WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **2472/19**
First Applicant: **David Miller**
Second Applicant: **Terren Tuhi**
Respondent: **Secretary, Department of Family and Community Services**
Date of Determination: **8 January 2021**
Citation No: **[2021] NSWWCC 22**

The Commission determines:

Findings

1. The issue estoppel defence is unsuccessful.

2. The applicants are estopped in pursuing these proceedings by reason of Anshun estoppel.

Order

3. Award for the respondent.

JOHN HARRIS
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 JOHN HARRIS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Ms Moori Miller was employed by the respondent (the employer) and died in the course of her employment with the respondent on 15 April 2011.

2. The background facts of the circumstances surrounding the death of Ms Miller are described by the President in *Secretary, Department of Communities and Justice v Miller*[1] (*Miller No 5*) and are set out herein. The President stated:[2]

> "7. As at 15 April 2011, the deceased, Ms Moori Miller, was employed by the Home Care Services Division of the State of New South Wales, based in Brewarrina, as a community transport driver. The deceased suffered from asthma her entire life.
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> 8. The deceased worked for "Nynghana Home Care" which provided indigenous services in the form of transporting clients to medical appointments between large towns in the north west of New South Wales. The deceased was a coordinator, working on her own from an office in Brewarrina. Her duties principally involved office work and also driving duties when other drivers were not available.
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> 9. On 14 April 2011, another driver became unavailable for a trip from Brewarrina to Dubbo and return the following day. The deceased undertook this trip, it appears, with three persons who had appointments in Dubbo.
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> 10. Around 4:30 pm the deceased was driving the community transport bus from Dubbo through to Brewarrina with about six passengers on board. She was driving along the Mitchell Highway towards Nyngan when she started experiencing breathing difficulties, including coughing and gasping for air. Passengers from the bus asked the deceased to pull over.
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> 11. Upon pulling over to the roadside it became apparent that Ms Miller was having an asthma attack. The deceased took some puffs of her puffer but continued to cough. As the vehicle pulled over, the vehicle travelling behind it realised that she was distressed and also pulled over. Off duty ambulance officer Mr Craig Holman was in this vehicle, returning from holidays to Nyngan.
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> 12. Mr Holman dragged the deceased from the vehicle and at this point realised she was unconscious. Mr Holman diagnosed that the deceased was in cardiac arrest, she was absent a pulse and respiration. He began CPR. As no ambulance officers were available in Nyngan, Mr Holman contacted the police for assistance at 4:45 pm.
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> 13. The police attended the job and picked up a doctor (Dr Abbas Haghshenas) and nurse (Nurse "Trish") from Nyngan Hospital at 4:49 pm. They arrived at the scene at 5:00 pm. Upon their arrival the police saw Mr Holman conducting compressions on the victim. Dr Haghshenas commenced insertion of the laryngeal mask airway while Mr Holman attempted defibrillation, however no shock was delivered. Oxygen and adrenaline were given to the deceased, and resuscitation attempts continued.

[1] [2020] NSWWCCPD 38.
[2] *Miller No 5* at [7]-[16].

14. Approximately four minutes later the fire brigade were on scene. Ten minutes later a single unit ambulance officer arrived, and the deceased was placed on the stretcher and conveyed by ambulance to Nyngan Hospital at 5:19 pm.

15. At the hospital they continued to work on resuscitating the deceased, however this was unsuccessful, and Ms Miller was pronounced dead at 6:23 pm.

16. For the sake of completeness, I record that the Deputy State Coroner dispensed with holding an inquest into Ms Miller's death and recorded the cause of death in his notice addressed to the appellant's solicitors dated 5 May 2014 as directly due to anoxia with the antecedent cause being a severe asthma attack. There is nothing noted under 'other significant conditions' in the notice dispensing with inquest."

3. Mr Miller (the first applicant) is the deceased's husband. Mr Terren Tuhi (the second applicant) is a child of the deceased. Proceedings have previously been brought by Mr Miller claiming the lump sum death benefit pursuant to the provisions of the *Workers Compensation Act 1987* (the 1987 Act). Mr Tuhi was the second respondent in those proceedings.

4. The matter has a lengthy history which has been summarised by the President in *Miller No 5*. Consistent with the statutory obligation to provide a "brief statement of reasons",[3] these Reasons should be read with the history of the litigation summarised at some length in *Miller No 5*. However, to explain the present issues, it is necessary to provide an abbreviated version of the litigation between the parties.

The prior proceedings

5. In matter number 5831/16 Mr Miller was named as the applicant and Mr Tuhi as the second respondent (the prior proceedings). It was admitted in the present proceedings that Mr Tuhi was represented in the prior proceedings by the solicitors who acted for Mr Miller.[4]

6. The employer admitted in the prior proceedings that there was no dispute that the "injury" was suffered "in the course of employment". The employer disputed that the injury arose out of the employment and otherwise denied s 9A.[5] Those admissions were made at the commencement of the hearing when there was no clear articulation as to the nature of the injury.[6]

7. Arbitrator Batchelor made an award in favour of the employer respondent: *Miller v The State of New South Wales*[7] (*Miller No 1*).

8. The Arbitrator noted that the deceased "suffered a severe asthma attack from which she died"[8] (at [5]) and that the respondent conceded that the injury occurred in the course of the deceased's employment" but that it did not arise out of that employment or that employment was a substantial contributing factor to that injury.[9]

[3] Section 294 of the *Workplace Injury Management & Workers Compensation Act 1998*.
[4] *Miller v Secretary, Department of Communities and Justice*, 1 December 2020 (T), pp 17-19.
[5] Reply, p 539.
[6] The submissions were made on page 3 of the transcript (Reply p 539).
[7] [2017] NSWWCC 66.
[8] *Miller No 1* at [5].
[9] *Miller No 1* at [7].

9. In his Reasons the Arbitrator referred to the "asthma attack" in the context of discussing the injury.[10] The Arbitrator's conclusions on s 9A again refer to the "asthma attack"[11] although at other times he referred to "severe asthma attack". The Arbitrator noted that the applicant relied on s 4(b)(ii) of the 1987 Act but that the "driving of the bus on 15 April 2011 did not bring on the asthma attack"[12] and observed that the "location of events may have been a substantial contributing factor to the deceased's death; it was not such a factor to her injury".[13]

10. The Arbitrator concluded that the "deceased's injury was a pre-existing medical condition which was not aggravated by her employment".[14] The following further reasons were provided:[15]

> "113. The applicant's submission is that because of the location of the asthma attack the deceased lost the opportunity to seek suitable treatment in Brewarrina, either at her doctor's surgery or the local hospital, or (in accordance with the "two-pronged approach" put forward by the applicant's counsel), having access to a second inhaler, nebuliser or ventilator. The following matters are relevant:
>
> (a) the deceased gave no indication of the apparent seriousness of her attack to the passengers on the community bus. She did not pull over until asked to do so;
>
> (b) the deceased suffered from a serious asthma condition and was at risk of a severe attack at any time;
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> (c) the condition was not well controlled, but the deceased was well educated as to how to manage her condition;
>
> (d) the deceased had a long history of treatment for her condition, both in hospital and with her treating doctors;
>
> (e) at the time the deceased was in the course of her employment and not carrying out anything other than normal duties as part of that employment as a community transport coordinator and driver, and
>
> (f) once the very serious nature of the asthma attack became apparent when the bus was between Nevertire and Nyngan, the "window of opportunity" for effective lifesaving treatment to be rendered to the deceased had unfortunately passed."

11. Injury in s 4 is defined as either "arising out of or in the course of employment". The acceptance of injury "in the course of" employment meant that the Arbitrator did not have to address injury "arising out of" employment. The causal connection between the injury and the employment was addressed when the Arbitrator addressed the stricter test of causation under s 9A.

