The court of appeal must 'decide for itself'

Dwyer v Calco Timbers Pty Ltd (2008) 244 ALR 257

By Guy Donovan

In a unanimous decision, the High Court of Australia has recently determined that the Victorian Court of Appeal is required by s134AD of the *Accident Compensation Act* 1985 (Vic) (the AC Act) to decide for itself whether or not a worker has sustained a 'serious injury' in an appeal from the County Court.

COUNTY COURT

Brett Dwyer was injured on 27 March 2000 when the arm of a crane fell on to his right arm. Mr Dwyer sought leave from the County Court of Victoria under s134AB(16) of the AC Act to bring proceedings for damages on the basis that he had sustained a serious injury.

On 1 December 2005, the County Court found that the impairment and loss of function in Mr Dwyer's right arm and his disfigurement were not a 'serious injury' under s134AB of the AC Act and, consequently, the court refused leave for Mr Dwyer to bring proceedings for damages.[1]

COURT OF APPEAL

On 8 September 2006, the Victorian Court of Appeal (Maxwell P, Eames and Neave JJA) dismissed an appeal from Mr Dwyer under s134AD of the AC Act.[2] In accordance with the decision of *Barwon Spinners Pty Ltd v Podolak*[3] (Barwon Spinners), the court stated that it must be satisfied that the decision of the County Court was wrong and should be reversed or set aside in order to allow the appeal. It found that the County Court was not wrong to conclude that Mr Dwyer had not sustained a serious injury.

HIGH COURT

Mr Dwyer appealed to the High Court on the basis that the Court of Appeal had misconceived the nature of the right of appeal provided under s134AD of the AC Act and had consequently failed to exercise its jurisdiction.

Section 134AD of the AC Act states that, on applications made 'under section 134AB(16)(b), the Court of Appeal shall decide for itself whether the injury is a serious injury' on the evidence and other material before the judge who heard the application and on any other evidence which the Court of Appeal may receive.

Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ unanimously allowed Mr Dwyer's appeal and held that the Court of Appeal erred in its reading of the provisions providing for appeal from the County Court.[4]

The Court of Appeal had emphasised the importance of error by the County Court in determining whether its judgment was the wrong one and should be reversed or set aside.[5] For the Court of Appeal to approach its task in this way was not *deciding for itself* whether on the balance of probabilities the injury was a serious injury as required by s134AD. Accordingly, the Court ordered that the appeal be allowed with costs and that the matter be remitted to the Court of Appeal.[6]

POINTS OF INTEREST

The Court of Appeal, in particular Eames JA, adopted a number of propositions from *Barwon Spinners*. This included the proposition that the County Court is a specialist tribunal that hears serious injury applications on a daily basis and thus has a significant advantage over the Court of Appeal in this area.[7] Accordingly, it is arguable that the decision of the High Court has the potential to lead to inconsistent decision-making because it puts the power to make decisions in relation to whether an injury is a 'serious injury' into the hands of a court that is less experienced in dealing with such matters.[8] In addressing this concern, the High Court stated that its decision was based upon the correct reading of the AC Act and the intention of the legislature. Further, the Court stated that the decision will centralise decision-making, with the consequence that consistency should be reached within a short time.[9]

In its judgment, the High Court referred to the case of *Allsmanti Pty Ltd v Ernikiolis*,[10] in which Maxwell P stated that the availability of a full rehearing on appeal can undermine the work of the County Court by encouraging the losing party to have the facts reheard in the hope that the Court of Appeal will take a different view. However, as was noted in the decision of the High Court, a great benefit of requiring the Court of Appeal to 'decide for itself' is that successful appeals under s134AD will not need to be remitted to the County Court for rehearing.[11] This will certainly have the capacity to reduce the costs and time that an injured worker invests in litigation. ■

Notes: **1** *Dwyer v Calco Timbers Pty Ltd* [2005] VCC 1132. **2** *Dwyer v Calco Timbers Pty Ltd* [2006] VSCA 187. **3** (2005) 14 VR 622. **4** *Dwyer v Calco Timbers Pty Ltd* (2008) 244 ALR 257 at 264. **5** At 268. **6** At 269. **7** [2006] VSCA 187 at 8 – 9. **8** at 42 – 43. **9** (2008) 244 ALR 257 at 268 – 69. **10** [2007] VSCA 17 at 71 – 2. **11** (2008) 244 ALR 257at 268 – 69.

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