Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

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Supreme Court of NSW Decisions

Judicial review of MAP's decision dismissing an appeal - MAP failed to address an application to admit fresh evidence - operation of s 328 WIMA – MAP's decision quashed & matter remitted to a differently constituted MAP

Cottom v Scone Racing Club Ltd [2023] NSWSC 779 – Schmidt AJ – 6/07/2023

This matter has a lengthy history and a Presidential decision (*Scone Race Club Limited v Cottom* [2021] NSWPICPD 33) was reported in Bulletin 103. The following summary is provided for assistance.

On 23/05/2008, the worker injured his right knee. In 2015, he claimed compensation under s 66 WCA for 20% WPI and the claim was resolved by way of a complying agreement.

In December 2017, weekly payments ceased under s 39 WCA and the worker unsuccessfully claimed WIDs. However, during those proceedings he received a copy of a report from Dr Isaacs (qualified by the employer) which assessed 41% WPI. He then filed an ARD seeking to have WPI assessed by an AMS in order to determine whether this was greater than 20% WPI.

On 10/09/2020, ***Arbitrator Young*** issued consent orders, which included an order remitting the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment of the right lower extremity (right knee, peripheral nerve damage and scarring).

The dispute was referred to Dr Burns and he issued a MAC, which assessed 20% WPI. However, before a COD was issued, the worker applied for reconsideration of the MAC under s 329(1)(b) WIMA. The appellant opposed that application, but the Arbitrator determined the dispute in favour of the worker and remitted the matter to the Registrar for referral to an AMS. He also asked the Registrar to withhold Dr Burns' MAC.

On appeal, the appellant alleged that the Arbitrator erred: (1) by misconceiving his task and in the exercise of his discretion by accepting that a referral to an occupational physician was within the Registrar's power and then concluding that the "interests of justice" favoured a reconsideration; (2) in fact by finding that the respondent "mistakenly" agreed to the assessment with Dr Burns, which finding was material and central to the Arbitrator's decision; (3) by failing to afford it procedural fairness by exercising his discretion on a basis not put to him by either party, and (4) by wrongly withholding the assessment by Dr Burns from the AMS appointed to conduct the reconsideration.

Deputy President Wood granted the appellant leave to appeal on an interlocutory matter.

The appellant sought to adduce fresh evidence in the appeal (a complete chain of emails passing between it, the worker and the PIC on 17/09/2020 regarding Dr Burns' appointment as AMS, in which it stated that the Arbitrator specifically requested an assessment by an orthopaedic surgeon).

Ultimately, Wood DP revoked the COD and remitted the matter to another Member for re-determination.

Thereafter, it appears that on 28 April 2022, ***Member Wynyard*** granted the worker leave to issue a Direction for Production to the PIC for production of the medical assessment file (relating to Dr Burns' assessment).

On 31 March 2022, ***the MAP (Member Sweeney, Dr D Dixon & Dr M Davies)*** issued a MAC, which confirmed the MAC. The MAP reported that on 18/11/2020, the worker appealed against the MAC under ss 327(3)(b), (c) and (d) WIMA. The MAP determined that it was not necessary to re-examine the worker because it could not find a demonstrable error to the application of incorrect criteria on the face of the document.

As to the issue of "*fresh evidence*", the MAP noted that the worker sought to rely upon his supplementary statement dated 16/11/2020, which asserted that he "*felt that Dr Burns would not listen*". He also alleged that Dr Burns would "*not listen to important things that I was telling him*" and that while he explained to Dr Burns that he had numbness from his "*right knee down the outside of my leg and into the top of my foot and ankle*", the doctor ignored this and only examined the inside of his leg. The worker stated:

> When I looked at his report I noticed that he had dismissed any nerve problem in my leg and feel that this is because he ignored where I was telling him where the numbness was.
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> I also told him that I get '*hot foot*' and all he said to me was '*yeah well your foot is not hot now*'.

