Common Law Division
Supreme Court
New South Wales

Case Name:	**Mandoukos v Allianz Australia Insurance Ltd**
Medium Neutral Citation:	[2026] NSWSC 911
Hearing Date(s):	15 July 2026
Date of Orders:	31 July 2026
Date of Decision:	31 July 2026
Jurisdiction:	Common Law
Before:	Schmidt AJ
Decision:	1. Mr Mandoukos' case must succeed. 2. The parties are to confer and produce final proposed orders, including as to costs, within 14 days. Together with short written submissions, in the event of any disagreement.
Catchwords:	ADMINISTRATIVE LAW — jurisdictional error — judicial review of Review Panel decision — Motor Accident Injuries Act 2017 (NSW) — where plaintiff underwent spinal surgery to treat other injuries suffered in an accident — whether the surgical removal of bone from facet joints in the spine resulted in further "injury" as defined in s 1.4 — where plaintiff suffered permanent physiological change as the result of the surgery — consent, therapeutic intent and successful treatment of symptoms of other injuries irrelevant to assessing physical consequences of surgery and whether they fall within definition of injury — error established — Panel's certificate set aside
Legislation Cited:	*Civil Liability Act 2002* (NSW), ss 3B, 5, 5D, 5E *Motor Accident Injuries Act 2017* (NSW), ss 1.3, 1.4, 1.6, 1.9, 2.3, 3.17, 3.24, 4.2, 4.4, 6.25, 7.20, 7.21, 7.23, 7.24, 7.26 *Motor Vehicles (Third Party) Insurance Act 1942* (NSW) *Supreme Court Act 1970* (NSW), s 69

	Uniform Civil Procedure Rules 2005 (NSW), r 42.1
Cases Cited:	*Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48 *Allianz Australia Insurance Limited v Estate of the Late Summer Abawi* (2025) 117 NSWLR 355; [2025] NSWCA 85 *Bridgefoot v Allianz Australia Insurance Limited* [2024] NSWPICMP 194 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 *Dean v Phung* [2012] NSWCA 223; [2012] Aust Torts Reports 82-111 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39 *Hunter v Insurance Australia Ltd trading as NRMA Insurance* [2021] NSWSC 623 *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522; [1985] HCA 37 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20 *Mandoukos v Allianz Australia Insurance Limited* [2023] NSWSC 1023 *Mandoukos v Allianz Australia Insurance Limited* [2024] NSWCA 71 *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468; [2016] HCA 19 *Ridolfi v Hammond* [2012] NSWCA 3 *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 *SZTAL v Minister for Immigration and Border Protection*; *SZTGM v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 *Watts v Rake* (1960) 108 CLR 158; [1960] HCA 58 *Whitfield v Melenewycz* (2016) 92 NSWLR 624; [2016] NSWCA 235
Texts Cited:	Macquarie Dictionary (online edition) Motor Accident Guidelines: State Insurance Regulatory Authority
Category:	Principal judgment

Parties:	Nicolas Mandoukos (Plaintiff) Allianz Australia Insurance Ltd (First Defendant) Review Panel Constituted Under Section 7.26 of the Motor Accident Injuries Act 2017 (Second Defendant) The President of the Personal Injury Commission of the NSW (Third Defendant)
Representation:	Counsel: DR Toomey SC / J Gumbert (Plaintiff) C Allan (Defendants) Solicitors: Hall & Wilcox Lawyers (Plaintiff) Crown Solicitors (Defendants)
File Number(s):	2025/487496
Publication Restriction:	

JUDGMENT

1 In January 2019 Mr Mandoukos was injured in a motor vehicle accident. He later pursued a claim for compensation under the *Motor Accident Injuries Act 2017* (NSW), which the Insurer did not accept. He then pursued the resulting medical dispute to the predecessor of the NSW Personal Injury Commission. It raised the issue of whether the 2019 accident had caused injury to his cervical spine. There being no issue that in 2010, he had already been injured in a previous motor vehicle accident.

2 In November 2019 the medical assessor to whom the parties' dispute was referred, found that the 2019 accident had caused Mr Mandoukos musculoligamentous strain of his cervical spine, as well as aggravation of pre-existing multilevel degenerative spondylosis. But that this injury fell within the definition of "minor injury" in s 1.6 of the Act, which has since been amended to refer to "threshold injury".

3 That assessment was upheld by a review panel in April 2020.

4 Afterwards, Mr Mandoukos underwent a foraminotomy to his spine, with the result that the Insurer revisited his claim. It then concluded that the surgery, which had involved the removal of bone from his spine, was not the result of the injuries he had sustained in the 2019 accident, but an aggravation of his pre-existing injury. And that the radicular symptoms which he suffered did not meet the criteria specified in the State Insurance Regulatory Authority's Motor Accident Guidelines.

5 In October 2020 Mr Mandoukos made an application for a further medical assessment, which was refused in February 2021. In July 2021 he filed another application for further medical assessment, providing additional information. The claim he then advanced including that had suffered radicular pathology leading to right arm radicular pain which had resulted in surgical treatment. He did not then claim that he had suffered a consequential injury as the result of the 2019 accident.

6 This claim was referred for assessment. In June 2022 the assessor concluded that the accident had caused Mr Mandoukos cervical spine/soft tissue injury, an aggravation of pre-existing degenerative pathology causing non-verifiable radicular symptoms in his right arm. But that it also fell into the definition of minor injury, there being no objective evidence of neurological deficits that would satisfy the definition of radiculopathy. Nor evidence of an injury to nerves or a rupture of tendons, ligaments, menisci or cartilage.

7 In September 2022 a delegate of the President of the Personal Injury Commission declined Mr Mandoukos' review application. It depending on a conclusion "that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application": s 7.26(5).

8 Mr Mandoukos then unsuccessfully pursued judicial review in this Court of the decisions of both the assessor and the delegate: *Supreme Court Act 1970* (NSW), s 69. Chen J dismissed his application, concluding that the medical assessor's decision had been made in accordance with law, with the result that it was not open to the delegate to find that it was incorrect in a material respect: *Mandoukos v Allianz Australia Insurance Limited* [2023] NSWSC 1023.

9 His Honour concluding that arguments about the foraminotomy Mr Mandoukos had undergone constituting a consequential injury could not be accepted: [90]-[95]. The central question being whether his cervical spine (or neck) injury was a minor injury or not, having regard to s 1.6 of the Act: at [96]. That being what had fallen to the medical assessor to determine, given the medical dispute which had been referred: at [100].

10 Mr Mandoukos' appeal from that decision was dismissed: *Mandoukos v Allianz Australia Insurance Limited* [2024] NSWCA 71. The appeal turning on the ambit of the parties' medical dispute. The Court concluding that the issue which Mr Mandoukos had pursued on his review application had not been part of the medical dispute which had been referred for assessment.

11 Mr Mandoukos then made a further application under s 7.24(2) of the Act, which permits further medical assessment after an initial medical assessment in specified circumstances. He then relied on the C5/6 foraminotomy procedure which he underwent in 2020. His case being that this surgery had been necessitated by the radiculopathy which he had suffered as the result of the 2019 accident.

12 The injuries referred for assessment were “injury to bone – facet joint”, due to foraminotomy surgery performed on 1 July 2020 as a consequence of the 2019 accident.

13 The medical assessor who dealt with that medical dispute concluded that Mr Mandoukos had suffered injury to his facet joints, as the result of the foraminotomy surgery, which he had undergone as a consequence of the injuries he had sustained in the 2019 accident. Further, that this was not a threshold injury for the purpose of s 1.6 of the Act.

14 The Insurer successfully pursued a review of that assessment. The Review Panel revoking the assessor’s certificate, despite itself having examined Mr Mandoukos and found that bone had been removed from his facet joints during the foraminotomy. Which had been performed as a consequence of injury he had sustained in the 2019 accident.

15 Despite this the Panel concluded that he had not suffered an injury for the purpose of the Act. With the result that it was unnecessary for it to determine whether this injury was a threshold injury, as defined. Observing that if that had to be determined, it was of the view that this injury did not fall within the s 1.6 definition.

16 The importance of this conclusion being that Mr Mandoukos could then pursue a claim for damages in respect of the 2019 accident, in accordance with the provisions of the Act. He not only having suffered soft tissue injury as the result of the 2019 accident, but also injury to bone.

17 In these proceedings Mr Mandoukos now seeks judicial review of the Review Panel's decision. Claiming that it fell into jurisdictional error in concluding that the consequential injury he had suffered because of the 2019 accident, as the result of the surgery which had removed bone from his spine, was not an injury for the purpose of the Act.

The ground of review

18 Mr Mandoukos pursues a single ground of review:

> "**Ground 1**
>
> 1. The Review Panel fell into error of law, apparent on the face of the record, and constructively failed to exercise its jurisdiction, by finding that the injury ('Injury to bone – facet joint – cervical spine – due to foraminotomy surgery performed by Dr McKechnie on 1 July 2020 as a consequence of injury sustained in the MVA on 8 January 2019') was not an injury for the purposes of the Act.
>
> 2. The Review Panel ought to have found that the injury was an injury for the purposes of the Act and was not a threshold injury for the purposes of s 1.6 of the Act.
>
> 3. Accordingly, the decision of the Review Panel is invalid and should be set aside."

