Challenging CARS Awards - Judicial review of decisions of claims assessors of the Motor Accidents Authority of NSW

A paper delivered by Mark Robinson SC to a Holman Webb conference held in Sydney on 29 October 2012

I am asked to speak to you today about challenging CARS awards, awards made by claims assessors of the Motor Accidents Authority of NSW. In fact, I was asked to speak on "*appealing*" CARS awards, but that would be lead to a very short talk indeed. As you all know, there is no "*appeal*" of claims assessors decisions provided for in the *Motor Accidents Compensation Act 1999 (NSW)*("the Act").

Accordingly, the only thing to do, when a claimant is sufficiently happy to accept his or her awarded sum of damages within the statutory period of 21 days (s 95(2)) is to write a cheque and deliver it, or seek to challenge the legality of the CARS decision in the Administrative Law list of the Common Law Division of the Supreme Court of NSW.

These are the usual options.

One possible option is for an insurer to rely on the fact that the insurer has not yet admitted liability due to service of an actual or "*deemed*" section 81 notice of liability (or fault or contributory negligence or whatever) and accordingly, contend that any CARS award is not binding in the particular case. An insurer has to set up this option carefully and well in advance for it to operate effectively. I shall speak about this in my talk.

I will speak about some recent challenges to CARS awards, such as:

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

2 *Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244 (McColl, Basten and Macfarlan JJA)(8 August 2012) – s 126 buffers – insurer not successful; and,

3 *Allianz Australia Insurance Ltd v Sprod* [2012] NSWCA 281 (Campbell, Barrett JJA and Sackville AJA).

As to the section 81 Notice issue I mentioned, I shall speak about a case I recently argued before Justice Rein concerning the very issue (*CIC Allianz Insurance Limited v Smalley*). We are waiting to see what he does.

I should first take a moment to discuss with you the legal context in which these challenges happened – the administrative law context.

Administrative Law in NSW

The wide range and scope of administrative law process and remedies should be first identified. Administrative law in New South Wales relates to or concerns the following things:

1. ***Self-help*** remedies or processes that might be invoked by aggrieved persons or entities from time to time (be they personal, political, fair or unfair, lawful or not). It can be as simple as picking up the telephone and speaking to the administrator who made the impugned decision or a letter-writing campaign.

2. ***Internal Review*** - where there is provision (usually in the enabling Act, but not necessarily so) for a person superior in employment status to the original administrative decision-maker to look at and re-make the subject decision (usually afresh).

3. ***Need the Documents? - Freedom of Information*** (now under *Government Information (Public Access) Act 2009* (NSW) - decisions are subject to merits appeals to the Information Commissioner and then to the Administrative Decisions Tribunal of NSW ("**ADT**"));

4. ***Breach of Privacy? - The Privacy Commissioner***, and the ADT in administering the *Privacy and Personal Information Protection Act 1998* (NSW) – involves breach of privacy by a State government agency only; and,

5. ***Maladministration? - The Ombudsman*** - whose office investigates and reports on systemic and particular instances of maladministration and makes recommendations (which are usually accepted by the NSW Government);

6. ***Corrupt Conduct? - The Independent Commission Against Corruption***;

7. ***Ex gratia or act of grace payments*** – When someone has suffered a financial or other detriment as a result of the workings of the government. This detriment must be of a nature which cannot be remedied or compensated through recourse to legal

proceedings. Payments are discretionary in nature and it is for Ministers to determine applications – see; NSW Treasury Circular NSW TC 05/05, 29 June 2005.

8. ***External Merits Review*** - is the process of obtaining an external review of the merits of a statutory (administrative) decision by a person or entity independent of the original decision-maker, who comes to a new decision. Merits review involves making a decision "*de novo*" (meaning, literally, from the very beginning, anew). It has also been referred to as "*standing in the shoes of the decision-maker*" and concerns a "*remaking*" of the decision under review in order to come to the correct or preferable decision based on evidence now presented. The jurisdiction of the General Division of the *ADT* is a leading example of an independent, external merits review body. The leading case on the nature of external merits review is *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

9. ***Judicial Review*** - the legality of administrative decisions, including those of Ministers, Governments and Tribunals that affect rights, interests or legitimate expectations of persons or entities (it usually arises in the Supreme Court of NSW, Common Law Division, Administrative Law List - by proceedings known as "*judicial review*" of administrative action). This is usually the option of last resort for an applicant, and it is undertaken when all other options for challenge are not available. A leading NSW case concerning judicial review is *Bruce v Cole* (1998) 45 NSWLR 163.

