Motor Accident Insurance Act (Qld)

Seeking leave to proceed pursuant to section 39(5)(c)

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The District Court of Queensland has recently considered two originating applications in which the applicant/plaintiff has sought the Court's leave to commence proceedings pursuant to Section 39(9)(c) of the Motor Accident Insurance Act against the driver of a motor vehicle and the CTP insurer of the motor vehicle.

Section 39(5) relevantly provides:

"The claimant may bring a proceeding in a Court for damages based on a motor vehicle accident claim only if-

(c) The Court gives leave to bring the proceeding despite non-compliance with requirements of this division"

In both cases before the District Court, the Applicant failed to comply with Section 37(2), which required a Notice of Claim to be given within 9 months after the motor vehicle accident or the first appearance of symptoms of the injury.

Accordingly, Section 39 of the Act imposes a bar to commencing proceedings as does the provisions in the *Limitation of Actions Act 1974* (Qld). Accordingly, the circumstances in which Section 39 operates to remove a claimant's common law right to bring a proceeding should be strictly construed as was stated by Her Honour Justice White of the Supreme Court in the matter of *Re Tonks* (number 4695 of 1998, 24 June 1998 unreported).

The two recent decisions before the District Court were *Re Rowe* (2673 of 1999) and *Re Johnstone* (2873 of 1999, 16 July 1999).

In the matter of *Re Rowe*, His Honour District Court Judge Brabazon QC did not grant the applicant leave to proceed pursuant to Section 39(5)(c). In that matter, the Applicant was a police officer who first injured his back in or about 1994 and then was involved in approximately four other motor vehicle accidents. His Honour held that the insurer would be prejudiced if leave was given as the insurer had not had the opportunity to have the Applicant medically examined by an orthopaedic surgeon prior to two further car accidents and several exacerbations of the injury.

The matter of *Re Johnstone* came before His Honour District Court Judge Trafford-Walker and His Honour distinguished *Re Rowe* on the basis that the Applicant before him was only involved in two car accidents: the one before His Honour in July 1996 and a further one on 12 June 1999.

In *Re Johnstone*, the Applicant gave several reasons for not complying with Section 37 in delivering the Notice within nine months of the accident, being that he believed he would make a full recovery, he travelled overseas shortly after the accident and he broke up with his girlfriend.

The insurer argued that these reasons were insufficient, but His Honour held that the reasons were sufficient and commended the Applicant for not clogging up the Court system and claiming against the insurer, believing that he would make a recovery.

The insurer also relied on *Re Rowe* and argued that it was prejudiced because it did not have the opportunity to have the Applicant medically examined before the second car accident and accordingly, it would now be difficult to determined the percentage of bodily impairment caused by each accident. His Honour said that the insurer was not so prejudiced, it was the Applicant because he held the burden of proof in relation to his injuries and their cause.

The insurer also argued that the trial would be lengthy, as the Court would be asked to "disentangle the Applicant's symptoms". Again His Honour rejected this argument, stating that the Court often faced Plaintiff's involved in several accidents and it was uncommon for orthopaedic surgeons to provide reports differentiating between each accident.

His Honour Judge Trafford-Walker granted the Applicant leave to proceed. ■

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