Conclusion

19 For reasons which follow, I have concluded that the Review Panel did err.

20 What it had to decide turning as it did on whether the consequential injury which it found Mr Mandoukos had suffered as the result of the foraminotomy he underwent in order to treat other injuries he had suffered in the 2019 accident, fell within the definition of "injury" in s 1.4 of the Act. That requiring it to determine whether he had suffered a further bodily injury.

Issues

21 Not in issue between the parties was:

> The Act does not confer a right to damages on a person injured in a motor vehicle accident as the result of negligence. That still arising

under the common law: *Whitfield v Melenewycz* (2016) 92 NSWLR 624; [2016] NSWCA 235 at [31];

At common law, an entitlement to damages depending on the injured person establishing that but for the accident, he or she would not have suffered the injury for which damages are pursued: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48 at [53];

Damages are generally not reduced because a plaintiff had a pre-existing condition which made the consequences of the accident more severe than if that condition had not been present: *Watts v Rake* (1960) 108 CLR 158 at 160; [1960] HCA 58;

It being for a defendant to discharge the "disentangling" evidentiary burden of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition in any event: *Ridolfi v Hammond* [2012] NSWCA 3 at [87]-[88], applying principles stated in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20, which were explained in *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208 at [103];

A motor accident which results in a previously asymptomatic condition becoming symptomatic, the accident having been a material or more than negligible cause of the aggravation, may thus establish that the person has suffered an injury compensable under the Act; and

The injuries Mr Mandoukos suffered in the 2019 accident caused painful symptoms which resulted in him pursuing various treatment unsuccessfully. And finally, the foraminotomy which was successful in relieving some, although not all, of the symptoms which his other injuries had caused. That surgery involving the removal of bone from his facet joints.

22 It was not the Insurer's case that Mr Mandoukos would have undergone the foraminotomy even if he had not been injured in the 2019 accident.

23 What was in issue thus turned on whether what was done to Mr Mandoukos' spine during that surgical treatment, had caused him an injury as defined in s 1.4. It having been pursued in order to relieve the painful symptoms which other injuries he had suffered in the accident continued to cause him. That ultimately turning on the question of whether the surgery had caused him further bodily injury, in addition to the soft tissue injury the accident had earlier caused.

24 There being no question that if the removal of the bone had resulted in a bodily injury, it did not fall within the definition of threshold injury, because that would not have been a soft tissue injury, as defined in s 1.6(2).

The parties' cases

25 Mr Mandoukos contended that "'injury' should be construed in the same way as it was originally intended in the earlier legislation, that is to refer to the 'damage' element of the tort of negligence and to limit that damage to personal damage or injury as distinct from property damage.": written submissions at [59]. Consistent with the High Court's guidance in *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468; [2016] HCA 19 at [75], no further limitation or qualification should be read into the defined term "injury", as none is required by the statutory terms and their context.

26 The Panel having accepted that Mr Mandoukos' need for the spinal surgery had been caused by the accident, its results were causally related to it: *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 529; [1985] HCA 37.

27 The removal of the bone from his spine to relieve symptoms which other injuries he had suffered in the accident caused to his cervical spine, having been an extension and reasonably foreseeable consequence of the injuries Mr Mandoukos suffered in the accident. That not falling within the definition of "threshold injury" in s 1.6.

28 Drawing an analogy with the result in *Hunter v Insurance Australia Ltd trading as NRMA Insurance* [2021] NSWSC 623, where Adamson J observed:

> "19 Thus, if the common law test of causation is applied to the present case, the injury sustained by the plaintiff at the hospital, PTSD, can readily be seen to have been caused by the motor vehicle accident since it was a reasonably foreseeable consequence of the physical injuries sustained by the plaintiff in the accident that the plaintiff would undergo surgery in a hospital and be subject to the associated risks. It does not follow from the circumstance that the hospital might also be liable to the plaintiff in negligence, that the negligent driver who caused the motor vehicle accident did not also cause the PTSD sustained as a result of what happened in the hospital.
>
> 20 By requiring that the PTSD be a direct consequence of the motor vehicle accident, the Panel applied the incorrect legal test, since an indirect, but foreseeable consequence, was sufficient to establish causation. The application of the incorrect legal test, which is evident from the Panel's reasons, amounts to an error of law on the face of the record since the reasons form part of the record, as they are required to be included in the certificate: s 61(9) of the Act."

29 Also relying on the legislative history referred to in *Allianz Australia Insurance Limited v Estate of the Late Summer Abawi* (2025) 117 NSWLR 355; [2025] NSWCA 85 and *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39.

30 The result being that given its factual findings, the Panel ought not to have followed the tentative, obiter observations of Stern JA in *Mandoukos v Allianz Australia Insurance Limited* [2024] NSWCA 71. The correct approach to the application of the defined term "injury" to the facts it found not permitting a comparison to be drawn between the impact of the surgery post-accident, with the state of his body pre-surgery. Consideration rather being required to be given to the comparison between Mr Mandoukos' state before the accident, with the state which the surgery necessitated by the accident had left his spine in.

31 Had the surgery been necessary immediately after the accident, there could have been no doubt that the removal of bone from his spine would have fallen within the definition of "injury". That the chain of events which the negligent driver had set in train when he caused the accident, had resulted in surgery only some time after the accident, made no difference to the question of

whether the damage to his spine resulting from the removal of the bone fell within the definition of “injury”.

32 Nor did his consent to that surgery or its therapeutic intent. It having been performed at a time when he was already injured, to treat symptoms the accident had caused. The no fault scheme established by the Act imposing no obligation on an injured person to establish ongoing detriment after treatment, only the physiological change which the accident had caused, in this case to his spine.

33 The factual question which the Panel had to determine thus being only whether the surgery resulting from the accident had resulted in identifiable physiological disturbance for the worse. Even minor lacerations having been found to have been sufficient to satisfy the definition of injury in *Abawi*.

34 It followed that when an accident had caused injury which later resulted in surgical treatment being undertaken for beneficial or therapeutic effect, it could not remove a resulting injury from the scheme of the Act. That not depending on such surgery having detrimental effect.

35 The Panel’s approach to the concept of injury having the unintended consequence that a negligent driver would remain liable at common law for the injury he or she had caused, because it did not come within the statutory scheme. Contrary to the purpose of the Act, to ensure that all personal or bodily injury caused by a motor accident comes within the scope of the scheme it establishes. It also providing for insurance for such accidents.

36 The Insurer’s case was that the only injury caused by the accident relevant on this application was that which Mr Mandoukos had suffered to his spine. Submitting that Chen J had been correct to conclude that the surgery he had undergone was not an injury for the purpose of the Act, but a treatment: at [19].

37 It accepted that what the Court of Appeal had observed in *Mandoukos* which the Panel had applied was obiter. But contended that the Panel had not erred in following its approach.

38 The Insurer's case also rested on there being no evidence that the surgery to which Mr Mandoukos had consented, had any identifiable detrimental impact on him. Despite the Panel having concluded that the accident had aggravated a previously asymptomatic degenerative disease, which had materially contributed to the need for the surgery in which the bone was removed from his spine. That having been found to have been reasonable and necessary in the circumstances and having also resulted in improved symptomatology.

39 The result was that the Panel had correctly concluded that the surgery did not constitute an injury for the purpose of the Act, having applied the reasoning in *Mandoukos*. Even though the parties in those proceedings had not addressed the authorities which the Panel had considered on its review.

40 Although it was accepted that the Panel had not made a final decision about whether the removal of bone from Mr Mandoukos' spine had resulted in a physiological change or disturbance.

41 But the Insurer contended that if an injured person "receives treatment or surgery arising from injuries sustained in a motor accident, the provisions of the *MAI Act* apply in accordance with section 1.9 and the owner or driver of the motor vehicle is insured in respect of their liability arising out of the motor accident".

42 In argument, examples of injury were also advanced. A motor vehicle accident which results in ligament damage which can be treated by surgery, but which requires the knee to be broken being one. The insurer submitting that:

> "it's a difficult example because that type of injury, damage to the ligament, it's already a non-threshold injury. So the treatment of that non-threshold injury doesn't render it non-threshold, it's already non-threshold because it's a damage to the ligament. So it falls out of the definition of 'soft tissue injury', and therefore, it's not a threshold injury. So whatever treatment comes from

> that, and is reasonably necessary as a result of that, falls within the, when one's assessing damages, assuming the accident is as a result of someone else's fault, it all goes into the general assessment of the consequences of that injury."

43 The problem in this case was explained to be that "we have a soft tissue injury, which has been treated with a foraminotomy and the question is whether that converts the injury to a non-threshold injury, even though it's reasonable and necessary."

44 It followed that the Panel had been correct in finding that Mr Mandoukos had not suffered further injury as defined in s 1.4, applying what had been observed in *Mandoukos* at [53]. The surgery not having had a detrimental impact on his symptoms or functioning.

45 Further, it was not controversial that damage, along with duty of care and breach of duty, were essential ingredients of the tort of negligence and that damages are assessed to compensate an injured person for loss.

46 But it could not be accepted that the definition of "injury" in the Act meant tortious damage, as Mr Mandoukos urged. Although personal injury was one element of damage in a personal injury case: *Mahony* at 527. It there being observed that where a negligent act causes personal injury, damage includes both the injury itself and other foreseeable consequences which have been suffered.

