Bulletin

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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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1. Allen v Dux Manufacturing Limited [2022] NSWSC 158
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Supreme Court of NSW Decisions

Workers Compensation – Jurisdictional error and error of law on the face of the record

Allen v Dux Manufacturing Limited [2022] NSWSC 158 – Harrison AsJ – 23/02/2022

The plaintiff claimed compensation under s 66 *WCA* for injuries to the left lower extremity, digestive system and TEMSKI scarring and the dispute was referred to an AMS for assessment.

On 4/11/2020, Dr Crane issued a MAC, which certified 4% WPI with respect to the left lower extremity, with no deduction made under s 232 *WIMA*. However, on 1/12/2020, the plaintiff appealed against the MAC under ss 327(3)(c) and (d) *WIMA*. The appeal was referred to a MAP and the employer opposed the appeal.

The MAP conducted a preliminary review and identified error by the AMS, in placing the plaintiff in class 1 under Table 17-38 and not class 2 and with respect to his assessment of the digestive system. Dr Garvey (an AMS member of the MAP) re-examined the plaintiff and provided a report to the MAP, which assessed 10% WPI (left lower extremity), but he applied a 50% deductible under s 323 *WIMA*) and 2% WPI (digestive system). The MAP adopted his reasoning and assessment and did not provide any other reasons. It revoked the MAC and issued a fresh MAC, which assessed 7% WPI.

The plaintiff applied to the Supreme Court for judicial review of the MAP's decision, on the grounds that it disclosed error of law on the face of the record and jurisdictional error. In particular, he alleged that the MAP erred in law and made a jurisdictional error: (1) when it made a deduction pursuant to s 323 when this was not a matter that had been raised by the parties; (2) when it failed to afford him procedural fairness by deciding to make a s 323 deduction without hearing from him; (3) when it failed to give reasons for adopting the assessment of Dr Garvey; (4) when it failed to consider for itself the assessment of the degree of impairment resulting from the injury as it was required to do; (5) when it excluded the effects of a DVT diagnosed in 2017 from its assessment without considering whether there was a causal connection between the subject injury and the later occurring DVT; (6) when it excluded the DVT diagnosed in 2017 from the assessment when this had not been done by the AMS and had not been a ground of appeal; and (7) when it did not afford him procedural fairness when it decided to exclude the DVT diagnosed in 2017 from the assessment without giving him an opportunity to be heard.

Associate Justice Harrison determined the summons.

Her Honour upheld grounds (1) and (2) and held that the MAP was not entitled to raise a new matter that was not dealt with by the AMS nor raised in either party's submissions in the appeal. In adopting Dr Garvey's reasoning in relation to s 323 *WIMA*, the MAP made a jurisdictional error as it failed to properly exercise the powers conferred in the *WIMA*.

Her Honour also upheld grounds (3) and (4) and held that the MAP erred in law when it simply adopted the reasoning of a member of the MAP. This approach does not satisfy the obligations to give reasons.

Her Honour held that it was not necessary to determine grounds (5), (6) and (7) and she remitted the matter to the President for determination according to law.

Jurisdictional error — Decision by Review Panel under MACA 1999 (NSW) — Whether Panel failed to respond to a substantial argument — Whether Panel decided the matter on a basis of which the plaintiff was not given notice — Function of Panel to make a new assessment

Jarvis v Allianz Australia Insurance Ltd [2022] NSWSC 161 – McCallum JA – 24/02/2022

On 4/05/2011, the plaintiff was driving over the Grafton Bridge, when a bus ran into the back of his car. The accident occurred at low speed and caused minor damage, but it followed upon many other MVAs that the plaintiff had been in, or seen or been otherwise affected by, including an accident during a speedway race in which he was trapped upside down in a car for a lengthy period, seeing the car in flames and fearing he would drown as water used to douse the flames filled his helmet.

In this MVA, the plaintiff suffered minor physical injuries to the neck and shoulders, which quickly resolved, but he developed symptoms of PTSD. He claimed damages under the MACA 1999 (NSW) and the insurer admitted liability, but it disputed that he had suffered greater than 10% permanent impairment. That dispute was referred to a MA for assessment.

