SUPREME COURT OF QUEENSLAND

CITATION:	*Lee v RACQ Insurance Limited* [2015] QSC 120
PARTIES:	LIEN-YANG LEE (applicant) **v** RACQ INSURANCE LIMITED ABN 50 009 704 152 (respondent)
FILE NO:	No 779 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2015
JUDGE:	Dalton J
ORDER:	**1. The respondent is enjoined from reducing any rehabilitation services provided pursuant to s 51(3) of the Motor Accident Insurance Act 1994 until 25 September 2015.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – OTHER MATTERS – where the respondent insurer stated it would meet the 'reasonable and appropriate cost' of the applicant insured's rehabilitation without admitting liability under s 39(1)(a)(iv) of the *Motor Accident Insurance Act* 1994 – where the respondent gave notice to the applicant that it would not pay the costs of the applicant's rehabilitation past a set date – where the applicant submitted that s 51(3) of the *Motor Accident Insurance Act* 1994 prevented the respondent from rescinding its decision to pay the costs of the applicant's rehabilitation – where the respondent's statement that it would meet the costs of the applicant's rehabilitation was alleged to be induced by fraud – where the applicant applies for an interlocutory injunction to restrain the respondents from ceasing to pay the costs of the applicant's rehabilitation – whether the respondents should be enjoined from ceasing or reducing the applicant's rehabilitation

	Motor Accident Insurance Act 1994 (Qld) ss 39 and 51 *Acts Interpretation Act* 1954 ss 4 and 24AA
	Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57 *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 *Firearm Distributors Pty Ltd v Carson & Ors* [2000] QSC 159
COUNSEL:	M Grant-Taylor QC for the applicant B F Charrington for the respondent
SOLICITORS:	Littles Lawyers for the applicant Cooper Grace Ward for the respondent

HER HONOUR: On 25 September 2013 at 1.20 pm, a car in which the applicant was travelling collided head-on with another vehicle. The applicant was badly injured. He suffered severe spinal injuries. He was only 16 years old. The matter came before me on 19 February 2015, and the evidence on that application was that there was some hope that the spinal injuries would improve if aggressive rehabilitation was pursued.

The circumstances of the accident seemed odd. The driver of the oncoming vehicle says that the car in which the applicant was travelling was on the wrong side of the road, and that when he took evasive action to move out of its path, the vehicle in which the applicant was travelling in effect mirrored his actions so that the vehicles collided fairly well head-on.

The car in which the applicant was travelling contained his two parents and two siblings. Even on the day of the accident, police attending the scene were suspicious as to who was driving. The applicant's version of events has always been that his father was driving. His family have all sworn that at the time of the accident, the applicant's father was driving, his mother was in the passenger seat, and the three children were in the back.

The respondent insurer, mindful of the applicant's youth and severe disabilities, stated in response to the notice of claim that it was prepared to meet the reasonable and appropriate cost of the applicant's rehabilitation without admitting liability; see section 39(1)(a)(iv) of the Motor Accident Insurance Act 1994. That section reads:

> *If a notice of motor vehicle accident claim is given to an insurer under this division ...*
>
> *(a) the insurer must, within 14 days after receiving the notice give the claimant written notice—*
>
> ...
>
> *(iv) stating whether the insurer is prepared (without admitting liability) to meet the reasonable and appropriate cost of the claimant's rehabilitation;*
>
> ...

On 20 November 2013, Mr Koekemoer, of the respondent insurer, wrote to the applicant saying:

> *Pursuant to section 39(1)(a)(iv) of the Act, we advise that we are prepared to meet the reasonable and appropriate costs of your client's rehabilitation ...*

Mr Koekemoer now says that if he had known of the DNA evidence (discussed below) at the time he made the decision pursuant to s39(1)(a)(iv), he would not have agreed to provide rehabilitation, and I can readily understand why this is so.

The extent of rehabilitation provided by the insurer was the subject of some dispute between the parties, and that is why the matter came before me in February. The matter came before me again on 1 May 2015 because the insurer had given notice to the applicant that after 15 May 2015 (a time fixed by my February orders), it would not provide any further rehabilitation services to the applicant because it believed he had no claim against the insurer under the Act by reason of the fact that it was he, rather than his father, who was driving the car. The applicant responded by bringing this application, which is one for an injunction to prevent the insurer ceasing to provide rehabilitation services.

