JUDICIAL REVIEW in the NSW motor accidents and workers' compensation schemes

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By Jnana Gumbert

The power to decide disputes in personal injury cases is increasingly being taken away from courts and put instead in the hands of administrative decision-makers. The two prime examples in NSW are the motor accidents scheme and the workers' compensation scheme.

In a system where more and more decisions are being made by administrative decision-makers, practitioners must be aware of the administrative law remedies that exist to review and quash these decisions.

THE GROUNDS FOR JUDICIAL REVIEW

The traditional common-law grounds for judicial review can be divided into two main categories – procedural and substantive.

The 'procedural grounds' aspect of judicial review relates to natural justice or, as it is now more commonly called, procedural fairness. The substantive grounds of judicial review relate to the doctrine of *ultra vires* and jurisdictional error (nowadays the terms are used interchangeably). The ground of review commonly referred to as '*Wednesbury* unreasonableness' (where the exercise of administrative power is so unreasonable that no reasonable person could have so exercised the power),[1] also falls within the realm of substantive error.

There is also a third category of review – 'error of law on the face of the record' – which allows a review court to intervene when it is apparent from an examination of the records of an inferior tribunal that an error of law was made. This includes both jurisdictional and non-jurisdictional error.

It is important to note that judicial review is distinct from merits review, and that courts undertaking judicial review will not venture into an analysis of the merits of the decision that is being reviewed. There is no point in applying for judicial review merely because a different decision could have been reached on the evidence. Judicial review is concerned only with the legality of the decision. The exception to this is in the case of *Wednesbury* unreasonableness; however, it is worth bearing in mind that there have not yet been any cases in the motor accidents or workers' compensation spheres where an allegation of *Wednesbury* unreasonableness has been upheld.

MOTOR ACCIDENTS COMPENSATION ACT 1999[2] – SIGNIFICANT FEATURES

a) Creation of the Claims Assessment and Resolution Service (CARS).[3] A claimant cannot commence court proceedings unless a certificate has been issued by CARS under ss92 or 94.[4]

The decision of a CARS assessor under s94 is binding on the CTP insurer if liability has been admitted,[5] but not on the claimant, who is entitled to have the case re-heard by a judge. This re-hearing is not limited to judicial review grounds, and the merits may be considered.

There is no legislative provision to prevent either party to a CARS assessment from applying for judicial review of a CARS decision.

b) There is no entitlement to compensation for non-economic loss, unless the claimant's degree of permanent whole-person impairment exceeds 10 per cent.[6] The Motor Accidents Authority (MAA) established the Medical Assessment Service (MAS) to co-ordinate assessment of medical disputes in accordance with the Act.

Section 61 states that any certificate issued by a medical assessor in relation to whole-person impairment is 'conclusive evidence as to the matters certified in any court proceedings or in any assessment by a claims assessor in respect of the claim concerned'.[7] However, a court can reject any certificate on the grounds that procedural fairness was denied.[8]

Medical assessors' decisions are subject to review by a panel of assessors, but only on the grounds that the decision is incorrect in a material respect.[9]

WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998[10] – SIGNIFICANT FEATURES

a) Creation of the Workers' Compensation Commission (WCC),[11] which has exclusive jurisdiction to determine all claims arising under the Act (subject to a few exceptions).[12]

A privative clause contained in s350 of the Act states that a decision of the WCC is final and not subject to appeal or review.

Under Part 9, parties may appeal from a decision of an arbitrator to the WCC (constituted by a single presidential member), but only if the registrar is satisfied that the conditions set out in s352 are satisfied. The WCC can either confirm the decision of the arbitrator, or revoke it and issue a new decision.[13]

Parties may appeal to the NSW Court of Appeal from a decision of the WCC, but only on a point of law. There is no right to a re-hearing before a court as there is under the MAC Act.

