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A DIFFERENT PERSPECTIVE

First Glance

BREACH OF DUTY OF CARE

Anikin v Sierra [2004] HCA 64	**High Court Restores Trial Judge's Finding on Negligence** • When making findings of fact a primary judge can enjoy advantages that cannot be fully recaptured on appeal. The Court of Appeal should defer to those findings except for the very limited circumstances when it can substitute its own, differing conclusions. • The Court of Appeal must consider all grounds of negligence when reviewing a primary judge's findings on liability.
Tobin v Worland [2005] NSWCA 188	**Duty of Care & The Dart-Out Child** • A driver, exercising reasonable care, should slow down and keep a proper look-out when he or she has notice of children being in area – facts distinguished from those in *Derrick v Cheung* [2001] HCA 38, where Ms Derrick drove within speed limit, with flow of traffic, kept proper look-out and had no reason to expect a child to suddenly dart out onto road
Manley v Alexander [2005] HCA 79	**High Court Says Drivers Must Look in All Directions** • Recognising one possible source of danger does not allow a driver to assign exclusive attention to that danger. • Driving requires reasonable attention to all that is occurring on and near the roadway that may present a source of danger. • A driver may be negligent for failing to observe a person lying on the roadway in his or her path when he or she was distracted by the presence of another person on the side of the road who was behaving in such a way that the person may have intended to dart across the road.

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Vale v Eggins [2006] NSWCA 348	**Duty of Care Owed to Intoxicated Motorists** • A driver who has notice of a hazard on the road, such as a pedestrian, should reman vigilant and take steps to reduce the risk of injury until the hazard has passed. • The effect of s 49 of the *Civil Liability Act 2002* is that the standard of care required by a driver is that of an ordinary, prudent driver and the content of that standard is not altered by the fact the victim may have been intoxicated.
Imbree v McNally [2008] HCA 40	**Standard of Care of Inexperienced Driver** • An inexperienced driver owes the same standard of care as any other person driving a motor vehicle - to take reasonable care to avoid injury to others. • The obligation to drive to the standard of a reasonable driver is not to be qualified by reference to the holding of a licence or the driver's level of experience. • The decision in *Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376, suggesting that an unqualified and inexperienced driver owes a *"lower"* standard of care to his orher supervisor, is no longer good law and should not be followed.
Dominello v Nominal Defendant [2009] NSWCA 95	**Nominal Defendant Liable for Diesel Fuel Spill** • Where a driver loses control of a vehicle on a slippery road, liability may not be established even where the driver was traveling at an excessive speed. Liability may be avoided if the evidence shows that the defendant would have lost control even if he or she were driving at a reasonable speed for the prevailing circumstances. • The Nominal Defendant may be liable for injury caused by fuel left on the surface of the road where the only reasonable inference from the circumstances is that the fuel spill was caused by the circumstances which involved negligence by the owner or driver of the unidentified vehicle. • The failure to properly replace a fuel cap constitutes negligence *"in the driving of the vehicle"* and also constitutes *"a defect in the vehicle"*.
State of NSW (NSW Police) v Nominal Defendant [2009] NSWCA 225	**The Duty of Care Owed During a Police Pursuit & The Chain of Causation** • The duty of care owed by a driver being pursued by a police officer continues even if at some point the latter's conduct becomes unreasonable. It is foreseeable that, in the context of a pursuit, a police officer may make an error of judgment in initiating or continuing a pursuit. • The chain of causation will not be broken in those circumstances where the negligence of the driver was a contributory cause of the intervening act of decision.

Mobbs v Kain [2009] NSWCA 301	**Driver Who Struck Infant Pedestrian Not Liable for Injury** • Whether a driver has failed to exercise reasonable skill and care and caused a pedestrian's injury are questions of fact. • For a driver to be found liable for a pedestrian's injury there must be a causal relationship between the speed of his/her vehicle and the accident. • A driver, taking reasonable care and keeping a proper look-out, should not be found to be travelling at a speed which is excessive if the speed of the vehicle had no bearing on whether a collision with a pedestrian occurred • If a collision would not have occurred simply because a vehicle would not have been where it was at the time the pedestrian ran on to the roadway (because it was being driven more slowly), causation will not be established.
Penrose v Nominal Defendant [2009] NSWSC 1187	**Driver of Unidentified Taxi Found Negligent Based on Circumstantial Evidence** • Circumstantial evidence can be sufficient to establish the involvement of an unidentified vehicle in an accident. To make that finding when the identity of the alleged vehicle is in dispute, the Court must be reasonably satisfied the circumstantial evidence raises a more probable inference that the alleged vehicle was involved in the accident. • Finding of identity of vehicle in question overturned on appeal: *Asim v Penrose & Anor* [2010] NSWCA 366.
Butt v Mrowka [2010] NSWCA 1081	**Injured Motorcycle Rider Fails to Establish Negligence** • The benefit of hindsight cannot be used to conclude that a defendant failed to exercise reasonable care simply because action which would have avoided a collision was not taken. • Whether a reasonable person would have taken those precautions is determined by a number of factors, including reasonable expectations about the manner in which other vehicles are being driven.
Sweeney v Thornton [2010] NSWSC 1030	**Extent of Supervising Driver's Duty of Care** • A supervising driver has a duty to give a learner driver ongoing instructions regarding his/her speed and control of the vehicle. • The supervising driver's duty extends to varying those instructions for changing circumstances. • Where a learner driver approaches a corner at excessive speed, taking into account his/her inexperience, the geometry of the bend and the weather conditions, the supervising driver has a duty to intervene by instructing the learner driver to slow down.

