Workers Compensation independent review office

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

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.

Decisions reported in this issue:

1. Scone Race Club Ltd v Cottom [2019] NSWCA 260
2. Hossain v Unity Grammar College Ltd and Ors [2019] NSWSC 1313
3. Le Twins Pty Limited v Luo [2019] NSWWCCPD 52
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Court of Appeal Decisions

Employer did not breach its duty of care to the worker – Court refuses worker's application for leave to raise an argument by a notice of contention

Scone Race Club Ltd v Cottom [2019] NSWCA 260 – Emmett AJA (Gleeson & Brereton JJA agreeing) - 31 October 2019

The appellant employed the worker as a waste management labourer. On 23 May 2008, he injured his right knee while removing a bin liner loaded with rubbish from a garbage bin. He sued the appellant for damages and at first instance, ***Judge Olsson*** entered judgment in his favour. However, the appellant appealed and the worker cross-appealed from her Honour's refusal to order interest on certain damages. The worker also sought to reply on a notice of contention, arguing that the Club was negligent in failing to supervise him to ensure that he adopted its system of waste removal.

Emmett AJA (Gleeson & Brereton JJA agreeing) allowed the appeal and dismissed the cross-appeal. The appellant did not dispute that it owed the worker a duty of care, but the issue was the content of that duty in the particular circumstances of this matter.

Brereton JA (at [30] and Emmett AJA (at 78]) held that despite the controversy at trial about what, if any, instructions the appellant gave the worker as to how the bins should be emptied, nothing ultimately turns on it. Their Honours also held that nothing turned on the primary judge's conclusion that the appellant failed to conduct an appropriate risk assessment, in the absence of explanation of how that assessment would have averted the injury: Brereton JA at [3] and Emmett AJA at [76].

The critical issue was whether reasonable care on the part of the appellant required that it install concrete pads upon which to locate the bins: Brereton JA at [3] and Emmett AJA at [68]. The court held that the primary judge erred in concluding that this was the content of the duty owed, given that: (a) The sloping grassy area where the accident occurred was not so steep as to present a hazard: Brereton JA at [3]; Emmett AJA at [80]; (b) There had been no prior or subsequent report of workers slipping on the grass when removing garbage: Brereton JA at [3]; Emmett AJA at [72]; (c) It was not industry practice at other country racecourses to install concrete pads: Brereton JA at [3]; Emmett AJA at [74]; (d) Concrete pads would introduce their own risks, including trip and slip hazards, and would be a harder surface than grass on which to fall: Brereton JA at [3]; Emmett AJA at [56]; (e) There was infrequent heavy use of the racecourse: Brereton JA at [3]; Emmett AJA at [43]; and (f) Installation would incur some cost: Brereton JA at [3]; Emmett AJA at [44].

Notice of Contention

The Court refused to grant leave to the worker to raise, by notice of contention, an argument that the appellant was negligent in failing to supervise him to ensure that he adopted its alleged system, in circumstances where that case was not advanced on the pleadings, and could have been met by evidence at trial: Gleeson JA at [1], Brereton JA at [4] and Emmett AJA at [84]-[86].

The Court set aside the orders made by the Primary Judge and directed that judgment be entered for the defendant and that the worker pay its costs. The worker was also ordered to pay the appellant's costs of the appeal and was to have a certificate under the *Suitors' Fund Act 1951 (NSW)* if he was otherwise entitled to it: Gleeson JA at [1], Brereton JA at [5] and Emmett AJA at [89].

Supreme Court of NSW Decisions

Damages – joint liability –proceedings for recovery of damages for personal injury against multiple parties – action may be brought against each tortfeasor subject to statutory modifications – Plaintiff cannot recover more than full satisfaction for loss against one or more of the tortfeasors

Hossain v Unity Grammar College Ltd and Ors [2019] NSWSC 1313 – Campbell J – 1 October 2019

The first defendant employed the plaintiff as a caretaker and night watchman. On 10 February 2019, he suffered serious injuries in a gas explosion. He sued the first defendant, Insurance Australia Limited ("IAL")(the insurer of Binah Projects Pty Ltd (de-registered) ("Binah") (third defendant); Five Star Universal Plumbing ("Five Star") (sixth defendant); Elgas Ltd ("Elgas") (seventh defendant); and Bernie Cohen & Associates Pty Ltd ("Cohen") (third cross-defendant). Binah was the principal contractor for construction of the College. Five Star was a plumbing and gasfitting contractor that performed work on the second stage of the building works, including gasfitting work from the one LPG gas tank on site, but it did not perform the defective work that was the direct and proximate cause of the explosion. Elgas supplied and installed the LPG gas tank and the LPG gas used at the College. Cohen was the private building certified for the construction of the College.

On 21 June 2007, Binah engaged Enma Plumbing Pty Ltd ("Enma") (now de-registered and uninsured) to install the LPG system and it installed a second stage regulator in the ceiling of a building, which was contrary to the instructions of the manufacturer of the regulator, the *Australian Standard 5601-2004* and the *Dangerous Goods (Gas Installations) Regulation 1998 (NSW)* (repealed) ("*DGR*").

In November 2007, Elgas delivered a 2.4 KL LPG storage tank to the College and on/about 11 February 2008, it supplied 2138 L of LPG gas to the gas tank. Between February 2008 and February 2010, the gas appliances at the College were connected to the LPG gas installation and supplied with gas from the storage tank. In 2009, Five Star was engaged to, and carried out, work on the second stage of the building works at the College, including the installation of a new gas line connected to the existing line at its tank end. By 10 February 2010, LPG gas that had vented from the regulator, settled in the ceiling space of the building and into the floor below, exploded.

Campbell J noted that common law principles apply to the case against the first defendant (see: s 3B (1) (f) of the *Civil Liability Act 2002 (NSW)*) and the test for causation in negligence cases is found in s 5D *Civil Liability Act 2002* (NSW). However, in proceedings for the recovery of damages for personal injury, which are unaffected by the provisions of Part 4 *Civil Liability Act*, a plaintiff may bring an action against each tortfeasor liable in respect of the same damage and obtain judgment against each for the whole of her or his loss (subject to statutory modifications regarding the quantum of damages recoverable in a given category of case). A plaintiff may not recover more than full satisfaction for his loss from one or more of the tortfeasors, but the loss may be spread among the various tortfeasors liable in respect of the damage by orders for statutory contribution under s 5 *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)* ("*LRMPA*"). This principle was expressed in the Scottish case of *Grant v Sun Shipping Co. Ltd* [1948] AC 549 at p 563 by Lord Du Parcq as follows:

> …I regard it as a well settled principle that when separate and independent acts of negligence on the part of two or more persons have directly contributed to cause injury and damage to another, the person injured may recover damages from any one of the wrongdoers, or from all of them … If the negligence or breach of duty of one person is the cause of injury to another, the wrongdoer cannot in all circumstances escape liability by proving that, though he was to blame, yet but for the negligence of a third person, the injured man would not have suffered the damage of which he complains. There is abundant authority for the proposition that the mere fact that a subsequent act of negligence has been the immediate cause of disaster does not exonerate the original offender.

His Lordship referred to *Burrows v March Gas & Coke Co.* (1872) LR7 Ex 96 where the defendant who supplied a defective pipe was not exonerated because "*the immediate cause of an explosion which caused damage to the plaintiff was the negligence of a third party, a gasfitter who having been called in to look for the source of an escape of gas, searched for it with a lighted candle*" (*Grant* at 563).

His Honour identified the relevant issue as whether any of the active parties are legally responsible for the plaintiff's injuries. He found that the explosion was initiated by a spark when the plaintiff turned on a light and that the evidence gave rise to a strong inference that no compliance plate had ever been attached to the gas installation. He held that it was unlikely that Cohen would have issued a Final Occupation Certificate if the work on the gas installation remained unfinished on 23 January 2008.

His Honour noted that without a Final Occupation Certificate, the College could not have commenced to operate as a school at the beginning of the first school term of 2008. This made it likely that Enma performed the work of laying the hard pipes that connected the in-ground installation to the first stage regulator, carried out (or not) such testing and inspecting of its installation as it considered necessary and connected the installation to the tank some time on 23 or 24 January 2008. He held, relevantly:

> 41 With the benefit of hindsight, it is apparent that Enma were ignorant of the requirements of *DGR* and applicable *Australian Standards* for the location of stage 2 regulators. It was probably ignorant of the requirements of *DGR* as to certificates of inspection and compliance plates. However, given the College was about to begin operation as a school, Binah, as principal contractor, would have been under pressure to complete the project and obtain the Final Occupation Certificate to enable the College to commence operations at the start of the school term…
>
> 42 I appreciate in arriving at these conclusions I have relied upon what I regard as the apparent logic of events and the significance of such contemporaneous documents as I have available to me. But I have also applied Lord Mansfield's "*maxim*" from *Blanch v Archer* given the complete absence of witnesses from the defendant's side of the record who doubtless could have cast light on this factual issue. I have in the light of that maxim considered what might otherwise be fairly slight proofs to be sufficient. In drawing the inference that the tank was connected to the installation, I have borne in mind the permissible reasoning process arising out of *Jones v Dunkel*.

His Honour stated that there may be a question about whether the plaintiff or Elgas bore the onus in relation to engaging the exception in cl 16 (3) *DGR,* but at the very least, Elgas would carry an evidential onus regarding that matter that it sought to discharge by its cross-examination of the experts and by the evidence of Mr Nottidge. He was satisfied with the experts' evidence that, from the gasfitter's point of view, no occasion would arise for requesting a delivery of gas before certification. He stated, relevantly:

> 52. …I am of the view that supply of gas to a container to be connected to a gas installation is prohibited unless a certificate of compliance is attached to the installation. Given that LPG is potentially dangerous, indeed explosive, the intent and purpose of cl 16 is to prohibit the supply of gas which is to be used in an installation until the installation has been certified as compliant. We can see this is how Elgas conducted itself even after the installation had been renewed by Mr Afiouni. It declined to restore the gas supply until it had received certificates of inspection under cl 10 *DGR* (Exhibit C, pp 128-132). At the same time Mr Afiouni attached a compliance plate in accordance with cl 10 DGR. I appreciate that while this was occurring the tank was approximately 70% full. Even so Elgas denied access to the gas until appropriate evidence of compliance with DGR was produced to it…
>
> 57 Were it necessary to make a decision on this third question of fact, I would not be prepared to act on the evidence of Mr Nottidge, especially given that Mr Ramjas had no direct knowledge of, or involvement in, the delivery of 11 February 2008, and in the absence of the persons identified above who still work for Elgas and who might be supposed to have some direct evidence about the circumstances of the supply of gas on 11 February 2008 but who were not called to give evidence at the hearing.

