

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4560/19
Applicant: Trevor O'Brien
Respondent: L & M Pittari Transport Pty Limited
Date of Determination: 9 January 2020
Citation: [2020] NSWCC 16

The Commission determines:

1. The Stryde intramedullary lengthening nail to be used in the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon, is an artificial aid within the meaning of section 59A(6)(a) of the *Workers Compensation Act 1987*.

The Commission orders:

2. The respondent pay for the costs of and ancillary to the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon.

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

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr Trevor O'Brien, is a 68-year-old man who was employed by L & M Pittari Transport Pty Limited (the respondent) as a truck driver.
2. On 12 July 2012, in the course of his employment with the respondent, Mr O'Brien walked on a cupboard to remove a fluorescent light tube. As he walked back along the cupboard and went to step down, a board broke, which resulted in him falling, twisting his left ankle and sustaining a Weber B left fibula fracture.
3. On 5 February 2013, Mr O'Brien underwent a left ankle arthroscopy, debridement and spur excision by Dr Angela Hatfield, Orthopaedic Surgeon.
4. On 1 October 2015, Mr O'Brien was carrying out grinding and welding in a shed as a contractor on a property owned by Mr Patrick Mancini. At about 1.30 pm, Mr O'Brien had positioned a ladder next to a trestle and climbed a few steps on the ladder to get off the trestle. He placed his left foot on the plank and whilst transferring from the ladder to the plank, placed weight on his left foot and turned onto the trestle. As he performed this manoeuvre, he felt a sharp pain in his left ankle and his left foot gave way before he was able to get onto the plank. He fell from a height of about one metre backwards onto the floor. He landed heavily on his backside, right hip and right leg. As he fell, he put his right hand out to break his fall. He sustained an intertrochanteric fracture of his right hip and a fracture of his distal right radius with displacement and underwent surgical procedures in relation to each.
5. On 4 December 2015, Mr O'Brien lodged a Worker's Injury Claim Form with the respondent.¹ Mr O'Brien claimed that the injuries he sustained on 1 October 2015 were consequential to his Weber B left fibula fracture (left ankle) in the course of his employment with the respondent on 12 July 2012. Initially, the respondent declined liability. However, on 1 July 2016, a Certificate of Determination – Consent Orders were entered into in the Commission.²
6. On 20 March 2018, Mr O'Brien, through his lawyers, made a written request to the respondent's relevant insurer at the time, Allianz Australia Workers Compensation (NSW) Limited (Allianz), to approve the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon under section 60 of the *Workers Compensation Act 1987* (the 1987 Act).³
7. On 17 May 2018, Allianz responded to Mr O'Brien's request for approval for the surgery proposed by Dr O'Carrigan, advising that it declined liability for injuries to his right leg on 1 October 2015 and relied upon its Dispute Notice dated 23 January 2018 (incorrectly referred to as 22 January 2018) pursuant to section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).⁴

ISSUES FOR DETERMINATION

8. The parties agreed that the following issue remained for determination:

Is the Stryde intramedullary lengthening nail to be used in the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon, an artificial aid within the meaning of section 59A(6)(a) of the 1987 Act?

¹ Application to Resolve a Dispute dated 4 September 2019 at pages 71-74

² Application to Resolve A dispute dated 4 September 2019 at page 75

³ Application to Resolve a Dispute dated 4 September 2019 at page 15

⁴ Application to Resolve a Dispute dated 4 September 2019 at page 9

Matters previously notified as disputed

9. The issues in dispute were notified in the Dispute Notice referred to above.

Matters not previously notified

10. Allianz did not raise section 59A as an issue in dispute in either its letter dated 17 May 2018 or in the Dispute Notice dated 23 January 2018 but did so at the Commission teleconference in this matter on 3 October 2019.

PROCEDURE BEFORE THE COMMISSION

11. The parties attended a conciliation conference/arbitration in Griffith on 10 December 2019. Ms Kavita Balendra of counsel appeared for Mr O'Brien and Mr Dewashish Adhikary of counsel appeared for the respondent.

