HIGH COURT OF AUSTRALIA

CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

JOHN DALY APPELLANT

AND

ALEXANDER THIERING & ORS RESPONDENTS

Daly v Thiering
[2013] HCA 45
6 November 2013
S115/2013

ORDER

1. *Appeal allowed.*

2. *Set aside order 2 of the Court of Appeal of the Supreme Court of New South Wales made on 20 February 2013 and, in its place, order that:*

   (a) *the appeal from the Supreme Court of New South Wales to the Court of Appeal be allowed; and*

   (b) *set aside the determination and formulation of Question 5 made by the Supreme Court on 19 December 2011 and, in its place, reformulate and answer that question as follows:*

   Question 5

   Whether on proper construction of section 130A of the Motor Accidents Compensation Act *1999 (NSW), Mr Thiering has any entitlement as against Mr Daly other than damages for non-economic loss and loss of earning capacity.*

Answer

On the proper construction of s 130A of the Motor Accidents Compensation Act *1999 (NSW), Mr Thiering has no entitlement to recover damages in accordance with s 128 of the* Motor Accidents Compensation Act *with respect to the provision of gratuitous attendant care services from Mr Daly or his compulsory third party insurer.*

3. The appellant pay the first and second respondents' costs of this appeal including the application for special leave to appeal.

On appeal from the Supreme Court of New South Wales

Representation

K P Rewell SC with D M Wilson for the appellant (instructed by Moray & Agnew Solicitors)

B W Walker SC with E G Romaniuk and E E Grotte for the first and second respondents (instructed by Slater & Gordon Lawyers)

S B Lloyd SC with B J Tronson for the third respondent (instructed by WorkCover Authority of New South Wales)

CATCHWORDS

Daly v Thiering

Statutes – Statutory construction – Whether Court of Appeal erred in construction of s 130A of *Motor Accidents Compensation Act* 1999 (NSW) – Whether *Griffiths v Kerkemeyer* damages precluded by s 130A in respect of participants under Scheme in *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) – Whether "provided for or are to be provided for" in s 130A means "paid for or are to be paid for".

Words and phrases – "provided for or are to be provided for".

Motor Accidents Compensation Act 1999 (NSW), ss 128(1), 130A.
Motor Accidents (Lifetime Care and Support) Act 2006 (NSW), ss 6, 8, 23, 26, 28.

1 CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ. From 1 October 2006 until 25 June 2012, s 130A of the *Motor Accidents Compensation Act* 1999 (NSW) ("the MAC Act") provided that:

> "No damages may be awarded to a person who is a participant in the Scheme under the *Motor Accidents (Lifetime Care and Support) Act* 2006 for economic loss in respect of the treatment and care needs (within the meaning of that Act) of the participant that relate to the motor accident injury in respect of which the person is a participant in that Scheme and *that are provided for or are to be provided for* while the person is a participant in that Scheme." (emphasis added)

2 The *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW) ("the LCS Act") was enacted at the same time as the MAC Act was amended by the introduction of s 130A[1]. The LCS Act established the Lifetime Care and Support Scheme ("the Scheme") for the lifetime care and support of certain persons who had been catastrophically and permanently injured in motor vehicle accidents in New South Wales[2].

3 In this case, the Court of Appeal of the Supreme Court of New South Wales held that s 130A of the MAC Act did not preclude an award of damages in respect of the treatment and care needs of a participant in the Scheme in circumstances where those needs had been met by services rendered gratuitously. The Court of Appeal reached that conclusion by reading the words "that are provided for or are to be provided for" in s 130A of the MAC Act to mean "that are paid for or are to be paid for"[3]. For the reasons that follow, that interpretation of the legislation cannot be accepted.

The legislation

4 Under s 8 of the LCS Act, an application for an injured person to become a participant in the Scheme could be made, either by or on behalf of the injured person, or by the compulsory third party insurer ("CTP insurer") of a claim made by the injured person in respect of the injury. Section 8(2) provided that an application by a CTP insurer did not require the consent of the injured person.

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1 *Thiering v Daly* (2011) 60 MVR 42 at 59 [83].

2 *Thiering v Daly* (2011) 60 MVR 42 at 59-60 [84].

3 *Daly v Thiering* (2013) 63 MVR 14 at 34-35 [73]-[74].

