Section 63 *Motor Accidents Compensation Act 1999* (NSW)

The proper officer of the MAA dismissed an application for review of a medical assessment by a review panel in *AAI Ltd v MAA of NSW* [2015] NSWSC 912. The insurer sought judicial review of that decision. At issue was whether the proper officer committed an error of law in refusing the review. The plaintiff was injured during an incident whilst a passenger in a vehicle by the driver, who had become violent before pushing her out of the vehicle into oncoming traffic. The driver then reversed the vehicle towards the plaintiff before coming out of the vehicle and assaulting her further, then forced her back into the vehicle and before driving off at high speed. The plaintiff subsequently escaped by jumping out of the moving vehicle.

The insurer claimed that the matter was complicated by the fact the plaintiff had been in a prior motor accident and it was difficult to ascertain whether she was injured as the result of that accident or as a result of the assaults.

The MAS assessment certificate differentiated between pre-existing injuries and injuries from the incident. It did not, however, differentiate between that could or could not be said to have arisen from a motor accident. The MAS assessment found 17% WPI, of which the pre-existing permanent impairment was 5% but which 2% was added for the effects of treatment. Accordingly, the final WPI was 14%.

The insurer submitted error in failing to distinguish and apportion and applied for a review. The proper officer dismissed the application, giving reasons for doing so.

Button J reviewed the definition of motor accident under ss 3 and s 3A *Motor Accidents Compensation Act 1999*. He noted that the essential question for the proper officer was whether he was satisfied under s 63(3) that there was reasonable cause to suspect the medical assessment was incorrect in a material respect. The insurer argued that should have been an internal apportionment regarding the sequence of events that began in the vehicle, continued outside and which resumed the vehicle until the plaintiff made good her escape.

Although the proper officer is not required to be positively satisfied that the medical assessment was incorrect in a material respect, the test is whether the proper officer "has reasonable cause to suspect that state of affairs" (*Meeuwissen v Boden* [2010] NSWCA 253). However, on the facts Button J concluded that the proper officer's decision did not demonstrate an error of law. Medical assessors are not required to undertake an intricate legal analysis of the meaning of causation. There is no need to analyse relevant High Court decisions. That task is for lawyers and judges, not medical assessors. Nor does a medical assessor determine quantum.

Furthermore, the authorities establish that the concept of causation can be said to be founded upon "material contribution".

The insurer relied upon *Allianz Australia Insurance Ltd v Gonzalez* [2013] NSWSC 362. However, that matter was readily distinguishable, as in that case there were two separate events - the motor accident and its aftermath. In this case the events in and out of the vehicle were not easily severable.

It is not the task of a medical assessor to determine what constitutes a "motor accident" as defined in the Act.

The proper officer concluded that there was no readily apparent method of separating the diagnosis of a physical injury arising from one incident which involved a number of events very closely connected in time. Button J saw no error in that approach, and found that the proper officer had not taken any irrelevant considerations into account.

Even if the proper officer had erred in law, Button J would have refused relief by way of judicial review, as the insurer had other opportunities to impugn the medical assessment and protect its interests and had not done so. The insurer's application was dismissed with costs.

Workplace injury/liability of owner of premises

The plaintiff in *Aldred v Stelcad Pty Ltd* [2015] NSWCA 201 was injured in a factory in the course of his employment by the tenant of that factory. The question at issue was whether the factory could be held liable for damages suffered by the worker. The plaintiff sued the owner, claiming a duty of care and breach of that duty leading to injury. However the primary judge found for the owner, whereupon the plaintiff appealed.

The terms of the tenancy are relevant in determining whether or not a duty is owed. The tenant was required to immediately make good any damage and to keep and maintain the premises, along with giving notice to the owner of any damage, accident or defects. The owner was entitled, but not obliged, to enter the premises with all necessary materials and equipment at all reasonable times.

The plaintiff's injury had occurred when stepping from a forklift, when his foot went through a hole in the concrete flooring.

The owner asserted that it was not liable but in any event any damages against it should be reduced by reason of the negligence and the employer's breach of duty.

At the time the lease was granted, the owner did not know, nor should have known, that the concrete flooring of the premises would become damaged by the tenant. There was insufficient evidence to establish any such knowledge on the owner's part. Accordingly, there was no duty and even if there was, a reasonable person in the owner's position would not have taken any precautions against such a risk.

The plaintiff's appeal was dismissed with costs.