

WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

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

Matter Number: 2625/20
Applicant: Maria Ann Niven
Respondent: A J Niven Gooloogong Buses
Date of Determination: 5 February 2021
Date of Amendment: 17 February 2021
Citation No: [2021] NSWCC 41

1. The matter is remitted to the Registrar for referral to an Approved Medical Specialist to assess the degree of permanent impairment, if any, of the right upper extremity, left lower extremity, the right lower extremity and scarring (TEMSKI) as a result of injury on 5 November 2013.
2. The documents to be forwarded to the Approved Medical Specialist are the following documents which were admitted by consent:
 - (a) The Application to Resolve a Dispute and all documents attached;
 - (b) The late documents filed by the applicant being a further statement of the applicant dated 2 October 2020 and a further report of Dr Mellick dated 17 September 2020;
 - (c) The Reply and all documents attached, and
 - (d) The late report of Dr O'Sullivan dated 26 June 2020.

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

Jane Peacock
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 JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. By Application to Resolve a Dispute (the Application), Ms Marie Niven (the applicant), seeks compensation under the *Workers Compensation Act 1987* (the 1987 Act) in respect of lump sum compensation, weekly compensation and compensation for medical expenses as a result of injuries suffered in a motor vehicle accident on 5 November 2013. On 5 November 2013 the applicant was injured when the bus she was driving was involved in a single vehicle accident. The applicant suffered injuries to her right and left upper extremities, her right lower extremity and scarring. The applicant was the sole occupant of the bus.
2. The respondent is Allen James Niven (the respondent). Allianz Australia Workers Compensation (NW) Limited is the relevant insurer for the purposes of workers compensation.
3. The respondent denied liability for the claim.

ISSUES IN DISPUTE

4. There is no dispute that on 5 November 2013 the applicant suffered injury to her right upper extremity, left lower extremity, right lower extremity and scarring when the bus she was driving crashed in a single vehicle incident.
5. The applicant seeks lump sum compensation, compensation for weekly benefits and medical expenses as a result of the injuries she has suffered.
6. The respondent disputes liability for the applicant's compensation claims on the basis of their allegation that the applicant suffered a stroke or stroke like event or transient ischemic attack (TIA) prior to crashing the bus and which caused her to crash the bus and hence caused her injuries. The respondent says this precludes the applicant from recovery of compensation by reason of the provisions of section 9B of the 1987 Act which provides that:

“no compensation is payable under this Act in respect of an injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature.”
7. The applicant denies that she suffered a stroke which caused her to crash the bus.
8. In the event that the applicant is successful on liability the respondent consents to the matter being remitted to the Registrar for referral to an Approved Medical Specialist (AMS) to assess the degree of permanent impairment, if any, of the right upper extremity, the left lower extremity, the right lower extremity and scarring (TEMSKI) as a result of injury on 5 November 2013.
9. Once the medical assessment certificate (MAC) is issued, the parties agree that the matter would be relisted for a telephone conference in respect of the claim for compensation for weekly benefits and medical expenses.

PROCEDURE BEFORE THE COMMISSION

10. This matter was formerly listed for a conciliation/arbitration before arbitrator Batchelor to take place by way of audio-visual link (AVL). The matter apparently did not proceed due to technical difficulties with the video conference platform.
11. The applicant applied to the President for leave to have her matter heard in a face to face conference. This application was declined by the Present and he directed the matter be relisted for conciliation/arbitration to take place by way of AVL.
12. The parties attended a conciliation arbitration by AVL (Modron platform) on 4 December 2020. The parties were both legally represented by counsel. The applicant was represented by Mr Trainor of counsel and the respondent was represented by Ms Goodman of counsel.
13. Unfortunately, there were again technical problems with the applicant's counsel Mr Trainor's ability to participate on the video. A work-around was employed with the consent of all parties whereby he was linked up by telephone. All parties consented to the matter proceeding on this basis.
14. Conciliation took place however the parties were unable to come to a resolution of the matter. 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 have 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 entire dispute.
15. It is noted that both counsel made oral submissions at the arbitration and as well-made written submission and the submissions of both parties, both oral and written, have been taken into careful account.

EVIDENCE

Documentary evidence

16. The following documents filed on behalf of each party were admitted into evidence before the Commission by consent and taken into account in making this determination:

For the applicant:

- (a) The Application and all documents attached.
- (b) The late documents being a further statement of the applicant dated 2 October 2020 and a further report of Dr Mellick dated 17 September 2020.

For the respondent:

- (a) The Reply and all documents attached.
- (b) A late report of Dr O'Sullivan dated 26 June 2020.

Oral evidence

17. The applicant did not seek leave to adduce further oral evidence.
18. The respondent's counsel sought leave to cross-examine the applicant which was consented to by the applicant and leave was granted. The applicant gave evidence under oath.

FINDINGS AND REASONS

19. The applicant was a school bus driver employed by the respondent. On 5 November 2013, she was injured when the bus she was driving was involved in a single vehicle accident. Mercifully, there were no children on board.
20. The applicant was trapped in the bus, attended by police and paramedics, airlifted and flown by helicopter to Westmead hospital where she was admitted and later that night operated upon.
21. The applicant suffered undisputed injuries to her right upper extremity, left lower extremity and right lower extremity and scarring.
22. The applicant claims lump sum compensation, compensation for weekly benefits and medical expenses as a result of her injuries.
23. However, the respondent says the applicant cannot recover compensation under the 1987 Act. The respondent alleges that the applicant suffered a stroke or stroke like event or TIA prior to the accident which caused the accident. On this basis the respondent submits that the applicant is precluded from the recovery of compensation by reason of the provisions of section (B of the 1987 Act which provides that no compensation is payable in respect of an injury caused by a stroke.
24. The applicant denies the allegation of the respondent. The applicant denies that she suffered a stroke prior to crashing the bus on 5 November 2013 and which caused the crash. The applicant concedes that she did indeed suffer a stroke two days later on 7 November 2013 in Westmead hospital where she was being treated for her injuries, having undergone surgery on the night of 5 November 2013.
25. I must make a determination in this matter on the evidence and in accordance with the law.
26. The relevant legislative provisions are section 9, 9A and 9B of the 1987 Act which provide as follows:

“9 Liability of employers for injuries received by workers—general

(cf former s 7 (1) (a))

(1) A worker who has received an injury (and, in the case of the death of the worker, his or her dependants) shall receive compensation from the worker’s employer in accordance with this Act.