On 4/10/2019, Dr Andrews diagnosed adjustment disorder with anxiety, PTSD and major depressive disorder as a result of the MVA, and assessed 15% WPI. He considered that the plaintiff's previous multiple exposures to MVA's may have led to vulnerability to overreacting in this circumstance and, on balance, Criterion A in DSM-5 had been met. In relation to the issue of apportionment for any pre-existing impairment, he noted the absence of any pre-existing or subsequent impairment and said, "*while [Mr Jarvis] had been subject to trauma in the past, there is no evidence that this caused any condition or illness. He was fully functional and had no impairment prior to May 2011*".

The Insurer sought a review of that assessment by a RP under s 63 MACA and on 18/11/2020, the RP revoked the MA's certificate and issued a new certificate that certified permanent impairment to be not greater than 10% because there was "*nil diagnosed psychiatric disorder related to the motor accident.*" It expressed the view that the speedway race accident was an event that was consistent with Criterion A of the diagnosis of PTSD, but the Grafton Bridge accident was a minor MVA that would not fulfil that criterion. It stated:

> Having regard for the extent to which Mr Jarvis had been exposed to traumatic events, considering the nature of the subject motor accident and taking into account the multiple personal losses, the Panel formed the conclusion that the subject motor accident represented a less than negligible contributing factor to the causation of his current psychiatric presentation and was not causally related to the development of PTSD which appears to have resulted from other significant stressors in his life which pre-dated the subject accident.

The plaintiff sought judicial review of the RP's decision on seven grounds, which were distilled during the hearing to assert jurisdictional error as follows: (1) it failed to engage with his evidence or submissions before it; (2) it denied him procedural fairness by deciding the matter on a basis upon which he was not given notice; and (3) it constructively failed to exercise a statutory function in that it failed to make a new assessment of all the matters with which the assessment was concerned, and/or did not make its assessment in accordance with the Permanent Impairment Guidelines.

Justice McCallum dismissed the summons and her reasons are summarised below.

Her Honour rejected ground (1) and held that the RP dealt with the substance of the plaintiff's argument. She referred to the High Court's decision in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [46] (*Wingfoot*), that the standard required of the reasons stated by a medical panel is different, being informed by the nature of the function the panel was required to perform. The Court said at [47] (the remarks were concerned with Victorian legislation but are of equal application here):

> The function of a Medical Panel is to form and to give its own opinion on the medical question referred for its opinion. In performing that function, the Medical Panel is doubtless obliged to observe procedural fairness, so as to give an opportunity for parties to the underlying question or matter who will be affected by the opinion to supply the Medical Panel with material which may be relevant to the formation of the opinion and to make submissions to the Medical Panel on the basis of that material. The material supplied may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on a medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the function of the Panel as being either to decide a dispute or to make up its mind by reference to competing contentions or competing medical opinions. The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

The High Court concluded, in that context, that the standard required of the statement of written reasons to be provided by the Medical Panel under the Victorian legislation is that they "*must explain the actual process of reasoning by which the Medical Panel in fact formed its opinion and must do so in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law*": at [65]. That statement is of equal application to the requirement under s 61(9) of the MACA to include reasons in a medical assessment certificate.

Based on *Wingfoot*, the RP was required to do no more than to form its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise and it came to a different conclusion on the causation issue because it did not consider that this MVA satisfied one of the diagnostic criteria in DSM-V. However, the RP was not required to explain why it took a different approach from the MA.

Further, there is no obligation for a RP to refer to every piece of evidence or every passage put forward by the parties. The insurer referred to the following observations of Basten JA in *Allianz Australia Insurance Limited v Cervantes* [2012] NSWCA 244; (2012) 61 MVR 443 at [22]:

> Neither *Dranichnikov* nor *Miah* went so far as to imply an obligation to consider every piece of evidence presented. Further, to refer to a report, but not to a particular passage in the report, may indicate an implicit preference for some other material which (in the absence of any no evidence ground) must be accepted as existing to support a particular conclusion. Such a course cannot constitute a failure to take into account a relevant consideration nor a failure to respond to a substantial argument: *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164 at [35].

