ABUSE

2007 release succours Parramatta bishopric

Magann v Trustees of the Roman Catholic Church of the Diocese of Parramatta [2019] NSWSC 1453. N Adams J. 28.10.19.

On the Church's application, N Adams J declared a 2007 deed of release extinguished the church's liability in respect of abuse 30 years ago. The plaintiff had sued in 2003, the Court of Appeal - [2005] NSWCA 358 - holding not just and reasonable to extend time.

"On 16 October 2007, Mr Magann entered into a Deed of Release with the Church where the parties agreed that, in exchange for a payment of $95,000, he would release and discharge the Church from "all actions, suits, claims and demands of every description past present and future relating to or arising from the Claim or the Complaint or any other matters set out in the Deed"," N Adams J [7].

Her Honour noted Royal Commission recommendations and the subsequent amendment of the Limitation Act 1969 (NSW) adding section 6A [No limitation period for child abuse actions].

"In response to the Church's reliance upon the Deed, Mr Magann challenged the validity of the Deed on a number of bases. First, he contended that it was not the intention of the parties that the Deed prevent Mr Magann from approaching the Church for further assistance. Second, he claimed that he was misled by the Church as to his entitlement and a report of an independent assessor, Ms Robyn Bailey, dated 14 August 2007, was kept from him until after the settlement. He contended that the Church took advantage of his vulnerability by negotiating without the assistance of legal advice, that he lacked capacity to enter the Deed and that the Church applied undue influence and unfair tactics against him. Mr Magann seeks orders under the Contracts Review Act 1980 (NSW) in relation to the Deed and also submitted that the Deed should be set aside on grounds of unconscionable conduct," N Adams J said [16].

Evidence was taken over four days in March.

In [141] "On my calculations, Mr Magann has been paid an amount of about $200,000 inclusive of the payment under the Deed," her Honour said.

"Had Mr Magann not sought to pursue compensation from the Church in 2007, then the Amendment Act would have permitted Mr Magann to apply to have the decision of the Court of Appeal set aside on the basis that the judgment concerned the limitation period rather than the merits of the claim. By receiving the funds and signing the Deed on 16 October 2007, Mr Magann's claim was settled between the parties. Unless that Deed is set aside Mr Magann cannot avail himself of the change brought about by the Amendment Act," [178].

Her Honour noted authorities to **releases**, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251; [2001] UKHL 8 at [8] per Lord Bingham: construe by objective reference; *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112; [1954] HCA 23 at 128-130: construe release narrowly; *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26: read down exclusion; *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302; [2015] VSCA 351, at [63] per Whelan JA: possible to enter into an arrangement which does settle 'all conceivable further disputes'.

"It was common ground that the Church continued to pay for Mr Magann's counselling and other purchases such as a utility truck after the Deed was entered into. Mr Magann

INSIDE THIS EDITION

relied on this evidence as suggesting that the Church did not intend the Deed to end its obligations to him. It is well-established that **post-contractual conduct is irrelevant and inadmissible** with respect to the meaning and construction of any contract: see *Brambles Holdings Ltd v Bathurst City Council* (2001) NSWCA 61 at [26],[36] and [38]. Similarly, evidence of pre-contractual negotiations or surrounding circumstances is only admissible if the language of the document is ambiguous or susceptible to more than one meaning: *Codelfa Constructions Proprietary Limited v State Rail Authority (NSW)* (1982) 149 CLR 337 at [352]," N Adams J said [189].

The Church had intended to close all liability.

To **capacity of the plaintiff**, noted *Hanna v Raoul* [2018] NSWCA 201 [47]-[51] per Beazley P, including "It is also necessary, for a transaction entered into by a person without the required capacity to be voidable, that the other party to the transaction have knowledge of the incapacity: see *Gibbons v Wright* (1954) 91 CLR 423; [1954] HCA 17 at 441"; also *Borchert v Terry* [2009] WASC 322. The onus was on the plaintiff: [194], unsatisfied [207].

To the **Contracts Review Act** 1980 (NSW), noted *Spina v Permanent Custodians Ltd* [2009] NSWCA 206 [74]; *Provident Capital Ltd v Papa* [2013] NSWCA 36 [7] Allsop P; *Lauvan Pty Ltd v Bega* [2018] NSWSC 154 [283]-[286] per Gleeson JA; *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, McHugh JA: absence of legal advice not determinative.

Here N Adams J was "unable to identify any undue influence or any unfair pressure or tactics", in [226], therefore statutory relief not available.

To **unconscionable conduct**, in [227], her Honour: "In *Thorne v Kennedy* (2017) 263 CLR 85; [2017] HCA 49 the High Court confirmed the relevant principles of unconscionable conduct in equity to be as follows at [38] (footnotes omitted):

[HC plurality] "A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage 'which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring 'victimisation', 'unconscientious conduct', or 'exploitation'. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage".

N Adams J: "Applying these principles to the facts as I have found them, Mr Magann has not established that he suffered from any special disadvantage let alone that the Church took advantage of it. No predatory state of mind on the part of the Church has been established," [228].

In [231] "The effect of this is that the deed is valid and the Church's liability is extinguished," her Honour said.

Orders, costs.

A (Church): L Gyles SC, A Campbell ins Makinson d'Apice. R (plaintiff): T Boyd ins Herbert Weller.

COSTS

Foregone $600,000 offers earns indemnity costs

Menz v Wagga Wagga Show Society Inc (No 4) [2019] NSWSC 1369. Bellew J. 29.10.19.

The defendant attracting order for indemnity costs based on offers of compromise, after Bellew J returned a verdict for the defendant based on Civil Liability Act 2002 (NSW) s 5L [No liability for harm suffered from obvious risks of dangerous recreational activities] on a horse shying case, [2019] NSWSC 541, 20 May 2019, the hearing having occupied four days in late September 2018.

The defendant had in March 2016 offered dismissal without costs, in April 2018 $600,000 plus costs, in May 2018 $637,500 plus costs.

Bellew J noted Uniform Civil Procedure Rules 2005 (NSW) rules 20.26 and 42.14. To their purpose, his Honour noted *Morgan v Johnson* [1998] NSWSC 367, NSWLR 578 at 581-582.

In [20] "…there is no basis on which to exercise the discretion to reverse the defendant's prima facie entitlement to the orders sought."

Plaintiff to pay defendant's indemnity costs from the first offer.

P: J A Hillier ins Commins Hendriks Solicitors. D: I Griscti ins Mason Black Lawyers.

Birth suit approval declined

Gray bhnf Salasovicova v St Vincent's Health Australia t/as Mater Hospital Sydney [2019] NSWSC 1402. Harrison J. 22.10.19.

Harrison J declined to approve the infant's settlement. "This is an application for approval of a proposed settlement in favour of the plaintiff who was born in April 2013 with what was shortly thereafter diagnosed as dystonic quadriplegic cerebral palsy. It is alleged that between approximately 10.30am and 4.58pm, when the plaintiff was delivered, that she suffered a series of foetal heart rate variations, descending into severe incidents of bradycardia at 12.30pm and more significantly at 3.30pm to which those charged with her mother's antenatal care did not adequately respond. The plaintiff alleges that despite these two significant instances of bradycardia, no attempts were made to deliver her by Caesarean section or within a short time thereafter but that the birth was permitted to continue to a vaginal delivery in the normal course," [1].

Later, "Having regard to the amount of the proposed compromise, and the balance of competing issues on liability, I am not presently satisfied on balance that the proposed settlement is in the best interests of the plaintiff. Parental concern about litigation outcomes is understandable but is not in the present case a factor that can easily overcome what I consider to be the insufficiency of the settlement that has been offered," [8].

Further, to **costs**, "I feel compelled to note in passing that it is, or at least it should be, unnecessary to indicate that solicitors for an infant or legally disable plaintiff do not have any automatic right or entitlement to be paid costs out of the settled funds held on trust for the infant or disable plaintiff following payment by the defendant. While it may be something that does not need to be stated, my experience in this Court continues to be that that simple and obvious fact is either not widely understood or fully appreciated. I say that upon the basis that affidavits sworn by solicitors for the purposes of approvals regularly refer to the solicitor and client component of their costs as if it is something that a judge should necessarily have regard to when assessing how much the plaintiff will receive for investment in the long term. These sworn references to such costs appear to proceed upon the unstated assumption that costs that are not recovered from the defendant will be deducted from that sum," [10].

At [12] "I have attempted in my position as the Professional Negligence List judge to make it clear that I understand the tensions that often exist among the competing interests of the plaintiff, his or her tutor and the solicitors retained by the tutor to act for the plaintiff. Although I do not do so universally, I attempt where it is possible and appropriate, when dealing with approvals, to give what is clearly a non-binding indication to any prospective trustee that payment of the unrecoverable costs from the settled funds might be worthy of favourable consideration in the case at hand. I refrain entirely from giving a contrary indication, even in circumstances where I might hold such a view," Harrison J said.

P: M Cranitch SC, A Campbell ins Gerard Malouf & Partners. 1D: Minter Ellison. 2D: Avant.

LIMITATIONS

Body hired worker defeats out of time defence

Beller v Rocla Pty Ltd [2019] NSWDC 616. Scotting DCJ. 1.11.19.

Labour hired plaintiff injured in 2011 while placed at defendant's factory at Mittagong.

Scotting DCJ: "Until the investigator told the plaintiff that he might have rights against the defendant, he was unaware that he had a claim against them. The plaintiff understood that he had received everything he was entitled to from Allianz as a result of his workers compensation claim. The plaintiff was satisfied with the outcome of his workers compensation claim in that he got paid his weekly wage, his medical expenses were paid for and the workers compensation insurer assisted with his rehabilitation to find work which he could do and which subsequently turned out to be more lucrative for him," [61].

His Honour detailed Limitation Act 1969 (NSW) ss 50C [Limitation period for personal injury actions] and 50D [Date cause of action is discoverable].

Scotting DCJ [70]: "These provisions were authoritatively considered in *Baker-Morrison v State of New South Wales* (2009) 74 NSWLR

454; [2009] NSWCA 35, from which **the following propositions** can be taken:

(1) The defendant bears the onus of proof of proving the facts relevant to the limitation defence [14].

(2) The requirements of section 50D(1)(b) and (c) that refer to "facts" are inter-related. If the facts are properly within the understanding in evaluation of a non-professional, the nature of the person's knowledge will be different from that which incorporates information or opinion supplied by a professional, on the basis of the exercise professional expertise [26].

(3) The use of the word "fact" in paragraphs (b) and (c) is used to describe a composite set of inferences or the result of an evaluation [27].

(4) Since what is discoverable for the purposes of section 50C of the Act is the "cause of action". The "fact" contemplated by section 50D(1)(b) of that Act is the relationship between the injury on the one hand and the fault of the defendant on the other, the relevant connection being one of causation [28].

