

# **Challenging Awards of Claims Assessors and Decisions of MAS Assessors, Review Panels and Proper Officers of the Motor Accidents Authority of NSW**

**A paper delivered by Mark Robinson SC to the NSW Bar Association's 2013 Personal Injury Conference, held in Sydney on 2 March 2013**

I am asked to speak to you today about challenging CARS assessor awards and decisions of MAS assessors, review panels and proper officers of the Motor Accidents Authority of NSW.

As you know, there is no “*appeal*” from these decisions provided for in the *Motor Accidents Compensation Act 1999 (NSW)* (“**the Act**”).

There is also no internal review or external review provided for in the Act, say in a tribunal such as the Administrative Decisions Tribunal of NSW, except for *de novo* review of medical assessors binding medical assessments. Section 63 provides for these reviews of medical assessments, but only if the proper officer says so in a “*gateway*” determination under section 63(3).

The only way to truly set these decisions aside, apart from some certain manoeuvres, which I will talk about, is to seek to quash them by judicial review in the Supreme Court of NSW. This invokes the Supreme Court's judicial review (or supervisory) jurisdiction derived from section 69 of the *Supreme Court Act 1970 (NSW)* which provides for the making of orders “*in the nature of*” the former prerogative writs, such as the former writ of certiorari. This jurisdiction is important as it enables the judicial supervision of executive and administrative decision making in New South Wales. It is constitutionally recognised and protected by section 73 of the *Commonwealth Constitution* (see, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 and, “*The centrality of jurisdictional error*”, Hon JJ Spigelman AC (2010) 21 Public Law Review 77).

You have heard a number of papers at these conferences about the content and mechanics of judicial review in NSW and of the grounds of judicial review. Today, I will give you a brief outline of some recent decisions of the court that show judicial review in action in motor accident cases in the MAA.

I will start with medical assessors.

Medical practitioners - general practitioners and specialist doctors - are appointed as “*medical assessors*” (section 59 of the Act) and they are supposed to possess a degree of independence. They are to bring professional judgment and skill to bear in making their decisions under sections 61 and, when they are appointed as review panel members, under section 63 as well.

In addition, they follow statutory provisions and guidelines that operate as delegated legislation. The primary guidelines they apply in particular are the:

- MAA’s “Medical Assessment Guidelines” dated 1 October 2008; and
- MAA’s *Guidelines for the Assessment of Permanent Impairment*, 1 October 2007 (the “**Permanent Impairment Guidelines**”) and the American Medical Associations (“**AMA**”) Guidelines, 4<sup>th</sup> edition (“**AMA4**”) (as modified by the Permanent Impairment Guidelines)

The role of the medical assessors as being independent is accepted by the Supreme Court-see, for example, *Goodman v The Motor Accidents Authority of NSW* (2009) 53 MVR 420; [2009] NSWSC 875 at [80]-[82] (Hoeben J); and *Ackling v QBE Insurance (Australia) Ltd* (2009) 53 MVR 377; [2009] NSWSC 881 at [77] and [85](Johnson J).

Medical assessments and review panel reviews are not adversarial proceedings; they are non-curial and inquisitorial processes under the Act and the relevant Guidelines. In *Goodman's case* (at [79]), Hoeben J stated:

"It is clear that independent medical assessments under the Act are not, and were not intended to be, an adversarial process. This is clear from the way they are carried out and the function which they perform within the scheme of the Act."

Challenges to medical assessor determinations by way of judicial review are rare. When made, they are usually wrapped up in a challenge to the validity a medical assessors review panel and sometimes, the proper officer’s decision as well– see, for example: *Allianz Australia Insurance Limited v Francica* [2012] NSWSC 1577 (Hall J); *Yen Ngoc Thi Nguyen v Motor Accidents Authority (NSW)* (2011) 58 MVR 296; [2011] NSWSC 351 (Hall J) and, *Stojanovic v Motor Accidents Authority (NSW)* (2010) 56 MVR 335; [2010] NSWSC 1090

(Harrison AsJ).

The explanation for this is as follows.

Although a medical assessment is binding on the parties and on any court (s 61(2)) – correctly put, it is “*conclusive evidence as to the matters certified*” in it, there a number of ways to challenge it or review it.

**First**, there is judicial review in the Supreme Court. However, remedies in judicial review are discretionary. In the case of a decision found to be erroneous in law or the subject of jurisdictional error, the established discretionary factors are, in short, that a remedy will not normally be granted if:

- a more convenient and satisfactory remedy exists;
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay;
- the applicant has acquiesced in the conduct of proceedings known to be defective; or,
- there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made.

See the discussion of the discretion generally and citation of some of the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [88]-[92] per Kirby J. (See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 322[80] (McHugh J); and *Re Refugee Review Tribunal; Ex Parte AALA* (2000) 204 CLR 82 at 108-109 [57]-[58] (Gaudron and Gummow JJ) (See also Professor Mark Aronson, Judicial Review of Administrative Action, 5<sup>th</sup> edn, 2013, Law Book Co at page 789 [12.15] “*Discretionary Criteria for Refusing Certiorari and Prohibition*”) *et seq.*

Since a *de novo* review of the medical assessor’s decision is available (via a proper officer’s separate determination pursuant to section 63(3)) and since that review is “*a new assessment of all the matters with which the medical assessment is concerned*” (s 63(3A)), a court would

expect that a more convenient and satisfactory remedy exists.