The worker also alleged that the scar on his leg "*gets discoloured sometimes and turns a red/white blotchy colour. My scar is numb and is longer when I bend my knee*" and he complained that he did not get a "*proper assessment done by Dr Burns*".

The MAP held that the supplementary statement was of no assistance and it was unable to accept the allegation that Dr Burns ignored what he was being told during the examination, or that he did not examine aspects of the right leg, as these were inconsistent with the detailed history and examination recorded in the MAC. In particular, the MAP stated:

> 49. The above excerpts from the MAC plainly demonstrate that the appellant's argument that the MA failed to examine him in accordance with the Referral is completely bereft of any factual foundation. Similarly, there is no factual basis for the assertion that the MA failed to examine the area of the lateral leg where he was directed by the appellant. On the contrary, the MA tested the entirety of the right leg for neurological signs including sensory loss. He reported "repeated testing" of the right lower limb demonstrated loss of sensation "in the entire leg below the knee." Testing the entirety of the right limb below the knee for sensory loss must involve testing of the lateral aspect of the leg.
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> 50. Then, the appellant asserts that the finding of sensory loss below the knee on the right side is consistent with the presence of "*peripheral nerve disorder*". That flies in the face of the finding of the MA that it was not consistent with peripheral nerve disorder. The MA was at pains to point out that the sensory testing did not "*follow a peripheral nerve distribution or a nerve root distribution*".

The MAP held that Dr Burns dealt extensively with the "*neuropathic pain*" aspect of the referral and there was nothing to suggest an error on his examination. His conclusion on neuropathic pain was the only conclusion open on the basis of his clear findings. There was also no evidence that the appellant has suffered injury to a peripheral nerve in his right leg either in the incident or as a result of the subsequent surgery. Therefore, the appellant's submission on this issue had no basis in the medical evidence. The MAP stated:

> 54. …It is difficult to imagine circumstances in which the recollection of a worker recorded a month after the consultation would cast doubt on, or be preferred to, the history, complaints, and examination findings recorded by the MA. More so in this case, where the MA has explored each of these areas in detail and set out his findings with commendable clarity.

For these reasons, the MAP held that the supplementary statement was irrelevant and should not be admitted and that there was no basis for ground (2) of the appeal.

In relation to scarring, the MAP held that it was open to the MA to assess 0% WPI as there was no competing assessment for scarring before him. The MA provided reasons for his assessment, which complied with the instruction in *Wingfoot* and the appellant had not proved error on this ground.

Accordingly, the MAP confirmed the MAC.

The worker then sought judicial review by the Supreme Court of NSW and he alleged that the PIC failed to provide the MAP with his application to admit fresh evidence in March 2022, which evidenced a deterioration in his condition since the Dr Burns' assessment, and that he suffered a consequential injury to his lumbar spine.

Schmidt AJ granted the plaintiff leave to proceed out of time and noted that . The plaintiff's grounds are set out below as they are difficult to summarise:

> 1. His application to admit late documents ("AALD") dated 9 March 2022, and the submissions by the First Defendant dated 15 March 2022 created a contest on "*liability*" for the claimed consequential spine injury. Both were relevant to the consideration of the Second Defendant and in the consideration by it of the appeal. It was relevant to the disputed level of "*whole person impairment*" ("*WPI*") caused by his accepted injury. The Second Defendant, in not receiving and considering the materials, demonstrated "*practical injustice*" and "*constructive failure to exercise jurisdiction*", both of which constitute jurisdictional error (*Sleiman v Gaddalla Ply Ltd* [2021] NSWCA 236 [at 90] ("*Sleiman*") per Leeming JA [at 20]) (with whom Payne and Gleeson JA agreed).
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> 2. He was denied procedural fairness, as the letter sent to the Second Defendant on 9/03/2022 (attaching the AALD) said that if his further evidence was not to be included in the material before the MAP, he wished to provide further submissions and make oral representations. It was a clear and unambiguous claim for the worker applicant be afforded procedural fairness (see e.g *Phillips v JW Williamson and RW Williamson trading as Williamson Bros* [2016] NSWSC 1681) ("*Phillips*"). The Second Defendant failed to give the Plaintiff any such opportunity, and in its decision under review, failed to consider the material or his request. The Second Defendant, in refusing or failing to consider the materials contained in the file of the PIC, determined the entitlements of the Plaintiff in circumstances that created "*practical injustice*" and material prejudice, such that the decision demonstrates constructive failure to exercise jurisdiction, and should be quashed. *Roger v De Gelder* (2015) 71 MVR 514; ("*De Gelder*") *Phillips v RW Williamson* [2016] NSWSC 1681("*Phillips*").
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> 3. His evidence of his claimed consequential injury to the lumbar spine was that it had not reached "*maximum medical improvement*". The unchallenged evidence was that it had occurred in the period after the original MAC and the filing of the Plaintiff's original application for reconsideration and his appeal to the Second Defendant. The unchallenged evidence was that the claimed consequential injury to his spine was yet to have any definitive treatment and, inferentially, not yet capable of being assessed as it had not reached "*maximum medical improvement*". It was for those reasons, the AALD was filed. In failing consider the request for the opportunity to be heard, the Second Defendant also failed to consider the mandates of the applicable guidelines for assessment of WPI, which include consideration of the stability of the impairment. The failure to consider (or receive) the evidence demonstrates the Panel has made an error in the exercise of its delegated power. This is also a constructive failure to exercise jurisdiction, or jurisdictional error (*Phillips* [at 61-67]).
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> 4. The Second Defendant in confirming the certificate of Dr Burns of 21 October 2020 and denying the appeal, failed in its statutory duty. The record of the Second Defendant demonstrates the decision was "manifestly deficient and [did] not constitute compliance with the minimum obligation" of the Second Defendant's delegated statutory power: Vegan [at 129]; *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 [at 131; *Ryder v Sundance Bakehouse* [2015] NSWSC

526 [at 28]; *Phillips v RW Williamson* [2016] NSWSC 1681; *Allianz v Rutland* [2015] NSWCA 328; *Boyce v Allianz* [2018] NSWCA 22 [see cases cited at 112ff].

5. The Second Defendant's decision also demonstrates a material error in the exercise of the delegated power and the decision is, therefore, ultra vires: *Meeuwissen v Boden* (2010) 78 NSWLR 143 "*Meeuwissen*" [per Basten J at 148] and/or legally unreasonable: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ("*Li*") and *Marsh v Insurance Group Limited t/as NRMA Insurance Limited* [2021] NSWSC 619 ("*Marsh*").

6. The Plaintiff relies on grounds 1 -5 above to assert "*jurisdictional error*" because the Second Defendant in its decision failed to apply itself to the real question to be decided, leading to jurisdictional error. These can be properly characterised "as a purported and not real exercise of (its) statutory function in [s 323] leaving that statutory function unexercised": *Rodger v De Gelder* (2015) MVR 514, Gleeson JA (in majority) at [109]; *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 (Jordan CJ).

Her Honour identified the issues for determination as: (1) whether the MAP ever saw the plaintiff's application; (2) whether the MAP failed to deal with his application as it was required to do; (3) whether the MAP so erred in the exercise of its powers, that orders quashing its decision should be made; and (4) whether those orders should be refused, because even if the application had been dealt with by the MAP, it could not have resulted in a decision any different to that to which it came.

In relation to issue (1), her Honour noted that s 378 WIMA had permitted an application to a MAP for reconsideration where evidence of deterioration came to light after an appeal. However, s 378 had been repealed, which underscores the importance of the consideration and resolution of applications to rely upon further evidence before an appeal is determined.

Her Honour stated that in this matter, the alleged deterioration of the knee and further injury to the spine, which the plaintiff sought to advance by his application to rely on further evidence on his appeal, was advanced before the MAP made its decision. Section 328(3) WIMA provided that evidence "*that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment*".

