

RECENT DECISIONS

Leach v The Nominal Defendant (QBE Insurance (Australia) Ltd) [2014] NSWCA 257- Judgment delivered 6 August 2014

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Summary

Under section 3A of the *Motor Accidents Compensation Act 1999* (NSW) a plaintiff must establish the following things to be entitled to compensation:

- there was fault by the owner or driver in the use or operation of a vehicle, and
- the injury is the result of and is caused during the driving of the vehicle (or a collision with a vehicle).

This case confirms that an injury sustained while a vehicle is being driven does not necessarily 'result from' the use or operation of the vehicle.

Legislation

Section 3A of the *Motor Accident Compensation Act 1999* (NSW) ("the Act").

Background

On 8 November 2008, Mr Leach was travelling as a passenger in a Mitsubishi Magna on the Prospect Highway at Seven Hills. When changing lanes, a Holden Commodore struck the Mitsubishi.

Gun shots were then fired from the Holden Commodore, injuring Mr Leach. The driver fled the scene and was never identified. The Commodore was reported as stolen at the time of the accident.

Mr Leach brought proceedings in the District Court against the Nominal Defendant under the Act. He argued that the injuries he suffered were caused by the conduct of the driver of the Commodore.

The trial judge considered the critical question to be determined was 'whether the injury was caused by the fault of the driver of the Commodore and whether the injury was a result of the driving of the car.'

The judge considered the case of *Nominal Defendant v Hawkins* [2011] NSWCA 93 ("Hawkins"). In that case, the plaintiff was riding a bike along the Pacific Highway. The occupants of a car behind him were yelling and beeping the horn. The plaintiff felt intimidated and rode onto the footpath. An object thrown from the car struck him. He lost control of his bike, collided with a telegraph pole and was injured. It was found that the driver drove the car so as to facilitate the object being thrown.

The judge distinguished Hawkins from the present facts. There was no pattern of harassing driving in this case. The judge accepted that there was driver fault, but did not consider that:

... gunfire can properly be considered to be part of or incidental to the negligent driving in this case. It is substantially distinct from and independent of it. The throwing of the object in Hawkins is something that developed in the process of harassment. The firing of the guns in this case was something that was planned.

The judge applied a 'common sense' approach to causation, and entered judgment in favour of the Nominal Defendant. Mr Leach appealed the decision.

Court of Appeal Decision

The Court of Appeal accepted that the trial judge was wrong to apply the 'common sense' test, but held that the same conclusion could be made using the proximate (nearest) cause test.

It was held that Mr Leach's injuries were not caused by the fault of the driver during the collision of the vehicle. McColl JA stated:

As is apparent from the discussion of Hawkins, in order to fall within section 3A, it is necessary to identify a sufficient connection between the injuries and the driving fault. Driving which is merely the occasion for the infliction of injuries will not suffice even if it is contemporaneous with the activity which inflicts the injury.

The Court of Appeal held that the trial judge did not make a mistake in distinguishing the case of Hawkins. The shooting in Mr Leach's case was held to be independent of the driver's fault, and the gunfire was the immediate cause of Mr Leach's injuries. Accordingly, the driving of the Commodore was not a relevant cause of Mr Leach's injuries within the meaning of section 3A of the Act. The appeal was dismissed.

For more information, please contact:



Sam Kennedy
Partner
T: 02 8257 5733
M: 0417 269 105
sam.kennedy@turkslegal.com.au



Eliza Hannon
Lawyer

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