12. As the injury and death occurred prior to 27 June 2012, the amendments made to s 4(b) by the *Workers Compensation Legislations Amendment Act 2012* are irrelevant. Accordingly, whether the injury was pleaded pursuant to either s 4(a) and/or s 4(b), the applicant was required to establish that "the employment concerned was a substantial contributing factor to the injury".

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[10] *Miller No 1* at [88] and [92].
[11] *Miller No 1* at [101(b)] and [101(d].
[12] *Miller No 1* at [107].
[13] *Miller No 1* at [110].
[14] *Miller No 1* at [112].
[15] *Miller No 1* at [113].

13. It was the failure to satisfy the requirements of s 9A that the applicants failed to discharge the onus in establishing the relevant causal connection between the employment and the injury.

14. The appeal against the decision in *Miller No 1* was dismissed: *Miller v State of New South Wales*[16] (*Miller No 2*).

15. In the course of his Reasons, Parker ADP stated:[17]

> "The essential reasoning was contained in [the Arbitrator's reasons at] paragraphs [112] and [113]. The finding that the cause of the deceased's injury was a pre-existing medical condition which was not aggravated by her employment (paragraph [112]), in my view, was fatal to the applicant's success. It was fatal because that finding meant that the applicant could not satisfy either s 4(b)(ii) or s 9A."

16. The appeal to the Court of Appeal was dismissed: *Miller v State of New South Wales*[18] (*Miller No 3*).

17. The Court of Appeal described the "forefront" of Mr Miller's submissions as that the Acting Deputy President failed to identify error in the Arbitrator's reasons, when the Arbitrator himself failed to address "whether the injury was the exacerbation of the asthma attack or the anoxia or the cardiac arrest".[19]

18. In rejecting this argument, the Court of Appeal stated:[20]

> "The short answer to all grounds of appeal is as was said by the respondent:
>
> > '[Injury] wasn't ever put in a different fashion. It was never put, either to the Arbitrator or to the Deputy President, that there was an injury simpliciter in the form of a cardiac arrest or anoxia which was the injury which was to be determined by the Arbitrator.'"

19. The Court of Appeal also made observations on causation if the appeal "were less narrowly confined" on "any formulation of the injury".[21] The Court stated:[22]

> "However, it should not be thought that the outcome in this Court would be otherwise if the appeal were less narrowly confined than it is.
>
> The issue of causation required a counterfactual analysis as to what could have occurred if the asthma attack had commenced while the deceased was in Brewarrina. The critical matter in the present case was that, on the unchallenged findings of primary fact, the deceased continued to drive the vehicle for 25–30 minutes after the onset of the asthma attack, and only pulled over when asked to do so by one of the passengers. At that stage, there was a very short period, of a matter of a few minutes, within which her life could be saved. Throughout the previous 25–30 minutes, the deceased had taken no steps to address her condition, and in particular, had not sought to administer Ventolin (which she had in the vehicle with her). There were also two nurses in the vehicle with her. Hence the force of the conclusion by the Arbitrator that he could not be satisfied that the assumptions that the deceased immediately

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[16] [2017] NSWWCCPD 38.
[17] *Miller No 2* at [83].
[18] [2018] NSWCA 152 (*Miller No 3*).
[19] *Miller No 3* at [16].
[20] *Miller No 3* at [29].
[21] *Miller No 3* at [37].
[22] *Miller No 3* at [34]-[35].

> recognised the seriousness of the attack and would have been able, had she been in Brewarrina, to get herself to the hospital in time, could be made out. Those assumptions were reproduced in [114] and the conclusion that there was not sufficient evidence to make a favourable finding was made in [115]."

The present proceedings

20. The applicants commenced the present proceedings which were originally determined by Arbitrator Wynyard on 11 October 2019 (*Miller No 4*).[23]

21. The Arbitrator found that the deceased died from an injury, namely anoxia and cardiac arrest which was an injury within the meaning of s 4(a) of the 1987 Act.[24] Anoxia is a lack of oxygen supply to the vital organs including the brain.[25] The Arbitrator concluded:[26]

> "I am satisfied that, had the deceased suffered her asthma attack whilst she was in her office at Brewarrina 30 minutes before she suffered her cardio-pulmonary arrest, she would probably have survived. I accept the evidence of Dr Jennings and Professor Fulde, which indeed accords with common sense, in that regard. The place of the injury, being in a remote location following her driving in the course of her employment from Brewarrina to Dubbo and thence through Nevertire to a point about 10 km from Nyngan, was a substantial contributing factor to her cardio-pulmonary arrest. The location deprived the deceased of the opportunity to have either the means or the time to avail herself of appropriate treatment."

22. The Arbitrator otherwise concluded that there were no relevant estoppels precluding the applicants from recovering compensation in respect of the death of the deceased.

23. The employer's appeal was upheld in part: *Miller No 5*. In an extensive discussion of the prior and present proceedings, the President concluded:

    (a) The proceedings constituted in *Miller No 4* were not estopped by the principle of *res judicata*;[27]

    (b) That error was established in the Arbitrator's discussion on issue estoppel;[28]

    (c) That error was established in the Arbitrator's conclusion that Anshun estoppel was not established;[29]

    (d) That error was not established in the second ground of appeal described as error in "fact or law in determining compensation for death of a worker was payable by the respondent contrary to the evidence".[30]

24. The President revoked the orders made in *Miller No 4* and remitted the matter to another Arbitrator.

25. This matter was listed before me on 1 July 2020. At that time, the applicants contended that the remittal was limited to the grounds of appeal which were successful. The respondent contended that the orders were not as restrictive and the applicant was required to establish liability issues, particularly those covered by ss 4(a) and 9A of the 1987 Act.

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[23] *Miller v Secretary, Department of Communities and Justice*, 2472/19, 11 October 2019 (*Miller No 4*).
[24] *Miller No 4* at [102].
[25] *Miller No 5* at [90] referring to Professor Fulde (Application, p 321).
[26] *Miller No 4* at [116].
[27] *Miller No 5* at [154].
[28] *Miller No 5* at [158].
[29] *Miller No 5* at [200]-[201].
[30] *Miller No 5* at [130] and [161]-[177].

26. Given the parties' divergent views as the effects of the orders in *Miller No 5*, I then made the following orders:[31]

> "1. The parties do not agree on the interpretation of the orders made in *Secretary, Department of Communities & Justice v Miller & Anor (No 5)* [2020] NSWWCCPD 38 (*Miller (No 5)*). It is not agreed whether the issues of s 4(a) and s 9A of the *Workers Compensation Act 1987* have been decided or whether that remains an issue for determination on the remittal.
>
> 2. Give [sic] this dispute and the potential ambiguity between orders 2 and 3 in *Miller (No 5),* the applicant has indicated that an application for reconsideration is being filed.
>
> 3. It is appropriate that the reconsideration application be determined prior to the matter proceeding further. In these circumstances, this application is stood over pending the determination of the reconsideration application."

27. An application for reconsideration of the orders made in *Miller No 5* was then filed by Mr Miller and Mr Tuhi. The position of the employer in the reconsideration application was inconsistent with the position taken before me on 1 July 2020 as the employer submitted to any order the President proposed to make on the reconsideration application: *Secretary, Department of Communities and Justice v Miller*[32] (*Miller No 7*).

28. The orders made by the President in *Miller No 7* were:

> "1. The decision of *Secretary, Department of Communities and Justice v Miller and anor (No 5)* [2020] NSWWCCPD 38 is reconsidered pursuant to s 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998*. Order [3] of that decision is amended that it now reads as follows:
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> "3. The matter is remitted to another Arbitrator to be dealt with in accordance with these reasons, and limited to determining the appellant's claims in respect of:
>
> (a) issue estoppel
> (b) *Anshun* estoppel."