Zanner v Zanner [2010] NSWCA 343	**Court of Appeal Considers Negligence of Children Drivers** • An inexperienced or unlicensed driver is under a duty of care to control his/her vehicle. • The scope of an inexperienced or unlicensed driver's duty of care will depend on the degree of their experience and the degree of care one would objectively expect of a driver of a similar age. • A trial judge's finding of contributory negligence will only be disturbed if it is unreasonable or unjust. • Contributory negligence should only be found to exceed 90% in rare cases where the risk created by the defendant is patently obvious and could have been avoided by the exercise of reasonable care on the part of the claimant.
Wagga Truck Towing Pty Limited v O'Toole; IAG Limited t/as NRMA Insurance v O'Toole [2011] NSWCA 191	**Liability for Negligence Advice** • Contribution may be sought from a third party where the negligent advice of that third party has caused the plaintiff to sustain injuries in a motor accident. • A driver may also be found liable where his/her actions, have partially caused injury to the plaintiff, notwithstanding the injury would not have occurred but for the negligent third party advice.

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CONTRIBUTORY NEGLIGENCE

McKenzie v Nominal Defendant [2005] NSWCA 180	**Contributory Negligence and the Highly Intoxicated Driver** • In assessing whether an intoxicated claimant is guilty of contributory negligence, the Court must consider how a reasonable sober person would have acted in the circumstances. • However, once a finding of contributory negligence is made, the Court is permitted to take into account the claimant's intoxication in assessing what reduction should be made for that contributory negligence.
Lambert v Zammit [2005] NSWSC 1135	**Contributory Negligence in Infant Dart Out Cases** • Where there are reasons to believe that a child may dart out into the path of a vehicle, the defendant is required to keep a proper lookout to both sides of the road, as well as the thoroughfare itself, and slow down to an appropriate speed. • A finding of contributory negligence is unlikely where the pedestrian is 7 years of age.
Petracho v Griffiths [2007] NSWCA 302	**Failure to Wear A Seat Belt** • When alleging contributory negligence, based upon the failure to wear a seatbelt, the onus is on the defendant to establish that a seatbelt was not worn. • Where only one party has obtained an expert's report on an issue, the Court is not obliged to accept that expert's opinion. • When giving expert evidence, an expert witness is required to be objective and take into account anomalies in the case which may support a different conclusion.

AAMI Ltd v Hain [2008] NSWCA 46	**No Duty of Passenger to Enquire Whether Driver Fit to Drive** • In assessing, for the purposes of s 138(2)(b) *MACA*, whether an injured person ought to have been aware of the driver's impairment from alcohol, consideration is to be given to the totality of the evidence including the observations and knowledge of the person and any other credible witness. The provision does not merely require consideration of the available objective evidence. • Even where there is evidence that a claimant knew a driver had consumed some alcohol in the relevant period, there is no obligation, based upon that knowledge alone, to inquire as to his fitness to drive before accepting a lift.
Turkmani v Visvalingam [2009] NSWCA 211	**Jogging Pedestrian Found Predominately at Fault** • A pedestrian should shoulder the majority of the blame where he or she runs across the road, against the lights.
Taheer v Australian Associated Motor Insurers Ltd [2010] NSWCA 191	**Pedestrian Wearing Dark Clothing at Night Guilty of Contributory Negligence** • The standard of care that applies for the purposes of contributory negligence is that which is prescribed by s 5R(2) of the *Civil Liability Act 2002*, namely, a reasonable person in the position of that person. • A pedestrian may be guilty of contributory negligence when crossing the road at night for failing to take into account his or her visibility arising from the colour of his or her clothing.
Zanner v Zanner [2010] NSWCA 343	**Circumstances Where 90% Reduction for Contributory Negligence Justified** • Contributory negligence should only be found to exceed 90% in rare cases where the risk created by the defendant is patently obvious and could have been avoided by the exercise of reasonable care on the claimant's part.
Allianz Australia Insurance Limited v Glenn Swainson [2011] QCA 136	**Intoxicated Plaintiff Bears Greater Proportion of Responsibility** • Where there is no independent evidence to the contrary, judges are entitled to draw inferences from the findings of fact based on common sense and their *"own experience of life"*. • Intoxicated plaintiffs, who by their actions are the main cause of a motor vehicle accident, may bear the greater proportion of responsibility.

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JUDICIAL REVIEW – CARS GENERAL ASSESSMENTS

Insurance Australia Limited v Helou [2008] NSWCA 240	**Scope of Right to Judicial Review** • The Court will only interfere with a CARS Assessor's decision were the Assessor acts outside his or her jurisdiction. • An error made within jurisdiction – such as a failure to properly analyse medical reports – cannot be corrected on a Judicial Review Application.
Zurich Australia Insurance Ltd v Motor Accidents Authority [2010] NSWSC 214	**Right to Cross-Examination** • A party to a CARS Assessment does not have an automatic right to cross-examine a witness. • Whether a refusal to allow questioning – or to limit questioning – amounts to a denial of procedural fairness depends upon the circumstances of the case. • A denial of procedural fairness may arise where questioning is not allowed on an issue which is in dispute and which is relevant to the outcome of the assessment.
Australian Associated Motor Insurers Ltd v Motor Accidents Authority [2010] NSWSC 833	**Independent Research by Assessor** • An Assessor may deny the parties procedural fairness by conducting research on a medical condition on Wikipedia without advising the parties and giving them a chance to comment on the independent research.
QBE Insurance (Australia) Limited v Cowan [2010] NSWSC 933	**Review of Assessment of Economic Loss** • An Assessor may to have regard to a MAS Certificate, amongst other evidence, in determining loss of earning capacity. • An Assessor may reduce an allowance for loss of earning capacity by a specified percentage to reflect a pre-existing condition.
Winter v NSW Police Force [2010] NSWWCCPD 121	**Right to Cross-Examination** • It is arguable that a party is denied procedural fairness where an Assessor refuses questioning on inconsistencies in the evidence.

Insurance Australia Group v Hutton-Potts [2010] NSWSC 1446	**Right to an Adjournment** • An Assessor may deny a party procedural fairness by refusing an adjournment to allow the party time to obtain information relevant to the assessment. • Judicial review may be sought were an Assessor fails to properly apply s 126 of the *MACA*.
NRMA Insurance Limited v Ainsworth [2011] NSWSC 344	**No Relief Granted Despite Error** • Certiorari will not be issued by the courts as a form of relief for an error of fact (that is not jurisdictional). • It is not an error of law for an Assessor to arrive at a conclusion which is supported by evidence simply because that conclusion is inconsistent with another conclusion that was available. • The Supreme Court has a discretion to issue certiorari where there is an error of law on the face of the record. • The circumstances in which orders in the nature of certiorari are refused by the court on discretionary grounds are rare.

