Ju Ju Nominees Pty Ltd v Carmichael [1999] NTSC 20

PARTIES:	JU JU NOMINEES PTY LTD
	v
	CARMICHAEL, Terrence
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 12 of 1998
DELIVERED:	11 March 1999
HEARING DATES:	23 November 1998
JUDGMENT OF:	MARTIN CJ., THOMAS AND BAILEY JJ.

CATCHWORDS:

PRACTICE – NORTHERN TERRITORY – WORK HEALTH COURT - APPEAL – PLEADINGS – ONUS OF PROOF – DUX LITUS – CAUSAL RELATION BETWEEN INJURY AND INCAPACITY OR DEATH

WORKERS' COMPENSATION – FOR WHAT INJURIES COMPENSATION PAYABLE - CANCELLATION OF WEEKLY COMPENSATION

Meaning of "appeal" – when onus of proof falls on worker or employer – when worker may amend Statement of Claim – grounds of appeal from Work Health Court – discretion of Judge to order costs –

Work Health Act (NT) 1993, s69, s104, s106 and s107
Work Health Regulations, r6
Work Health Court Rules, r24(2)
Supreme Court Rules 10.02
Foresight Pty Ltd v Maddick (1991) 1 NTLR 209, referred to
Collins Radio Constructors v Day, Court of Appeal (Unreported), referred to
Brooks v Wyatt (1994) 99 NTR 12, referred to
Horne v Sedco Forex Australia (1992) 106 FLR 373, referred to
Collins Radio Constructors v Day, Court of Appeal, 9 March 1998 (Unreported), followed
Morrisey v Conaust Limited (1991) 1 NTLR 183 at 189, considered
AAT Kings Tours Pty Ltd v Hughes (1994) 4 NTLR 185, considered
Disability Services of Central Australia v Regan, Court of Appeal, unreported 31 July 1998, referred to

Barbaro v Leighton Constructions Pty Ltd (1980) 44 FLR 204, referred to

REPRESENTATION:

Counsel:

Appellant:	Mr I Nosworthy
Respondent:	Mr Waters QC

Solicitors:

Appellant:	Bowden Turner & Deane
Respondent:	Caroline Scicluna & Associates

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mar98013
IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Ju Ju Nominees Pty Ltd v Carmichael [1999] NTSC 20
No. AP 12 of 1998

BETWEEN:

JU JU NOMINEES PTY LTD
Appellant

AND:

TERRENCE CARMICHAEL
Respondent

CORAM: MARTIN CJ., THOMAS AND BAILEY JJ.

REASONS FOR JUDGMENT

(Delivered 11 March 1998)

[1] MARTIN CJ: This appeal again draws together the mysteries of debilitating back pain, the complexities of the workings of the *Work Health Act* enfolded in the procedures of the Work Health Court, compounded as they all are by the subtle distinctions often found between questions of law and questions of fact. As Sir Winston Churchill said of Russia: "It is a riddle wrapped in a mystery inside an enigma".

[2] The ground of appeal from the Work Health Court which succeeded before his Honour Justice Angel, against whose decision this appeal is brought, was as follows:

> "2. The learned Magistrate erred in law in that her factual findings:

(i) 'that any aggravation which was caused by the appellant's employment in November 1990 no longer exists.'

(ii) that the appellant's employment with the respondent (1985-1994) did not specifically cause any disability but that the degenerative disease was caused as 'the result of degenerative condition of the appellant's spine such degeneration being related to his age which in part would have been caused by his work over the proceeding 14 years'.

Were made in the absence of any accepted evidence to that effect or at all."

[3] The search should be simply directed to whether there was any evidence which if accepted would have supported the learned Magistrate's findings of fact. If that search is successful, then that would be the end of the appeal since no error of law will have been demonstrated. However, the position is not quite so straightforward in this case.

[4] Not the least of the reasons for the confusion which has arisen in this and other cases concerning appeals against an employer's decision to cancel or reduce weekly compensation pursuant to s69, lies in the unsatisfactory manner in which the legislation and the Work Health Court have attempted to construct the right to appeal and the practice and procedure relating to it. It is provided in s69(1)(b) that a statement to be given to the worker shall indicate that the worker has a right to "appeal" against the decision. Nowhere is such a right expressly given (see Mildren J., *Foresight Pty Ltd v Maddick* (1991) 1 NTLR 209 at 213). The only other mention in the Act relating to such a thing appears in s104(3) which provides that

"proceedings" in respect of a decision of an employer under s69 shall be commenced not later than 28 days after the notice was received. The form prescribed for use by the employer (Form 5 of the *Work Health Regulations*) informs the worker of the right to "contest" the decision. The rules of the Work Health Court provide that proceedings by a worker for the recovery of compensation shall be commenced under s104 of the Act by filing an application to the court in accordance with Form 1 (r6). That application is to include a statement of claim stating concise details of the facts giving rise to the "claim". Further, requirements as to a statement of claim, as appended to Form 1, state that it should state concise details of the facts giving rise to the claim "including the following where applicable … (g) the period or periods for which compensation payments are claimed (with dates)". There is a note to the form "Do not quote sections of the *Work Health Act* or any other law. Just state the facts".

[5] It is little wonder that a draftsman when faced with all of that might find it difficult to formulate a statement of claim which operates as an "appeal", without introducing material which could raise doubts in the minds of an employer as to just what the worker seeks.

[6] So it was here. The worker was given a notice by the employer purporting to cancel payment of weekly benefits. The reasons given for the decision of the employer, as set out is "medical information now at hand from Dr North indicates that any incapacity from which you presently suffer is due to your underlying degenerative condition. The effects of your injury of 1.11.90

have now ceased." (An attempt to raise the validity of that notice at trial was unsuccessful see *Collins Radio Constructors v Day*, Court of Appeal of the Northern Territory, unreported, 9 March 1998).