29. The matter was then listed for hearing before me on 1 December 2020. Mr John Wilson of counsel appeared for the applicants and Mr Luke Morgan of counsel appeared for the respondent.

30. The documentation admitted into evidence was:

> (a) Application to Resolve a Dispute (Application) and attachments; and
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> (b) Reply and attachments.

31. There was no objection to any document. There was no application by either party to adduce oral evidence.

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[31] *Miller v Secretary, Department of Communities & Justice*, 1 July 2020, (*Miller No 6*).
[32] [2020] NSWWCCPD 57 at [7].

32. The parties had filed written submissions prior to the arbitration hearing. During the arbitration hearing the applicants withdrew the contentions at [88]-[95] of their written submissions, specifically that the second applicant was not a party to the proceedings in *Miller No 1*.[33] That concession was made after the employer referred to the original letter of claim made by the solicitors on behalf of both Mr Miller and Mr Tuhi.[34]

33. I observe that Mr Tuhi was named as the second respondent in the prior proceedings and the second applicant in the present proceedings. Despite the manner in which Mr Tuhi has been named, I refer to both Mr Miller and Mr Tuhi as "the applicants" in both the present and prior proceedings.

34. The respondent bears the onus of proof in establishing either defence. In these circumstances I have reversed the order when summarising the parties' submissions.

ISSUE ESTOPPEL

Employer's submissions

35. The employer submitted that an "indispensable element of the claims in both *Miller No 1* and *Miller No 4* was the significance of the remoteness of the location" which was "determined in Millers No 1, 2 & 3".

36. The employer referred to the Arbitrator's summary of the pleadings and the evidence in *Miller No 1*. It referred to the finding by the Court of Appeal in *Miller No 3* that in the appeal to Parker ADP in *Miller No 2*, there was no "challenge made to the approach taken by the Arbitrator that the 'injury' was the deceased's asthma which had been aggravated or exacerbated when she suffered the asthma attack".[35]

37. The employer also referred to the observation that there was no causal connection to any formulation of injury. The Court of Appeal stated:[36]

> "On no view of the meaning of s 9A could the deceased's employment be causally connected with any formulation of the injury unless the deceased would more likely have rapidly appreciated that she was suffering a severe asthmatic attack. It is plain from the reasons of the Arbitrator that he could not make any such finding."

38. The employer submitted that there had been a determination by Arbitrator Batchelor "with respect to the very issue *Miller No 6* seeks to have determined that is the relevance of the remoteness of the location and the onset of the condition." It ultimately submitted:[37]

> "Miller No 1 (along with 2 & 3) determined the issue as to whether the remoteness of the deceased's location when she passed away was a relevant consideration to whether there was an entitlement to death benefits under the Act. As the issue was determined, issue estoppel on the point arose."

39. The employer submitted in oral submissions that the onset of asthma and the cardiac arrest was "the same injury" because "the cardiac arrest was precipitated … by the deceased's asthma".[38]

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[33] T, p 19.
[34] T p 12 referring Reply, p 299.
[35] *Miller No 3* at [19].
[36] *Miller No 3* at [37].
[37] Respondent's written submissions, p 4.
[38] T, p 26-27.

Applicants' submissions

40. The applicants noted the distinction between res judicata and issue estoppel and that the remittal was limited to the latter.[39] It submitted:[40]

> "With respect to estoppel, before Arbitrator Batchelor the state of fact or law giving rise to compensation was whether the deceased suffered a disease injury, whereas the issue in the second proceedings is whether the deceased suffered a personal injury as defined by s 4(a).
>
> The causes of action are different and therefore no issue estoppel arises."

41. Reference was made to the different injuries argued. In *Miller No 1*, the injury was argued as being asthma for the purposes of s 4(b)(ii) of the 1987 Act, whereas in *Miller No 4*, it was argued as being anoxia and/or cardiac arrest within the meaning of s 4(a) of the 1987 Act. It was submitted:[41]

> "The causes of action are different and therefore, the consideration of the 'remoteness of the location' and any findings of fact or conclusions drawn in either proceedings give rise to different considerations because there [are] different injuries pleaded."

42. The applicant referred to the further evidence from Dr Jennings, Professor Fulde and the statement from Ms Finlayson. It was submitted that because the deceased was driving in a remote location, this was a "substantial contributory factor to her cardio-pulmonary arrest".[42]

Reasons

43. In *Blair v Curran*, Dixon J (as his Honour then was) stated:[43]

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order."

44. In *Miller No 1*, Arbitrator Batchelor made the following finding:[44]

> "In this case the cause of the deceased's injury was a pre-existing medical condition which was not aggravated by her employment."

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[39] Applicants' written submissions, [45].
[40] Applicants' written submissions, [48]-[49].
[41] Applicant's submissions, [51].
[42] Applicant's submissions, [55].
[43] [1939] CA 23; (1939) 62 CLR 464 at 531-532.
[44] *Miller No 1* at [112].

45. The Arbitrator then expanded on the conclusion stated in the previous paragraph with the following findings:[45]

> "113. The applicant's submission is that because of the location of the asthma attack the deceased lost the opportunity to seek suitable treatment in Brewarrina, either at her doctor's surgery or the local hospital, or (in accordance with the "two-pronged approach" put forward by the applicant's counsel), having access to a second inhaler, nebuliser or ventilator. The following matters are relevant:
>
> (a) the deceased gave no indication of the apparent seriousness of her attack to the passengers on the community bus. She did not pull over until asked to do so;
>
> (b) the deceased suffered from a serious asthma condition and was at risk of a severe attack at any time;
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> (c) the condition was not well controlled, but the deceased was well educated as to how to manage her condition;
>
> (d) the deceased had a long history of treatment for her condition, both in hospital and with her treating doctors;
>
> (e) at the time the deceased was in the course of her employment and not carrying out anything other than normal duties as part of that employment as a community transport coordinator and driver, and
>
> (f) once the very serious nature of the asthma attack became apparent when the bus was between Nevertire and Nyngan, the "window of opportunity" for effective lifesaving treatment to be rendered to the deceased had unfortunately passed.
>
> 114. In order for the applicant to succeed in his claim, on the basis put forward at the hearing, a number of matters would have to be assumed, namely:
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> (a) that the deceased was in or close to Brewarrina at the time of her attack;
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> (b) that she immediately recognised the seriousness of the attack;
>
> (c) that the use of an additional puffer, nebuliser or ventolin was insufficient treatment to deal with the attack;
>
> (d) that she was able to get herself to the Brewarrina Hospital in time for the appropriate treatment to be administered to her. In this context, I do not think that, having regard to the opinions of Professor Young and Dr Bryant on the seriousness of the applicant's condition, attendance at a doctor's surgery would have been sufficient to receive the necessary treatment, and
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> (e) that the treatment given at the Hospital would have been adequate to save the deceased's life.
>
> 115. I do not think that there is sufficient evidence to make a finding in favour of the applicant on the basis of these assumptions.
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> 116. Having regard to all of the evidence I find that the applicant has not, on the balance of probabilities, discharged the onus of proof on him to show that the deceased's employment was a substantial contributing factor to the injury suffered by her in the course of her employment on 15 April 2011."

[45] *Miller No 1* at [113].

46. Parker ADP described the finding (set out at [44] herein) as "fatal to the applicant's success … because that finding meant that the applicant could not satisfy either s 4(b)(ii) or s 9A".[46] The Court of Appeal noted the observations of Parker ADP[47] and stated:

> "36. True it is that the ADP disregarded what was said in [114]. No real attempt was made in this Court to defend that aspect of the ADP's reasons. To the contrary, the rejection of the counterfactual was sufficient to determine the entirety of the dispute.
>
> 37. On no view of the meaning of s 9A could the deceased's employment be causally connected with any formulation of the injury unless the deceased would more likely have rapidly appreciated that she was suffering a severe asthmatic attack. It is plain from the reasons of the Arbitrator that he could not make any such finding."