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JUDICIAL REVIEW – MAS FURTHER ASSESSMENTS

SECTION 62(1)(a)	
Wilkie v Motor Accidents Authority & Ors [2007] NSWSC 1086	**Discretionary Considerations in Granting Judicial Relief** • A party who wishes to challenge the Proper Officer's decision to refer the matter for a further assessment should bring an administrative law challenge prior to the further assessment taking place. • A party who wishes to challenge a MAS Assessment should utilise the review procedure in s 63 prior to seeking relief from the Supreme Court. • A proper officer is not required to give reasons for a decision that the matter should be referred for a further assessment.
Garcia v Motor Accidents Authority of NSW [2009] NSWSC 1056	**Meaning of "*Additional Relevant Information*" in s 62(1)(a)** • Whether there has been an error of law depends upon a construction of the MAS Assessor's Statement of Reasons. • The face of the record includes the MAS Assessor's reasons for the decision. The wrong test utilised by a MAS Assessor to determine causation is an error of law on the face of the record for the purposes of an order in the nature of certiorari. • The term "*additional relevant information about the injury*" in s 62(1) of the *Motor Accidents Compensation Act* (the Act) a technical legal term and its meaning is a question of law. • "*Additional relevant information about the injury*" is additional information relevant to the assessment that was not previously available and may extend to an opinion expressed by a medical expert of a kind previously considered by MAS

Alavanja v NRMA Insurance [2010] NSWSC 1182	**"*Additional Relevant Information"* Does Not Include Material of a Kind That Was Already Before an Assessor** • An opinion by an expert, in circumstances where the Assessor had not previously had expert opinion of that nature, is considered *"additional relevant information about the injury"*: *Garcia v Motor Accidents Authority of NSW* [2009] NSWSC 1056 confirmed. • However, a further opinion of a medical expert must contain new information not previously before the Assessor. • Differences of opinion and differing assessments of whole person impairment alone cannot constitute *"additional relevant information"*.
Cupac v Motor Accident Authority [2010] NSWSC 631	**A MAS Assessor is Not Required to Give Detailed Reasons for their Conclusions** • A MAS Assessor is not required to provide detailed reasons for their conclusions, as the MAS Guidelines and the AMA IV Guides do not stipulate what form the reasons are to take. • A failure to provide *"adequate"* reasons does not constitute a breach of procedural fairness. • A MAS Assessor is not required to assess a claimant's presentation with an eye to each and every criterion set out in the statutory guides.
Singh v Motor Accidents Authority of NSW [2010] NSWSC 500	**The Proper Officer As a Gate Keeper** • The role of the Proper Officer is a procedural role and not an administrative or jurisdictional gateway through which the parties are required to pass. • The Proper Officer does not have any decision making jurisdiction as to whether the referral for a further assessment has been validly made, or whether the conditions in s 62(1)(a) and s 62(1A) of the *MACA* have been satisfied.
Singh v Motor Accidents Authority of NSW (No2) [2010] NSWSC 1443	**"*Additional Relevant Information*" Must be Additional to the Party Relying on the Information** • *"Additional relevant information about the injury"* must be construed by reference to the objects of the Act, namely to facilitate the early resolution of claims and the need for parties to co-operate. • A party making an application under s 62(1)(a) can only do so if the information relied on *"is additional"* to the party relying on that information. • Even if the information relied upon by a party making an application has not previously been seen by the opposing party, or a MAS Assessor, it will not be considered "*additional*", if the party making the application had the material previously.

Rodger v De Gelder & Anor [2011] NSWCA 97	**The Medical Assessment Guidelines Should be Construed in a Practical and Commonsense Way** • Clause 14.7 of the MAS Guidelines should be read consistently with the question raised by s 62 of the Act. Any other understanding of the provisions makes a nonsense of the process required to be undertaken by the Proper Officer. • "Application" in clause 14.7 of the MAS Guidelines may be interpreted to refer to the "previous assessment". • If the Proper Officer is not satisfied that the deterioration of an injury or additional relevant information about the injury would have a material effect on the outcome of the "Application [previous assessment]", the Proper Officer may dismiss the application.

SECTION 62(1)(b)	
Chami v Motor Accidents Authority [2009] NSWSC 1358	**Procedural Fairness a Relevant Consideration in Referring a Matter Back to MAS Pursuant to s 62(1)(b)** • A complaint about procedural fairness by a party is a ground that should be considered when a CARS Assessor exercises his or her discretion under s 62(1)(b). • Section 61(4) of the Act confers an express power on the Court to *"reject"* a Certificate. This power is distinct from the unfettered discretion of a Claims Assessor or a Court to refer a matter back to MAS pursuant to s 62(1)(b).
Devic v Motor Accidents Authority [2009] NSWSC 1289	**Contemporaneous Records Relevant to the Discretion in s 62(1)(b)** • The task of a CARS Assessor pursuant to s 62(1)(b) to refer a matter for further assessment is not to consider whether the original MAS Assessment was correct. • The task is for the CARS Assessor to determine whether or not the MAS Assessor may have arrived at a different conclusion, had they the further material before them at the assessment. • Production of contemporaneous medical records of a claimant not previously before an assessor, may invoke the exercise of the discretion.

Trazivuc v Motor Accidents Authority [2010] NSWCA 287	**A CARS Assessor has an Unfettered Discretion to Refer the Matter Back to MAS Pursuant to s 62(1)(b)** • A Court or CARS Assessor has an unfettered discretion to refer a matter back for a further assessment pursuant to s 62(1)(b). • The discretion should, however, only be exercised where there are good reasons to do so and where it would be unjust not to do so. • One good reason for a Court or CARS Assessor to do so would be that there are grounds to believe that the further assessment may reverse the previous finding in relation to a threshold dispute.

