Nowlin Pty Limited v Robson Robson v GIO Australia Ltd

MAA NSW Servitium Claims

Bill Madden, Blessington Judd, NSW

For some time a degree of uncertainty has existed regarding the availability of a claim under the Motor Accidents Act action *per quod servitium amisit*.

The issue came before Acting Justice Hamilton as a question of law tried separately from other issues in the proceedings and judgment was delivered on 30 October 1996.

Nowlin Pty Limited was the employer of Margaret Craig who was also a director and shareholder of the Plaintiff company. Mrs Craig was injured in an accident on 6 October 1990 and thereafter alleged that she was unable to work for and on behalf of the Plaintiff company and thus unable to produce income for it.

The Court found that the answer required consideration of the width of the term "liability in respect of the death of or injury to a person" which appears in Section 9 and Schedule 1 of the Transport Accidents Compensation Act 1987. The Court found some assistance from the High Court in Crittenden's case in deciding that the phrase did encompass servitium claims. The insurer contended that, even if liability in an action *per quod servitium amisit* could be characterised as being "in respect of ... an injury" it nevertheless fell outside the scope of the CTP policy for a number of reasons.

1. The liability arose under a Contract or Agreement between the Plaintiff and its employee and thus is excluded by Section 16(b). The Court disagreed.
2. Section 70 of the Act expressly prohibits any award of damages in respect of an accident other than in accordance with Part 6 of the Act. The Court held that Section 70 was not an exhaustive, but rather the legislation restored common law rights subject to limitations and variations imposed by Section 70.
3. There are a number of provisions of the Act which are consistent only with the concept of both the injured person and the claimant being limited to natural persons and not corporations. The Court did not accept that submission and noted that a *servitium* claim could just as easily be brought by an employer who is a natural person.
4. In a servitium claim, there would be no reduction for the contributory negligence of the employee which was inconsistent with the legislative scheme established by the Act. The Court did not accept the primary assertion that damages in such an action are exempt invariably from apportionment for contributory negligence.
5. An employee has a statutory right to recover any compensation paid to any employee under Section 151Z(1)(d) of the Workers Compensation Act 1987 and the provision of the special statutory right of recovery excludes any wider right at common law. The Court noted that an equivalent section existed in the previous Workers Compensation Act and rejected the proposition.
6. There was no appropriate claim form for actions *per quod servitium amisit*. The Court unsurprisingly held that the statute cannot be interpreted by reference to the lack of a claim form.