47 That the definition of injury in s 1.4 captured both the injury and its foreseeable consequences, which resulted in statutory benefits under the Act, was disputed, the definition not dealing at all with damages. Reliance also being placed on s 6.25, which requires the injured person to provide specified particulars of the injury suffered.

48 Still the Insurer contended that treatment, including surgical treatment pursued for a therapeutic purpose after a person is injured in a motor accident, which has no detrimental outcome, does not fall within the s 1.4 definition of "injury". Although it was accepted that if the surgery resulted in a deterioration of the

pre-existing symptoms, the definition might be satisfied. But if there was no deterioration, there could be no further bodily injury.

The challenged review decision

49 The Review Panel issued its certificate, revoking that which the assessor had issued, having itself undertaken the assessment which the parties' medical dispute required.

The medical assessor's decision

50 The assessor had explained the history he had taken from Mr Mandoukos, which included him experiencing neck, right shoulder and lower back pain after the 2019 accident. He before the accident having worked in heavy construction, despite having been injured in the 2010 accident. With the result that after the 2019 accident, he had been unable to work and had pursued physiotherapy for his ongoing symptoms. But his persistent pain had resulted in the 2020 surgery, which had removed bone from his spine, with resulting improvement in his symptoms.

51 The assessor found that Mr Mandoukos had never returned to his pre-injury heavy work which had involved repetitive lifting, grinding, using a jackhammer and digging. On examination, he still being unable to bend over because of the neck and back pain which he suffered as a result, movements he could not tolerate in his work.

52 The assessor summarised the documents he had reviewed, which included a description of the accident. This had involved three impacts in a head on collision with a truck, causing Mr Mandoukos severe central chest pain, pain in the neck and shoulder, as well as a swollen right hand, which were described in ambulance reports.

53 Mr Mandoukos' injuries included a C5/6 disc protrusion severely compressing his right C6 nerves root, as well as mild impingement of the left C6 nerve root. The anticipated outcome of the surgery to his spine was described as an 80-

90% chance of improvement in his radicular right arm symptoms, with some neck pain and headaches likely to remain. The outcome of the surgery had accorded with this.

54 Mr Mandoukos' severe sharpshooting pain through the right arm having resolved, with occasional mild pain and numbness at times continuing, as well as residual headaches and neck pain still being experienced.

55 The assessor concluded that the surgery had been necessary and reasonable, given the 2019 accident. But it had resulted in injury to the bone and partial or complete rupture of ligaments or tendons. The removal of bone constituting a non-threshold injury, given the s 1.6 definition.

The Panel's reasons

56 The Review Panel disagreed.

57 In its statement of reasons, the Panel explained the accident, the claim and the medical dispute referred for determination. Identifying its task to be to determine:

- "causation in respect of the claimant undergoing the cervical spine surgery
- whether the subject surgery falls within the definition of 'injury' for the purposes of the MAI Act. The claimant submits that the surgery constitutes an injury, and conversely, the insurer submits that it is not an injury.
- if it is determined to be an injury, whether such injury is a threshold injury for the purposes of the MAI Act."

58 The Panel then explained the earlier claims Mr Mandoukos had pursued and their outcome, as well as the assessor's decision it had to review.

59 It then turned to explain the review process and the teleconference at which it had clarified what was in issue between the parties. They agreed that a clinical re-examination was not required. But the Panel had still undertaken its own examination, in order to take an accurate history from Mr Mandoukos, to assist its determination of causation: at [27].

60 The Panel then turned to explain the legislative framework and the applicable Guidelines. Guideline 5.6 requiring:

> "The assessment of whether an injury caused by the accident is a threshold injury for the purposes of the Act should be based on the evidence available and include all relevant findings derived from:
>
> (a) a comprehensive accurate history, including pre-accident history and pre-existing conditions
>
> (b) a review of all relevant records available at the assessment
>
> (c) a comprehensive description of the injured person's current symptoms
>
> (d) a careful and thorough physical and/or psychological examination
>
> (e) diagnostic tests available at the assessment. Imaging findings that are used to support the assessment should correspond with symptoms and findings on examination."

61 The Panel noted that whether radiculopathy was present was essential: G 5.6. And that would not be classified as a threshold injury, quoting the definition of radiculopathy in G 5.8. While neurological symptoms of the neck or spine that do not meet this definition, would be assessed as a threshold injury.

62 The Panel then explained what a consideration of causation involved, ss 5D and 5E of the *Civil Liability Act 2002* (NSW) applying: at [35]-[37].

63 The Panel noted at [40]: that "the Medical Assessor diagnosed a cervical neck strain, and aggravation of pre-existing C5/6 degenerative disc disease caused by the motor accident."

64 The Panel found that the spinal surgery Mr Mandoukos had undergone was "reasonable and necessary and related to the subject motor accident". The surgeon having found "the surgery resulted in injury to bone and partial or complete rupture of ligaments or tendons": [41]. Noting that the assessor had concluded that the referred injury was not a threshold injury: at [42].

65 The Panel then explained the parties' submissions. The Insurer relying on what had been discussed in *Mandoukos* and decided in *May*. Mr Mandoukos

contending that the surgical treatment had caused him further injury, which the Guidelines provided had to be taken into account. Clause 6.113 providing:

> "… the assessment of spinal impairment is made at the time the injured person is examined. If surgery has been performed, then the effect of the surgery, as well as the structural inclusions, must be taken into consideration when assessing impairment. Refer also to clause 6.20 of these Guidelines."

66 Mr Mandoukos relying on *Mahony* to submit that he had satisfied the but for test of causation, the injuries caused in the 2019 accident having been exacerbated by the surgery he underwent. Also relying on *Hunter v Insurance Australia Ltd trading as NRMA Insurance* [2021] NSWSC 623, to submit that the fact that the surgery may have had beneficial effect was irrelevant to the question of whether it had resulted in further injury.

67 The Panel then explained the documents it had to consider and the results of its examination. Mr Mandoukos having explained his history, before and after the 2019 accident. The 2010 accident having left him able to undertake his former heavy work in construction labour. Although he had experienced some limitations immediately before the accident.

68 Afterwards, he began to develop symptoms within hours, beginning with mild right-sided symptoms which became unbearable after 9-10 months. He then experiencing severe pain on movement of his right shoulder, as well as numbness in his right arm. Injections in his neck not having been effective, he underwent the recommended surgery, which improved his symptoms. Although he still experienced pain and numbness, precipitated by sustained movement of his right arm.

69 Under the heading "Causation", the Panel concluded that the accident had aggravated a degenerative disease that was previously symptomatic, given the documentation which established pre-existing change, a 5% WPI having been assessed in respect of the first accident: at [109].

70 It was satisfied that the second accident had caused a significant aggravation of the pre-existing cervical spine degenerative condition, which did not respond

to non-surgical treatment. This being evidenced by consistent complaints of significant neck symptoms which non-surgical treatment failed to treat: at [111]. It noted his worsening symptoms after the accident and that the medical evidence demonstrated an improvement after surgery, although he continued to complain of neck symptoms.

71 The Panel then turned to consider whether the surgery itself was an "injury", accepting that it was established that it was causally related to the 2019 accident. After quoting the defined term in s 1.4(1), it observed at [116] that it agreed with:

> "the comments of the Panel in the matter of *Bridgefoot*, where it was observed that: 'when a word in a statute is defined in terms of itself, then subject to the context, the Act uses the word as appearing in the definition in its natural and ordinary meaning…'"

72 The Panel then explained it had paid regard to obiter observations in *Mandoukos*, quoting from [52] to [54]. It concluded at [119] that:

> "in the absence of evidence that the surgery had an identifiable detrimental impact upon the claimant's symptoms or functioning arising from the surgery, it is doubtful that the surgery could be considered to constitute an injury for the purposes of the MAI Act."

73 The Panel then turned to consider the question of whether the surgery had a detrimental impact on Mr Mandoukos' symptoms or functioning, of which it was not satisfied: at [120]. Despite the ongoing symptoms which he suffered, it concluded that overall, the surgery had improved his symptomology, rather than having had a "detrimental impact".

74 It also noted that the surgery had been offered with therapeutic intent: at [121]. With the result that it did not fall within the definition of "injury" given the reasoning in *Dean v Phung* [2012] NSWCA 223; [2012] Aust Torts Reports 82 - 111: at [121]. Despite accepting that any surgery had the consequence of the patient having physiological change, quoting *May* at [75]: at [122].

75 Despite it being explained in *May* that "An injury, it has long been repeatedly explained, is some definite or 'distinct physiological change' or 'physiological

disturbance' for the worse which, if not 'sudden', is at least 'identifiable'", the Panel concluded at [123] that:

> "the term 'physiological change' is an especially broad concept and finds that whilst the term is informative in considering the definition of injury, it does not encompass the entirety of what is required to meet the definition of injury for the purposes of the MAI Act. For instance, a physiological change can include relatively simple physical changes, for example, a change in heart rate, which in and of itself would not ordinarily be accepted as being an injury. Put another way, the Panel accepts that an injury must involve a physiological change, but a physiological change per se does not equal an injury having occurred."

76 The Panel did accept that there had to be a causal connection between the motor vehicle accident and the injury, which did not have to be occasioned at the time of the accident. But it said, at [124], that "the Panel does not make any finding that any 'continuum of harm or disturbance suffered' constitutes an injury".