Thus it was open to the CTP insurer of a claim to override a choice by an injured person not to become a participant in the Scheme.

5 Under s 23 of the LCS Act, the Lifetime Care and Support Authority of New South Wales ("the Authority") was required to make an assessment of the participant's treatment and care needs that are reasonable and necessary in the circumstances and relate to the motor vehicle accident in respect of which the person is a participant in the Scheme. The assessment was to be made in accordance with the guidelines issued by the Authority under s 58 of the LCS Act. The Authority was obliged to certify in writing as to its assessment[4].

6 Under s 26(1) of the LCS Act, the Authority's assessment of the treatment and care needs of a participant was "final and binding for the purposes of this Act and any proceedings under this Act."

7 Section 28 of the LCS Act contemplated that the guidelines might make provision for the intervals at which assessments of a participant's treatment and care needs are to be carried out.

8 By s 6(1), the LCS Act provided that the Authority:

> "is to pay the reasonable *expenses incurred* by or on behalf of a person while a participant in the Scheme in providing for such of the treatment and care needs of the participant as relate to the motor accident injury in respect of which the person is a participant and as are reasonable and necessary in the circumstances." (emphasis added)

9 The plain meaning of s 6(1) is that the reasonable expenses, if any, incurred by or on behalf of a participant in the Scheme, in providing for his or her treatment and care needs from time to time, must be paid by the Authority.

10 By s 6(2) of the LCS Act, the "treatment and care needs" of a participant included:

> "the participant's needs for or in connection with …
>
> (f) attendant care services, [and]
>
> (g) domestic assistance".

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4 *Motor Accidents (Lifetime Care and Support) Act* 2006 (NSW), s 23(4).

11 The LCS Act was not explicit as to whether the Authority was to be the sole provider of treatment and care needs to a participant in the Scheme. The Authority and Mr Daly were at issue as to whether the LCS Act contemplated that the Authority was obliged to provide all the treatment and care needs of a participant in the Scheme; but it is not necessary in this case to resolve that point. It is tolerably clear that the effect of ss 23 and 26 was that the Authority determined what services were to be rendered to a participant by way of treatment and care.

12 Section 128(1) of the MAC Act provided that:

> "Compensation, included in an award of damages, for the value of attendant care services:
>
> (a) which have been or are to be provided by another person to the person in whose favour the award is made, and
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> (b) for which the person in whose favour the award is made has not paid and is not liable to pay,
>
> must not exceed the amount determined in accordance with this section."

13 Section 128 went on to limit the quantum of compensation to be awarded for attendant care services; but it is not presently necessary to consider those limitations. What is significant is that s 128 was predicated upon the continuing availability under the common law of that component of damages usually described as the "*Griffiths v Kerkemeyer*" component. This description derives, of course, from the decision of this Court[5] which established that under the common law in Australia an injured plaintiff may recover from a tortfeasor an award of damages by way of compensation for economic loss measured by reference to the value of treatment and care needs occasioned by the injuries suffered by the plaintiff, even though the services by which those needs were met were rendered gratuitously to the plaintiff.

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5 *Griffiths v Kerkemeyer* (1977) 139 CLR 161; [1977] HCA 45.

14 The primary judge summarised the purpose animating the LCS Act and s 130A of the MAC Act[6] in terms which were approved by the Court of Appeal[7] and were not disputed in this Court. It is convenient to adopt that summary here:

> "It seems tolerably clear that it was the intention of the government to introduce legislation which would establish a scheme with these features:
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> (a) It would cover those who, as a consequence of a motor vehicle accident, were catastrophically and permanently injured;
>
> (b) The injuries were such that the individuals would require treatment and care for the whole of their lives;
>
> (c) The LCS Scheme would provide for all of that treatment and care, including attendant care, for as long as it was necessary on an individually assessed basis;
>
> (d) Because the LCS Scheme would attend to the provision of lifetime treatment and care, an injured person would not need, and would not be entitled to, compensation by way of damages for any treatment and care needs including attendant care;
>
> (e) The only limitation on the provision of treatment and care was that it was reasonable in the circumstances, and that the injury was caused in a motor vehicle accident."

Factual background

15 Mr Thiering, the first respondent, suffered catastrophic and permanent injuries in a motor vehicle accident on 28 October 2007. Since then he has been, for all relevant purposes, a participant in the Scheme under the LCS Act.

