Millar v ABC Marketing and Sales Pty Ltd [2012] NTSC 21

PARTIES:	MILLAR, Betty v ABC MARKETING AND SALES PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 7 of 2011 (21004782)
DELIVERED:	29 March 2012
HEARING DATES:	22 and 23 February 2012
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Workers' compensation — Successive injuries — Hopkins Agreement relating to one injury — Whether double compensation — Burden of proof

Workers' compensation —— Worker claimed compensation from employer for knee condition — Whether two independent knee injuries or additional injury to pre-existing injury — Whether different employers liable for same loss — *Workers Rehabilitation and Compensation Act* ss 3, 64, 65, 68, 73, 116(1)

Workers' compensation — Compensation — Whether employee suffered financial loss — Assessment of most profitable employment —Which party has onus to establish financial loss — *Work Health Court Rules* — Rule 8.01, 8.03 (c)

Workers Rehabilitation and Compensation Act
Work Health Court Rules

Blatch v Archer (1774) 1 Cowp. 63; *Currie v Dempsey* (1967) 69 SR (NSW) 116; *George Starr v Northern Territory of Australia* Unreported, 23 October 1998; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32; *Wilson v Lowery* (1993) 4 NTLR 79; applied.

Ju Ju Nominees Pty Ltd v Carmichael [1999] 9 NTLR 1; *McIntyre v Tumminello Holdings No 1* [2004] NTMC 97; *R v Turner* (1816) 5 M & S 206; distinguished.

Bushby v Morris [1980] 1 NSWLR 81; *Hopkins v Collins/Angus and Robertson Publishers Pty Ltd* Unreported LA 4 of 1997 (9202305) 21 May 1997; *J & H Timbers Pty Ltd v Nelson* (1971-1972) 126 CLR 625; *Morris v Riverwild Management Pty Ltd* (2011) 284 ALR 413; *Normandy Mining Pty Ltd v Horner* [2000] NTSC 79; *Northern Cement Pty Ltd v Uni Ioasa* Unreported, Martin CJ, 17/6/1994; *Prenn v Simmonds* [1971] 3 All ER 237; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; *Un v Schroter (t/as Povey), Carney & Ors* [2001] NTSC 62; followed.

Napper & Anor v Bultitude & Anor [2009] SASC 37, not followed.

AAT King's Tours Pty Ltd v Hughes (1994) 4 NTLR 185; *Allianz Australia Insurance Ltd v Territory Insurance Office* (2008) 23 NTLR 186; *Australian Eagle Insurance Company Limited v Federation Insurance Ltd* (1976) 15 SASR 282; *Bellia v Colonial Sugar Refining Co Ltd* (1961) 61 SR (NSW) 401; *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1; *Dunkel & Another* (1958-1959) 101 CLR 298; *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345; *Franklin Self Serve Pt Ltd v Wyber* (1999) 48 NSWLR 249; *Jones v Paff v Speed* (1961) 105 CLR 549; *Kars v Kars* (1996) 187 CLR 354; *Manser v Spry & Another* (1994) 181 CLR 428; *Munce v Vinidex Tubemakers Pty Ltd* [1974] 2 NSWLR 235; *Parry v Cleaver* [1970] AC 1; *Redding v Lee* (1983) 151 CLR 117; *The National Insurance Company of New Zealand Ltd v Espagne* (1961) 105 CLR; *Transfield Pty Ltd v Mastroianni* [1998] NSWSC 259; *Webster and Another v Lampard* (1993) 177 CLR 598; *Workcover/Royal & Sun Alliance (York Civil Pty Ltd) v Tarbotton* [2003] SAWCT 40; *Workcover/Royal & Sun Alliance (York Civil Pty Ltd) v Tarbotton* [2005] SAWCT 34; *Young v Queensland Trustees Ltd* (1956) 99 CLR 560; *Zheng v Cai* (2009) 239 CLR 446; referred.

REPRESENTATION:

Counsel:

Appellant:	Mr M. Johnson
Respondent:	Mr M. Crawley

Solicitors:

Appellant:	Ms C. Scicluna
Respondent:	Cridlands MB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. LA 7 of 2011 (21004782)

Millar v ABC Marketing and Sales Pty Ltd [2012] NTSC 21
No. LA 7 of 2011 (21004782)

BETWEEN:

BETTY MILLAR
Appellant

AND:

ABC MARKETING AND SALES PTY LTD
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 29 March 2012)

[1] This is an appeal from the Work Health Court pursuant to s 116(1) of the *Workers Rehabilitation and Compensation Act* (the Act), which limits appeals to this Court to questions of law only.

Background facts

[2] The appellant is a 51-year-old woman who was employed by the respondent in 2005 as a marketer. Her work involved travelling to supermarkets and checking the stock on shelves. On 18 June 2005 she suffered an anterior cruciate ligament injury to her right knee in the course of her employment which was treated conservatively. She made a claim for compensation under

the Act which was accepted by her employer. She received compensation for total incapacity. In late September 2005 she returned to work with an alternative employer, Litchfield Realty, as a real estate agent's representative, on a commission basis. She continued to receive compensation until 30 November 2005 when she was certified fit to return to work by Dr E Moore.[1]

[3] Over the next three years, the appellant continued to suffer from continuing problems with her right knee. There were times when her knee would swell and become painful, but the problems would resolve if she did not undertake repetitive squatting, heaving lifting, or climbing stairs. During this period she tried a number of different jobs, each of which caused some discomfort with her knee. She did not feel the need to seek any medical treatment.