77 The Panel thus found at [125] that "liability must generally flow to the insurer for any consequence of the injury suffered, however any consequence of that injury would not necessarily fall within the definition of injury."

78 The Panel also noted that cl 6.113 of the Guidelines required the effect of surgery to be taken into account in any assessment of impairment: at [126]. But observed that impairment is not necessarily synonymous with injury, it being a consequence of injury.

79 It also accepted that "liability for the consequences of the injury will flow". Yet also said consequences do not necessarily constitute an injury for the purpose of the Act, this not being inconsistent with the approach in *Mahony*: at [127]. The Court here having concluded that the original tortfeasor will be liable for exacerbation of an injury by medical treatment. The original injury carrying some risk that resulting medical treatment will be negligently administrated, citing *Hunter*: at [128].

80 The Panel did not consider that the surgery had been performed negligently, or that it had caused additional injury. It having rather improved Mr Mandoukos'

symptoms: at [129]. Noting that Chen J in *Mandoukos* had observed at [93] that "ordinarily, an accident-related injury creates a need for treatment, but that treatment is not an 'injury', nor a 'consequential injury'": at [130].

81 The Panel then considered the ordinary meaning of the word "injury". Observing at [131]-[132]:

> "131. In considering the ordinary meaning of the word 'injury', the Panel is of the view that for a physiological change to be regarded as an injury for the purposes of the MAI Act, indicia would include it having arisen unintentionally, typically from an external force outside the control of the affected individual. Further, it would not be planned or deliberate, and it would have an overall adverse effect on the individual inflicted. In addition, it would not be consented to by a reasonably minded individual.
>
> 132. With this in mind, in respect of a surgical intervention performed with the intent of treating an injury, such step is noted to be a deliberate act, that is consented to with the explicit aim of reducing or removing a disease, symptom or loss of function. Surgery, when performed in such context, involves predictable, controlled disturbances to bodily tissue with a specific intention to avoid adverse effects of that disturbance."

82 The Panel concluded:

> "134. Having found the above, and in consideration of the evidence discussed above, the Panel is of the view that the referred injury: 'injury to bone – facet joint – cervical spine – due to foraminotomy surgery performed by Dr McKechnie on 1 July 2020 as a consequence of injury sustained in the MVA on 8 January 2019' does not constitute an injury for the purposes of the MAI Act and therefore a determination of whether it constitutes a threshold injury is not required.
>
> 135. The Panel does observe, however, that in the event that the surgery was considered to constitute an injury for the purposes of the MAI Act, the removal of the bone during the surgery, would then necessarily need to be deemed a non-threshold injury. This is due to the fact that the removal of bone is outside the definition of a soft tissue injury as defined by s 1.6 of the MAI Act."

The *Motor Accident Injuries Act*

83 What is in issue has to be resolved in the context of the statutory scheme as a whole. Providing as it does for both a no fault compensation scheme which results in the payment of statutory benefits, as well as limiting damages available at common law to persons injured in a motor accident. The Act

intending to provide early and ongoing support to those injured in such accidents.

84 With the defined word “injury” having, as a result, work to do in many parts of the legislative scheme, including in the definition of “motor accident” itself.

85 The task of construction of the Act begins and ends with the statutory text. In this case what is in issue turning on the definition of injury in s 1.4. It having to be construed in context, with an understanding of context having utility “if, and in so far as, it assists in fixing the meaning of the statutory text”: *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [22], quoting *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39] and referring to *SZTAL v Minister for Immigration and Border Protection*; *SZTGM v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [37].

86 Integral to making a choice between a range of potential meanings being discernment of the statutory purpose: *SZTAL* at [39]. That requirement, it seems to me supports the approach for which Mr Mandoukos contended, rather than that of the insurer.

87 It having been explained in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 at 304; [1981] HCA 26 that it is:

> “an elementary and fundamental principle that the object of the court, in interpreting a statute, ‘is to see what is the intention expressed by the words used’…. It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say…. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case…. However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. … The danger that lies in departing from the ordinary meaning of unambiguous provisions is that ‘it may degrade into mere judicial criticism of the propriety of

> the acts of the Legislature', … it may lead judges to put their own ideas of justice or social policy in place of the words of the statute."

88 These observations appear particularly pertinent in the context of a definition of injury which uses the undefined term "personal and bodily injury".

89 It should also be noted that both the Act and the *Civil Liability Act 2002* (NSW), which regulates tortious claims generally, both alter the common law which applies to claims for damages for personal injury. It is only in the case of an act that is done by a person with intent to cause injury or death to another, that the common law continues to apply in the way regulated by s 3B of the *Civil Liability Act*.

90 Including, it would seem, in the event that a motor vehicle is intentionally used to injure or kill a person, rather than the death or injury resulting from a motor accident.

The statutory scheme

91 The concept of injury caused by a motor vehicle accident lies at the heart of the statutory scheme. Consistently with the statutory history, the *Motor Vehicle Injuries Act* being but little concerned with injury to property and largely concerned with injury to people's bodies and minds.

92 Mr Mandoukos relied on this to establish the notion that the concept of injury in that Act equates to damages for injury in negligence at common law. This was disputed but, it seems to me, is not what the issues lying between the parties depend on.

93 In advancing the case that the Panel was correct in concluding that the surgical removal of bone from a person's facet joints for a therapeutic purpose did not result in injury as defined in the Act, the intended purpose of the surgery thereby having been achieved, the Insurer relied on the objects of the Act specified in s 1.3.

94 They including not only making third-party bodily insurance compulsory for all owners of motor vehicles registered in New South Wales, but also keeping premiums for third-party policies affordable, by ensuring that profits achieved by insurers do not exceed the amount that is sufficient to underwrite the relevant risk and by limiting benefits payable for soft tissue injuries and psychological or psychiatric injuries that are not recognised psychiatric illnesses: ss 1.3(c) and (d).

95 Also relevant, however, is that the specified objects include providing both early and ongoing financial support for persons injured in motor accidents: s 1.3(b).

96 The scheme also includes:

> Part 2 of the Act which establishes a system of compulsory third-party insurance for motor vehicles, which provides for insurance "against liability in respect of the death of or injury to a person caused by the fault of the owner or driver of the vehicle": s 2.3;
>
> Part 3 providing for statutory benefits when death of or injury to a person results from a motor accident in the State, whether or not the accident was caused by the fault of the driver. With insurers having to "require an injured person who is in receipt of weekly payments of statutory benefits under this Division to undertake such reasonable and necessary treatment, rehabilitation or vocational training as the Motor Accident Guidelines may require" and injured persons who fail, without reasonable excuse to comply, having their weekly payments suspended while their failure continues: s 3.17;
>
> With s 3.24(1) specifying that the statutory benefits to which an injured person is entitled, relevantly include "the reasonable cost of treatment and care". And s 3.24(2) providing that "No statutory benefits are payable for the cost of treatment and care to the extent that the treatment and care concerned was not reasonable and necessary in the circumstances

or did not relate to the injury resulting from the motor accident concerned.";

The Motor Accident Guidelines may provide for circumstances in which the cost of treatment and care is taken to be reasonable: s 3.24(3);

Awards of damages that relate to the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle are regulated by Part 4;

Section 4.2 providing:

"**4.2 General regulation of award of damages (cf s 123 MACA)**

(1) Damages cannot be awarded to a person in respect of a motor accident contrary to this Part.

(2) To remove doubt it is declared that if the substantive law of New South Wales is to govern a claim for damages in respect of a motor accident, the provisions of this Part are part of that substantive law and are to be applied accordingly by a court of this or another jurisdiction that determines the claim and by the Commission.

(3) If damages are awarded to a person in respect of a motor accident contrary to this Part, the person against whom the award is made—

(a) is not required to pay those damages to the extent that the award is contrary to this Part, and

(b) is, to the extent that the person has paid as damages an amount in excess of the amount awarded in conformity with this Part, entitled to recover the excess as a debt from the person to whom the payment is made."

But no damages may be awarded to an injured person if the person's **only** injuries resulting from the motor accident were "threshold injuries": s 4.4. That term is defined in s 1.6:

"(1) For the purposes of this Act, a ***threshold injury*** is, subject to this section, one or more of the following—

(a) a soft tissue injury,

(b) a psychological or psychiatric injury that is not a recognised psychiatric illness.

(2) A soft tissue injury is (subject to this section) an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage."

Section 1.9 deals with other restrictions on the application of the Act. It provides:

"**1.9 General restrictions on application of Act (cf s 3A MACA)**

(1) This Act (including any third-party policy under this Act) applies in respect of the death of or injury to a person that results from the use or operation of a motor vehicle only if the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during—

(a) the driving of the vehicle, or

(b) a collision, or action taken to avoid a collision, with the vehicle, or

(c) the vehicle's running out of control, or

(d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.

(2) This Act (including any third-party policy under this Act) does not apply in respect of an injury that arises gradually from a series of incidents."

