragraph [72] does not follow from the first.

69. The words *"are provided for or are to be provided for"* do not require that, for the exclusion in s.130A to operate, "the participant must be entitled to compensation for those needs under the Scheme". "Providing for" a participant's care needs has nothing to do with paying "compensation" to the participant.

70. The Court accepts as a description of s.130A, the words *"apparently a provision to prevent the double recovery of damages"*.

71. Undoubtedly, one purpose of s.130A is to prevent a participant obtaining damages for care supplied by the LCS Authority, at no cost to the participant. If the participant were to recover damages for such care, there would undoubtedly be "double recovery".

72. But the words of s.130A are not limited to that purpose. The section excludes an entitlement to damages under the MAC Act, in respect of care needs that *"are provided for or are to be provided for"* while the person claiming damages is a participant in the Scheme.

73. That is surely a recognition of the responsibility of the Scheme to "provide for" all of a participant's treatment and care needs, subject only to the qualifications that the treatment and care needs to be "provided for" must be "reasonable and necessary" and must be caused by the motor accident in question.

74. Care needs that are not "reasonable and necessary" and/or not caused by the relevant motor accident are not compensable under the MAC Act in any event [see for example, s.53 and s.83(2) of the MAC Act and cases such as *Dang v Chea* [2013] NSWCA 80 at [38] – [40])].

75. If s.130A *"has the effect of depriving the participant of compensation* (i.e. damages) *in certain circumstances"*, "explicit language" is used in s.130A to achieve that result, and in particular the words "provided for". It is difficult to see how the language of s.130A could be more explicit.

76. In any event, any "presumption" that a right to a certain head of damage cannot be removed by legislation in the absence of "explicit language" must be approached with caution.

77. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, McHugh J said at [36]:

> There is a presumption – admittedly weak these days – that a statue is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so. In *Malika Holdings Pty Ltd v Stretton*, however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.

78. The Appellant respectfully submits that the second sentence of paragraph [73] of the judgment of the Court of Appeal does not follow from the first. The fact that no "expense" may be incurred by the Authority in respect of attendant care services provided by a family member of a participant, does not mean that the care needs fulfilled by the family member have not been "provided for under the scheme".

79. To the contrary, where (as is required by s.23 of the LCS Act) the LCS Authority makes an assessment of the participant's total care needs, and then enters into arrangements (whether commercial or unpaid) to ensure that all such care needs are in fact met, the participant's care needs have clearly been *"provided for under the Scheme".*

80. The last sentence of paragraph [74] is difficult to comprehend. The fact that s.130A of the MAC Act excludes a participant in the LCS Scheme from recovering certain damages, cannot and does not mean that other words and phrases used in the section must have a "monetary" character. The Appellant respectfully submits that this simply does not follow, either linguistically or as a matter of construction.

81. The Appellant respectfully submits that the Court of Appeal failed to grapple with the concept that, with the introduction of the LCS Scheme, the "treatment and care needs" of participants in the Scheme which may previously have given rise to an entitlement to damages against the tortfeasor and his or her insurer, became the responsibility of the Scheme, and of the LCS Authority, which in turn is entitled to impose a levy on motorists sufficient to fund that responsibility.

82. The "treatment and care needs" for which responsibility was shifted to the Scheme and the Authority are those listed in s.6(2) of the LCS Act, which include "attendant care services" such as Mrs Thiering's services.

83. In short, the Appellant submits that the New South Wales Court of Appeal construed unambiguous words in s.130A (that is, the words "*provided for*") as having a completely different meaning ("*paid for*") without there being any sound reason to depart from long-established principles of statutory construction cautioning against this approach.

84. In doing so, the Court of Appeal construed s.130A of the MAC Act with the result that the intended division of funding of the motor accidents scheme in New South Wales between the compulsory third party insurers and the Lifetime Care and Support Scheme has been frustrated.

Amendment of the legislation following the decision of Garling J

85. The *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act* 2012 [**the Amendment Act**] came into effect on 25 June 2012. The Amendment Act amends the MAC Act and the LCS Act.

86. One effect of the Amendment Act is to exclude completely any claim for damages under the MAC Act in respect of the treatment and care needs of participants in the Scheme, including "gratuitous" care [see s.141A MAC Act, which replaced s.130A].

