

Administrative exam:

1.

V1:

The VCT appears to have broad de novo merits review power. While it does not have remaking or remitting amongst its powers like the AAT might, the power it has under s23 to vary, set aside and make any other order it deems necessary essentially allows it the same power. It is certainly wider than the discretion of the Administrative and Disciplinary Div of the SA District Court, as it needn't have 'cogent reasons' to depart from the original decision.

In her appeal to the VCT, V1 will be looking to have her decision remade or varied to include damages for her psychological injury and her loss of earnings. To do this she will need to argue how they fall within the statutory criteria.

In arguing loss for psychological injury, V1 would contend that this injury was not 'too indirect and remote', but rather that her injury qualified as one where 'the causal relationship is clearly established' under s14(i)(iii). There could be little doubt that anything other than the incident would have caused such injury, and she would submit any possible evidence as to assist to this, and the extent of the injury, such as psychologist's reports.

One issue that V1 may have to center on this point is that the statute talks about 'physical injury or financial loss'. V1 would probably need to argue if this were raised that her mental injury would fall under the physical injury 'banner', as the form appears to be used to distinguish from cases where loss is purely financial.

V2:

Decisions of the VCT are protected by a very strong privative clause, purporting to protect its decisions from review 'in any court on any ground'. The SASC has often read privative clauses literally, (e.g. *Tsimlines*), but such a strong provision has yet to be considered by the SASC. A strong clause was considered by the NSWSC in *Mitchforce*. The court there said that at the very least, the 3 *Hichman* provisos apply.

The *Hichman* provisos require a bona fide attempt to exercise power, that the decisions relates to the subject matter of the legislation, and that the decision is reasonably capable of reference to the power given to the tribunal. None of these factors seem to be disputable here – all seem satisfied.

Mitchforce also seemed to indicate that the rule from 5157 about inviolable limits and imperative duties applies. Thus if any of the Grounds of Review discussed below can show that some inviolable limit has been breached, they may be reviewable.

Mitchforce showed that jurisdictional error can be excluded from review by a privative clause at the state level. Notice though that if errors are jurisdictional, V2 will probably have a better chance of escaping the privative clause than if errors are aren't. In this case, a key factor toward the jurisdictional nature of any errors will be whether the VCT is deemed to be a

tribunal or an inferior court. In *Craig v WCT*, for example the Worker's Compensation Tribunal was deemed to be an inferior court, and thus less of its errors were jurisdictional, as opposed to a tribunal, where you presume most errors of law will be jurisdictional. *Trust Co v Shining* would tell us to weigh up indicators either way to see if this is a court or a tribunal.

- One key factor in *Trust Co v Shining* was the lack of judges in the NSW ADT. Here the VCT is presided over by a judge.
- Although it is not bound by rules of witnesses it can require witnesses to appear and testify under oath.

I would be of the opinion that these factors make the VCT appear to be an inferior court, and thus less of its errors would be deemed jurisdictional.

Assuming review is available, V2 would be appealing to the SASC in its inherent jurisdiction (s17 Supreme Court Act). There is little doubt this matter is justiciable. It does not fall into any of the categories of often non-justiciable matters (e.g. National Security in CCSV), nor does it relate to any of the factors *Peho-Wallsend* (e.g. Nature of the Power, Complexity, Polycentricity). It should be noted that the 'decision' I refer to is the decision of the VCT to only award V2 \$2000. Standing is not at issue. V2 is directly affected by the decision, has her interests at stake etc.

As for actual grounds for the review:

Procedural Fairness would apply to V2's hearing by the VCT. She no doubt passes the criteria from *Kioa* - this administrative decision affects her right to compensation, or failing that her interest in it, or in the very least her legitimate expectation to compensation. A key point of the VCT's decision is their emphasis on V2's position as the driver's partner and her supposed 'free will' in entering the car. On the facts provided, the VCT appears to have said nothing to V2 to indicate that this may be a factor in the decision. *Kioa* and *VEAL* both stand for the proposition that any adverse allegations against you should be disclosed such that you may have a chance to respond to them. In this case, however, the counter argument may be that this potentially adverse information was clearly known to both parties, and never really hidden.

In that case, V2 could still argue that she was denied an adequate hearing when the judge refuses to hear her side of the story about the accident. It may be difficult, however, to see exactly what practical injustice this would have caused V2, given that her submission and the court transcript would have contained roughly the same material, however, would seem to say it is irrelevant that a hearing may not have made a difference. There is no absolute right to an oral hearing, e.g. *Chen v MIEA*, however where a court like tribunal is established to only deal with the most difficult of cases, you might distinguish this to *Chen*, where the vast volume of decision dealt with by refugee officers would be impractical to give everyone an oral hearing. Here although to have a court like tribunal refuse to hear oral evidence the impracticality argument is gone.

It is of note that there is no estoppel in administrative cases such as these exercising public powers (*Kurtovic, Quin*). This would preclude V2 from enforcing the 'no blame' rule found on the website/(unrecognizable). Looking at the case *Teoh*, however, where ratification of treaty could rise to a legitimate expectation despite *Teoh* not ever knowing about it, you

would say V2 has an even stronger cases as she knew of the material. Thus if they were not going to stick to this policy, V2 should have been informed (following *Teoh*).

There may also be a bias issue here. It would likely be too hard to make out actual bias, but perhaps apprehended bias. The judge's actions to a fair minded observer may raise a reasonable apprehension of bias (*Stolley*). He dismissed her arguments, has not seemed to have read any of the material in any depth, and only adjourned briefly. The counter argument would be necessity – the VCT is the only place you can go for this, and this judge is its only member. But this can be distinguished from *Laws*, in that here it isn't some opinion based on over familiarity, it's an informed opinion based on under familiarity. And being the only decision maker shouldn't bring with it a right to lazy decision making.

These errors are probably not jurisdictional, going on *Craig's* case, if it is an inferior court, but denial of PF is usually grounds for Certiorari done. There may also be an argument that there were clear terms in the privative clause excluding procedural fairness, and that the privative clause may be read as no review of any decisions of the tribunal that accord with procedural fairness.

There may be the argument that there has been a misinterpretation of the statement. It seems that it is a 2 stage process:

1. Does the victim satisfy all criteria from s14(1) (NB doesn't make sense unless you apply an 'AND' between each sub-point.
2. If so, may award damages based on injury/loss.

So it would seem that once point 1 is made out, the only question is what the extent of damages is. While it is discretionary, the discretion seems to be either award nothing or award something based on loss (not award something based on whether you want). Thus in this case her relationship with the driver may be an irrelevant consideration.