Bulletin

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.

Decisions reported in this issue

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Court of Appeal Decisions

Section 66 WCA – whether WPI resulting from multiple injuries should be aggregated – Held: all injuries "resulted from" and "arose out of" the first incident – Appeal against decision of a presidential member in point of law – Presidential member erred in construing ss 322 (2) and (3) WIMA

Ozcan v Macarthur Disability Services Ltd [2021] NSWCA 56 – Macfarlan & McCallum JJA & Simpson AJA – 12/04/2021

The appellant claimed compensation under s 66 *WCA* for permanent impairment of the cervical, thoracic and lumbar spines, right upper extremity and a consequential gastrointestinal disorder as a result of injuries on 14/11/2011, 3/05/2012 and 26/09/2012.

The respondent disputed the claims for compensation for injury to the cervical and lumbar spines on 3/05/2012 and 21/07/2016, injury to the thoracic spine on 3/05/2012 and the alleged injuries to the cervical and lumbar spines and right upper extremity on 14/11/2011, 3/05/2012 and 26/09/2012. It also disputed that the WPI assessments could be aggregated under s 322 *WIMA*.

On 17/04/2019, ***Arbitrator Burge*** issued a COD, which remitted the dispute to an AMS to determine the degree of whole person impairment as follows: (1) Injury on 14/11/2011 – lumbar, thoracic and cervical spines, right upper extremity (shoulder) and upper digestive tract; (2) Injury on 3/05/2012 – lumbar and thoracic spines and upper digestive tract; and (3) Injury on 26/09/2012 – lumbar and thoracic spines and upper digestive tract. The AMS was also directed to apportion the impairment with respect to the lumbar and thoracic spines and upper digestive tract between the 3 dates of injury. On 7/06/2019, Dr Berry issued a MAC that assessed combined 15% WPI.

The matter was then referred to ***Arbitrator Wynyard***, to make final orders and determine the claims for weekly payments and s 60 expenses. However, the insurer disputed that the worker was entitled to compensation under s 66 *WCA* based upon the combined WPI assessment.

On 19/08/2019, Arbitrator Wynyard issued Consent Orders for weekly compensation and made a general order under s 60 WCA. In relation to permanent impairment, he held that the AMS found there was no impairment caused by injury to the cervical spine or to the upper digestive tract and the MAC certified that there was 3% WPI (right shoulder), 5% WPI (thoracic spine) and 7% WPI (lumbar spine). However, the AMS divided the spinal impairments equally between the 3 dates of injury, so that 4% was due to the injury on 14/11/2011, 4% was due to the injury of 3/05/2012 and 4% was due to the injury of 26/09/2012.

The worker argued that the MAC conclusively presumed that she was suffering from 15% WPI and that when s 322 *WIMA* is properly applied, the degree of permanent impairment can be seen to have resulted from the injury on 14/11/2011. Section 322 (2) *WIMA* allows impairments to be assessed together when they result from the same injury, but s 322 (3) provides for impairments that resulted from more than one injury to be assessed together where the injuries arise out of the same incident. The worker argued that the injurious event on 14/11/2011 involved the thoracic spine, the lumbar spine and the right upper extremity and that "*the same incident*" could also be determined as meaning "*the injurious event*". The later incidents also contributed to the injury and it could not be asserted that either of the later injuries were '*novus actus interveniens'*. Further, there was no conflict with the principles concerning aggregation in *Department of Juvenile Justice v Edmed*, because they applied in circumstances to which s 322 (2) *WIMA* were directed, and the circumstances in this matter are governed by s 322 (3) *WIMA*: see *Aboushadi*.

However, the respondent argued that this is not a causation case and that as the evidence indicates that there was no injury to the spine in 2011, combining the subsequent incidents with that event was not possible. In relation to *Edmed*, there could be no aggregation because the pathologies differed. Further, the AMS was not asked to combine the impairments and he acted beyond power in so doing so. Therefore, the provisions of s 326 *WIMA* do not apply to the combined total of 15% WPI.

The Arbitrator stated, relevantly:

> 69. However, whilst the principle of material contribution will establish a causal connection between two injurious events, it is not concerned with the calculation of whole person impairment itself. In both Johnson and Nicol there was no dispute as to the pathology involved, namely a psychological/psychiatric condition, so there was no need to discuss the application of s 322…
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> 71. The provisions of Part 7 of Chapter 7 of the 1998 Act are concerned only with the medical assessment of whole person impairment for the purposes of the application of the 1987 Act regarding payment of lump sum. Under s 326 (2) an opinion by an AMS on issues not defined under s 326 (1) is not binding.

The Arbitrator held that there are some practical difficulties standing in the path of the worker's approach. Firstly, an AMS is bound by the terms of his referral. As can be seen, he was not asked to combine the assessments he made in respect of each matter that was referred to him. Secondly, each matter was described as an "*injury*." Thirdly, each matter was described as: Date of Injury 1 – 14/11/2011, Date of Injury 2 – 3/05/2012 and Date of Injury 3 – 26/09/2012. Fourthly, the AMS was "*directed*" to apportion the impairment resulting from the "*three separate dates of injury*." Therefore, the AMS' opinion regarding the combined value was beyond his remit and it is not a binding opinion and does not reflect the parties' intention when Consent Orders were made on 17/04/2019.

The Arbitrator stated that the MAC conclusively proves that on 21/05/2019, the worker was suffering from the following WPI: 3% in respect of the injury to the right upper extremity; 5% in respect of the thoracic spine; and 7% in respect of the lumbar spine. He was also satisfied that the AMS' finding that each date of injury contributed to the WPI regarding the thoracic and lumbar spine, in the proportion of 4%, or one third, must conclusively be presumed correct. He held, relevantly:

> 80. The MAC is conclusively presumed to be correct as to the degree of permanent impairment of the worker as the result of "*an injury*" pursuant to s 326 (1) (a). Pursuant to the terms of the referral, the AMS was obliged to assess the degree of permanent impairment of the worker as a result of three injuries, 14 November 2011, 3 May 2012 and 26 September 2012.
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> 81. Those are the limits of the presumption that the assessment is conclusively correct. Those then are the assessments that have to be the subject of my orders.

82. There is no conclusive evidence before me that the combined value of the three assessments is binding, as s 325 (1) requires an AMS to give a MAC "*as to the matters referred for assessment*." The AMS was not asked in the referral to assess the combined value of the three injuries referred to him…

88. The reasons given by the AMS for the apportionment of the spinal injuries were perfunctory and without explanation. It may be that a further examination of the evidence would justify a reassessment. However, that is not a matter for me, as the provisions of section 326 (1) compel me to apply the assessment certified.

89. Accordingly, the MAC conclusively proves that:

(a) For the injury on 14 November 2011, the worker suffered 3% WPI in relation to the right shoulder and 4% in relation to the thoracic and lumbar areas of the spine. These pathologies arose out of the same incident and can be assessed together pursuant to s 322 (3), giving an entitlement of 7% WPI;

(b) For the injury on 3 May 2012, the worker suffered a 4% WPI in relation to the thoracic and lumbar areas of the spine; and

(c) For the injury on 26 September 2012, the worker suffered a 4% WPI in relation to the thoracic and lumbar areas of the spine.

