Paper for Claims Assessors of the Motor Accidents Authority of NSW

A paper delivered by Mark Robinson SC to a MAA Claims Assessors' Conference held in Sydney on 15 October 2014

I am asked to speak to you today about administrative law challenges to decisions of the Claims Assessment and Resolution Service (CARS) of the Motor Accidents Authority of New South Wales (MAA).

As you know, the *Motor Accidents Compensation Act 1999* (NSW) ("the Act") does not provide for an "appeal" from these decisions. Furthermore, there is no provision in the Act for internal or external review, say in a tribunal such as the New South Wales Civil and Administrative Tribunal (NCAT).

The only way to set these decisions aside is to seek to quash them by judicial review in the Supreme Court of NSW. This invokes the Supreme Court's judicial review (or supervisory) jurisdiction derived from section 69 of the *Supreme Court Act 1970* (NSW). The section provides for the making of orders "in the nature of" the former prerogative writs, such as the former *writ of certiorari*. This jurisdiction is important as it enables the judicial supervision of executive and administrative decision making in New South Wales. It is constitutionally recognised and protected by section 73 of the *Commonwealth Constitution* [*Kirk v Industrial Court of NSW* (2010) 239 CLR 531; "The Centrality of Jurisdictional Error", Hon JJ Spigelman AC (2010) 21 Public Law Review 77].

I will not speak today about the content and mechanics of judicial review proceedings in New South Wales or about the grounds of judicial review. Today, I will give you a brief outline of some recent decisions of the Supreme Court that demonstrate judicial review in action in CARS motor accident cases in the MAA.

CARS Assessors or Claims Assessors

As you know, there is no "*appeal*" or review of claims assessors decisions provided in the

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

The Principal Claims Assessor is appointed by the Minister and must be an Australian lawyer. She is important, thus the Act provides for her to have capital letters in her title, unlike claims assessors, who do not. Section 105 provides that a claims assessor is, in the exercise of his or her functions, "*subject to the general control and direction of the Principal Claims Assessor*". But the PCA is not empowered to overrule or interfere with any decision of a claims assessor "*that affects the interests of the parties to an assessment in respect of any such assessment*" [s105(3)].

There are two main types of judicial review challenges here:

1. challenges to the assessment of monetary damages (ss 94 & 95); and

2. challenges to a decision to grant the parties exemption from having to go to a claims assessment at all (and to thereby be permitted to go straight to a court). Exemption can be "*mandatory*" (section 92(1)(a)) or "*discretionary*" (section 92(1)(b)). Extensive guidelines are set out in the Claims Assessment Guidelines.

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

One unexpected matter that recently came up was *Bastick v Allianz Australia Insurance Limited* (2014) 67 MVR 143; [2014] NSWSC 887 (Hulme AJ). There, the claims assessor (Alan Cowley) made his award on damages and sent his certificate of assessment to the parties. Within the relevant period for acceptance of the award by the claimant in section 95(2)(b) of the Act, the claimant sent acceptance of the CARS award by way of a letter to the MAA. By oversight, no corresponding letter was sent to the insurer or its solicitors. The 21 day period then lapsed. The insurer was requested to pay and it refused. The claimant commenced Supreme Court proceedings seeking declarations that the insurer was liable to

pay. Notwithstanding that the Claims Assessment Guidelines and clause 18.8 provides plainly that the method by which a party to an assessment exceptional rejects an assessment under section 95 is to notify the other party in writing of the acceptance or rejection, the court found that notification to the MAA alone was sufficient notice for the purposes of section 95 of the Act. The court held (at [19]) that the claimant's decision must be communicated to someone. That communication must be to someone having an interest in hearing of the acceptance or, possibly, being involved in the assessment. Communication to the insurer would be regarded by the court as "adequate communication". The court's decision was based on the terms of section 95(2) which did not contain any specification or limit as to how acceptance is to occur and does not specifically say that acceptance should be effected by notice to the insurer. The court considered that the guideline was not "mandatory" such that breach of which nullified the acceptance of the award by the claimant (at [28]). Accordingly, the court made declarations that the claim was accepted and that the insurer was liable to pay the claimant the assessed damages.

