

Indemnity Costs Awarded To Plaintiff Where Defendants Showed An Ulterior Motive In Delaying The Admission Of Liability

Rouse v Shepherd & Ors

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In the last edition of the APLA Update reference was made to a decision of Badgery Parker J. in the New South Wales Supreme Court in which an award of over \$3,000,000.00 was made to a plaintiff widow and her four children in a Compensation to Relatives Act claim.

On 23 November 1994 Badgery-Parker J. gave judgment on an application which was made by the plaintiff in the same case for indemnity costs in respect of the preparation of liability. It will be recalled from the last case note that the facts of the case involved an accident in which the deceased was killed on the south coast of New South Wales when the car in which he was a passenger crossed the incorrect side of the roadway and collided head on with another vehicle. The allegations made were that the first and second defendants (who were responsible for the two vehicles involved) were negligent and also that the third defendant which was the Roads and Traffic Authority was negligent in relation to the way in which it sign-posted certain road works which were being carried out at the place where the accident occurred.

The defendants had maintained a denial of liability right up to the date of the hearing except for an admission on two occasions by the solicitors for the first and second defendants which admissions of liability were subsequently withdrawn. All defendants maintained their denial of liability up until the date of trial notwithstanding repeated requests by the solicitors for the plaintiff that they should admit liability, particularly in view of the fact that a coronial inquest had produced clear evidence that not only was the driver of the vehicle in

which the plaintiff was injured at fault but also that the Roads and Traffic Authority were at fault.

In consequence of the continued refusal of the defendants to admit liability the plaintiff's legal representatives were forced to expend a large amount of time and money preparing the case on liability which had already been presented to the coroner's court and then presenting that case over the first two days of the trial.

In the event the defendants changed their stance on the second day of the trial and admitted liability. The trial judge found that the defendants probably had some ulterior motive in delaying admission of liability until that stage. He reached this conclusion because they had had ready access to the material presented at and the conclusions of the coronial inquest. They had also not denied that the admission of liability depended upon the resolution between themselves of their respective contributions to the accident, and, it seemed, were labouring under a misapprehension as to the plaintiff's need to agree to any apportionment arrangement. This misapprehension was contrary to clearly established law that a plaintiff is entitled to judgment as against each defendant proved to be a joint tort-feasor.

The trial judge found that the obstinacy of the defendants was based on an ulterior motive and their refusal to admit liability was unreasonable in the circumstances. This behaviour put the plaintiff (and her legal advisers) to the considerable expense of investigating an issue which the defendants were seemingly only pursuing as a question of tactics between themselves. His Honour noted that the cost to the plaintiff was further compounded by the defendants refusal to allow the tender of depositions from the coronial inquest especially in light of the fact that the defendants did not seem to have much doubt as to their own liability or true intention to defend it in court.

In all the circumstances His Honour considered that an award of indemnity costs should be made against the defendants to the plaintiff in respect of the preparation of the case on liability.