It would not hear the matter, until that remedy had been exhausted. One should go to the panel first, if one can.

This is partly why so many proper officer decisions are challenged in the Supreme Court.

**Second**, if there is scope for identifying a denial of procedural fairness in the medical assessor's decision, usually in the reasons for decision, a better remedy might be in utilising section 61(4) of the Act and putting on a Notice of Motion in the District or Supreme Court seeking the have the court "*reject*" the certificate and making a new medical assessment or referring it back to the MAA for a new assessment to be undertaken.

This action was quite popular years ago. There were many cases on it, particularly in the District Court: see, for example, *David Harry Ragen v Nominal Defendant*, unreported, 15 September 2005, District Court of NSW at Sydney No 2746 of 2003 (Judge Sorby); *Ali v Oke*, unreported, District Court of NSW, 12 December 2006 (Gibson DCJ); *Catsicas* - unreported, District Court of NSW (Sidis DCJ), 30 July 2004; *Cecil J Cooke v Smith Bros Trade & Transport*, unreported, District Court of NSW, (Judge Balla) 2 June 2006; *El Debal v Network Welding Pty Ltd*, unreported, District Court of NSW, (Acting Judge Christie), 14 December 2004; *Mihalopoulos v Vu*, unreported, District Court of NSW, (Judge Garling) 23 April 2004; *Ragen v Nominal Defendant*, unreported, District Court of NSW (Sorby DCJ) 15 September 2005; *Nithiananthan v Davenport* [2006] NSWDC 105(Phegan DCJ).

Judge Finnane handed down such a decision on 15 February 2013 in the matter of *Hind Kourouche v Penelope Frost (NRMA)*, unreported, District Court of New South Wales at Sydney No 208748 of 2011. It concerned a "*rejection*" application for denial of procedural fairness and substantial injustice of a review panel decision. The Court ordered on the plaintiff's motion that the certificate issued by the review panel dated be rejected as to all of the matters certified in it and the plaintiff's medical dispute was referred to the Medical Assessment Service of the MAA for a further assessment of the plaintiff's whole person impairment.

Section 61(4) of the Act relevantly provides:

**“61 Status of medical assessments**

(4) In any court proceedings, the court may (despite anything to the contrary in this section) *reject a certificate* as to all or any of the matters certified in it, *on the grounds of denial of procedural fairness* to a party to the proceedings in connection with the issue of the certificate, but only if the court is satisfied that admission of the certificate as to the matter or matters concerned would cause *substantial injustice* to that party.

(5) If a certificate as to any matter is rejected under subsection (4), the court is to *refer that matter again* for assessment under this Part and adjourn the proceedings until a further certificate is given and admitted in evidence in the proceedings.

(6) However, if a certificate as to whether or not the degree of permanent impairment of the injured person is greater than 10% is rejected under subsection (4), the court may, if it considers it appropriate, *substitute a determination of the court* as to the degree of permanent impairment of the injured person (assessed by the court in accordance with section 133) instead of referring that matter again for assessment under this Part.

(7) Except as provided by subsection (6), a court may not substitute its own determination as to any medical assessment matter.” (my emphasis)

In that case, Assessor Dr Michael Prior, a specialist in Psychiatry, had earlier determined that the claimant was injured in the motor vehicle accident and her whole person impairment was 25%. Previous medico-legal reports that were before the panel (19 reports in all) said that she was seriously psychologically impaired and her range was from 7% WPI (from the insurers reports) to 19% (from the claimant’s reports). Her injuries were, in essence, accepted by the parties as being Chronic Post-Traumatic Stress Disorder and Comorbid Major Depressive Disorder caused by the motor vehicle accident. The principal issue was WPI.

Incredibly, the review panel found that it was not able to label her condition within DSM IV, notwithstanding that it was recognised to be serious and bad. It held that there were therefore no injuries caused by the accident to be assessed. It awarded her 0% WPH.

Justice Finnane held that the denial of natural justice/procedural fairness (and, indeed the

substantial injustice to her) was the fact that the parties were at issue before the MAA that she in fact suffered from a psychological condition. The only real dispute was the WPI allocation. The review panel effectively ignored the entirety of the medical evidence produced both on behalf of the plaintiff as well as the defendant and the worker's compensation insurer.

The Court held the panel should have warned the claimant first that it was minded to make such a finding and given her the opportunity to adduce further evidence or make submissions.

**Third**, as you all know, another way to beat a medical assessment is to replace it by seeking from the MAA a further medical assessment for additional relevant information or deterioration of the injuries under section 62(1)(a) of the Act. Alternatively, at any time a claims assessor or a court may exercise a statutory discretion to refer a matter for further assessment for any (lawful) reason under section 62(1)(b) of the Act.

### **The Medical Assessors Review Panel**

The conduct of the review panel's review is governed by section 63 of the Act. As I have said, the nature of the review is described as a *de novo* review of all matters with which the medical assessment is concerned (section 63(3A) and *McKee v Allianz Australia Insurance Ltd* (2008) 71 NSWLR 609; [2008] NSWCA 163 (Allsop P, Giles and Basten JJA)).

A new certificate is issued which "*revokes*" the former certificate (section 63(4)).

Section 61 is said to apply to any new certificate (section 63(6)).

Plainly, review panel assessments are medical assessments within the meaning of Part 3.4 of the Act.

There are review panel guidelines applicable by reason of sections 44(1)(d) and 65(1) of the Act. The main such guidelines are contained in the MAA's "*Medical Assessment Guidelines*".