Recovery for no fault motor accidents is regulated by Part 5;

Part 6 regulates motor accident claims. It requires the claimant to provide the insurer of the person against whom the claim is made with all "relevant particulars" about the claim as expeditiously as possible after the claim is made: s 6.25(1). "Relevant particulars" are defined in s 6.25(2) to include:

"(b) the injuries sustained by the claimant in the motor accident, and

(c) all disabilities and impairments arising from those injuries,"

Part 7 deals with dispute resolution. With Schedule 2 to the Act specifying in cl 2 the matters declared to be medical assessment matters for the purposes of Part 7 to be:

> "(a) the degree of permanent impairment of the injured person that has resulted from the injury caused by the motor accident (including whether the degree of permanent impairment is greater than a particular percentage),
>
> (b) whether any treatment and care provided or to be provided to the injured person is reasonable and necessary in the circumstances or relates to the injury caused by the motor accident for the purposes of section 3.24 (Entitlement to statutory benefits for treatment and care),
>
> (c) (Repealed)
>
> (d) the degree of impairment of the earning capacity of the injured person that has resulted from the injury caused by the motor accident,
>
> (e) whether the injury caused by the motor accident is a threshold injury for the purposes of the Act."

Medical disputes are referred to medical assessors who assess the degree of permanent impairment of the injured person for the purposes of the Act, in accordance with the Motor Accident Guidelines: ss 7.20 and 7.21. With impairments that result from more than one injury arising out of the same motor accident having to be assessed together, when the injured person's degree of permanent impairment is assessed: s 7.21(2);

The resulting certificate issued by an assessor being prima facie evidence of any matter certified as to the degree of impairment of earning capacity of the injured person as a result of the injury and also conclusive evidence of any other matter certified: s 7.23(2);

If such a certificate is challenged on the ground that the assessment was incorrect in a material respect, the President of the Commission may only refer it to a Review Panel, if satisfied that "there is reasonable cause to suspect that the assessment was incorrect in a material respect": s 7.26(5);

Such a review is not limited to that aspect of the assessment that is alleged to be incorrect and must be conducted by the Review Panel by

way of a new assessment of all the matters with which the medical assessment is concerned: s 7.26(6);

Part 8 regulates Costs and Fees and Part 9 Insurers; and

Part 10 regulates Administration. Including by providing for the Motor Accident Guidelines, which assessors and review panels must take into account, in their assessment of injury which result from motor vehicle accidents.

The concept of injury

97 Whether the Review Panel erred in concluding that the result of the surgery was not an injury which fell within the statutory scheme, depends on how the word "injury" is defined and used in the Act. Its ordinary meaning being concerned with harm, it being defined in the Macquarie Online Dictionary to mean:

> "**1.** harm of any kind done or sustained: *to escape without injury.*
>
> **2.** a particular form or instance of harm: *severe bodily injuries.*
>
> **3.** wrong or injustice done or suffered.
>
> **4.** *Law* the infringement of a right (opposed to *damage*)."

98 It should be noted, by way of comparison, that in the *Civil Liability Act*, the concept of "harm" is utilised. It being defined in s 5 to include personal injury, damage to property and economic loss. While "personal injury" is there defined to include pre-natal injury, impairment of a person's physical or mental condition, and disease.

99 The concept of "injury' is differently defined in the Act.

100 In resolving what the word "injury" means in this statutory context, account must be taken of the pivotal concept "motor accident". It being defined in s 1.4 to mean "an incident or accident involving the use or operation of a motor vehicle that causes the death of or injury to a person where the death or injury

is a result of and is caused (whether or not as a result of a defect in the vehicle) during—

(a) the driving of the vehicle, or

(b) a collision, or action taken to avoid a collision, with the vehicle, or

(c) the vehicle's running out of control, or

(d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control."

101 With "injury" being defined in s 1.4 to mean "personal or bodily injury and includes—

(a) pre-natal injury, and

(b) psychological or psychiatric injury, and

(c) damage to artificial members, eyes or teeth, crutches or other aids or spectacle glasses."

102 There is no definition of "personal and bodily injury", but the term undoubtedly includes soft tissue injuries. They being defined in s 1.6(2) to mean "an injury to tissue that connects, supports or surrounds other structures or organs of the body (such as muscles, tendons, ligaments, menisci, cartilage, fascia, fibrous tissues, fat, blood vessels and synovial membranes), but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage".

103 With the result that injury to other body parts, including bones, does not fall into the definition of soft tissue injury, as the Review Panel observed at [135].

104 It thus follows from the words used in these statutory definitions, that the Act intends that the widely defined word "injury" includes any harm done to a person's body in a motor accident, or which is sustained as the result of such an accident, whether or not the injury falls within the definition of "soft tissue injury".

What fell to the Panel to determine

105 The basis of a view that the removal of healthy bone from an already injured person's facet joints, in order to improve symptoms suffered as the result of other injuries caused by a motor accident, did not result in further injury which fell within the statutory scheme is difficult to see, as a matter of logic, given the altered state in which the person's body was left.

106 But still the Panel concluded that the injury which resulted from Mr Mandoukos' surgery was not an injury for the purpose of the Act.

107 The Insurer contended that the Panel was correct in concluding that the bodily injuries which the surgery itself caused, were not covered by the statutory regime. Despite Mr Mandoukos having been injured in the 2019 accident, with the result that in 2020 he underwent spinal surgery to treat the painful symptoms which his other injuries had caused, which had prevented him from returning to work.

108 With the result that even though the surgery was reasonable and necessary, not even the cost of the surgery has been met by the Insurer.

109 On the Insurer's approach the Panel's conclusion was dictated by the obiter observations of the Court of Appeal in *Mandoukos.* There being nothing in the Act itself which it contended drove that result.

110 The Review Panel cannot be criticised for taking the Court's observations into account. But what now has to be resolved is whether it was open to it to conclude that the further damage which the surgery caused to Mr Mandoukos' body did not result in injury for the purpose of the Act, given all that it had found on its assessment.

111 In resolving this it may not be overlooked that the Panel arrived at its conclusions, having considered whether the surgery was an injury. Rather than addressing itself to the question of whether the damage which the surgery undoubtedly caused to Mr Mandoukos' skin, tissue, blood vessels and spine,

bone having been removed from his facet joints, left him with further bodily injury which fell within the s1.4 definition of ‘injury’.

The medical dispute the Assessor and Review Panel had to consider

112 What the Panel had to consider for itself, was whether the 2019 accident had caused Mr Mandoukos the claimed injury to his spine, he having undergone the surgery in order to treat the symptoms his other injuries continued to cause. Other treatments having failed.

113 The surgery having resulted in the removal of healthy, undamaged bone from joints in his spine.

114 This required the Panel to determine whether that alteration to his body resulted in him suffering consequential “bodily injury”. Taking into account that his body, after the surgery, had been left in a different state than it was in, before the 2019 accident. His spine then being intact, while after the surgery it was not, its state having been permanently altered.

115 There being no suggestion that his body could regrow the bone removed from his spine, or that it could heal itself, as it might have been able to do, had the bone only been fractured during the surgery.

116 What had been referred for assessment as the result of the parties’ further medical dispute having been Mr Mandoukos’ claimed “injury to bone – facet joint – cervical spine”.

117 The Panel correctly accepted that injury to bone was outside the definition of soft tissue injury and not a threshold injury: s 1.6. But still it concluded that the removal of Mr Mandoukos’ bone did not result in an injury for the purpose of the Act. That this conclusion was available, given the definition of ‘injury’ which had to be applied, may not be accepted,

Why the Panel erred

118 There is no issue that surgical removal of bone from a person's spine after a motor accident could result in an injury as defined in s 1.4 and that such an injury would not be a threshold injury. Even if before such surgery the injured person had suffered only soft tissue injury.

119 In the event of dispute, whether surgery had caused a further bodily injury to a person's bone being for an assessor to determine.

120 The result of the Panel's conclusions was that the assessor had erred in accepting that the removal of bone from Mr Mandoukos' spine had caused him further injury, as defined in s 1.4.

121 The Panel arrived at its conclusions, having posed for itself the question of whether the **surgery** fell within the definition of injury. There was no real issue in these proceedings that the question which the Panel considered did not arise to be determined, given the claimed injury it had to consider on the review.

122 Mr Mandoukos' claim being that the injuries he suffered as the result of the motor accident included injury to bone in his facet joint.

123 The dispute about that claim required the Panel to consider the physical results of the surgery which Mr Mandoukos underwent, it found as the result of the 2019 accident. The foraminotomy having involved an incision, in order that the bone which had to be disturbed could not only be accessed, but part of it removed from his facet joints. That was not what the Panel considered.

124 This error in the Panel's approach, in my view, explains how it came to err in the conclusion which it arrived at, as I am satisfied that it did.

125 Concentrating as it did, as a result, on the purpose of the surgery. Rather than on its physical consequences for Mr Mandoukos' body. Despite that being what the definition of injury in s 1.4 is concerned with and the surgery having undoubtedly resulted in a permanent alteration to Mr Mandoukos' spine. That

involving an injury which the Panel correctly recognised, it is not disputed, was not a threshold injury.

126 On Mr Mandoukos' case, the Panel's approach also led it to incorrectly concentrate on a comparison between his position immediately before and after the surgery. Rather than on what the Act required. A comparison of the state of his spine before the accident, with its state after the surgery. The definition of injury being concerned, as it is, with bodily injury which results from a motor accident. Irrespective of whether the injury was caused directly during the accident, or as the consequence of later surgery which the accident made reasonable and necessary.

127 While this was resisted by the Insurer, I consider that it must be accepted that the Panel did err in the comparison which it made.