Therefore, s 328(3) expressly provided for the plaintiff's application, so long as the documents he wished to rely on were not available or could not reasonably have been obtained before Dr Burns' assessment. If the statutory criteria were satisfied, the relevance of those documents and what they established could also be put in issue before the panel and if raised by the Race Club, would also be for it to resolve.

Given the case which the Race Club advanced in these proceedings, it would have contended that those documents were not relevant to the grounds of appeal that the plaintiff advanced. That would have been disputed by the plaintiff and would have been a matter for the MAP to resolve. Accordingly, her Honour concluded that the MAP erred because it failed to consider this application.

Her Honour stated that it was not a matter for the Supreme Court to determine what conclusion the MAP would have reached in relation to the plaintiff's application if it had been considered. However, she was satisfied that there was a prospect that it might have succeeded. Accordingly, she set aside the MAP's decision and remitted the matter for determination by a differently constituted MAP.

Judicial review – error of law on face of record – assessment of culpability for motor accident – cessation of statutory benefits – failure to apply correct legal principles – factual finding without evidence – whether finding of contributory negligence manifestly unreasonable

Allianz Australia Insurance Limited v Shuk [2023] NSWSC 788 – Basten AJ – 7/07/2023

The plaintiff sought judicial review of a decision of a member of the PIC under the *Motor Accident Injuries Act 2017 (NSW)* (MAIA). The decision concerned the level of responsibility of the first defendant, who was a pedestrian at the time she was hit by a motor vehicle that the plaintiff insured.

Basten AJ stated that as the assessment of proportionate responsibility for the accident involved an evaluative judgment, based on limited evidence as to how the accident occurred, the grounds for setting aside the decision would be quite limited.

His Honour noted that the accident occurred at around 2.45pm on 5/03/2021, at a bus stand on Smith Street, Parramatta. The claimant walked to the rear of the bus (from which she had alighted), turned left at the rear of the bus thus stepping off the kerb onto the roadway and onto what appears to have been a bus parking lane only. The road in front of her, which she intended to cross, had two-way traffic. Until she reached and traversed the rear of the bus, she would not have been able to see traffic coming on the other side of the road from her left. However, the near side lane into which she then moved involved traffic coming from her right, travelling in the same direction as the bus from which she had alighted. There is no doubt that she did not look to the right as she stepped out into the near side lane.

The security camera footage (part of the material before the member) shows the claimant walking behind the bus and stepping out onto the lane. At that point, she was looking left and not right and she clearly walked into the path of the oncoming car on her right. The CCTV footage shows the car braking vigorously and stopping on her foot, causing a significant injury to the foot and ankle.

The evidence available to the member, other than the CCTV footage, included written statements of the insured driver and 2 independent witnesses, as well as an oral statement from the bus-driver. His Honour noted that the claimant's account was only available to the Court in the form of brief references in the member's reasons (her evidence was taken at an oral hearing and, if recorded, the recording was not available to the Court).

His Honour noted conflicts in the evidence, which the member neither noted nor resolved. Both independent witnesses recounted that there were 2 buses in the inside lane, one about 3 metres behind the claimant's bus, and that the claimant walked between them. However, the CCTV footage suggested otherwise and the picture recorded on the film was clearly foreshortened in the direction of the camera. However, as the claimant walked out onto the roadway behind her bus, there is a space of some 5 or 6 metres on her right where there is no bus. Almost immediately after the accident, a bus drove into that space. Whether the second bus arrived from somewhere else or moved forward a few metres is not known. However, if the witnesses' accounts were correct, it would have been almost impossible for the insured driver to see the claimant step off the kerb and pass between the buses. On the other hand, if there were in fact no second bus on the claimant's right, the insured driver coming from the claimant's right would have had a better opportunity of seeing her before the collision.