[4] On 7 April 2008 she commenced employment with Mining and Civil Services Pty Ltd at Howard Springs operating a sand wash plant. In early June 2008, there was a major breakdown with the equipment and the appellant was involved over the next two or three days working in a squatting position unbolting pipes whilst the machinery was being repaired. This caused her knee to swell up considerably. Initially she continued to work at the request of her employer until a short time later when she began to suffer cramps in her neck and shoulders, and was unable to move an arm, as a result of her work. The appellant ceased employment and lodged two claims for compensation. The first claim related to an injury to her right

[1] The certificate indicated that the appellant had ceased to be incapacitated for work.

knee which is said in the claim form to have occurred on 7 June 2008. The second claim related to her upper body injuries which were said in the claim form to have occurred on 12 June 2008. Both of those claims were accepted and she received workers compensation payments until November 2008 when she was again certified fit for work. The employer then cancelled her payments. Dissatisfied with that decision, the appellant lodged an application in the Work Health Court challenging the employer's decision.

[5] By a Deed dated 24 September 2009 entered into between the appellant and QBE Insurance (Australia) Limited (QBE), the insurers of Mining and Civil Services Pty Ltd, the appellant agreed to discontinue her claims against Mining and Civil Services Pty Ltd in consideration of the sum of $80,000. The Deed is in the form commonly called a Hopkins Agreement, so called following the decision of this Court by Angel J in *Hopkins v Collins/Angus and Robertson Publishers Pty Ltd*[2] which upheld the validity of a similar Deed. It will be necessary to return to the terms of the Deed later.

[6] The appellant had surgery to repair a medical meniscus tear by Dr Patterson, an orthopaedic surgeon, on 1 August 2008. Despite being certified fit for work in November 2008 the appellant continued to suffer from difficulties with her knee. She was out of work during the period 24 February 2009 until 25 April 2010, and for a period between 13 June 2010 and November 2010. During 2010 she did courses in book keeping and a certificate course in business administration to try to obtain the skills needed to work in an

[2] Unreported LA 4 of 1997 (9202305) 21 May 1997.

office. She also obtained some employment during 2009 and 2010 working for Coles and at the airport but this aggravated her knee. Ultimately in November 2010 the appellant obtained full time employment with Wilsons Security, working as a security guard at the Family Law Courts in Mitchell Street. It is not in dispute that since her commencement of that employment, which was still ongoing as at the date of trial in August 2011, the appellant's earnings were such as to disentitle her to any ongoing benefits by way of weekly compensation.

The pleaded claim

[7] On 10 February 2010, the appellant filed an application against the respondent in the Work Health Court. The claim, as ultimately formulated in the Amended Statement of Claim, sought the following orders:

> "(i) The worker remains entitled to receive compensation as a result of an injury sustained on 28 June 2005.
>
> (ii) The Employer is to pay the Worker's benefits pursuant to Section 73 of the Act and weekly benefits of compensation in accordance with Section 65 of the Act.
>
> (iii) The Employer is to pay the Worker's costs of and incidental to this proceeding, to be fixed in default of agreement."

[8] The respondent denied liability. In its Second Further Amended Defence, the respondent pleaded that the appellant long ceased to be incapacitated for work as a result of the injury in 2005; alternatively any incapacity she had thereafter did not result in economic loss; that any incapacity she had thereafter was caused by or contributed to the injury she sustained to her

knee on 7 June 2008; that the lump sum compensation of $80,000 paid in respect of the injury in June 2008 was received "to apply to and towards the losses claimed and [the Worker] is thereby precluded from seeking payment of them from the Employer in accordance with the principle of double compensation."

The decision of the Work Health Court

[9] The learned Magistrate's essential findings may be summarised as follows:

(i) The appellant continues to have difficulties with her right knee. She has had periods of pain and swelling in her knee since the injury in 2005. The restriction in the use of her knee has become considerably worse since 2008.

(ii) The appellant has a continuing compensable injury arising out of her employment in 2005.

(iii) The appellant had not proved that her loss of earning capacity in 2009 related to her knee injury in 2005.

(iv) The appellant's knee injury in 2005 resulted in loss of earning capacity from January 2010.

(v) The appellant was entitled to an award for certain rehabilitation expenses, medical expenses and travelling expenses, but had not proved that all of her claims for medical and travel expenses were related to the knee injury in 2005.

(vi) The appellant cannot be compensated twice for the same loss. The payment made under the Deed fell within s 54(2) of the Act, which provides that "a person is not entitled to compensation under this part if, in respect of an injury...compensation or damages has been recovered under the applicable law..." S 54(6) provides that "applicable law" means... "a law of the Territory other than this Act." A "law of the Territory" is defined by s 17 of the *Interpretation Act* as including the common law. The burden of proving that the payment of $80,000 was not double compensation or compensation for the same loss fell upon the appellant. Therefore the appellant had to prove that the payment of

> $80,000 "was not a payment for compensation of her continuing problems with her knee." It was clear from the terms of the Deed between the appellant and QBE that the money paid to her was intended to be a payment for all possible compensation the appellant might have under the Act relating to the injury to her knee in 2008, as well as her upper body injury in 2008. The appellant had not discharged her burden to prove to the court that the payment of $80,000 was "not compensation for the knee." Therefore, the amount of $80,000 "must be deducted from any award this Court grants relating to [the appellant's] claim against [the Respondent] to avoid double compensation for the compensable knee injury and subsequent loss of earning capacity" including "legal fees, medical expenses past and future and weekly benefits." In the result, the Court made a declaration of liability for compensation in favour of the appellant totalling $13,924.58, but set off against that amount the $80,000 paid under the Deed, and ordered each party to bear their own costs.

