Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

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

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PIC - Presidential Decisions

PIAWE – ss 44C & 44E WCA – Calculation of PISWE in accordance with an Enterprise agreement – Whether or not earnings were calculated on the basis of ordinary hours worked

Hall v Lindsay Brothers Management Pty Limited [2021] NSWPICPD 31 – Acting Deputy President Parker SC – 6/10/2021

The appellant truck driver injured his back on 4/10/2018. The insurer accepted liability and asserted that employment was subject to the Respondent's Enterprise Agreement 2015, which was approved by the Fair Work Commission and commenced on 28/10/2015 and had a nominal expiry date of 30/06/2019. On 26/04/2019, it calculated PIAWE as $2,101.41, comprising: (a) $1,110.87 in ordinary earnings; (b) $985.79 in overtime, and (c) $4.75 in shift allowances.

On 3/12/2019, the insurer advised the appellant that as he had received 52 weeks of weekly benefits, from 17/12/2019, the overtime and shift allowances would be removed and continuing payments would be based upon his ordinary earnings and that PIAWE would be $1,120 per week (after indexation).

The appellant applied to iCare for a review of the PIAWE calculation. On 19/05/2020, iCare determined that: (a) the relevant period was 45 weeks (taking into account the weeks of unpaid leave); (b) the total ordinary earnings across the 45 week period were $48,875.13 resulting in a weekly average of $1,086.11; (c) the total overtime and shift allowances across the 45 week relevant period were $43,973.78 resulting in a weekly average of $977.20 for overtime and shift allowances; (d) PIAWE for the first 52 weeks was $2,063.31; and after the first 52 weeks, the overtime and shift allowances are removed resulting in PIAWE $1,086.11, which was indexed to a current rate of $1,120 per week.

The appellant filed an ARD and alleged that PIAWE continues to be $2,324.06, which includes an allowance for remote travel or, in the alternative, for the first 52 weeks (removing the allowance for remote travel) PIAWE is $2,143.73.

Arbitrator Peacock issued a COD on 27/01/2021, which ordered the Respondent to pay the appellant weekly payments: (1) from 8/10/2018, based on PIAWE of $2,143.73; and (2) from 17/12/2019, based on PIAWE of $1,166.53, and subject to indexation, the respondent was to have credit for payments made. She also gave the parties to apply within 14 days regarding the form of order to be made.

The Arbitrator held that the REMSERV deduction of $157.52 per week was wrongly excluded and needed to be added back in, but she was not persuaded that the remote travel allowance should be included in the calculation and that in the first 52 weeks PIAWE is $2,143.73.

The appellant appealed against the post-52 week determination and alleged that the Arbitrator erred: (1) in conflating the definitional provisions in an Enterprise Agreement with the statutory test in s 44E which requires a bifurcated test of whether or not the earning were, in fact, calculated on the basis of ordinary hours worked; and (2) in fact and law in finding that his earnings were calculated on the basis of ordinary hours worked.

Acting Deputy President Parker SC upheld both grounds of appeal for reasons summarised below.

- The Arbitrator was persuaded that the "fair work instrument" converted the kilometres travelled to ordinary hours of work such that there is a base rate of pay which is separate from the overtime and shift allowances, but she did not fully address the requirements of s 44E(1) *WCA.*
- Section 44E(1) provides for the determination of the "ordinary earnings" for the purpose of determining the PIAWE by addressing 2 categories of worker: (1) workers whose "base rate of pay is calculated on the basis of ordinary hours worked" in s 44E(1)(a); and (2) "in any other case" s 44E(1)(b) applies.
- The question to be addressed is in which category is the appellant's employment?
- Section 44G defines the base rate of pay as "*the rate of pay payable to a worker for his or her ordinary hours of work*", subject to various amounts which are to be excluded and ss 44G(2) provides:

  > In relation to pre-injury average weekly earnings and current weekly earnings, if, at the time of the injury:
  >
  > (a) a worker's base rate of pay is prescribed by a fair work instrument that applies to the worker, and
  >
  > (b) the worker's actual rate of pay for ordinary hours is higher than that rate of pay,
  >
  > the worker's actual rate of pay is to be taken to be the worker's base rate of pay.

