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Limitation of actions
The effect of Mercer v Allianz and s138AB

1 MERCER V ALLIANZ [2016] TASFC 2

1.1 Factual matrix

(a) On 11 March 2008, Mr Mercer was very badly injured in the course of his employment with a company named Windsor Agencies Pty Ltd, and hence the claim arose under the "election provisions" as existed prior to 1 July 2010.

(b) Allianz alleged that on or about 3 September 2008, the parties agreed that Mr Mercer's degree of permanent impairment was not less than 30% of the whole person, thus giving rise to the right of election to claim damages. This is because on that date Allianz sent a cheque representing a payment for a 70% WPI.

(c) Allianz alleged therefore that the date of discoverability was no later than 3 September 2008, or at the least, a time earlier than a date three years before the issue of the writ on 21 February 2012.

(d) Mr Mercer argues that the date of discoverability did not occur before 21 February 2009.

(e) Mr Mercer argues it was on or about 26 February 2010 that, by signing the form of election, the parties agreed that Mr Mercer's degree of permanent impairment of the whole person was not less than 30%.

(f) On 5 March 2010, Mr Mercer lodged with the Tribunal his election to claim damages.

(g) On 26 January 2011, Windsor Agencies was deregistered.

(h) On 21 February 2012, Mr Mercer commenced his action for damages against Allianz, as the insurer of Windsor Agencies, relying on s601AG of the Corporations Act.

1.2 The Full Court decision

(a) The Full Court of Tasmania (2-1) said that the payment of the WPI over 30% was not, for the purposes of s138AB, an agreement that such an impairment existed. The Court said (per Porter.J) that "*it is clear that money was requested and paid at that time without the employer or anyone on its behalf communicating agreement as to anything. It is one thing to choose to pay rather than getting involved in a dispute or to putting [sic] a claimant to proof. It is another thing both to pay and to acknowledge that there was a right to payment. Allianz*

took the former course, not the latter".

(b) This meant that because the Full Court upheld that an action did not accrue (begin) until the permanent impairment is agreed at greater than 30% (as decided in *Skilled Engineering Limited v Glaxo Wellcome Australia Pty Ltd* [2005] TASSC 86; (2005) 15 Tas R 88) that the action did not accrue until that agreement on 26 February 2010 when Allianz's solicitors signed the s138AB election.

(c) Hence Mr Mercer had until three years from this date to issue proceedings under s5 A(3)(a) of the Limitation Act.

2 PRACTICAL IMPLICATIONS

2.1 For accidents prior to 1/7/2010

(a) It is clear that whilst Mercer remains good law that without a formal agreement where there exists a greater than 30% WPI that a potential plaintiff's time for commencing proceedings will not commence and no limitation Defence will apply (other than the 12 year long stop) until three years after the agreement.

(b) Hence Insurers and Employers should be careful to:

(i) ensure that any payment of a WPI over 30% is accompanied by an express agreement of a greater than 30% WPI;

(ii) ensure that the agreement is based on a s72 assessment;

(iii) if they want to "start the clock" on the limitation defence, seek an agreement from the worker or their representatives as soon as it is clear that a greater than 30% WPI exists; and

(iv) in the absence of an agreement from the Worker's solicitors (who may seek to not agree for tactical reasons) to make application to the Tribunal.

2.2 For accidents after 1/7/2010

(a) Whilst the Act was substantially amended to remove the election provisions and a 30% WPI with the "threshold requirement" that a 20% WPI and statement from a medical practitioner and determination by the Tribunal, it is likely that the Supreme Court would determine that:

(i) a cause of Action does not accrue until the Tribunal has determined that the degree of permanent impairment is not less than 20%; and

(ii) hence time does not commence to run until the threshold requirement has been met.

(b) As a result, Employers and Insurers should be careful:

(i) to be aware that the payment of a greater than 20% WPI alone does not mean the threshold requirement is met;

(ii) that an agreement of a greater than 20% WPI, no matter how recorded, will not meet

the threshold requirement;

(iii) that without meeting the threshold requirement any "recovery" under the Wrongs Act is likely to be compromised;

(iv) that unless and until the Tribunal makes a s138(3)(b) determination and order, that the time limited for issue of common law proceedings will not commence; and

(v) if they want to "start the clock" on the limitation defence seek both a statement in writing from the medical practitioner (s138(3)(a) and the Tribunal determination(s138(3)(b))).

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