A claimant may commence court proceedings to recover work injury damages if certain thresholds are met,[14] but this entitlement is restricted and compensation is limited.

b) Entitlement to compensation for non-economic loss is restricted. The WCC appoints medical assessors to assess a claimant's whole-person impairment. The certificate issued by an assessor is 'conclusively presumed to be correct' in relation to findings about whole-person impairment.[15]

Either party may appeal to the registrar against a medical assessment, but only on certain limited grounds.[16] If the registrar is satisfied that one of the grounds for appeal exists,[17] the matter is referred to an Appeal Panel, which will carry out a 'review of the original assessment'.[18] This review is *de novo* and is not confined to correcting errors found in the original assessment.[19] There is no further right of appeal.[20]

The privative clause in s350 of the WIM Act does not affect the right to apply for judicial review of an Appeal Panel's decision, as it does not constitute the WCC for the purposes of that section.[21]

APPLYING FOR JUDICIAL REVIEW

To apply for judicial review, one must file a summons pursuant to s69 of the *Supreme Court Act* 1970 (NSW). This summons should seek orders to the following effect:

1. That the decision of (insert name of decision-maker) be set aside.
2. That the matter be remitted for further consideration by the decision-maker or some other officer for reconsideration and re-determination according to law.

The summons should be accompanied by an affidavit setting out the errors made by the decision-maker and the grounds upon which judicial review is sought. The defendants should be the decision-maker, the body that appointed the decision-maker (for example, CARS, MAS, or the WCC) and the other party affected by the decision.

THE APPROACH OF THE COURTS

There have been many cases arising from administrative decisions in the subject schemes. The grounds of review raised in these cases, and the judicial response, are analysed below.

Denial of procedural fairness

Procedural fairness requires that parties have the opportunity to be heard before a decision is made that affects them, and >>

also requires that the decision-maker be fair and objective. In situations where administrative decision-makers are making decisions that could adversely affect the interests of parties (that is, decisions that are judicial in nature), they are required to afford procedural fairness to parties unless this is specifically excluded by statute. Mason J said, in *Kioa v West*:

> 'The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'[22]

In the motor accidents and workers' compensation schemes, most decisions made by the statutory authorities will affect a party's rights or interests, and therefore procedural fairness will be required to the extent that it is not excluded by the legislation. Some types of decisions, however, have been determined to be insufficiently judicial in nature to require procedural fairness. This will be discussed further below.

The MAC Act makes it clear that procedural fairness applies in relation to medical assessments conducted by MAS.[23]

Many factors suggest that the rules of procedural fairness apply to the CARS process.[24] The case law confirms that the rules of procedural fairness do apply to CARS decisions at least, to the extent that they are not specifically excluded by the Act.

In *Graham Kelly v Motor Accidents Authority of NSW*,[25] Rothman J held (citing *Annetts v McCann*[26]) that, because the CARS process may adversely affect a party's rights, 'procedural fairness can only be rendered inappropriate by plain words of necessary intendment'.[27]

Despite the fact that the workers' compensation legislation is more restrictive than the motor accidents legislation, procedural fairness has not been fully excluded. For example, approved medical specialists are required to give reasons for their decisions.[28] It seems that the rules of procedural fairness will apply, to the extent that they are not excluded by the Act, when the decision-maker is exercising powers of a judicial nature.

Duty to give reasons for decisions

There is usually an obligation to give reasons for a decision involving the exercise of judicial power, but not for purely administrative decisions.[29] The key question, therefore, is whether the administrative decision-maker is exercising a judicial power. A judicial determination has been described as being 'a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy'.[30]

Procedural fairness may sometimes require that reasons be given for administrative decisions that are not of a judicial nature, where the failure to do so would adversely affect a person's rights or legitimate expectations.[31] In particular, if there is a right of appeal from an administrative decision, then a requirement to give reasons may be implied.[32]

CARS assessors are required by legislation to give reasons for their decisions.[33] These reasons must be 'simple, succinct and clear' and must enable a court to test whether the decision was 'supported by a process of reasoning that is supportable in law and in fact'.[34]

In *Kelly*,[35] Rothman J cited *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[36] as follows:

> 'the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed … any court … must beware of turning a view of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision.'