Review panel practices and procedures are provided for in Chapter 16 (Reviews of medical assessments) especially at clauses 16.21 to 16.26. Most of them are machinery provisions. It is not provided for specifically in the Act, but the review panel must have power to determine for itself its own procedures apart from what is provided for in the Act and the guidelines.

The MAA has published three practice notes relating to review panels. They are published pursuant to 65(2) of the Act in order to “*promote accurate and consistent (reviews of) medical assessments*”.

Judicial review challenges to review panel decisions are a growth industry at the moment.

Plaintiffs are usually the claimant, seeking to set aside a WPI assessment of 10% or under. Occasionally, insurers are the plaintiffs, seeking to set aside assessments of 11% or over – see for example; *Currie v Motor Accidents Authority (NSW)(NRMA)* [2013] NSWSC 83 (Adams J); *Nelkovska v Motor Accidents Authority of New South Wales* [2012] NSWSC 819 (AsJ Harrison); *Owen v Motor Accidents Authority (NSW)*(2012) 61 MVR 245; [2012] NSWSC 650 (SG Campbell J); *Allianz v Motor Accidents Authority of NSW* (2011) 57 MVR 319; [2011] NSWSC 102 (Hidden J); *Bratic v Motor Accidents Authority of NSW* (2010) 57 MVR 122; [2010] NSWSC 1244 (Fullerton J); *Sanhueza v AAMI Limited* (2010) 56 MVR 34; [2010] NSWSC 774 (Smart AJ); and, *Graovac v Motor Accidents Authority* (2010) 56 MVR 212; [2010] NSWSC 938 (Harrison AsJ)

In *Currie v Motor Accidents Authority (NSW)(NRMA)* [2013] NSWSC 83 (Adams J) there was an application by a claimant to quash an unfavourable review panel decision. It was fought on two main grounds, causation and denial of procedural fairness. The first ground lost and the second ground was successful and the assessment was set aside.

The plaintiff was injured on 21 February 2007. There were two cars were racing along a road when the driver of one of those cars lost control and the vehicle struck a truck travelling along on the road causing that driver to lose control. The truck rolled, finishing upside down. The plaintiff rushed to the aid of the driver, whose legs were trapped inside the cabin. One leg was partly amputated. The plaintiff tried to lift the cabin dashboard up in order to free the

driver, as he was afraid the vehicle would explode. Police and paramedics soon arrived. The driver was placed in a helicopter but he died on the way to the hospital. The plaintiff said that, when he tried to lift the dashboard, he experienced a sudden onset of pain in his lower back and, after he got home his back became progressively more painful after a couple of hours. He took some Panadol but did not go to see a doctor until three months after the accident. He saw a GP, Dr Gibbins, on 21 May 2007 and he told her that about a month ago, he was pushing a car when sudden severe pain was felt down his back and he now has persistent low back pain radiating down his right leg to his knee and pain in his hip. Justice Adams records it differently in [2] of the decision.

The review panel's reasons on causation, were that:

“There was no contemporaneous evidence that Mr Currie had sustained any injury to his lower back on 21 February 2007. And ...

The Panel concluded that the duration of three months between the alleged accident and the first report to a medical attendant of symptoms in the back and legs does not indicate a causal nexus between the two events.

The Panel concluded that none of the claimed injuries were caused by an alleged motor vehicle accident on 21 February 2007.”

In addition, the panel also expressly took into account the claimant's statements and his submissions (unlike the review panel in *Owen v Motor Accidents Authority (NSW)*(2012) 61 MVR 245; [2012] NSWSC 650 (SG Campbell J). The Court set aside that decision because the review panel had only considered the contemporaneous medical evidence and not the claimant's evidence on causation).

The plaintiff's case on causation was that the panel had failed to apply the correct test for determining the causation of injury since it had failed to "*verify that the motor accident could have caused or contributed to the impairment*". In other words, it was what the panel failed to state that was considered bad, not what it actually said.

The Court said (at [13]):

“[I]t seems to me that the guidelines, applied with common-sense to the facts giving rise to the issue in the review, will not lead to error although they are couched in terms which differ somewhat both from the common law and s 50 of the *Civil*

*Liability Act 2002*. The Panel indeed did conclude that the plaintiff's injury was not caused or contributed to by the accident. It may be that its reasoning was faulty in relying upon the absence of contemporaneous medical evidence, but that does not suggest that it did not undertake the statutory task, rather that its error (if any) was one of fact."

Review of fact finding is generally impermissible in judicial review.

On the natural justice/procedural fairness ground, the plaintiff's case was that the plaintiff was not re-examined by the review panel and he should have been re-examined so that the panel could have put to him certain matters that needed to be put.

In the panel's reasons it made two (important) factual findings. It said:

"The Panel was of the opinion that had Mr Currie sustained any significant injury to the lumbar region of his back his pain would have been of such severity that he would have sought medical attention." And

"It is assumed that an ambulance would have been called to the scene of the accident on 21 February 2007, from the description obtained by Assessor Truskett, to attend occupants of the vehicles involved in the accident. Had Mr Currie had any significant symptom he then had the opportunity to report it."

There was no ambulance report tendered before the review panel and, although the insurer's detailed submissions squarely raised the issue of causation and the absence of contemporaneous evidence, the panel relied on the above reasoning. The plaintiff had said nothing about the ambulance officers at all in his evidence and submissions.

