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## What Evidence Can Establish That There Was No Departure From The Standard Of Care Expected Of An Expert Professional Advisor?

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### **Palios Meegan & Nicholson Holdings Pty Ltd and Anor v Shore [2010] SASFC 21**

The Judgment of the Full Court of the Supreme Court of SA was delivered in this matter on 12 August 2010.

The Full Court unanimously upheld the Appeal. The previous orders made by His Honour Judge Tilmouth in the District Court have been set aside, and the plaintiff's claim dismissed in its entirety.

#### **Background / Facts**

The practitioner, Ms Palios, was retained to act for Ms Shore in relation to pursuing her entitlements under the *Workers' Rehabilitation and Compensation Act* consequent upon an injury sustained by her in the course of her employment with Resthaven Inc in July 1996.

Initially, the retainer was confined to advising Ms Shore in relation to her entitlement for lump sum compensation pursuant to Section 43 of the Act. WorkCover determined this entitlement at \$33,550.00, which determination was disputed. During the course of discussions concerning the dispute, the solicitors for WorkCover enquired whether Ms Shore was interested in an all up settlement.

Subsequent negotiations resulted in Ms Shore accepting an all up settlement of \$116,500.00 in August 1998. This amount included a redemption sum for future entitlements to income maintenance and medical expenses of \$50,000.00. At the time of the settlement, Ms Shore was 52 years of age. She was then receiving income maintenance of \$532.70 gross per week. She was not undertaking any paid employment and her weekly payments were calculated on the basis that she was totally incapacitated.

Under the Act she was then potentially entitled to continue to receive income maintenance until her 65<sup>th</sup> birthday. Of course, whether or not she did so, would depend on the course of her recovery from her injuries and the extent of her incapacity from time to time. She also had a potential entitlement under the Act to have her medical expenses relating to the compensable disabilities paid for life.

Under the Act, redemption can only be effected by the agreement of WorkCover and the worker, and subject to legal and financial advice being provided to the worker. There was no arithmetical or actuarial calculation resulting in the figure of \$50,000.00. WorkCover had a policy whereby it would rarely agree to redeem future weekly payments for any sum greater than \$50,000.00.

Section 35(6a) of the Act provides that if a liability to make weekly payments is redeemed, the worker is taken to be receiving the weekly payments that would have been payable if there had been no redemption. Accordingly, if a worker redeems an entitlement to future weekly payments and subsequently sustains a further compensable disability, any income maintenance payable in respect of that subsequent disability will be reduced by the amount that would have been payable if there had been no redemption.

In this instance the redemption agreement included a provision whereby Ms Shore agreed that \$532.70 was the weekly payment that would have been payable if there had been no redemption.



Ms Shore obtained employment at the Parklyn Aged Care Facility in May 1999. She suffered further injury during the course of that employment in July 2004. The claim for compensation for this subsequent injury was accepted by WorkCover. However, because of the previous redemption the rate of weekly payment entitlement was then reduced by the Section 35(6a) figure of \$532.70.

Ms Shore then brought a claim against Ms Palios, asserting that Ms Palios had provided deficient advice to her and in particular had not properly advised her in relation to Section 35(6a) or the adequacy of the redemption / settlement. Ms Shore asserted that the practitioner had:

1. Failed to advise that her future entitlements to compensation were for an amount considerably in excess of \$50,000.00;
2. Failed to inform her that a redemption of the entitlement to future weekly compensation would disentitle or reduce the amount of weekly payments which she would otherwise receive in the event that she suffered a further compensable disability.

The matter proceeded to trial in the District Court of South Australia in October 2008.

### The Practitioner's Case

Ms Palios' evidence was that she gave advice to Ms Shore not to redeem her entitlement to worker's compensation benefits. She had told Ms Shore on a number of occasions that she would be 'better off' to stay on the system. She expressed her personal view the medical evidence pertaining to Ms Shore, the nature of her occupation and her age, would make it difficult for the WorkCover Corporation to take steps to either reduce her ongoing benefits or cease making payments to her. Further there was a reasonable expectation of WorkCover continuing to pay for medical expenses.



A file note had been made of a telephone call between Ms Shore and Ms Palios of their discussion along these lines.

