



## Précis Paper

### Judicial review in Motor Accident Matters

A discussion about the recent decision of *Shmailov v AAI Limited* [2020] NSWSC 887.

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## Judicial review in Motor Accident Matters

In this edition of BenchTV, Rohan de Meyrick (Barrister, 4<sup>th</sup> Floor Selborne Chambers, Sydney) and Grant Watson (Partner, Grieve Watson Kelly Lawyers, Sydney) discuss the recent case of *Shmailov v AAI Limited* [2020] NSWSC 887.

### Overview

1. The case of *Shmailov v AAI Limited* (2020) NSWSC 887 was an administrative law case involving an application for review of the Proper Officer of State Insurance Regulatory Authority (SIRA), which makes decisions about medical assessments for motor accident injuries.
2. The plaintiff was seeking a review of a medical assessment certificate that had been issued by a psychiatrist in relation to the percentage impairment that he suffered.
3. This case proceeded under the *Motor Accidents Compensation Act* 1999 (NSW) which has been superseded by the *Motor Accident Injuries Act* 2017 (NSW). The wording of the Proper Officer's role is relatively identical between the two acts and as a result this decision has ongoing relevance in the law.
4. The case concerned a judicial review application because in both acts there is no statutory right to appeal this particular decision and as a result one's only option to challenge the decision of the Proper Officer is to take it to the Supreme Court under their broad powers to review administrative decisions.
5. The plaintiff, Mr Shmailov had sought an assessment of his whole person impairment from a medical assessor and by a medical assessment certificate, the psychiatrist had opined the plaintiff had not overcome the 10% threshold which is crucial for entitlement to non-economic loss damages.
6. He sought a review and prima facie under the legislation there is a right to bring an application to a medical panel. The Proper Officer has a gatekeeper role in that when the Proper Officer receives a request for a review, they will arrange for any such application to be referred to a panel of three medical assessors but only if the proper officer is satisfied that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particular set out in the application.

### Facts of Case

7. Mr Shmailov, prior to the accident operated a furniture upholstery business. In April 2014, he was injured in a motorcycle accident. He suffered minor physical injuries and the major consequences of the accident was a head injury which caused migraines as well as a psychiatric injury.

8. The diagnosis settled on by the medical assessment service was an adjustment disorder with mixed anxiety and depressed mood. Under the *Motor Vehicles Compensation Act* and now the *Motor Accidents Injuries Act*, a person is only able to claim non-economic loss in connection with an injury if a certain threshold of severity is met. Under section 131 of the *Motor Vehicles Compensation Act* you must be over 10% impaired in order to bring a claim for non-economic loss.
9. In order to determine the level of impairment, the matter is referred off to the medical assessments service who must apply guidelines published by the Motor Accidents Authority. In relation to psychiatric injuries, the Motor Accidents Authority uses the Psychiatric Impairment Rating Scale which requires the assessment of the effects of someone's psychiatric injury to be placed into various categories which are combined to form a percentage which is above or below the 10% requirement.
10. In Mr Shmailov's case he was originally referred for such an assessment in 2018 and found to have 6% whole person impairment in connection with his adjustment disorder. His condition worsened overtime and there was a further application made on the basis that since the time of the earlier application, he had reduced his hours at work, he had had to delegate things he had previously done himself in his business, he had experienced memory and concentration loss and he felt uninterested and unmotivated in his business.
11. In 2019 it came before Assessor Samuels for further assessment and he applied a fairly strict approach to the psychiatric impairment rating scale when it came to measuring adaptivity or employability. In assigning a class for that category, Assessor Samuels referred to the criteria in the guidelines relating to the difference between a class 2 and a class 3 injury, which made reference to whether or not an injured person is, as a result of their injury incapable of working more than 20 hours per week
12. The evidence in relation to Mr Shmailov as advised to the doctor and in the statements was that Mr Shmailov was working about 20 hours per week. Assessor Samuels found that as he was doing the same job for around 20 hours per week, he therefore was in class 2 for employability.
13. The matter then went on application to the Proper Officer for a review of that determination, essentially on the basis that the Assessor had failed to consider the subjective circumstances of this particular applicant who was not a regular 38 hour a week wage earner. He was in fact a self-employed person who had changed the nature of duties in his work by delegating and had dramatically reduced his hours from the approximate 50 -60 hours a week, which he regularly worked. The application was based on the premise that the 20 hours a week criteria cannot be strictly interpreted and had to be applied to the particular individual and their individual circumstances.

