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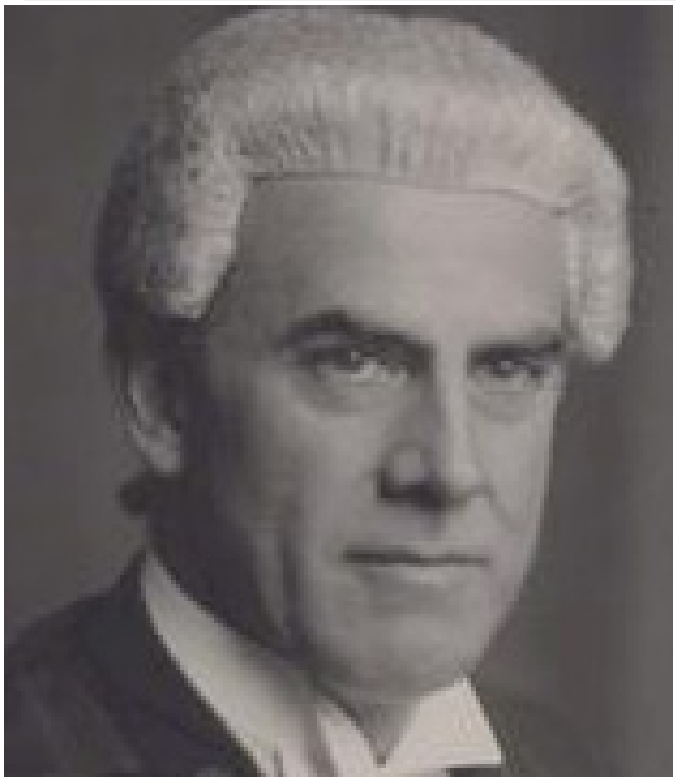
Including Motor Accidents & Workers Compensation Monthly Summaries



Lord Evershed MR - click to biography

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Deeds

Circumstances tell

Gentile v Gentile [2018] NSWSC 574. Darke J. 26.4.18.

Darke J "In approaching this question of construction it is appropriate to apply the well-known principles as expressed by the High Court in cases such as *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640; [2014] HCA 7 at [35], and *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* (2017) 91 ALJR 486; [2017] HCA 12 at [16]. The language of the Deed thus needs to be considered in conjunction with the surrounding circumstances known to the parties, and the commercial purposes or objects to be secured by the agreement. As submitted by the defendant, and as appears to be common ground, the surrounding circumstances include that the four parties to the Deed are immediate family members, the first and second plaintiffs being the married parents of the third plaintiff and the defendant," [18], then replicating the 1984 deed.

Later, "However, reading the language of the Deed as a whole, I do not think that it should be concluded that the parties intended that the parents would have only life interests (or rights of residence for life) in the property. The parties recited that they were purchasing the property as joint tenants. The Deed contains no language to the effect that any of the parties would hold an interest less than an interest in fee simple. Whilst it is expressly contemplated in clauses 1 and 2 that the property might be sold whilst one or both of the parents was alive, the Deed is silent as to how the proceeds of any sale would be distributed amongst the co-owners. If the parties had intended the parents to have only life interests, it is likely that provision would be made to cater for such in the event of a sale. The absence of provision in that respect is more readily explained if the intention was that the proceeds would be distributed in accordance with the respective shares held by the co-owners at the time of sale," his Honour said [27].

At [30] "In my opinion, the first and second plaintiffs are not merely the holders of life interests or rights of residency. The Deed does not provide for rights or interests of that character. Moreover, such rights or interests cannot, in accordance with the well-established principles for the implication of terms in written agreements, be implied from the terms of the Deed. Terms to that effect fail, at least, the test of necessity. I agree with the submissions made by counsel for the plaintiffs in this regard."

Trustees for sale appointed, particularly Gavin Moss, liquidator, and Mohammed Najjar, chartered accountant.

P: Mr J T Johnson ins PJG Solicitors. D: Mr P W Bates ins Adams & Co Lawyers Pty Ltd.

Equity

Illegality defence

Lay v Pech [2018] NSWSC 460. Robb J. 19.4.18.

Entitlement to $1/2m residence in Sydney suburb Cabramatta.

In [7] Robb J "The plaintiffs' case is that, at some time in 2014, [second plaintiff] Mr Tai advised [first plaintiff] Ms Lay of his intention to amicably end their relationship, and that the plaintiffs jointly decided that the Property should be transferred into the name of Ms Lay, as it had always been intended as a home for her and her children to reside in. Upon investigation, however, it became apparent that, because Ms Lay was dependent on Centrelink payments for her income, she would not be able to obtain a mortgage to refinance the Westpac mortgage that was in Mr Tai's name. Ms Lay asked Mr Tai to transfer the title to the Property into the names of her three children, and they agreed that the transfer would completely discharge any claim that Ms Lay had against Mr Tai by way of a property settlement in relation to the ending of their relationship. It was then realised that the Property could not be transferred into the names of Ms Lay's daughters, as they were then both minors. The plaintiffs say that they then agreed with [first plaintiff's son, the defendant] Mr Pech that Mr Tai would transfer the title to the Property into the name of Mr Pech alone, who would obtain a loan to pay out Mr Tai's Westpac loan, as Mr Pech was an adult and was in employment."

Later, [77] "However, the ultimate reason why I reject Mr Pech's defence is that the alleged illegality did not have an "immediate and necessary relation" to the beneficial ownership of the Property, or the entitlement of the plaintiffs to the relief that they claim, within the principle in *Dering v Earl of Winchelsea* (1787) 1 Cox Eq 318 at 319; 29 ER 1184 at 1185. Accordingly, even if the illegality alleged had been established, it would not have justified the Court in declining the relief sought by the plaintiffs. There would not have been the necessary nexus between the illegality and the equities sued for.

"This requirement is sufficiently established by the decision of the High Court in *Nelson v Nelson* (1995) 184 CLR 538; [1995] HCA 25 per Dawson J at 581, Toohey J at 587 and McHugh J at 611 to 613. See also the decision of the Court of Appeal in *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269," his Honour said [78].

"In my view it is not necessary to analyse the authorities that considered the question of when the presence of illegality will justify the refusal of the relief sought, because in this case, not only is the illegality not sufficiently established, but also it has no real connection at all with the beneficial ownership of the Property, and in particular the circumstances in which the title to the property was placed into the name of Mr Pech," [79].

"I am therefore satisfied that the plaintiffs have established their entitlement to the relief claimed in relation to the beneficial ownership of the Property. I understand that the plaintiffs seek an order that Mr Pech transfer the title to the Property to Mr Tai. As I understand it, that course is proposed because no order for the transfer of the property could be performed until such time as Mr Tai has been able to secure a new mortgage to pay out the mortgage that is presently secured on the Property in Mr Pech's name," [80].

The defendant Mr Pech was obliged to repay certain money., and should pay the plaintiffs' costs.

"The plaintiffs should prepare short minutes of order to give effect to these reasons for judgment, including as I have said above, appropriate orders concerning the beneficial ownership of the Property, and the transfer of title to the property in conjunction with the refinancing of the present mortgage. The short minutes should be discussed with the legal representatives of Mr Pech. If agreement can be reached, I will make appropriate orders in chambers. If not, the matter can be relisted by approaching my associate. It would be desirable if final orders could be made within 14 days," Robb J said [85].

P: Mr J Lo Schiavo ins Alliance Compensation & Litigation Lawyers. D: Ms I J King ins Woolf Associates.

Industrial negligence

Deregistration leads to insurers' joinder

Damm v Coastwide Site Services Pty Ltd [2018] NSWSC 611. McCallum J. 27.4.18.

"On 29 May 2012, the plaintiff in these proceedings fell from an elevated work platform as a result of which he claims to have suffered serious injuries. By these proceedings, he seeks damages in respect of those alleged injuries," McCallum J said [1].

"The proceedings were commenced by statement of claim filed on 27 August 2014 against Coastwide Site Services Pty Ltd, the company for which it was alleged the plaintiff was working on the relevant day. In May 2015, the principal contractor, Leighton Contractors Pty Ltd, was joined as second defendant. In March 2016, the plaintiff joined Hauv's Rigging Pty Limited, an employee of which was alleged to have been supervising the plaintiff at the time of the accident," her Honour said [2].

Hauv's had become deregistered without knowledge of the insurers or practitioners.

At [6] "In those unusual circumstances, two notices of motion are before the Court today. The first is an application by the plaintiff filed on 9 January 2018 seeking leave to proceed against the insurers under either s 5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) or, alternatively, pursuant to r 6.19 of the Uniform Civil Procedure Rules 2005 (NSW). The second is an application by Leighton naming ASIC as the respondent and seeking an order pursuant to s 601AH(2) of the Corporations Act 2001 (Cth) reinstating Hauv's as a company. The insurers consent to be joined but oppose the reinstatement of the deregistered company."

Then, "In those circumstances (as I understand the position, with the agreement of all parties), it has been proposed on behalf of the insurers that the Court might today grant leave to the plaintiff to join the insurers pursuant to s 5 of the Civil Liability (Third Party Claims Against Insurers) Act, direct the insurers to file a defence within 28 days and bring the matter back immediately after the 28-day period so that, if indemnity has been denied, the Court could then consider making the order reinstating Hauv's to the register," McCallum J said [13].

"In the event that indemnity is denied, there would seem to be real utility in making that order. Conversely, if indemnity is not denied, on the strength of the submissions I have heard today, I have difficulty seeing any utility in reinstating the deregistered company. Indeed, there is a real risk that to make the order would be contrary to the overriding purpose stated in s 56 of the Civil Procedure Act 2005 (NSW), since there might be a divided camp, as it were, between insured and insurer, potentially raising the need for separate representation of those parties and unnecessary complication of the legal issues raised by the third cross-claim," her Honour said [14].

Orders, including "I grant leave to the plaintiff to join Tokio Marine Kiln Syndicates and QBE Underwriting Limited as defendants in the proceedings pursuant to s 5 of the Civil Liability (Third Party Claims Against Insurers) Act", leave to file third further amended statement of claim joining the insurers, who were directed to file defences within 28 days, costs in the cause.

P: M Baroni ins Taylor & Scott. 1D (Coastwide): McCabes. 2D: K McMenamen ins Thompson Cooper Lawyers. 3D (Hauv's): Lander & Rogers. 4D (Workers Compensation Nominal Insurer): Curwoods. Proposed defendants (Tokio Marine Kiln Syndicates, QBE Underwriting Ltd): D Lloyd.

Rail Corp fails to dislodge body-hired worker's verdict

Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust [2018] NSWCA 82. Beazley ACJ, McColl & Meagher JJA agreeing. 24.4.18.

Appeal from plaintiff's verdict per Campbell J, [2016] NSWSC 1897, dismissed with costs.

Head note: The first respondent was employed by the second respondent, which hired out his labour to the appellant. The work involved removing old railway sleepers and replacing them with new sleepers. The first respondent worked as a labourer and, in particular, although not solely, a jackhammer operator. The first respondent brought proceedings against the appellant and second respondent for injuries he claimed he suffered in the course of and due to the nature and

conditions of his employment.

The primary judge held that the first respondent sustained injury due to the negligence of the appellant. His Honour also entered judgment against the second respondent. The appellant appealed and the second respondent cross-appealed against the primary judge's findings of liability.

The parties raised a number of issues on the appeal and cross-appeal. In essence, the issue of whether the appellant breached its duty of care to the first respondent concerned whether the first respondent was required to work without the benefit of adequate rest breaks in circumstances where the worker with whom he was teamed did not undertake the full range of tasks involved in the removal and replacement of sleepers and, in particular, did not jackhammer.

There was also an issue as to whether the risk of harm was 'not insignificant'.

The second respondent also challenged whether it breached its duty of care to the first respondent. The issue on causation concerned whether the primary judge erred in accepting the evidence of one of the medical experts that the first respondent suffered an internal disc disruption, where there was conflicting evidence.

The parties also challenged the primary judge's finding that the first respondent was not contributorily negligent.

Beazley ACJ (McColl and Meagher JJA agreeing) held, dismissing the appeal:

(i) The first respondent's case was based on nature and conditions of his employment, and not on having sustained a frank injury: [29].

(ii) The evidence did not support the inference drawn by the primary judge that the first respondent may have been called upon to perform more than his share of the work clearing away the rubble created by the jackhammering. Nor did the evidence support the inference that the first respondent would have been, at least frequently, left to his own devices to perform all of the tasks required to remove and replace the sleepers. To the extent that the primary judge based his finding that the first respondent would not have received the benefit of the breaks inherent in the system of work on these inferences, the finding was unsupported: [76]–[87].

