REHABILITATION – AN INSURER'S OBLIGATION TO PROVIDE REHABILITATION ENTITLEMENTS UNDER THE *MOTOR ACCIDENT INSURANCE ACT* 1994 – WHAT IS THE EXTENT OF AN INSURER'S OBLIGATIONS?

TRAVIS SCHULTZ

Introduction

The fact that Queensland has a CTP scheme which is intended to assist people injured in motor vehicle accidents where they were not at fault is generally well understood. Most people understand that it is a fault based system but the extent of a claimant's entitlement under the legislation is not generally well understood. The purposed of this paper is to highlight the extend of an injured person's rights to rehabilitation assistance under the *Motor Accident Insurance Act.*

The Act

One of the objects of the MAIA is to "promote and encourage, as far as practicable, the rehabilitation of claimants who sustained personal injury because of motor vehicle accidents".[1]

The Act defines "rehabilitation" in a way that seems innocuous enough at first, but closer examination suggests the definition to be of a wider scope than was perhaps first anticipated by insurers and claimants alike. The term is defined in section 4 of the MAIA as -

[1] See: Section 3(d) MAIA.

"Rehabilitation" means the use of medical, psychological, physical, social, educational and vocational measures (individually or in combination -

(a) to restore, as far as reasonably possible, physical or mental functions lost or impaired through personal injury; and

(b) to optimise, as far as reasonably possible, the quality of life of a person who suffers the loss of impairment of physical or mental functions through personal injury.

By way of comparison, the definition under the MAIA is of far greater breadth than appears in similar legislation, such as the *Workers' Compensation & Rehabilitation Act 2003*, which defines "rehabilitation" in section 40 as -

40 Meaning of rehabilitation

(1) Rehabilitation, of a worker, is a process designed to--

(a) ensure the worker's earliest possible return to work; or

(b) maximise the worker's independent functioning.

(2) Rehabilitation includes--

(a) necessary and reasonable--

(i) suitable duties programs; or

(ii) services provided by a registered person; or

(iii) services approved by an insurer; or

(b) the provision of necessary and reasonable aids or equipment to the worker.

(3) The purpose of rehabilitation is--

(a) to return the worker to the worker's pre-injury duties; or

(b) if it is not feasible to return the worker to the worker's pre-injury duties--to return the worker, either temporarily or permanently, to other suitable duties with the worker's pre-injury employer; or

(c) if paragraph (b) is not feasible--to return the worker, either temporarily or permanently, to other suitable duties with another employer; or

(d) if paragraphs (a), (b) and (c) are not feasible--to maximise the worker's independent functioning.

An insurer's obligation to provide rehabilitation is imposed by section 51 of the MAIA, which provides: -

> **Obligation to provide rehabilitation services**
>
> (1) An insurer may make rehabilitation services available to a claimant on the insurer's own initiative or at the claimant's request.
>
> (2) An insurer that makes rehabilitation services available to a claimant before admitting or denying liability on the claim must not be taken, for that reason, to have admitted liability.
>
> (3) Once liability has been admitted on a claim, or the insurer has agreed to fund rehabilitation services without making an admission of liability, the insurer must, at the claimant's request, ensure that reasonable and appropriate rehabilitation services are made available to the claimant.
>
> …

History

Shortly after the Act commenced, Moynihan J (as his Honour then was) was called upon to interpret the rehabilitation provisions in *Re Walker*[2]. His Honour observed[3] -

> "It may be accepted that the Act, and particularly s 51(5), is to be construed beneficially from the perspective of the claimants.
>
> …
>
> As I read the legislation, the applicant's remedy remains damages designed to restore him, so far as money is able, to his pre-accident condition and to satisfy, again in so far as money can, needs caused by his injury; see for example *Van Gurvan v Fenton* (1992) 175 CLR 327; 17 MVR 29. The present case is concerned with interim measures with the overall consequences of the applicant's injuries to be assessed later.