Legal issues

In *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] NSWCA 48, the High Court unanimously said of negligence cases generally, 9at [11]):

> In considering each of the issues of duty, breach and causation, it is of the first importance to identify the proper starting point for the relevant inquiry. In this case there are two statutes which require particular consideration: the Civil Liability Act 2002 (NSW) and the Liquor Act (1982 (NSW)). If attention is not directed first to the Civil Liability Act, and then to the Liquor Act, there is serious risk that the inquiries about duty, breach and causation will miscarry.

His Honour noted that the *Civil Liability Act* and *DGR* require particular consideration*. The* legal liability of the first defendant must be determined by reference to ordinary common law principles, which will be informed by the *DGR,* and the liability of the other defendants will likely to be informed by both the *Civil Liability Act* and the *DGR.* The question of when a private right of action for a breach of a statutory provision arises was discussed by Dixon J (as the Chief Justice then was) in *O'Connor v SP Bray Ltd* (1936) 56 CLR 467 at 477:

> It is a question of some difficulty whether a civil remedy is given to a person injured in consequence of the breach of [a clause and a regulation]. Such a person may, of course, maintain an action of negligence and rely on the failure to comply with the statutory regulations as evidence of negligence. But it is a different question whether the enactment itself confers a distinct cause of action. The received doctrine is that when a statute prescribes in the interests of safety of members of the public or a class of them a course of conduct and does no more than penalise a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show, an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions, or by reference to matters governing the policy of the provision, rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction…
>
> In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognised by the general principles of the common law …. Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless in the nature of the provision or from the scope of the legislation of which it forms a part, a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.

Further, in *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218, Mason J (as he then was) felt able to state the principle in more general terms by reference *O'Connor* (at 231):

> Ordinarily a duty imposed by statute to take measures for the safety of others involves a correlative private right, unless from the nature of the provision or from the scope of the legislation a contrary intention appears.

In *Byrne v Australian Airlines Limited* (1995) 185 CLR 410; [1995] HCA 24 at 424 Brennan CJ, Dawson, and Toohey JJ expressed the principle in the following terms:

> A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection…
>
> The question is one of the construction of the statute … One generalisation that can be made is that where the persons upon whom the statutory obligation is imposed are under an existing common law duty of care towards the persons whom the statute is intended to benefit or protect, the statutory prescription of a higher or more specific standard of care may, in the absence of any indication of a contrary intention, properly be construed as creating a private right.

His Honour noted that in *McDonald (T/as B.E. McDonald Transport) v Girkaid Pty Ltd* [2004] NSWCA 294; [2004] Aust. Torts Rep. 81 – 768, the Court of Appeal considered the question whether certain provisions of the *DGR* confer a civil cause of action for breach. McColl JA (with whom Beazley JA and Young CJ in Eq agreed) stated at [174] that, "*the question whether a statutory duty confers a correlative private right of action*" also turns on whether "the statute imposes a duty to take a specific precautions" (*O'Connor v S.P. Bray Ltd*) or "*measures for the safety of others*" (*John Pfeiffer Pty Ltd v Canny*). Her Honour at [176] emphasised that the question of "*whether a statute confers a private cause of action ultimately turns upon the terms of the legislation*". Legislation which merely "*prescribes the end, but not the means*" (at [177]) and "*does not identify any specific precaution*" or measure which the defendant is to take for the safety of others is not the type of provision supporting the correlative private right of action for harm caused by its breach. Her Honour also said at [178]:

> The conclusion that one out of several clauses in the enactment does not create a private right is not inconsistent with a conclusion that other clauses in the same enactment do create such a right: see *O'Connor v S P Bray Ltd* … at 479.

First defendant's liability

His Honour held that the first defendant owes the plaintiff a non-delegable duty to exercise reasonable care to avoid exposing him to unnecessary risk of injury: *Czatyrko v Edith Cowan University* [2005] HCA 14; 79 ALJR 839 at [12]. The duty extends to the provision of a safe place of work. In *Cotter v Huddart Parker Ltd* 42 SR (NSW) 33 at 37 Jordan CJ formulated the employer's duty in respect of the safety of the place of work as a duty to make "*the place of employment … as safe as the exercise of reasonable skill and care will permit.*" Although reversed on appeal to the High Court in *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624; [1942] HCA 34 on other grounds, the Chief Justice's formulation of the duty was not questioned: *Glass McHugh Douglas*, *The Liability of Employers, Second Edition (1979).* His Honour clearly formulated this aspect of the employer's duty as corresponding with the formulation of the duty owed to contractual entrants by McCardie J in *MacLenan v Segar* [1917] 2KB 325 at p 333. He stated:

> 72 This formulation dovetails with the explanation of the non-delegable nature of the employer's duty of care given Mason P in *TNT v Christie* (2003) 65 NSWLR 1; [2003] NSWCA 47 at [47] and [48]:
>
> > [47] The authorities cited … demonstrate that, in the realm of negligence, (a) a non-delegable duty of care will (like a duty based on vicarious liability) be imposed on categories of persons regardless of personal fault on their part in the circumstances giving rise to the plaintiff's injury; but (b) the plaintiff must prove that damage was caused by lack of reasonable care on the part of someone (not necessarily the defendant) within the scope of the relevant duty of care.

> [48] The second requirement, namely that the plaintiff's injury occur within the scope of the special relationship, is frequently passed over because the requirement is clearly satisfied in the particular case. But the issue cannot be ignored and it has significance in cases such as the present. (My emphasis.)

> 73 It is to be borne in mind that *TNT v Christie* was a case concerned with the employer's duty to provide safe plant and equipment. The formulation of the content of the duty to exercise reasonable care to provide safe premises in the terms expressed by Jordan CJ emphasises the non-delegable or personal nature of the duty.
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> 74 As Mason CJ emphasised (at [45]) by reference to *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550 there are categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury will not be discharged by the employment of a qualified and ostensibly competent, independent contractor. This is because non-delegable duties are "*of a special and "more stringent" kind". Duties of this kind extend "to seeing that care is taken*".

His Honour held that the obvious negligence of Enma in failing to either locate the second stage regulator, or vent it to the outside of Building D, provides a sufficient basis for a finding of negligence on the part of the first defendant. As Mason P explained, liability for breach of an employer's duty can be imposed on the employer "*regardless of personal fault*" provided the damage was caused by a lack of reasonable care on the part of someone within the scope of the employer's duty of care. Those "*conditions*" are satisfied in this case. However, if this were this not correct, he was inclined to hold that the first defendant breached cl 15 of *DGR* as it used the gas installation when a compliance plate was not attached to it. The attachment and maintenance of compliance plates in a conspicuous place on a gas installation near the point of attachment of the installation to the gas container as a central requirement of *DGR*. Its absence should have raised questions about the compliance of the gas installation leading to testing and inspection of the whole installation and an inspection by any qualified person would have made it obvious that the second stage regulator was fitted in contravention of *AS 1596* and the intended operation of the regulator would be to release gas into the roof void, which would accumulate in a dangerous manner.

The first defendant argued that it is not a qualified gasfitter and the knowledge of such an expert should not be imputed to it. However, his Honour held that this was not an answer to an employer's obligation, which is to maintain the safety of the premises not just to provide premises that are at the outset apparently safe, and that these premises were unsafe from the outset by reason of the patent defect in the gas installation constituted by the location of the second stage regulator.

The first defendant also argued that the reasoning of the House of Lords in *Davie v New Merton Board Mills* [1959] AC 604, which was discussed by Mason P in *TNT v Christie* at [55] ff, absolves it from liability. His Honour noted that *Davie* concerned an inherent latent defect in a tool called a drift used by being struck by a hammer. When struck, a piece broke off because of its excessive hardness and entered the plaintiff's eye and it was, in the circumstances, a dangerous tool. The latent defect arose from its negligent manufacture by reputable makers who had supplied it to a reputable firm of suppliers from whom the employer purchased it. The employer had a system of maintenance and inspection, but the defect was not susceptible to discovery by any reasonable inspection. The House of Lords held that the employer's duty did not "*extend to defects due to the want of skill or care on the part of anyone concerned in manufacture or sale in circumstances where the employer bought the plant from a reputable source*" (*TNT v Christie* at [58]).

In *TNT v Christie*, Mason P held that the principle in *Davie* did not apply because the employer's duty extended to negligence in the servicing and maintenance of the equipment. It is implicit that the defect was discoverable in the course of maintenance and delegation of the responsibility for maintenance to an independent contractor did not absolve the employer of legal responsibility *"if it could be shown that the plaintiff employee's injury was a result of negligence in regard to the maintenance and repair of the equipment*" (*TNT v Christie* at [61]).

His Honour held that this matter is quite different from *Davie* and *TNT v Christie*. The duty here is concerned with the safety of premises occupied by the employer and the "*defect*" that made the workplace unsafe was discoverable upon reasonable inspection even if only by a qualified gasfitter. Therefore, *Davie* does not assist the first defendant and it breached its duty to exercise reasonable care to provide a safe place of work for the plaintiff. It had been in occupation for about two years before the explosion. Enma's negligence is imputed to it by its non-delegable duty its own negligence in failing to maintain the premises were legal causes of the plaintiff's personal injury. It is unnecessary to analyse causation by reference to s 5D *Civil Liability Act* in a case of employer's liability.

Liability of Binah and IAL

His Honour held that this matter does not fall into the category of case considered in *Leighton Contractors Pty Ltd v Fox* and *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 at [47], which were concerned with the duty owed by a principal contractor to independent contractors and the employees of the latter engaged in the construction or other work being carried out on site. This matter is concerned with the duty of a principal contractor, or builder, to subsequent users of the building under construction. It is not concerned with economic loss but with personal injury and the duty is not as constrained as that discussed by the High Court in those cases. He held that generally in the absence of a non-delegable duty, the appointment of an apparently competent contractor discharges the obligation of reasonable care.

However, his Honour held that there is no evidence to show that Enma was incompetent at the time of its engagement, but a reasonable principal contractor in Binah's position (undertaking construction work for a school including the construction of LPG gas installations) ought to have had a familiarity with the compliance requirements of *DGR* (including the obligation of the gasfitter to provide the certificate of inspection immediately after testing following the completion of the gasfitting work in accordance with cl 20 (1) of *DGR*). Binah ought to have been aware that Enma's omission to both provide the cl 10 Certificate of Inspection and attach the cl 11 compliance plate raised a question about whether the installation was free from patent defects.