Her Honour accepted the insurer's reliance on remarks of R A Hulme J in *QBE Insurance v Alawia* [2016] NSWSC 1875, that "*how a matter is to be taken into account is a matter for the decision-maker. It may be dismissed, given little weight, or decisive weight.*" She held that this reasoning explained by the RP rejected the temporal correlation as an adequate basis for finding causation and it simply did not accept, having regard to the nature of the MVA, that it could have been a contributing factor to the causation of the later symptoms. Accordingly, the RP discharged its statutory function.

Her Honour rejected ground (2). She noted that the plaintiff complained that while the insurer's submissions in support of the application for review focussed on the diagnosis of PTSD and major depressive disorder, it was "not at all apparent" that the review application related to the issue of "causation of PTSD". She held that there were 2 difficulties with this argument: (1) the terms of the review application are directed to establishing the "*gatekeeper*" requirement of s 63 that the assessment was "*incorrect in a material respect*". A review application is not in the nature of a pleading and does not determine the issues in dispute; and (2) If, as she found, the plaintiff articulated the triggering argument or regarded it as a key part of his argument, he must have appreciated that the issue of causation was in play.

Her Honour stated:

> 47. The focus on the temporal connection necessarily acknowledged that the nature of the accident did not of itself explain the development of symptoms. Put bluntly, it was a minor rear-end collision which, of itself, could not explain the development of PTSD. That the Review Panel would turn its mind to that issue (as required in accordance with its function to make its own assessment of the matter referred) should not have taken Mr Jarvis by surprise. Further, as I have found in considering the first ground for review, he did put his argument on that issue.

Her Honour also rejected ground (3). She noted that part 1.6 of the Guidelines specify a two-fold test of causation, requiring the RP to verify both of the following: (1) The alleged factor could have caused or contributed to worsening of the impairment, which is a medical determination. (1) The alleged factor did cause of contribute to worsening of the impairment, which is a non-medical determination. She stated:

> 51. In circumstances where the claimant falls at the first hurdle, the is no occasion to proceed to the second step and indeed it makes no sense to do so. If the alleged factor could not have caused or contributed to the worsening of the impairment, it must follow that it did not cause or contribute to the worsening of the impairment.

PIC - Presidential Decisions

Section 261(4) WIMA – Failure to make a claim occasioned by ignorance, mistake, or other reasonable excuse – Adequacy of Member's reasons

Hou v Zhen Qi Hou Pty Ltd [2022] NSWPICPD 6 – President Judge Phillips DCJ – 21/02/2022

The appellant was a working director of the respondent. On 15/04/2014, he fell at work and suffered a fractured right foot, which required surgery. He resumed light duties in January 2015.

The 6-month time limit to make a claim for compensation (s 261 *WIMA*) expired on 15/10/2014. However, the appellant did not make a claim until 20/07/2015 (15 months after the injury). The insurer disputed the claim for a number of reasons, including s 261 *WIMA*. The appellant sought a review of the decision on the basis that the delay was occasioned by advice from his lawyer to make a claim for public liability insurance, but the insurer maintained the dispute.

On 29/10/2019, the appellant claimed compensation under s 66 *WCA* for 11% WPI and the insurer disputed the claim. On 7/07/2020, the appellant's solicitors made a claim for surgery, which the insurer also disputed under ss 254 & 261 *WIMA* and ss 4, 9A, 59A & 60 *WCA*. On 8/03/2021, he commenced proceedings claiming past and future s 60 expenses.

Member Moore identified 2 issues for determination: (1) s 261 *WIMA;* and (2) s 59A *WCA*. She issued a COD, which entered an award for the respondent on the basis that she did not accept that the failure to make a claim was occasioned by ignorance, mistake or other reasonable cause: s 261 *WIMA*.

