

AUSTRALIA / JUDGMENT

Serrao (by his tutor Serrao) v Cornelius [2017] NSWCA 61

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Court of Appeal Supreme Court New South Wales Medium Neutral Citation: Serrao (by his tutor Serrao) v Cornelius [2017] NSWCA 61 Hearing dates: On the papers Decision date: 28 March 2017 Before: Leeming JA Sackville AJA Emmett AJA Decision: 1. Orders made by the primary judge on 13 February 2015 set aside.

2. Grounds 1-4 of the Amended Notice of Appeal filed in Court on 10 March 2016 dismissed.
3. Allow the appeal on Ground 5 of the Amended Notice of Appeal.
4. Cross appeal allowed.
5. In lieu of orders made by the primary Judge, the Court makes the following orders:
 - (1) Judgment for the plaintiff on the cause of action pleaded under Part 1.2 Div 1 of the Motor Accidents (Compensation) Act 1999 (NSW) in the sum of \$1,058,756.50 inclusive of fund management.
 - (2) Proceedings are otherwise dismissed.
 - (3) No order for the costs of the proceedings with the intent that each party bear his or her own costs.
6. Respondent to have credit for \$74,578.18 in statutory deductions paid to Centrelink (in the sum of \$73,064.53) and Medicare (in the sum of \$1,513.65).
7. Respondent to have credit for \$1,481,800.62 paid to the Office of the New South Wales Trustee & Guardian on 22 April 2015.
8. Appellant pay restitution in the sum of \$497,622.30 to the respondent plus interest at the rates prescribed for the purposes of s 101 Civil Procedure Act 2005 (NSW) from and including 22 April 2015 to the date of payment.
9. There be no order as to the costs of the appeal and cross appeal, with the intent that each party bear his or her own costs of the appeal and the cross appeal.
10. The parties have liberty to apply on seven days' notice. Catchwords: DAMAGES – plaintiff under incapacity – compromise of component of damages representing costs of fund management – component relatively small and supported by evidence – compromise

approved Legislation Cited: Civil Procedure Act 2005 (NSW), s 76(3) Motor Accidents Compensation Act 1999 (NSW) Cases Cited: Institoris by his next friend Maria Institoris v Falconer [2012] NSWCA 298 Serrao (by his tutor Serrao) v Cornelius [2016] NSWCA 60; 75 MVR 58 Serrao (by his tutor Serrao) v Cornelius (No 2) [2016] NSWCA 231 Serrao (by his tutor Serrao) v Cornelius (No 3) [2016] NSWCA 293 Category: Consequential orders (other than Costs) Parties: Daniel Terrence Serrao by his tutor Alicia Serrao (Appellant) Claire Myfawny Cornelius (Respondent) Representation: Counsel:

Solicitors: Herbert Weller (Appellant) Hall & Wilcox (Respondent) File Number(s): 2015/67841 Decision under appeal Court or tribunal: District Court of New South Wales Citation: Serrao (by his tutor Serrao) v Cornelius [2015] NSWDC 4 Date of Decision: 6 February 2015 Before: Hatzistergos DCJ File Number(s): 2013/215744

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Judgment

1. THE COURT: Last year, this Court delivered three judgments on an appeal and cross-appeal from a decision of the District Court: Serrao (by his tutor Serrao) v Cornelius [2016] NSWCA 60; 75 MVR 58, Serrao (by his tutor Serrao) v Cornelius (No 2) [2016] NSWCA 231 and Serrao (by his tutor Serrao) v Cornelius (No 3) [2016] NSWCA 293. It will be convenient to refer to these as the first, second and third judgments. The litigation arose out of a motor vehicle accident that took place on 14 August 2010.
2. Although the orders this Court is asked to make, by consent, are elaborate, most of them reflect the outcome of and in many cases the orders made in those earlier decisions. There is one relatively minor component of the orders which reflects a compromise, in the amount of \$24,500, being a component of damages relating to funds management. Because Mr Serrao is a person under legal incapacity, there may be no compromise or settlement of his claim without court approval: Civil Procedure Act 2005 (NSW), s 76(3).
3. It is not necessary for present purposes to address the background in any detail; it may be found in this Court's earlier judgments. The Court has before it two affidavits of a solicitor with the day to day carriage of the matter on behalf of Ms Cornelius, sworn on 30 November 2016 and 11 January 2017. The latter affidavit records that a compromise has been reached as to the allowance for funds management, on the basis that Mr Serrao's solicitor and junior counsel have waived their costs of the appeal, and no claim will be made on the fund in relation to the costs of the appeal of Mr Serrao's senior counsel.