A reasonable principal contractor in Binah's position would also have questioned at that stage whether Enma was a reasonably competent gasfitter and would have engaged an independent contractor to test and inspect the installation (including the associated fittings) to ascertain whether the installation was compliant with the requirements of *DGR* and if not, to rectify any patent defects like the second stage regulator that had not been located or at least vented to the atmosphere. He stated, relevantly:

> 95 In expressing these conclusions, I have approached the matter having regard to the general principles in s 5B *Civil Liability Act*. There is no doubt, informed by the provisions of *DGR* that the use of LPG gas operations involves potential danger unless the precautions laid down in the *DGR* are observed. The risk of a gas leak in a non-compliant installation was, viewed prospectively, foreseeable and not insignificant. The magnitude of the risk was great when one has regard to the potentially catastrophic outcome if it materialised, even if the chance of the risk materialising was not great. In these circumstances, a reasonable person in Binah's

> position would have taken the precaution of having the installation tested and inspected independently and causing any patent defects uncovered in that process to be rectified…
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> 97 I have already referred to the principle expressed in *Grant v Sun Shipping Co. Ltd* (at [8] above). That decision was cited with approval by McHugh J in *Bennett v Minister of Community Welfare* (1992) 176 CLR 409. Nothing in s 5D dilutes the authority of that decision. Section 5D (1) (a) speaks of negligence as "*a necessary condition of the occurrence of the harm*". The indefinite article qualifying "*necessary*" has been deliberately chosen to connote that the idea, referred to in *Bennett*, that for the purpose of the but for test the tortfeasor's negligence need only be one of more than one necessary conditions.

His Honour held that Binah's negligence was a necessary condition of the harm suffered by the plaintiff and there is no reason why the scope of Binah's liability should not extend to the personal injury caused by its negligence. Persons in the position of the plaintiff, pupils, teachers and other workers at the school were vulnerable in the sense that they were not in a position to take precautions for their own safety in relation to the risk of a gas explosion. Therefore, Binah is legally liable to the plaintiff and under s 601 *AG,* IAL must meet that liability.

His Honour also stated that if his conclusions are wrong, he is satisfied that Binah's duty is non-delegable and a category of non-delegable duty not disapproved of in *Leichardt Municipal Council v Montgomery* was that established by the unanimous decision of Mason CJ, Deane, Dawson, Toohey and Gaudron JJ in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, in which their Honours said at 550:

> It has long been recognised that there are certain categories of case in which a duty to take reasonable care to avoid a foreseeable risk of injury to another will not be discharged merely by the employment of a qualified and ostensibly competent independent contractor. In those categories of case, the nature of the relationship of proximity gives rise to a duty of care of a special and "*more stringent*" kind, namely a "*duty to ensure that reasonable care is taken*". Put differently, the requirement of reasonable care in those categories of case extends "*to seeing that care is taken*".

His Honour noted that *Burnie Port Authority* was concerned with a liability of an occupier for the harm caused by the escape from its land of a dangerous substance, in that case, fire. Having explained why the former rule in *Rylands v Fletcher* (1868), LR 3HL 330 should be "*absorbed by the principles of ordinary negligence*", their Honours stated at p 556:

> Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. In a case where the person or property of the other person is lawfully in a place outside the premises, that duty of care both varies in degree according to the magnitude of the risk involved and extends to ensuring that such care is taken.
>
> It is unnecessary for the purposes of the present case to express a concluded view on the question whether the duty of care owed, in such circumstances, to a lawful visitor on the premises is likewise a non-delegable one. The ordinary processes of legal reasoning by analogy, induction and deduction would prima facie indicate that it is.

This extract was clearly considered dicta in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 and should be applied to this matter. There was no doubt that Binah took advantage of its control of the premises to introduce a dangerous substance (LP gas) and to carry on a dangerous activity in terms of facilitating the use of the gas installation by the College. As their Honour's said at p 554:

> Where a duty of care arises under the ordinary law of negligence, the standard of care exacted is that which is reasonable in the circumstances. It has been emphasised in many cases that the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur. Even where a dangerous substance or a dangerous activity of a kind which might attract the rule in *Rylands v Fletcher* is involved, the standard of care remains "*that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances*". In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of "*reasonable care*" may involve "*a degree of diligence so stringent as to amount practically to a guarantee of safety*". (Footnotes omitted).

Given the risk involved in the introduction of a fixed LPG installation, his Honour held that there is no injustice in imposing the more stringent duty of seeing that reasonable care is taken upon the principle contractor. The consequences of Enma's obvious negligence are sheeted home as legal liability in Binah, which IAL must assume.

Liability of Five Star

His Honour noted that the plaintiff's claim was framed in negligence and breach of statutory duty for contravention of cl 9 *DGR* and failure to comply with cl 11 was relied upon as a particular of negligence. However, a significant issue was whether Five Star completed the gasfitting works when it finished work on the site in November 2009, as "*completion of gasfitting work*" is a factor that triggers the cl 9 *DGR* obligations.

Voli v Inglewood Shire Council (1964)110 CLR 74, establishes that a building professional or tradesman who undertakes work on the construction of a building will owe a duty of care to future users of the building to exercise reasonable care to eliminate unnecessary risks of personal injury arising from the work they perform. This is the duty that Five Star owed to the plaintiff and the following extract from *Voli* at (p 85) applies (Windeyer J, Dixon CJ and Owen J agreeing):

> What an architect must do to avoid liability for negligence cannot be more precisely defined than by saying that he must use reasonable care, skill and diligence in the performance of the work he undertakes…
>
> …neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast on him by law not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered…
>
> An architect is not ordinarily liable because someone falls down in the building and is injured. He may be if the building falls down and someone is injured.

By undertaking work for the first defendant, Five Star's duty extended to include a class of people including the plaintiff who were lawfully using the School who were vulnerable to risks arising out of non-compliance with *DGR* in the sense they could not themselves take precautions to protect themselves against such risks. Had they turned their minds to such matters they would have expected gasfitting work to have been performed competently, safely and in accordance with *DGR.* It owed the plaintiff a standard of care consistent with that of a reasonably competent gasfitter familiar with the requirements of *DGR.*

His Honour held that for the purposes of cll 9, 10 and 11 of *DGR,* several obligations arose that were not met by Mr Afiouni immediately after finishing his gasfitting work on the existing gas installation. He held, relevantly:

> 132 Had Five Star Plumbing complied with the regulations inherent to their duty, it seems inevitable that the improper manner in which the gas installation was flued would have been exposed due amongst other things to the absence of a compliance plate and the non-compliant and unsafe way in which it was vented into the ceiling. Consequently the harm caused to Mr Hossain would not have occurred and the clauses of the regulation would have achieved their purpose to prevent and detect risks of danger associated with the install and supply of Gas.

His Honour accepted the plaintiff's argument as to causation under s 5D *Civil Liability Act* and he found that if Five Star had inspected the existing installation as required, the second stage regulator responsible for the discharge of gas that led to the explosion would have been detected and the likelihood is that either the regulator would have been rectified, or the system defected and not used until rectified. In either case, the explosion would not have occurred on the balance of probabilities. Therefore, Five Star plumbing is liable for the harm suffered to the plaintiff under a statutory breach of cl 9 (b) (ii), which gives rise to a private right of action.

Liability of Elgas

His Honour noted that the claim was framed in negligence and breach of statutory duty imposed by cl 16 *DGR.* He noted that Elgas argued that, assuming that it was negligent or breached a statutory duty, its negligence was not a necessary condition of the harm suffered by the plaintiff for the purpose of s 5D *Civil Liability Act.* Further, the intervening negligence of Five Star was *a novus actus interveniens* that severed the chain of causation between any breach and the harm suffered by the plaintiff. Therefore, the scope of its liability should not extend to the harm suffered.

Elgas relied upon the decision in *Adeels Palace (*in particular at [48] – [57]) and argued that the statement at [50] to the effect that recognition that changing any of the circumstances in which harm occurs might have made a difference does not prove factual causation. It is necessary that causation be proved affirmatively on the balance of probabilities by evidence actually accepted by the Court.

However, his Honour held that it is well accepted that gas is a potentially dangerous substance if not handled with care and in accordance with the requirements of *DGR*. Both the existence of the duty and its content are informed by *DGR* and in particular cl 16, which imposes a particular obligation on the supplier of gas. The elusive "*something more*" in this case is the absence of the compliance plate, which is a central requirement of the regulatory scheme. Each participant in the scheme needs objective evidence that the gas installation in which the LPG is to be introduced is compliant and free of patent defects. He held:

> 156 In my opinion the absence of the compliance plate was the additional factor which enlivened a duty of care in relation to the supply of gas to the gas tank connected to the gas installation at the College. Obviously introducing gas into a gas installation affected by patent defect involves a foreseeable risk of serious harm which is not insignificant and which a reasonable gas supplier would take precautions against. The relevant precautions viewed prospectively are to refuse to supply the gas until receiving a certificate of inspection from a qualified gasfitter certifying that the installation is free of defect, and satisfying itself that a compliance plate has been attached to the installation in a conspicuous position near the connection with the gas tank confirming these matters.

Therefore, Elgas was subject to a duty of reasonable care and it breached that duty by supplying the LPG gas to the tank on 11 February 2008.

His Honour stated that it is probably unnecessary to separately consider whether cl 16 of *DGR* gives rise to a correlative civil cause of action, but for reasons similar to those regarding cl 9 of *DGR* in respect of Five Star's liability, cl 16 of *DGR* gives rise to a correlative private cause of action sounding in damages.

As to causation, the plaintiff cannot succeed unless he proves on the balance of probabilities that his personal injuries were caused by Elgas' negligence. His Honour held:

> 162 Given my earlier analysis, so far as the law of negligence is concerned questions of causation are governed by s 5D and 5E of the *Civil Liability Act*. If I am correct in my opinion that in the present case a breach of cl 16 is not statutory negligence caught by s 5A of the *Civil Liability Act* then questions of causation in the case of breach of statutory duty are covered by general law considerations which are not identical to the statute. However, in the present circumstances I doubt there is any practical difference and the questions can be treated together for present purposes.

Questions of causation, unlike questions of foreseeability, are evaluated in retrospect and the Court must determine what happened and why. He was satisfied on the balance of probabilities that Elgas' breach was a necessary condition of, and materially contributed to, the harm suffered by the plaintiff. However, his Honour found that Five Star's negligence was not a *novus actus interveniens* severing the chain of causation between Elgas' negligence or breach of statutory duty and the harm suffered by the plaintiff. Therefore, Elgas is legally liable to the plaintiff.