(2) Compensation is payable whether the injury was received by the worker at or away from the worker’s place of employment.

9A No compensation payable unless employment substantial contributing factor to injury

(1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.

[Note: In the case of a disease injury, the worker’s employment must be the main contributing factor. See section 4.]

(2) The following are examples of matters to be taken into account for the purposes of determining whether a worker's employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination)—

- (a) the time and place of the injury,
- (b) the nature of the work performed and the particular tasks of that work,
- (c) the duration of the employment,
- (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
- (e) the worker's state of health before the injury and the existence of any hereditary risks,
- (f) the worker's lifestyle and his or her activities outside the workplace.

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following—

- (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
- (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.

(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies.

9B No compensation for heart attack or stroke unless nature of employment results in significantly greater risk

(1) No compensation is payable under this Act in respect of an injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature.

(2) In this section—

"heart attack injury" means an injury to the heart, or any blood vessel supplying or associated with the heart, that consists of, is caused by, results in or is associated with—

- (a) any heart attack, or
- (b) any myocardial infarction, or

- (c) any myocardial ischaemia, or
- (d) any angina, whether unstable or otherwise, or
- (e) any fibrillation, whether atrial or ventricular or otherwise, or
- (f) any arrhythmia of the heart, or
- (g) any tachycardia, whether ventricular, supra ventricular or otherwise, or
- (h) any harm or damage to such a blood vessel or to any associated plaque, or
- (i) any impairment, disturbance or alteration of blood, or blood circulation, within such a blood vessel, or
- (j) any occlusion of such a blood vessel, whether the occlusion is total or partial, or
- (k) any rupture of such a blood vessel, including any rupture of an aneurism of such a blood vessel, or
- (l) any haemorrhage from such a blood vessel, or
- (m) any aortic dissection, or
- (n) any consequential physical harm or damage, including harm or damage to the brain, or
- (o) any consequential mental harm or damage.

"stroke injury" means an injury to the brain, or any of the blood vessels supplying or associated with the brain, that consists of, is caused by, results in or is associated with—

- (a) any stroke, or
- (b) any cerebral infarction, or
- (c) any cerebral ischaemia, or
- (d) any rupture of such a blood vessel, including any rupture of an aneurism of such a blood vessel, or
- (e) any subarachnoid haemorrhage, or
- (f) any haemorrhage from such a blood vessel, or

(g) any harm or damage to such a blood vessel or to any associated plaque, or

(h) any impairment, disturbance or alteration of blood, or blood circulation, within such a blood vessel, or

(i) any occlusion of such a blood vessel, whether the occlusion is total or partial, or

(j) any consequential physical harm or damage, including neurological harm or damage, or

(k) any consequential mental harm or damage.”

27. Turning now to an examination of the evidence in this case.

28. The applicant gave evidence in three statements dated 30 June 2014, 1 May 2020 and 2 October 2020 respectively.

29. The applicant was cross-examined.

30. The applicant gave evidence in her first statement dated 30 June 2014 that she does the school bus run. She does one run in the morning and one in the afternoon. The afternoon run commences at 2.45pm.

31. She gave evidence that on 5 November 2013 she was driving the bus in a westerly direction along Lachlan Valley Way. The bus was empty as she had dropped all the children off. The depot is at 1 Grey street Gooloogong. She remembers leaving the depot and heading to the school. She says she can't remember picking the children up or dropping them off. She says:

“I can remember thinking that the bus was rolling and I tried to straighten the bus up and I hit some loose dirt on the left hand side of the road and hit a tree.”

32. She goes on:

“I was trapped in the driver's seat. Joanne Clarke who is an emergency nurse and she stopped and came to my assistance and she called 000. Gooloogong Police and Cowra Ambulance attended the accident scene and I was removed from the bus with the assistance of Cowra rescue and I was conveyed by helicopter to Westmead hospital.”

33. The applicant was operated on later that night. She stayed in hospital for 99 days. She required a number of operations.

34. The applicant provided a further statement of 1 May 2020 in which she gave further evidence as follows:

“4 I am given to understand that Allianz alleges that I suffered a stroke immediately prior to the subject accident which caused me to lose control of the bus, resulting in hitting the tree. In relation to this, I disagree that this is so for the following reasons:

4.1. I do not recall hitting my head at any time immediately before the collision, nor while the bus was going down the embankment after I lost control in the gravel.

4.2 Following the accident. I spoke with various witnesses, including the nurse Joanne Clarke (nee Davies). While talking to Joanne, I had no problems communicating along with those persons and apart from the terrible pain from my arms and legs, I was unaware of any other physical problem. Certainly, at that time I did not have any problems with my vision.

4.2 [sic] I recall that while I was still at the crash scene, I was fully aware, and there was no problems with my vision. While I was at the scene, the first response unit (FRU) from Gooloogo came to assist and gave me something known to me as a "green Whistle" to relieve the pain. (I know this as a green whistle from my previous time working for the FRU. The green whistle and the contents of the green whistle (Methoxyflurane) is used on conscious patients by a trained professional for pain relief) I recall speaking to members of the FRU before I was given the green Whistle. After I was given the green whistle, my memory is no clear until sometime later, by which time I had been admitted to hospital in Sydney.

4.3 A few days after the accident, I remember having a conversation with the hospital staff to the following effect:

The hospital staff said: you have gone blind.

I said.

'well, if that is all that has happened to me then I have done well.'

4.3 I did not have a loss of vision prior to the accident or at the time that I recall speaking to other immediately after the accident occurred. On that basis, it is my view that any stroke I had occurred after the accident."

35. The applicant gave further evidence in a further statement dated 2 October 2020 as follows:

"4. The bus run that I had been driving for 10 months February 2013 was a very regular run and necessitated the dropping off of up to 16 children between the time that I left the school and the time that I returned to my home. I have no independent recollection of dropping off any particular child that day as there was no reason to remember a particular drop off of a student. I also do not remember any loss of vision prior to the accident.