47. The observations of Parker ADP must be read in the context that the employer accepted "injury" within the meaning of s 4(b) because the injury was sustained "in the course of" the employment.[48]

48. The Arbitrator in *Miller No 1* considered the comments of the "notion of causation" in the context of s 9A. The Arbitrator stated:[49]

> "The location of events may have been a substantial contributing factor to the deceased's death; it was not a factor to her injury."

49. The Arbitrator then cited *Badawi v Nexon Asia Pacific Pty Ltd*[50] (*Badawi*) when discussing "the causal connection between employment and injury in terms of ss 4 and 9A of the 1987 Act". Given that the passage cited in *Badawi* was directed to the provisions of s 9A of the 1987 Act, the conclusion reached by the Arbitrator that the "cause of the deceased's injury was a pre-existing medical condition" indicates that there was an implicit finding that s 9A was not established. At [116] of the Reasons in *Miller No 1* the Arbitrator expressly found that the applicant had not discharged the onus of proof in establishing that the "deceased's employment was a substantial contributing factor to the injury". That is consistent with the observations of the Court of Appeal in *Miller No 3* where the Court concluded:[51]

> "On no view of the meaning of s 9A could the deceased's employment be causally connected with any formulation of the injury …".

50. I have mentioned these matters because there remains a lack of clarity in the submissions on the precise nature of the issue estoppel defence. The employer contends that the defence arises from "the significance of the remoteness of the location"[52] and referred to the evidence and pleadings in *Miller No 1*. It submitted:[53]

> "There has been a determination made by Arbitrator Batchelor with respect to the very issue Miller No 6 seeks to have determined that is the relevance of the remoteness of the location and the onset of the condition."

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[46] *Miller No 2* at [83].
[47] *Miller No 3* at [19].
[48] See Transcript in *Miller No 1* at Reply, p 703.
[49] *Miller No 1* at [110].
[50] [2009] NSWCA 324 at [112] cited *Miller No 1* at [121].
[51] *Miller No 3* at [37].
[52] Employer's written submissions, p 3.
[53] Employer's written submissions, p 4.

51. That submission does not particularise the specific finding made by the Arbitrator. However, the reference in the written submissions to the Court of Appeal decision at [37] is consistent with what is set out above.

52. I have set out the findings by Arbitrator Batchelor in some detail because the applicants were unsuccessful because they did not satisfy s 9A of the 1987 Act. That failure was based on an allegation of injury described as an asthma attack which the parties agreed was an injury within the meaning of s 4(b)(ii) of the 1987 Act.

53. The present proceedings are based on an injury pleaded as "anoxia and cardiac arrest" and found to be an injury within the meaning of s 4(a) of the 1987 Act.[54] The remittal to me is limited in terms and I am bound by the finding in *Miller No 4* and confirmed on appeal in *Miller No 5*, that this is an injury which arose out of the course of employment and to which the employment concerned was a substantial contributing factor to the injury.

54. At the arbitration hearing counsel were drawn to the discussion in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine*[55] (*Hine*) of the distinction between "mere evidentiary facts" and "ultimate facts".[56]

55. The employer contended that "it is the same injury, that is the cardiac arrest was precipitated by the … asthma".[57] The employer then referred to the findings of Arbitrator Batchelor in *Miller No 1* at [113], particularly at [113(f)].

56. The applicants submitted:[58]

> "I agree with Mr Morgan that the issue of the remoteness was, is, … an ultimate fact which needed to be determined by the Arbitrator when considering the s 9A issue in those original proceedings".

57. The applicants then repeated that the finding in *Miller No 1* went to a different injury.

58. The relevant finding by Arbitrator Wynyard in *Miller No 4* on the causal nexus between the injury and the employment was as follows:[59]

> "I am satisfied that, had the deceased suffered her asthma attack whilst she was in her office at Brewarrina 30 minutes before she suffered her cardio-pulmonary arrest, she would probably have survived. I accept the evidence of Dr Jennings and Professor Fulde, which indeed accords with common sense, in that regard. The place of the injury, being in a remote location following her driving in the course of her employment from Brewarrina to Dubbo and thence through Nevertire to a point about 10 km from Nyngan, was a substantial contributing factor to her cardio-pulmonary arrest. The location deprived the deceased of the opportunity to have either the means or the time to avail herself of appropriate treatment."

59. The finding, apparently expressed in terms of satisfaction of s 9A, refers to employment being "a substantial contributory factor" to the cardio-pulmonary arrest. This is distinguished from the finding in *Miller No 1* which concerned the causal nexus between the place of the work and the injury then pleaded.

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[54] See Certificate of Determination in *Miller No 4*.
[55] [2016] NSWCA 213.
[56] *Hine* at [24].
[57] T, pp 25-26.
[58] T, pp 30-31.
[59] *Miller No 4* at [116].

60. Section 9A of the 1987 Act as in force as at the date of the deceased's death relevantly provided:

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

61. The ingredients of issue estoppel were discussed at length by McColl JA in *Habib v Radio 2UE Sydney Pty Ltd*[60] (*Habib*). Her Honour stated:[61]

> "In order to establish Diplock LJ's second species of *estoppel per rem judicatam*, issue estoppel (the second principle referred to in *Dow Jones*), it is necessary, as Lord Guest stated in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (at 935):
>
> > '(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.'
>
> His Lordship's statement was cited with approval by the Full Court (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) in *Kuligowski v MetroBus* [2004] HCA 34; 220 CLR 363 (at [21]); see also *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* [1992] FCA 272; (1992) 36 FCR 406 (at 412) per Gummow J referring with approval to *Carl Zeiss* (at 909 - 910) per Lord Reid."

62. McColl JA further discussed the concept of what was meant by the "same question" to be decided. Her Honour referred with emphasis to what was stated by Barwick CJ in *Ramsay Pilgrim,*[62] which was adopted by the High Court in *Kuligowski v Metrobus*[63] (*Kuligowski*), that is:

> "The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case."

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[60] [2009] NSWCA 23.
[61] *Habib* at [76], Giles & Campbell JJA agreeing.
[62] [1968] HCA 34; (1968) 118 CLR 271 at [276].
[63] [2004] HCA 34 at [40].

63. In *Kuligowski* the High Court emphasised the strict requirements in satisfying issue estoppel and stated:[64]

> "*Not all estoppels are odious* [*New Brunswick Railway Co v British & French Trust Corp Ltd* [1939] AC 1 at 21 per Lord Maugham LC]. *But all must be certain. It is for that reason that the law*, as exemplified in the passage from the judgment of Barwick CJ in *Ramsay v Pilgram* [(1968) [1968] HCA 34; 118 CLR 271 at 276] set out above, *has strict requirements for the application of issue estoppel*." (emphasis in original)

64. In response to my query about observations of the Court of Appeal in *Hine,* both parties accepted that the findings in *Miller No 1* on the question of the remote location was an "ultimate fact". However, the applicants stressed, that the finding did not relate to the same injury.

65. The employer's submission that the issue estoppel arises from the findings of "remote location" cannot be divorced from the fact that *Miller No 1* related to whether the requirements of s 9A had been established. The opening words of s 9A direct attention to "injury" and whether "the employment concerned was a substantial contributory factor to the injury".

