

12 December 2011

Insurance Law Case Note

Lifetime Care and Support Scheme Participants - the complex nature of claims for gratuitous services

Update - *Thiering v Daly* [2011] NSWSC 1345

The matter was last before the Court on 9 December 2011. Orders have not yet been made by his Honour Justice Garling and judgment has been reserved. The Lifetime Care and Support (LCS) Authority has however lodged a Notice of Intention to Appeal.

Decision

Damages for gratuitous care are available under Section 128 of the *Motor Accidents Compensation Act 1999* (MACA) but only up to the date of judgment or settlement of the damages claim where gratuitous services have in fact been provided to the claimant and have not been paid for under the LCS Scheme. They are not available after that time in respect to any services which are to be provided in the future.

Implications of the decision

- If a provider of gratuitous care makes a successful claim on the LCS Authority (encouraged to do so by the fact that Section 128 of the MACA does not apply to assessment of those services), then those services "...are provided for ..." by the LCS Scheme and, accordingly, there would be no entitlement under Section 128 of the MACA.
- If a provider of gratuitous care does not make a successful claim on the LCS Authority, then the decision supports a claim for gratuitous care damages (referred to as G v K damages) by the claimant under Section 128 of the MACA but only up to the date of judgment or settlement of the damages claim where gratuitous services have in fact been provided to the claimant. The CAN assessment would be relevant in considering gratuitous services in fact provided.
- G v K damages are not available under Section 128 of the MACA after judgment or settlement in respect to any services which are to be provided in the future, whether by way of paid care or gratuitous care.

- If a provider of gratuitous care is successful in substantiating a debt due by the LCS Authority relying on the principles of quantum meruit, assessment of that debt would be included in any recovery action by the Authority at least against an interstate CTP insurer/scheme, unconstrained by Section 128 of the MACA. In this way, any recovery would be inflated in comparison with the normal assessment under the MACA.

Conclusions

The decision highlights the risk to CTP insurers that, despite the intention of the LCS Scheme to cover treatment and care needs for those severely injured in motor accidents in NSW, G v K damages will still be awarded under the MACA.

It remains to be seen whether a provider of gratuitous care to a LCS Scheme participant will be successful in substantiating a debt due by the LCS Authority relying on quantum meruit principles.

In any event, legislative amendment as suggested by his Honour Justice Garling may be required to ensure clarity of interpretation of the *Motor Accidents (Lifetime Care and Support) Act 2006* (LCS Act) and the MACA, in particular regarding G v K damages.

The decision in detail

The recent decision of his Honour Justice Garling in the Supreme Court of NSW in the matter of *Thiering v Daly* [2011] NSWSC 1345, handed down on 11 November 2011, considered the entitlement of a LCS Scheme participant to claim for gratuitous services provided while they are a participant in the LCS Scheme. The Court considered claims by both the injured claimant, who had suffered quadriplegia in a motor vehicle accident, and his mother, who had been providing him with gratuitous care.

His Honour Justice Garling, in reaching his conclusions, considered that there were 3 possible ways of the legislation, being the LCS Act and the MACA, operating so far as G v K damages are concerned:

1. G v K damages remain outside the LCS Scheme and are at the direct expense of the CTP insurers in the usual way;

2. G v K damages are wholly subsumed by the LCS Scheme and are no longer available to a claimant who is also a lifetime participant in the LCS Scheme; or
3. G v K damages are available but only up to the date of judgment or settlement of the damages claim where gratuitous services have in fact been provided to the claimant, and have not been paid for under the LCS Scheme. They are not available after that time in respect to any services which are to be provided in the future.

Of note, his Honour specifically commented that it was apparent that none of these options easily sat with all provisions of the legislation and that clearly it was necessary for the legislation to be reviewed and amended to make plain which of these possible options is the one which reflects the intention of the legislature.

Seeking to find an interpretation which best fulfils the purpose of the legislation, his Honour concluded that the correct option for the interpretation of this legislation is the third option detailed above.

In summary, his Honour found that:

- Section 6 of the LCS Act identifies an obligation upon the LCS Authority to pay for expenses incurred by or on behalf of a participant, or monies for which a legal liability exists to pay.
- Where the LCS Authority has not paid for care provided gratuitously under Section 6 of the LCS Act and there is no accepted or proved legal obligation to pay for that care (for example, as a debt based on a claim by the provider of the care assessed on quantum meruit principles), then the services when delivered prior to an assessment date, have not been "...provided for..." as noted in Section 130A of the MACA and damages can still be recovered under the MACA for such services.
- However, since such services are a necessary part of the treatment and care needs of the participant, and since the LCS Authority is obliged to provide for those services in the future, the future attendant care services are excluded from an award of damages to a participant by reason of Section 130A of the MACA, because they are "...to be provided for..."

Of note, in reaching his conclusions, his Honour considered the ability of the injured plaintiff's mother to seek payment from the LCS Authority with respect to the gratuitous services she provided to the injured plaintiff to the date of judgment, commenting at paragraph 169 of the judgment as follows:

"If the second plaintiff, Mrs Thiering, establishes a legal liability resting in the LCS Authority, such as one in accordance with the principles of quantum meruit, to pay her for the attendant care services which she has provided, the LCS Authority would be obliged to pay Mrs Thiering for the fair and reasonable value of the attendant care services she has provided, where those attendance care services are included in an assessment of the reasonable treatment and care services of Mr Thiering produced in accordance with s 23 of the LCS Act. Mrs Thiering, in propounding such a claim, is not limited to the formula contained within s 128 of the MAC Act for the recovery of a reasonable value of her services."

Of concern with respect to the decision, however, is his Honour's reference to Section 54(1) of the LCS Act and the interplay between the legislation (LCS Act and MACA). His Honour noted at paragraph 143(e) of the judgment that:

"Where the injuries sustained by the participant have been wholly or partially caused by the negligence of a motor vehicle tortfeasor, the CTP insurer remains obliged, if and when called upon, to pay the LCS Authority money for the treatment and care costs of the participant: Section 54(1) of the LCS Act."

This part of the judgment and its implications are perhaps controversial, as on the face of Section 54(1) of the LCS Act, while this is a provision governing the repayment of monies, it is referable to uninsured and interstate insurers and third party tortfeasors.

Contacts

Christine Lazzarotto, Sydney +61 2 9391 3227
Peter Ewin, Melbourne +61 3 8602 9226
Brenton James, Adelaide +61 8 8414 3347

clazzarotto@hunthunt.com.au
pewin@hunthunt.com.au
bjames@hunthunt.com.au

© Hunt & Hunt 2011

Disclaimer: The information contained in this e-alert is not advice and should not be relied upon as legal advice. Hunt & Hunt recommends that if you have a matter that is legal, or has legal implications, you consult with your legal adviser. If you no longer wish to receive this e-alert or any other publication from Hunt & Hunt Lawyers, please email us at unsubscribe@hunthunt.com.au