Although counsel for the applicant seem to disclaim it in submissions, the application is clearly enough one for an interlocutory injunction. It asks for an injunction until the final hearing and determination of the application or earlier order. The insured's case was that once the insurer had stated that it was prepared to meet the rehabilitation costs pursuant to s39(1)(a)(iv) of the Act, that decision was not able to be withdrawn or changed without either the consent of the claimant or and order of the Court because of the words of s51(3) of the Act, which provides:

> *Once liability has been admitted on a claim, or the insurer has agreed to fund rehabilitation services without making an admission of liability, the insurer must, at the claimant's request, ensure that reasonable and appropriate rehabilitation services are made available to the claimant.*

Mr Koekemoer made an affidavit on behalf of the respondent insurer on this application. He explained that when he made the decision pursuant to s39(1)(a)(iv) of the Act, he had received the preliminary police investigation report and noted that there was an issue as to who was driving. He instructed investigators, who looked at all questions relating to liability, including that question, and he took heed of the fact that his investigator's report showed that the applicant's father was adamant he was the driver and said that the blood on the driver's side airbag was his. He noted that it was curious that the insured driver asserted he could not steer the vehicle to the left immediately before the collision. He said at paragraph 33 of his affidavit, which is court document 24:

> *I was conscious of the claim involving a young person who had sustained a very severe spinal injury. While there were inconsistencies apparent in the material as to whom the driver of the vehicle was, I thought it would be appropriate, in the circumstances where the claimant's father and his mother allege the father was the driver, to continue to fund the reasonable and appropriate rehabilitation of the applicant.*

When police investigations were further advanced, it was revealed that quite extensive blood all over the driver's side airbag belonged to the applicant, not his father. This is consistent with the evidence that it was the applicant who suffered facial injuries, including a broken tooth, and as the hospital report has it "blood in the nose" and facial abrasions. The applicant's father did not have injuries which would readily account for his bleeding, or for his bleeding on the airbag to such an extent as is shown in the photographs.

I notice also that the police photographs taken after the accident show the driver's side seatbelt still done up and the driver's side seat in a very reclined position, consistent with the person who was driving having been removed under the seatbelt, across the back of the seat, and into the rear of the vehicle.

Certainly the physical circumstances of the crash site and the DNA testing make a strong case that it was the applicant rather than his father who was driving. I am conscious that this is an interlocutory application, and all the information I rely upon to form that conclusion is hearsay. I am also conscious that the members of the applicant's family have sworn that it was his father who was driving. There are no independent witnesses who can give direct evidence as to this.

The driver of the oncoming vehicle saw the applicant's father attending to him at a time when the applicant was in the back seat of the car. A later-comer to the scene saw the applicant's father attending to the applicant on the roadside out of the confines of the car. That latter bystander did notice that the applicant had a lot of blood on his face – court document 25, exhibit number 136. There are certainly statements made by the applicant's father which will, I imagine, provide fertile ground for cross-examination should this matter ever run to trial. The police have concluded that it was the applicant who was driving. They have made a conscious decision not to prosecute him because of the severity of his injuries – see court document 25, pp 8 and 9, of the exhibit bundle.

I am also conscious of the affidavit from Dr Coyne, who expresses a tentative opinion only as to whether or not the applicant's facial injuries are consistent with being hit in the face by a driver's side airbag. He thinks it would be unusual to have a broken tooth from such a hit, but thinks that a bloody nose would be consistent with being hit by an airbag. In effect, he disclaims definitive expertise in the area and recommends that a maxillofacial surgeon be consulted.

The insurer has taken the view that the claim against it was fraudulent, and that it:

> *reconsiders or rescinds its original decision to provide rehabilitation short of liability admission and decides not to provide rehabilitation*

– court document 25, exhibit bundle 145.

The obligation at s51(3) of the Motor Accident Insurance Act does appear to be mandatory. There is not any clear provision in the statute to cater for circumstances such as this. Subsection (10) provides that:

> *An insurer who is induced by a claimant's fraud to provide rehabilitation services for the claimant may recover the cost to the insurer of providing the services, as a debt, from the claimant.*

> That provision will be of little assistance here. First of all, the question of whether or not this claimant has been fraudulent cannot be determined until trial, if there is a trial, and in any case, the claimant has no assets, so that

recovery will likely be nugatory. Otherwise, the only option given by the statute to the insurer is to make an application pursuant to subsection (7)(b), which allows the insurer to:

> *apply to the court to decide what rehabilitation services are, in the circumstances of the case, reasonable and appropriate ...*

The difficulty with that is that the application is permitted to the insurer if it is of the opinion that "the cost of rehabilitation services is unreasonable". It might be that an insurer is able to make an application pursuant to 7(b) in a case like this claiming that the cost of any rehabilitation service is unreasonable, but the language of the section is not particularly apt to the present circumstances. I express no further opinion on that.

