WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **6694/20**
Applicant: **Thomas Tilbrook Sloane**
Respondent: **St Ignatius College Riverview**
Date of Determination: **23 February 2021**
Citation No: **[2021] NSWWCC 59**

The Commission determines:

1. I decline the respondent's application to rely on Dr Carney's report dated 21 December 2020.

2. Pursuant to s 289A(4) of the *Workplace Injury Management and Workers Compensation Act 1998*, I decline the respondent's application to rely on its s 78 notice dated 7 December 2020.

3. I remit the matter to the Registrar for referral to an Approved Medical Specialist to assess the applicant's permanent impairment and the appointment arranged for 5 March 2021 should go ahead.

4. The referral is in respect of:

Date of injury:	16 August 2017
Body parts:	Lumbar spine
Method of assessment:	Whole person impairment.

5. The following material only is to be sent to the Approved Medical Specialist:

   (a) Application to Resolve a Dispute
   (b) Reply – **omitting** pages 28 and following

A statement is attached setting out the Commission's reasons for the determination.

Catherine McDonald
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF CATHERINE McDONALD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Disputes Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Thomas Sloane was employed by St Ignatius College Riverview (Riverview) as a facilities assistant when he suffered an injury to his back on 16 August 2016. Liability was accepted and he underwent surgery on two occasions.

2. In 2018, whilst working for another employer, Mr Sloane experienced a recurrence of pain. His employer notified its insurer and the insurer accepted liability for a third operation.

3. Mr Sloane made a claim for permanent impairment compensation against Riverview. Riverview's insurer did not serve a notice under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) until after the proceedings had been commenced.

4. Mr Sloane seeks that I determine the permanent impairment claim or that the appointment arranged with an Approved Medical Specialist (AMS) proceed.

5. Riverview seeks leave under s 289A(4) of the 1998 Act to dispute liability for the permanent impairment claim and to rely on documents in support of that application. It seeks to dispute liability on the basis that the recurrence in 2018 was a new injury.

PROCEDURE BEFORE THE COMMISSION

6. Because this is a claim for permanent compensation only, the Commission would usually arrange an examination by an AMS on receipt of the Application to Resolve a Dispute (ARD). When the Reply in this claim was filed, it sought leave to rely on a s 78 notice dated 7 December 2020 and Riverview requested that it be listed for telephone conference.

7. The telephone conference took place on 21 December 2020 when Mr Morgan of counsel appeared for Mr Sloane and Mr Gaitanis of counsel appeared for Riverview. Both counsel requested that the issue be listed for arbitration hearing. Riverview sought leave to issue a direction for production to EML, the insurer which paid for the surgery.

8. The matter was listed for conciliation conference and arbitration hearing by telephone on 25 January 2021 when the same counsel appeared. Riverview's solicitor sought to provide written submissions. The parties were aware of them but no steps had been taken to provide them to the Commission before the conciliation conference and arbitration hearing commenced.

9. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

10. Riverview sought to rely on a report by Dr P Carney, neurosurgeon, dated 21 December 2020 which was served on the day of the telephone conference. For reasons discussed with the parties, I declined leave to rely on that report and said that I would provide formal reasons in this decision.

11. At the time of the hearing, the Commission had arranged an examination by an Approved Medical Specialist on 19 February 2021. I understand that the appointment has been changed to 5 March 2021.

EVIDENCE

DR CARNEY'S SUPPLEMENTARY REPORT

44. The submissions of counsel should be read in the context of my decision not to permit Riverview to rely on Dr Carney's supplementary report. It is therefore appropriate that I set out the submissions made by counsel and my decision with respect to it before summarising the submissions.

45. With respect to the inclusion of Dr Carney's second report, Mr Morgan said that no letter of instructions was provided in the file and no re-examination was carried out. Dr Carney said that Mr Sloane had engaged in a very heavy occupation, a statement for which there was no evidence. Despite noting that he had no history of the nature of the injury, Dr Carney expressed a view about causation. The questions he was asked (in particular that set out above) were not consistent with the evidence and the brief answers constituted a "bare *ipse dixit*." Though the question is the weight which should be given to the report rather than its admissibility, its admission would place Mr Sloane at a significant disadvantage.