Grounds 1-4 of the appeal

[10] The appellant submitted that the injury in 2005 was not the same injury as the knee injury in 2008. This was because the 2008 knee injury was an exacerbation of the 2005 injury. There was no clear finding to this effect, although Her Honour seems to have accepted that this was so,[3] or at least possibly so.[4] On the other hand there was no finding that the 2005 and 2008 injuries were separate and distinct injuries resulting in separate or distinct periods of incapacity. If the 2008 injury was an exacerbation of the 2005 injury, the 2008 injury was not the same injury as the 2005 injury because the definition of "injury" includes "the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury."[5] If the effects of the 2008 injury had ceased altogether, then the only conclusion

[3] See Reasons para [36].
[4] See Reasons para [106].
[5] The Act, s 3(1) definition of "injury."

consistent with the Court's findings is that both injuries were separate and distinct injuries.

[11] Mr Johnson, who appeared for the appellant, submitted that s 54 applied only where the injuries were the same injury. I accept that submission. Plainly when s 54(2) refers to having "received compensation under this part in respect of *the injury*" it is referring to the injury referred to in s 54(1). Mr Crawley for the respondent did not submit that the two injuries were the same injury. He did not rely on s 54 or the presumption contained in s 54(5). His argument rested on the proposition that any incapacity as a consequence of the problems with the appellant's knee were caused by both injuries, which raises a different issue.

[12] In my opinion s 54 did not operate to preclude the appellant from claiming compensation from the respondent, because the injuries were not the same injury. In so far as the learned Magistrate relied upon s 54, she was in error.

[13] However, Mr Crawley submitted that if the loss of capacity to earn income was the result of both injuries, giving rise to a liability in two different employers for the same loss, payment by one employer will discharge the liability of the other employer pro tanto. I have no doubt that this submission is correct.[6] Another way of expressing the same idea, is the "rule against double compensation," namely that a person cannot recover

[6] *Bushby v Morris* [1980] 1 NSWLR 81 at 88 (Privy Council).

more than he has lost.[7] However, whether or not this general rule applies, depends upon the character of the payment already received. For example, the general principle does not apply if the payment is intended as a gift, or is the result of a statutory right to receive a pension;[8] or is a payment made under a policy of accident insurance taken out by the employee,[9] or if the Act by its terms precludes the Court from taking it into account, as was the case in *Franklin Self Serve Pt Ltd v Wyber*.[10] In *Un v Schroter (t/as Povey), Carney & Ors,*[11] Martin CJ held that so much of an amount paid for unfair dismissal pursuant to the operations of the *Workplace Relations Act* (Cth) as related to loss of wages could be set off against an award of workers compensation, but amounts received consequent upon conciliation processes under the *Anti-Discrimination Act* 1992 (NT) and consequent upon an award under the *Crimes (Victims Assistance) Act* 1982 (NT) could not be set off, because those payments were not shown to be for incapacity for any injury compensable under the *Work Health Act*, and were directed to assist the Worker in relation to a matter unrelated to incapacity resulting from injury as encompassed by the Act. The reasons why these collateral benefits which are not to be taken into account have been variously stated as being because the payment was not intended to be made in diminution of the liability of the

[7] See *Franklin Self Serve Pty Ltd v Wyber* (1999) 48 NSWLR 249 at [29]; *WorkCover Corporation/Royal and Sun Alliance Workers Compensation (SA) Ltd v Tarbotton* [2003] SAWCT 40 at 78; *Manser v Spry & Anor* (1994) 181 CLR 428.
[8] *Paff v Speed* (1961) 105 CLR 549; *The National Insurance Company of New Zealand Ltd v Espagne* (1961) 105 CLR 569; *Redding v Lee* (1983) 151 CLR 117
[9] *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1; *The National Insurance Company of New Zealand Ltd v Espagne* (1961) 105 CLR at 588.
[10] (1999) 48 NSWLR 249.
[11] [2001] NTSC 62.

party liable,[12] or because the payee was obliged to recoup the payer either because of the legislation under which the payment was made, or by reason of the existence of another restitutory remedy in the payer; or because the payee bought the right to receive the money from the payer (as in the case of accident insurance, pensions and superannuation entitlements); or because characterisation of the benefit will indicate whether or not it was intended to replace the loss,[13] or because the weighing of conflicting policy considerations favour not taking the benefit into account,[14] or because of policy reasons.[15] Whenever the question of double compensation arises, the character and purpose of the payment is, in my opinion a useful, if not a necessary, starting point.[16]

The Deed

[14] The preamble to the Deed provides that whereas:

> "On or about 7 June 2008 and 12 June 2008, the Worker [the appellant] suffered injuries in the course of her employment with Mining and Civil Services Pty Ltd....[the Employer]; namely an injury to the Worker's left and right arms, elbows, shoulders, wrists, right knee and all other physical and/or psychological/psychiatric condition (s) or sequela of the said injuries and any other injury/injuries (hereinafter collectively referred to as "the injury.")