The Arbitrator held that he could not determine the nature of the injury to the thoracic spine on 14/11/2011, and that he could not make any determination regarding aggregation. As entitlements resulting from the different dates of injury could not be assessed together, the worker failed to meet the threshold under s 66 WCA. He therefore entered an award for the respondent in relation to the claim under s 66 WCA and made a general order for payment of s 60 expenses.

On appeal, ***Deputy President Wood*** held that the spinal injuries could be assessed together and resulted in 12% WPI, but that the 3% WPI for the shoulder injury could not be aggregated with the 12% WPI because it was obtained in a different injurious event, it did not materially contribute to the subsequent spinal injuries and was not the same injury (pathology). This meant that the appellant was not entitled to compensation under s 66 *WCA* for her shoulder injury.

The appellant sought leave to appeal to the Court of Appeal under s 353 *WIMA* and the main issue was whether the Deputy President misconstrued ss 322 (2) and (3) *WIMA* and erred in finding that the appellant could not have all of her injuries assessed together, which would have resulted in a total of 15% WPI.

The Court (Macfarlan & McCallum JJA & Simpson AJA) granted leave to appeal and allowed the appeal. The headnote provides as follows.

(Per Macfarlan JA, McCallum JA and Simpson AJA agreeing at [28] and [35] respectively):

The applicant's argument that she was entitled to have the 3% WPI in respect of her right shoulder injury assessed together with the 12% total WPI found in respect of her spinal injuries was correct: [13]. The Deputy President was correct to add the WPI percentages referrable to the thoracic and lumbar spine injuries suffered in the two later incidents to those suffered in the first incident: [14]. That approach fell within the second category identified in *Oakley* and applied s 65 (1) and (2) of *the 1987 Act*: [14]. If the later spinal injuries resulted from those suffered on the first date, s 322 (3) of the 1998 Act required them to be assessed with the impairment arising out of the right shoulder injury because the injuries all arose out of the same incident, that is, that of 14 November 2011: [16]. All the injuries therefore "*resulted from*" and "*arose out of*" the first incident: [15], [18]. In consequence, all the injuries should have been "*treated as one injury*" and "*assessed together*", as directed by s 65 (2) of *the 1987 Act* and s 322 (3) of *the 1998 Act*: [15], [16].

State Government Insurance Commission v Oakley (1990) 10 MVR 570, considered.

It was not necessary or appropriate to express any concluded view concerning the correctness of the decision in *Edmed*: [22]. *Edmed* was distinguishable from the present case because it did not address any argument that an injury materially contributed to later injuries and therefore that the later injuries "*arose out of*" or "*resulted from*" the first: [22], [24]. Even if correct, the approach in *Edmed* to s 322 (2) of *the 1998 Act* does not have any limiting effect on s 322 (3): [24].

Department of Juvenile Justice v Edmed [2008] NSWWCCPD 6; (2008) 7 DDCR 288, discussed.

(Additional observations per McCallum JA, Simpson AJA agreeing at [35], regarding the "*presumption from amendment*"):

The force or validity of the presumption from amendment rests on the confidence with which it can be concluded that the legislature knew of the decision and the relevant interpretation at the time the statute was amended, so that the absence of amendment may be seen to indicate a considered choice indicating adoption of that interpretation: [32]. In this case, it is highly unlikely that parliamentary counsel, in drafting various amendments to the workers compensation legislation, acted on instructions given after the decision in *Edmed* had not only been scrutinised for what it says about s 322 (2) but also interpreted as having a necessary implication for the proper construction of s 322 (3): [34]. This is an instance in which it is "*artificial, and unpersuasive*" to attribute Parliament with a consciousness of the judicial interpretation contended to have informed the relevant amendments: [34].

Public Service Association of New South Wales v Industrial Commission of New South Wales (1985) 1 NSWLR 627; *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309; [2004] HCA 40, applied. *Department of Juvenile Justice v Edmed* [2008] NSWWCCPD 6; (2008) 7 DDCR 288, discussed.

Supreme Court of NSW – Judicial Review Decisions

Jurisdictional error and error of law on the face of the record – PIRS – wrong classification – irrelevant consideration – failure to disclose part of reasoning.

Perry v George Weston Foods Limited [2021] NSWSC 359 – Rothman J – 9/04/2021

The plaintiff suffered a psychological injury and ceased work in September 2018. He claimed compensation under s 66 WCA and an AMS issued a MAC, which assessed 9% WPI, including the following assessment under PIRS for "*social and recreational activities*", in which he reported that the plaintiff "*enjoyed following English soccer online.*"

The plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* However, a Delegate of the Registrar of the Commission declined to allow the appeal to proceed. The plaintiff then applied for judicial review of the MAC and the Delegate's decision.

Rothman J noted that the plaintiff essentially argued that the AMS' reference to his having "*enjoyed following English soccer online*" wrongly categorises the activity, which is not otherwise discussed or described in his reasons and under the PIRS rating scale, this finding does not fit within "*social and recreational activities*". He relied upon the Court of Appeal's decision in *Ballas,* which held that solitary poker machine gambling did not fit within "*social and recreational activities*".

With respect to the Delegate's decision, the plaintiff argued that the AMS' error in miscategorising the activity of following English soccer online as a social and recreational activity is at least "*arguable*" as a ground of appeal. Therefore, the Delegate should have allowed the appeal to proceed and when the decision is read as a whole, the Delegate determined the correctness of the proposed appeal ground rather than considering its arguability.

His Honour noted that there was an application to the Registrar for the matter to proceed to an Appeal Panel and the application was refused. He stated:

25 As I understand the submission of the first defendant, it is not that the Court should not deal with the matter because there was an appeal process which had not been utilised. Rather it is that, because there is an appeal process that has been utilised, the Court ought not to deal with the First Decision, being the decision that was the subject of the application for referral. It is not clear, from the submission of the first defendant, whether it is submitted that the decision of the Registrar, or the Registrar's Delegate, is the operative decision as a consequence of which no orders in the nature of judicial review should be made involving the First Decision.

26 As to the Second Decision, the first defendant submits that the Delegate's Decision involved the exercise of the statutory power conferred by the provisions of s 327 of the 1998 Act. The first defendant submits that the Delegate was aware of her role and that it was not to assess, nor to determine, the ground of appeal.

His Honour found that whether or not the AMS' use of following soccer online has been used positively or negatively in scoring the plaintiff's WPI, the lack of explanation of its use amounts to a failure to disclose the reasoning path by which he utilised this factor. The wrong assignment of conduct to one scale, when it should have been assigned to another, which incorrect assignment affects the assessment of the WPI, will result in the AMS taking into account an irrelevant consideration in the context of assigning a class to each of the distinct scales. This was made clear in *Ballas.*

His Honour accepted that the plaintiff was not afforded the opportunity to put material in relation to this topic and it is impossible to understand how the AMS brought that factor into calculation in determining social and recreational activities and what he considered to be the activity that was actually undertaken. More importantly, that does not fit within a category that is directed at interaction with other people and it seems little different from playing a poker machine, which when it was included in "*social and recreational activities*", amounted to mistake according to the Court of Appeal. The AMS also misconstrued and misapplied the PIRS Guidelines.