Liability of Cohen

His Honour noted that Cohen was the principal certifying authority under the *EPA* for at least the first stage of the construction (including the erection of building D). It remained in the proceedings as third cross-defendant to the first defendant's Amended Statement of First Cross Claim, which pleaded against it the averments that the plaintiff made in his Second Further Amended Statement of Claim.

The case alleged that Cohen was a corporation that provided professional certification services to the building industry and that at all material times it was responsible for inspecting the works performed by Binah and Enma and certifying that those works complied with the relevant building and *Australian Standards* and were constructed in accordance with good and safe building practices and were carried out in a workman-like manner. The particulars of negligence include allegations of the failure to undertake a proper inspection of the LPG gas system, failing to identify that the regulators were installed in confined spaces, failing to ascertain that the regulators were not adequately ventilated and "*failing to require evidence of certification of the correct installation of gas regulators and the LPG gas system from a qualified gasfitter or plumber.*" His Honour held:

184 In the absence of expert evidence, it is impossible for me to find that a principal certifying authority is required to check each and every technical detail of each and every aspect of the multifarious professions and trades brought to bear in the erection of a school or other complex building. However, a principal certifying authority has a common law duty informed by statute to exercise reasonable care in checking the matters of which the certifier is required to be satisfied before issuing a certificate.

185 I was referred to the decision of the Court of Appeal in *Ku-ring-gai Council v Chan* [2017] NSWCA 226; 224 LGERA 330 in relation to the interaction of the law of negligence with the statutory obligations of a principal certifying authority. Cohen acknowledged that that case was concerned with whether there was a duty owed to subsequent purchasers of a dwelling house to exercise reasonable care to obviate the risk of them incurring pure economic loss because of hidden defects built into the dwelling during the course of construction. The Court of Appeal (Meagher JA; McColl JA and Sackville AJA agreeing) concluded that the Council as principal certifier was not subject to the duty of care imputed by the learned primary judge ([99]). In the course of his reasons, Meagher JA pointed out (at [72]) that a duty of care to avoid economic loss "*is not a duty directed to avoiding the risk of physical injury to persons occupying and using a new building. Whether the Council has such a duty and may be liable for such injuries (either to the owner or occupier of the building or the person injured) depends upon the application of quite different principles than those applying to the purchasers' claim*." His Honour referred to the decision in *Fangrove Pty Ltd v Todd Group Holdings Pty Ltd* [1999] 2 Qd R 239 at [19] – [20].

186 *Fangrove* concerned the question of the liability of a structural engineer to a future purchaser of the building. McPherson JA said:

> The decision in *Voli v. Inglewood Shire Council* (1963) 110 C.L.R. 74 suggests that the defendant might well have been liable for such [personal] injuries resulting from defective design of the wall in this case. It seems rather artificial in such circumstances to speak as if the wall were a defective product that the defendant put into circulation. It is true that it was part of a commercial building, and, in that limited sense, it might be regarded as a "circulating" subject or object of commercial enterprise. But the underlying reason for the distinction must surely be that *the law values the physical integrity of a person at a level well above the interests of commerce. The former is protected by the law even when, in similar circumstances, the latter is not.* (My emphasis)

His Honour continued at paragraph [4]:

> It is another matter to hold an engineering designer liable in negligence for design defects that produce economic loss, rather than personal injury, to a person like the plaintiff here, with whom the designer was never in any contractual relationship.

187 Meagher JA added another reason, applicable to this area of discourse, for the difference in the law's treatment of economic loss, on the one hand and personal injury on the other (at [72]):

> A related reason may be that the primary interest sought to be secured by the EPA Act in requiring certification to authorise occupation and use of a new, renovated or altered building, is the safety of those doing or seeking to do so.

His Honour held that Cohen owed a duty to exercise reasonable care in the discharge of its statutory functions that were to be exercised to promote the health and safety of future occupiers and users of the building and to avoid personal injury to such occupants and users from the erroneous certification of compliance by the various professionals and trades engaged in the building work with the requirements of the building safety regulation, standards or codes informing their work. It was obliged to obtain from the various professions and trades, documentation certifying their compliance with the requirements governing their work. The very purpose of cl 10 and 11 of *DGR* is to enable others to be satisfied that the work has been properly done in accordance with its requirements. He held that for the purpose of s 5B *Civil Liability Act*, the risk was that if in a given area, including gasfitting, the certifier failed to obtain certification of compliance, he may issue a Final Occupation Certificate in respect of a non-compliant building, exposing the occupants and users to a risk of personal injury arising from a defect in the building. He held:

> 193 Specifically, for the purpose of s 5B *Civil Liability Act*, the risk of injury arising from Cohen's failure to obtain evidence of compliance of the LPG installation before issuing the Final Occupation Certificate was a gas explosion with potentially catastrophic consequences because of a failure of non-compliant component of the gas installation. This extends to an explosion due to the negligent location of, or failure to vent, a second stage regulator. The question of whether Cohen is negligent depends upon a failure to take the precaution of refusing to issue the final occupation certificate until Binah produced a certificate of inspection under cl 10 *DGR*, and took steps to have a person authorised under *DGR* attach the compliance plate required by cl 11 to the installation.

His Honour held that this risk was foreseeable and not insignificant and a reasonable person in Cohen's position would have taken the precaution that he identified, which involved no expense on its part and no more than it discharging his statutory obligations. Cohen's negligence was a necessary condition of the plaintiff's personal injuries in accordance with the requirements of s 5D of the *Civil Liability Act.*

Statutory contribution

His Honour stated that the evaluation of comparative responsibility between tortfeasors is a quasi-discretionary one calling for a broad assessment of the relative contribution of each and the principal relevant considerations are: (1) the degree of departure of each tortfeasor from the standard of reasonable care; and (2) the relative causative potency of the specific act or omission of each resulting in legal liability for the plaintiff's injuries. He held that it was impossible to overlook the fact that none of the tortfeasors is the party primarily responsible for the explosion that caused the plaintiff's injuries. As the responsibility of each is, in a factual sense "secondary", it is very difficult to differentiate them without splitting hairs or descending into an exercise in unreal and false precision. However, he held that liability should be "*apportioned*" between defendants on a pro rata basis (20% each), allowing for the requirements of Div 3 of Part 5, and s 151Z (2) *WCA*.

His Honour held that the absence of formal claims for contribution by each tortfeasor against the others does not prevent the Court from making appropriate orders that will dispose of the litigation and avoid further litigation: *HIH Casualty & General Insurance Limited v Pluim Constructions Pty Ltd* [2000] NSWCA 281; 11 ANZ Ins Cas 61-477 at [81] – [82] per Handley JA and Foster AJA.

In that matter, the question of the liability of each insurer was fully litigated before the trial judge even if the issue of contribution had not been formally joined between them. In expressing their conclusion about the absence of formal claims for contribution, Handley JA and Forster AJA referred to *Croston v Vaughan* [1938] 1 KB 540, in which an application for contribution followed the giving of judgment for the plaintiff against each of two

defendants and the trial judge obliged. One question on appeal was "*whether the learned judge had jurisdiction at all to enter upon the task of apportioning the blame between the two co-defendants whom he had held liable without some separate formal legal proceedings being instituted*" (p 564 – 565 per Scott LJ). Scott LJ answered this question by saying (p 565):

> I agree with the judgment delivered by my colleagues on this point, holding that [the trial judge] had jurisdiction and that it was the intention of [the s 5 equivalent] that the trial judge should deal with the matter, and that he had power to dispense with any formal application. And I am inclined to think that it was open to the learned judge, even if one of the parties had dissented, to exercise the jurisdiction of that section if he thought fit. Reading that section as a whole, I think it was the intention of Parliament that the judge who had heard a case of primary liability at the instance of a plaintiff should, with the knowledge of the facts as proved in evidence before him, then and there assess the apportionment not merely of the damage, but also of the blame.

First-defendant's cross-claim under s 151Z (a) (d) WCA

His Honour noted that the first defendant sought statutory indemnity under s 151Z (1) (d) *WCA* from each of the cross-defendants with respect to the workers compensation payments that it made to the plaintiff. However, a considerable body of authority establishes that a negligent employer is not entitled to the benefit of that indemnity: *Public Transport Commission of New South Wales v J Murray-Moore (NSW) Pty Ltd* (1975) 132 CLR 336; *I & J Foods Pty Ltd v Bergzam Pty Ltd* (1997) 14 NSW CCR 486; *CSR Timber Products Pty Ltd v Weathertex Pty Ltd* (2013) 83 NSWLR 466; [2013] NSWCA 49 at [43]; *Endeavour Energy v Precision Helicopters Pty Ltd (No 2)* [2015] NSWCA 357 at [43]; *South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312; (2017) 327 FLR 110 at [172]. He held:

> 204 For the reasons explained by Basten JA in *Precision Helicopters* the employer cannot call in aid s 151Z (2) (e) because the alternative conditions for the special operation of s 151Z (1) (d) expressed the opening words of paragraph (e) of s 151Z (2) have not been satisfied. The first alternative has not been satisfied because Mr Hossain did take proceedings against his employer, and the second alternative has not been satisfied because the occasion has not yet arisen for Mr Hossain to choose whether he will accept satisfaction of the judgment to be entered against the College as his employer, or not. Section 151Z (2) (e) gives s 151Z (1) (d) partial operation only where both the employer, and here, one or other of the other tortfeasors would be legally liable to pay Mr Hossain damages. In *Precision Helicopters* at [48] Basten JA said:
>
> > Unless the opening words to paragraph (e) are satisfied [the employer] has no entitlement to indemnity given that it is liable to the plaintiff in damages.

Quantum

His Honour assessed *Civil Liability Act* damages as $3,203,270 and entered judgment for the plaintiff against the third, sixth and seventh defendants. He assessed Work Injury Damages as $1,064,and entered judgment for the plaintiff against the first defendant. Otherwise, he entered judgment as follows: (a) for the first defendant in relation to its cross-claims against the third, sixth and seventh defendants in the sum of $209,394.80; (b) for the third defendant in respect of its cross-claims against the first, sixth and seventh defendants in the sum of $748,468; (c) for the sixth defendant in relation to its cross-claim against the first defendant in the sum of $209,394; and (d) for the sixth defendant in respect of its cross-claims against the third and seventh defendants in the sum of $748,468.80. He also made costs orders.

