

TERRITORY INSURANCE OFFICE v KERIN

Supreme Court of the Northern Territory of Australia

Rice J.

10 March, 18 August and 1 September, 1986.

Practice and Procedure - Declaration under s.18 of the Supreme Court Act and O.57 r.2 for determination of question of whether applicant for "benefits" under ss.13, 18 and 19 of Motor Accidents (Compensation) Act 1979 entitled to compromise for rights - whether power to exercise discretion to make declaration when both parties at arm's length agree and other criteria satisfied - statutory interpretation - expressio unius exclusio alterius - power to renounce rights - whether any right capable of being renounced - whether contrary to statute as being created in public interest - scope and policy of Motor Accidents (Compensation) Act 1979.

Motor Accidents (Compensation) Act ss. 5,6,7,13,15,16,18,19,  
40 and 41.  
Supreme Court Act ss.18 and 79  
Supreme Court Rules O.57 r.2  
Territory Insurance Office Act 1979

Cases referred to:

Brooks v Burns Philp Trustee Co. Ltd. (1968-1969) 121 C.L.R. 432  
Felton v Mulligan (1971) 124 C.L.R. 367  
Forster v Jododex Aust. Pty. Ltd. (1972) 127 C.L.R. 421  
Lieberman & Anor. v Morris (1944) 69 C.L.R. 69  
Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd. (1921) 2 A.C. 438.  
Rylands Brothers (Aust.) Ltd. v Morgan & Ors. (1927) 27 S.R. (N.S.W.) 161

Counsel for the Plaintiff:	Mr. P. Bracher
Solicitor for the Plaintiff:	Ward Keller
Counsel for the Defendant:	Mr. D. Farquhar
Solicitor for the Defendant:	Poveys
Counsel for the Attorney-General:	Mr. B. Martin Q.C., Solicitor-General
Solicitor for the Attorney-General:	N.T. Crown

ric860034

IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA

No. 598 of 1985

IN THE MATTER of  
THE MOTOR ACCIDENTS  
(COMPENSATION) ACT 1979  
AS AMENDED

AND:

IN THE MATTER of  
AN AGREEMENT PROPOSED TO BE  
ENTERED INTO BETWEEN THE  
TERRITORY INSURANCE OFFICE  
AND MAJELLA TERESE KERIN

BETWEEN:

TERRITORY INSURANCE OFFICE

Plaintiff

AND:

MAJELLA TERESE KERIN

Defendant

CORAM: Rice J.

REASONS FOR JUDGMENT  
(delivered 1 September 1986)

This is an application by the plaintiff, Territory Insurance Office, by way of an Originating Summons for a declaration pursuant to s.18 of the Supreme Court Act and under Order 57 Rule 2. Taken in turn, s.18 provides:-

"18.(1) The Court may, in relation to any matter in which it has jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

(2) A proceeding is not open to objection on the ground that a declaratory order only is sought."

Order 57 Rule 2 is in these terms:-

"57.(2) Where any person claims any legal or equitable right, and the determination of the question whether he is entitled to that right depends upon a question of construction of any Act, State Act, Ordinance or regulation in force in the Territory, that person may apply by originating summons for the determination of that question and for a declaration as to the right claimed."

The background history is that the defendant, Majella Terese Kerin, on 24 March 1982 instituted proceedings in this Court by way of Writ of Summons claiming damages for personal injuries arising out of a motor vehicle accident on 5 September 1981. Pursuant to s.5 of the Motor Accidents (Compensation) Act 1979, as it stood when the cause of action arose, her claim for damages is limited to "damages for pain and suffering or (sic) loss of amenities of life". This provision has been liberally interpreted by this Court in a number of previous decisions and for all intents and purposes it is now well established that the plaintiff's claim is limited to "damages for pain

and suffering and loss of amenities of life".

Nevertheless, Miss Kerin is precluded by force of that legislation from claiming medical and kindred expenses or what are euphemistically known as "special damages" in those proceedings.

For the purposes of the present proceedings the following Agreed Statement of Facts was presented to me:-

" AGREED STATEMENT OF FACTS

1. The defendant in these proceedings received personal injuries as a result of a motor vehicle accident occurring on or about 5 September 1981.
2. Majella Terese Kerin is a resident of the Northern Territory.  
  
