CITATION:	*MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33
PARTIES:	MACMAHON CONTRACTORS PTY LTD (ABN 37 007 611 485) v LEE, Mitchell Paul
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 10 of 2016 (21507050)
DELIVERED:	3 May 2017
HEARING DATES:	27 and 28 February 2017
JUDGMENT OF:	KELLY J
APPEAL FROM:	WORK HEALTH COURT

CATCHWORDS:

WORKERS' COMPENSATION – Injury – Physical injury and psychological sequela –*Workers Rehabilitation and Compensation Act* s 65 – Mere notice of existence of psychological sequela does not amount to acceptance of liability to pay compensation for loss of earning capacity as a result of the sequela – Worker obliged to give notice of alleged incapacity as a result of a sequela under s 80

WORKERS' COMPENSATION – Cancellation of compensation – Validity of notice - *Workers Rehabilitation and Compensation Act* s 69

ADMINISTRATIVE LAW — Judicial review — Work Health Court NT — Jurisdictional error — Natural justice — Failure to give adequate reasons

BANKRUPTCY - Action — Effect of bankruptcy on – Court action commenced by bankrupt before bankruptcy – Whether stay of proceedings – Whether action in respect of "personal injury or wrong" — *Bankruptcy Act 1966* (Cth), ss 60(2), 60(4) – Action under *Workers Rehabilitation and Compensation Act* s 65 for restoration of benefits for loss of earning capacity is an action in respect of a "personal injury or wrong"

Bankruptcy Act 1966 (Cth) s 58, 60, 71, 73, 116, 139P, 139Q

Workers Rehabilitation and Compensation Act 1986 (NT), s 65, s 69, s 73, 116, Sub-division B of Division 3 of Part 5

Bauen Constructions v Westwood Interiors [2010] NSWSC 1359; *Berryman v Zurich Australia Ltd* (2016) 310 FLR 108; [2016] WASC 196; *Cox v Journeaux and Ors (No. 2.)* (1935) 52 CLR 713; *Duckworth v Water Corporation* (2012) 261 FLR 185; *Faulkner v Bluett* (1981) 52 FLR 115; *Moss v Eaglestone* (2011) 83 NSWLR 476; [2011] NSWCA 404; *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791; *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWCA 112; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; *Sharna v Victorian WorkCover Authority* (2012) 36 VR 318; *Starr v Northern Territory of Australia* (1998) (unreported, Supreme Court of the Northern Territory 23 October 1998); *Teague v Chin* [2013] NTSC 72; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Van Dongen v Northern Territory of Australia* [2009] NTSC 1; applied

CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor [2016] NTSC 42; referred to

REPRESENTATION:

Counsel:

Appellant:	W Roper
Respondent:	K Sibley

Solicitors:

Appellant:	Maurice Blackburn
Respondent:	Hunt & Hunt

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

MacMahon Contractors Pty Ltd v Lee [2017] NTSC 33
No. LCA 10 of 2016 (21507050)

IN THE MATTER of an appeal under the *Workers Rehabilitation and Compensation Act*

BETWEEN:

MACMAHON CONTRACTORS PTY LTD (ABN 37 007 611 485)
Appellant

AND:

MITCHELL PAUL LEE
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 3 May 2017)

[1] This is an appeal by an employer against a decision of the Work Health Court ordering reinstatement of weekly benefits and payment of medical expenses, and dismissing the employer's counterclaim for a declaration that the worker had ceased to be incapacitated for work.

The work injury and dealings with the employer's insurer

[2] On 21 November 2012, the respondent injured his back while putting on a seat belt on a bus provided by his employer. On 25 February 2013, he

submitted a compensation claim form under the *Workers Rehabilitation and Compensation Act 1986* (NT) ("the Act") which stated (relevantly):

- Part of body affected: Lower back
- Type of injury or disease: L4/L5 disc irritation.

[3] The appellant initially deferred a decision on liability. On 15 April 2013, the appellant's insurer wrote to the respondent advising (relevantly):

> Date of injury: 21 November 2012
>
> Injury: Irritated Facet Joint
>
> Employer: Mcmahon (sic)
>
> …
>
> Following completion of our investigations, please note that GIO have now accepted liability on behalf of your employer.
>
> We advise that compensation will continue to be paid at your normal weekly rate of $2,269.55 gross to you by your employer on regular pay days, but not in advance and only for the periods of incapacity covered by medical certificates.

[4] The respondent participated in a return to work programme and went back to full duties in January 2013. However, he suffered a recurrence of pain from the original injury and was again off work.

[5] The respondent submitted a series of medical certificates by his treating doctor, Dr Woollons, certifying the degree of the respondent's capacity for work during the periods covered by those certificates and he was paid

amounts of weekly compensation by the appellant pursuant to Sub-division B of Division 3 of Part 5 of the Act (first under s 64 and then, after the first 26 weeks of incapacity, under s 65).

[6] Each of those certificates contained the following statement:

> The worker is/was suffering from (list all medical/dental diagnoses relevant to the claim): Lumbar back pain

[7] On each of those certificates in which Dr Woollons certified that the respondent had some capacity for work, limits were set for certain physical activities which could be undertaken by the worker, for example:

- light duties as tolerated, two days per week, four hours per day;
- lifting: weight limit 10 kg – occasional;
- no bending/twisting/squatting;
- pushing/pulling – occasional.

[8] On none of those forms is there any reference to any psychological injury affecting the respondent's capacity for work, until 28 May 2015, after the appellant had issued a notice cancelling the respondent's benefits.

[9] The respondent was referred to APM rehabilitation providers who arranged return to work trials for the respondent and made periodic reports to the appellant.

[10] The reports from APM indicated that there may be a non-organic/ psychological component to the respondent's rehabilitation needs, and the respondent was referred to the Wesley Hospital pain management clinic and on their recommendation saw a psychologist, Sheldon Goldenberg, for four counselling sessions on 3 April 2014, 13 May 2014, 27 May 2014 and 10 June 2014. (The treatment received is outlined at [45](g) below.)

[11] The appellant arranged for the respondent to be examined by an orthopaedic surgeon, Associate Professor Day, and a psychiatrist, Dr Oelrichs, and reports prepared. In a report dated 8 September 2014, Associate Professor Day said that the strain in the respondent's lumbar spine was likely resolved. The report also made a number of comments in relation to the respondent's psychological condition. (These are detailed at [45](j) below.)

[12] Dr Oelrichs' report of 15 September 2015 set out the respondent's reported physical and mental symptoms (set out in more detail at [45](k) below), gave a diagnosis of "adjustment disorder with depressed mood" which had "now mainly resolved" and stated:

> Yes it is appropriate to continue a return to work plan with the assistance of a vocational provider. There should be no restrictions on duties and numbers of hours in relation to his psychological condition.

Cancellation of benefits and matters leading to the issue of proceedings in the Work Health Court

[13] On 9 December 2014, Associate Professor Day issued a medical certificate in the following terms:

> I, Associate Professor Gregory Day, Medical Practitioner, HEREBY state that I examined Mitchel Lee ("the Worker") in relation to his work related injury, namely a strain in the lumbar spine ("the injury") that he sustained on or about 21 November 2012.
>
> As a result of my examination I CERTIFY that:
>
> The Worker has ceased to be incapacitated for work as a result of the injury.
>
> 1. The Worker's injury as referred to above has resolved.
>
> 2. If the Worker is still incapacitated for work, then such incapacity is due to other factors not related to the injury.
>
> 3. The worker does not require any further treatment for the injury. *[punctuation in original]*

[14] On 10 December 2014, the appellant gave the respondent notice of cancellation of benefits ("the Notice") in the following terms (formal parts omitted).

> With regard to your claim for payment of benefits, (claim number GIO A3985579/NT Worksafe 213447), as prescribed under the *Workers Rehabilitation and Compensation Act*, you are hereby advised that your employer, MacMahon Contractors Pty Ltd acting on the advice of GIO Workers Compensation hereby: -
>
> Cancels payments of weekly benefits to you pursuant to Section 69 of the *Workers Rehabilitation and Compensation Act*. The cancellation will be effective 14 days from the date of this notice.

The reasons for this decision are:-

1. On 21 November 2012 you sustained an injury to your back out of or in the course of your employment.

2. You submitted a workers' compensation form on 25 February 2013 and liability was accepted by GIO on behalf of the Employer.

3. On 8 September 2014 you were examined by Associate Professor Gregory Day. A copy of his report dated 12 September 2014 is **attached**.

4. In Associate Professor Gregory Day's opinion it is likely that the strain in the lumbar spine has resolved. He further states that there is no indication for any further physical treatment (pages 6 & 5 of the report respectively).

5. On 9 September 2014 Associate Professor Day certified that you had ceased to be incapacitated for work as a result of your work injury on the following basis:

    a. Your work injury has resolved;

    b. If you are still incapacitated for work, then such incapacity is due to other factors and not related to the injury;

    c. You do not require any further treatment for the work injury.

    Please see medical certificate **attached**.

6. As your work injury has resolved you are no longer entitled to medical and like expenses.

The Notice attached the requisite advice in relation to mediation and rights of appeal.

[15] The respondent applied for mediation on 14 December 2014 following which the appellant agreed on a without prejudice basis to pay for six further counselling sessions with Mr Goldberg.