---

[2] See: (1995) 22 MVR 245.
[3] See: ibid, pages 247, 248.

> Section 51(5) provides a test in broad terms. The elements would seem to be "the circumstances of the case", "reasonable" and "appropriate". "Reasonable" would appear to connote no more than its usual meaning as founded on reason as distinct from arbitrary or capricious. "Appropriate" would appear to connote "suitable or fitting for a particular purpose" in this case "rehabilitation" as defined.
>
> Subsection (5) appears to require the court to form its own opinion.
>
> Although there may be a role for the expert opinion in some aspects of applications under subs (5), that should be limited by the nature of the jurisdiction and to evidence of expert opinion properly defined. The court must make up its own mind at an interim stage in a broad rather than refined way."

After that statement emphasising a beneficial interpretation of the provision in favour of claimants, and confirmed by the decision of Byrne J (as His Honour then was) in *McMullen v Suhr*[4], it is of some surprise that it took so long for another decision to be reported concerning the extent of an insurer's obligation to provide rehabilitation services. *Delaney v AAMI Insurance Limited*[5] concerned an applicant who had suffered serious organic brain damage and other injuries in a motor cycle accident. M. A. Wilson J determined that, within reason, the claimant was entitled to choose his own rehabilitation provider.

It must be kept in mind, however, as it must generally in analysing authority, that each case will turn upon their own facts and whilst the decisions referred to provide some guidance of the application of the section generally, each case must necessarily be decided by the facts giving rise to the claim.

In Queensland, a licensed insurer in the CTP Insurance sector is bound by the provisions of the "industry deed"[6], a document of statutory force and which provides -

---

[4] See: (1998) 2 Qd R 406.
[5] See: [2007] QSC 174.
[6] See: section 65 of the MAIA.

"(1) A licensed insurer is bound by the industry deed.

(2) The industry deed may –

…

(e) provide direction and guidance for licensed Insurer's about initiating, managing, monitoring and measuring the effectiveness of, the provision of rehabilitation services for injured claimants.

..."

The industry deed imposes an obligation on an insurer to deal with claims "as quickly as possible" and requires insurers to ensure that their procedures where dealing with claims are "efficient and cost effective".[7]

In January 2007, and in conformity with clause 4 of the industry deed, the Motor Accident Insurance Commission published the *Rehabilitation Standards for CTP Insurer's*, in effect Standards which outline a claimant's obligation to co-operate with the insurer, and the corresponding obligation on an insurer to ensure that reasonable and appropriate rehabilitation services are made available to a claimant. The Standards articulate the obligations on insurers in a way that is perhaps intended to highlight the extent of the obligations by making it clear that it is not the insurer's role to develop treatment and rehabilitation plans but, rather, to facilitate the rehabilitation process[8].

However, the principles of the necessity for co-operation between a claimant and an insurer are not new.[9]

Chapter 2 of the Standards, which deals with the Principles of Rehabilitation in the CTP Insurance scheme, provides[10] -

---

[7] See: Industry deed found in schedule 5 to the Motor Accident Insurance Regulation 2004 ("the MAIR"), clause 3.

[8] See: chapter 3 ("Role of Stakeholders"), standards.

[9] See: *McMullen v Suhr* (supra).

[10] See: paragraph 7.

> "A distinction needs to be made between (i) the rehabilitation process, which is about optimising the injured person's recovery, and (ii) the medico-legal process, which comes later in the life of a claim when the overall consequences of the person's injuries are assessed by medico-legal experts and used in formulating the damages likely to be recovered."

The Standards also provide in section (c)[11] that -

> "claimants are informed of their ability to exercise choice in the selection of an appropriately qualified and experienced service provider whose intervention is supported by the medical evidence."

Some Examples

McKay v Suncorp Metway Insurance Limited[12].