5. I am given to understand that Dr O'Sullivan places considerable weight on the fact that the statement dated 30 June 2014 I said words to the effect that I had no recollection of the fifty-minute period immediately prior to the accident. This is not correct; in that I have some recollections of the trip. I recall leaving the depot at about 3pm to take the children home. As noted in the first of Dr OSullivan's reports, I do recall traveling on Kangaroo Road, Waterview Lane and the Cowra road.

6. At the time of my statement of 30 June 2014 I was on heavy medication including panadeine forte which may have impacted on my recollection of events at the time."

36. The applicant was cross-examined about her evidence and gave evidence under cross-examination as follows:

"Ms Goodman: Q: Ms Niven or Mrs Niven, sorry, on – you remember going and seeing Dr O'Sullivan?

A. Yes.

Q. And he's a neurologist?

A. Yes.

Q. Okay. And I think, in fact, you saw him on 27 June 2018 in Sydney?

A. Yes.

Q. Yes. Okay. So, Mrs Niven, do you remember that the doctor asked you to give him – to tell him what actually happened on the day?

A. Yes.

Q. And can you remember that you told him that you recall getting into the bus around 3.00pm, this was to go and pick up the children?

A. Yes.

Q. Yes. And you picked up the children from school?

A. Yes.

Q. And you drove up to Kangaroo Street, about 14 kilometres?

A. Yes.

Q. And that at that point you had to drop off a child?

A. Yes.

Q. But you could not specifically remember dropping him off on the day?

A. That's true, yes.

Q. Yes. And then you continued and you drove back down the road to Waterview Lane?

A. Yes. Yes. No, I don't remember that.

Q. Don't remember that. Okay. And then back onto Power Road?

A. I don't remember.

Q. Okay. That is, you don't remember doing that on the day?

A. That's true.

Q. Okay. And you cannot, in fact, recall dropping the rest?

A. That's true.

Q. Okay. You then drove back to Gooloogong?

A. Yes.

Q. And do you remember going over the Kangarooobie Creek?

A. Yes.

Q. That was about one kilometre from Gooloogong?

A. Yes.

Q. And then you were on the Lachlan Valley Way?

A. Yes.

Q. You remember that?

A. Yes.

Q. And the next thing that you remember or at least this is what you told Dr O'Sullivan, was that you felt that the bus - - -

MR TRAINOR: I object to this. I object to it on the basis that there are two propositions in there. The one proposition is this is what you told Dr Sullivan and the other proposition was this is what you remember. It's of some distinction but the witness needs to know is she being asked what she remembers or is she being asked what she told Dr O'Sullivan?

MS GOODMAN: I withdraw the question, Arbitrator. Would you just allow me a moment?

Q. Thank you. Mrs Niven, do you remember saying to Dr O'Sullivan that the next thing that you recall was a feeling as if the bus was rolling?

A. Yes.

Q. Yes. And is that how you felt, can you remember that now?

A. It felt like I was losing control of the bus, yes.

Q. And then you took some evasive action?

A. Yes.

Q. As a result of which the bus went down an embankment and hit a tree?

A. Yes.

Q. Yes."

37. The evidence shows that Ms Joanne Davies (Clarke), a nurse, was the first person to arrive at the scene. She did not see the accident but arrived shortly after and called triple 000 before attending to the applicant. Ms Davies gave evidence in a signed letter dated 18 September 2015. There was no objection to the form of the evidence and it was admitted by consent.
38. Ms Davies gave evidence that she was the first person to arrive at the scene. She says:
- “I would like to acknowledge that when I arrived at the single vehicle accident on Lachlan Valley Way, at approx. 3.45pm to 3,50pm I stopped my vehicle some 20-30 meters on the side of the road, in front of the bus. As I got out of the vehicle, I observed that MRS Niven was sitting upright in the driver’s seat. Before I could say anything, Mrs Niven was calling my name and clearly voicing instructions. Identifying that her leg was stuck and she could not turn the vehicles engine off. The engine was still going but her voice was loud and clear, able to be heard above this, she also instructed me to call emergency services. I remained near my vehicle, whilst I called emergency set vies, as I was aware that mobile reception could be lost if I went over near the vehicle. I called 000 twice due to line drop out. Whilst I was on the phone, I also alerted two other vehicles driving past to stop. After the emergency call was alerted I proceded over to the bus and commenced first aid.”
39. Ms Davies goes onto describe what she found when she got down to the bus:
- “Mrs Niven was trapped in the driver side of the vehicle with her right leg. She was conscious and alert and able to converse with us. She expressed concern for her leg being trapped and that shew was in pain, she also had a noticeable injury to her right lower arm. That required a bandage to be applied. Her left leg and arm were able to be moved, independently by her. Whilst waiting for emergency services to arrive. Mrs Niven was clearly able to describe to us her thoughts and actions that had occurred after she left the side of the road with the bus.”
40. Ms Davies went on to give evidence of her long experience as a nurse noting she has been “working as a registered nurse for 25 years, both in Sydney and in rural locations, I had worked for 5 years in the emergency department in Cowra hospital, having been FLECC (first line emergency care course) certified.
41. She gives her opinion “whilst I cannot identify the reason that this accident had occurred I can clearly express that it is my professional opinion that Mrs Niven did not have a stroke at the time of leaving the road.”
42. The latter opinion is of little weight, the most that Ms Davies can say is that, with the benefit of her professional experience, the applicant was not presenting as someone who had just had a stroke. But what is important about Ms Davies evidence is that she was the first on the scene and very quickly so. Her evidence is important because it attests to the conscious state of the applicant and her state of alertness and her ability to see. She is in fact able to immediately recognise Ms Davies from afar as Ms Davies stayed up on the road (the bus was down the embankment) some 20 -30 metres in front of the bus so that mobile reception could be maintained to call 000. Even then the line dropped out and she had to call back (verified by the COPS entry). The applicant was alert to the point of giving instructions, her voice could be heard over the still running engine which was loud. When Ms Davies went down to the applicant, she was conscious and able to give instructions and identify where she was hurt. This evidence becomes very important when weighing, in the balance, the competing expert medical opinions about whether the applicant suffered a stroke prior to the crash.

43. Another witness who attended the scene was Ms Sue Gavin, a member of the SES response team, who also gives evidence in the form of a signed letter. Consistent with the evidence of Ms Davies, the evidence of Ms Gavin is that the applicant was conscious, alert, not showing signs of confusion and was in fact giving instructions to Ms Gavin about getting Ms Gavin's husband to contact the applicant's husband. Ms Gavin says:

"I arrived at the site of Maria Nivens accident at about approximately 3.52pm on Tuesday the 5th November 2013.