His honour stated:

66 Jurisdictional error occurs, at least, where there is: a failure to take into account a relevant consideration; taking into account an irrelevant consideration; utilisation of the wrong test or asking oneself the wrong question; a misapprehension of the nature limits of the power of the decision-maker; or a denial of procedural fairness. It is unnecessary, for present purposes, to deal with issues of logicality or unreasonableness.

67 To the extent that the Assessor took into account following English soccer online as a criterion that involves the plaintiff engaging in social and recreational activities, the Assessor has had regard to an irrelevant consideration. Nevertheless, it is unnecessary for the plaintiff to show jurisdictional error in order to succeed in this application. It is sufficient to show error of law on the face of the record, which, for present purposes, includes the reasons for Decision.

68 Error of law must be distinguished from merit review, otherwise the Court is "*apt to encourage a slide into impermissible merit review*". The fundamental distinction between correcting administrative injustice or error by a review of the merits of that administrative conduct, on the one hand, and, on the other hand, determining the extent of power and legality of the exercise of the administrative function, is often hard to define.

69 Nevertheless the distinction is important. Judicial review does not go beyond the declaration and enforcement of the law which determines the limits and governs the exercise of the power of the decision-maker. If the consequence of that declaration and enforcement is the avoidance of administrative injustice, that is an ancillary aspect of judicial review...

76 Ultimately, whether the error of the Assessor is an error of jurisdiction or an error of law matters little difference for the purposes of the remedies in these proceedings. Error has been disclosed and the application will be granted.

Accordingly, his Honour set aside the MAC dated 9/03/2020 and declared that the MAC and the Registrar's decision dated 222/05/2020 are void and of no effect. He remitted the matter to the PIC for referral to a different AMS to determine the medical dispute according to law and ordered the first defendant to pay the plaintiff's costs of and incidental to the proceedings.

WCC - Presidential Decisions

Section 119 WIMA – Suspension of weekly benefits due to alleged non-compliance with Guidelines – Alleged factual error – Alleged procedural unfairness

University of New South Wales v Lee [2021] NSWPICPD 4 – Deputy President Snell – 31/03/2021

The worker suffered a psychological injury (deemed date: 8/01/2020). The appellant accepted provisional liability, but on 10/01/2020 it advised the worker that it had arranged for her to be psychiatrically examined by Dr Miller on 18/03/2020. The reason provided was that the medical records requested from the treating GP had not been received and information from treating medical practitioners was not available.

However, the worker's solicitors sent an email to the appellant that "*the requirement to attend is considered unreasonable*" and that the information was requested from the GP "*last week*", a tax invoice for the records had been sent to it that morning and that it would receive the notes when it paid the tax invoice.

In an email dated 17/02/2020, the appellant asserted that the IME was arranged in accordance with the Guidelines and that if the worker did not attend, weekly payments would be suspended under s 119 (3) *WIMA.*

However, on 6/03/2020, the worker's solicitors emailed the appellant maintaining that the IME did not comply with the Guidelines. The appellant replied that it was "*not bound by guidelines*" and that it was "*in compliance with*" them and weekly payments would be suspended if the worker failed to attend.

On 23/03/2020, the appellant issued a notice under s 119 (3) *WIMA* suspending payment of weekly benefits until the IME had taken place and it gave notice of a further appointment with the same IME on 7/05/2020. That same day, the worker's solicitors responded by email, drawing the appellant's attention to Pt 7.7 of the Guidelines, and advising that orders would be sought in the Commission that the suspension was unreasonable, that payments be reinstated from the date of the suspension, and that interest be paid.

On 7/04/2020, ***Arbitrator Rimmer*** conducted a telephone conference. The worker's solicitor made oral submissions, but the solicitor for the appellant did not because he did not have carriage of the matter and the Arbitrator ordered the appellant to file submissions by 9/04/2020. On 9/04/2020, the appellant lodged an Application to Appeal to a Presidential member, which was rejected for procedural reasons.

On 14/04/2020, the Arbitrator directed the parties to file and serve written submissions, but that day the appellant successfully lodged the Application to Appeal.

On 28/05/2020, ***Deputy President Wood*** determined that appeal and found that as it concerned orders of an interlocutory nature, leave to proceed was required under s 352 (3A) *WIMA*. Wood DP rejected a number of the appellant's submissions and declined to grant leave to appeal. She remitted the matter to Arbitrator Rimmer for determination of the substantive issues.

On 23/04/2020, the appellant applied for the Arbitrator to recuse herself on the basis of apprehended bias and the Arbitrator did so.

Arbitrator Batchelor conducted an arbitration on 19/08/2020. On 15/09/2020, he issued a COD, which determined that the worker was not obliged to attend the IME and that the appellant was not entitled to suspend the provisional weekly payments. He ordered the appellant to reinstate the provisional payments from 18/03/2020 for the balance of the 12-week period but declined to award interest.

The appellant appealed against that decision and asserted that the Arbitrator erred as follows: (1) in law in purporting to make an order in the nature of declaratory relief; (2) in fact in determining that there had relevantly been a claim for weekly compensation; (3) in law in the consideration and application of the 'Guidelines'; (4) in fact in determining that it had not complied with the Guidelines; (5) in law and discretion in making orders not sought in the Application; and (6) in law on the basis that the Arbitrator determined the matter on a basis not put by or to the parties, constituting a denial of procedural fairness.

Deputy President Snell confirmed the COD and his reasons are summarised below:

Snell DP rejected grounds (1), (2) and (5), which he considered together on the basis that they overlapped. He noted that the Arbitrator stated that the appellant conceded that the worker had made a claim for weekly benefits as she was in receipt of provisional payments of weekly compensation under the appellant's letter to her dated 22/01/2020. Snell DP held that this letter was plainly capable of supporting the Arbitrator's conclusion and that the appellant was in a position to adduce evidence that its concession was erroneous, if that was its position, but it did not do so. The Arbitrator's finding on this issue was one of fact and the appellant cannot successfully challenge it on appeal. The Arbitrator did not err in finding that a claim for compensation had been made.

Snell DP also found that the appellant's argument that there was no evidence to support an entitlement to benefits was without merit as it had not disputed matters such as incapacity and the employment matters and it purported to suspend payments under s 119 (3) *WIMA.* This was the sole issue between the parties and the Arbitrator correctly noted this.

Snell DP rejected grounds (3) and (4), which he considered together as they concerned the application of the Guidelines. He held that the Arbitrator was bound to rely upon the Guidelines and he did not err in so doing. He rejected the appellant's argument that the Guidelines precluded it from pre-paying the GP's tax invoice as the document does not suggest that it has any regulatory authority and what purports to prohibit pre-payment for medical reports, does not prohibit paying a fee for clinical notes.

Snell DP also rejected ground (6) and he stated, relevantly:

> 77. The University's submissions on this added ground are put in very general and unhelpful terms, that the nominated paragraphs contain matter not the subject of submissions by the worker or addressed to the parties by the Arbitrator. In general terms, the Arbitrator's reasons address the basis on which the matter was conducted before him. The University's submissions do not address, with any specificity, the matters that were allegedly outside the submissions and how the case was conducted. They do not address how procedural unfairness allegedly resulted, for example, on what matters the University was not afforded an opportunity to make submissions. They do not address whether any such denial of procedural fairness could have affected the result. The University has not made good its argument in Ground No. 6.

