

**RECENT DECISIONS**

# Notional assessment of damages in recovery proceedings does not bind worker in damages claim

*IAG Limited trading as NRMA Insurance v Lucic* [2019] NSWSC 620 (28 May 2019)

[Link to decision](#)

**Summary**

The NSW Supreme Court has held that a worker will not be bound by the formulation of notional damages for the purpose of recovery proceedings under section 151Z of the *Workers Compensation Act 1987* (the '1987 Act') if the worker subsequently brings a separate action against the third party claiming damages.

**Background**

The worker suffered injury as the result of a motor vehicle accident that occurred in the course of his employment on 31 August 2005 for which he received workers compensation payments.

In 2007, the workers compensation insurer brought recovery proceedings against the third party driver claiming the statutory indemnity (recovery) under section 151Z of the 1987 Act.

The proceedings were heard and determined by Judge Truss of the District Court who gave judgment on 3 October 2007 in which she notionally assessed the damages that would have been payable to the worker in the sum of \$196,800 setting the limit of any right of recovery. Judgment was entered for the amount of compensation paid to the date of judgment (\$91,096.79).

The worker then made a claim against the third party driver claiming CTP damages under the *Motor Accidents Compensation Act 1999* and the CTP insurer applied for an exemption from CARS on the basis that the claim was not suitable for CARS assessment.

The CARS Assessor refused the application finding that there was no issue estoppel or abuse of process as the worker could not be regarded as 'privity' with respect to the recovery proceedings. The CARS Assessor assessed the worker's damages in the sum of \$1,548,026.45 (31 August 2018).

**Application for Review**

The CTP insurer applied to the Supreme Court for an administrative review of the decision of the CARS Assessor that was heard by Justice Adamson who reviewed a number of case authorities in which there had not been found to be an issue estoppel or res judicata on the basis of sufficient privity of interest between the worker and employer.

Notably, in this case, the worker was not a party to the recovery proceedings and the workers compensation insurer did not represent the legal interests of the worker in enforcing the statutory indemnity in its favour so as to give rise to an estoppel.

Her Honour summarised the relevant principles as follows:

1. Parties to proceedings are bound by judgments between them and essential issues decided in proceedings to which they are parties;
2. Where a party could have made a claim against the other party to proceedings but did not, that party will not be permitted, in further proceedings, to raise the claim as this would amount to an abuse of process;
3. As between the same parties, an issue estoppel will arise in subsequent proceedings on a different cause of action to prevent re-litigation of an issue already determined between them in previous proceedings; and
4. Persons who were not parties to such proceedings are not affected except to the extent that they are estopped from re-litigating in new proceedings against a different party, an issue on which it was unsuccessful in previous proceedings, as this would amount to an abuse of process.

Her Honour held that the worker was not bound by the notional assessment of damages in the recovery proceedings as he was neither a party nor privity to a party and dismissed the summons.

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## Conclusion

The decision clarifies the position such that workers compensation insurers may pursue recovery actions without raising concerns that a notional assessment of damages might otherwise prejudice a worker's subsequent claim for damages against the third party.

The interests of the parties are distinct and although both matters involve consideration of the damages payable, the recovery proceedings are materially different to the extent that the assessment is notional being assessed at the date of judgement and based on the evidence available to the workers compensation insurer.

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