SUPREME COURT OF QUEENSLAND

CITATION:	*Allianz Australia Insurance Limited v McCarthy* [2012] QCA 331
PARTIES:	**ALLIANZ AUSTRALIA INSURANCE LIMITED** (appellant) **v** **EMMA JAYNE McCARTHY** (respondent)
FILE NO/S:	Appeal No 372 of 2012 DC No 1484 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Margaret McMurdo P, White and Gotterson JJA Judgment of the Court
ORDERS:	**1. The appellant pay the respondent's costs of the proceedings in the District Court fixed at $2,500 pursuant to s 55F(3)(a) of the *Motor Accident Insurance Act* 1994 (Qld).** **2. The appellant pay the respondent the sum of $2,937.70 as interest on the damages amount.** **3. An indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld) be granted in favour of the respondent in respect of the costs of the within appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where respondent's claim governed by the *Motor Accident Insurance Act* 1994 (Qld) – where damages awarded were more than $30,000 but not more than $50,000 – whether appellant should be ordered to pay respondent's costs of the proceedings fixed in the sum of $2,500 – whether respondent is also entitled to interest from date of judgment in the District Court on judgment sum ordered by the Court of Appeal

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN GRANTED – where respondent sought an indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld) – where appeal had succeeded on question of law – whether an indemnity certificate should be granted

Appeal Costs Fund Act 1973 (Qld), s 15(1), s 16
Appeal Costs Fund Regulation 2010 (Qld)
Civil Proceedings Act 2011 (Qld), s 58(3)
Motor Accident Insurance Act 1994 (Qld), s 55F

Allianz Australia Insurance Limited v McCarthy [2012] QCA 312, considered
Lauchlan v Hartley [1980] Qd R 149

COUNSEL:	No appearance by the appellant, the appellant's submissions were heard on the papers No appearance by the respondent, the respondent's submissions were heard on the papers
SOLICITORS:	McInnes Wilson Lawyers for the appellant Kerin Lawyers for the respondent

[1] **THE COURT:** On 13 November 2012 the court allowed an appeal by the insurer in respect of the quantum of damages for loss of future earning capacity[1] awarded to the respondent in the District Court. The court set aside the order made in the District Court that the appellant pay the respondent the sum of $59,448.67 and instead ordered, by a majority of the court,[2] that the appellant pay the respondent the amount of $32,200. The court ordered that the respondent pay the appellant's costs of the appeal to be assessed on the standard basis and further ordered that the parties provide written submissions as to how the costs of the proceedings below ought to be paid.

[2] The parties have now provided those submissions. The respondent also seeks an indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld).[3]

[3] The respondent's claim is governed by the *Motor Accident Insurance Act* 1994 (Qld).[4] Section 55F (since amended) governs how the costs of proceedings in cases involving relatively small awards of damages are to be paid. If a court awards more than $30,000 in damages in a proceeding based on a motor vehicle accident claim[5], but not more than $50,000, the court must order costs as follows:

> "if the amount awarded is less than the claimant's mandatory final offer but more than the insurer's mandatory final offer, costs are to be awarded to the claimant on a standard basis up to a maximum of $2500"[6]

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1 *Allianz Australia Insurance Limited v McCarthy* [2012] QCA 312.
2 Margaret McMurdo P and Gotterson JJA.
3 Practice Direction No 2 of 2010, para 29.
4 Reprint 5. Reprint 6, the current legislation, contains an amended s 55F.
5 The provision does not apply to the costs of appellate proceedings.
6 Section 55F(3)(a).

and

> "if the amount awarded is equal to, or more than, the claimant's mandatory final offer, costs are to be awarded to the claimant on the following basis–
>
> (i) costs up to the date on which the proceedings started are to be awarded on a standard basis up to a limit of $2500;
>
> (ii) costs on or after the date on which the proceedings started are to be awarded on an indemnity basis".[7]

[4] The parties participated in a compulsory conference on 4 May 2010. Mandatory final offers were exchanged following that conference:

- The appellant offered $30,000 with no allowance for costs.
- The respondent offered to accept $198,000 plus costs to be agreed or assessed.

[5] After the proceedings were commenced and before trial, offers pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld) were made:

- On 31 January 2011 the appellant offered to pay the respondent $30,000 with no allowance for costs.
- On 8 February 2011 the respondent offered to settle her claim for $50,001 plus costs to be agreed or assessed.