I am a member of the Gooloogong SES response team. I spoke to Maria and she asked me to send my husband Rodney to go and get her husband Allan to go and pick up the rest of the children on then other bus run, Maris right leg was pinned, and she was worried about blood clots because of the lack of circulation, maria spoke to me very clearly and did not show any signs of confusion."

44. Consistent with the evidence of Ms Davies and Ms Gavin, another witness Mr Watson, captain of the volunteer fire brigade gave evidence about the applicant being alert and coherent at the accident scene. Mr Alan Watson also gives evidence in the form of a signed letter dated 23 July 2019 as follows:

"On Tuesday 5 November 2013 I attended a motor vehicle accident at approximately 4pm, I am a volunteer of the local brigade and was the captain of the brigade at that time and was notified by fire control to attend.

It was a bus crash just outside Gooloogong on the Cowra road, and the driver was Marie Niven.

The doors of the bus were already open, and I entered the bus and observed two nursing staff (i.e. Jo Clark and Vera Read) were already attending and Sue Gavin, a SES memener. I sat beside Maria and spoke to her, I said'don't worry – well have you out of here soon."

Maria was in a lot of pain, but she was very alert and coherent. the paramedic team retried Maria from the bus and I helped escort Maria to the helicopter."

45. The evidence of the three witnesses above is all consistent. They arrived on the scene early and all of them attest to the applicant's alertness and coherence. From their evidence the applicant was clearly able to see.
46. The police attended the scene. The entry in COPS dated 5 November 2013 by Senior Constable Tydd who notes:

"It is evident Niven has driven the bus over the top of a guidepost before it went down the embankment where it travelled about another 100 metres along the level grassed table drain before colliding head on with a large tree. Niven was trapped in the vehicle by her legs."

47. The COPS narrative notes that Ms Clarke (Davies) was on the scene moments later and she called triple 000.

48. The COPS narrative goes on:

"police were soon to arrive on scene and requested further emergency services, namely ambulance and rescue. Local ambulance inspector arrived and co-ordinated the rescue. The author spoke to the driver while she was trapped in the vehicle and she stated that she 'just hit the gravel and could not control it'."

49. That is, the contemporaneous history given by the applicant to the attending police officer was that she hit the gravel and could not control the bus.

50. The applicant was airlifted to Westmead Hospital. The clinical notes from Westmead Hospital are in evidence and I have carefully reviewed them. On admission she was administered the GLASGOW COMA test and she scored 15. Her vision was tested and she was equally reactive in both pupils.
51. She was not diagnosed on admission as having a stroke or stroke like event and in fact was clearly deemed well enough to be operated on because she underwent surgery in respect of her orthopaedic injuries that night.
52. On admission, it is noted that there had been no loss of consciousness.
53. Her neurological exam is noted as alert and pupils are examined and are reported as reactive to light bilaterally. These neurological observations are repeated prior to surgery and during recovery on 6 November 2013.
54. There are no vision problems recorded until 7 November 2013 when the applicant reports that she can't see "today".
55. The nurses progress note at 19.10pm (7.10pm) on 5 November 2013 records a history given of "lost control on gravel hitting tree" with no loss of consciousness.
56. Repeated examination record that the applicant is conscious and pupils equally reactive.
57. Face and head are examined with "NAD" (no abnormality detected).
58. At 8.30pm that night, the notes record that the applicant is transferred to theatre for operation on her leg.
59. The next day, on 6 November 2013, examination by nursing recovery notes pupils are equal and reactive to light 3mm.
60. On 6 November 2013 at 9am, Dr Lye confirmed that CT head was cleared and "neuro obs" (neurological observations) were ceased.
61. On 6 November 2013 at 1.30pm, the applicant was examined by Dr Rogers RMO. His notes record:

"6 11 13 1330 Rogers EOC RMO:

CTB showing old L temporo-parietal infarct, r sided subgaleal haematoma and no acute intracranial pathology.
Note history of CVA but no convincing history of CVA leading to crash"
62. In other words, the findings on the CT relate to a past event referred to as an "old L temporo-parietal infarct."
63. The RMO notes that there is "no convincing history of CVA leading to crash". CVA means a cerebrovascular accident which is the medical term for a stroke.
64. The RMO Dr Rogers goes onto note the history from the applicant that she did not lose consciousness before or after the accident and has a full recollection of events. Dr Rogers records as follows:

"currently drowsy but in pain in both LL bilaterally- full recollection of events- no LOC [loss of consciousness], took corner too wide, ran onto gravel, felt would "flip bus" it swerved, ran into tree."

65. That is, the day after the accident and after having been operated on, the applicant is maintaining a consistent version of events.
66. The Plan is noted by Dr Rogers to include:

“MRI brain
Monitor metabolic acidosis with serial ABGs for resolution – if no resolution
sign of ongoing ischaemia.”
67. The MRI did not take place until 7 November 2013, after which time the applicant had in fact had a stroke on 7 November 2013.
68. Observations are recorded on 7 November 2013 at 7am.
69. Later that day the patient is noted to be alert, but reports vision loss “today” contrasted to yesterday: “unable to see things today”.
70. Current issues are then noted to include vision loss. On careful review of the records, this is the first report of vision loss and contrasts with all prior recorded observations of the applicant wherein the reactivity of her pupils was repeatedly tested and recorded as being equal and reactive.
71. At 12pm, it again noted “pt reports she cant see today”.
72. At 5.10pm on 7 November 2013, there is a record of a neurology consult and reference is made to Dr Mohart. A history is recorded: driving bus – on to some gravel – did not want to flip bus- drove into tree.
Denies weakness, numbness, vision disturbance, dizziness prior to crash”.
73. Again, contemporaneous to the accident and whilst in hospital recovering from surgery, the applicant is consistently denying that she had any weakness, numbness, vision disturbance, dizziness prior to the crash.
74. Doctor Mohart seems to consider “likely cardiac embolic event -likely percipient for MVA”
75. In fact, the doctor’s treating the applicant at Westmead never come to a definitive conclusion on this issue to the extent her transfer notes in the Westmead Transfer letter to Orange Base Hospital for rehabilitation contain a question-mark as follows:
“Embolic stroke bilateral posterior circulation
?cardioembolic precipitating accident”
76. That is, when the applicant is discharged from Westmead Hospital some months later there is still a question mark in the treating opinion as to whether the applicant had a stroke or stroke like event which precipitated the motor vehicle accident.
77. Turning then to an examination of the competing IME opinions.
78. The applicant relies on the opinion of Dr Ross Mellick consultant neurologist. He is the IME qualified on behalf of the applicant.
79. He has provided three reports, namely 1 January 2019, 7 April 2020 and 17 September 2020.
80. Dr Mellick saw the applicant on 4 December 2018 and provided a report dated 11 January 2019.