(5) The fault of the defendant referred to in section 50D(1)(b) of the Act is to be ascertained by reference to legal concepts, not moral blameworthiness so that, while there is no need for a plaintiff to be able to articulate a cause of action in terms of negligence, nuisance, breach of duty or otherwise, the key factors necessary to establish legal liability must be known [39].

(6) Section 50D(1)(c) requires that the person have available to him or her relevant legal and medical information to allow an informed professional judgment to be made of the seriousness of the injury sufficient to justify the bringing of the proceedings [44].

(7) In order to note whether an injury was sufficiently serious to justify the bringing of an action within the meaning of section 50D(1)(c) of the Act, a person must know not only that the injury was serious, but also, in approximate terms, whether that injury was sufficient to bring a person over any statutory thresholds that now exist [44].

(8) The knowledge requirement is met if the person has a belief that the facts can be established on the balance of probabilities. The belief can be held on firm or shaky grounds. It is not necessary for the belief to be strong enough to satisfy a solicitor's certification requirements under the relevant legislation [45].

(9) Section 50D(2) is premised on an assumption that the person has not taken all reasonable steps to ascertain the facts, or a particular fact, requiring an assessment to be made of what would have been ascertained had such steps been taken [57].

(10) In most circumstances, the step of instructing a solicitor will be sufficient for a prospective plaintiff to satisfy the element of taking "all reasonable steps" within the meaning of section 50D(2) of the Act [58].

(11) In some circumstances there may be a question of whether the plaintiff's instructions were adequate or whether other limitations prevented the solicitor from taking proper steps in a timely fashion [58].

(12) The phrase 'ought to have known' means that the person should have inquired as to the fact. In this sense 'should' connotes a culpable omission by the person who should have known [59].

(13) The expression 'ought to know' is identified by reference to what the putative plaintiff 'would' have found out, if he or she had taken all reasonable steps [59]."

At [71] "In *Bostik Australia Pty Ltd v Liddiard* [2009] NSWCA 167, the Court of Appeal decided that it was not sufficient for the purposes of section 50D(1)(b) that a person merely knows the facts necessary to establish the fault of the defendant. The defendant must also know that a defendant is, as a matter of law, liable to pay damages [38] – [49]. In that case, Mr Liddiard was employed by Brolton Industries Pty Limited (Brolton) to work at the premises of Bostik Australia Pty Ltd (Bostik). At the time of his injury, Mr Liddiard's services were being provided to Bostik by Brolton pursuant to an arrangement of which Mr Liddiard was unaware. Mr Liddiard did not become aware of the arrangement until his solicitor was served with a statement prepared by Bostik's manager of the site where he worked. The trial judge found that Mr Liddiard simply understood that he worked for Brolton and saw no relevance in Bostik's role in the work he performed. The Court of Appeal upheld the trial judge's finding that Mr Liddiard did not know the fact that the injury was caused by the fault of Bostik until after his solicitor received a copy of Mr Lynch's statement which was within the three year discoverability period," Scotting DCJ said.

"In *State of New South Wales v Gillett* [2012]

NSWCA 83 a five member bench of the Court of Appeal upheld the correctness of *Baker-Morrison*. That case also referred to *Bostik Australia Pty Ltd v Liddiard* with approval. Whilst the main judgment was delivered by Beazley JA (as her Honour then was), Campbell JA expressed additional reasons for agreeing with her Honour, which were in turn accepted by McColl, Young and Whealy JJA. As to the requirements of section 50D(1)(b) and (c), Campbell JA succinctly stated at [131]:

[**Campbell JA**] "For a person to be in a situation where he or she knows or ought to know that an injury was sufficiently serious to justify the bringing of an action on the cause of action, they would have to know (or be in a position where they ought to know) that they have sufficient prospects of recovering enough damages for it to be worthwhile litigating. That would require, at the least, knowledge (whether derived from the plaintiff's own knowledge, from friends or acquaintances, or from professional advice) that the injury in question is one for which the law would hold the defendant liable in damages, and that the damages that could be recovered are large enough to be worth the time and trouble of suing. Thus knowledge of actionability is necessary before s50(1)(c) is satisfied. And, because it is involved in there being 'fault', actionability is likewise one of the 'key factors necessary to establish liability' that must be known before s50D(1)(b) is satisfied."

Scotting DCJ: "In *Baggs v University of Sydney Union* [2103] NSWCA 451, the plaintiff was wrongly advised by two solicitors that her claim relating to a fall down fire stairs in a building was against her employer, The University of Sydney, rather than against the defendant who was the occupier of the building in which she fell. Accordingly, she was advised that she should not decide to pursue an action until six months after her impending surgery, being a time when it was expected that her injuries would stabilise and after which her whole person impairment could be assessed. A 15% whole person impairment was required before she could pursue a work injury damages claim. The Court of Appeal held that there was no reason for the plaintiff to doubt the advice that she had been given and that it presented an insurmountable hurdle to her commencing a work injury damages claim until that advice was superseded," [73].

At [90] "On 20 March 2014 the plaintiff was advised that his workers' compensation file would be closed because he had achieved a successful return to work and all of his outstanding entitlements to weekly compensation had been paid. The plaintiff accepted the truth of that advice from Allianz, because those matters were in fact true. The plaintiff was advised to contact Allianz or Workforce only if he was currently unfit for work or not working in a position with suitable duties. Neither of those conditions applied to the plaintiff. The plaintiff was not advised to seek legal advice about any other entitlements that he may have against anyone, including his rights to compensation from Workforce pursuant to section 66 and 67 Workers Compensation Act 1987," his Honour said.

"The circumstances of this case can and should be distinguished from a case where a putative plaintiff has a need to pursue a case and does not have an alternative remedy. In the present case, the plaintiff was not looking for a claim against the defendant, or an alternative claim against Workforce, because he was receiving significant benefits as a result of making his workers compensation claim. He was satisfied with those benefits because on the information that he had from Mr Bridges and Allianz, he was receiving everything that he was entitled to," [91].

"The plaintiff was never advised by anyone to seek legal advice. The concepts of occupier's liability and/or work injury damages are legal constructs and not matters about which a lay person can reasonably be expected to know. The plaintiff knew, as could be reasonably expected, that he had a claim of some sort. When he enquired of the employees of the defendant they pointed him in the direction of Workforce, to make a workers' compensation claim. This corresponded with the plaintiff's own state of knowledge that he had a no fault claim because he was injured at work," Scotting DCJ said [92].

Limitation defence failed, by consent verdict for the plaintiff $282,411.63, costs.

P: P Beale, J Doyan ins CMC. D: D O'Dowd ins Moray & Agnew.

MOTOR ACCIDENTS

$1.5m award remitted for retrial in District Court

Patel v Casey [2019] NSWCA 285. Basten JA, Leeming JA and Barrett AJA agreeing. 27.11.19.

Remitting for retrial a motor accidents award of Curtis ADCJ.

Basten JA: "The conclusion reached by the trial judge that the plaintiff suffered a significant neck injury in the course of the motor vehicle incident which occurred on 16 January 2011 must be set aside. The finding was made without addressing central elements of the defence case, which was not lacking in substance," [63].

"The plaintiff's case in this regard turned on the credibility and reliability of her oral testimony. The challenge by the defence was directed squarely at her reliability. Accordingly, it is not possible for this Court, not having heard her evidence, to make its own findings. That exercise requires a further trial in the District Court," his Honour said, [64].

"An order for a new trial requires that the Court be satisfied that some substantial wrong or miscarriage has been occasioned by the error identified above. In this case, there can be no doubt as to the satisfaction of that criterion. A critical issue as to the assessment of damages has not been properly determined according to law. Furthermore, although counsel for the plaintiff submitted that this Court would be satisfied that the award was otherwise within an appropriate range, that submission should be rejected. The award of more than $1.5 million was a substantial sum, in excess of twice the general jurisdictional limit of the District Court (which does not apply to motor accident claims). Not only was the sum significant, but the defence case raised serious issues as to whether there was a loss of earning capacity in the range identified by the plaintiff and accepted by the trial judge," [65].

"Because the appellant's challenges to the assessment of damages extended to other details of the calculations of past and future economic loss, a retrial will have to involve a full assessment of all issues with respect to damages, and not merely the finding as to whether there was a level of disability arising from a neck injury caused by the motor vehicle incident in 2011," [66].

Appeal allowed, new trial, respondent to pay appeal costs with certificate under Suitors' Fund Act 1951 (NSW).

A: Mr K Rewell SC ins Hall & Wilcox. R: Messrs R McIlwaine SC, R Quickenden ins Whitelaw McDonald.

Backhoe impact within MACA ambit

tractor picture

Rolton v Corowa Golf Club Ltd [2019] NSWDC 699. Levy SC DCJ. 26.11.19.

By separate question, held the 2004 injury within the ambit of the Motor Accidents Compensation Act 1999 (NSW).

The plaintiff greenkeeper had been struck by a backhoe operated by a fellow employee.

Levy SC DCJ: "On behalf of the plaintiff it was submitted, based on the settled interpretation of the aggregated terms bodily injury caused by a collision with a part of the vehicle due to fault in the vehicle being driven or running out of control, where contact between the vehicle and the plaintiff caused bodily injury, the plaintiff's injury falls within the scheme of the MAC Act as s 3(a)(ii) of that Act is engaged: *AMP General Insurance Ltd v Kull & Anor* [2005] NSWCA 442, at [52]; *RG & KM Whitehead Pty Ltd v Lowe* [2013] NSWCA 117, at [60]-[61]," [10].

"On behalf of the defendant, it was submitted that the decision in *RG & KM Whitehead Pty Ltd* is factually distinguishable because in this case it was the backhoe component of the vehicle that had swung around and struck the plaintiff whilst the stabilisers of the vehicle were down. In that regard, it was argued that the vehicle should actually be used as a vehicle for a collision to be considered as being an effective cause of an injury: *Inasmuch Community Inc v Bright & Anor* [2006] NSWCA 99, at [43]-[44]," his Honour said [11].

After detailing MACA s 3 [Definitions] therein injury, Levy SC DCJ said: "At the outset of the consideration it must be recognised that there are no bright lines to be drawn between the legislative schemes for compensation under the MAC Act and the regime governed by the Workers Compensation Act 1987 (NSW) and the Workplace Injury Management and Workers Compensation Act 1998 (NSW): TVH Australasia Pty Ltd v Chaseling [2012] NSWCA 149, at [23]. The schemes can

coalesce or overlap. The determination of the separate question is dependent upon findings of fact," [13].

"As was pointed out to counsel for the defendant during argument, to the extent that the schemes may overlap, that is simply a matter to be resolved by an application of the principles of double insurance, possibly requiring that there be a sharing of loss as between insurers: *Allianz Australia Insurance Ltd v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCOM0430* [2019] NSWCA 271. That process is not a determinant of the separate question that has been identified for decision in this instance," [14].