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JUDICIAL REVIEW – MAS REVIEW APPLICATIONS

Rahme v Beavan [2009] NSWSC 58	**MAS Review Panel Required to Give Adequate Reasons** • The Supreme Court held that a Review Panel constituted under s 63 of the *MACA* is required to give adequate reasons for its decision under s 61(9). • A claimant would be denied procedural fairness where the Review Panel fails to fully explain the reasons for their decision.
Transport Accident Commission of Victoria v Motor Accidents Authority of NSW & Ors [2009] NSWSC 940	**MAS Proper Officer's Decision to Reject Application in Error is Subject to Judicial Review** • The decision of a MAS Proper Officer to dismiss an Application for Further Medical Assessment is conferred by s 62(1B) but the scope of the discretion is curtailed by the MAA Permanent Impairment Guidelines. • The task of the Proper Officer considering an Application by a party is to determine whether there is relevant additional information and if so, whether it is capable of having a material effect on the outcome of the previous assessment. • In considering additional information contained in a Review Application, the Proper Officer must give proper consideration as to whether the material is capable of having the material effect in the outcome of the previous assessment.
Sanhueza v AAMI Limited [2010] NSWSC 774	**Certificate of Impairment Issued by Review Panel Quashed – Psychiatric Impairment Rating Scale Considered** • When considering an Application to Review, the test is whether the Proper Officer has reasonable cause to suspect the medical assessment was incorrect in a material respect, having regard to the particulars set out therein. It is not necessary for the Proper Officer to individually specify the documents he/she considered or to decide whether a particular conclusion is open or available on that material. • When applying the psychiatric impairment rating scale, it must be remembered that the examples provided in each class of impairment are descriptive, not determinative, exhaustive or exclusive to which class. It is possible for

	an area of function to be allocated a class of impairment based on non-comparable examples. • The Review Panel is required to investigate an issue which formed part of the material on which the original MAS Assessor made a determination with respect to the class impairment for an area of function. This may involve a request for further documents and/or a further examination of the claimant. • It is correct and open to the Review Panel to undertake a fresh assessment of all matters with which the medical assessment is concerned, whether or not a review is sought by the Review Applicant.
Graovac v Motor Accidents Authority [2010] NSWCA 224	**Relevant and Irrelevant Considerations by MAS Review Panel Assessor** • In the absence of specific legislative limitations, a MAS Review Panel has the power to make a decision based on the information before it and give weight to that information in accordance with clinical judgment. • Engagement in judicial consideration of the decision maker's decision making process and the weight of consideration given to the material before it, is tantamount to a merit review which is not within the scope of the *MACA* nor the *Supreme Court Act 1970*. • Section 69 of the *Supreme Court Act 1970* does not allow the Court to replace the decision of the Review Panel with a "better" decision, the nature of relief offered is limited to the scrutiny of the legality of the decision.
Bratic v Motor Accidents Authority [2010] NSWSC	**Failure to Request Re-examination by MAS Review Panel is Acquiescence to the Review Panel process** • A claimant submitts to the review process where there is a failure to request a re-examination by the Review Panel to challenge the earlier Assessor's clinical findings. • Delay is not determinative in the Court's exercise of its discretion under s 69 of the *Supreme Court Act 1970*.
Dogon v Redmond & Ors [2010] NSWSC 1329	**Review Available where MAS Assessor Fails to Explain Causation Findings** • A MAS Assessor is required to give proper reasons for his or her causation findings. • Where a MAS Assessor fails to give proper reasons for his or her findings on causation, the aggrieved party may seek a review under s 63 of the *MACA*.

Farache v Motor Accidents Authority of NSW & Ors [2011] NSWSC 446	**Proper Officer Correct in Concluding Reasonable Cause to Suspect MAS Assessor Failed to Properly Consider the Question of Causation Where Failure to Explain Reasons for Findings Present** • The failure of a MAS Assessor to include in his reasons any reference to findings as to causation of an injury gives rise to a suspicion that the MAS Assessor failed to properly consider the question of causation.

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PROCEDURAL CASES

LATE CLAIMS	
Blackburn v Allianz Australia Insurance Ltd [2004] NSWCA 385	**Meaning of `Full and Satisfactory'** • The Court requires a full and complete explanation for delay in order to evaluate the conduct of the claimant. • In assessing whether a claimant has a satisfactory explanation for delay, the subjective circumstances of the claimant should be taken into account. • Unsatisfactory conduct by a solicitor (including misunderstanding of the limitation period) does not render an explanation unsatisfactory, in circumstances where the conduct of the claimant (and perhaps his or her guardian) has been satisfactory.
Figliuzzi v Yonan [2005] NSWSC 290	**Failure to Obtain Legal Advice May Render Explanation Unsatisfactory** • Depending on the circumstances, it is arguable that an explanation for delay is not satisfactory where the claimant has failed to obtain legal advice as to whether or not his or her understanding of his or her legal rights is correct.
Gudelj v Motor Accidents Authority [2011] NSWCA 158	**Procedure In Late Claims** • Either the claimant or the insurer may seek an exemption in the face of an adverse Special Assessment Certificate in a late claim dispute. • Section 73(3)(c) permits both mandatory and discretionary exemption applications to proceed through the gateway to court. • An insurer is obligated to determine liability in accordance with s 81, even where a claim has been rejected for procedural non-compliance. • Where a Section 81 Notice is not issued, the insurer will be deemed to have denied liability in accordance with s 81(3), thereby permitting a discretionary exemption under s 92(1)(b). •

LATE CLAIMS	
	• Rejection of a claim for procedural non-compliance constitutes a denial of liability for the purposes of s 81, however, it does not fulfil any of the grounds for mandatory exemption in clause 8.11.1 of the *Claims Assessment Guidelines*. • Rejection of a claim for procedural non-compliance – as a denial of liability for the claim – may, however, permit a discretionary exemption under s 92(1)(b).

