Writs on the off-chance that later enquiries may turn up something on which a claim might be based. When the Writs were issued, there were good grounds for advancing a claim against the auditors sufficient to enable a claim to be made. The reason for awaiting an expert's report before the Statement of Claim was filed was to assess the strength of the case and to ensure that it was formulated in a proper way. The application to strike out the proceedings was, therefore, dismissed.

The disparity in viewpoint which emerges is that the Queensland authorities seem to suggest that the party issuing the Writ will have difficulty in showing there has been reasonable excuse for the action taken. The statement by Dowsett J. in the *Clarke* case (supra) appears to go one step further than even the other Queensland authorities, and declares it to be an inappropriate practice to issue a Writ without the intention of serving it. Allied with that is what appears to be, in His Honour's view, an obligation on the part of any party who issues a Writ to serve it as soon as reasonably practicable. The consequence of failure to do so would presumably be that the Writ would be liable to be struck out later as an abuse of process, and renewal of the Writ, at the point where it was about to become stale, would be out of the question.

The Brain Injured Plaintiff: Evidentiary Issues

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Background

The forensic investigation and proof of the existence, nature and extent of subtle brain damage has become an essential part of the armoury of the personal injury lawyer, and been the subject of previous comment by Everingham in this Newsletter. (*APLA Update*, no. 5, August 1994, pp 14-15. and October 1994, pp 3-4)

In this note, we wish to outline a recent decision of the NSW Court of Appeal, *New South Wales Medical Defence Union Ltd v Crawford [No. 2]; New South Wales Medical Defence Union Ltd v Bailey [No. 2]; Bailey v Crawford [No. 2]*, CA 40128/92, 40127/92, 40134/92, decided 30/6/94 (Kirby P & Sheller JA; Mahony JA dissenting) still unreported, which we believe to be the first time that a superior court in Australia has analysed in depth the forensic application of the current state of clinical and scientific knowledge and opinion concerning subtle brain damage.

By way of background, we should explain that *Crawford* is a test case on a variety of legal and factual issues arising out of 'deep sleep' and associated treatment given at the former Chelmsford Private Hospital. Some of those general issues were reviewed by Bates in an earlier Newsletter (No. 3 April 1994) . The *Crawford* appeals were so large and complex that they were divided into separate, but overlapping, hearings in the Court of Appeal, and judgments were delivered after each stage, see *(New South Wales Medical Defence Union Limited v Crawford (1993) 31 NSWLR 469 (CA) , Crawford [No. 2]* (see above) *& New South Wales Medical Defence Union Ltd v Crawford [No. 3]; New South Wales Medical Defence Union Ltd v Bailey [No. 3] 23.9.94* unreported; *CA* . On 1 June 1995 the High Court of Australia reserved judgment on a selected number of the legal issues, which will not be considered here. However, the issues to be outlined in the present note, touching the forensic methodology in subtle brain damage litigation, were

not included in the more limited legal issues that were argued in the High Court. The decision of the Court of Appeal on subtle brain damage was not appealed, and is final.

Discussion

In *Crawford [No. 2]* the Court of Appeal by a majority (Kirby P, Sheller JA; Mahoney JA dissenting) dismissed appeals by the Estate of the late Dr Bailey and his professional indemnity insurer from a judgment of Enderby J given in favour of Crawford on 28 February 1992. The plaintiff at the trial (the respondent in the appeals), Maxwell Duncan Crawford had been a patient of the late Dr Harry R. Bailey. Crawford was admitted to Chelmsford Private Hospital on Christmas Day 1973 according to Dr Bailey's clinical notes suffering from anxiety, and was hospitalised there for a month until 25 January 1974. Crawford was subjected to a course of deep sleep treatment ('DST') and electroconvulsive therapy ('ECT'). Whilst a patient, it was alleged that he suffered various injuries, the main ones being subtle anoxic (oxygen deprivation) brain damage and foot drop. The plaintiff's wife and mother gave evidence to the effect that they had noticed significant changes in the plaintiff's behaviour and personality from that time, and changes were also noted by a fellow employee who had worked under Mr Crawford before admission to Chelmsford. After Chelmsford, due to Crawford's inability to perform adequately at work, there was role reversal and the former subordinate was placed in a position of authority over Mr Crawford. The plaintiff thereafter suffered many changes of employment, his domestic life deteriorated, and as a result of argument his wife left the matrimonial home in South Australia and they were subsequently divorced. About this time the plaintiff experienced signs that bespoke the onset of schizophrenia. At trial it was said that the plaintiff spent much time "listening to his voices" which commanded him in what to and, what to eat.