The Court relied on the often quoted passage in *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590 – 592 on procedural fairness, that:

"The subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material ...

The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material."

The Court held (at [22]) that the ambulance issue was an "*important element of the Panel's*

*reasoning*” and that (at [21]) the panel “*assumed that the plaintiff had an opportunity to report a significant symptom in his back to the ambulance officers. A moment's reflection would have shown that there were obvious reasons why he might not have ...*”

The panel did not first put all this to the claimant and he was thereby denied procedural fairness, a jurisdictional error.

The review panel decision was set aside.

### **Proper Officer Decisions**

Proper officers are persons designated by the MAA to make decisions on section 62 (referral of matter for further medical assessment) and section 63(3) (referral of a matter to a review panel for a review of a medical assessment).

Both of these decisions have proven highly contentious for claimants and for insurers. There are many cases – see, for example: *Rodger v De Gelder* (2011) 80 NSWLR 594; 58 MVR 23; [2011] NSWCA 97 (Beazley, McColl and Macfarlan JJA) a challenge to a section 62 further proper officer decision; *QBE Insurance (Australia) Ltd v Henderson* [2012] NSWSC 1607 (Rein J) – insurer challenge to a proper officer “*further*” decision; *Lewis v Motor Accidents Authority of NSW* (2012) 60 MVR 185; [2012] NSWSC 56 (Adams J)- claimant’s challenge to a proper officer decision under section 63 to refuse to refer a matter to a review panel.

In *QBE Insurance (Australia) Ltd v Henderson* [2012] NSWSC 1607 (Rein J), the Court was asked by an insurer to set aside a proper officer’s decision to refuse an application for a medical assessment to go for a further assessment – section 62. The medical assessor had found 16% WPI on psychiatric grounds caused by the motor vehicle accident. The insurer had then lodged further material which was said to “*plainly*” constitute “*additional relevant information*”, the statutory threshold (in addition to the fact that the new material must be “*such as to be capable of having a material effect on the outcome of the previous assessment*” (s62(1A)).

The additional information was contained in a new psychiatrist’s report which was from an examination that occurred after the medical assessment report and stated of his injuries, *inter*

*alia:*

“They are not consistent with the accident. I believe he has recovered from his initial condition and he now suffers from a condition that is unrelated to the accident”

The proper officer dealt with the whole application in two substantive paragraphs which relevantly stated:

“Whilst [the psychiatrist] comes to a different conclusion in his most recent report, this is not “*additional relevant information*” as it is an issue that has previously been canvassed and considered by the Assessor”

The Court held that the new material was in fact “*additional relevant information*” (at [35]), set the decision aside and said that the proper office is “*to now proceed to consider whether the information is of a character that is capable of having a material effect on the conclusion that the claimant suffers from PTSD as a result of the motor vehicle accident.*”

In addition to setting aside the decision, the Court made a declaration that “*the plaintiff’s application made pursuant to s 62 contained “additional relevant information about the injury” within the meaning of that expression in s 62(1)(a).*”

### **CARS Assessors or Claims Assessors**

As you all know, there is no “*appeal*” or review of claims assessors decisions provided in the Act.

A “*claims assessor*” is a person who, in the opinion of the MAA is “*suitably qualified*” and who may be a member of the MAA staff and who is “*appointed*” as a claims assessor by the MAA pursuant to section 99 of the Act. A claims assessor is empowered to assess claims under Part 4.4 (claims assessment and resolution) (ss 88 to 121) and also in accordance with Chapter 5 (award of damages) (ss 122 to 156).

The Principal Claims Assessor is appointed by the Minister and must be an Australian lawyer. She is important, thus the Act provides for her to have capital letters in her title, unlike claims assessors, who do not. Section 105 provides that a claims assessor is, in the

exercise of his or her functions, “*subject to the general control and direction of the Principal Claims Assessor*”. But the PCA is not empowered to overrule or interfere with any decision of a claims assessor “*that affects the interests of the parties to an assessment in respect of any such assessment*” (s 105(3)).

There are two main types of judicial review challenges here. Challenges to the assessment of damages (ss 94 & 95) and challenges to a decision to grant the parties exemption from having to go to a claims assessment at all (and to thereby be permitted to go straight to a court).

Exemption can be “*mandatory*” (section 92(1)(a)) or “*discretionary*” (section 92(1)(b)). Extensive guidelines are set out in the Claims Assessment Guidelines.

There are many judicial review cases in regard to each of these decisions.

In *Allianz Australia Insurance Ltd v Tarabay* [2013] NSWSC 141 (Rothman J), a claims assessor made a decision to refuse the insurer’s exemption application. The Supreme Court set it aside. It was a case where the insurer made numerous claims that the claimant had made a “*false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the claimant in the accident giving rise to the claim*” Claims Assessment Guidelines, clause 14.16.11.

The Court considered the claims were so serious that they should have been styled “*fraud*” claims. The claims were well documented and the claimant did not have a satisfactory explanation for them.

The claims were in short (at [12] to [17]) the claimant, a mechanic, had (or participated in) lodging:

- A false PAYG payment for \$52,832 in support of past economic loss from a truck repair company;
- He said he had been employed by a smash repair company for 8 months, but his tax return showed no earnings there at all;

- He lied on his resume about how long he had worked there;
- He said he worked for Ultratune and he told his solicitors he never worked for Ultratune. Ultratune then sent a letter saying he did work for Ultratune at Fairfield but a virus ate their computer. Co-incidentally, the sole secretary/director/shareholder of Ultratune at Fairfield was the claimant's brother.