WCC – Presidential Decisions

Causation – assessment of WPI – Two distinct injuries occurred and combined assessment not permitted – neither individual assessment satisfied the threshold under s 66 (1) WCA – award for the respondent entered

Le Twins Pty Limited v Luo [2019] NSWWCCPD 52 – Acting Deputy President Parker SC – 25 October 2019

On 18 August 2015, the worker injured his right shoulder. On 19 August 2016, he suffered a frank injury to his left shoulder. The appellant accepted liability for both injuries. On 19 October 2018, he claimed compensation under s 66 *WCA* for 13% WPI with respect to both shoulders and alleged that his left shoulder injury a consequence of his right shoulder injury. However, the appellant disputed the claim.

On 5 April 2019, ***Arbitrator Homan*** issued a COD, which determined that the worker suffered a consequential injury to his left shoulder and she ordered the appellant to pay compensation under s 66 *WCA* for 12% WPI.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) in not first identifying the pathological change that occurred in the left shoulder on 19 August 2016; (2) in failing to identify the pathological change that caused her to fall into error with respect to her findings as to causation; (3) in relying on inferences which were not available on the evidence; (4) in relying on *Murphy v Allity Management Services* to support a finding of more than one cause of injury; and (5) in concluding that there was an unbroken causal chain and the pathology in the left shoulder '*resulted from*' the right shoulder injury on 18 August 2015.

Acting Deputy President Parker SC determined the appeal on the papers.

Ground 5

ADP Parker SC noted that the Arbitrator quoted and directed attention to s 322 *WIMA* and quoted a passage from the decision of Kirby P in *Kooragang Cement Pty Limited v Bates,* that "*what is required is a common sense evaluation of the causal chain".* However, the Arbitrator omitted the final sentence of that quoted passage (at page 464):

> But in each case, the Judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned.

That sentence directs attention to the need to address the statutory formula when considering the issue of causation. ADP Parker stated:

> 27. The requirement that the decision maker address the statute is imperative as is made clear in *Comcare v Martin*. There the High Court was concerned with the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*. Section 14 (1) provided that Comcare was liable to pay compensation in respect of an injury suffered by an employee if that injury resulted in incapacity for work. Section 5A (1) defined "*injury*" to include "*a disease suffered by an employee … other than "a disease … suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment*".
>
> 28. The Full Federal Court had invoked a "*common sense*" determination of causation: see *Martin v Comcare* [2015] FCAFC 169 [110], [125].
>
> 29. The High Court reversed the Full Federal Court's decision. The High Court identified the controlling principle in the following terms:

> 42 Causation in the legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any 'common sense' approach to causation which can provide a useful, still less universal, legal norm. Nevertheless, the majority in the Full Court construed the phrase '*as a result of*' in s 5A (1) as importing a 'common sense' notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose.

ADP Parker SC held that the Arbitrator failed to interrogate the text, context and purpose of s 322 *WIMA.* Her conclusion that the right shoulder injury on 18 August 2015 materially contributed to the incident on 19 August 2016, was not based on a proper "*interrogation*" of s 322. The correct question for the purpose of s 322 (2) was did the impairments "*result from the same injury*"; for the purpose of s 322 (3) the correct question was did the impairments "*result from the same incident*". The Arbitrator did not ask those questions and her decision is affected by legal error and must be set aside. Therefore, the assessments should not have been combined to achieve an overall assessment of 12% for the purpose of satisfying the threshold under s 66 (1) *WCA.*

ADP Parker SC re-determined the dispute as follows.

Grounds (1) and (2)

He rejected grounds (1) and (2). He held that the error was that the Arbitrator did not consider causation for the purposes of s 322 *WIMA.*

Ground (3)

He upheld ground (3) and stated that the proven facts do not support the inferences that the Arbitrator drew. There was no proper basis for determining that the worker's choice to lift using his left arm was compelled by the prior injury to his right arm and there was no evidence to support a conclusion that he would not have injured his left shoulder if he performed a bilateral lift.

Ground (4)

He rejected ground (4). He stated that *Murphy* is an example of the requirement to consider the purpose for which causation is being determined: *Comcare v Martin.* The determination in *Murphy* was for the purpose of an award under s 60 in respect of surgery that had been performed. The test in *Murphy* was whether or not the surgery was "*reasonably necessary*" in the circumstances. The statutory question in this matter is whether the impairment suffered by the worker in respect of the two injuries to his shoulders could be accommodated within sub-sections 322 (2) or (3). He stated:

> 71. I do not regard the Arbitrator's conclusion at [81] of her reasons that a condition may have more than one cause as incorrect. Most conditions are the result of multiple factors. The question is always whether the facts as found satisfy the statutory criterion for causation.
>
> 72. In my view, the Arbitrator was in error in her conclusion that Mr Luo's impairment was caused by the injury to the right arm. That was because the injury to the right arm did not materially contribute to the injury to the left arm. That is because "*[t]he law does not accept John Stuart Mill's definition of cause as the sum of the conditions which are jointly sufficient to produce it. … at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage*": *March v E & M.H Stramare.*

Accordingly, ADP Parker SC upheld the appeal. As the injuries occurred on different dates and to different shoulders, s 322 (2) *WIMA* is not engaged and s 322A (3) *WIMA* only permits impairments from more than one injury to be assessed together where the injuries arise out of the same incident. As neither of the individual assessments were greater than 10% WPI, the worker is not entitled to compensation under s 66 (1) *WCA* and he entered an award for the respondent.

Estoppel - Bouchmouni v Bakhos Matta t/as Western Red Services [2013] NSWWCCPD 4 considered; Workers Compensation Legislation Amendment Act 2018; Pt 19L of Sch 6 of the Workers Compensation Act 1987 considered

Etherton v ISS Property Services Pty Limited [2019] NSWWCCPD 53 – President Judge Phillips – 28 October 2019

The appellant challenged Arbitrator Wynyard's finding that he was estopped from pursuing his claim under s 66 *WCA* due to Consent Orders entered in an earlier matter. He also challenged the Arbitrator's decision to determine a medical dispute relying upon the *Workers Compensation Legislation Amendment Act 2018.*

On 15 April 2015, the appellant suffered injury when he lost his footing and fell forward on his right leg at work. He claimed compensation, but the insurer disputed the claim under ss 4, 9A, 33, 60 and 66 *WCA.* On 9 February 2016, he filed an ARD, which claimed weekly payments and the cost of total right knee replacement surgery. He underwent that surgery on 3 March 2016.

On 5 May 2016, ***Arbitrator Snell*** issued an Amended COD – Consent Orders, which provided, relevantly:

- The ARD was amended to also allege injury to the right knee sustained as a result of the nature and conditions of employment over the entire period of the appellant's employment up to 15 April 2015.
- An award for the respondent was entered in respect of that allegation of injury.
- The respondent agreed to pay the appellant weekly compensation from 18 May 2015 to 15 November 2015, with an award for the respondent thereafter.
- The respondent agreed to meet treatment expenses up to $3,871.25, with an award for the respondent for the claim for the cost of a right total knee replacement on the basis that the surgery was not reasonably necessary as a result of the injury on 15 April 2015.
- The parties agreed to consent findings as follows:
    - Since 15 November 2015, the appellant has not suffered any incapacity as a result of the work injury;
    - Since 4 March 2016, the appellant has not required any medical, hospital or related treatment as a result of the work injury; and
    - Since 4 March 2016, the appellant has recovered from the effects of the work injury.

The appellant claimed compensation under s 66 *WCA* for 18% WPI based upon an assessment from Dr Giblin, which was based upon the right total knee replacement. However, the insurer disputed the claim and relied upon the terms of the Consent Orders.

On 28 November 2018, the appellant filed a further ARD and this was heard by ***Arbitrator Wynyard.*** On 18 March 2019, he i entered an award for the respondent and noted that the issue with Dr Giblin's opinion was that he either ignored or was not aware of the Consent Orders. In respect of the estoppel issue, he stated:

> 49. The subject injury is clearly that of 15 April 2015 and the effect of Order 3 of the Consent Orders is that Mr Etherton's injury can only be viewed as a personal injury as defined in s 4 (a) of *the 1987 Act*. Order 3 provided an award for the respondent in relation to the claim of injury due to the nature and conditions of employment…
>
> 51. The evidence regarding injury to which I have adverted, that is to say the histories taken by the various medical practitioners, and indeed that given by Mr Etherton himself, is consistent with the description given in Part 4 of both ARDs. Whilst the term '*nature and conditions*' has no formal definition, it is commonly used as a shorthand method of describing a '*disease injury*' as defined in s 4 (b). Although the ARD in matter 658/2016 referred to the aggravation of osteoarthritis, the effect of Order 3 was to make the claim a personal injury (or '*frank*' injury, as such an injury is commonly called). The effect of Mr Robison's amendment to Part 4 in the present ARD to delete the allegation regarding the nature and conditions of employment has the same effect, that is to say, the injury relied on is a personal injury which occurred on 15 April 2015.
>
> 52. No argument was made that the effect of Order 3 had any different effect.
>
> 53. Accordingly, the evidence relied upon by the parties to reach the agreement recorded in the Consent Orders of 17 May 2016 was that which was before the Commission in that matter. The fact that the pagination is different in the evidence presented before me is simply a reflection of the preparation of the documentation in these pleadings.
>
> 54. The effect of Order 5 of the Consent Orders is that Mr Etherton is unable to claim that the right total knee replacement surgery resulted from the injury of 15 April 2015. This is however precisely what Dr Peter Giblin alleged in his opinion. Dr Giblin made a provisional diagnosis of soft tissue injury to the right knee '*reasonably causally related to the subject injury 15 April 2015*.' Whilst he acknowledged the presence of pre-existing age-related changes within the right knee he nonetheless found that the injury caused '*a material aggravation*' which produced a '*symptom complex formation*' which necessitated the right total knee replacement.

The Arbitrator held that the appellant was estopped from alleging that he is entitled to compensation on the basis that injury to the right knee was caused by the fall in 2015.

The Appellant appealed on three grounds and asserted that the Arbitrator erred: (1) in finding that he was estopped from proceeding with the claim; (2) by acting ultra vires to determine a medical dispute; and (3) by constructing (sic) the 2018 amending Act so as to have retrospective effect.

President Phillips DCJ determined the appeal on the papers. His findings and reasons are summarised below.