46. Mr Gaitanis said that the report should be admitted and that the letters of instructions to Drs Anderson and Tait also did not form part of the evidence.

47. In response, Mr Morgan said that the reports of Drs Anderson and Tait could be read without placing reliance on the letters of instructions.

48. My reasons for not permitting reliance on the report follow.

49. In *Paric v John Holland (Constructions) Pty Ltd* Samuels JA said[1]:

> "I have myself looked at the evidence and looked at the hypothetical facts and while I would agree that in some respects the material put does differ in terms from what was proved, all in all I would regard it as open to the tribunal of fact to consider that it was a fair foundation and remains a reasonable support for the opinions which were sought and given…
>
> It is a question of whether the hypothetical material put to the expert witnesses represents a fair climate for the opinions they expressed. I do not think there is any requirement that the matter put is precisely consonant with the material provided; and certainly it cannot be contended that there was no evidence upon which the opinions could be based.
>
> Discrepancies may be fatal; in some cases even slight discrepancies may be fatal; in other cases even broad departures are not likely to affect the force of the expert opinion. Moreover, it is for the tribunal of fact to assess this factual basis. In the present case it seems to me that there was a fair climate in which the expert views could properly flourish, and certainly it was open to the learned judge to come to that conclusion."

50. In *South Western Sydney Area Health Service v Edmonds*[2] [2007] NSWCA 16 McColl JA said:[3]

> "In *Hevi Lift (PNG) Ltd v Etherington* at [84] I said (Mason P and Beazley JA agreeing) that '[a] court should not act upon an expert opinion the basis for which is not explained by the witness expressing it*'.* In so saying, I referred with approval (inter alia) to Heydon JA's analysis of the admissibility of expert

[1] [1984] 2 NSWLR 509, 510.
[2] [2007] NSWCA 16.
[3] At [130]-[132].

evidence in *Makita (Australia) Pty Limited v Sprowles* (at [59] – [82]). In that case (at [59]) Heydon JA cited with apparent approval Lord President Cooper's statement in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* (1953) SC 34 at 39-40 that:

> '… the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'

This statement is apposite in the context of Commission hearings, and, indeed, is implicitly recognised in r 70. While it must be recognised that '[t]here is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission and decisions whether to allow cross-examination or to limit it are discretionary' (*Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng* [2006] NSWCA 34 at [37]), the fact that cross-examination of an expert witness may be permitted indicates the desirability of expert reports conforming as far as possible to common law standards of admissibility designed to ensure they have probative value. Even if that is too stringent an approach in the face of s 354, as the rules recognise, evidence must be 'logical and probative' and 'unqualified opinions are unacceptable'.

In my view Dr Rivett's statement that 'in general all the problems are work-related' which the Arbitrator accepted in concluding that the respondent's duties were sufficient to cause her injury (apparently within the meaning of s 16) amounted to a bare *ipse dixit*. It was not probative of the issue before the Arbitrator."

51. In *Hancock v East Coast Timber Products Pty Limited*[4] Beazley JA said:

> "Although not bound by the rules of evidence, there can be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. As the authorities make plain, even in evidence-based jurisdictions, that does not require strict compliance with each and every feature referred to by Heydon JA in *Makita* to be set out in each and every report . In many cases, certain aspects to which his Honour referred will not be in dispute. A report ought not be rejected for that reason alone.
>
> In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of admissibility but of weight…
> …
> what was required for satisfactory compliance with the principles governing expert evidence was for his reports to set out the facts observed, the assumed facts including those garnered from other sources such as the history provided by the appellant, and information from x-rays and other tests."[5]

52. The intended purpose of the report is to support the s 78 notice, which declines liability for the third operation. It is also intended to be provided to an AMS, to persuade them that any impairment resulting from the third operation should not be assessed.

[4] [2011] NSWCA 11.
[5] At [82], [83] and [85].

53. The report has so little weight that it should not be admitted. The statements of opinion are "bare ipse dixits". Dr Carney was not provided with a fair climate in which to express his opinion.

