

MOTOR ACCIDENTS COMPENSATION
APPEAL TRIBUNAL
AT DARWIN

M7 of 1994
(9419748)

BETWEEN:

ANDREW JAMES DIX
Appellant

AND:

TERRITORY INSURANCE OFFICE
Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 13 October 1995)

This matter is listed for hearing on 1 November 1995.

This application has been brought by the applicant for a ruling that at the hearing of this matter the respondent is to be dux litis. The application is opposed by the respondent.

At the hearing of the application, counsel for the applicant sought to rely on the affidavit of Alison Mary Lowrie sworn 4 October 1995. I received the affidavit subject to objection to certain parts of the affidavit by counsel for the respondent. I noted the objection at the time and stated I would give my ruling in respect of the objections to parts of the affidavit material at the time of making a ruling in respect of the application.

I agree with the objection made by counsel for the respondent that paragraph 2(iv) to (x) of the affidavit of Alison May Lowrie sworn 4 October 1995, is not admissible because such communication between the solicitors is privileged. I further agree with the objection by counsel for the respondent to paragraphs 5 and 6 of the affidavit. These paragraphs are conclusions rather than a statement of what was

actually said. I am informed that Mr Senior, the then solicitor for the respondent, is by reason of serious illness not able to make a reply to the assertion. In addition I am informed that any statements by Mr Senior at the time referred to in the affidavit, i.e. June 1995, may have been affected by his ill health.

Accordingly, I rule that paragraph 2(iv) to (x) and paragraphs 5 and 6 of the affidavit of Alison Mary Lowrie sworn 4 October 1995 are inadmissible.

It is the applicant's contention that the real issue is not the nature of the hearing but rather its scope. It is the applicant's submission that the word "matter" in s29(1) of the *Motor Accidents (Compensation) Act* is a reference to the determination by which the applicant is aggrieved namely the determination dated 6 September 1994. The only issue raised in that determination (as in the earlier determination of the designated person) was non-entitlement to benefits by reason of the influence or quantity of alcohol substantially contributing to the accident.

The applicant argues this is the only issue raised in the reference and answer. Thus the only question that arises upon this reference to the Tribunal is whether the applicant is disentitled to benefits by reason of the influence and quantity of alcohol substantially contributing to the accident. This is the only issue between the parties which has thus far arisen.

The applicant submits the legal and evidential onus rests with the respondent on this, the only issue in the reference for the following reasons:

1) Prima facie the applicant has an entitlement under s13 of the Act (once he is accepted as a "resident").

2) He might then be disentitled under s9 of the Act if the Board (or, in this appeal, the Tribunal) is of the opinion

that the influence or quantity of alcohol substantially contributed to the accident.

3) If the injured person has a prima facie entitlement, then the party which alleges or relies on a disentitling factor should bear the onus with respect to that disentitling factor.

4) Therefore the respondent T.I.O. has the legal and evidential onus.

Accordingly, the applicant submits the respondent must be *dux litis*.

The appellant was aggrieved by the decision of the "designated person" dated 8 June 1994 that the applicant was not entitled to a benefit under s13 or s17 of the Act as a result of s9 of the Act because "the influence of alcohol substantially contributed to the accident."

Paragraph 6 and 7 of this determination states as follows:

"6. The influence or quantity of alcohol substantially contributed to the accident.

7. Pursuant to s9 the applicant is not entitled to a benefit referred to in s13 or s17 of the Act."

The applicant then requested, pursuant to s27(2) of the Act, that the designated person refer the matter in respect of which the applicant was aggrieved, namely, points 6 and 7 of the determination to the Board for its determination.

This request was made by letter dated 1 July 1994 from Cridlands, the applicant's solicitors, to the designated person, Motor Accidents Compensation Department.

The Board considered the matter and issued a determination dated 6 September 1994, in which it stated *inter alia*:

" 1) The applicant was driving a motor vehicle whilst he had a concentration of alcohol in his blood equal to 80 milligrams or more of alcohol per 100 millilitres of blood.

2) The influence or quantity of alcohol substantially contributed to the accident.

3) Pursuant to s9 the applicant is not entitled to a benefit referred to in Section 13 or 17 of the Act."