In *McKay*, the claimant suffered a severe brain injury as a result of a motorcycle accident. She was a pillion passenger on the bike being driven by the first respondent, her husband. Such was the extent of her injuries that although she had insight into her condition, she was unable to speak, feed herself or walk, and her means of communication were limited to eye and facial movement and, at times, moving a yes or no card in response to simple questions.

The applicant and her husband lived in an old double storey home at the Glasshouse Mountains. It had an upstairs kitchen, narrow corridors and was unsuitable to be navigated in a wheel-chair. The applicant's condition was such that she had involuntary movements and it was suggested that she would require two full-time carers and that she could only be transferred by means of a hoist.

---

[11] See: Concerning the facilitation of access to appropriate rehabilitation services for injured claimants.

[12] See: Unreported, Queensland Supreme Court, No. 2097/2009, per Atkinson J, 23 March 2009.

The applicant's family wanted the claimant to be cared for at home rather than in a State government facility and proposed that Suncorp (who had admitted liability on the claim) should provide a purpose built home care facility on the basis that it was impractical (or at least not cost effective) to modify the existing home, and consequently demolition and re-building would be required. The proposed residence required sufficient space for carers as well as all of the usual modifications that would be needed by a person with care needs of that nature. In addition, the claimant wanted a vehicle to be purchased and modified and to be of a type that could accommodate her (after modification) in the front passenger seat as opposed to being forced to ride in a wheelchair in the back of the vehicle.

Perhaps not surprisingly, Suncorp opposed the application.

Ultimately, the application was heard by Atkinson J on 23 March 2009. After lengthy argument, Her Honour indicated to Counsel for the applicant that "the merits are all on your side" but wanted more evidence regarding some of the architectural issues. The transcript reflects Her Honour's views[13] -

> **Her Honour:** No, please don't interrupt me while I'm trying to speak – that to construe the act beneficially from the perspective of the claimants and informed as one ought to be by the international convention, to restore her as far as money is able to to her pre-accident condition and satisfy as far as money can the needs caused by her injury, she needs – it's uncontested that she needs to be back in her own home and it seems to me incontrovertible , so long as the cost is not excessive, that that can be achieved better in a new home than by retro-fitting the old home, but to make an order which just gives carte blanche to the building of a new home with any number of features of any size of any condition, I just – I don't think I have the power to do that, and nor would I want to. So, that is the difficulty you have put me in.

[13] See: T1-36 at [33].

After the exchanges, the matter was adjourned and the parties negotiated the terms of an order, which were ultimately made by consent[14]. The order was in the following terms: -

1. It be declared that in the circumstances of the case it would be reasonable and appropriate to make the following rehabilitation services available to the applicant:
   (a) The funding of the demolition of the residence presently located on the property owned by the applicant and the first respondent as joint tenants and situate at premises at 224 Johnston Road, Glass House Mountains in Queensland, and the construction upon the property of a new dwelling purpose built to accommodate the applicant's disabilities, limited to an amount of $425,000.00;
   (b) The funding of the provision of a new, specially modified motor vehicle, for example, a Mercedes Benz Viano van of the kind described in Exhibits TS2, TS3 and TS16 to the affidavit of Travis Schultz filed 20 March, 2009, limited to an amount of $100,000.00.
2. The second respondent pay the applicant's costs of and incidental to the application, as agreed or, failing agreement, to be assessed.
3. Liberty to apply.

Aldridge v Allianz Australia Insurance Ltd[15]

Following *McKay*, *Aldridge v Allianz Australia Insurance Limited* concerned a similar application determined by Applegarth J and which concerned a claimant who, once again, was a motor cyclist struck by a motor vehicle insured by the second respondent. She was a single mother with 3 teenage daughters who lived in a two storey home at Pacific Paradise on the Sunshine Coast. The applicant was rendered a paraplegic as a result of serious spinal injuries and unable to access the second floor of her home.

---

[14] See: Consent in the sense that the parties reached agreement as to the terms of an order after Her Honour had indicated her views on the application.
[15] See: [2009] QSC 259.

