out of the tortious death of the deceased. A compromise by the deceased's personal representative of a cause of action being prosecuted at the time of death which survives for the benefit of the estate does not preclude a subsequent claim by the dependants for damages for loss of dependency: *Kupke* v *The Corporation of the Sisters of Mercy & Ors* (QLR 24 February 1996).

No damages for pain and suffering or for loss of expectation of life are available, and nor are exemplary damages. No claim for future economic loss is permissible. Further, and other than for funeral expenses, losses or gains to the estate consequent upon the death are not to be taken into account.

In essence, the estate action is limited to funeral expenses, special damages, and, where necessary, testamentary expenses. In that context, special damages include ambulance, medical and hospital treatment undergone between the time of the accident and the time of death. Funeral expenses will be allowed in a moderate sum. Testamentary expenses and costs may be allowed if it was necessary to incur those expenses in order to prosecute the estate action.

An estate action is available at the suit of the deceased's executor or the administrator of his estate. His widow does not necessarily have a cause of action unless she falls into an appropriate class. Unless the estate action is brought by the executor of the deceased's estate or its administrator, it will fail.

Editors Note:

S.C.Williams QC will be presenting a paper on the ***Evolution of and Latest Developments in the Griffiths v Kerkemeyer Principle*** *at the APLA National Conference, 17-20 October 1996*

Your Cases Wanted!

Members with useful or interesting cases are asked to write them down and send them to the National Office.

We NEED short case notes as well as articles on current issues affecting plaintiff lawyers.

Call **John Peacock** on **(02) 9415 4233** to discuss length and specifications.

The Provision of Rehabilitation Services under the Motor Accident Insurance Act (Queensland)

Ian Brown, Carter Capner, Brisbane

Practitioners should be aware of the decision in *McMullen v Suhr & Suncorp* (unreported, Supreme Court, Qld, 02.04.96).

Ms McMullen, a 28 year old single supporting mother, suffered paraplegia as a result of a motor vehicle accident in March 1995.

After service by the plaintiff of a Section 37 Notice upon Suncorp, the CTP insurer, Suncorp wrote to the plaintiff's solicitors:

> We are prepared to settle liability on the basis of 100 per cent apportionment in favour of your client.

Suncorp was originally very obliging in terms of the plaintiff's rehabilitation needs. They arranged to purchase a new motor vehicle for the plaintiff (as her existing vehicle was not suitable given her disability) and to pay rental on a wheelchair accessible house (as her own home was not wheelchair accessible and could not be made so). It also paid for modifications to the plaintiff's rental premises.

Negotiations failed to resolve various issues. Suncorp then notified the plaintiff's solicitors in January 1996 that it was no longer prepared to pay the plaintiff's rental as they did not consider it to be a valid rehabilitation expense.

Consequently, the plaintiff asked the Supreme Court to determine whether the payment of rent was in the nature of *rehabilitative services* within the meaning of s.51 of the Motor Accident Insurance Act 1994 ("the MAIA").

The insurer's first line of argument was that there had been no admission of liability pursuant to s51(3) of the MAIA. Byrne J rejected this argument citing the correspondence from Suncorp to the plaintiff's solicitors after the delivery of the s.37 Notice.

The insurer then argued that the payment of rent was not a *rehabilitation* expense as contemplated by the Act and that in any event the expense was not a *reasonable* one.

The plaintiff argued that s.51 and the reference to rehabilitation services should be read in light of the

definition of rehabilitation contained in s.4 which provides:

rehabilitation means the use of medical, psychological, physical, social, educational and vocational measures (individually or in combination)

(a) to restore, as far as reasonably possible, physical or mental functions lost or impaired through personal injury; and

(b) to optimise, as far as reasonably possible, the quality of life of a person who suffers theloss or impairment of physical or mental functions through personal injury;

The plaintiff argued that *rehabilitation services* should be given the widest possible meaning. Conversely, the insurer argued that a narrow interpretation should be adopted and that the payment of rent was not a *service*.

The plaintiff referred to medical reports by a number of specialists and therapists including, inter alia, the Director of the Spinal Injuries Unit at the Princess Alexandra Hospital, a psychologist and the plaintiff's rehabilitation co-ordinator, an Occupational Therapist, which all stated that the provision of suitably wheelchair accessible accommodation allowing the plaintiff to live independently was essential, not only for her emotional well being, but also to assist her in learning to live as a wheelchair bound person and to identify her specific living requirements when the time came to build permanent accommodation.

Dr Hill, the Director of the Spinal Injuries Unit at the Princess Alexandra Hospital stated in his report, inter alia:

> I believe that it is extremely important that (the plaintiff) is supported in appropriate accommodation, and continues to care for herself in the way that she has been taught.

The plaintiff's treating psychologist reported, inter alia:

> (The plaintiff) needs to be in a home of her own in order to maintain her independence. This is essential for her emotional well-being. Living with her mother does not seem to be an option for a number of reasons including the fact that this would decrease her feeling of independence. Hence the sooner the housing situation can be clarified for her the better.