- The Arbitrator did not determine whether the base rate of pay under the EA was greater than the actual rate of ordinary pay and neither party made submissions on this issue.
- The EA provides that the rate of pay payable their ordinary hours of work is the amount set forth in the table to clause 5.1. That is to say, a minimum of $1,055.28 for weekly base kilometres of 2,515. The reference to the hourly rate of $27.7705 is an equivalent hourly rate "for purposes of leave under the NES". The "NES" is the National Employment Standards (EA clause 7.1).
- The EA makes the "rate" of pay dependant on the amount payable with respect to the kilometres travelled. The final sentence of clause 5.1 makes this even clearer. In the event that the driver does not perform the weekly base kilometres and subject to the proviso, the driver is paid for the actual number of kilometres travelled at the rate specified in 5.2.
- In this case, the rate specified is $0.4196 per kilometre. If the appellant's rate of pay was to be calculated based on ordinary hours worked, then the calculation would be the hourly rate multiplied by the number of hours.
- The expression in s 44E(1)(a) "*calculated on the basis of ordinary hours worked*" indicates a calculation on the basis of a rate per hour multiplied by the number of hours worked, but the EA does not provide for remuneration to be calculated by reference to an hourly rate.
- The hourly amount in the third column is an "*Equivalent hourly rate*" for purposes of leave under the "*NES*". In its terms that indicates that the worker's remuneration is not calculated on the basis of ordinary hours worked. To achieve an "*equivalence*" between the basis of remuneration under the EA and the NES scheme, the EA provides a notional hourly rate but this is not the same as prescribing an hourly rate for the purpose of calculating the ordinary pay.
- Therefore, the base rate of pay was not calculated based on the ordinary hours worked and the appellant's ordinary earnings are to be calculated in accordance with s 44E(1)(b).

Parker ADP held that unless the parties can reach agreement, the matter needs to be remitted to the Arbitrator to determine this amount.

Parker ADP also upheld ground (2) and held that the calculus should be based on s 44E(1)(b) *WCA.* He stated, relevantly:

> 85. The appropriate remedy is for a remitter to the Arbitrator to calculate the post 52 weeks PIAWE by reference to s 44E(1)(b).
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> 86. The above is dispositive of the appeal. I add, s 44C(1)(b) requires overtime and shift allowance payments to be deducted for the post 52 week period irrespective of whether s 44E(1)(a) or (b) applies. The EA expressly recognises overtime in clause 4 (sub-clauses 4.1.2, 4.1.3 and 4.1.4) and clause 5.2.
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> 87. Although the starting point is different, depending on which of s 44E(1)(a) or (b) applies, s 44C of the 1987 Act requires that overtime and shift allowance payments be excluded in calculating the PIAWE for the period commencing after the first 52 weeks for which weekly payments are payable in all cases.
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> 88. The reality is, contrary to the position taken by the appellant, as recorded by the Arbitrator at [6] of the reasons for the post 52 week period the overtime etc components have to be excluded irrespective of whether s 44E(1)(a) or (b) is applied. This follows from the operation of s 44C(1)(b) and (5).

Pleadings on 'injury' – Section 42(3) of the PIC Act 2020 - Dealing with disputed expert evidence – Hume v Walton [2005] NSWCA 148, [69] - Duty to give reasons

University of New South Wales v Labit [2021] NSWPICPD 32 – Deputy President Snell – 7/10/2021

From September 2016, the worker was employed by the appellant as a research fellow in its Business School and she became a lecturer from May 2020. She alleged that her roles involved "*working primarily at the computer with a significant workload*" and that from March 2019, she developed occasional right wrist soreness which became constant by December 2019.

The appellant disputed the claim and asserted that the worker failed to give notice and make the claim within the required time limits. However, following an IME by Dr Reiter, rheumatologist, it issued a also disputed the allegations of 'injury', 'substantial contributing factor' and asserted that the condition did not result from a work injury.

The worker filed an ARD and claimed continuing weekly payments of $317.74 per week and s 60 expenses, including past costs of $2,521.24, the costs of carpel tunnel release surgery and ongoing physiotherapy, which were estimated as "approximately $10,000".

Arbitrator Young issued a COD on 4/01/2021, which awarded the worker continuing weekly payments from 17/08/2020 under s 37 WCA and he also made a "general award" under s 60 *WCA*. As there were no submissions on capacity and economic loss or the reasonable necessity of the proposed surgery, he granted the parties liberty to apply in respect of those matters if they could not be resolved.

The Appellant appealed and asserted that the Arbitrator erred in law: (1) in making an award for the payment of compensation without making any finding as to injuries; (2) (denial of procedural fairness) in determining the matter on a basis not put by or to the parties; and (3) going beyond the matters the subject of the application in determining liability; and that he erred: (4) in law and fact in failing to properly consider and weigh the evidence.; and (5) in failing to give adequate reasons.

