Use of clinical records as evidence in serious injury applications –

Court of Appeal update

A. Introduction

1. The matter of *Philippiadis v Transport Accident Commission*[1] came before the Court of Appeal as an application for leave to appeal orders made by Cohen J in the County Court of Victoria dismissing two originating motions filed by the applicant ("Mr Philippiadis") seeking leave pursuant to s 93(4)(d) of the *Transport Accident Act 1986* (Vic) ("the Act") to bring common law proceedings for damages in relation to the injuries arising out of two transport accidents. In its decision, the Court of Appeal made a number of findings regarding the application of the rule in *Browne v Dunn* to clinical notes and the use which can be made of clinical notes as evidence in serious injury applications. The focus of this summary is on those findings.

B. Background facts

2. On 7 November 2008, Mr Philippiadis was driving his car when an oncoming car veered on to his side of the road. He swerved to the left but the other car struck the driver's side front of his car. Mr Philippiadis could not get out of his car and was removed when an ambulance arrived. He was in great pain and was taken to hospital.

3. After the accident he had immediate pain in his wrists, shoulders and neck, lower back, right knee and headaches. He consulted his general practitioner, Dr Charles Lewis. On 12 October 2010, he had an operation on his wrists which brought considerable improvement.

4. Mr Philippiadis had ongoing pain in his neck and shoulders. The pain was constant and varied depending on the activity.

[1] [2016] VSCA 1

5. On 3 February 2011, Mr Philippiadis was involved in another car accident. He was a passenger in a car, instructing a learner driver. The car was hit from behind while stationary.

6. A few days after this second accident he attended Dr Lewis. However, Mr Philippiadis believed the consequences of the second accident were not serious and that the ongoing pain consequences he suffered in his neck and shoulders were the result of the earlier accident in 2008.

C. Summary of the proceedings and issues in the County Court

7. Mr Philippiadis issued an originating motion dated 19 June 2013 seeking leave pursuant to s 93(4)(d) of the Act to bring common law proceedings for damages in relation to the injuries arising out of the 2008 accident.

8. Mr Philippiadis also issued a second originating motion dated 4 July 2014 seeking leave pursuant to s 93(4)(d) of the Act to bring common law proceedings for damages in relation to the injuries arising out of the 2011 accident.

9. Both originating motions contained various injuries under *Particulars of Injury* and both relied on the definition of "serious injury" contained in s 93(17)(a) of the Act, being a "serious long-term impairment or loss of a body function." However, in the conduct of the serious injury applications in the County Court only the injury to his neck was relied upon.

10. The serious injury applications for both the 2008 and 2011 accidents were heard together on 3 and 4 February 2015 in the County Court before Cohen J sitting at Ballarat.

11. The respondent contended the injuries suffered in either collision did not constitute a serious injury. The respondent relied on:

    (a) the applicant's pre-existing injuries and medical conditions;

(b) the prohibition against combining or aggregating the consequences of multiple injuries or of two accidents on one body function; and

(c) the requirement that the consequences of any aggravation or exacerbation needs to be identified and, if the additional impairment does not involve a serious long term impairment of a body function, then the statutory threshold of *serious injury* is not met.[2]

12. Her Honour ultimately found that neither the neck injury suffered by the plaintiff in the 2008 accident or the neck injury in the 2011 accident caused consequences great enough, taken in isolation from other injuries, to meet the requisite level of seriousness to satisfy the definition of serious injury. Accordingly, both originating motions were dismissed with an order that the applicant pay the respondent's costs.

D. Grounds of Appeal

13. Mr Philippiadis relied on the following grounds of appeal in the Court of Appeal (although ground 2 was abandoned at the hearing):

1. The learned judge erred in the exercise of her discretion in refusing to grant leave to bring common law proceedings under s 93(4)(d) of the *Transport Accident Act* by failing to take into account the entirety of the evidence and by giving too much weight to medical clinical notes (Reasons for Judgment at [11], [70], [73], [79] & [80]) in preference to other evidence, particularly in circumstances where her Honour accepted that the applicant:

(a) was genuinely trying to tell the truth as he recalled it;[3]

(b) was reasonably stoic and determined and was not deliberately exaggerating or embellishing what he had to say about his injuries or their impact on his life;[4]

[2] *Petkovski v Galletti (1994) 1 VR 436*
[3] Reasons for Judgment dated 5 March 2015 at [9]

(c) was a proud man who does his best to keep the extent of his suffering to himself;[5]

(d) spoke English as his second language and this impacted upon his comprehension and vocabulary;[6] and

(e) prior to the 2008 car accident the applicant had led a relatively active life for his age, despite his pre-existing injuries.[7]

2. The learned judge erred in her application of the principles enunciated in *Humphries v Poljak* [1992] 2 VR 129 to the facts of this case. In particular, the learned judge failed to distinguish between:

(a) a structural worsening of pre-existing pathology; and

(b) the aggravation and worsening of the pain consequences of pre-existing pathology (Reasons for Judgment at [31], [71] & [79]).