Administrative law did not develop in a vacuum.

Much of the above is comparatively modern. However, judicial review was developed by the courts in England and Australia over 500 years and for good reason. Its purpose was to keep a check on inferior court judges and tribunals and quasi-judicial tribunals as well as to keep check on executive decision-makers so as to ensure they all acted lawfully and within the scope of their legal powers. Primary tenets of administrative law have developed over time. Overall, they are to ensure that in the making of administrative decisions, there is:

a. legality (judicial review and merits);
b. fairness; (judicial review and merits)
c. participation (merits);
d. accountability; (merits)
e. consistency; (merits)
f. rationality; (judicial review and merits)
g. proportionality (judicial review and merits); and,
f. impartiality (judicial review and merits).

The usual aim of an **external merits review** process in a tribunal is to provide the review

applicant with a correct or preferable administrative decision, while at the same time, improving quality and consistency in relation to the making of decisions of that kind. It is an aid to good public administration.

The primary aim of **judicial review** in the court is to ensure (and to some extent, enforce) legality, namely the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

The fundamental distinction between the two is known as the "*legality/merits distinction*".

This must be born in mind at all times in this area.

Judicial Review

Early identification of the most appropriate ground or grounds of judicial review is the key to success in this area, providing you have also sought the appropriate remedy and the discretionary factors do not work against you. The discretionary factors are these. A remedy will not normally be granted (on the finding of a legal error or defect) if:

- a more convenient and satisfactory remedy exists (such as a merits appeal to the ADT);
- no useful result could ensue (futility);
- the applicant has been guilty of unwarrantable delay, or,
- if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made[1]; also;
- an applicant should not have acquiesced in the conduct of proceedings known to be defective. An applicant cannot "*sleep on their rights*" - they should make an election to challenge or no longer participate in the executive of court-like process below.[2]

1 See the discussion of the discretion and the relevant cases at *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [91]-[92] per Kirby J.
2 Aronson and Dyer and Groves Judicial Review of Administrative Action, 4th edition, 2009, Law Book Co, Sydney at [12.175]. cf: *Rodger v De Gelder* (2011) 58 MVR 23; [2011] NSWCA 97 (Beazley, McColl and Macfarlan JJA)

Jurisdictional Error and the Grounds of Judicial Review

Ordinarily, judicial review remedies (orders in the nature of the prerogative writs, certiorari, prohibition and mandamus and injunctions and declarations) are available under the *Supreme Court Act* 1970 (NSW) in the Court's exercise of its supervisory jurisdiction over State statutory decision-makers and tribunals.

Establishing a ground of judicial review is all that is ordinarily required in order to move the Court for a remedy (which in judicial review, as we have seen, is discretionary in most cases – possibly except for denials of natural justice – see: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at [80] (per McHugh, with Kirby J agreeing)).

Examples of jurisdictional errors of State tribunals and executive decision-makers include them:

- identifying a wrong issue;
- asking a wrong question;
- ignoring relevant material;
- relying on irrelevant material; or
- an incorrect interpretation and/or application to the facts of the applicable law,

in a way that affects the exercise of power (see: *Craig v State of South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]; and *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at [60] to [70].

Jurisdictional errors that may be committed by a tribunal or executive body (post *Craig's case*) that will always be corrected by a Superior Court (as extended by the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [61]-[63]) can also be discussed as follows:

- The definition of "*jurisdictional error*" in *Craig's case*, is not exhaustive (*Kirk's* case also held this at [60] to [70]).

- Those different kinds of error may well overlap.

- The circumstances of a particular case may permit more than one characterisation of the error identified, for example,

- as the decision-maker both asking the wrong question, and
- ignoring relevant material.