The Deed then recites in Paragraph B that the Worker submitted two claims for compensation pursuant to the Act against the Employer, and that QBE was the Employer's insurer. Recitals D to K recite the progress of the

[12] *Zheng v Cai* (2009) 239 CLR 446.
[13] See Luntz, Assessment of Damages for Personal Injuries and Death 4th Edn, pps 428-430.
[14] See for example *Kars v Kars* (1996) 187 CLR 354 at 382.
[15] *Parry v Cleaver* [1970] AC 1 at 39.
[16] *Redding v Lee* (1983) 151 CLR 117 at 137 per Mason and Dawson JJ.

claims, the defence of the claims throughout, the commencement of proceedings in the Work Health Court and the denial of liability of the claims. Recital L refers to the fact that the parties have agreed to resolve the various disputes between the parties. Clause 2 provides that QBE will within 14 days pay to the Worker's solicitor "an un-dissected capital sum of $80,000...as payment for her future loss of earning capacity, permanent impairment and any and all future entitlements to compensation pursuant to the Act...in respect of the injury and the claims." Clause 3 provides that upon payment of the $80,000, the Worker will file notices of discontinuance of the applications in the Work Health Court. Clause 5 provides that should the Worker seek to further pursue the claims against the Employer in respect of the injury "she shall be liable to repay the Insurer for and on behalf of the Employer the total sum of $80,000..." plus interest. Clause 7 provides that the agreement does not limit the Worker's rights under the Act in connection with the injury, but if the Worker does pursue her rights, and as a result she becomes entitled to receive further payments of compensation, clause 6 provides that "the Worker authorises the Insurer for and on behalf of the Employer to deduct from such payments all monies that the Worker is liable to repay" pursuant to clause 5. There are other provisions as well, but they are not directly relevant.

[15] Mr Johnson submitted that the payment of $80,000 was not a payment of compensation made under the Act. He characterised it as a payment made in consideration of discontinuing the claims under the Act; nor was it a

payment made in settlement of the appellant's claims for compensation under the Act. Mr Johnson referred me to *Hopkins v Collins/Angus and Robertson Publishers Pty Ltd*[17] where Angel J held that the sum paid under the Deed in that case was not in settlement of a claim for compensation because the Deed did not extinguish the claim. I have no doubt that Angel J is correct, but that does not provide an answer to the question. Mr Crawley submitted that what the appellant received was lump-sum compensation on account of compensation under the Act, referring to the express terms of the Deed. In my opinion, the provisions of the Deed make it clear that the $80,000 was paid in respect of the appellant's right to receive compensation under the Act for the "injury", which included the 2008 knee injury. It was intended by the parties to be able to be set off against whatever amounts of compensation, whether past of future, the appellant might be entitled to recover under the Act. I therefore accept Mr Crawley's submission.

[16] I also reject Mr Johnson's submissions that no part of the monies paid related to the 2008 knee injury. On the face of the Deed, the definition of "injury" included the knee injury. In any event, it is not possible to prorate the payments.[18]

[17] Mr Johnson correctly points out that the Work Health Court did not find that the payment of $80,000 was in fact a payment on account of compensation for, inter alia, the knee injury. The learned Magistrate's approach went no

[17] Unreported LA 4 of 1997 (9202305) 21 May 1997.
[18] *Morris v Riverwild Management Pty Ltd* (2011) 284 ALR 413 at [47] – [49].

further than to find that it *could* be a payment for the loss suffered arising from the knee injury, and that as the appellant had the burden of proving otherwise, and had not done so, the Court was required to deduct the payment. However, I am not bound by the learned Magistrate's approach if, as a matter of law, the correct finding is that the payment was an amount of compensation for the knee injury. Mr Johnson's submission was that this was not a question of law, but a question of fact, citing *Workcover/Royal & Sun Alliance (York Civil Pty Ltd) v Tarbotton*.[19] Whatever may have been the situation in that case, the true construction to be given to the Deed is a question of law. Mr Johnson referred me to the evidence of the appellant that, so far as she was aware, the claims for compensation in the matters referred to in the Deed did not relate to her knee injury, and there was no evidence to the contrary. This does not assist the appellant. The Deed is clear that the injury as defined includes the 2008 knee injury. Oral evidence cannot be received to explain the parties' intentions or to contradict the express and clear terms of the Deed except in exceptional circumstances which do not arise here.[20]

[18] Having regard to the character and purpose of the payment of the sum of $80,000, was the learned Magistrate correct to deduct the $80,000 under the double recovery rule? Clearly the intention of the parties in making the payment was not intended as a gift or voluntary payment. I do not consider

[19] [2005] SAWCT 34 at [32].
[20] *Prenn v Simmonds* [1971] 3 All ER 237; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 606.

that the scheme of the Act shows an intention that the appellant is entitled to receive double compensation. There is the underlying principle of double insurance which I also consider may be relevant. A worker may commence a claim against each employer whose employment contributed to the compensable disability. If the loss is met entirely by one employer, that employer can seek contribution from the other employer. The right to seek contribution by one employer is subrogated to the employer's insurer. If the appellant's loss in respect of the 2005 injury is in fact the responsibility of both the respondent and Mining and Civil Services Pty Ltd, any payment made by QBE could be the subject of a claim for contribution against the insurers of the respondent.[21] Therefore, assuming that both employers were liable for the payments of compensation payable in respect of incapacity arising after the Deed was executed, any compensation paid by, or on behalf of the respondent, by its insurer would have the result that it would lose its right to contribution from QBE because QBE had already satisfied that loss. This consideration, and the nature and purpose of the payment made by QBE under the Deed, lead to the conclusion that there cannot be double recovery.