[16] In December 2014, Dr Woollons completed a Centrelink Medical Certificate which stated (relevantly):

> **Fitness for work/study**
>
> In my opinion this person is/has been unfit for work/study from Tuesday, 16 December 2014 to Monday, 16 March 2015 inclusive.
>
> | | |
> |---|---|
> | Can the patient currently do their usual work/study? | No |
> | Can the patient do any other work for 8 hours or more per week? | Yes |
>
> In order to prepare your patient for return to work/study, certain assistance may be offered. Please identify any factors which may impact on participation.
>
> Back pain limits work
>
> **Treatment** – please describe the patient's treatment regime. Include past current and planned treatment.
>
> Analgesia, exercise programme

Proceedings in the Work Health Court

[17] The mediation was unsuccessful and on 11 February 2015 the respondent commenced proceedings in the Work Health Court. (Before that, on 13 January 2015 the respondent filed a Debtor's Petition for bankruptcy. He

was declared bankrupt with a commencement date of the date of filing of the petition.)

[18] In his statement of claim the respondent pleaded that his duties required him to move heavy objects while constantly bending over[1] and that he felt a sharp pain in his lower back while putting on his seat belt on the bus.[2] He pleaded that as a result of those events he suffered:

(a) a lower back injury, and

(b) a psychological injury,[3]

and that on 12 February 2013 he suffered an aggravation of both the lower back injury and the psychological injury.[4] (Alternatively, the respondent pleaded that the lower back injury caused or materially contributed to a secondary or consequential psychological injury.)[5]

[19] The respondent pleaded that he had received benefits under the Act for both the lower back and the psychological injuries in the form of medical treatment, rehabilitation and weekly payments.[6] He then pleaded that the

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1 Statement of Claim [4]

2 Statement of Claim [5]

3 Statement of Claim [6]

4 Statement of Claim [11] and [12]

5 Statement of Claim [7] and [13]

6 Statement of Claim [19]

appellant had ceased medical treatment and weekly payments by way of the Notice and that the Notice was "invalid and unlawful" on the grounds that:

(a) it enclosed a medical certificate that addressed the lower back injury only and did not refer to the psychological injury; and

(b) the reasons in the Notice did not provide sufficient detail to enable the respondent to understand why the respondent's entitlement to weekly benefits for the secondary psychological injury was cancelled.[7]

[20] The respondent claimed weekly benefits under s 65 of the Act from 10 December 2014 and continuing, as well as continuing payment of medical expenses.[8]

[21] In its defence the appellant denied the existence of any psychological injury, said that the alleged psychological injury was not caused by and did not arise out of the respondent's employment and was not a secondary or consequential injury.[9] The appellant also pleaded that the respondent had not given notice of the alleged psychological injury[10] and denied that the respondent had been in receipt of compensation for anything other than his

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7 Statement of Claim [20] and [21]

8 Statement of Claim [25]

9 Defence [2], [3], [5], [6] and [7]

10 Defence [3] and [6]

accepted injury, which was a strain of the lumber spine.[11]

[22] In response to the respondent's pleading that the Notice was invalid, the appellant denied the allegation and pleaded that:

(a) the respondent did not sustain a secondary psychological injury;

(b) the respondent did not make a claim for a secondary psychological injury;

(c) if he did sustain a secondary psychological injury:

(i) it was not incapacitating him at the date of the Notice, and

(ii) it was not sustained out of or in the course of his employment.[12]

[23] In addition, the appellant counterclaimed for declarations that the lumbar spine injury had resolved by 9 December 2014, and that the respondent had ceased to be incapacitated for work on or about that date.

[24] On 27 May 2015 the respondent's solicitors obtained an independent report from Dr Shaw who said (relevantly):

> Examination of the back identified a normal lumbar lordosis. The back displayed a good range of motion with flattening of the lumbar lordosis during flexion. Extension, lateral flexion, and rotation were all full range. Straight leg raising was 90 degrees with negative stretch test.
>
> …

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11 Defence [11] and [2]

12 Defence [13]

> Lower back pain of uncertain aetiology but displaying full range of motion is consistent with DRE lumbar category 1 providing for zero percent whole person impairment.
>
> ....
>
> I stand by my opinion that I am unable to give a diagnosis or explanation for ongoing lower back pain.

[25] Presumably as a result of this report, the respondent did not seek to argue at the trial of the proceeding in the Work Health Court that he was still suffering any incapacity as a result of the lower back injury. The respondent limited himself to submitting that the Notice was invalid because the attached medical certificate addressed the lower back injury only and did not refer to the psychological injury, and because the reasons in the Notice did not provide sufficient detail to enable the respondent to understand why the respondent's entitlement to weekly benefits for the secondary psychological injury had been cancelled.

Decision of the Work Health Court

[26] The learned Chief Magistrate (as he then was) held that the Notice was invalid because it failed to deal with the alleged psychological injury.

[27] In the reasons for decision, his Honour summarised the contentions of the parties in the pleadings. His Honour summarised the respondent's contentions in these terms:

> The core of the challenge to the validity of the notice of decision is that, in non-compliance with s 69 of the Act, the employer failed to supply a medical certificate dealing with the worker's claim for the

psychological injury and provide sufficient reason to enable the worker to understand why his weekly benefits were being cancelled.

As the medical certificate that must accompany a s 69 notice must state the worker has ceased to be incapacitated for work as a consequence of the injury claimed, the worker asserts that in order to validly cancel the weekly payments being made to the worker the notice should have been accompanied by a medical certificate stating that the worker had ceased to be incapacitated for the secondary or consequential psychological injury. The reason for that is "when an employer accepts a claim it does so for all purposes, not merely for the medical conditions or complaints made at the time that the worker completed the claim form; and that includes any consequential injury that the worker might suffer as a consequence of the original injury". The worker argues that in accepting the worker's claim for the physical back injury – and accepting liability for that injury – the employer also accepted liability for the secondary or consequential psychological injury.

Having accepted liability for the secondary or consequential psychological injury, the worker failed to provide a medical certificate certifying that the worker had ceased to be incapacitated as a consequence of the secondary or psychological injury.

The employer failed to provide such a certificate as required by s 69(3) of the Act. The medical certificate from Associate Professor Day that accompanied the notice of decision only referred to the worker's back injury, and made no reference to the worker's secondary or consequential psychological injury.

…

Nor was any reference made in the notice of decision itself to the fact that benefits were to be cancelled on the basis that the worker had ceased to be incapacitated as a result of a psychological injury.[13] [*citations omitted*]

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[13] *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 5-6

[28] His Honour also noted that the respondent claimed that the Notice failed to provide sufficient reasons to enable the respondent to understand why benefits were being cancelled.

[29] Having set out the respondent's contention (and the fact that the appellant denied that the notice was invalid), his Honour identified the issue for determination in the following terms:

> The issue that needs to be considered and determined is whether the employer's acceptance of the worker's claim for the physical back injury included the psychological injury that the worker alleges he suffered as a result of the back injury. Unless the employer accepted liability for the psychological injury, the validity of the notice of decision cannot be impugned on the ground that neither the notice or the accompanying medical certificate failed to state that the worker had ceased to be incapacitated as a result of a psychological injury. If the employer's acceptance of the back injury is found not to have included the psychological injury, then the notice of decision must be found to be valid. As the worker does not seek to challenge the issue of the notice of decision insofar as it purported to cancel benefits on the basis of a cessation of incapacity for work as a result of the physical back injury, that is the end of the proceedings brought by the worker.
>
> The employer's counter claim only falls for consideration if the Court finds that the employer invalidly cancelled the worker's weekly benefits because of the failure of the notice and the accompanying medical certificate to deal with the worker's secondary or consequential mental injury.[14] [*emphasis added*]

[30] His Honour went on to consider the validity of the Notice, noted that the respondent had the onus of proving that the psychological injury was included in the appellant's acceptance of liability, and found that the respondent had satisfied that onus.

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14 Ibid at 6

[31] His Honour based this conclusion on evidence that showed the appellant was on notice of the existence of a psychological component to the respondent's injury in various reports which refer to the respondent having an adjustment disorder with depression, to his being treated for depression, and to an ongoing need for psychological support and counselling. His Honour referred to the report which the appellant obtained from Dr Oelrichs, which his Honour said provided a diagnosis of a hitherto non-specific psychiatric or psychological injury, namely an adjustment disorder with depressed mood that was causally related to the respondent's physical back injury. His Honour found that the effect of this report was to put the appellant on notice that the respondent had suffered a secondary or consequential mental injury following the work related physical back injury.

[32] His Honour concluded:

> Having been put on clear notice of the occurrence/ existence of a secondary or consequential injury, and while continuing to pay weekly benefits in relation to the admitted claim in respect of the physical back injury, as a matter of logic and common sense the employer must be taken to have accepted liability for the second or consequential injury. This accords with the well-established law that an employer is deemed to have accepted liability for all compensation to which a worker is entitled for an original injury and its sequellae, or that an acceptance of liability in respect of a claim for compensation is an acceptance of the worker's injury and its consequences arising from a work related incident.[15]

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[15] Ibid; his Honour relied on three decisions of the Work Health Court as establishing these principles.