[7] The statement of claim reads:

> "1. The Applicant Worker sustained an injury to his back in the course of or arising out of his employment with the Respondent in or about November 1990.
>
> 2. The Applicant had been employed by the Respondent in the capacity of a plumber for approximately ten years prior to the date of injury. The Applicant's work was often heavy and required him to manouevre (sic) himself into uncomfortable postures. As a result of the back injury sustained the Applicant underwent a lumbar fusion operation in January 1992. The Applicant subsequently attempted two returns to work but found that he was unable to cope with the light duties. The Applicant's employment with the Respondent was terminated on 5th August 1994.
>
> 3. The Applicant states that he continues to remain totally incapacitated from the effects of the injury sustained in or arising out of the course of his employment and further, that his employment aggravated or accelerated any pre-existing degenerative condition from which the Applicant may suffer.
>
> 4. The Applicant disputes the Respondent's decision to cancel his payments for the reason that any incapacity from which he presently suffers is due to his underlying degenerative condition and further denies that he has ceased to suffer from the effects of his injury.
>
> 5. The Applicant seeks a reinstatement of his weekly payments of compensation from the date of termination of payments to date and continuing in accordance with the Act. The Applicant further seeks that the Respondent pay his costs of this application."

[8] The Answer reads:

"1. The Respondent admits that the Applicant sustained an injury to his back in or about November 1990 but does not admit that the injury was sustained in the course of or arising out of his employment with the Respondent.

2. The Respondent admits that the Applicant had been employed by it from on or about 5 March 1986 and further admits that the Applicant underwent a lumbar fusion operation in or about January 1992. The Respondent admits that the Applicant's employment ended on or about 5 August 1994 but save as expressly admitted the Respondent does not admit the allegations contained in paragraph 2 of the Statement of Claim.

3. The Respondent denies that the Applicant is totally incapacitated either as alleged in paragraph 3 of the Statement of Claim or at all and, in the alternative says:

3.1 any incapacity for work which he now suffers as a result of the alleged injury has ceased and his present incapacity is due to his pre-existing physical condition;

(3.2 he is presently only partially incapacitated and the most profitable employment for which he is suited would permit sufficient earnings so that there is no entitlement to compensation under the Work Health Act).

(This paragraph was struck out at trial)

4. The Respondent admits that the Applicant disputes the Respondent's decision to cancel his payments for the reasons set out in paragraph 4 of the Statement of Claim, but says that there is no ongoing entitlement to payments and that the Applicant has ceased to suffer from the effects of his alleged injury.

5. The Respondent denies that the Applicant is entitled to determinations either as sought in paragraph 5 of the Statement of Claim or at all."

[9] Nowhere does either party refer to s69 or the notice given to the worker.

The worker talks about the employer's "decision to cancel his payments",

(Statement of Claim par4), and the employer reiterates the reason given in the notice as an alternative to its denial that the worker is totally incapacitated (answer par3.1).

[10] Having disputed the employer's decision to cancel his payments, the worker seeks "the reinstatement" of payments from date of termination. As will be seen, it is unnecessary to claim relief in those terms, but it clearly enough raises the "appeal" or "contest". The worker then goes on to seek an order for continuing payments which, coupled with the plea of continuing incapacity, gives the impression that he seeks a determination of a claim for compensation, not simply a determination as to whether cancellation of payments by the employer was effective. The answer to the statement of claim, after canvassing the fact pleaded, denied that the worker was entitled to reinstatement of his weekly payments and continuing payments. There is no counterclaim (see *Work Health Court Rules* r24(2) and *Supreme Court Rules* 10.02 *Brooks v Wyatt* (1994) 99 NTR 12 at 17).

[11] It does not appear that either side sought to clarify the doubts and ambiguities arising from the pleadings or the remedies sought by any communication with the other. It was only when counsel for the worker opened the case before the Work Health Court that the parties apparently recognised that they had been steaming in different directions. It is difficult to see how the parties could have arrived at their separate positions at the commencement of the trial had the provisions of s106 and 107 of the Work Health Court and r9 which is supplementary thereto been carried out. Those

provisions are specifically designed, amongst other things, to ensure that all parties understand what the issues are to be determined.

[12] Counsel, then appearing for the worker, said that the matter came before that court by way of an appeal pursuant to s104. She moved on to refer the court to the nature of such an appeal as determined by this Court. Counsel for the employer argued that a review of the documentation showed that the court was dealing with an "originating process". That submission was made with a view to distinguishing between an appeal on the one hand and a claim for compensation on the other, but does not acknowledge that the only way to raise an appeal is by complying with s104 and the rules of the Work Health Court, to which I have referred. Much debate followed as to procedural matters, but ultimately the stage was reached when counsel for the worker said "This matter, your Worship, comes before you pursuant to an appeal by s104. The appeal is against a decision of the employer to cease payments …". And she proceeded to then tender some documents. Immediately prior to calling the worker, counsel again said: "This is an appeal from a cessation of payments". I support what is said by Justice Thomas in her reasons on the question of dux litus.

[13] Nothing was then done with a view to amending the pleadings so as to make clear the limited nature of the case which the worker really wanted to bring and of the relief sought. For the benefit of the trial court and appellate courts, a proper adjudication should be made to define the limits of the contest by amending the pleadings. As to pleadings generally see the

remarks of Mildren J. in *Horne v Sedco Forex Australia* (1992) 106 FLR 373 at p379. It must have been quite clear to the court and to the employer by the time the worker embarked upon the calling of evidence that his case was limited in the way opened by his counsel.

[14] Counsel for the employer in closing submitted that properly understood, the Act requires compliance with s69, but that there was a primary application for compensation by reference to the application under s104, in which case the worker assumed the onus of proof; the Act provides for "interim relief to the employer" and then the worker faces the task of bringing a claim for compensation. The manner in which the proceedings by way of appeal were initiated by the worker, for the reasons already explained, may well give rise to such a misunderstanding, but regard also has to be had to the way in which the law has developed in the Territory in relation to the *Work Health Act*.

