PRACTICE UPDATES

Recovering Costs Of Expert Accountant's Reports

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Britz v. J B Davies Enterprises Ptv Ltd (unreported) Pratt DCJ, Brisbane District Court 19.03.93

Plaintiffs often encounter difficulty on taxation, recovering the costs incurred in engaging an expert accountant to prepare calculations of the plaintiff's economic loss. In a recent District Court case in Queenslandwhich resulted in an award of approximately $130,000.00, Pratt DCJ remarked most favourably on the practice of the preparation of such reports:

"As to the remaining heads of past and future economic loss I have been greatly assisted by a report from [chartered accountants] which became Exhibit l0. Such assistance is to be encouraged. The time is long past when Judges of this Court should be expected to flounder about with a mass of material which is not brought together in professional manner. I am prepared to accept the chartered accountant scenario 1 in point of concept and calculation so that one can safely take the figure of about $90,000 as a starting point."

Although this was a high damage case, the plaintiff was an employee rather than self-employed, there seems no basis why the same reasoning can not be applied in cases of smaller losses. The judgment generally lends great assistance to the plaintiff's cause in endorsing the practice of engaging third parties to prepare reports in relation to economic loss. As the current District Court Cost Scale makes no allowance for solicitors carrying out work of that type, it would seem expedient to engage accountants in appropriate cases rather than carry out the calculations themselves.

Recent Workers Compensation Decisions Important for Lawyers in South Australia

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Two recent decisions of the South Australian Full Court are of great importance for South Australian practitioners dealing in the Workers Compensation jurisdiction. Both decisions concern the interpretation of the Third Schedule to the Workers Rehabilitation and Compensation Act 1986 ("the Act"). This schedule is a type of "Table of Maims". Pursuant to Section 43 of the Act injured workers are entitled to lump sum compensation for non-economic loss in accordance with the Third Schedule.

Both Section 43 and the Third Schedule were substantially amended in December of 1992, which amendments were held to be retrospective in Workers Rehabilitation and Compensation Commission v Hoiski (1993) 170 LSJS 130. The effect of the amendments was to make the Third Schedule the complete code for the entitlement to, and calculation of, lump sums for non-economic loss.

The recent decisions of Workers Rehabilitation and Compensation Corporation v Battaglia (Judgment delivered 22nd July 1994) and Workers Rehabilitation and Compensation Corporation v Hann (Judgment delivered 28th July 1994) have made clearer some other consequences of the December 1992 amendments.

In Battaglia the worker had sustained an injury to his back. He had already received some compensation for non-economic loss because of the resultant permanent disability to his back. The Full Court held that he was entitled to further compensation pursuant to the Third Schedule for the permanent loss of capacity to engage in sexual intercourse (even though that loss of capacity was only partial). In other words it was held that for the purpose of the Act the worker had two compensable disabilities for which claims could be made pursuant to Section 43.

The earlier payment for non-economic loss was paid to the worker pursuant to Section 43(3) of the Act. That section was repealed by the December 1992 amendments. However, the case is still of general importance as it clearly follows from the decision that workers with an injury to one part of their body (for example the back) can make a separate claim for the effect their injury has on their ability to engage in sexual intercourse.

This decision is of considerable importance as payments for this disability are potentially very high. Furthermore, although this decision concerned a back injury, there is no reason to restrict the scope of the case to any specific type of injury.

To many this decision will be seen as some form of just offset to other consequences of the 1992 amendments. In particular it is generally believed in the local profession that the effect of those amendments was to reduce considerably the payments received pursuant to Section 43 by some classes of injured workers - in particular those with back injuries. Many practitioners believe that the payouts to workers with back injuries for non-economic loss were reduced by as much as two-thirds. The fact that the amendments were made retrospective only increased the sense of injustice felt by many.

In Hann the worker was not so fortunate. The Full Court held that, as a result of the 1992 amendments, the worker was not entitled to receive a Section 43 payment for a purely "mental" disability. The Court came to this conclusion on the basis that, in the 1992 amendments, the word "mental" was excluded from the Third Schedule which now only makes reference to the impairment of a "physical or sensory faculty".

The decision of the Full Court was clearly based on purely legal grounds and was not in any way a judgment on the reasonableness of this amendment. The result of the decision is that one class of injured workers are clearly discriminated against by the legislation as it now stands.

The position of injured workers with psychiatric disabilities is made even worse by the fact that their entitlement to make a claim for common law damages for pain and suffering was also taken away by the 1992 amendments.

In terms of logic and fairness the present scenario is quite unjustifiable. Whether or not the present Government will move to legislate to correct this anomaly is somewhat debatable given the fact that, to date, they have shown very little sympathy for "stress" claims.

There is a small crumb of consolation. It seems arguable that if a mental disability results in a physical impairment, then that physical impairment is compensable. One obvious example of a physical impairment would be impotency caused by a depressive illness. Another example is that of a somatoform pain disorder. No doubt we can expect some interesting case law regarding what amounts to a "physical or sensory" disability as opposed to a "mental" disability.