

BETWEEN:

JOHN DALY
Appellant

and

ALEXANDER THIERING
First Respondent

ROSE MATILDA THIERING
Second Respondent

LIFETIME CARE & SUPPORT AUTHORITY OF NEW SOUTH WALES
Third Respondent



20

APPELLANT'S REPLY

Part I:

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

Part II:

[Reply to the argument of the First and Second Respondents.]

30

1. The Appellant does not agree with the submission by the First and Second Respondents that the care given by Mrs Thiering to her son has, in some periods, "*a dual, but separate, character*" [3]. Mrs Thiering cares for her son for significant periods each day out of concern for her son's welfare and, no doubt, to preserve an intimate loving relationship with her son that could scarcely be maintained in the constant presence of commercial care providers paid for by the LCS Authority.

40

2. The Appellant contends that it does not matter at all on the question of construction, whether or not the LCS Authority includes Mrs Thiering by name and/or the hours of care she provides in the Authority's "care plan". The Appellant does not agree with the Respondents' argument that the facts of this case "*present two situations*" [12].

50

3. The Authority is required under s.23 of the LCS Act to assess all of the treatment and care needs of Mr Thiering, subject *only* to the prerequisites that (i) The treatment and care needs must be "reasonable and necessary in the circumstances"; (ii) The treatment and care needs must relate to the motor accident injury in question; and (iii) The treatment and care needs must fall within those listed in s.6(2).

4. Both s.23 and s.6 confirm that what is being assessed are the treatment and care *needs* of the participant.
5. The manner in which services are to be delivered to meet those needs is a separate and distinct step in the decision-making process and practical implementation required of the Authority to ensure that the participant's treatment and care needs are actually met.
- 10 6. The Authority is required to certify in writing as to its assessment of the participant's treatment and care *needs*; s.23(4). Whether Mrs Thiering or anyone else is mentioned in the certificate is irrelevant to the purpose and effect of the certificate.
7. Section 6 of the LCS Act refers to exactly the same treatment and care needs as s.23. Section 6(1) is based on the Authority "providing for" treatment and care needs, subject to the same two prerequisites as s.23(2). Section 6(2) adds the third prerequisite.
- 20 8. The LCS Authority may set out the manner in which services are to be *delivered* in order to meet the participant's care needs in the certificate as to the assessment, or in some other "care plan" or document. Obviously, the Authority must make clear and specific decisions as to how and by whom the treatment and care required by participants such as Mr Thiering, is to be delivered "on the ground".
9. The First and Second Respondents' argument distinguishes between a "hypothetical situation" where the Authority pays Mrs Thiering for the care she gives, and a situation where she is not paid [12] – [16].
- 30 10. The Appellant argues that such a distinction does not affect the Authority's obligation to provide for all of a participant's treatment and care needs, and is irrelevant to the construction of s.130A of the MAC Act.
11. Obviously, where the Authority pays a service provider to satisfy treatment and care needs of a participant, those needs have been "provided for". But it does not follow that any treatment and care needs for which no payment has been made, has not been "provided for".
- 40 12. Section 6(1) of the LCS Act clearly defines the treatment and care needs of a participant with which the section is concerned, namely those that satisfy the prerequisites referred to above. Some of that treatment and care may be *provided* (i.e. delivered) without incurring a monetary cost. All s.6(1) does, is to require the Authority to pay any monetary expense that is incurred in *providing for all* of the treatment and care needs of a participant that satisfy the prerequisites.
- 50 13. The Appellant contends that it is the Authority's business to determine how it meets a participant's care needs; if the manner in which the Authority meets those needs incurs a monetary expense, the Authority must pay that expense.

14. The LCS Authority cannot abdicate its responsibility to provide for all of a participant's assessed care needs that satisfy the prerequisites, nor can it delegate its responsibility to a family member or anyone else.
15. If for any reason (such as illness) Mrs Thiering is unable, with or without notice, to provide care to her son, the Authority must immediately replace Mrs Thiering's services. Mr Thiering, whose care needs are constant and immediate, does not have to wait for a new "care plan" to be created or for a new assessment of his care needs to be made.
16. Mr Thiering's care needs do not change if his mother falls ill or is unable to continue to provide care as she has done to date. The responsibility for all of Mr Thiering's care needs remains with the LCS Authority.
17. The Respondents argue [17] that the words "to pay" and "expenses incurred" in s.6(1) of the LCS Act, limit the services with which the words "providing for" are concerned, to those which incur a monetary expense. The Appellant does not agree with the First and Second Respondents' argument that s.6(1) is "not engaged" with a participant's treatment and care needs, unless an expense is incurred in meeting those needs [19].
18. That is not a literal, contextual or accurate reading of s.6(1). The words of the section make clear that the treatment and care needs the Authority is "providing for" are all the treatment and care needs of the participant that satisfy the three prerequisites, whether a monetary expense is incurred in meeting those needs, or not.
19. This construction has the effect that the words "providing for" in s.6(1) are given exactly the same meaning as the words "provided for" in s.130A of the MAC Act.
20. The First and Second Respondents' argument deals at length with the Appellant's contention that the LCS Scheme is to be fully funded by a levy imposed on motorists in New South Wales.
21. First, what the First and Second Respondents refer to as "the fully-funded argument" is not essential to the construction of s.130A of the MAC Act (and s.6 of the LCS Act) for which the Appellant contends, although it is certainly supportive of it. The basis of the Appellant's argument is the clear meaning of the relevant statutory provisions.
22. Second, the fact that the Scheme is to be "fully-funded" is not simply the "broad intention" of the legislature, as the First and Second Respondents contend [29]. The funding of the Scheme is the subject of specific provisions in the LCS Act: see Part 7 of the LCS Act.