On appeal, the appellant asserted that the Member erred: (1) in law when she failed to correctly pose the statutory question she needed to answer; (2) in law when she failed to consider the alternative question of whether the failure to make a claim within the six-month period was occasioned by other reasonable cause; (3) in law when she failed to give any reasons as to why there was no other reasonable cause that occasioned the failure; (4) in fact finding when she concluded the letter from Slater and Gordon dated 21 July 2015 "did not make a reference to pursuing a workers compensation claim;" and (5) in the exercise of a discretion in taking into account irrelevant matters being: (a) either the three-year limitation period for commencing a public liability claim or the three-year period referred to in s 261(4) of the 1998 Act; (b) the GP's note of the consultation on 11 September 2015; (c) the motivation to claim weekly benefits caused by financial hardship; or (d) the reference to a tribunal hearing.

President Phillips stated that the starting point for consideration of s 261 *WIMA* is the decision of Burke J in *Gregson*, where his Honour said (at [61]):

> The ignorance referred to is ignorance of the rights deriving from the Act and the obligations imposed by it. Effectively the Court is required to be satisfied that the applicant was unaware of those rights and obligations and thus failed to make the requisite claim.

Snell DP recently considered s 261 *WIMA* in *Burke v Suncorp Staff Pty Ltd* [2021] NSWPICPD 6, and he affirmed a Member's reasoning in delivering an award for the respondent, finding that the failure to make the claim was not occasioned by the appellant's ignorance. Snell DP stated:

> 24. The Member referred to the appellant's submission that she failed to make a claim at an appropriate time 'because she did not realise that a claim could be made in this jurisdiction for the consequences of a psychiatric injury'. He noted the appellant had been employed by an insurance company in a department that processed claims. She was 'successfully assessed under her income protection policy following her psychiatric injury in 2010'. She had previously successfully completed a workers compensation claim in respect of a back injury. The Arbitrator said that the respondent's counsel expressed 'some reservations' about the appellant's submission on this issue. The Member said: 'I share those reservations.' He said he had already found the appellant's evidence to be unreliable. He found the appellant's explanation to be inadequate. She said she had not discussed the availability of workers compensation when arranging her income support claim. She did not discuss her consultation with Dr Lovric where the topic was raised twice.
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> 25. The Member said 'it may very well be that she did not consider her options at that time, not out of ignorance, but because she was receiving weekly payments under her income protection policy and, as she said, did not turn her mind to her rights at workers compensation.' He said this was 'a different proposition from being ignorant of the existence of those rights'. The Member referred to the appellant's history of working as a manager, in a responsible job with David Jones, before she commenced with the respondent. She would have performed her duties as a claims officer in a responsible way also. She was aware of the workers compensation scheme as she had previously made a claim herself. The Member said it was likely she would have been aware of the existence of workers compensation for psychological injuries. The Member said he was not persuaded of the appellant's ignorance in this regard.
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> 26. The Member found that the appellant's failure to make a claim was not occasioned by ignorance. There was an award for the respondent.

His Honour held that the approach taken by Snell DP in *Burke* is relevant to this matter.

His Honour rejected ground (1) and stated that this does not represent a fair reading of the Member's decision. He stated:

> 65. Considered correctly, the offending line in [63] does not purport to be the test that the Member was dealing with in full, rather it is clear from the sentence that the Member is describing her task in shorthand and when one marries what appears in [63] with [64] of the reasons, it can be clearly understood that the Member is grappling with one concept and one concept alone, and that is the meaning of the word 'ignorance' for the purposes of s 261 of the 1998 Act. It is clear from a consideration of the decision that the Member, having correctly set out the appellant's case, particularly at reasons [17] and [18], then proceeded to deal with those arguments. No issue has been taken by the appellant on appeal that the description of the appellant's arguments at reasons [17] and [18] was anything other than an accurate reflection of the case conducted below. Having posed the correct questions for consideration, the fact that a short form or summary of one aspect of that task is set out at reasons [63] is not a fair reading of the Member's decision, nor is it revealing of any error on the Member's part.
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> 66. The appellant has asserted that the Member failed to correctly pose statutory questions that she needed to answer. These were the issues raised by the appellant as representing the contest between the parties and these were addressed in terms by the Member.

His Honour rejected ground (2) and he held that the alleged error did not occur.