Deputy President Snell determined the appeal on the papers.

Snell DP rejected grounds (1) and (2) . He held when evidence is read as a whole, it is quite clear that the worker's case was not one involving an injury simpliciter under s 4(a) *WCA* on 10/01/2020. The Arbitrator's approach in his reasons at [25], dealing with the 'pleadings issue', was economical but by and large correct. It was consistent with the approach taken in *Cairney*, and the authorities referred to in Cairney. It was consistent with the appropriate application of s 354 of *the 1998 Act* as it was at the time.

Snell DP noted that a central issue on appeal was correctly dealt with the 'injury' issue on its merits, bas on the 'disease' provisions, despite the difficulty in the pleadings identified by the appellant. He held that the Arbitrator's approach was consistent with the former s 354 *WIMA* which applied at the time and it was consistent with relevant authority and was clearly correct.

Snell DP stated that ground (1) is based on the premise that the Arbitrator did not make a valid finding of injury, because his finding did not relate to "*any incident or any pathology resulting from it*", referring to "*injury on one day only being the 10 January 2020*". However, he found that the Arbitrator's approach to the proof of injury and the 'pleadings issue' was correct.

Ground (3) is based on the proposition that the Arbitrator erred in law in going beyond the allegation that injury was suffered on a single day - 10 January 2020. He repeated his previous reasons in rejecting that ground.

Snell DP upheld grounds (4) and (5). He noted that there was a clear conflict of medical opinion and he stated:

> 90. …In *Hume v Walton* [2005] NSWCA 148 (at [69]) McColl JA stated:
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> > The primary judge's duty was not only to record the evidence but also to record the findings she made based on that evidence: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728. While the extent of that duty may depend upon the circumstances of the individual case (ibid), where there is disputed expert evidence, the 'parties are entitled to have the judge enter into the issues canvassed before the Court and to an explanation by the judge as to why the judge prefers one case over the other': *Archibald v Byron Shire Council* [2003] NSWCA 292; (2003) 129 LGERA 311 at [54] per Sheller JA (with whom Beazley JA agreed); see also *Bright v Joodie Holdings No 2 Pty Ltd* [2005] NSWCA 134 at [33] per Santow JA (with whom Sheller JA and Campbell AJA agreed).
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> 91. The reasons did not comply with this duty. The Arbitrator gave reasons for why he did not accept that part of Dr Reiter's opinion which relied on scientific studies, in part because the studies did not concern themselves with the issue of aggravation (see [83] above). Dr Reiter additionally opined that employment was not a contributing factor to any aggravation (see [87] above). The Arbitrator referred to the fact that Dr Reiter was asked about "disease and aggravation (etc) of disease", but did not refer to her opinion on the issue nor to why he did not accept it. The Arbitrator's preference for the opinion of Dr Bodel over that of Dr Reiter on the aggravation issue was essentially unexplained.
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> 92. The only reference to the report of Dr Edwards in the reasons is that at [27], where the Arbitrator refers to recording a submission from the appellant that Dr Edwards' history was not "consistent with what was alleged in the Application". This appears to be a reference to the following submission by Mr Macken:
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> > And the last thing of significance obviously, Arbitrator, is the report of Dr Edwards. Dr Edwards, again, is given the history that is not consistent with what is .. (not transcribable 0.51.37).. in the Application. That is problems going back to March and particularly in December.
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> 93. The Arbitrator dealt with the above submission in the reasons at [27] on the basis that it was a reference to the 'pleadings issue'. The reasons do not otherwise refer to Dr Edwards' report. The appellant's submissions on Dr Edwards relied on other matters. There was reference to Dr Edwards' discussion of the MRI of the cervical spine that was carried out and to the doctors' view that he could not find evidence of carpal tunnel syndrome on examination. The appellant addressed on Dr Edwards' opinion that the respondent's condition "has nothing to do with the work activities at university". The reasons did not deal in any meaningful way with the evidence of Dr Edwards. They did not "enter into the issues canvassed" and explain why the Arbitrator preferred the respondent's medical case over that relied on in the appellant's case.

Accordingly, Snell DP revoked the COD and remitted the matter to another Member for re-determination consistent with his reasons.

