Submission No 5

INQUIRY INTO THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND MOTOR ACCIDENTS COUNCIL - TENTH REVIEW

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Date received: 30/04/2010

THE LAW SOCIETY
OF NEW SOUTH WALES

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21 April 2010

The Hon Christine Robertson MLC
Committee Chair
Standing Committee on Law & Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Facsimile No: 9230 3371

Dear Ms Robertson,

The Law Society of NSW Injury Compensation Committee (Committee) wishes to thank the Standing Committee on Law & Justice for the opportunity to provide a submission in respect of the tenth review of the Motor Accidents Authority and the Motor Accidents Council.

The Committee wishes to raise the following matters regarding the ongoing functioning of the Motor Accidents Authority:

1. The Committee continues to be disturbed by the inadequacy of the present legal costs regime set out in the *Motor Accidents Compensation Regulation,* 2005 ("the Regulation").

   This inadequacy is, firstly, manifested in the lack of appropriate recognition of the extra work required of lawyers as a result of the procedural provisions introduced by the Authority since 2006 which require more thorough preparation, particularisation and negotiation of claims even before an application is lodged with the Claims Assessment and Resolution Service (CARS). Secondly, and more importantly, the inadequacy of the current costs regime is most apparent in the unrealistic allowances made for overall scaled costs under Clause 4 of Schedule 1 of the Regulations and for medical report fees in Schedule 2 of the Regulations.

   Whilst the Committee acknowledges and appreciates that the recent commencement of the *Motor Accidents Compensation Amendment (Costs & Fees) Regulation,* 2010 does encompass a small increase in legal fees to reflect recent movements in the Consumer Price Index, the Motor Accidents Authority itself accepts that this Regulation is no more than an interim step in the review process of the Regulation which is due to be reviewed and remade prior to 1 September 2010. The Committee reiterates that there must be fundamental increases in the level of legal fees to reflect the fact that there have not been any

substantive changes (other than CPI increases) in the level of legal fees since the scheme first commenced in 1999. The FMRC Report which was received by the Motor Accidents Authority in December 2008 reinforced the fact that the existing costs regulations were manifestly inadequate when it came to covering anything like the full costs payable by a plaintiff out of a motor accident damages action. There is no suggestion in the FMRC Report that the total legal costs charged by the law firms to the clients on a solicitor/client basis were in any way excessive. Despite obtaining this FMRC report in December 2008, there is still no substantive change to the costs regulation. The Committee acknowledges and appreciates the work of the current Costs Regulation Working Party but it must be said a similar Costs Working Party was convened in 2008 with no end result. The Committee understands the existing costs regulation is due to be reviewed and remade prior to 1 September 2010. The Committee is anxious to ensure that some meaningful improvement is achieved in the current costs regime under the proposed Regulation. In this respect, it must be borne in mind that an increase in the regulated costs will not mean any greater profits for lawyers. In all but the very small claims, lawyers will still be charging the same fees as they did previously. The sole beneficiary of increases in the costs regulations will be the injured. Regrettably we are currently in a situation where the most vulnerable (the injured persons) are subsidising the scheme on an ever increasing basis as the gap between the costs recoverable under the Regulation and the real costs widen.

2. The Committee is mindful that the recent Supreme Court decision of *Ackling v. QBE Insurance (Australia) Limited* delivered on 28 August 2009 appears to endorse the proposition that, in relation to those matters set out in s.58, a medical assessor appointed by the Medical Assessment Service is entitled to express a binding view on the causation of the Claimant's injuries. The Committee submits that medical practitioners are not trained in the legal test of causation and are, therefore, ill-equipped to assess such matters. Whereas *Ackling* was an issue in relation to the Claimant's entitlement to non-economic loss (i.e. pain and suffering), a medical assessor may equally express a binding view pursuant to s.58 as to whether "*any such treatment relates to the injury caused by the motor accident*" and as to whether past or future medical treatment "*is reasonable and necessary*". Disconcertingly, treatment is defined not only to include issues relating to medical treatment or dental treatment, but also to include "*attendant care services*" pursuant to s.42 of the *Motor Accidents Compensation Act*, 1999. Effectively this means that a doctor, or possibly an occupational therapist, will be providing a binding assessment not only as to the reasonableness of any proposed care regime but also as to whether or not the injury itself was one that was caused by the motor accident.