[19] However, before there is any question of double recovery, what must be shown is that both the respondent and Mining and Civil Services Pty Ltd were liable under the Act for the effects of the incapacity during the period of and following 2009. As mentioned earlier, there was no specific finding by the learned Magistrate that the incapacity in 2009 and following could be

[21] *Australian Eagle Insurance Company Limited v Federation Insurance Ltd* (1976) 15 SASR 282; *Allianz Australia Insurance Ltd v Territory Insurance Office* (2008) 23 NTLR 186.

attributed to both the injury in 2005 and the injury in 2008. The approach of the learned Magistrate was more guarded. She found only that the aggravation or exacerbation of the 2005 injury by the 2008 injury may also continue to have an effect.[22] The ultimate finding was based on two propositions. First, that the respondent bore an evidential burden that there was a payment which could have been compensation for the same injury as the 2005 injury, which the respondent had discharged. Secondly, that issue having been raised, the legal burden of proof lay with the appellant to prove otherwise.[23]

Burden of proof

[20] Mr Johnson submitted that the learned Magistrate erred in finding that the burden of proof has shifted to the appellant. He referred to the decision of Martin CJ in *Un v Schroter (t/as Povey), Carney & Ors*[24] where his Honour rejected a submission that s 54 of the Act placed an onus on the Worker to show that the compensation received was not for the same injury. I was referred also to *Transfield Pty Ltd v Mastroianni*[25] where the Court expressed the view that the employer in a similar situation as the present had the evidentiary onus, and "probably the legal onus on this issue." Mr Crawley referred me to the decision of Gray J in *Napper & Anor v Bultitude & Anor*[26] where it was held that the defendants had established on the

[22] Reasons para [36], [89].
[23] Reasons, para [89], [90].
[24] [2001] NTSC 62 at [15] unreported.
[25] [1998] NSWSC 259 at 97 (unreported).
[26] [2009] SASC 37 at [60] (unreported).

evidence that there was a real possibility of double compensation and that it was for the plaintiffs to demonstrate on the balance of probabilities that this had not occurred. None of these authorities refer to any other decided authorities on the point. The learned Magistrate followed *Napper's* case, holding that it was consistent with the reasoning in *Ju Ju Nominees Pty Ltd v Carmichael*[27] and *McIntyre v Tumminello Holdings No 1*.[28] I am unable to see anything in those cases which bear on this issue.

[21] I therefore consider that the matter of who bore the legal onus of proof must be derived from first principles. The general rule is that 'he who asserts must prove', and this usually means that there is an evidential as well as a legal onus on the same party. The rule was expressed by Walsh JA in *Currie v Dempsey*[29] thus:

> "The burden of proof in establishing a case, lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has."

[22] Very often the pleadings give guidance as to who bears the legal onus.[30] For example, if the defendant raises a statute of limitations defence, it must be pleaded by the defendant, because if the defence succeeds, the plaintiff will

[27] [1999] 9 NTLR 1.
[28] [2004] NTMC 97.
[29] (1967) 69 SR (NSW) 116 at 125.
[30] See Cross on Evidence, Australian Edition, para [7055].

lose, and it is not an essential element of the cause of action for the plaintiff to prove that the claim is not statute-barred.[31]

[23] In this case, the respondent pleaded in its answer that the appellant was precluded from seeking payment from the employer by reason of the principle of double compensation. The appellant did not raise any new matters relating to this plea in her reply, but merely joined issue. Prima facie, the evidential and legal onus of proof rested with the respondent on this issue.

[24] However, as is pointed out by Cross on Evidence,[32] there are difficulties which sometimes arise with regard to whether an assertion is essential to one party's case or that of his adversary. For example, in *Young v Queensland Trustees Ltd*[33] the High Court held that in an action for debt, the defence of repayment was required to be proved by the defendant. This was because the cause of action was not based on a mere breach of contract, but on *indebitatus assumpsit*. Therefore, repayment needed to be pleaded by the defendant.[34] On the other hand, if a defendant wishes to assert that a plaintiff has failed to mitigate his loss, the defendant bears both the evidentiary and legal burden of proof.[35]

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[31] *Webster and Another v Lampard* (1993) 177 CLR 598 at 606-607; (1993) 116 ALR 545 at 551.
[32] Cross on Evidence, Australian Edition, para [7075].
[33] (1956) 99 CLR 560.
[34] (1956) 99 CLR 560 at 567-570.
[35] *Munce v Vinidex Tubemakers Pty Ltd* [1974] 2 NSWLR 235.

[25] In *Napper and Anor v Bultitude and Anor*[36] Gray J decided that the plaintiffs bore the onus of proving that there was no double compensation because the ability to call evidence on this topic rested with the defendants. The defendants were not a party to other proceedings which had resulted in a settlement, and the defendants were not aware of the details of the settlement. In other words, it is possible that Gray J decided the issue relying on the rule expressed by Bayley J in *R v Turner*:[37]

> "If a negative averment be made by one party, which is particularly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative."

[26] However, as Cross points out,[38] the rule expressed by Bayley J is a rule of statutory interpretation confined to cases where the affirmative or negative averments are peculiarly within the knowledge of a person charged with an offence. As to the general law, the position is, to quote Lord Mansfield CJ in *Blatch v Archer*:[39]

> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and the power of the other to have contradicted."