PIC – Member Decisions

Workers Compensation

Declaration that proposed surgery is reasonably necessary and a claim for the costs of a bed and mattress as a "curative apparatus" failed – Worker failed to satisfy his onus of proof

Honarvar v Professional Painting AU Pty Ltd [2021] NSWPIC 282 – Member Wynyard – 8/08/2021

On 7/07/2017, the worker fractured his right ankle and injured his lumbar spine when he fell from a ladder at work. He underwent several surgeries on his right ankle and extensive conservative treatment for injuries to his lumbar and cervical spines, including physiotherapy, hydrotherapy, cortisone and epidural injections and pain medication, without relief. He was also referred to a psychologist and psychiatrist. The respondent disputed claims under s 60 *WCA* for an orthopaedic mattress and bed valued at "*approximately $33,700*" and L5/S1 anterior interbody fusion surgery.

The worker applied for declarations under s 60 (5) *WCA*.

Member Wynyard identified the issues for determination as: (1) whether surgery proposed by Dr Al Khawaja was reasonably necessary; and (2) whether the claim for an orthopaedic mattress and bed is maintainable.

The Member declined to make a declaration under s 60(5) *WCA*. After discussing the principles set out by Roche DP in *Diab*, he observed that the worker had based his case on the assumption that all he has to prove is that alternative treatment has not been effective, but evidence as to the potential effectiveness of available alternative treatment is one of the factors that an applicant for a declaration under s 60 (5) *WCA* must satisfy. This requires further proof than simply the worker's subjective view. He also noted that the reports from the treating practitioners were unhelpful in considering the criteria because they supported the need for the proposed surgery on the basis that nothing else had worked.

The Member stated, relevantly:

> 106. The answer to many of the questions that I have raised are usually to be found in the clinical notes of the various treating practitioners in the event that no reports had been lodged from them. The failure by the applicant to lodge any supporting material from any of the practitioners who provided the alternative treatment has left a lacuna in his evidence that Mr Malouf was, with respect, unable to repair in his submissions.
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> 107. The failure of the alternative treatment, including the right ankle surgery, raises of itself a question as to whether there is some other condition at work preventing Mr Honarvar from recovery. The answer to that question becomes more relevant when the evidence shows that he has been under psychiatric care, it would appear, for many years. Again, questions arise as to why he was referred to a psychologist and a psychiatrist; who referred him and, critically, what the opinion of these practitioners revealed as to his mental state. The absence of evidence from this source leaves open the possibility, if not the probability, that what is preventing Mr Honarvar from recovery is not the alternative treatment, but rather his mental state.
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> 108. I cannot be satisfied accordingly that the criterion of the availability of alternative treatment has been properly addressed.
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> 109. I am also not persuaded that the proposed surgery is appropriate. Dr Carmody expressed misgivings when he was contemplating surgery on the right ankle. He wondered whether Mr Honarvar was not suffering some depression which both contributed to his pain and compromised any result of major surgery. This anticipation in the case of the ankle surgery proved to be accurate.
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> 110. Dr Al Khawaja maintained that the proposed surgery was appropriate because of the appearance of the MRI scan dated 4 December 2019, which I assumed he was referring to in his report of 19 December 2019. Dr Al Khawaja referred to the MRI scan in calling Mr Honarvar's injury "*significant*." This was because the scan showed an L5/S1 disc bulge "pushing the left L5 nerve root." These findings, Dr Al Khawaja then said "*explained Mr Honarvar's symptoms*."

111. Dr Al Khawaja repeated that opinion in his report of 16 March 2021, again saying that the disc bulge at L5/S1 showed that the L5 nerve root was being pushed. It is clear that Dr Al Khawaja was not aware that a further MRI scan had been taken on 17 September 2020, and that it showed no L5 nerve compression of significance.

112. Dr Darwish commented on the comparison between that scan and the earlier scan of 17 November 2007, saying that the 2007 scan showed "potential compression of the left L5 nerve root". It follows that Dr Al Khawaja's opinion that Mr Honarvar was suffering a significant injury to the lumbar spine is compromised by the fact that he was unaware of the later MRI scan which showed that the pathology in 2017 had altered by 2020 to the extent that Dr Darwish simply described the injury as an aggravation of degenerative changes. I am not satisfied therefore that the injury is now as significant Dr Al Khawaja assumed on the basis of the outdated MRI.