[15] Notwithstanding the various difficulties to which reference has been made, it is established that:

1. Where weekly compensation is to be cancelled by an employer for the reason that the worker has ceased to be incapacitated for work a notice given under s69(1) must sufficiently state the reason and be accompanied by the medical certificate referred to in s69(3), *Collins Radio Constructors v Day*, Court of Appeal, unreported 9 March

1998. (The appeal before his Honour proceeded on the basis that there had been compliance with the procedural requirements of s69).

2. The employer carries the onus of establishing the change of circumstances warranting the cancellation or reduction of the amount of weekly compensation pursuant to s69, *Morrisey v Conaust Limited* (1991) 1 NTLR 183 at 189; *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at pp190-191; *Disability Services of Central Australian v Regan*, Court of Appeal, unreported 31 July 1998.

3. If the employer asserts that the worker has ceased to be incapacitated for work, then it assumes the burden of proof, *AAT Kings Tours Pty Ltd v Hughes* at p191.

4. If the employer succeeds in proving an assertion that total incapacity for work has ceased, demonstrating a change in loss of earning capacity, the onus of proving any partial incapacity for work passes generally to the worker, *Barbaro v Leighton Constructions Pty Ltd* (1980) 44 FLR 204 at 223; *AAT Kings Tours Pty Ltd v Hughes* at p191.

5. If the employer fails to establish the grounds stated in the notice, the effect of allowing the worker's appeal would be that the employer would be required by force of s69 to continue to make weekly payments of compensation until lawfully permitted to cease or reduce those payments, either by the giving of a fresh notice or by

making a substantive application under s104, *Disability Services v Regan* at p4.

6. If the worker has widened the scope of the issues for trial beyond an appeal under s69, then the employer is not confined to the grounds stated in the notice, but can raise by way of answer any other ground to resist the claim if it wishes, including as to whether there ever was any injury in the first place, *Disability Services v Regan* p5. In that matter the worker had sought orders for weekly compensation from the date of cessation of payments to date of claim and continuing, and for payments under s78 for costs of household services. It appears from p5 that it was an issue on the appeal as to whether the learned Magistrate at trial was in error in dismissing the worker's claim. It is not suggested in that judgment that the worker's claim had not been the subject of the trial.

[16] In my opinion, subject to the question of prejudice to the other side, there is no reason why a worker should not be able to clarify a statement of claim and the relief sought so as to make it clear that the worker is limiting the issue to an "appeal" against the employer's decision to cancel or reduce payments under s69.

[17] The reasons for cancelling payment of weekly compensation are set out in p[6]. The notice of cancellation of payments (as opposed to reduction) and the reasons indicate that the employer's position was that the worker had

ceased to be incapacitated at all for work by the injury, that is, that the worker no longer suffered any loss of earning capacity for work as a result of the injury.

[18] As to the facts, his Honour said:

> "The appellant was first employed as a plumber by the respondent in March 1986. In November 1990 he sustained an injury to his back. On 10 April 1992 the worker claimed compensation under the *Work Health Act* and on 9 May 1992 the employer accepted liability under the Act and duly commenced weekly compensation payments. Approximately half way through 1994 the worker commenced working for the respondent again, but did so on less than a full time basis. The worker's contract of employment was terminated on 10 August 1994. On 8 December 1994 the worker was informed that the payment of compensation would be discontinued, on the basis that his admitted incapacity at that time was due to an underlying degenerative condition and the effects of the November 1990 accident had ceased to operate."

[19] The employer's insurers acceptance of liability noted the injury as being "lower back pain" and the date of the injury "November 1990". The nature of the injury was not specified, only a symptom. By accepting liability and commencing payment of weekly compensation, the employer admitted that the worker had suffered an injury which had materially contributed to his incapacity for work (s53). Relevantly, by definition in s3, "injury" means any injury, which had arisen out of or in the course of the worker's employment, including a "disease" (a physical ailment of gradual development) and/or an aggravation of a pre-existing disease which had materially contributed to his inability or limited ability to undertake paid work.

[20] Her Worship's approach to the task before her is demonstrated at the commencement of her reasons:

> "The applicant seeks a reinstatement of his weekly payments of compensation from the date of termination of payments to the date of the application and continuing in accordance with the Work Health Act.
>
> The applicant disputes the respondent's decision to cancel his payments for the reason that any incapacity from which he presently suffers, is due to his underlying degenerative condition and further denies that he has ceased to suffer from the effects of his injury."

and a little later:

> "The employer bears the onus of establishing the matters set out in the Form 5 notice".

[21] In the course of her reasons in which she reviewed the evidence of the worker, his wife and the medical experts, her Worship said:

> "There is some conflict as between the medical experts as to the cause of the current state of the Worker's back. It is agreed there is a very significant degree of degeneration affecting the discs in his lumbar spine. The cause of that degeneration is in dispute as to whether it is age and work related or whether it is specifically work related. I consider Dr North in his evidence and in his reports is not saying that there was no relationship between the Worker's employment and the degeneration of his back but that the degeneration of the back is related to his overall work for many years and not specifically to the incident in 1990 which formed the basis of the original claim. In his report Exhibit W26, Dr North states "I think that Mr Carmichael has a very significant degree of degeneration affecting the discs in the lumbar spine, this degenerative condition is the cause of his back pain in my opinion. I believe that the aggravation of his degenerative condition by injury has now ceased, and that his present incapacity is due to the pre-existing condition". He explained this statement in his evidence.

Dr Girgis on the other hand does not accept that degeneration over a lengthy period of time has been shown to exist, but that degenerative changes exhibited are selective rather than a generalised condition and that they are directly related to the conditions and type of work he has done as a plumber and that the conditions of his employment were related to his low back symptoms with substantial permanent aggravation occurring on the 1 November 1990 at work. He believed the Worker's present incapacity was a direct result of the 1990 injury and that permanent aggravation of that injury has not ceased."

…

"I am of the view the Worker prior to November 1990 suffered from a degenerative condition affecting the discs in his lumbar spine, that degeneration has in part been exacerbated in my view, by the lumbar fusion done in 1992. However, I consider any aggravation which was caused by his employment in November 1990 no longer exists. I consider the evidence of Dr North in which he does not say employment is not a contributing factor to the underlying degenerative condition, must be taken in the context of his plumbing employment for many years. Accordingly I am of the view the Respondent was justified in discontinuing payments on the basis of the report from Dr North at the time of issuing the notice Exhibit W6.

