SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v National Injury Insurance Agency, Queensland* [2020] QSC 289
PARTIES:	**JAMIE EDWARD SMITH** (applicant) **v** **NATIONAL INJURY INSURANCE AGENCY, QUEENSLAND** (respondent)
FILE NO/S:	SC No 346 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	18 September 2020
DELIVERED AT:	Cairns
HEARING DATE:	10 September 2020
JUDGE:	Henry J
ORDERS:	**1. The respondent's application to dismiss the application pursuant to s 48 *Judicial Review Act* is dismissed.** **2. The decision of the respondent's internal review officer of 26 May 2020 on the applicant's application for an internal review is quashed.** **3. The applicant's application for internal review is referred back to the respondent for determination, with the decision-making period as defined by the *National Injury Insurance Scheme (Queensland) Act* commencing as if the application was received today.** **4. The parties will be heard as to costs, if costs are not agreed in the meantime, at 9.15 a.m. 7 October 2020 (out of town parties having to leave to appear by telephone or audio-visual link).**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – PURPOSIVE APPROACH – GENERAL PRINCIPLES – where the applicant was seriously injured in a motorcycle accident and suffered a brachial plexus injury leaving his right arm functionally useless – where the applicant still had some capacity for

movement in his thumb and wrist – where the applicant applied to be a participant in the National Injury Insurance Scheme – where the applicant submits his injury fell within the definition of "serious personal injury" in sch 1 National Injury Insurance Scheme (Queensland) 2016 which relevantly included "a permanent injury to the brachial plexus resulting in an impairment equivalent to a shoulder disarticulation amputation" – where the respondent rejected the applicant's request to become a participant in the scheme because the applicant retained slight feeling and movement in his thumb and wrist – where the respondent took the view that the ordinary meaning of "impairment equivalent" required the applicant to have no feeling whatsoever in his arm or hand to be "equivalent" to a shoulder disarticulation injury – whether the respondent fell into an error of law or failed to consider a relevant consideration because of its interpretation of the definition of "serious personal injury"

ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DIRECTION TO ACT OR REFRAIN FROM ACTING – where the respondent adopted the incorrect interpretation of the statute – where if the respondent had adopted the correct interpretation of the statute, on the information before the decision maker, the applicant would have met the definition of "serious personal injury" – where there would remain a discretion as to whether the applicant should become a "interim member" or a "permanent member" of the National Injury Insurance Scheme (Queensland) – whether the court should make a direction compelling the respondent to make a particular decision – whether the court should declare that the applicant's injury meets the definition of "serious personal injury"

Acts Interpretation Act 1954 (Qld), s 14A, s 14B(1)(c)
Judicial Review Act 1991 (Qld) s 13, s 20(2), s 48, s 30
National Injury Insurance Scheme (Queensland) Act 2016 (Qld) s 3, s 4, s 12, s 20(2), s 23, 16, 109, sch 1
National Injury Insurance Scheme (Queensland) Regulation 2016 (Qld)

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited
Allianz Australia Insurance Ltd v Ridge (2018) 85 MVR 228, considered
Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389, cited
Commissioner of Taxation of the Commonwealth of Australia

v Consolidated Media Holdings Ltd (2012) 250 CLR 503, cited
Masters v Garcia (2005) 65 NSWLR 92, applied

COUNSEL: S Deaves for the applicant
E Longbottom QC for the respondent

SOLICITORS: Maurice Blackburn for the applicant
Minter Ellison for the respondent

[1] The applicant, Mr Smith, was seriously injured in a motorcycle crash on 20 July 2019. He suffered a catastrophic brachial plexus injury, leaving him with a useless and painful right arm. If that impairment comes within the meaning of the words, "an impairment equivalent to a shoulder disarticulation amputation", then he has suffered a "serious personal injury" within the meaning of the *National Injury Insurance Scheme (Queensland) Act 2016* ("the *NIIS Act*") and is eligible for approval to participate in the National Injury Insurance Scheme, Queensland ("the Scheme"). The primary issue for determination by this court is the correct statutory interpretation of those words.