81. Dr Mellick records a history:

“Ms Niven told me that she can recall events associated with the accident and can remember being aware if the bus beginning to roll and because she felt it was about to tip over, she tried to straighten it by steering to the left. The bus passed over a bump and came to rest following a collision with a tree. She can recall events sequentially and remembers trying to stand up and get out of the vehicle. She he was unable to do that because her leg was jammed and it was in contact with hot metal as the bus engine was apparently still running. She informed me that the accident occurred near to a small town with a population of about 200 people and that she immediately recognised the people that came to her assistance after the impact with the tree and could remember all their names.”

82. Dr Mellick then detailed his review of the clinical records from Westmead Hospital.

83. Dr Mellick notes that the history provided to him by the applicant “clearly located the onset of neurological symptoms to be on 7 November 2013 hen she was suddenly unable to see. She reported no similar symptoms in temporal relationship to the motor vehicle accident two days previously.”

84. Dr Mellick reviewed the CT and MRI.

85. Dr Mellick had regard to the opinion of the IME qualified on behalf of the report of Dr O’Sullivan as contained in his report dated 4 Jul 2018.

86. Dr Mellick goes on to opine as follow:

“the information I have obtained from Ms Niven does not draw attention to any history establishing an infarct or other cerebral event to have been the cause of the motor vehicle accident. The information in the Westhead Hospital’s notes, whilst being somewhat inadequate, nevertheless establishes evidence of an infarct on 7 November in keeping with the patient’s history and further supported by MRI evidence radiologically.

It is also noted that the MRI evidence is consonant with the history given by Ms Niven regarding impairment of vision. Impairment of vision would not be expected to be the primary consequence of bilateral MCA infarcts, as identified in the non-contrast CT referred to above. However, if the infarcts arose because of embolism, emboli may have also entered the vertebral circulation and resulted in transient visual loss. It is also possible that dynamic factors may have contributed to the neurological symptom recorded, in which case involvement of vascular territories other than the cerebral artery territories might also have transiently occurred for that reason. On the basis of the evidence available to me, I would interpret the information to indicate that the infarcts occurred at Westmead Hospital on & November 2013, perhaps in association with an acute fall in Ms Niven’s haemoglobin arising as a result of the trauma and the bleeding recorded. Also, perhaps embolic causes may have been responsible.”

87. The applicant’s solicitors wrote to Dr Mellick on 22 January 2002 providing him with further documents. Dr Mellick provided a further report dated 7 April 2020. He writes as follows:

“Thankyou for your letter of 22 January 2002 and for a considerable number of documents.
An ambulance officer’s report dated 5 November 2013 provides legible detail of Ms Niven’s clinical condition when assessed at 1605 hours.

The information which you have sent with regard to Nurse Joanne Davies' observations at the scene of the accident and the testimony by Senior Constable Tydd are internally supportive and are in keeping with the details of the accident that I recorded in my report of 11 January 2019.

I have documents from the Westmead Hospital written at 1915 hours on the day of injury and the information is further expanded by an ICU note at 1930 hours. I also note in the Westmead Hospital notes handwritten comments carrying the date 7 November 2013 when reference is made to bilateral visual loss and that the visual loss had not been present on the previous day. An additional handwritten note made at 1200 on 7 November 2013 again reports that Ms Niven had visual problems, "patient reports she can't see today..."

88. Dr Mellick opines:

"This additional information supplements information in my previous report and clearly indicates that the stroke had not occurred before the injury and was not the cause of the injury."

89. Based on the evidence before him Dr Mellick opines:

"It is more likely than not that the stroke occurred after the motor vehicle accident on 5 November 2013."

90. Dr Mellick provided a further report dated 17 September 2020. He has been provided with the report of Dr O'Sullivan dated 26 June 2020.

91. Dr Mellick notes that Dr O'Sullivan had opined that the applicant had a TIA prior to the accident which affected her visual ability and then became aware of the vehicle rolling and recovered her vision and while in hospital recovering from the orthopaedic injuries she may not been aware of her visual loss until 7 November. He notes that Dr O'Sullivan had concluded on this basis:

"Therefore, I consider the cerebral event would have occurred just prior to the accident and the infarct would have continued to develop over time between the event on date of admission i.e., 5 November and 7 November."

92. Dr Mellick refutes the opinion of Dr O'Sullivan by referring to the history given to him by the applicant that "clearly located the onset of neurological symptoms to be on 7 November 2013 when she said she was suddenly unable to see. She reported no similar symptoms in temporal relationship to the motor accident two days previously."

93. Dr Mellick goes on to point out:

"One of the hallmarks of stroke is the sudden nature of the onset. The word "suddenly" used in my report was the word used by Ms Niven and is a classical description of the onset of a cerebral infarct. It is therefore entirely in keeping with that interpretation of the history and MRI scan done on the day the infarcts were identified also conformed the interpretation of the history I received from her."

94. Dr Mellick notes that the onset of the visual disorder is on the day on which the MRI scans identified the cause for that visual disorder and that the history draws attention to no symptoms of visual disorder, nor any other neurological deficit prior to 7 November 2013.

95. Dr Mellick notes that Dr Sullivan "provides the suggestion that a transient ischaemic event occurred which affected her visual ability, causing the accident but unnoticed by the patient and persisted without her being aware of it; more so, "continued to develop" for two days without her being aware of any abnormalities and for the clinical notes not identifying anything to suggest a stroke in evolution.

96. Dr Mellick says:

“I respectfully suggest that the history provided by Ms Niven provides no adequate basis for such a hypothesis.”

97. Dr Mellick goes onto to refer to the importance of the eyewitness accounts. He refers to:

“...an eyewitness account from MS Joanna Davies, registered nurse with 25 years of experience, including 5 years in the emergency department of Cowra hospital. Ms Davies was apparently attending Ms Niven at the site of the crash, who was trapped in the bus for a period. Nurse Davies spoke to Ms Niven who recognised Ms Davies, called her by name and was able to speak. I quote from the letter, “voicing instructions including instructions to call emergency services, clearly able to describe her thoughts and actions that had occurred prior to the bus leaving the road, was conscious alert and able to converse.”

98. Dr Mellick notes the Glasgow Coma Score of 15/15 on 5 November 2013.

99. Dr Mellick goes onto to say:

“The information regarding the conversation between Ms Niven and Registered Nurse Davies and Senior Constable Tydd provide support for the history given to me by the patient and provide no support for the proposal that the stroke occurred prior to the injury, was the cause of the injury and developed additionally over the next two days without awareness of the patient or any of the medical staff until loss of vision was reported by Ms Niven. I think it is highly unlikely that there was a stroke in evolution for two days prior to the patient’s history to me that on 7 November she suddenly developed loss of vision.”

100. The respondent qualified Dr O’Sullivan neurologist. Dr O’Sullivan provided two reports dated 4 July 2018 and 26 June 2020, respectively.

101. Dr O’Sullivan first saw the applicant on 27 June 2018 and provided a report dated 4 July 2018.

102. Dr O’Sullivan took a history from the applicant as follows:

“She was driving a school bus, namely a Toyota Coaster, which had 20 seats. The bus was empty. As I mentioned in my previous report, Ms Niven told me that she recalled getting into the bus at around 3.00pm. She picked up the children from school and then drove up to Kangaroo Road for some 14km. She dropped off one of the children but could not recall dropping him off. She then drove the bus back down that road to Waterview Lane. She then drove back onto Cowra Road, but was unable to recall driving in that area, nor could she recall dropping off the remaining children. She then drove back to Gooloogong over the Kangaroo Creek, which was 1km from Gooloogong. She was on the Lachlan Valley Way when the vehicle rolled over.

The next thing Ms Niven recalled was a feeling as if the bus was rolling. She realised suddenly that she could not get the bus to turn to the right because of oncoming traffic, so she turned left, went onto the gravel and down an embankment and lost control of the steering wheel. She then hit a tree on the driver’s side.”

103. Dr O’Sullivan is asked a series of questions which he answers as follows:

“Are you able to say, on a balance of probabilities, whether the stroke preceded the accident or occurred sometime immediately after? Please provide your reasons. “on the balance of probabilities in view of the above history that I obtained from her regarding the proceeding events prior to the motor vehicle accident, I would have to say that there was some cerebral event that occurred prior to the accident which caused her to have the sensation as if the bus was rolling and she subsequently over corrected, went onto the gravel and down the embankment. The reason why I think there was a preceding neurological event be it a transient ischaemic attack or transient global amnesia is because she is unable to recall the events of what was happening to her from 3.00pm up until, 350pm at the time of the accident.

Noting your answer above, would you say it is “more probable than not the stroke arose before/after the motor vehicle accident? Please provide your reasons. In view of what I have stated above, I would have to say it is more probable than not that the cerebrovascular event arose before the motor vehicle accident because of her amnesia from 3pm to 350pm.”

104. In his first report, Dr O’Sullivan relies on his view of the history that the applicant had amnesia from 3pm to 3.50pm. The applicant has given evidence in her statement dated 2 October 2020 that I set out above in which she says she could recall parts of the trip. This evidence was maintained under cross-examination as I have set out above. To the extent that Dr O’Sullivan’s opinion in his first report relies on the applicant having amnesia between 3pm and 3.50pm, this is not supported by the applicant’s evidence that she could recall parts of the trip and I note she was tested under cross-examination and she maintained her evidence that she could recall parts of the trip. I accept the applicant’s evidence in this regard. She was credible under cross-examination.

105. Dr O’Sullivan provided a further report, at the request of the respondent’s lawyers, dated 26 June 2020.

106. Dr O’Sullivan recites the list of documentation he has reviewed as follows:

- Statement of Maria Niven dated 30 June 2014
- Supplementary Statement of Maria Niven dated 1 May 2020
- Statement of Joanne Davies dated 18 September 2015
- Statement of Sue Gavin
- Statement of Alan Watson dated 23 July 2019
- Police COP’s Entry NSW Police Force dated 3 July 2019
- Police Report NSW Police Force dated 13 August 2019
- Claim Form Maria Niven dated 13 June 2014
- Section 7 4 Notice Allianz Insurance dated 28 August 2018
- Report of Dr John Giles dated 7 March 2018
- Report of Dr James Vote dated 3 July 2018
- Report of Dr Ross Mellick dated 11 January 2019
- Report of Dr Ross Mellick dated 7 April 2020
- Supplementary Report of Dr John Giles dated 7 May 2020”

107. Dr O’Sullivan reiterated the history previously obtained and noted it was somewhat different to that obtained by Dr Mellick. He said:

“It was through the course of that history that I considered, and still do consider, that Ms Niven had a cerebral event prior to the accident.

Dr Mellick, in his report dated 11 January 2019, obtained a similar history to what I had obtained. He did comment that Ms Niven was aware of loss of vision on 7 November, while she was an inpatient at Westmead Hospital. He stated that she could recall events sequentially and remembered trying to stand out and get out of the vehicle after the accident. He said that she was able to recall events associated with the accident and could remember being aware of the bus beginning to roll because she felt it was about to tip over. He said that she tried to straighten it by steering to the left.

Dr Mellick's history was somewhat different to the history that I obtained in that Ms Niven told me that she had no memory of dropping off the children, either on the Kangaroo Road nor on Cowra Road. Ms Niven told me that the first thing she remembered was the bus rolling. She said that she could not turn the bus to the right because of oncoming traffic, so she turned left and went onto the gravel and down an embankment and lost control of the steering wheel. She then hit a tree.

Therefore, as I stated previously, and this is in contradistinction to what Dr Mellick said, that Ms Niven had, in my view, a cerebral event prior to the accident."

108. Dr O'Sullivan then proceeds to answer a series of questions posed to him by the respondent's lawyers as follows:

"1. **The claimant has served her statement evidence and correspondence from multiple other parties indicating that she was cognisant and coherent at the time of the accident, and in the period immediately thereafter. Can you please confirm if this is relevant to whether or not she suffered a stroke or cerebral infarct prior to the MVA? Can you please provide your reasons why/why not?**

This history is different to what Ms Niven told me in the sense that she could not recall dropping the children off and the first thing she recalled was seeing the bus rolling. This would indicate to me that she suffered some cerebral event which made her alter the steering to cause the vehicle to roll. Of course, she recalled the bus rolling and hitting the tree and sustaining the serious orthopaedic injuries, as well as her neurological injuries.

I suspect that Ms Niven may well have had a transient ischaemic event which predisposed patients to suffer a stroke or cerebral infarct.

I should point out that the MRI scan which was done 2 days after admission on 7 November 2013 revealed bilateral circulation infarcts, namely in the posterior left temporal lobe and inferior aspect of the right parietal lobe. Therefore, the events may have been that she had a transient ischaemic attack in the posterior circulation which would also have affected her occipital lobe, resulting in her having impaired vision and not being able to recall the events prior to the vehicle rolling over.

(a) Please confirm if it is possible for people to remain cognisant and coherent even if they have suffered cerebral infarct or other cerebral event? Can you please explain your reasons on how/why this is, or is not, possible?

I consider that although Ms Niven claims that she was cognisant and coherent, this would not be possible if she had suffered a cerebral event prior to the accident. I can only reiterate that in my view she probably had a transient ischaemic event to the posterior circulation, resulting in her being amnesic and possibly impaired vision which has resulted in the accident and that the accident itself did not cause her stroke.

- 2. Can you please review Dr Mellick's two reports, and the hospital notes that he has referred to and please provide an opinion on whether you agree or disagree with the doctor's conclusions, giving reasons why? In doing so can you please confirm:**

As mentioned above, I have reviewed Dr Mellick's reports and his history has not gone into the details regarding Ms Niven's pre-existing or pre-accident amnesic episodes, that is, not remembering to leave the children on Cowra Road nor did she have any recollection of going across the creek. I suspect, as I have stated above, that she most likely had a transient ischaemic event in the posterior circulation which would have caused her impaired memory as well as perhaps at the time of the accident as the vehicle started to roll or just prior to rolling, she may well have had visual impairment.

Therefore I cannot agree with Dr Mellick's conclusions.

- (a) The doctor seems to have referred to an MRI of 7 November 2013 as particularly pertinent regarding a stroke, but also noted CT scan of the brain on 5 November 2013 showed infarcts. Can you please explain, in lay terms, the difference between a "stroke" and "cerebral infarct"?**

I note that Dr Mellick referred to the MRI report of 7 November 2013 as particularly pertinent regarding a stroke, but also noted that the CT scan of the brain showed an infarct. With regards to the difference between the terms "stroke" and "cerebral infarct", these terms are interchangeable and refer in fact to the same event. A stroke may be caused by either a cerebral haemorrhage or a cerebral infarct. A stroke, however, in the majority of causes is caused by a blood vessel blocking off, producing the infarct, as documented in Ms Niven's MRI scan.

- i. Is it the case that the claimant in this matter might have suffered a cerebral infarct or some other cerebral event prior to the MVA, and only suffered a "stroke" while in hospital on or about 7 November 2013?**

In the history that I obtained, Ms Niven said that on 7 November 2013 she was alert, orientated and talking appropriately, but according to the Westmead Hospital notes, she told them that she could not see things properly. Subsequent investigations established the presence of the posterior circulation infarcts.

Therefore, I suspect, as stated above, that Ms Niven had, prior to the vehicle accident, a transient ischaemic event which would have affected her visual ability and then became aware of the vehicle rolling and recovered

her vision to some degree and while in hospital for the first 48 hours, in the course of her orthopaedic injuries, she may not have been aware of her visual loss until 7 November. Therefore, I consider the cerebral event would have occurred just prior to the accident and the infarct would have continued to develop over time between the event on date of admission, that is 5 November, and 7 November.

(b) Does the CT scan of 5 November 2013 confirm the claimant had suffered a stroke, or cerebral infarct, as at that time?

I note the CT scan performed on 5 November 2013 was reported to reveal a large frontoparietal haematoma in the occipital region and no evidence of recent intracranial haemorrhage. There was reported to be a 6.5cm x 3cm hypodense left temporo-occipital region in keeping with an acute MCA territory cerebral infarct, together with smaller hypodense areas involving the right parietal lobe, in keeping with a further infarct within the right MCA territory.

I would have to state that those changes that were demonstrated on the CT scan in the distribution of the MCA territory would be all consistent with Ms Niven having a T.I.A. just prior to the vehicle accident.

Therefore, the CT scan of 5 November 2013 confirmed that Ms Niven had suffered a cerebral infarct.

(c) It is unclear to us whether Dr Mellick has commented on significance of the infarcts that were identified on 5 November 2013, including when they most likely arose. To the extent not already done so above, can you please comment on the CT scan on 5 November 2013 and its significance?

As I have stated above, I suspect a cerebral event occurred just prior to the vehicle rolling over. The infarct would have continued to develop at the time and subsequent to this incident.

I should point out that the infarcts, although the report of the CT scan showed that they were in MCA territory, a subsequent MRI scan showed that the infarcts resulted from posterior circulation impairment which would have resulted in Ms Niven having the impaired vision prior to the accident. I am convinced that her loss of vision was caused by her posterior circulation infarcts.

(d) Can you please review Dr Mellick's comments that the loss of vision would not be the primary consequence of bilateral infarcts? Can you please provide a lay explanation of what the doctor is suggesting? For example, is he suggesting that infarcts were identified on CT of 5 November 2013, but the loss of vision was not caused by those infarcts? Please provide reasons.

As I have stated above, the bilateral infarcts that Ms Niven sustained were in the posterior circulation territory as demonstrated in the subsequent MRI scan. The CT scan raised the possibility that the infarcts were in the MCA territory, however it is clear from the MRI

scan that they were in the posterior circulation and this could have caused an ischaemic event to her occipital lobe, resulting in her loss of vision at the time of the accident and the reason why the vehicle rolled.

Therefore, I disagree with Dr Mellick that the loss of vision was not caused by her cerebral infarcts.

i. Please also comment on whether you agree/disagree with Dr Mellick's comments about the loss of vision being a primary consequence of bilateral infarcts, and why?

As mentioned above, I disagree with Dr Mellick's comments about the loss of vision. As he pointed out in his reports, he did not consider that the loss of vision was as a consequence of the bilateral infarcts. As I have explained above, I consider that the loss of vision relates to Ms Niven's posterior infarcts.

As pointed out, however, by Dr Mellick, Ms Niven suffered from severe orthopaedic injuries and the blood loss may have contributed to her cerebral events, but as I have stated above, she obviously had some cerebral event prior to the accident in that she could not recall dropping off the children when driving.

ii. Overall, based on further review of the material now before you, is there any change to your opinion on the following (explaining reasons why there is, or is not, any change to your opinion):

On further review of the material before me, there is no change to my opinion on the following matters.

iii. whether the stroke, or alternatively a cerebral infarct, represents the onset or aggravation of a disease?

A stroke, or cerebral infarct, which causes a stroke, may represent the onset or aggravation of a cerebrovascular disease.

iv. whether it is "more probable than not" the stroke or a cerebral infarct arose before/after the vehicle leaving the road and striking a tree? Please provide your reasons.

I consider it is more probable than not that Ms Niven had a transient ischaemic attack with memory impairment resulting in her losing control of the vehicle, which then rolled over and struck the tree. Subsequently after her admission to Westmead Hospital with her severe orthopaedic injuries, she may have then dropped her haemoglobin sufficiently to cause more cerebrovascular pathology.

v. In the event the stroke, or alternatively a cerebral infarct, preceded the accident, are you able to say whether the stroke/infarct caused or materially contributed to the accident? Please refer to whatever clinical experience or evidence you are relying on in making your assessment.

It is clear that when Ms Niven was admitted on 5 November 2013, she had evidence of cerebral infarcts as documented. She had no previous history of cerebral infarcts and as I have stated above, I consider that she had a transient ischaemic event with loss of memory and perhaps impairment of vision prior to the vehicle rolling over and then going down an embankment and hitting a tree. She did sustain horrendous orthopaedic injuries, as documented.

I rely on the above statement from my clinical experience.

vi. *Whether the claimant's employment gave rise to a significantly greater risk of the worker suffering the stroke or cerebral infarct than had the worker not been employed in employment of that nature.*

As I have stated above, I do not consider that Ms Niven's employment was a major contributing factor to her stroke or cerebral infarcts. It is quite conceivable that she could have had such an event while not driving a vehicle.

vii. *Whether the claimant's employment was the main contributing factor to the onset or aggravation of a disease by way of stroke/infarct? Why/why not?*

I do not consider Ms Niven's employment is the main contributing factor to the onset or aggravation of a disease by way of stroke/infarct. I say this because in my view Ms Niven would have had some type of cerebral event, such as a transient ischaemic attack, which has resulted in her not remembering dropping off the children nor did she remember losing control of the vehicle until it started to roll over. This would have been the first event in regard to her developing a stroke/infarct.

viii. *Would you say it was likely the claimant would have suffered a stroke of the type she suffered, more or less at the same time in her life, had she not been working as a Bus Driver/Cleaner?*

It is possible that Ms Niven may have suffered a stroke of the type she suffered more or less at the same time in her life had she not been working as a bus driver/cleaner.

The additional information would be that the initial CT scan of the brain taken on admission showed the presence of cerebral infarcts and that raised the possibility that Ms Niven may have had evidence of cerebrovascular disease prior to her severe accident and then she had a further episode, such as a TIA in the posterior circulation, which resulted in her losing control of the vehicle."

109. The expert opinions are at odds in this case. I have to weigh their respective opinions in the balance with the other evidence that is before me and come to a decision, on the balance of probabilities, whether the applicant had a stroke or stroke like event or TIA prior to crashing the bus and in fact causing her to crash.

110. When all of the evidence is weighed in the balance, I prefer the opinion of Dr Mellick because Dr Mellick takes greater cognisance of the contemporaneous accounts of the applicant's condition immediately after the crash – she was alert, she was conscious, she had no impairment of vision. These accounts are provided by the evidence of the reliable witnesses who attended upon her at the scene. It is consistent with the account of the crash that the applicant gave to the medical professionals who examined her at the hospital. Moreover, the records of Westmead Hospital on admission show her neurological examination to be normal over repeated examination including on repeated pupil testing for light reactivity which is repeatedly shown to be equal and reactive. Her Glasgow Coma score is 15. She is judged fit to be operated on that night. Neurological observations the next day 6 November 2013 are consistent. No loss of vision is recorded. The first record of loss of vision is on 7 November 2013 consistent with a stroke and verified by the MRI findings. Dr Mellick takes all this into account and concludes that Dr O'Sullivan's proposal is unsupported by the contemporaneous accounts as follows:

“The information regarding the conversation between Ms Niven and Registered Nurse Davies and Senior Constable Tydd provide support for the history given to me by the patient and provide no support for the proposal that the stroke occurred prior to the injury, was the cause of the injury and developed additionally over the next two days without awareness of the patient or any of the medical staff until loss of vision was reported by Ms Niven. I think it is highly unlikely that there was a stroke in evolution for two days prior to the patient's history to me that on 7 November she suddenly developed loss of vision.”

111. When all of the evidence is weighed in the balance, I prefer Dr Mellick's opinion to that of Dr O'Sullivan which in my view does not take adequate account of the contemporaneous witness accounts or adequate account of the clinical notes from Westmead hospital recording sound neurological examinations up until the sudden loss of vision is reported by the applicant on 7 November 2013 consistent with a stroke.

112. When all of the evidence is weighed in the balance, I am not satisfied on the balance of probabilities that the applicant had a stroke within the meaning of section 9B causing her to crash the bus causing her injuries. This means section 9B does not apply to preclude the applicant from recovering compensation for her undisputed injuries.

113. In the event this was my finding, the parties agreed to the matter being remitted to the Registrar for referral to an AMS and then the matter being relisted for a telephone conference once the MAC is issued, in respect of the claim for weekly benefits and medical expenses. I will accordingly so order.