I note the parties in these proceedings have proceeded on the basis that it is for the court to determine whether the Worker continues to suffer from an incapacity as a result of an injury suffered by him in November 1990. Evidence has been called by both parties as to what has occurred since 8 December 1994 and up to the time of his giving evidence in these proceedings the only relevance of that evidence in my view, can be to the principle question as to whether he continues to suffer from an incapacity as a result of that injury. As already indicated, I consider any aggravation which was caused by his employment in November 1990 no longer exists, but that any disability suffered by him is the result of the degenerative condition of his spine such degeneration being related to his age which in part would have been caused by his work over the preceding 14 years and not specifically related to his work with Logan Plumbing. In reaching these conclusions, I take into account Mr Carmichael's evidence as to what he can and cannot do, in particular work carried out by him on the block of land in Queensland and the evidence and reports of the experts which have been tended before me and given in court. Further the evidence of Mrs Carmichael as to observations of

> her husband of recent times. I therefore do not consider it has been established that any further payments of compensation should be made to the Worker."

[22] It was argued before this Court on behalf of the appellant that her Worship disclosed by various passages in her reasons that she had not approached the matter before her as being confined to the worker's appeal. I do not accept that. There is nothing at the commencement of her reasons which would indicate that she was embarking upon a task which went beyond the confines of such an appeal, her reference to the onus on the employer reinforces that view. Nowhere in the course of her reasons does she indicate that there is any onus resting upon the worker, except perhaps for the last passage quoted above. As to her Worship's consideration of evidence going to the worker's incapacity after service of the notice and until the date of hearing, it can be explained by her reference to the relevance of it going to the principal question as to whether the worker continued to suffer any incapacity as a result of the particular injury in November 1990. It does not seem to me that there can be any objection to receiving and considering evidence relating to the effect which an injury had at a particular date by reference to circumstances and events after that date. It may be highly instructive. There is no clear indication that in the last paragraph of her reasons her Worship was turning her mind to an issue other than that of the appeal.

[23] Having set out the bulk of her Worship's findings as detailed above, his Honour said:

> "It would appear from the reasons published by the learned Magistrate that she did not attach any weight to the evidence of Dr Hillier (at 30). Furthermore, the learned Magistrate refers to the evidence of Dr North as "not saying that there was no relationship between the Worker's employment and the degeneration of his back but that the degeneration of the back is related to his overall work for many years and not specifically to the incident in 1990 …" (at 27) and that his evidence "must be taken in the context of his plumbing employment for many years". Therefore, the learned Magistrate did not consider the evidence of Dr North being probative of the issue of whether the worker's incapacity was unrelated to the employment with (sic the) respondent. The medical opinion expressed by Dr Girgis in his report is that the incapacity of the worker was in fact caused by the employment with the respondent. Consequently, none of the medical evidence, as the learned Magistrate saw it, supported a finding that the incapacity was not related to the employment with the respondent.
>
> That leaves the evidence of the worker and his wife. Counsel for the respondent was at pains to point out the (sic) that the testimony of the worker given in evidence in chief when compared to his evidence whilst under cross-examination suggested that the former evidence lacked credibility. Even if that submission is accepted by this Court, the evidence of the worker falls short of establishing that the incapacity is not work related. At most, this evidence is capable of supporting a finding that the worker is less incapacitated than he stated in evidence in chief. His evidence is not capable of supporting a finding that his admitted current incapacity is not work related.
>
> It follows that there was therefore no evidence accepted by the learned Magistrate which was capable in law to support a finding that the worker's incapacity was not work related. The respondent failed to discharge the onus on it to establish the facts asserted in its s69 notice. Accordingly, the appeal is allowed and the order of the learned Magistrate is set aside."

[24] Four of the many grounds of appeal to his Honour's judgment assert that he erred in law in finding that the onus was on the employer to justify the reasons for the cancellation of payments. It is put that before her Worship the parties did not confine themselves to the cancellation, but conducted the

"action on the merits", meaning that the onus was on the worker to establish his right to compensation and the amount of it. Notwithstanding the difficulties brought about by the way the parties tried to define the issues in their pleadings, I am satisfied that the worker confined the case he took to the Work Health Court to an appeal under s69 (see above). Furthermore, the employer did not properly raise any wider issue which created any onus on the worker. These grounds of appeal must be dismissed.

[25] Apart from the evidence from Dr North there is nothing going to support the reasons given in the notice. The doctor, a neosurgeon, had seen the worker at the request of his treating doctor. In a report to the worker's solicitor he stated: "I am not sure about the influence of his employment but it is likely that this is one factor in his overall picture of degenerative lumbar disc spine". A few weeks later, in response to an inquiry from the employer's insurer, he said:

> "I think that Mr Carmichael has a very significant degree of degeneration affecting the discs in the lumbar spine. This degeneration condition is the cause of his back pain in my opinion. I believe that the aggravation of his degenerative condition by injury has now ceased and that his present incapacity is due to the pre-existing condition."

[26] The doctor agreed in evidence before the court that he could not identify the cause of lumbar spinal degeneration. He accepted what he had said in his first report as "a fair statement … I agreed with what I have written and I stand by it". Accordingly, it was open to her Worship to find that the evidence of Dr North did not support the proposition that the worker's

employment was not a contributing factor to the underlying degenerative condition. Given the evidence accepted by her, her finding that the employer was justified in discontinuing compensation payments was an error of law. His Honour so held.

[27] Other grounds of appeal raise issues going to the way in which his Honour dealt with findings of fact. As the extracts above show, his Honour restated the learned Magistrate's finding of fact in short form. Appeals from the Work Health Court are limited to questions of law and his Honour rightly did not go into the evidence except to the extent required to be satisfied that there was support for the findings of fact made in the court below.

[28] The remaining grounds of appeal take issue as to the manner in which his Honour expressed himself, but fall away when the words are taken in their right context.

