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 AND SUPPORT AUTHORITY OF NEW SOUTH WALES
Third Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Part I: publication on the internet

1. The first and second respondents on advice certify that these submissions are in a form suitable for publication on the internet.

Part II: statement of the issues the appeal presents

2. The interpretation of the legislation, and how it impacts on the damages recoverable by the first and second respondents.

3. The voluntary services performed by the second respondent in respect of the first respondent have, in some periods, a dual, but separate, character. They represent, *first,* the combination of unpaid voluntary services of a character within s 128 of the MAC Act (*Griffiths v Kerkemeyer* type damages) and, *second*, unpaid services that formed part of the third respondent's care plan, but for which the second respondent was not paid by the third respondent, or for which the third respondent refused to pay the second respondent.

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4. There remains in this regard the outstanding matter of the second respondent pleading, or re-pleading, a claim based on the matters discussed by the Court of Appeal (CA [76] (AB 293)), the primary judge (TJ [143(h)] (AB 222)), or as otherwise arising from those decisions, and these appeal proceedings. There are likely to be periods in which it will be claimed at trial that the legislation has the impact that the first respondent can recover damages pursuant to s 128, and the second respondent can recover damages for the services she provided to the first respondent as part of the care plan.

5. The appeal concerns the interpretation of s 6(1) of the LCS Act and s 130A of the MAC Act. The primary matter is the interpretation of the words: "that are provided for or are to be provided for" in s 130A of the MAC Act, and the words: "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". In addition, ss 6(2), 7(3) and 23 of the LCS Act and s 128 of the MAC Act are relevant.

Part III: s 78B of the Judiciary Act 1903 (Cth)

6. The first and second respondents on advice certify that they have considered whether notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth) and consider that no such notice is required.

Part IV: statement of factual issues as set out in the appellant's narrative of facts in contention

7. The first and second respondents accept that the appellant's statement of factual matters is accurate for the purposes of this appeal, subject to the following matters.

8. The Court of Appeal records the agreed facts at CA [15] (AB 270) and describes the "care plans" at CA [16] (AB 271).

9. The appellant notes the factual matters set out in paragraphs 3 and 4 above.

Part V: constitutional provisions, statutes and regulations

10. The first and second respondents agree that the appellant and the third respondent have identified the applicable statutes.

Part VI: statement of argument

11. A construction based on the text and (non-extrinsic) context or purpose of the legislation: The impact of the extrinsic material on the interpretation of the legislation is considered in paragraphs 20 to 19 below (the "fully funded" argument). The principles governing interpretation without consideration of extrinsic materials are stated in *Project Blue Sky Inc v Australia Broadcasting Authority* (1998) 194 CLR 355, [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ).

12. The facts present two situations that give rise to the dispute as to the operation of the legislation. *First*, the situation where the second respondent is performing unpaid services that form part of the third respondent's assessment of the first respondent's

treatment and care needs as a participant in the scheme. The first and second respondents say that these unpaid services form the basis of a claim against the third respondent and/or the appellant. *Second*, the situation where the second respondent is performing unpaid *Griffiths v Kerkemeyer* type services that would otherwise come within s 128 of the MAC Act. The first and second respondents say that these unpaid services form the basis of a claim against the appellant and are in the nature of damages within s 128 of the MAC Act.

13. If, in the first situation, hypothetically, the second respondent had been paid by the third respondent, the operation of s 130A of the MAC Act, in connection with s 6(1) of the LCS Act, is clear:[1] for the purposes of s 6(1) the third respondent would "pay" "expenses incurred" "in providing for the treatment and care needs", then for the purposes of s 130A as "the treatment and care needs" have been "provided for or are to be provided for", damages for economic loss in respect of those treatment and care needs cannot be recovered.

14. In the first situation, that hypothetical example of the family member being paid by the third respondent for services performed for the first respondent provides a useful guide to how the provisions operate, and how they should be interpreted.