Further, doing the above results in the decision-maker exceeding the authority or powers given by the relevant statute (*ie*: committing a "*jurisdictional error*"). In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made. He or she did not have jurisdiction to make it - *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 esp at [51] to [53].

Denials of natural justice or breaches of the rules of procedural fairness almost invariably result in a jurisdictional error - *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83]; *Refugee Review Tribunal, Re; Ex parte Aala* (2000) 204 CLR 82; and, *Minister for Immigration and Multicultural Affairs, Re; Ex parte Miah* (2001) 206 CLR 57.

The remaining traditional grounds of judicial review (in addition to denials of natural justice or breaches of procedural fairness – including bias and apprehended bias) in respect of tribunals and executive decision-makers include:

1 Errors of law (including identifying a wrong issue; making an erroneous finding; and reaching a mistaken conclusion).
2 improper purpose;
3 bad faith;
4 irrelevant/relevant considerations;
5 *duty to inquire* (in very limited circumstances);
6 acting under dictation;
7 unreasonableness;
8 *proportionality* (not presently available);
9 no evidence;
10 *uncertainty*;
11 inflexible application of a policy (without regard to the individual merits of the application);
12 manifest irrationality or illogicality;
13 failure to afford a "*proper, genuine and realistic consideration*" of material; and,
14 *failure to provide reasons or adequate reasons where reasons are required to be provided as part of the decision-maker's power.*

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

(claims assessor Allan Cowley)

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

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

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

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

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

> The first is the "*clear distinction*" still drawn under the general law between "*want of jurisdiction and the manner of its exercise*": *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 – see, *Craig v State of South Australia* [1995] HCA 58; 184 CLR 163. That decision was in part overturned in NSW by amendments to section 69 of the *Supreme Court Act 1970*(NSW). It now provides that "*the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination*": s 69(4). The court of appeal stated (at [17]) that:

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

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

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

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

> "… to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record. As explained by Tate JA in *Easwaralingam v Director of Public Prosecutions (Vic)* [2010] VSCA 353; 208 A Crim R 122 at [25], a case apparently not involving an allegation of jurisdictional error:
>
> > "[A]n application for certiorari is not the same as a general appeal for error of law, most importantly, because it falls to be determined on the basis of different material. An application for certiorari does not invite a scouring of all the evidence before the inferior court to determine whether the proper inferences were drawn from it or whether an item of evidence was overlooked."

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

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

Economic Loss and Buffers

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

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

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

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

Section 126 of the Act provides:

> "126 **Future economic loss—claimant's prospects and adjustments**
>
> (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
>
> (2) When a court determines the amount of any such award of damages it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events concerned might have occurred but for the injury.
>
> (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

Justice McColl considered that it was appropriate for a claims assessor to award a buffer when the impact of the injury upon the economic benefit from exercising earning incapacity after injury is "*difficult to determine*" (at [6]). Also, (citing Mason P in *Leichhardt Municipal Council v Montgomery* [2005] NSWCA 432 at [2]) a buffer is appropriate where there is "*a smallish risk that otherwise secure employment prospects may come to an end, in consequence of the tort-related injury, at some distant time in the future.*"

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

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

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

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

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

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

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

Mcfarlan JA held that (at [70]) if the claims assessor had calculated a buffer figure by "*allowing a notional sum for each year of the remainder of the claimant's working life, he*

should have referred to that reasoning process in his reasons."

His Honour also said (at [71]):

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

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

He also said (at [72]):

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

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

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

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

He set out the primary assumptions that would constitute the minimum content of section 126 (at [31]) and held that "*most*" of those factors were discussed by the claims assessor below (at

[32]). His Honour did not find those findings or factors were contained under the claims assessor's heading "*future economic loss*". His Honour found those factors throughout the entire reasons for decision including from the statement of issues and in the background notations and in the summary of medical evidence (see at [33]). His Honour held that all these things need to be read together in order to determine whether or not section 126 was complied with.