The allegation of brain damage was strenuously denied by the Bailey Estate and Dr Bailey's former professional indemnity insurer, and the case as tried included a most rigorous and careful examination of a history which spread over the plaintiff's life from his birth in 1947 up to his treatment at Chelmsford in 1973/74 and the seventeen years thereafter to the trial (1990-91). Extensive expert evidence on the brain damage issues was called on both sides from most highly qualified psychiatrists and neuropsychologists. This is not unusual at first instance, but what was remarkable was that on appeal in *Crawford [No. 2]* this aspect of the litigation was analysed so fully and comprehensively.

Sheller JA gave the main majority judgment concerning the brain damage issue. His Honour reviewed the plaintiff's family history and the three diagnostic possibilities which could explain the condition which took the plaintiff into the Chelmsford Hospital. In the greatest possible detail Sheller JA reviewed the treatment at Chelmsford and the changes in behaviour before and after Chelmsford. Sheller JA also considered the function of an appellate court in reviewing trial findings in this area (at pp38-45, 60-61), and there is a handy review of the cases in that portion of his judgment. (See also *Voulis v Kozary (1975) 180 CLR 177* reported only recently although decided many years ago.) On this point Sheller JA concluded:-

> "It is for the appellants to show that he (the primary judge) acted on evidence which was inconsistent with facts incontrovertibly established by the evidence, or which was glaringly improbable".

Subtle brain damage cases often turn very much on lay evidence to corroborate changes in behaviour and personality that date from the time of the incident, which were recorded by Sheller JA (at pp 2-23, 47-53), and in that respect Sheller JA (at p 45) applied the dictum of Murphy J in *Tubemakers of Australia Ltd v Fernandez (1976) 50 ALJR 720* at p 725 that-

> "If expert evidence establishes that the relationship is possible (that is, it is a reasonable hypothesis or one consistent with scientific knowledge) the proof to the required standard (civil or criminal) that the relationship existed in the case under consideration may then be achieved by further evidence (expert or non-expert)".

Sheller JA also cited (at p 46) *EMI Australia Limited v Bes [1970] 2 NSWLR 238, 242* per Herron CJ who said that:

> "... if medical science is prepared to say

> that it is a possible view, then ... the judge after examining the lay evidence may decide it is probable. It is only when medical evidence denies that there is any connexion that the judge is not entitled in such a case to act on his own intuitive reasoning."

In analysing all of Crawford's symptoms and signs before and after Chelmsford, Sheller JA said that it was open to the primary judge to accept expert evidence on the plaintiff's side that these were confirmation of brain damage even though they departedfrom the "classical pattern for the evolution of brain damage" (p 51).

The Court of Appeal also upheld the primary judge's finding that the brain damage later caused Crawford to become schizophrenic (see Sheller JA at pp 37-38, 58-59).

There is also a lengthy analysis of the psychometric evidence, on which there was much conflict between neurosychologists, see Sheller JA at 54-58 (with whom Kirby P concurred at pp 16-17); see Mahoney J's dissenting views on that topic at pp 21-25.

In summary, any trial lawyer preparing a case on subtle brain damage will find much assistance in these judgments on the prosecution or defence of such claims.

Income Tax Charge Notices May Affect Lawyers' Costs Recovery in Personal Injury Actions

Kate Hendry, Qld

Section 218 of the Income Tax Assessment Act provides:

218(1) The Commissioner may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the taxpayer at his last place of address known to the Commissioner), require:

(a) Any person by whom any money is due or accruing or may become due to a taxpayer;

(b) Any person who holds or may subsequently hold money for or on account of a taxpayer;

(c) Any person who holds or may subsequently hold money for or on account of some other person for payment to a taxpayer; or

(d) Any person having authority from some other person to pay money to a taxpayer, to pay to the Commissioner, either forthwith upon the money becoming due or being held, or at or within a time specified in the notice (not being a time before the money becomes due or is held)

(e) So much of the money as is sufficient to pay the amount due by the taxpayer in respect of tax or, if the amount of money is equal to or less than the amount due by the taxpayer in respect of tax, the amount of money; ...

The section further provides that a person who refuses or fails to comply with a s218 Notice is guilty of an offence, and the person making payment pursuant to the Notice is deemed to have been acting under the authority of the taxpayer and of all other persons concerned and is indemnified in respect of such payment.