113. This impinges not only on the question of whether the proposed surgery is appropriate, but it also raises the question as to whether it is actually or potentially effective. In that regard the evidence of Dr Darwish was unconvincing. A prognosis that proposed outcome would give "at best" only 50% chance of success - and a small chance of making the symptoms worse -is not a ringing endorsement for the effectiveness of the treatment. Dr Al Khawaja, on being told on 9 April 2020 that the epidural injection had not succeeded told Mr Honarvar that his only option "in my hand" was a surgical option. That too I do not read as an endorsement of the potential effectiveness of the treatment. I also did not discount the possibility of other treatment being available, as Dr Al Khawaja is a neurosurgeon and, as I read his comment, his expertise after administering the epidural block, was limited to surgery. Dr Al Khawaja's statement that there was a "good chance for this to help" needs to be read in the context of his disclaimer that "I cannot guarantee it."

114. I am further unpersuaded that the proposed surgery was actually or potentially effective in view of the comments I have made regarding the possible relevance of Mr Honarvar's mental state, which was also the subject of Dr Carmody's first impression that Mr Honarvar's condition might have been affected by some depression.

115. These reservations reinforce the view of Dr Sheehy that it was unlikely that the proposed surgery would result in any significant improvement or associated functional gains. I also accept that failure of conservative management is not an indicator for anterior lumbar surgery. Dr Sheehy and Dr Carmody both spoke of pain management being the appropriate treatment, which opinions I accept as being more likely to alleviate Mr Honarvar's condition than the proposed surgery.

The Member also rejected the claim for the orthopaedic mattress and bed. He stated, relevantly:

119. As I have found that the proposed surgery is not reasonably necessary the reasons advanced for the supply of the bed fall away in any event. Dr Al Khawaja recommended the bed for the purposes of recovery from the proposed surgery, but he did make a comment that a firm mattress would assist in minimising Mr Honarvar's pain. That may be, but it does not impose on the respondent an obligation to supply one. There are no particular therapeutic or curative qualities in the purchase of a mattress of a type that is commonly used by members of the public. No explanation has been made as to the exorbitant cost of the proposed bed, and it is common sense that if Mr Honarvar has a bad back, then he should not be sleeping in a child's bed.

Accordingly, the Member entered an award for the respondent.

Further lumbar decompression and fusion surgery is reasonably necessary

Proctor v Paragon Risk Management Pty Limited [2021] NSWPIC 382 – Member Haddock – 29/09/2021

On 2/12/2012, the worker injured his neck, lower back, both shoulders and wrists, right elbow and left knee in a work-related motor cycle accident. On 11/04/2018, the WCC determined that L3 to L5 anterior and posterior decompression and fusion surgery was reasonably necessary as a result of the work-related injuries and he ordered the respondent to meet the costs under s 60 *WCA*.

In December 2020, the worker sought approval for further surgery (anterior fusion and decompression from the L3 to S1 levels), but, the respondent disputed the claim on the basis that it sought further information from the NTS and his responses were inadequate. Following an IME by Dr Casikar, it disputed that the proposed surgery was reasonably necessary.

Member Haddock conducted an Arbitration on 8/09/2021. She noted that Dr Casikar did not support the proposed further surgery partly based on his belief that the indications for the initial surgery were not related to the accident. However, that belief is contrary to a determination by the WCC.

The Member applied the principles set out in the decision of Roche DP in *Diab* (at [86]):

> Reasonably necessary does not mean 'absolutely necessary'…If something is 'necessary', in the sense of indispensable, it will be 'reasonably necessary'. That is because reasonable necessity is a lesser requirement than 'necessary'. Depending on the circumstances, a range of different treatments may qualify as 'reasonably necessary' and a worker only has to establish that the treatment claimed is one of those treatments. A worker certainly does not have to establish that the treatment claimed is 'reasonable and necessary', which is a significantly more demanding test that many insurers and doctors apply.

The Member noted that Roche DP approved the decision of Burke J of the Compensation Court in Rose and said:

> [88] In the context of s 60, the relevant matters, according to the criteria of reasonableness, include, but are not necessarily limited to, the matters noted by Burke CCJ at point (5) in Rose…namely: (a) the appropriateness of the particular treatment; (b) the availability of alternative treatment, and its potential effectiveness; (c) the cost of the treatment; (d) the actual or potential effectiveness of the treatment, and (e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.
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> [89] With respect to point (d), it should be noted that while the effectiveness of the treatment is relevant to whether the treatment was reasonably necessary, it is certainly not determinative. Evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, bearing in mind that all treatment, especially surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment was not reasonably necessary. As always, each case will depend on its facts.
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> [90] While the above matters are 'useful heads for consideration', the 'essential question remains whether the treatment was reasonably necessary' (*Margaroff v Cordon Bleu Cookware Pty Ltd* [1997] NSWCC 13; (1997) 15 NSWCCR 204 at 208C). Thus, it is not simply a matter of asking, as was suggested in *Bartolo* [*Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1; 14 NSWCCR 233] is it better that the worker have the treatment or not. As noted by French CJ and Gummow J at [58] in *Spencer v Commonwealth of Australia* [2010] HCA 28, when dealing with how the expression 'no reasonable prospect' should be understood, '[n]o paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content'.