87. Introducing the Amendment Act, the Minister (Mr Pearce) drew attention to the adverse effects for compulsory third party insurers, and for the motor accident scheme in general, of the decision of Garling J:

> Compulsory third party insurers have calculated their premiums on the assumption that they were no longer liable for any of the treatment and care expenses of participants in the lifetime care scheme.
> This was a reasonable thing to do, considering the clear intent of the original legislation as clearly expressed by Minister Watkins in his speech introducing the original legislation.
> ...
> If this happens motorists will be paying twice for meeting the treatment and care costs of lifetime care scheme participants: once by the payment of an increased compulsory third party insurance premium, and then again by the payment of the levy to fund the Lifetime Care and Support Scheme. To ensure that this does not eventuate, the Government is introducing the Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Bill 2012.

88. The problem for compulsory third party insurers in New South Wales is that the Amendment Act leaves a period from the date of commencement of the Scheme in 2006 to the effective commencement of the amendments (understood to be 30 May 2012) during which insurers are exposed to a liability for damages for gratuitous care unfunded by premium income.

89. This liability is unfunded because insurers have, quite properly, calculated their premiums since the inception of the LCS Scheme, on the basis that they are no longer liable for any part of the treatment and care needs of participants in the LCS Scheme.

Part VII:
[*Applicable statutory provisions*]

The applicable statutory provisions as they existed at the time of the subject motor accident on 28 October 2007 (all of which were unchanged at the time of the trial before Garling J), and copies of each later provision amending or repealing those provisions (and the relevant transitional provisions) are attached as annexures to these Submissions.

Part VIII:
[*Orders sought*]

The Appellant seeks the following orders:

1. That the Appeal be allowed.

2. That the decision of the New South Wales Court of Appeal given on 20 February 2013 be set aside.

3. In lieu of the orders of the New South Wales Court of Appeal, that the fifth question considered by Garling J be answered as follows:

A. Mr Thiering, as a participant in the Lifetime Care and Support Scheme, is not entitled to recover from Mr Daly (or his compulsory third party insurer), damages under s.128 of the *Motor Accidents Compensation Act* 1999 (NSW).

4. That the Appellant pay the First and Second Respondent's costs of the Appeal to this Court (including costs of the Application for Special Leave to Appeal to this Court), and of the Appeal to the New South Wales Court of Appeal from the decision of Garling J.

5. Such further or other orders as the Court deems fit.

Part IX:

I estimate that less than 3 hours will be required for the presentation of the Appellant's argument.

Dated: **21 June 2013**

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ANNEXURE

APPLICABLE STATUTORY PROVISIONS

Motor Accidents Compensation Act 1999 (NSW)

Relevant sections of the Act as they existed at the time of the subject motor accident on 28 October 2007 are set out below (all of which were unchanged at the time of the hearing before Garling J, apart from the addition of s.83(6) which is irrelevant to this Appeal).

130A No damages for expenses covered by the Lifetime Care and Support Scheme

No damages may be awarded to a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006* for economic loss in respect of the treatment and care needs (within the meaning of that Act) of the participant that relate to the motor accident injury in respect of which the person is a participant in that Scheme and that are provided for or are to be provided for while the person is a participant in that Scheme.

128 Damages for economic loss – maximum amount for provision of certain attendant services

(1) Compensation, included in an award of damages, for the value of attendant care services:

(a) which have been or are to be provided by another person to the person in whose favour the award is made, and

(b) for which the person in whose favour the award is made has not paid and is not liable to pay,

must not exceed the amount determined in accordance with this section.

(2) No compensation is to be awarded if the services would have been provided to the person even if the person had not been injured by the motor accident.

(3) No compensation is to be awarded if the services are provided, or are to be provided:

(a) for less than 6 hours per week, and

(b) for less than 6 months.

(4) If the services provided or to be provided are not less than 40 hours per week, the amount of compensation must not exceed:

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:

(i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award – that quarter, or

(ii) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

(5) If the services provided or to be provided are less than 40 hours per week, the amount of compensation must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (4) (a) or (b), as the case requires.

(6) Unless evidence is adduced to the contrary, the court is to assume that the value of the services is the maximum amount determined under subsection (4) or (5), as the case requires.

(7) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.

83 Duty of insurer to make hospital, medical and other payments

(1) Once liability has been admitted (wholly or in part) or determined (wholly or in part) against the person against whom the claim is made, it is the duty of an insurer to make payment to or on behalf of the claimant in respect of:

(a) hospital, medical and pharmaceutical expenses, and

(b) rehabilitation expenses, and

(c) respite care expenses in respect of a claimant who is seriously injured and in need of constant care over a long term, and

(d) attendant care services expenses in respect of a claimant who is seriously injured and in need of constant care over a long term (being services provided by a person with appropriate training to provide those services, but not including services provided by a person who is related to the claimant or any services for which the claimant has not paid and is not liable to pay),

as incurred.