There is another matter coming up soon to be heard in the Supreme Court where the claimant's solicitors failed to notify anyone of the claimant's instructions to accept the award of damages. It just sat there in the in tray unsent. The matter will be heard within the next few months.

The Exemption Cases

In *Allianz Australia Insurance Ltd v Tarabay* (2013) 62 MVR 537; [2013] NSWSC 141 (Rothman J), a claims assessor made a decision to refuse the insurer's exemption application. The Supreme Court set it aside. It was a case where the insurer made numerous claims that the plaintiff had made a "*false or misleading statement in a material particular in relation to the injuries, loss or damage sustained by the plaintiff in the accident giving rise to the claim*" [Claims Assessment Guidelines, clause 14.16.11].

The Court considered the claims were so serious that they should have been styled "*fraud*" claims. The claims were well documented and the plaintiff did not have a satisfactory explanation for them. The claims were in short (at [12] to [17]) the plaintiff, a mechanic, had (or participated in) lodging:

- A false PAYG payment for $52,832 in support of past economic loss from a truck repair company;

- He said he had been employed by a smash repair company for 8 months, but his tax return showed no earnings there at all;

- He lied on his resume about how long he had worked there;

- He said he worked for Ultratune and he told his solicitors he never worked for Ultratune. Ultratune then sent a letter saying he did work for Ultratune at Fairfield but a virus ate their computer. Co-incidentally, the sole secretary/ director/ shareholder of Ultratune at Fairfield was the plaintiff's brother.

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

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

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

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

It said [at 66 and 67]:

> *"[It] was an interlocutory proceeding in which the task of Allianz was not to*

> *prove the fraud alleged but to satisfy the Assessor, on the basis of an allegation, reasonably put, of fraud so that the matter was not one that should be heard in a CARS assessment.*
>
> *The Assessor asked herself the wrong question and answered it. In doing so she has reached a concluded view as to the substance of the matter alleged, without having heard the parties in full on the issue. In so doing, the Assessor has issued a decision vitiated by jurisdictional error and error of law on the face of the record":* [*Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [82]."

The Court set the decision aside and referred the matter to a different claims assessor (because the insurer has alleged apprehended bias in the case as well, which was not found by the Court).

Tarabay was applied in *NRMA Insurance v Banos* (2013) 65 MVR 312; [2013] NSWSC 1519 (Campbell J) (18 October 2013). There, the insurer challenged claims assessor (Elyse White) on her adverse decision on a discretionary exemption application, s 92((1)(b). The court held that the wrong test had been applied. There were false and misleading claims alleged, similar to *Tarabay*. The exemption decision was set aside.

Challenges to Awards of Damages - Assessments

In *Pham v NRMA* (2014) 66 MVR 152; [2014] NSWCA 22 (Macfarlan & Leeming JJA, Tobias AJA) (19 February 2014) the Court of Appeal considered the case of a dry cleaner who had operated his business for many years. It was about to close (due to the shopping centre requirements) and he had obtained a new lease in a different suburb. Then he was involved in a motor vehicle accident and hurt badly, such that he was held by a claims assessor to have no residual earning capacity. It was disclosed at the CARS hearing that the claimant had been living off his non-taxed and non-declared income for many years. He paid his house off from these earnings and sent his children to private schools. His taxable income was a few thousand dollars every year.

The claims assessor wanted to assist and came up with an idea, unsupported by the facts, that he should have the earnings of an employed dry cleaner. Justice Hall at first instance, in

NRMA Insurance Limited v Pham (2013) 63 MVR 326, held that the claims assessor's decision was invalid in that jurisdictional error was made out. The Court of Appeal held that the claims assessor simply had to do the best she could do with incomplete information and set aside the primary judge's decision. It held (at [14]):

> "The evidence before the Assessor was limited but, in accordance with well-established authority, she had to do the best she could to estimate Mr Pham's loss (see for example *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54; 174 CLR 64 at 83; *State of New South Wales v Moss* [2000] NSWCA 133; 54 NSWLR 536 at [71]-[72])."

At the conclusion of the judgment, as one of the orders made, the SC Registrar was directed to refer the judgment to the Commissioner of Taxation for his consideration.

In *RACQ Insurance Ltd v Motor Accidents Authority of NSW (No 2)* [2014] NSWSC 1126 (Campbell J) an insurer challenged the validity a claims assessor's award (assessor Buckley). The total award was $656,033.06. However, only the award as to non-economic loss was in issue in the proceedings. That was $240,000.