In *Latash v Motor Accidents Authority of New South Wales*,[37] Hislop J held that the acting proper officer of MAS had a duty to give reasons for her decision not to allow the review of a medical assessment under the *Medical Assessment Guidelines*.[38] There have been few cases dealing with decisions of MAS assessors, mainly because parties may ask the judge hearing the substantive case to refer a matter back to MAS under ss61 or 62 of the MAC Act. Such applications have been made in a number of cases being heard before the District Court.[39]

An issue has arisen in workers' compensation cases as to whether the Appeal Panel, deciding an appeal from the decision of an approved medical specialist, has a duty to give reasons. While the WIM Act does not expressly oblige the Appeal Panel to give reasons, the NSW Court of Appeal found that it had an implied duty to do so in *Campbelltown City Council v Vegan*[40] because:

1. The Appeal Panel was exercising functions of a judicial rather than administrative character.
2. Approved medical specialists have a duty to provide reasons, and 'it would be anomalous if the resolution of a medical dispute were to be the subject of reasons only when undertaken by an approved medical specialist, and not when undertaken by an Appeal Panel'.[41]
3. 'Justice must not only be done but it must be seen to be done.'[42]

It has been held that the function of the registrar in deciding whether to allow an appeal from a medical assessment is not sufficiently judicial in character to imply that reasons for the decision must be given.[43]

The right to be heard

The CARS system gives both parties the right to be heard before a decision is made, through written and oral submissions.[44] An assessor can make an assessment on the paperwork only if satisfied that sufficient information is available. In making this decision, the assessor must have regard to the matters set out in clause 14.11 of the *Claims Assessment Guidelines*. The MAS system allows parties to make written submissions before a dispute is decided.[45]

The entitlement to a hearing under the workers' compensation scheme is similar to the CARS scheme. Under s354 of the WIM Act, the WCC may exercise its functions without holding a hearing, if it is satisfied that it has sufficient information. This section was considered in *Fletcher International Exports Pty Limited v Barrow*,[46] where it was held

that the WCC is not required to notify parties of its intention to conduct a hearing on the paperwork.[47]

Similarly, in *Crean v Burrangong Pet Food Pty Limited*,[48] it was held that a Medical Appeal Panel in the workers' compensation scheme does not have to inform a party if it intends to reach a decision different to that of the accredited medical specialist. It was held that parties do not have a legitimate expectation of making further submissions before such a decision is made. A medical appeal panel may also make a decision on the paperwork with or without conducting a hearing.[49]

Appearance of bias

The test of appearance of bias that has been applied in cases arising from the motor accidents scheme is as follows:

> 'whether a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias would reach that conclusion.'[50]

An allegation of bias was made in *Zurich Australian Insurance Limited v MAA*.[51] The plaintiff in that case was unsuccessful in establishing bias on behalf of the decision-maker.

Jurisdictional error

In *Anthony David Craig v The State of South Australia*,[52] the High Court provided the following broad statement of principle in relation to jurisdictional error in administrative decision-making:

> 'If such an administrative tribunal falls into error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, at the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'[53]

This statement has been held to apply to CARS decisions[54] and decisions under the workers' compensation scheme.[55]

Is a decision involving jurisdictional error a decision at all?

In *Crazzi*,[56] an issue arose as to 'whether it is open to an assessor under the MAC Act, who has purposed to issue a s94 certificate and statement of reasons in circumstances involving jurisdictional error, to remedy the defect by completing the exercise of jurisdiction and issuing a certificate and statement of reasons'.[57]

Johnson J relied upon *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[58] where it was held that '[a] decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.'[59] In deciding *Crazzi*, Johnson J held that, if a CARS assessor makes a jurisdictional error in purporting to issue a CARS certificate, the certificate has no force and the assessor is required to perform his/her statutory duties and issue another certificate.

In *Australian Associated Motor Insurers Ltd v Jessel*,[60] *Crazzi* was discussed and distinguished. It was held that a certificate issued by a MAS assessor is conclusive only as to the matters that are certified by the assessor, and that the proper officer is entitled, indeed required, to refer any matters that have not been assessed to another assessor.

The issue in *Crazzi* has not yet arisen in the context of the workers' compensation scheme. However, given the structure of this scheme, there is no reason why the principle in *Bhardwaj* as applied in *Crazzi* should not also be applied to it.