On 10 October 1994 the applicant issued a reference to the Tribunal pursuant to s29 of the *Motor Accidents (Compensation) Act*. Section 29 provides as follows:

" (1) Any person who is aggrieved -

(a) by a determination of the Board under this Act; or

(b) by the failure of the Board to make a determination within the 60 days referred to in section 27(3),

may, within 28 days after being served under section 27(4) with a copy of the determination of the Board or the expiration of that time, as the case may be, refer the matter to the Tribunal.

(2) The Board may, at any time, refer to the Tribunal any matter affecting the right of any person to a benefit, or the amount of a benefit, under this Act.

(3) Where a matter is referred to the Tribunal, it shall conduct such hearings into the matter as it thinks fit and may make such determination as the Board could have made thereon as the Tribunal considers proper in the circumstances having regard to the intention of the Act, and such determination is binding on the Board.

(4) A hearing conducted under this Part by the Tribunal shall be a hearing *de novo*."

A hearing before the Tribunal is a hearing *de novo* (*McMillan v TIO* (1988) 57 NTR 24).

The respondent argues that the "matter" which is referred to the Tribunal is not simply the determination of the Board; it is the "matter" which was raised before the Board - that is the substantive claim of the applicant or "the subject matter for determination".

The respondent states the subject matter for the purposes of this case is the entitlement of Mr Dix to benefits under the scheme. The respondent argues that payment of such benefits is what the applicant sought from the original decision maker and again from the Board. The respondent submits the applicant's statement of claim in the reference to this Tribunal seeks a determination that he "be entitled to benefits pursuant to sections 13 and 17 of the Act".

The respondent submits that the Board has not considered, and consequently there has been no acceptance of, the following factors essential to a successful claim by the applicant:

(a) that the applicant was involved in an "accident" as defined;

(b) that he suffered injuries as required by the Act, the only finding being that he suffered "undefined" personal injury which in itself is not sufficient to ground any entitlement to benefits;

(c) that he suffered any loss of earning capacity; or

(d) that he suffered any permanent impairment.

The respondent notes that the applicant in his reference to the Tribunal claims to "be entitled to benefits pursuant to s13 and 17 of the Act". To be so entitled he will have to prove the matters referred to in the preceding paragraph.

Accordingly, it is the respondent's submission the applicant should be *dux litis*.

The scope of the hearing before the Tribunal was dealt with by Martin J (as he then was) in *Saroukas v Territory Insurance Office* (1988) 91 FLR 44 at 450-451:

"..... The Tribunal, however, is required to conduct such hearing into the matter as it thinks fit: s29(3). It seems to me, that in order to determine how it shall

exercise that discretion, the Tribunal needs to know what the issues are for its determination. The only prescribed way in which that knowledge can be imparted, is through the reference and answer to the reference: Forms 2 and 4 of the Rules.

Assuming the Tribunal may make the orders sought, the definition of issues between the parties, by means of the reference and answer (and any further particulars), serves the further useful purpose of enabling the Tribunal to consider the substance of applications of the type now under consideration."

and at p453:

"As already mentioned, once a referral is made to this Tribunal the answer to the reference should disclose why the Board opposes the Tribunal making a decision contrary to that made by the Board. That being done, the issues between the applicant and respondent, thought by them to be relevant, become apparent."

I respectfully adopt His Honour's reasoning.

A reading of the reference to the Tribunal by the applicant and the answer by the respondent clearly indicates that the issue raised by the applicant in his reference to the Tribunal and addressed in the answer by the respondent is the ruling by the Board upholding the determination of the designated person that the influence of alcohol substantially contributed to the accident and pursuant to s9 the applicant is not entitled to a benefit referred to in s13 or s17 of the *Motor Accidents (Compensation) Act*.

I agree with the submissions by counsel for the applicant that this is the only issue before the Tribunal.

On this issue the legal and evidential onus rests with the respondent, *Hebbron v Board of the Territory Insurance Office* decision of Asche J delivered 21 November 1986, ex tempore unreported transcript p220 at 226.5:

"Section 9 is plainly an exclusion section, and I have ruled, and I confirm the ruling that the onus therefore is on the board to establish the matters which it seeks to rely upon under section 9. If any authority is required

for that, it is in the simple statement, onus probandi estae qui affimat non qui negat, which is no more than commonsense of saying that the onus of proof is upon the person who relies upon the particular factor."

I have come to the conclusion the respondent has the burden of proof on the only issue before the Tribunal.

Accordingly, the respondent is dux litis.