Although the insurer agreed to make (and did make) some modifications to the downstairs area to facilitate the claimant's release from hospital, and agreement had been reached to install a lift in the home to permit the claimant to access the upstairs portion of the house, and for other modifications such as widening corridors and doorways, raising bench heights in the kitchen etc.

The claimant had requested, and agreed to those modifications, but then determined that it was simply unsuitable to attempt to modify her existing home. One of her teenage daughters suffered badly from asthma and would periodically suffer severe asthma attacks. Such were the severity of some attacks that she could be hospitalised, and the attacks could be potentially fatal. Amongst the claimant's concerns was that if her daughter had such an attack it would take her close to ten minutes to transfer to her chair, get to and into the lift, take the lift to the upper floor and then attempt to render any possible assistance. It was common ground between all of the occupational therapists that a single storey home was best suited to the claimant given her confinement to a wheel-chair.

The claimant brought an application for an order that the CTP Insurer either acquire a block of land for her and build her a purpose built home or alternatively, that it acquire an existing single storey home in the same locality and modify it to suit the claimant's accident-related needs. Allianz however argued that its obligation was to either continue with the modifications that had been proposed (including the installation of a lift) or, alternatively, rent her some short term accommodation in the area and modify it so that it was temporarily suitable until her claim was resolved or determined by a Court.

After a hearing, Applegarth J ordered the insurer to acquire an existing single storey home in the locality and modify it to the claimant's accident-related needs. His Honour concluded[16] -

> In conclusion, the fourth option is a reasonable and appropriate rehabilitation service, and the most suitable option in the circumstances. It meets both short-

[16] See: (supra) at [90].

term and long-term accommodation needs that were caused by the accident, and which should be met to optimise, as far as reasonably possible, the quality of the applicant's life. The option is reasonable and appropriate because any capital gain that the applicant receives above that required to meet her accident-related needs, and which the respondent proves at trial, may be brought into account according to well-established principles governing the assessment of compensation, provided a notice is given under s 51(4). The respondent's legitimate interests will be protected by the terms of the order to be submitted.

***Raymonde Ann Michael v Transport Accident Commission*[17]**

Hot on the heels of *Aldridge* was another decision dealing with a CTP insurer's obligations to provide rehabilitation under the MAIA. *Raymonde Ann Michael v Transport Accident Commission* concerned a plaintiff was a nurse and who had suffered personal injuries in a head-on motor vehicle accident. Her significant injuries included a severe lower limb and knee injury, as well as symptoms of PTSD. As a result of her injuries, she had not been able to return to her employment and her financial resources had been depleted to the point that she was unable to afford to meet her mortgage and she had relocated to reside with her mother who lived in a rural hinterland town. It was clear that she was going to be required to undertake long term rehabilitation which would preclude her from returning to work for many months and probably never as a nurse but perhaps in a newer role or position that was less physically demanding.

She sought an order that the insurer provide a rehabilitation co-ordinator of her choice to co-ordinate her rehabilitation, an order that the insurer reimburse a number of out-of pocket expenses that she had incurred (including the cost of some supplements and protein bars that had been used on advice of her treating practitioners), and, perhaps most significantly to her, an order that the CTP insurer provide taxi vouchers so that she was able to not only attend

[17] See: *Raymonde Ann Michael v Transport Accident Commission*, Unreported, Supreme Court of Queensland, No.245/2010, per M. A. Wilson J, 19 January 2010.

doctors and medical appointments, but so that she could get to any places that she reasonably wished to go whether for treatment, social visits or even retail therapy.