Luxton v Vines (1952) 85 CLR 352; [1952] HCA 19; *Holloway v McFeeters* (1956) 94 CLR 470; [1956] HCA 25 considered. *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 referred to.

(iii) However, the evidence did support the primary judge's finding that the appellant was negligent in failing to provide the first respondent with a safe system of work, where he was the only worker in his team of two required to jackhammer and where he undertook additional heavy lifting without assistance, which under the general de facto system of work was undertaken by two workers: [111]–[131].

TNT Australia Pty Ltd v Christie (2003) 65 NSWLR 1; [2003] NSWCA 47 considered.

(iv) The risk of personal injury through the exertion of effort and strain in the performance of repetitive heavy labouring work was not insignificant: [138]–[143]. *Wyong Shire Council v Shirt* (1980) 146 CLR 40; [1980] HCA 12; *Shaw v Thomas* [2010] NSWCA 169; *South Sydney Junior Rugby League Club Ltd v Gazis* [2016] NSWCA 8 considered.

Sibraa v Brown [2012] NSWCA 328; *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 86 NSWLR 55; [2013] NSWCA 361; *Bitupave Ltd v Pillinger* (2015) 72 MVR 460; [2015] NSWCA 298; *Vincent v Woolworths Ltd* [2016] NSWCA 40; *Gulic v Boral Transport Ltd* [2016] NSWCA 269 referred to.

(v) The primary judge did not err in accepting the evidence of one of the experts that the first respondent suffered an internal disc disruption which progressed to a disc protrusion, and gave adequate reasons for doing so. Nor did the primary judge err in accepting the evidence of one of the experts that cumulative trauma could be a cause of the first respondent's injury: [179]–[192].

(vi) The primary judge did not err in finding that the first respondent was not contributorily negligent. The first respondent could not be expected to regulate his own work practices so that they were safe for him: [201]–[205], [229]. *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529; [1985] HCA 34; *Grills v Leighton Contractors Pty Ltd* [2015] NSWCA 72; *Jurox Pty Ltd v Fullick* [2016] NSWCA 180 considered.

(vii) The primary judge did not err in finding that the second respondent breached its non-delegable duty of care to the first respondent, notwithstanding that it did not devise or have direct control over the system of work under which the first respondent was required to work: [218]–[228].

Kondis v State Transport Authority (1984) 154 CLR 672; [1984] HCA 61; *Lepore v State of New South Wales* (2001) 52 NSWLR 420; [2001] NSWCA 112; *TNT Australia Pty Ltd v Christie* (2003) 65 NSWLR 1; [2003] NSWCA 47; *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424; [2004] HCA 28; *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 217 CLR 469; [2004] HCA 29; *Czatyrko v Edith Cowan University* (2005) 214 ALR 349; [2005] HCA 14; *Estate of the Late M T Mutton by its Executors & R W Mutton trading as Mutton Bros v Howard Haulage Pty Ltd* [2007] NSWCA 340 considered.

A: A Casselden SC, J Malouf ins Hicksons Lawyers. 1R: D A Campbell SC, D L Del Monte ins Acorn Lawyers. 2R: M Windsor SC, R Perla ins Moray & Agnew.

Medical negligence

Irrationality in CL Act belies unreasonable

South Western Sydney Local Health District v Gould [2018] NSWCA 69. Leeming JA, Basten & Meagher JJA agreeing. 13.4.18.

Allowing with costs and Suitors Fund Act certificate the hospital's appeal against the judgment of Levy SC DCJ - *Gould v South Western Sydney Local Health District* [2017] NSWDC 67 - finding negligence liability in the treatment of an 8yo lad presenting in August 2011 with a compound fracture of his left thumb, in which gangrene developed leading to amputation.

Leeming JA: "The causative breach of duty was reflected in a particular of negligence: 'Failed to use an appropriate antibiotic regime including a second generation cephalosporin plus gentamycin'," in [11].

"It was and is uncontroversial that a penicillin-derived antibiotic (flucloxacillin) was administered to the plaintiff at Campbelltown Hospital, and a cephalosporin (namely, cephazolin), was administered at Liverpool Hospital at around 23:55 later that evening. The critical element of the finding at [600], therefore, was the failure to administer an additional antibiotic drug, gentamicin, that evening. That failure was found to have been a breach of duty and to have caused the infection which led to the loss of the plaintiff's left thumb," his Honour said in [13].

At [22] "In 2011 the book called "Therapeutic Guidelines – Antibiotic" was in its 14th edition. It contained advice concerning the administration of antibiotics in particular categories, including open compound fractures. It recommended a range of antibiotics, depending on (a) whether the patient was hypersensitive to penicillin, (b) whether the soiling or tissue damage was severe, (c) whether devitalised tissue was present, and (d) whether there had been "significant fresh or salt water exposure". The antibiotic gentamicin was not recommended in that book," Leeming JA said, before extracting from the work.

"The following matters follow from that section of the book: (1) The book does not in any circumstances recommend the administration of gentamicin; (2) The antibiotics administered to the plaintiff – initially flucloxacillin followed by cephazolin – were consistent with the advice in the book; (3) The final section extracted above required consideration of whether there had been "significant fresh or saltwater exposure", in which case a combination of antibiotics was to be administered," [24].

"The book was the subject of competing opinions by Professors Raftos and Gatus as to whether it was a "de facto" standard or rather a work which tended to be used by junior doctors. Professor Gatus said that "these guidelines have been established to have standard treatment regimes nationally" and that they were evidence-based. He said that gentamicin did not appear in the Guidelines "on evidence" and rejected what he described as the practice of medicine "according to whims", by which he meant administering antibiotics other than on the basis of evidence. There was also debate between Professors Gatus and Raftos as to what amounted to "significant exposure" to water," Leeming JA said [25].

"The evidence was that ciprofloxacin was an alternative to gentamicin. It was common ground that its administration would have been inappropriate," [26].

"The statement of claim is a sparse document which does not mention the Civil Liability Act. The defence relied, in terms, upon ss 5B and 5D (which govern breach and causation), and, by way of positive defence, asserted that, by its servants or agents, the local health district

acted in a manner that (at the time the service was provided) was "widely accepted in Australia by peer professional opinion as competent professional practice" so as to engage s 5O. There was no reply, and accordingly, there was an implied joinder of issue on the defence: UCPR r 14.7(2)," [27].

Leeming JA considered [28]+ CLA ss 5B and 5O, of which latter:

"I shall return below to the construction of s 5O and how that section interacts with s 5B. For present, it suffices to note the following propositions, which I regard as uncontroversial: (1) it is settled that the defendant bears the onus of establishing the elements of s 5O(1) (namely, he or she was a "professional" and acted in a manner which, at the time, was widely accepted in Australia by peer professional opinion as competent professional practice): *Dobler v Halverson* (2007) 70 NSWLR 151; [2007] NSWCA 335 at [60]- [61] and *Sydney South West Area Health Services v MD* [2009] NSWCA 343 at [20]-[21], [51] and [58]; (2) it is clear from s 5O(3) that there may be inconsistent bodies of peer professional opinion each of which is widely accepted; (3) it is clear from s 5O(4) that peer professional opinion may be widely accepted without being universally accepted; (4) subject to s 5O(2), when the elements of s 5O(1) are made out, the defendant does not incur a liability in negligence; (5) if the court considers that the opinion is irrational, then the section does not to that extent apply; (6) the test of "irrational" in s 5O(2) is not otherwise defined, but in light of s 5O(3) and (4) it cannot be sufficient for peer professional opinion to be irrational merely because one peer, or a body of peers, does not share that opinion," Leeming JA said [30].

At [36] "The primary judge considered that the four medical doctors who had given opinion evidence should each be considered as "peers" in Australia for the purposes of the section: at [618]. The four doctors were Associate Professor Raftos and Dr Mansour (called by the plaintiff) and Associate Professor Gatus and Dr Haertsch (called by the defendant)."

"For the reasons given below, the reasoning of the primary judge that the opinions of the defendant's experts were irrational cannot be sustained, both because it was procedurally unfair, and because his Honour applied the wrong legal test. This Court can and should, in accordance with s 75A(10) of the Supreme Court Act 1970 (NSW), find that s 5O was a complete answer to the allegation that the failure to administer gentamicin was a breach of duty. That is dispositive of this appeal," [39].

Later, "The evidence of Professor Gatus was also admitted without objection. Unlike Dr Haertsch, Professor Gatus participated in an expert conclave and gave concurrent evidence with Dr Raftos. Unlike Dr Haertsch, Professor Gatus' opinions were accompanied by fully articulated reasons. However, no differently from Dr Haertsch, it was not put to Professor Gatus that his evidence was irrational," Leeming JA said [62].

After quoting some of the judgment below, "It is difficult to resist the inference that the primary judge conflated the ordinary process of resolving a conflict between competing expert opinions, with the entirely different process required by s 5O(2) of determining whether an opinion is "irrational". The primary judge regarded Professor Gatus' views insofar as they were based on antibiotic stewardship as reflected in the guidelines as "misdirected" and "overstated" in contrast with those of Professor Raftos, which were to be "preferred on grounds of rationality"; the sense of his Honour's reasons is that because the views of the Professor Raftos were more rational or better reasoned, those of Professor Gatus were irrational," Leeming JA said [65].

"There are two difficulties with the reasoning process of the primary judge: it was procedurally unfair and it misapplied the test in s 5O(2)," [68], then quoting from *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-7; [1990] HCA 11 and noting *Krnjulac v Lincu* [2015] NSWCA 367 at [15]-[18].

"If the defendant's peer professional opinion evidence in support of its defence under s 5O (1) were to be disregarded because it was irrational within the meaning of s 5O(2), then one of three things needed to have occurred. Ideally, s 5O(2) would have been pleaded, and thus whether the evidence was irrational would have been raised as an issue on the pleadings (in most cases, including the present, that would have required a reply). Alternatively, the parties might have chosen to depart from the issues raised in the pleadings to fight the case on that basis. A further alternative is suggested by the way in which s 5O(2) is directed to courts. It is possible that both parties might

accept that the peer professional opinion evidence which had been adduced was not irrational, but that the court might consider that it was. This might be thought to be unlikely, having regard to the nature of litigation, but it is possible. In that case, it would be necessary for the court to raise with the parties the prospect that the evidence might be considered irrational, so as to give them an opportunity to be heard (and, if appropriate, adduce evidence directed to that prospect)," Leeming JA said [70].

"Section 5O(2) was not pleaded, nor mentioned throughout the trial. Nor was it suggested at any stage that the defendant's peer professional opinion evidence was irrational. After hearing final submissions, the primary judge invited the parties to provide further submissions directed to whether s 5O was available to a corporate defendant. The defendant supplied further submissions; if the plaintiff did, they were not provided to this Court. Once again, neither in the invitation from the primary judge or in the submissions supplied was there any mention of irrationality," his Honour said [71].

"It was wrong for the primary judge to reject the evidence of Dr Haertsch as irrational when no complaint was made about it by the plaintiff, and no warning was given to the defendant or, for that matter, to Dr Haertsch that that might occur. The same is true of the rejection of Professor Gatus' views. It was no part of the plaintiff's case that his views were irrational, nor so far as the transcript records did the primary judge advise that he might form that view. None of this was procedurally fair to the defendant," [72].

"Further, it may be that the plaintiff would have expressed a view that the judge not take the course which was taken, which has led to ground 1 of this appeal: see for example what was said in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [133] as to the possibility that a respondent "might have wished to say something against deciding the case on that basis, or in that particular way". Plaintiffs seldom wish to obtain judgment in their favour in circumstances that are procedurally unfair," [73].

"Although this was ground 1 of the appeal, no submissions were made in writing or orally seeking to defend the approach taken by the primary judge as procedurally fair," [74].

"In those circumstances, it was not open to the primary judge to make the findings made under s 5O(2)," Leeming JA said [75].

His Honour detailed considerations to the utility of the dictionary to understand legislative instruments: [76]+, before focussing on "irrational" in s 5O.

In [111] "The question of what in fact is a standard practice of professional peers throughout Australia is at least in part a question of fact: see *Sparks v Hobson* [2018] NSWCA 29 at [345]. It may be that in some cases the distinction between opinion and fact is difficult to draw. But [treating surgeon] Dr Scott's evidence did not fall into this category. He simply gave uncontradicted evidence of what the standard antibiotic treatment was for wounds of this kind in the eight hospitals in which he had worked. That evidence was entirely factual, and squarely relevant to (a) the issue whether the practice was widespread in Australia, and (b) the point which first emerged in the judgment, namely, whether the practice was irrational," Leeming JA said.

