

AUSTRALIA / JUDGMENT

Luke v Workers Compensation Nominal Insurer [2009] NSWSC 930

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New South Wales Supreme Court

CITATION : Luke v Workers Compensation Nominal Insurer [2009] NSWSC 930

HEARING DATE(S) : 7 September 2009

JUDGMENT DATE : 7 September 2009

JUDGMENT OF : Price J at 1

EX TEMPORE JUDGMENT DATE : 7 September 2009

DECISION : The application for the declaration sought in order 5 is dismissed.

CATCHWORDS : Common Law - Practice and Procedure - whether a declaration that any assessment of damages for loss of earning capacity as defined in s 151G of the Workers Compensation Act 1987 includes an award for damages representing the costs of funds management should be made in interlocutory proceedings - advisory opinion - mediation - overriding purpose - applications for discrete consideration of issues properly matters for the trial judge in interlocutory proceedings to be discouraged.

LEGISLATION CITED : Civil Procedure Act 2005 s 56(1), s 58, Workers Compensation Act 1987 s 151G

CATEGORY : Procedural and other rulings

PARTIES : Gary Luke Workers Compensation Nominal Insurer - A State Government Statutory Authority

FILE NUMBER(S) : SC 020109/09

COUNSEL : Mr C Hart (Applicant) Mr G Sarginson (Respondent)

IN THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION PROGRESSIVE LIST
PRICE J

MONDAY 7 SEPTEMBER 2009

020109/09 GARY LUKE v WORKERS COMPENSATION NOMINAL INSURER - A STATE GOVERNMENT STATUTORY AUTHORITY

EX TEMPORE JUDGMENT 1 HIS HONOUR: On 12 March 2009, the plaintiff commenced proceedings against Mid Coast Roofing Pty Ltd for injuries sustained on 21 December 2004, when he fell from a roof in the course of his employment as a roof tiler with the defendant. The causes of action are negligence and/or breach of statutory duty. 2 By notice of motion filed on 12 June 2009 the plaintiff seeks the following:

4. A declaration that the plaintiff is unable to manage his affairs.
5. A declaration that any assessment of damages for loss of earning capacity as defined in s 151G of the Workers Compensation Act 1987 (the Act) includes an award for damages representing the costs of funds management.

3 The balance of the orders sought in the motion has been dealt with by the Registrar. 4 The plaintiff contends, so far as order 5 is concerned, that any assessment of damages for loss of earning capacity as defined in s 151G of the Act includes an award for damages representing the costs of funds management and seeks a declaration to that effect. On the other hand, the defendant submits that, as a matter of law, s 151G of the Act precludes the plaintiff from obtaining damages in respect of the costs of future professional management of damages/verdict monies. Furthermore, the defendant argues that it is not appropriate for the court, on an interlocutory basis, to make the order sought.

5 The defendant put to me that on an interlocutory basis, the court has the power to order that the plaintiff is entitled to claim damages for the costs of future professional management of any award of damages. Should the plaintiff be entitled to such damages as a matter of law, the determination and quantification of such damages involve complex issues of fact and law which the trial judge should determine after hearing all the evidence. The plaintiff submits, however, that mediation of the plaintiff's claim may be assisted by a declaration in the terms sought.

6 I do not propose to make the declaration for the following reasons:

1. To declare in interlocutory proceedings that any assessment of the plaintiff's damages for loss of earning capacity as defined in s 151G of the Act includes an award for damages representing the costs of funds management might bind and fetter the discretion of the trial judge. What if, it might be asked, the trial judge does not agree with the decision that I have reached on this issue? Is the trial judge bound by the declaration, or is the judge entitled to make up his or her mind, having heard evidence and legal argument? Should the trial judge not be bound, then what is the point of these proceedings? The plaintiff's contention is that a declaration might assist the mediation process. As I pointed out in oral argument, if the declaration has no binding effect, then it is open to the defendant to reject it. The declaration would amount to no more than an advisory opinion which will be of little help in mediation and in any event is inappropriate.

2. The terms of the declaration, as drafted, involve considerations of law and fact. The court will need to determine the extent of the plaintiff's injuries and the question of the loss of his capacity to manage an award of damages. These are matters for evidence before the trial judge.
3. The overriding purpose of the Civil Procedure Act 2005 (the CPA) is to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 56(1) of the CPA. I do not understand how it can be said that the overriding purpose of the CPA is served by hiving off for discrete consideration an important issue such as this which should be properly decided by the trial judge. There appears to me, as the common law list judge, to be an increasing trend to have discreet issues, which are properly matters to be considered at trial, determined in interlocutory proceedings. That trend, in my opinion, needs to be discouraged. 7 I take into account in dismissing the application those matters specified in s 58 of the CPA. The application for the declaration sought in order 5 is dismissed. 8 As order number 4 is dependant on the court's attitude to order number 5, I do not propose to make that declaration. 9 The general principle is that costs follow the event. However, the matters which have been the subject of written submissions and oral argument by both counsel will not be wasted as they will be canvassed before the trial judge. I do not make an order that the plaintiff pays the defendant's costs of today. If the plaintiff ultimately succeeds, I order that he is not to have the costs of today's motion. oOo

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Prepared on 28 October 2026 · Esheria