[33] His Honour went on to hold that there was other evidence that demonstrated that the appellant had accepted liability for the secondary of consequential mental injury by its conduct. The conduct he relied upon was:

(a) paying for the respondent to attend the Wesley Hospital pain management clinic and paying for treatment by a psychologist, Mr Goldenberg;

(b) arranging for the respondent to be examined by a psychiatrist, Dr Oelrichs; and

(c) not attempting to limit its acceptance of the claim or pay for psychological treatment on a 'without prejudice' basis.

[34] It seems from the passage from the reasons for decision quoted at [32] above that his Honour also saw the fact that the appellant continued making payments of weekly benefits under s 65 as part of the conduct by which the appellant accepted liability for the psychological injury.

[35] His Honour concluded, finally:

> In light of the employer's acceptance of liability for the secondary or consequential psychological injury, I find that the notice of decision was invalid because the notice did not purport to cancel weekly benefits on the basis of a cessation of incapacity as a result of the secondary or consequential psychological injury: it merely cancelled payments on the basis of a cessation of incapacity as a result of the physical back injury. The accompanying medical certificate only referred to the back injury and made no reference to the psychological injury at all. There was no certificate certifying that

> the worker had ceased to be incapacitated as a result of a psychological injury. Furthermore, the notice failed to provide the worker (who thought his psychological injury had been accepted) with sufficient reasons for him to understand why his weekly benefits were being cancelled. The worker was not advised that his weekly benefits were being cancelled because he ceased to be incapacitated as a result of his psychological injury.[16]

[36] His Honour also dismissed the appellant's counterclaim. (This is dealt with below.)

Appeal

[37] The appellant has appealed against the decision that the Notice was invalid. In summary, the grounds of appeal were that the learned trial magistrate erred:

(a) in finding that in accepting liability for the physical back injury, the appellant had accepted liability for a psychological injury ("the alleged sequela");

(b) in making that finding without first finding that the alleged sequela was made out or, if made out, was a compensable injury under the Act; and

(c) in finding that the Notice was void and of no effect in that it failed to deal with the alleged sequela.

[38] The appellant has also appealed against the dismissal of its counterclaim. (Again, this is dealt with below.)

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[16] *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 15

Determination of the Appeal against the finding that the Notice was void

[39] In considering whether the Notice was invalid, his Honour defined the issue for determination in these terms:

> The issue that needs to be considered and determined is whether the employer's acceptance of the worker's claim for the physical back injury included the psychological injury that the worker alleges he suffered as a result of the back injury.[17]

[40] In my view, in defining the issue for determination in those terms, his Honour asked himself the wrong question. Section 69 only applies to cancellation of weekly benefits – ie benefits under Sub-division B of Division 3 of Part 5 of the Act,[18] in this case s 65. In order to decide whether the appellant was obliged to give notice under s 69 that weekly benefits were being cancelled because "the worker had ceased to be incapacitated for the secondary or consequential psychological injury", the question which needs to be answered is whether benefits had ever been paid to the respondent under s 65 for any incapacity for work as a result of a psychological injury.

[41] The answer to that question is "no". There is simply no evidence that the appellant ever accepted any liability to pay benefits under s 65 as a result of any claimed incapacity for work as a result of a psychological injury.

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17 Ibid at 6

18 *Workers Rehabilitation and Compensation Act 1986* (NT) s 69(1)

Indeed there is no evidence that the respondent ever claimed s 65 benefits as a result of such an injury.

[42] At no stage did the appellant receive notification from the respondent that he claimed to be incapacitated from work as a result of any psychological condition. All medical certificates submitted in support of the claim for weekly benefits described the injury as "[l]umbar back pain". None of them made any reference to any incapacity for work as a result of a psychological condition.

[43] Part of his Honour's reasoning process is this:

> Having been put on clear notice of the occurrence/existence of a secondary or consequential injury, and while continuing to pay weekly benefits in relation to the admitted claim in respect of the physical back injury, as a matter of logic and common sense the employer must be taken to have accepted liability for the second or consequential injury.[19]

[44] As the appellant submitted, in this paragraph, his Honour has conflated awareness with acceptance of liability. It does not follow as a matter of logic from the mere fact that the appellant has been put on notice of the existence of something, that the appellant has accepted liability for that thing. However, leaving that aside, as a matter of law, the appellant was obliged to continue paying weekly benefits to the respondent until it issued a notice of cancellation of such benefits under s 69 of the Act. The continuation of such payments after the appellant was aware that the

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[19] *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 13

respondent claimed to have a psychological injury cannot, therefore, give rise to an inference that the appellant had accepted that the respondent had suffered any incapacity for work as a result of any psychological injury for which the appellant was liable to pay compensation under s 65.

[45] On the hearing of this appeal, the respondent relied on the following evidence in support of the proposition that the appellant was on notice of the claimed psychological injury and must therefore (following his Honour's reasoning) have accepted liability for it:

(a) a report of Dr Peter Dobson (consultant orthopaedic surgeon) dated 14 March 2013 in which contains the following:

> However I am also concerned that there may be some nonorganic signs present. There is no real objective evidence of any localised nerve involvement in spite of the paraesthesia in his foot either on clinical examination or in the MRI scan.
>
> ….
>
> My concern would be if he should be developing any other non-organic pathology.
>
> …..
>
> The overall prognosis is somewhat guarded at this stage depending on his return to rehabilitation and treatment with some positive psychological reinforcement.

(b) oral evidence given by the respondent at the trial to the effect that he had told someone at GIO that he had been prescribed anti-depressant medication,

(c) a report of Dr Peter Johnstone (consultant orthopaedic surgeon) which states:

> He [*ie the respondent*] reported taking Celebrex and antidepressant tablets in the morning. He stated that he was not sure that the Celebrex was giving him much benefit.

(d) a report of Dr Leigh Atkinson (neurosurgeon) which states:

> There is the additional history of some adjustment disorder with depression, treated with Cipramil in recent months, 20mg daily.

(e) a report of Dr Sarah Lindsay (anaesthetist and pain medicine specialist) which states:

> His depression is almost certainly related to his ongoing pain and the sequelae of his current work situation.
>
> ....
>
> There is no question that he's going to require ongoing psychological support to help him maintain motivation to participate in a physical program which is going to be essential to his rehabilitation.

(f) a report of Justine Collofello[20] which states:

> If Mr Lee is going to be able to manage his condition and the adjustment to injury process well, he will require adjustment to injury counselling with a private Psychologist including stress and depression management. During therapy, it is recommended that strategies are taught that focus on proactively dealing with stress as Mr Lee admitted that he tends to internalise pressures. He also admitted that he feels more pressure at present given his wife has

[20] Dr Atkinson, Dr Lindsay and Justine Collofello were all part of the Wesley Pain Management Centre to which the respondent was referred.

been unwell and the uncertainty surrounding what work he could perform.

(g) a report of evidence of Sheldon Goldenberg (psychologist) which states:

> Mr Lee has attended four sessions on 3/4/14, 13/5/14, 27/5/14 and 10/6/14 as a follow-up to the treatment he received at Wesley Hospital, in which he participated in a pain management program. Mr Lee has progressed during these sessions but he continues to report the following issues:
>
> - Inability to sit for extended periods of time (20 to 30 minutes without severe discomfort)
> - Sharp and persistent pain in his neck and back
> - Fatigue
> - Feelings of sadness and disappointment with himself for not being able to manage his discomfort
> - Anger
> - Fear of his future
> - Difficulties with his current relationship
>
> Further sessions are required to assist Mr Lee in self-managing his levels of pain and discomfort. The treatment recommended involves Pain Management via clinical hypnosis and self-regulation in order to build tolerance and endurance in a manageable way.

(h) evidence of the respondent given at the trial that GIO paid for his sessions with Mr Goldenberg,

(i) APM reports dated 4 July 2014 and 5 September 2014 which state under the heading "Factor Affecting Rehabilitation":

> Mr Lee has a secondary psychological condition that impacts on his mental wellbeing.

(j) a report by Associate Professor Day (consultant orthopaedic surgeon) which states:

> I have taken Dr Oelrich's medical opinion into consideration and will now answer your questions accordingly.
>
> To answer your questions:
>
> 1. **The history of the circumstances/factors giving rise to the employee's condition?**
>
> The history of the circumstances was provided in the body of this report. There appeared to be other psychological factors which are currently impacting on Mr Lee's current condition.
>
> 2. **Clinical findings and presentation at the time of consultation (sic)**
>
> All findings and presentation have been provided in the body of the report.
>
> 3. **Do you accept that Mr Lee's current condition is a direct result of the work related events that he has described in his chronology of events, or does his condition more properly reflect the effects of a pre-existing injury, underlying, or other condition? If yes please detail as far as possible, including when you would anticipate the aggravation factors to have ceased.**
>
> There did not appear to be a pre-existing condition in the lumbar spine affecting the current symptoms. However there may be

psychological factors which are impacting on Mr Lee's current symptoms.

4. **Are the reported symptoms likely to improve with further treatment? If so, what treatment do you recommend including frequency and expected duration?**

There is no indication for any further physical treatment. Physiotherapy treatment, spinal injections and manipulations are not likely to be effective. There is no indication for considering spinal surgery. It may be reasonable to explore whether psychological or psychiatric treatment may be of benefit.

5. **Do you feel that further investigation in regards to Mr Lee's reported symptoms is required? If yes, please detail theses (sic) investigations and the appropriate specialist to undertake (sic)**

From a spine surgery point of view, no further investigations are required.