His Honour rejected ground (3). He noted that the appellant alleged a failure to give any reasons for the conclusion that the exception was not made out. He referred to the decision of Kirby J in *Roncevich v Repatriation Commission* [2005] HCA 40, which considered the adequacy of reasons, as follows:

> Upon this basis, it may be accepted (as the primary judge concluded in the Federal Court) that the reasons of the Tribunal were brief. However, that is not necessarily a flaw in the context of such a busy administrative tribunal. Courts conducting this form of review have been repeatedly enjoined by this Court to avoid overly pernickety examination of the reasons. The focus of attention is on the substance of the decision and whether it has addressed the 'real issue' presented by the contest between the parties. (emphasis added, footnotes omitted)

His Honour held that reading the decision as a whole, it is clear that the Member was not persuaded that the "other reasonable excuse" submission was made good by the appellant. The Member addressed the issue in contest between the parties, in the *Roncevich* sense, and reached a decision that was available.

His Honour rejected ground (4) and held that there are a number of aspects of the evidence that point to or suggest knowledge or awareness on the appellant's part regarding workers compensation matters. He noted the appellant's evidence was that after his fall, he retained Slater & Gordon to act for him and they advised him not to lodge a workers compensation claim and to pursue a public liability claim instead. There were also various references to workers compensation matters in medical records. He stated, relevantly:

> 95. The appellant quite fairly cannot assert that the error which appears at reasons [33] affected the Member's reasoning process. At its highest, the appellant quite fairly asserts that it may have infected the reasoning process. Notwithstanding this mistake, there was other material available which led to the inference about the appellant having knowledge prior to receiving the 21 July 2015 advice. Absent this material that I have identified, the submission made by the appellant might have had some substance. However in light of that material, it cannot be said that the factual error made by the Member formed part of the reasoning process and as a result this appeal ground has not been established.

In relation to ground (5), his Honour stated that the key question is whether any of the 4 matters that the appellant complained of caused the discretion to miscarry. He considered each of these matters separately.

His Honour rejected ground 5(a) and he held that the Member's statement at [37] is factually correct and that the Member was quite properly directing her mind to the provisions of s 261, namely that if the claim was made out of time, it could still be pursued on the basis of ignorance or mistake provided it was within the three year time limit. This is a proper and appropriate direction for the Member to be giving herself and did not involve any error of discretion.

His Honour rejected ground 5(b) and held that the appellant's complaint was not a far or available reading of the decision. He stated, relevantly:

> 112.The critical finding is at reasons [46]. At [46] the Member said, construing these various entries from the Epping Health Care Centre clinical notes, that they suggested to her that the appellant had some knowledge of workers compensation procedures as early as October 2014. Pausing here, October 2014 is an important date because it is during that month that the six-month period for the purposes of s 261 of the 1998 Act expires. Further, the reference at reasons [43] to the clinical notes supports this finding. It is also noteworthy that at no stage did the appellant take issue with the contents of the 26 October 2014 clinical notes. Whilst the reference to "entries" at reasons [46] is perhaps inapt, in my view it is apparent that it is the October 2014 clinical note entry that is the source of attention and concern of the Member.

At [14}, the Member set out the appellant's statement in some detail, and noted that he made various assertions, including, "*I do not speak or read English. I am not familiar with the processes and procedure of what is required of me and I rely on the advice of professionals who unfortunately misinformed me.*" The Member then assessed the evidence and identified where this appeared to be at odds with the appellant's statement and she observed (at [62]):

> It is clear to me that the [appellant] on at least several occasions discussed compensation for his injury with his doctors, such that I can infer, particularly in the absence of any earlier statements, that he had knowledge of his rights and entitlements to compensation.

His Honour held that this was a proper and appropriate task to undertake given the contents of the appellant's statement.