Ground (1)

His Honour upheld ground (1). He noted that the appellant argued that the estoppel is limited to the claim for injury to the right knee as a result of the nature and conditions of his employment and it does not apply to the frank injury on 15 April 2015. He stated, relevantly:

> 86. Roche DP considered at length the principles relating to whether consent orders can give rise to res judicata estoppels in *Bouchmouni v Bakhos Matta t/as Western Red Services*. After referring to relevant authorities, he made the following observations:
>
> > I draw the following conclusions from the above authorities:

(a) consent orders create res judicata estoppels, but only to the extent of what was '*necessarily decided*' (*Habib* at [186]);

(b) to determine what was '*necessarily decided*', the Commission will closely examine the pleadings and particulars, the s 74 notice, and the legislation, because that material forms part of the mutually known facts and assists in objectively determining the 'genesis' and 'aim' of the orders (*Isaacs* at 75; *Spencer Bower* at [39]; *DTR Nominees* at 429);

(c) consent orders should be construed by reference to what a reasonable person would understand by the language the parties have used in the orders, having regard to the context in which the words appear and the purpose and object of the transaction (*Cordon Investments* at [52]);

(d) where the words in the consent orders are ambiguous, or susceptible of more than one meaning, extrinsic evidence is admissible to show the facts which the negotiating parties had in their minds (*Codelfa* at 350), but such evidence is not admissible to contradict the language of the orders when it has a plain meaning and is not ambiguous or susceptible of more than one meaning (*Codelfa* at 352);

(e) prior negotiations that tend to establish objective background facts which were known to both parties and the subject matter of the consent orders will be admissible (*Codelfa* at 352);

(f) evidence of prior negotiations that are reflective of the parties' actual (subjective) intentions is not receivable (*Codelfa* at 352), and

(g) the interpretation of consent orders is not governed by the parties' subjective beliefs or understandings about their rights and liabilities. It is an objective test of what a reasonable person would understand by the language in which the parties have expressed their agreement (*Toll* at [40]; *Cordon Investments* at [52]).

His Honour held that it is necessary to examine the pleadings, the evidence and the dispute notices to ascertain exactly what was '*necessarily decided*' by the Consent Orders and to consider their text. He held that the payments reflected in Orders 4 and 5 cannot be payments in respect of the nature and conditions claim as an award for the respondent was entered in Order 3. The Commission's power to make an order depends upon the worker suffering an injury and when this determination was made, there was a pleading and a body of evidence filed on behalf of the appellant that alleged a frank injury to his right knee on 15 April 2015. That injury was not adverted to in Order 2 and it cannot be subject to the award in favour of the respondent in Order 3. He stated:

> 96. Properly construed, this order (order 5) is limited to the cost of a total knee replacement in relation to the 15 April 2015 knee injury as not being reasonably necessary, which is of course a separate head of claim under s 60. This award in favour of the respondent in relation to the total right knee replacement does cause problems, as has been identified, with the ultimate opinion provided by Dr Peter Giblin. The problem arises because Dr Giblin was not instructed with this fact and thus did not take it into account in arriving at his opinion. However this is a different issue from whether or not Order 5 creates an issue estoppel as is ultimately found by the learned Arbitrator.

97. In my opinion, and consistent with what was found in *Habib*, what was "*necessarily decided*" by the Consent Orders can be distilled into the following issues:

(a) That the respondent employer in proceedings ARD 658/16 obtained an award in its favour with respect to the allegation that Mr Etherton had suffered injury to his right knee sustained as a result of the nature and conditions of his employment over the entire period of that employment, up to and including 15 April 2015.

(b) That there was an award for the respondent employer with regards to s 60 expenses after 4 March 2016, including an award for the respondent employer with respect to the cost of a right total knee replacement on the grounds that that was not reasonably necessary as a result of the right knee injury suffered on 15 April 2015.

His Honour held that whether the appellant suffered a frank injury to his right knee on 15 April 2015 was not necessarily decided by the consent orders, although orders 4 and 5 by definition can only apply to it. Accordingly, the Arbitrator erred in finding that the appellant was estopped from seeking further compensation and no relevant estoppel arises with respect to these proceedings arising from the previous Consent Orders.

Grounds (2) and (3)

His Honour rejected these grounds. He held that it is necessary to consider: (1) whether or not the 2018 amendments are procedural or substantive? And (2) whether or not cl 2 of Pt 19L of Sch 6 *WCA* applies to this matter. He held that the appellant's claim is not a claim in relation to compensation paid or payable in respect of any period prior to 1 January 2019. Rather, he is seeking the referral of his claim for permanent impairment to an AMS in order to have his claim assessed. Section 66 (1) *WCA* states that this "*[p]ermanent impairment compensation is in addition to any other compensation under this Act.*"

His Honour also held that Pt 19L (2) (does not apply to this claim and that the effect of Pt 19L (2) (1) on this claim is that the 2018 amendments apply. Therefore, the Arbitrator was acting within power when he determined the claim under s 66 *WCA* consistently with the 2018 amending Act.

Accordingly, his Honour concluded that as the Arbitrator assessed the permanent impairment as being 10% WPI, the appellant is not entitled to compensation under s 66 *WCA* and he confirmed the COD.

WCC - Medical Appeal Panel Decisions

Psychological injury – Ferguson applied – co-morbid condition of obstructive sleep apnoea not relevant to WPI assessment – MAC confirmed

Ifopo v Secretary, Department of Communities and Justice [2019] NSWWCCMA 154 – Arbitrator Wynyard, Dr J Parmegiani & Dr M Hong – 29 October 2019

The appellant suffered a psychological injury as a result of alleged bullying and harassment at work. She alleged that her mental state deteriorated over 2017 and she consulted her GP on 22 July 2017. She was referred to a psychologist on 1 August 2017, received treatment and returned to work. However, her condition deteriorated in 2018 and in 2019, she was placed on a performance review due to lateness as she was struggling to get to work on time.

The appellant claimed compensation under s 66 *WCA* and the dispute was referred to an AMS for assessment of WPI resulting from a psychological/psychiatric injury dated 10 July 2017 (deemed). On 13 June 2019, Dr Glozier issued a MAC that assessed 8% WPI (7% + 1% for the effects of treatment).

However, the appellant appealed and asserted that the MAC contains a demonstrable error. She requested a re-examination by a member of the MAP, but the MAP denied this request as no demonstrable error was found. It determined the appeal on the papers.

Ground (1) – PIRS

The MAP stated that the assessment of psychiatric disorder has been considered in a number of case. In *Ferguson v State of New South Wales,* Campbell J was concerned with a case inn which the MAP revoked a MAC on the basis that the AMS' finding had been glaringly improbable. His Honour held that the MAP had fallen into jurisdictional error and he stated:

> 24. The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the AMS was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
>
> 25. The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see *Jenkins v Ambulance Service of New South Wales.* The Appeal Panel said, 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

The MAP noted that in *Glenn William Parker v Select Civil Pty Ltd*, another case regarding assessment of psychiatric disorder, Harrison AsJ cited [23] of *Ferguson* with approval at [65]. Her Honour said at [66]:

> In relation to classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense. (*Ferguson* [24])…..

Further, in *Jenkins*, Garling J said at [73]:

> It was a matter for the clinical judgment of the AMS to determine whether the impairment with respect to employability was at the moderate level, as he did, or at some other level. But, in seeking judicial review, a mere disagreement about the level of impairment is not sufficient to demonstrate error of a kind susceptible to judicial review.

The MAP held that it must be satisfied that the AMS' assessment in this category was erroneous in one of the following ways (to use the reference by Campbell J in *Ferguson*): (a) if the categorisation was glaringly improbable; (b) if it could be demonstrated that the AMS was unaware of significant factual matters; (c) if a clear misunderstanding could be demonstrated, or (d) if an unsupportable reasoning process could be made out. It stated that the two PIRS categories that the AMS fell into error in assessing were "*social functioning and recreational activities*" and "*concentration, persistence and pace*".

In relation to the former category, the MAP rejected the appellant's submissions and held that these did not take into account the reasons given by the AMS, namely that there had been an improvement in 2019. The AMS engaged with the opinion of Associate-Professor Robertson, the appellant's medico-legal specialist, and clearly explained why his view differed.

The MAP also rejected the appellant's submissions in relation to the latter category. It held that the AMS' comments that the appellant has an issue with motivation must be seen in the context of his finding that she probably suffers from obstructive sleep disorder and they have been taken out of context by an eye "*too keenly focussed on the perception of error.*" It stated, relevantly:

> 56. We have some difficulty in comprehending the criticism of the AMS that his opinion was gratuitous and failed to be objective, fair and independent. Such comments are regrettable and of no assistance, especially where, as in the present case, the report by the AMS has been thorough, considered and clearly expressed. It is within his expertise to make an assessment of the reasons for a psychiatric symptom such as concentration, persistence and pace.

Ground (2) – Sleep Apnoea

The MAP noted that the AMS determined that the worker's obstructive sleep apnoea was not linked to her work-related injury. However, the existence of that co-morbid feature did not affect the quantum of the WPI. As there was no impact on the AMS' assessment, no demonstrable error was established.

Accordingly, the MAP confirmed the MAC.

Section 323 WIMA – Failure to consider whether any impairment arose from a previous injury was an error

State of New South Wales v Dunn [2019] NSWWCCMA 156 – Arbitrator Rimmer, Dr M Burns & Dr J B Stephenson – 30 October 2019

On 2 April 2015, the worker injured her cervical spine at work. She claimed compensation under s 66 *WCA* and the dispute was referred to an AMS. On 17 July 2019, Dr Kuru issued a MAC, which assessed 24% WPI as a result of the injury (27% - 1/10 deduction under s 323 *WIMA*).

However, the appellant appealed and asserted that the MAC contained a demonstrable error. The MAP determined that a further medical examination was not required and that the appeal should be determined on the papers.

The worker sought to adduce fresh evidence in the response to the appeal, comprising certificates of capacity dated 25 & 27 March 2015 and 8 April 2015 and consultation notes (x 7) from Dr McMinimee from 23 March 2015 to 10 April 2015. The worker's solicitor submitted that all but one of the consultation notes were annexed to the ARD and were in evidence, but the certificates of capacity were not annexed to the ARD and 'provided context' for the corresponding consultation notes. The appellant did not oppose the admission of this fresh evidence.