[29] The respondent also complains that his Honour ordered it to pay the costs of the appeal in circumstances where the successful ground of appeal was introduced by way of amendment at the commencement of the hearing. When asked whether he opposed the application to amend, counsel for the respondent said: "I don't consent to it, but there's not a lot I can say. We are here about the merits of the matter and these things address the merits". His Honour enquired as to whether he was ready to meet the new points raised and counsel said that he was. The worker succeeded before his Honour on one of the grounds introduced by way of amendment. His

Honour's order as to costs was made in the exercise of his discretion. He favoured the party which had succeeded on the appeal and nothing has been put to this Court to demonstrate that his Honour erred in that regard.

[30] I would order that the appeal be dismissed and the appellant be ordered to pay the costs of the appeal to this Court.

[31] THOMAS J: This is an appeal by the employer under the provisions of the *Work Health Act* from a decision of Angel A/CJ who allowed an appeal from the Work Health Court.

[32] His Honour found that the employer had failed to discharge the onus upon it to establish the facts asserted in its notice under s69 of the *Work Health Act*.

[33] Accordingly, he allowed the appeal and set aside the order of the learned stipendiary magistrate. His Honour further ordered that as the basis for discontinuance of the payments of compensation to the worker had not been made out, the worker's entitlements under the *Work Health Act* were restored with interest thereon. He made a further order that the employer pay the worker's costs of the appeal and the costs of the proceedings in the Work Health Court.

[34] The history of this matter is as follows:

[35] It is not in dispute that the respondent commenced employment with the appellant on or about 5 March 1986.

[36] On 11 March 1992 the worker (hereinafter referred to as the respondent), made a worker's compensation claim upon his employer (hereinafter referred to as the appellant) (AB 198).

[37] The respondent claimed that while he was employed by the appellant at the "Dixon Road Flats" in November 1990 he was involved in the following incident:

> "Back pain was evident after drain laying at Dixon Road Flats. When I tried to straighten up, felt as if I had dislocated something."

[38] The respondent claimed injury to his lower back. He stated in his claim form that he had stopped work for various periods over two years. He had not worked since his operation. In his claim form the respondent states he was hospitalised for a period from 9 December 1991 to 11 December 1991 and from 29 January 1992 to 9 February 1992. It is not in dispute that the respondent underwent a spinal fusion operation in January 1992.

[39] By letter dated 9 May 1992 from the appellant's insurers, the respondent was advised that his employer had accepted liability for weekly compensation in respect of his claim for a lower back injury he had suffered in November 1990.

[40] In August 1993, the respondent first attempted to return to work.

[41] In May 1994, the respondent returned to work in an administrative role on light duties.

[42] The respondent's employment with the appellant was terminated on 5 August 1994 following the death of a director of the appellant company.

[43] On 8 December 1994 the appellant's insurers wrote to the respondent advising him inter alia as follows:

> "The receipt of new medical information from Dr North reveals that your condition is not related to your work injury but rather as a result of your underlying degenerative condition.
>
> Accordingly liability is disputed and all accounts for treatment remain your responsibility.
>
> The reason for our decision is outlined in the enclosed Form 5 Notice which also provides information on your appeal rights."

[44] A copy of the Form 5 Notice is at p202.1 and p202.2 of the Appeal Book. This Notice, omitting formal parts, states as follows:

> "Dear Mr Carmichael,
>
> Pursuant to your claim for payment of benefits as prescribed in the Work Health Act, you are hereby advised that your employer:
>
> G.M. Logan Pty Ltd. (acting on the advice of the Territory Insurance Office):
>
> Disputes liability for your claim pursuant to section 85 of the Work Health Act.
>
> Cancels Payment of weekly benefits to you pursuant to section 69 of the Work Health Act.
>
> The reasons for this decision are:
>
> Medical information now at hand from Dr. North indicates that any incapacity from which you presently suffer is due to your underlying degenerative condition. The effects of your injury of 1/11/90 have now ceased."

[45] The Form 5 was based on a report received from Dr North dated 22 November 1994 in Exhibit W27. Dr North expressed the following opinions (AB 216):

> "1. In my opinion, the injury of 1990 would not now be influencing his capacity for work.
>
> 2. It is hard to understand why the lumbar fusion was performed on 11th November, 1993. In my opinion, it would not be influencing his present capacity for work.
>
> 3. I think that Mr. Carmichael has a very significant degree of degeneration affecting the discs in the lumbar spine. This degenerative condition is the cause of his back pain, in my opinion. I believe that the aggravation of his degenerative condition by injury has now ceased and that his present incapacity is due to the pre existing condition."

[46] On 19 December 1994, the respondent issued a statement of claim in the Work Health Court at Alice Springs. The respondent:

- claimed that as a result of this injury in November 1990, he underwent a lumbar fusion operation in January 1992. He had subsequently attempted two returns to work but was unable to cope with light duties.;

- claimed he remained totally incapacitated from the effects of the injury and further that his employment aggravated or accelerated any pre-existing degenerative condition;

- disputed the employer's decision to cancel his payments and denied that he ceased to suffer from the effects of his injury.

- sought reinstatement of his weekly compensation from the date of termination of the payments to date and continuing and an order for costs.

[47] The matter proceeded to hearing in the Work Health Court in Alice Springs commencing on 9 September 1996. At the commencement of the hearing before the learned stipendiary magistrate, Mr Nosworthy for the employer, referred to the worker's claim as being "a claim for compensation on its merits". Ms Gearin, who represented the worker stated that the matter was an appeal under s104 of the *Work Health Act* and the issue for determination was whether s69 had been complied with.

[48] Ms Gearin relied on the following passage from *Wormald International (Aust) Pty Ltd v Barry Leslie Aherne*, unreported decision of Mildren J delivered 21 June 1994 at pp10-11:

> "…. This submission overlooks what the issues were in the worker's appeal. The only issue in those proceedings was whether or not the employer was justified in stopping payments for the reason given in its notice. The employer was not entitled in those proceedings to attempt to justify its position on other grounds, by attempting to put in issue, for example, whether the worker suffered injury arising out of or in the course of his employment. There would otherwise be no point to s69(b) of the Act which required the employer to provide reasons for its decision to cancel payments. If there are other reasons, they must be made the subject of another notice if they are to be relied upon."