66. The applicants were unsuccessful in *Miller No 1* because the Arbitrator was not satisfied that the requirements of s 9A were established, specifically that the employment concerned was a substantial contributory factor to the injury.[65] The employer's contention that the issue estoppel is the "remoteness of events" ignores the critical finding by Arbitrator Batchelor that this was determined in the concept of the injury relied upon in those proceedings. In this respect I agree with the applicants' submissions, albeit expressed in a different context, that "you cannot just consider the issue of remoteness or causation without then considering the issue of the original injury".[66]

67. The employer otherwise submitted that the asthma attack and the cardiac arrest were "the same injury"[67]. Not only is that factually incorrect, but it is also inconsistent with what it submitted to and was relied upon by the Court of Appeal in *Miller No 3*.[68]

68. I accept the applicants' submission that the finding forming the basis of the issue estoppel is for a different injury occurring at a slightly different time, some 30 minutes later. The authorities set out at [61]-[63] herein require that the issue be "identical" rather than extremely similar. There is no identical issue determined in *Miller No 1* which was determined in *Miller No 4*.

69. I do not accept that the employer's identification of the "remoteness of the location" as satisfying the meaning of an "identical issue".

70. I otherwise observe that the employer referred to but did not submit that the observation by the Court of Appeal (set out at [19] herein) constituted the issue estoppel. I return to the Court's observations on causation when discussing the Anshun estoppel defence.

71. I repeat, for the sake of completeness, that the second applicant's contention made in *Miller No 5* that it was not a privy to any finding in *Miller No 1* was abandoned during the arbitration hearing.

72. The issue estoppel defence is unsuccessful.

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[64] *Kuligowski* at [47].
[65] *Miller No 1* at [110].
[66] T, p 48.
[67] T, p 26.
[68] At [29].

ANSHUN ESTOPPEL

Employer's submissions

73. The employer submitted that the applicants were presented with an opportunity to pursue a claim under both s 4(a) and s 4(b) of the 1987 Act "but chose not to press the first limb". It submitted that the applicants have advanced "no evidence" to suggest there was a lack of evidence to support a claim based on s 4(a) of the 1987 Act.

74. The employer referred to the principles discussed by Judge Neilson in *Bruce v Grocon Ltd,*[69] which were approved by the President in *Miller No 5.*[70]

75. The employer further submitted that "essentially the same evidence is relied on to assert a different cause of death with reference to the definition in the Act". The conduct of the applicants in the prior proceedings at first instance, before the Acting Deputy President and the Court of Appeal "were entirely matters of choice and discretion" and "no evidence is advanced as to why this course was taken".

76. The employer referred to the observations of the plurality in *Anshun*[71] and the "caution" expressed by McColl JA in *Habib v Radio 2UE Sydney Pty Ltd*[72] (*Habib*).

77. It was submitted that this was not a circumstance where benefits were pursued in a piecemeal fashion as it was not an issue of quantification but an "entitlement to the benefit". There was no explanation why the s 4(a) case was not pursued in the prior proceedings.

78. The employer submitted:

> "Here the dependents of the deceased seek a further determination with respect to the same entitlement to a death benefit under the Act arising out of the same fact circumstance and relating to the same compensation; the claims were brought three years apart and after the first proceedings was litigated at three levels."

79. In oral submissions the employer referred to the Anshun principles articulated in *Miller No 4* at [98] and described by the President in *Miller No 5* as an "entirely uncontroversial formulation".[73] Reference was made by the employer to paragraphs [37] to [40] of *Anshun* whilst the applicants referred to paragraph [37].[74]

80. The employer referred to the observations in *Miller No 5* that material was available to prosecute the s 4(a) claim[75] and submitted that the s 4(a) injury was pleaded in the prior proceedings but was not pressed.[76] A "conscious decision was made not to pursue it".[77] In these circumstances it was unreasonable that it was not done at first instance with reference to broader concepts of the benefits of finality of litigation and "those matters that the President identified".[78] The onus then shifts to the applicants to explain why it was not unreasonable to pursue the claim. No evidence was advanced by the applicants as to why the s 4(a) cause of action was not pursued in the prior proceedings.

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[69] [1995] NSWCC10; NSWCCR 247 at 261-262.
[70] *Miller No 5* at [194].
[71] *Anshun* at [37].
[72] [2009] NSWCA 231 at [84].
[73] T, p 21 referring to *Miller No 5* at [191].
[74] T, pp 22-23.
[75] T, p 38.
[76] T, p 40.
[77] T, p 40.
[78] T, p 40.

81. In *Anshun* the High Court noted (at [43]) that the Port Melbourne Authority did not adduce evidence at the trial as to why it failed to raise the issue in the first action.

82. The applicants are now back four years later effectively running the same case in circumstances where they effectively abandoned the s 4(a) case at first instance in the prior proceedings.

83. During the arbitration hearing in *Miller No 1*, the applicant relied on "s 4(b)(ii) in relation to the fact that the applicant had a disease which was the asthma".[79]

84. The applicant then described the asthma attack as a narrowing of the airways where the body tissues are deprived of oxygen supply "which then leads to cardiac arrest" and stated at the time that this "is what occurred with Moori's situation".[80] This comment showed that the applicant knew during the hearing of *Miller No 1* that the deceased suffered the s 4(a) injury that was subsequently relied upon in *Miller No 4*. The statement by the applicant's counsel is otherwise consistent with the summary of the evidence by the President in *Miller No 5* at [198].

Applicants' submissions

85. The applicants referred to the discussion in *Anshun* at [96] that there may be a variety of reasons why a party justifiably refrains from litigating an issue and to the observations in *Miller No 5* that the mere fact that a party makes a choice to litigate a matter in other proceedings is insufficient to ground an Anshun estoppel.

86. The applicants referred to the additional medical evidence tendered in *Miller No 4* and submitted that "there was an absence of such evidence in the earlier proceedings required to support the s 4(a) claim."[81]

87. The applicants submitted that the onus of proof lay on the employer: *Fourmeninapub Pty Ltd v Booth*[82] and "that the employer has not provided any outline or basis to demonstrate that the failure to bring a claim in the earlier proceedings was unreasonable".[83]

88. The applicants submitted that there was an "absence of medical evidence before Arbitrator Batchelor to support the present claim" based on the cardio-pulmonary arrest, which was an injury within the meaning of s 4(a).

89. The question of whether it was unreasonable to have not advanced the s 4(a) case requires a consideration of what was known to the applicants and their advisers. Reference was made to the observations of McColl JA in *Habib* that the exercise required an evaluative element based upon what a litigant could reasonably have been expected to do in the earlier proceedings.

90. The applicants referred to the observations of Allsop P in *Champerslife Pty Ltd v Manolovski*[84] (*Champerslife*) when his Honour stated:[85]

> "3 The question of unreasonableness is derived significantly from the matter being so relevant to the subject matter of the first proceeding. There are at least two related assessments that have to be made: was the matter **so relevant** that it can be said to have been **unreasonable** not to rely upon it in the first proceeding? Whilst it is necessary to eschew language of abuse of process,

[79] Reply, p 563.
[80] Reply, p 553.
[81] Applicants' written submissions, [60].
[82] [2019] NSWWCCPD 25 at [130].
[83] Applicants' written submissions, [72].
[84] [2010] NSWCA 33.
[85] At [3].

the character of the assessments is such as to make relevant to a point what Lord Bingham of Cornhill said in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31:

> **'It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been,** so as to render the raising of it in later proceedings necessarily abusive. **That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case,** focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.' (emphasis added in original)

Leaving to one side his Lordship's reference to "abusive" and "misusing or abusing the process of the court", what is of assistance from what he said is the recognition that the assessment is not to be made mechanistically, but rather there is a value judgment to be made referable to the proper conduct of modern litigation.