54. The report was apparently obtained quickly. Dr Carney was not given an opportunity to re-examine Mr Sloane. It is not clear what material he was given but he said that it was insufficient to determine the nature of the injury.

55. He provided short statements without reasoning in response to questions from Riverview's solicitor. He assumed that Mr Sloane was "engaged in a very heavy occupation" and was lifting a tree. That assumption is not supported by the evidence.

56. The questions set out at [42] above asked Dr Carney to accept assumptions which are not supported by the evidence set out above. Mr Sloane was not cleared to return to pre-injury duties by Dr Tait. Dr Tait said in January 2018 that Mr Sloane no longer had leg pain but he was left with an occasional "twitch" in the left buttock so that it was misleading to ask Dr Carney to assume that there was no radiculopathy after the second surgery.

57. The late provision of the report made it impossible for Mr Sloane to meet it.

58. In those circumstances, the prejudice arising from Dr Carney's report so far outweighs its probative value that it should not be admitted.

SUSBMISSIONS – s 289A(4)

59. Section 298 of the 1998 Act provides:

> "…
> (3) A dispute about a claim for lump sum compensation cannot be referred for determination by the Commission unless the person on whom the claim is made—
> (a) wholly disputes liability for the claim, or
> (b) made an offer of settlement to the claimant pursuant to the determination of the claim as and when required by this Act and 1 month has elapsed since the offer was made, or
> (c) fails to determine the claim as and when required by this Act.
> **Note—**
> The determination of a claim requires the making of a reasonable offer of settlement (if liability is wholly or partly accepted). Failure to make a reasonable offer of settlement constitutes a failure to determine the claim.
> …
> (5) The Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission."

60. Section 298A of the 1998 Act provides:

> **"289A Further restrictions as to when a dispute can be referred to Commission**
>
> (1) A dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed.
> (2) A matter is taken to have been previously notified as disputed if—
> (a) it was notified in a notice of dispute under this Act or the 1987 Act after a claim was made or a claim was reviewed, or

(b) it concerns matters, raised in writing between the parties before the dispute is referred to the Registrar for determination by the Commission, concerning an offer of settlement of a claim for lump sum compensation.

(3) The Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission. However, the Commission may hear or otherwise deal with a matter subsequently arising out of such a dispute.

(4) Despite subsection (3), a dispute relating to previously unnotified matters may be heard or otherwise dealt with by the Commission if the Commission is of the opinion that it is in the interests of justice to do so."

61. Both counsel made submissions with Riverview's written submissions in mind so it is appropriate to deal with them first. No effort was made to provide the submissions to the Commission before the conciliation conference and that failure made the conduct of the hearing difficult.

62. Riverview submitted that Mr Sloane recovered from the effects of the injury on 16 August 2017 and that the "unchallenged evidence" is that he suffered a further injury on 10 May 2018. It submitted that it was not apparent from Dr Tait's report dated 22 May 2018 that he was specifically aware of the injury on 10 May 2018. Approval was sought for surgery but Mr Sloane or his subsequent employer made a claim on its insurer.

63. Because of my determination about Dr Carney's report dated 21 December 2020, I will not set out the submissions based on it.

64. Riverview submitted that documents from EML showed that liability for the claim was accepted and that it continued to accept liability, paying weekly compensation.

65. Riverview conceded that the issues now sought to be relied on had not been raised before the commencement of these proceedings and said that the failure to respond to the s 66 claim was administrative oversight. It referred to the decision of Roche DP in *Mateus v Zodune Pty Limited t/as Tempo Cleaning Services*[6] (*Mateus*).

66. Riverview submitted that it acted promptly to place Mr Sloane and the Commission on notice of the dispute to be raised. It said that Mr Sloane does not suffer any prejudice which would outweigh the prejudice it would suffer if leave is not granted. It submitted that Dr Anderson's assessment of permanent impairment contained loadings in respect of the third surgery and that EML had made an explicit admission of liability by meeting the cost of the surgery and continuing to accept the claim. It submitted that there was a significant liability issue to be determined.