6. **Are there any barriers to recovery and return to work? What strategies would assist in managing these barriers?**

Yes, Mr Lee is physically unfit. He also may have significant psychological factors which are currently impacting on his ability to return to work.

7. **Is it appropriate to continue the graduated return to work plan with the assistance of the vocational rehabilitation provider? Please include if this should be in his pre-injury duties or alternative duties, any restrictions on duties and number of hours. Please detail.**

For reasons unknown, Mr Lee's suitable duties program ceased two months ago. I have not been provided with details of the reasons for the cessation. Perhaps it may be reasonable to wait for the review of the psychiatrist to determine whether the program should continue at all.

8. **Are any other factors besides the reported condition that might be having a significant influence on the (sic) Mr Lee's presentation? Including social factors or other reported activities; such as social driving, sports etc.**

Mr Lee indicated that he is having significant psychological problems and has been on antidepressant medication for some time.

9. **State your overall prognosis regarding:**

(i) **Improvement in the physical condition;**

Mr Lee is psychologically depressed. He is physically deconditioned and it would probably take two or three years of hardening at a gymnasium for him to return to any sort of physical condition to enable him to work as a labourer.

(ii) **Resolution of the injury;**

At this stage, it is likely that the strain in the lumbar spine has resolved.

(iii) **Return to work, pre-injury duties or otherwise.**

Whilst I am not an occupational physician, I believe that there may be factors other than orthopaedic which are impinging on Mr Lee's ability to return to his pre-injury duties.

(k) a report of Dr Oelrichs (consultant psychiatrist) which refers to the respondent being on anti-depressant medication prescribed by his general practitioner, refers to the respondent's reports of his physical limitations due to chronic pain, summarises the reports of some of the other consultants and states:

Mr Lee explained that his main problem in relation to the psychological symptoms relate to disturbance and lack of ability to perform his everyday tasks and ongoing chronic pain.

…

He states that he has ongoing physical restrictions with lifting, bending and stretching and chronic pain.

…

Mr Lee outlines the main mental health concerns for him relating to him feeling “I’m frustrated and had enough”, “I am annoyed, I can’t find out what’s wrong” and “nothing has helped the pain”.

…

He is upset as he had spent money on his four-wheel drive but he cannot drive it. He stated that a friend uses it now.

…

Mr Lee’s main concerns relate to his future and the frustration regarding his physical pain and his concerns that he would like to do physical work.

…

The content of his thought revealed concerns regarding his work future.

…

Mr Lee described sufficient symptoms to meet the DSM-IV criteria. Mr Lee from reports would have suffered from adjustment disorder with depressed mood. His condition is now stable. He has some mild residual symptoms of frustration and anxiety regarding his future. His condition is best described using DSM-IV.

> Axis I: Adjustment disorder with depressed mood now mainly resolved. Mild residual symptoms.
>
> Axis II: No diagnosis.
>
> Axis III: Lower back pain L4/5 irritation.
>
> Axis IV: Stresses relating to chronic back pain and stresses due to inability to participate in normal activities due to lower back pain.
>
> Axis V: Currently moderate to good level of functioning.
>
> …
>
> Noting Mr Lee's current presentation he does have residual symptoms of adjustment disorder. I would suggest a further six sessions in relation to his work injury of 12 November 2012 before declaring his condition stable and stationary.
>
> …..
>
> Yes it is appropriate to continue a return to work plan with the assistance of a vocational provider. There should be no restrictions on duties and numbers of hours in relation to his psychological condition.

[46] The evidence relied on by the respondent (set out above) does not suggest that the respondent had ever claimed to any of the report writers that he was incapacitated from work as a result of any psychological injury. Quite the reverse, his claim (as detailed in the report of the psychiatric specialist), appears to be that he was depressed and frustrated because of the pain in his back and because he was unable to work as a result of that back pain. This was confirmed in the report of Dr Oelrichs in which she stated that there

was no limitation on the hours or type of work the respondent could perform as a result of the respondent's psychological condition.[21]

[47] The appellant paid for sessions with a psychologist, Mr Goldenberg. These appear to have been for the purposes of pain management rather than treatment for any psychological injury. However, even assuming that they could be so categorised, acceptance by the appellant that the respondent required treatment for a psychological condition does not *ipso facto* amount to acceptance that that psychological injury resulted in any incapacity for work.

[48] In my view his Honour was in error in finding that the Notice was invalid and that error was an error of law.

[49] First, his Honour defined the issue for determination by reference to the wrong question. The question for determination was not whether the appellant's acceptance of the respondent's claim for the physical back injury included the psychological injury that the worker claims to have suffered as a result of the back injury. To determine whether the appellant was obliged to give notice under s 69 that weekly benefits were being cancelled because "the worker had ceased to be incapacitated for the secondary or consequential psychological injury", the question which needed to be answered was whether benefits had ever been paid to the respondent under

[21] As a matter of logic and common sense, if the respondent's psychological problem was being contributed to by his perception that he was unable to work, then working, as long as he could physically, would be likely to help rather than hinder his condition.

s 65 for any incapacity for work as a result of a psychological injury. (It would be nonsensical to state that the respondent "had ceased to be" incapacitated as a result of a psychological injury if he had never claimed to be incapacitated for work as a result of a psychological injury and had never been paid weekly benefits for being incapacitated for work as a result of a psychological injury.)

[50] Second, his Honour failed to determine an issue on the pleadings. The respondent pleaded in his statement of claim that he had been in receipt of weekly benefits for a psychological injury.[22] The appellant specifically denied that and pleaded that he had only ever been in receipt of weekly payments for the admitted injury which was back strain.[23] This was therefore a live issue which his Honour was bound to determine, but, as a result of posing the wrong question, his Honour failed to determine it.

[51] Third, in answering the question which his Honour did pose, his Honour seems to have assumed that an acceptance of liability to pay compensation in relation to the respondent's back injury *ipso facto* amounted to acceptance of liability to pay weekly benefits under s 65 in relation to any secondary injury arising from the back injury regardless of whether the respondent had given notice that the secondary injury was productive of any incapacity to work (or ever claimed that to be the case); regardless of whether there was any evidence that the secondary injury was productive of an incapacity to

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22 Statement of Claim [19]

23 Defence [11] and [2]

work; and regardless of whether the appellant had accepted that the secondary injury was productive of an incapacity for work. That is not the effect of the authorities.

[52] A worker claiming an entitlement to compensation bears the onus of proving that he has suffered incapacity and that the incapacity is productive of financial loss.[24] That is equally true of an alleged incapacity as a result of a sequela to an original compensable injury. A person claiming to be entitled to payment of compensation under s 65 as a result of an incapacity caused by such a sequela must prove that the sequela exists and is in fact a sequela of the original injury, that it has caused incapacity for work, and that the incapacity has been productive of financial loss. Further, notice of the alleged incapacity as a result of a sequela must be given to the employer. As Southwood J said in *Van Dongen v Northern Territory of Australia*:

> The third reason why the appellant's first argument cannot be sustained, even assuming the appellant's mental injury was a sequela of his physical injuries, is the appellant was required to give notice to the employer of his mental injury in accordance with s 80 and s 81 of the Act. As the appellant's mental injury was a separate and discrete injury[25] which resulted in him being partially incapacitated, the appellant was required to give notice to the respondent, as soon as practicable, of the date on which his mental injury occurred and the cause of his mental injury. He failed to do so. While it may not be necessary to make a further claim for workers compensation for a sequela of an injury which results in incapacity, the requirement for a

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[24] *Starr v Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Mildren J, 23 October 1998)

[25] The fact that a psychological injury is a sequela of a physical injury does not mean that it is not "a separate and discrete injury". Indeed it is implicit in the present respondent's contention that the Notice was obliged to refer separately to the psychological injury that the respondent saw it as "separate and discrete" – albeit secondary to the principal physical injury.

> worker to give notice of injury to the employer under s 80 of the Act is a continuing obligation. Notice is required to be given of any injury, including any sequela, which results in incapacity for which compensation is claimed. There is no entitlement to compensation unless such notice is given.[26] *[emphasis added] [references omitted]*

[53] In this case, the respondent effectively attempted to side-step the onus of proving that he had an incapacity for work as a result of a psychological injury by confining his case to a technical argument that the Notice was invalid.

[54] His Honour determined, effectively in the alternative to the finding of automatic or deemed acceptance, that the appellant had in fact, by its conduct, accepted liability for the respondent's secondary psychological injury. As explained above, in doing so his Honour was addressing the wrong question. When the issue is properly defined, it is clear that there is no evidence upon which to base any finding that the appellant ever accepted liability to pay compensation for any loss of capacity for work arising out of any psychological injury or ever paid weekly benefits for any such loss of capacity.[27]

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26 [2009] NTSC 1 at [42]

27 In making this assessment, his Honour made the logical error of assuming that notice of a psychological injury amounted to acceptance of liability for the same.* However, that error did not necessarily affect the result. The operative error, it seems to me was in defining the issue for determination by reference to the wrong question.

* There are several logical steps missing in making this assumption: 1) notice of a claim (or of an opinion by a doctor) does not mean that the claim (or opinion) is accepted as true; 2) notice of the existence of a psychological condition (assuming the claim/opinion is accepted as true) says nothing about the cause of the psychological condition. (Further, the fact that there may be a secondary injury which was caused by a primary injury, does not logically imply that that secondary injury is productive of any loss of capacity to work. It is this last error which led his Honour to pose the wrong question.)