Procedural history

[2] Mr Smith's application for approval to participate in the Scheme, made pursuant to s 16 *NIIS Act*, was refused. His application for an internal review of that decision under s 109 of the *NIIS Act* failed when an internal review officer, by a decision dated 26 May 2020, confirmed the original decision.

[3] Mr Smith now seeks a statutory order of review of the internal review decision. The respondent cross-applied to dismiss the application pursuant to ss 13 or 48 *Judicial Review Act 1991* (Qld).

[4] It became apparent at the outset of the hearing that the application for dismissal pursuant to s 48 involved arguments which were in any event arguments against the merits of Mr Smith's application and were inevitably destined to be heard in opposition to the application without the need for a s 48 application. However, the application for a dismissal pursuant to s 13 related to the availability of another forum to quell the controversy. I accordingly heard the s 13 application at the outset of the hearing.

Section 13 application

[5] Section 13 provides:

> "**13 When application for statutory order of review must be dismissed**
>
> Despite section 10, but without limiting section 48, if—
>
> (a) an application under section 20 to 22 or 43 is made to the court in relation to a reviewable matter; and
>
> (b) provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person;

> the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so." (emphasis added)

[6] Section 13(b) is satisfied here. Section 127 of the *NIIS Act* provides that a person given an internal review decision of the kind Mr Smith has been given, may apply to the Queensland Civil and Administrative Tribunal ("QCAT") for review of that decision. I was therefore required to dismiss the present application if satisfied, having regard to the interests of justice, that I should do so,

[7] Mr Smith actually filed an application for a QCAT review of the decision, three days after filing the present application, apparently to protect his position pending the outcome of this application. The respondent submitted it was relevant to the interests of justice that such a review would be less constrained than an application for statutory order of review in that it would be a fresh hearing on the merits.[1] However, that is a neutral consideration given the applicant wants to resolve the alleged legal error forthwith and without the delay of a fresh hearing at QCAT.

[8] QCAT gave directions on the papers on 24 August 2020, setting deadlines for provision of various materials and directing that the application would be listed for a compulsory conference in Brisbane at a time and date to be advised not before 10 November 2020, and listed for a directions hearing in Brisbane at a time and date to be advised. In light of that timeframe and in light of the evidence of a general nature before me regarding the timeliness of hearings at QCAT, that application is very unlikely to be heard this year and unlikely to be heard until about March next year – six months hence.

[9] Compounding the issue of delay is that, even if the applicant were to eventually succeed in his pursuit of approval to participate in the National Injury Insurance Scheme, it is very likely that he would, pursuant to s 22 of the *NIIS Act*, be accepted in the first instance for a so-called "participation period" as opposed to for the rest of his life. The participation period is defined in sch 1 *NIIS Act* as being a period of two years, commencing on the day the participant is accepted. This has consequences for the progress of the applicant's common law claim for damages pursuant to the *Motor Accident Insurance Act 1994* (Qld).

[10] The only pre-litigation process outstanding in respect of that claim is the compulsory conference. However, as the experienced personal injuries solicitor acting for Mr Smith deposes, she cannot advise her client to progress that process until there is a determination of whether Mr Smith is to be accepted into the National Injury Insurance Scheme as a lifetime participant. In her experience, acceptance into the scheme is almost always confined to the two-year participation period in the first instance. This has the practical effect that, in the event Mr Smith succeeds in being accepted into the scheme, there will likely be a further two-year delay in the advancing of his common law claim for damages. While it is not suggested he will be without economic support in the meantime, this is a significant period of uncertainty during which he will not be able to plan his future life with any degree of certainty. It was a weighty consideration in favour of hearing the present application that, if successful, it would avoid further exacerbating that already problematic delay by at least another six months.

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1 See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(2).

[11] In light of that consideration, I was not satisfied, having regard to the interests of justice, that I should dismiss the application pursuant to s 13. I therefore dismissed the cross-application so far as it related to s 13 on the day of the hearing, indicating I would deliver my reasons later (as I have now done).

[12] I now turn to substantive consideration of Mr Smith's application, beginning with the statutory framework.