12. During the conciliation phase the parties agreed as follows:

(a) Injury was not in dispute.

(b) The right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon is reasonably necessary as a result of injury on 12 July 2012.

(c) That if the Stryde nail to be used in the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon is found to be an "artificial aid" within the meaning of section 59A(6)(a) of the 1987 Act, then Mr O'Brien is entitled to an order that respondent pay for the costs of and ancillary to the proposed surgery.

13. During the conciliation phase an interlocutory dispute arose, which was raised at the teleconference before Arbitrator Burge but it was not determined then. The respondent again sought to raise section 59A of the 1987 Act as an issue.

14. The interlocutory issue was determined by me during the arbitration phase after hearing the oral submissions of the parties. The respondent was granted leave under section 289A(4) of the 1998 Act to raise the previously unnotified issue under section 59A of the 1987 Act.

15. The oral submissions and my reasons for the determination in relation to the interlocutory issue were sound recorded and the sound recording is available to the parties.

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

EVIDENCE

Documentary evidence

17. The following documents were in evidence before the Commission and taken into account in making this determination:

(a) Application to Resolve a Dispute (ARD) dated 4 September 2019 and attached documents, and

(b) Reply dated 25 September 2019 and attached documents.

Oral evidence

18. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

FINDINGS AND REASONS

Is the Stryde intramedullary lengthening nail to be used in the right leg lengthening surgical procedure proposed by Dr Tim O’Carrigan, Orthopaedic Surgeon, an artificial aid within the meaning of section 59A(6)(a) of the 1987 Act?

19. Firstly, I will refer to the relevant legislation and legal principles.

20. Section 59A of the 1987 Act provides:

- “(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.
- (2) The compensation period in respect of an injured worker is:
 - (a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years commencing on:
 - (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
 - (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or
 - (b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on:
 - (i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or
 - (ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).
- (3) If weekly payments of compensation become payable to a worker after compensation under this Division ceases to be payable to the worker, compensation under this Division is once again payable to the worker but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.
- (4) For the avoidance of doubt, weekly payments of compensation are payable to a worker for the purposes of this section only while the worker satisfies the requirement of incapacity for work and all other requirements of Division 2 that the worker must satisfy in order to be entitled to weekly payments of compensation.

- (5) This section does not apply to a worker with high needs (as defined in Division 2).
- (6) This section does not apply to compensation in respect of any of the following kinds of medical or related treatment:
 - (a) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries),
 - (b) the modification of a worker's home or vehicle,
 - (c) secondary surgery.
- (7) Surgery is '**secondary surgery**' if:
 - (a) the surgery is directly consequential on earlier surgery and affects a part of the body affected by the earlier surgery, and
 - (b) the surgery is approved by the insurer within 2 years after the earlier surgery was approved (or is approved later than that pursuant to the determination of a dispute that arose within that 2 years).
- (8) This section does not affect the requirements of section 60 (including, for example, the requirement for the prior approval of the insurer for secondary surgery)."

21. Section 60(1) of the 1987 Act relevantly provides:

"If as a result of an injury received by a worker, it is reasonably necessary that:

- (a) any medical or related treatment (other than domestic assistance) be given, or
- (b) any hospital treatment be given, or
- (c) any ambulance service be provided, or
- (d) any workplace rehabilitation service be provided,

the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2)."

22. Section 60(5) of the 1987 Act relevantly provides:

"The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute may be referred by the Registrar for assessment under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act."

23. If there is a finding that the Stryde nail to be used in the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon, is an artificial aid within the meaning of section 59A(6)(a) of the 1987 Act, then Mr O'Brien is not subject to the time limits on compensation provided for in section 59A(1) and (2) and he will be entitled to an order that respondent pay for the costs of and ancillary to the proposed surgery.