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

Adequacy of Reasons as a Ground of Judicial Review

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

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

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

> "The purpose underlying the obligation to give reasons is in part the discipline of

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

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

***Allianz Australia Insurance Ltd v Cervantes* [2012] NSWCA 244**
(claims assessor Tom Goudkamp)

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

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

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

In the Court of Appeal, Justices McFarlan and McColl agreed with the judgment of Justice Basten. On the question of a buffer in relation to future economic loss Justice McFarlan made some further remarks (at [51] and [52]). He said that on his view of the case it was difficult "*if not impossible*" to precisely calculate future economic loss for the specialist

doctor. Her injuries, which were sustained while she was a passenger while test driving a red Ferrari she was intending to purchase, restricted her ability to engage in public and private practice as a nephrologist. The income she would have earned from these various activities, had she not been insured, would have varied significantly "*depending on the mix of activities*". His Honour said "*precisely what that mix would have been from time to time could only be a matter of speculation*".

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

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

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

As to the second issue in *Cervantes*, the appellant insurer argued that the claims assessor unlawfully rejected an opinion of Dr Klaas Akkerman, a specialist medical expert (psychiatrist) qualified by the insurer, for the sole stated reason that he "*is the only medico to cast any doubt on the claimant's genuineness*". It was argued that this cannot constitute any

rational or lawful basis for rejecting medical evidence. Justice Basten said it could in that the error was in essence an error of fact and not one of law. It was therefore not justiciable in judicial review proceedings.

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

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

Allianz Australia Insurance Ltd v Sprod **[2012] NSWCA 281**

(claims assessor John Tancred)

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

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

> "**40. Future economic loss.** The Claimant is concerned about the possibility of losing his job. He explained that he is the only light duties worker in the area of the factory where he works. He is concerned that a pallet system will be introduced at work. This will leave very little for him to do and, I infer, increase his chances of losing his job. The Claimant explained to me in answer to Ms Allan's questions that fork lift driving is not a full time job. Workers driving forklifts have to do physical tasks as well.
> 41. I am satisfied that there is a chance of the Claimant losing his present job, despite his benevolent employer and that he will then be at a disadvantage on the open labour market. His lifting restriction will make it difficult to obtain a manual job, which is all he has ever done.
> 42. Bearing in mind the Claimant's present high earnings I am satisfied that it is appropriate to allow $250.00 net per week for future economic loss. The calculation is $250.00 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 Claimant's net income has jumped by about $16,000 to approximately $1,000 net per week."

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

In the Supreme Court, the insurer argued that there were a number of significant problems with these paragraphs. The assessor had failed to set out any real explanation or provide any real reasoning for his decision here. More importantly, he failed to make any attempt to comply with the necessary requirements of awarding damages for this head of damage pursuant to section 126 of the MAC Act. Under section 126 of the MAC Act, a claims assessor is bound to disclose certain assumptions about the claimant's most likely future circumstances but for the injury and is required to make adjustments to any amount of damages for future economic loss by reference to a "*percentage possibility*" that future events might occur.

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

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

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

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

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

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

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

1. Assessors do not have to prepare elaborate statements of reasons and explanations of assumptions.
2. They must work on the basis of facts.
3. However, an important element of the statutory scheme is the deployment of the expertise and experience of assessors as specialists. They are not meant to act as if

they were judges. Their task is only to assess the amount that "*a court would be likely to award*" as damages. The function is no more than to estimate and to predict likelihood.

4. There is a clear place for informed intuition and speculation.
5. The purpose of s 126 is to produce ***a reasonable degree of transparency*** as to assumptions and the reasons for them so that those interested in the assessment may have an insight into the way in which the task of assessment was performed.
6. The section recognises that assumptions are necessary and appropriate. It does not seek to define aspects that may or may not properly be made the subject of assumptions about future earning capacity.
7. Its aim is merely to ensure that an insight can be obtained into the ***content*** of the assumptions and the ***reasons*** for their adoption. (my emphasis)

In *Smalley v Motor Accidents Authority of New South Wales* [2012] NSWSC 1456 (Rein J)(2 November 2012) there was, among other things, a challenge to decision of the Principal Claims Assessor of the MAA (PCA) pursuant to section 92(1)(a) of the Act to exempt a matter from CARS. The claimant was the applicant.