4 One fundamental error in the approach of the respondent was to build on the proposition that because the matter **could** have been raised in the first proceeding to draw a conclusion, it **should** have been. That mechanistic approach was what Lord Bingham was rejecting in the above passage from *Johnson v Gore Wood*. It is also what Gibbs CJ, Mason J and Aickin J found objectionable in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. In that case at 590, Lord Kilbrandon spoke of the principle as "*an abuse of process to raise in subsequent proceedings matters which **could and therefore should** have been litigated in earlier proceedings*" (emphasis added). This way of putting it overstated the principle. The mere fact that the matter could have been raised does not mean it should have been raised (for the operation of the principle). Rather, it has to be **so relevant** as to make it **unreasonable** not to raise it."

91. Consistent with the observations set out above, the applicants emphasised the distinction between whether a matter could have been raised and whether it should have been raised in the prior proceedings and submitted:[86]

> It would be wrong to hold that because a matter could have been raised in earlier proceedings it should have been, and then to take the matter even further and say that the "could" or the "should" was unreasonable, and then to say that such decision was of such a magnitude so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should be a broad, merits-based judgment which takes account of the public and private interest involved in the conduct of applications in the Workers Compensation Commission." (emphasis in original)

92. The applicants referred to the fact that the rules of evidence are not strictly applied, the legislation is "considered to be beneficial" and "most importantly the costs of conducting the hearing is governed by legal aid funded by the system which is designed to support the benefit of workers and which should not be drained by conducting expensive and over prepared litigation".[87]

93. The applicants submitted that the only logical conclusion was that they had not acted unreasonably "considering the effort that has been given to this litigation".[88]

[86] Applicants' written submissions, [78] and [86].
[87] Applicants' written submissions, [77].
[88] Applicants' written submissions, [79].

94. The applicants referred to their compliance with "WIRO's disbursement funding policy" and the necessity to ensure that unnecessary and excessive disbursements are not incurred. It was submitted that prior to the previous proceedings the only reports obtained were from Associate Professor Bryant and Dr Paul Jennings. It was asserted that this evidence "was sufficient for the Applicant to succeed on its merits" and it was not reasonable to incur "a multitude of expenses in order to cover every contingency in every matter otherwise the system would be unfairly burdened and not be complying with the requirements under the WIRO Funding Policy."[89]

95. The applicants submitted that further evidence came into existence after the decision in *Miller No 1*, which was rejected on appeal in *Miller No 2*. Apparently "the issues raised by the Arbitrator were considered and additional expert and lay evidence was obtained", which had then become "reasonable and necessary" in accordance with fulfilling obligations through WIRO.[90] It was said that the assessment of the applicants' actions should be made on the basis of "a value judgment … referable to the proper conduct of modern litigation." Reference was made to the "restrictions placed upon injured workers and their legal representatives".

96. The applicants asserted that the further evidence was not so relevant in the first proceedings "because it was not what was pleaded", therefore, it was not relevant and was otherwise not available.[91]

97. In oral submissions the applicants referred to the s 74 notice issued by the Insurer prior to the first proceedings.[92] It submitted that the notice accepted that the deceased worker "suffered an injury in the nature of a severe asthma attack which resulted in her death"[93] but that the applicant had not discharged the onus of proof under s 9A of the 1987 Act. Accordingly, s 4(a) "wasn't an issue in those proceedings".[94]

98. The fresh evidence obtained after *Miller No 1* went to both the issue pleaded in *Miller No 4* but also to the s 9A issue.[95] Whilst it was known that the deceased suffered a cardiac arrest, the issue was "whether or not there was an issue which was the cardiac arrest".[96] The further evidence that dealt with that issue is set out at paragraph 34 of the written submissions and "has to be read, not only from the remoteness and the causation perspective but from the injury, being the injury of the heart attack, the cardiac arrest."[97]

99. The further evidence addressed the issue of s 9A in the context of the "cardiac arrest injury rather than the asthma attack injury".[98]

100. The onus of proof is on the respondent who is "quickly glossing over it".[99]

101. An alternative submission, based on a proposition put by myself, was that the applicants could and should have known that there was a s 4(a) injury as argued in *Miller No 4* but could not succeed as the evidence was essentially relevant to s 9A of the 1987 Act.[100]

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[89] Applicants' written submissions, [81].
[90] Applicants' written submissions, [83].
[91] Applicants' written submissions, [87].
[92] Reply, p 315.
[93] Reply, p 316.
[94] T, p 43.
[95] T, p 43.
[96] T, p 46.
[97] T, p 49.
[98] T, p 52.
[99] T, p 54.
[100] T, pp 55-56.

102. The employer must otherwise establish that it was unreasonable in all the circumstances and "they have got to make these submissions and they haven't done it and they have got to present evidence to say it and then we should respond to it."[101] Even though the respondent made oral submissions on this issue it "hasn't answered the question".[102]

103. The applicants emphasised the distinction between the allegation of injury argued in the prior proceedings, asthma attack, with the allegation of injury by way of anoxia and cardiac arrest in the present proceedings.[103] Unfortunately at various points during the arbitration hearing the applicant referred to the allegation of injury by way of asthma attack as alleged in the prior proceedings as also being a s 4(a) injury.

Respondent's submissions in reply

104. The respondent submitted in reply:[104]

> "The deceased worker suffered cardiac arrest and died due to the remoteness of the location and critical medical attention not being received when she was in the realms of her employment as a Home Care service driver. Now as far as putting on evidence to say that it was unreasonable for the applicant in these proceedings to run the arguments they run now in the original proceedings, what can we do other than to say they squarely pleaded it back in 2016 and we're here fighting about it again, the matter having been to the Presidential level twice and been to the Court of Appeal once, were squarely raised as the basis for the claim for compensation in 2016 is the very issue we're arguing about today. Now what more can someone in our, the respondent, do when responding to an assertion of the right to compensation other than to say, hang on a second, they ran this argument and had the material available to run this argument years ago and here we are re-litigating it. Now we'd proved that, (a) the evidence is there. We've proved that there on top of the issue was being a relevant matter that needs to be determined. What more can we do? I mean, we can't delve into the minds of Mr Wilson and his solicitors and try to come up with an explanation as to why they conducted themselves in the fashion they did. And Mr Wilson says well it's all to do with WIRO funding without any evidence to support the proposition in his submissions. We can do no more than what we've done and that is identify the fact that these issues were live issues, that they weren't litigated. They're now being litigated again and they should have been litigated in the first instance and say, right that's unreasonable with reference to the general principles that are discussed by the President in his decision and discussed by the High Court in *Anshun*. And in *Anshun*, in that very decision, the High Court identifies the fact that in the failure on the part of the party that hadn't raised or contested the issue at the relevant point had put no evidence on to explain why they hadn't done it and that's exactly what we've got here."

Reasons

Legal principles

105. In *Anshun* the plurality stated:

> "37. In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not

[101] T, p 57.
[102] T, p 58.
[103] T, p 68.
[104] T, p 60.

> to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations given in Cromwell v. County of Sac. (1876) 94 US (24 Law Ed, at p 199)
>
> 38. It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment. In this respect the discussion in Brewer v. Brewer [1953] HCA 19; (1953) 88 CLR 1 is illuminating."

106. The principles of *Anshun* were summarised by the President in *Miller No 5*. His Honour stated:[105]

> "The mere fact that a party makes a choice to litigate a matter in other proceedings in and of itself is insufficient to ground an *Anshun* estoppel. This proposition has even greater resonance in the context of workers compensation cases given that the legislation does provide for various statutory benefits which can, quite properly, be asserted in different proceedings. But this does not mean that every decision in a worker's compensation matter to litigate separate claims will always be permissible from an *Anshun* point of view. Rather, such a decision will only give rise to an *Anshun* estoppel if it was unreasonable not to have pleaded this cause in the earlier action. The principles distilled from the various authorities are neatly summarised by Judge Neilson in *Bruce v Grocon Ltd* in the following terms:
>
> > "The principles which I distil from these authorities are:
> >
> > (a) the principle in the *Port of Melbourne Authority v Anshun Pty Ltd* extends to claims as well as to defences: O'Brien's case in the Court of Appeal and Boles' case;
> >
> > (b) estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceeding or the granting of remedies inconsistent with the remedy originally granted or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
> >
> > (c) the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
> >
> > (d) it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case: Boles' case.'"