24. Both parties referred to the New South Wales Court of Appeal decision in *Pacific National Pty Limited v Baldacchino* (*Baldacchino*).⁵ In *Baldacchino*, Macfarlan JA, with whom Simpson AJA and Payne JA agreed, found that a total knee replacement was an “artificial aid” within the meaning of section 59A(6)(a) of the 1987 Act.
25. It is worthwhile repeating the relevant legislative history set out by Macfarlan JA in *Baldacchino*:

“The legislative history

6. Section 10(1) of the *Workers Compensation Act 1926* (NSW), on enactment, provided for compensation payable in respect of workplace injuries to include ‘the cost of such medical, surgical and hospital treatment as may in the opinion of the commission reasonably be required to relieve the worker from the effects of the injury’. Subsection (2) stated that the ‘treatment’ was to include ‘nursing, medicines, medical and surgical supplies, crutches, artificial members and other curative apparatus ...’
 7. Section 10(2) was amended in 1951 to provide (in (b)) that ‘Medical treatment’ included:

‘the provision of skiagrams [that is, x-rays], crutches, and artificial members, eyes or teeth and other artificial aids and spectacle glasses’.
 8. Section 59 of the 1987 Act, on enactment, provided that ‘medical or related treatment’ for which compensation was payable included:

‘(d) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles,
...
(g) the modification of a worker’s home or vehicle directed by a medical practitioner having regard to the nature of the worker’s incapacity.’
 9. This Act was amended in 2012 to include s 59A which limited the period of time for which compensation was recoverable for work injuries. Section 59A was amended in 2015 to introduce qualifications to that limitation....
 10. Neither the Second Reading Speech nor the Explanatory Memorandum relating to the 2015 amendment provides any assistance on the issue presently before this Court.”⁶
26. Macfarlan JA then considered the decision of *Thomas v Ferguson Transformers Pty Limited* (*Thomas*),⁷ a Court of Appeal decision which considered section 10 of the *Workers Compensation Act 1926* (the 1926 Act) as it stood following the 1951 amendments. *Thomas* was considered by the Court because it achieved some prominence at first instance, on appeal to the Presidential Unit of the Commission, as well as in submissions in the Court of Appeal in *Baldacchino*.
 27. In *Thomas*, the Court of Appeal was concerned with the form of section 10 of the 1926 Act as it stood after the 1951 amendments referred to above. The Court of Appeal held that the cost of the modification of a motor vehicle to enable it to be driven by the applicant, who was disabled by a workplace injury, and the cost of special driving lessons for the applicant were costs of the provision of “artificial aids” within section 10(2)(b). Mahoney JA dissented in respect of the latter finding because he considered that the evidence in the case before him was open to the inference that the lessons were to teach the applicant how to drive the motor vehicle, rather than specifically to use the modifications to it.

⁵ *Pacific National Pty Limited v Baldacchino* [2018] NSWCA 281

⁶ *Baldacchino* at [6]-[10]

⁷ *Thomas v Ferguson Transformers Pty Limited* [1979] 1 NSWLR 216

28. In *Baldacchino*, Macfarlan JA quoted the following passage from the judgment of Hutley JA, with whom Hope JA agreed, in *Thomas*:

“An artificial aid, in my opinion, is anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome. The other articles in the subclause, crutches, artificial members, eyes or teeth, are illustrations of this. Because of [the applicant’s] injury, she has lost all capacity for natural progression. The modifications to the car have given her some capacity to transport herself. It was suggested that, on this basis, the car was an artificial aid, and every person whose capacity to walk was diminished could have a car supplied at the expense of the insurer. It is not necessary to decide whether this conclusion follows. **The essential quality of an artificial aid is that it is an aid specially tailored to the needs of a person, which flowed from the injury.** The artificial aid is specific to an injured person. These modifications have this quality. As an artificial aid is useless unless the person for whom it is provided can use it, the provision of an artificial aid includes the provision of instruction in its use (emphasis added).”⁸