(2) The duty of an insurer under this section to make payments applies only to the extent to which those payments:

(a) are reasonable and necessary in the circumstances, and

(b) are properly verified, and

(c) relate to the injury caused by the fault of the owner or driver of the motor vehicle to which the third-party policy taken to have been issued by the insurer relates.

(3) An insurer may agree to make payments to or on behalf of the claimant in respect of attendant care services provided by a person who is related to the claimant or by a person other than a person with appropriate training to provide those services.

(4) It is a condition of an insurer's licence under Part 7.1 that the insurer must comply with this section.

(5) A payment made under this section to or on behalf of a claimant before the claimant obtains judgment for damages against the defendant is, to the extent of its amount, a defence to proceedings by the claimant against the defendant for damages.

53 Treatment expenses not payable

Treatment expenses are not required to be paid under this Part to the extent that the treatment concerned was not reasonable and necessary in the circumstances to reach a standard of good medical existing at the time or did not relate to the injury caused by the motor accident concerned.

***Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW)**

The relevant statutory provisions as they existed at the time of the subject motor accident on 28 October 2007 are set out below (all of which were unchanged at the time of the commencement of the hearing before Garling J on 29 August 2011).

6 Scheme participants' treatment and care needs to be paid for by Authority

(1) The Authority is to pay the reasonable expenses incurred by or on behalf of a person while a participant in the Scheme in providing for such of the treatment and care needs of the participant as relate to the motor accident injury in respect of which the person is a participant and as are reasonable and necessary in the circumstances.

(2) For the purposes of this Act, the **"treatment and care needs"** of a participant are the participant's needs for or in connection with any of the following:

(a) medical treatment (including pharmaceuticals),

(b) dental treatment,

(c) rehabilitation,

(d) ambulance transportation,

(e) respite care,

(f) attendant care services,

(g) domestic assistance,

(h) aids and appliances,

(i) artificial members, eyes and teeth,

(j) education and vocational training,

(k) home and transport modification,

(l) Workplace and educational facility modifications,

(m) such other kinds of treatment, care, support or services as may be prescribed by the regulations.

(3) As an alternative to paying the expenses for which it is liable under this section as and when they are incurred, the Authority may pay those expenses by the payment to the participant of an amount to cover those expenses over a fixed period pursuant to an agreement between the Authority and the participant for the payment of those expenses by the participant.

(4) The LTCS Guidelines may make provisions for or with respect to determining which treatment and care needs of a participant in the Scheme are reasonable and necessary in the circumstances.

11 Effect of Scheme on motor accident compensation claims and limitation periods

(1) This Act does not limit or otherwise affect the application of the *Motor Accidents Compensation Act* 1999 in respect of a motor accident injury of a person who is or who is eligible to become a participant in the Scheme, except as specifically provided by that Act.

(2) While a person is an interim participant in the Scheme in respect of an injury, time does not run for the purposes of section 109 (Time limitations on commencement of court proceedings) of the *Motor Accidents Compensation Act 1999* or a provision of the *Limitation Act 1969* in respect of a cause of action on a claim for damages that relate to the injury or to any other injury suffered by the person as a result of the motor accident concerned.

23 Assessment of treatment and care needs of participants

(1) The Authority is to make an assessment of the treatment and care needs of a participant in the Scheme.

(2) The assessment is an assessment of the participant's treatment and care needs that are reasonable and necessary in the circumstances, and as relate to the motor accident injury in respect of which the person is a participant in the Scheme.

(3) An assessment of treatment and care needs is to be made in accordance with the LTCS Guidelines.

(4) The Authority is to certify in writing as to its assessment of the treatment and care needs of the participant including its reasons for any finding on which the assessment is based, and is to give a copy of the certificate to the participate.

28 LTCS Guidelines

(1) The LTCS Guidelines may make provision for or with respect to the assessment of the treatment and care needs of a participant in the Scheme.

(2) In particular, the LTCS Guidelines may make provision for or with respect to the following:

(a) the procedures to be followed in connection with such an assessment,

(b) the intervals at which such assessments are to be carried out,

(c) the methods and criteria to be used to determine the treatment and care needs of participants,

(d) the information to be provided by participants for the purposes of or in connection with assessments.