"The primary judge's conclusions on irrationality, which paid no regard to the evidence of Dr Scott, cannot stand for the reasons already given. In the absence of a limiting order, it is open to have regard to Dr Scott's evidence to reinforce the conclusion that not administering gentamicin was a practice which was widespread in Australia," [112].

Among miscellany adumbrated by Leeming JA [113]+, noted a hospital ED printed form boldly stating "No gentamicin", which did not detract from evidence that the drug was not administered commonly.

At [114] "Different views have been expressed in this Court as to whether it is necessary to identify a particular "practice" in order to engage s 5O. The distinction was captured by Simpson JA in *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 at [335], as to whether the reference to "practice" is a reference to the practice of the relevant profession, or more narrowly to a particular specific practice or method of providing the services. The latter was favoured in *McKenna v Hunter & New England Local Health District* [2013] NSWCA 476; [2013] Aust Torts Rep 82-156, however, an appeal was allowed by the High Court on the anterior question of duty: *Hunter & New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA

44. In *Sparks v Hobson; Gray v Hobson*, Basten JA and Simpson JA favoured the former, while Macfarlan JA favoured the latter, with Basten and Simpson JJA expressing different views as to the precedential weight to be given to this Court's earlier decision. That divisive issue may be put entirely to one side for the purposes of this appeal. On any view, the practice of administering antibiotic prophylactic following an open fracture which was confined to flucloxacillin and cephazolin and did not extend to gentamicin – a practice which is set out in the fairly mechanical decision-tree in the Therapeutic Guidelines – Antibiotic – is a "practice" capable of engaging s 5O," Leeming JA said.

Later, "In the present case, the separate consideration under ss 5B and 5C, followed by s 5O, appears to have led to error. The primary judge rejected as irrational evidence which was contrary to the standard determined in accordance with s 5B. But the effect of s 5O, in a case where its preconditions are made out, is to replace the standard of care against which breach is assessed. There is no occasion to compare the s 5O standard with that which would be considered in the application of s 5B in a case when the preconditions of s 5O have been made out," [129].

Basten JA, in [6]: "If the conduct is judged by reference to a standard widely accepted by the person's peers, it will often not be possible to know why particular individuals accepted it, and it does not matter. It will only be if the court can, on the evidence, be satisfied that there is no rational basis for it that it can properly be rejected.

"To achieve rejection, there may be an evidential burden on the plaintiff, if only because in the area of professional expertise the court will usually be unable to dismiss what appears to be widely accepted by trained professionals without relevant evidence. That burden will not be satisfied by evidence merely justifying an alternative approach. Yet the evidence in the present case went no further than that. Accordingly it was not open to the trial judge to dismiss the evidence that the conduct of the appellant was in accordance with widely accepted peer opinion. The claim had to be dismissed. I agree with the orders proposed by Leeming JA," Basten JA said [7].

A: R Cheney SC, R Sergi ins Curwoods Lawyers. R: A Stone SC, J Masur ins Schreuder Partners.

Chiropractor within CLA professional ambit

Zhang v Hardas (No 2) [2018] NSWSC 432. Leeming JA. 13.4.18.

At first instance, defendant's verdict in negligence cause on psychiatric injury against the chiropractor defendant.

Leeming JA: "My findings on the way in which Mr Hardas treated Ms Zhang are dispositive of the entire case. Even if there was a breach of duty in Mr Hardas continuing to treat Ms Zhang between February and September 2007 when she continued to develop symptoms, it is not established that any of the applications of the Activator II – a handful of times on each occasion, and never more than once or twice to any particular part of the spine – caused any physical or psychiatric injury," [106].

The defendant had relied on Civil Liability Act 2002 (NSW) s 32 [Mental harm--duty of care].

"Section 32 in substance reinstates what had been held in this Court and by the minority of the High Court in *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 as to the need to prove that the defendant should reasonably have foreseen that his or her conduct might cause mental harm to a person of normal fortitude: see at [109]-[118] (McHugh J), [273]-[283] (Hayne J) and [333]-[334] (Callinan J), and see P Handford, Tort Liability for Mental Harm (3rd ed, Lawbook Co, 2017), pp 292-293," Leeming JA said [109].

Then, "It was common ground between the parties, and in accordance with what was held in *Optus Administration Pty Ltd v Wright (By his tutor)* (2017) 94 NSWLR 229; [2017] NSWCA 21 at [35]- [36], that there must be a "particular and separate inquiry into the existence of a duty of care with respect to mental harm". Plainly enough, it is appropriate to deal with the confining effect of s 32 upon the scope of a duty of care at the outset," his Honour said [111].

Later, "Accepting as I do the reality of Ms Zhang's psychiatric injury, and the pain she feels, I am not persuaded that she has established any impairment to her physical condition, as opposed to impairment of her mental condition. I accept the evidence of Professor Anderson and Dr Rutkowski that there is no physical injury they can see, and the

Chiropractor's tool Activator II

evidence of the psychiatrists that her symptoms reflect the somatisation of her psychiatric illness," [132].

"I am conscious that Mr Barry submitted that "pain is, of course, by definition, physical". This does not alter my view that the pain from which Ms Zhang suffers falls outside the definition of "mental harm". Further, Mr Barry submitted that there was physical damage caused to Ms Zhang during the course of her treatment by Mr Hardas. However, the evidence falls short of establishing injury other than mental harm," [133].

"In short, I conclude that the only injury established by Ms Zhang is injury which s 32 excludes from the scope of the duty of care owed to her by Mr Hardas. That conclusion is dispositive of this litigation," Leeming JA said [134].

Hypothetically otherwise, his Honour turned to CLA s 5O [Standard of care for professionals].

In [138] "Merely calling oneself a professional or advertising that one performs a professional service is insufficient to be practising a profession for the purposes of s 5O," Leeming JA said.

At [141] "That said, there is no reason to confine the notion of "practising a profession" in s 5O to preconceived notions of the three professions which have been recognised from "time immemorial", namely, the Bar, the Established Church and the Military: J Jackson, Professions and Professionalization: Volume 3, Sociological Studies (Cambridge University Press, 1970), p 65. Indeed, that formulation is remarkable insofar as it excludes the medical profession, which was one profession for whose benefit s 5O was undoubtedly enacted, reversing what had been held in *Rogers v Whitaker* (1992) 175 CLR 479; [1992] HCA 58 and *Naxakis v Western General Hospital* (1999) 197 CLR 269; [1999] HCA 22 and restoring a test along the lines of what had been held in *Bolitho v City and Hackney Health Authority* [1997] UKHL 46; [1998] AC 232. The legislative history is summarised in *Dobler v Halverson* (2007) 70 NSWLR 151; [2007] NSWCA 335 at [56]- [63] and *South Western Sydney Local Health District v Gould* [2018] NSWCA 69 at [89]-[95]. {Summary page 5}

"The history of professions is of significant interest and complexity. It is a remarkable thing, perhaps reflecting the rise of what has been termed "the professional society" in the twentieth century, that at least three of the papers in Jesting Pilate concern professions and professionalism. Indeed, Sir Owen Dixon's paper "Jesting Pilate" itself, which supplies the title of that volume, and which was delivered to the Royal Australasian College of Surgeons, compares aspects of the legal and medical professions. Today, the undoubted professionalism of surgeons, and medical practitioners more generally, illustrates the temporal dimension of the issue. For even the medical profession, to which s 5O is squarely directed, was not always regarded as a profession. It was not one of the three professions recognised from "time immemorial". Further, physicians achieved professional status before surgeons and occupied a distinctly superior social position in the nineteenth century (as Stephen Maturin pointed out to Jack Aubrey with a touch of acerbity early in the second chapter of Patrick O'Brien's Master and Commander), while both would have been asked to enter through the tradesmen's door in the 18th or early 19th centuries. It is to be recalled that the surgeons and barbers had merged in 1540, only separating so as to form the Royal College of Surgeons in 1745: see 18 Geo II c 15 "An Act for making the Surgeons of London and the Barbers of London two separate and distinct Corporations", which in turn refers to the lengthy statute 32 Hen VIII c 42," his Honour said [142].

"It follows that whether or not a person practises a "profession" turns not upon some canonical list, but rather upon whether the

occupation is characterised by features which mark it out as a profession. What precisely those features are is contestable. Dixon wrote:

[**Sir Owen Dixon**] "It is the essence of a profession that its members master and practise an art. The art must depend on a special branch of organized knowledge and be indispensable to the progress of maintenance of society, and the skill and knowledge of the profession must be available to the service of the State or the community": "The Profession of Accountancy" in O Dixon, Jesting Pilate (2nd ed, William S Hein & Co, 1997), 192.

Leeming JA "One very distinguished legal historian has written that "what distinguishes a profession from any other occupation is the ability of its membership to determine, directly or indirectly, who may pursue that particular vocation": W Prest, "Introduction: The Profession and Society in Early Modern England" in W Prest (ed), The Professions in Early Modern England (Croom Helm, Kent, 1987), p 14. I favour the view that the essential nature of practising a profession is closely linked to a partial monopoly, justified by education and public benefit, and involving a measure of altruism distinct from the drive for profit: see H Perkin, The Rise of Professional Society (Routledge, 1989), chs 1 and 4 and J S Anderson, Lawyers and the Makings of English Land Law 1832-1940 (Clarendon Press Oxford, 1992), ch 9. But it is not necessary to express any concluded view on the broader question; the more limited question whether chiropractors practised a profession in 2007 is complex enough," [144]. noted statutes governing chiropractors in NSW.

At [169] "Section 5O of the Civil Liability Act does not define "profession". However, it was enacted in a context in which (a) it was plain that the conventional medical profession was squarely within the mischief to which it was directed and (b) legislation treated chiropractors in ways which were similar to medical practitioners. The Chiropractors Tribunal operated similarly to the Medical Tribunal, especially insofar as provision was made for regulation, involving statutory concepts of professional misconduct and unsatisfactory professional conduct. The relevant statute in 2007, the Chiropractors Act 2001, consistently treated chiropractors as professionals. There is every reason for the undefined term "professional" in s 5O to extend to occupations regarded by the same Legislature as "professional"," [169].

"The foregoing is sufficient to conclude that chiropractors were regarded, for the purposes of the Civil Liability Act in 2007, as practising a profession. It will also be seen that the notion of a licensed monopoly of people who practise spinal manipulation, with educational qualifications and mechanisms for admitting and excluding those who meet or fail to meet those standards, also appears to apply. It will also be plain from the legislative history that the same would not have been true some decades before," [170].

At [175] "Accepting the issues are as have been thereby framed, I find that the use of the Activator Method was widely accepted in Australia. That is sufficient to satisfy s 5O(1)."

Hypothesising to the irrationality proviso in s 5O(2), Leeming JA "If Ms Zhang were to seek to rely upon the exclusion in s 5O(2), it was necessary, as a matter of basic procedural fairness, for her to have identified this before the trial: *South Western Sydney Local Health District v Gould* [2018] NSWCA 69 at [69]-[75]. Section 5O(2) gives rise to quite separate factual issues from s 5O(1). Not only was there no reply, but there was no mention of s 5O(2) in Ms Zhang's opening, or for that matter closing, submissions. Accordingly, I refrain from considering whether the prima facie applicability of s 5O is affected by s 5O (2)," [179].

In context of s 5D causation, "Conversely, if I am wrong about the primary question of fact, and indeed Mr Hardas did inflict hundreds of blows upon Ms Zhang, then notwithstanding the paucity of evidence, and the contestability of Dr Cooke's opinions, I would conclude that Ms Zhang's present psychiatric state was materially contributed to by Mr Hardas. Further, on this premise, there is in my view no reason for Mr Hardas' scope of liability for treatment which was seriously contrary to the Activator Protocols not to extend to the loss she has suffered," [202].

Limitation defence failed.

"Ms Zhang's claim is prima facie barred (and extinguished) by the Limitation Act 1969 (NSW): ss 50C and 63. Proceedings were commenced almost 6 years after her last consultation with Mr Hardas. The "3 year post discoverability limitation period" applicable to claims for damages for personal injury is the period of 3 years running from and including the date on which the cause of action is

discoverable by the plaintiff. The effect of s 50D in its application to Ms Zhang is that her cause of action was only "discoverable" when she knew or ought to have known each of the facts that (a) the injury has occurred, (b) the injury was caused by the fault of Mr Hardas, and (c) the injury was sufficiently serious to justify the bringing of an action on the cause of action," Leeming JA said [203].