Then, "I do not accept the defendant's submission, based on the cited portions of the decision in *Inasmuch*, as to the elements required for there to have been a collision. This is because, as was referred to at [44] in that case, for the scheme of the MAC Act to apply, it is not necessary for a motor vehicle to be in motion: *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26; 221 CLR 568, at [131]," Levy SC DCJ said [16].

"In argument, the defendant also pointed to a first instance decision in *Suncorp Metway Insurance Limited v Sichter* [2005] QSC 164. In my view, that decision is distinguishable from the facts in the present case. That decision involved the factual question of whether the vehicle ceased to be driven whilst the lifting device on a garbage truck was being operated. In the present case, the driver remained at the controls but mistakenly operated the controls on the vehicle," [17].

Defendant to pay costs.

P: Mr P Mooney SC ins Masselos & Co. D: Mr J Gracie ins Lee Legal Group.

Suitable, not capable, is s92 exemption question

Insurance Australia Ltd t/as NRMA Insurance v Gurbuz Aslan [2019] NSWSC 1587. Harrison AsJ. 14.11.19.

Found CARS Assessor erred to jurisdiction in refusing the plaintiff's application for exemption.

Harrison AsJ: "The insurer submitted that the reasons Westpac Bank provided for his dismissal in its response in the Fair Work Commission are irreconcilable with the first defendant's statement dated 8 August 2018. They are also irreconcilable with the first defendant's claim that his accident-related injuries led to the termination of his employment with Westpac," [21].

"Documents produced by the Fair Work Commission, and in particular Westpac's response, underline the necessity for the insurer to have access to the first defendant's employment file at Westpac. Those documents may defeat the first defendant's claim for loss of earnings altogether," her Honour said [22].

Harrison AsJ detailed MACA s 92 [Claims exempt from assessment] and SIRA Claims Assessment Guidelines cll 14.11 and 14.16.

The insurer had relied on *IAG Limited t/as NRMA v Khaled* [2019] NSWSC 320 [27]-[31] per Bellew J, and *IAG Ltd t/as NRMA Insurance v Qianxia Lou* [2019] NSWSC 382, Wilson J.

To the proposition that the CARS Assessor had applied the wrong test, Harrison AsJ said: "This ground of review raises the identical issue dealt with in *Khaled*. Bearing in mind the terms of s 92(1)(b) of the MAC Act, the question that the claims assessor was required to ask herself was "whether the claim was not **suitable for assessment** in CARS". However, she misdirected herself and asked the wrong question, which was whether she was satisfied this claim was capable of assessment in CARS. The claims assessor applied the wrong test. By so doing, she misunderstood or misconstrued the scope and nature of her power pursuant to s 92(1)(b) of the MAC Act, and incorrectly exercised that power in determining the insurer's application. This constitutes a constructive failure to exercise jurisdiction and it is an error on the face of the record," [41].

A second proposition, that the assessor had failed the statutory task, such was substantially as the prior ground.

"The claims assessor was obliged to determine whether the claim was not suitable for assessment. Instead the claims assessor considered whether the claim was capable of assessment at CARS. The claims assessor failed to perform her statutory task. By doing so, she fell into jurisdictional error. It is also constitutes an error on the face of the record," Harrison AsJ said [44].

In response to further submissions that the assessor had erred in basing her determination partially for s 100 direction to

Westpac which had not produced, Harrison AsJ said that failure should be addressed to SIRA.

Exemption refusal quashed, remitted to SIRA, costs reserved as all defendants filed submitting appearances.

P: Mr K Rewell SC ins Hall & Wilcox.

Submissions to Court 'potentially misleading'

Allianz Australia Insurance Ltd v Akopyan [2019] NSWSC 1487. Lonergan J. 30.10.19.

Lonergan J criticised the insurer's written submissions to the Court as misleading, dismissing with costs its application for judicial review of a MAS medical review panel (Drs Samson Roberts, Wayne Mason and Thomas Newlyn) which certified 41% WPI on injury of psychotic disorder due to another general medical condition, in terms of DSM IV or V, the original medical assessor Dr Synnott having certified 26% on psychotic disorder NOS [not otherwise specified].

The motor accident was August 2015.

Her Honour noted the panel considering Drs Synnott, Klug (24% WPI), Andronikashvili, documents associated with Mental Health Act 2007 (NSW) admissions, ambulance records, GP Dr A Virk, psychologist Ms Flores-Kater, Dr Virgona, psychologist Dr Roldan.

"There is an account of bizarre behavior by Mr Akopyan in the days following the accident it seems given by Mr Akopyan's wife. Police were called and the history obtained indicates that Mr Akopyan was admitted to hospital. The Panel notes a history from Mr Akopyan's wife that due to other bizarre behavior she called an ambulance and Mr Akopyan spent six weeks in hospital during which time he was aggressive and would throw food in her face. There were other incidents and admissions to hospital described by Mr Akopyan and Mrs Akopyan," Lonergan J said [44].

In [48], her Honour quoted the panel: "The Panel concluded that Mr Akopyan had developed a Psychotic Disorder due to a General Medical Condition, namely as a result of the head injury sustained in the motor accident. The Panel could not identify any other potential causative factor in the development of his psychotic symptomatology and the nature of the symptoms described was consistent with the diagnosis made. The differential diagnosis of Schizophrenia was considered, however, whilst some of the symptoms could be explained by the diagnosis of Schizophrenia, others would not readily be explained nor is it typical of the natural history of Schizophrenia that it should develop abruptly and at the age of 41 years."

To the nature of the instant proceeding, Lonergan J detailed Supreme Court Act 1970 (NSW) s 69, then cited *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229 (The Court) at [45], then [52]-[58].

Lonergan J: "It is also clearly settled law that medical assessors are to form their own opinion on the medical question referred to it by applying their own medical experience and their own medical expertise: *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [47] per French CJ, Crennan, Bell, Gageler and Keane JJ. The reasons must explain the path of reasoning by which the conclusion was reached: *Wingfoot* at [55]," [54].

Lonergan J cited *D'Ament v Allianz Australia Insurance Ltd* [2019] NSWCA 201, [74], [77]: finding unproven fact may be error of law but not necessarily error of law on the face of the record.

Addressing the application grounds, "I observe at the outset that the plaintiff's written submissions ("PWS") are replete with value judgements by the author as to the importance, weight and cogency of material made available to the Panel for its evaluation. Examples of this occur repeatedly throughout the PWS and betray an attitude of merits review," Lonergan J said [56].

"In PWS [11], a reference to Dr Synnott regarding Mr Akopyan as "an unreliable historian" is followed by the comment "which appears undeniable". In PWS [13] there is gratuitous commentary upon Dr Synnott's diagnosis, describing it as one that "could scarcely have been more non-specific", despite it corresponding to a DSM-IV identifiable psychiatric condition. In PWS [17], an opinion is volunteered that "the first defendant provided little reliable information when interviewed by the Review Panel" but again this is a value judgement by the author of the PWS, rather than a reference to any conclusion reached or observation made by the Panel," her Honour said [57].

"In PWS [19] there is **a partial quote from**

DSM-IV which leaves out a critical part of the relevant passage where it specifically addresses matters that need to be taken into account when identifying the diagnostic features of Psychotic Disorder due to a General Medical Condition. The incomplete quote leaves a potentially misleading impression of what is in DSM-IV as to what a diagnosing psychiatrist or here, the Panel, should take into account in considering that particular diagnosis," [58].

Her Honour quoted the whole DSM IV passage.

"The defendant fortunately tendered the complete extract from DSM-IV otherwise this Court may well have been misled by the incompletely extracted material," Lonergan J said [61].

"In respect of ground 1, apart from constantly emphasising that there is no evidence of a head injury, (an observation with which I do not agree), evaluative commentary is made throughout the PWS dealing with that ground, indicating the opinion of the author of the PWS as to the kind of things that, in his view, ought to have been noted in contemporaneous reports but were not, but at the same time minimising or disregarding matters that were recorded that can indicate a head injury. For example, at PWS [34] commentary is made that: "a CT scan of the brain was arranged at Westmead Hospital, but only because the First Defendant professed to be amnesic of the event". There is no evidence cited for the drawing of that conclusion. This is followed by the somewhat withering comment, again betraying a merits review type of approach: "The result of the CT scan was, *predictably*, normal" (emphasis added)," [62].

"The PWS then go on to emphasise evidence that another specialist, a neuropsychologist, took the view that the temporal relationship between the accident and the onset of psychotic symptoms is "insufficient" to establish causation, but makes no reference to other experts whose reports were also before the Panel who took a different view, let alone any reference to the DSM-IV which specifically states temporal relationship is a matter that ought to be considered," [63].

Then, "In the DWS [defendant's written submissions], Mr Sheldon SC submitted that the approach taken in the PWS was incorrect. It is wrong for the plaintiff to proceed on the basis that a self-report of symptoms cannot establish evidence of head injury. This means that even the possibility of an error of law is not raised. The only submission properly open to the plaintiff in these circumstances relates to the weight to be attached to such evidence which is, of course, entirely a matter for the Panel relying on its own professional skill and judgement to determine, based on its clinical experience. To submit otherwise is to "dress up a merits review as a complaint of reviewable error"," Lonergan J said [65].

"Mr Sheldon SC pointed out the incomplete DSM-IV quote thus providing the highly relevant parts of that extract and what was required by DSM-IV to be considered about the aetiology of the condition as well as the alternative analyses that can provide the necessary connection between the general medical condition and the psychosis," [66].

"In oral submissions, Mr Khandhar SC (appearing for Mr Akopyan in substitution for Mr Sheldon SC) referred to a number of sources of evidence of head injury within the material available to the Panel:

(1) The ambulance electronic note of dizziness;

(2) The Emergency Department triage note at 9:06am under the heading "Presenting Information" – "Self-extricated but unsteady on feet, amnesic to events";

(3) The Emergency Department trauma admission note – "Cervical spine pain lateral neck pain", "head pain" and "amnesic for events" at 9:40am;

(4) The nursing note at 10:55am - "Patient arrived to department with nurse escort. Patient is alert and states name and date of birth. States has no recollection of events...";

(5) The Emergency Department Trauma Admission Form where under the heading "Trauma Series X-rays" is included a hand-written note: "CT brain – amnesia on scene"," her Honour said [67].

"All those **points demonstrate clinical references** to a general medical condition, namely head injury, involving dizziness, unsteadiness, amnesia and head pain in the hours immediately after the accident," [68].

"Mr Khandhar SC submitted that the analysis by the Panel was done consistently with the requirements of the application of the DSM-IV diagnostic approach, including, as required by

the relevant part of DSM-IV, the need for the clinician(s) to "also judge that the disturbance is not better accounted for by a primary Psychotic Disorder, a Substance-Induced Psychotic Disorder, or another primary mental disorder (e.g., Adjustment Disorder)"," [69].