SECTION 81 NOTICES	
Nominal Defendant v Gabriel [2007] NSWCA 52	• An insurer which serves a Section 81 Notice admitting liability is not precluded from filing a Defence in subsequent court proceedings placing liability in issue. • The making of an admission in a Section 81 Notice merely constitutes evidence that an admission has been made and may be weighed up with other evidence as to liability at trial. • If a claimant wishes to allege that the insurer is estopped from contesting liability as a consequence of an admission made in a Section 81 Notice, that issue is to be determined at trial.
QBE Insurance v Motor Accidents Authority [2008] NSWSC 434	**Insurer Bound by Section 81 Notice within CARS Process** • An insurer is bound, within the CARS process, by any admission of liability contained in a Section 81 Notice unless there was fraud where s 118 applies. • In considering an application for exemption under s 92(1)(a), the Principal Claims Assessor may only consider the determination made as to liability contained in the insurer's first valid Section 81 Notice.
CIC Allianz Insurance Ltd v Erturk [2010] NSWSC 302	**Insurer Bound by Section 81 Notice Notwithstanding Honest Mistake in Notice** • An insurer is bound by a Section 81 Notice admitting fault whilst the matter remains in the CARS process. • On an Application for Mandatory Exemption, the PCA is not permitted to look behind a validly issued Section 81 Notice to consider the circumstances in which it was produced. • An insurer remains bound by its Section 81 Notice even whether an admission contained in that Notice was made as a consequence of an honest mistake.

SECTION 110 NOTICES	
McNamara v Fitzgibbon [2005] NSWCA 274	**Period of Delay Requiring Explanation** • In applying for reinstatement pursuant to s 110(5), the claimant must provide a full and satisfactory explanation for the whole of the period up to the date reinstatement is sought, rather than just the 3-month period following the service of the s 110 Notice.
Hickey's Transport Pty Ltd v Gordon [2008] NSWCA 167	**Quality of Explanation for Delay** • Even where delay is sought to be explained by solicitor error, the explanation will ordinarily not be full unless the claimant also explains his or her state of mind and the role he or she played in the delay.

STATUS OF CARS ASSESSMENTS	
Lee v Yang [2006] NSWCA 214	**Finding of Contributory Negligence Not Binding on Insurer; Permitting Rehearing on Liability and Quantum** • Where an insurer does not accept a CARS Assessor's Assessment of contributory negligence, the insurer is not bound by the Assessor's decision on quantum with the result that both liability and quantum will be in issue in any subsequent court proceedings.
Hayek v Trujillo [2007] NSWCA 139	**Special Assessment Certificate Does Not Permit Commencement of Proceedings** • An insurer loses the right to challenge a claim on the basis of delay where it fails to request an explanation for delay within 2 months of receiving the claim. • A Special Assessment Certificate, although issued "in accordance with" s 94(4), is not a Section 94 Certificate for the purpose of s 108 and does not permit the claimant to commence court proceedings.

3-YEAR LIMITATION PERIOD	
Paice v Hill [2009] NSWCA 156	• For the purpose of s 109(2) of the *MACA*, time on the 3-year limitation period does not stop running in respect of an Application for Special Assessment under s 96. • Time on the 3-year limitation period in s 109 also does not stop running in respect of a defective Application for General Assessment or a defective Application for Exemption.

MISCELLANEOUS PROCEDURAL CASES	
El-Helou v Smith [2009] NSWSC 741	**Authority to Obtain Centrelink Records** • Section 208 of the *Social Security (Administration) Act (Cth) 1999* permits the disclosure of Centrelink records where the recipient of Centrelink benefits provides an authority. • In court proceedings, s 56 of the *Civil Procedure Act 2005* places a duty on all parties to assist the Court to further the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings. • Section 56 of the *Civil Procedure Act 2005* empowers the Court to make an order that the plaintiff provide an authority for the release of his or her Centrelink records where the contents are relevant to the issues in dispute and promote the fair resolution of the proceedings. • However, Centrelink records remain protected in CARS proceedings given paragraph 16.13.1 of the *MAA Claims Assessment Guidelines* which specifically prohibits a CARS Assessor from directing a claimant to provide a Centrelink authority.
Nominal Defendant v Staggs [2010] NSWCA 224	**Joinder of Nominal Defendant** • An insurer which intends to join the Nominal Defendant to proceedings must give notice of that intention within 3 months of receiving a claim form from the claimant, and must provide details of the allegations against the Nominal Defendant within 2 months thereafter. • A Court may extend the time limit for providing notice to the Nominal Defendant if it provides a full and satisfactory explanation for the entire period of the delay. • A Court can not extend the time for providing details of the allegations against the Nominal Defendant. • Each additional month of delay in providing notice to the Nominal Defendant is significant. • In considering an insurer's explanation for delay, a Court may draw inferences regarding the insurer's actions, knowledge and beliefs having regard to the insurer's status as an institutional litigant.

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NON-ECONOMIC LOSS

Murdoch v Davis [2005] NSWCA 466	**Status of MAS Certificates** • A MAS whole person impairment certificate is binding to the extent that it certifies greater than 10% WPI. • A Court may not assess damages on a basis inconsistent with a MAS Certificate certifying greater than 10% WPI at a particular date.
Darke v El Debal [2006] NSWCA 86	**A Judge Cannot Substitute Their Opinion on the Threshold Issue** • This decision confirms the binding nature of MAS Assessments. • A Trial Judge cannot simply overrule a Certificate and substitute their own opinion, merely because the MAS report is inconsistent with the complaints alleged by the injured person. • There must be evidence of some real procedural unfairness for Section 61 to apply, and even when there is real procedural unfairness, a Trial Judge should ordinarily still refer a matter back to MAS for further medical assessment.
Brown v Lewis [2006] NSWCA 87	**A Medical Assessor's Findings are Not Conclusive for all Purposes** • The only effect of a MAS permanent impairment certificate certifying greater than 10% WPI is to *"unlock the door to an award of non-economic loss"*. • Where the claimant is over 10% WPI, the measure of non-economic loss is assessed according to common law principles subject to the cap in s 134. • There is no requirement for a medical assessor to do more than certify whether the degree of permanent impairment is greater than 10%. • If more information is provided in the certificate or the supporting reasons then it may cast evidentiary light (of a non-conclusive nature) upon the issue at hand. • The actual percentage of permanent impairment calculated by a Medical Assessor for the purpose of s 58(1)(d) is of limited assistance for the purpose of calculating damages for economic loss.