"In belated response to Mr Hardas' defence, Ms Zhang sought to bring herself within s 50D, essentially by pointing to delays in Mr Hardas and Dr Nicola providing their medical records, and further delays in obtaining an opinion on prospects sufficient to certify a statement of claim," [204].

"The question is whether a plaintiff knew or ought to have known the "key factors necessary to give rise to liability": *Baker-Morrison v State of New South Wales* (2009) 74 NSWLR 454; [2009] NSWCA 35 at [39]; *State of New South Wales v Gillett* [2012] NSWCA 83 at [94]. It was not until April 2011 that an opinion was sought from Mr Watts as to whether the treatment carried out by Mr Hardas was appropriate and whether Ms Zhang would have avoided her injuries had she received appropriate treatment, and his report was received two or three months thereafter. By that time, Ms Zhang's cause of action was discoverable within the meaning of s 50D, but that is within three years of her commencing proceedings," his Honour said [205].

"It is true that Ms Zhang retained solicitors in August 2009. There was a waiver of privilege by her as to the advice she had been given, but there was no tender of any documents reflecting advice given at some earlier stage to Ms Zhang about her ability to bring proceedings. Mr Fordham candidly acknowledged that had a record of such advice been found in the documents as to which privilege had been waived, he would have tendered it," [206].

"Accordingly, I take the communications in April and July 2011 at face value. I would infer that that was the first time Ms Zhang was told that she was able to bring proceedings. The consequence is that Mr Hardas' limitation defence fails," [207].

Damages prospected.

Proceedings dismissed with costs.

P: C T Barry QC, E Grotte ins Walker Law Group. D: M Fordham SC, C P O'Neill ins Norton Rose Fulbright.

Motor accidents

Likelihood of damages threshold

Linda Joy Crawshaw v Natasha Coxon [2018] NSWDC 92. Mahony SC DCJ. 13.4.18.

Time extended, each own costs.

"Dr Davis had opined that the endplate injury in her thoracic spine may result in some degree of degenerative change, and Associate Professor Papantoniou had raised the possibility of surgery to the lumbar and thoracic spine. On that basis it was submitted that the plaintiff would be entitled to claim a buffer for future loss of earning capacity that would exceed the threshold in question here, namely, $112,500.00. Further, the plaintiff submitted that the defendant had previously conceded a buffer of $10,000.00 for future loss of earning capacity, which was described as "grossly inadequate given the plaintiff's impairments"," Mahony SC DCJ said [28].

"For past and future treatment expenses the plaintiff set out various components of the plaintiff's claim, arriving at an approximate figure of $40,000.00. That included an assessment by Ms Trudy Warner, occupational therapist, of future equipment requirements of nearly $15,000.00," his Honour said [29].

"In respect of the plaintiff's claim for past and future gratuitous attendant care services, learned Counsel for the plaintiff acknowledged that a certificate issued by Assessor David McGrath dated 18 May 2017 precluded any claim for attendant care services and child care services captured by s 15B of the Civil Liability Act 2002. However, it was submitted on behalf of the plaintiff that a trial judge would be likely to be persuaded to reject the certificate of Assessor McGrath pursuant to s 61(4) of the Act, on the basis that the plaintiff had been denied procedure fairness in respect of that assessment. The assessment had taken place without examination of the plaintiff and that the assessment was based on video surveillance not seen by the plaintiff. If the certificate was rejected by the trial judge, the matter would then have to be referred back to MAS pursuant to s 61(5) of the MACA and a fresh assessment made. In any event, if that did not occur, the certificate issued by Assessor McGrath was restricted to its terms and did not include any claim made for gardening, mowing

or yard maintenance. Properly assessed at a rate of $70 per week, such claim would amount to an award of damages in excess of $64,000.00," [30].

Then, [36] under heading Legal principles, "Section 109 of MACA involves the exercise by the Court of a broad discretion. Section 109(3)(b) employs the same formula of words, i.e. "likely to be awarded" as was used in s 43A(7) of the Motor Accidents Act 1988. In respect of that section, in *Harika v Stanley Tupaea* [2003] NSWCA 332; (2003) 58 NSWLR 675, Mason P said as follows:

[**Mason P**] "An application under s 43A(7) must proceed on evidence (*Aiello* at [13]). But it is not the trial of the claim and it is relevant that the parties fought this particular application without cross-examining any of the witnesses. When parties join issue on the basis of tendering medical reports that take a range of positions, the court should be very slow to resolve the matter adversely to the claimant on the basis of medical reports that are debatably favourable to the insurer on the threshold issue but are contradicted by the claimant's medical evidence [25]. What is required by the words "likely to be awarded"? [26]. The word "likely" must be construed in context. It does not always require proof or persuasion to a probability greater than 50% (*Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* [1979] FCA 85; (1979 42 FLR 331 at 345-7, *Jungarrayi v Olney* (1992) 34 FLR 496). The present case involves an interlocutory application in which summary dismissal of a presumptively valid claim is sought. The court is involved in a predictive exercise. In analogous contexts, judges have favoured the broader sense of "a real and not a remote chance or possibility, regardless of whether it is less or more than 50 per cent" that Deane J adopted in *Tillmanns* (see *Secretary, Department of Employment, Education Training and Youth Affairs v Barrett* (1998) 82 FCR 524, *Dwyer v Movements International Movers (WA) Pty Ltd* [2000] WASCA 75, *Smith v Western Australia* [2001] FCA 19; (2001) 108 FCR 442). That is the approach to be adopted here".

Mahony SC DCJ: "That approach was adopted by Hoeben JA (Basten and Tobias JJA agreeing) in *Eades v Gunestepe* [2012] NSWCA 204. His Honour also adopted the construction applied to the words "likely to be awarded" in *Sinclair v Darwich* [2010] NSWCA 195; (2010) 77 NSWLR 166 as meaning that there is a "real chance" or a "real prospect" of such an award," [37].

"In respect of the assessment of damages involved in this evaluation, Hoeben JA (as his Honour then was) described it as a "predictive assessment". The Court is to assess whether there is a "real chance" or "a real prospect" of the plaintiff crossing the threshold. This was described by Basten JA as "an imprecise standard" (see [10]). His Honour went on to find that what is required is "the notion of a substantial, as distinct from a remote chance", applying *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 398," his Honour said [38].

"In *Dijakovic v Perez* [2015] NSWCA 174 at [120], "the threshold issue" involved in s 109(3)(b) was approached by considering "the claimant's medical evidence, taken at its highest". That has been held to also extend to the plaintiff's lay evidence, for example, in relation to the need for domestic care – see *Al-Ebadi v Guo* [2017] NSWDC 107 per Taylor DCJ, at [24]. His Honour went on to state, however, that:

[**P Taylor SC DCJ**] "The Court must, nevertheless, exercise care in determining what is the real extent of the plaintiff's evidence on damages, rather than accept submissions on damages that may lack an evidentiary foundation".

Mahony SC DCJ: "I do not accept the defendant's submission that the plaintiff's explanation is not full, and is therefore not satisfactory on the basis of a lacuna in the evidence as to what was in her mind at the time of making her election following the CARS award. The defendant had already accepted the plaintiff's explanation for her late claim as being a full and satisfactory explanation. Further, it was conceded that the plaintiff's claim was thereafter diligently prosecuted through the MAS process to the CARS hearing. The Statement of Claim was filed on behalf of the plaintiff approximately one month after the CARS award. The plaintiff's evidence made it clear that she relied on her solicitor's advice to commence those proceedings, even though she was not told that leave was required to commence the proceedings out of time. Given the defendant's concession as to the full and satisfactory explanation for the delay in bringing a late claim, and the diligent prosecution of the

plaintiff's claim thereafter, it would have been a reasonable expectation that leave would be granted in the court's discretion, provided the damages threshold could be met," [40].

In [42] "In those circumstances, whilst her claim for past loss may be limited to a modest amount reflecting the workers compensation payback, there is a real chance that on a full hearing the plaintiff will establish that she has a diminished earning capacity in the future, which is or may be productive of financial loss, in accordance with *Medlin v State Government Insurance Office* [1995] HCA 5; (1995) 182 CLR 1, and that she will be able to establish an entitlement to damages pursuant to s 126 of the MACA on the basis of proven assumptions as to her ability to continue work, or to have had working life shortened," Mahony SC DCJ said.

"I am not prepared to take into account, as part of the predictive assessment, that a trial judge may reject the certification of Assessor McGrath in respect of her need for past gratuitous care and assistance. However, that does not mean that she will be entitled to an award of damages for past loss relating to gardening, lawn mowing and the like, and an award of damages for a substantial time into the future. In addition, the plaintiff will be entitled to past and future treatment expenses and incidentals which the defendant has conceded may be in the order of $40,000.00," [43].

"The defendant has admitted liability and the matter will proceed to trial on the question of damages only. On the above analysis, accepting the plaintiff's medical evidence at its highest, there is a real prospect that the plaintiff would be awarded damages under the heads of damages set out above, well in excess of $112,500.00," [44].

"I am therefore persuaded that both limbs of s 109(3) have been satisfied and I propose to grant leave to the plaintiff to commence proceedings in respect of her claim for personal injury damages arising from the motor vehicle accident on 20 October 2011, nunc pro tunc, by the filing of her Statement of Claim on 30 November 2017," [45].

Leave by summons granted, defendant's notice of motion dismissed, no costs on summons, each own costs on notice of motion.

P: A Canceri. D: D Hanna. Solicitors unannounced.

Nuisance

Metes and bounds of explosive liability

Marketform Managing Agency Ltd v Amashaw Pty Ltd [2018] NSWCA 70. Meagher JA, Leeming JA & Emmett AJA agreeing. 11.4.18.

After McDougall J, [2017] NSWSC 612, found the appellant's public liability indemnity policy responding to the southern Sydney service station claim after explosion caused by leaking hydrocarbons, here appeal and cross appeal dismissed with costs.

Meagher JA: "The further testing recommended by the EPA and undertaken by Leighton O'Brien and Alliance did not identify any continuing source of leaks at the site. Considering the position as at May 2012, a reasonable person in the insured's position would have been justified in continuing to believe that the existing contamination was the result of historical leaks and spills, and not out of the ordinary having regard to the earlier use of the site," [41].

"Finally, nothing in the Alliance reports suggested that a climatic or geological change might shift the onsite pollution to neighbouring properties. That risk would not be self-evident to a lay person, and there was no evidence that it was something known, or likely to be known, to Amashaw in May 2012," his Honuor said [42].

Then, "By ground 5, Marketform submits that the primary judge erred in treating the explosion on 3 June 2013 as having caused injury or damage in some sense relevant to the operation of cl 10: Judgment [127], [128]. In my view, this ground must be upheld. The indemnity at issue in Marketform's appeal (as distinct from Amashaw's cross appeal) relates to the Short Term Measures, which concerned the removal of existing contamination in the sewer owned and maintained by Sydney Water. Those measures were not directed to replacing sewer pipes or otherwise rectifying physical damage to land or chattels caused by the explosion. On Amashaw's case as pleaded and conducted, and maintained on appeal, that indemnity was said to respond to liabilities in nuisance to various entities, including Sydney Water, for substantial interference with rights over land which "commenced probably on 11

May [2013], with the first complaints of petrol odours". To the extent that interference arose from the risk of fire or explosion, the materialisation of that risk had no bearing on Amashaw's liability, or entitlement to indemnity, in relation to the Short Term Measures," [50].

"That being so, the explosion did not itself constitute or cause any actionable loss in respect of which Amashaw asserted a liability to pay damages in nuisance. That conclusion makes it necessary to consider afresh Marketform's argument that the relevant Damage did not occur in its entirety within the period of insurance as required by cl 10. That argument, which is maintained by ground 4.1, directs attention to the particular Damage allegedly suffered by Sydney Water, as understood within general principles of private nuisance," [51].

"For present purposes, a nuisance may be defined as an "unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it": WVH Rogers, Winfield and Jolowicz on Tort, (6th ed 1954, Sweet & Maxwell) at 712 [14-4], quoted in *Hargrave v Goldman* [1963] HCA 56; (1963) 110 CLR 40 at 59 (Windeyer J). Such interference may take several forms, including the infringement of rights constituting an easement, from which interference "the law presumes damage": *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 at 349–350 (Lord Wright MR). Whether by analogy with that position or otherwise, Marketform conceded that the presence of petrol in the sewer was capable of constituting a nuisance against Sydney Water, which enjoyed statutory rights to operate and maintain its sewer in land: see Sydney Water Act 1994 (NSW) ss 37, 38. Thus, both Marketform and Amashaw accepted that the state of affairs in the sewer could substantially interfere with Sydney Water's enjoyment of rights in land, an actionable loss expressly included within the definition of "Damage"," [52].