It was contended that the assessor fell into legal error when dealing with the claimant's life expectancy. The claimant was 72 years of age as at the date of the accident and 77 years of age as at the date of his assessment. Statistically, her remaining expected life was 13.3 years. However there was a dispute between the experts about how long she might last. The insurer's expert estimated she was unlikely to survive 7 to 9 years. The assessor preferred the views of the claimant's doctor, who said that her life expectancy had not been reduced. Also, the claims assessor rejected Court of Appeal authority on the significance of the age factor in the total equation (*Reece v Reece* (1994) 19 MVR 103).

The court held that the claims assessor was entitled to choose between medical experts on life expectancy and that the general approach to determining life expectancy was lawful and not in any way unreasonable or unjustifiable. As for damages for noneconomic loss, the court held that a claims assessor was required to adopt the common law's methodology for the assessment of such damages and that no error had been established. The court applied what has been stated by Justice Dixon (in *Watson's case*) that the common law approach to the

assessment of general damages applicable here is:

> "The standards by which the amount of general damages is to be fixed are indefinite and uncertain, and to estimate the sum to be awarded involves the exercise of a form of discretionary judgment".

It was also contended in the proceedings that the decision was bad because the reasons were inadequate and that it was afflicted by manifest unreasonableness. Both of these grounds of judicial review were rejected by the court.

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

1. *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302; (2012) 60 MVR 194; [2012] NSWCA 13 (McColl, Basten and Macfarlan JJA)(16 February 2012) – s 126 buffers, reasons;

2. *Allianz Australia Insurance Ltd v Cervantes* (2012) 61 MVR 443; [2012] NSWCA 244 (McColl, Basten and Macfarlan JJA)(8 August 2012) – s 126 buffers; and

3. *Allianz Australia Insurance Ltd v Sprod* (2012) 81 NSWLR 626; (2011) 59 MVR 250; [2012] NSWCA 281 – s126 economic loss (Campbell, Barrett JJA and Sackville AJA).

***Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302**

This was an appeal from a decision of Justice Hislop. It concerned the legal validity of a claims assessor's award of future economic loss by way of a "*buffer*". The amount of the buffer awarded to the plaintiff was $200,000 plus $22,000 for superannuation. This was a significant amount and the insurer did not accept that it was lawful in the circumstances. After testing in the Supreme Court of New South Wales, the insurer was not happy with the Supreme Court decision which was not very well reasoned and was unconvincing. It was also very "*light on*" in the parts that mattered. Accordingly, it appealed to the Court of Appeal.

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

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

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

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

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

In order to prove the ground of judicial review of error of law on the face of the record, the "*record*" has been held to be very narrow, limited to the instrument or page that actually records the decision or orders [*Craig v State of South Australia* (1995)184 CLR 163]. That decision was in part overturned in NSW by amendments to section 69 of the *Supreme Court Act 1970* (NSW). It now provides that "*the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination*" [s 69(4)]. The court of appeal stated (at [17]) that:

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

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

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

The Court of Appeal said (at [18]) that, for the purposes of evidence, these considerations require an applicant *"... to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record*." As explained by Tate JA in *Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; 208 A Crim R 122 at [25], a case apparently not involving an allegation of jurisdictional error:

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

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

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

Economic Loss and Buffers

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

Alternatively, it was contended that the claims assessor did not provide adequate reasons for his decision. The Court did not agree. This occurred in the context of an increasing number of damages determinations of claims assessors of substantial sums determined by way of buffers (*Kerr* at [5]). Justice Basten wrote primary decision with which the two other judges largely agreed. Section 126 of the Act provides:

126 Future economic loss—plaintiff's prospects and adjustments

(1) A court cannot make an award of damages for future economic loss unless the plaintiff first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the plaintiff's most likely future circumstances but for the injury.

(2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.

(3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentages by which damages were adjusted."