[55] The respondent submitted that if his Honour made an error in determining that the appellant had accepted liability to pay compensation under s 65 for a psychological injury, then this was a mistake of fact and therefore not appellable. If there is evidence which, if believed, would support the finding, there is no error of law. Where (as here) an appeal lies only in relation to an error of law, a finding of fact cannot be disturbed on the basis that it is perverse, or against the weight of the evidence even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound.[28]

[56] However, a finding of fact for which there is no evidence amounts to an error of law, and there was no evidence on which his Honour could have found that the appellant had accepted liability to pay compensation under s 65 for any incapacity for work (as distinct from liability for the cost of treatment under s 73) as a result of a psychological injury. This is an error of law, but it arises out of the primary error of law which consisted of posing the wrong question for determination under the Act – as explained in [49] above.

[57] His Honour also held that the Notice failed to provide sufficient reasons to enable the respondent to understand why benefits were being cancelled. That finding suffers from the same error of law as the finding that the appellant had "accepted the psychological injury". The only claim for weekly benefits the respondent ever made was for loss of capacity to work

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28 *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at [37]

as a result of a lumbar spine injury. The Notice clearly stated that benefits were being cancelled because the respondent was no longer incapacitated for work as a result of that lumbar spine injury. There is no lack of clarity in that explanation. His Honour found (or assumed) that the respondent "thought his psychological injury had been accepted". However, it is not an "injury" that is accepted – it is liability to pay compensation for the consequences of that injury and, under the Act, there are various types of consequences for which compensation can become payable. Acceptance of liability to pay for treatment for an injury does not logically entail any acceptance that the injury is productive of an incapacity for work and hence a liability to pay weekly benefits under Sub-division B of Division 3 of Part 5 of the Act. (The Act does not require a notice under s 29 to be served on cessation of payment for medical expenses under s 73.)

[58] The appeal is allowed.

Appeal against the dismissal of the counterclaim

[59] Having allowed the appeal against the decision to give judgment in favour of the respondent, it is not strictly necessary for me to determine the appeal against the decision to dismiss the appellant's counterclaim, but I intend to do so for the sake of completeness and in case I am wrong in relation to the appeal proper.

[60] In the amended Notice of Appeal the appellant set out the following grounds of appeal in relation to the dismissal of the counterclaim.

(a) The learned trial magistrate erred in finding there was "no other evidence before the Court that is sufficiently cogent either alone or in conjunction with Dr Oelrichs' report and evidence to prove that the worker had ceased to be incapacitated for work as at 9 December 2014".[29]

(b) The learned trial magistrate failed to give proper consideration to the evidence and failed to give proper reasons for his decision to dismiss the counterclaim.

[61] It seems to me that, if it were necessary to decide, the appeal against the dismissal of the counterclaim would also have to be allowed.

Pleadings on the counterclaim

[62] In its counterclaim, the appellant pleaded that by about 9 December 2014, if not earlier, the respondent was no longer suffering from the accepted injury admitted in the defence (ie a strain of the lumbar spine);[30] that any partial incapacity he may have been suffering as a result of the accepted injury did not give rise to any loss of earning capacity;[31] and that if the respondent sustained a mental injury/mental sequela to the admitted claim, it did not

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29 *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 22

30 Counterclaim [2] and Defence [2]

31 Counterclaim [4]

result in any incapacity for work.[32] The appellant sought declarations to this effect. The respondent denied all of the allegations in the counterclaim.

Evidence at the trial

[63] At the trial, the appellant tendered video surveillance evidence of the respondent taken at the workplace where the respondent was employed on a return to work program (Alchemy Automotive) and conducted extensive cross-examination of the respondent in relation to the activities shown on the video.

[64] At the hearing of the substantive proceedings the respondent:

(a) presented to the court with a pronounced limp in his left leg and testified that the limp was due to his back pain and that he had experienced a consistent limp in that leg from December 2013 to the date of the hearing;

(b) presented to the court with apparent marked limitations in his ability to raise his arms above shoulder height, his forward and backward flexion and his flexion to the left;[33]

(c) gave evidence that:

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[32] Counterclaim [5]

[33] There was no challenge to this description of the respondent's presentation by counsel for the respondent.

(i) if he stood for any period of time the pain in his back increased, and that if he stood for more than ten to fifteen minutes he had to sit down or lie down;

(ii) when he works the pain is excruciating – more than 10 on a scale of 1 to 10;

(iii) he could not pull up his trousers or tie his shoelaces and avoids wearing lace up shoes for that reason;

(iv) he did not drive his manual Mazda BT-50 Utility (the four-wheel drive to which Dr Oelrichs refers in her report) to and from work because his back pain was such that he couldn't drive a manual car;

(v) he had not driven that vehicle since some time before seeing Dr Oelrichs in September 2014;

(vi) the Alchemy Automotive work trial did not require him to spend lots of time on his feet or involve bending over frequently and that if it had, that would have caused him extreme pain and he wouldn't have been able to continue performing the role;

(vii) that job did not involve lifting up heavy tyres on a fairly frequent basis, pushing and pulling vehicles, or bending over a hood of a motor vehicle with his head inside the motor vehicle working on the engine for extended periods of time (up to twenty minutes),

and that he could not do any of those things because he was in such pain because of his back.

[65] It was common ground that the video surveillance evidence (which was conducted over a number of days) showed the respondent:

(a) walking without a limp;

(b) driving the manual utility to work and around town with his wife as a passenger;

(c) wearing lace up shoes and bending over to tie them up;

(d) bending over to the ground with full range of movement, picking up a wheel and placing it in the tray of his truck;

(e) picking up three more tyres in succession and putting them in the tray of the truck, without a rest;

(f) sweeping the floor;

(g) arriving at work sometimes at 6:41am and sometimes at 7.00am, opening the workshop himself with his keys and departing at 4:30pm or 5.00pm and sometimes later.

[66] After being taken to video surveillance evidence, in cross-examination the respondent:

(a) conceded that he had continued to drive the manual utility;

(b) conceded that the usual opening hours at Alchemy Automotive were 7.00am until at least 4.00pm;

(c) conceded that he worked full time hours and, from time to time, in excess of full time hours;

(d) admitted that he was enjoying his role at Alchemy Automotive and that depression was not affecting his ability to perform that role;

(e) admitted that he continued to work at Alchemy Automotive in the period 14 November to 15 December 2014; and

(f) accepted that whilst at Alchemy Automotive, he was performing the critical components of his pre-injury role.

Appellant's submissions at the trial

[67] At the trial, counsel for the appellant relied on the video surveillance evidence and the admissions made by the respondent as objective evidence that the respondent was not incapacitated for work.[34] The appellant submitted that it showed the respondent could and did do a full day's work not incapacitated by either pain or depression. Counsel for the appellant's final submission to his Honour was this.

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[34] The respondent also admitted in cross-examination that he had misled Dr Oelrichs with respect to his use of the manual utility with the intention of bolstering a finding of depression and that he had not brought to Dr Woollons' attention the nature of the work he was undertaking at Alchemy Automotive, but these admissions are relevant more to the use of the surveillance evidence for credit purposes.

> So you only get to the counterclaim if you find that there is merit in the technical argument my friend advances about acceptance of the claim and therefore deficiency of the notice. When you get past that technical argument, we say the counterclaim allows you to consider the real factual merits of the case. And the real factual merits of the case, and the evidence that's before your Honour, is very clear that there was absolutely nothing wrong with this fellow at the time the notice was given. He accepts that he was doing at his new job what he was doing in his old job.[35]

Decision on the counterclaim

[68] In dealing with the counterclaim, his Honour began by summarising the appellant's case in the following terms:

> As stated earlier, the employer restricted its claim to seeking declarations that the worker did not suffer a secondary or consequential mental injury; but if, in fact, the worker did suffer such an injury he ceased to be incapacitated as a result of that mental injury as at the date of cancellation of weekly benefits. The employer bears the onus of proving both the former and latter state of affairs.[36]

[69] This summary is not strictly accurate. The appellant was not seeking a declaration that the respondent had "ceased to be incapacitated as a result of that mental injury"; it was seeking a declaration that if the respondent sustained a mental injury/mental sequela to the admitted claim, it did not result in any incapacity for work. In other words, his Honour began by assuming the opposite of what the appellant had to prove - that if the respondent had suffered a mental injury then it must necessarily have resulted in an incapacity for work.

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35 Transcript of Proceeding, *Lee v MacMahon Contractors Pty Ltd* (Work Health Court of the Northern Territory, 21507050, Lowndes CM, 25 January 2016) 230

36 *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 15

[70] His Honour went on to consider the question: Did the worker in fact suffer a secondary or consequential mental injury? In considering this question, his Honour said there was a significant body of expert evidence which established the existence of a secondary or consequential mental injury. His Honour then referred to the video surveillance evidence and summarised the appellant's contentions in relation to it in these terms:

> Whether or not the Court accepts the expert medical evidence depends upon an assessment of the credibility and reliability of the worker both as an historian and self-reporter.
>
> As to the worker's credibility and reliability in relation to his physical back injury, there were very significant inconsistencies between the worker's evidence as to the effects of his back injury on his ability to perform various physical activities and the "real (and objective) evidence" contained in the surveillance evidence which depicted a markedly different scenario in relation to the performance of the same or similar physical activities. When the discrepancies were put to the worker he was unable to explain them.
>
> The employer seeks to rely upon these inconsistencies and the worker's failure to explain them as a clear indication that the worker was less than an honest and reliable witness in relation to the effects of his physical back injury; and is therefore an equally less than honest and unreliable historian and self-reporter of symptoms in relation to his mental injury and its effects.[37]

In other words, his Honour saw the appellant's case in relation to the surveillance evidence as going only to the respondent's credit.