107. The parties referred to the extensive discussion by McColl JA in *Habib*[106]. Indeed, the relevant error identified by the President in *Miller No 5* was the failure in *Miller No 4* to consider the "evaluative element based upon what a litigant could reasonably have been expected to do in earlier proceedings".

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[105] *Miller No 5* at [195].
[106] At [82]-[87].

The applicants' knowledge of the existence of the s 4(a) action

108. For the following reasons I reject the applicants' submission that it was unaware at the time of *Miller No 1* of the s 4(a) injury as pleaded in *Miller No 4*. Indeed, I make a positive finding that the applicants had knowledge of the existence of the s 4(a) injury during the hearing in *Miller No 1*.

109. The reasons and findings of Arbitrator Batchelor in *Miller No 1* show that the applicant then argued a case based on s 4(b)(ii), that the allegations of injury was an aggravation etc. of an asthma attack and that the applicant failed because they did not satisfy s 9A of the 1987 Act.

110. The applicants' submitted that they were not aware in the prior proceedings of the s 4(a) injury as pleaded in the present proceedings and the further evidence went to that issue. During submissions I raised with the applicants' counsel that the further evidence did not relate to whether the deceased suffered "an injury in the course of employment" but whether the death could have been avoided.[107]

111. I accept the employer's submission that the applicants' legal representatives knew in the prior proceedings that the deceased suffered cardiac arrest as a s 4(a) injury in the course of her employment. The transcript in *Miller No 1* shows that the applicants' counsel knew of this when he referred to the process whereby an asthma attack may lead to cardiac arrest.[108] Counsel then stated:

> "Just from a general point of view I take that the urgency of the need for someone who's suffering an asthma attack and I take you to page 4 of Dr Jennings's report at page 258 of the ARD where he outlines just from an input point of view what occurs when someone is having an asthma attack which can be summarised as being the narrowing of the airways. The body tissues become hypoxic, which is being deprived of oxygen supply, which then leads on to cardiac arrest and that is what occurred with Moori's situation and which then the cause of death being anoxia which is total deprivation of oxygen."

112. When the respondent made the submission, based on this passage that the applicants "did know"[109] about the s 4(a) injury, the applicants' response did not address the submission but reflected back to the fact that different injuries were alleged in the two sets of proceedings.[110]

113. The President in *Miller No 5* summarised the evidence known to the applicants in *Miller No 1* which established that the deceased had suffered a s 4(a) injury, namely anoxia and cardiac arrest.[111] I adopt that summary for the purposes of this decision.

114. It is otherwise a self-evident fact that the deceased was in the course of her employment driving the community transport bus from Dubbo to Brewarrina when she suffered the asthma attack. Shortly thereafter the deceased suffered anoxia and cardiac arrest and died. During this period, the deceased remained in the course of her employment.

The further evidence filed in Miller No 4

115. The applicants referred to the further evidence relied upon in *Miller No 4* which was not part of the material filed in *Miller No 1*. That evidence is summarised by the President in *Miller No 5* at [85]-[98]. I adopt that summary without repeating it in these Reasons.

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[107] T, p 42.
[108] Reply, p 717.
[109] T, p 66.
[110] See the discussion at T, p 68.
[111] *Miller No 5* at [198].

116. The applicants in their written submissions also summarised the further evidence which was not dissimilar to that stated by the President.[112]

117. The further evidence almost, if not exclusively, addressed the medical treatment that was available if the deceased was in Brewarrina at the time of suffering an asthma attack and what may have happened if the deceased had then sought medical treatment.

118. The further report of Dr Paul Jennings dated 4 August 2017 was asked to address the proposition as to what would have happened had the deceased worker suffered the asthma attack in her office situated in Brewarrina. The further report of Professor Fulde addressed a similar assumption concerning what may have occurred if the deceased worker was in Brewarrina at the time of the asthma attack and what was available for the next 30-40 minutes prior to the acute deterioration.

119. Ms Heather Finlayson was an employee at Brewarrina Hospital and provided evidence as to available treatment at Brewarrina Hospital on 15 April 2011.

120. There are portions of the evidence that address the nature of the deceased's cardiac arrest and death. However, those portions of the further evidence were already known to the applicants.

121. The further evidence does not essentially enlarge on whether the deceased worker suffered a s 4(a) injury but whether, had the initial asthma attack occurred in Brewarrina, the deceased worker had available medical treatment in order to survive.

The pleadings in Miller No 1 and the employer's letter of denial

122. The applicants asserted that the s 4(a) injury of anoxia and cardiac arrest was not pleaded in *Miller No 1*. The employer made the contrary submission.

123. The applicants' submission is correct. The pleading refers to the deceased suffering an asthma attack and "suffered cardiac arrest and died due to the remoteness of the location". As the Court of Appeal observed in *Miller No 3*, the pleading was "insufficient"[113] and did not identify the "injury" which was only clarified in oral submissions.

124. The applicants referred to the s 74 notice dated 28 February 2016 and submitted that the notice did not identify a "dispute that the deceased worker suffered an injury in the nature of a severe asthma attack which resulted in her death" and that "meant at the first proceedings, Miller No. 1, before Arbitrator Batchelor, the issue was not whether or not there had been a s 4(a) injury because that was never identified as an issue in accordance with the section 74 notice."[114]

125. There are two inaccuracies with this submission. First, the denial letter refers to the deceased worker suffering "an asthma attack" and that the "severe asthma attack caused the death of the deceased worker as a result of anoxia".

126. Secondly, whilst the letter accepts that the "deceased worker suffered an injury in the nature of a severe asthma attack which resulted in her death", that denial does not dictate how the applicants prosecuted the prior proceedings. It was not an issue in the prior proceedings because the applicants did not pursue the s 4(a) action, not because the denial letter disputed or did not dispute a s 4(a) injury.

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[112] Applicants' written submissions, [34]-[35].
[113] *Miller No 3* at [33].
[114] T, p 42-43.

The absence of evidence concerning why s 4(a) was not raised in the prior proceedings

127. The employer referred to the absence of evidence from the applicants explaining why they did not argue the s 4(a) injury in the prior proceedings and referred to observations by the plurality in *Anshun*[115] where the High Court observed that no explanation was then provided. It submitted that no evidence was led explaining why the decision was made. With some justification, the employer refers to the applicants' submission without any evidence regarding the WIRO funding policy which were advanced as a reason for not pursuing the s 4(a) action in the previous proceedings. It was otherwise submitted by the employer that the applicants' submission was made in the absence of evidence from the solicitor that the further reports could not have been obtained.

128. I accept the respondent's submission that the applicants have attempted to explain why the s 4(a) claim was not pursued in the prior proceedings in the absence of evidence. The applicants' explanation by way of submission is otherwise inconsistent with the finding that they were aware of the s 4(a) action at the relevant time and had sufficient evidence to establish it.

Findings

129. For the reasons expressed earlier, I am satisfied that at the time of making submissions in the prior proceedings before Arbitrator Batchelor, the applicants' legal representatives were aware of the specific s 4(a) injury occurring in the course of employment which was subsequently pleaded and argued in *Miller No 4*.