His Honour noted that the member stated that the claimant gave evidence at the oral hearing, that as she walked towards the rear of her bus, "*she was looking in the direction from which the insured vehicle was travelling. … She said that she perceived that she had sufficient distance to be able to cross the road and walked behind the bus*". Assuming that the member accepted that evidence, which was described as "*consistent with*" the CCTV footage, there was no express finding about whether or not the claimant saw the vehicle that hit her at any point, nor whether she could have seen it. If she could have seen the vehicle, it might be inferred that the driver of the vehicle could have seen her, which would have been significant.

His Honour stated:

> 17. In my view, although the finding contradicted the evidence of the independent witnesses and of the driver, it was a finding which was open to the member based on the CCTV footage. Nevertheless, if the claimant saw the insured driver's car approaching and stepped into its path without a second glance to her right, such conduct might have formed the basis for a finding of a high level of contributory negligence, unless the approaching vehicle had accelerated unexpectedly. It will be necessary to return to that point shortly.

In relation to "*errors of law on face of record*", his Honour noted that the insurer accepted that any relevant error of law must be identified by reference to the member's reasons. The apportionment of culpability required under s 3.11 required an assessment of the fault of both the driver and the claimant and the insurer alleged that the member's reasons revealed legal error in the approach adopted in each aspect of the assessment and in the comparison, as follows.

As to the fault of the driver, the insurer argued that the member's reasoning commenced with 2 propositions (which were not challenged): (1) "*Driving requires reasonable attention to all that is happening on or near the roadway that may present a source of danger*", referring to the decision of the High Court in *Manley v Alexander*. She stated that the duty was "*amplified*" where a vehicle "*is entering a high pedestrian traffic area, where it is reasonably expected that passengers will be alighting from buses and attempting to cross the road with a view to catch[ing] connecting buses*". However, it took issue with the following passage:

> 30 It is not necessarily proof of adherence to the requisite standard of care that the insured vehicle was travelling on or under the speed limit. As the CCTV footage supports, the speed at which the insured driver was travelling was inappropriate to constitute the necessary precaution to avoid the foreseeable loss of pedestrians [sic] conducting themselves in the matter to which I have referred above….
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> 32 Indeed, she was able to stop it becoming apparent that the claimant was entering lane 2. Had the insured driver been driving at the speed at which I consider she ought to have been, consistent with the prevailing conditions I have described, she would have, in applying the brakes as she did, ultimately been able to stop in sufficient time to avoid running over the claimant's foot…
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> 34 When considering the respective culpability of the parties, I am satisfied that the responsibility for the motor accident strongly attaches to the insured driver. Likewise, on the score of causative contribution for the accident, the insured driver had the far superior means of avoiding the damage to the claimant by reducing her speed in what was an obviously built-up high pedestrian traffic area. It was the driver's conduct, in failing to drive to the prevailing conditions, that overwhelmingly contributed to the motor accident. *Had the injured driver been driving [at] an appropriate speed she would have been able to brake sufficiently so as not to collide with the claimant's foot. As the CCTV footage shows, the insured driver was able to brake, just not quickly enough to avoid the collision. If her speed had been reduced, the collision would not have occurred*. (Emphasis added.)

The insurer argued that the member did not identify the maximum speed for safe driving in the area and that this approach to the assessment of breach of duty was inconsistent with the principles stated by the High Court in *Derrick v Cheung* (*Derrick*).

In *Derrick* a motorist hit an infant who ran onto the road into the path of her vehicle. The trial judge had found that the driver was negligent, "*because a collision might have been avoided had the motorist been travelling at a lesser speed than she was*". The Court noted that, in finding for the plaintiff, the trial judge "*accepted a submission that in all of the circumstances, the appellant's speed of 45 to 50 kilometres per hour (despite being well within the prescribed speed limit) was excessive, because, his Honour said, at that speed it was beyond the power of a motorist to stop in time if a child suddenly appeared from in front of one of the parked cars*". In concluding that there was "*no basis upon which any finding of negligence on the part of the appellant could be made*" the Court stated:

> 13 Even if the inference which the trial judge drew, that if the appellant's speed had been slower by a few kilometres per hour she would have been able to avoid the collision, was more than mere speculation, it is still not an inference upon which a finding of negligence could be based. Few occurrences in human affairs, in retrospect, can be said to have been, in absolute terms, inevitable. Different conduct on the part of those involved in them almost always would have produced a different result. But the possibility of a different result is not the issue and does not represent the proper test for negligence.