"Mr Khandhar SC submitted that if there is some evidence of head injury, even one piece, then the "no evidence" ground fails. That ground should truly be seen as a complaint about the weight the Panel gave to evidence that was before it, which is not a matter for this Court, and is entirely a matter for the expertise of the Panel," [70].

"I accept the submissions made in both the written and oral submissions by senior counsel for Mr Akopyan. I reject the submissions made by the plaintiff. It seems to me the ground fails at the first hurdle given that there was contemporaneous evidence of head injury available for the Panel to consider. I also accept that the Panel, which comprised expert specialist psychiatrists, were required to, and did in fact, analyse the background and clinical history, directly assessed Mr Akopyan and applied their professional skill and judgment to the task at hand. There is no error of law and certainly no error of law on the face of the record in how it completed that task," Lonergan J said [71].

Other grounds were "little more than an amplification and/or repetition of the first ground".

Summons dismissed with costs.

P: K Rewell SC ins Hall & Wilcox Lawyers. D: P Khandhar SC ins Brydens.

NRMA fails its challenge, with indemnity costs

Insurance Australia Ltd v Salvadori [2019] NSWSC 1470. Johnson J. 29.10.19.

Johnson J dismissed with indemnity costs the plaintiff insurer's application for judicial review of the Proper Officer declining the insurer's application for section 63 review of the assessment of medical assessor Dr Eugene Gehr who had certified 17% WPI (cervical 5%, thoracic 5%, left shoulder 8%) resulting from Ms Salvadori's injuries in a motor accident at Ingleburn on 31 March 2017.

"The grounds of judicial review relied upon by the Insurer are set out in the Summons. The Insurer alleges that jurisdictional error occurred and/or constructive failure of a decision maker to perform relevant duties under the MAC Act. The Insurer acknowledges (as it must) that the Court is undertaking supervisory jurisdiction concerning the lawfulness or legality of the decision and not merits review," Johnson J said [21].

The insurer had extracted from the assessment certificate [22].

"The Insurer submitted that instructions given by the Medical Assessor to Ms Salvadori (in the underlined portion of the preceding paragraph) were not supported by the required methodology as set out in the PI Guidelines and in the AMA4 Guides. It was submitted by the Insurer that the instruction to Ms Salvadori to report the onset of "discomfort", following which the movement would be discontinued, was not consistent with the PI Guidelines and the AMA4 Guides in that:

(a) there was nothing in either of those guidelines which requires that movement be ceased on the onset of discomfort;

(b) it was inconsistent with the requirement to record maximum range of movement, for movement to be ceased on the onset of discomfort," his Honour noted [23].

"The Insurer submitted that the Medical Assessor's instructions were legally incorrect (having regard to the relevant guidelines) and that the Medical Assessor had erred in so providing those instructions. It was submitted that these "unlawful instructions" affected the entirety of the methodology of the assessment of the shoulders as the measurements were ceased at the onset of discomfort rather than at the maximum range of movement," [24].

"The Insurer submitted that this constituted error on law on the face of the record or an error so fundamental as to constitute a jurisdictional error: *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58 at [14]; *Minister of Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at [82]; *Rodger v De Gelder* (2015) 71 MVR 514; [2015] NSWCA 211 at [95]," [25].

His Honour quoted [26] from the Proper Officer's reasons, including as follows:

[**Proper Officer Ms Margot Undercliffe**] "[9] The applicant appears to be submitting that an assessor while examining a claimant as part of the dispute resolution process, should push that claimant in the range of motion assessment to a point of pain and discomfort, which could potentially lead to further injury.

Whilst there is nothing in the Guidelines or the Guides that specifically addresses this issue, it is difficult to believe that a scheme which aims to assist in the recovery of an injured claimant would propose such a methodology as being appropriate. …

"[12] It follows that I am not satisfied that the Assessor has erred in his methodology nor in his instructions to the claimant. I do not accept that a claimant should be put in pain for the purpose of assessing impairment. I am not satisfied of reasonable cause to suspect the assessment is incorrect in a material respect on this ground."

Johnson J: "The Insurer submitted that "discomfort" is not the same as "pain" and that the Proper Officer had erred in conflating the two and in failing to understand and respond to the evidence and submissions before her," [28].

"Ms Salvadori submitted that it would be contrary to the proper exercise of clinical judgment in the practice of medicine for a medical assessor to require an examinee to undertake and persist with a painful movement with the possible risk of injury resulting," [33].

"To the extent that the Insurer sought to distinguish the terms "discomfort" and "pain", Ms Salvadori noted that there was no textual or dictionary support for this distinction. It was submitted that the term "pain" is a synonym for "discomfort" and vice versa," [34].

Johnson J noted the Guidelines cll 1.2, 1.18.2, 1.38, 1.47-1.50, and AMA 4 Chapter 3.

"The Insurer's challenge to the decision of the Proper Officer rises no higher than the complaint made concerning the examination by the Medical Assessor. As I am not satisfied that error is demonstrated on the part of the Medical Assessor, then a similar conclusion should be expressed with respect to the decision of the Proper Officer," his Honour said [70].

"To the extent that the Proper Officer went further in her reasons (in paragraphs 9 and 12 at [26] above) in stating that she did not accept that a claimant should be put in pain for the purpose of assessing impairment, this is a fair comment given the arguments which had been advanced on behalf of the Insurer. After all, the Insurer's argument before the Proper Officer, and in this Court, was that it was legally wrong for the Medical Assessor to say anything to Ms Salvadori about pain or discomfort at all. That argument meant that it was legally necessary for the Medical Assessor to require Ms Salvadori to attempt movement and continue with that attempt with the only qualification being that if Ms Salvadori stated that she felt pain, then the Medical Assessor ought then invite her to cease movement. To the extent there was a passing submission by the Insurer of a denial of procedural fairness (see [29] above), I am not satisfied that the approach of the Proper Officer operated unfairly to the Insurer," [71].

Two days prior the Supreme Court hearing, Ms Salvadori had put on an offer of compromise of verdict for her and no costs, noting the lady had already incurred costs of $20,000, such offer without response from the insurer.

In [94], "In circumstances where the Offer of Compromise was made two days out from the hearing inviting the dismissal of the Summons on the basis that each party bear its own costs, I am satisfied there was a significant compromise on the First Defendant's part," Johnson J said.

Summons dismissed with costs, such on the indemnity basis from the making of the offer.

P: Mr M Robinson SC, Ms J Gumbert ins Sparke Helmore. D: Mr A Stone SC, Ms M Holz ins Bonura Legal.

NEGLIGENCE

Gravel truck v paddocks' cultivator

Lindsay v Neil Earthmoving Pty Ltd [2019] NSWDC 612. Smith SC DCJ. 1.11.19.

Smith SC DCJ: "On 7 April 2017 Troy Lindsay was cultivating a paddock on land at Tottenham, approximately 140 kilometres due west of Dubbo. At the same time, Dale Collins was transporting gravel in a truck along a road on the eastern border of the same paddock. The ground was dry and a breeze carried dust from the cultivation work which obstructed the vision of both Collins and Lindsay. As Lindsay approached the roadway he turned his tractor in order to continue the cultivation but was struck by Collins' truck. The collision caused extensive damage to the tractor. It is agreed between the parties that the damage caused by the collision amounted to $217,204.55. The issues are whether that damage was caused by the negligence of Collins and secondly,

whether the damage was contributed to by the negligence of Lindsay," [1].

Later, his Honour noted Civil Liability Act 2002 (NSW) ss 5B [General principles] and 5C [Other principles].

"The structure of these provisions makes it **essential to determine** the relevant "risk of harm". It is only once that is identified that it is possible to consider what precautions should be taken by a reasonable person in the defendant's position: *Uniting Church in Australia Property Trust (NSW) v Miller* [2015] NSWCA 320; 91 NSWLR 752 at [106]," Smith SC DCJ said [37].

Then, "The steps that could have been taken by Mr Collins to avoid the risk of a collision included him either coming to a complete stop when he saw the tractor ahead of him travelling towards the track or decreasing his speed to well below 20 kilometres per hour. These steps would have taken little time and almost no effort," [43].

"On his own evidence, Mr Collins did not take either of those steps. In failing to do so, he breached his duty of care. That breach of duty was **a necessary condition** of the occurrence of the harm suffered as a result of the collision. Simply put, had the truck not been where it was, and in motion, the tractor would not have hit it and would not have been damaged. The truck was where it was only because Mr Collins failed to take reasonable care to avoid any collision," [44].

To contributory negligence, Smith SC DCJ noted CLA s 5R and *Gordon v Truong; Truong v Gordon* [2014] NSWCA 97 at [14]-[16].

At [51] "In his evidence, Troy Lindsay said that slowing down to any greater degree would be inconvenient; however, in face of the considerable risk and amount of damage that would occur in a collision, that inconvenience did not make the measure of slowing down any less reasonable.

"For that reason, I consider that Troy Lindsay, as an operator of large machinery on a paddock where there was a reasonably foreseeable risk of collision with other large machinery, ought to have slowed down sufficiently before each turn in order to determine whether there was a truck on the track at that time and whether it was safe for him to turn. He failed to do that and turned the tractor without any real regard for the risk of collision," [52].

"In my view, the responsibility of each party was largely identical. While Mr Collins could see the tractor, he paid it insufficient regard and it is likely that he miscalculated its trajectory, thinking that it was travelling at a more oblique angle than it actually was. I do not accept his evidence that he was travelling at 20–25 km/h as that is inconsistent with the skid mark left by the tyres once he applied the brakes. I also do not accept that he was not using the accelerator at all because, as he accepted in cross-examination, he would have done that only 200 metres or so from the double gates that led to Moira Vale Road and the collision occurred some 700 metres before the gates," [53].

"On the other hand, Mr Lindsay turned the tractor to his left without being able to see anything at all on that side. He knew that there were heavy trucks using the road but acted as though they were not there and he was cultivating an empty paddock," [54].

"For those reasons, I assess the plaintiffs' contributory negligence at 50%," Smith SC DCJ said [55].

Verdict and judgment for the plaintiffs $108,602.28, pre-judgment interest and costs for submissions.

P: Mr P Regattieri ins Duffy Elliott. D: Mr G Carolan ins Chamberlains.

Campdrafting suit falls to obvious risk

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2019] NSWSC 1506. Lonergan J. 4.11.19.

Defendant's verdict in event horse riding case, after 8 days' trial.

Lonergan J: "Emily Jade Rose Tapp ("Emily") is 28 years old. When she was 19, she participated in a campdraft event at Ellerston, New South Wales, an event organised by the defendant. She fell from her horse whilst competing late on Saturday 8 January 2011, the second day of a three day event and suffered a significant spinal injury in the form of incomplete T11 quadriplegia. She is wheelchair bound and has most impressively gone on to perform at an elite paralympian level despite this accident and the enormous emotional and physical obstacles she has faced and continues to face," [1].