The MAP held that the fresh evidence adduced additional relevant information as required by s 327 (3) (b) *WIMA* and is information of a medical kind or which was directly related to a decision required to be made by the AMS. However, the evidence was certainly available and could reasonably have been obtained before the AMS' assessment and it was not admitted as fresh evidence, but that these are documents that it would call upon as additional information under s 324 (1) *WIMA.*

The appellant argued that the AMS erred by electing to apply a 1/10 deduction under s 323 *WIMA* because this was at odds with all of the evidence. The worker elected to rely upon an injury occurring on 3 April 2015. It acknowledged that the worker suffered two distinct and separate injuries on 18 March 2015 and 2 April 2015, but said that she wither gave the AMS an incorrect history regarding the development of her symptoms or the AMS obtained an incorrect history by recording that the worker first developed radiculopathy following the latter injury. However, contemporaneous evidence indicated that these symptoms were present prior to April 2015 and they were amply sufficient to justify an assessment of DARE Cervical Category III. It argued that the MAP should revoke the MAC and apply a 50% deduction under s 323 *WIMA.*

However, the worker argued that the weight of the evidence supported a deduction on 1/10 under s 323 *WIMA* and that the overwhelming weight of the evidence establishes that no radicular symptoms were present or complained of by the worker until after the 2 April 2015 incident and she underwent cervical fusion surgery as a consequence of the injury on 2 April 2015 only. Therefore, the MAC should be confirmed.

The MAP held that the decision in *Cole v Wenaline Pty Limited* governs the approach to assessing the s 323 deduction and noted that in *Pereira v Siemens Ltd* [2015] NSWSC 1133, Garling J said:

> 81. The assessment required by s 323 is one which must be based on fact, not assumptions or hypotheses: *Elcheikh v Diamond Formwork (NSW) Pty Ltd (In Liq)* [2013] NSWSC 365 at [89]; *Matthew Hall Pty Ltd v Smart* [2000] NSWSC 284 at [33]; *Ryder v Sundance Bakehouse* [2015] NSWSC 526 at [40].
>
> 82. The process encompassed by s 323 requires the application of each of the following steps before reaching the ultimate conclusion of the existence of a pre-existing injury which has an impact on the assessment of the injury the subject of the worker's claim.
>
> 83. The first step requires a finding of fact that the worker has suffered an injury at work which has resulted in a degree of permanent impairment which has been assessed pursuant to s 322 of the 1998 Act: see *Elcheikh* at [125].
>
> 84. The second step which needs to be addressed is, assuming such an injury has been sustained and impairment has resulted, what is the extent of that impairment expressed as a percentage of the whole person: see *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [38]; *Elcheikh* at [126].
>
> 85. The third matter to be addressed is whether the worker had any previous injury, or any pre-existing condition or abnormality. The previous injury does not have to be one in respect of which compensation is payable under the 1998 Act. If the phrase 'pre-existing condition or abnormality' is to be relied upon, then such condition or abnormality must be a diagnosable or established clinical entity: *Fire & Rescue NSW v Clinen* [2013] NSWSC 629.
>
> 86. A finding of the existence of a previous injury can be made without the presence of symptoms, but there must be evidence which demonstrates the existence of that pre-existing condition: *Mathew Hall* at [31]-[32].
>
> 87. The pre-existing injury or condition must, on the available evidence, have caused or contributed to the assessed whole person impairment: see *Matthew Hall* at [32]; *Cole* at [29]-[31]; *Elcheikh* at [88] and *Ryder* at [42].

> 88. It cannot be assumed that the mere existence of a pre-existing injury means that it has contributed to the current whole person impairment: *Clinen* at [32]; *Cole* at [30]; *Elcheikh* at [91]. What must occur is that there must be an enquiry into whether there are other causes of the whole person impairment which reflect a difference in the degree of impairment: *Ryder* at [45].
>
> 89. Next in dealing with the application of s 323, the extent of the contribution, if any, of the pre-existing condition to the current impairment must be assessed in order to fix the deductible proportion. If the extent of the deductible proportion will be difficult or costly to determine, an assumption is made that the deductible proportion will be fixed at 10%, unless that is at odds with the available evidence: s 323 (2) of *the 1998 Act.*
>
> 90. Each of these steps, and considerations, is a necessary element of a determination that an assessed whole person impairment is to be reduced by a deductible proportion by virtue of the application of s 323 of *the 1998 Act*.

The MAP held that the AMS applied a 1/10 deduction under s 323 *WIMA* with respect to pre-existing cervical spondylosis, but that he made no deduction for the previous frank injury on 18 March 2015. The AMS did not consider whether any impairment arose from that frank injury and it was satisfied that this was a demonstrable error.

The MAP determined that a deductible of 1/10 was appropriate for pre-existing cervical spondylosis and stated, relevantly:

> 60. The two week period, in the Appeal Panel's opinion, while insufficient to allow the aggravation of a pre-existing underlying degenerative change caused in the injury on 18 March 2015 to settle, was a sufficient period for radicular signs to have appeared if they had been caused as a result of the first injury on 18 March 2015. The Appeal Panel were of the view that the symptoms caused in the first injury on 18 March 2015 had improved with treatment and would have continued to improve but for the second injury.

The MAP held that none of the permanent impairment was caused or contributed to by the injury on 18 March 2015. As its assessment was the same as that of the AMS, it confirmed the MAC as the review has not led to a different result and should not be interfered with: *Robinson v Riley* [1971] 1 NSWLR 403.

WCC – Arbitrator Decisions

Application for reconsideration of COD under s 350 (3) WIMA refused – Substantial merits not established on the available evidence

Mikhail v Universal Anodisers Pty Ltd [2019] NSWWCC 346 – Arbitrator Wright – 22 October 2019

On 25 February 2019 the worker lodged an ARD that claimed compensation under s 66 *WCA* for 15% WPI. The respondent disputed the degree of permanent impairment and asserted that it was not fully ascertainable and that MMI had not been reached because a treating doctor recommended further treatment and/or possible spinal fusion surgery. However, on 18 March 2019, the worker's solicitor advised the respondent's solicitor that, "*my instructions are that he will not be going ahead with a spinal fusion.*"

On 8 April 2019, Dr Harvey-Sutton issued a MAC that assessed 12% WPI due to the injury at work on 5 August 2014. On 18 April 2019, the worker's previous solicitors wrote to him, providing him with a copy of the MAC and advising that as the AMS found no verifiable signs of radiculopathy in the left leg, he was not entitled to the additional 2% WPI that would satisfy the threshold for a claim for work injury damages.

The previous solicitors advised the worker that they would review the matter further and advise on appeal prospects and that any appeal must be lodged within 28 days of the MAC. On 16 May 2019, they wrote to him advising against an appeal. This was the last day on which an appeal could be lodged and they ceased to act for him. Their letter noted that the worker told them that he had spoken to another solicitor and had been advised that he may have a claim for gastrointestinal impairment.

On 23 May 2019, the Commission issued a COD based upon the MAC, which ordered the respondent to pay compensation for 12% WPI under s 66 *WCA*.

On 10 June 2019, the worker's current solicitors took over the conduct of the matter and sought advice from Counsel. On 3 July 2019, they sought to lodge an Application for Appeal against the MAC, but the Commission rejected this under s 327 (7) *WIMA.* The Registry advised them that they must first lodge an application for reconsideration in accordance with the Registrar's Guidelines.

Arbitrator Wright declined the application for reconsideration of the COD. In so doing, he cited the decision in *Samuel v Sebel Furniture Ltd,* which set out the general principles relevant to an application for reconsideration under s 350 (3) *WIMA*, and he was particularly concerned with the following*:*

> (5) reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Maksoudian*'); …
>
> (8) a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and 9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354 (3) of *the 1998 Act*).

The Arbitrator held that principle (5) in *Samuel* applies to a COD issued after the expiration of the appeal period without an appeal being lodged against a MAC, but the consideration of principle (8) should have regard to the context in which it was originally stated in *Hurst v Goodyear Tyre & Rubber Co (Australia) Ltd*: *Atomic Steel Constructions Pty Ltd v Tedeschi.* He stated:

> 54. Thus, applying *Sorcevski v Steggles Pty Ltd,* mistakenly signed consent orders by counsel were found not be determinative of whether relief should be granted: *Tedeschi.*

The Arbitrator accepted that the worker had sufficient reason, and had explained the reason, for the delay in lodging the application for reconsideration and that the delay was not unduly long. It was therefore necessary to consider the merits of the application, including the merits of the proposed appeal and he accepted that the worker had sufficient reason for the delay in lodging an appeal against the MAC, as his former solicitors advised him against doing so on the last day of the appeal period. However, their advice did not extend to considering the worker's treatment at that time and the question of MMI and, as at 10 June 2019, the worker was being treated by Dr Nazha, who was considering further treatment including a trial of a spinal cord stimulator. He regarded this as an oversight by the previous solicitors. He applied the context of *Hurst* to this matter, which allowed a finding that the previous solicitors' oversight is not determinative for the relief to be granted, but this did not not mean that the application has substantial merits.

The Arbitrator held that no substantial merits were established. The worker did not identify any grounds of appeal as required under s 327 (3) *WIMA* and he did not put forward any specific reason for reconsideration by the AMS. While the worker's statements would support arguments of demonstrable error or of matters for further reconsideration, he did

not accept them. The assessment of whether MMI has been reached, or whether the degree of permanent impairment can be fully ascertained, is a matter of clinical judgment and assessment for the AMS.

The Arbitrator held that there is no medical evidence that the worker has not reached MMI. There was no recommendation for surgery, or further treatment from any of the surgeons that he has consulted for treatment opinions, and the worker relied upon a medicolegal report of Dr Stephenson, which assessed permanent impairment and did not certify that MMI had not been reached. He stated:

> 70. Taking the MAC as a whole, I am satisfied that the AMS was referring to the outcome of the surgery and not a continuing deterioration, and the answer of "no" at paragraph 8(b) was a slip or typographical error, in the context of the MAC assessing permanent impairment. I do not accept this argument. Contrary to the applicant's submissions, the answers by the AMS to the questions posed at paragraphs 8(c) and (d) are consistent with the assessment of permanent impairment and an answer that properly read should have been "yes" at paragraph 8(a).

The Arbitrator held that worsening of pain after the surgery in March 2017, did not suggest a continuing deterioration and there was no other medical evidence to suggest that is the case. The AMS considered the history of surgery and pain after it and exercised clinical judgment in assessing permanent impairment. He considered the worker's statements and submissions on the current evidence to be speculation about what treatment may come to pass at some uncertain future time and it is not evidence that he is, or should have been, assessed as not having reached MMI.

The Arbitrator stated that Dr Nazha's post-MAC reports may be additional relevant information that could not have been obtained before the MAC (s 327 (3) (b)), they do not support the argument that MMI has not been reached and on 1 July 2019, he reported that the worker "*is still quite non-committed to any options presented to him*".