WCC – Arbitrator Decisions

Death Benefits – Accepted psychological injury resulted in attempted suicide – Respondent argued that treatment provided to the deceased at hospital was so inexcusably bad as to break the chain of causation between the psychological injury and death – Held: the chain of causation was not broken

Ironmonger v Gunnedah Shire Council [2021] NSWPIC 53 – Member Peacock – 26/03/2021

The deceased died on 10/03/2017 and his father claimed death benefits and funeral expenses on the basis that the death resulted from a psychological injury that is deemed to have occurred on 28/02/2017. The respondent disputed liability.

Member Peacock noted that there was no dispute that after returning home on 28/02/2017, the deceased took a large overdose of drug and was hospitalised but died in hospital on 10/03/2017.

On 16/01/2018, the Coroner determined the cause of death as being: "*1(a) Direct cause: pulmonary embolism; 1(b) antecedent causes; 2 Other significant condition: morbid obesity*".

The respondent argued that there was a novus actus interveniens resulting from the medical treatment administered to the deceased in hospital with respect to the prophylaxis of and treatment of deep vein thrombosis or thromboembolism.

Member Peacock (at [20]) cited the decision of Byron DP in *Council of the City of Sydney v Estate of Belinda Jane Griffey and Anor (No. 1)* [2008] NSWWCCPD 114 (*Griffey*), which summarised the case law on whether a death results from injury, as follows:

> It is necessarily true that Ms Griffey would not have required medical treatment in the Hospital, 'but for' the injuries sustained in the motor vehicle accident. The logical character of this connection is clear. However, the sine qua non essence of the proposition, does not of itself establish a causal connection between the separate incidents of the motor vehicle accident and what occurred in the Hospital, or establish a legal liability for payment of compensation. "*… the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain*." (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463 ('*Kooragang*')). See also *March v Stramare (E & MH) Pty Ltd* [1991] HCA12; (1991) 171 CLR 506 ('*March*'), per Mason CJ at [23] where he stated, "*… the 'but for' test does not provide a satisfactory answer in those causes in which a superseding cause, described as a novus actus interveniens, is said to break the chain of causation which would otherwise have resulted from an earlier wrongful act*."
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> In this matter the Council's position is that the chain of causation of injury was broken by a novus actus interveniens, being the negligence of the Hospital in the medical treatment reasonably sought for injuries sustained in the motor vehicle accident. It submits that the separate and distinct injury that arose by reason of that regime of treatment is not compensable under the Workers Compensation legislation. On the other hand the Estate and the Hospital submit essentially, that the chain of causation was not broken and that injury occurred and developed in a factually causative way in circumstances that evolved throughout the treatment administered to her, in seeking to alleviate the injuries she sustained in the accident.
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> The question to be asked is twofold: if there is a chain of causation, was it broken to the extent that it was rendered inoperative, or "*functus officio*" as described in *Davies v Swan Motor Co (Swansea) Ltd* [1947] 2 KB 291 at 318 (*Davies*), or was the initiating '*action*' still operative and the subsequent events part of the history or "*circumstances in which the cause operates*", *Minister of Pensions v Chennell* [1947] KB 250 at 256 (*Chennell*)? These are questions of fact, having regard to the circumstances of the case.
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> The test of causation under the Workers Compensation legislation is whether the incapacity or medical treatment resulted from the work injury sustained. In *Kooragang*, Kirby P stated at 462, Sheller and Powell JJA agreeing, in considering the principles of causation in the jurisdiction, that since English authority in 1909:
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> > … it has been well recognized in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.
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> However, the Court of Appeal stated that the importation of notions of "*proximate cause*" [alone] by the use of the phrase "*results from*" are not now, accepted.
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> His Honour continued at 463-464:

> The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. … What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death '*results from*' the impugned work injury … is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle, which Hart and Honore [H.L.A. Hart & Tony Honorě, Causation in the Law 2nd ed., (New York: Oxford University Press, 1985)] identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter will do well to return as McHugh JA advised, to the statutory formula and ask the question whether the disputed incapacity or death '*resulted from*' the work injury which is impugned.

The concept of the 'chain of causation' is demonstrated by the facts in *Kooragang*. The worker developed back pain in 1981 while he had been climbing frequently up and down from his truck. He was diagnosed with advanced discogenic disease that was aggravated by excessive movement, as described. He was off work for some nine months. After returning to work he appeared to cope well, but in May 1983, while lifting bags of cement, pain increased down his leg. He was certified fit for light duties. However, none were available and he ceased work and received payment of workers compensation. His own doctor considered that he was distressed because of the delay in resolving his claim. In May 1986, his doctor found him to be very severely depressed because of the chronicity of his condition. This continued for several years and in March 1992 his workers compensation payments ceased. On 8 June 1992 he died of a myocardial infarction. The trial judge found that the acceleration of his cardiovascular disease and myocardial infarction resulted, in a relevant sense, from his back injury sustained in 1981. On appeal, the Court of Appeal found that there was an unbroken chain of undisputed evidence and consequently, upheld the trial judge's finding that the worker's death had resulted from his back injuries at work in 1981 and 1983.

Questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. (*Chappel v Hart* [1998] HCA 55; [1998] 195 CLR 232, per Gaudron J at [7] (*Chappell*). See also *Kooragang* per Kirby P at 464). In the instant matter, the legal framework is the workers compensation legislation. Most of the authorities in relation to the matter of novus actus interveniens are necessarily, of qualified practical relevance to a claim for workers compensation, which resides within a particular statutory framework. Many of such authorities are concerned with common law claims. The facts and circumstances of each case are invariably different. In *Vairy v Wyong Shire Council* (2005) 223 CLR 422, Gleeson CJ and Kirby J warned:

It is understandable that in the search for consistency, comparisons with similar cases will be made. However, as Lord Steyn said in *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 at 1089, decided cases in this area are fact-sensitive, and it is a sterile exercise involving a misuse of precedent, to seek the solution to one case in discussions on the facts in other cases.

What needs to be established to give rise to a novus actus interveniens is, upon a common sense evaluation of the causal chain in **the instant case**, a "*new cause*" which has disturbed the sequence of events, and which can "*be described as either unreasonable or extraneous or extrinsic*" (per McHugh JA in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 428 (Bennett) quoting Lord Wright in *Lord v Pacific Steam Navigation Co Ltd (The Oropesa)* [1943] 1 All ER 211 (*The Oropesa*)). Before the novus actus can be regarded as the sole cause

of the ultimate incapacity, it must be demonstrated that the incapacity that would have resulted from the injury sustained in the motor vehicle accident has been replaced by a different and intervening cause that produced the ensuing incapacity.

In *The Oropesa*, Lord Wright stated, as referred to in *Migge v Wormald Bros. Industries Ltd* [1972] 2 NSWLR 29 at 36:

> To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic.