Ms Palios was adamant that after being informed by Ms Shore that in fact she wished to take steps to resolve her claim and to redeem her entitlements, she then went about attempting to negotiate the best deal she could for Ms Shore based on the medical evidence and WorkCover policy at the time. There was no specific note on the file of Ms Shore telling Ms Palios that she wanted to take steps to finalise her claim, and nor was there any specific note of the advice given about the effects of redemption. Ms Palios gave evidence as to her “standard practice” when giving such advice.

### **The Plaintiff’s Case**

Ms Shore’s case was that insufficient advice had been provided to her by Ms Palios as to the potential ramifications of accepting a redemption of her entitlements to workers compensation benefits. It was also argued that Ms Palios was negligent in failing to inform Ms Shore that she would be effectively squandering what was the ongoing equivalent of a sum of \$532.70 per week until age 65.

It was argued that had she not redeemed, and instead remained on workers compensation benefits, Ms Shore had a realistic expectation of receiving ongoing benefits of this sum to age 65. It was suggested that had this been properly explained to Ms Shore she would have not accepted the redemption. “Further, had she been properly informed of the effect of Section 35(6a) of the Act, she also would not have accepted the redemption”.

### **District Court Finding**

Ms Palios was found to have been negligent in failing to properly advise Ms Shore about the consequences of entering into a series of redemption agreements on 21 August 1998. His Honour Judge Tilmouth found that were it not for the negligent advice Ms Shore would not have entered into those agreements, and as a result, she had sustained loss. Damages of approximately \$46,500.00 were awarded, together with costs.



Judgment was entered by an Order made on 12 June 2009 following His Honour’s reasons for decision on negligence and damages dated 23 January 2009, *Shore v Palios Meegan & Nicholson [2009] SADC5*: on damages dated 13 May 2009, *Shore v Palios Meegan & Nicholson (No2) [2009] SADC50* and on certification for the costs of Senior Counsel dated 12 June 2009, *Shore v Palios Meegan & Nicholson (No3) [2009] SADC66*.

### **Full Court Appeal – Supreme Court of SA**

These decisions were appealed on behalf of Ms Palios and her firm. The Full Court delivered its decision on 12 August 2010 upholding the appeal. The Orders made by the Full Court of the Supreme Court were as follows:

1. Appeal allowed
2. Cross Appeal dismissed
3. Set aside the Orders of Judge Tilmouth made on 23 January 2009, 13 May 2009 and 12 June 2009
4. Respondents for claim dismissed
5. Respondent to pay the appellants’ costs of the appeal and the action
6. No order as to cost with respect to the cross appeal.

The Full Court considered that there was no basis to reach the conclusion that there had been a departure from the standard of care expected of an expert professional advisor. In so holding, the Court considered that there were two critical pieces of evidence:

## 1. “Standard Practice”

The practitioner was an experienced and diligent solicitor in the area of worker’s compensation, and “evidence as to the established practices of an expert professional advisor is relevant, probative and consequently admissible to prove the general advices that that advisor would give in the course of professional engagements” - although this was circumstantial evidence, it “could allow a conclusion to be drawn as to the probability that such general practice was followed in the present proceeding” (per Gray J).

## 2. Client Certificate

All redemption agreements drawn by WorkCover contain a Certificate to be signed by the injured worker summarising the nature of legal advice received about the redemption agreement - the Certificate signed by Ms Shore was a significant piece of evidence that corroborated the practitioner’s evidence as to the advice that she had provided, and in turn established that the practitioner had discharged her duty of care to Ms Shore.

## Conclusion

In view of the Certificates that must be signed by workers as to the legal advice that they had received before entering into WorkCover redemption agreements, it would seem most unlikely that a worker will be able to establish that a legal practitioner has failed to give the appropriate advice. Accordingly, future claims against legal practitioners practicing in the area of WorkCover redemption agreements are unlikely to be brought (or capable of being established if they are).

Similarly, this authority is likely to be of benefit to legal practitioners practicing in other areas where their clients are obliged to obtain legal advice as to the effect of an agreement and sign a Certificate as to the nature of the advice provided and their understanding of that (for example, family law BFA’s, loan and franchise agreements).

Nevertheless, practitioners are reminded that whilst unnecessary as a matter of principle, it is still prudent to keep detailed written records of all dealings with clients, and in particular as to crucial advice. Detailed file notes will aid a practitioner’s memory should the practitioner have to give evidence in defending any claim that may be brought against him or her. Letters to clients confirming such advice are also significant pieces of evidence. Such written records may well prevent a claim being made in the first place, or persuade a claimant not to pursue the claim to trial.

**For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.**

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