[Reply to the arguments of the Third Respondent]

23. The Third Respondent supports the outcome for which the Appellant contends, although for different reasons [30].
24. The thrust of the Third Respondent's argument is that, by giving care to her son, Mrs Thiering has "provided for" part of Mr Thiering's treatment and care needs, thus removing the Authority's responsibility to provide for those needs [14].
- 10 25. Without wishing to be overly pedantic, the Appellant argues that, while Mrs Thiering is providing care services to her son (or "supplying" or "giving" or "rendering" those services to her son), she is not providing for her son's treatment and care needs. That remains the responsibility of the Authority.
26. The Third Respondent disavows any "agreement" or "arrangement" with Mrs Thiering – it argues that Mrs Thiering's services are in all senses voluntary. The Appellant agrees with the First and Second Respondents that any such notion is vexed, given the context in which a parent "agrees" or "volunteers" to provide services to a catastrophically injured child.
- 20 27. But even if it were correct that no arrangement or agreement exists between the LCS Authority and Mrs Thiering, this does not affect the Appellant's argument as to the construction of s.130A of the MAC Act and s.6(1) of the LCS Act.
28. Because it remains the responsibility of the LCS Authority to provide for all of Mr Thiering's treatment and care needs, it does not matter who provides the services required to satisfy that responsibility, as long as it is satisfied. The Authority is well aware, and has to be well aware, of the extent of the services provided by Mrs Thiering, because the Authority must ensure that all of Mr Thiering's needs are provided for. And it is aware.
- 30 29. The Appellant agrees with the Third Respondent's contention [28] that "*Paying for something is not the only way treatment and care needs can be provided for*". But the Appellant does not agree that "*paying for services is the only way in which the Authority provides for such needs*". Again, a distinction must be drawn between "providing for" a participant's treatment and care needs, and *providing* (and paying for) the services required to meet those needs.
- 40 30. The Third Respondent takes a different approach to the construction of s.6 from both the Appellant and the First and Second Respondents [37] – [44].
31. Insofar as the Third Respondent argues that it may have no responsibility at all in connection with a part of a participant's treatment and care needs, for example, if the participant decides to secure and pay for services outside the Scheme's authorised providers [44], the Appellant does not agree, for the same reasons as were set out above.
- 50

32. A "financially independent" participant may cease at any time to self-fund care services elsewhere, whereupon the LCS Authority is immediately required to supply those services, and therefore has to include the needs to which those services respond in its assessment under s.23.

10 33. The Appellant does not agree with the Third Respondent's argument [50] that "*the legislation envisages that there may be instances where not all treatment and care needs will be provided for by the Authority*". The legislation envisages that there may be instances where not all treatment and care of a participant will be *paid for* or *provided* by the Authority; but the treatment and care needs must be *provided for* by the Authority.

34. The Third Respondent argues that the relevant question considered by Garling J should be answered in different words (but with the same result) as has been proposed by the Appellant [66]. The Appellant disagrees with the last part of the answer formulated by the Third Respondent. The Appellant would be content with this form of answer to the fifth question:

20 *In respect of the period during which Mr Thiering has been a participant in the Scheme (since 6 December 2007 when he was accepted as an interim participant), Mr Thiering has no entitlement as against the Appellant for economic loss in respect of his treatment and care needs, including but not limited to any care provided by Mrs Thiering.*

Third Respondent and Costs

30 35. The undertaking as to costs made by the Appellant on the grant of special leave to appeal, does not cover the costs of the Third Respondent.

36. The Third Respondent did not participate in the appeal in the New South Wales Court of Appeal but filed a submitting appearance. The Third Respondent again filed a submitting appearance on the application for special leave to appeal to this Court.

37. The Third Respondent gave no prior notice that it intended to appear on this Appeal, if special leave to appeal was granted.

40 38. The Appellant respectfully submits that the Third Respondent should pay its own costs of this Appeal, in any event.

Dated: **14 August 2013**



.....
KEITH REWELL SC

Telephone: (02) 9231 5805

Facsimile: (02) 9232 8975

Email: rewell@jackshand.com.au