Pham v Shui [2006] NSWCA 373	**Is a MAS Assessor's Decision on Causation Binding on the Court and a CARS Assessor?** • Only the permanent impairment finding is binding pursuant to s 61(2). • The assessment of causation itself is not conclusive.
Ackling v QBE Insurance (Australia) Limited [2009] NSWSC 8814	**Medical Assessors Empowered to Assess Causation** • MAS Assessors have the power to assess causation. • Assessing causation is part and parcel of assessing s 60 issues of whole person impairment and stabilisation. • Section 58(1)(d) operates to ensure the consideration of causation when assessing whole person impairment. • The manner in which causation is to be assessed is in keeping with the statutory provisions and delegated legislation.
Motor Accidents Authority v Mills [2010] NSWCA 82	**MAS Referrals Cannot be Confined so as to Exclude Consideration of Causation** • A Court or Claims Assessor does not have the power to bind a Medical Assessor on the issue of causation. • A certificate under Pt 3.4 of the Act of the degree of permanent impairment of the injured person as a result of the injury caused by the motor accident is conclusive evidence of the degree of that permanent impairment and its causation by the motor accident.
Tchen v Nominal Defendant [2010] NSWCA 245	**Court Endorses Previous Decisions Regarding Conclusiveness of MAS Determination on Causation** • The supporting reasons of a medical assessment certificate from MAS are not ordinarily admissible as evidence. • A medical assessment certificate is not conclusive evidence as to causation for the purposes of economic loss. • Damages for economic loss should be adjusted to reflect the difficulty a claimant may have experienced in any event had they not been injured. • A buffer for future commercial domestic assistance may be appropriate where it is possible a claimant may be unable to receive the required care on a gratuitous basis.
Allianz Australia Insurance Ltd v Motor Accidents Authority [2011] NSWSC 102	**Court Rejects Need for Pre-existing Symptomatic Impairment to be Permanent at Time of Subsequent Accident** • The court determined that for the second sentence of clause 1.33 of the MAA Guidelines for the assessment of permanent impairment to be engaged it is not necessary that the impairment arising from an initial accident be permanent at the time of a subsequent accident.

	• The permanency of a pre-existing impairment is to be determined as at the time of the assessment and not as at the time of the subsequent accident. • Clause 1.23 of the MAA Medical Guidelines for the assessment of permanent impairment requires the evaluation of impairment as at the time of assessment, whether that impairment arises directly from the accident in question or is a pre-existing or subsequent impairment within the meaning of clauses 1.33 and 1.36 of those Guidelines respectively.
Nguyen v Motor Accidents Authority of New South Wales and Anor [2011] NSWSC 351	**Assessment Required of Shoulder Impairment Even Where Afflicted Only Be Referred Pain** • Referred pain to shoulders arising from a neck injury is an injury that can be assessed at MAS even if no direct injury was sustained to the shoulders. • This decision debunks the theory that the shoulder injury should only be assessed by MAS if there has been a direct injury to it.

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First Glance

LOSS OF EARNING CAPACITY

Penrith City Council v Parks [2004] NSWCA 201	**Award of Buffer for Future Economic Loss** • Section 126 of the Act does not preclude the award of a buffer for future economic loss.
Tran v Younis [2006] NSWCA 188	**Assessing Diminution in Earning Capacity** • The insurer does not have an onus to lead evidence as to the availability of work or the value of the residual earning capacity. • Section 126 of the Act does not require the making of assumptions of great specificity. • The Court is entitled to utilise average weekly earnings as a guide to valuing a claimant's residual earning capacity where specific evidence has not been adduced. • Damages for loss of earning capacity should be awarded only if the diminution is or may be productive of financial loss.
Dyldam Developments Pty Ltd v Jones [2008] NSWCA 56	**Use of Historical Earnings to Calculate Loss** • An Assessor or a Judge should only depart from historical earnings, such as those disclosed in tax returns, to assess economic loss if there are some compelling reasons to do so.
Kallouf v Middis [2008] NSWCA 61	**Burden of Proof for Economic Loss** • The insurer bears the onus of proving the claimant has a residual earning capacity. • The claimant bears the onus of establishing a total loss of earning capacity. • An award should not be made for superannuation loss in circumstances where the award for loss of earning capacity is based upon self-employed earnings.

Allianz Australia Insurance Ltd v Elias [2009] NSWCA 123	**Appealing an Award for Economic Loss** • A judge must provide reasons supporting an award for past or future economic loss, otherwise the award is defective. • The reasons must explain how the award was calculated and what assumptions were made.
Miller v Galderisi [2009] NSWCA 353	**Award for Economic Loss Where Claimant Unemployed** • For an award of damages for economic loss to be validly made in circumstances where the claimant was unemployed at the time of the accident the evidence must indicate that the claimant had an earning capacity at the time of the accident and, but for the accident, it would have been exercised and produced income.
Zheng v Cai [2009] HCA 52	**Benevolent Payments from a Third Party** • If a claimant has received a benevolent payment from a third party following an accident, the payment must not be deducted from an award for economic loss unless it was the intention of the third party to make that payment as a remuneration to the claimant.
Fkiaras v Fkiaras [2010] NSWCA 116	**Assessing Economic Loss Under s 125** • There are 3 stages to assessing damages for economic loss under s 125 of the Act. Firstly, probable net weekly earnings but for the injury, which are capped by s 125(2), must be assessed. Next, post-accident earnings and/or residual earning capacity, which are not capped, must be assessed. Lastly, the difference, if any, between probable net weekly earnings and post-accident earnings and/or residual earning capacity forms the basis for any award. • The reference to "earnings" in s 125 is a reference to income earned by the exercise of the claimant's earning capacity, that is, through his or her physical exertion or input. • A claimant's post-accident earnings and/or residual earning capacity cannot be traced back to the exercise of their earning capacity prior to the accident.
Arnott v Choy [2010] NSWCA 2569	**Mitigation of Damages** • A finding regarding a claimant's residual earning capacity will be dictated by the medical and lay evidence, which must be considered and applied as a whole, not selectively. • A claimant is required to mitigate the damage caused by his or her loss of earning capacity by taking reasonable steps to pursue alternative employment opportunities.