Similarly, in *Mobbs v Kain* Giles JA stated:

> 2 The trial judge did not find a particular speed at which, in the exercise of reasonable care, the second appellant should have been travelling when passing the bus. He found at [69] that the second appellant drove at a speed which was excessive in the circumstances. By this I understand him to have meant the speed to which he had referred earlier in that paragraph as '*a speed which would have permitted the second defendant to stop if the plaintiff had emerged from behind the bus in the way he did*'.

Further, in a judgment with which Macfarlan JA agreed, McColl JA stated:

> 103 It is not reasonable, in my view, to require the second appellant to slow down to whatever speed would have avoided the accident. Leaving aside the high level of abstraction at which such a conclusion is expressed and its failure to address the particular risk, it is, in my view, the product of impermissible hindsight reasoning. The s 5B/Shirt inquiry requires the Court to look forward to identify what a reasonable person would have done in the circumstances, not backward to identify what would have avoided the injury ….

His Honour stated that the member's bald statements that the driver should have been going at a speed which would have allowed her to avoid hitting the claimant obscured the need to ask (i) at what distance the driver should have seen the claimant; (ii) at what speed would she necessarily have been travelling to avoid hitting the claimant, and (iii) did reasonable care for other road users require that she not exceed that speed. As is well known to those involved in motor vehicle cases, there is always a reaction time to be taken into account and a calculation based on the rate of deceleration upon applying the brakes. A vehicle travelling at 36 kph would cover 10 metres in each second. The findings of fact made by the member did not permit any calculation as to the speed which would have been the maximum speed in order to avoid the collision. If that speed were less than 40 kph, there may have been a question as to whether, even in an area where there are bus stops, reasonable care required drivers to proceed at a lower speed. It was legal error to approach the issue of the insured driver's fault by referring to an indeterminate "*appropriate*" speed, and not answering the questions identified above.

However, without a proper finding as to breach of duty, the proportionate culpability of each cannot be assessed, the insurer was correct in asserting that the member failed in a material respect to apply the correct legal principle.

As to the culpability of the claimant, his Honour found that there was a degree of ambiguity about when the claimant first observed the vehicle in front of which she walked. Although it was not possible to tell from the CCTV footage how long she took to move from the kerb to lane 2 (on the near side of which she was hit) it is unlikely to have taken more than 4 seconds. In that time, a vehicle travelling at less than 40 kph may have covered 40 metres. Even if the driver had seen the claimant at the time the claimant apparently saw the car (as she was about to step off the kerb), it does not follow that the driver was required to assume that the claimant would walk across the road in front of her.

Assuming there was some evidence about the position of the vehicle when first seen by the claimant, there was no finding as to where it was. The problem for assessing the claimant's culpability was that if she did not see the vehicle, it was because she did not look and she should have done, but if she did see the vehicle, to ignore its approach as she stepped into its lane involved a significant level of culpability. The member failed to make necessary findings of fact and in that sense was not in a position to assess the culpability of the claimant. That was to fail properly to carry out a necessary step in resolving the dispute and demonstrated legal error.

As to conducting the comparative exercise, the insurer argued that the member had commenced the exercise of comparing the respective levels of culpability of the 2 parties on a false footing. The member stated that in a motor accident case, where a vehicle strikes a pedestrian, almost inevitably, the insured driver's responsibility will be treated as more significant than a pedestrian's failure to keep a lookout; because of the former's potential to do great harm: see *Anikin v Sierra*. This involved a misapprehension of the reasoning of the High Court in that decision.