15. The appellant's (and third respondent's) argument is directed to stopping an outcome that permits an accident victim recovering damages for services provided by a family member. In the hypothetical example, that is achieved by *(a)* the corresponding meaning of "providing for" in s 6(1) and "provided for"[2] in s 130A. With that same meaning, *(b)*, "providing for" in s 6(1) and "provided for" in s 130A must be understood as being payment. This is, *(c)*, consistent with the requirement in s 6(1) "to pay" "expenses incurred" and the preclusion in s 130A "no damages may be awarded" because, as a matter of logic, expenses have been incurred and payment made or is to be made.[3] This is also consistent with the LCS Act establishing an authority which has the role of assessing care and treatment needs and paying expenses incurred for those needs.

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1 The services performed by the second respondent come within ss 6(2)(f) and 6(2)(g) of the LCS Act. The third respondent's obligation to assess the treatment and care needs of the first respondent is contained in s 23 of the LCS Act. The scheme of s 23 is to, first, impose a requirement to make an assessment of the treatment and care needs (s 23(1)), and, second, to treat that assessment as being "an assessment of the participant's treatment and care needs that are reasonable and necessary in the circumstances" (s 23(2)) (compare AS [46]).

2 In s 130A "provided for" appears twice in the words: "that are provided for or are to be provided". The use of "provided for" is the same in those words, but they have a different temporal focus: the past and the future.

3 Similarly, and still consistently, s 7(3) of the LCS Act approaches the subject matter of s 130A from the opposite direction: if future economic loss in respect of treatment and care needs has been awarded (by judgment or settlement) that accident victim "is not eligible to be a participant in the Scheme" (TJ [150] (AB225)). Still consistently, a pre-scheme commencement accident victim can buy into the Scheme pursuant to s 7A of the LCS Act. These matters are all predicated on a payment equivalent for the needs.

16. What then in the first situation is it about the second respondent's performance of unpaid services for the first respondent that causes the legislation to operate in the same way? The first and second respondents say that in principle there is no difference. The appellant's argument (and the third respondent's argument) in substance requires the text of the provisions, or the context of them, and the purpose of the legislation, to either treat "to pay" "expenses incurred" as covering unpaid services or treat "providing for" or "provided for" as covering unpaid services.

17. The concomitant expressions "to pay" and "expenses incurred" in s 6(1) do not accommodate unpaid services and that has the impact that "providing for" in s 6(1) has operation in respect only of paid (not unpaid) services. The core of the appellant's position nonetheless would have "provided for" in s 130A as having operation in respect of unpaid services. For s 130A to operate to stop damages being awarded "provided for" has to have the same operation as in s 6(1). This is because s 130A is subordinate to s 6(1): the events in s 6(1) have to have occurred for s 130A to operate, and this is why the Court of Appeal (CA [72] (AB292)) (and the trial judge (TJ [93] (AB209), [110] (AB214) and [143(g)] (AB222)) were correct to identify that s 130A operates as a provision against double recovery, and not a provision which extinguishes an entitlement. This is the harmonious operation of the legislation. In this context, interpreting "providing for" in s 6(1) and "provided for" in s 130A distorts (CA [67] (AB291)) the meaning which flows from the coupling of "to pay" and "expenses incurred" in s 6(1).

18. The broad purposes of the LCS Act identified by the trial judge (TJ [85] (AB206)) (and relied on by the appellant (AS [22])) do not change that operation. Of necessity, those purposes are broad, and they do not change the operation of the legislation to the circumstances presented in this appeal[4] because the provisions in question can be interpreted to operate in a harmonious way and with appropriate hierarchy (as identified in paragraphs 15 and 17 above).

19. The second situation causes no different operation. As s 6(1) is not engaged (as the services are outside the assessed care plan), the subordinate s 130A does not operate to prevent recovery. In the second situation, the first respondent must at trial establish an entitlement within s 128 of the MAC Act, but s 130A does not extinguish the availability of those damages. Section 7(3) of the LCS Act applies in this situation, but until it is engaged (by judgment or settlement that includes damages for future economic loss in respect of future treatment and care needs), the legislation does not stop or extinguish those entitlements.

20. <u>A construction impacted on by extrinsic material – the "fully funded" argument:</u> The "fully funded" argument (AS [51] to [65] and [84]) has a substantive impact on the appellant's submission as to interpretation of s 130A.