[71] His Honour summarised the respondent's contention in this way.

> However, it was submitted on behalf of the worker that the inconsistencies were capable of a reasonable explanation. It was

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[37] Ibid at 16

> submitted that they were merely instances of 'gilding the lily' or 'over-egging the pudding'; and in any event there was no challenge to the employer's assertion that the worker had ceased to be incapacitated as a result of the back injury, and therefore the worker's evidence in relation to his physical injury was of little, or no, significance.[38]

[72] His Honour agreed with the respondent, and in this part of the decision he treated the video surveillance evidence as relevant only to the respondent's credit. His Honour stated the issue, and his conclusion, in these terms.

> As the worker's case is that he developed a secondary or consequential mental injury as a result of the original physical injury, the court cannot as a matter of logic and common sense overlook the shortcomings of the worker's evidence in relation to his back injury when assessing the accuracy and reliability of the history given by the worker to medical practitioners and other professionals in relation to his mental injury and the self-reporting of his symptoms to those persons.
>
> However, it is incumbent upon the employer to show that the weaknesses and shortcomings of the worker's evidence in relation to his physical injury impact upon the credibility and reliability of his evidence concerning his mental injury (including the history he gave to medical practitioners and other professional personnel and the self-reporting of symptoms) to such an extent that it is open to the court to find that the worker never in fact suffered the injury.
>
> In my opinion, the employer has failed to discharge that onus.
>
> Despite all of the shortcomings with the worker's evidence concerning his back injury I am unable to conclude that he was an untruthful witness. However it is fair to say that he was not a reliable witness due to the inconsistencies in his evidence. That is important because if he were found to have been a dishonest witness in relation to the evidence about his physical injury, then there would be serious concerns about the veracity of his evidence in relation to the secondary or consequential mental injury. <u>The only issue is whether the unreliability that pervaded the worker's evidence in</u>

[38] Ibid

> relation to the back injury also permeates the history he gave to the various medical practitioners and other professionals of a mental injury and the self-reporting of his symptoms.[39] [*emphasis added*]

[73] His Honour went on to consider the question: Had the worker ceased to be incapacitated as at the date of cancellation of benefits? (As mentioned above, this was not the question for determination on the pleadings. However, to be fair to the learned Chief Magistrate, in submissions before his Honour, counsel for the appellant referred to seeking a declaration that the worker had ceased to be incapacitated for work as at 9 December 2014 and added, "That encapsulates, in our respectful submission, the physical and mental injury.")[40]

[74] In considering this question, his Honour said, "The employer principally relied on the report of Dr Oelrichs in support of the contention that the worker had ceased to be incapacitated as a result of the mental injury as at the date of cancellation of benefits."[41] His Honour analysed that report in

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39 Ibid at 17

40 Somewhat bizarrely, the respondent did not contend that he was incapacitated for work as a result of the back injury so the appellant did not pursue its claim for a declaration that the respondent was not incapacitated for work as a result of the back injury.

On the counterclaim the respondent confined himself to submitting that the appellant had not proved he was no longer incapacitated for work as a result of the psychological injury, though he had never claimed to be incapacitated for work as a result of the psychological injury alone and had first claimed (in a certificate dated 28 May 2015) to be incapacitated for work as a combined result of the back injury and psychological injury after he had instituted these proceedings. It is little wonder if his Honour became confused.

41 *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 15; In fact although that report says that the psychological condition was "largely resolved", it did not state that the respondent had ceased to be incapacitated for work as a result of a psychological condition. It did not express any opinion about whether he had ever been incapacitated for work as a result of a psychological condition. It simply stated that there should be no restriction on the hours the respondent could work as a result of his psychological condition.

great detail, pointed to some inconsistencies and concluded that Dr Oelrichs' evidence was not "sufficiently cogent to support a finding that the worker had ceased to be incapacitated for work as at the date of cancellation, that is 9 December 2014".[42]

[75] His Honour then referred briefly to the employer's reliance on the absence of any physical explanation for the respondent's continuing complaints of pain but said that that did "not get the appellant 'past the post' in terms of its burden of proving that the worker had ceased to be incapacitated for work as at the date of cancellation of weekly benefits".[43]

[76] Finally, his Honour said:

> There is no other evidence before the court that is sufficiently cogent either alone or in conjunction with Dr Oelrich's report and evidence to prove that the worker had ceased to be incapacitated for work as at 9 December 2014. Significantly, there is no evidence such as a psychiatric report closer in time, and prior, to the date of cancellation, proffering a prognosis following the further psychological intervention and the worker's participation in the return to work program.[44] *[emphasis added]*

[77] The appellant complains that in reaching this conclusion his Honour:

(a) failed to take into account the video surveillance evidence showing the worker actually performing a full day's work apparently unaffected by

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[42] *Lee v MacMahon Contractors Pty Ltd* (Unreported, Work Health Court of the Northern Territory, Lowndes CM, 18 March 2016) 22

[43] Ibid

[44] Ibid

either physical or mental incapacity, and the worker's admissions in cross-examination referred to above;

(b) failed completely to deal with one of the appellant's principal contentions, namely that this was objective evidence that "there was absolutely nothing wrong" with the respondent when the Notice was given; and

(c) failed to give adequate reasons for his conclusion that "[t]here is no other evidence before the court that is sufficiently cogent either alone or in conjunction with Dr Oelrichs' report and evidence to prove that the worker had ceased to be incapacitated for work as at 9 December 2014."

[78] It is plain that his Honour did not, in his reasons, refer to the above evidence relied on by the appellant as establishing that the respondent was not incapacitated for work – or to the appellant's contention to that effect. The question on this appeal is whether his failure to do so amounts to an error of law.

[79] The respondent contends that this was a decision on the facts. His Honour had all the evidence before him and the passage complained of was simply a finding that on the whole of the evidence his Honour was not satisfied that the employer had established that the worker was not incapacitated (or as his Honour put it "had ceased to be incapacitated") for work as a result of the psychological injury. I disagree.

[80] Natural justice requires a judge to give reasons for his decision, and a failure to give adequate reasons is an error of law.[45]

[81] I recently considered the requirement to give reasons for a decision in the context of an adjudicator appointed under the *Construction Contracts (Security of Payments) Act 2004* (NT).[46] The requirement to give reasons generally requires "an explanation connecting any findings of fact with the ultimate decision".[47] The reasons should show that the decision maker "has turned his or her mind to the dispute and has addressed the issues raised by the parties".[48]

[82] The requirement for adequate reasons is no less stringent for a Local Court judge than for an adjudicator (who need not be legally qualified) administering what has been described as "a rough and ready procedure" in a very tight time frame:[49] arguably it is considerably more stringent.[50]

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[45] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 667 per Gibbs CJ; *Teague v Chin* [2013] NTSC 72 at [25]

[46] *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42

[47] *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* (2014) 242 IR 318; [2014] NSWCA 112 at [46] per Basten JA

[48] *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791 at [129]

[49] See discussion in *CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor* [2016] NTSC 42 at [90]

[50] See the remarks of McDougall J in *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [23] that "adjudicators work under significantly greater time pressures than judges, and their reasons should not be scrutinised with the attention to detail to which the reasons of trial judges and intermediate appellate courts are subjected in ultimate courts of appeal".

[83] There is a presumption that reasons given by a judge are all of the reasons for coming to the conclusion expressed,[51] and inadequacy of the reasons may therefore lead to an inference that not all matters which should have been taken into account were taken into account and that the issues which were required to be addressed were not addressed.[52]

[84] In my view, the bare statement by his Honour that "[t]here is no other evidence before the court that is sufficiently cogent … to prove that the worker had ceased to be incapacitated for work as at 9 December 2014" amounts to a failure to give proper reasons for the decision to dismiss the counterclaim from which an inference can be drawn that his Honour failed to address one of the principal contentions of the appellant at the trial – that the surveillance evidence and the admissions made by the respondent in cross-examination led to the inevitable conclusion that the respondent was not incapacitated for work at the relevant time. One can also infer that his Honour failed to take that surveillance evidence and those admissions into account except for the limited purpose of assessing the respondent's credit when determining whether the respondent had suffered a mental injury at all.