[49] Ms Gearin also relied upon the authority of *AAT Kings Tours Pty Ltd v Hughes* (1994) 99 NTR 33, for the submission that the onus was upon the employer to prove on the balance of probabilities the change of

circumstances on which it relied in the s69 Notice. Ms Gearin further submitted that it is only after the employer has proved they have complied with s69 and can justify the change of circumstances that the worker is required to give evidence: *J.H. Constructions Proprietary Limited v Phillip Davis* (unreported) decision of Asche CJ No. 530 and 450 of 1989, delivered 3 November 1989 at t/p10:

> "It seems to me therefore on ordinary principles that the onus of proof in these proceedings must be on the employer and he must be dux litus."

[50] See also *Northern Cement Pty Ltd v Uni Ioasa* (unreported) decision of Martin CJ, No. 240 of 1993, delivered 17 June 1994.

[51] It was Ms Gearin's submission that the employer was dux litis. Mr Nosworthy did not consent to the employer proceeding dux litis. It was Mr Nosworthy's submission that this was not just an appeal by the worker against a cancellation pursuant to s69, but an originating proceeding by the worker for weekly payments of compensation.

[52] The learned stipendiary magistrate ruled that the worker should open his case first to prove the prerequisites that the worker needed to establish, for example; that he was employed, that a claim was served, that liability had been admitted in accordance with the Act and that payments had commenced.

[53] Although there are no grounds of appeal to do with the ruling that the worker should begin, there is reason to consider that it may not have been correct.

[54] In *Disability Services of Central Australia v Beverley Regan* (unreported, 31 July 1998, Mildren J at p10) referred to the possible existence of a Practice Direction issued by the former Chief Stipendiary Magistrate "dealing with the question of who is to be dux litis, apparently requiring a worker who appears under s69 to lead all of the workers evidence first". Assuming that the Practice Directions did exist, Mildren J further stated that he was "doubtful whether such a matter is capable of being the subject of practice direction". I share that view. Priestley J seems also to have endorsed those remarks.

[55] In the present case the better approach would appear to have been that stated by Asche CJ in *J.H. Constructions Proprietary Limited v Phillip Davis* (supra). In that matter his Honour was dealing with an appeal under s111 of the *Work Health Act*. However, the principles may be equally applicable in these proceedings under s104 of the *Work Health Act*. His Honour stated at p10:

> "It seems to me therefore on ordinary principles that the onus of proof in these proceedings must be on the employer and he must be dux litis."

[56] Other statements of Asche CJ which are particularly apposite appear at p11-12:

> "In the Territory legislation, it is true that under Section 69(d), it is the worker who must seek the review rather than the employer, but he does that by way of appeal under Section 111; that is, he does no more than refer the matter to the court for a determination, but he is not thereby undertaking any onus of proof.
>
> The section does not suggest that he must prove he remains incapacitated or that his appeal to the court is an application of that nature. It merely invokes the aid of the court which determines the matter on normal principles, bearing in mind that the process had been commenced, not by the worker, but by the employer maintaining that the employer has sufficient reasons for cancelling or reducing the payments, and that is the case which must be established."

And at p13:

> "I agree however with Mr Hiley that it would be oppressive and unfair if the employer could simply allege that the worker was no longer incapacitated and leave it to the worker to establish time and again his continued entitlement."

[57] Mr Nosworthy made reference to the claim being a claim by the worker for compensation on its merits. I do not agree with this interpretation of the worker's claim. The worker appealed the employer's decision by issuing a statement of claim under s104 of the *Work Health Act*. This was the only way the worker could bring his appeal before the court. The worker was seeking a reinstatement of his weekly benefits. That was not a hearing on the merits of the worker's claim. There was no issue at trial of whether there were levels of incapacity. It was an appeal from the employer's decision to cancel weekly benefits.

[58] In this respect this matter is distinguishable from the decision of the Court of Appeal in *Disability Services of Central Australia v Beverley Regan*

(unreported) No. AP7 of 1998 delivered 31 July 1998. In the latter case the worker had, through her Statement of Claim and in the way in which her case was conducted at trial, opened up the whole question of the merits of the claim. The respondent in this matter did not do this in the trial before the learned stipendiary magistrate. Neither did the appellant.

[59] Counsel for the worker and the employer and the learned stipendiary magistrate proceeded on the basis that the employer bore the onus of proof of establishing the matters set out in the Form 5. I quote the following exchange (AB 33):

> "MS GEARIN: Your Worship, I just wanted to clarify with you that in terms of the matters that are alleged in the Form 5 notice, the employer bears the onus of proof in relation to the matters as alleged there. I accept what you say in terms of dux litis.
>
> HER WORSHIP: Sorry, the matters alleged as in the injury or lack thereof?
>
> MS GEARIN: Yes, whether they rose out of the course of employment and whether whatever incapacity he suffers from now as a result of the injury or of the pre-existing degenerative condition that my learned friend bears the legal and evidentiary onus on that even though I go first.
>
> HER WORSHIP: I don't think there's any argument over that, is there?"

[60] Mr Nosworthy then acknowledged before the learned stipendiary magistrate that the authorities were against him, but stated that it was the worker who was seeking to change the status quo because payments were not currently being received by him. I do not accept this submission. The employer changed the status quo by cancelling the weekly benefits. It was therefore

for the employer to prove on the balance of probabilities that that action was justified.

[61] Before the learned stipendiary magistrate oral testimony was given by the respondent, the respondent's wife, Dr Girgis and Dr North. Inter alia, the following documentary evidence was tendered: Medical report of Dr Hillier dated 30 January 1995 (Exhibit W6), medical reports of Dr Girgis dated 12 January 1996 (Exhibit W2), Dr North dated 22 November 1994 (Exhibit E26) and 10 October 1994 (Exhibit E27).