The *NIIS Act*

[13] The explanatory notes to the *National Injury Insurance Scheme (Queensland) Bill* 2016 explained the Bill's genesis lay in a 2011 Productivity Commission recommendation that a National Injury Insurance Scheme exist alongside the National Disability Insurance Scheme, with the intention of meeting the lifetime care and support needs of people who sustain serious personal injury in Queensland in a motor vehicle accident, regardless of fault. Heads of Agreement between Queensland and the Commonwealth Governments were entered into in May 2013 with a view to Queensland implementing a National Injury Insurance Scheme for motor accidents by 1 July 2016.

[14] The purpose of the *NIIS Act* is identified in s 3(1) as follows:

> "**3 Purpose of Act and achieving purpose**
>
> (1) The purpose of this Act is to ensure that persons who suffer particular serious personal injuries as a result of a motor accident in Queensland receive necessary and reasonable treatment, care and support, regardless of fault. …" (emphasis added)

[15] Section 4 deals with the application of the Act, relevantly providing:

> "**4 Application of Act**
>
> (1) This Act applies in relation to a serious personal injury caused by, through or in connection with a prescribed vehicle …" (emphasis added)

[16] The Act unsurprisingly defines the serious personal injuries to which it applies. Schedule 1 *NIIS Act* relevantly provides:

> "***serious personal injury*** means a personal injury that is—
>
> (a) a permanent spinal cord injury resulting in a permanent neurological deficit; or
>
> (b) a traumatic brain injury resulting in a permanent impairment of cognitive, physical or psychosocial function; or
>
> (c) a forequarter amputation or shoulder disarticulation amputation; or
>
> (d) the amputation of a leg through or above the femur; or
>
> (e) the amputation of more than 1 limb or parts of different limbs; or

(f) a permanent injury to the brachial plexus resulting in an impairment equivalent to a shoulder disarticulation amputation; or

(g) a full thickness burn to all or part of the body; or

(h) an inhalation burn resulting in a permanent respiratory impairment; or

(i) permanent blindness caused by a trauma." (emphasis added)

[17] An injury meeting the definition of any of those catastrophic injuries would fulfill the pre-requisite of eligibility for support under the *NIIS Act* that an applicant has suffered a "serious personal injury". Thus, s 12 relevantly provides:

"**12 Persons eligible to participate in scheme**

(1) A person is eligible to participate in the scheme in relation to a serious personal injury suffered by the person if—

(a) this Act applies in relation to the injury; and

(b) the injury meets the criteria (the ***eligibility criteria***) for the injury prescribed by regulation. …"

[18] Section 12(1)(b) speaks of "eligibility criteria". The *National Injury Insurance Scheme (Queensland) Regulation 2016* stipulates eligibility criteria for all bar two of the personal injuries listed in the above definition of "serious personal injury". No eligibility criteria have been provided for the injuries stipulated in the definition at (c) and (f); (f) being the definition of concern in this case. On its face, s 12(1)'s inclusion of the word "and" between sub-ss (1)(a) and (1)(b) makes the meeting of eligibility criteria prescribed by regulation a pre-requisite for eligibility to participate. However, if there are no eligibility criteria prescribed, such an interpretation would be manifestly unreasonable and contrary to s 12(1)'s indication that the Act should apply to sufferers of "serious personal injury". The respondent correctly accepts that s 12(1)(b) should be read as having application only if relevant eligibility criteria have been prescribed by regulation. The need to read words into the *NIIS Act* to give it a workable meaning and effect had a running theme in this application.

[19] Before leaving the topic of eligibility criteria it is convenient to dispense with a submission of the respondent based on the logic that the absence in the Regulation of eligibility criteria relevant to the statutory definition at paragraph (f) supports the view the definition's meaning is unambiguous and meant to be so simple as to require no elaboration. The submission apparently sought to avoid the Court's usual reluctance to use delegated legislation in aid of construction of an Act, discussed in Pearce and Geddes, *Statutory Interpretation in Australia*,[2] on the basis it is the absence, rather than presence of a relevant regulation from which an interpretive inference can be drawn. The respondent's submission must in any event fail because it assumes no potential interpretation of the definition other than the interpretation it contends for is of sufficient clarity to be applied without the need for eligibility criteria. As will be seen, the interpretation favoured by these

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2 (LexisNexis, 8th ed, 2014) 133–6 [3.41].

reasons below derives from the ordinary meaning of the text of the definition and is also of sufficiently simple meaning as to be applied without the need for eligibility criteria.