Majella Terese Kerin commenced proceedings numbered 111 of 1982 in the Supreme Court of the Northern Territory of Australia seeking damages from SHIREE TELFORD AND STEVEN SEPAC.
4. The parties, for the purpose of these proceedings admit the allegations contained in Majella Terese Kerin's Statement of Claim in Action No. 111 of 1982, a copy of which is attached. (I omit this document as it is not relevant for present purposes).
5. The defendants to Action No. 111 of 1982 are both residents of the Northern Territory.
6. That negotiations have been conducted between the plaintiff and the defendant in these proceedings to settle Majella Terese Kerin's action numbered 111 of 1982.
7. The parties are desirous of settling the entirety of the rights of Majella Terese Kerin arising at common law or under the Motor Accidents (Compensation) Act as a result of the said accident and provisionally have agreed on figures for that purpose as follows:-

- (a) \$10,000 for the defendant's rights to common law damages for pain and suffering and loss of amenities of life.
- (b) \$3,000 being in full redemption of any rights which the defendant may have now or in the future to benefits under the Motor Accidents (Compensation) Act as amended from time to time.

DATED the 30th day of September, 1985."

The entitlement to benefits under the Motor Accidents (Compensation) Act is provided for by s.7:-

"7. Subject to this Part, where a resident of the Territory dies or suffers injuries in or as a result of an accident that occurred in the Territory or in or from a Territory motor vehicle, there is payable -

- (a) to or on behalf of that person, in the case where he is injured; or
- (b) to his spouse, dependent child or dependent parent, in the case of his death,

such benefits as are provided for in this Act."

By Originating Summons dated 15 October 1985 the plaintiff seeks:-

- "1. A determination of the question of whether an applicant for benefits under the Motor Accidents (Compensation) Act 1979 As Amended (the Act) is entitled to make and be bound by an agreement to compromise her rights to receive:-

- (a) Compensation for loss of earning capacity pursuant to Section 13 of the Act;
  - (b) Future medical and rehabilitation expenses pursuant to Section 18 of the Act;
  - (c) Future payments for the cost of making any necessary alteration to houses, motor vehicles, etc. pursuant to Section 19 of the Act.
2. Such other determination as may be considered proper by the court.
  3. An order that the costs of this application and order be paid by the Territory Insurance Office in any event."

On the basis of the agreed facts and of the authorities cited to me, I am satisfied of the competency of this Court to make a declaration determining the question posed in the application notwithstanding that the defendant, Miss Kerin, does not fulfil the role of "a proper contradictor" in the present proceedings. Her position is such that whatever the outcome of the present application, her rights are preserved. Hence I consider that it is in the interests of both parties to exercise my discretion in favour of making a declaration. (See Forster v Jododex Aust. Pty. Ltd. (1972) 127 C.L.R. 421, per Gibbs J. (as he then was) at pp.435 and 437 and Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd. (1921) 2 A.C. 438, per Lord Dunedin at p.448. See also Declaratory Orders by P.W. Young (1975 Edn.))

I have had the benefit of useful submissions by counsel for the respective parties as well as from the learned Solicitor-General following my direction made on 10 March 1986 pursuant to s.79 of the Supreme Court Act that the Attorney-General be acquainted with the present proceedings with leave to intervene if so advised.

When the matter came on before me again on 18 August 1986, counsel for the respective parties intimated that they supported the views expressed on behalf of the Attorney-General contained in written submissions which dealt extensively with a review of the Motor Accidents (Compensation) Act and the Territory Insurance Office Act 1979 as well as with certain principles of statutory interpretation.

I should perhaps mention that I have derived no benefit from that canon of construction summarized in the maxim expressio unius exclusio alterius. As is well established, it must always be applied with caution and only in appropriate cases. (See Rylands Brothers (Australia) Ltd. v Morgan & Ors. (1927) 27 S.R. (N.S.W.) 161, per Long Innes J. at p.168 to 169.) I have, nevertheless, found it necessary to contrast various provisions in an attempt to divine the true intendment of the Act overall. The defendant has had the benefit of separate representation throughout and by the very nature of her basic claim for

damages (and indeed for "benefits" under the Act) is at arm's length with the plaintiff and is anxious to renounce her rights to further benefits under the Act beyond those of the negotiated settlement. Accordingly, it is submitted that she is not purporting to contract out of her rights to medical expenses under s.18 but merely seeking to contract with the plaintiff not to enforce her rights. In added support of this submission, it is pointed out that the Act contains no provision against contracting out and hence I should apply the principle expounded by Windeyer J. in Brooks v Burns Philp Trustee Co. Ltd. (1968-1969) 121 C.L.R. 432 at p.456 and reiterated by him in Felton v Mulligan (1971) 124 C.L.R. 367 at p.386, viz.:-