128 The Review Panel did, at [130], refer to what Chen J had concluded in *Mandoukos* at [93]. But it did not note his Honour's observation there that:

> "Generally speaking, when a surgical procedure is performed to treat an injury sustained in an accident, the total condition resulting from the injury and the surgery is to be attributed to the original injury, subject to the operation being reasonably undertaken by the injured person: *Lindeman Ltd v Colvin* (1946) 74 CLR 313, 321; [1946] HCA 35; *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29, 44-46; *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522, 529; [1985] HCA 37."

129 His Honour also observed that they did not support the proposition that surgery following an injury is, in and of itself, a separate injury nor a consequential one. And that in those proceedings, Mr Mandoukos had not explained precisely how or why this conclusion followed in his case.

130 That the surgery had caused him further injury was, however, what Mr Mandoukos had successfully established before the assessor, on the materials which then had to be considered. The Insurer contended on the review that the assessor was incorrect in arriving at that conclusion, with the result that the Panel had to consider for itself, when it undertook the required assessment again, whether the surgery had caused him further bodily injury.

131 Despite concluding that the surgery had resulted in physiological change to Mr Mandoukos' body, the Panel still concluded that the result was not an injury for the purpose of the Act. That being because the surgery had been pursued with his consent, in order to treat his other injuries and had involved controlled disturbances to his body with a specific intent to avoid adverse effects, which had successfully treated some of his symptoms.

132 I am satisfied that none of these considerations were relevant to the question of whether the surgery had caused Mr Mandoukos further bodily injury, which was what the s 1.4 definition of injury required the Panel to consider. It not being concerned at all with whether:

- it is a surgical procedure necessitated by a motor accident which results in further harm or damage to a person's body;

- the injured person has consented to the surgery; or

- the surgeon intends to inflict only controlled disturbance to the injured person's body and to avoid adverse effects, in order to treat the consequences of other injuries caused by the motor accident.

133 Most surgery which results from a motor accident is, after all, likely performed with a patient's consent and with therapeutic intent. The surgery may or may not achieve its purpose. But the definition of injury is not concerned with any of these matters.

134 Given that definition, the Panel's focus had to be on whether the permanent change, which it was not disputed the surgery made to Mr Mandoukos' body, established that he had suffered further bodily injury.

135 The Panel's finding that injury to bone did not fall within the definition of threshold injury in s 1.6 accorded with the proper construction of "threshold injury" which was considered in *Abawi*. There it was lacerations to the skin suffered in a motor vehicle accident which was the subject of the medical

dispute. But it was not in issue that "one thing that the definition of soft tissue certainly does not involve is bones and the skeletal system": at [42].

136 This was relied on by Mr Mandoukos to establish that a bodily injury did not have to be a long term one, in order to satisfy the definition. That in his case, the alteration to his spine was permanent, being relevant.

137 It was also concluded in *Abawi* at [71] that "the definition in s 1.6(2) should be understood as identifying soft tissue as tissue a significant and characteristic feature of which is connecting, supporting or surrounding other structures or organs in a physical sense, such as to warrant that tissue being characterised as having that function. That is not likely to include most organs."

138 It is evident that surgery is always likely, at least, to result in soft tissue injury. That, of itself, establishing that surgery necessitated by a motor accident will almost inevitably result in further bodily injury, even if what is injured as a result all falls into the definition of soft tissue injury.

139 The construction of "injury" and whether the surgical removal of bone from an injured person's facet joints fell within the definition, that having resulted in a further bodily injury, did not arise to be determined in either *Abawi* or *Mandoukos.* The parties' earlier medical dispute having concerned the radiculopathy Mr Mandoukos had suffered as the result of the accident.

140 Stern JA noted in *Mandoukos* that neither personal nor bodily injury is itself defined in s 1.4. Also referring to *Dean v Phung* [2012] NSWCA 223 and noting Basten JA's observations at [30] that, in ordinary language, an injury is a harmful consequence and that "a harmful consequence would not ordinarily be used to describe [s]omething which is done with a therapeutic intent, that is, to prevent, remove or ameliorate a disability or pathological condition".

141 *Dean* was concerned with a claim for damages in negligence pursued as the result of claimed unnecessary dental surgery, which Mr Dean also claimed the surgeon had known would be ineffective. In issue was thus whether the surgery

had involved deliberate acts done with intent to injure Mr Dean, that attracting s 3B of the *Civil Liability Act*, with the result that his damages would not be assessed under that Act. That required consideration to be given to whether the physical impairment Mr Dean had suffered had been intentionally inflicted by unnecessary surgery.

142 This is what there generated the discussion of therapeutic intent. Basten JA observing at [30] that:

> "A medical procedure will generally be an intentional act: the critical issue is whether, in particular circumstances, it was done 'with intent to cause injury'. In ordinary language, an injury is a harmful consequence. Something which is done with a therapeutic intent, that is, to prevent, remove or ameliorate a disability or pathological condition, would not ordinarily be so described. Indeed, even non-therapeutic treatment, such as cosmetic surgery, would not generally be so described: compare *Secretary, Department of Health and Community Services v JWB (Marion's Case)* [1992] HCA 15; 175 CLR 218 at 269 (Brennan J). The somewhat controversial distinction between therapeutic and non-therapeutic purposes may be disregarded. The appellant sought assistance from the dentist in relation to some minor chipping of his front teeth, together with a level of sensitivity and pain, apparently resulting from injury to the teeth, such symptoms not having preceded the blow to his jaw. There was no suggestion the purpose of the treatment was cosmetic. So far as the operation of s 3B is concerned, it would have been sufficient for the appellant's purposes to establish that the dentist knew at the time of giving the relevant advice that the treatment was not reasonably necessary."

143 Unlike s 3B of the *Civil Liability Act*, the definition of injury in s 1.4 of the Act is not concerned with intentional acts which cause injury. Nor with the therapeutic intent of surgery. The Act being concerned as it is with injury which has resulted from a motor accident, the definition including a bodily injury, which may or may not be a soft tissue injury.

144 It follows that if an injury results from an intentional act involving use of a motor vehicle, rather than from a motor accident as defined in s 1.4, it will also be s 3B of the *Civil Liability Act* under which damages for the harm which the injured person has suffered as a result, would be pursued against the wrongdoer who caused that harm.

145 This accords with the injuries with which the Act is concerned being the subject of the no fault system which regulates damages for injuries suffered in, or as a

result of, a motor **accident**. And the compensation and treatment which it provides for, as well as the damages which those who are injured in such accidents may pursue, also being regulated by the Act. That imposing limits on the damages otherwise available to them, unlike harm which results from intentional acts.

146 This also explains the expansive definition of injury adopted in s 1.4 of the Act. It embracing not only personal and bodily injury, but also pre-natal, psychological and psychiatric injury, as well as damage to certain property. Namely, "artificial members, eyes or teeth, crutches or other aids or spectacle glasses."

147 This definition reflecting the legislative history, which it was not disputed began with the *Motor Vehicles (Third Party) Insurance Act 1942* (NSW), which introduced the requirement for third party motor vehicle insurance for personal or bodily injury. An aspect of the statutory scheme which is still maintained in the definition of injury in s 1.4 being that it encompasses specified property closely associated with a person's body.

148 That definition, in my view, captures all bodily injuries caused by a motor accident, including those which result from surgery pursued with therapeutic intent, to treat other injuries caused by the accident. It being pertinent that intention is not utilised in either the definition, the Act or the Guidelines, which expressly contemplate that a person injured in a motor accident may be further injured as the result of surgery which has to be pursued as the result of an accident.

149 That being the form of treatment which, it is not in issue, Mr Mandoukos required as a result of the 2019 accident, other treatments for his injuries having failed.

150 Such treatment, it has to be accepted, will result in further bodily injury of the kind which falls into the definition of "soft tissue injury" in s 1.6, despite consent and therapeutic intent. With known risks then undoubtedly also having to be

taken by the injured person. For example, infection which may also result in further injury being suffered as the result of damage which the surgery caused to a patient's skin, flesh and blood vessels when they are pierced, which will then have to heal. With scarring also possibly then resulting.

151 This was Mr Mandoukos' position, his surgery having been pursued after the 2019 accident. But it also resulted in deliberate damage to his facet joints, when bone was removed from them. That he did not suffer further injury, as defined, as the result of this surgery, is thus not apparent.

152 It may also not be overlooked that surgery may not only be immediately necessary after a motor accident, in order to repair or treat a body part directly injured in the accident, or to save the person's life. It may become necessary later, in order to treat another injury which was the direct result of the accident. If, for example, such an injury does not heal or deteriorates.

153 Or surgery may be pursued even later, as it was in Mr Mandoukos' case, in order to treat ongoing symptoms which other body parts injured in the accident continue to cause.

154 This was why the Panel correctly observed that an injury does not necessarily have to be caused in the accident itself: at [124]. This also accords with the Guidelines, to which it also referred, which require that when resulting impairment is assessed, the effect of surgery must be taken into account: at [126]. Impairment being a possible consequence of injury caused by the surgery.

155 Having so reasoned, it is not readily apparent why the Review Panel did not consider whether the results of the surgery included further bodily injury. That being what it had to consider, given the s 1.4 definition, which it quoted.

156 That would have accorded with the approach explained in *May*, referred to by Stern JA in *Mandoukos* at [52]. There the meaning of the word "injury" used in

other workers compensation legislation having arisen to be considered: at [41].