Mr Smith's injury

[20] Mr Smith's injury of present relevance is a brachial plexus injury**.** The brachial plexus is a network of nerves in the neck, passing under the clavicle and into the axilla (the armpit), originating in the fifth, sixth, seventh and eighth cervical and first two thoracic spinal nerves. It innervates the muscles and skin of the chest, shoulders and arms.[3] An injury to it evidently may cause a loss of movement and sense of touch in the arm.

[21] Mr Smith deposed below that his brachial plexus injury causes him significant disabilities and limitations. He deposed:

> "(a)I have no active movement or feeling in my right shoulder;
>
> (b) I have no active movement or feeling in my right upper arm;
>
> (c) I have no active movement or feeling in my right elbow;
>
> (d) My arm is like a dead weight and I have no control over it whatsoever, so I now wear a sling for the majority of the time and only remove my sling when I shower or lay down.
>
> (e) I have no power at all in the grip of my right hand and the sensation in my fingers of my right hand is significantly reduced.
>
> (f) My right arm is very achy and I experience shooting pains down my arm and hand randomly throughout the day
>
> (g) Due to having no movement or feeling in my right shoulder, upper arm and elbow, and reduced strength, function and coordination of my right hand, I cannot do any functional activities with my right arm, for example:
>
> (i) I cannot cut up any meats or vegetables or peel or grate food;
>
> (ii) I cannot wash my left arm or place shampoo in my left hand to wash my hair in the shower. I am now reliant on my wife to wash my left arm and hair (and dry it);
>
> (iii)I am unable to reach overhead to hang washing on the line;
>
> (iv) I cannot push a shopping trolley or lawn mower;
>
> (v) I cannot drive an unmodified car;
>
> (vi) I cannot perform the fine motor skills like fastening shirt buttons, zipping up the fly in my pants, or opening a jar; etc.
>
> (h) The dead weight of my right arm causes me to experience pain all the time.

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[3] Mosby's *Dictionary of Medicine, Nursing and Health Professionals* 3rd edition pp 239, 240.

(i) I often wake in the middle in the night when I want to roll over as I am required to physically move my right arm with me when I roll. This sleep disturbance causes me to feel tired during the day."[4]

[22] The other evidence of Mr Smith's injury before the internal review officer below was contained within a variety of medical records, notes and letters and a number of reports. The upshot of that evidence was that Mr Smith has a very severe brachial plexus injury, causing significant pain to the shoulder, arm and hand and leaving him unable to move or stabilise his right shoulder and arm. He does retain some capacity for movement of his thumb and wrist. However, the information before the internal review officer about what functional use that modest residual capacity for movement could be put to identified no functional capacity.

[23] The position was well summarised in the report of Stephen Hoey, Occupational Therapist, where he corrected an incorrect interpretation in some earlier records of the word "function". He opined:

> "Both have identified some limited movement and strength in the hand and wrist. That does not make a hand 'functional'. Function requires not only the ability to oppose the digits or make a fist (with strength), but also the stability of the upper limb to hold the hand in a position so that it can be 'functional'. Mr Smith has none of these essential criterion [sic] for 'reasonable function' of the right hand. He cannot stabilise the hand and arm. He cannot move the hand into 'functional' positions. He has gross sensory disturbance of the hand and upper limb (sensory feedback is a key aspect of a functional hand). He has substantial strength disturbance of the hand and wrist. He has a noteworthy pain experience grossly affecting the shoulder, arm and hand. Mr Smith does not have 'reasonable function' of the hand."[5]

[24] In summary, according to the evidence before the internal review officer, Mr Smith has been left with a right arm that is useless and painful. It might be thought that is an impairment which equates to having no arm. The internal review officer thought not, because of the retained modest capacity for movement in the hand and wrist.