(3) An assessment of the treatment and care needs of a participant in the Scheme is to be carried out in accordance with the LTCS Guidelines.

Later provisions amending or repealing the above provisions, and transitional provisions

***Motor Accidents Compensation Act* 1999 (NSW)**

Sections 53 and 83 are unchanged (apart from the addition of s.83(2A) and s.83(6) which are irrelevant to this Appeal).

Sections 128 and 130A were repealed by the *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act* 2012 (NSW)

Section 130A was replaced by s.141A, a copy of which is attached.

Section 128 was replaced by s.141B, a copy of which is attached.

The relevant transitional provision is Clause 40 of Schedule 5 to the Act, a copy of which is attached.

The "relevant date" to which the transitional provision refers is understood to be 30 May 2012.

***Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW)**

Section 11, 23 and 28 are unchanged.

Section 6 was repealed by the *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act* 2012 (NSW) and was replaced by s.11A, s.11B and s.11C, copies of which are attached.

The transitional provision for the amendment is Clause 3 of Part 3 of Schedule 3 to the Act, a copy of which is annexed.

The "relevant date" to which the transitional provision refers is understood to be 30 May 2012.

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS COMPENSATION ACT 1999

141A No damages relating to treatment and care needs for Lifetime Care and Support Scheme participants

Working Date: *3 April 2013*

Select Date:
Year Month Day
2013 04 03
View

141A No damages relating to treatment and care needs for Lifetime Care and Support Scheme participants

(1) No damages may be awarded to a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006* in respect of any of the treatment and care needs of the participant, or any excluded treatment and care needs, that relate to the motor accident injury in respect of which the person is a participant in the Scheme and that arise during the period in which the person is a participant in the Scheme.

(2) This section applies:

(a) whether or not the treatment and care needs are assessed treatment and care needs under the *Motor Accidents (Lifetime Care and Support) Act 2006* , and

(b) whether or not the Lifetime Care and Support Authority is required to make a payment in respect of the treatment and care needs concerned, and

(c) whether or not the treatment, care, support or service (provided in connection with treatment and care needs) is provided on a gratuitous basis.

(3) In this section,
"**treatment and care needs**" and
"**excluded treatment and care needs**" have the same meanings as they have in the *Motor Accidents (Lifetime Care and Support) Act 2006* .

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS COMPENSATION ACT 1999

141B Maximum amount of damages for provision of certain attendant care services

Working Date: *3 April 2013*

Select Date:
Year 2013 - Month 04 - Day 03
View

141B Maximum amount of damages for provision of certain attendant care services

(cf s 72 MAA)

(1) Compensation, included in an award of damages, for the value of attendant care services:

(a) which have been or are to be provided by another person to the person in whose favour the award is made, and

(b) for which the person in whose favour the award is made has not paid and is not liable to pay,

must not exceed the amount determined in accordance with this section.

(2) No compensation is to be awarded if the services would have been provided to the person even if the person had not been injured by the motor accident.

(3) Further, no compensation is to be awarded unless the services are provided (or to be provided):

(a) for at least 6 hours per week, and

(b) for a period of at least 6 consecutive months.

(4) If the services provided or to be provided are not less than 40 hours per week, the amount of compensation must not exceed:

(a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:

(i) in respect of the whole or any part of a quarter

occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award—that quarter, or

(ii) in respect of the whole or any part of any other quarter—the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award, or

(b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.

(5) If the services provided or to be provided are less than 40 hours per week, the amount of compensation must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (4) (a) or (b), as the case requires.

(6) Unless evidence is adduced to the contrary, the court is to assume that the value of the services is the maximum amount determined under subsection (4) or (5), as the case requires.

(7) Except as provided by this section, nothing in this section affects any other law relating to the value of attendant care services.

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS COMPENSATION ACT 1999

40 General operation of amendments

Working Date: *25 June 2012*

Select Date:
Year Month Day
2012 - 06 - 25
View

40 General operation of amendments

(1) An amendment made to this Act by the *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act 2012* ("**the amending Act**") applies in relation to any claim made on or after the relevant date, regardless of whether the claim is made in relation to past or future treatment and care needs.

(2) To avoid doubt, subclause (1) applies even if the motor accident concerned occurred before the relevant date or the claim relates to a person who was a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act 2006* before the relevant date.

