

assumptions were.

The insurer submitted that the assessor gave no adequate reasons for rejecting the evidence from the insurer's medico-legal experts, and appeared simply to accept the diagnoses of the claimant's medico-legal experts where they conflicted with the insurer's experts. Hidden J considered that while the assessor's reasons were sparse in respect of the medical evidence, the opinion when read as a whole was likely adequate.

The assessor awarded approximately \$352,000 for future economic loss. The insurer submitted that there was an internal inconsistency in the figures relied upon by the assessor, and a failure to comply with s126 of the MACA, in that the assessor failed to provide reasons to justify the assumptions made in arriving at the future economic loss figure. The court indicated that the insurer's argument had merit.

Lastly, in respect of future commercial care, the insurer

submitted that the assessor had failed to identify or apply any of the principles concerning future commercial care, and submitted that the assessor's care finding was not adequately explained. The court suggested that the reasons provided as to future commercial care were 'barely adequate'.

In the previous matter of *Allianz Australia Insurance Limited v Ward* [2010] NSWSC 720, Hidden J held that although an assessor's reasons need not be lengthy and should avoid undue formality and technicality, they must still demonstrate that the issues in the case have been determined. This decision goes further and creates authority for the principle that a failure to give proper reasons is sufficient to establish a jurisdictional error invalidating the assessor's certificate and requiring it to be set aside. ■

Brendan Jones is a lawyer at Moray & Agnew in Canberra.

PHONE (02) 6262 6922 EMAIL bjones@moray.com.au.

The nominal defendant and unregistered motor vehicles

Zerella Holdings Pty Ltd v Williams 2012 [SASCFC 100]
and *Nominal Defendant v Uele* [2012] NSWSC 271

By Andrew Stone

For motor accidents occurring in NSW, there are effectively four hurdles to pursuing a claim against the Nominal Defendant where injury has been caused by an unregistered motor vehicle.

For other states, at least the first two are usually relevant. These hurdles are:

- (i) the usual issue of establishing fault on the part of the driver of the unregistered vehicle;
- (ii) establishing that the accident occurred on a road (s33(1));
- (iii) demonstrating that the injured party was not a trespasser (s33(1)(3A)); and
- (iv) establishing that the vehicle concerned was a 'motor vehicle' within the scope of s33(5).

While these issues may appear straightforward at first sight, the reality is that the definitions of 'road' and 'motor vehicle' can give rise to significant complexity. Two recent decisions (one from the Full Court of the Supreme Court of South Australia and one from the NSW Court of Appeal) have addressed these issues.

A ROAD

Section 3 of the *Motor Accidents Compensation Act 1999* (NSW) defines a road as being a road or road-related area

within the meaning of the *Road Transport (Vehicle Registration) Act 1997*. That legislation defines a road as incorporating a road-related area. This includes median strips, footpaths, nature strips, areas open to the public and designated for use by cyclists or animals, a road shoulder and 'an area that is not a road and that is open to or used by the public for driving, riding or parking vehicles'.

This latter provision has given rise to numerous cases to determine whether a Woolworths car park, Stockton Beach, Sandgate Markets, a wharf, a nature park and a closed speedway are open to and used by the public for driving. Such cases invariably end up being determined in accordance with their facts. In *Zerella Holdings Pty Ltd v Williams*,¹ the majority provided useful guidance as to the principles to be applied.

In *Zerella*, the plaintiff was injured in the loading dock area of a fruit and vegetable processing plant. The company that controlled the premises had signage on internal roads, stating that visitors to the premises were not permitted to proceed directly to the loading dock area. There was a pre-booking system for delivery vehicles. There was a gate at the entrance to the property that was closed at night, but open and unguarded by day. Despite these systems, some casual visitors still drove to the loading dock area. >>

In the particular circumstances of the case, a 2-1 majority held that the loading dock area was not open to and used by the public. Of interest to those addressing Nominal Defendant claims were the principles set out in determining whether a road or area was 'open to or used by the public'. The court stated [from 40]:

- (i) It is not necessary that the land be publicly owned or that there be a public right of access of use. Different considerations apply to private land compared with public land in this respect.
- (ii) In the case of private land, the composite phrase 'open to or used by the public' encompasses legal entitlement to entry by the public (*de jure*) as well as actual use by the public (*de facto*). The words 'open to' are more apposite to the former and the words 'used by' are more apposite to the latter.
- (iii) In the case of private land, the phrase 'open to....the public' refers to an invitation or licence expressly or impliedly extended to members of the public by the private occupier. The question is not whether the land is physically open to the public, although the existence or non-existence of a physical barrier to entry may be one factor in assessing whether an invitation is extended to the public.
- (iv) For this purpose, there is a distinction between a general invitation extended without discrimination to the public and a series of invitations restricted to specific invitees for the purpose of transacting business with the occupier or otherwise. Much will depend on the circumstances, including the restrictions upon those eligible for entrance and the scope of the permitted use on gaining access.
- (v) The mere fact that a fee is charged or that the area is used only by members of the public with a particular interest (for example, swimming or natural history in the case of public pools and museums respectively) does not of itself establish that it is not 'open to the public'.
- (vi) In the case of private land, the phrase 'used by the public' refers to actual use (even without the permission of the occupier) by the public, but not to mere use by specific invitees or to an isolated use by a member or members of the public.

The court went on to comment with regards to car parks [at 41]:

'...if an occupier does not enforce the limitation of use of a car park to his or her customers, and the car park is, in fact, habitually used by members of the public for their own purposes, the car park will usually be found to be a public place....On the other hand, use by members of the public who ignore the occupier's express or objectively implied conditions of use in which the occupier could not reasonably be expected to control, will not constitute use by the public.'

In summary, each case depends upon its facts, requiring consideration of the degree of access and circumstances of access to the area in question.

A MOTOR VEHICLE

Section 33(5) of the *Motor Accidents Compensation Act 1999*

(NSW) defines a 'motor vehicle' for the purposes of the Nominal Defendant provisions as being either:

- (a) exempt from registration, or
- (b) required to be registered, and:
 - (i) at the time of manufacture, capable of registration; or
 - (ii) at the time of manufacture, with minor adjustments, capable of registration; or
 - (iii) was previously capable of registration, but is no longer capable of registration because it has fallen into disrepair.

It is noted that s33(5) was amended in 2006. Previously, the requirement had been that the vehicle be capable of registration immediately prior to the subject accident (with 'minor repair'). The focus was on the specific vehicle involved in the accident. This created some particular difficulties for plaintiffs. The plaintiff may have no idea as to the state of the vehicle that ran them down and may be in no position to prove whether or not it was capable of registration immediately prior to the accident.

The amended s33(5) shifts the focus back to the state of the vehicle at the time of manufacture.

An issue then arises as to vehicles that are not capable of regular on-road registration, but are capable of registration under some special provisions. This includes the issuing of an UVP (Unregistered Vehicle Permit) and Conditional Registration. The issuing of Conditional Registration has largely taken over from the issuing of UVPs (since about 2004). A wide variety of vehicles can be issued with Conditional Registration on public roads. The Conditional Registration comes with a CTP policy (currently issued by QBE) as part of the price of registration. The CTP coverage applies only while the vehicle is being used on a road or road-related area and not while the vehicle is being used on private property.

There may be specific restrictions on conditional registration (such as 'not at night').

Examples of vehicles that can be issued with Conditional Registration include:

- agricultural motorbikes (when used on roads between farm properties);
- forklifts;
- golf carts;
- motocross motorbikes (for recreational riding on Stockton Beach, north of Newcastle) – the only public area in NSW where motocross motorbike riding is lawful; and
- cranes and other mobile industrial machinery.

The Roads and Maritime Services (RMS) website (the RTA having been subsumed into the RMS), identifies the various categories of Conditional Registration that can be issued.

In *Nominal Defendant v Uele*,² the NSW Court of Appeal considered whether the test as to a vehicle being capable of Conditional Registration at the time of manufacture was objective or whether it required an enquiry into the history of the use of the specific subject vehicle.