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[4] The broad purposes identified by the trial judge at TJ [85(c) and 85(d)] (AB206)) (relied on by the appellant at AS [26]) are apt for the typical situation envisaged in the hypothetical example referred to in paragraph 13 above. Because the hypothetical situation is the typical situation that the legislature contemplated, the broadly stated purpose also reflects that situation.

21. The "fully funded" argument has as its starting point that it is to be found in the parliamentary speech (AS [51]-[53]), as its mid point that the third respondent assesses all the reasonable needs of the first respondent (AS [58]-[64]) and in doing so provides for them (AS [65]) and has as its end point that services not provided, or paid for, cannot be recovered from the appellant because, in substance, a premium was not collected and, as a result, the scheme in this regard is not "fully funded" (AS [84], but described in terms of "the division of funding of the motor accidents scheme" "has been frustrated").

22. The appellant's mid point treats the third respondent's assessment of the first respondent's treatment and care as being the provision of "all" reasonable needs. This is not correct. As noted earlier,[5] an assessment made pursuant to s 23(1) may not in a particular case provide for "all" reasonable needs, but the scheme by s 23(2) treats (in substance, deems) its assessment as "an assessment of the participant's treatment and care needs that are reasonable and necessary in the circumstances".[6]

23. The appellant's mid point also treats the use of a family member to perform services for no payment (or in circumstances where a claim for payment is refused) as being within the statutory notion of "provided for" in s 130A. For the reasons set out in paragraphs 17 and 18 above this is incorrect because "provided for" in s 130A is tied to payment ("pay the reasonable expenses" "in providing for") under s 6(1).

24. Even viewed in isolation from its relationship to s 6(1), s 130A is hard-pressed to treat voluntarily provided services, or performed services for which payment is not made, as being services "provided for" by the scheme. Voluntary services are services provided by the person providing them. Where services are performed but payment is refused, the services also retain their voluntary character until remuneration is paid. In neither circumstance are the services appropriately characterised as "provided for" by the scheme.

25. The appellant's starting point and its end point treat the ministerial speech as being directed in substance to the funding of the CTP scheme. The ministerial speech is ambiguous in this regard. It is more apparent from the text of the speech at AS [53] (also third respondent's materials, page 4) that the speech is directed to the scheme being "fully funded", which is described by the minister as being "consistent" with the requirements on licenced CTP insurer's under the motor accidents scheme.

26. The speech is directed to the general issue of the funding of the scheme by a levy, and there is no statement directed with any particularity toward s 6(1) or s 130A operating in the manner contended by the appellant. As such, the speech does not assist in

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5 See footnote 1 above.

6 Once an assessment is made for the purposes of s 23(1) and is treated (in substance, deemed) by s 23(2) as "an assessment of the participant's treatment and care needs that are reasonable and necessary in the circumstances", the treatment and care needs so assessed become the basis of the obligation "to pay the reasonable expenses incurred by or on behalf of a person" "in providing for such treatment and care needs" "as are reasonable and necessary in the circumstances", and those last words pick up the effect of s 23(2).

revealing in any relevant detail the ministerial intention[7] as to how those sections should operate in any circumstance, yet alone the present circumstances. At its highest, the ministerial intention of the scheme being "fully funded" has an unrefined aspirational quality, which reflects a not unsurprising broad governmental policy. The speech, for those reasons, is not a sound basis by which to interpret s 6(1) and s 130A.

27. Moreover, as the speech is ambiguous as regards the intention asserted in respect of the CTP scheme to be "fully funded", the speech should not be considered. To be contrasted, in *Re Bolton; Ex Parte Beane*, (1987) 162 CLR 514 the ministerial second reading speech *"unambiguously"* (518) asserted that the relevant part of the defence forces legislation applied to deserters or absentees whether or not they are from a visiting force. Mason CJ, Wilson and Dawson JJ said, 518:

> "But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

28. Similarly, in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the statement by McHugh, Gummow, Kirby and Hayne JJ at [69]-[71] was made in the setting where extrinsic material in the nature of a speech was not being considered, and the material as to the context and purpose of the legislation was the provisions of the legislation (see [47]-[66], noting that no notified policies or ministerial directions (made relevant by s.161 of the legislation) were considered: [62]).