16 Pursuant to arrangements between the Authority and Mrs Rose Thiering (Mr Thiering's mother, the second respondent), a significant part of Mr Thiering's

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6 *Thiering v Daly* (2011) 60 MVR 42 at 60-61 [85].

7 *Daly v Thiering* (2013) 63 MVR 14 at 29 [47].

domestic care has been undertaken by Mrs Thiering. She has not been paid for the services she has rendered in that regard.

17 Mrs Thiering offered her services out of concern for her son, and the Authority agreed to her meeting part of his treatment and care needs. These needs were included in those identified by the Authority in its assessments under s 23 of the LCS Act. In the assessments of those needs by the Authority, responsibility for many hours of Mr Thiering's care was "allocated" to Mrs Thiering.

The proceedings

18 Mr Thiering sued Mr Daly (the driver of the motor vehicle allegedly at fault) for damages for negligence in respect of the injuries suffered by Mr Thiering on 28 October 2007. His claim included a claim for the value of the services provided by Mrs Thiering in the care of Mr Thiering. Mr Daly's CTP insurer stands behind his liability, if any, to Mr Thiering.

19 Mr Daly denied liability to Mr Thiering for the value of the services rendered by Mrs Thiering. In particular, Mr Daly relied upon s 130A of the MAC Act, contending that Mr Thiering's claim to recover the value of those services was a claim for economic loss in respect of the treatment and care needs of Mr Thiering, a participant in the Scheme whose domestic care needs were provided for while he was a participant in the Scheme.

20 In addition to Mr Thiering's claim against Mr Daly, Mrs Thiering and Mr Thiering brought proceedings against the Authority to recover the value of the domestic services provided by Mrs Thiering. The Authority defended those proceedings on the basis that Mr Thiering and his mother volunteered that she would undertake the provision of part of his treatment and care needs (being needs that the Authority would have arranged to meet but for the efforts of Mrs Thiering) in circumstances which negated any obligation in the Authority to pay for those services.

21 Several preliminary questions were posed by the parties for determination by the primary judge. These included a question as to the effect of s 130A of the MAC Act.

22 The preliminary questions also included questions concerning the viability of Mr and Mrs Thiering's claims against the Authority. Whether Mr or Mrs Thiering has a viable claim against the Authority for the value of the services rendered by Mrs Thiering has no bearing on whether s 130A of the

MAC Act affords Mr Daly an answer to Mr Thiering's claim against him, and is immaterial to the resolution of the issue of construction of s 130A of the MAC Act with which this appeal is concerned. In determining that issue it is necessary to refrain from commenting upon the questions which were not debated in this Court.

The determination at first instance

23 The primary judge, Garling J, held that s 130A of the MAC Act does not preclude Mr Thiering's claim for damages in respect of the value of the treatment and care services rendered by his mother. His Honour's determination in this regard related to Question 5, which was in the following terms[8]:

> "Whether on proper construction of section 130A of the [MAC Act], [Mr Thiering] has any entitlement as against [Mr Daly] other than damages for non-economic loss and loss of earning capacity",

and which his Honour answered[9]:

> "Yes, Mr Thiering, as a participant in the LCS Scheme is entitled to recover from [Mr Daly or his CTP insurer] damages in accordance with s 128 of the MAC Act for the period from the accident to the date of judgment, or settlement, as the case may be, unless the LCS Scheme has incurred an expense under s 6(1) of the LCS Act with respect to the provision of such gratuitous attendant care services."

24 It is to be noted that, on this view, damages recoverable in respect of this head of loss did not extend to services rendered after the resolution of Mr Thiering's claim by judgment or settlement. This limitation reflected his Honour's view of the operation of s 7(3) of the LCS Act[10]. Whether or not that view is correct need not be determined on this appeal.

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8 *Thiering v Daly* (2011) 60 MVR 42 at 47 [15].

9 *Thiering v Daly* (2011) 60 MVR 42 at 77 [169].

10 *Thiering v Daly* (2011) 60 MVR 42 at 65-66 [109]-[110], 67 [124], 71 [143(k)], 73 [150]. That view was accepted by the Court of Appeal as well: *Daly v Thiering* (2013) 63 MVR 14 at 21 [14], 29-31 [50]-[52].

25 Mr Daly sought leave to appeal from the decision of the primary judge to the Court of Appeal. Mr Daly's application for leave to appeal was granted, but the Court of Appeal dismissed his appeal.