(3) In this clause:
"**claim**" includes a claim or request for payment in relation to treatment and care needs made to a licensed insurer or the Lifetime Care and Support Authority under the *Motor Accidents (Lifetime Care and Support) Act 2006* .
"**the relevant date**" means the date of introduction into Parliament of the Bill for the amending Act.

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) ACT 2006

11A Assessed treatment and care needs of participants to be paid for by Authority

Working Date: *1 August 2012*

Select Date:
Year 2012 - Month 08 - Day 01
View

11A Assessed treatment and care needs of participants to be paid for by Authority

(1) The Authority is to pay for all of the reasonable expenses incurred by or on behalf of a person in relation to the assessed treatment and care needs of the person while the person is a participant in the Scheme.

(2) The "**assessed treatment and care needs**" of a person who is a participant in the Scheme are those treatment and care needs that are assessed by the Authority, in its treatment and care needs assessment, to be treatment and care needs that:

(a) are reasonable and necessary in the circumstances, and

(b) relate to the motor accident injury in respect of which the person is a participant.

(3) No expenses are payable in respect of:

(a) excluded treatment and care needs, and

(b) treatment and care needs that are not assessed treatment and care needs.

(4) As an alternative to paying the expenses for which it is liable under this section as and when they are incurred, the Authority may pay those expenses by the payment to the participant of an amount to cover those expenses over a fixed period pursuant to an agreement between the Authority and the participant for the payment of those expenses by the participant.

(5) The LTCS Guidelines may make provision for or with respect to determining which treatment and care needs of a participant in the Scheme are reasonable and necessary in the circumstances and relate to the motor accident injury in respect of which the person is a participant.

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) ACT 2006

Select Date:
Year Month Day
2012 08 01
View

11B Payment not required in certain circumstances

Working Date: *1 August 2012*

11B Payment not required in certain circumstances

(1) The Authority is not required to make a payment in relation to the following:

(a) any treatment, care, support or service provided to a participant in the Scheme on a gratuitous basis (that is, anything provided to a participant for which the participant has not paid and is not liable to pay),

(b) any treatment, care, support or service that is required to be provided by an approved provider but is provided by a person who is not, at the time of the provision, an approved provider.

(2) However, the Authority may elect to make a payment in relation to any treatment, care, support or service referred to in subsection (1) if the Authority is of the opinion that special circumstances exist that justify such payment.

(3) The LTCS Guidelines may make provision for or with respect to determining whether special circumstances exist that justify payment in relation to any treatment, care, support or service referred to in subsection (1).

(4) To avoid doubt, this section applies even if the treatment, care, support or services concerned are provided in connection with the provision of the assessed treatment and care needs of a participant in the Scheme.

(5) This section has effect despite section 11A.

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) ACT 2006

11C Approved providers

Working Date: *1 August 2012*

Select Date:
Year 2012 - Month 08 - Day 01
View

11C Approved providers

(1) The following treatment, care, support or services (provided in connection with the provision of assessed treatment and care needs of a participant in the Scheme) are to be provided only by an approved provider of the treatment, care, support or service:

(a) attendant care services,

(b) any other treatment, care, support or services (other than the services of a medical practitioner) identified in the LTCS Guidelines as treatment, care, support or services that are to be provided by an approved provider.

(2) An "**approved provider**" of a service is a person, or a person of a class, approved by the Authority (or by any other person specified in the LTCS Guidelines), in accordance with the LTCS Guidelines, to provide the treatment, care, support or service under the Scheme.

(3) The LTCS Guidelines may also make provision for or with respect to the standards of competency of approved providers.

New South Wales Acts (Point-in-Time)

MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) ACT 2006

3 General operation of amendments

Working Date: *25 June 2012*

Select Date:
Year 2012 - Month 06 - Day 25
View

3 General operation of amendments

(1) An amendment made to this Act by the *Motor Accidents and Lifetime Care and Support Schemes Legislation Amendment Act 2012* ("**the amending Act**") applies in relation to any claim made on or after the relevant date, regardless of whether the claim is made in relation to past or future treatment and care needs.

(2) To avoid doubt, subclause (1) applies even if the motor accident concerned occurred before the relevant date or the claim relates to a person who was a participant in the Scheme before the relevant date.

(3) In this clause:
"**claim**" means a claim within the meaning of the *Motor Accidents Compensation Act 1999* or a claim or request for payment in relation to treatment and care needs made to a licensed insurer or the Authority under this Act.
"**the relevant date**" means the date of introduction into Parliament of the Bill for the amending Act.