"Emily alleges that her fall from her horse was caused by the negligence of the

defendant organisation, The Australian Bushmen's Campdraft and Rodeo Association Ltd ("ABCRA"). She also alleges that there was an agreement between her and the defendant that had various terms, both specific and implied, and that the defendant breached its agreement with her in a number of respects, and because of those breaches she is entitled to damages," [2].

The plaintiff had signed a liability waiver before the event. A copy of the waiver is annexed to the Caselaw judgment version, linked to this extract.

Her Honour noted expertise, for the plaintiff from soil scientist Dr Gunnar Kirchhof, geotechnical consultants Douglas Partners, horse behaviour experts Mr Hunter Doughty.

The defendant raised Civil Liability Act 2002 (NSW) s 5L [No liability for harm suffered from obvious risks of dangerous recreational activities], s 5F [Meaning of "obvious risk"], s 5K [Definitions].

Lonergan J noted *Goode v Angland* [2017] NSWCA 311 [185] Leeming JA: s 5L a liability defeating rule which might be dealt with early. The onus was on the defendant.

At [119] Lonergan J: "Whether a risk is obvious is to be determined objectively in accordance with s 5F and the question is whether it was a risk that in the circumstances would have been obvious to a reasonable person in the position of the plaintiff exercising ordinary perception, intelligence and judgment. This position is a reflection of the position at common law (see *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* (2004) Aust Torts Reports 81-754; [2004] NSWCA 247 per Tobias JA at [161]) and this continues to be the test. There is a requirement that the circumstances take into account the plaintiff's age, observations and experience (*Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of NSW v Dederer & Anor* (2006) Aust Torts Reports 81-860; [2006] NSWCA 101 at [152]; *Jaber v Rockdale City Council* [2008] NSWCA 98. Inadvertence to objective risks by a particular plaintiff does not negate their obvious nature."

"I also have no difficulty in concluding that the recreational activity was dangerous. I am conscious of the evidence and submission that falls at campdrafting events were rare, but the potential harm is catastrophic, as it was here. It is widely known, and Emily accepted that she knew, that there was a risk of serious injury, head injury or even death from a fall from a horse. The waiver form she signed was to a similar effect. An activity may be a "dangerous recreational activity" even though the **probability of such harm is low**: *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17 at [31]," Lonergan J said [125].

Her Honour noted CLA ss 5G [Injured persons presumed to be aware of obvious risks] and 5H [No proactive duty to warn of obvious risk] and submissions.

"I find that the defendant has established that in the circumstances, it had no obligation to inform the plaintiff of the risk of falling from her horse during the campdraft event, as this risk was obvious. Unlike the hidden risk of slipping whilst simply walking across a floor due to excess polish, not known to the user of the floor in *C G Maloney v Hutton-Potts* [2006] NSWCA 136, the risk of falling from a horse during the rigours of a campdrafting event was obvious. The risks entailed in walking across an apparently recently polished floor that had a hidden risk of excess polish (clearly found to be the cause of the fall) are very different to riding at speed on a horse and corralling a beast, in a particular required configuration, in a relatively confined space where the activity itself is known to entail a risk of falling," Lonergan J said [145].

To the **liability waiver**, her Honour noted CLA s 5M [No duty of care for recreational activity where risk warning].

"As stated by Basten JA in *Action Paintball Games Pty Ltd (In liquidation) v Barker* [2013] NSWCA 128 it is possible to warn of a risk without instructing the recipient of the warning as to all of the steps which are necessary to avoid the risk. His Honour also noted that an adequate risk warning can be given, at least in some circumstances, by reference to the general kind of risk involved, absent a precise delineation of each separate obstacle or hazard which may be encountered," Lonergan J said [161].

"Section 5M thus provides a further basis upon which to reject the plaintiff's claim against the defendant, as another basis to negate the proposition that the defendant owed any duty of care to the plaintiff," [162].

The plaintiff had pleaded breach of implied terms of contract, considered the **Australian**

Consumer Law within Schedule 2 of the Competition and Consumer Act 2010 (Cth), the ACL provisions agitated particularly ss 60 [Guarantee as to due care and skill], 64 [Guarantees not to be excluded etc. by contract], 275 [Limitation of liability etc], 139A [Terms excluding consumer guarantees from supplies of recreational services] as well as CLA s 5N [Waiver of contractual duty of care for recreational activities].

Her Honour found no contract. The ACL would not anyway have availed.

At [189] "A number of the provisions of the CL Act upon which the defendant relies are encompassed by s 275 of the ACL. In particular: (1) Section 5L of the CL Act is a law which precludes liability; (2) Section 5H of the CL Act is a law which limits liability; and (3) Section 5M of the CL Act is a law which precludes liability.

"It follows for the purposes of s 275, each of those provisions of the CL Act are laws that apply to limit or exclude liability. Because of this, the plaintiff cannot rely upon the provisions of the ACL to circumvent the operation of those sections of the CL Act," Lonergan J said [190].

"I accept the defendant's submissions that s 64 of the ACL is not made out on the evidence," [191].

The plaintiff had not established breach of duty of care [215], thus forbidding finding causation.

At [219] "The defendant set out in paragraph [104] of its Amended Defence that another basis for asserting it is not liable to the plaintiff is that the acts and omissions pleaded by the plaintiff were the acts and omissions of people who were first, **volunteers** as defined in s 60 of the CL Act, and second, that they were performing community work on a voluntary basis and not for private financial gain and which was for a charitable, philanthropic, sporting or cultural purpose," [219].

Then noted CLA ss 59 [Application of Part], 60 [Definitions], 61 [Protection of volunteers], 64 [Liability of volunteer not excluded if acting outside scope of activities or contrary to instructions] and 3C [Act operates to exclude or limit vicarious liability].

Lonergan J said: "I accept that the persons identified as having carried out any relevant acts or being responsible for any relevant omissions were volunteers as defined, carrying out community work and thus are entitled to s 61 protection. I reject that any of those volunteers were acting outside the scope of activities authorised by the organisation or contrary to instructions given by the organisation and that protection extends to the ABCRA if any vicarious liability allegation is asserted, although no such allegation is evident on the pleadings," [225].

Verdict and judgment for the defendant with costs.

P: A Bartley SC, K Oldfield, J Hillier ins Commins Hendricks Solicitors. D: G Watson SC, D Lloyd ins RGS Law.

WORKERS COMPENSATION

Fund entitled to interest after s 151Z agreement

Workers Compensation Nominal Insurer v Allmen Engineering Projects Pty Ltd [2019] NSWSC 1582. Campbell J. 15.11.19.

A catastrophically injured worker recovered judgment of more than $10m, the WC Nominal Insurer agreeing to accept $2.9m from the defendant, and that amount paid in mid 2018, instead of the $3.4m claimed.

Campbell J: "The amount of interest claimed is $382,565.25. Allmen accepts that this is the maximum amount to which WCNI may be entitled for interest at the maximum rate prescribed by Rule 6.2(8) Uniform Civil Procedure Rules 2005 (NSW), calculated between the date of the first payment of compensation and Allmen's reimbursement payment on 14 June 2018. That is to say, it accepts the accuracy of the arithematic. However, it strongly disputes that WCNI has any entitlement to interest as claimed at all," [5].

Later, "Although from earlier correspondence, it may have appeared that the recovery agreement between WCNI and the worker's representatives, and the consent orders between Allmen and the worker's representatives were made under s 151Z(1)(b), rather than s 151Z(1)(d), the parties, by the correspondence extracted at [21] above, agreed that this was not the case. One may safely infer that this is because there could be no liability in the worker to repay WCNI under s 151Z(1)(b) until he had actually recovered the damages. The liability of the worker to make a repayment is a liability to repay compensation

already received "out of those damages": s 151Z(1)(b) (at [9] above). When Allmen paid the agreed recovery amount to WCNI by cheque dated 9 June 2018, the worker had obtained judgment, approved by the Court, in his damages proceedings but he had not recovered the damages. It may be inferred that the cheque for the net proceeds of the worker's judgment of $10,557,074.79 was drawn at about the same time as the cheque reimbursing WCNI. As I have said, that cheque was forwarded to Mr Maait's legal practice on 12 June 2018. The net amount due to the worker was paid into Court on 14 June 2018 (Exhibit D: Protective List Short Minutes of Order 21 June 2018) but it could not be said to have been received by the worker, or recovered by him, until the money was paid out to the appointed manager of the worker's estate under order 16 made in the protective list on 21 June 2018. Accordingly, the payment made to WCNI on 12 June 2018 could not have been made under s 151Z(1)(b)," [21].

"At the same time, clearly, those representing the worker, including his tutor had an interest in agreeing, and if possible, as here, reducing, the amount to be deducted from the damages under the provisions of s 151Z(1). Only then could there be certainty about the net proceeds of any settlement of the worker's damages proceedings. As I have emphasised at [9] above, and as Mr MJ Walsh SC for WCNI submitted, where s 151Z is set out, that by dint of s 151Z(1)(e(1), any payment made towards the s 151Z(1)(d) indemnity when, at the time of the payment, the worker has obtained judgment for damages from the person paying under the indemnity but judgment has not been satisfied, the payment, to the extent of its amount, "satisfies the judgment". It seems to me that this is the most apposite provision to apply in determining what in substance, quite apart from the form of the arrangements the parties sought to employ, happened when their various agreements including the consent orders were given effect to by performance in June 2018," his Honour said [22].

"I find that Allmen's payment to WCNI on 12 June 2018 was made under s 151Z(1)(d) WCA, WCNI having agreed to accept a reduced amount. Section 151Z(1)(e1), and not s 151Z(1)(b), governed the payment," [23].

The defendant had demurred.

"Turning then to the plea of **accord and satisfaction,** Mr Perla referred to the judgment of Pembroke J in *Stroud v O'Connor* [2016] NSWSC 629 and the authorities referred to therein. Mr Walsh referred in particular *El-Mir & 1 Or v Risk* [2005] NSWCA 260 at [48] and [54] and the authorities referred. Amongst the authorities referred to in those more recent cases is the judgment of Dixon J (as the Chief Justice then was) in *McDermitt v Black* (1940) 63 CLR 161; [1940] HCA 4 at pp 183-184. In that passage, his Honour said:

[Dixon J] "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. *It may be a promise or contract or it may be the act or thing promised.* But, whatever it is*, until it is provided and accepted*, the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction" (Campbell J's emphasis).