In *May* the statutory definition being considered capturing both:

- an injury (other than a disease), "being a physical or mental injury"; and
- the "aggravation of a physical or mental injury (other than a disease)".

157 In *May* it was observed by the plurality:

> "45 'Injury' in par (b) is used in its 'primary' sense. As Gleeson CJ and Kirby J explained in *Kennedy Cleaning Services Pty Ltd v Petkoska*, if 'something ... can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an "injury" in the primary sense of that word' (emphasis added).
>
> 46 That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee. It may be, for example, the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery, the rupture of an arterial wall or a lesion to the brain. Each would be described as an 'injury' in the primary sense.
>
> 47 However, as the Full Court correctly held, 'suddenness' is not necessary for there to be an 'injury' in the primary sense. A physiological change might be 'sudden and ascertainable'. A physiological change might be 'dramatic'. The employee's condition might be a 'disturbance of the normal physiological state'. That an 'injury' in the primary sense can arise, and can be described, in a variety of ways does not mean that 'suddenness' is irrelevant. As the Full Court said, 'suddenness' is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease (as occurred in *Zickar v MGH Plastic Industries Pty Ltd* and *Kennedy Cleaning*). But it is the physiological change – the nature and incidents of that change – that remains central."

158 Gageler J there explained at [75]:

> "More than a century of teasing out the ordinary sense in which injury is used in the context of workers compensation legislation has shown that suffering an injury is not confined to 'getting hurt' (an injury might be constituted by nothing more than 'something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel') but that suffering an injury involves something more than merely 'becoming sick'. An injury, it has long been repeatedly explained, is some definite or distinct 'physiological change' or 'physiological disturbance' for the worse which, if not 'sudden', is at least 'identifiable'. The universality of that explanation has been questioned,

> and the comment has fairly been made that 'a distinct physiological change is not itself an expression of clear and definite meaning'. The expression has nevertheless been shown by repeated usage to have utility as an exposition of the particular sense in which injury has been used, and continues to be used, in the particular legislative context."

159 His Honour went on to explain that "At least in the case of a physical injury, to suffer an injury is more than just to experience the onset of dysfunction": at [77].

160 If the Review Panel had approached the concept of a bodily injury in this way, by considering the physiological changes and disturbances which the surgery caused to the normal physiological state of Mr Mandoukos' facet joints, it would have been driven to conclude that not only had it resulted in further soft tissue injury, but that the surgical removal of bone from those joints had also resulted in him suffering further bodily injury.

161 The Panel did conclude that the surgery had been pursued because of the dysfunction which Mr Mandoukos had suffered as the result of the other injuries he had suffered in the 2019 accident. That was what necessitated the removal of bone from his facet joints. That establishing that he had experienced more than the onset of the dysfunction which his other injuries had caused him.

162 That the surgery had some success in alleviating that dysfunction, the painful symptoms he had developed after the 2019 accident having improved to some extent as the result of the surgery, was also irrelevant to the question of whether the surgery itself had caused him further bodily injury.

163 On what the Panel found, that positive outcome of the surgery was incapable of altering the fact that it had also resulted not only in further soft tissue injury, but also a disturbance of his spine, as the result of its permanent alteration.

164 In *Mandoukos*, Stern JA had also observed with my emphasis:

> "53 Ultimately, the submission advanced by senior counsel for Mr Mandoukos was that the foraminotomy procedure fell within the definition of injury in the Act because:

> 'in circumstances where surgery brings about an alteration in the claimant's body, and that alteration has only been brought about not through the choice of the claimant in any real sense but, but by reason of someone else having wronged them, then it is in ordinary parlance in our submission to be regarded as injury.'

> 54 In circumstances in which, as here, the particular surgical procedure is not contended to have been other than reasonably necessary, and the Court was not taken to any evidence showing an identifiable detrimental impact upon Mr Mandoukos' symptoms or functioning arising from the foraminotomy procedure, it may be doubted whether this submission should be accepted. That is particularly so given that the scheme of the Act is to provide treatment, care, compensation and financial support to those injured in motor accidents. However, having regard to my conclusions as to the ambit of the medical dispute referred to the Medical Assessor, as set out below, it is unnecessary to decide whether or not Mr Mandoukos' contention is correct. **Moreover, given that this is a matter which may ultimately turn upon a detailed factual assessment, it is undesirable for this Court to express any concluded view in circumstances in which there has not been any medical assessment of the impact of the surgery upon Mr Mandoukos.**"

165 This is what fell to the Panel to consider, it having undertaken the foreshadowed factual assessment.

166 The Court in *Mandoukos* did not have the benefit of all that the Review Panel was provided to consider. Nor the conclusions which it came to, about what had necessitated the surgery Mr Mandoukos underwent; why it was reasonable for Mr Mandoukos to have pursued it, given how he had been injured in the accident; and the permanent alteration to his spine which resulted. It having been pursued in order to treat the painful symptoms which his other injuries continued to cause, they preventing him from returning to work.

167 It is also pertinent that in *May* the plurality discussed how the existence of an injury may be established, observing that the word "injury" is not always used in the defined sense at [59]-[60]. It was there also observed at [52], again with my emphasis:

> "If there is not a 'disease' within par (a) of the definition of 'injury', the tribunal of fact next inquires whether there is an 'injury (other than a disease)' within par (b). The third question is – does the evidence demonstrate the existence of a physical or mental 'injury' (in the primary sense of that word)? **Generally, that will be determined by asking whether the employee has suffered**

> **something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state**. **However, that judicial language is not to be construed or applied as if it were the words of a statute defining a necessary condition for the existence of an 'injury (other than a disease)'. The language of judgments should not 'be applied literally to facts without further consideration of what is conveyed by the reasoning' in the cases from which it is derived, or without regard to the text and scheme of the Act**."

168 It follows that what the Panel had to focus its attention on was the application of the definition of "injury" in s 1.4 of the Act to the results of the surgery on Mr Mandoukos' body. In order to determine whether they fell within the concept of bodily injury. Which, as I have explained, required it to have regard to both the soft tissue injury which surgery typically causes, as well as to the permanent alteration of his spine which also resulted.

169 I am satisfied that the Panel failed to undertake this consideration, despite the attention it paid to what had been observed in the various authorities it referred to. The Panel having concluded on the material it had considered that:

- the accident had caused a significant aggravation of Mr Mandoukos' pre-existing cervical spine degenerative condition;

- his resulting painful condition drove his pursuit of the surgery; and

- it had addressed some of his symptoms by the removal of bone from joints in his spine.

170 This established that Mr Mandoukos had not only experienced the onset of dysfunction, as the result of other injuries the accident had caused. But that he had pursued surgical treatment which itself had caused physiological change or disturbance, including to his spine. That he had suffered further bodily injury as a result, necessarily followed.

171 I am thus satisfied that the Panel erred in concluding that Mr Mandoukos had not suffered an injury within the meaning of the Act. Given not only how the

concept of injury is defined and used in the Act, but all that the Panel concluded the accident had caused.

172 Even in these proceedings, there was no suggestion that Mr Mandoukos would have required surgery which left his spine no longer intact in any event, if the 2019 accident had not occurred.

173 How the Panel erred, I am thus satisfied, is in not identifying that the surgical removal of bone from Mr Mandoukos' spine resulted in him suffering further bodily injury. But for the accident, he would not have suffered either the soft tissue injury which the surgery inflicted, nor the damage to his spine which resulted. But for the accident, it would have remained intact.

174 It is pertinent that in these proceedings, it was accepted that had bone been severed from Mr Mandoukos' spine during the accident, he would have suffered a bodily injury. That bone was deliberately removed from his spine with therapeutic intent which succeeded in alleviating his ongoing symptoms, on which the Insurer relied, cannot support the conclusion the Panel arrived at. That the further injury which resulted from the surgery, reasonably pursued only because of the motor accident, did not fall within the statutory scheme.

175 It being the physical consequences of the surgery, with which the concept of injury used in the Act, as I have explained, is concerned.

176 The approach urged for the Insurer seems to me to involve construing the undefined term "bodily injury" used in s 1.4 in an unintended way. One which that term itself does not warrant and which sits uncomfortably, not only with the scheme of the Act, but with various of the observations in the authorities to which reference was made.

177 The approach urged requiring the adoption of a gloss on the s 1.4 definition of injury which is not available, the term encompassing all bodily injuries, including soft tissue injury. That approach does not accord with either the definitions themselves, nor with the scheme of the Act.

178 It must also be accepted that such an approach is likely to result in unintended consequences. Some of which have already materialised in Mr Mandoukos' case. Namely, that the cost of the surgery he reasonably pursued in order to relieve the painful, ongoing symptoms caused by the other bodily injuries he had suffered in the 2019 accident, have not been met by the Insurer.

179 It seems to me that this outcome is entirely contrary to what the statutory scheme intends.

180 There being no issue that Mr Mandoukos only pursued the surgery in order to treat the painful exacerbation of his pre-existing condition which the 2019 accident had caused. He having been able to work in heavy construction before the accident, and unable to work at all afterwards.

181 Causation was in issue before the Review Panel. But in these proceedings the Insurer accepted that the required causation had been established. Despite it also being agreed that the surgery had been reasonable and necessary, the Insurer has still not met the cost.

182 There is simply no evidence that but for the accident, Mr Mandoukos would, in any event, have pursued the surgical treatment which resulted in the removal of bone from his facet joints, with resulting alleviation of ongoing symptoms caused by his other injuries.