### The Assessment process

14. The Proper Officer rejected the claim and failed to refer it onto a panel of three medical assessors.
15. In 1999, the *Motor Accidents Compensation Act* underwent amendments which moved away from the judicially assessed threshold of non-economic loss to inject some objectivity into the assessment of a percentage impairment by moving the decision to doctors rather than lawyers.
16. The motor accident's system relies on a hybrid between the American Medical Association's guides to the assessment of permanent impairment but usually with local guidelines structuring and modifying that system. In terms of psychiatric assessment, the system is to look at different classes of practical effects on that person's life and then rate each of those classes as between a 1, being no impairment and a 5 being extreme impairment. They then take the most frequently occurring number and extrapolate score for psychiatric injury. This means that one point on any one of these can mean the difference between being entitled to non-economic loss damages and not being entitled to non-economic loss damages.
17. Mr Shmailov's case was such a case where a small margin meant the difference between getting over the threshold and being under the threshold. One of the key phrases in the local guidelines provides that the classes in each of the areas functioning are described through the use of common examples. These are intended to be illustrative rather than literal criteria. This means that the medical assessor should obtain a history from the person's pre accident lifestyle activities and habits and then assess the extent to which these have changed as a result of psychiatric injury.
18. One of the faults that Mr Shmailov sought to illustrate both in terms of the application that the proper officer rejected but also in terms of endeavouring to persuade the Supreme Court that the decision was erroneous and liable to administrative law relief, was to point out that that comparative process had not properly occurred and in the particular example that they had that the medical assessor in the first instance had taken a too literal view of the class descriptors.
19. The plaintiff was seeking a medical panel review because the medical assessor had not properly done the before and after comparison because to focus solely on the reference to 20 hours a week is clearly premised on a typical case where someone may be working for example 40 hours a week in which 20 week a roughly 50% loss of earning capacity This was apt to confuse rather than inform as assessment of Mr Shmailov because his pre-injury circumstances were quite different to the norm.

#### Decision of the Proper Officer

20. The function of the Proper Officer is to determine whether or not there is reasonable cause to suspect that an error was made. The Proper Officer proceeded to determine the question of whether or not there was a reasonable cause to suspect an error had been

made by determining whether or not in fact an error had been made and determining that against Mr Shmailov and not referring the matter to an Appeal Panel. This gave rise to the Application to the Supreme Court for judicial review of that decision.

### Decision of the Supreme Court

21. The defendant was represented by Senior Counsel who put up an opposition to the application. One thing they pointed out was that Mr Shmailov arguments was really seeking a merits review and that it is not the territory of an administrative law application where, because there is no statutory framework for one's appeal, one is effectively relying on jurisdictional area.
22. In the territory of an administrative law review, one need to demonstrate some kind of jurisdictional error, that is some sort of constructive failure to exercise the jurisdiction that is given to that particular administrative officer or a failure to properly apply the test.
23. Whilst it is an administrative review of the decision of the Proper Officer exercising their gate keeper function, that role required them to look at the prima facie merits of the decision and the prima facie arguments that were put up against that decision that constituted the medical assessment certificate. Therefore, to some degree, the merits of the application were relevant as it had to be demonstrated to the court that there was some merit in their application to review the decision of the proper officer.
24. Mr Shmailov's case received some traction by pointing to the gate keeper function given to the Proper Officer.
25. In the decision of *Meeuwissen v Boden* [2010] NSWCA 253; 78 NSWLR 145, the primary judgement referred to the fact that a Proper Officer exercising this role is only a gatekeeper. The court noted that it is not the Proper Officer's job to decide the merits of the application, only to decide whether there is a reasonable cause to suspect that some error of significance has been made that could affect the final result.
26. In application of that decision and its principles, Mr Shmailov was ultimately successful in convincing the Associate Justice Harrison in the Supreme Court to set aside the decision of the proper officer and refer the matter back.
27. Her Honour Associate Justice Harrison found that the Proper Officer had not only overstepped the gate keeper role, she queried whether or not the class descriptors had been properly applied. She was prima facie convinced that the medical assessor at first instance had taken an overly prescriptive view of those descriptors and that in deciding not to advance the appeal and to reject the application, the Proper Officer had fallen into the same error of thinking, that was to take the words of the descriptors and taking them literally, failing to take into account the plaintiff's pre-injury capacity to work and arbitrarily applying a 20 hour a week cut off.

### Implications of decision

28. The decision will have application in the field of motor accidents due to the identical wording in the *Motor Accidents Injury Act*.
29. This case concerns a growing area of application because many compensation schemes that have been set up attempt to limit the types of appeals that are available by not providing them in the legislation. However, no matter how legislation is structured so as to not provide rights of appeal, the Supreme Court has inherent jurisdiction to deal with administrative law review across a broad range of decision makers but particularly government decision makers who make decisions about people's rights.
30. It is important for Proper Officers operating in the gate keeper role recognise that there is a fine line between having to give sufficient reasons for their decisions and delving into the merits that should be referred to the review panel. In *Elliott v Insurance Australia t/as NRMA Insurance* [2014] NSWSC 1848, the court expressed some surprise regarding the length of the decision of the Proper Officer, the implication being that these decisions may have taken on a caliber that the statutory provisions did not intend them to have.

## **BIOGRAPHY**

### Rohan De Meyrick

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Rohan was called to the NSW Bar in 1991. With over 26 years' experience as a barrister, he has a wide range of expertise in civil litigation especially in Common Law, Commercial and Equity matters.

### Grant Watson

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Grant was admitted as a lawyer in 2006. He has extensive experience in all areas of injury compensation and insurance claims, including public liability, professional negligence, motor accidents, motor accidents, workers compensation, Comcare, TPD and income protection and general litigation. Grant regularly appears in the Supreme Court, District Court, Workers Compensation Commission and Administrative Appeals Tribunal.

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*Motor Accident Injuries Act 2017* (NSW)

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*Elliott v Insurance Australia t/as NRMA Insurance* [2014] NSWSC 1848