29. Even if it were accepted that there was a broad intention to have a "fully funded" LCS scheme and a "fully funded" CTP scheme, it is doubtful whether such an intention would operate to displace the construction of the legislation that is obtained from review of the terms of the legislation, and the context and the purpose which the terms of the legislation provide. This was in substance what the Court of Appeal did. Hoeben JA acknowledged the extrinsic materials based "fully funded" argument (CA [62]-[64] (AB209)), but preferred a construction reached by reference to the provisions, and their indicators of context and purpose (CA [65]-[74] (AB209-293)), which included a conclusion that s 130A of the MAC Act was aimed at preventing double recovery of damages, and not removing a compensation entitlement, for which "explicit language would have to be used to achieve that result" (CA [72] (AB292)).

30. The "fully funded" argument suffers the illegitimacy identified in *Certain Lloyds Underwriters v Cross* [2012] HCA 56. French CJ and Hayne J, after setting out the applying principles, [23]-[32], and after referring to *Project Blue Sky Inc*, [24] and [25], reminded that, [26]:

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[7] Treating the speech as an objective statement of parliament's intention can itself be a problematic starting point, for reasons including those discussed in cases such as *Harrison v Melhem* (2008) 72 NSWLR 380, [13]-[14] (Spigelman CJ), and (in a constitutional context) *Eastman v The* Queen (2000) CLR 1, [146]-[147] (McHugh J)).

> "[t]he purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions."

31. The "fully funded" argument also suffers the illegitimacy of seeking, as a matter of substance, to use the extrinsic materials to otherwise displace the construction reached by application of the principle of construction to the non-extrinsic materials. In *Certain Lloyds Underwriters v Cross* Kiefel JJ, after referring to *Alcan (NT) Alumina Pty Ltd v Commission of Territory Revenue*, [88], stated, [89]:

> "It is legitimate to resort to materials outside the statute, but it is necessary to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute. An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit."

32. No obligation to pay or compensate the second respondent: The appellant's and the third respondent's competing interpretations both say, in substance, that the second respondent is not required to be paid or compensated (AS [39] and 3R [69]).

33. The appellant's proposition rests on its construction of s 130A (AS [40]), which the first and second respondents' say is incorrect, as developed above.

34. The third respondent's proposition rests on something more opportunistic: by "allocating work" to Mrs Thiering in the third respondent's assessment (pursuant to s 23(1)) of her son's treatment and care needs (3R [27]) it has "provided for" her son's treatment and care needs because "paying for something is not the only way treatment and care needs can be provided for: they can be provided for by a mother (for example) by agreeing[8] to do the acts done that need to be done (and then doing them)" (3R [28]).

35. In substance, the third respondent's position is that if the services are performed without a requirement for payment, there is no obligation to pay or compensate. This is not the operation of s 6(1) which is directed to the obligation to "pay reasonable expenses incurred" "in providing for" treatment and care needs. In respect of the statutory notion of "incurred", if the performance of services is procured and they are performed (as the third respondent relies on in 3R [27] (allocating work to Mrs Thiering in the plan and she does it)) then the expenses for those services have nonetheless been "incurred" (which is in part acknowledged in 3R [27] ("That said, paying for services is the only way in which the Authority provides for such needs").

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[8] The notion of "agreeing" is vexed. A family member "agreeing" to perform services invites inquiry as to the circumstances in which the agreement was procured, and the extent of the family member's true knowledge of his or her entitlement to recompense being waived.

36. Third respondent and costs: The third respondent did not appear at the special leave application and submitted. In the event that the third respondent obtains, or becomes entitled to, a costs order in these proceedings, or the Courts below, against the first and second respondents, the costs order should be met by either the appellant, or the third respondent should be required to give a similar undertaking as that given by the appellant (AB 299.47-55), because of the third respondent's same industry and scheme interest as the appellant.

Part VII: argument on notice of contention or cross-appeal

37. Not applicable.

Part VIII: estimate of number of hours required for the presentation of the first and second respondents' oral argument

38. One hour.

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