[85] Counsel for the respondent contended that his Honour was not obliged to deal with every piece of evidence and that this evidence was of little importance as there was no question before the Court about the respondent's

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[51] *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [23]

[52] *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* (2014) 242 IR 318; [2014] NSWCA 112 at [40]

physical injury. (The respondent was not contesting the validity of the Notice in so far as it ceased his benefits in respect of the back injury.) I do not agree. First, the respondent's evidence (and his claim all along to those who provided expert reports) was that it was the pain from his back that was the direct cause of his mental condition. Evidence that he no longer suffered from back pain was therefore directly relevant to the question of whether he suffered any incapacity as a result of any mental condition.[53] Second (and more importantly), the evidence which his Honour failed to refer to included admissions by the respondent that he was working full time hours (and more), that he was enjoying his role at Alchemy Automotive, and that depression was not affecting his ability to perform that role. The appellant's submissions about the effect of this evidence was a key component of the appellant's case on the counterclaim which the learned trial magistrate was obliged to deal with, and his Honour failed to do so.

[86] Counsel for the respondent also submitted that the surveillance evidence did not go as far as the appellant contended. That may be so but is beside the point. If his Honour was of the view that the appellant's contentions about

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53 The respondent's case in relation to the psychological injury involved a number of steps.
(a) He was suffering from chronic back pain which incapacitated him from work.
(b) The chronic back pain and inability to work led to him suffering depression.
(c) He instituted proceedings claiming:
  (i) that he was incapacitated from work as a result of the back injury and psychological injury (in which contention the onus would have been on him); and
  (ii) that the Notice of cessation of weekly benefits was invalid as it did not refer to the psychological injury.

The respondent then withdrew any contention that he was suffering from any incapacity from work as the result of a back injury. This was rather like building a tower of blocks and then withdrawing one of the middle blocks leaving the top block suspended in mid-air, or like the Goon Show in which Neddy stands on Eccles shoulders to reach a high window, but they still can't quite reach it so Eccles climbs up onto Neddy's shoulders.

the effect of the surveillance evidence and the admissions were over stated or incorrect, one would have expected a reference to that evidence and those contentions in the reasons for decision and an explanation as to why his Honour did not accept the appellant's contentions.

[87] Had it been necessary for me to decide, I would also have allowed the appeal in relation to the counterclaim.

Appeal against the finding that the respondent's proceeding was not stayed by virtue of s 60(2) of the *Bankruptcy Act* (Cth)

[88] After the respondent became bankrupt, the appellant applied in interlocutory proceedings for the Work Health Court to reserve, by way of a special case stated to the Supreme Court, the question of whether the statutory chose in action consisting of the right to sue for compensation for loss of earning capacity under the Act is property which vests in a trustee in bankruptcy under s 58 of the *Bankruptcy Act*. Alternatively, the appellant applied for judgment on the ground that the proceeding was stayed by operation of s 60(2) of the *Bankruptcy Act*. Both applications were refused. The learned judge hearing the interlocutory application found that the proceeding was an action in respect of a personal injury or wrong within the meaning of s 60(4) of the *Bankruptcy Act* and hence not stayed under s 60(2). The appellant

appeals against that decision.[54] (The appellant has also instituted proceedings seeking, *inter alia*, a declaration that the respondent has no standing to bring the present proceeding.)

Relevant statutory provisions

[89] Under s 58 of the *Bankruptcy Act 1966* (Cth), all property existing as at the date of bankruptcy and all after-acquired property vests in the Trustee. Section 116 provides that all such property is divisible among the bankrupt's creditors subject to certain exceptions. Those exceptions include any right of the bankrupt to recover damages or compensation for personal injury or wrong done to the bankrupt (or the bankrupt's the spouse, de facto partner or a family member).[55]

[90] Upon a person becoming a bankrupt, any actions commenced by that person before becoming a bankrupt are stayed,[56] except an action in respect of "any personal injury or wrong done to the bankrupt" (or the bankrupt's spouse, de facto partner or family member).[57]

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[54] Where the Work Health Court is constituted by a Local Court Judge a party who is aggrieved by a decision or determination of the Court may appeal to the Supreme Court against that decision or determination on a question of law [*Workers Rehabilitation and Compensation Act 1986* (NT) s 116(1)] but only after the final determination of the proceeding in which the decision or determination was made [s 116(3)].

[55] *Bankruptcy Act 1966* (Cth) s 116(2)(g)

[56] Ibid s 60(2)

[57] Ibid s 60(4)

[91] The question for determination on this appeal is whether the judge at first instance was wrong in law to hold that the proceeding brought by the respondent was a claim for "personal injury or wrong".

[92] The phrase "personal injury or wrong" is a composite term.[58] The only actions commenced by a bankrupt that are not stayed are those "where the essential cause of action is the personal injury done to the person or feelings of the bankrupt".[59]

[93] This phrase was considered by Dixon J (as he then was) in *Cox v Journeaux & Ors (No. 2.)*.[60] To be an action for personal injury or wrong within the meaning of s 60(4), the damages (or part of the damages) claimed must be "estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property."[61]

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58 *Duckworth v Water Corporation* (2012) 261 FLR 185; in that case Edelman J said at [85]: "The phrase 'personal injury or wrong' has a long history of interpretation. The words are a paregmenon. 'Wrong' and 'personal injury' have the same connotation and derivation."

A paregmenon is a juxtaposition of words that have the same derivation (or derivation and connotation): for example, "He wished rather to die a present death, than to live in the misery of life." Another example often given is "Sense and Sensibility" which have a common derivation though not the same connotation – that being rather the point of the title.

Strictly speaking it is "wrong" and "injury" rather than "wrong" and "personal injury" that have the same connotation – though not a common derivation. ("Wrong" is said to derive from Old Norse [*rangr*] and "injury" from Latin [*iniuria*].) None of this takes away from the point made in *Duckworth v Water Corporation* which is that what is exempt from the operation of s 60(2) by s 60(4) is a personal injury or wrong: the term "wrong" does not refer to a general wrong.

59 *Faulkner v Bluett* (1981) 52 FLR 115 at 119 per Lockhart J

60 (1935) 52 CLR 713

61 Ibid at 721 per Dixon J

[94] The appellant contends that a claim under s 65 of the Act is a claim for economic loss rather than personal injury as the amount payable to a worker under s 65 is measured not by reference to immediate pain and suffering but rather by reference to a loss of earning capacity contingent upon a work related injury. [62] Counsel for the appellant submitted that under the Act, the worker's entitlement to compensation for pain and suffering is to be found in s 71, which provides for compensation for permanent impairment.

[95] The appellant argues that it would be anomalous if the respondent were able to continue this proceeding in his own name and receive the entirety of any compensation payable for his own benefit, when, if he had received the same amount by way of wages, he would have been liable to pay a proportion of the amount received to the trustee. (If during a particular period a bankrupt derives income in excess of a threshold amount, the bankrupt is liable to pay a contribution to the trustee in respect of that period,[63] and the respondent has an admitted net income considerably in excess of the threshold amount.)

[96] If this is an anomaly, it is one that is a result of the legislative provisions and one that is for the legislature to cure if it is thought to be productive of injustice. It is not a reason for giving a constrained or unnatural construction to the legislation.

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62 The appellant makes the same argument in relation to that aspect of the respondent's claim which claims compensation under *Workers Rehabilitation and Compensation Act 1986* (NT) s 73 for reimbursement of medical expenses incurred or to be incurred.

63 *Bankruptcy Act 1966* (Cth) ss 139P and 139Q

[97] The respondent relies on a number of recent authorities concerning the equivalent provisions in legislation from other Australian jurisdictions. The first is *Sharma v Victorian WorkCover Authority.*[64]

[98] Mr Sharma suffered injuries in a road accident in South Africa. He brought common law proceedings for damages in South Africa which he settled.

[99] Mr Sharma had been receiving benefits under the *Accident Compensation Act 1985* (Vic) and the Victorian WorkCover Authority brought proceedings against Mr Sharma seeking payment of an amount equivalent to the amount that he received in settlement of the South African proceeding.[65] Mr Sharma counterclaimed alleging that the Authority had underpaid weekly benefits to him, had unlawfully ceased to pay his medical and like expenses, and had unlawfully suspended payments of compensation.

[100] The trial magistrate ordered that Mr Sharma pay the Authority $680,178.84[66] plus interest and dismissed Mr Sharma's counterclaim. Mr Sharma appealed from all of the orders made.

[101] After filing the Notice of Appeal, Mr Sharma became bankrupt on his own petition. The Authority sought to have the appeal struck out on the ground that the appeal had been stayed by the operation of s 60(2) of the

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64 (2012) 36 VR 318; [2012] VSCA 254

65 The Authority's claim was based on a provision of the Act which provided that if a person receives compensation under the Act in respect of any injury and subsequently obtains damages in respect of the injury under the law of any place outside Victoria, the Authority is entitled to recover from that person the amount of compensation paid under the Act or an amount equal to the damages obtained whichever is less.

66 the amount that Mr Sharma had received in settlement of his South African common law claim

Bankruptcy Act. Mr Sharma argued that the appeal was not stayed because it was a proceeding in respect of a personal injury or wrong done to Mr Sharma within the meaning of s 60(4). In relation to that part of the appeal against the dismissal of Mr Sharma's counterclaim, the Victorian Court of Appeal held:

> [T]he counterclaim concerned allegations of underpayment of weekly benefits, cessation of payment of medical expenses and suspension of compensation payments. Any entitlement to such payments under the *Accident Compensation Act*, clearly relates to the personal injuries that Mr Sharma sustained in the car accident. At least part of the compensation to be paid has immediate reference to the physical injuries Mr Sharma suffered. It makes no difference that the basis for the counterclaim is a statutory right to be paid compensation. The action is still one brought 'in respect of personal injury' for the purposes of s 60(4) of the Bankruptcy Act. In my opinion, insofar as the appeal concerns any entitlement to be paid compensation under the *Accident Compensation Act*, it falls within the exception in s 60(4) of the Bankruptcy Act.[67] *[emphasis added]*

[102] *Sharma* is directly on point: the compensation provisions in the Victorian *Accident Compensation Act* are not materially different from those in the Northern Territory Act. In particular, there is no material difference between s 65 and the equivalent provision in s 93B of the Victorian Act.