His Honour rejected ground 5(c). He held that the Member did not make a positive finding that the appellant was in financial difficulties and she agreed with Snell DP's observations in *Burke*. The issue arose in the context of an argument about whether the appellant had turned his mind to considering a workers compensation claim along the lines as was considered in *Burke*, and he did not see this passage of the decision being used for the purposes asserted by the appellant. He stated, relevantly:

> 129. At its highest, this issue is part of a consideration relating to the Member's assessment of the Presidential decision in *Burke*. The Member, quite properly, did not make any positive finding as to whether or not the appellant was in financial difficulties as the evidence was not of a quality to substantiate such a finding. In the absence of such factual finding, it cannot be said that the Member's discretion miscarried in the House sense. This might have been different had such a positive finding been made on this issue in circumstances where the evidence taken at its highest would not have supported such a finding. As a consequence, this ground of appeal is not made out and is dismissed.

His Honour also rejected ground 5(d) and he stated:

> 133. It is to be remembered that in the appellant's statement, he asserted that he had very limited English and was not familiar with laws and procedures. The Member was entitled to review the evidence and test that proposition. This was done which led to the Member's ultimate finding that the appellant's evidence was unreliable and that his explanations in relation to his claim were inadequate. I do not read or construe the reference to the tribunal hearing at reasons [60] as having any relationship to knowledge of workers compensation, rather it seems that this was a part of the Member's assessment regarding the appellant's English skills. This material which was within the Ryde Hospital notes was, it is true, not addressed by the appellant in his statement. The inference that the appellant says was drawn by the Member, namely that this tribunal hearing may have imparted knowledge to the appellant about workers compensation, is not made out. Just as I have referred to above, the Member, having closely considered the appellant's statement, then reviewed the evidence in order to assess whether or not the explanations stated by the appellant in his statement were in fact made out.

Accordingly, his Honour confirmed the COD.

PIC – Member Decisions

Motor Accidents

MAIA – Claimant was not wholly or mostly at fault as medical evidence supported a finding that he had long standing mental health issues and that the accident occurred when he was in the midst of a psychotic episode - Blameless accident provisions in the MAIA 1999, the no-fault provisions of MAIA and the cases of Davis v Swift, AAI Limited t/as GIO and Whitfield v Melenewycz considered.

ACV v The Nominal Defendant [2022] NSWPIC 64 – Member Cassidy – 14/02/2022

On 12/08/2019, the claimant suffered serious injuries including multiple fractures drove his car, when his car left the road and collided with a pole. He claimed statutory benefits under Pt 3 of the MAIA, initially against NRMA (whom he thought was the insurer of his vehicle), but ultimately against the Nominal Defendant. The Nominal Defendant denied the claim and dispute was referred to the PIC.

Member Cassidy noted that an issue arose as to whether the claimant was charged with or convicted of a serious driving offence sufficient to disentitle him to statutory benefits under s 3.37 MAIA. She noted that the claimant was charged with driving whilst disqualified, with is not a serious driving offence within the meaning of s 3.37 MAIA.

It was therefore necessary to determine whether the claimant was wholly or mostly at fault, as if he was, no statutory benefits are payable because his vehicle was uninsured: s 3.36(1). The claimant argued that he was in the middle of a psychotic episode at the time of the accident and he did not know what he was doing and could not be considered to be at fault for what he did.

The Member was satisfied that the cause of the accident was the claimant driving at speed, losing control of his car and colliding with a power pole. She accepted that at the time of the accident, the claimant was having a psychotic episode, which manifested itself in hallucinations including visual hallucinations and that he was delusional and took to the wheel of is car in an attempt to escape the "incarnate, non-corporeal" beings that his delusions led him to believe were about to attack him and cause him harm including dismemberment. She also accepted the claimant's evidence that he drove at reckless speed and crashed due to a desire to kill himself due to his delusional beliefs that he was being persecuted and pursued.