The plaintiff in this case was run down by an unregistered motocross motorbike on Cobar Reserve. The subject motorbike had been manufactured by Yamaha in 2000, although the accident did not occur until 2008. At the time

of manufacture, the motocross motorbike was not capable of being registered for regular on-road use – it lacked essential items such as indicators and brake lights.

However, the class of motocross motorbikes could have been issued with an Unregistered Vehicle Permit (now Conditional Registration) for either agricultural use or for recreational riding on Stockton Beach. There was no evidence that the particular bike had ever been used for such purposes.

It would not have been possible to obtain a UVP in 2000 (or indeed now), which would have permitted the use of the bike on Cobar Reserve.

The Nominal Defendant argued at trial and again on appeal that it was necessary to look back through the user history of the specific motorbike to determine whether it ever in fact had been put to a use such that Conditional Registration (or a UVP) would have been issued.

This approach was rejected by the trial judge and the Court of Appeal. The Court of Appeal held that the test was purely objective – whether the class of bike/vehicle was theoretically capable of being issued with a UVP or being conditionally registered as at the time of manufacture.

Justice Meagher (with whom Justices Macfarlan and Sackville concurred) stated that s33(5)(b)(i) [at 28]:

‘directs attention to the characteristics and specification of the vehicle when manufactured’.

Justice Meagher continued [at 29]:

‘Each of paragraphs (B)(i),(ii) and (iii) is concerned with the physical characteristics of the vehicle as distinct from the identity or purpose of the owner or operator of the vehicle at any relevant point in time.’

Justice Meagher concluded:

‘The application of those criteria should yield the same answer for all vehicles which have the same physical characteristics, irrespective of their use or proposed use by any owner or driver at any time before the motor accident.’

The decision in *Nominal Defendant v Uele* means that any motorised vehicle capable of Conditional Registration at the time of manufacture or subsequently will be covered by the NSW Nominal Defendant scheme while being used on a road or road-related area, subject to the other criteria identified above (establishing breach of duty, no trespassing).

This is irrespective of whether the specific vehicle was ever put to any use such that Conditional Registration would in fact have been issued.

Given that there may have been instances in the past of the Nominal Defendant (or insurers acting as agents for the Nominal Defendant) rejecting claims caused by vehicles such as unregistered motocross motorbikes on public roads, those who have advised in such cases are encouraged to review their files. *Nominal Defendant v Uele* makes clear that the NSW Nominal Defendant scheme covers injuries involving unregistered motocross motorbikes where such accidents occur on areas that are open to and used by the public for riding.

Further, given that it uses similar entry criteria to the motor accidents scheme (eliminating the element of fault), the NSW Lifetime Care and Support (LTCS) scheme should accept as members the at-fault riders/operators/drivers of vehicles and machinery such as motocross motorbikes, forklifts and golf carts. This is when the operators of such machinery are catastrophically injured and subject to the vehicle involved being used on a road or road-related area at the time of injury. (The LTCS scheme treats work-related injuries differently.) ■

Notes: 1 *Zerella Holdings Pty Ltd v Williams* [2012] SASFC 100. 2 *Nominal Defendant v Uele* [2012] NSWSC 271.

Andrew Stone is a barrister practising from Sir James Martin Chambers. He is the NSW Director of the ALA and was counsel for the plaintiff in *Nominal Defendant v Uele*. **PHONE** (02) 9223 8088 **EMAIL** stone@sirjamesmartin.com.

Lawyers



for the People

Advertise here

For information and bookings contact:

Renée Harris

Publications Manager

T +61 2 9258 7700

F +61 2 9258 7777

E renee@lawyersalliance.com.au



GLOBAL

Risk • Compliance • Investigations • Support

- Investigation & Evidence Gathering
- Liability
- Loss & Damages
- Witness Statements
- Locating Persons of Interest
- Scene Examination
- Assessment of Systems of Work
- Risk Assessment
- Pre Trial Defence Preparation
- Expert Evidence (Use of Force)

Servicing Lawyers Australia Wide

DEFERRING FEES – Injury matters (Plaintiff) until settlement

1300 550 475 | phoenixglobal.com.au