His Honour stated that the principle to be derived from *Anikin* is not that the driver's level of culpability will, almost inevitably, be greater than that of the pedestrian, but rather that each case must be assessed according to its own circumstances and in some the driver may bear no responsibility at all. He found that the principle stated in the last passage from *Anikin was* that "*the bus driver, far greater capacity to cause damage*" because the bus, and any motor vehicle are both heavy machines. However, the member did not state that and, assuming that both driver and pedestrian can see each other, and the driver is not driving at high speed, it may well be that the pedestrian has superior ability to avoid an accident.

The insurer argued that the member failed to give appropriate weight to the operation of s 5R of the *Civil Liability Act*, as discussed in *T and X and in Boral Bricks Pty Ltd v Cosmidis (No 2)*. [12] In other words, the member erred by applying some *a priori principle* that weighted the scales in favour of the claimant irrespective of the particular circumstances of the case. That challenge should also be accepted as involving legal error.

His Honour held that the member's errors of law were each sufficient set aside the decision.

His Honour also accepted the insurer's complaint that it was it was impossible to derive an inference of acceleration from the CCTV footage, as the right-hand limit of the picture is only just wide enough to allow the full length of the vehicle to appear after it stopped. It must have been decelerating for much, if not all, of the time it was visible. The inference that was then drawn, that the driver was speeding to travel through traffic lights, cannot have been available. On any view, even if the car had been accelerating, it would have been unsupported speculation.

His Honour found that this finding was significant, as if the claimant in fact looked down Smith Street and saw the vehicle approaching, which must have been before she left the kerb (after which time it is clear she did not look to the right), then the only excuse for not looking again to the right before stepping into lane 2 was that the vehicle had unexpectedly accelerated. This finding could not have been made on the evidence and it was arguably contradicted in the following paragraph of the reasons, when the member drew the inference from the CCTV footage that the insured driver "*was able to brake, just not quickly enough to avoid the collision*".

His Honour stated:

> 50. For a no evidence finding to support quashing a decision, the fact found must have been material to the outcome. There is some difficulty in being sure that the finding of acceleration was material, although it certainly provided a basis for reducing the contributory negligence of the complainant. In any event, it is not necessary to rely upon this ground in this matter.

Finally, his Honour stated, relevantly:

> 51. … In my view, applying correct principles, a finding of 25% contributory negligence was well below the bottom of any range reasonably available to the member. On the other hand, it might be contended that the member's finding was explicable on the basis of the principles of law which she applied. Where those principles have been found to involve legal error on the face of the record, it is neither necessary nor helpful to explore the basis of the further ground, which was not fully developed in the course of submissions.

Accordingly, his Honour set aside the member's decision and remitted the matter to the PIC for reconsideration by a different member.

PIC - Presidential Decisions

Appeal against Member's decision to refer a matter for further medical assessment under s 329(1)(a) WIMA – COD revoked & matter remitted to the MA for sole purpose of assessing the degree of WPI in the left shoulder (absent any consideration of the occurrence of injury).

Secretary, New South Wales Department of Education v Connolly [2023] NSWPICPD 38 – President Judge Phillips – 30/06/2023

This appeal concerned a decision made by Member Wright to allow a further medical assessment of the worker, following an application for reconsideration under s 329(1) WIMA.

The worker was employed by the appellant as a teacher. On 30/09/2009, she injured her cervical spine and left upper extremity/shoulder when a volleyball struck the left side of her head and temporal region. Injury was not disputed and the worker underwent surgery (foraminotomies at the C5/6 and C6/7 levels).

On 20/05/2020, the worker made a claim under s 66 WCA for 26% WPI based on assessments from Dr Patrick. The appellant was unable to have the worker examined due to the COVID-19 pandemic and the matter was referred to Dr Pillemer on 29/06/2021. The examination proceeded on 8/11/2021.

On 18/11/2021, Dr Pillemer issued a MAC, which assessed 20% WPI with respect to the cervical spine, 0% with respect to the left upper extremity and 1% WPI for scarring. However, as scarring was not part of the referral, he did not include it in the combined assessment of WPI.

