DALY v THIERING & ORS (S115/2013)

Court appealed from: New South Wales Court of Appeal
[2013] NSWCA 25

Date of judgment: 20 February 2013

Special leave granted: 7 June 2013

Mr Alexander Thiering was catastrophically injured while riding his motor bike in October 2007. He suffered spinal cord injuries and is now a quadriplegic, with only limited elbow flexion, shoulder and neck movements possible. Mr John Daly was the driver of the car that collided with him.

Mr Thiering brought proceedings in the Supreme Court against Mr Daly and QBE Insurance Australia Ltd ("QBE") (as the compulsory third party insurer of Mr Daly's car) for damages arising from his injuries. Mr Daly admitted his negligence but he also alleged that Mr Thiering was guilty of contributory negligence. Mrs Rose Thiering is Mr Thiering's mother. She has provided, and continues to provide, attendant care services to Mr Thiering. She is the second plaintiff in those Supreme Court proceedings and she seeks payment from the Lifetime Care and Support Authority of NSW ("LCSA") for the provision of those services.

Mr Thiering is a lifetime participant in a scheme ("the Scheme") administered by the LCSA but established under the *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) ("the LCS Act"). The broad aim of the LCS Act is to provide lifetime care and support for those who have suffered from a traumatic spinal cord injury and/or a severe traumatic brain injury. Before the commencement of the LCS Act, damages in respect of Mr Thiering's treatment and care needs were recoverable under the *Motor Accidents Compensation Act* 1999 (NSW) ("MAC Act"). In order to be eligible for such damages, an injured plaintiff has to establish negligence.

Justice Garling was asked to determine five questions separately and in advance of all other issues in the Supreme Court proceedings. Relevantly, those questions were:

1. Does the LCSA have an obligation under the LCS Act to pay for gratuitous care and assistance provided by Mrs Thiering to Mr Thiering up to the date of judgment?

2. If there is an obligation to pay Mrs Thiering, on what basis should an appropriate hourly rate be determined?

3. Does Mrs Thiering have standing to bring and maintain these proceedings against the LCSA?

4. If so, issues 1 and 2 above also arise for determination in Mrs Thiering's claim against the LCSA.

5. Whether on proper construction of s 130A of the MAC Act, Mr Thiering has any entitlement as against Mr Daly other than damages for non-economic loss and loss of earning capacity?

Justice Garling held, inter alia, that Mr Daly and QBE were liable to Mr Thiering for damages under the MAC Act for the value of the care provided by Mrs Thiering. This was for the period up to the date of the settlement (or judgment) in the proceedings brought by Mr Thiering, but not in the future.

As a result of Justice Garling's decision, the legislation relating to the Scheme was amended by the *Motor Accidents Lifetime Care and Support Schemes Legislation Amendment Act* 2012 (NSW) commencing on 25 June 2012. That Act amended both the LCS Act and the MAC Act, the effect of which was to make it clear that CTP insurers have no liability for damages in respect of the treatment and care needs of participants in the Scheme, including care provided on a "gratuitous basis".

On 20 February 2013 the Court of Appeal (McColl, Macfarlan & Hoeben JJA) held that s 130A of the MAC Act did not preclude damages being paid by a third party for past attendant care services where the Scheme has not paid and is not liable to pay, for those services.

The grounds of appeal include:

- The New South Wales Court of Appeal erred in its construction of s 130A of the MAC Act.

- The New South Wales Court of Appeal erred in its construction of s 6(1) of the LCS Act.