4. The orders which the Court is asked to make by consent involve the following elements. Proposed orders 1-4 involve setting aside the orders made by the primary judge on 13 February 2015, dismissing grounds 1-4 of the amended notice of appeal, allowing the appeal on ground 5 and allowing the cross-appeal. The success of the cross-appeal and the failure of grounds 1-4 of the appeal reflect the outcome of the first judgment of this Court.
5. The success on ground 5 of the appeal reflects the outcome of the second judgment of this Court, based on the "blameless motor accident" provisions of the Motor Accidents Compensation Act 1999 (NSW), a matter not determined by the primary judge. It is Mr Serrao's success on that ground which leads to proposed order 5, namely, that in lieu of the orders made at first instance, there be judgment in favour of Mr Serrao based on the "blameless motor accident" provisions in the sum of \$1,058,756.50 inclusive of fund management, and that the proceedings be otherwise dismissed with no order as to costs. The first order made in this Court's third judgment was that there be a judgment in favour of Mr Serrao based on the "blameless motor accident" provisions, in an amount to be quantified. Paragraph 6 of the third judgment was: "After receiving further written submissions from the parties, the Court in the Second Appeal Judgment upheld Ground 5 of the Amended Notice of Appeal. The Court concluded that the appellant was entitled to damages against the Respondent pursuant to s 7B of the MAC Act. However, the Court reduced the total damages as assessed by the primary Judge (\$2,068,513.00) by 50 per cent to take account of the appellant's contributory negligence. Accordingly, subject to assessing damages for the costs of funds management, the Court found that the appellant was entitled to damages of \$1,034,256.50. The Second Appeal Judgment recorded that the appellant proposed that the assessment of damages for the costs of funds management should be determined separately, pursuant to Uniform Civil Procedure Rules 2005 (NSW) (UCPR) r 28.2. This proposal was apparently made because the appellant's advisers took the view that the corpus of the fund to be managed could not be known until all costs issues had been resolved."
1. It will be seen that the difference between the judgment proposed in the consent short minutes of order of \$1,058,756.50 and the entitlement (save for the cost of fund management) in this Court's second judgment of \$1,034,256.50 is the \$24,500 agreed between the parties.
2. The orders otherwise dismissing the proceedings with no order as to costs reflect the first and third decisions of this Court.
3. Proposed orders 6, 7 and 8 deal with amounts to be paid and credited, and do not involve any element of compromise. Proposed order 9, that there be no order as to the costs of the appeal and cross-appeal, reflect this Court's third decision. Proposed order 10 gives liberty to apply, which is appropriate given the history of this litigation and the nature of the orders sought to be made.

4. Thus, the only question for approval relates to the agreed amount of \$24,500 representing the costs of fund management. The question is whether the compromise is in the best interests of or is beneficial to Mr Serrao: see *Institoris by his next friend Maria Institoris v Falconer* [2012] NSWCA 298 at [2].
5. That amount is based upon a report of Mr David Watt dated 25 November 2016 on the fund management costs on a fund of \$138,612 (including a very minor component of the fund management of fund income). There is no dispute as to the methodology or the calculations, which on their face are orthodox and reasonable. Equally, it is clear that any attempt to litigate this component of the damages would rapidly generate legal costs of the same order of magnitude or more than the amount itself. In those circumstances, the settlement of the costs of fund management in the amount agreed between the parties is in the best interests of Mr Serrao.
6. Accordingly, the Court makes the orders in the short minutes of order. The fact that some of those orders duplicate orders which have already been made does not stand against this Court making the orders in a single document in this procedurally complicated litigation in the form requested by both parties. **DISCLAIMER** - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated. Decision last updated: 28 March 2017

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