29. As to whether *Thomas* is a relevant authority, Macfarlan JA said:

“... in my view, *Thomas* remains a relevant authority, containing a useful explanation of what constitutes an ‘artificial aid’, notwithstanding that the present legislation is, to some extent, in a different form to that considered in that case. The only arguably material change in the form of the legislation has been the insertion in it of express reference to ‘the modification of a worker’s home or vehicle’ as constituting medical treatment (s 59A(6)(b)). By this change, the legislature confirmed that the finding in *Thomas* reflected its intent that the injured worker’s right to compensation in respect of the cost of such modification should not be subject to a time limit.”⁹

30. Macfarlan JA agreed with a submission of the appellant that the expression “artificial aids” must work to ameliorate the effect of the person’s disability, and that it may comprise a single object or a composite of objects operating together.¹⁰ His Honour described the nature of a total knee replacement operation, including that the procedure involved the insertion of plastic materials and said:

“Plainly these materials are designed to facilitate the movement and use of the knee after the operation, therefore easing the patient’s disability. Their ‘provision’ (see s 59A(6)(a)) cannot occur without a surgical operation. The cost of the operation therefore falls within the statutory provision.”¹¹

31. In referring to submissions by the appellant relating to a total knee replacement, Macfarlan JA said:

“Whilst it is a different means of alleviating a disability, there is no feature of the knee replacement which distinguishes it in principle, or character, from the other aids referred to.”¹²

32. As to whether section 59A(6)(a) of the 1987 Act is beneficial in its operation, Macfarlan JA said:

“As stated in *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1; [2014] HCA 18 at [29], to determine whether a statutory provision is beneficial, a court should not construe the legislation under consideration as a whole but instead direct attention to the particular provision in question. On this basis, s 59A(6)(a) is clearly beneficial because it restricts the operation of a limitation on compensation that is payable.

⁸ *Baldacchino* at [13]

⁹ *Baldacchino* at [34]

¹⁰ *Baldacchino* at [29]

¹¹ *Baldacchino* at [29]

¹² *Baldacchino* at [38]

As s 59(6)(a) in my view has a clear meaning (at least so far as is presently relevant), it is unnecessary to rely upon that conclusion but, if account is taken of it, it assists the respondent, not the appellant.”¹³

33. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties.
34. Mr O’Brien’s principal submissions may be summarised as follows:
- (a) The legal principles involved in relation to the issue for determination were set out in *Baldacchino*. An artificial aid is anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome. Its essential quality is that it is an aid specially tailored to the needs of a person, which flowed from the injury. The artificial aid is specific to an injured person.
 - (b) An artificial aid must work to ameliorate the effect of the injured person’s disability, and that it may comprise a single object or a composite of objects operating together.
 - (c) The disabilities resulting from Mr O’Brien’s consequential injury to his right proximal femoral pertrochanteric fracture on 1 October 2015 are a right leg shortening of 1.8 cm resulting in cramps in his right leg, back pain, knee and ankle pain and a short leg stiff hip gait.
 - (d) The surgical process proposed by Dr O’Carrigan was described as the removal of the dynamic hip screw (DHS); the insertion of a stainless steel intramedullary Stryde nail to restore the leg length requiring an osteotomy of the femur. The Stryde nail falls clearly within the description of an artificial aid in accordance with the principles in *Baldacchino*, being a single object, the effect of which is to ameliorate Mr O’Brien’s disability. The Stryde nail will allow Mr O’Brien to weight bear. Its provision cannot occur without a surgical operation. As such, it falls squarely within the provisions of section 59A(6)(a) of the 1987 Act.
 - (e) As referred to in *Baldacchino*, many artificial aids involve a process of connection of articles to the body in a manner comparable to that involved in knee replacements, including the provision of artificial limbs which can involve the insertion of supporting structures in bones to which artificial limbs can be attached. As such, the decision contemplated the possibility of the situation in Mr O’Brien’s case, where the Stryde nail is attached to Mr O’Brien’s bone (his femur) and would assist in reducing his disability. It is not clear at all that the nail would not be adjusted to suit Mr O’Brien’s body. The respondent has no evidence to say that the nail would not be adjusted to suit Mr O’Brien’s body.
35. The respondents’ principal submissions may be summarised as follows:
- (a) The Stryde nail is not an aid because the nail itself is a surgical tool, rather than something that has been specifically constructed, and that tool is used to facilitate the leg lengthening.
 - (b) The Stryde nail is not something that is to be constructed specifically for Mr O’Brien’s use. It is distinguishable from a prosthesis or a hearing aid. The nail does not have the characteristic of facilitating movement as in *Baldacchino*. It does not perform the tasks of a prosthetic. The nail simply uses a tool to achieve a goal, that is, to extend the leg to fix the leg length discrepancy.