The insurer, however, suggested that: -

- it would appoint its own internal rehabilitation co-ordinator who is based in Victoria;
- would reimburse some of the expenses but not others unless medical evidence could be produced to show the need for the expense was created solely by the injury; and
- it would agree to provide a limited number of taxi vouchers but on the basis that they could only be used to attend medical appointments and not otherwise. The evidence was that the applicant lived three kilometres from the nearest bus station, she could not walk that far and there was no public transport in her immediate locality. She could not use public transport because of her injuries and being on crutches and she could not afford to take taxis because she simply did not have any funds now that she was unable to work, reliant on Centrelink benefits and unable to meet her mortgage commitments.

In the end, Justice Wilson made orders in the following terms:-

1. It be declared that in the circumstances of the case it would be reasonable and appropriate to make the following rehabilitation services available to the applicant:
   (a) The appointment of Ms Suzanne Cox of *Edge Rehabilitation* to be the applicant's rehabilitation co-ordinator;
   (b) The funding of the initiatives described in Section 1.0 ("Initial rehabilitation needs assessment"), except for paragraph 1.2.9, and Section 2.0 ("Initial rehabilitation report"), except for paragraph 2.2.1, of the report of *Edge Rehabilitation* (Ms

Suzanne Cox) dated 8 January, 2010, being Exhibit TS1 to the affidavit of Travis Schultz filed 13 January, 2010.

(c) The funding of the applicant's reasonable transport needs by the respondent's provision of books of taxi vouchers requested from time to time by the applicant, the first of which books of vouchers is to be provided no later than 22 January, 2010, subject to the applicant accounting in writing to the respondent, upon the use of each $250.00 worth of such vouchers, with respect to particulars of the taxi journeys involved, by reference to the date and purpose of each journey.

(d) The reimbursement to the applicant, no later than 22 January, 2010, of $1,000.00 on account of the expenses listed in the letters of Schultz Toomey O'Brien to the respondent dated 18 November, 2009 and 14 December, 2009, being Exhibits TS3 and TS17 respectively to the affidavit of Travis Schultz filed 8 January, 2010.

2. The respondent pays the applicant's costs of and incidental to the application, as agreed or, failing agreement, to be assessed.

3. Liberty to apply.

Rogers v Suncorp Met-Way Insurance Limited **[2013] QSC 230**

In this case, the applicant made a request through his litigation guardian that the insurer build him his own purpose-built residence and provide one on one care. He had suffered an acquired brain injury which meant that he had developed a severe behavioral impairment consistent with a frontal lobe disorder. It was considered to be a risk of harm to others. The insurer had agreed to fund and did in fact fund accommodation in a share house where there were other residents. There were conflicting medical opinions as to whether the arrangements were suitable or not. Ultimately, in the circumstances, Boddice J thought it was reasonable for the existing arrangements to continue for now even though there was some uncertainty of the availability of the share home in the future. Interestingly, the respondent, Suncorp Met-Way Insurance Limited, agreed to meet the cost of provision of taxi vouchers as well

as the provision of services from a sex worker. Given the agreement of the respondent to provide those services, no formal order was made that they would be funded.

***Dylan v RACQ AMP General Insurance* [2001] QSC 347**

The applicant, Michael Dylan, suffered significant orthopaedic injuries in a motor vehicle accident. He lived in a remote location at Taromeo where he was assisted by relatives who would take him to Yarraman to access a wheelchair accessible pool, and to Kingaroy and Nanango for physiotherapy. He thought his rehabilitation was being hindered because he was so far away from medical services in Brisbane. He sought an order that the insurer fund the cost of renting premises in Brisbane for 6 months to enable him to access treatment. The CTP Insurer agreed to advance him $4,500.50 to cover 6 month's rent but it was not agreed as to whether that was an advanced payment of damages or a rehabilitation expense. The Insurer offered to meet the cost of rent as an advanced payment of damages and accordingly Mackenzie J declined to make an order that it be considered a rehabilitation expense at that stage.