The decision below

[25] The internal review officer reasoned that the key issue was whether Mr Smith's impairment was equivalent to a shoulder disarticulation amputation. Of the relevant definition of "serious personal injury" she reasoned:

> "4.6 Taking the words at their plain and ordinary meanings, I consider this to mean a person with a serious personal injury category (f) must have a permanent brachial plexus injury which results in loss or damage that is <u>equal in effect or function</u> to the separation of the entire arm from the

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4 Affidavit of Jamie Edward Smith, dated 19 June 2020, [12].

5 Affidavit of Jamie Edward Smith, dated 19 June 2020, Exs p 683 [27].

> shoulder joint with amputation of the entire arm."[6] (emphasis added)

[26] The meaning conveyed by the use of the word "effect" in this context is not entirely clear. The officer went on to note the medical evidence indicated there was some preserved hand function and movement and feeling in the wrist and some fingers. She did not note the so-called "preserved hand function" was, on the information before her, a capacity for movement as opposed to a capacity for functional movement, as Mr Hoey had explained (see the quote at [23] above).

[27] The internal review officer then reached the determinative passage of her reasoning:

> "4.11 On the basis of the evidence considered in the Internal Review, Mr Smith does not have an impairment equivalent of a shoulder disarticulation amputation.
>
> 4.12 Using the plain meaning of the words 'impairment' and 'equivalent to', a person who has experienced a qualifying category (f) serious personal injury must have a permanent brachial plexus injury which results in loss or damage that is equal in effect or function to the separation of the entire arm from the shoulder joint, with amputation of the entire arm. It follows that a person who had experienced a shoulder disarticulation amputation would not have any preserved movement/feeling in any part of their entire arm (including hand). Conversely, if there is preserved movement/feeling, it would be an illogical interpretation of the section for such an impairment to be considered equivalent to a shoulder disarticulation amputation."[7]

[28] It is clear from this passage that the assessment below drifted into a comparison of the differing bare effects of the brachial plexus injury with a shoulder disarticulation amputation, rather than of the impairment occasioned. As much is clear from the last quoted two sentences of the internal review officer. Her determinative consideration was that the effect of a shoulder disarticulation amputation is an absence of "movement/feeling" in any part of the arm including the hand, whereas the effect of Mr Smith's brachial plexus injury is that he retained some "movement/feeling" in his arm.

[29] The internal review officer did not consider whether the modest capacity for movement and feeling retained in Mr Smith's hand and wrist could fulfill any functional purpose, which, on the evidence, it could not. Had that occurred it would have brought focus to the extent of Mr Smith's impairment. What occurred was a comparison with a shoulder disarticulation amputation of the bare effect of the brachial plexus injury, not of the impairment resulting from it.

Consideration

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6 Affidavit of Jamie Edward Smith, dated 19 June 2020, Exs p 694.

7 Affidavit of Jamie Edward Smith, dated 19 June 2020, Exs p 695.

[30] It is well established that the task of statutory interpretation is text-based. So, for example, the High Court observed in *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd*:[8]

> "'This Court has stated on many occasions that the task of statutory construction must begin with consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and insofar as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

[31] Turning then to the text to be interpreted, the relevant definition of serious personal injury is:

> "a permanent injury to the brachial plexus resulting in an impairment equivalent to a shoulder disarticulation amputation".

For the reasons which follow, the meaning of that definition is readily ascertained from the ordinary meaning of the words used, considered in the context of their use.

[32] Before turning to that context is should be noted the words "impairment equivalent" in the definition are not defined by the Act and therefore carry their well-known ordinary meanings. Dictionary definitions of "impairment" include:

> "The act of impairing, or fact of being impaired; deterioration; injurious lessening or weakening."[9]

[33] Dictionary definitions of "equivalent" include:

> "equal in value, measure, force, effect, significance, etc."[10]

[34] Turning to the text of the definition more generally, it is noteworthy that the definition refers to impairment in the context of an injury to the human body, that is, to impairment of the human body. The definition invokes consideration of more than the bare physical effect of the injury. It requires consideration of the significance of that effect for the working or functioning of the arm. It is only by considering the injury's impact upon the arm's capacity to function as it should, that the nature of the impairment of the body can be ascertained and compared for equivalence with a shoulder disarticulation amputation.