Thus there is no reversal of the legal onus of proof, but a plaintiff's knowledge of essential facts may lessen the amount of evidence required to be led by the defendant to discharge an evidential burden borne by the defendant, or vice versa. It may be that only slight evidence will be enough

[36] [2009] SASC 37 (unreported).
[37] (1816) 5 M & S 206 at 211; 105 ER 1026 at 1028.
[38] Cross on Evidence, Australian Edition, para [7160].
[39] (1774) 1 Cowp. 63 at 65; 98 ER 969 at 970.

to discharge the evidentiary burden, but it is clear that the legal burden has not shifted. The same reasoning applies and underlies the principle in *Jones v Dunkel & Another*:[40] see the discussion in *Bellia v Colonial Sugar Refining Co Ltd*.[41] The observation of Gray J in *Napper and Anor v Bultitude & Anor*[42] must be seen in this light.

[27] In the proceedings in the Work Health Court, two issues arose relating to the question of whether or not there was a double recovery. First, there had to be proved that the appellant received a payment in the nature of compensation for a compensable injury for her knee injury in 2008. Secondly, that the consequences of the incapacity flowing from the knee injury after 2008 were due to both the 2005 and 2008 injuries. In relation to the first issue, the respondent bore both the legal and evidential onus. The respondent pleaded the issue, and it must prove it. It was no part of the plaintiff's case to prove that the ongoing effects of the 2005 injury had been compensated for by the terms of the Deed between the appellant and QBE. The respondent clearly established the first issue by proving the terms of the Deed.

[28] As to the second issue, that was so bound up with the first issue, in my opinion the respondent bore both the legal and evidentiary burden of proof on that issue as well, it being impossible to separate the two, as each depended upon the other. In further support of this conclusion, I note that

[40] (1958-1959) 101 CLR 298.
[41] (1961) 61 SR (NSW) 401 at 407-409.
[42] [2009] SASC 37 (unreported).

the respondent pleaded that any loss of earning capacity during the relevant period was caused, or materially contributed to, by the 2008 injury. Further, it was no part of the appellant's case to prove as an element of her case that her ongoing incapacity had anything to do with the 2008 injury. Her case was that she suffered economic loss as a result of the injury in 2005, and on this issue she succeeded. In terms of the dictum of Walsh JA in *Currie v Dempsey*, supra, the respondent's denial of liability did not deny an essential ingredient of the appellant's claim but raised an allegation which, if established, constituted a good defence to recovery. I therefore find that the appellant has established that the Work Health Court erred in deciding that the appellant bore the onus of proof, and grounds 3 and 4 of the appeal must be upheld, although I would dismiss grounds 1 and 2 for the reasons already given.

Ground 5

[29] This ground asserts that the learned Magistrate erred in finding that the appellant did not prove that her loss of earning capacity from 24 February 2009 to 31 December 2009 was due to her knee injury and not due to her upper body injuries as a result of the 2008 injury.

[30] The learned Magistrate observed that the appellant still had the onus of proving that her 2005 knee injury caused her loss of incapacity in 2009 and subsequently her Honour found that she had not discharged the onus to prove that her loss of earning capacity in 2009 was due to the knee injury,

although she noted that if it was due to both the knee injury and the upper body injury, the appellant was entitled to succeed.

[31] The issue raised by this ground is therefore, prima facie, a question of fact. The appellant can only succeed if the uncontradicted evidence, or the evidence accepted by the learned Magistrate, showed that the only conclusion open to the learned Magistrate was that the 2005 knee injury was a cause of her incapacity and loss. But a finding of fact will not be disturbed on the basis that it is "perverse", or "against the evidence or the weight of the evidence or contrary to the overwhelming weight of the evidence" or because the probative force is all one way, even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound.[43]

[32] As Mr Crawley in his submissions pointed out, the evidence was not all one way, and I consider that it was open to the learned Magistrate to find that she was unable to glean from the evidence when her knee injury started to contribute to her loss of earning capacity in 2009. The appellant herself did not give in evidence-in-chief that her knee injury was a cause of her problems in finding work in 2009, although she did assert it in cross-examination. On the other hand, there was evidence that she did not find the need to consult any medical assistance for her knee at that time, and her complaint in commencing proceedings in 2009 for the 2008 injury

[43] *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32; *Wilson v Lowery* (1993) 4 NTLR 79.

related not to her knee, but to her upper body injuries, so far as she was aware.

[33] This was a question of fact for the learned Magistrate to determine. I am not satisfied that any error of law has been shown. This ground of appeal is dismissed.

Ground 6

[34] This ground asserts that the learned Magistrate erred in finding that there was no evidence that the appellant attended physiotherapy treatment for her knee injury. This raises similar principles to those discussed in ground 5.

[35] There is evidence that in September 2009, Dr Paterson was of the view that further physiotherapy was needed. Mr Crawley referred to the evidence of the appellant's general practitioner, Dr Moore, in March 2010 that physiotherapy would not aid the appellant's rehabilitation or improve her function. The learned Magistrate found that there was no evidence of the requirement for a physiotherapist relating to the knee, and no supporting documentation to indicate the purpose of those attendances. No report from or evidence from a physiotherapist was tendered or given. Nor were any accounts tendered, although a schedule of expenses, including physiotherapy expenses, was handed up on the basis that there was no dispute about quantum. The schedule indicates that the accounts were dated 19/7/2010 and 26/8/2010. However, that did not amount to an admission of liability. Mr Johnson referred me to some vague passages in the transcript where the

appellant referred to physiotherapy, but it is far from clear what treatment she actually received, and if it related to her knee injury.