[62] In her reasons for decision, the learned stipendiary magistrate makes it clear that the only issue she was addressing was whether the worker continued to suffer from an incapacity as a result of an injury suffered by him in November 1990. In her reasons for decision, the learned stipendiary magistrate quoted extensively the evidence of Dr North and the worker, Mr Carmichael. The learned stipendiary magistrate also stated her concerns about accepting the opinion expressed by Dr Hillier in his report and then stated as follows (AB 251-2):

> "Having heard all of the evidence before me, I am of the view the Worker prior to November 1990 suffered from a degenerative condition affecting the discs in his lumbar spine, that degeneration has in part been exacerbated in my view, by the lumbar fusion done in 1992. However, I consider any aggravation which was caused by his employment in November 1990 no longer exists. I consider the evidence of Dr North in which he does not say employment is not a contributing factor to the underlying degenerative condition, must be taken in the context of his plumbing employment for many years. Accordingly I am of the view the Respondent was justified in discontinuing payments on the basis of the report from Dr North at the time of issuing the notice Exhibit W6.

> I note the parties in these proceedings have proceeded on the basis that it is for the court to determine whether the Worker continues to suffer from an incapacity as a result of an injury suffered by him in November 1990. Evidence has been called by both parties as to what has occurred since 8 December 1994 and up to the time of his giving evidence in these proceedings the only relevance of that evidence in my view, can be to the principle (sic) question as to whether he continues to suffer from an incapacity as a result of that injury. As already indicated, I consider any aggravation which was caused by his employment in November 1990 no longer exists, but that any disability suffered by him is the result of the degenerative condition of his spine such degeneration being related to his age which in part would have been caused by his work over the preceding 14 years and not specifically related to his work with Logan Plumbing. In reaching these conclusions, I take into account Mr Carmichael's evidence as to what he can and cannot do, in particular work carried out by him on the block of land in Queensland and the evidence and reports of the experts which have been tended (sic) before me and given in court. Further the evidence of Mrs Carmichael as to observations of her husband of recent times. I therefore do not consider it has been established that any further payments of compensation should be made to the Worker."

[63] In his reasons for judgment, his Honour summarised the learned stipendiary magistrate's findings and set out the three grounds of appeal from her decision (AB 339-40):

> "1. The learned Magistrate erred in law in finding that no notice was required pursuant to section 69(1) of the *Work Health Act* where the worker returned to work for a limited number of hours and remained partially incapacitated for work.
>
> 2. The learned Magistrate erred in law in that her factual findings:
>
> (i) 'that any aggravation which was caused by the appellant's employment in November 1990 no longer exists.'
>
> (ii) that the appellant's employment with the respondent (1985-1994) did not specifically cause any disability but that the degenerative disease was caused on 'the result of degenerative condition of the appellant's spine such degeneration being related to his age which in part would have been caused by his work over the preceding 14 years.'

were made in the absence of any accepted evidence to that effect or at all.

3. The learned Magistrate erred in law in finding the Work Health Court's only function was to determine 'whether the worker continues to suffer from an incapacity as a result of an injury suffered by him in November 1990'."

[64] With respect to Ground 1, his Honour found that (AB 344):

> "…. the employer was therefore not entitled to cancel the compensation payments without complying with s69(1) by virtue of the worker's return to work. It was merely entitled to reduce the amount of such payments without complying with s69(1) such that they accorded with the worker's entitlements under the Act, assuming that the worker had such residual entitlements."

[65] With respect to Ground 2, his Honour found that (AB 347):

> "…. The respondent failed to discharge the onus on it to establish the facts asserted in its s69 notice. …."

[66] His Honour allowed the appeal and made orders that the order of the learned stipendiary magistrate be set aside. He further ordered that the worker's entitlements under the *Work Health Act* be restored with interest thereon. In addition he made an order that the employer pay the worker's costs of the appeal to the Supreme Court and the cost of the proceedings in the Work Health Court.

[67] The essential reasons given by his Honour for allowing the appeal are set out at AB 346-7 as follows:

> "It would appear from the reasons published by the learned Magistrate that she did not attach any weight to the evidence of Dr Hillier (at 30). Furthermore, the learned Magistrate refers to the

> evidence of Dr North as "not saying that there was no relationship between the Worker's employment and the degeneration of his back but that the degeneration of the back is related to his overall work for many years and not specifically to the incident in 1990 …" (at 27) and that his evidence "must be taken in the context of his plumbing employment for many years". Therefore, the learned Magistrate did not consider the evidence of Dr North being probative of the issue of whether the worker's incapacity was unrelated to the employment with respondent. The medical opinion expressed by Dr Girgis in his report is that the incapacity of the worker was in fact caused by the employment with the respondent. Consequently, none of the medical evidence, as the learned Magistrate saw it, supported a finding that the incapacity was not related to the employment with the respondent.
>
> That leaves the evidence of the worker and his wife. Counsel for the respondent was at pains to point out that the testimony of the worker given in evidence in chief when compared to his evidence whilst under cross-examination suggested that the former evidence lacked credibility. Even if that submission is accepted by this Court, the evidence of the worker falls short of establishing that the incapacity is not work related. At most, this evidence is capable of supporting a finding that the worker is less incapacitated than he stated in evidence in chief. His evidence is not capable of supporting a finding that his admitted current incapacity is not work related.
>
> It follows that there was therefore no evidence accepted by the learned Magistrate which was capable in law to support a finding that the worker's incapacity was not work related. The respondent failed to discharge the onus on it to establish the facts asserted in its s69 notice. Accordingly, the appeal is allowed and the order of the learned Magistrate is set aside. Further, as the basis for the discontinuance of the payments of compensation to the worker are not made out the worker's entitlements under the Work Health (Act) are restored with interest thereon. As to the question of costs I order that the employer pay the worker's costs of the appeal to this Court and the costs of the proceedings in the Work Health Court."

[68] His Honour, having allowed the appeal under Ground 2, did not deal with Ground 3.