The claims assessor accepted in her reasons that there were some “*inconsistencies*” in the claimant's evidence but that all these difficulties could be overcome by giving the insurer a bit more time at the final assessment hearing to cross-examine the claimant.

Strangely, she said at the end of her reasons:

“Therefore having looked at all of the issues and the replies thereto I am not satisfied that the Claimant or any other person has made a statement knowing that it is false and misleading in a material particular in relation to all of the headings pursuant to s 117 of the Act.”

The Court held that this was not the issue before the assessor. It said (at [62]):

“The “*issue*” that was before the Assessor was whether an exemption should be granted. The question that has been answered is whether Allianz has proved fraud. That is not the question that was before the Assessor.”

He said (at [66] and [67]):

“[It] was an interlocutory proceeding in which the task of Allianz was not to prove the fraud alleged but to satisfy the Assessor, on the basis of an allegation, reasonably put, of fraud so that the matter was not one that should be heard in a CARS assessment.

The Assessor asked herself the wrong question and answered it. In doing so she has reached a concluded view as to the substance of the matter alleged, without having heard the parties in full on the issue. In so doing, the Assessor has issued a decision vitiated by jurisdictional error and error of law on the face of the record: *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82].”

The Court set the decision aside and referred the matter to a different claims assessor

(because the insurer has alleged apprehended bias in the case as well, which was not found by the Court).

As to claims assessments of damages for motor vehicle injuries, usually, the claimant's choice is to accept it (within 21 days) or not accept it (s 95(2)).

If the award is accepted, the insurer's task is to simply write a cheque and deliver it, or seek to challenge the legality of the CARS decision in the Administrative Law list of the Common Law Division of the Supreme Court of NSW.

One possible option is for an insurer to rely on the fact that the insurer has not yet fully admitted liability due to service of an actual or "*deemed*" section 81 notice of liability (or fault or contributory negligence or whatever) and accordingly, contend that any CARS award is not binding in the particular case. This scenario is being argued in two cases of which I am aware in April this year (and, see *Smalley v Motor Accidents Authority of New South Wales* [2012] NSWSC 1456 (Rein J) which raises similar issues. It is on appeal).

I will speak in the remainder of the paper about three recent challenges to awards of damages by claims assessors:

- 1 *Allianz Australia Insurance Ltd v Kerr* (2012) 60 MVR 194; [2012] NSWCA 13 (McColl, Basten and Macfarlan JJA)(16 February 2012) – s 126 buffers, reasons,
- 2 *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443; [2012] NSWCA 244 (McColl, Basten and Macfarlan JJA)(8 August 2012) – s 126 buffers; and,
- 3 *Allianz Australia Insurance Ltd v Sprod* (2011) 59 MVR 250; [2012] NSWCA 281 – s 126 economic loss (Campbell, Barrett JJA and Sackville AJA).

### ***Allianz Australia Insurance Ltd v Kerr* (2012) 60 MVR 194**

This was an appeal from a decision of Justice Hislop. It concerned the legal validity of a claims assessor's award of future economic loss by way of a "*buffer*". The amount of the

buffer awarded to the claimant was \$200,000 plus \$22,000 for superannuation. This was a significant amount and the insurer did not accept that it was lawful in the circumstances. After testing in the Supreme Court of New South Wales, the insurer was not happy with the Supreme Court decision which was not very well reasoned and was unconvincing. It was also very "*light on*" in the parts that mattered. Accordingly, it appealed to the Court of Appeal.

The Court of Appeal considered the questions before it most seriously and delivered an important judgment in relation to a number of areas, in particular:

- the evidence needed to be adduced in judicial review cases;
- the award of buffers in motor accidents cases; and
- adequacy of reasons as a ground of judicial review.

### **Evidence Needed to establish Jurisdictional Error or Error of Law on the Face of the Record**

In *Allianz v Kerr*, the NSW Court of Appeal (Basten JA and Macfarlan JA agreeing) discussed the evidence that was required to establish jurisdictional error or error of law on the face of the record in judicial review proceedings. The court described two administrative law principles of "*restraint*" in this regard (at [15]):

“The first is the "*clear distinction*" still drawn under the general law between "*want of jurisdiction and the manner of its exercise*": *Parisiennne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; 59 CLR 369 at 389 (Dixon J), recently cited with approval in *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146 at [5]. The second principle is that, whilst jurisdictional error may be established by any admissible evidence relevant for that purpose, a quashing order based on the

broader concept of error of law must identify the relevant error as appearing "*on the face of the record*".

In order to prove the ground of judicial review of error of law on the face of the record, the "*record*" has been held to be very narrow, limited to the instrument or page that actually records the decision or orders – see, *Craig v State of South Australia* (1995)184 CLR 163. That decision was in part overturned in NSW by amendments to section 69 of the *Supreme*

*Court Act 1970*(NSW). It now provides that "*the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination*": s 69(4). The court of appeal stated (at [17]) that:

“Given the procedural history outlined above, it is significant that the amendment did not refer to written evidence (such as affidavits and documentary material), nor did it refer to the transcript, whether of evidence or submissions.”

Accordingly, it was considered that (at [18]):

“[I]t was appropriate for the reviewing court to consider not only the certificate given by the claims assessor, but also his statement of reasons. It was less clear, however, whether the court might properly accept as evidence and scrutinise the reports of medical and other experts and the submissions made by the parties before the assessor. In the present case, such material was admitted by the primary judge, apparently without objection. Nevertheless, if the limits of this Court's jurisdiction preclude it taking such material into account for a particular purpose, it should not do so.”