Hart and Honorĕ describe "*the problem*" thus, at page 134:

> The type of problem we consider, stated in the traditional causal language, involves three terms. In its simplest form the question is whether certain harm is the consequence of a certain wrongful act given the presence of a third factor, e.g. whether the death in hospital of a person negligently run down by defendant is the consequence of defendant's negligent act, given some third factors such as that [the] deceased was an alcoholic and delirium tremens flared up after the accident; that he contracted scarlet fever from the attending physician; that a surgeon was negligent in performing an operation on him or, mistaking him for another patient, operated on the wrong side; or, taking pity on his sufferings, deliberately killed him, or that on the way to hospital he was struck by a falling tile. In all these instances we assume [sine non qua] that the [initial] wrongful act and the third factor were each a necessary condition of the harm, but in each instance a causal problem is raised by the presence of the third factor: the law must decide whether or not the third factor negatives causal connection.

In *Bailey amp* [1999] NSWSC 1391; *1 Ors v Redebi Pty Limited 1 Ors* [1999] NSWSC 918 (13 September 1999) (*Bailey*), in determining a claim for common law damages, Santow J said at [99];

> It will generally speaking, not be possible to establish a novus actus interveniens unless:
>
> (a) the breach is shown to have had no causative effect, even of the 'but for' kind, because the injury would have occurred, or the same risk of it, even if the duty had been performed; compare *Chappel v Hart* [1998] HCA 55; (1998) 156 ALR 517; 72 ALJR 1344 (where the minority would have concluded that a surgeon's failure to warn did not materially contribute to the plaintiff's injury),
>
> (b) the intervening act or decision was not a reasonably foreseeable consequence of the negligent act in the sense of being '*in the ordinary course of things the very kind of thing likely to happen as a result of the defendant's negligence*' (per Mason CJ in *March v E & M H Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 at 517-8).
>
> (c) there was no positive duty to take precautions against the happening of the intervening act or that class of act; contrast the finding of the House of Lords in *Reeves v Commissioner of Police of the Metropolis* [1999] UKHL 3 WLR 363 that there was a positive duty of care to guard against that very act – suicide by a prisoner – so precluding any defence based on novus actus interveniens (or volenti) despite the autonomous nature of the prisoner's decision.

In *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 361, McHugh JA (as he then was), citing *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37; (1985) 156 CLR 522 (*Mahony*), said:

> *Mahony* makes it clear (at 529-530) that the exacerbation of an injury by a negligent medical treatment though reasonably foreseeable, may constitute a novus actus interveniens if the treatment is inexcusably bad or improper.

However, it is instructive to consider the context in *Mahony* from which the statement made by McHugh JA was derived. In that case, the High Court said at 529-530:

> In particular circumstances, minds may differ as to whether a subsequent injury was foreseeable or whether it is too remote to be regarded as a consequence for which an earlier tortfeasor may be held liable. When an injury is exacerbated by medical treatment, however, the exacerbation may easily be regarded as a foreseeable consequence for which the first tortfeasor is liable. Provided the plaintiff acts reasonably in seeking or accepting the treatment, negligence in the administration of the treatment need not be regarded as a novus actus interveniens, which relieves the first tortfeasor of liability for the plaintiff's subsequent condition. The original injury can be regarded as carrying some risk that medical treatment might be negligently given: see *Beavis v Apthorpe* (24); *Moore v A.G.C. (Insurance) Ltd* (25); *Lawrie v Meggitt* (26); *Price v Milawski* (27); *Katzman v Yaeck* (28). It may be the very kind of thing which is likely to happen as a result of the first tortfeasor's negligence: cf. per Lord Reid in *Dorset Yacht Co. v Home Office* (29). That approach is consistent with the view taken in workers' compensation cases that the total condition of a worker whose compensable injury is exacerbated by medical treatment, reasonably undertaken to alleviate that injury, is to be attributed to the accident (see *Lindeman Ltd v Colvin* (30), per Dixon J; *Migge v Wormald Bros. Industries Ltd.* (31), per Mason J.A.; on appeal (32)), although medical negligence or inefficiency [whether by commission or omission] can be held to amount to a new cause of incapacity in some circumstances: *Rothwell v Caverswall Stone Co*. (33); *Hogan v Bentinck Colleries* (34). In the last-mentioned case Lord Reid, in dissent, expressed the opinion that there is a break in the chain of causation when a doctor is guilty of such negligence as would make him liable in damages. We think, with respect, that that test is too rigid. Some degree of medical negligence in the treatment of an injury may well be a reasonably foreseeable result of the act or omission by which that injury was inflicted, and then no clear line can be drawn to limit the original tortfeasor's liability to exclude the consequences of the medical negligence.
>
> However, in the ordinary case where efficient medical services are available to an injured plaintiff, the original injury does not carry the risk of medical treatment or advice that is '*inexcusably bad*' (*Martin v. Isbard* (35)), or '*completely outside the bounds of what any reputable medical practitioner might prescribe*' (*Lawrie v Meggitt* (36)), or '*so obviously unnecessary or improper that it is in the nature of a gratuitous aggravation of the injury* (*South Australian Stevedoring Co. Ltd. V Holbertson* [[1939] SASR] (37)) ['*Holbertson*'] or '*extravagant from the point of view of medical practice or hospital routine*': Hart and Honore, Causation in the Law (1959), p. 169. In such a case, it is proper to regard the exacerbation of a plaintiff's condition as resulting solely from the grossly negligent medical treatment or advice, and the fact that the plaintiff acted reasonably in seeking and accepting the treatment or in following the advice will not make the original tortfeasor liable for that exacerbation.
>
> The High Court in *Mahony* had earlier stated (at 528) that for a novus actus interveniens to break the chain of causation, it must be possible to draw a line clearly before a liability, "*that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him, is treated as the result of a second tortfeasor's negligence alone*: See *Chapman v Hearse* (18)." The Court went on to say that whether such a line can and should be drawn is very much a matter of fact and degree. The Court said that where it is not possible to draw a clear line, the first tortfeasor may be liable in negligence for a subsequent injury and its consequences although the act or omission of another tortfeasor is the more immediate cause of that injury (528-529).

In its reference to Holbertson, the High Court in *Mahony* quoted the following statement made by the Full Supreme Court of South Australia, at 264, in which that Court attempted to illustrate how the distinction might be made:

> As a matter of commonsense we think that a mistake of this kind is a sequela of the injury. When a man gets his arm broken all that he can do is to get it set by a competent practitioner, and he has to take the risk of the doctor making a mistake. If the treatment is so obviously unnecessary or improper that it is in the nature of a gratuitous aggravation of the injury, it may be possible to find the cause of the incapacity without relating it back to the original injury, but in the case of slight negligence (the kind of mistake that anyone is likely to make, although it may have to be paid for), we think that it is impossible to say that the chain of causation is broken, or that the new act has given a fresh origin to the after consequences.