Failing to have regard to relevant considerations/ having regard to irrelevant considerations

In *Kelly*,[61] Rothman J held that, where an administrative-maker is required to have regard to a consideration, giving weight to that consideration is a fundamental element in making the decision. But the decision-maker is entitled also to have regard to other considerations[62] and – absent *Wednesbury* unreasonableness – the court is not entitled to review the decision.[63] Similar conclusions were reached in *Insurance Australia Limited trading as NRMA Insurance v Motor Accidents Authority of New South Wales and Mahmoud Khateib*.[64] Appeals from *Kelly* and *Khateib* were dismissed.[65]

Cases under the workers' compensation scheme have been approached in the same way, with Latham J stating >>

in *Inghams*[66] that 'the distinction between judicial review of administrative decisions and merits review is a relevant one in the circumstances of this case'.

In situations where the legislation calls for the decision-maker to be 'satisfied' about something, a party seeking review must demonstrate that the decision was 'illogical, irrational or lacking a basis in findings or inferences of facts supported on logical grounds'.[67]

Error of law of the face of the record

The Supreme Court has the power 'to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings'.[68]

This power has been interpreted and defined in the following terms:

> 'The phrase "error of law" is not limited to jurisdictional error. Accordingly … this Court has had the power to grant relief in the nature of certiorari for any error of law that appears on the face of the record of the proceedings (which includes the reasons for determination of the court or tribunal concerned). That includes non-jurisdictional error.'[69]

Many cases dealing with error of law on the face of the record also consider jurisdictional error, as error of law on the face of the record relates to both jurisdictional and non-jurisdictional errors.

In *Richards v Richards*,[70] Malpass AsJ granted relief to the plaintiff on the ground that there was a clear error on the face of the record in the calculation of damages, which amounted to jurisdictional error.

A failure to give reasons was held to amount to error of law on the face of the record in *Campbelltown City Council v Vegan*.[71] A similar decision was reached in *Petrovic*.[72]

In *Summerfield v Registrar of the Workers Compensation Commission*,[73] the test in *Craig* was specifically applied in relation to the registrar's application of s327(3)(b) of the WIM Act. It was found that the registrar had identified a wrong issue and asked herself the wrong question, and this was held to constitute an error of law on the face of the record.[74]

CONCLUSION

Administrative decision-makers must make decisions in accordance with the instruments that give them their power. This includes affording procedural fairness to parties where necessary. A failure to afford procedural fairness or to act within their jurisdiction will give rise to a right for a party to apply for judicial review.

It is important to remember the distinction between judicial review and merits review when considering whether to apply to the courts for review of an administrative decision. Many applicants have sought merits review under the guise of judicial review, but the courts have been uncompromising in maintaining the distinction between the two. ■