¹³ *Baldacchino* at [39]

- (c) Mr O'Brien does not make use of the nail. So, the inference is that it is a tool, not an aid. The nail would not actually assist in achieving its goal of leg lengthening. It is used as a tool. It would not perform the task of an aid.
- (d) If there is a finding that the nail is an artificial aid, then it would open the possibilities of other types of procedures that included any metalware to overcome the restrictions imposed by section 59A of the 1987 Act contrary to the intention of the legislation.

36. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.
37. In evidence, there is an evidentiary statement by Mr O'Brien dated 15 March 2016,¹⁴ which provided the details of the circumstances surrounding the injuries he sustained on 11 July 2012 and 1 October 2015. As injury is not in dispute, I need not go beyond the detail provided under the heading "Background" above.
38. In evidence, there is also a supplementary evidentiary statement by Mr O'Brien dated 6 June 2018.¹⁵ I will now refer to the relevant parts of that statement.
39. Mr O'Brien stated that his right leg had become progressively shorter than the left since about 2016. He understood that this was because of slippage of the DHS that was inserted at the time of the surgery following his fall on 1 October 2015. As a result of his right leg being shorter than his left leg, he walks lopsided. The altered walking pattern causes him pain in his ankles, knees, hips and lower back. He consulted his general practitioner, who referred him for assessment and management by an orthopaedic specialist. Eventually, he consulted Dr O'Carrigan, on the referral of another orthopaedic surgeon, Dr Simon Matthews. Dr O'Carrigan confirmed that his right leg was 18 mm shorter than the left leg. He undertook a three-month trial of heel implants. However, the implants did not improve his altered gait pattern and he continued to experience problems with his ankles, knees, hips and lower back. Dr O'Carrigan advised that he could perform a surgical procedure to either reduce the length of his left leg or lengthen his right leg. He was also advised by Dr O'Carrigan that, once his legs were evened out, the level of pain in his ankles, knees, hips and lower back should reduce. Mr O'Brien stated that he has chosen to undergo the right leg lengthening procedure proposed by Dr O'Carrigan.
40. In evidence, there is a report by Dr O'Carrigan to Dr Matthews dated 28 November 2017.¹⁶ I will now refer to the relevant parts of that report.
41. Dr O'Carrigan took a history from Mr O'Brien that he had workers compensation related ankle problems, which led to pain whilst he was up a step ladder, causing him to fall and suffer a right proximal femoral pertrochanteric fracture. The fracture was treated appropriately with the insertion of a DHS in 2015. The fracture had healed in good position but with a shortening of about 16 mm, which led to secondary problems with pain. Dr O'Carrigan noted that erect leg x-rays demonstrated a 1.8 cm shortening of the right leg compared to the left leg and that Mr O'Brien was very aware of the leg length discrepancy and was keen to correct it.
42. Dr O'Carrigan explained that the approach to Mr O'Brien's problem was either to shorten the long leg or lengthen the short leg. The shortening of the long leg would involve a 1.8 cm segment removed from the femur and a plate or nail fixation. It involved a disturbance of the 'normal' leg. Mr O'Brien did not want to disturb his good leg and was not keen on that approach.

