

CRIME DOES NOT PAY – CRIMINAL OFFENCE DEFEATS CTP CLAIM FOR DAMAGES

24 JUNE 2019 | COMPULSORY THIRD PARTY (CTP)

The District Court of NSW found that there is no duty of care owed to an injured person claiming damages in circumstances where that person was found to have committed a serious criminal offence. Alternatively, a finding of substantial contributory negligence can also be made.

IN ISSUE

- Whether the Plaintiff attempted to rob the Defendant
- Whether this alleged attempted robbery and the Defendant's reaction resulted in the Plaintiff's injuries
- Whether the Plaintiff was guilty of contributory negligence

THE BACKGROUND

At the time of the motor vehicle accident, the Plaintiff (then aged 15 years) and her three companions were travelling in a taxi being driven by the Defendant. The Plaintiff was sitting in the front passenger seat. After reaching their destination, the taxi stopped and her companions unfastened their seatbelts and got out of the vehicle. The Plaintiff also unfastened her seatbelt and opened the door but then a struggle ensued between the Plaintiff and the Defendant. The Defendant accelerated the vehicle and the struggle caused the Plaintiff to fall out of the taxi while it was travelling at 27 km/h. The taxi crossed the wrong side of the road, mounted the kerb, and came to a stop after it struck a small electric box.

The Plaintiff landed on the footpath and sustained severe injuries which resulted in paraplegia. She subsequently qualified as a permanent participant in the Lifetime Care and Support Scheme. Therefore, her claim is limited to non-economic loss, past economic loss, and future economic loss.

Criminal proceedings were commenced in the Children's Court of NSW. The Plaintiff also claimed damages against the CTP insurer of the Defendant. While the Defendant did not give evidence, his evidence from the Children's Court proceedings (as well as contemporaneous evidence such as witness accounts and police interview) was tendered which noted that the Defendant was acting in self-defence when the Plaintiff allegedly produced a knife and attempted to rob him. The Plaintiff's evidence was that there was no robbery attempt, no knife, and the Defendant just ignored her instructions to stop and simply continued driving.

THE DECISION AT TRIAL

Judge Gibson's findings were ultimately based on the Plaintiff's credibility and the inconsistent evidence she and her companions separately gave which ranged from a refusal to cooperate to outright admissions that there was a pre-meditated robbery attempt involving a knife.

Her Honour also noted the various contemporaneous witness accounts provided by bystanders, police officers, and ambulance officers who immediately responded to the accident. The police also found a kitchen knife near the accident scene and the plaintiff herself admitted that she had a knife during her first consultation with her solicitors as recorded in a social worker's notes who was present during the hospital consultation. During cross-examination, she vehemently denied ever having a knife.

Her Honour found the Plaintiff to be an untruthful witness and that the evidence demonstrated that her conduct satisfied the elements of armed robbery and also constituted a serious offence so as to not be awarded damages pursuant to section 54 of the Civil Liability Act 2002 (NSW). There was no duty of care owed by the Defendant when the Plaintiff was using a knife to try and rob him and he merely responded in self-defence by trying to push her away. Alternatively, Her Honour also made a finding of 100% contributory negligence.

Implications for you

The case affirms previous motor vehicle accident decisions where the court can make a finding that there was no duty of care owed to the injured person who is found to have been committing a serious criminal offence at the time of the injury. Alternatively, a substantial finding of contributory negligence can also be made.

[SW v MK \(No. 5\) \[2019\] NSWDC 242](#)

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