130. The employer submitted and I accept that both the present and prior proceedings involve the same factual context in which the applicants seek the same relief. The matter being litigated in the present proceedings is extremely close to what was argued in the previous proceedings. Whilst I accept that they are separate injuries, there is also no doubt that the onset of the asthma attack resulted in cardiac arrest and anoxia over a short time frame.

131. I accept the employer's submission that the evidence it relies upon is based upon what has occurred and what was known by the applicants. To the extent that the applicants' submitted that the employer failed to adduce evidence and for them to respond, that submission misconceives that the facts relied upon by the employer are established from the evidence that was served in the prior proceedings and what has been shown to have been known by the applicants when *Miller No 1* was argued.

132. Whilst the applicants do not bear the onus of proof, they have not provided any evidence as to why they chose to argue injury in the manner they did in *Miller No 1* and raise a different injury in *Miller No 4*.

133. I accept the employer's submissions that no evidence was advanced by the applicants as to why the course was taken not to argue the s 4(a) injury in the prior proceedings. The explanation that they were not aware of the s 4(a) injury and that the further evidence was relevant to that decision does not stand up to any proper analysis.

134. A similar observation concerning the failure by the party refraining to act to place evidence explaining their decision was made by the plurality in *Anshun*. I agree with Mr Morgan's submission that his client could not file evidence explaining why the applicants' legal representatives made the choice they did.

[115] *Anshun* at [43].

135. I have earlier set out my reasons for rejecting a principal submission, one that was accepted in *Miller No 4*, that the applicants were unaware of the s 4(a) injury when *Miller No 1* was argued.

136. The applicants have relied upon other reasons proffered by way of submission and in the absence of direct evidence.[116] The employer noted that these submissions were made in the absence of evidence.

137. The applicants referred to the need to limit "unnecessary and excessive disbursements" in order to comply with WIRO's disbursement funding policy. That explanation does not explain why further questions were not asked of medical experts in the prior proceedings to elucidate matters pertaining to the causal connection between injury and the employment concerned. The explanation also does not sit with my conclusion that the applicants were aware of the s 4(a) injury at the time of arguing *Miller No 1*.

138. The applicants asserted that the "evidence came to light after the decision of Arbitrator Batchelor"[117] and after a consideration of the reasons provided in *Miller No 1*[118]. This is a poor explanation by the applicants' legal practitioners that it is reliant on the reasons provided by the Arbitrator in circumstances where those reasons were based on submissions provided by the employer during the prior proceedings.

139. The further evidence relied upon in *Miller No 4* showed the medical facilities available in Brewarrina on the relevant day, the physical location between the deceased's normal place of employment and these facilities and what was likely to have happened had the deceased sought medical treatment between the onset of the asthma attack and the acute deterioration some 30-40 minutes later when the deceased suffered the s 4(a) injury.

140. All this evidence was relevant to an analysis of the causal connection as defined in s 9A between the employment and the injury although it did not directly address the deficiency in the evidence, as noted by the Court of Appeal. Relevantly the Court commented:[119]

> "The issue of causation required a counterfactual analysis as to what could have occurred if the asthma attack had commenced while the deceased was in Brewarrina. The critical matter in the present case was that, on the unchallenged findings of primary fact, the deceased continued to drive the vehicle for 25-30 minutes after the onset of the asthma attack, and only pulled over when asked to do so by one of the passengers."

141. The applicants also submitted that the "rules of evidence are not as strictly applied" in the Commission. It is unclear how that submission explains the failure to raise the s 4(a) allegation in the prior case. The fact that the rules of evidence are not strictly applied otherwise does not mean that they are ignored. The Court of Appeal has previously held in *South Western Sydney Area Health Service v Edmonds*[120] that the principles of procedure set out in the Workers Compensation Commission Rules "broadly reflects fundamental principles of the common law concerning admissibility of evidence".[121] I reject the applicants' submission as relevant to the consideration of the Anshun principle.

142. I also reject the applicants' submissions that the "legislation is considered to be beneficial". That submission reflects an outdated approach. Recent Court of Appeal and High Court authority have either declined to adopt a beneficial approach (see for example *Hochbaum v*

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[116] Applicants' submissions, [73]-[87].
[117] Applicants' submissions at [82].
[118] Applicants' submissions at [83].
[119] *Miller No 3* at [35].
[120] [2007] NSWCA 16.
[121] At [128] per McColl JA, Giles and Tobias JJA agreeing.

RSM Building Services Pty Ltd[122] and *Hunter Quarries Pty Ltd v Mexon*[123]) or found that aspects of the legislation were clearly not beneficial to workers: see *ADCO Constructions Pty Ltd v Goudappel*[124] and *Cram Fluid Power Pty Ltd v Green*[125]. It is otherwise unclear and was not explained by the applicants how a beneficial approach to construction of the legislation assists the applicants on this issue.

143. The applicants referred to the system being legally funded and should "not be drained by conducting expensive and over prepared litigation". There was no evidence of the extra cost in obtaining the further evidence relied upon in the present proceedings. There was no evidence why the relevant questions could not have been asked at first instance.

144. The system objectives are defined in s 3 of the 1998 Act and include the delivery of benefits "efficiently and effectively". It is not in the interests of the efficiency of the Commission that different allegations of "injury" are argued in separate proceedings to establish a liability to pay a lump sum death benefit. The present proceedings amply show the inefficiency of the application of Commission resources when different allegations of injury are raised in separate proceedings resulting in a multitude of appellant decisions.

145. The system objectives are consistent with the public interest of the finality of litigation. In this respect I refer to and adopt the policy considerations discussed in *Miller No 5* at [187].

146. I accept that there is a competing private interest in the applicants' favour to recover compensation entitlements.

147. I accept the employer's submission that both the prior and present proceedings relate to the same factual circumstances involving extremely similar causes of actions.

148. I accept that the applicants knew at the time of *Miller No 1* that the deceased suffered both an asthma attack (s 4(b)(ii)) and a s 4(a) injury described as anoxia and cardiac arrest. The factual matrix clearly shows that the subject matter was relevant to the subject matter of the prior proceedings as discussed in *Champerslife*.

149. A further policy consideration is the problem associated with conflicting judgments: see *Anshun* at [40].

150. It is the reasoning in *Miller No 1* with the discussion in *Miller No 3* that makes the findings on s 9A in the prior and present proceedings inconsistent.

151. The comments of the Court of Appeal set out at [19] herein, based on the findings in *Miller No 1* (set out at [10] herein) were based on the absence of any causal connection between the employment concerned and the injury as alleged. Indeed, the observations by the Court of Appeal in favour of the employer were made in the context of "any formulation of the injury".

152. Whilst the further evidence obtained by the applicant after the decision was issued in *Miller No 1* explains in part, the differences in the outcome in the prior and the present proceedings, the findings made by Arbitrator Wynyard in *Miller No 4* (set out at [21] herein) are grossly inconsistent with the s 9A finding in *Miller No 1*. Indeed, the latter findings in *Miller No 4* had no regard nor did they explain the "unchallenged findings"[126] that the deceased worker took no steps in the first 30 minutes of the asthma attack to seek any treatment. This further matter illustrates the gross inconsistency between the decisions in the prior and present proceedings on s 9A of the 1987 Act.

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[122] [2020] NSWCA 113 at [39].
[123] [2018] NSWCA 178 at [53] and [65].
[124] [2014] HCA 18 at [29].
[125] [2015] NSWCA 250 at [122].
[126] *Miller No 3* at [37].

153. This is a further reason why the Anshun defence is successful.

154. For all these Reasons, I am satisfied that it was unreasonable that the applicants did not pursue the s 4(a) injury in *Miller No 1* and that the Anshun estoppel defence is established.

FINDINGS and ORDERS

155. The findings and orders are set out in the Certificate of Determination.