The Arbitrator rejected the worker's complaints regarding the AMS' comments on inconsistency on examination and he held that there is no evidence to support a ground of appeal under s 327 (3) (a) *WIMA* (deterioration of permanent impairment). It was not necessary for him to comment on the respondent's submissions regarding the decisions in *Singh, Milosavljevic* and *O'Callaghan* and the operation of s 322A *WIMA.*

Exempt employer – Remitter of application after previous COD was set aside due to denial of procedural fairness

Elias Bader t/as Genuine Kitchens v Workers Compensation Nominal Insurer [2019] NSWWCC 350 – Arbitrator Perry – 25 October 2019

The full background to this dispute was reported in Bulletin no. 28, but a summary is as follows.

The employer began business as a sole trader in/about 2013, but in February 2014, the worker asked him for work and he began working with him for 5 days per week (although there was conflicting evidence about his starting date). On 20 October 2014, the worker badly cut his left thumb while using a circular saw and he did not return to work. The employer was uninsured at that time.

On 14 August 2015, the Nominal Insurer served a notice upon the employer under s 145 (1) WCA seeking reimbursement $30,815.82. He filed a Miscellaneous Application under s 145 (3) WCA and argued that he was an "*exempt employer*" under s 155AA WCA. On 2 February 2016, that dispute was resolved and Consent Orders indicate that the employer agreed to voluntarily repay a compromised amount to the Nominal Insurer.

On 15 January 2018, the Nominal Insurer served a further notice upon the employer under s 145 (1) WCA seeking reimbursement of a further $70,188.02. The employer filed a further Miscellaneous Application under s 145 (3) WCA and again argued that he was an exempt employer. He also sought reconsideration of the 2016 Consent Orders. The Nominal Insurer disputed that application.

Arbitrator Homan noted that the employer's evidence was to the effect that before he started his business, his accountant told him to obtain advice from an insurance broker. He did this and was advised that he required insurance if he paid wages exceeding $7,500 per year. Based on that advice, he decided that he did not require insurance as he only intended to employ the worker for a short term of about one month and he believed that total wages would not exceed $7,500. However, the worker continued to work even after he was told that there was no more work. On 24 October 2014, he handed the worker a letter of termination of employment dated 19 October 2014.

The employer's accountant wrote a letter in which he said that in 2014, the employer told him that he had employed a family friend for a period of three to four weeks and that total wages would not exceed $4,000 to $5,000. The employer relied upon that letter.

The arbitrator identified 4 issues: (1) Did the WCC have power to reconsider the COD issued on 2 February 2015; (2) If yes, should the discretion to reconsider the COD be exercised? (3) Was the employer estopped from arguing that he was an exempt employer?; and (4) Was the employer an exempt employer (i.e. Did the Nominal Insurer establish on the balance of probabilities that when the injury occurred, the appellant did not objectively have reasonable grounds for believing that the total amount of wages payable for the 2014/5 financial year would not exceed $7,500?).

On 1 August 2018, the Arbitrator issued a COD. She declined to reconsider the Consent Orders and held that the employer was not an exempt employer under s 155AA WCA. She stated that while the accountant's evidence appeared to corroborate the employer's evidence, this was inconsistent with the fact that he obtained insurance shortly after the injury occurred. She also expressed concern that the accountant's evidence "*was not given under oath or affirmation*" and said that she was not satisfied that this was sufficient to overcome her concerns regarding the employer's evidence.

The employer appealed and asserted that the Arbitrator erred: (1) by failing to make a finding that answers the correct question "*as noted by the Statutory test to determine an exempt employer*"; (2) in fact and law by assessing wages paid in the past and payable in the future; (3) by failing to afford him procedural fairness by rejecting the accountant's evidence without first putting the rejection to him; (4) by making findings regarding the minimum wage, applicable tax and handwritten notations without evidence; (5) by failing to take consider relevant evidence from the insurance broker and the accountant; (6) by considering irrelevant evidence (the Western Union transactions) and making the subsequent irrational finding; and (7) by mistaking the evidence of the termination letter.

Deputy President Wood determined the appeal on the papers under s 345 (6) WIMA. She noted that the employer sought to rely upon an affidavit from the accountant and that he asserted that failure to admit this would cause him substantial injustice because of the Arbitrator's raised procedural fairness issues.

DP Wood held that while s 354 (2) *WIMA* permits the Commission to "*inform itself on any matter in such manner*" it thinks fit, it is obliged to comply with the rules of procedural fairness. She stated:

> 137. Failing to afford procedural fairness is an error that must be corrected unless it could not possibly have affected the outcome. A decision or award based on a point not raised by the parties or by the Commission would constitute a denial of procedural fairness and be susceptible to challenge.

Wood DP held that the employer was denied procedural fairness. She revoked the COD and remitted the matter to another Arbitrator for re-determination.

Arbitrator Perry held that: (1) The employer was an exempt employer within the meaning of s 155AA *WCA* between 1 July 2014 and 24 October 2014; (2) The employer is deemed to have obtained from the first respondent, and the first respondent is deemed to have issued, a policy of insurance in accordance with s 155 *WCA* for that period; and (3) The employer is not estopped from arguing that he was an exempt employer with respect to the notice issued by the first respondent on 15 January 2018, under s 145 (1) *WCA.* However, he refused the employer's claim for an order that he is not liable to reimburse the first respondent in respect of its notice under s 145 (1) *WCA* dated 14 August 2015.

The Arbitrator stated, relevantly:

> 133. I am entitled to draw inferences, but they must be probable or likely ones. The highest the worker's evidence gets is in his statement of 12 November 2014: that he "*…commenced …employment … on a full-time basis..*." I am not prepared to infer from this that he has given evidence that his employment would be ongoing. The questions that were posed for the "*Future Action*" on 16 January 2015 were never answered by the respondents. They were only answered to the extent that the applicant has clarified his case.
>
> 134. Again, I recognise that any deficiencies in the investigation is not determinative. I must determine the question of whether the applicant was an exempt employer in accordance with the principles set out in *Kula*. But it does assist to go back to this very early stage of the first respondent's analysis of the applicant's claim (that he was an exempt employer; made within about 8 days of the injury) to see how that analysis has been conducted. To a significant extent, the present position of, and submissions for, the first respondent iterates the claims decision. I do accept that there has been a forceful denial of and challenge to the credit of the applicant and his claim that he was an exempt employer. In the result though, I do accept his evidence, on the balance of probabilities, to a sufficient extent to allow me to be satisfied that he has proved, on the *Prior* standard, that he is a relevantly exempt employer…
>
> 139. Despite my misgivings about the applicant's evidence in this respect, I do not believe it necessary to make a finding one way or the other about this sub-issue. Ultimately, it essentially goes only to the question of the quantum of wages being paid to the worker. Both he and the applicant agree that $550 per week was paid into his CBA account during the employment. He said he performed overtime and was paid cash, but also says "*I am not above to prove that*". Despite that belief, it may, as counsel for each respondent has said, that the evidence regarding the 17 October 2014 deposit slip does constitute proof; as does the evidence from the worker that he would not have been able to survive on $550 per week.
>
> 140. The reason I believe it unnecessary to decide this is because even if I were to find that the worker was paid, as is submitted for each respondent, $1,000 per week, every week, I still believe there would have been reasonable grounds for believing in all the circumstances, objectively viewed, that the total amount of wages would not exceed $7,500…

> 142. I still believe it likely the applicant did tell the worker he could only employ him for a short term to assist him to get into the workforce; and that he had given the worker more than one notice that he was wanting the worker to leave; and that the worker should be trying to find another job. He had come out of retirement, established a business which was relatively restricted in its operation compared to his earlier businesses and he had no employees. Then he was asked, through family references, to engage the worker. None of this contradicted by the worker. It is also corroborated by the evidence from his daughter. I accept her evidence…
>
> 156. In all the circumstances, including the lack of evidence for each respondent to contradict the applicant, I find it more likely than not that the applicant did give the notice of finish to the worker on 20 October 2014. I also find that the applicant did, indeed, raise with the worker his concern about the worker needing to look for other employment, and to leave (or prepare to do so), on more than one occasion prior to 17 October 2014, because he believed he could not keep the worker employed for much longer as the exemption limit may be crossed. I believe this likelihood to be consistent with the preponderance of the evidence…
>
> 162. I also find, objectively viewed, that the applicant had reasonable grounds for believing that the total amount of wages that would be payable by him during the 2015 financial year, to workers employed by him, would not be more than $7,500.00. Again, the standard of proof used for the "*reasonable grounds for believing*" aspect is as discussed in Prior. However the standard of proof used for assessing the applicants evidence for purposes other than the "*reasonable grounds for believing*" aspect is what was or is more likely or probable.
>
> 163. There is no requirement to accept the whole of the evidence of any one witness. As noted by Campbell JA in *Chanaa v Zarour* [2011] NSWCA 199 (at [86]):
>
>> …The criminal law requires certain types of evidence to be corroborated … in the civil law corroboration is not a technical term, or a legal requirement … task of the judge is to decide, on the basis of the whole of the evidence (denials and all) what he or she accepts. In doing that, there is no requirement … to accept the whole of the evidence of any one witness.
>
> 164. I nevertheless apply the principle that although this Commission is not bound by the rules of evidence, it is still required to draw its conclusions from satisfactory material, in the probative sense, to ensure such conclusions are not seen to be capricious, arbitrary or without proper foundation or material (*OneSteel*).

In relation to the question of estoppel, the Arbitrator referred to the decision in *Anschun* and stated:

> 169. In light of the above principles, and for those reasons, I do not believe it was unreasonable of the applicant to not raise the exempt employer defence in the proceedings leading up to the 2016 orders. I infer, on a likely basis, that at least one of the significant reasons for settling that earlier case by agreeing to pay the 2015 notice in full, involved him taking into account the evidentiary landscape, in concert with what may have been perceived to be a lack of authoritative legal principle applying to s155AA of *the 1987 Act* (*Kula* was not decided until 2018). The length and complexity of the present proceeding also bears witness to this.

The Arbitrator also considered the decision of the High Court in *Tomlinson v Ramsey Food Processing* [2015] HCA28; (2015) 256 CLR 507 and held that the applicant's reliance upon the exempt employer defence does not constitute an abuse of process.

In refusing to make an order that the employer is not liable to reimburse the first respondent under the 2015 notice, the Arbitrator stated:

> 172. Even if I am wrong about understanding that the RA is no longer on foot, I would still refuse to make the order sought. As the first respondent correctly submitted, the 2015 notice was the subject of a private agreement. I therefore doubt whether the Commission would have jurisdiction to deal with this, even with a RA. But it is not necessary to decide that. It is sufficient to state that on the evidence before the Commission in these proceedings, I would not make such order. The agreement noted in the 2016 orders clearly enough was intended to finalise the claim by the first respondent in the 2015 notice. Finality in litigation is of course an important policy in the law.

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Kim Garling