67. Riverview also opposed the determination of the permanent impairment claim. It referred to the decision of the Court of Appeal in *Secretary, New South Wales Department of Education v Johnson*[7] (*Johnson*). It said that common law principles of causation apply but conceded that a further injury will not always result in some degree of permanent impairment being excluded. It said that the facts of this matter were markedly different to *Johnson* and the evidence supported the submission that the third injury was a novus actus, severing the causal chain.

68. Mr Morgan said that there was no explanation in the evidence why Riverview's insurer had failed to deal with Mr Sloane's claim in accordance with the time frames in the legislation. He said an order permitting a previously unnotified dispute to be heard is an indulgence, allowing some latitude from the stringent requirements on insurers to deal with claims expeditiously.

[6] [2007] NSWWCCPD 227.
[7] [2019] NSWCA 321.

69. Mr Morgan said that one of the striking holes in this application was the lack of explanation at all why the claim had not been responded to since it was made on 1 April 2020. He set out the history of correspondence summarised above. He noted that a period of eight months delay was unexplained. When an extension of time or other indulgence is sought in common law matters or under the *Uniform Civil Procedure Rules 2005*, it is necessary that a fulsome explanation is given as to why the mandated course has not been followed.

70. Mr Morgan relied on the decision in *Mateus* and referred to the list of factors to be considered in an application under s 289A(4) in [48].

71. Ms Sloane's statement showed that she made numerous telephone calls to Riverview's insurer when Mr Sloane was in hospital awaiting surgery in May 2018. Dr Tait's report dated 22 May 2018 was sent to Riverview's insurer. It cannot be said that the insurer was not aware of the third incident or the surgery and that sits uncomfortably with the lack of action on the claim in April 2020.

72. Mr Morgan said that Mr Sloane was first made aware of the issue that Riverview's insurer sought to raise after proceedings were commenced. If Riverview was permitted to rely on the defence then Mr Sloane would need time to assemble evidence to meet it before the issue could be determined.

73. In response to Riverview's written submissions, Mr Morgan said that it was clear from Dr Tait's report dated 22 May 2018 that he was very much aware that Mr Sloane had suffered a further injury. That was confirmed by Ms Sloane's statement. The surgery needed to be undertaken with some urgency. EML accepted liability after it was informed of the injury by Mr Sloane's subsequent employer. Mr Morgan noted that there was significant prejudice to Mr Sloane if Riverview was allowed to raise the dispute and that there was no evidence that the failure to respond to the claim was an administrative oversight.

74. Mr Gaitanis adopted the written submissions made by his instructing solicitor but noted that when the permanent impairment claim was made EML was still paying weekly compensation. The claim was hasty and precipitous despite the requirement on the Commission to act in accordance with equity and good conscience and the substantial merits of the case. He said that the issue of prejudice was a primary issue when applying s 289A(4) and that there were substantial merits in Riverview's argument which should be determined. He did not cite any authority for that submission. He said that if an AMS was to determine the matter without consideration of those arguments, he or she would fall into error.

FINDINGS AND REASONS

75. Section 289A(4) allows the Commission to deal with previously unnotified disputes if it is in the interests of justice to do so. The High Court considered the meaning of "the interests of justice" in *BHP Billiton Limited v Schultz*[8] in the context of an application under cross-vesting legislation to transfer proceedings from the Dust Diseases Tribunal of NSW to the Supreme Court of South Australia. Gleeson CJ, McHugh and Heydon JJ said:

> "The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so, the interests of the respective parties, which might in some respects be common (as, for example, cost and efficiency), and in other respects conflicting, will arise for consideration."

[8] [2004] HCA 61.

76. The principles applicable to s 289A(4) are set out in *Mateus*. Roche DP noted that the arbitrator had considered the following factors:

> "(a) the degree of difficulty or complexity to which the unnotified issues give rise;
> (b) when the insurer notified that it wished to contest any unnotified issue/s;
> (c) the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;
> (d) any prejudice that may be occasioned to the worker, and
> (e) any other relevant matters arising from the particular circumstances of the case."