[6] The appellant submits that since the respondent has received more than its mandatory final offer but not more than $50,000 and has not been awarded either her mandatory final offer or the offer made pursuant to the *UCPR*, the appellant should be ordered to pay the respondent's costs of the proceedings fixed in the sum of $2,500.

[7] The respondent agrees with those submissions save that since she has received none of the damages awarded to her in the District Court, she contends that she is entitled to interest pursuant to s 58(3) of the *Civil Proceedings Act* 2011 (Qld) and, applying Supreme Court Practice Direction 21 of 2012, at the rate of 10 per cent per annum on the judgment sum ordered to be paid by this court from the date of judgment in the District Court (333 days). That calculation gives an amount of $2,937.70.

[8] The appellant filed further submissions on 28 November 2012 responding to the claim for interest. The appellant does not resist an order for interest on the damages sum from the date of judgment in the District Court nor the rate proposed but does contend that the calculation should be on $32,200 less certain amounts said to be due to Medicare Australia and WorkCover Australia. There are two things to say about this contention. Firstly, there is no evidence in the record before this court that those amounts are in fact due. Secondly, no argument is advanced by the appellant as to why it is that deductions from the damages in those amounts ought to be made in order to calculate interest. The respondent is entitled to payment by the appellant of the full amount of the damages and to interest on it to compensate her for being held out of the benefit of those damages since 16 December 2011.

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7 Section 55F(3)(b).

[9] It is appropriate, then, that interest be ordered to be paid on the damages awarded in the District Court in favour of the respondent, limited to interest on the amount of $32,200 ordered in this court.

Indemnity certificate

[10] The respondent seeks an indemnity certificate in respect of the costs ordered to be paid by her to the appellant pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld). That is because the appeal by the insurer succeeded on a question of law. The question of law identified by the respondent was the failure of the primary judge to reveal the methodology for the award of $40,000 for future economic loss as required by s 55(3) of the *Civil Liability Act* 2003.[8] This error of law is not of the kind discussed by Connolly J in *Lauchlan v Hartley*[9] where both sides of a legal debate were said to be "fairly arguable"[10] thus permitting the exercise of the discretion to grant a certificate. The respondent here had contended below for a relatively pessimistic view of her future earning capacity but did not, by submissions made on her behalf, seek to induce the primary judge to disregard the mandated obligation in s 55(3) to disclose her Honour's methodology in arriving at the figure she selected. Had her Honour analysed the basis for the amount she awarded it would likely have been seen by her Honour as unsupportable.

[11] Once an appeal is successful on an error of law, it is at the discretion of the court whether a certificate should issue. In this case there should be a certificate granted in respect of the costs ordered on the appeal.

[12] The respondent seeks an order for an indemnity certificate for the prescribed limit under the *Appeal Costs Fund Regulation* of $15,000. The effect of an indemnity certificate is set out in s 16 of the *Appeal Costs Fund Act*. It provides that where a respondent to an appeal has been granted an indemnity certificate under section 15, the certificate entitles the respondent to be paid from the Appeal Costs Fund an amount equal to the appellant's costs of the appeal in respect of which the certificate was granted. The amount is calculated by reference to the assessment of the costs (or agreement as to quantum) by the Board and the respondent or the respondent's solicitor and the appellant or the appellant's solicitor and actually paid by or on behalf of the respondent.[11]

[13] Section 16(1)(b) provides that the certificate also covers an amount equal to the respondent's costs of the appeal as assessed or agreed upon by the Board and the respondent or the respondent's solicitor and not ordered to be paid by any other party.

[14] Accordingly, it is for the Appeal Costs Fund Board to agree[12] to the amount of the costs to be paid. No doubt, in the case of a modest award of damages it may be uneconomical to have the costs formally assessed and the Board and the parties would seek to reach agreement.

[15] The further orders are:

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8 The President at [4], White JA at [65] and Gotterson JA at [68].
9 [1980] Qd R 149.
10 At 150.
11 Section 16(1)(a).
12 Section 16(1)(a)(iv) and (b).

1. The appellant pay the respondent's costs of the proceedings in the District Court fixed at $2,500 pursuant to s 55F(3)(a) of the *Motor Accident Insurance Act* 1994 (Qld).

2. The appellant pay the respondent the sum of $2,937.70 as interest on the damages amount.

3. An indemnity certificate pursuant to s 15(1) of the *Appeal Costs Fund Act* 1973 (Qld) be granted in favour of the respondent in respect of the costs of the within appeal.