The Member found that there was no evidence that further alternative treatments would be effective and that while the cost of the surgery is not insubstantial, the Respondent did not dispute liability based on cost. Regarding the potential effectiveness of the surgery, Dr Hsu expected improved function and decreased pain, but not a complete resolution of symptoms. Based upon the *Diab* criteria, she found that the proposed surgery was reasonably necessary as a result of the injury suffered on 1/01/2012 and she ordered the Respondent to meet the costs under s 60 *WCA*.

Motor Accidents

Claimant rode his bicycle and attempted to make a left hand turn at a t-intersection controlled by traffic lights and was struck by the insured's motor vehicle – Held: Both parties had an unobstructed vision available and failed to keep a proper lookout, but the accident was not caused wholly or mostly by the fault of the claimant - Contributory negligence assessed as 50%

Dahal v QBE Insurance (Australia) Limited [2021] NSWPIC 308 – Member Ford – 16/08/2021

On 14/07/2020, the insured driver drove his vehicle through a green traffic signal and the front passenger side of his vehicle was struck by a bicycle being ridden by the claimant. The claimant was injured and was admitted to Concord Hospital. Police attended the scene of the accident.

The Member noted that in his interview with Police, the claimant said that he was looking down at his phone as he approached the intersection and he could not say what colour the traffic lights were as he entered the intersection. However, at the assessment conference, the claimant denied making that statement and said that the lights were green.

The Member rejected the claimant's statements at the assessment conference and found that the contemporaneous statements that he made to Police were a true recollection of the circumstances leading to the accident. However, he also found that the insured driver did not look to his left, even very briefly, because if he had done so he would have immediately noticed the claimant riding his bicycle towards the intersection. He found that the insured diver was travelling at relatively low speed and that he had ample time and opportunity to see the claimant approaching. He stated, relevantly:

> 40. In such circumstances, the insured driver when proceeding through the t-intersection should still be keeping a proper lookout which includes not only looking straight ahead but also having regard to the presence of any vehicle or cyclists either moving or stationary in Hill Road. In such circumstances, the insured driver would have been able to bring his vehicle to a halt very quickly having regard to his slow speed or at least sounded his horn to alert the claimant to his presence on the roadway.
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> 41. I therefore find the insured driver negligent in the driving of his vehicle as he had not kept a proper lookout when proceeding through the t-intersection.
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> 42. I therefore find the claimant was not wholly at fault in causing the accident.

As to whether the claimant accident was mostly caused by the fault of the claimant, the Member held that the burden of proving contributory negligence rests with the insurer. He stated, relevantly:

> 44. A claimant who asserts a motorist is negligent in failing to keep a proper lookout must establish the motorist had the opportunity to see the claimant and failed to do so. This is consistent with the principle in Manley, that is the duty of a motorist to be observant of all possible sources of danger on the road.
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> 45. Section 5 R (1) of the *Civil Liability Act* provides principles that are applicable in determining whether a person has been negligent can also apply in determining whether the person who has suffered harm has been contributory negligent in failing to take precaution against the risk of that harm. The standard of care required of the person who suffered harm is that of a reasonable person in the position of that person and the matter is to be determined on the basis of what that person knew or ought to have known at the time, see ss 5R (2) (a) and (b).
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> 46. Section 5 (B) of the *Civil Liability Act* provides in determining a whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
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> (a) the probability that the harm would occur if care would not take;
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> (b) the likely seriousness of the harm;
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> (c) the burden of taking precautions to avoid the risk of harm;
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> (d) the social utility of the activity that creates the risk of harm;

(e) the determination of whether a claimant has been contributory negligent is to be decided objectively on the facts and circumstances of the case, see *Serrao (by his tutor) Serrao v Cornelius (2)* 2016 NSW CA231 (at 61); *T and X Company Pty Limited v Chivas* (2014) NSW CA 235 (at 51);

The Member found that neither the insured driver nor the claimant were keeping a proper lookout in the circumstances. He assessed the claimant's contributory negligence as being 50% and as this was not greater than 61%,, the accident was not caused wholly or mostly by the fault of the claimant.

