

Case Note

Case Note | Surgery does not, of its own, transform a threshold injury into a non-threshold injury under MAIA

Mandoukos v Allianz Australia Insurance Limited [2023] NSWSC 1023

In *Mandoukos v Allianz Australia Insurance Limited* the Supreme Court clarifies whether a surgical procedure impacts the nature of an injury; specifically whether it can transform a minor (threshold) injury into a non-minor (non-threshold) injury within the meaning of the *Motor Accident Injuries Act 2017*.

Principles

1. Surgical procedures are generally a reasonably foreseeable consequence of an accident-related injury. Such treatment does not equate to a further injury, nor does it, of its own, transform a minor injury to a non-minor injury.
2. A party wishing to raise a complaint regarding a decision maker's reasoning and the manner of their assessment cannot do so in the absence of having advanced their argument before the decision maker in the first instance.

Background

The Plaintiff was involved in a motor vehicle accident in January 2019. He injured his right knee and cervical spine. A dispute arose about whether those injuries were minor injuries (now known as threshold injuries) within the meaning of the *Motor Accident Injuries Act 2017* (the Act). It was determined by a Medical Assessor that the spinal injury was minor and the knee injury was unrelated to the subject accident. A medical review panel upheld this assessment.

The Plaintiff filed an application for further medical assessment. He relied upon a report from his treating neurosurgeon as '*additional relevant information*'. It was submitted that the report demonstrated that the plaintiff had radicular pain, as a consequence of which he underwent surgery to his cervical spine, being a foraminotomy. The application was declined. An application for review of that decision was declined by the delegate of the President of the Commission.

Consequently, the Plaintiff sought judicial review of the further medical assessment and the decision of the delegate. He argued, among other things, that the Medical Assessor and the delegate failed to consider whether the cervical spine surgery constituted a "*consequential injury*".

Issues

The Plaintiff raised four grounds of review that concern the manner in which the Medical Assessor dealt with the spinal surgery:

1. The Medical Assessor failed to consider whether the “*consequential injury*” was a non-minor injury and, by not doing so, constructively failed to exercise jurisdiction.
2. The Medical Assessor failed to apply the lawful test of causation with regard to the “*consequential injury*”.
3. The Medical Assessor did not afford the Plaintiff procedural fairness by failing to respond to the Plaintiff’s submissions that the accident created a need for surgery and that surgery rendered his injuries non-minor.
4. The Medical Assessor failed to provide legally sufficient reasoning for why the surgery did not cause the Plaintiff’s injuries to be non-minor.

Decision

The alleged consequential injury

The Court did not accept the Plaintiff’s submission that because the need for surgery was caused by the accident, the surgery was “*in the nature of a consequential injury*”. Chen J also did not accept the further submission that, because the surgery involved the removal of bone, the injury became a non-minor injury.

His Honour observed that ordinarily, an accident-related injury creates a need for treatment, but that treatment is not an injury, nor is it a “*consequential injury*”. There is not, as suggested by the Plaintiff, a presumption that a minor injury transforms into a non-minor injury merely because there is some form of surgery.

Further, the Court observed that the Plaintiff never advanced arguments regarding a “*consequential injury*” or put forward evidence about what the surgery involved before the Medical Assessor. The Plaintiff cannot now recast the case, particularly where the ground of review relates to an allegation that the medical assessor failed to consider these matters.

Failure to exercise jurisdiction

Chen J stated that a constructive failure arises when a decision-maker purports to have exercised the jurisdiction but, in substance, has not undertaken or completed such a task by failing to address an essential matter.

Noting that the Plaintiff did not advance his argument to the medical assessor, His Honour did not accept that any reviewable error or any error at all had been demonstrated.

Failure to provide legally sufficient reasoning

The Plaintiff's specific case advanced to the Medical Assessor was that he had radiculopathy and therefore his cervical spine injury was a non-minor injury. Chen J observed that the Medical Assessor dealt with that case and his reasons identified:

1. The case the Plaintiff made.
2. The finding he made.
3. His conclusion on that issue.

Chen J held that the Medical Assessor's path of reasoning was clear and therefore, legally sufficient. His Honour added that the Medical Assessor was not required to provide legally sufficient reasoning to a case that was never made to him, nor one that arose on the material.

Final result

The Court held that having rejected all grounds of review, there was no basis upon which the matter could be subjected to a different outcome by the delegate. The summons was dismissed with costs.

Why this case is important

The Court's decision confirms that surgical treatment in response to an accident-related injury does not equate to a further injury. Nor does it, of itself, transform a minor injury to a non-minor injury.

When considering the merits of review applications, it is important to keep in mind that a complaint about the adequacy of a Medical Assessor's reasoning is context-dependent. A complaint cannot be made about the failure of a decision maker to address an argument if it was not before them at the time.

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