Campbell J: "Mr Perla argued that the recovery agreement with the worker's representatives was a contract to accept a reduced amount from Allmen for the plaintiff's cause of action pursuant to s 151Z(1)(d). The satisfaction provided by Allmen means that the Statement of Claim, according to Mr Perla's argument, does not disclose a reasonable cause of action or amounts to an abuse of process. With respect, this is not correct. The contract was not made with Allmen and the doctrine of privity of contract precludes Allmen from setting up the recovery agreement in answer to WCNI's claim," [28].

"In any event, the recovery agreement was entered into after the proper commencement of the proceedings. At the time of their commencement there had been "no promise or contract", or any "act or thing promised", by Allmen, or the worker for that matter. In my judgment the plea does not run to defeat WCNI's proceedings," his Honour said [29].

To interest, "Mr Perla acknowledges that in previous cases, courts have awarded interest in proceedings brought to enforce the statutory indemnity where the defendant has after the commencement of the proceedings either paid the amount due under the indemnity or has discharged its liability under s 151Z(1)(d), or its predecessor s 64(1)(b) Workers' Compensation Act 1926, by satisfying the

worker's judgment for damages: *Howard Rotavator Pty Ltd v Wilson* (1987) 8 NSWLR 498 at 501E; *State of New South Wales (Government Cleaning Services) v Cooper* (2000) 49 NSWLR 221; [2000] NSWCA 148 at [14] – [23]; *Kwanchi Pty Ltd v Kocisis* (1986) 40 NSWLR 270. Mr Perla submits however that those decisions depend upon the express language of s 83A District Court Act, which language is materially different from s 100 CPA," Campbell J said [30].

His Honour detailed the statutory provisions and noted submissions and authorities.

In [35], "In *Nine Network Australia Pty Ltd v Birketu* [2016] NSWSC 694 a debtor paid the amount of a large debt one week after the commencement of proceedings and two days before the summons was returnable in the Commercial List. Hammerschlag J characterised the payment as a capitulation (at [8])."

Then, Campbell J "Although the expression "may include interest in the amount for which judgment is given" may be read as meaning that interest is only allowable in the circumstances to which the sub-section applies as some lesser portion of a larger amount for which judgment is given, the language of subsection (2) read as whole makes clear that **judgment may be given for interest** without judgment being given for the whole or any part of the debt or damages which has been paid after the commencement of proceedings, but before judgment. Taking the text, context and purpose of the statute together, I am satisfied that the Court's power is not restricted to including interest in a larger judgment which deals with the debt or damages for the recovery of which the proceedings were commenced. As the *Advertising Marketing Group* and *Grima* decisions demonstrate the reasoning of the Court of Appeal authorities in relation to s 83A(1A) continue to apply to s 100 (2) CPA. And Hammerschlag J's decision in *Birketu* is direct authority for the proposition that s 100(2) CPA supports a judgment for interest only," in [37].

Discretionary consideration did not deter the entitlement.

Ordered the defendant to pay the plaintiff interest $382,565.25, and costs.

P: Mr M J Walsh SC ins Turks Legal. D: Mr R Perla ins Moray & Agnew.

MAP, arbitrator quashed with remitter

Martinovic v Workers Compensation Commission of New South Wales & Ors [2019] NSWSC 1532. N Adams J. 8.11.19.

Judicial review allowed, with costs, of WCC Arbitrator Mr Gerard Egan declining reconsideration in May 2018, and a Medical Appeal Panel assessing 12% WPI in April 2016 without re-examining the plaintiff despite request, and AMS Dr Robert Adler assessing 8% WPI in late 2015.

The plaintiff is a carpenter working as a gyprocker who while lifting doors in August 2013 suffered back injury later requiring decompressive discectomy by Dr Peter Bentivoglio in context of constitutional stenosis.

The employer rejected the plaintiff's previous solicitor's assertion of entitlement to commence at common law.

The plaintiff then instructed NSW Compensation Lawyers who brought 1998 Act s 350 reconsideration application, such declined by the arbitrator notwithstanding finding the appeal panel had erred.

Fifteen grounds for this judicial review application were advanced. N Adams J detailed the statutory context, process incidents and authorities.

At [121] "The difficulty with Corporate Projects' argument is that it does not address the nub of the complaint made by Mr Martinovic which is that his complaint about his assessment by the AMS and request for a re-examination was completely ignored by the Appeal Panel. This complaint was closely connected with the radiculopathy complaint which the Appeal Panel also ignored. In these circumstances it is no answer to say that it could only have been if the Panel was satisfied of error that any re-examination ought to have been ordered; no finding of error could have been made if the complaint was not even addressed," N Adams J said.

"An alternate submission put by Corporate Projects under this ground was to note that at [8] of the reasons the Appeal Panel stated that it did not consider a re-examination necessary. Having considered a number of decisions concerning Appeal Panels, I accept Mr Martinovic's submission that this is **a pro forma paragraph** and does not suggest that

the separate argument raised by Mr Martinovic was considered. This is supported by the fact that no reasons were provided as to why Mr Martinovic's request was rejected," her Honour said [122].

"I am satisfied that, consistent with the "findings" of the Arbitrator, these three errors are clearly established," [123].

Then, "I am satisfied that three jurisdictional errors have been established. Whether they be classified as a failure to engage with Mr Martinovic's arguments (*Dranichnikov v Minister for Immigration and Cultural Affairs* (2003) 77 ALJR 1088) or as a failure to provide reasons (*Campbelltown City Council v Vegan* (2006) 67 NSWLR 272), **jurisdictional error is established**. It follows that there are grounds to quash the decision of the Appeal Panel for jurisdictional error(s)," [125].

"I am satisfied that the decision of the Appeal Panel is vitiated by jurisdictional error. On this basis the decision of the Arbitrator cannot stand and is liable to be quashed as well. This can only occur if an extension of time is granted to Mr Martinovic to seek judicial review of the decision of the Appeal Panel. Corporate Projects opposed an extension of time being granted. I will now turn to consider these arguments and the principles pertaining to them," [126].

To the limitation, at [134] "As stated above, UCPR r 59.10(1) provides that proceedings for judicial review must be **commenced within three months** of the date of the decision but r 59.10(2) provides that the Court may "at any time" extend that time. Rule 59.10(3) provides some factors that "should" be taken into account when considering whether to extend time under r 50.10(2), namely any particular interest of Mr Martinovic in challenging the decision, possible prejudice to other persons caused by the passage of time, if the relief were to be granted, including but not limited to prejudice to parties to the proceedings, the time at which Mr Martinovic became or, by exercising reasonable diligence, should have become aware of the decision, and any relevant public interest," N Adams J said [134].

Further, "In addition to the discretionary factors set out in UCPR r 59.10(3), in *Dyason v Butterworth* [2015] NSWCA 52, McColl JA (with whom Barrett and Gleeson JJA agreed) identified (at [65]) **two further relevant factors** to which it is necessary to have regard on this question: the length of the delay and whether the plaintiff has a "fairly arguable case"," [137].

"I have weighed up the competing arguments concerning an extension of time. In particular, I have had regard to Corporate Projects' argument that "a mere inability to obtain favourable advice" is not a satisfactory excuse of delay. I am not satisfied that is what occurred in this case. Mr Martinovic's lawyer ceased corresponding with him so he approached a new solicitor. Once he did so, things moved reasonably quickly," [139].

"A further relevant consideration is that I am satisfied that the Appeal Panel fell into jurisdictional error," in [141].

"For these reasons, I am satisfied that it is appropriate to extend time to seek judicial review of the decision of the Appeal Panel. I am also satisfied there are no additional discretionary reasons militating against granting the relief sought in relation to that decision," N Adams J said [142].

1998 Act s 352 Presidential appeal relief was limited in its instant availability and did not militate against the grant of judicial review.

"In circumstances where I have arrived at the conclusion that the Arbitrator's decision should be quashed only after being satisfied that the decision of the Appeal Panel is vitiated by jurisdiction error, I am not satisfied that the existence of a limited (out of time) alternate statutory avenue against the decision of the Arbitrator militates against the granting of the relief sought in relation to the decision of the Arbitrator," her Honour said [144].

Quashed the decisions of the arbitrator and medical appeal panel, remitted, costs.

P: Messrs M Robinson SC, S Blount ins NSW Compensation Lawyers. 4D: Ms B Tronson, Mr M Cobb-Clark ins HWL Ebsworth.

No prejudice to defendant for losing s 151IA limit

Ricky Pon Keung Law v Eurocars (North Shore) Pty Ltd [2019] NSWDC 665. Judge Priestley SC. 1.11.19.

Leave to commence granted pursuant to Workers Compensation Act 1987 (NSW) s 151D.

Judge Priestley [3]: "Both parties provided helpful chronologies. There is no real dispute as to the facts of this matter so far as they pertain to the motion before the court. Nor is there any serious dispute (subject to determining a question as to the meaning of the term "prejudice") as to the three propositions that need to be established to obtain leave, the onus of which is upon the applicant. Those three propositions as stated by Basten JA in *Gower v State of NSW* [2018] NSWCA 132 at [4] are:

(a) as to whether there has been an adequate explanation as to why the claim was not brought within the three years;

(b) that the applicant has a reasonably arguable basis for a negligence claim, and

(c) the conduct of a trial more than 7 years after the injury was suffered would not cause the defendant significant prejudice, so as to render the trial unfair."

Of the worker's circumstances, Judge Priestley said: "The applicant was born on 25 May 1952 in Hong Kong and attended university in Taiwan. He graduated in 1973 with a mechanical engineering degree. He moved to Australia in 1993. In 1996 he went to TAFE to study English and improve his language skills. Despite his Bachelor degree in mechanical engineering the work he carried out from 1998 to 2004 was heavy physical work. He then obtained an engineering job in 2004 and kept that till 2009. In January 2011 he started work with the defendant. This work required him to wash and vacuum between 50 to 60 motor vehicles per day and then move heavy items such as tyres during overtime which he did on a regular daily basis. About six months after starting this job he complained to the service manager that he was experiencing pain in his arms and back and he needed assistance or a reduced workload. This did not happen. In July 2012 he obtained a medical certificate for time off work due to neck, low back, arm and knee pain. Further complaints led to the applicant being told to not complain; in a telephone call with the service manager the applicant was told if he could not do the job he should quit. In a document at pages 34 and 35 of the affidavit of Mr Ranson the date of which creation is not recorded but which refers to an injury on 6 August 2012 the applicant made an initial notification of injury which is the first step in making a claim of the type leave is now being sought to make. There was no cross examination of the applicant and the precise time of the phone call just referred to (see paragraph 23 of the affidavit of the applicant) is not known. What remains unclear is whether there is any connection between that phone call and the initial notification of injury. Ultimately in my view this does not need to be resolved because at about the time of that initial notification the uncontested evidence on this application is the applicant felt very bad by what had been said to him by the service manager and the applicant says he tried not to complain anymore because he did not want to lose his job," [6].