Claimant wholly at fault for accident – no exceptional circumstances established

Marzifar v Allianz Australia Insurance Limited [2021] NSWPIC 323 – Member Williams – 27/08/2021

On 19/09/2019, the claimant drove his vehicle into an intersection and a collision occurred between his vehicle and that of the insured driver. He claimed statutory benefits and the insurer accepted liability for the first 26 weeks, but denied liability thereafter under ss 3.11. and 3.28 of the *MAI Act,* on the basis that the accident was caused wholly by the fault of the claimant.

The claimant alleged that he had a green traffic light facing him as he entered the intersection and that he was not at fault. The claimant initially asserted that the insured driver was using his mobile phone when the accident occurred, but he later said that he did not see that driver until after the accident occurred.

Member Williams conducted an assessment conference. After discussing the evidence in detail, the Member held that the claimant's initial insistence that the insured driver was using his mobile phone before the accident occurred had led him to conclude that he had re-constructed events after the accident. He stated, relevantly:

> 43. I am satisfied that JR was not using his mobile telephone as he was driving through the intersection. There is no direct evidence that he was. While the claimant initially asserted that JR was on his mobile phone when the accident occurred, he conceded in his evidence at the assessment that he did not see JR until after the accident. JR gave evidence that he had his mobile phone in a cradle in his vehicle. His evidence is that he was not using his phone as he made the right hand turn and that he picked up his phone to make a call after the accident.
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> 44. The claimant's initial insistence that JR was using his mobile phone while proceeding to make a right hand turn has led me to the conclusion that he has re-constructed events after the accident.
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> …
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> 47. In terms of the telephone conversation between the claimant and JR after the accident, having heard from the witnesses, I preferred JR's account of the conversation. Mrs Berangi's evidence in relation to this conversation was coloured by the account provided to her by the claimant. She did not hear what JR said during the phone call. That then left the evidence of the claimant and JR. I found it more probable than not that JR called the claimant because the claimant had informed the property damage insurer that JR was at fault, and this resulted in the insurer refusing to provide JR with a hire car. I found that it was more probable than not that JR called the claimant because he considered the claimant had provided an inaccurate version of events and he wanted the claimant to 'correct the record'. At the end of the day, when the conversation took place, and what was said, were not critical considerations when it came to resolving the factual dispute between the parties in relation to the traffic lights. …
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> 51. Ultimately, I preferred JR's evidence to that of the claimant and his wife. I did not find his evidence to be exaggerated. His contemporaneous account, contained in the NRMA Incident Description form dated 25 September 2019, provided six days after the accident, records that he turned right when faced with a green light. This version of events is consistent with the version contained in his written statements dated 13 February 2020 and 8 July 2021 and his oral evidence.

52. While I accept JR's evidence that he made a right hand turn after the traffic lights facing him changed from red to green, I am not satisfied that the evidence of the claimant and his wife in relation to the traffic lights is intentionally false. The impression I formed was that they each believed that their evidence was correct. However, I have concluded that the claimant and his wife have reconstructed events. Their initial insistence that JR was on his mobile phone when the accident occurred despite seeing him for the first time after the accident gave rise to doubt in my mind as to the reliability if their evidence…

58. I find that the claimant was faced with a solid red traffic signal as he entered the intersection.

59. The duty of the driver of a motor vehicle to users of the roadway is to take reasonable care for their safety having regard to all the circumstances of the case: McHugh J *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger. And much more often than not, that will require simultaneous attention to, and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path: *Manley v Alexander* [2005] HCA 79 at [11].

Accordingly, the Member found that the accident was caused by the fault of the claimant and he was not satisfied that the insured driver breached the duty he owed to other road users.

Common law claim for damages – 61 year-old pedestrian suffered multiple physical injuries and psychological injury – significant pre-existing lumbar spine condition, diabetes and psychological injury – damages assessed for non-economic loss & past economic loss, but not for future economic loss

Toprak v IAG Limited trading as NRMA Insurance [2021] NSWPIC 365 – Member McTegg – 22/09/2021

On 11/06/2018, the claimant was injured in a MVA. The insurer admitted liability for the accident.

The claimant claimed damages and the dispute was referred to ***Member McTegg***, who noted that the real issues were the quantum of the claim for non-economic loss and whether the accident resulted in an impairment of earning capacity that produced financial loss.

The Member noted that the claimant is 61 years old and that he suffered depression following g the breakdown of his marriage and had received either the Disability pension or other Centrelink benefits since 2000. He also had a long-standing back problem and suffered diabetes, but he argued that despite these medical problems he was able to manage his life quite well before the accident.