183 In my view, that the surgery achieved this result was incapable of altering its consequences for his body. Not only further soft tissue injury, but also damage which has left his spine no longer intact, as it was before the accident. That well establishing, in my view, that the surgery had caused him yet further bodily injuries.

184 This precluding the acceptance of the insurer's approach, that it is only if surgery is pursued with therapeutic intent and results in a deterioration in the symptoms it is intended to treat, that a further bodily injury will result. That

approach departs considerably from the simple terms in which the concept of "injury" is defined in the Act and the various uses to which that term is there put.

185 In Mr Mandoukos' case, on its approach, the result being not only that he has no right to have the cost of the surgery met under the statutory scheme, but also no right to pursue any damages it caused, either under the Act, the *Civil Liability Act* or at common law. That is a conclusion which it seems to me the Court should be slow to accept, given the provisions of the Act which I have explained.

186 The conclusion that this is not how the Act is intended to operate is supported by a consideration of other analogies which the parties addressed.

187 There being no question that an accident which results in a limb being severed, leaves the injured person with a bodily injury. As observed in *May* at [62], that is a physiological change as a matter of common sense. A permanent one, whether the limb is lost during the accident itself, or as the result of a surgical procedure which the accident results in.

188 Amputation required after an accident, because of the injuries which it caused, unarguably also resulting in further bodily injuries. Irrespective of when such surgery is undertaken, or the level of its success.

189 By way of comparison, a person's spine which is no longer intact after a motor vehicle accident, because a piece of bone broke away in the accident, will also, as a matter of common sense, establish a bodily injury. Surgery may then be required to remove the broken piece of bone, that likely causing further bodily injuries.

190 That a piece of a person's spine is surgically removed after an accident, in order to treat other injuries it has caused, can result in no different outcome. Not only will physiological change or disturbance to the spine result from the surgery, but also further bodily injuries. Whether or not the therapeutic purpose for which the surgery was pursued is achieved.

191 In Mr Mandoukos' case, there being no question that the state of his spine itself was altered by the surgery, bone thereby having been removed from his facet joints, I consider it to also be a matter of common sense that he suffered further bodily injuries, even though the surgery was successful.

192 Each case depends on its own facts, of course. They are for the medical assessor to whom a medical dispute is referred to consider, in the event of dispute. But the evidence has to be assessed in accordance with all of the requirements of the statutory scheme and the applicable Guidelines.

193 In its reasons the Panel referred to *Bridgefoot v Allianz Australia Insurance Limited* [2024] NSWPICMP 194, observing that personal or bodily injury not being defined, it had to be given its natural and ordinary meaning, which necessarily depends on the physical state of the body. But it failed to consider whether the undoubtedly altered physical state that Mr Mandoukos' body was left in by the surgery, by comparison to its state before the accident, established that he had suffered further bodily injury, as well as the benefits the surgery achieved for his other injuries.

194 The Panel's conclusions rested on the absence of evidence of detrimental impact on Mr Mandoukos' symptoms or functioning, which it considered made it doubtful that the surgery constituted an injury. Taking into account that it had been pursued with therapeutic intent and had the effect of ameliorating symptomology, at least to an extent.

195 The result was that while it accepted that the surgery had resulted in physiological change, the Panel concluded that this did not per se establish injury. Nor, it considered, did it establish a continuum of harm or disturbance suffered after an injury. It also took into account that the surgery had not been performed negligently, concluding that it had not caused additional injury, because it had improved Mr Mandoukos' symptoms.

196 What the Panel did not consider, as it had to, was that this improvement was achieved by removal of a part of Mr Mandoukos' previously undamaged spine. And that the surgery itself caused further soft tissue injuries.

197 Instead taking the view that for a physiological change to constitute an injury, it had to have arisen unintentionally. Typically from an external force outside the control of the affected individual, not planned or deliberate and overall, with an adverse effect not consented to by a reasonably minded individual.

198 It seems to me that in so approaching what it had to determine, the Panel erred. It thereby having approached the statutory definition by taking into account irrelevant considerations. A further bodily injury not being precluded by surgery necessitated by a motor accident being pursued in order to alleviate the symptoms of other injuries caused by the accident.

199 The existence of a resulting bodily injury must be ascertained by a comparison between the physical state of the injured person's body immediately before the accident, with its state immediately after the surgery.

200 If that comparison establishes that the surgery has resulted in a further physiological change or disturbance to the injured person's body, an injury as defined in s 1.4 will be established, because such change or disturbance will establish the existence of a further bodily injury.

201 The physical consequences of a particular surgery will depend on a range of factors it is unnecessary to explore. But consent is not one of them. That a reasonably minded person consented to surgery which it is claimed resulted in further bodily injury, being incapable of having any impact on the determination of the outcome of the surgery on the person's body, whether it was successful or not.

202 It being the actual physical and, given the definition of injury, any psychological results of such surgery, which will answer the question of whether the surgery caused the injured person a further injury. That requiring a comparison

between the state in which the person's body has been left after the surgery, with its state before the accident.

203 There was no issue that Mr Mandoukos' spine was intact before the accident and no longer intact after the surgery.

204 Given this, it was fortunate indeed that the surgery helped achieve its intended result, improvement in the painful symptoms Mr Mandoukos was still experiencing as a result of the accident. But that outcome was incapable of altering the physical impact of the surgery on his body, which was what the Panel's determination had to rest on, given the statutory definition it had to apply.

205 Given what the Panel did decide, having considered the material it explained, that the surgery had left Mr Mandoukos with further bodily injuries cannot be doubted. Not only soft tissue injuries, but injury to his facet joints, they having had healthy bone removed from them. The benefits which resulted were incapable of affecting that outcome, permanent alterations to the state of his spine having been made. That establishing physiological changes and disturbances which he did not suffer before the accident.

206 The consequences of those further bodily injuries, as well as the other injuries he suffered, for the whole person impairment Mr Mandoukos may have suffered from the motor accident, will be for an assessor to determine in accordance with the requirements of the Act and Guidelines, in the event of further dispute.

207 That will depend in part on what impact, if any, the bodily injuries which the surgery caused Mr Mandoukos may have had, including the permanent removal of bone from his facet joints. That need not now be speculated about. Although it can be observed that matters such as whether Mr Mandoukos recovered sufficiently to be able to resume work and any limitations which may have resulted from the surgery, which he did not have before the accident, will be relevant to such an assessment.

208 But it must be accepted that the Panel erred in concluding that the further injury which it found Mr Mandoukos had suffered as the result of the surgery, did not fall within the statutory scheme. Given the definitions which the Panel had to consider and apply to the facts which it found, that conclusion was not available, driven as it was by a misapplication of the statutory scheme.

209 With the result, I am satisfied, that the Panel did fall into the claimed error and that its certificate must be set aside.

Other claimed consequences

210 It is necessary only briefly to deal with the parties' dispute about the unintended consequences of the disputed interpretation of the word "injury" in the Act. Some of which I have already touched on.

211 For Mr Mandoukos, it was also contended that if the surgery he pursued with resulting damage to his spine did not bring the state his spine had been left in within the definition of "injury", he had the right to pursue a damages claim in respect of his injuries at common law. Part 4 of the Act regulating only "death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle": s 4.1(1).

212 The potential consequence being that owners and drivers of motor vehicles would not be insured for such claims.

213 This was resisted by the Insurer, who contended that while the damage caused by the surgery did not result in any injury for the purpose of the Act, that the insurance in issue applied to all motor accidents.

214 It is not possible to come to final conclusions about this issue, because much would depend on the terms of the insurance policies in question, as well as on any claim pursued.

215 But it can be observed that if the policy was in respect of death or injury caused in a motor accident regulated by the Act, and the claim was pursued in respect

of injury which did not fall within the statutory scheme, as the Panel concluded Mr Mandoukos' injury did not, then it is likely that the policy would not cover a claim for damages resulting from such an injury.

216 That, I accept, is another reason to doubt the correctness of the conclusion which the Panel reached and the approach which the Insurer urged.

217 To resist this conclusion, the Insurer relied on the broad definition of motor accident in s 1.4, but as I have explained, that definition itself uses the defined term "injury". If Mr Mandoukos' surgery did not result in such an injury, an insured person covered only for such injury, would likely not be covered.

Costs

218 The usual order under the Uniform Civil Procedure Rules 2005 (NSW) is that costs follow the event: r 42.1. In this case, that is an order in Mr Mandoukos' favour.

219 In the event of any dispute the parties should file and serve short written submissions within 14 days.

Orders

220 It follows that Mr Mandoukos' case must succeed.

221 It was not in issue between the parties that if the case advanced for Mr Mandoukos was accepted, the Court could accede to his submission that orders should be made under s 69(3) of the *Supreme Court Act*. It enabling the Court to order, if satisfied that the Panel fell into an error of law, which appears on the face of the record of its proceedings, not only to quash the certificate it issued, but also to make such judgment or orders as are required for the purpose of finally determining the proceedings.

222 I accept the parties' common position, given the conclusions which I have reached and so direct them to confer and produce final proposed orders,

including as to costs, within 14 days. Together with short written submissions, in the event of any disagreement.

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I certify that the preceding 222
paragraphs are a true copy
of the reasons for the Judgment
of Acting Justice Schmidt.
Dated: 31 July 2026

Associate