***Delaney v AAMI Insurance* [2007] QSC 174**

In this case, the applicant had been seriously injured in a motor vehicle accident. The Insurer had not admitted liability but agreed to fund rehabilitation services. The applicant needed rehabilitation services which included treatment by a neurologist, a dietitian, an occupational therapist, a physiotherapist and a speech pathologist but the applicant and the insurer were unable to agree upon who should be the service providers or who should be the case managers. AAMI would only agree to fund the cost of treatment by service providers that it selected. Wilson J however found that an injured person should have the right to select their own treatment providers and accordingly ordered that the applicant's nominated treatment providers provide the treatment and that the insurer fund the cost.

In *Delaney*[18], M. A. Wilson J was critical of the approach of the CTP Insurer in attempting to impose conditions on the provisions of rehabilitation such that it would only fund the cost of services provided by the treatment providers it proposed. Her Honour said[19] -

> "The applicant's rehabilitation needs seem to have been overshadowed by the respondent's intransigent attitude that it will meet the costs only if the rehabilitation services are provided by persons it selects.
>
> This dictatorial attitude is inconsistent with the Legislature's expressed intention to promote and encourage rehabilitation of injured persons and with the express provision in the Rehabilitation Standards which are binding on it that claimants be informed of their ability to exercise choice in the selection of an appropriately qualified and experienced service provider whose intervention is supported by the medical evidence. Ultimately it is in the mutual interests of the applicant and the respondent that these issues be dealt with calmly and dispassionately, in spirit of co-operation and good will."

RACQ's Recent Approach

As a result of new rehabilitation standards for CTP Insurers being promulgated in February 2020, some slight changes to the wording seems to have excited some insurers to think they will be able to now water down the extent of their obligation. RACQ in particular have been attempting to dictate the amounts they will pay for allied health treatment from a range of different practitioners. It has not just impacted on physiotherapists but also podiatrists, psychologists, and the like.

MAIC have promulgated "Reasonable and Appropriate Rehabilitation Guidance for CTP Insurers". Guidance question no. 5 provides:

- The cost is in line with what a member of the public without a CTP insurance claim would be charged for the same service.

---

[18] See: (supra).
[19] See: At paragraph [16].

- The fee is in line with normal market rates.

RACQ argue that what is considered reasonable should be determined by reference to what a statutory insurer would pay.

An application was to have been heard in the Supreme Court on Tuesday, 7 July 2020 however that application, brought by RACQ, was resolved by consent and when RACQ attempted to press for a ruling, it was dismissed and an order for costs was made against them. Accordingly, RACQ's argument has not been tested. The nub of their argument appears to be that they are only obliged to pay "reasonable" costs. They argued that what is "reasonable", is to be judged by reference to what would ordinarily have to be paid for the provision of a particular service by a large statutory insurer. They draw an analogy between the ability of Workcover and the Department of Veteran's Affairs to set the amounts which they will pay and argue that it entitles RACQ as a licensed CTP Insurer, to only have to pay an amount that a large insurer would ordinarily be able to negotiate with treatment providers.

It is highly likely that the argument will be raised in an application which will soon be heard in the Supreme Court, so for now it is a question of "watch this space".

Conclusion

Each case is a question of fact which must be looked at against its own circumstances, and the particular injuries sustained by a claimant, in order to determine what is "reasonable and appropriate" "rehabilitation" to any particular claimant. Each case will necessarily differ and involve competing considerations as to questions of reasonableness in order to achieve the desired outcome of the MAIA. Necessarily, as the MAIA and the *Rehabilitation Standards for CTP Insurers* published by the Motor Accident Insurance Commissions promote, there must be co-operation between insurers on the one hand and claimants on the other in order to achieve the desired outcome. Obviously, it requires a common-sense approach to achieve that outcome without resorting to litigation for a determination of what constitutes rehabilitation within the circumstances of each case. Whilst the principles from the relatively few cases

thus far give some guidance as to the beneficial interpretation of the section to claimants, it is far from “open slather” for a claimant to demand and expect to receive what it considers it should have in an ideal world.