Member Peacock noted that in *Griffey* the Deputy President overturned the arbitrator's finding that there was no break in causation caused by treatment at hospital between the injuries the worker received in a motor vehicle accident and subsequent death. She stated that each matter will turn on its own facts and she stated that the medical experts disagreed on whether the dosage of medication prescribed for the deceased was adequate to prevent the pulmonary embolism, which was the direct cause of death. She found, relevantly:

> 72. For a break in causation to be found, the treatment given at Tamworth Hospital must be found to be so "*inexcusably bad*" that the death results from the treatment and not the injury. Here there are competing expert opinions which must be weighed in the balance with the factual evidence. The experts disagree on whether the dosage for VTE was adequate to prevent the pulmonary embolism which was the direct cause of death. When all of the evidence is weighed in the balance I prefer the opinion of A/Prof Raftos and A/Prof Haber to that of A/Prof Collquhoun. It is clear that there is no consensus about whether the VTE prophylaxis dosage should be adjusted, and indeed to what levels, for obese patients. The deceased's prognosis was poor. He was treated at the standard dose for VTE which did not prevent death by pulmonary embolism. Whilst massive pulmonary embolism is necessarily fatal it is not necessarily preventable at either the standard dose or at a higher dosage about which there are no clear guidelines in NSW for obese patients. The guideline is clear that the patient at risk of VTE must be treated with 40mg Clexane daily and with the use of a mechanical device. This was in fact the treatment that was undertaken by Tamworth Hospital. There is no consensus about the efficacy or safety of dosage adjustment for obese patients. Hence there was no guideline in NSW about dosage adjustment that could have better informed the practice of the Doctors at Tamworth Hospital in February and March 2017. When all of the evidence is weighed in the balance, I am not satisfied on the balance of probabilities that the treatment afforded by Tamworth Base Hospital was so inexcusably bad as to break the chain of causation between injury on 28 February 2017 and death on 10 March 2017…

Accordingly, member Peacock awarded the applicant death benefits under s 25 *WCA* and funeral expenses under s 26 *WCA.*

Work capacity – injury to left ankle and heel, consequential injury to lumbar spine and secondary psychological condition – Worker fit for sedentary work as a result of physical injuries, but he has no current work capacity as a result of his psychological injury

Saade v Sydney Night Patrol Inquiry Co Pty Ltd t/as SNP Security [2021] NSWPIC 53 – Member Haddock – 30/03/2021

The worker injured his left heel (plantar fasciitis), both legs and lower back as a result of the nature and conditions of his employment for the respondent (deemed date: 27/03/2019) and he also alleged a consequential psychiatric/psychological condition. The respondent accepted liability for the physical injuries and made weekly payments until 15/05/2020, but it disputed liability for the alleged psychiatric/psychological condition. The insurer disputed liability for weekly payments on the basis that the worker did not have a total or partial incapacity for work resulting from an injury and s 60 expenses.

Member Haddock conducted an arbitration to determine whether the worker has an incapacity for work after 15/05/2020 and, if so, the extent of the incapacity. The parties agreed that PIAWE is $1,309.39.

The worker argued that he has no current work capacity, but the respondent argued that he has a current work capacity and could work approximately 50% of the working week in a wide range of duties.

Member Haddock found that the weight of the medical evidence leads to the conclusion that the worker is not able to return to his pre-injury duties, which involved standing for long periods, due to both the physical and psychological injuries. As a result of the physical injuries, the worker would be able to perform sedentary duties only.

Member Haddock referred to the Labour Analysis report, which identified work as an alarm, security and surveillance monitor; information officer; and call centre operator as being suitable sedentary work for the worker. She noted that the cognitive demands of these roles may be summarised as communication; organisation; analysis; and decision-making skills. She noted the worker's evidence that he lacks concentration and patience and he is no longer motivated and sociable and that the medical evidence indicates that the psychological condition causes symptoms including sleep disturbance, fatigue, reduced concentration, irritability with only minor provocation, lack of desire to interact with others, anger, heart palpitations, nausea, difficulty breathing and feeling worthless. She stated:

> 236. The employment options identified by Ms Kurta appear to overlook the applicant's significant psychological symptoms. Even if he were to be successful in obtaining employment, I do not accept that he has the capacity to perform the activities required in those positions, having regard to the provisions of section 32A.
>
> 237. All the identified positions involve customer service; interpersonal skills; and interaction with the public. The applicant has withdrawn from personal contact and is angry and impatient even with his own family.
>
> 238. The positions require such skills as attention to detail; the ability to multi-task and prioritise; problem solving; organisational skills; and resilience and positivity. The position of information officer may require working with distressed and unpredictable people. I would accept that may also be a requirement of a call centre operator.
>
> 239. Dr Bisht opined that the applicant could work for 16 hours a week, in a job that did not require him to interact with unfamiliar people; make complex decisions; or sustain intense concentration for long periods. All the suggested occupations require these skills. The applicant would obviously be unable to focus on a CCTV screen for eight hours at a time.
>
> 240. The applicant has a varied occupational background, and has customer service skills, having worked in retail and in a casino, as well as in security. He commenced, but did not complete, a law degree in Lebanon. He is 49 years old. It would be expected that he would therefore have current work capacity. However, he has unfortunately developed a severe psychological condition that incapacitates him for the very type of sedentary work his physical injuries would require him to seek. Any customer service position would require him to interact with unfamiliar people, potentially make complex decisions and multi-task, and maintain his concentration, even in a part-time position.
>
> 241. There is no evidence of any recent return to work plans or occupational rehabilitation services that are to be taken into account in determining whether the applicant has current work capacity.
>
> 242. Taking into account the evidence of the applicant, his wife and the medical evidence, I am satisfied that the applicant has had no current work capacity since 15 May 2020.

Accordingly, Member Haddock awarded the worker continuing weekly payments from 15/05/2020 at the rate of $1,047.51 per week under s 37 WCA

Mixed psychological and arguably unrelated frontal lobe pathology – Parties disagreed regarding the speciality of the Medical Assessor – Held: the effect of WIMA and Procedural Direction PIC 6 as well as SIRA Guidelines is that a Member has power to remit a matter to the President for referral to a Medical Assessor, but where the parties cannot agree on the appropriate assessor or his/her specialty it is the President who chooses the assessor.

Nikolovski v McDonalds Australia Limited [2021] NSWPIC 55 – Member Young – 31/03/2021

In this matter, there was no dispute that the worker suffered a psychological injury, although the extent of resulting pathology was disputed. The issue for determination was whether the Medical Assessor should be a psychiatrist (as the worker argued) or a neuropsychiatrist (as the respondent argued), which raised issues concerning the power of Members to refer a medical dispute for assessment and to choose the speciality of the Medical Assessor where the speciality is not agreed by the parties.

Member Young conducted an arbitration hearing on 11/02/2021. On 31/03/2021, he issued a COD, in which he remitted the matter to the President for referral to a Medical Assessor chosen by the President to determine the extent of the worker's WPI, if any, which results from psychological injury suffered on 22/06/2017 (deemed date). He asked the President's delegate to place before the Medical Assessor a copy of the Application, a copy of the Reply and a copy of the Statement of Reasons and he made a general order for payment of s 60 expenses. His reasons are summarised below.