The Court of Appeal

26 In the Court of Appeal, Hoeben JA, with whom McColl and Macfarlan JJA agreed, held that Mr Thiering, as a participant in the Scheme, may claim damages against Mr Daly pursuant to s 128 of the MAC Act notwithstanding s 130A of the MAC Act.

27 In this Court, the written submissions made on Mr Thiering's behalf supported the reasoning of the Court of Appeal. In oral argument, however, counsel for Mr Thiering did not seek to support that reasoning, but rather advanced a new and different argument in support of the Court of Appeal's conclusion. In these circumstances it is convenient to consider the reasoning of the Court of Appeal before turning to consider the novel argument which was pressed on Mr Thiering's behalf.

28 The steps in the reasoning whereby Hoeben JA reached his conclusion do not lend themselves to summary restatement. Hoeben JA began by summarising the submission advanced on behalf of Mr Daly[11]:

> "The applicant submitted that gratuitous attendant care provided by a friend or family member of the participant, if it were included in the care plan, and the care plan had been implemented or was to be implemented, satisfied the description in s 130A of 'treatment and care needs ... that are provided for or are to be provided for'. The applicant submitted that such an interpretation was consistent with the intention behind the [S]cheme".

29 Hoeben JA then stated the first step in his reasons for rejecting that submission[12]:

> "The contrary interpretation is that s 130A of the MAC Act excludes recovery of damages under s 128 only to the extent that the participant's needs 'are provided for or are to be provided for' while in the [S]cheme. This means that for the exclusion to operate, the participant

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11 *Daly v Thiering* (2013) 63 MVR 14 at 34 [71].

12 *Daly v Thiering* (2013) 63 MVR 14 at 34 [72].

> must be entitled to compensation for those needs under the [S]cheme. Otherwise, what is apparently a provision to prevent the double recovery of damages, would have the effect of depriving the participant of compensation in certain circumstances. Explicit language would have to be used to achieve that result."

30 The second and third sentences of that paragraph conflate damages by way of compensation with "providing for" needs under the Scheme. The LCS Act established a no-fault scheme concerned to ensure that the treatment and care needs of a participant in the Scheme were assessed and met. Sections 128 and 130A of the MAC Act were concerned to regulate the common law entitlement of a person injured in a motor vehicle accident to recover damages for tortiously inflicted injury.

31 Section 6(1) of the LCS Act was the source of the Authority's obligation to pay all expenses incurred in providing for the assessed treatment and care needs of a participant in the Scheme. Section 6(1) of the LCS Act required that any expenses incurred in providing for the assessed treatment and care needs of a participant in the Scheme, to the extent that they were reasonable expenses, were to be paid by the Authority. But the Authority had no obligation in relation to the payment of damages by way of compensation for injury: on no view of the legislation was the Authority made an indemnifier of the liability of a tortfeasor to a participant in the Scheme. For the exclusion in s 130A to operate, it was necessary that the treatment and care needs of a participant were met under the Scheme; it was not necessary that the participant be entitled to monetary compensation.

32 The final sentence of the paragraph under discussion invokes the principle of statutory construction that common law rights should be taken to have been cut down by statute only where there is a clear legislative expression of an unmistakable and unambiguous intention to do so[13]. The interpretation of the legislation does not admit of any real doubt; but it should be said that the jealous scrutiny which is applied by courts to statutes which might incidentally affect common law rights is not appropriate to s 130A[14]. As Basten JA said in

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13 *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *Coco v The Queen* (1994) 179 CLR 427 at 437-438; [1994] HCA 15.

14 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36]; [2003] HCA 33; *Electrolux Home Products Pty Ltd v Australian Workers' Union*

(Footnote continues on next page)

Harrison v Melhem of legislation concerned to ensure the availability of compensation to victims of motor vehicle accidents[15]:

> "[B]oth the existence of an effective remedy and controls over the extent of compensation have long since moved beyond the scope of the general law unaffected by statute, and have become the specific attention of widespread statutory interventions.
>
> … [W]here consideration of the legislation, in a given statutory context, favours a construction involving greater rather than lesser constraint, there is no reason not to give effect to the construction so indicated."

