

## Case Note

### *Procedural fairness requires decision makers to ensure those affected by their decisions are fully aware of relevant distinctions*

[Amos v AAI Limited t/as GIO \[2023\] NSWSC 1193](#)

#### Introduction

When deliberating a question or matter which will inform a Review Panel's decision, to what extent must the Claimant be aware of, and propositioned about the issue at hand?

In *Amos v AAI Limited t/as GIO* the Supreme Court clarified this duty in circumstances where a Review Panel failed to ensure that the Plaintiff was alerted to the meaning of, and distinctions between, various medical terminologies which were integral to the determination made.

#### Principles

1. A Claimant is denied procedural fairness where a Review Panel does not alert them to distinctions drawn by the Panel, where these distinctions are integral to the determination being made.
2. A Claimant is denied procedural fairness where a Review Panel fails to enquire upon them for information which is integral to the determination being made.

#### Background

As a result of a motor vehicle accident, the Plaintiff suffered multiple injuries, the relevant injury being a fracture to the right orbit/eye socket. The right orbit injury was sustained approximately one month after the accident in a fall, which the Plaintiff alleges was due to vertigo and dizziness caused by the accident.

The right orbit injury was determined by PIC Medical Assessor, Dr Steiner, to attract a 29% permanent impairment rating (24% for the impairment to the visual system and 6% to the nervous system). The right orbit injury decision was aggregated among the assessments related to the other injuries in a combined certificate by Medical Assessor Nichols dated 5 February 2022 which certified an accumulated total WPI of 52%.

Assessor Steiner's decision was contested by the Insurer, and was referred to the Review Panel for assessment. On 15 November 2022, the Review Panel issued a decision in which it concluded that Assessor Nichols' combined certificate be revoked, determining that the right orbital fracture was not caused by the accident, as the fall was either accidental or caused by non-specific pre-existing dizziness.

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The Review Panel determined that the crucial issue for determination was whether the symptoms described met the specific definitions of “paroxysmal positional vertigo” and not “dizziness”. This distinction was made where the Plaintiff reported the sensation of “*spinning in his head*” and a failure to reach out for support. The Panel determined that this did not accord with vertigo-like conditions, stating that the Plaintiff failed to report the sensation of the “room spinning around him”.

Consequently, the Plaintiff sought judicial review of the Review Panel’s decision.

## Issues

The Plaintiff raised five grounds for Judicial Review:

1. The Review Panel failed to expose a path of reasoning and was internally inconsistent based on the failure to explain the difference between the sensation of spinning in the head and sensation of the room spinning, in circumstances where the room was never actually spinning.
2. The Review Panel denied the Plaintiff procedural fairness and/or breached the rules of natural justice by failing to proposition the Claimant about the sensation of spinning and whether he needed to reach out for support.
3. The Review Panel denied the Plaintiff procedural fairness and/or breached the rules of natural justice as the Review Panel did not alert the Plaintiff to the distinction between the specific definitions for “paroxysmal positional vertigo” and “dizziness”, given that the terms are used by many interchangeably.
4. The Review Panel erroneously treated the lack of contemporaneous evidence of complaint as determinative of causation.
5. The Review Panel failed to bring to the attention of the plaintiff inconsistencies in the medical records and clinical findings on which it sought to rely and failed to give the plaintiff an opportunity to respond to those alleged inconsistencies.

## Decision

Rothman J ordered that the decision, certificate, and medical assessment of the Review Panel be quashed as the Plaintiff had been denied procedural fairness based on grounds 2, 3, and 5. Ground 1 was refused and ground 4 was deemed unnecessary to be dealt with by the Court.

Rothman J summarised his decision at [137]:

*“... the Court considers that the plaintiff has been denied procedural fairness in the manner in which the Review Panel dealt with the appeal and, in particular, by not alerting the plaintiff in a manner by which the plaintiff would reasonably apprehend the distinctions being drawn and the issue with which the Review Panel was dealing with the difference between “dizziness” and “paroxysmal positional vertigo”; on the necessity of the plaintiff needing to reach out for support. The failure of the plaintiff to be asked whether he felt he needed support or to reach out for it amounted to a failure to apprise the plaintiff of the issues with which he was required to deal, if he were able to deal with it.”*

Ultimately, in circumstances where the issue at hand involves a fine and detailed distinction, the Court determined that the Review Panel should have provided sufficient information and/or questioned the Plaintiff on the issue so that they, or at least their legal representatives, were aware of the fine nature of the distinctions being drawn and the need to deal with them.

### Final result

The Supreme Court quashed the decision, certificate, and medical assessment of the Review Panel and remitted the application for review again by a differently constituted Review Panel.

### Why the case is important

The decision underscores the duty of a Review Panel or administrative decision maker to make aware a party affected by their decision of an issue at hand and the distinctions drawn about that issue which are crucial to the final determination.

The decision further confirms that where a Review Panel considers a critical issue that is concerned with fine and detailed distinctions, such as the use of medical terminology, it is more optimal and, ultimately, in the interest of all parties for those distinctions to be presented in terms which can be understood by a layperson.

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