> *The extent of a Member's power*
>
> 11. The first matter of contention is whether a member of this Commission has power to refer a matter for consideration by a Medical Assessor. Secondly, has a Member power to determine the relevant specialty of the Medical Assessor?
>
> 12. Both section 321A (3) of the *Workplace Injury Management and Workers Compensation Act 1998* and Part 2.1 of the *Workers Compensation Medical Dispute Assessment Guidelines (Assessment Guidelines*) enable "*the Commission or the Registrar*" to refer a medical dispute for assessment. Since the introduction of the *Personal Injury Commission Act 2020*, however, schedule 6 at section 6.11 [52[#93]] removes the reference to "*Registrar*" and instead inserts the word "*President*" but the reference to "*the Commission*" appears to be unchanged.
>
> 13. Because Part 2.1 of the *Assessment Guidelines* also allows "*the Commission*" to refer a medical dispute, that Part would have no work to do if as submitted by the applicant it is qualified by Part 2.5, Part 2.6 or Part 2.8 so that the Registrar must refer the assessment. It is, in my view, tolerably clear that the "*Commission*" (ie., a Member) may make a referral, even though the mechanics of that referral must be administered by the President or his delegate.
>
> 14. In terms of the *New South Wales Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, it is clear that the assessor must be advised of the nature of the injury or condition in respect of which assessment is sought. It may well be that (hypothetically) the applicant's medical condition is an entanglement of different pathologies. But it is not in my view a Member's function to theoretically disentangle those conditions and form some conclusion concerning which is the more preferable specialty among different types of the same specialty, namely (in the present matter) psychiatrists. To do so would I think intrude into the Medical Assessor's territory. It is sufficient I think to say that the applicant alleges a psychological injury or condition and that is the injury or condition to be so referred.
>
> 15. It may be that a qualified and appointed psychiatrist Medical Assessor feels unable to arrive at an assessment without further neuropsychiatric or neuropsychological input. But that too is from the viewpoint of this Commission mere speculation, because this Commission is not authorised to determine whether further specialist medical opinion is required. To do so would in my view be an intrusion into matters which are clearly within the province of the Medical Assessor and indeed would in many matters pre-empt the Assessor's function.

16. *Procedural Direction PIC 6-Medical Assessments* came into effect on 1 March 2021. Relevantly, it provides:

> 25. A dispute in relation to the degree of permanent impairment may be referred to a member for conciliation, in appropriate circumstances, if the matter remains unresolved, a member may determine the dispute in accordance with the evidence. Alternatively, the member may refer the matter to a medical assessor for assessment.
>
> 26. Where the dispute is referred to a medical assessor, the parties may agree on the medical assessor who is to assess the dispute, or, if the parties have not agreed**, the President will choose the most appropriate assessor to conduct the assessment**. The parties may advise the Commission in writing of the name of the medical assessor they have agreed to appoint at the time of filing the application and/or reply or within seven days after the dispute is referred. However, if the President is not satisfied that the medical assessor nominated by the parties is appropriate, a different medical assessor may be selected. (emphasis added)

17. *The Evaluation Guidelines* at Chapter 11.2 provide:

> evaluation of psychiatric impairment is conducted by a psychiatrist who has undergone appropriate training in this assessment method.

18. This *Evaluation Guideline* Chapter 11.2 is descriptive in its wording. It does not compel the President to select a psychiatrist as the appropriate specialty. It describes the specialty but the absence of compulsive wording (for example "*shall be conducted*" or "*must be conducted*") means that the President's power to select the Medical Assessor is unimpeded.

19. Chapter 11.6 of the *Evaluation Guidelines* contemplates that the psychiatrist can have regard to appropriate psychometric testing. That logically must refer to external opinion in the matter. It is clear in my view that although limited in his opinion, there is psychometric testing which has been performed by Dr Roldan. In saying this I do not advocate Dr Roldan's or any other opinion: this is a matter to be determined by the Medical Assessor consistent with Chapter 11 of the Evaluation Guidelines. That evaluation enables the Medical Assessor to request further opinion, if considered appropriate. But the availability of "*opinion*" as so expressed by Dr Roldan, means that this matter is not necessarily entirely deficient of information to support a referral by me as a Member.

20. The current internet publication by State Insurance Regulatory Authority of the *Workers Compensation Medical Dispute Assessment Guidelines* (28/3/21) continues to use the descriptions "*Registrar*" and "*Approved Medical Specialist*" (AMS) in terms of the referral process, but Part 2.1 authorises the Commission to refer a medical dispute for assessment by an "*AMS*". The choice of the AMS is dealt with in Parts 2.5 to 2.8, but importantly in the absence of agreement between the parties it is the Registrar (sic-President), not the Commission Member, who makes that choice.

21. It follows therefore that whilst a Member has power to refer a medical dispute to a Medical Assessor, a Member cannot require the President or his delegate to choose any particular specialty for any such referral. That is my primary conclusion, but if I am wrong about this then I see the following matters as relevant from the medical evidence relied upon.

Death Benefits – Suicide – Injuries to both knees aggravated a psychological condition – Section 14 (3) WCA

Dadd v Toll Dnata Airport Services Pty Limited [2021] NSWPIC 54 – Member McDonald – 31/03/2021

On 1/03/2013, the deceased worker took his own life. There is no dispute that the applicant (the deceased's widow) was his sole dependant and she claimed the death benefit of $489,750 and funeral expenses on the basis that the deceased suffered depression as a consequence of a workplace injury to his knees on 26/10/2011 and this caused him to take his own life.

The respondent disputed the claim on the basis that there is insufficient evidence to establish a connection between the knee injuries and the death and under s 14 (3) *WCA* because his death was the result of an intentional self-inflicted injury.

Member McDonald conducted an Arbitration and on 31/03/2021, she issued a COD, which determined that the deceased's death resulted from a psychological injury that was a consequence of the injuries to both knees on 26/11/2011 and that the applicant was partially dependent upon him for support at the date of death.

Member McDonald noted that the parties referred to an "*eggshell skull*", which was referred to in *State Transit Authority of New South Wales v Chemler,* in which by Spigelman CJ stated:

> In this area of law, as in negligence, the talem qualem principle is applicable i.e. employers take their employees as they find them. With respect to psychological injury there is an '*eggshell psyche*' principle which, like the equivalent 'eggshell skull' principle, is a rule of compensation not of liability. The element of foreseeability required by the law of negligence is not the basis of the '*eggshell skull*' principle and it can be applied by way of analogy to claims for compensation under the 1987 Act. (See *Morgan v Tame* (2000) 49 NSWLR 21 esp at [23]-[29] and cases quoted therein. See also *Tame v New South Wales* (2002) 211 CLR 317 esp at [318] and *Nominal Defendant v Gardikiotis* (1995) 186 CLR 49 at 68.)

Member McDonald found that the fact that the deceased may have been susceptible to developing a psychological injury or had an "*eggshell psyche*" does not preclude a finding that the aggravation of his psychological condition resulted from the injury. The best view of the medical evidence is that any consequential injury is an aggravation or exacerbation of the underlying psychological injury and that it arose after and was caused by the knee injury.

