Thus, the action will have to be prepared for trial before it is even commenced at great expense to the plaintiffs.

(iii) Plaintiffs will have to allow insurers access to their private records. This includes information from the plaintiff's doctors and employers as well as police, taxation and social security records. These provisions will abolish entrenched common law rights which have been specifically recognised by the High Court of Australia as representing some protection of the citizen, "particularly the weak, the unintelligent and ill informed" - see Baker v. Campbell (1983) ALJR 749

(iv) Cost penalties are imposed upon parties who refuse to make offers, or make offers which are not exceeded in a subsequent trial. This of course, has little or no effect upon an insurer because of their size, but only serves to amplify the fears of any plaintiff about litigation. This scheme will allow insurers to continue to make improperly low offers amounting to unfair compensation.

(v) The Bill provides for an insurer's ability to " "suggest" a claimant undergo particular medical treatment or return to work. This power, if mishandled, constitutes an intrusion into the personal relations between a patient and his doctor and will only aid insurers in "undercover" evidence gathering.

(vi) The Act removes a party's right to trial by jury. Its abolition will do away with one of the most important aspects of our civil justice system.

Conclusion

Like the Motor Accidents legislation which came into effect on 1 September 1994, this proposed legislation will prove to be a dismal failure unless there is a concerted and honest attempt by insurers to comply with the spirit of the Act. Unless insurers abandon their reprehensible conduct of making meagre offers of settlement in circumstances which amount to intimidation of plaintiffs then the process of pre-action preparation of the trial will be a costly waste of time.

Compensation to Relatives: Where the deceased is a high income earner.

Coral Rouse D Colin Albert Shepherd & Ors New South Wales Supreme Court. Badgery-Parker .J. 15 September 1994

Peter Semmler Q.C, NSW

In an 80 page judgment which will be of specific interest to New South Wales practitioners so far as the construction of local legislation is concerned, but also of more general application in the assessment of damages under Compensation to Relatives legislation in other states, Badgery-Parker J. in the New South Wales Supreme Court awarded $3,092,321.00 to the widow and four children of a deceased medical practitioner on 15 September, 1994.

The claim arose out of an accident on the Princes Highway on the south coast of New South Wales on 20 June 1989. The plaintiff sued the driver of a vehicle in which the deceased was a passenger together with the driver of another vehicle with which it collided as well as the New South Wales Roads and Traffic Authority which, it was alleged, negligently carried out road work in the area where the accident occurred. After two days of evidence on the liability issue counsel for each of the defendants admitted liability.

The case is important for New South Wales lawyers because it is authority for the proposition that even for accidents involving motor vehicles occurring after 1 July 1987, if it can be established that a tortfeasor is negligent otherwise than as owner or driver (in this case on the basis of negligent road construction) then the damages assessed against that tortfeasor are not caught by Section 69 or Part 6 of the Motor Accidents Act. They are to be assessed according to common law principles and in particular using the 3% discount tables rather than the 5% tables.

In this case because of the sums involved the plaintiff recovered nearly $600,000.00 more against

the Roads and Traffic Authority (against whom damages were assessed according to common law principles) than she recovered against the drivers of the vehicles involved, in respect of identical losses, because the damages recoverable against the drivers were restricted by Part 6 of the Motor Accidents Act.

The case is also of interest so far as the claim for the cost of funds management was concerned. On behalf of the plaintiff it was put, by analogy to the principle applying to personal injuries cases recently enunciated in Nominal Defendant v Gardikiotis (New South Wales Court of Appeal, unreported, 19 May 1994) that the plaintiff widow and her children, although not mentally impaired as a result of the accident, ought to be entitled to recover the cost of management of the sum awarded for lost dependency. This claim was rejected by the trial judge. He distinguished a claim under the New South Wales Compensation to Relatives Act from a claim at common law for personal injuries so far as the entitlement to the cost of funds management was concerned. He further noted that the Damages (Infants and Persons of Unsound Mind) Act 1929, whilst providing for the management of funds, made no provision for costs incurred in the management of the minor's funds by the Public Trustee to be recoverable from a tortfeasor. On this basis also he rejected the claim.

The case is also of general importance because it analyses in detail the principles applicable to the assessment of damages for lost dependency in a case where the deceased was a self-employed high income earner and where his financial affairs were regulated, and the dependents derived their support, through the medium of a medical practice company and a family trust.

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Leonie Wynn v. New South Wales Insurance Ministerial Corporation

(Unreported, New South Wales Court of Appeal, 11 August 1994)

Peter Semmler Q.C, NSW

A decision which will be of particular concern to plaintiff lawyers representing women was handed by the New South Wales Court of Appeal on 11 August 1994. It concerned a claim by a female executive of the American Express Corporation who had been injured in a motor vehicle accident on 23 November 1986. She had been awarded the sum of $990,547.00 for future lost earning capacity by a judge of the New South Wales District Court. Those damages included an allowance of $705,980.00 for lost earning capacity in the future. That allowance was reduced by the Court of Appeal to $411,350.00 and the overall verdict was reduced by nearly one third to $678,334.00.

The plaintiff had testified that despite the long hours which her employment demanded, and the stress and responsibility associated with it, she intended to pursue her career as far and as long as possible. The trial judge found it was quite probable, but for her injuries that she would have risen beyond her position as Director of Customer Services with American Express at the time of her trial ultimately to the position of Vice President of the company.

Although the plaintiff and her husband had no children at the time of the trial, evidence was given by them both that they intended to have one and possibly two children in the future. The plaintiff testified that she would have arranged for her child to be cared for by a full time nanny with assistance from her mother-in-law until the child was old enough to attend a child minding centre. No deduction from the damages awarded had been made on this account by the trial judge.

In the Court of Appeal, Handley J.A. observed at page 11: