Submission
No 8

NINTH REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE MOTOR ACCIDENTS AUTHORITY AND THE MOTOR ACCIDENTS COUNCIL

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This submission addresses both the Ninth Review of the MAA and MAC and the First Review of the LTCSA and LTCSAC. A duplicate submission has been processed as received by the LTCSA/LTCSAC Review and is available for download from that inquiry web page.

The New South Wales Bar Association

00/334-4

16 May 2008

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

Dear Ms Robertson

Re: Ninth Review of the Exercise of the Functions of the Motor Accidents Authority and Motor Accidents Council and first review of the exercise of the functions of the Lifetime Care and Support Authority and Lifetime Care and Support Advisory Council

Thank you for your letter of 10 March 2008 seeking the New South Wales Bar Association's submission in relation to the above Law and Justice Committee inquiry.

A copy of the Association's submission is attached.

Please do not hesitate to contact Mr. Alastair McConnachie, Director, Law Reform and Public Affairs on 9229 1756 or amcconnachie@nswbar.asn.au if you have any inquiries as to the matters raised in the submission.

Yours sincerely

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STANDING COMMITTEE ON LAW AND JUSTICE

9TH REVIEW OF THE OPERATION OF THE MOTOR ACCIDENTS AUTHORITY AND MOTOR ACCIDENTS COUNCIL AND FIRST REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE LIFETIME CARE AND SUPPORT AUTHORITY AND LIFETIME CARE AND SUPPORT ADVISORY COUNCIL

SUBMISSION OF THE NEW SOUTH WALES BAR ASSOCIATION

16 MAY 2008

Introduction

The New South Wales Bar Association ("the Association") again welcomes the opportunity to provide submissions and questions for the Standing Committee on Law and Justice to consider in its annual review of the motor accidents scheme.

This year the Standing Committee on Law and Justice has advised that the primary focus of its review will be on the Claims Assessment & Resolution Service ("CARS") and the Lifetime Care & Support Scheme ("LTCS").

The Association has accordingly restricted its submissions to these aspects of the motor accidents scheme.

1. The Claims Assessment and Resolution Service

Introductory comments

The Association's primary position remains that substantive rights should be determined by independent judicial decision makers rather than through a process of bureaucratic assessment.

The Motor Accidents Authority ("MAA") will no doubt point to statistics which show that the processing time of cases at CARS is faster than the 9-12 months it takes to resolve a District Court case. However, the Standing Committee is invited to look beyond these figures at the total resolution time (from date of accident to settlement or award) within the court system as compared to the CARS system. Part of the reason that the CARS system now has shorter resolution times is that parties are required to conduct far more extensive preparations of each case prior to filing a CARS application. There is now more work involved in preparing a case prior to lodging a CARS application than there is required in the preparation of a Statement of Claim. Although cases are at CARS for less time, each takes just as long to resolve.

The additional requirements imposed on practitioners by CARS have made the system intensely bureaucratic. The Bar Association understands that a number of CARS assessors have been invited to give evidence. Most CARS assessors are also private practitioners. If the Standing Committee is not calling evidence from scheme users, the Bar Association invites the Standing Committee to question these assessors as to their experiences with the CARS system and its bureaucratic nature in their capacity as private practitioners rather than as CARS assessors.

Notwithstanding the in principle objection to the determination of substantive rights outside the legal system, the Bar Association has few complaints about the CARS assessors and the quality of their decision making. Rather, the issues set out below in relation to CARS principally relate to administrative flaws and the overly bureaucratic nature of the system.

1.1 CARS Administrative Processes

The MAA can rightly claim that the average length of time that a matter is before CARS has been dramatically reduced over the past two years. However, not all of this reduction can be attributed to efficiency on the part of the MAA. Indeed, part of the reduction in CARS processing time has been achieved by making it far more difficult to lodge a CARS

application for assessment. The CARS registry readily rejects any application that has any procedural deficiency.

The end result is that the parties find it far easier to settle cases than to try and proceed to CARS.

In December 2006 there were over 1,300 matters allocated to the various assessors for assessment with a further 500 applications lodged and waiting to be allocated to an assessor. By early 2008 the number of matters allocated for assessment had fallen to around 800 and the number waiting to be allocated to an assessor had fallen under 400. There is a direct connection between the falling number of matters for assessment and the additional complexity that has been introduced into the CARS system.

Prior to lodging a CARS application a claimant is now required to:

i. Prepare a detailed statement from the claimant;
ii. Prepare detailed statements from any other witnesses including care providers;
iii. Have all medical reports available;
iv. Prepare a schedule of damages;
v. Prepare written submissions in support of the schedule of damages;
vi. Have all economic loss materials (including tax records, wage records and the like); and
vii. Have concluded any necessary MAS assessments.

The MAA will not accept a matter for assessment at CARS unless the insurer has made an offer of settlement. The insurer does not have to make an offer of settlement until the claimant's condition has stabilised and all particulars have been provided. It is certainly not unusual for insurers to dispute either stabilisation or the adequacy of particulars provided. This in turn creates further delay and makes it far harder for a claimant to meet the necessary criteria to be able to lodge a CARS application.

The CARS system was originally designed to handle short, simple and straightforward matters. On this basis, the assumption was that the average CARS assessment would last for about two hours. It was anticipated that assessments could be conducted on the papers. However, because of the difficulty in obtaining an exemption for complexity (an issue addressed further below) CARS now regularly handles claims worth hundreds of thousands and even millions of dollars. Such cases cannot be fairly dealt with on the shortened basis on which the CARS system was designed to operate.

One further consequence of the declining number of matters being lodged with CARS is the number of changes expanding the powers which can be exercised by CARS. Recent amendments to the *Motor Accidents Compensation Act 1999* ("the MAC Act") created new powers for CARS to assess interlocutory disputes. CARS was also given the power to determine whether there had been due search and enquiry in Nominal Defendant cases. This was not a change sought by any scheme participants. These amendments leave it open to argument whether such changes have been instituted to keep up the overall workload of the scheme in light of the decline in its core function of processing applications. Similarly, practitioners have noted that with the decline in lodgement of applications with CARS it has become far harder to obtain a discretionary exemption from the CARS system. Further submissions in relation to this issue are set out below.

It is submitted that the Standing Committee may wish to address the following questions to the MAA and the CARS assessors who appear before the Standing Committee:

1.1.1 Has there been a significant decline in the number of applications being lodged with CARS? If so, why?

1.1.2 Has the CARS process become too bureaucratic? How can this be fixed?

1.1.3 Has the CARS registry become too keen to reject *"deficient"* applications?

1.1.4 What is CARS doing to make the CARS process simpler, quicker and more efficient for the participants (as distinct from making it simpler and quicker for CARS itself)?

1.2 Exemptions from CARS

Section 92 of the MAC Act provides for two categories of exemption from assessment by CARS. Section 92(1)(a) provides that a claim is exempt if the regulations provide for it to be exempted. Section 92(1)(b) allows a case to be exempt if a claims assessor has made a preliminary assessment of the claim and has determined (with the approval of the Principal Claims Assessor) that it is not suitable for assessment.

When it comes to exemptions under section 92(1)(a), the *Claims Assessment Guidelines* provide for both mandatory and discretionary exemptions. Currently the mandatory grounds for exemption set out in chapter 7 of the Guidelines include:

7.1.1 Where liability is denied;
7.1.2 Where contributory negligence of more than 25% is alleged;
7.1.3 Where the claimant lacks legal capacity;
7.1.4 Where the claim is not made against a licensed or other CTP insurer.

There is then provision for discretionary exemptions. The Principal Claims Assessor ("PCA") exercises the sole discretion as to whether an exemption should be granted. Factors which the PCA takes into account when considering whether to grant a discretionary exemption include:

7.11.1 The extent to which the heads of damage are agreed;
7.11.2 Whether there are complex legal issues;
7.11.3 Whether there are complex factual issues;
7.11.4 Whether there are complex issues of quantum or complex issues in the assessment of damages;
7.11.5 Whether the claim exceeds 10% WPI and other issues of complexity;
7.11.6 Whether there are complex issues of causation;
7.11.7 Whether the insurer is deemed to have denied liability;
7.11.8 Where the claimant or a material witness resides outside the jurisdiction;
7.11.9 Where the claimant seeks to proceed against one or more non CTP parties;
7.11.10 If the insurer makes an allegation that a person has made a false or misleading statement within the meaning of section 117.

It is noted there are currently discussions between scheme users and the MAA concerning an MAA proposal to shift claims involving claimants with legal incapacity and claims where more than 25% contributory negligence is alleged from the mandatory exemption category into the discretionary exemption category. There are perceptions that this shift is a move by

the MAA to make up for the falling number of CARS matters for assessment. The anecdotal experience of members of the Association is that it is becoming increasingly difficult to obtain a discretionary exemption from the MAA. The Association notes the potential for conflict in the role of the PCA as the sole dispenser of discretionary exemptions and the head of an otherwise declining jurisdiction.

It is extremely difficult to prove on administrative appeal that the PCA has erred in refusing a discretionary exemption. Several insurers have tried and failed. Few claimants have the financial resources to afford a Supreme Court challenge to the decision of the PCA to refuse a discretionary exemption.

The Association is of the view that the CARS assessors are largely well qualified and experienced personal injury practitioners. However, this does not mean that the CARS assessors are just as well positioned as a judge to determine large and complex cases. Rather than constituting a quick and simple mechanism for resolving claims, it appears that CARS is developing into a highly involved, complicated and bureaucratic alternative.

Questions which the Standing Committee may wish to ask include:

1.2.1 How many discretionary (as distinct from mandatory) exemptions does the MAA grant each year?

1.2.2 How easy is it to get a discretionary exemption? Have there been cases where individual CARS Assessors have recommended a discretionary exemption (on the basis that the matter is complex) only to have their judgments overruled by the Principal Claims Assessor? Why does this occur?

1.2.3 Is CARS as well equipped as a court to determine claims for over $1 million? What differences would there be between the two hearings?

1.3 Costs

The fact that the CARS system was designed to deal with simple and easy cases is borne out by the associated cost regulations. A claimant can recover $475 (plus GST) for the costs of representation at an assessment conference. This fee covers the first two hours. Each additional hour the assessment conference runs the claimant can recover an extra $150 per hour.

For complex CARS matters the claimant invariably is represented by counsel with an instructing solicitor. With hundreds of thousands of dollars at stake it is understandable the claimant wants a skilled advocate to represent him or her. Similarly, in most larger matters the insurer is represented by either a specialist solicitor or a solicitor and counsel.

On the assumption that both the solicitor and counsel charge $300 per hour, a claimant loses $450 per hour for each hour that the conference extends over two hours. This is an unwarranted subsidisation of the Scheme by the claimant.

If CARS is restricted to simple, straightforward and low value cases in which representation by counsel is not required, then the costs regulations can be justified. However, if large cases are going to be kept within the CARS system then the costs recoverable should be commensurate with the care and skill of the legal work that is required to properly present the case.

The Standing Committee may consider asking the MAA and the CARS assessors the following questions:

1.3.1 What is the duration of the average assessment conference? Do some conferences extend over more than one day?

1.3.2 Is the MAA aware that the recoverable costs of representation at an assessment conference do not adequately cover the actual costs incurred?

1.3.3 If so, what is the MAA doing about it?

1.3.4 Do the CARS Assessors (as private practitioners) believe that the costs regulations adequately cover the actual costs of an assessment conference? Are claimants at CARS cross-subsidising the scheme?

1.3.5 Where an assessment conference has to be adjourned because of an action of the insurer there is no capacity for the Assessor to allow any additional costs to be recovered by the claimant. In the court system the defaulting party would be ordered to pay the costs thrown away. A CARS Assessor has no such power. Why not?

1.4 Publication of decisions

Under the *Workplace Injury Management and Workers Compensation Act 1998* the Workers' Compensation Commission has the power to publish its decisions. The Commission operates under a presumption in favour of the publication of its decisions, including the decisions of individual Assessors. The MAA does not publish the decisions of CARS assessors at all. It has been suggested that these decisions should not be published as they would be subject to statutory privacy provisions (to protect the claimant) or that there are concerns about defamation should a CARS Assessor make adverse determinations as to a person's credit.

1.4.1 Why doesn't the MAA publish its decisions? Would not consistency of decision making and promotion of public confidence in decision making be improved by publication?

1.5 Rehearings

The changes introduced by the MAC Act involve sacrifices by both parties. For the claimants, a significantly smaller number of cases were entitled to general damages (compensation for pain and suffering). Legal fees were heavily restricted.

The sacrifice made by the insurers was that (unlike the claimant) they do not receive a right of rehearing from a CARS Assessor's decision.

The claimant's right of rehearing from a CARS assessment is largely illusory. Very few cases proceed to a court hearing after CARS. The claimant needs to improve on the CARS assessor's award by 20% to recover any costs. Even if that 20% improvement is achieved, the costs recovered are highly restricted and again involve heavy cross subsidy of the Scheme. It is unsurprising that almost no cases are reheard; the claimant simply can't afford the risk or the cost. The reality is that neither party has an effective right of rehearing.

There is an exception. Section 95 of the MAC Act provides that where an insurer alleges contributory negligence it is entitled to reject the Assessor's determination. The Court of Appeal decision of *Lee v. Yang* [2006] NSWCA 214 has interpreted this provision to allow an

insurer who alleges contributory negligence to not only reject the Assessor's findings on contributory negligence but also force the claimant to seek a rehearing of the Assessor's findings on damages.

There is now a clear incentive for insurers to allege contributory negligence in as many cases as possible: it procures them the right to force a rehearing they would otherwise not be entitled to.

In the first six years of operation of the Scheme the Association understands that there was a relatively modest number of cases involving allegations of contributory negligence. Since the Court of Appeal decision in *Lee v Yang* was handed down, the number of cases in which contributory negligence is alleged has apparently more than doubled.

The difficulty for the claimant is that, if the insurer forces a rehearing, the claimant is still caught by the cost regulations. The claimant may have been willing to accept the Assessor's award but is forced to a court case he or she does not want on punitive costs scales that may significantly diminish the damages recovered (even if a court awards the same damages as the CARS Assessor).

The Association's representative on the Motor Accident Council (Mr Andrew Stone) presented a detailed submission to the Council on this issue. The submission has the support of the Association. It is annexed. The MAA has undertaken to examine the issue but claims that it is not yet aware of any significant problem in this regard.

Questions which the Standing Committee may consider putting to the Motor Accidents Authority include:

1.5.1 What statistics does the MAA have as to any increase in the number of cases in which contributory negligence is being alleged? Can any such increase be linked to *Lee v Yang*?

1.5.2 What is the justification for allowing a rehearing of the assessment of damages simply because the insurer alleges contributory negligence?

1.5.3 What is the justification for restricting the claimant's costs when the claimant was prepared to accept the Assessor's award and it is the insurer who has forced the rehearing?

2. The Lifetime Care And Support ("LTCS") Scheme

At the time of drafting these submissions the LTCS scheme has been in operation for children for just over 18 months and for adults for just over 6 months. Comments made about the operation of the LTCS are largely based on concerns about scheme design. To date there has been only a small number of claims and no litigated cases.

It is too early for the Bar Association to make any detailed submissions regarding the LTCS. However, one issue that was raised whilst the scheme was being devised is worth immediate consideration.

Participants in the scheme who are dissatisfied with the assessment of their care needs have a right of review. However, in order to fully exercise review rights it may be necessary to collate materials, present submissions and even demonstrate that there has been a *"material error"* in an initial assessment. In short, the appeal rights are not easily accessed by the average citizen, let alone a participant in the scheme who may be suffering from a brain injury.

There are no costs recoverable for legal representation in these disputes with the LTCS Authority. The Association has previously advocated that some form of legal representation or advisory service be made available to LTCS participants so that they are able to exercise their review rights. The Standing Committee is invited to ask what steps have been taken in this direction to ensure fair and open access to review rights for Scheme participants.

3. The Motor Accidents Council

At last years hearing of the Standing Committee on Law and Justice the Association's representative on the Motor Accidents Council (Mr Andrew Stone) was critical of the restricted nature of debate within the Council. At the request of the Standing Committee further written submissions were provided.

The Association and Mr Stone wish to acknowledge that subsequent to last year's hearings the Motor Accidents Council has provided the starting point for an important law reform. Mr. Stone (on behalf of the Association) took to the Motor Accident Council a submission to reverse a High Court decision which stripped CTP coverage from parents who were acting as instructors for their children in teaching them to drive. This submission gained the support of the Motor Accidents Council and is now reflected in legislative changes to the MAC Act that will take effect from October 2008. The Association acknowledges that this is an excellent example of the Motor Accidents Council acting as a generator of ideas and change within the Motor Accident Scheme. The Association encourages the more frequent use of the Motor Accidents Council in this role.

16 May 2008

The New South Wales Bar Association

06/371

15 February 2008

Mr David Bowen
General Manager
Motor Accidents Authority of NSW
DX 1517 SYDNEY

Dear ~~Mr~~ David Bowen

Submission: Insurers rehearing CARS Assessments

Attached is a submission from Mr Andrew Stone, barrister, which I understand has been forwarded to the Motor Accidents Authority.

Mr Stone's submission has been considered by the Association's Common Law Committee. Both the Committee and the Association strongly support the contents of the submission, and we would request that the submission be forwarded for the consideration of the Motor Accidents Council.

Yours sincerely

P A Selth
Executive Director

Cc: Mr Andrew Stone

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SUBMISSION TO MOTOR ACCIDENTS COUNCIL

INSURERS REHEARING CARS ASSESSMENTS

EXECUTIVE SUMMARY

An insurer who alleges up to 25% contributory negligence is entitled (per section 95) to not accept a CARS assessor's award both as to contributory negligence and the quantum of damages. The claimant is forced to litigate all aspects of the case even though he was prepared to accept the CARS assessor's determination.

In litigating that case (against his will) the claimant is still caught by the highly restrictive costs provisions of the Motor Accidents Costs Regulations.

Given the inherent unfairness of this situation I ask the Motor Accident Council to make recommendations to the Minister (in accordance with the Council's power under section 209(d) of the Act) as follows:

1. That section 95 of the Motor Accidents Compensation Act 1999 be amended to clarify and specify that a CARS assessor's determination as to damages is binding on an insurer irrespective of allegations of contributory negligence and that only an allegation of contributory negligence can be litigated at the insurer's insistence.

2. That the Motor Accident Costs Regulations be amended to provide that where it is an insurer who forces a claimant to litigate following a CARS assessor's determination (using the mechanism of a contributory negligence allegation and section 95) then the restrictive costs regulations do not apply and the claimant is entitled to recover the ordinary party/party costs of the litigation.

JUDICIAL INTERPRETATION OF SECTION 95

It was initially thought that section 95 created a right for an insurer to rehear a CARS assessor's determination only on the issue of contributory negligence. On any judicial rehearing forced by the insurer, the quantum of damages assessed by the CARS assessor would be unchallengeable.

QBE challenged this interpretation of section 95, initially by way of Notice of Motion before the Judicial Registrar in the District Court in *Yang v Lee*. Both the Judicial Registrar and subsequently Judge Garling held that a CARS assessor's determination of damages could not be reassessed when the insurer sought a rehearing on contributory negligence unless the plaintiff had rejected the CARS assessor's damages award. It was noted that this interpretation had the advantage of acting as a disincentive for insurers to

make spurious allegations of contributory negligence merely to preserve a right to reargue damages.

However, the Court of Appeal reached a different view in *Lee v Yang* [2006] NSWCA 214. The Court of Appeal determined that an insurer who was dissatisfied with an assessment of contributory negligence is able to challenge an award of damages in the District Court proceedings which the insurer could force the claimant to bring.

A PERVERSE OUTCOME

The Court of Appeal decision in *Lee v Yang* leads to unsatisfactorily perverse outcomes. A CTP insurer can create an automatic right of rehearing of a CARS assessor's award simply by alleging contributory negligence. There may be no evidence to support the allegation of contributory negligence. The insurer need not ever try to prove any contributory negligence. The insurer can run dead on the contributory negligence issue before the CARS assessor and on any subsequent court rehearing. The insurer may never plead contributory negligence in its defence.

However, simply by making the allegation in its s.81 notice, (a test of creativity rather than reality) the insurer generates the right to a rehearing it would otherwise not have.

The Court of Appeal's interpretation of section 95 creates the incentive for CTP insurers to engage their imaginations in propounding allegations of contributory negligence.

PUTTING THE SCHEME OUT OF BALANCE

It is respectfully submitted that the Court of Appeal decision in *Lee v Yang* disturbs the balance created by various compromises made in the design of the motor accident scheme in 1999. The 1999 Act was based on a series of compromises. The CARS assessment regime was introduced as a quick and efficient means of providing less formal claims assessment. Claimants surrendered the right to compensation for pain and suffering in all but 10% of cases and had significant restrictions placed on the recovery of legal costs. In return, insurers were not given any right to challenge a CARS assessor's determination of the quantum of damages. There was some balance between the "injustices" imposed on both claimants and insurers.

This balance is thrown out of kilter if insurers are able to create a right to rehear the CARS assessor's determination of damages simply by making an allegation (however spurious) of contributory negligence. Further, there is a fundamental and presumably unintended unfairness to the claimant in that he can be forced to rehear a case in the District Court with the application of cost restrictions that can only be described as punitive.

CASE STUDIES

Two recent cases illustrate the difficulties involved.

Mr. Nieweglowski was run down whilst walking on a marked pedestrian crossing inside a carpark. He was intoxicated at the time but his drunkenness played no part in the accident and was not a ground of contributory negligence. A driver reversing through the carpark ran down Mr. Nieweglowski from behind.

The insurer alleged 25% contributory negligence on the basis that the claimant failed to keep a proper lookout. The matter proceeded to a CARS assessment. The insurer did not call the driver. The CARS assessor inferred that the insured driver's evidence would not have assisted the insurer's contributory negligence argument.

The CARS assessor concluded:

> *"The only ground for the allegation was that the claimant should have observed the insured vehicle had he been keeping a proper lookout. That allegation is totally unsubstantiated. I go so far as to comment that there was not a shred of evidence to support the allegation of contributory negligence in the section 81 notice, although the allegation was maintained throughout the conference."*

The CARS assessor went onto to assess damages at $249,066.

The claimant sought to accept the CARS assessor's award. The insurer (because it had alleged contributory negligence) did not have to accept the award. The claimant is now litigating in the District Court where the assessment of damages by the CARS assessor is in issue.

The claimant's costs of litigating in the District Court are capped at 2% of the total court award above and beyond the costs allowed for the CARS assessment process. Assuming the Court makes a similar award of damages to that of the CARS assessor then the additional costs recoverable by the claimant (in proceedings which the claimant did not wish to bring) are $4,981. The cap on costs applies irrespective of how many call-overs there are, how many subpoenaed documents need to be read and how many days the court hearing stretches for.

If Mr. Nieweglowski receives the same damages as the CARS assessor awarded the cost to him of the rehearing is likely to be $15,000-$20,000 (in solicitor/client costs incurred).

Ms. Burgess was a 16-year-old rear seat passenger when she was involved in motor vehicle accident on 30 March 2003. The CTP insurer alleged 25% contributory negligence on the basis that the claimant was the passenger in a

vehicle driven by a person affected by illicit drugs and on the basis that although she was wearing a seatbelt it was not properly adjusted.

The CARS assessor did hear evidence from the insured driver. The driver denied that he was affected by marijuana at the time of accident. Given that evidence it is hardly surprising that the CARS assessor found that the insurer had not discharged its onus of proof to demonstrate that the driver was affected by drugs, or that the passenger ought to have been aware of an impairment of driving ability.

On the seatbelt issue there was expert evidence led by the insurer as to the possible positioning of the seatbelt at the time of the accident. The assessor's determination of this issue was extensive and thoughtful with over 2 pages of reasons. The assessor ultimately determined that the claimant was wearing a lap-sash seatbelt and that the insurer had not demonstrated that the seatbelt was not properly adjusted or worn at the time of accident. The assessor accordingly made no deduction for contributory negligence.

The assessor went on to calculate damages at $561,501.

Again, the claimant sought to accept the assessor's award. On the basis that contributory negligence had been alleged the insurer did not accept the award and is now forcing the claimant to litigate in the District Court where both contributory negligence and damages will be in issue.

In this case, assuming a judge awards similar damages to the CARS assessor, the total recoverable legal costs for the court proceedings will be $11,230 above the costs recovered to the conclusion of the CARS process. Again, there is no prospect that this will properly cover the costs of a case that may take some days to hear.

The claimant was prepared to accept the assessor's award and to conclude her case. The claim will now stretch out for another 12 months and significant additional legal costs will be incurred.

SOLUTIONS AND RECOMMENDATIONS

For the reasons set out above, the decision of the Court of Appeal in *Lee v Yang* has created an unexpected right for CTP insurers to litigate a CARS assessor's determination of damages. They can do so whilst subjecting the claimant to a restrictive and punitive costs regime.

The first solution is relatively easily provided. Amend the costs regulations so that if an insurer chooses to force a CARS assessment to be re-litigated then the insurer should not get the benefit and protection of the costs regulations. Ordinary party/party costs and the court rules in relation to offers of compromise should apply.

Section 151 of the Motor Accidents Compensation Act 1999 arguably does not apply – subsection 2 is limited to circumstances where the *claimant* does

not accept the amount of damages assessed. It is the costs regulations that restrict the claimant's costs where the claimant is forced to rehear by the insurer. The costs regulations should be amended so that where it is the insurer seeking the rehearing the costs regulations do not apply.

The longer-term solution is to fix section 95 so that insurers don't get to force rehearings simply by alleging a potentially spurious ground of contributory negligence. Given the profitability of the CTP scheme for insurers under the 1999 Act there is a good argument that CTP insurers should have no right of rehearing from a CARS assessment at all. Why not make the CARS assessment fully binding on a CTP insurer? I am not aware of any cases of a CTP insurer forcing a case to litigation on the issue of contributory negligence alone. The right to challenge a CARS assessor's findings on contributory negligence was rarely, if ever, used until it became a trigger to challenge the award of damages.

At the very least, the arbitrariness of a right of rehearing being dependent upon the capacity to allege contributory negligence should be removed.

Finally, in making decisions about potential reforms in this area it would be useful to have some information as to the success rate of CTP insurers in proving allegations of contributory negligence. It would be helpful if the MAA were able to put together some figures as to the frequency with which contributory negligence is being alleged in section 81 notices and the success of insurers before CARS assessors and courts in proving the allegations of contributory negligence made. It would clearly be of concern if CTP insurers were making an increasing number of allegations of contributory negligence simply to create rights to rehearing from CARS assessors' awards of damages.

ANDREW STONE

20 December 2007