[69] The appellant appeals from the whole of his Honour's judgment given on 7 May 1998 on the following grounds (AB 351-3):

"2.1 The learned Justice erred in finding (Reasons for Judgment page 10.3) that there was no evidence accepted by the learned Magistrate which was capable in law to support a finding that the worker's incapacity was not work related.

2.2 The learned Justice erred in accepting (Reasons for Judgment page 7.5) and/or acting on the submission of the appellant's counsel that the test on appeal was "the absence of any accepted evidence".

2.3 The learned Justice erred (Reasons for Judgment page 9.6) in attempting to analyse the presiding Magistrate's consideration of the evidence, when the proper test, regardless of the presiding Magistrate's reasons, was to examine whether or not there was evidence which, if believed, would have supported the presiding Magistrate's finding that the effects of the pleaded injury no longer existed.

2.4 The learned Justice misdirected himself (Reasons for Judgment page 7.5) by accepting the test suggested by counsel for the appellant, namely the "causal nexus incapacity" when the *Work Health Act* requires that the worker "suffers an injury".

2.5 The learned Justice erred (Reasons for Judgment page 9.6) in accepting as the appropriate test for his consideration "the issue of whether the worker's incapacity was related to his employment with the respondent".

2.6 The learned Justice erred in finding (Reasons for Judgment page 8.1) that the onus was on the respondent to prove that the incapacity currently suffered by the worker was "not work related".

2.7 Given the learned Justice's finding that the appellant was not able to challenge the validity of the Section 69 Notice (Reasons for Judgment page 4.6) the learned Justice erred:

(a) in proceeding to find that the employer carried the onus to establish the facts asserted in the Section 69 Notice; and

(b) in proceeding to consider the requirements of Section 69 of the *Work Health Act*.

2.8 The learned Justice misdirected himself on the question of onus of proof, by ignoring the fact that before the presiding Magistrate the parties conducted the action on the merits, and did not confine themselves to an analysis of the merits or otherwise of the cancellation under Section 69.

2.9 Alternatively to grounds 2.6, 2.7, and 2.8 hereof, the learned Justice erred (Reasons for Judgment page 7.7 and page 9.7) in treating the matter as an appeal pursuant to Section 69 of the *Work Health Act* in respect of an alleged injury on 1 November 1990, but nevertheless having regard to the broader question of "whether the worker's incapacity was unrelated to the employment with the respondent", and treating the employer as having the onus of proof on all issues.

2.10 The learned Justice erred (Reasons for Judgment page 10.7) in ordering that the worker's entitlements under the *Work Health Act* be restored with interest thereon.

2.11 The learned Justice erred (Reasons for Judgment page 10.7) in allowing the worker the costs of the appeal, given the amendment of the Notice of Appeal on the day of the hearing, and the absence of notice to the employer of the propose amendment.

3. ORDERS SOUGHT:

3.1 That the orders made by the learned Justice, in his Reasons for Judgment dated 7 May 1998 be set aside.

3.2 That the orders of the Presiding Magistrate be reinstated.

3.3 That the respondent pay the appellant's costs of, and incidental to, the appeal before the learned Justice in any event.

3.4 That the respondent pay the appellant's costs of, and incidental to this appeal.

3.5 That the respondent pay the appellant's costs of, and incidental to, the proceeding in the Work Health Court.

3.6 Such further or other order or orders as to this Honourable Court seem fit."

[70] I agree with his Honour's analysis of the conclusion drawn by the learned stipendiary magistrate from the evidence before her. On this analysis the magistrate made an error of law.

[71] I do not accept the submission by Mr Nosworthy, counsel for the appellant, that what he describes as the use of loose language by his Honour (at AB

344.4) when his Honour referred to a "causal nexus" between employment and incapacity, has led to a failure by his Honour to consider the proper test in relation to the pleaded injury. I have concluded that his Honour applied the proper test in relation to the pleaded injury.

[72] Mr Nosworthy argues that implicit in the decision of the learned stipendiary magistrate is a finding by her that she accepted the opinion of Dr North and found that the respondent lacked credibility. Accordingly, the appellant would argue it was not open to his Honour on the principles laid down in *Wilson v Lowery* (1993) 110 FLR 142, to dispute these findings of fact. If there was evidence upon which the magistrate could base her findings, then no error of law has been demonstrated.

[73] *Wilson v Lowery* (supra) sets out the principles on appeals from the Work Health Court. An appeal from the Work Health Court to the Supreme Court is restricted to a question of law. An appeal from the Supreme Court to the Court of Appeal is similarly restricted. It is not for a judge at first instance, nor for a Court of Appeal to make findings of fact or to interfere with a magistrate's finding of fact where there is evidence to support such findings.

[74] I agree with Mr Waters' submission that the issue of the respondent's credibility on a hearing confined to s69 of the *Work Health Act* is irrelevant. The respondent was entitled to put the employer to the proof of the matters contained in Form 5.

[75] In this matter, his Honour the judge at the first instance did not interfere with the findings of fact made by the learned stipendiary magistrate, nor did he attempt to make alternative findings of fact.

[76] His Honour analysed the learned stipendiary magistrate's legal conclusions, based on the facts as she found them.

[77] I agree with his Honour's analysis of these conclusions and agree that they were not open to the learned stipendiary magistrate on the facts as she found them. Accordingly, there was an error of law. His Honour allowed the appeal and set aside the orders of the learned stipendiary magistrate.

[78] I agree with his Honour's reasons and with his conclusion and would dismiss this appeal.

[79] BAILEY J: I have had the benefit of reading the judgments of Martin CJ and Thomas J in draft form. For the reasons that each separately state I would order that the appeal be dismissed and the appellant be ordered to pay the costs of the appeal.

[80] I would only add that I particularly endorse the remarks of the Chief Justice as to the need for both counsel and the Work Health Court to pay close attention to the nature of any appeal against an employer's decision to cancel or reduce weekly compensation pursuant to s69 of the Work Health Act and the need for pleadings to be in proper form before proceeding with the hearing. Similarly, I endorse the observations of Thomas J as to the

question of who is to be dux litis in an appeal against an employer's decision under s69 of the Act.