"The real issue between the parties was whether that interference occurred upon the arrival of PSH in the sewer with its attendant risk of explosion (as Marketform argued) or only upon Sydney Water's discovery of that risk (as Amashaw argued). The resolution of that issue turns on the character of the interest of Sydney Water protected from injury by the law of nuisance. As Professor Newark explained in his article "The Boundaries of Nuisance" (1949) 65 LQR 480, 488–489, extracted in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 687–688 (Lord Goff):

[**Professor Newark**] "In true cases of nuisance, the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the plaintiff in an action for nuisance must show some title to realty. Likewise, it is because the plaintiff must show some act which disturbs the actual or prospective enjoyment of rights over land that we have the rule that the true nuisance should normally have some degree of permanence about it".

Meagher JA [54] "Whether a state of affairs so injures the ample exercise of rights over land is a question of fact, which may depend, for example, on the character of the locality in which an inconvenience is created: see *Walter v Selfe* [1851] EngR 335; (1851) 4 De G & Sm 315 at 322, 324; [1851] EngR 335; 64 ER 849 at 852 (Knight Bruce V-C); *St Helen's Smelting Co v Tipping* (1865) 11 HLC 642 at 650; 11 ER 1483 at 1486 (Westbury LC); *Don Brass Foundry Pty Ltd v Stead* [1948] NSWStRp 47; (1948) 48 SR (NSW) 482 at 486 (Jordan CJ). Noises or smells or fumes may suffice: see, eg, *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 at 695–696 (Veale J). But they are not necessary. In *Thompson-Schwab v Costaki* [1956] 1 All ER 652, the alleged nuisance consisted in the use of adjoining premises for prostitution. Lord Evershed MR (with whom Romer and Parker LJJ agreed) made clear (at 654) that nuisances need "not impinge on the senses – for example, the nose or the ear", and continued:

[**Lord Evershed MR**] "The case made for the plaintiff shows to my mind at least a sufficient prima facie case to this effect, that the activities being conducted at No. 12 Chesterfield Street are not only open, but they are notorious and such as force themselves on the sense of sight at least of the residents in No. 13. The perambulations of the prostitutes and of their customers in something which is obvious, which is blatant, and which as I think the first plaintiff has shown prima facie to constitute not a mere hurt to his sensibilities as

a fastidious man, but so as to constitute a sensible interference with the comfortable and convenient enjoyment of his residence where live with him his wife, his son and his servants".

Meagher JA "By its nature, that interference with the "convenient enjoyment" of rights could not have occurred so long as the claimant was ignorant of his neighbour's activities. The same is true in the present case. An unknown risk of fire or explosion within the sewer lines could not restrict Sydney Water's liberty to operate and maintain sewer works. Only upon becoming aware of that risk was Sydney Water deprived of the opportunity reasonably to exercise those rights without, for example, endangering a person working on or close to the relevant works. For that reason, any material interference with Sydney Water's rights over land occurred when it became aware of the risk associated with the presence of PSH. It is not suggested that this took place before mid-May 2013. It follows that the relevant Damage occurred in its entirety during the second period of insurance and ground 4.1 should be dismissed," [55].

"There is another reason why that is so. If the mere presence of PSH in the sewer with its attendant risk of fire or explosion (whether known or unknown) constituted a nuisance against Sydney Water, that state of affairs would give rise to a fresh cause of action at every moment that it subsisted: *Shadwell v Hutchinson* [1830] EngR 941; (1830) 4 Car & P 333 at 334; [1830] EngR 941; 172 ER 728 at 729 (Lord Tenterden CJ); *Whitehouse v Fellowes* [1861] EngR 314; (1861) 10 CB (NS) 765 at 783–784, 786–788; [1861] EngR 314; 142 ER 654 at 661–662 (Williams J), 663 (Willes, Byles and Keating JJ, separately); *Manson v Shire of Maffra* [1881] VicLawRp 119; (1881) 7 VLR (L) 364 at 375 (Stawell CJ). The instances of that state of affairs might differ only in time and extent, but the law would regard each as a distinct source of liability. By way of illustration, had Amashaw not reinstated the sewer, Sydney Water could have commenced an action six years after 15 June 2012 for any damages arising from the continuance of the risk after that date, notwithstanding that its causes of action before that date were no longer maintainable: Limitation Act 1969 (NSW), s 14(1)(b)," Meagher JA said [56].

"The Short Term Measures undertaken in late May and early June 2013 were directed to removing the risk of fire or explosion that existed by reason of the petrol-contaminated groundwater (including PSH) then present in the sewer, not any risk existing at an earlier point in time. It was not controversial that the ongoing presence of that risk was due to the continuous entry and flow of contaminated groundwater through the sewer. The Short Term Measures discharged a liability to Sydney Water for the reasonable cost of putting the sewer in the state it would have been in had such groundwater not entered: *Evans v Balog* [1976] 1 NSWLR 36 at 39–40 (Samuels JA, Moffitt P and Hutley JA agreeing). Accordingly, if the risk of fire or explosion constituted Damage, the Damage for which Amashaw was liable in damages to Sydney Water occurred in its entirety during the period of the renewed policy," his Honour said [57].

To costs, "The primary judge made no order as to the costs of the proceedings, with the intention that each party should pay its own costs: *Amashaw Pty Ltd v Marketform Managing Agency Ltd (No 2)* [2017] NSWSC 793. Because Amashaw recovered an amount less than $500,000, it was not entitled to a costs order unless the Court was satisfied that its commencement and continuation in the Supreme Court, rather than the District Court, was warranted: Uniform Civil Procedure Rules 2005 (NSW), r 42.34. If grounds 1 to 4 are rejected, the quantum of Amashaw's indemnity remains less than $500,000 and the premise of ground 5 (that in considering costs his Honour proceeded on an error as to quantum) is not made out. Amashaw's written submissions contend for two further errors of principle in the primary judge's exercise of the costs discretion. Those errors are not the subject of any ground of appeal and were not relied on in the oral argument. It follows that ground 5 also must be dismissed," Meagher JA said [70].

In concurring reasons, Emmett AJA: "In its cross appeal, Amashaw contended that the primary judge should have found that construction of the interception system in the public streets surrounding the service station, being the Preventative Works, was necessary to prevent continuation of petrol entering the water main from soil surrounding it and to control the continuation of the flow of petroleum beneath the land beyond the eastern

boundary of the service station. I agree with Meagher JA, for the reasons proposed by his Honour, that the primary judge made no error in concluding that the Preventative Work was designed to prevent nuisance rather than to abate nuisance. In effect, Amashaw was seeking insurance cover in respect of the cost of satisfying the condition of cover that it had taken all reasonable precautions to prevent loss by Pollution. The Preventative Work was in effect a precaution to prevent loss in the future by Pollution," [81].

Orders.

A: M R Elliott SC ins Colin Biggers & Paisley Pty Ltd. R: A Sullivan QC, T Brennan ins A R Connolly & Co.

Practitioners

D. Minus defamation dismissed with costs

Minus v Harbour Radio Pty Ltd (No 4) [2018] NSWSC 622. McCallum J. 20.4.18.

McCallum J "I have reached the conclusion that Mr Minus is either unable or unwilling to comply with the duties imposed on a litigant under Part 6 of the Civil Procedure Act 2005. The manner in which Mr Minus has responded to my questions reveals that he has either a disregard for orders of the Court or an inability to process the importance of complying with them. On either analysis, I am persuaded that the defendants should no longer be subjected to the nuisance and inconvenience of the manner in which Mr Minus persists, after warning upon warning, in conducting this litigation," [23].

Proceedings dismissed with costs.

P: Self. D: M Richardson ins Banki Haddock Fiora.

Procedure

Debt judgment against recalcitrant defendant

Qiang v Raxigi Pty Ltd t/as V. Hovanessian & Associates (ABN 89 002 595 879) [2018] NSWDC 87. Gibson DCJ. 11.4.18.

"The context in which the adjournment is sought is also relevant. An adjournment sought after a series of failure to comply (particularly of the kind demonstrated here) may be viewed by the court as yet another attempt to deny an opponent a fair hearing. Courts must be aware, as a matter of practicality, that trial tactics, rather than misfortune or oversight, are often the rationale behind delay tactics. In *Vale v Vale* [2001] NSWCA 245 at [92] Mason P commented (when rejecting a submission concerning an assertedly important failure to call a witness) that, while the goddess of justice may be wearing a blindfold, she was not blinded to "the realities of trial tactics." Similar observations concerning "trial by ambush" (in relation to the conduct of defendants in this court) were made by Young A-JA in *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; (2001) 53 NSWLR 116," Gibson DCJ said [24].

"In particular, in relation to preparation for hearing, the parties are expected to take the "cards on the table" approach and to comply with their obligations under timetables: *Glover v Australian Ultra Concrete Floors Pty Ltd* [2003] NSWCA 80 at [60]; *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [205]; *Zisis v Knighton* [2008] NSWCA 42 at [50]," her Honour said [25].

Later, "This is not a case where the party in default can point to the clarity of its pleadings and particulars, or its prior good conduct of the case. The defendant has failed at every step of these proceedings to comply with orders. There can be no basis for the setting aside of so many self-executing orders," [40].

"For similar reasons, I also refused Mr Hovanessian's request to cross-examine the plaintiff on his affidavit in order to elicit material favourable to the defendant," [41].

"While ordinarily such a right appears axiomatic (see s 62(4)(d)), s 56 Civil Procedure Act 2005 (NSW) will permit the court to dispense with cross-examination in circumstances of the kind noted in Ritchie's

Uniform Civil Procedure (NSW) at [s.62.15] (see also the cases discussed in *Chief Executive Officer of Customs v Evenfont* [2007] NSWSC 431, where there was a failure to file affidavits). The circumstances of such a refusal would nevertheless have to be exceptional. I also note that courts give special indulgences to litigants in person; in *Lee v Cha* [2009] NSWCA 13 at [72] – [84] the Court endorsed the right of a litigant in person to cross-examine for five days although he had failed to provide any particulars or discovery," Gibson DCJ said [42].

"However, this is a defendant whose defence gives no hint of the matters concerning which Mr Hovanessian proposes to cross-examine (cf *Kirby v Sanderson Motors Pty Ltd* [2002] NSWCA 44; (2001) 54 NSWLR 135) and is in repeated breach of self-executing orders. Mr Hovanessian, when asked to give an indication of the kind of material about which he would cross-examine the plaintiff, could not do so. Moreover, in circumstances where the plaintiff had been entitled to assume that he would not be required for cross-examination given the total absence of affidavits in reply, he had not given any notice of his requirement to have the plaintiff attend for cross-examination. In addition, there would be considerable difficulties for evidence rulings; Mr Hovanessian has referred to four witnesses whose evidence he proposes to rely upon, although he was unable to remember the names of two of them and the two he named were not at the relevant meeting; it would be difficult to deal with hearsay or *Brown v Dunn* issues where the defendant's evidence is of such an unknown quality," [43].

At [49] "Mr Qiang's claim against the defendant Raxigi is made pursuant to a contractual term that if the defendant did not obtain an identified result (namely, securing for Mr Qiang an 80% shareholding in the ASX-listed company, Mandalong Resources Ltd ("Mandalong")), the monies the plaintiff paid to the defendant would be refunded. The claim brought is one in debt for the sums paid," her Honour noted.

Later, "In August 2016, the plaintiff's solicitors sent a letter of demand for the total sum of $231,000. No reply was received and the plaintiff then commenced these proceedings," [72].

"As the action is one in debt, once the existence of the debt is proven, the onus is on Raxigi to prove that the debt has been repaid or discharged: *Young v Queensland Trustees Ltd* [1956] HCA 51; (1956) 99 CLR 560 at 569-570; *Muirhead v Commonwealth Bank of Australia* [1996] QCA 241; [1997] 1 Qd R 567 at 577 ("Once an indebtedness is established, it is for the defendant to plead and prove it has been discharged")," Gibson DCJ said [73].

"Raxigi has not filed any evidence. The evidence of the plaintiff is to the contrary, and supported by contemporaneous documentation. The defendant's onus has not been discharged," [74].

"Mr Qiang is entitled to judgment against Raxigi in the amount of $231,000, plus interest pursuant to s 100 of the Civil Procedure Act 2005. As at 27 March 2018, the interest that has accrued at court rates on the sum of $231,000 since 15 January 2016 (being when the monies became payable by Raxigi to Mr Qiang) is $28,738.02," in [75] then tabulated interest calculation.

Plaintiff's judgment $259,738.02, costs with liberty to apply.