The insurer here sent a letter denying any liability outside the 3 months of the filing of a "*late claim*" (section 72). Accordingly, there had been a "deemed" denial of liability pursuant to section 81(3) of the Act (*Gudelj v Motor Accidents Authority of New South Wales* (2011) 58 MVR 342; [2011] NSWCA 158 (Giles and Hodgson JJA and Handley AJA)). Claims assessor Helen Wall had recently determined that the late claim would be accepted by the MAA. This has been opposed by the insurer.

The first letter dated 24 January 2011 said, *inter alia*, as to the late claim determination:

> "… this assessment and the Certificate is not binding on the Insurer. The Insurer maintains this claim may not be made pursuant to Section 73 of the MACA.
>
> Because the Insurer maintains this claim may not be made, the Insurer is not required to admit or deny liability for the claim pursuant to Section 81(1), and will not do so. The fact that the Insurer declines to give written notice to the claimant pursuant to Section 81(1) is not to be taken as a denial of liability pursuant to Section 81(3).

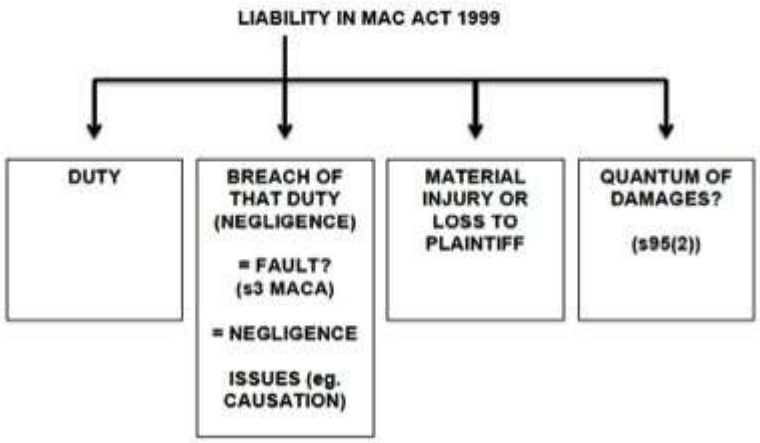
> The Insurer does not accept any liability for this claim regardless of whether the matter proceeds to assessment under Section 94 of the MACA. The Insurer will not regard any assessment under Section 94 as binding on the Insurer.

The insurer sent a second letter dated 21 September 2011 which was headed "*Section 81 Notice*" and it referred to the first letter said that "*liability*" was still not admitted and it also said the insurer now accepted that "*the accident occurred due to the fault of the insured driver*".

The claimant argued before Justice Rein that this constituted an admission of liability which was prohibited by section 81, properly construed. It was argued that there is no room in the Act for partial admissions to be made (such as fault) after the three month mark has passed (even for a late claim – post *Gudelj* in the Court of Appeal).

The insurer successfully argued that the second letter was a lawful section 81 notice and it operated as partial admission of liability which was plainly compliant with section 81(4) of the Act. The insurer prepared a flow-chart of the various possible meanings of the words "*liability*" and "*fault*" it was handed up and relied on by the Court at the hearing.

The PCA's decision was upheld and the matter has gone on appeal to the Court of Appeal.



Future Case

Keep a look out for a decision of Justice Peter Hall in *NRMA Insurance Limited v Thang Van Pham* Supreme Court of NSW, Common Law Division, Administrative Law List No 178122 of 2012, Solicitor, Ms Tain Moxham of Holman Webb.

It was a challenge to an assessment of claims assessor Elyse White. It was heard on 5 October 2012. The claims assessor determined economic loss both past and future in the award. She awarded $166,780 for past loss and $311,376 for future loss. She failed to set out crucial assumptions regarding the particular claimant, the owner of a dry cleaning business. The evidence was that the claimant had spent years in the black economy and had earned very little for the taxman. Also, notwithstanding that he was capable of working after the accident, he had given plain evidence that he would not work (and would not have worked) as an employed laundry worker in the future at <u>any</u> time, he would only work for himself in a business – the claims assessor determined he should be awarded future loss calculated as the average weekly net earnings of an employed laundry worker from the time of the accident at $773 per week to age 65. The claims assessor's assumptions and her compliance with section 126 of the Act is at issue in the case.

Thank you