Justice McColl considered that it was appropriate for a claims assessor to award a buffer when the impact of the injury upon the economic benefit from exercising earning incapacity after injury is:

> "*difficult to determine*" (at [6]). Also, (citing Mason P in *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [2]) a buffer is appropriate where there is "*a smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future.*"

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

- "difficult to assess" and
- "necessarily impressionistic"

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

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

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

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

Justice Macfarlan made remarks concerning the buffer for future economic loss awarded by the claims assessor. He held (at [67]) a buffer may be awarded:

> "*to compensate an injured person for the possibility that he or she may suffer economic loss in the future as a result of a loss of capacity to earn income*".

He cited the principle cited by McColl JA above from Mason P about a buffer being appropriate where there is "*a smallish risk*" of relevant loss "*at some distant time in the future*".

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

His Honour also said (at [71]):

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

He said the outcomes of those cases would be different, namely, the awards would be struck

down by the Court as unlawful. He also said (at [72]):

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

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

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

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

He set out the primary assumptions that would constitute the minimum content of section 126 (at [31]) and held that "*most*" of those factors were discussed by the claims assessor below (at [32]). His Honour did <u>not</u> find those findings or factors were contained under the claims assessor's heading "*future economic loss*". His Honour found those factors throughout the entire reasons for decision including from the statement of issues and in the background notations and in the summary of medical evidence (see at [33]). His Honour held that all these things need to be read together in order to determine whether or not section 126 was complied with. On the appeal, it was held the buffer was appropriately explained within the terms of the Act.

Adequacy of Reasons as a Ground of Judicial Review

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

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

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

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

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

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

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

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

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

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

His Honour considered that the "*extreme difficulty*" of calculating future economic loss in the claims assessment on appeal justified the assessor making an award by way of a buffer.

The appellant insurer had two points other than the buffer point that it wished to agitate in the

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

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

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

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

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

***Allianz Australia Insurance Ltd v Sprod* (2012) 81 NSWLR 626**

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

> **Future economic loss.**
>
> 40. The Plaintiff is concerned about the possibility of losing his job. He explained that he is the only light duties worker in the area of the factory where he works. He is concerned that a pallet system will be introduced at work. This will leave very little for him to do and, I infer, increase his chances of losing his job. The Plaintiff explained to me in answer to Ms Allan's questions that fork lift driving is not a full time job. Workers driving forklifts have to do physical tasks as well.
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> 41. I am satisfied that there is a chance of the Plaintiff losing his present job, despite his benevolent employer and that he will then be at a disadvantage on the open labour market. His lifting restriction will make it difficult to obtain a manual job, which is all he has ever done.
>
> 42. Bearing in mind the Plaintiff's present high earnings I am satisfied that it is appropriate to allow $250.00 net per week for future economic loss. The calculation is $250.00 x 632 (18.3 years) x .85 = $134,300.00.
>
> 43. Future superannuation at 11% is $14,773.00."

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

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

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

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

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

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

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

> [26] The underlying principle is that the plaintiff should have a sum by way of damages for the difference between earning capacity as it would have been in the absence of the injury and the earning capacity as it is following the injury. Both elements involve uncertainty and conjecture and, therefore, require that assumptions be made, albeit assumptions shaped by the available evidence. The assumptions cover, among other things, remaining expectancy of working life, the impact of the injury on that expectation, the extent to which the ability to function will be curtailed and the earnings that work according to the reduced ability will produce, together with assumptions regarding discounted present value and investment returns and as to vicissitudes or adverse contingencies. Because of s 126(1), ***an assessor has a duty to form an opinion*** that the assumptions to be applied in relation to such matters going to future earning capacity "*accord with the plaintiff's most likely future circumstances but for the injury*".
>
> [27] ***The duty*** under s 126(1) to be satisfied that the adopted assumptions accord with the most likely future circumstances but for the injury ***is supplemented by the*** s 126(3) ***duty to articulate the assumption*** on which the award is based. This, as has been said in this Court more than once, is to ensure transparency and, at the same time, to inject an element of rigor or method that may be overlooked or simply abandoned if the statutory system did not insist on the identification and articulation of the assumptions employed." (my emphasis)

It was held in the present case that the claims assessor had failed to "*engage with and perform the tasks prescribed by s 126*" (at [37]). Once the claims assessor engaged upon a process of

calculation, the section 126 duties became apparent and he was obliged to state his assumptions as set out in the Act. Some of the matters identified by the Court that were wrongfully omitted here were:

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

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

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

Thank you