"When a statute creates and confers rights and imposes corresponding duties, persons for whose benefit this was done may by contract waive or renounce their rights, unless to do so would be contrary to the statute. It may be seen that it would be so, because of an express prohibition against 'contracting out', or because the provisions of the statute, read as a whole, are inconsistent with a power to forego its benefits : or the policy and purpose of the statute may shew that the rights which it confers on individuals are given not for their benefit alone, but also in the public interest, and are therefore not capable of being renounced."

In Lieberman & Anor. v Morris (1944) 69 C.L.R. 69, Rich J. at p.84 made the following observation:-

"Speaking generally, public policy may be said to be policy in the observance of which the welfare of the community is involved (Wilkinson v Osborne) (1915) 21 C.L.R. 89, at p.97. Whenever a statute creates new rights, public policy in a broad sense



is always involved, because the legislature must be assumed to have thought it desirable in the public interest that the rights should be brought into existence. But it does not necessarily follow that an agreement to release or abandon rights so conferred should be regarded as opposed to public policy in general or even to the policy of the particular Act. As was pointed out in Admiralty Commissioners v Valverda (Owners) (1938) A.C., at p.185, 'the problem must be solved on a consideration of the scope and policy of the particular statute.'

It is necessary, therefore, to turn to a consideration of the nature and extent of the rights created by the relevant legislation as well as its scope and policy.

In my opinion, the short answer to question 1(b) (supra) arising for determination in this matter is provided in the language of s.18 itself, which provides as follows:-

"18.(1) Subject to sub-section (3), there is payable to or on behalf of a person entitled to a benefit under this Act in respect of an injury received by him in or as a result of an accident all the expenses reasonably incurred by him or on his behalf for the provision of the treatment required by him in respect of that injury other than accommodation and treatment in a hospital in the Territory.

(2) In sub-section (1) 'treatment' means -

- (a) medical, surgical or dental treatment or nursing or other care provided to the person referred to in that sub-section;
- (b) training, education or care required for the rehabilitation of that person; and

- (c) the conveyance of that person to any place for the purpose of his receiving any treatment referred to in this sub-section or to a hospital.

(3) Where a person referred to in sub-section (1) who is admitted to a hospital requests the Board to approve the provision to him of treatment or care of a particular kind or by a particular medical practitioner, whether or not in the Territory, and the Board is of the opinion that the request is reasonable in the circumstances, the reasonable expenses incurred in providing that treatment or care, as the case may be, shall be payable to or on behalf of that person.

(4) In addition to any payment the Office may make under sub-section (1), where standard rate hospital charges are raised in respect of a person referred to in that sub-section -

- (a) who is not a person referred to in section 20(1)(a) of the States (Tax Sharing and Health Grants) Act 1981 of the Commonwealth as -

- (i) an eligible pensioner or the dependant of an eligible pensioner; or
- (ii) a disadvantaged person or the dependant of a disadvantaged person; or

- (b) who is not indemnified, by any means, against the cost of the hospital accommodation and treatment in respect of which the charges are raised,

the Office may pay to the hospital an amount equivalent to those charges.

(5) Payments made under this section to, on behalf of or in respect of a person shall not, in the aggregate, exceed \$50,000 in respect of any one accident."

It will be noted that the entitlement to the benefit therein prescribed is expressly limited by sub.s(1) to "all expenses reasonably incurred by him or on his behalf for the provision of the treatment required by him ...". The phrase "reasonably incurred," by necessary implication, speaks only of past liability with the added test of reasonableness in the need for the type of treatment required. To import into the sub-section any concept of future treatment would, in my opinion, fall outside the intendment of the Act. In short, I hold that an entitlement to a benefit under s.18 of the Motor Accidents (Compensation) Act does not accrue until the relevant expense has been incurred; and hence, there is no right capable of being renounced and no corresponding duty to pay a benefit under the section until then.