3. The learned judge's reasons are inadequate. In particular, they contain bare conclusions and fail to:

(a) provide an intelligible explanation of the process of reasoning that led her from the evidence to the findings and from the findings to the ultimate conclusion; and

(b) in giving reasons which deal with the substantial points that were raised, explain why that evidence or material was rejected.

E. Court of Appeal decision

[4] Ibid at [11]
[5] Ibid
[6] Ibid at [10]
[7] Ibid at [69]

14. Mr Philippiadis was refused leave to appeal. The Court of Appeal concluded the application did not meet either the 'the real prospect of success' test in s 14C of the *Supreme Court Act 1986* or the *Niemann*[8] test.[9]

D. Findings relevant to the conduct of serious injury applications

15. This appeal raised a number of issues concerning the conduct of serious injury applications. Relevantly, the Court of Appeal held:

Re: Cross-examination on clinical notes and the rule in *Browne v Dunn*

(a) Senior counsel for the respondent at the hearing had not breached the rule in *Browne v Dunn* and "no unfairness was occasioned by the respondent failing to put to the applicant Dr Lewis's clinical notes and reports so that he could have the opportunity of giving evidence as to their accuracy and reliability and as to any inconsistency between them and his evidence-in-chief. As such, the judge was not required to moderate the weight she gave to the clinical notes and reports."[10] The Court of Appeal's reasons were as follows:

(i) The clinical notes and reports had been tendered by Mr Philippiadis' own counsel;[11]

(ii) The inconsistencies between the clinical notes and reports and the evidence of Mr Philippiadis' and his wife was recognised as a key issue from the outset of the trial;[12]

[8] *Niemann v Electronic Industries Ltd* [1978] VR 431
[9] *Philippiadis v Transport Accident Commission* [2016] VSCA 1 at [69]
[10] Ibid at [94]
[11] Ibid at [95]
[12] Ibid

(iii) "There was nothing subtle or indirect about the adverse inference that could be drawn and the findings that could be made based on Dr Lewis's clinical notes and reports"[13];

(iv) Mr Philippiadis was on notice of the adverse evidence at the commencement of the trial and "it was a matter for him to advert to any inconsistency between that evidence and his own"[14];

(v) Given Mr Philippiadis adduced inconsistent evidence without explanation, "the respondent was entitled to exploit the inconsistencies and the judge was entitled to choose which evidence to accept"[15];

(vi) The fact that little direct use was made of the clinical notes and reports in cross-examination did not alter the fact that they were evidence upon which the judge could rely[16];

(vii) Both parties produced an áide memoir' based on the clinical notes and informed the judge that these documents would shorten cross-examination of Mr Philippiadis and therefore, through his counsel, he "acquiesced in the process of being cross-examined by reference to the respondent's

[13] Ibid
[14] Ibid at [96]
[15] Ibid at [97]
[16] Ibid at [99]

aide memoir rather than by directly by reference to the clinical notes"[17];

(viii) In these circumstances, the respondent was not required to put the clinical notes and reports to Mr Philippiadis and the judge was not required to warn Mr Philippiadis of the risk she may reject part of his or his wife's evidence on the basis of the notes and reports.[18]

Re: Clinical notes as evidence

(b) In the circumstances of the case "the judge was more than justified in preferring the observations and opinions" of the general practitioner[19];

(c) "[C]ourts need to exercise care in relying on the records of medical practitioners. Such records usually contain a selective summary in the doctor's own words of what the patient tells the doctor and cannot be treated as a verbatim transcript of the entire medical attendance. The records may be inaccurate through miscommunication or misleading through omission."[20];

(d) "However, notwithstanding their limitations, very often clinical notes constitute highly probative evidence because they are independent and contemporaneous and deal with matters within the author's area of expertise."[21];

(e) "Ordinarily, a patient who visits his or her longstanding general practitioner is likely to inform the general practitioner of the

[17] Ibid at [100]
[18] Ibid at [101]
[19] Ibid at [103]
[20] Ibid at [105]
[21] Ibid

health issues that are then of concern to the patient. Also, a general practitioner who makes notes of each attendance would be expected to record the main health complaints made by the patient and the practitioner's observations and actions taken in relation to such complaints. It may be accepted that, in respect of some attendances, there may be departures from what would ordinarily be expected. However, where an injury is having

> serious adverse health consequences for a patient and that patient visits his or her general practitioner on a regular basis, it would be very unusual for the patient not to mention those consequences and for those practitioner's clinical notes not to refer to them over a lengthy continuous period of time."[22]; and

(f) The accuracy of the clinical notes and reports of Dr Lewis were not challenged by Mr Philippiadis[23] , neither was it suggested that he had concealed his suffering from Dr Lewis at attendances.[24]

Dated: 23 February 2016

Adam Coote

Owen Dixon Chambers West

Green's List

[22] Ibid at [106]
[23] Ibid at [107]
[24] Ibid at [109]