[36] I am not satisfied that any error of law by the learned Magistrate has been proved. This ground of appeal is dismissed.

Ground 7

[37] This ground raised similar issues relating to medical expenses incurred relating to an orthopaedic specialist, Dr Baddeley. The learned Magistrate rejected the claim as it was not proved to relate to the knee injury. Mr Johnson conceded that no evidence was given to support the claim. This ground is dismissed.

Ground 8 and 9

[38] These grounds relate to costs. As the outcome of the costs question might be affected by the outcome of this appeal, these grounds have been deferred pending my decision on the merits of the appeal.

Notice of Contention

[39] The point raised by the counsel for the respondent in his outline of argument by way of contention is that the appellant bore the onus of proving that the knee injury was productive of financial loss, and that she has failed to discharge the onus of proof.

[40] No formal notice of contention was filed by the respondent in the Court as required by Rule 87.09A of the Supreme Court Rules. Counsel for the appellant waived non-compliance, but submitted that Mr Crawley's submission went further than his outline of argument.

[41] The respondent's argument was that a worker who suffers incapacity extending beyond a period of 26 weeks is entitled, pursuant to s 65(1) of the Act, to receive weekly compensation amounting to "75% of his or her loss of earning capacity or 150% of average weekly earnings at the time the payment is made, whichever is the lesser amount, until" he reaches retiring age as provided by subparagraphs (a) or (b). Section 65(2) provides:

> "(2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:
>
> (a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:
>
> (i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available to him or her; and
>
> (ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,
>
> and having regard to the matters referred to in section 68."

[42] Section 65 (2) has to be considered in the light of s 68 which provides:

> "68 **Assessment of most profitable employment**
>
> In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to:
>
> (a) his or her age;
>
> (b) his or her experience, training and other existing skills;
>
> (c) his or her potential for rehabilitation training;
>
> (d) his or her language skills;
>
> (e) in respect of the period referred to in section 65(2)(b)(i) – the potential availability of such employment;
>
> (f) the impairments suffered by the worker; and
>
> (g) any other relevant factor."

[43] The appellant's claim for weekly compensation was particularised in a document handed up to the Work Health Court. It was not exhibited, but by consent became an exhibit in the appeal as Ext A2. It was apparently treated by the parties as an accurate calculation of her loss subject only to whether or not she could prove a loss at all. It appears also that the Court relied on this material to decide the quantum of the appellant's loss. The respondent took no issue with this on this appeal.

[44] The respondent asserts that the appellant needed to prove the quantum of the loss of earning capacity by reference to the criteria in s 65(2), and s 68, that the evidence established that in April 2009 the appellant could have earned more than her normal weekly earnings as indexed, that the learned

Magistrate erred in ruling that the respondent was required, if it intended to rely on s 65(2)(b)(ii) of the Act, to plead that provision, and that the learned Magistrate should have found that there was no loss.

[45] Mr Crawley referred to my own decision in *Starr v Northern Territory of Australia*[44] where I held that a worker bears the onus of proving that he suffered incapacity, and that the incapacity was productive of financial loss. I do not resile from what I then said.

[46] First, it is necessary to observe that s 65 applies "after the first 26 weeks referred to in s 64." Section 64 relevantly refers to an entitlement to compensation "equal to the difference between what he or she actually earned in employment during a week and his normal weekly earnings immediately before the date on which he or she first became entitled to compensation, in respect of any period during which the total period, or aggregate of the periods, of his or her total or partial incapacity, as the case may be, arising out of or materially contributed to by the same injury does not exceed 26 weeks." It is important to note that, by reference to the "aggregate of the periods" and "a week" the legislature intended that the calculation of the first 26 week period related to the total number of weeks during which the worker's incapacity was productive of financial loss. On the findings of the learned Magistrate, there was a period of incapacity resulting in loss due to the knee injury in 2005 "for a period of time" (which is not specified) until her doctor gave her clearance to go back to work," but

[44] Unreported, 23 October 1998.

the evidence was that this lasted from 18 June 2005 until late September 2005. Thereafter, the learned Magistrate found that she was incapacitated due to her knee injury resulting in financial loss from 1 January to 25 April 2010, from 30 April 2010 to 31 December 2010, and from 1 January 2011 to 14 January 2011, and there was a period of incapacity due to both knee injuries in 2008. The total aggregate periods of incapacity exceeds 26 weeks, the 26 week period ending possibly some-time in January 2010. However, on these facts, the first 104 weeks of total or partial incapacity had not been exceeded. Therefore it seems to me that on the evidence s 65(2) (a) and (b) (i) applied, but not s 65(2) (a) and (b) (ii). This construction of the Act is further supported by s 65(6) which provides:

> "For the purpose of this section, a worker shall be taken to be totally incapacitated if he or she is not capable of earning any amount if he or she were to engage in the most profitable employment, if any, reasonably available to him or her, and having regard to the matters referred to in section 68."