The claimant stated that in the week before the accident occurred, he did some paid work in a kebab shop and received $500 for 25 hours' work. He hoped that he would be able to reach an agreement with the owner for permanent paid work, but the accident occurred before any agreement was reached.

Based upon the evidence, the Member found that the claimant suffered pre-existing chronic back pain and intermittent neck and shoulder pain, but he now also suffered pain in his pelvis, low-back, right leg and ankle. She also found that prior to the accident, the claimant had some capacity for part-time light work, but she was satisfied that the accident resulted in the destruction of an residual earning capacity.

In assessing non-economic loss, the Member stated:

104. In *RACQ Insurance Ltd v Motor Accidents Authority of New South Wales (No. 2)* [2014] NSWSC 1126, the court stated the principle expounded by the Court in *Reece v Reece* (1994) MVR 103 that a plaintiff's non-economic loss damages must be reduced by reference to his age is not applicable in claims under the *Motor Accidents Compensation Act 1999* (the forerunner of *the MAI Act*) as Part 5.3 of the Act does not apply the proportionality principle in awarding non-economic loss damages.

105. However, when assessing damages for non-economic loss the age of the claimant is still a relevant consideration when taking into account the period over which the pain and suffering will be experienced. In this case the claimant is 61 years of age with a life expectancy of 24 years.

106. Noting the current maximum payable for non-economic loss is $590,000 I consider an appropriate award for non-economic loss to be the sum of $300,000. I assess damages accordingly

In assessing past-economic loss, the Member found that there was no dispute that the claimant completed a work trial in a kebab shop in the week before the accident occurred, working 3 to 4 hours per day for 4 days. The owner stated that if he had offered the claimant a job, he would have been paid $1,000 to $1,200 per week for 12 to 16 hours' work, with the option of an increase in hours if sales increased. However, the Member noted that the owner was not aware of the claimant's pre-existing medical history and his assessment that he was capable of full-time work was based on limited observations for no more than 4 hours on any given day. She stated, relevantly:

117. Whilst there was no firm offer of employment on the table at the time of the accident, I am satisfied having regard to the evidence of the claimant and of Mr Emecen that the work trial was considered satisfactory and that, in all, likelihood an agreement would been reached, and the claimant would have attempted a return to work in the kebab industry.

118. However, noting the claimant had not worked in paid employment for the preceding 18 years and having regard to his pre-existing health conditions, in particular, his chronic back pain, I am not satisfied the claimant would been able to maintain full time employment or employment on an ongoing basis.

119. Even though the claimant stated he wanted to get back to work prior to the accident he was not well motivated to maintain paid employment having regard to his 18 years out of the workforce. I think it unlikely the claimant would have worked any longer than18 months having regard to the deterioration in his cardiac condition in or about January 2020.

120. Having regard to the uncertainty as to the hours available and the capacity of the claimant to work any more than 12 to 16 hours per week I propose to assess past wage loss by reference to the amount paid for the work trial of $500 gross or $463 net per week for a period of 18 months.

Accordingly, the Member assessed past economic loss totalling $36,114, comprising 78 weeks at the rate of $463 net per week, $3,972.53 for loss of superannuation and $616 under *Fox v Wood* for taxation deducted from statutory payments.

In assessing future economic loss, the Member held that she must have regard to s 4.7 of *the MAI Act*, which states that damages under this head may not be awarded unless the claimant establishes the assumptions about his future earning capacity accord with his most-likely future circumstances but for the injury. She held that while the accident further impaired the claimant's earning capacity, she was not satisfied that his most likely future circumstances included paid employment had the accident not occurred. Further, considering the claimant's apparent lack of motivation to participate in paid work and having regard to his pre-existing health conditions, she was not satisfied that he would have maintained employment even if the accident had not occurred. She stated:

129. In cases such as *Medlin v State Government Insurance Commission* (1995) 185 CLR and *Husher v Husher* (1999) 197 CLR 138, the High Court confirmed that the fundamental questions to be determined in a case such as this, are whether the claimant has sustained a loss or diminution in her earning capacity and, if so, whether that loss or diminution will result in economic loss.

130. Whilst I accept the accident has resulted in an impairment of the claimant's earning capacity, I am not satisfied that such impairment will result in economic loss where I am not satisfied the claimant was likely to have maintained paid employment.

Accordingly, the Member made no allowance for future economic loss.