Furthermore, while other sections of the Act make specific provision for commutation of certain potential benefits (e.g. secs.15 and 16 for which an express statutory discharge is accorded to the Territory Insurance Office and its Board, for commutation of a benefit payable under s.13 for loss of earning capacity in certain limited circumstances,) no corresponding provision exists for commutation or discharge of the liability for medical and rehabilitation expenses under s.18. The nature and extent of the right to commute under ss.15 and 16 is

self-explanatory and I, therefore, set out both sections in full:-

"15.(1) Where, in the opinion of the Board, because of the small amount of a benefit payable under section 13 to a person the administrative costs in calculating and paying that benefit place an unnecessary burden on the administration of the compensation scheme established by this Act, it may commute those payments at present values and pay the commuted amount to the person and, subject to sub-section (2), the payment of that amount is a full discharge of the obligations under section 13 of the Office and the Board.

(2) Where at any time after an amount has been paid under sub-section (1) the circumstances in relation to a person to or in respect of whom it was paid change to such an extent as, in the opinion of the Board, to warrant further payments under section 13 being made, the Board may determine that such payments shall be made but, notwithstanding anything in that section, may reduce the amounts otherwise payable under that section by such amounts as it determines have already been paid in respect of the relevant period in the commuted amount paid under sub-section (1) of this section.

16.(1) A person receiving a benefit under section 13 may, at any time, apply in writing to the Board for a lump-sum payment of that benefit.

(2) On receiving an application under sub-section (1) the Board may, at its discretion, commute at present values the benefit payable to the applicant and pay the commuted amount to him.

(3) The payment of an amount under sub-section (2) is a full discharge of the obligation under section 13 of the Office and the Board in respect of the injury in respect of which the benefit was payable."

As in the case of a benefit under s.18, no provision exists for the commutation of benefits or the discharge of liability under s.19 which simply provides:-

"In addition to the benefits provided under section 18, a person referred to in that section shall be entitled to -

- (a) the cost of providing appliances required for his use as a consequence of the injury; and
- (b) the reasonable cost of necessary alterations to -
  - (i) the building in which he resides or proposes to reside;
  - (ii) a motor vehicle used by him; and
  - (iii) such other articles of personal use as, in the opinion of the Board, require modification; and
- (c) the reasonable cost of providing such special facilities and equipment as the Board considers necessary for his rehabilitation,

to a maximum amount of \$20,000."

It is also to be noted that this section refers specifically to "cost" in all three paragraphs and imports the concept of reasonableness in paragraphs (b) and (c). In my opinion, therefore, this section clearly contemplates the actual provision of appliances, necessary alterations of the type specified and such special facilities and equipment

as the Board considers necessary for rehabilitation. I hold that an entitlement to a benefit under s.19 does not accrue until the need for the particular item and the reasonableness of its cost have been established; and hence, there is no right capable of being renounced and no corresponding duty to pay a benefit under the section until then.

Moreover, I am of the opinion that apart from the express provisions relating to commutation and to discharge of liability the only power that the Territory Insurance Office has to "settle" a claim is expressly limited to one for "damages" in contradistinction to one for "benefits" because of the combined effect of secs. 5, 6 and 40 of the Act.

These sections provide as follows:-

"5.(1) Subject to sub-section (2), no action for damages shall lie in the Territory in respect of the death of or injury to a resident of the Territory in or as a result of an accident that occurred in the Territory.

(2) Subject to sub-section (3), nothing in sub-section (1) deprives a person of the right to bring an action for damages for pain and suffering or loss of amenities of life.

(3) A person who has received or has elected to receive a benefit under section 17 shall not commence or continue an action referred to in sub-section (2).

6.(1) Subject to sub-section (2), where a person is liable to pay damages in respect of the death of or injury to any person in or as a result of an accident -

- (a) that occurred in the Territory and at the time of that accident the first-mentioned person was in control of a motor vehicle other than a Territory motor vehicle; or
- (b) that occurred in any place, whether or not in the Territory, and at the time of that accident the first-mentioned person was -
  - (i) the owner of a Territory motor vehicle involved in the accident and in respect of which he was so liable; or
  - (ii) in control of a Territory motor vehicle,

the Office shall indemnify him or his personal representatives to the extent of his liability.