33 In the field of motor vehicle accidents, legislative intervention to ensure that injured persons are provided meaningful compensation and care which the community is able to afford is now commonplace. There was no occasion to read the language of s 130A with an eye to preserving the common law rights of a participant in the Scheme, especially given that s 128 of the MAC Act evinces an unmistakable intention to cut back those rights, and given further that s 130A was enacted as an integral part of legislative measures to provide for the lifetime care of a participant in the Scheme established by the LCS Act.

34 We now turn to consider the reasoning by which Hoeben JA accepted the submission advanced by Mr Thiering[16]:

> "The submission [for Mr Thiering] proceeds that for the reasons already indicated, if the participant is not liable to pay a family member or friend for the attendant care services provided, there are no relevant expenses under the [S]cheme to be reimbursed by the [A]uthority to him or her. The needs fulfilled by the friend or family member are thus not ones 'provided for under the Scheme' and are not excluded by s 130A of the MAC Act from a damages claim. This would require that the words 'are provided for' or 'are to be provided for' as used in s 130A be given the meaning 'are paid for or are to be paid for'.

(2004) 221 CLR 309 at 328-329 [19]; [2004] HCA 40; *Harrison v Melhem* (2008) 72 NSWLR 380 at 382 [2], 383-384 [7]-[10], 407-409 [212]-[221].

15 (2008) 72 NSWLR 380 at 409 [220]-[221].

16 *Daly v Thiering* (2013) 63 MVR 14 at 34-35 [73]-[74].

I prefer the latter interpretation of the words 'provided for'. Such an interpretation fits more easily with a provision to prevent double recovery of damages. It also fits more easily with a provision which is specifically referring to 'damages', that is a monetary amount."

35 This reasoning reworks the language of s 6(1) of the LCS Act in a way which does not give effect to the plain meaning of the words, and then deploys that reworked language artificially to confine the scope of s 130A of the MAC Act.

36 The words "providing for" in s 6(1) of the LCS Act (and "provided for" in s 130A of the MAC Act) should be given their ordinary and natural meaning. It is readily apparent that one may provide for services without paying for them. Thus, for example, services may be provided for an injured person pursuant to an arrangement with a charitable organisation which involves no payment to that organisation.

37 Sections 23 and 26 of the LCS Act made it clear that the treatment and care needs of a participant are all of the participant's treatment and care needs as assessed from time to time by the Authority that are reasonable and necessary and that relate to the motor vehicle accident. Because each of the Authority's assessments of Mr Thiering's care and treatment needs included the needs which were met by Mrs Thiering, the Authority was obliged by s 6(1) of the LCS Act to pay for the expenses, if any, incurred in meeting those needs. That obligation was imposed on the Authority. If no expense was incurred in relation to the provision of those services, there might have been a windfall benefit to the Authority. Whether or not the Authority is entitled to a windfall in this case is not a question to be resolved in this appeal[17]. The point which is germane to this appeal is that any such windfall benefit to the Authority did not come at the expense of Mr Daly or his CTP insurer.

38 The recovery of damages for economic loss in respect of the treatment and care needs of a participant in the Scheme was precluded by s 130A so long as they were provided for or to be provided for, whether or not the value of those services was an "expense incurred" by Mr Thiering or on his behalf.

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17 In fairness to the Authority it should be noted that it has not set out to obtain a windfall. It has made it clear that it stands ready to pay for services necessary to meet the needs attended to by Mrs Thiering if those services are rendered by a person approved under the guidelines.

Section 130A of the MAC Act did not invite an inquiry as to how the Authority, or any other person, might go about the provision of services to meet the needs of a participant in the Scheme for treatment and care. Nor did it suggest any intention to differentiate between care needs that were provided by the Authority itself and those provided by contractors to the Authority, or between whether they were paid for or not paid for by the Authority.

39 Section 130A stated, in terms, that "economic loss in respect of the treatment and care needs (within the meaning of [the LCS] Act) of the participant" was no longer compensable by way of an award of damages. The reference in s 130A to "economic loss" in respect of the treatment and care needs of an injured person was apt to describe, not only the loss resulting from "expenses incurred" to meet those needs, but also, as *Griffiths v Kerkemeyer*[18] itself established, the loss of capacity to meet one's own treatment and care needs. That loss of capacity was held to be economic loss suffered by an injured plaintiff even though the services rendered to meet that loss of capacity were rendered gratuitously. As Stephen J said[19]: "[I]t is for the plaintiff's loss, represented by his need, that damages are to be awarded." And as Mason J said[20]: "[T]he true loss is the loss of capacity which occasions the need for the service." It was on this footing that economic loss in respect of treatment and care needs was held to be compensable by an award of damages even though the services by which those needs were met were provided gratuitously.