The Court of Appeal said (at [18]) that, for the purposes of evidence, these considerations require an applicant:

“... to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record. As explained by Tate JA in *Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; 208 A Crim R 122 at [25], a case apparently not involving an allegation of jurisdictional error:

"[A]n application for certiorari is not the same as a general appeal for error of law, most importantly, because it falls to be determined on the basis of different material. An application for certiorari does not invite a scouring of all the evidence before the inferior court to determine whether the proper inferences were drawn from it or whether an item of evidence was overlooked."

In summary, the Court said (at [62]):

“... the range of challenges on a judicial review application is limited to errors of law on the face of the record and jurisdictional error. In the case of the latter, the kind of error is more limited, but the scope of inquiry is broader. In principle, in order to go beyond the face of the record, it would be necessary to identify a jurisdictional error.”

## **Economic Loss and Buffers**

In *Allianz v Kerr*, the claims assessor's buffer of more than \$200,000 was upheld as being lawful. The award was challenged primarily because the reasons of the claims assessor did not comply with or conform to what was required pursuant to section 126 of the Act in that, the determination is necessary to make a decision as required by that provision were not present. The Court did not agree.

Alternatively, it was contended that the claims assessor did not provide adequate reasons for his decision. The Court did not agree.

This occurred in the context of an increasing number of damages determinations of claims assessors of substantial sums determined by way of buffers (*Kerr* at [5]).

Justice Basten wrote primary decision with which the two other judges largely agreed.

Section 126 of the Act provides:

### **"126 Future economic loss—claimant's prospects and adjustments**

- (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
- (2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.
- (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

Justice McColl considered that it was appropriate for a claims assessor to award a buffer when the impact of the injury upon the economic benefit from exercising earning incapacity after injury is "*difficult to determine*" (at [6]). Also, (citing Mason P in *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [2]) a buffer is appropriate where there is "*a*

*smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future.”*

She said (at [7]) the award of a buffer is:

- “difficult to assess” and
- “necessarily impressionistic”

She held that s 126 of the Act was (at [8]):

- intended (by Parliament) to promote intellectual rigour;
- in assessing damages, on occasion “*an element of impression must be involved*”.

Most importantly (since it is largely supported by Justice Macfarlan in his judgment) McColl J said at [9]:

“The foregoing should not be seen as a licence to award buffers indiscriminately. Where the evidence enables a more certain determination of the difference between the economic benefits the plaintiff derived from exercising earning capacity before injury and the economic benefit derived from exercising that capacity after injury, recourse should not ordinarily be had to the award of damages for future economic loss by way of a buffer. Each case must turn on its own facts.”

Justice Macfarlan made remarks concerning the buffer for future economic loss awarded by the claims assessor. He held (at [67]) a buffer may be awarded “*to compensate an injured person for the possibility that he or she may suffer economic loss in the future as a result of a loss of capacity to earn income*”. He cited the principle cited by McColl JA above from Mason P about a buffer being appropriate where there is “*a smallish risk*” of relevant loss “*at some distant time in the future*”.

McFarlan JA held that (at [70]) if the claims assessor had calculated a buffer figure by “*allowing a notional sum for each year of the remainder of the claimant's working life, he should have referred to that reasoning process in his reasons.*”

His Honour also said (at [71]):

*“In other cases it may be able to be inferred (from the size of the award or other factors) that a process of reasoning, rather than simple intuition, led to the determination of the size of a buffer.”*

He said the outcomes of those cases would be different, namely, the awards would be struck down by the Court as unlawful.

He also said (at [72]):

“...awards in respect of future economic loss should wherever possible result from evidence-based calculations or estimates that are exposed in the decision-maker's reasons. The award of a buffer that is not supported by an explanation of how and why the amount was arrived at should remain a last resort where no alternative is available.”

In the reasons for assessment, under the heading “*Future Economic Loss*” there was only the following findings and reasoning:

““In my view she has satisfied me that but for the accident she would have had continual work, albeit that from time to time she would have needed to change jobs and have had time off work. Thus she has satisfied s 126 of the Act. She is entitled to some amount for future economic loss but I accept the insurer's submission that it should be by way of a buffer rather than a concise calculation, given the claimant's concession of pre-existing psychological issues, her pre-existing work history and her current capacity for work. An amount of \$20,000.00 as submitted by the insurer is clearly inappropriate. I believe the sum of \$200,000.00 is the appropriate sum. Again I have allowed a further \$22,000.00 on the basis of future superannuation loss.”

On the appeal decision, Justice Basten's judgment set out the history of the common law use of buffers (at [24] to [29]) and then discussed the Court's consideration of section 126 of the Act (at [30]).

He set out the primary assumptions that would constitute the minimum content of section 126 (at [31]) and held that “*most*” of those factors were discussed by the claims assessor below (at [32]). His Honour did not find those findings or factors were contained under the claims assessor's heading “*future economic loss*”. His Honour found those factors throughout the entire reasons for decision including from the statement of issues and in the background

notations and in the summary of medical evidence (see at [33]). His Honour held that all these things need to be read together in order to determine whether or not section 126 was complied with.

On the appeal, it was held the buffer was appropriately explained within the terms of the Act.