P: Mr A Macauley ins Jurisbridge Legal. D: By leave, Mr V Hovanessian.

Superannuation

Aspects of TPD claims

Carroll v United Super Pty Ltd [2018] NSWSC 403. Slattery J. 4.4.18.

Slattery J "The law defining the scope of the duties of decision makers dealing with claims by members of superannuation funds for whom the trustee has obtained insurance cover is well developed. That law and the corresponding rights of members may be shortly stated," [86].

"*The Member's Standing to Sue*. A member of a superannuation fund for whom the trustee has obtained insurance cover has standing to seek an order that the insurer pay the trustee the amount due to the trustee under the insurance contract: *Erzurumlu v Kellogg Superannuation Pty Ltd* [2013] NSWSC 1115 ("Erzurumlu") at [54]. The member has standing to bring a claim both under the Deed against the trustee and under the Policy against the insurer: *Wyllie v National Mutual Life Association of Australasia Ltd* (1997) 217 ALR 324 ("Wyllie"), at 337-338," his Honour said [87].

"*The Trustee's Decision-Making Duties*. In making its determination, a trustee has a duty

to apply a trust fund, such as the Fund, in accordance with the trust deed, in this case the Deed: *Finch v Telstra Super Pty Ltd* [2010] HCA 36; (2008) 242 CLR 254 ("Finch") at [30] ff. It is also required to act in good faith, on a real and genuine consideration of the material before it, for the purpose for which it was conferred, for sound reasons where the trustee has disclosed reasons, although the Trustee is not obliged to give reasons for its decision: *Hannover Life Re of Australia Ltd v Sayseng* [2005] NSWCA 214 ("Sayseng") at [32] ff (per Santow JA). Where no reasonable person deciding whether to form the opinion required of the trustee could have reached that decision, a failure of good faith, a failure of genuine consideration, or a lack of proper purposes may be inferred: *Sayseng* at [33]. The ambit of any challenge to a trustee's decision is restricted to consideration of the material available to the trustee: *Sayseng* at [33]," [88].

"*Finch* adds important definition to the duties that apply to trustees of superannuation funds, such as the Trustee, and explains that the decisions of such a Trustee may be reviewable for want of "properly informed consideration". The High Court explained this in *Finch* at [66]," then quoted such [89].

"The general rule where a trustee has failed to discharge its duties in considering a member's claim is to refer the matter back to the trustee for reconsideration: *Sayseng* at [33]. But if the Court vitiates an insurer's decision upon breach of an insurer's duty of utmost good faith and embarks on a second stage inquiry, and on that inquiry finds that the plaintiff is totally and permanently disabled within the Policy definition, there may be no further work for the Trustee to perform and no need to remit the matter to the Trustee for further consideration and it can be dealt with by the Court: *Jones v United Super Pty Limited* [2016] NSWSC 1551 at [112]," Slattery J said [90].

"This statement of applicable principle now deals with the duties on insurers in the position of Hannover," [91].

"*The Insurer's Duty of Utmost Good Faith*. An insurer dealing with a claim against it owes an insured a duty of utmost good faith, sometimes also described as a duty of good faith and fair dealing: *Sayseng* at [36]. The duty of utmost good faith does not impose obligations in the abstract; it depends on the contractual rights and obligations of the parties in relation to the claim; and it imposes an obligation on the insurer to exercise its rights and discharge its obligations as conferred by the contract of insurance with the utmost good faith: *Ziogos v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2015] NSWSC 1385 ("Ziogos") at [66]," his Honour said [92].

"The insurer's obligation of utmost good faith is contractual not fiduciary. Conduct which would not be permissible in a fiduciary relationship will not necessarily infringe the duties of good faith and fair dealing, as the fiduciary relationship is one in which the parties are not free to pursue their separate interests: JD Heydon, MJ Leeming and PG Turner, Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (5th ed, 2014, LexisNexis Butterworths) ("Meagher, Gummow & Lehane")," [93].

"Some common practical examples of the discharge of the obligation of good faith and fair dealing assist in understanding its scope. The obligation may, in appropriate circumstances, require an obvious enquiry to be made: *Halloran v Hardwood Nominees Pty Ltd* [2007] NSWSC 913 ("Halloran") at [38]. It is important to correlate the activities that an insured is capable of undertaking, as for example activities that are demonstrated in video surveillance material, to the activities the insured is required to undertake in employment: *Ziogos* at [103]," [94].

"*The Duty to Form an Opinion*. Under a contract for insurance, if an element of insurance liability is expressed in terms of the satisfaction, or opinion, of the insurer, the insurer is obliged to act reasonably in considering and determining that matter: *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61-113 ("Edwards") and *Sayseng* at [47]. In *Edwards* (at 77,536) McLelland J stated with respect to clauses such as that in issue in this case, that there was an implied obligation on the insurer to consider and determine whether it should form the relevant opinion, which involved a consideration and determination of the correct question; and in the exercise of powers affecting the interest of both itself and the claimant the insurer was under a duty of good faith and fair dealing requiring it to have due regard to the interest of the claimant. McLelland J's statement of the law was once more adopted with approval by the Court of

Appeal last year in *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233 ("Jones")," [95].

"*Jones* also approved (at [82] – [85]) Brereton J's statement in *Jones v United Super Pty Limited* [2016] NSWSC 1551 at [55] that the insurer's decision will also be liable to be reviewed and avoided by the Court if in forming an opinion (about a claimant's disability) the insurer: (1) misdirects itself in law, that is to say asks itself the wrong question; or (2) takes into account an irrelevant consideration or fails to take into account a relevant consideration," [96].

At [100] "The insurer's duty of utmost good faith in dealing with a claim and the duty to act reasonably in forming an opinion may be compared and contrasted. The duty of utmost good faith: (a) is broader than the implied term obliging the insurer to act reasonably and applies to all aspects of the claims handling process: *Ziogos* at [68] and *Jones* at [71]; (b) does not imply a higher or stricter standard than the implied term requiring the insurer to act reasonably in considering and determining the matter: *Ziogos* at [69]; (c) is not to be equated with the implied obligation to act reasonably in forming an opinion concerning or being satisfied about a particular matter; nor are the two standards the same: *Ziogos* at [73], commenting on *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1; and (d) requires the insurer to form the opinion itself and to act with the utmost good faith in doing so and it is not sufficient that some other insurer acting reasonably could have reached the conclusion that it did: *Ziogos* at [74]," Slattery J said.

"Some authorities have used other words to describe the obligation to act reasonably in forming an opinion. Nicholas J's description of the obligation is particularly useful: as one which requires the decision-maker to give an objective even-handed and realistic consideration to the whole of the evidence, uninfluenced by personal beliefs, prejudice, suspicion, or speculation: *Savelberg v United Super Pty Ltd* [2011] NSWSC 1482 at [13]. In accordance with authority, "objective" in Nicholas J's formulation should be taken to mean "unbiased from the perspective of the decision-maker" and not to invite an assessment of a hypothetical claimant or a decision divorced from the actual material before the decision-maker," [101].

"*The Duty to Give Reasons*. It follows from the requirement that the insurer itself form an opinion acting in accordance with its duty of utmost good faith, that the insurer should give reasons for its decision," in [102] then quoting Ball J in *Ziogos* at [75].

"But an insurer is not required to undertake the detailed consideration of a claim required at a court hearing: *Chammas v Harwood Nominees* (1993) 7 ANZ Ins Cas 61-175 ("Chammas") and *Weber v Tiss Pty Ltd* [2005] NSWSC 67 at [8], ("Weber"). An insurer's statement of reasons for declining a claim should be understood as a practical document intended to inform the claimant of the basis of the decision rather than providing detailed reasons with reference to the evidence being relied upon, comparable to a judgment of a court or tribunal: *Weber* at [8]," [103].

"*The Use of Expert Evidence*. Expert evidence was deployed on both sides in this case and some of it was before the Trustee and Hannover at the time of their respective decisions. This circumstance adds additional content to the applicable duties in the consideration and determination of this claim. The following additional statements of principle have relevance where experts are involved. If the insurer seeks an opinion from an expert it must provide the expert with all the information relevant to the expert's opinion; the expert must be asked the right questions; but asking the right questions of the expert does not require the insurer to ask the expert to address specific provisions in the policy as the insurer is making the ultimate decision and not delegating it: *Lazarevic v United Super Pty Ltd* [2014] NSWSC 96 ("Lazarevic") at [101]. Experts and the insurers who rely upon them should attend to evidence relating to the individual insured and the insured's characteristics rather than to general statements of hope or expectation about the circumstances or conduct of anyone suffering from the condition in question: *Ziogos* at [102]. Where an expert's opinion about an insured's circumstances or capacity for employment depends upon an assumption it may be impermissible for the insurer to rely upon the expert's opinion as to that matter unless the assumption is verified: see for example *Ziogos* at [103]," Slattery J said [104].

"*The Consequences of Non-Compliance*. If the insurer does not comply with its duty of utmost good faith the Court may itself determine the

question whether the insurer suffered from total and permanent disablement: *Sayseng* at [36](e), *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104 at [25] and *Jones* at [67]," [105].

To legal principles governing interpretation of the education, training and experience (ETE) clause, in [188] Slattery J "From those cases statements of applicable principle can be refined. In the Court of Appeal's decision in *Jones* (at [147] – [150]) Gleeson JA considered Brereton J's elucidation of the meaning of an ETE clause identical to the one under consideration in this case. The effect of the Court of Appeal's decision in *Jones* was to approve Brereton J's comprehensive statement at first instance in that case (*Jones v United Super Pty Limited* [2016] NSWSC 1551, [71] – [72]) of the proper interpretation of the ETE clause," and quoted same fully.

"In the ETE clause the word "by" in the phrase "reasonably fitted by education, training or experience" clearly expresses the notion of a link or connection between the suggested future work and the insured's past, education, training and experience": *Jones* at [146] citing *Wardley Australia Limited v the State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514 at 525," his Honour said [189].

"*Unlikely Ever" to be Able.* The words "unlikely" and "ever" in this group of words have both been closely considered. The word "unlikely" in the formulation has been said to mean improbable in the sense of a less than 50 per cent chance: *Halloran* at [76] and *Beverly v Tyndall Life Insurance Co Ltd* [1999] WASCA 98; (1999) 21 WAR 327 at 32," [190].

"Expressing the word "unlikely" as requiring a less than 50 per cent chance does not invite a statistical test, as the formula is not concerned with what is likely in the population as a whole but rather whether having regard to what is known about the insured, he or she was unlikely ever to be able to engage in any gainful profession, trade or occupation for which he or she was reasonably qualified by reason of education, training or experience: *Ziogos* at [83]," [191].

Then, "The issue is whether it is unlikely that the insured would actually obtain paid employment for which the insured was qualified by education, training or experience, not whether in theory the insured may obtain employment of that type: *Halloran* at [76]; *Banovic v United Super Pty Ltd* [2014] NSWSC 1470 and *Lazarevic* at [108]-[109]," Slattery J said [193].

"*Regular Remuneration Work*". Capacity to perform "regular remunerative work" is different from the capacity to perform a particular work task; and it does not follow that because a person is physically capable of performing one or more work tasks, that that the person has an ability to engage in remunerative work: *Hannover Life Re of Australasia Ltd v Colella* [2014] VSCA 205; (2014) 47 VR 1; VSCA 205 ("Colella") and *Jones v United Super Pty Limited* [2016] NSWSC 1551 at [77]," [194].

"A person can be reasonably fitted for "Regular Remuneration Work" by reason of education, or training or experience or a combination of those factors: *Hannover Life Re of Australasia Ltd v Dargan* (2013) 83 NSWLR 246; [2013] NSWCA 57 ("Dargan"). A claimant may require further training to pursue another occupation after the termination of his employment, leading to the assessment of whether the claimant was totally and permanently disabled. The fact that some further training may be required does not preclude a conclusion that the claimant was reasonably fitted to carry out the further occupation: *Dargan* at [44]. In *Dargan*, for example, a heavy vehicle driver had already obtained a certificate to become a taxi driver and only needed to pass a subsequent week long course to ensure that he was able to retain that certificate: *Dargan* at [40]. He was found not to be TPD. But in *Halloran* the claimant had ceased to be employed in a role of greasing machinery and in the three years after leaving that employment he completed a TAFE course qualifying him for white collar work. Brereton J held in *Halloran* that at the time of suffering his injury the claimant was not qualified for that work "by reason of his education, training and experience": *Halloran* at [35] and *Dargan* at [40] – [41]," his Honour said [195].