The Occupational Therapist engaged by the plaintiff's solicitor to assess her specific needs as a paraplegic, stated in his report, inter alia:

> (The plaintiff) is very fortunate therefore, to have found a house available for rent, in her home town of Toowoomba which comes close to meeting her requirements as a wheelchair dependent paraplegic... Perhaps not so obvious is the benefit such temporary accommodation offers (the plaintiff), since it allows her to determine by experience just exactly what she does require when planning for a house to be purpose built in the future.

The insurer argued that the payment of rent was in the nature of food and clothing and thus an expense the plaintiff would have incurred had she not been injured.

Byrne J, was initially primarily concerned as to why the matter had come before him, considering the intention of the MAIA and the need for the parties to effectively communicate.

His Honour found that the reason for the insurer's decision not to pay rent did not become apparent until, during the course of the plaintiff's submissions, an Affidavit by the insurer's claims officer was filed by leave, stating Suncorp's concerns that the plaintiff might die before judgement thus defeating the recovery by the insurer of the expenditure.

His Honour dismissed this submission, finding that the medical evidence indicated that the plaintiff's longevity was not affected by her injuries. His Honour stated:

> Such evidence as there is suggests that it is almost certain that the applicant will live for many years.

The insurer also argued that the plaintiff had not taken steps to sell her own home, the proceeds of which sale could be used to pay her rent, and was thus enjoying the benefit of the premises in which she resided paid for by the insurer and the rent she received from tenant occupying her own home.

After hearing oral evidence from the plaintiff, His Honour found that the plaintiff was using her best endeavours to sell the property and thus rejected this argument by the insurer.

His Honour referred to the apparent inconsistencies between the reference to "rehabilitation services" in s.51 and the definition of *rehabilitation* in s.4. His Honour stated,

> It is curious that the Act speaks of rehabilitation "services" in s.51; for it is plain from the definition of "rehabilitation" in s.4 that "services" must be understood in a considerably extended sense. It must include goods.

Referring to the rented premises his Honour found,

> The accommodation the applicant now occupies has the effect of optimising the quality of her

> life. That house may fairly be regarded as a physical thing which acts to "optimise the quality" of her life.

Having considered the extensive medical evidence submitted by the plaintiff, His Honour found,

> ...having regard to the evident remedial intent of s.51, and given the provisions for recovery of expenditure on rehabilitation services in s.51(9), no narrow view should be taken of the extent of the obligation imposed upon an insurer under s.51(1).

His Honour went on to find,

> In these circumstances, it seems to me proper to regard the rent which must be paid to enable her (the plaintiff) to achieve those ongoing advantages as *rehabilitation services*, especially having regard to paragraph (b) of the definition of *rehabilitation*.

His Honour consequently ordered the ongoing payment of the rent as a valid rehabilitation expense.

The effect of this decision is to greatly widen the scope of *rehabilitation services* under the MAIA. Clearly *services* includes goods and rent in appropriate cases.

Byrne J's comments in the course of his judgement indicate that "physical things" which act to "optimise the quality of life" of an injured person will, in appropriate cases, be considered to be rehabilitation services under s.51.

The decision in *McMullen* should be also be considered in light of the decision of Moynihan J in *Re Walker* (unreported, Supreme Court, Qld, 18 August 1995). In that case his Honour considered the meanings of "reasonable" and "appropriate" in reference to rehabilitation services as referred to in s.51(5) of the MAIA.

In *Re Walker* the applicant was seeking an order that the insurer pay for various costs including, inter alia, the cost of a new motor vehicle, an income subsidy, domestic and gardening assistance (including the cost of flying relatives from New Zealand) and the provision of a food blender. The applicant had sustained a serious jaw injury, dislocated wrist, injury to his lower back and damage to his knee. His Honour found only the food blender to be a rehabilitation expense.

The fact situation in *Re Walker* is of course completely distinguishable from that in *McMullen*. However in *Re Walker*, Moynihan J found,

> Although there may be a role for expert opinion in some aspects of applications under subs.(5), that should be limited by the nature of the jurisdiction and to evidence of expert opinion properly defined. The court must make up its own mind at an interim stage in a broad rather than refined way.

Clearly, the approach of Byrne J in *McMullen* differs from Moynihan J in that fundamental respect - Byrne J relied to a considerable extent upon the expert medical evidence submitted by the plaintiff.

In *Re Walker* the applicant proceeded without the benefit of a rehabilitation consultant, while the insurer had, from the outset, retained the services of such a consultant.

The judgement of Moynihan J in *Re Walker* indicates that the plaintiff's legal representatives may have proceeded with the application where many of the goods and services for which payment was sought from the insurer could not be supported by expert evidence to the effect that they were of a rehabilitative nature.

Since the introduction of the MAIA it is clear that motor vehicle personal injuries litigation is becoming an increasingly specialised area with practitioners required to become familiar with many aspects of rehabilitation.

Insurance companies are rapidly educating and adapting themselves so as to ensure minimal exposure to payouts on claims. Plaintiff's lawyers must also continue to educate and adapt themselves to ensure that they provide the highest standard of representation to their clients to ensure optimum compensation for injured claimants.

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