On 14/12/2021, the worker applied for reconsideration of the MAC, on the basis that the MA erred in finding no injury to the left upper extremity, and based on his clinical findings, he was "*obligated*" to assess impairment arising as a result of scarring and occipital neuralgia, despite these not being included in the referral.

The worker acknowledged that while the assessment of 0% WPI for scarring would not have been allowed for inclusion in the referral to the MA (likewise with occipital neuralgia), she would be severely prejudiced if the MA was not able to assess these body parts in accordance with his opinion. She argued that there was no way to foresee the findings and diagnosis of the MA, and she was limited to only one assessment of permanent impairment. In the context of s 329(1) of the 1998 Act, it was argued that a Reconsideration of the MAC may be a more pragmatic approach rather than proceeding with an appeal to a MAP.

The appellant agreed that the MA erroneously found that there was no injury to the left shoulder. However, it argued that this should have no bearing on the assessment of 0% WPI noting the MA's examination findings of no pathology. It argued that the MA's omission of an assessment of impairment for scarring and/or occupational neuralgia was not an error, as these body parts were not the subject of the medical dispute.

The appellant referred to the authority in *Skates v Hills Industries Ltd* as the guiding authority that body parts subject of a referral in a medical dispute (defined in s 319 WIMA) are those which form the claim made to an insurer. The appellant submitted that at no stage was there a claim made for scarring or occipital neuralgia, and thus, in applying *Skates*, it would be impermissible for assessments to take place as they were not subject of the medical dispute. The appellant sought amendment of the MAC by removal of the MA's findings as to injury to the left shoulder, scarring and occipital neuralgia.

Member Wright heard the Reconsideration Application and issued a COD on 21/06/2022, which determined the dispute in favour of the worker. He ordered the matter to be remitted to Dr Pillemer to assess WPI in the cervical spine, the left upper extremity, scarring and occipital neuralgia.

The appellant appealed and alleged that the Member's erred as follows:

(1) in law in failing to properly apply the decision in *Skates*;

(2) in fact, in finding that the worker did not specify the precise body systems claimed;

(3) in law, in finding that occipital neuralgia and scarring formed part of the worker's claim;

(4a) in law, in finding that occipital neuralgia and scarring formed part of the 'medical dispute' between the parties;

(4b) in law, in finding that the worker could amend the claim following the amended MAC dated 18/11/2021; and

(5) in law, in finding that the grounds of the appeal were capable of being made out.

President Judge Phillips allowed the appeal.

His Honour upheld ground (1) and held that the Member erred in finding that the MAC was further evidence not available to the worker and could not have reasonably been obtained by the worker prior to the MAC. He stated, relevantly:

> 84. Contrary to the Member's acceptance that the MAC issued by the Medical Assessor was "*further evidence that was not available to the [respondent]*", it was in fact the ultimate and binding resolution of the medical dispute. The acceptance that the MAC was further evidence was an error. As Basten JA said in *Skates* at [27], the jurisdiction of the Commission in a claim for lump sum compensation is "*not at large*". The effect of the Member's reasoning is contrary to these remarks and is contrary to the binding authority of *Skates*.
>
> 85. This approach is also consistent with Deputy President Snell's remarks in *Singh*, which I have extracted above. Neither scarring nor occipital neuralgia formed part of the "*medical dispute*" notified in this matter.

His Honour upheld ground (2) and stated that, as Leeming JA stated in *Skates* at [48], "*the fundamental legal concept is a dispute*." Without a dispute there is no need for any application to the PIC. A fair reading of the worker's claim, its supporting documentation and the ARD would plainly reveal the metes and bounds of the dispute, namely WPI of the cervical spine and the left upper extremity (shoulder).

His Honour upheld ground (3) and he found that the Member erred in finding that scarring and occipital neuralgia formed part of the worker's claim.

Based on this finding, his Honour upheld grounds (4a) and (4b).

His Honour also upheld ground (5).

Accordingly, his Honour remitted the matter to Dr Pillemer to determine the degree of WPI in the cervical spine and left upper extremity/shoulder.