77. Roche DP said:

> "In determining whether it was 'in the interests of justice' to allow the Respondent Employer to dispute injury, the Arbitrator correctly identified at paragraph 18 of her Reasons the matters relevant to the exercise of the discretion (see [38] above). To those matters I would add the following observations:
>
> (a) a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved;
>
> (b) any insurer seeking to dispute an unnotified matter is seeking to have a discretion exercised in its favour and, accordingly, must act promptly to bring the matter to the attention of the Commission and all other parties;
>
> (c) any unreasonable or unexplained delay in giving notice of an unnotified matter will be relevant to the exercise of the discretion;
>
> (d) in exercising its discretion the Commission may have regard to the merit and substance of the issue that is sought to be raised;
>
> (e) in assessing prejudice to the worker it will be significant to consider when and in what circumstances the worker was first made aware of the unnotified issue that is sought to be raised;
>
> (f) though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial merits of the case, those matters will not be determinative, and
>
> (g) the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion."

78. Roche DP considered the factors for and against the exercise of the discretion and, in that case, determined that the factors in favour of its exercise outweighed those against. One of the factors against the exercise of discretion was that the failure to notify the dispute was never explained.

79. In the context of a limitation statute, broad considerations of justice are relevant to the exercise of a discretion to extend time and they "include an examination of the conduct of the applicant for leave and the reasonableness of the explanation for the delay" – *Brisbane South Regional Health Authority v Taylor*[9]*,* considered in *Itek Graphics Pty Limited v Elliott*[10]*.*

[9] (1996) 186 CLR 541.
[10] [2001] NSWCA 442.

80. It might be expected that some evidence explaining the conduct of Riverview's insurer would be provided. There is no evidence to show why Riverview's insurer failed to respond to the permanent impairment claim, merely a submission that it was an administrative oversight. The lack of an explanation is a factor strongly against the exercise of the discretion. If a party seeks the exercise of a discretion, evidence should be provided to explain why it should be exercised.

81. Riverview suggested that it acted promptly to place Mr Sloane on notice that the claim was disputed. I do not agree. Riverview's insurer was aware of the issues concerning liability for the third surgery when it declined to pay for it in 2018. Its conduct at the time was dilatory and the evidence suggests it was looking for ways to decline the claim rather than working out if it should be accepted. There is no evidence that a formal notice declining the claim was issued. It did not fulfil its obligations under the 1998 Act to respond to the claim promptly at that time, when Dr Tait said that Mr Sloane was in very considerable pain and recommended surgery.

82. The permanent impairment claim was foreshadowed in April 2020, though Mr Sloane's solicitor merely sought a concession that Mr Sloane had more than 15% impairment at that stage. No reason has been offered for the insurer's failure to decline the claim at that time, nor when a response was sought in May. The permanent impairment claim was made in July. It appears that no action was taken and no medical examination was organised. The dispute was only raised after the proceedings were commenced. It cannot be said that the insurer acted promptly.

83. The prejudice which would be occasioned to Mr Sloane if Riverview is permitted to rely on the s 78 notice is clear and significant and the issues in the proceedings would become more complex if those in the s 78 notice required determination.

84. Further medical evidence would be required to meet the argument that the 2018 incident was a novus actus interveniens. There would inevitably be a delay in determining Mr Sloane's entitlements while the disputes raised by the s 78 notice were determined and if a finding was made that there was a second injury, his entitlement to lump sum compensation may be affected.

85. The merits of the claim do not favour granting the application. Dr Tait said in his report dated 22 May 2018 that Mr Sloane had a recurrence of left-sided L1 radiculopathy secondary to an exacerbation of his previous injury. He was aware in January 2018 that Mr Sloane no longer worked for Riverview and, contrary to Riverview's written submissions, he was aware in May 2018 that the exacerbation occurred at work.

86. Dr Anderson considered that all subsequent clinical issues were strongly related to the injury in August 2017.

87. There is no evidence to support the contention that the injury in 2018 was a new injury rather than a recurrence of the 2017 injury. The submission that the evidence about a second injury was unchallenged is not correct. The method adopted in an effort to obtain evidence from Dr Carney was misguided and the questions asked of him were inappropriate.