Obviously, periods of time when the worker was in actual employment show that the worker was not totally incapacitated during those periods. Further, s 65(2) (b) refers to the amount "she is from time to time capable of earning in a week." This confirms that it is the total aggregate number of weeks of incapacity to earn income which must be calculated for the purpose of s 65(2) (b) (i) and not merely a period of two years commencing from the end of the first 26 weeks of incapacity.

[47] So far as the evidence that the respondent wished to rely upon as showing that she could have engaged in employment as a security officer with the

Family Court of Australia is concerned, there was no evidence that this employment was reasonably available to her in the first 104 weeks of her total or partial incapacity. Irrespective of any pleading issue, that question therefore did not arise.

[48] It is therefore not strictly necessary to decide who bore the onus of proving what is the most profitable employment that could be undertaken by a worker, but in case I am wrong in my findings so far, I think I should deal with this issue. In any case where the period of 26 weeks has elapsed, in my opinion the legal onus is on the worker, and not the employer, in a primary claim for compensation,[45] to prove the difference between the amounts in s 65(2) (a): see *J & H Timbers Pty Ltd v Nelson*.[46] The only qualification to this is that if the employer seeks to raise the argument that the worker has failed to mitigate his loss, this must be pleaded, and the burden of proof rests on the employer.[47] In that respect, where a worker produces evidence which if accepted would establish the relevant difference, but the employer wishes to establish that there was some other better paid work which the employee could do, the employer bears, at the least, an evidentiary onus to prove that.[48] If the evidence is properly characterised as proof that the employee has failed to mitigate his loss, that must be pleaded by the employer who bears the legal onus of proof.

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[45] cf. situations where there is an appeal under s 69 of the Act; see *AAT Kings Pty Ltd v Hughes* (1994) 4 NTLR 185 at 190-191.
[46] (1971-1972) 126 CLR 625 at 638-639; 644-645; 649-651.
[47] *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345; *Munce v Vinidex Tubemakers Pty Ltd* [1974] 2 NSWLR 235.
[48] *Normandy Mining Pty Ltd v Horner* [2000] NTSC 79.

[49] The learned Magistrate, however, relied on the Work Health Court Rules, and it is necessary to consider this before finally disposing of this point.

[50] Rule 8.01 of the Work Health Court Rules, upon which the learned Magistrate relied, provides[49] that a pleading is to, "if a claim or defence of a party arises by or under an Act – identify the provision relied on." The learned Magistrate refused to permit the respondent to argue that the worker's benefits under s 65(2) (b) (ii) of the Act reduced the amount which could be claimed because that was a statutory provision upon which the respondent wished to rely. In my opinion this was in error. The respondent was not relying on a defence under an Act within the meaning of that Rule. As I have endeavoured to explain, the burden of proving the relevant difference between the amounts in s 65(2) (a) and s 65(2) (b) rested on the worker. However, under Rule 8.03 (c) of the Work Health Court Rules, a party who wishes to raise a question of fact which does not arise out of a preceding pleading is required to plead it. Therefore it seems to me that, where an employer wishes to raise as an issue that the most profitable employment reasonably open to the worker is some employment other than that which the worker has asserted in the Statement of Claim, the employer must plead it. As was observed by Martin CJ in *Northern Cement Pty Ltd v Ioasa*[50], it is up to the employer to point to evidence in the case minimising [the worker's] liability in monetary terms. It would be unreasonable to require the worker 'to prove an open ended negative,' such as that he was

[49] Rule 8.01 (1) (d).
[50] Unreported, Martin CJ, 17/6/1994.

not capable of earning more than an amount he chose to rely upon. Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequences of such findings rests with the employer. To the extent that this in truth involves the respondent employer raising as an issue that the worker has not mitigated his loss, the legal as well as the evidentiary burden of proof rests with the employer.

Orders sought

[51] The appellant seeks an order that the respondent pay arrears of weekly compensation from 24 February 2009 to 14 January 2011, and past s 73 expenses. In the light of these reasons, the best that the appellant can recover are the amounts found to be payable by the learned Magistrate totalling $13,924.58.

[52] I have considered whether or not I should make orders in those terms or remit the matter back to the learned Magistrate, bearing in mind that the appeal has succeeded on the issue of who bore the onus of proof and whether it was discharged.

[53] The way the case was run below was that the appellant claimed that her incapacity was due to the 2005 injury, and the respondent had evidence to the effect that her incapacity after 2008 was due to a natural degeneration of the knee. There was some evidence that the 2008 knee injury was also a contributing factor to her incapacity in 2010-2011. Questions of causation

are questions of fact, and therefore this is a matter which the employer had to prove. There is no factual presumption that merely because the 2008 knee injury was an aggravation of the 2005 injury, the effects of the 2008 knee injury were also a contributing cause to incapacity in 2010.[51] It is quite possible that the effects of the 2008 injury were spent shortly after the appellant was certified fit for work. The learned Magistrate could have found on this issue in favour of the respondent, but did not. I can only assume that the learned Magistrate was not satisfied that this had been proved. In those circumstances I consider that the appellant is entitled to the orders of the kind sought. No argument was presented to me by Mr Crawley to the contrary.

[54] I make the following orders:

(1) Appeal allowed.

(2) Order made in paragraph 7 of the orders made by the learned Magistrate is set aside.

(3) The appeal is otherwise dismissed.

[55] I will hear the parties as to the costs of the appeal and as to costs in the Work Health Court.

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[51] *Starr v Northern Territory of Australia*, NT Supreme Court, 23/10/1998 (unreported).