Who's to blame and what are the limits?

Zurich Australian Insurance Ltd v Pellegrino [2010] NSWSC 1114

By Paul Byrne

Mrs Pellegrino was injured in three separate accidents in 1987, 2002 and 2005. Following her first accident, Mrs Pellegrino was assessed as having an intermittent but persistent injury that necessitated periodic treatment, which was continuing at the time of her second accident in 2002. In making an assessment of Mrs Pellegrino's injuries related to the second accident (the Zurich accident), and third accident (the NRMA accident), the assessor made an allowance for the injuries sustained in the 1987 accident by reducing the overall damages by 15 per cent. The Claims Assessment and Resolution Service (CARS) assessment determined that the Zurich accident, while being relatively minor, had aggravated an existing condition but that Mrs Pellegrino had retained relatively normal function and managed to continue with everyday work and personal and domestic activity. However, the NRMA accident increased the intensity of her existing condition and resulted in the development of a psychological condition that prevented her from returning to her work.

In these proceedings, Zurich was seeking an order that the decision of the CARS assessor be set aside in relation to the accident claims brought by Mrs Pellegrino, arguing that the decision should be set aside due to an error based on s69 of the *Supreme Court Act* 1970 (NSW).

JUDICIAL REVIEW

In making its judgment, the court considered the question of judicial review generally and therefore its jurisdiction. In considering this question His Honour, Harrison AsJ, noted that the court under s69 of the *Supreme Court Act* 1970 (NSW), has the power to, 'grant any relief or remedy in the nature of a writ of *certiorari* which includes the jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record'.[1]

When the question of judicial review arises, the court must consider the limits of its action. In particular, it must be aware that its duty and jurisdiction to review administrative action is limited only to the enforcement of the law that governs the exercise of the repository's power. It is not the role of the court to provide a remedy for administrative error or injustice, as this is the role and function of the tribunal or administrative body alone. These principles have been applied by the High Court in a number of decisions that have established the limits of judicial review. In the *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986), the limited role of the court was emphasised, the judgment containing a clear statement that highlighted that the court has no role in substituting its decision for that of the tribunal.[2]

In instances where an administrative tribunal does make an error at law, the court has the power to grant relief in the nature of *certiorari*. However, this does not allow the court to undertake a general review of the order or decision made by the tribunal, nor does it allow for a substitution of the order or decision that the court thinks should have been made. It provides only for the quashing of the order, or decision, based on a number of established grounds – jurisdictional error, denial of procedural fairness, fraud and error of law on the face of the record.[3] These grounds may potentially overlap and the court may undertake a review of a particular case on a number of these grounds. In making its decision based on these elements, the court may avoid injustice or error. However, this cannot be its sole intention, as it is beyond its jurisdiction to consider.

APPORTIONMENT OF DAMAGES

In its submission, Zurich argued firstly that the apportionment of damages between the two accidents (the Zurich and NRMA accidents) was based on an error of law. Secondly, should that review fail, Zurich argued that the CARS assessor in making his decision had erred in law in that he did not calculate damages correctly.

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In considering how to assess damages, the CARS assessor considered whether Mrs Pellegrino's entitlement should be determined by way of independent award for each accident or as a whole for both accidents, after which responsibility should be apportioned between the two accidents whether it be by way of all, or some, heads of damage. Given the degree of overlap of injuries between the two accidents, the assessor determined the second option to be preferable and apportioned damages accordingly.[4] Zurich submitted that the assessor had made an error at law in not making an assessment in relation to each accident.

In considering Zurich's claim, the court indicated that the assessment of damages is not an exact science, and referred to previous decisions that supported this conclusion (see *Oakley*,[5] *Barbaro*[6] *and Aboushadi*,[7] in which approaches to the assessment of damages were identified). From these cases it has been established that where a further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage is greater because the earlier injury has been aggravated, the damage from the injury should be treated as the defendant's negligence.[8] The overall damage can be calculated and then apportioned between the tortfeasors.

The court found that there had been no error in law, nor did it find any jurisdictional error in the assessor's approach. The appeal was dismissed. ■

Notes: **1** *Zurich Australian Insurance Limited v Elizabeth Pellegrino; Elizabeth Pellegrino v NRMA Insurance Australia Ltd* [2010] NSWSC 1114 at 4. **2** *Ibid* at 5. **3** *Ibid.* **4** *Ibid* at 21. **5** *Ibid* at 31. **6** *Ibid* at 32. **7** *Ibid* at 34. **8** *Ibid* at 43.

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Insurance contract read down – indemnity upheld

Dargham v Kovacevic [2011] NSWSC 2

By Shane Dawson

Justice Hislop of the NSW Supreme Court awarded damages to the plaintiff, Fadi Dargham, after he suffered a fall while working as a labourer on a building site. His honour found the owner-occupier of the site, Sibin Djuric, liable for the plaintiff's injuries. The Court also upheld a cross-claim by Mr Djuric against his insurer, Mecon, ordering the insurer to indemnify Mr Djuric for the damages.

THE PLAINTIFF'S CLAIM

The plaintiff was injured in 2005 after slipping and falling down a partially constructed stairwell, which essentially consisted of an unfenced void in the second floor, with a plank and some plywood covering an estimated third of the void. The floor was wet with dew, and Mr Dargham slipped on to the covering plywood, which gave way under his weight, and he fell down the stairwell. He suffered injuries