(2) The Office is not bound to indemnify a person under sub-section (1) where that person is already indemnified under any contract of insurance or under the law applicable in the place where the accident occurred." (My emphasis)

"40.(1) The office -

- (a) may undertake the settlement of any claim against a person referred to in section 6(1) in respect of his liability referred to in that section;
- (b) may take over during such period as it thinks fit the conduct on behalf of that person of any proceedings taken or had to enforce the claim or for the settlement of any question arising with reference to the claim;

- (c) may defend or conduct those proceedings in the name and on behalf of that person; and
- (d) shall indemnify that person against all costs and expenses of or incidental to any of those proceedings while the Office retains the defence or conduct of the proceedings.

(2) The person referred to in sub-section (1) shall sign all such warrants and authorities as the Office requires for the purpose of enabling it to have the defence or conduct of any proceedings referred to in that sub-section and, in default of his so doing, the court in which the proceedings are pending may order that the warrants and authorities be signed by the Office on behalf of that person.

(3) Nothing said or done by or on behalf of the Office in connection with the settlement of any such claim or the defence or conduct of any such proceedings shall be regarded as an admission of liability in respect of, or shall in any way prejudice, any other claim, action or proceeding arising out of the same occurrence." (My emphasis)

Indeed, the distinction between "damages" and "a benefit under the Act" is highlighted by the saving provisions in s.41 of the Act which provides as follows:-

"41.(1) In this section 'authorized insurer' and 'third-party policy' have the same meaning as they respectively have in Part V of the Motor Vehicles Act as in force immediately before the commencement of this Act.

(2) Notwithstanding anything in this Act, where an action in respect of the death or injury of a person in or as a result of an accident would have lain



under the law applicable immediately before the commencement of this Act had the accident then occurred, nothing in this Act shall apply so as to prevent a person pursuing such action against a person who, at the time of the accident, was the holder of a current third-party policy.

(3) Notwithstanding anything in this Act, the Board may, as a condition of paying or continuing to pay a benefit under this Act -

- (a) in a case referred to in sub-section (2); or
- (b) in a case where a person entitled to a benefit under this Act has a right of action against any other person as a result of the accident in respect of which that entitlement arose,

require the person to commence or continue an action against the person holding a current third-party policy or that other person, as the case may be.

(4) Where a person recovers damages as a result of an action commenced or continued in pursuance of a requirement under sub-section (3) -

- (a) the payment of benefits under this Act to that person shall cease; and
- (b) there shall be reimbursed to the Office from any amount so recovered the amount of benefits under this Act paid by the Office to or on behalf of that person, and that amount shall be paid to the Office by the authorized insurer concerned, in a case referred to in sub-section (2), or the person against whom judgment is given in any other case, before any amount of the judgment (other than the costs in the action) are paid to the person.

(5) Where a person commences or continues an action in pursuance of a requirement under sub-section (3), and that action is unsuccessful or the amount recovered is not sufficient to reimburse the person for the costs in bringing the action, the Office shall pay to the person the reasonable amount of those costs or the amount by which the amount recovered falls short of the amount of those costs, as the case may be." (My emphasis)

With the abolition of common law remedies and the substitution of a no-fault scheme under the Act, a potential claimant's remedies have undergone such a dramatic change that I am far from satisfied that the legislature has evinced an intention to accord to the Territory Insurance Office the power or authority to discharge its statutory liability to pay benefits under the Motor Accidents (Compensation) Act by way of settlement or compromise other than by commutation as prescribed by ss.15 and 16 of the Act. By its very nature, the Act is a form of social legislation which, in my opinion, is designed to preserve, as a matter of public policy in the field of social insurance, the statutory entitlements of injured persons to the pecuniary limits prescribed from time to time should the need arise. Thus viewed, the Act read as a whole is inconsistent with a power on the part of a claimant under it, to forego its benefits other than under ss.15 and 16.

I understand fully that this view will inevitably give rise to administrative problems especially in the realm

of making provision for reserves in the assessment of potential liability on the part of the insurer; but the remedy lies in amending legislation if it is the intention of the legislature to give effect to some form of modification of the scheme.

Accordingly, I answer the questions posed for determination as follows:-

- |      |                              |
|------|------------------------------|
| 1(a) | Yes; subject to ss.15 and 16 |
| 1(b) | No                           |
| 1(c) | No                           |