"In the middle of 2013 the applicant says his condition was unbearable so he took two weeks off to recover. It was when he returned to work that his employment was terminated. The applicant then proceeded to try and look for work. On his first work trial at a similar type of job his injuries made it difficult to carry out his duties and he was not offered the role. The applicant was told this was because he was not fast enough and his English was poor. The applicant says he applied for nearly a dozen more jobs and had 4 interviews but with the same result as the first trial. In 2014 he applied for and obtained a disability support pension," his Honour said [7].

"In 2016 he made an enquiry about accessing his superannuation and consequently learnt from a Legal Aid Office solicitor that he may have a workers compensation claim. Armed with this information the applicant who was aware the workers compensation insurer of the defendant was QBE, contacted QBE and was emailed a workers compensation claim form which he filled out and submitted. He received a response in April 2017 from QBE rejecting his claim and that was when he decided he should obtain legal advice. He consulted his current solicitors thereafter in June 2017," [8].

The date of injury was that on the claim form,

as distinct from when the gentleman's employment was terminated [10].

In [13] "Since the involvement of the applicant's solicitor, there is no suggestion of a lack of diligence, and as noted above, without receiving an AMS assessment of 15% there is no point to filing a claim other than to end the period of delay. Whilst there may be an argument that is a prudent course, in my view where there is ongoing correspondence and other dealings between the insurer and the applicant's solicitor totally in line as if a claim has been made, the resultant delay in the commencement of the claim is sufficiently and acceptably explained," his Honour said, finding the worker entitled.

But the defendant asserted prejudice by reason of the effect of 1987 Act s 151IA [**Retirement age]**.

Judge Priestley: "The parties are agreed that the effect of this section is that a claimant such as the applicant may be awarded future economic loss but only calculated up to the pension age. Pursuant to the provisions of that section "pension age" is as defined in the Social Security Act 1991 which in the case of a man born on 25 May 1952 is 65 years. The grievance of the defendant in this case is that there is no restriction under the WCA for the awarding of past economic loss in the period between the date of trial (and therefore the date of assessment of damages) and the earlier date of having reached pension age. That is the grievance of the insurer is that by reason of this claim being brought after 25 May 2017 the applicant is now able to make a claim for economic loss in a period being the period from and after 25 May 2017 to the date of trial, which he would not have been entitled to do had he brought the claim within three years of the date of injury (assuming the trial concluded and orders made before 25 May 2017). The defendant reasonably at least in a chronological view of the world says that if the claim had been brought before 6 August 2015 the likelihood is the claim would have been resolved or determined by the court before 25 May 2017 and there would be no liability under the WCA possible for economic loss for any period past 25 May 2017," [17].

"Whilst chronologically that may be a reasonable view, as a matter of law applying the principles relating to the application of section 151D it is in my view not an available approach. The basis for this view turns on the view I take of the meaning of "prejudice". The term "prejudice" or "unfair prejudice" is a term often used in considering the admissibility of evidence and also in considering the granting of leave to bring proceedings after a certain time or the granting of an extension of time under various limitation of actions regimes. Whilst not directly on point to this application the reference to the use of that term in matters of evidence is instructive. In the evidentiary context something is unduly prejudicial for various reasons but predominantly because its result is to impede a fair hearing, normally because if the evidence was admitted it may be that the other party is unable to meet that evidence. Take for example the often encountered problem of late served evidence," his Honour said [18], then noting authorities cited in *Gower*, wherein at [183] White JA cited McColl JA in *Salvation Army (South Australia Property Trust) v Rundle* [2008] NSWCA 347 [96]: significant prejudice such to make chance of fair trial unlikely.

Leave granted nunc pro tunc, plaintiff's costs in the cause.

P: M Khandhar SC ins Brydens. D: Mr P Stockley ins Hicksons.

Race day rubbish bag lifting verdict set aside

Scone Race Club Ltd v Cottom [2019] NSWCA 260. Emmett AJA, Gleeson JA agreeing, Brereton JA agreeing separately. 31.10.19.

Allowed with costs the employer's appeal against Olsson DCJ's judgment $339,515.02 for the respondent worker who was injured removing a bin liner loaded with rubbish from a garbage bin at the country race course in May 2008.

At [3] Brereton JA: "In my judgment, despite the controversy at the trial about what if any instructions the Club gave the worker and in particular whether he was to change the liner leaving the bin in situ and drag the full bag to the skip (as he did), or wheel the full bin to the skip and empty it there, nothing ultimately turns on it. Nor does anything turn on the judge's conclusion that the Club failed to conduct an appropriate risk assessment, in the absence of explanation of how that assessment would have averted the injury. The critical issue is whether, as the primary

judge held, reasonable care on the part of the Club required that it install concrete pads upon which to locate the bins. I agree with Emmett AJA that her Honour erred in so holding, given that:

(1) although the evidence does not permit a precise finding as to the gradient of the sloping grassy area where the accident occurred, it was not steep, nor such as itself to present a hazard;

(2) there had been no previous report of any problem with workers slipping on the grass when removing garbage, nor any since;

(3) it was not industry practice, at other country racecourses, to install concrete pads;

(4) concrete pads would introduce their own risks, including trip hazard from the change in surface levels, and would be a harder surface than grass on which to fall;

(5) concrete pads would be of dubious efficacy in reducing the risk of slipping on spilt refuse;

(6) there was infrequent heavy use of the racecourse, such that there were perhaps two occasions each year in which it might have been necessary to place bins in the relevant areas; and

(7) installation would incur some, even if modest, cost."

Leading on the appeal, Emmett AJA detailed the evidence below.

At [80] Emmett AJA: "I consider, for the reasons advanced on behalf of the Club, that the primary judge erred in concluding that the Club failed to take reasonable care by reason of its failure to install concrete pads upon which to locate the bins. There was no evidence as to the gradient of the slope to indicate why the slope itself was a hazard for an employee removing loaded bin liners from the bins. Clearly, the slope was not so steep that the bins were unstable. The precise mechanism of the Worker's fall, in relation to his standing on an incline, is quite unclear. There was no specific or reliable evidence as to the area of, or depth of, the pads or the places where they should have been installed. It is by no means certain that a concrete pad would be less prone to causing injury than grass. I do not consider that the Club was in breach of any duty of care or any statutory duty that it owed to the Worker."

Appeal allowed, judgment below substituted with verdict for the defendant with costs, respondent to have Suitors Fund Act certificate.

A: L King SC ins Leigh Virtue & Associates. R: C Hart, S Mueller ins Bale Boshev.

Improved pleading not materially different

Sohailee v City Projects & Developments Pty Ltd [2019] NSWSC 1452. Cavanagh J. 18.10.19.

Cavanagh J declined the employer's application to strike out pleadings for offending Workplace Injury Management and Workers Compensation Act 1998 (NSW) s 318 [Parties limited to pre-filing statement and defence].

At [40] "In *Road Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HCA 42, the Court emphasised the importance of proper identification of the risk of harm in any negligence pleading. It has been said that in some respects s 5B of the Civil Liability Act merely represents a restatement of common law principles," Cavanagh J said.

"In my view it is always appropriate for a plaintiff to properly plead all of the aspects of negligence which include matters relating to foreseeability and risk of harm. In doing so the plaintiff has not filed a materially different proposed statement of claim. The plaintiff has merely filed a better and more proper form of pleading.

"Section 318 of the Workplace Injury Act does not require the plaintiff to file a statement of claim which is identical to the one which was filed as part of the pre-filing process. It just cannot be materially different. Indeed, it should be incumbent upon a plaintiff to ensure that a statement of claim filed in this Court is properly pleaded, albeit — as required by s 318 — not materially different from the proposed statement of claim served with the pre-filing process," [42].

"It may be that the pleader thought it appropriate to adopt the words used in s 5B of the Civil Liability Act and it may be that the second defendant viewed those paragraphs as making reference to the Civil Liability Act because they appear to come directly from s 5B and there is some reference to that Act in the correspondence. However, there is no reference to the Civil Liability Act in those paragraphs and, as indicated by Mr Sleight, the paragraphs are intended to reflect a proper pleading with reference to material facts and

those matters which should always be pleaded in a negligence action. They do not create any material difference for the purposes of s 318 of the Workplace Injury Act," [43].

Motion dismissed with costs.

Applicant employer 2D: Mr P Rickard ins Stiles Lawyers. Plaintiff: Mr J Sleight ins David Legal. 1D occupier: Mr B Jones ins McMahons.

AMS, MAP vitiated on causation

Bosch v McCain Foods (Australia) Pty Ltd [2019] NSWSC 1390. Simpson AJ. 15.10.19.

Simpson AJ quashed and remitted an AMS determination and consequent medical appeal panel for failure to determine causation reasonably.

"From about 2005 the plaintiff was employed by McCain Foods as a production worker. On 24 March 2015, in the course of her employment, she lifted a box of pies and experienced sudden severe back pain as well as painful symptoms in her pelvic region. She was referred by her general practitioner to Dr Jane Manning, a urogynaecologist. Dr Manning diagnosed vaginal prolapse and bladder hypersensitivity. She advised the plaintiff that she could undergo repair, or could combine the repair with hysterectomy. The latter course, Dr Manning advised, would give a better operative result and reduce the risk of recurrence. Thereafter, Dr Manning provided a number of reports to the plaintiff, to her solicitors, to her general practitioner, and to EML," her Honour noted [21].

At [80] "It is well established that causation is a question of fact: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12; *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463.

"It would be simplistic and wrong, however, to say, on the formula of *Haroun*, *Bindah* and other cases, that question of the cause of a medical condition fall outside the ambit of the medical assessment procedure provided by Ch 7, Pt 7 of the WIM Act. A number of decisions of the Court of Appeal have held to that effect: see, for example, in addition to those already mentioned, *Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski* [2013] NSWCA 449; (2013) 12 DDCR 515. That leaves open the unattractive but real possibility of inconsistent decisions. That, indeed, is what has happened here. The Arbitrator's decision that McCain Foods (EML) pay the costs of the hysterectomy necessarily incorporated a finding that, as a result of the work injury, that surgery, including hysterectomy, was reasonably necessary. The determinations of the AMS and the Appeal Panel, on the other hand, were that the causal connection was lacking," [81].

Then, [87] "The plaintiff's case at all times was that the decision to undergo the hysterectomy resulted from her now undoubted need to undergo the vaginal repair surgery. Dr Manning's reports and advice constituted **evidence of the causal connection**, to which neither the AMS nor the Appeal Panel paid adequate attention. Rather, they categorised the surgery as "elective" (which they appeared to regard as decisive), and considered other hypothetical reasons for the plaintiff's decision, reasons which had no basis in the evidence.