Notes: **1** *Associated Provincial Picture Theatre Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. **2** *Motor Accidents Compensation Act* 1999 (NSW) (MAC Act). **3** *Ibid*, s98. **4** *Ibid*, s108. **5** *Ibid*, s95. **6** *Ibid*, s131. **7** *Ibid*, s61(2). **8** *Ibid*, s61(4). **9** *Ibid*, s63. **10** *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) (WIM Act). The WIM Act incorporates the provisions of the *Workers Compensation Act* 1987 (NSW) (WC Act). **11** *Ibid*, s366. **12** *Ibid*, s105. **13** *Ibid*, s352(7). **14** WC Act, s151H. **15** WIM Act, s326(1). **16** *Ibid*, s327(3). **17** *Ibid*, s327(4). **18** *Ibid*, s328. **19** *Campbelltown City Council v Vegan* [2004] NSWSC 1129 at 80-81. **20** WIM Act, s327(7). **21** *Vegan*, above n19, at 34. **22** *Kioa v West* (1985) 159 CLR 550 at 584. **23** MAC Act, s61(4). **24** See s94(5) regarding the requirement for reasons for decisions of CARS assessors and also see the numerous procedural requirements in the MAA's *Claims Assessment Guidelines*. **25** *Graham Kelly v Motor Accidents Authority of NSW* [2006] NSWSC 1444 (*Kelly*). **26** (1990) 170 CLR 596 at 598. **27** *Kelly*, above n25, at 54. **28** WIM Act, s325(2). **29** *Public Service Board of NSW v Osmond* (1985) 159 CLR 656 at 662-667 (*Osmond*). **30** *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355. **31** *Osmond*, above n29 at 670, 676; *Attorney-General of NSW v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 at 734-735 (*Kennedy Miller*). **32** *Kennedy Miller*, above n31, at 735. **33** MAC Act, s94. **34** *Allianz Australia Insurance Limited v Motor Accidents Authority of New South Wales* [2006] NSWSC 1096 at 37 (*Allianz v MAA*). **35** *Kelly*, above n25. **36** (1996) 185 CLR 259 at 272. **37** *Latash v Motor Accidents Authority of New South Wales* [2006] NSWSC 66. **38** MAA, *Medical Assessment Guidelines*. **39** *Mafra v Egan (No 1)* [2006] NSWDC 22; *Nithianantha v Davenport* [2006] NSWDC 105; *Towell v Schuetrumpe* [2006] NSWDC 159; *Ragen v The Nominal Defendant* [2007] NSWDC 84 at 85. **40** *Campbelltown City Council v Vegan* [2006] NSWCA 284. **41** *Ibid* at 115. **42** *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 278 D-E. **43** *Inghams Enterprises v Iogha* [2006] NSWSC 456 at 22 (*Inghams*); *Riverina Wines Pty Ltd v Registrar of the Workers' Compensation Commission of NSW* [2007] NSWCA 149 at 114. **44** MAA, *Claims Assessment Guidelines*. **45** MAA, *Medical Assessment Guidelines*. **46** *Fletcher International Exports Pty Limited v Barrow* [2007] NSWCA 244. **47** *Ibid* at 94, 96. **48** *Crean v Burrangong Pet Food Pty Limited* [2007] NSWSC 839. **49** *Petrovic v BC Serv No. 14 Pty Limited* [2007] NSWSC 1156 at 38 (*Petrovic*). **50** *Ex parte H* (2001) 75 ALJR 982 at 28; *Zurich Australian Insurance Limited v MAA* [2006] NSWSC 845 at 73 (*Zurich v MAA*). **51** *Ibid*. **52** *Anthony David Craig v The State of South Australia* [1995] HCA 58 (*Craig*). **53** *Ibid* at 14. **54** *Zurich v MAA*, above n50, at 54; *Allianz v MAA*, above n34, at 35; *Kelly*, above n25, at 54. **55** *Vegan*, above n19, at 38; *Wikaira v Registrar of the Workers' Compensation Commission of NSW* [2005] NSWSC 954; *Zuanic v Gypro-Tech (Australia) Pty Limited (in liquidation)* [2006] NSWSC 739. **56** *Allianz Australia Insurance Limited v Crazzi and Others* [2006] NSWSC 1090 at 144. **57** *Ibid* at 6. **58** *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11. **59** *Ibid* at 51. **60** *Australian Associated Motor Insurers Ltd v Jessel* [2007] NSWSC 1351. **61** *Kelly*, above n25. **62** *Ibid* at 64. **63** *Ibid* at 74. **64** *Insurance Australia Limited trading as NRMA Insurance v Motor Accidents Authority of New South Wales and Mahmoud Khateib* [2006] NSWSC 1448. **65** *Insurance Australia Limited t/as NRMA Insurance (000 016 722) v Motor Accidents Authority of New South Wales; Kelly v Motor Accidents Authority of New South Wales* [2007] NSWCA 314. **66** *Inghams*, above n43, at 40. **67** *Ibid* at 23; *Re Minister for Immigration and Multi-Cultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59; *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at 59. **68** *Supreme Court Act* 1970 (NSW), s69(3). **69** *Australian Securities and Investments Commission v Farley* (2001) 51 NSWLR 494 at 9; *Hanna v Department of Immigration, Multicultural and Indigenous Affairs* [2004] NSWCA 275 at 28. **70** *Richards v Richards* [2006] NSWSC 140. **71** *Vegan*, above n19, at 130. **72** *Petrovic*, above n49, at 43. **73** *Summerfield v Registrar of the Workers Compensation Commission* [2006] NSWSC 515. **74** *Ibid* at 64.

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