[35] The definition speaks of two types of injury – a permanent injury to the brachial plexus and a shoulder disarticulation amputation. The nature of a brachial plexus injury was discussed above. As to a shoulder disarticulation amputation, "disarticulation" is the separation of a joint without cutting through a bone.[11] It follows that a shoulder disarticulation amputation would involve amputation of the

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8 (2012) 250 CLR 503, 519 (footnote omitted, brackets in original).
9 *Oxford English Dictionary* (2nd ed 1989) vol VII, 696.
10 *Macquarie Dictionary* (7th ed, 2017) vol I, 512.
11 *Mosby's Dictionary of Medicine, Nursing and Health Professionals* (3rd ed, 2014) 532.

entire arm at the skeletal junction (of the clavicle, scapula and humerus) where the arm attaches to the trunk of the body.

[36] Thus, it is obvious the definition speaks of two very different injuries. One involves an injured arm and the other involves the loss of an arm. In themselves they could never be equivalent. But the definition does not call for a comparison of the injuries. It calls for a comparison of impairment resulting from a brachial plexus injury with a shoulder disarticulation amputation.

[37] Such a comparison requires consideration of the form of equivalence that a shoulder disarticulation amputation might potentially have with the impairment resulting from a brachial plexus injury is present. The obvious potential form of equivalence thrown up by such consideration is the loss of functional use of the arm itself. Indeed, in the absence of expert evidence exposing another, it is the only apparent form of potential equivalence.

[38] I refer to loss of "functional" use of the arm itself because an arm may retain some minor physical capacity, yet that capacity may be so inconsequential in light of what has been lost that the arm serves no practical function. Such an arm is useless and the impairment occasioned is equivalent to having no arm at all.

[39] I also refer to loss of functional "use of the arm itself" because a functionally useless arm may retain uses for the body as a whole, deriving merely from the fact the otherwise useless arm remains attached to the body. For instance, such an arm may aid body balance or enhance the body's cosmetic appearance, advantages which are lost if the arm is amputated. If such retained inactive contributions of that kind were relevant to the definition's consideration of impairment equivalence, then such equivalence could never be achieved.

[40] The point is further illustrated by contrast with the observations of Button J in the New South Wales case of *Allianz Australia Insurance Ltd v Ridge*.[12] Button J there observed the capacity of an unmoving and unfeeling limb to aid balance and cosmetic appearance would preclude a conclusion of equivalence of impairment with an amputated arm. However, his Honour was interpreting a guideline made pursuant to the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW), which then spoke only of the impairment equivalent of amputation and did not narrow the focus by reference to the impairment resulting from a brachial plexus injury.[13] The presence of that focus in the Queensland definition means the legislature must have contemplated it was actually possible that there could from time to time be equivalence of the impairment resulting from a brachial plexus injury with shoulder disarticulation amputation. The definition thus requires focus upon the presence of the potential form of equivalence, not on the inevitable differences between the effect of the two injuries.

[41] In reasoning that the loss of functional use of the arm itself is the only apparent potential point of impairment equivalence, I am conscious that pain resulting in impairment may be a common feature of each form of injury. However, the extent of pain and consequential degree of impairment from a brachial plexus injury is a variable, which will change from case to case. On the other hand, the injury with

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12 (2018) 85 MVR 228, 231 [21].

13 New South Wales, *Government Gazette*, No 54, 25 May 2012, 2245.

which the consequential impairment is to be compared is a constant; it is not the subject of information which will change from case to case. This precludes a sensible comparison of pain impairment caused by a brachial plexus injury with a shoulder disarticulation amputation.

[42] The above analysis of what may be drawn as a matter of logic from the text of the definition exposes a flaw with the approach of the internal review officer. It considered the bare physical effect of the injury, viz retention of some capacity for movement and feeling. It did not consider the injury's impact upon the capacity of Mr Smith's body to function as it should, viz being left with an arm which is functionally useless notwithstanding its modest capacity for movement. The internal review officer erred by requiring a test of equivalence of bare physical effect, rather than the statutory definition's test of equivalence of impairment. This involved an error in the construction of the definition, constituting both an error of law and a consequential failure to take a relevant consideration into account, namely Mr Smith's loss of functional use of his arm. This provides grounds for interference by this court.[14]

[43] The respondent continued to submit before me that at least that part of the internal review officer's interpretation of the statutory definition was correct, no longer pressing a residual sense of feeling as relevant but arguing that the persistence of any capacity for movement meant the definition would not be met. It was submitted the equivalence impairment referred to by the definition was "no remnant function", by which, it was clarified, was meant, no remaining capacity for movement. The respondent's counsel maintained, when pressed with an example by me, that even if the only capacity for movement of the arm was the capacity to move the little finger, that would mean there was not impairment equivalence and the statutory definition has not been met.

[44] The respondent's submission is unsustainable. The nature of the respective physical effects of the two injuries under consideration - a shoulder disarticulation amputation and a brachial plexus injury - are intractably different because one effects the absence of something which is present in the other. If the statutory test required an equivalence of physical effect it is difficult to see how it could ever be met. Perhaps the respondent's interpretation explains why, on the evidence, only one applicant with a brachial plexus injury has ever made a successful application for eligibility for the Scheme in Queensland.

[45] It is presumably because the comparison called for by the statutory definition relates to different injuries that the definition focusses upon "impairment" equivalence rather than equivalence of physical effect. This is not to suggest the respective physical effects of the injuries are irrelevant. To the contrary, they will help inform a material consideration, namely the injury's impact upon the capacity of an applicant's arm to function as it should. The focus of the definition though is upon equivalence of impairment, not equivalence of bare physical effects. More particularly, as explained above, it calls for a consideration of whether the brachial plexus injury gives rise to the only apparent form of impairment such an injury can

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[14] *Judicial Review Act* ss 20(2), 23, 30. See *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 397 as to the inter-dependency of notions of meaning and construction resulting in a question of law.

potentially share with a shoulder disarticulation amputation - the deprivation of functional use of the arm itself.

[46] The parties each argued the different interpretations urged by them were confirmed by reference to the explanatory notes to the *National Injury Insurance Scheme (Queensland) Bill 2016*.[15] The notes explained, in respect of what was to become s 12 of the *NIIS Act*:

> "For example, it is proposed to expand the injury coverage to include people who sustain permanent brachial plexus injuries resulting in an impairment equivalent to multiple shoulder disarticulation amputations. Therefore, a person who sustains nerve damage resulting in a complete lack of mobility in their arms will qualify in this injury category when they may otherwise have been required to amputate their arms in order to gain access to the scheme."

[47] The respondent seized upon the second sentence of the above passage and its reference to "a complete lack of mobility in their arms" as meaning nothing less than complete immobility will suffice. The applicant seized upon the same sentence to argue that in medicine the word "arm" does not include the wrist or hand and on that interpretation the applicant's arm is immoveable. Each submission contorts the breadth of the apparently intended meaning of the sentence. The language used in the sentence was apparently couched in lay rather than medically precise terminology so that the reference to arms was unlikely to be meant as excluding the wrists and hands of the arm. As to the respondent's argument, the sentence was merely identifying a circumstance in which an applicant will qualify. It was not cast in exclusory terms, nor would I impute such an intent. It is implausible that by its words the legislature was representing it intended to deprive eligibility to a person whose arm is immobile save for a minor capacity for movement which is functionally useless. This would be contrary to the Legislature's desire, exposed by the explanatory note, that applicants like Mr Smith not have to amputate their useless arm in order to access the scheme.

[48] The above passage from the explanatory notes does at least tend to confirm that it is function, not bare effect, with which the definition is concerned. To that extent it tends to confirm, as I have found, that it is loss of functional use of the arm itself which the impairment referred to in the definition is concerned with.

[49] Finally, I record that the purpose of the Act, a relevant consideration pursuant to s 14A *Acts Interpretation Act 1954* (Qld), appears to be of neutral relevance here, in that none of the contended interpretations emerges as better than the other in achieving the Act's purpose. It will be recalled the Act's purpose is to ensure those who suffer particular serious personal injuries as a result of motor accidents receive necessary and reasonable, care and support. The respondent was at pains to submit that purpose does not work backwards to call for a beneficial approach to interpretation when determining the class of persons in need of care and support by reason of their injuries. I agree. To do so would be illogical, particularly in the context of a framework which includes the support of the relatively more broadly available assistance of the National Disability Insurance Scheme.

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[15] Recourse to such material to confirm the interpretation conveyed by the ordinary meaning of the provision is permitted by s 14B(1)(c) *Acts Interpretation Act 1954* (Qld).

Appropriate relief

[50] I have found the internal review officer's decision was the product of an erroneous interpretation of the definition, involving an error of law and a consequent failure to take a relevant consideration into account. It follows from this conclusion in the applicant's favour that the respondent's cross-application pursuant to s 48 *Judicial Review Act* to dismiss must fail.

[51] In light of my conclusions it is inevitable that I should quash the internal review officer's decision and refer Mr Smith's application for internal review back to the respondent for determination, with the decision-making period as defined by the *NIIS Act* commencing as if the application was received today. I will so order.

[52] Mr Smith's counsel submitted that in the event I interpreted the definition as I have it would mean that on the evidence before the internal review officer, she should have upheld the review and granted Mr Smith eligibility for the Scheme. It was in effect submitted my orders should now deliver that outcome by declaration and or direction, pursuant to the broad powers conferred by s 30 *Judicial Review Act*.

[53] It would not be appropriate to make a direction because a component of the decision to be made has not been litigated before me, namely whether or not the respondent should accept Mr Smith as a participant in the Scheme for the participation period or for the rest of his life. The evidence indicates his impairment is permanent but the significance of that to the form of acceptance was not explored.

[54] As to a declaration, Mr Smith's representatives were astute to the possibility that if the internal review officer was applying the correct interpretation, she may have made an information request pursuant to s 108 *NIIS Act*, perhaps to double-check that Mr Smith's modest capacity for movement in the hand and wrist was of no functional use. The likelihood of possible interest in such further information was marginal, since, on the information already provided, it was apparent that Mr Smith's arm was functionally useless to him. In any event, to address that possibility a supplementary report from Mr Hoey was exhibited before me.[16] The report confirms Mr Smith's "arm is completely non-functional".

[55] In my respectful view the information presently available to the respondent, including the supplementary report of Mr Hoey exhibited in these proceedings, is likely sufficient for a decision-maker acting reasonably to reach a properly informed decision. That information appears to compel the conclusion that Mr Smith's brachial plexus injury meets the definition of "serious personal injury" in the *NIIS Act*. I have contemplated making a declaration of fact to that effect but decline to do so for two reasons.

[56] Firstly, a declaration should serve a purpose.[17] A declaration of fact is of doubtful utility here, beyond that already achieved by this judgment in ensuring the respondent applies the correct test to Mr Smith's circumstance. Secondly, a court should take care not to make a declaration which would have the effect of deciding a question pending before a decision maker whose information gathering in respect

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16 Affidavit of Tanya Straguszi, dated 6 July 2020, Ex TS2.

17 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–2.

of the question may be incomplete.[18] To the extent a declaration's additional utility would be to oblige the respondent to forthwith accept Mr Smith as a Scheme participant, that would fetter the discretion vested in the statutory decision maker pursuant to s 108 to request information. There may be matters beyond those litigated before me which inform that discretion.

[57] It will be necessary to hear the parties as to costs if costs are not agreed.

Orders

[58] My orders are:

1. The respondent's application to dismiss the application pursuant to s 48 *Judicial Review Act* is dismissed.

2. The decision of the respondent's internal review officer of 26 May 2020 on the applicant's application for an internal review is quashed.

3. The applicant's application for internal review is referred back to the respondent for determination, with the decision-making period as defined by the *National Injury Insurance Scheme (Queensland) Act* commencing as if the application was received today.

4. The parties will be heard as to costs, if costs are not agreed in the meantime, at 9.15 a.m. 7 October 2020 (out of town parties having to leave to appear by telephone or audio-visual link).

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18 *Masters v Garcia* (2005) 65 NSWLR 92, 115–7.