88. The fact that EML has paid compensation is immaterial. Mr Sloane's employer notified its insurer of the incident as it was required to do. That insurer paid compensation. It constitutes a rebuttable admission that some compensation was payable as between Mr Sloane and EML but has no impact on the relationship between Mr Sloane and Riverview or its liability to pay permanent impairment compensation.

89. The Court of Appeal decision in *Johnson* does not assist Riverview and Riverview conceded that is may not. The Court considered[11] the possible categories where an earlier injury is followed by a later injury set out in *State Government Insurance Commission v Oakley*[12]:

> "Where the later injury results from a subsequent accident that would not have occurred had the victim not been in the physical condition caused by the earlier accident, the second injury should be treated as having a causal connection with the earlier accident.
>
> Where an earlier injury is exacerbated by a subsequent injury, there will be a causal connection between the original injury and the subsequent damage unless it can be shown that some part of the subsequent damage would have been occasioned even if the original injury had not occurred.
>
> Where a victim, who had previously suffered an injury, suffers a subsequent injury and the subsequent injury would have occurred whether or not the victim had suffered the original injury and the damage sustained by reason of the subsequent injury includes no element of aggravation of the earlier injury, there will be no causal connection between the original injury and the damage subsequently sustained."

90. Because of the way Riverview's insurer managed the claim, there is no evidence that the claim falls into the third category.

91. The Commission's obligation to act in accordance with equity, good conscience and the substantial merits of the case in s 354(3) of the 1998 Act does not overcome all of the issues discussed above. The obligation does not require that Riverview be permitted to rely on its s 78 notice. The obligation in s 354(3) appears in the context of legislation that requires disputes to be clearly notified and which prevents disputes being raised late unless it is in the interests of justice.

92. In the application of s 289A(4) to these proceedings, it is not in the interests of justice that Riverview be permitted to rely on its s 78 notice.

Permanent Impairment Assessment

93. Because of the decision I have reached with respect to the s 78 notice, the impairment will be assessed in respect of the date of injury of 16 August 2017 only.

94. Mr Sloane sought that I assess permanent impairment. Since the repeal of s 65(3) of the Workers Compensation Act 1987 there is no impediment to me doing so in appropriate circumstances.

95. Based on Mr Sloane's statement dated 17 November 2020, there would not be any reason to depart from Dr Anderson's assessment of 17% permanent impairment in his report dated 19 June 2020 which is an uncontroversial application of the *Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed. Subject to the satisfaction of the assessor that there is radiculopathy, there is no room for the exercise of discretion in that assessment.

96. However, counsel did not make submissions on that aspect of the matter. To allow procedural fairness, I decline to make an assessment of permanent impairment and the appointment with an AMS on 5 March 2021 should go ahead.

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[11] At [70] and [126].
[12] (1990) 10 MVR 570; [1990] AustTorts Reports 81-0003 p 67 and 57.

97. The parties did not address about the material to be sent to the AMS. It seems to me that only the documents listed below should be sent but I grant liberty to apply in the event the parties agree that further documents are required. No documents relevant to the dispute I have determined should be included. The documents which should be sent to the AMS are:

    (a) ARD and supporting documents, and

    (b) Reply – omitting pages 28 and following

98. I make the following orders:

    (a) I decline Riverview's application to rely on Dr Carney's report dated 21 December 2020.

    (b) Pursuant to s 289A(4) of the 1998 Act, I decline Riverview's application to rely on its s 78 notice dated 7 December 2020.

    (c) I remit the matter to the Registrar for referral to an AMS to assess the applicant's permanent impairment and the appointment arranged for 5 March 2021 should go ahead.

    (d) The referral is in respect of:

Date of injury:	16 August 2017
Body parts:	Lumbar spine
Method of assessment:	Whole person impairment.

    (e) The following material only is to be sent to the AMS:

        (i) ARD and supporting documents, and

        (ii) Reply – **omitting** pages 28 and following.