Insurance Australia Group v Hutton-Potts [2010] NSWSC 1446	**Judicial Review of CARS Award for Economic Loss** • A claims assessor's failure to provide details of the assumptions on which an award for economic loss was based, and the relevant percentage by which damages were adjusted to reflect the likelihood of a future economic loss occurring regardless of the accident, may amount to a jurisdictional error.

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First Glance

DOMESTIC ASSISTANCE

CSR Limited v Eddy [2005] HCA 64	**High Court Abolishes Sullivan v Gordon Damages** • The decision of *Sullivan v Gordon* (1999) 47 NSWLR 319 is no longer good law and does not form part of the common law of Australia. • It is not permissible to award compensation for services provided by a care giver which replace the services provided by the claimant to a third party. **NB:** Section 15B of the *Civil Liability Act* has restored the right to claim compensation for replacement services subject to the requirements of that provision.
Teuma v Trujillo [2007] NSWCA 139	**Fair Give and Take of Family Life No Longer Relevant to Award for Gratuitous Care** • The claimant is entitled to compensation for gratuitous services provided as a consequence of a need caused by the accident, even where those services are provided in the fair give and take of family life. • Compensation for gratuitous care should only be granted where the services are provided for the well-being of the claimant.
Miller v Galderisi [2009] NSWCA 353	**Award Should Only be Made for Commercial Assistance Where it is Demonstrated Gratuitous Care Will Cease** • When assessing a claim for commercial domestic assistance, consideration must be given to the past and future circumstances of the claimant, as well as any past, current and prospective providers of gratuitous care. • If gratuitous domestic assistance has been, and is being, provided to the claimant, an award of damages for future commercial domestic assistance can only be made if it can be established when and why the current arrangement for the provision of gratuitous care will cease so as to create a need for commercial assistance.

Allianz Australia Insurance Limited v Roger Ward [2010] NSWSC 720	**Supreme Court Confirms Continuous 6-Hour Per Week Threshold** • Claims under s 128 of the *MACA* and s 15B of the *Civil Liability Act 2002* must be assessed separately rather than on a global basis. • The 6-hour per week threshold in both s 128 of the *MACA* and s 15B of the *Civil Liability Act 2002* is a continuous threshold which continues to apply beyond the first 6 months and into the future.
Arnott v Choy [2010] NSWCA 2569	**Need to Assess Capacity for Independent Living** • An award of damages for attendant care may be found to be excessive if there is evidence which indicates a claimant retains some capacity for independent living. • Damages awarded for future attendant care and future case management should be closely scrutinised. There exists the potential for over-compensation on the basis that, even though they are separate heads of damage, the same services/facilities may be incorporated into each of them to form the basis for an award.
Hill v Forrester [2010] NSWCA 170	**Court of Appeal Confirms Continuous 6-Hour Per Week Threshold** • The 6-hour per week "intensity requirement" contained in s 15(3)(a) of the *Civil Liability Act 2002* is a continuing one. A claimant can only recover damages for gratuitous care for periods where it can be established that the services were provided (or are to be provided) for at least 6 hours per week. • Where a claimant satisfies the 6-month "duration requirement" contained in s 15(3)(b) of the *Civil Liability Act 2002*, they are permitted to recover damages for gratuitous care provided during earlier broken periods of less than 6 months in duration.

First Glance

INDEMNITY/DUAL INSURANCE

TNT Australia Pty Ltd v Willis [2004] NSWCA 455	**Meaning of "Injury" Pursuant to s3** • The Court of Appeal considered what constitutes an "injury" for the purpose of Section 3 of the *Motor Accidents Act 1988*. Whilst the case was decided under the 1988 Act, it is equally applicable to claims under the *MACA*. • The court held that the occasional lifting of weights of 27kg was an unreasonable risk and there was no defect merely because a worker was required to manoeuvre ramps into place.
QBE Workers Compensation v Dolan [2004] NSWCA 458	**Workers Compensation Payments Still Recoverable Despite a Verdict for the Defendant in CTP proceedings** • An employer is entitled to recover payments made to a worker from a CTP insured pursuant to Section 151Z(1)(d) of the *Workers Compensation Act 1987* notwithstanding that the CTP insurer may have compromised the direct CTP claim by the worker for a verdict for the Defendant (confirming *GIO v McDonald* (1991) 25 NSWCA 492). • It is possible that the employer may recover all of its payments pursuant to Section 151Z(1)(d) even where the CTP insurer has settled the worker's CTP claim for a lesser sum, if the sum paid by the CTP insurer is assessed as representing less than the CTP insurer's full liability.
QBE Insurance v Smith [2005] NSWCA 130	**A Broader Definition of the Meaning of "Injury"** • For an injury to be considered the result of `*the driving of the vehicle*', the vehicle need not be in motion. • Directions given by a person while in control of a vehicle may be included within the concept of `*the driving of the vehicle*'. • An injury caused to a child whilst crossing the road results from `*fault*' of a driver `*in the driving of the vehicle*' where the driver parks on one side of the road, instructs the child to open a gate on the other side of the road but fails to give him proper instructions or watch out for approaching vehicles.