¹⁴ ARD at pages 2-8

¹⁵ ARD at page 1

¹⁶ ARD at pages 15-16

43. Dr O’Carrigan explained that lengthening the short leg could be done using a Precice intramedullary lengthening nail. Such approach would involve removal of the DHS and insertion of a nail with an osteotomy (a surgical fracture) of the proximal femur and fixation proximally and distally with locking screws. Lengthening would start 10 days post operatively by 1 mm per day and would reach full length by four weeks post operatively and thereafter, progress to full weight-bearing by three months and fully healed by six months. Dr O’Carrigan also explained that the nail was telescopic with an internal magnet that drives a lengthening mechanism. The internal magnet is controlled by an external remote control magnet (ERC) which is applied to the leg. A 1.5 Tesla magnetic field rotates the magnet within the nail, precisely controlling the rate and level of lengthening. It creates a stable environment and allows new bone formation within that space over time.
44. Dr O’Carrigan opined that correction of Mr O’Brien’s leg length discrepancy would have every chance of improving the pain profile of his lower limbs. He noted that leg length discrepancies of 1.5 cm become increasingly symptomatic over time and because of his age, Mr O’Brien would not be able to adapt to that leg discrepancy as well as a younger person.
45. In evidence, there is a report by Dr O’Carrigan to Dr Shahid Abbas, General Practitioner dated 25 July 2019.¹⁷ I will now refer to the relevant parts of that report.
46. Dr O’Carrigan repeated the history and observations made in his report dated 28 November 2017. He noted that Mr O’Brien continued to experience problems with cramps in his right leg, back pain, knee and ankle pain. He observed that Mr O’Brien had a short leg stiff hip gait and that repeat erect leg x-rays now demonstrated a 1.9 cm shortening of the right leg.
47. Dr O’Carrigan presented a slightly different plan in relation to Mr O’Brien’s right leg lengthening. The procedure is similar, in that, it will involve removing the DHS, carrying out an osteotomy of the femur and inserting an intramedullary lengthening nail. The nail would be a stainless steel Stryde nail rather than the Precice titanium nail referred to previously. The Precice nail is of similar design to the Stryde nail. Using the Precice nail, Mr O’Brien would not be able to fully weight bear during the lengthening process and until there is bridging bone. The Stryde nail is four times stronger than the Precice titanium nail and Mr O’Brien would be able to weight bear as tolerated during the lengthening process. Dr O’Carrigan opined that using the Stryde nail would lead to less morbidity from the lengthening due to muscle weakness and would reduce the risk of contractures, the risk of DVT and potentially could assist with bone healing.
48. Dr O’Carrigan referred to his discussion with Mr O’Brien about the proposed surgical procedure and its potential risks and complications. He noted that Mr O’Brien was keen to proceed with the surgery pending the insurer’s approval. Finally, Dr O’Carrigan opined that the correction of Mr O’Brien’s leg length discrepancy would make a big difference to his pain profile and function. It would be a very worthwhile process.
49. In evidence, there is a report by Dr O’Carrigan to Mr O’Brien’s lawyers dated 4 August 2019.¹⁸ I will now refer to the relevant parts of that report.
50. Dr O’Carrigan’s report repeated in full that which was contained in his report to Dr Abbas dated 25 July 2019 and then responded to specific questions put to him by Mr O’Brien’s lawyers.
51. Dr O’Carrigan opined that the proposed right leg lengthening procedure with the Stryde nail is “reasonable and necessary”.¹⁹ He commented that Mr O’Brien’s leg length discrepancy was presenting problems with his gait as well as his back and transferred stress particularly to the joints of the collateral leg. Correction could help relieve those symptoms and prevent them from deteriorating.