   The Committee members have noticed an increasing tendency for insurers, in particular, to lodge applications with the Medical Assessment Service (MAS) in relation to past and future care disputes so this is not a matter of minimal significance.

   In the Committee's view, this power to deal with care disputes is one that should be the subject of detailed analysis by a legally trained person who has all the relevant material before him or her including any relevant care statements and including the totality of the medical evidence. This legally trained person should have the capacity, if appropriate, to question the Claimant and his or her carers and to invite legal submissions from Solicitors or Counsel from both sides. This is not a question which can be adequately answered by one medical assessment

or occupational therapy assessment performed in the presence of the Claimant even if that assessment be in the Claimant's own house. For instance, the assessment of the reasonableness or otherwise of care requires consideration of the provisions of s.128 of the *Motor Accidents Compensation Act*, 1999 and numerous Court of Appeal decisions dealing with a claim for care (example *Teuma v. C P & P K Judd Pty Ltd* and *Geaghan v. D'Aubert*) as well as the High Court's decision in *CSR Limited v. Eddy*. These are all issues that are appropriately addressed by an assessor who is legally trained and who has practised substantially in the area of personal injury for an extended period.

If one needs an example of the problems associated with requiring a non-legally trained person to assess causation then one need only turn to the Supreme Court decision of Rothman J handed down on 2 October 2009 in the matter of *Garcia v Motor Accidents Authority*. His Honour criticised the MAS assessor for applying the wrong test of causation and clarified that it "*is sufficient for the tortuous act to have contributed to the damage; it need not be the sole cause. Nor need it be the major cause*". In this case his Honour determined that the medical assessor "*has determined causation without regard to the motor vehicle accident, as an operative cause of the injuries, including the injuries from undergoing the resulting operation. This is to misunderstand the nature of causation and to disregard, in the assessment thereof, an operative but not major, cause of injury*".

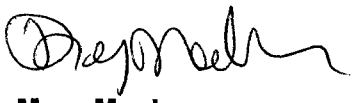
The Committee believes that leaving the determination of care disputes in the hands of medical assessors represents a denial of natural justice for the injured person and it has the real potential to stagnate the whole MAS and CARS process during the inevitable review and further medical assessment process which follows a flawed MAS care determination.

3. The Committee is concerned about the potential impact of the recent New South Wales Court of Appeal decision in *Zotti v AAMI Limited* (2009) NSWCA 323. The effect of this decision is that some drivers on public roads will not be insured for third party purposes if they were at fault in the accident and an injury was sustained not during the accident itself but at some subsequent time. The Committee understands that the Motor Accidents Authority is contemplating a legislative solution to this problem but no evidence of this has yet been forthcoming.

The other recent decision which causes the Committee some considerable concern is the Court of Appeal decision in *Doumit v Jabbs Excavations Pty Limited* (2009) NSWCA 360. Here the Court held that a bulldozer which was operating on treads rather than wheels was not a motor vehicle and was not governed by the third party scheme. This means that in respect of such vehicles which operate on treads, green slip monies have been collected by the relevant insurers but there is no corresponding third party insurance policy which covers the vehicles. The Committee understands that the Motor Accidents Authority is currently in the course of considering this problem in conjunction with the Roads & Traffic Authority but it is the Committee's submission that this problem requires urgent legislative amendment given that a significant number of vehicles which are currently operating on public roads are presently uninsured by reason of this decision.

We trust the above submission is of assistance in the course of conducting your review. If you require any further information please do not hesitate to contact Andrew Wilson, Executive Member, Injury Compensation Committee on telephone 9926 0256 or email: andrew.wilson@lawsociety.com.au.

Yours sincerely



Mary Macken
President