The insurer relied on section 24AA of the Acts Interpretation Act which provides that:

> *If an Act authorises or requires the making of an instrument or decision, the power includes power to amend or repeal the instrument or decision.*

Section 39(1)(a) does require the insurer to state whether or not it is prepared to meet reasonable costs of rehabilitation. It does not, in terms, require a decision, although clearly enough before the insurer can make a statement, there must be a decision. I am doubtful as to the application of section 24AA because of the provision at subsection (b) which says that the power to amend or appeal a decision:

> *is exercisable in the same way, and subject to the same conditions, as the power to make the decision.*

Here, the decision was to be made within 14 days after receiving a notice of claim, not on an *ad hoc* basis. Moreover, section 4 of the Acts Interpretation Act provides that its application may be displaced by a contrary intention appearing in any act, and I think there is something to be said for the argument advanced on behalf of the applicant that the mandatory language of section 51(3), together with the fact that there are some provisions for dealing with the situation where rehabilitation expenses are to be reduced, but not this situation, does tend to lead to a conclusion that the legislature intended s24AA not apply to the decision antecedent to the statement made pursuant to s39(1)(a)(iv). If an insurer could change its decision to provide rehabilitation when it wished pursuant to s24AA, there would seem little room for the application of s51(7)(b).

There is also the difficulty referred to in *Firearm Distributors Pty Ltd v Carson* [2000] QSC 159 [32] that the Act should not be interpreted so as to allow an insurer to make successive decisions as to these matters, because such vacillation on the part of an insurer could be unreasonable and have an unfortunate effect on the victims of motor accidents.

There has always been an exception in the cases of misrepresentation as to fraud. See [39] ff of *Firearm Distributors* and the authorities cited there. As to this, Justice Chesterman said at [42] of that case:

> *The exception recognised by the cases that a decision induced by fraud or misrepresentation may be reconsidered would appear, on principle, to be valid. Such a decision is not a proper exercise of the power so that a subsequent decision is, in reality, the first exercise of the power authorised by the statute.*

As noted above, there will be no definitive finding as to whether or not there has been fraud in this case until a trial. The question before me is whether or not the plaintiff has established a prima facie in the sense explained in *Beecham Group Limited v Bristol Laboratories Pty Ltd – ABC v O'Neill* (2006) 222 CLR 57, [65]. As Justices Gummow and Hayne said in *O'Neill*'s case, the applicant need not show that it is more probable than not that it will succeed at trial, but must show a sufficient likelihood of success to justify the circumstances of the preservation of the *status quo* pending the trial. As their Honours continued, it has been recognised that how strong a probability needs to be depends upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks. In this way, it can be seen that the two questions to be considered, where an interlocutory injunction is sought, do impinge on each other. Furthermore, in considering the balance of convenience it is desirable that the Court have regard to the strength of the plaintiff's case for relief – *Samsung Electronics Co Ltd v Apple Inc* and the cases cited there at [71].

In my view, the plaintiff applicant does show a prima facie case here. In circumstances where his family have sworn affidavits that he was not driving the car at the time of the accident it is difficult to see how I could come to any other conclusion on an interlocutory hearing. However, I must record that I am concerned about the strength of that prima facie case and, in particular, I do not think it is more probable than not on the basis of what I have seen that the applicant will succeed in this case at trial.

As to the balance of convenience, the applicant has no assets and offers no security to the respondent insurer, should it be damaged by the injunction. The applicant has already had rehabilitation worth around $200,000 provided by the insurer. If it transpires that the insurer is correct and that payment has been induced by fraud, the insurer's rights pursuant to s 51(10) will likely be nugatory. If further money is spent between now and the date of trial on rehabilitation and the respondent is correct as to who was driving the vehicle, that money will also be lost to the respondent.

In evaluating the balance of convenience, I have regard to the fact that the parties are asking for orders expediting the trial of the matter.

I also have regard to the fact that the decision made by the insurer pursuant to s 39(1)(a)(iv) is one made voluntarily, that is, even if an insurer assesses a claimant's prospects of success in a court action as high, it need not fund rehabilitation.

I have regard to the fact that the purpose of the Act would not be served by insurers who vacillate in their decisions pursuant to s 39(1)(a)(iv). On the other hand, countering that consideration in this case, I have regard to what I see as quite strong circumstantial evidence of fraud and the weakness of the prima facie case shown by the applicant.

I note that the application I heard in February was one in which the applicant asserted that it was important for him to receive rehabilitation care up to the second anniversary of the accident, which would be 25 September 2015. The medical evidence was that, although the applicant's injuries were severe, they were not necessarily wholly irretrievable, and that there was some hope of improvement were rehabilitation provided for this two-year period. As I commented then, it would be tragic if the applicant lost some chance of medical improvement because he could not afford therapy.

To continue therapy for another four months will undoubtedly involve the insurer in extra expense. Having regard to the expensive it has incurred to date – $200,000 over 20 months – I would extrapolate that it will cost around another $40,000 to continue therapy until 25 September 2015. As I say, if the insurer is correct about the facts of the accident, there is a good chance that money will be lost to it. On the other hand, if the applicant proves correct at trial as to the circumstances of the accident, it may be that much will be lost to him which cannot be measured in monetary terms.

I have found this balancing of convenience very difficult but, in the end, it is that latter factor which weighs most heavily in my discretion. Bearing all the matters in mind, I will make an order that the respondent is enjoined from reducing any rehabilitation services provided pursuant to s 51(3) of the Motor Accident Insurance Act 1994 until 25 September 2015.

_____