¹⁷ ARD at pages 20-22

¹⁸ ARD at pages 17-19

¹⁹ ARD at page 18 at [2]

52. Dr O’Carrigan observed that Mr O’Brien had not rushed into the decision to proceed with the proposed surgery. The first consultation was in 2017 and Mr O’Brien had given it further time before deciding to pursue a surgical option. Dr O’Carrigan opined that leg lengthening surgery for Mr O’Brien was now timely and had every chance of being successful.
53. I reject the respondent’s submissions that the Stryde intramedullary lengthening nail is a surgical tool used to facilitate leg lengthening and not an artificial aid; that the nail would not actually assist in achieving its goal of leg lengthening; and that it is not something that is to be constructed specifically for Mr O’Brien’s use. As I have articulated below, the Stryde nail will be, through its telescopic mechanism, an aid specially tailored to the needs of Mr O’Brien during the lengthening process.
54. I reject the respondent’s submissions that the Stryde nail is distinguishable from a prosthesis or a hearing aid and that it does not have the characteristic of facilitating movement as in *Baldacchino*. As I have articulated below, the Stryde nail will facilitate an improvement in Mr O’Brien’s gait pattern and will alleviate and prevent the deterioration of his low back pain and collateral leg joint pain.
55. I reject the respondent’s submission that if there is a finding that the Stryde nail is an “artificial aid”, then it would open the possibilities of other types of procedures that included any metalware in order to overcome the restrictions imposed by section 59A of the 1987 Act contrary to the intention of the legislation. As Macfarlan JA said in *Baldacchino*:

“I should not be taken to be adopting a general rule that the cost of surgery is always a cost of ‘[t]he provision of ... artificial aids’, as there may be cases where the insertion of material into a person’s body is only an incidental part of major surgery. Each case must be decided on its own facts.”²⁰

In his case, the Stryde intramedullary lengthening nail is certainly not incidental to the proposed major surgery and I am satisfied on the facts for the reasons stated below that it is an “artificial aid” within the meaning of section 59A(6)(a) of the 1987 Act.

56. “Artificial aids” must work to ameliorate the effect of a person’s disability. In this case, the expert evidence is that the stainless steel Stryde intramedullary lengthening nail to be used in the proposed surgery will alleviate and prevent the deterioration of Mr O’Brien’s gait problems, back pain and collateral leg joint pain.
57. An “artificial aid” may comprise a single object or a composite of objects operating together. In this case, the unchallenged expert evidence of Dr O’Carrigan was that the Stryde intramedullary lengthening nail is telescopic with an internal magnet that drives a lengthening mechanism. The internal magnet is controlled by an ERC which is applied to the leg. A 1.5 Tesla magnetic field rotates the magnet within the nail, precisely controlling the rate and level of lengthening. It creates a stable environment and allows new bone formation within that space over time.
58. The unchallenged expert evidence is that the proposed right leg lengthening surgical procedure will involve the removal of the DHS and an osteotomy of the femur, that is, a surgical fracture to enable the Stryde intramedullary lengthening nail to be internally imbedded between the surgically fractured bones in the femur. The Stryde nail is then fixed proximally and distally to the femur with locking screws. Right leg lengthening would commence five days after the insertion and fixation of the Stryde nail using the ERC applied to the leg to precisely control the rate and level of lengthening at 1 mm per day and would be out to full length four weeks post-operatively. In this sense, the essential quality of an artificial aid is satisfied, in that, it is an aid specially tailored to the needs of a person, which flowed from the injury.

²⁰ *Baldacchino* at [42]

59. Clearly, the Stryde nail and its telescopic component are specifically designed to facilitate and maintain the required leg length and following surgery, ease Mr O'Brien's disabilities as described above. The "provision" of the Stryde nail (see section 59A(6)(a) of the 1987 Act) cannot occur without a surgical operation. Therefore, the cost of the operation falls within the statutory provision.

CONCLUSION

60. I find that Stryde intramedullary lengthening nail to be used in the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon, is an artificial aid within the meaning of section 59A(6)(a) of the 1987 Act.
61. I order that the respondent pay for the costs of and ancillary to the right leg lengthening surgical procedure proposed by Dr Tim O'Carrigan, Orthopaedic Surgeon.