amended by s 154A) operated.[3] Therefore, s 154A did not alter or vary the order made by McInerney J, and so the constitutional question did not arise.

Chief Justice French agreed with the reasons in the joint judgment.[4] His Honour also emphasised that there is a 'clear distinction' between the judicial function exercised by judge in imposing a sentence, and the administrative function exercised by a parole authority in determining whether a person eligible for release on parole should be released.[5] His Honour observed that s 154A imposed strict conditions upon the exercise of *executive* power to release Mr Crump, and it thereby altered what had been the statutory consequences of the sentence imposed by McInerney J. However, his Honour concluded, contrary to Mr Crump's case, that s 154A did not alter the legal effect of the sentence.[6]

Justice Heydon held that the only consequence of McInerney J's determination of a minimum term was that it created an opportunity for a parole application in November 2003 under the legislative scheme governing parole applications, and s 154A only operated on such a parole application, by altering the conditions which must be met before Mr Crump could be released on parole. Section 154A did not deal with the sentence determined by McInerney J, and it therefore did not alter any rights or entitlements created by his Honour's order.[7]

Having concluded that s 154A did not have the effect contended for by the plaintiff, it was unnecessary for the High Court to embark upon any analysis to identify what limits Ch III of the *Constitution* might impose upon a state parliament's power to legislate in a manner which alters or varies orders made by a court.

Endnotes

1. *Crump v State of New South Wales* [2012] HCA 20 at [48] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
2. *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 102, 112, 138.
3. *Crump v State of New South Wales* [2012] HCA 20 at [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
4. *Crump v State of New South Wales* [2012] HCA 20 at [5] per French CJ.
5. *Crump v State of New South Wales* [2012] HCA 20 at [28] per French CJ.
6. *Crump v State of New South Wales* [2012] HCA 20 at [35] per French CJ.
7. *Crump v State of New South Wales* [2012] HCA 20 at [70]-[72] per Heydon J.

Motor accident compensation

Daniel Hanna reports on the decision in *Nominal Defendant v Wallace Meakes* [2012] NSWCA 66 (4 April 2012)

On 4 April 2012 the NSW Court of Appeal delivered a leading decision on section 34 of the *Motor Accidents Compensation Act 1999* (NSW). It is also the first major decision on the 'due inquiry and search' test in Nominal Defendant cases since 1975.

Background

Wallace Meakes, a solicitor, was injured on 1 August 2008. He was a pedestrian who was attempting to cross Park Street, near the corner of Elizabeth Street in the Sydney CBD. It was 4.00pm and the traffic was congested. Being in a hurry to get to an appointment, he did not check the pedestrian signals before crossing.

Just before Mr Meakes completed his crossing, he was hit by a car. The driver stopped, got out of the car and spoke with him. Mr Meakes then left the accident scene. He did not take down the details of the car or driver before leaving. A few days later he reported the accident to the police and returned to the scene to find witnesses. A couple of employees at the nearby Starbucks had seen the accident, but nobody had taken down the registration details of the car.

Section 34(1) of the *Motor Accidents Compensation Act 1999* (NSW) provides that an action for the recovery of damages in respect of death of or injury to a person caused by the fault of the owner or driver of a motor vehicle may, if the identity of the vehicle cannot be established, be brought against the Nominal Defendant. However, subsection (1AA) provides that a claim cannot be made against the Nominal Defendant under s 34 unless due inquiry and search has been made to establish the identity of the motor vehicle concerned.

In the District Court trial the Nominal Defendant, represented by Allianz, contested due inquiry and

search on the basis that the plaintiff should have taken the driver's or vehicle's details down before leaving the scene.

Judge Levy SC found that due inquiry and search had been established. He excused the failure to take down the car's details on the basis that Mr Meakes did not think he was severely injured until some time later. He also found Mr Meakes to be justifiably unaware of the legal requirements of making a claim, despite both being a solicitor and having a prior motor accident claim in which he had obtained the other driver's details.

Appeal

The appeal judgment of Sackville AJA (with whom McColl and Basten JJA agreed) explored the history of the 'due inquiry and search' test, dating back to *Blandford v Fox* (1944) SR (NSW) 241 and *Harrison v Nominal Defendant* (1975) 7 ALR 680. It affirmed the following principles:

- It is a plaintiff's duty to prove that due inquiry and search has been performed;
- The level of search and inquiry required is what is 'reasonable' in the circumstances of the accident, and in the situation of the plaintiff after the accident;
- To be 'reasonable' the effort must be 'as prompt and thorough as the circumstances will permit... The inquiries must be set on foot before the scent is cold...';
- The concept of 'due' search cannot be applied stringently – it does not mean that every single path must be followed;
- The test can be satisfied if, in the circumstances, no search or inquiry is performed but no such efforts could be expected to reveal the information in any case;
- A finding by a trial judge that the vehicle's identity cannot be established as required by the section should not easily be set aside on appeal.

Appellate interference was justified in this case because Levy DCJ had applied the wrong reasoning process. Instead of asking whether the positive duty had been met, he found that it was 'understandable and excusable' for the plaintiff not to have made the inquiry.

The court went a little further. Paragraph 71 of Sackville AJA's judgment is critical:

> In assessing 'due inquiry and search' that should have been undertaken in this case it is appropriate to treat the respondent as a *reasonably informed member of the community*. Such a person could be expected to know that a victim injured in a motor vehicle accident, where another person is at fault, may be able to claim compensation from the person at fault. Where the victim is a pedestrian, a reasonably informed member of the community could be expected to appreciate that it is important to obtain the registration number of the vehicle and, if possible, the details of the driver in order to pursue any claim for compensation. [emphasis added]

Applying those principles to Mr Meakes, the Court of Appeal found that a reasonable person in his position would have taken down the offending vehicle's details. The factors they found telling were:

- The ease with which the plaintiff could have recorded the details. The driver approached him. He had a pen and paper in his briefcase. He agreed in evidence that it would have been a simple thing to record the number plate;
- The plaintiff must have been aware that he was injured, despite his value judgments about the extent of his injury;
- The plaintiff was not so injured as to prevent him writing down registration details, which would have taken no more than a few seconds; and
- To find that the plaintiff had satisfied section 34 in this situation would come close to undermining it and depriving it of any real utility.

The District Court verdict, originally totalling $433,565 plus costs, was overturned and replaced with a verdict for the defendant, with the plaintiff/respondent to pay the costs in both the lower court and appeal proceedings.

Commentary

This case should become a benchmark for the 'due inquiry and search' provisions of the *Motor Accidents Compensation Act 1999* (NSW), and similar provisions in other statutory schemes. The court's findings about what an objective 'reasonably informed member of the community' should know about a right to claim also break new ground. How that concept will be applied to other claim situations remains to be seen.