Member McDonald held that the relevant test of causation is set out in *Kooragang* and the cases that explain it. She stated:

> 199. Roche DP summarised the facts of Kooragang in *Bouchmouni v Bakhos Matta t/as Western Red Services* (*Bouchmouni*). Mr Bates suffered a back injury in 1981. By 1985 his general practitioner reported that he was very distressed because of the delay "in reaching a solution to his back difficulty." He continued to suffer depression. In 1992, Mr Bates received a letter from the insurer telling him that payments of compensation would cease. He saw his general practitioner, severely depressed, worried that he was unable to pay the doctor and that he would have to sell his house and anxious about his future. Three months later, he died of a heart attack. His general practitioner said that while Mr Bates had heart disease, his condition was exacerbated by the depression and anxiety suffered as a result of the protracted compensation process.
>
> 200. Roche DP said:
>
> > The test of causation in a claim for death benefits under the 1987 Act is the same as in a claim for weekly compensation: if the death '*results from an injury*', compensation is payable (s 25 of the 1987 Act). The same test applies to claims for lump sum compensation: a worker who has received an injury that '*results in a degree of permanent impairment*' (now of more than 10 per cent) is entitled to compensation for that impairment (s 66 of the 1987 Act; *Sidiropoulos v Able Placements Pty Ltd* [1998] NSWCC 7; 16 NSWCCR 123.
>
> 201. Roche DP said that the trial judge found that Mr Bates suffered an injury to his lower back and died of a myocardial infarction as a result of that injury. He did not find that the worker suffered a psychological injury or that the heart attack was an injury.
>
> 202. In the Court of Appeal in *Kooragang*, Kirby P said that "*[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate*". His Honour said:

Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.

203. Kirby P said:

The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase '*results from*', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. 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.

204. In *Bouchmouni*, Roche DP said:

It may be seen that if an '*injury*' sets in train a series of events then, if the chain is unbroken and provides the relevant causative explanation for the incapacity or impairment, compensation is payable (though, in the case of a claim for compensation for permanent impairment, the payment is dependent upon an assessment by an Approved Medical Specialist (AMS)). That does not mean that the condition that provides the relevant causative explanation for the incapacity or impairment is an '*injury*'.

The fact that the worker in *Kooragang* died from a heart attack did not mean that the heart attack was an '*injury*'. It meant that, on the facts of that case, there was an unbroken chain of causation between the back injury and the death. In other words, the heart attack (and death) resulted from the back injury.

Member McDonald found that the evidence supports the conclusion that there was an unbroken chain of causation between the knee injuries and the aggravation of the deceased's underlying psychological condition which led to his death.

In relation to the application of s 14 (3) *WCA,* Member McDonald stated:

215. The section was considered by the Court of Appeal in *Holdlen*. The trial judge found that an orthopaedic injury had resulted in psychological sequelae and made a real contribution to the worker's marital breakdown, change in lifestyle and financial circumstances which "*led to a desperate act which he committed whilst overcome with depression*." Giles JA said that there was ample evidence on which the conclusion could be based. The employer argued that the trial judge failed to give effect to s 14 (3).

216. Giles JA said that, historically, the inquiry as to the sanity of a worker who had taken his own life was regarded as going to causation because suicide as an intentional act, would break the chain of causation unless the worker's mental state was such that it could not be regarded as intentional. His Honour said:

> Section 14 (3) is not easy to construe. The word '*injury*', used twice, must be used in two different senses, notwithstanding that it is defined in s 4. On one view, the first injury is a physical condition short of death caused by an injury as defined, and the injury as defined must not be an intentional self-inflicted injury. On this construction s 14 (3) says nothing about death by suicide in a case such as the present, because it could apply only if the 14 November 1994 injury was an intentional self-inflicted injury. On another view, the first injury is an injury as defined and the second injury is an act of injuring; this appears to have been the view taken in *Bird v Australian Iron & Steel Pty Ltd*. On this construction s 14 (3) can arguably apply to death by suicide in a case such as the present, because the death of a worker by suicide could be said to be caused by an intentional self-inflicted act of injuring.

217. Giles JA said that while that inquiry was important historically, it may not be necessary now because "*an intentional act even of the person wronged may not break the chain of causation*" and because describing the inquiry as one into insanity may mislead. His Honour said:

> If s 14 (3) on its proper construction can apply to death by suicide in a case such as the present, which as will be seen it is not necessary to decide, the same considerations arise. Although the section refers to intentional self-inflicted injury, the deliberate act of suicide may be the product of a will so overborne or influenced by the worker's circumstances that it should not be regarded as an intentional act.

218. His Honour said:

> The question for the trial judge was one of fact, the worker's mental state. It did not turn on a medical concept of insanity. It was a question of fact the trial judge could decide on the evidence of the worker's injury and its effect, without expert medical evidence, and there was no need for the special experience of an appropriately qualified medical practitioner (cf *MMI Workers Compensation (NSW) v Kennedy* (1993) 9 NSWCCR 482 at 489). That is not to say that expert medical evidence would not have been admissible and valuable, but there was no error in point of law in making the finding in its absence.

219. In *Simeon Wines Limited t/as Buronga Hill Winery v Bobos* (*Bobos*) the Court of Appeal declined to grant leave to appeal a finding by a judge of the Compensation Court that a worker's suicide was a consequence of the worker's illness rather than the exercise of free will, relying on *Holdlen*. Sheller JA said:

> At trial, Simeon Wines' submissions examined in detail the circumstances at the time that the deceased committed suicide and the suggestion that he had put his affairs in order and planned his suicide. This would account for an apparent improvement in his mood. It was submitted that this material demonstrated that his suicide was premeditated and planned (that is deliberate and intentional) and that he was in command of his faculties. There was nothing to suggest that he was a suicide risk. Simeon Wines submitted that there was no evidence that the deceased's volition was overborne by any psychiatric condition resulting from an injury covered by the Act. At trial it appears that no oral evidence was given by the medical experts. Instead, various reports were put before the Judge and he reached the conclusion described in the passage from his judgment that I have quoted. This was a finding of fact. The appeal is against that finding, even though dressed as an argument of alleged insufficiency of evidence such as to raise a question of law; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156.

220. Roche DP considered the section in *Hayman*, where the claim for the death benefit was disputed on the basis that death did not result from an injury but from family relationships and world events and relying on s 14 (3). The Arbitrator had determined that death resulted from the injury. On appeal, the employer sought to argue that that finding was in error in circumstances where the suicide was an intentional act and there was no evidence that the worker's volition had been overborne.

221. Roche DP noted that the argument had not been raised at arbitration and much of the decision turned on that issue. Having considered *Holdlen* and *Bobos*, Roche DP said:

> I am satisfied that, as a result of his depressive disorder, which had been caused by the injury to his right arm, Mr Hayman lost the ability to control his suicidal ideation, which developed into suicidal intent, and that his power of volition was seriously compromised, that is, it was so overborne that, though the suicide was a deliberate act, it was not an intentional act. This finding negates the application of s 14 (3) and the defence based on that provision fails…

223. Mr Robison said that there was evidence that Mr Dadd planned his death in a careful and deliberate fashion. That does not necessarily lead to a conclusion that the act was an intentional self-inflicted. I prefer the evidence of Dr Teoh that his severe depressive symptoms had distorted his judgement and perception.

Accordingly, Member McDonald awarded the applicant death benefits of $489,750 under s 25 *WCA* and funeral expenses of $9,000 under s 26 *WCA.*