At [197] "*Geographical Limitation on Employment*. In Jones (at [173] - [176]) the Court of Appeal considered, but did not decide, whether the policy definition of total and permanent disablement would be satisfied, if the claimant was incapable of finding available employment in or near the location where he lived. A ground of appeal in *Jones* was directed to challenging particular remarks of the

learned trial judge, Brereton J, which remarks were not essential to his Honour's reasoning and therefore the issue did not need to be determined on appeal in Jones. Brereton J's remarks at first instance in *Jones v United Super Pty Limited* (at [67]) were relevantly as follows:

[**Brereton J**] "I find it difficult to accept that someone who has always resided and worked in a regional town may be regarded as not TPD because there are jobs which he or she could physically perform, but only on the other side of the country. They would have lost the ability, which they formerly had, to work in any employment for which they were fitted by education, training or experience, where they live".

Slattery J considered aspects of Australian common law in this context.

Then, in [209] "*The Time to Determine TPD Status*. The time at which a claimant suffers TPD is capable of a general answer, which was discussed by Ball J in *Ziogos* at [86]," and quoted same, as follows:

[**Ball J**] "Before turning to the facts of the case, one final point should be made. Generally, and subject to the terms of the policy, the question whether a member suffers from TPD is to be determined as at the expiration of the qualifying period specified in the policy. In the normal case, it is at that point of time that the insured person's cause of action under the policy arises: see *Giles v National Mutual Life Association of Australasia Ltd* (1986) 4 ANZ Ins Cas 60-751 at 74,529 per Pidgeon J, cited with approval by Brereton J in *Halloran v Harwood Nominees* at [33]. See also Stevenson J's discussion in *Shuetrim v FSS Trustee Corporation* [2015] NSWSC 464 at [51] ff. However, that will not always be the case. Where the right to make a claim under the policy depends, as in this case, on the formation of an opinion by the insurer in relation to a matter concerning the future which itself is uncertain, the position is less clear. It is difficult to see how the insurer could be in breach of the policy until the claim is made and the opinion is formed or the insurer fails to form the opinion in breach of its duty of utmost good faith. In those cases, the question whether the member suffers from TPD should be determined at the time the insurer forms its opinion or fails to form its opinion consistently with its duty of utmost good faith. In addition, as Pidgeon J pointed out in Giles, it is possible to take into account subsequent events to the extent that they shed light on what was likely at the time the assessment was to be made

Later, after traverse of facts and findings, at [278] Slattery J "*In Summary*. In my view, no matter how Mr Carroll's prior vocational experience is approached, Mr Carroll is unlikely ever to be able to engage in Regular Remuneration Work as defined under the Policy, based on his education, training or experience. The two forms of work which he could undertake based on his education, training or experience are precluded for different reasons. Estimating and project management work is not wholly sedentary and requires visits to work sites. I accept the medical evidence that says Mr Carroll is unfit for such physical work. And in relation to running small family businesses, the highest characterisation that could be given of Mr Carroll's work for Too Easy Distributing or Nicholas Wines was that it was "casual work or other work of an intermittent nature", which Bathurst CJ said in *Dargan* does not qualify as Regular Remuneration Work.

"For these reasons the Court has concluded that the plaintiff is successful in challenging both the Trustee's and Hannover's decisions in 2013 and 2014 that Mr Carroll was not Totally and Permanently Disabled under the Policy and the Deed. The Court proceeded to a second stage inquiry and assessed for itself whether Mr Carroll is Totally and Permanently Disabled within the Policy as at the time for assessment, 9 March 2012 and finds that he is. The plaintiff is therefore entitled to a declaration to that effect and orders that Hannover pay the sum of $104,000 to the Trustee for distribution to Mr Carroll," Slattery J said [279], and costs.

Orders for short minutes.

P: A Coombes ins Firths Compensation Lawyers, Mr Stephen Firth. D: B Nolan ins TurksLegal, Mr Michael Iacuzzi.

Workers Compensation

Worker dismissed in second appeals round

Jaffarie v Quality Castings Pty Ltd [2018] NSWCA 88. Leeming JA, White JA agreeing separately, Macfarlan JA agreeing. 27.4.18.

Leeming JA adopted the history advanced by Snell AP in the decision appealed against, *Jaffarie v Quality Castings Pty Ltd* [2017] NSWWCCPD 2, the acting Commission president noting Mr Jaffarie having been born in Afghanistan in 1987, coming to Australia in late 2008, working with the respondent and suffering lifting injury in mid 2009 and terminated a week later, the fund agent three months later ceasing weekly payments, the worker thereafter operating a fruit shop until his visa was cancelled in mid 2013, then kept in gaol by the Federal Government at Villawood.

On September 2012 application, an arbitrator found lumbar injury, a closed period of weekly payments, appeal dismissed - [2014] NSWWCCPD 79, but thereafter, earlier Court of Appeal application allowed, [2015] NSWCA 335.

On remitter, Commission Senior Arbitrator McDonald awarded weekly payments to late 2012.

The unrepresented Mr Jaffarie sought reconsideration, over submissions relying on *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145, the reconsideration refused, followed by appeal to a Commission president pursuant to 1998 Act s 352, wherein the Senior Arbitrator's determination was affirmed.

At [36] Leeming JA: "First, these points were addressed by the Acting President, at [155]-[164]. The definition of "existing recipient of weekly payments" in Part 19H of Schedule 6 of the Workers Compensation Act 1987 is "an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments". The Acting President considered that it was clear that Mr Jaffarie did not answer that definition: at [157]. That is the subject of the "concession" which is said to involve error.

"Secondly, nowhere in his written submissions does Mr Jaffarie identify why that could be wrong in point of law. It is, with respect, plainly right. The "weekly payments amendments" are certain amendments made by the Workers Compensation Legislation Amendment Act 2012 (NSW) in late 2012. Mr Jaffarie had ceased being in receipt of weekly payments some three years earlier. True it is that in 2016 he obtained a determination that he had been entitled to weekly benefits from September 2009 until 31 December 2012. That does not alter the fact that he was not in receipt of weekly payments of compensation in September 2012. I am conscious of s 30(1)(c) of the Interpretation Act 1987 (NSW), and that at the time the amendments were made, Mr Jaffarie had made a claim which extended to weekly compensation. However, the definition of an "existing recipient of weekly payments" is "an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments", while cl 3 of Part 19H makes it plain that the amendment extended to claims for compensation made before the commencement of the amendment," [37].

White JA: "Mr Jaffarie sought three forms of compensation under the Workers Compensation Act: weekly compensation by way of income support under Div 2 of Pt 3, compensation for medical, hospital, and rehabilitation expenses under Div 3 of Pt 3, and lump sum compensation for non-economic loss under Div 4. Mr Jaffarie's degree of permanent impairment was directly relevant only to the last category of compensation. His entitlement to weekly payments depended upon a determination of whether he was totally or partially incapacitated for work resulting from an "injury" as defined (s 33) and upon the operation of the Workers Compensation Legislation Amendment Act 2012 (NSW). It was common ground that the Senior Arbitrator could determine the degree of Mr Jaffarie's incapacity for work resulting from his injury," [60].

"Nor did Mr Jaffarie's claim for compensation for medical treatment depend upon a determination of the degree of permanent impairment arising from personal injury suffered in the course of employment. The Senior Arbitrator noted (at [195]) that the parties did not address on the claim for s 60 expenses. The Senior Arbitrator said that because of the findings she made the respondent was liable only for Div 3 of Part 3 expenses for the treatment of Mr Jaffarie's

lumbosacral spine. Under s 59A(2) compensation is not payable under s 60 in respect of any treatment, service or assistance provided more than 12 months after a worker has ceased to be entitled to weekly payments of compensation. The Senior Arbitrator noted that the payment of s 60 expenses would be subject to the limits in s 59A of the Workers Compensation Act and the relevant transitional provisions. No issue was raised under s 60(5) concerning the jurisdiction of the Commission in respect of a dispute concerning any proposed treatment or service," his Honour said [61].

"Mr Jaffarie's third possible entitlement to compensation is for lump sum compensation under s 66 of the Workers Compensation Act. At the relevant time, under s 66(1) a worker who received an "injury" (that is, an injury as defined in s 4) that resulted in a degree of permanent impairment greater than 10 per cent was entitled to receive from his or her employer compensation as provided for by s 66. The amount of permanent impairment compensation was to be calculated under s 66 as it was in force at the date the injury was received, that is, on 12 June 2009 (s 66(3)). Under s 65(3), if there is a dispute about the degree of permanent impairment the Commission cannot award permanent impairment compensation unless the degree of permanent impairment has been assessed by an approved medical specialist. In her certificate of determination the Senior Arbitrator remitted the matter to the Registrar for referral to an approved medical specialist to assess Mr Jaffarie's permanent impairment resulting from the injury to his lumbar spine. Mr Jaffarie complains that that referral did not extend to injury to his thoracic spine that the Senior Arbitrator found was not work-related. This may have a significant effect on the determination by an approved medical specialist of the degree of permanent impairment. That could be relevant both to the determination of whether Mr Jaffarie satisfies the 10 per cent permanent impairment threshold for lump sum compensation and whether he satisfies the 15 per cent permanent impairment threshold for any claim that he might bring for work injury damages (Workers Compensation Act, s 151H)," [62].

White JA noted 1987 Act s 65 and 1998 Act ss 321 and 326.

"The question is whether in s 65(3) the reference to "a dispute about the degree of permanent impairment of an injured worker" extends to a dispute about the degree of permanent impairment of an injured worker that results from an injury (as defined), that is, relevantly for present purposes, from a personal injury arising out of or in the course of employment (s 4). The omission from s 65 (3) of the words "that results from an injury" is consistent with s 321 of the WIM Act that defines the circumstances in which a medical dispute concerning permanent impairment can and cannot be referred to an approved medical specialist under Pt 7 of Ch 7 of the WIM Act," in [64].

Then "These sections, when read with the definition of "medical dispute" in s 319, delineate the roles of the Commission and an approved medical specialist (or an Appeal Panel) (ss 327 and 328). The Commission cannot itself refer for assessment under Pt 7 of Ch 7 a medical dispute concerning permanent impairment of an injured worker. Only the Registrar or a court can make that referral. Hence, the Senior Arbitrator in this case remitted the matter to the Registrar for referral to an approved medical specialist to assess Mr Jaffarie's permanent impairment resulting from injury to his lumbar spine (*Peric v Chul Lee Hyuang Ho Shin Jon Lee & Ors* [2009] NSWWCCPD 47 at [64]- [65])," White JA said [66].

"Under s 321(4)(a) the Registrar may not refer a medical dispute concerning permanent impairment for medical assessment to an approved medical specialist if "liability" is in issue. That must extend to liability of the employer to pay compensation for permanent impairment under s 66. Under s 65 of the Workers Compensation Act the degree of permanent impairment that results from an injury is to be assessed as provided by Pt 7 of Ch 7 of the WIM Act. But under s 321 (which is in Pt 7 of Ch 7 of the WIM Act), except in the case of an expedited assessment under Pt 5 of Ch 7, a medical dispute concerning permanent impairment of an injured worker cannot be referred for assessment either by the Commission (s 321(3)), or by the Registrar, if "liability is in issue and has not been determined by the Commission" (s 321(4)(a)). Hence the question of whether a worker has suffered an injury as defined, that is, relevantly, a personal injury arising out of or in the course of employment, is a question to be

determined not by an approved medical specialist, but by the Commission. If liability to pay compensation is in issue, and the Commission has determined that an injury said to have given rise to some degree of permanent impairment did arise out of or in the course of employment, then the degree to which the worker was permanently impaired is a medical dispute to be determined by an approved medical specialist (or on appeal by an Appeal Panel). Conversely, if the Commission determines that the injury was not an injury as defined in s 4 so that the employer is not liable to pay compensation, there will be no occasion for referral of a medical dispute concerning permanent impairment to be referred under s 321," [67].

In such context, the appellant raised question of concomitance of the foregoing view with two authorities, *Bindah v Carter Holt Harvey Woodproducts Australia Pty Ltd* [2014] NSWCA 264 per Emmett JA (with whom Ward JA agreed) at [110], and *Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski* [2013] NSWCA 449; (2013) 12 DDCR 515, here White JA holding the worker's demurs without foundation.

Ultimately, "By ground 3 Mr Jaffarie asserted that the Senior Arbitrator acted unreasonably in excluding injury to the thoracic spine. However, there was evidence upon which the Senior Arbitrator could properly have made the determination that she did. It does not appear to me that the determination was unreasonable, let alone, that it was a determination at which no reasonable decision-maker could have arrived. Mr Jaffarie did not point to the Senior Arbitrator as having acted on any wrong principle. This ground raises no error in point of law," White JA said [83].