40 The same result follows from the adoption of a more broadly purposive approach to the construction of s 130A of the MAC Act. In that regard, the evident purpose of s 130A of the MAC Act was to render the concept of damages for economic loss in respect of treatment and care needs redundant so far as participants in the Scheme were concerned. That purpose was given effect by removing the occasion for an award of compensation by way of damages for economic loss in respect of treatment and care needs. Under the Scheme those needs were, or were to be, provided for under the LCS Act by virtue of that person's participation in the Scheme.

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18 (1977) 139 CLR 161 at 163-164, 171, 192-193.

19 (1977) 139 CLR 161 at 178.

20 (1977) 139 CLR 161 at 193.

A novel argument

41 The new argument advanced on Mr Thiering's behalf focused on the Authority's assessments of Mr Thiering's treatment and care needs. Noting that these assessments referred to the hours devoted by Mrs Thiering to the care of her son, counsel for Mr Thiering argued that these assessments reflected a conclusion by the Authority that, to the extent that Mrs Thiering was providing care to her son, his need for care was met. Since his needs had, to that extent, been met, they were not "provided for" to Mr Thiering as a participant under the Scheme as there was no relevant "need" to be provided for.

42 The fair resolution of this argument is attended by some difficulty because it was raised so late in the course of proceedings. At the very least, the argument should have been heralded by a notice of contention[21]. The argument also raised questions of fact as to the effect of the Authority's assessments; and counsel for the Authority urged that these questions cannot be resolved on this appeal, these questions not having been litigated yet, as between the Authority and the Thierings or at all.

43 All that having been said, it is possible to resolve the new argument without entering upon the resolution of the factual issues adverted to by counsel for the Authority. That is because the proposition of law on which Mr Thiering's new argument depends cannot be sustained. That proposition is that such of Mr Thiering's treatment and care needs as were met by his mother were not treatment and care needs within the meaning of s 6 of the LCS Act or s 130A of the MAC Act.

44 The LCS Act did not contemplate a distinction between "met needs" and "unmet needs". Nor did s 130A of the MAC Act. Section 6(1) of the LCS Act obliged the Authority to pay the reasonable expenses incurred by anyone, by or on behalf of a participant, in providing for all of the needs so assessed by the Authority. Section 23 of the LCS Act contemplated an assessment from time to time of all of the current treatment and care needs of a participant in the Scheme; and s 26 made that assessment binding. The effect of these provisions was that the Authority's assessment of a participant's treatment and care needs from time to time conclusively determined the needs to be provided for under the Scheme and not merely those needs for the provision of which the Authority was obliged to pay.

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21 High Court Rules 2004 (Cth), r 42.08.5.

45 That the legislative package consisting of the LCS Act and s 130A of the MAC Act observed no distinction between met needs and unmet needs of the kind for which Mr Thiering contended is hardly surprising. If the interpretation advanced by Mr Thiering's counsel were correct, it would mean that a participant in the Scheme would be free to choose the extent that the Scheme applied to them. Thus an injured person with sufficient means could choose to arrange for his or her treatment and care needs to be met from his or her own resources, and then recover that expense from the CTP insurer unaffected by s 130A. In that way, the choice conferred on the insurer by s 8 of the LCS Act might be rendered nugatory. That is not an outcome countenanced by the legislation.

Conclusion and orders

46 The appeal should be allowed and the decision of the Court of Appeal set aside. The appeal to the Court of Appeal should be allowed, and the determination of Question 5 by the primary judge should be set aside. In place of that determination, Question 5 should be answered:

> "On the proper construction of s 130A of the MAC Act, Mr Thiering has no entitlement to recover damages in accordance with s 128 of the MAC Act with respect to the provision of gratuitous attendant care services from Mr Daly or his CTP insurer."

47 Pursuant to the undertaking given on behalf of Mr Daly as a condition of the grant of special leave to appeal, Mr Daly must pay Mr and Mrs Thiering's costs in this Court. The costs orders made in favour of Mr and Mrs Thiering in the courts below are to stand.