A NEW DAY FOR PIPA?

27 MARCH 2017 | PROCEDURE

The Court of Appeal decision in Day v Woolworths [QCA] 337 seems to have received less attention than it perhaps deserves.

The Appeal concerned a decision, in part, concerned with Woolworths’ (the respondent’s) disclosure obligations pursuant to section 27 of the Personal Injuries Proceedings Act 2002 (PIPA). By the time the appeal was heard and the decision handed down, a compulsory conference had been held and litigation commenced.

Although self-represented, Ms Day’s view that the obligations imposed by s27 survived the commencement of litigation is one that has been long-held by the profession. Although not specifically determined previously, those views appear to be grounded in the Court of Appeal’s decision in Angus v Conelius & Anor [2007] QCA 190, which dealt with the similar provision (section 45) of the Motor Accident Insurance Act 1994 (the MAIA).

Woolworths’ appealed orders made in the District Court under s35 of PIPA for answers to be provided to questions posed by the appellant to the respondent pursuant to s27 of PIPA.

THE HISTORICAL POSITION

In Angus the Court of Appeal (constituted by Williams, Jerrard and Atkinson JJJ) held that there was nothing in the MAIA that precluded the provisions of s45 applying following the institution of proceedings. The Court saw no reason why the provisions in the MAIA and those in the UCPR could not operate together, going so far as to say that they were complimentary.

Section 45(3) of the MAIA requires the claimant to advise the respondent of any significant change in circumstances of the claimant’s medical condition, disability or financial loss ‘before the claim is resolved’. The Court of Appeal placed particular emphasis on the ongoing nature of this obligation for its contextual implication that the s45 obligations survived the commencement of proceedings.

In Cleary v Rinaudo 2013 [ACTCA] 32 the ACT Court of Appeal was required to analyse the application of section 68 of the Civil Law (Wrongs) Act 2002 (the Wrongs Act) - which mirrors the obligations in s27 of PIPA. The plaintiff (who was the respondent to the appeal) had sought disclosure of a medical report obtained by the defendant in the litigated phase of the claim. The Court of Appeal turned to the Queensland decisions for guidance given the similarities between the Wrongs Act and PIPA.

In Cleary the Court distinguished the decision in Angus on the basis that section 68 is contained within chapter 5 which is headed ‘Pre-court Procedures’. In the MAIA s45 is contained within division 3 ‘Claims procedures’. The Court also rejected the respondent’s
submission that ‘pre-court’ meant ‘pre-hearing’, finding that it meant instead ‘pre-action’.

The Court also held that the decision in *Angus* was distinguishable on the basis that the obligation in section 68 is not expressed as continuing until the claim has resolved. Whilst that phrase is mirrored in s 22(6) of PIPA there is no analogous provision in either s27 of PIPA or the *Wrongs Act*. This left the position under PIPA unsettled.

**THE CONSEQUENCES OF THE DAY DECISION**

The Court of Appeal in *Day* (constituted by McMurdo P, Philippides JA and Jackson J) refused leave to appeal (despite noting that perhaps at least one of the questions should have been answered) based on the fact that, litigation having commenced, the pre-court procedures under PIPA had concluded. In the Court’s view, the granting of leave to appeal in those circumstances would be of no utility.

On one view, the Court of Appeal’s failure to detail reasons for its conclusion that s27 had not survived the commencement of litigation may arguably limit the decision to its own facts. If not, practitioners on either side of the plaintiff/defendant divide will need to seriously consider whether any additional information is required before agreeing to attend any conference.

If *Day* has been correctly decided, whilst parties will now be protected from having to provide additional information once litigation has commenced, it may make the road to getting to that stage just that much longer.

**AUTHORS**