The Member stated that in a single vehicle collision involving a claim by the driver, an analysis of whether there was fault in terms of negligence or a breach of duty of care is irrelevant as the claimant owes a duty of care to prevent accident and injury to other road users but not to himself. As the Court noted in *Whitfield v Melenewycz* [2016] NSWCA 325, Meagher JA at [31], you cannot sue yourself in negligence. Therefore, the approach should be to consider whether the claimant was solely responsible or solely to blame for the accident. She stated:

> 88. In my view the claimant was not solely responsible or solely to blame and therefore not wholly at fault because he was in a psychotic state, having hallucinations and delusional thoughts in the lead up to his accident. In my view having read the whole of the evidence, the claimant was not operating in any sphere of reality and therefore was not aware of what he was really doing or why he was doing it. He thought he was being chased by "Ancients" or "Archons", when he was not. He thought he was able to communicate with these imaginary robed figures without speaking and that he was going to be killed or dismembered by them, but he was not. He wanted to go to the hospital but thought the "Ancients" or "Archons" would be there, but they were not. He thought the police discovered him soon after the accident and then left him but they did not. He thought his mother had been killed, and she had not. He attempted to stand up on his two broken legs while in hospital, but could not.
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> 89. Whatever choices the claimant made in the hours leading up to his accident, they were not, on the evidence, rational choices made by someone in full possession of their faculties. The claimant's actions before this accident were not voluntary or as a result of his own will appreciating the nature of what he was doing and the likely impact or consequences of it but were a result of his psychotic and delusional state. I make this finding, in particular noting the Canberra Hospital staff found the claimant had no legal capacity to make decisions for his own treatment and as a result had him scheduled presumably under the mental health legislation of that jurisdiction.
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> 90. The evidence before me as to the cause of his psychotic state comes from Doctor C who diagnosed the claimant's long-term mental health issues as post-traumatic stress disorder as a victim of childhood sexual abuse and a brief psychotic disorder where the predominate cause was stress.
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> 91. There is no medical evidence before me to suggest that anything the claimant did or did not do caused his decline into this psychotic state.
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> 92. In *Davis v Swift*, another no-fault damages case, Meagher JA said at [33]:
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> > The circumstances in which an incident or accident may be a 'blameless accident' are varied. They include (as the Second Reading Speech makes clear) where the driver has been incapacitated from continuing in careful control of the vehicle because of some unforeseen and immediately debilitating illness or medical condition.

The Member stated that under s 3.36(4) MAIA, if the claimant's contributory negligence is assessed at more than 61%, he would be mostly at fault for the accident. She stated, relevantly:

95. In the decision of *Axiak v Ingram* the court found in a "blameless accident" that the reduction of damages for contributory negligence under section 7F of the MAC Act should be determined by assessing the extent to which the plaintiff departed from the standard of care she was required to observe in the interests of her own safety. The usual evaluation of relative culpability between plaintiff and defendant could not occur in a blameless accident where there was no primary negligence to consider or measure against.

96. The important point to consider in *Axiak* was that the standard of care the claimant was required to observe was the interests of her own (and not someone else's) safety.

97. This was the fourth episode of psychosis experienced by the claimant according to his statement and the Griffith Hospital records. The claimant had been having treatment and appears to recognise that his psychotic episodes are related to periods of heightened anxiety and no sleep. In terms of what steps he had taken to avoid this, I do not have the claimant's treating doctor's records. But the claimant had attended a doctor and had sleeping medication as it is referred to in his statement and the Griffith Hospital records). On the day before his accident, he appears to have recognised a deterioration in his mental state and had the wherewithal to take a sleeping pill to get some rest but was unable to sleep for long. Part of his auditory and visual hallucinations was said to be his belief that the "Archons" would come to dismember him if he took any more tablets and went to sleep.

98. I note the claimant has earlier taken steps to prevent his behaviour causing this accident. He says in his statement that he chained the gate to the property as a physical prompt for him to hopefully recognise a delusional state of mind.

99. The claimant was wearing his seatbelt at the time of the accident and while there are past episodes of hospital admissions due to alcohol withdrawal and a history of alcohol abuse, there is no evidence before me that alcohol had anything to do with this accident. A blood test for example returned a negative result.

100. I am therefore satisfied, on the evidence relied on by the parties, that the claimant had taken steps in the interests of his own safety but was not responsible, due to his psychotic state, for any conduct that might ordinarily accord with 'contributory negligence'.

Accordingly, the Member held that the claimant was not prevented from obtaining statutory benefits as he was not wholly or mostly at fault for causing his injuries.