### **Adequacy of Reasons as a Ground of Judicial Review**

In *Allianz v Kerr*, the Court of Appeal considered the adequacy of the reasons of the claims assessor. The claims assessor was assessing damages in a personal injury claim that was binding, should the claimant have accepted it. The Court held that as the Act (s 94(5)) only required the provision of “*a brief statement*” of reasons, that there was a lesser obligation on the claims assessor than that imposed on the courts (*Kerr* at [53]). The Court also suggested that there was nothing in the language of the Act that imposed a requirement on a claims assessor to make a finding on every question of fact which is regarded by the court, on judicial review of the decision, as being material - (*Kerr* at [54]-[55]).

As discussed above, the decision in that case concerned a “*buffer*” sum for future economic loss. It was held that when a decision involves an evaluation, or a judgment or is there in inherent imprecision in arriving at it, the court considers it was not to be expected that a decision-maker would be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion (citing High Court authority).

The Court of Appeal set out the following passage on reasons (at [58]) from *Saville v Health Care Complaints Commission* [2006] NSWCA 298 (per Basten JA, Handley and Tobias JJA agreeing):

“The purpose underlying the obligation to give reasons is in part the discipline of rationality, being the antithesis of arbitrariness, which follows from the exercise of justifying a conclusion, together with the transparency of decision-making, which permits the parties and the public to understand the result reached. However, this purpose must be given practical effect in particular circumstances.”

Further, the Court in *Kerr's case* held (at [59]) that when a claims assessor determines a buffer amount, he or she need not explain why some particular amount was chosen as opposed to another. Significantly, the Court also held (at [60]) that an assessor “*was not required to give reasons for findings he did not make, [and] he was not required to give reasons for issues he did not determine.*”

***Allianz Australia Insurance Ltd v Cervantes (2012) 61 MVR 443***

This case, which was argued about five months after *Allianz v Kerr* was handed down. It was another buffer case where the claims assessor had given very little reasons and which the insurer had considered was non-compliant in terms of section 126 of the Act.

The amount awarded that was in contention was \$400,000 for future economic loss and another buffer that was awarded of \$75,000 for past economic loss. This was in a judgment for about \$570,000. The Court of Appeal was comprised of the same justices who heard the case in relation to Sarah Kerr.

The trial judge was Rothman J. He dealt with the buffer issued by positing that the claimant medical specialist doctor could have earned much more money than that awarded by the claims assessor and therefore the buffer was not inappropriate.

In the Court of Appeal, Justices McFarlan and McColl agreed with the judgment of Justice Basten. On the question of a buffer in relation to future economic loss Justice McFarlan made some further remarks (at [51] and [52]). He said that on his view of the case it was difficult “*if not impossible*” to precisely calculate future economic loss for the specialist doctor. Her injuries, which were sustained while she was a passenger while test driving a red Ferrari she was intending to purchase, restricted her ability to engage in public and private practice as a nephrologist. The income she would have earned from these various activities, had she not been insured, would have varied significantly “*depending on the mix of activities*”. His Honour said “*precisely what that mix would have been from time to time could only be a matter of speculation*”.

His Honour considered that the “*extreme difficulty*” of calculating future economic loss in the

claims assessment on appeal justified the assessor making an award by way of a buffer.

The appellant insurer had two points other than the buffer point that it wished to agitate in the Court of Appeal. The first one concerned tender to CARS of two expert medical reports of an orthopaedic surgeon, Dr James Bodel. Dr Bodel's reports were sought by the claimant but they were served and put into evidence by the insurer. In the reasons for decision, the claims assessor summarised what Dr Bodel's evidence was. However, what was entirely omitted in that summary and what was not taken into account by the claims assessor was some important evidence relating to the plaintiff insurer's case, namely, the opinion expressed by Dr Bodel that notwithstanding the injuries from the motor vehicle accident, the claimant "*should be able to continue in her chosen career [as a specialist doctor employed by a hospital and/or as a private specialist] until her normal retirement age*". In his reasons, he merely said "*I accept the opinions and diagnoses of Dr James Bodel*". Yet he did not deal with it.

The insurer contended this was an error of law or jurisdictional error or constructive failure. Justice Basten considered that it could have been any one of all three, but the factual foundation for the alleged ground had not been made out for a number of reasons (at [17] & [18]). His Honour did not think that the statement mattered and that, in any event the claims assessor did take it into account.

As to the second issue in *Cervantes*, the appellant insurer argued that the claims assessor unlawfully rejected an opinion of Dr Klaas Akkerman, a specialist medical expert (psychiatrist) qualified by the insurer, for the sole stated reason that he "*is the only medico to cast any doubt on the claimant's genuineness*". It was argued that this cannot constitute any rational or lawful basis for rejecting medical evidence. Justice Basten said it could in that the error was in essence an error of fact and not one of law. It was therefore not justiciable in judicial review proceedings.

As to the issue of the buffers totalling \$475,000, Justice Basten held there was no vitiating error in the two determinations and there was no error in the claims assessor choosing to undertake the section 126 task by way of a buffer as opposed to a calculation (at [46]).

His Honour set out another way of describing the claims assessor's tasks relating to buffers and section 126 of the Act at [33] to [40].

***Allianz Australia Insurance Ltd v Sprod (2011) 59 MVR 250***

In this case, Justice Barrett JJA published the decision and Campbell JJA and Sackville AJA agreed. It concerned a claims assessor's reasons for decision where he set out his reasoning for awarding future economic loss to the claimant in the amount of \$134,300.00.

