

RECENT DECISIONS

Court of Appeal NSW Supreme Court Decision

Pacific National Pty Ltd v Baldacchino (2018) NSW CA 281[Link to decision](#)

Mr Baldacchino injured his left knee in the course of his employment in 1999. The injury eventually required Mr Baldacchino to undergo a total knee replacement. The employer disputed the claim and the worker filed an Application to Resolve a Dispute.

At the initial hearing, Arbitrator Harris held that the surgery was reasonably necessary with respect to the work related injury to the left knee. He also found that the time limits contained in section 59A (1) and (2) of the 1987 Act were not applicable due to a total knee replacement being an *artificial aid* in accordance with section 59A(6)(a).

The employer appealed from the arbitrator's decision that was then confirmed by Deputy President Snell.

An appeal was then brought from the Presidential decision that a total knee replacement was not subject to the limitations contained in sections 59A of the Act as it involved the provision of an *artificial aid*, within the meaning of section 59A(6)(a) of the Act.

The appellant argued that the Deputy President had incorrectly held that a total knee replacement was an *artificial aid* within the meaning of section 59A(6)(a). In the alternative, the appellant argued that if any compensation was payable then it was in respect of the cost of the materials used in the knee replacement operation and not the cost of the surgery itself.

The Court held that the Deputy President had not erred in finding that a total knee replacement was an artificial aid within the meaning of the section. It was also noted that the Deputy President did not err in his reference to the case of *Thomas v Ferguson Transformers Pty Ltd* (1979) 1 NSWLR 216.

The Court also did not accept that only the cost of materials required for the knee replacement surgery should be covered (as opposed to the surgery itself). The Court considered that the total knee replacement surgery was an *artificial aid* and fell within the meaning in section 59A(6)(a).

Macfarlan JA held that artificial aids must *work to ameliorate the effect of a person's disability and may comprise a single object or a composite of objects operating together*. However a knee replacement has these characteristics. Macfarlan JA stated that the surgery involved the ends of the femur and tibia being replaced with an introduced material and a piece of plastic being inserted between the bones as reconstructed.

The provision of those could not occur without a surgical operation and therefore the operation itself was found to also fall within the statutory provision.

Macfarlan JA considered that there was no reason why an artificial aid could not be internal to the body. He did not accept that the article or object must be complete in itself and indicated that there was no such requirement evident in the statutory words.

With respect to the *Thomas* case, Macfarlan JA stated that this case was a relevant authority despite the changes in legislation since it had been determined in 1979. Macfarlan JA considered that the only *arguably material change in the form of the legislation has been the insertion in it of express reference to "the modification of a worker's home or vehicle" as constituting medical treatment (s 59A (6)(b))*. This change was stated as endorsing the outcome in *Thomas* rather than contradicting it.

The decision of the Supreme Court has significant implications in that while total knee replacement surgery is now clearly considered to be an *artificial aid* it is likely that similar surgical procedures relating to other joints and body parts will also qualify for the same exemption.

Decision Number: (2018) NSW CA 281

Decision Date: 23 November 2018

Decision Maker(s): Macfarlan JA, Payne JA and Simpson JA of the Court of Appeal NSW Supreme Court

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