

protect those insured vehicles and drivers against liability to pay damages for common law and statutory causes of action which the law defines as a tort or other civil wrong.

- If the QLD Parliament had intended a gap to exist so that a QLD driver would be liable for damages for 'special entitlements' personally under MACA, it would have been expressed within the words of the statute or elsewhere.

The QLD statutory policy was accordingly held to respond to s7J MACA claims.

The same principle would presumably apply to 'blameless

accidents' under s7B of MACA, where a claim is also founded on 'deemed fault'.

This decision has avoided the potential liability of all drivers of QLD-registered vehicles entering NSW for driving uninsured and unregistered vehicles. Under s10 of MACA, to be recognised in NSW, a policy must cover liability in any part of the Commonwealth. If the QLD policy did not, then the vehicle would be uninsured in NSW. If uninsured, then the registration is also invalidated. NSW has clearly lost a large potential source of revenue! ■

Case changes lifetime care and support scheme

Re *Thiering v Daly* [2011] NSWSC 1345

In this case, at issue was whether a plaintiff who was a permanent member of the Lifetime Care and Support Scheme (LTCS), and who had been assessed as requiring sleepover care from his mother, was entitled to compensation for the mother's services.

The plaintiff was an accepted lifetime participant in the LTCS Scheme, intended to provide lifetime care and support of catastrophically injured individuals. The LTCS Authority decided that it would expect his mother to provide at least eight hours of care each day uncompensated to meet the assessed need. Section 128 of MACA entitles an injured plaintiff to damages for gratuitous services but limits the amount recoverable. Section 130A provides that:

'No damages may be awarded to a person who is a participant in the Scheme ... for economic loss in respect of the treatment and care needs ... that relate to the motor accident injury in respect of which the person is a participant in that Scheme and that are provided for or are to be provided for while the person is a participant in that Scheme.'

Garling J drew attention to the obligation under the *Motor Accidents (Lifetime Care and Support) Act 2006* s6(1) '... to pay the reasonable expenses incurred by or on behalf of a person while a participant in the Scheme in providing for such as the treatment and care needs of the participant as related to the motor accident injury ... and as are reasonable and necessary in the circumstances'.

However, clause 6 of the LTCS Scheme Guidelines expressly prohibits compensation for family members or friends who may be employed to provide services only in exceptional circumstances, and then only through an employment contract with a provider. The Guidelines gratuitously add:

'The Authority will not fund attendant care services that are provided by family or friends ... where the Authority has not approved the need for care ... The Authority will not fund a family member or friend to provide inactive

sleepovers.'

Garling J said there were three possible interpretations of the position:

- (a) Gratuitous damages remain outside the LTCS Scheme and are recoverable from the CTP insurer in the usual way.
- (b) Gratuitous damages are wholly subsumed by the LTCS Scheme and are no longer available to a claimant who is a lifetime participant.
- (c) Gratuitous damages are available, but only up to the date of judgment or assessment and thereafter are not recoverable as damages once the services are to be provided under the LTCS Scheme.

After considering the purposes of the Scheme, including the Second Reading Speech, Garling J concluded that although the Guidelines are generally valid [131], the guideline representing Part 8 that prevents compensation for gratuitous services by family members or friends cannot be supported because it is inconsistent with the requirements to meet the participant's needs, particularly where the plan to meet those needs expressly refers to those particular services [138].

Garling J concluded that the appropriate approach was option (c) [144-6]. This means that the plaintiff is entitled to sue for compensation for gratuitous services provided (and such services will not be limited by s128 in terms of quantum [153]) up until the date when damages are awarded or assessed. However, for the future, there will be no compensation for gratuitous services but the obligation lies with the LTCS Authority to provide that which is reasonable and necessary.

In respect of services that have been provided in the past, a claim may be made for them on a *quantum meruit* basis. The sum recoverable will not be restricted in the manner provided in s128 of MACA.

The right to damages for past gratuitous services has now been removed by legislative amendment. ■