The claims assessor's entire reasoning for awarding future economic loss to the claimant was as follows:

"**40. Future economic loss.** The Claimant is concerned about the possibility of losing his job. He explained that he is the only light duties worker in the area of the factory where he works. He is concerned that a pallet system will be introduced at work. This will leave very little for him to do and, I infer, increase his chances of losing his job. The Claimant explained to me in answer to Ms Allan's questions that fork lift driving is not a full time job. Workers driving forklifts have to do physical tasks as well.

41. I am satisfied that there is a chance of the Claimant losing his present job, despite his benevolent employer and that he will then be at a disadvantage on the open labour market. His lifting restriction will make it difficult to obtain a manual job, which is all he has ever done.

42. Bearing in mind the Claimant's present high earnings I am satisfied that it is appropriate to allow \$250.00 net per week for future economic loss. The calculation is  $\$250.00 \times 632$  (18.3 years)  $\times .85 = \$134,300.00$ .

43. Future superannuation at 11% is \$14,773.00."

There was also an odd issue not fully resolved at [36] of the reasons where the claims assessor said:

"His earnings went up by approximately \$4,500 net in the year prior to his motor accident and then down by \$1,500 in the year of the accident. They went up slightly the next year. In the most recent financial year the Claimant's net income has jumped by about \$16,000 to approximately \$1,000 net per week."

These very odd movements were not the subject of firm findings by the claims assessor.

In the Supreme Court, the insurer argued that there were a number of significant problems with these paragraphs. The assessor had failed to set out any real explanation or provide any real reasoning for his decision here. More importantly, he failed to make any attempt to comply with the necessary requirements of awarding damages for this head of damage

pursuant to section 126 of the MAC Act. Under section 126 of the MAC Act, a claims assessor is bound to disclose certain assumptions about the claimant's most likely future circumstances but for the injury and is required to make adjustments to any amount of damages for future economic loss by reference to a "*percentage possibility*" that future events might occur.

The Court of Appeal agreed. The Court of appeal disagreed with the trial judge that the award of damages could have constituted a buffer and it was therefore no error that it was not properly explained. The Court said that this was not a buffer case. It said (at [25]) "*There was, in this case, resort to a precise figure of \$250 net per week and a calculation by reference to that figure, based on a stated number of years of expected working life.*"

Justice Barrett explained succinctly the duties in section 126 of the Act (at [26] and [27]):

“26 The underlying principle is that the plaintiff should have a sum by way of damages for the difference between earning capacity as it would have been in the absence of the injury and the earning capacity as it is following the injury. Both elements involve uncertainty and conjecture and, therefore, require that assumptions be made, albeit assumptions shaped by the available evidence. The assumptions cover, among other things, remaining expectancy of working life, the impact of the injury on that expectation, the extent to which the ability to function will be curtailed and the earnings that work according to the reduced ability will produce, together with assumptions regarding discounted present value and investment returns and as to vicissitudes or adverse contingencies. Because of s 126(1), ***an assessor has a duty to form an opinion*** that the assumptions to be applied in relation to such matters going to future earning capacity "*accord with the claimant's most likely future circumstances but for the injury*".

27 ***The duty*** under s 126(1) to be satisfied that the adopted assumptions accord with the most likely future circumstances but for the injury ***is supplemented by the s 126(3) duty to articulate the assumption*** on which the award is based. This, as has been said in this Court more than once, is to ensure transparency and, at the same time, to inject an element of rigor or method that may be overlooked or simply abandoned if the statutory system did not insist on the identification and articulation of the assumptions employed.” (my emphasis)

It was held in the present case that the claims assessor had failed to “*engage with and perform the tasks prescribed by s 126*” (at [37]). Once the claims assessor engaged upon a process of calculation, the section 126 duties became apparent and he was obliged to state his assumptions as set out in the Act. Some of the matters identified by the Court that were

wrongfully omitted here were:

- There was no statement by the assessor of the assumptions underlying the figure of \$250 net per week as lost earnings for the balance of the working life (at [34]);
- Why did assessor assume that earnings at the higher level \$1,000 net per week would be likely to be maintained for the balance of his working life? - Particularly when the assessor expressed an inability to understand how the increase had come about (see [36])?
- There was no explicit explanation of why a residual working life of 18.3 years was chosen or, what assumption was made in that respect; and,
- There was no reference to the assumption that gave rise to the allowance of 15% for vicissitudes (can be brief) (at [33]).

The Court made some final and helpful remarks made in order to assist claims assessors in the exercise of their future decisions. It said (at [42]), in summary:

1. Assessors do not have to prepare elaborate statements of reasons and explanations of assumptions.
2. They must work on the basis of facts.
3. However, an important element of the statutory scheme is the deployment of the expertise and experience of assessors as specialists. They are not meant to act as if they were judges. Their task is only to assess the amount that "*a court would be likely to award*" as damages. The function is no more than to estimate and to predict likelihood.
4. There is a clear place for informed intuition and speculation.
5. The purpose of s 126 is to produce *a reasonable degree of transparency* as to assumptions and the reasons for them so that those interested in the assessment may have an insight into the way in which the task of assessment was performed.
6. The section recognises that assumptions are necessary and appropriate. It does not seek to define aspects that may or may not properly be made the subject of assumptions about future earning capacity.
7. Its aim is merely to ensure that an insight can be obtained into the *content* of the

assumptions and the *reasons* for their adoption. (my emphasis)

Thank you