

CLAIMANT MUST COMPLY WITH REQUEST TO ATTEND MACA MEDICAL TO CONTINUE CLAIM

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IN ISSUE

- Whether an insurer may request a claimant undergo medical examination for purpose of determining eligibility to participate in Lifetime Care and Support Scheme.

THE BACKGROUND

On 18 October 2007, Mr Adilzada, the respondent driver, was injured in a motor accident, sustaining a serious brain injury. He commenced proceedings against the Nominal Defendant for damages relating to those injuries, including for economic loss for treatment and care services.

On 9 January 2013, the respondent was accepted as an interim participant in the Lifetime Care and Support Scheme (the Scheme). Pursuant to s 130A of the *Motor Accident Compensation Act 1999* (NSW) (MACA), participation in the Scheme would affect the respondent's entitlement to recover damages for economic loss for treatment and care services.

The period of the respondent's interim participation in the Scheme expired on 9 January 2015. In the case of brain injury, any application to become a participant in the Scheme has to be accompanied by a Functional Independence Measure (FIM) assessment. The Nominal Defendant requested that the respondent undertake an FIM assessment to determine his eligibility for the Scheme. The respondent did not do so.

The Nominal Defendant subsequently filed a Notice of Motion for a determination of whether such a request was within the application of s 86 of MACA.

THE DECISION AT TRIAL

The trial judge found that s 86(1) had no application to the *Motor Accidents (Lifetime Care and Support) Act*

2006 (NSW) (LCSA).

THE DECISION ON APPEAL

The Court of Appeal found that in making a request under s 86(1) under MACA for the purpose of determining a claimant's eligibility for participation in the Scheme, the insurer is responding to the claim in a way expressly provided for by s 130A MACA and the LCSA. Its doing so is within the purpose for which the entitlement in s 86(1) is conferred.

The Court of Appeal held that an insurer or a person against whom a motor accident claim is made may under s 86(1) MACA request a claimant to undergo a medical examination or assessment for the purpose of determining that person's eligibility for participation in the Scheme. If the claimant fails without reasonable excuse to comply with such a request, court proceedings cannot be commenced or continued in respect of the claim where the failure continues.

IMPLICATIONS FOR YOU

In circumstances where claimants may have a preference for the receipt of lump sum damages as opposed to the ongoing provision of treatment and attendant care services, it is a matter beyond their control if they are eligible for the Scheme.

The judgment supports Insurers now being able to rely on s86 MACA to compel claimants to attend medical assessments for the purposes of having the claimants' eligibility for participation in the Scheme assessed before the claimants' entitlements for damages may proceed.

Nominal Defendant v Adilzada [2016] NSWCA 266

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