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd [2005] HCA 26	**Meaning of "*a Result of*" and "*Caused*" Pursuant to s3** • In interpreting the definition of "injury" in s 3, meaning must be given both to the words "*a result of*" and also the words "*is caused*". • The use of the words "*a result of*" in the definition of "*injury*" conveys that the injury must be sustained during the driving of the vehicle, or a collision with the vehicle or the vehicle running out of control. • The use of the words "*is caused*" in the definition of "*injury*" conveys that the injury must be sustained as a consequence of one of those events. • In respect of defect cases, to fall within the definition of "*injury*", the injury must be sustained during the use or operation of the vehicle and must be sustained as a consequence of a defect in the vehicle.
Portlock v Baulderstone Hornibrook [2005] NSWSC 775	**When is an Injury Caused?** • An injury is not caused during the *"driving of the vehicle"* where no locomotion is intended or attempted and a crane is only being used for the purpose of lifting. • An injury is not caused during a vehicle running out of control merely because it makes two sudden movements backwards, particularly where the movement ceases by application of the brakes.
Hunt v State of NSW [2005] NSWSC 1150	**Damage Limitation Provisions** • The damage limitation provisions in Chapter 5 of the *MACA* do not apply to injuries caused by motor vehicles in the absence of an "*accident*". • However, claims relating to injuries caused by the non-accidental use and operation of motor vehicles still fall within the statutory indemnity in s 10 of the *MACA*.
AMP General Insurance Ltd v Kull [2005] NSWSA 442	**Meaning of "*a Result of*" and "*Caused*" pursuant to s3** • An injury caused to the claimant's hand by a driver turning on the ignition whilst the claimant was adjusting the fanbelt of the vehicle was not "*a result of and caused during the driving of the vehicle*" within the meaning of the definition of "*injury*" in s 3 of the MAC Act. • Such an injury was also not "*a result of and caused during a collision with the vehicle*".
Toll Pty Ltd v Dakic [2006] NSWCA 58	**Unsafe System of Work** • An injury caused in a defect case does not fall within the definition of "injury" in s 3 of the MAC Act where the proximate cause of the injury was the system of work rather than the defect, even where the owner and the employer are the same entity.

	• In assessing whether the proximate cause was the defect or the system of work, consideration should be given to whether the injury was caused by the inanimate object constituting the defect or the human intervention of the employer or some other person.
Nominal Defendant v GLG Australia Ltd [2006] HCA 11	**Unsafe System of Work** • An injury caused by an unsafe system of work, which involves the use and operation of a motor vehicle, does not necessarily fall within the CTP Indemnity, even where the vehicle is owned by the entity which devised the system.
Inasmuch Community Inc v Bright [2006] NSWCA 99	**Meaning of "*Collision*"** • An injury caused to a claimant by contact with the swinging rear door of a truck blown closed by the wind was not the *"result of and caused during…a collision…with the motor vehicle*". • For the purpose of definition of "*injury*" in s3, the word "*collision*" should be interpreted narrower than the dictionary definition.
Walfertan Processors Pty Ltd v Dever [2006] NSWCA	**Onus on CTP Insurer to Establish Unsafe System** • A CTP insurer alleging that a defect was not the cause of an injury should establish the existence of an unsafe system of work in the circumstances.
Brambles Australia Ltd v Sandy [2006] NSWCA 357	**When is an Injury Not an Injury for the Purposes of s3?** • An injury sustained by a truck driver as a result of an unsafe system of work, causing the truck to overturn, does not constitute an "*injury*" for the purpose of the MAC Act.
JA & BM Bowden & Sons v Doughty [2009] NSWCA 82	**Negligent Instruction of Employer** • Damages will be assessed under Chapter 5 of the MAC Act where the injury was caused by the fault of the owner or driver in the use or operation of the vehicle. • An injury involving a motor vehicle will not be characterised as having been caused by fault in the use or operation of the vehicle where the predominant cause of the injury was the negligent instruction of an employer.

Zotti v Australasian Associated Motor Insurers Limited [2009] NSWCA 323	**Cause and Effect Relationship** • The purpose of the MAC Act is to narrow the concept of "*injury*" to only cover situations where there is a cause and effect relationship between the type of event or circumstance and the injury, as opposed to a situation in which a vehicle merely provided an occasion or setting for the injury. • If the injury occurs some time following the accident and not during a collision, s 3 of the MAC Act will not be satisfied, even if the significant causal elements during the event are established. • The phrase "*during a collision*" encompasses the point of impact and is likely to include the situation in which the vehicles remain in their post-collision positions, but not when the effects of the collision, including oil and debris, have been removed.
Ron Lai Plastic Pty Ltd v Cui Ngo [2010] NSWCA 128	**Trial Judge Allowed to Draw Inferences from Evidence with Considering the Definition of "*motor accident*"** • When considering whether the factual circumstances of a case satisfy the definition of a *"motor accident"* within the meaning of s 3 of the MAC Act a trial judge is permitted to draw inferences from the evidence which is given or, as in this case, not given. • If the factual circumstances of a case involve the unloading of freight via a forklift and the evidence favours a finding that the negligent use or operation of the forklift caused injury, it is likely the provisions of s 3 of the MAC Act will be found to be satisfied.
Galea v Bagtrans Pty Ltd [2010] NSWCA 350	**Circumstances Giving Rise to an *Incident* for the Purposes of s 3** • When determining whether or not a claimant has sustained an *"injury"* for the purposes of s 3 of the *MACA* it is not necessary to show that the injury has been caused by an accident. It is sufficient in the alternative that there be an incident which causes the injury. • An injury caused by a sudden jolting of a vehicle on a road is sufficient to satisfy the requirements of s 3 of the *MACA*, however each matter will turn on its own facts.
Zurich Australia Insurance Ltd v GIO General Ltd [2011] NSWCA 47	**When Dual Insurance Applies** • The principles of double insurance apply, even where there are no *"actually crystallised liabilities*". A commercial settlement with a claimant does not prevent an insurer seeking contribution from another insurer. • Insurers should seek agreement regarding quantum of a settlement from potential contributors prior to finalising a settlement with a claimant.

Nominal Defendant v Hawkins [2011] NSWCA 93	**Driver Who Allowed Object to be Thrown from Vehicle Negligent in Driving of Vehicle** • The circumstances of an accident may be such that an inference can be drawn that the driver was aware that a passenger would intentionally throw an object out of a motor vehicle and thereby injure a third party. • Where the manner of driving of a vehicle is such as to intimidate or harass a third party, and the third party sustains injury, the manner of driving establishes fault in the use of, or operation of, the vehicle, as defined by s 3(1) of the *MACA*. • The act of driving a motor vehicle so as to allow a passenger to throw an object out of a window and hit a third party, can be considered concurrent and independent causes of the third party's injury, and may also fall within the definition of s 3(1) of the *MACA*.

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