"Nowhere in the "Findings and Reasons" is there any discussion of the plaintiff's contention that the hysterectomy and consequent permanent impairment "resulted from" the work injury. The statement at [53] that the Appeal Panel was unable to accept that the need for the hysterectomy only occurred because of the compensable injury is **nothing but a conclusion**, lacking any reasoned explanation. The Appeal Panel was obliged, in the execution of its task, to grapple with the plaintiff's contentions and, if it rejected them, to explain why. The Appeal Panel made no reference, for example, to the statements attributed to Dr Manning that performing the hysterectomy would give a "better operative result" for the prolapse surgery, and that it would reduce the risk of recurrence of prolapse. Although mentioned in passing, these were significant considerations on the question of causation, warranting due attention. They were not given that due attention," Simpson AJ said [88].

"Nor did the Appeal Panel give any explanation for agreeing (at [57]) with the conclusion of the AMS that the hysterectomy was an elective procedure; nor, for concurring, at [58], with the AMS's finding (based on his medical knowledge and judgment) that the hysterectomy was not the result of the work injury," [89].

"In noting that no recommendation had been

made by Dr Manning in her 21 March 2016 report, the Appeal Panel distracted itself from the 2 September 2015 report, which did make such a recommendation.

"The consequence is that there was a constructive failure on the part of the Appeal Panel to exercise the jurisdiction conferred. It may also be said that the **speculation** about alternative possible reasons for the plaintiff's decision constituted a denial of procedural fairness.

"The plaintiff has therefore succeeded in establishing **jurisdictional error**. I am also satisfied that the reasons of the Appeal Panel were inadequate, constituting error or law on the face of the record (*Wingfoot*)," her Honour said [92].

Declared MAC "vitiated by jurisdictional error", the appeal panel decision "vitiated by jurisdictional error and error of law on the face of the record", the latter quashed, remitted the worker's medical appeal, EML to pay costs.

P: D J Hooke SC, E Grotte ins Santone Lawyers. D: P Perry ins Hicksons.

Contrib, residual capacity findings displaced

Kabic v AAI Limited t/as GIO [2019] NSWCA 247. White JA, Meagher and McCallum JJA agreeing. 11.10.19.

The appellant was a construction formworker who slipped on a wet plywood platform without safety barriers at Redfern in 2011.

Button J - [2017] NSWSC 1281 - had found the worker one-third liable for contributory negligence, and awarded damages $452,395.18 against the site occupier, Calcono, represented by its insurer.

Here the Court of Appeal, White JA leading, allowed the worker's appeal against the contributory negligence finding, and excised the trial judge's deduction of residual earning capacity from the award for future economic loss.

To whether the platform was slippery, White JA noted liability expertise from consulting engineer Mr Ian Burn of HL Burn & Associates.

At [82] "As a general proposition, it is common experience that if a surface is wet the liquid reduces the friction on the surface, making it more slippery (*Australian Oil Refining Pty Ltd v Bourne* (1979) 54 ALJR 192 at 193-194)," White JA said.

"Without deciding the question, it may be that for a special surface such as the treated plywood in this case, which is outside common experience, expert evidence would be needed to establish that the surface, if wet, would be more slippery than it would be when dry," [83].

Such evidence was adduced via Mr Burn.

"Calcono submitted that this evidence should have been rejected because it did not satisfy the requirements of s 79 of the Evidence Act 1995 (NSW) because there was no reasoning or analysis addressing the questions of whether, as a matter of physics, the formply had a particular coefficient of dynamic friction when dry and whether that coefficient was different when wet, and if so, what that difference was," [86].

"If the question were precisely how much more slippery the formply was when wet than dry, then that objection would have had substance. But as in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [49], exactness was not required. Mr Burn had the expertise based on experience of the hazardous nature of treated formply when wet to express the opinions he did, and there was no need for greater precision," [87].

Of contributory negligence, in [110] "The act of contributory negligence, as found, was in Mr Kabic's not drawing the attention of his superiors (presumably the foreman, Mr Calautti) to the unsafe conditions in which he had been directed to work."

Then [115] "A finding of contributory negligence can only be made if it was reasonably practicable for Mr Kabic to have taken an alternative course of conduct which would have obviated the risk of injury. The primary judge acknowledged that someone in Mr Kabic's position may have been reluctant to refuse (in effect) to work. An employee is not guilty of contributory negligence by **following orders** (*Hartge v F Lassetter & Co Ltd* [1916] NSWStRp 27; (1916) 16 SR (NSW) 174 at 182-183; *Meani v Sungravure Ltd* [1964] NSWR 11 at 19; *Sungravure Pty Ltd v Meani* [1964] HCA 16; (1964) 110 CLR 24 at 33; [1964] HCA 16)," White JA said.

Further [122] "The plaintiff is not guilty of contributory negligence if his or her conduct amounts to mere inadvertence, thoughtlessness, inattention or misjudgment having regard to all of the circumstances, including whether the employee had no real choice but to adopt an unsafe system of work

(*Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; (1985) 59 ALJR 492 at 493-4; *Ghunaim v Bart* at [82]-[83]; *Boral Resources* at [59]-[60]; *McLean v Tedman* (1984) 155 CLR 306 at 315; *Pollard* at [15]-[16]; *J Blackwood & Son* at [116]; *Jurox Pty Ltd v Fullick* [2016] NSWCA 180 at [86]; *Williams v Metcash Trading Ltd* [2019] NSWCA 94 at [77]).

"I agree with Calcono's submission that this is not a case of inadvertence or inattention which has resulted from familiarity and repetition or pre-occupation with matters in hand and the need for concentration upon those matters. It is an even weaker case for finding contributory negligence. Mr Kabic was **doing what he was directed to do**. Although he acknowledged at one point in his cross-examination that if he were directed to work in what he thought was an unsafe environment, he was obliged to advise his employer or somebody else in a position of supervision or control, he gave a cogent reason for not doing so which the primary judge did not address. The finding of contributory negligence should be set aside," [123].

To **economic loss**, noted the worker's reliance on vocational psychologist and rehabilitation counsellor Mr Ross Girdler who "…expressed the opinion that regardless of his ability to sustain work, Mr Kabic's injuries would continue to prevent him from securing employment", in [141].

The respondent on appeal had conceded its onus to prove the nature of work fitness.

"The medical evidence does not establish the availability of jobs which Mr Kabic would be capable of performing or the likelihood of his securing employment in such jobs," White JA said [145].

"The primary judge did not address that question. This was an error into which the primary judge may have been misled by Calcono's submissions," [146].

"On appeal, Calcono placed reliance upon the primary judge's finding that Mr Kabic had engaged in something akin to a charade in describing his attempts to obtain employment and relied upon other adverse credit findings, including that there was a degree of malingering in his presentation, that he was not being entirely truthful about his almost lack of facility in the English language and that his evidence as to the periods he claimed he expended on housework were excessive and unreliable," [147].

His Honour detailed other experts' proofs to suitable work. Mr Girdler had opined "Regardless of his ability to sustain work, Mr Kabic's injuries will continue to prevent him from securing employment", having regard to the local labour market, and rejection of work applications.

"Once the "charade" finding is set aside, Mr Girdler's reasoning is compelling. The primary judge ought to have concluded that notwithstanding his capacity to undertake light duties, Mr Kabic was unable to secure employment of the kind identified in the rehabilitation reports and that the likely consequence of his loss of capacity to do heavy physical work is that it is unlikely that he would ever obtain any form of suitable employment on the open labour market," White JA said [165].

"The assessment of damages for **past economic loss** should be varied accordingly by excising the deduction for residual earning capacity," his Honour said [166].

To future economic loss, noted the award $144,236.10 predicated on the $600 residuum and ceasing the work at age 50.

White JA [170]: "This approach to assessing damages in relation to hypothetical and future events is inconsistent with *Malec v J C Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638 at 640 (per Brennan and Dawson JJ) and 642-643 (per Deane, Gaudron and McHugh JJ); [1990] HCA 20. Brennan and Dawson JJ cited with approval (at 640) the following passage from the judgment of Lord Diplock in *Mallett v McMonagle* [1970] AC 166

[**Lord Diplock**] "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances,

whether they are more or less than even, in the amount of damages which it awards."

White JA quoted Deane, Gaudron and McHugh JJ in *Malec* at 642-643, before referring to *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; (2005) 3 DDCR 1 at [103] and *Metro North Hospital and Health Service v Pierce* [2018] NSWCA 11 at [112]- [114], [166]-[167], [170].

Later, "Neither party provided submissions on appeal as to how a *Malec v J C Hutton Pty Ltd* approach to the assessment of damages should be applied. Whilst some percentage chance should be allowed for the prospect that Mr Kabic would be able to work as a formwork labourer past the age of 50, the application of appropriate discounts for the possibility that he would not be able to work as a formwork labourer up to the age of 50 would more than offset any additional component of damages to reflect prospects of his working as a formwork labourer after the age of 50, particularly when applying the five per cent tables to calculate the present value of assumed future income," White JA said [191].

The trial finding of unlikely to have worked as a form worker beyond 50 years of age was undisturbed.

At [202] "In summary therefore, I conclude that the plaintiff's challenge to the finding of contributory negligence should succeed and that the award of damages for past and future economic loss should be set aside by deleting the reduction of damages for residual earning capacity. The challenges to the award of damages should otherwise be dismissed," White JA said.

Appeal allowed in part, cross-appeal dismissed, directed parties to provide short minutes or, in default of agreement, each party to file and serve orders with short submissions, respondent to pay costs.

A: B J Gross QC, F Curran ins Carters Law Firm. R: M McCulloch, R Perla ins Moray & Agnew. 2XR (Workers Compensation Nominal Defendant): N Chen SC, J Lee ins HWL Ebsworth.

BACKYARD

"The concepts of occupier's liability and/or work injury damages are legal constructs and not matters about which a lay person can reasonably be expected to know," **Scotting DCJ, *Beller*, 1.11.19.**

"The incomplete quote leaves a potentially misleading impression of what is in DSM-IV as to what a diagnosing psychiatrist or here, the Panel, should take into account in considering that particular diagnosis," **Lonergan J, *Allianz*, 30.10.19.**

"The Insurer submitted that "discomfort" is not the same as "pain" and that the Proper Officer had erred in conflating the two and in failing to understand and respond to the evidence and submissions before her," **Johnson J, *Insurance Australia*, 29.10.19.**

Personal Injury Monthly NSW

Published by and © 2019 GA Publishing Mosman Sydney ABN 95 757 725 395. 4/914 Military Rd Mosman NSW 2088. Australia. DX 9306 Mosman.
Edited by Anthony Monaghan.
This edition published 29.11.19.
Subscriptions - Annual $385 incl GST (12 editions) renews $330.
Subscribe on line, please see www.gapublishing.com.au, or by cheque to GA Publishing, mail 4/914 Military Rd Mosman NSW 2088 Australia, or DX 9306 Mosman. Receipt/tax invoice, by return, and editions thereafter.