Appeal dismissed with costs.

A: Self. 1R: I D Roberts SC, J Malouf ins Sparke Helmore Lawyers. 2R (Registrar WCC): Subm, Crown Solicitor's Office.

Medical appeal panel fails on causation

Nicol v Macquarie University [2018] NSWSC 530. Harrison Asj. 27.4.18.

Granting with costs judicial review of a psychiatric WPI determination of a NSW Workers Compensation Commission Medical Appeal Panel, comprising Arbitrator Mr John Wynyard and Approved Medical Specialists psychiatrists Dr Robert Gertler (graduated 1965) and Port Macquarie's Dr Brian Parsonage.

Mr Nicol was injured in May 2006 working as a return to work co-ordinator with the north-western Sydney university employer, which terminated his employment later that year, and was ordered to pay weekly compensation in the period before he was employed from October 2006 by Cambridge Insurance where he was later certified unfit for a period in late 2007 with depression and anxiety.

Mr Nicol then brought Commission proceedings for WPI assessment from injury while employed by the university.

AMS psychiatrist Dr Ash Takyar assessed 50% WPI, appealed by the employer per 1998 Act s 327(3), allowed by the Registrar, the Panel finding 8% WPI.

Harrison AsJ [15]+ detailed incidents of the statutory scheme, particularly 1987 Act ss 4 and 9A, 1998 Act ss 319, 323, 325, 327, 328, 331, then NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (Fourth edition, 1 April 2016) clauses 1.6, 11.10, 11.11, 11.12. To the Psychiatric Impairment Rating Scale (PIRS), her Honour noted *Ferguson v State of New South Wales & Ors* [2017] NSWSC 887 [14] per Campbell J. Her Honour assayed the facts, medical opinions advanced, and the medical determinations.

Later, [59] Harrison AsJ "Macquarie University made lengthy submissions. It identified three main issues. They are that the AMS:

(1) failed to take a correct history of the subsequent psychological injury sustained while Mr Nicol was employed by Cambridge (failed to take correct history);

(2) failed to make a deduction on the assessment of permanent impairment due to the ongoing effects of the subsequent injury

sustained while Mr Nicol was employed by Cambridge (failure to make deduction); and
(3) The AMS erred in the assessment of Tables 11.1, 11.3, 11.4 and 11.5 Psychiatric Impairment Rating Scale (PIRS) in relation to the following categories and that the AMS ought to have assessed Mr Nicol as follows: (a) Self care and personal hygiene – Class 2; (b) Travel – Class 3; (c) Social functioning – Class 3; (d) Concentration, persistence and pace – Class 3 (error in assigning PIRS classes)."

The university had relied on *Schofield v Abigroup Limited* [2016] NSWSC 954 [33] per Fullerton J:

[**Fullerton J**] "Accordingly in assessing the degree of permanent impairment as a result of that injury, the Approved Medical Specialist was required to make an appropriate adjustment for injury that was the result of the plaintiff's employment after the deemed date in the course of employment outside the jurisdiction".

Harrison AsJ: "In *Schofield*, the question to be determined was the extent of the defendant's liability for the earlier injury [hearing loss] deemed to have occurred in New South Wales. The reason that the deduction was made for his latter employment was because it occurred outside the jurisdiction of New South Wales. *Schofield* does not assist the situation here where Mr Nicol suffered injury entirely within New South Wales," [65].

To the medical assessment appeal criteria in s 327, her Honour noted a Hansard extract [73], then *Campbelltown City Council v Vegan* [2004] NSWSC 1129 [59] (Wood CJ at CL), and *Merza v Registrar of the Workers Compensation Commission* [2006] NSWSC 939 [39] (Hoeben J):

[**Hoeben J**] "I do not propose to, nor is it necessary, that I define what is "demonstrable error" for the purposes of s 327 of the Act in an exhaustive way. It is sufficient for the purposes of this matter that I conclude that "demonstrable error" is an error which is readily apparent from an examination of the medical assessment certificate and the document referring the matter to the AMS for assessment".

At [87] "Before I deal with the grounds of judicial review, I will set out the requirements of both the AMS and the Appeal Panel's obligation to give reasons," Harrison AsJ said.

"I adopt the approach that I should read the Appeal Panel's reasons for decision as a whole and should not read its reasons with an eye finely tuned for error: *McGinn v Ashfield Council* [2012] NSWCA 238 per McColl JA at [17] (Sackville AJA and Gzell J agreeing); *Walsh v Parramatta City Council* [2007] NSWLEC 255; (2007) 161 LGERA 118 (at [67]) per Preston CJ citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 (at 291). As to what constitutes sufficient reasons of a Tribunal member (and Appeal Panel), this is set out in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 40; [2013] HCA 43; 88 ALJR 52 ("Wingfoot") at [47], [55]-56] and *Campbelltown City Council v Vegan* [2006] NSWCA 284; 67 NSWLR 372 ("Vegan")," her Honour said [88] before quoting *Wingfoot* at [47] and *Vegan* [121]-[122].

Then, [92] "There are numerous grounds of review, however the main grounds of review can be summarised as follows:
(1) The Appeal Panel denied Mr Nicol procedural fairness as it failed to afford him an opportunity to address the issue of apportionment during the clinical assessment carried out by a member [Gertler] of the Appeal Panel (procedural fairness);
(2) The Appeal Panel misapplied its statutory task in respect of causation, thereby constructively failing to exercise its jurisdiction and the Appeal Panel erred as it assumed that there had been a subsequent injury which resulted in a degree of permanent impairment. In approaching the task from this point of departure, it erred in respect of the question of causation of the degree of permanent impairment (causation); and
(3) The Appeal Panel applied an incorrect methodology to the evaluation of permanent impairment in respect of the apportionment and thereby misconstrued its task. It thereby failed to exercise jurisdiction. Also the Appeal Panel's approach to apportionment by treating it as causally severed when there was no probative, factual or legal basis to do so (apportionment)," Harrison AsJ said.

Noted reliance on *Crean v Burrangong Pet Food Pty Limited* [2007] NSWSC 839 [37]-[40] (McClellan CJ at CL), *Frost v Kourouche* [2014] NSWCA 39 [36] (Leeming JA, Beazley P, Basten JA agreeing), et al.

At [118] her Honour: "I accept that in accordance with *Crean* procedural fairness does not require there to be disclosure of the intention on the part of the Appeal Panel to

increase or decrease a WPI finding if the finding in regards to WPI is to be different from that of the AMS. Additionally, there is no requirement for an Appeal Panel to disclose in advance for comment its evaluation of the proportion for deduction which is appropriate in respect of subsequent injury.

"It is important to recognise that the test set out in Frost, is framed in terms of the "avoidance of practical injustice". This test stipulates that procedural fairness requires the decision maker to take any and all necessary steps to ensure a fair hearing. It is fair to say that both parties addressed Mr Nicol's injury or injuries at Macquarie University and subsequently at Cambridge in the submissions made to the Appeal Panel. Mr Nicol was re-examined by a member of the Appeal Panel. If Mr Nicol wished to obtain a further medical legal report on causation to put before the Appeal Panel, he could have requested an opportunity to obtain one. He did not do so," Harrison AsJ said [119].

In these circumstances, it is my view that the Appeal Panel afforded Mr Nicol procedural fairness," her Honour said [120].

Later, [142] Harrison As J "There are several alternative outcomes in regards to causation where a latter injury aggravates or contributes to a prior injury. In *Government Insurance Office of NSW v Aboushadi* [1999] NSWCA 396 ("Aboushadi"), the Court of Appeal considered the relevant principles where a second accident caused greater damage due to the result of an earlier accident. Mason P (with whom Meagher JA and Barr J agreed) stated at [22]:

[**Mason P**] "His Honour [Wright ADCJ] correctly applied *Fishlock v Plumber* [1950] SAStRp 18; [1950] SASR 176, a case which (with others cited) was cited by Malcolm CJ in *State Insurance Commission v Oakley* (1990) Aus Tort Reports 81-003 at 67 to be authority for the first two of the following three propositions:

(1) where the further injury results from a subsequent accident, which would not have occurred had the plaintiff not been in the physical condition caused by the defendant's negligence, the added damage should be treated as caused by that negligence;

(2) where the further injury results from a subsequent accident, which would have occurred had the plaintiff been in normal health, but the damage sustained is greater because of aggravation of the earlier injury, the additional damage resulting from the aggravated injury should be treated as caused by the defendant's negligence; and

(3) where the further injury results from a subsequent accident which would have occurred and the plaintiff been in normal health and the damage sustained include no element of aggravation of the earlier injury, the subsequent accident and further injury should be regarded as casually independent of the first."

At [144] Harrison AsJ "I accept that the decision on causation of Mr Nicol's depression is essentially a medical opinion, but the Appeal Panel's decision must nevertheless be made in accordance with the statutory requirements, including s 9A(1) of the Workers Compensation Act 1987 (NSW). The Appeal Panel did not specifically set out the statutory requirements of s 9A(1). The language used by the Appeal Panel also indicated that the new injury caused Mr Nicol's symptoms to recur, yet made no reference to any novus actus that broke the chain of causation from Mr Nicol's earlier injury sustained at Macquarie University.

"The characterisation of the new injury as causing symptoms to recur suggests that the new injury and prior injury are linked. Based upon the decision of *Aboushadi* (which I have set out above), the present circumstances appear to fall into the second category. In other words, the further injury which resulted at Cambridge would have occurred even if Mr Nicol had been in normal health, but the damage sustained was greater because it was an aggravation of the earlier injury from Macquarie University. It is this additional damage resulting from the aggravated injury that remains causally linked to the first injury at Macquarie University. While Macquarie University submitted that the aggravation of an earlier injury does fall within the scope of the statutory definition of "injury" under s 4 of the Workers Compensation Act, it does not follow that the aggravation alone results in a new injury unless the causal chain has been broken," [145].

"The Appeal Panel also made reference to Mr Nicol's improvement in condition as constituting a remission of the first injury. The Appeal Panel did not refer to Mr Nicol being on any medication at that time. Putting to one side the inconsistent statements of Mr Nicol

regarding his depression, this improvement does not constitute the required novus actus to snap the causative connection as set out in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796," [146].

"In my view, the Appeal Panel's reasoning on causation discloses that it misapplied its statutory task and thereby constructively failed to exercise its jurisdiction. The Appeal Panel's decision is vitiated by jurisdiction error," Harrison AsJ said [147].

Accordingly unnecessary to consider apportionment and PIRS application.

Declaration jurisdictional error, by certiorari panel determination quashed, matter remitted, respondent employer to pay the plaintiff's costs.

P: E G Romaniuk, E E Grotte ins Walker Law Group. 1D: H Halligan ins Hicksons Lawyers. 2&3D: Submitting.

Miscellany

US Gov't indicts litigation lenders

The New York Times, 11 May 2018. Click here to full report.

"The indictment offers insight into the unregulated and opaque world of the litigation-finance business. Such finance firms, many of them backed by hedge funds and private equity companies, typically bankroll lawsuits with large cash advances. The goal is to profit on the advances, some of which come with interest rates as high as 100 percent, from the proceeds of any settlements or jury verdicts."

Editor's note: Unfortunately I have been diagnosed with prostate cancer which has spread somewhat, requiring attention in coming months. Editions will continue, with occasional delays. Anthony Monaghan, 7.6.18.

Backyard

"After two months, Mr Nicol had implemented new systems and this caused his boss' attitude towards him to change," **- Harrison AsJ, *Nicol*, 27.4.18.**

"The manner in which Mr Minus has responded to my questions reveals that he has either a disregard for orders of the Court or an inability to process the importance of complying with them," **- McCallum J, *Minus*, 20.4.18.**

"The fleets of white vans streaming through many suburbs on weekday mornings which proclaim garden, swimming pool and domestic handyman services are ready examples of businesses that assert that they adhere to a professional standard, but which in no sense "practise a profession"," **- Leeming JA, *Zhang*, 13.4.18.**

"That said, there is no reason to confine the notion of "practising a profession" in s 5O to preconceived notions of the three professions which have been recognised from "time immemorial", namely, the Bar, the Established Church and the Military," **- Leeming JA, *Zhang*, 13.4.18.**

"In addition, there would be considerable difficulties for evidence rulings; Mr Hovanessian has referred to four witnesses whose evidence he proposes to rely upon, although he was unable to remember the names of two of them and the two he named were not at the relevant meeting; it would be difficult to deal with hearsay or *Brown v Dunn* issues where the defendant's evidence is of such an unknown quality," **- Gibson DCJ, *Qiang*, 11.4.18**

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Notes