

## Case Note

### *Insurer remedies for false and misleading statements*

[Allianz Australia Insurance Limited v Yu \[2024\] NSWSC 31](#)

#### Introduction

When assessing the seriousness and effect of a claimant's injury, self-reported symptoms form an integral basis of any expert medical opinion and an insurer's evaluation of the claim. But what happens when a claimant knowingly exaggerates their symptoms and disabilities?

Section 118 of the *Motor Accident Compensation Act 1999* (NSW) (MACA), and section 6.42 of the *Motor Accident Injuries Act 2017* (NSW) (MAIA) provide significant consequences for a claimant who has made false and misleading statements with the goal of obtaining a financial benefit, including recovery of that benefit.

In *Allianz Australia Insurance Limited v Yu* the Supreme Court outlines the standard of proof an insurer must demonstrate to successfully recover the financial benefit obtained by the claimant.

#### Principles

1. Successful engagement of fraud recovery provisions requires strong evidence, given the nature and seriousness of an allegation of fraud.
2. The totality of the evidence must indicate the claimant knowingly made false and misleading statements with the purpose of obtaining a financial benefit. Representations alone will not be sufficient to overcome the standard of proof.
3. In the event a claim is successfully made under these provisions, an insurer is entitled to recover only the difference between what the claimant received, and the value of what they would have received had they not engaged in fraudulent conduct.

#### Background

The claimant was involved in a motor vehicle accident in NSW on 31 July 2013. He made a personal injury claim under the MACA, alleging he sustained a severe psychiatric injury as a result of the accident. Allianz Australia Insurance Limited (Allianz) was the relevant CTP insurer.

The claimant alleged that as a result of his injury, he continued to experience disabilities including a persistent lack of motivation, cognitive impairment, inability to work, inability to maintain personal hygiene and needs, and reclusive behaviour.

Evidence obtained by Allianz indicated that the claimant's whole person impairment was well in excess of the 10% threshold, and as a result he was entitled to damages for non-economic loss. The MACA claim was settled in March 2015 for \$750,000, inclusive of costs.

Following settlement of his claim, the claimant's wife commenced her own MACA claim, alleging she sustained a nervous shock injury as a result of her husband's 2013 accident.

Throughout her claim, it became apparent that the history reported by her was grossly inconsistent with the reports made by the claimant in his own claim.

Subsequent investigations by Allianz revealed the following:

- i. The claimant did not appear to be overborne with a cognitive disability. It appeared he was competently managing his and his wife's complex finances and real estate portfolio. It also appeared the claimant had, since the accident, coordinated and overseen renovations of his residence in Thornleigh NSW.
- ii. Given the complex nature of handling his and his wife's finances, and the renovations of his property, it appeared that the claimant did not have any significant restriction on his capacity to work. Bank statements also indicated that he had indeed been working throughout the life of his claim.
- iii. It appeared that the claimant was able to communicate in English significantly more competently than he had claimed.
- iv. The claimant appeared to have easily maintained his personal hygiene and did not display any reclusive or anti-social behaviour. Witness statements were, on the contrary, describing the claimant as professional, calm and well dressed.

Based upon these investigations, Allianz formed the view that the claimant had made false and misleading statements throughout his MACA claim with the goal of obtaining a financial benefit.

Allianz commenced proceedings in the Supreme Court seeking to recover a portion of the settlement paid to the claimant in accordance with section 118 of the MACA.

## Issues

Allianz alleged that:

1. The claimant had engaged in the tort of deceit by knowingly making false and misleading representations as to his psychiatric injury and disabilities
2. The claimant made such representations with the goal of achieving a financial benefit
3. Allianz relied on the claimant's representations in settling the MACA claim, and
4. As a result of the false and misleading representations made by the claimant, Allianz suffered loss.

## Decision

### *Grounds 1 & 2*

The claimant argued that he had not knowingly engaged in deceit with a clear goal of financial benefit on the following basis:

- i. He did not understand the purpose of any medico-legal examinations
- ii. He did not know Allianz would rely on the representations he made to doctors, both treating and medico-legal, and
- iii. The use of an interpreter had interfered with his communication with the various medical professionals.

The Court rejected this argument on all points.

Witness evidence overwhelmingly demonstrated that the claimant was not overborne with cognitive disabilities, and that he was able to communicate in English to a relatively proficient degree.

Justice Weinstein went on to find the claimant's credibility to be poor, noting there was no other plausible explanation for the representations he had made, other than for his own financial benefit.

### Ground 3

Whether Allianz was induced into settlement by the claimant's representations is a question of fact. The Court considered the totality of the evidence given, noting that the medical evidence had formed the basis of the assessment made on the claimant's claim. The Court found that the claimant's false and misleading representations altered the opinion given by the various medical experts.

The Court was also required to consider that the evidence given in these proceedings was largely done so with the benefit of hindsight. Justice Weinstein applied the *Briginshaw* standard when considering the weight of the evidence given, and was ultimately satisfied that Allianz was indeed induced into settlement to their financial detriment.<sup>1</sup>

### Ground 4

The Court followed *Checchia v Insurance Australia Ltd trading as NRMA Insurance* in applying the 'settlement theory' when assessing the damage suffered by the plaintiff.<sup>2</sup>

As a result, damages were calculated by determining the amount for which Allianz would have resolved the MACA claim, had he not engaged in false and misleading conduct. The difference between the two figures was then awarded to Allianz.

## Final Result

Justice Weinstein considered the nature and gravity of the allegation of fraud against the evidence adduced. He was ultimately satisfied that, on the balance of probabilities, Allianz's evidence in totality was strong enough to establish fraud.

The Court concluded that the claimant had both engaged in the tort of deceit and was in breach of section 118 of the MACA.

Judgment was found in favour of Allianz. The claimant was ordered to pay Allianz \$670,000 plus interest and costs.

## Why this decision is important

Although this decision deals with section 118 of MACA, the principles apply equally to the identical provision contained at section 6.42 of MAIA.

While it may not always be obvious that a claimant has knowingly made a false and misleading representation with a goal of financial benefit, insurers should be mindful of mischaracterising these provisions as a 'fail safe' option. Reliance on representations made by a claimant alone, will not engage this provision.

---

<sup>1</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34.

<sup>2</sup> [2009] NSWSC 1005.

February 2024

This can only be established with strong evidence which, considered in totality, supports an allegation of fraud. Adhering to a due diligence policy when collecting evidence remains the most effective avenue to prevent fraud.

**This article was written by Principal Andrew Gorman with the assistance of Graduate Allisa Hollier. For further information or advice on any related matters please contact Andrew.**



**Andrew Gorman**

**Principal**

+61 2 8088 1945

[agorman@meridianlawyers.com.au](mailto:agorman@meridianlawyers.com.au)



**Allisa Hollier**

**Graduate**

+61 2 8088 1966

[ahollier@meridianlawyers.com.au](mailto:ahollier@meridianlawyers.com.au)

**Subscribe to receive our latest insights and updates on a regular basis.**

Disclaimer: This information is current as of February 2024. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.