[103] The second case relied upon by the respondent is *Berryman v Zurich Australia Ltd*.[68]

[104] A large granite rock crushed Mr Berryman's right foot in a work accident. Mr Berryman commenced an action against Zurich for damages for breach of

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67 *Sharma v Victorian WorkCover Authority* (2012) 36 VR 318 at 322-323 [17]

68 (2016) 310 FLR 108; [2016] WASC 196

an insurance policy that provided for him to be paid $2 million if he became totally and permanently disabled. Mr Berryman became bankrupt after commencing the action, and Zurich applied for an order that the action be dismissed on the ground that it was deemed to have been abandoned by operation of s 60(3) of the *Bankruptcy Act 1966* (Cth) as the trustee had not elected to continue with the action within 28 days after service of a notice by the defendant. Mr Berryman contended that he was entitled to continue the proceeding in his own name as it was a proceeding in respect of personal injury within the meaning of s 60(4).

[105] Zurich relied on the test for what constitutes a claim for personal injuries formulated by Dixon J (as he then was) in *Cox v Journeaux & Ors (No. 2.)* - as does the appellant on this case. Zurich argued that Mr Berryman's claim was in contract and was therefore not in respect of a "personal injury or wrong". First, it was argued, he could not succeed "without reference to his rights of property" since his claim in contract was founded upon rights conferred upon him by the agreement, and those rights are choses in action which are property rights. Second, Zurich argued that Mr Berryman's claim did not satisfy the test set out in *Cox v Journeaux & Ors (No. 2.)* because any damages recoverable would be assessed by reference to the breach of the contractual promise to pay $2 million upon the occurrence of the agreed contingency and not upon the extent of Mr Berryman's injury or any pain suffered by him as a consequence of it.

[106] Tottle J in the Supreme Court of Western Australia concluded that Mr Berryman's action did fall within s 60(4). (He also found that his right to compensation fell within the exception in s 116(2)(g) and was not property divisible among his creditors.) Adopting a purposive approach to the construction of ss 60(4) and 116(2), his Honour said:

> Plainly the purpose of these sections is to protect a bankrupt's right to compensation for personal injury or wrong from his or her creditors. It is important to appreciate the underlying principle as developed by the common law of bankruptcy, that is, that it was considered harsh and unjust to give the solace for the hurt to the person or personal feelings of the bankrupt to general creditors: *Moss v Eaglestone* at [55] and [64]. To adapt Kirby P's words in *Daemar v Industrial Commission of New South Wales* compensation for such personal injury or wrong was not part of the 'legitimate entitlements' of the creditors.[69]

[107] Tottle J rejected Zurich's submissions (summarised above). He said, first, that the contention that the form of the action (ie suing to enforce a contractual right) meant that the proceeding necessarily fell outside s 60(4) was "not supported by precedent or principle".[70]

[108] By way of precedent, Tottle J referred to *Moss v Eaglestone*.[71] In that case the issue was whether a bankrupt's action against his former solicitor for damages for loss of a chance to prosecute a defamation action fell within the exception provided for by s 60(4). Allsop P (with whose reasons Campbell and Young JJA agreed) held that s 60(4) did apply, and that the interposition

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69 *Berryman v Zurich Australia Ltd* (2016) 310 FLR 108 at 123 [62], citing *Moss v Eaglestone* (2011) 83 NSWLR 476, *Daemar v Industrial Commission of New South Wales* (1988) 12 NSWLR 45

70 *Berryman v Zurich Australia Ltd* (2016) 310 FLR 108 at 123 [65]

71 (2011) 83 NSWLR 476; [2011] NSWCA 404

of a claim (in contract, or tort, or both) for negligence between the bankrupt and the underlying claim for defamation which had been lost was immaterial. The Court held that there was no sound reason in logic or policy why that claim in negligence should enure for the benefit of creditors, when the primary defamation claim did not.

[109] After referring to precedent, Tottle J added:

> As to principle: s 60(4) and s 116(2)(g) focus on the substance of the claim not the form of the action. There is nothing in the text of the provisions or in the context that supports the proposition that the legal basis of a claim is determinative. The focus on the substance of the action reflects the underlying statutory intent. [72]

[110] Tottle J dealt with the submission by Zurich that Mr Berryman's action did not fall within s 60(4) because his damages are not "estimated by immediate reference" to his pain and suffering (the same submission made by counsel for the appellant in this case) by pointing out that the submission did not reflect Allsop P's approach in *Moss v Eaglestone* to the application of Dixon J's test in *Cox v Journeaux & Ors (No. 2.).*[73] *Moss v Eaglestone* was a case in which the damages that might be awarded to the bankrupt were to be estimated by reference to the value of the loss of a chance. Yet Allsop P said: "The damages being the value of the chose will be estimated in

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[72] *Berryman v Zurich Australia Ltd* (2016) 310 FLR 108 at 123 [67]

[73] Ibid at 124 [73] – 125 [78]

significant respects by the immediate reference to the reputational harm".[74]

[*emphasis added*]

[111] In concluding that s 60(4) did apply to Mr Berryman's claim Tottle J said:

> In Mr Berryman's action the critical fact is the injury to his foot. The injury and its consequences are the facts by which his entitlement to compensation is to be determined. Had he not suffered the injury and had it not had the effect of a 'total and permanent disability' within the meaning of the policy, he would have had no claim. The substance and nature of his claim are not altered by the interposition of the policy between his injury and his action, just as in *Moss v Eaglestone* the interposition of the requirement to assess the value of the bankrupt's lost chance (an assessment that involves factors other than the extent of the reputational damage) did not alter the nature and substance of bankrupt's claim.[75]

[112] In his written outline, counsel for the appellant on this appeal made the following submission.

> If the question was capable of being answered simply by asking oneself whether the action involved a claim resulting from a personal injury rather than asking whether the damages were calculable by reference to the pain and suffering resulting from that alleged injury, it is difficult to conceive what purpose Dixon J's requirement for "an immediate reference to pain" might serve.

[113] I disagree. It seems to me that that submission reflects the danger inherent in treating words in a decision (even of the High Court), directed as they inevitably are to the particular circumstances of the case being decided and the issues thrown up for determination in those particular circumstances, as though they were words in a statute.

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74 *Moss v Eaglestone* (2011) 83 NSWLR 476 at 494 [66]

75 *Berryman v Zurich Australia Ltd* (2016) 310 FLR 108 at 125 [76]

[114] The appellant submitted that I ought not follow the line of authority represented by *Berryman v Zurich Australia Ltd* and *Sharma v Victorian WorkCover Authority*. Even if I entertained some doubt about the correctness of the decisions, I would hesitate to refuse to follow two single instance Supreme Court decisions from two different States, particularly where those decisions are compatible with the approach adopted by the New South Wales Court of Appeal (as the appellant's submissions are not). As it happens, I have no doubt about the correctness of those two decisions, which seem to me to be correct in principle and, as I have said, consistent with the approach adopted by the NSW Court of Appeal in *Moss v Eaglestone*.

[115] Further, in the Victorian Supreme Court in *Sheehan v Brett-Young (No 3)*[76] John Dixon J reviewed the authorities and identified some of the considerations relevant to the assessment of the character of claims as falling within s 60(4) or not. Among the principles he identified were these:

> (e) When the essential nature of the wrong is personal, the cause of action remains with the bankrupt. A cause of action for personal injury, which can include compensation for loss of capacity to earn income is the classic example of an action that will remain with the bankrupt;
>
> (f) The essential nature of the wrong is personal where the damages or part of them are to be assessed by reference to the loss sustained by the bankrupt in respect of his mind, body or character and without reference to his rights of property. In this context, the concept of 'mind, body or character' is only constrained by reference to the objects and purpose of the

[76] [2016] VSC 39

> *Bankruptcy Act*. It is well recognised that impairment of earning capacity is compensable without reference to any property right of a plaintiff who sustains injury to his mind body or character. It is not within the contemplation of the *Bankruptcy Act* that compensation for damage to such a personal asset should be available for the payment of provable debts[77]

[116] It seems to me that, just as in Mr Berryman's case, "the critical fact" here is the alleged injury to the respondent's back and the alleged consequential mental injury. The proceeding is one that falls within the exception in s 60(4) and was accordingly not stayed by the operation of s 60(2).

[117] The learned trial magistrate at first instance was not in error. The appeal on this ground must be dismissed.

[118] ORDERS:

(1) The appeal against the decision allowing the respondent's claim on the basis that the Notice was invalid is allowed.

(2) The decision of the learned Chief Magistrate is set aside and instead there will be judgment for the appellant.

(3) The appeal against the order dismissing the appellant's application for a permanent stay of the respondent's proceeding is dismissed.

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[77] *Sheehan v Brett-Young (No 3)* [2016] VSC 39 at [62]