PARTIES:	CRESTWOOD PHOENIX DARWIN PTY LTD and THE NOMINAL INSURER v KAMARAKIS, Savasti
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	COURT OF APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	AP7 of 1993
DELIVERED:	23 December 1996
HEARING DATES:	9 and 10 December 1993
JUDGMENT OF:	MARTIN CJ., GALLOP & ANGEL JJ.

CATCHWORDS:

Appeal and New Trial - Appeal - General principles - In general and right of appeal - Appeal from Workers Compensation Court to Supreme Court and from Supreme Court to Court of Appeal limited to questions of law - Open for Worker's Compensation Court to amend reasons in order to resolve discrepancies prior to formal award being taken out.

Workmens Compensation Act (NT)

Salvatore Lapa (No. 2) (1995) 80 A Crim R 398, referred to.
Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239, referred to.

Workers' Compensation - For what injuries compensation payable - Sufficiency of evidence and onus of proof - Work Health appeal - Weekly compensation - Cross appeal against finding by intermediate appeal tribunal that there was no evidence to sustain finding by Worker's Compensation Court's that respondent was incapacitated by injury in the specified period - "No sufficient evidence test" -

Evidence found to support findings upon which award based - No error of law.

Workmens Compensation Act (NT)

Australian Broadcasting Tribunal v Bond & Ors (1990) 170 CLR 321, referred to.

Workers' Compensation - Assessment and amount of compensation - Review of award - Award under s10 Workmens Compensation Act (NT) - Total and permanent loss of efficient use - Fact that error of law was made in misapplying one provision of the Act does not mean resulting award made in light of the findings was not correct when supported by other provisions of the Act.

Workmens Compensation Act (NT), s10

Gunn Developments (NT) Pty Ltd v John Robert Edwards unreported Muirhead J., 12 April 1977, at pp4-6, applied.

Workers' Compensation - For what injuries compensation payable - Causal relation between injury and incapacity or death - Generally - Open on evidence to make finding of total incapacity during relevant period - Onus of proof in matters relating to total and partial incapacity.

Workmens Compensation Act (NT)

Aitken v Goodyear Tyre & Rubber Co (Aust) Ltd (1945) 46 SR (NSW) 20, referred to.
Bryer v Metropolitan Water, Sewerage and Drainage Board (1939) SR (NSW) 321, applied.
Connelly v J & A Brown & Abermain Seaham Collieries Ltd [1946] WCR 58, referred to.
Northern Cement Pty Ltd v Ioasa unreported Martin CJ., 17 June 1994, referred to.

Workers' Compensation - Assessment and amount of compensation - Redemption of weekly payments - No express requirement in Territory legislation as to matters which Court is to consider in relation to an application for redemption - Contingencies to be taken into account in calculation of lump sum.

Workmens Compensation Act (NT), Sch 2, par (13)

Calico Printers' Association, Limited v Higham (1912) 1 KB 93, considered.
The Commonwealth of Australia v Blackwell (1987) 163 CLR 428, referred to.
Groote Eylandt Mining Co Pty Ltd v Albantis (1983) 24 NTR 13, considered.
Todorovic & Anor v Waller (1981) 150 CLR 402, considered.
Watkins Ltd & Anor v Renata (1984) 29 NTR 38, considered.
Watkins Ltd & Anor v Renata (1985) 61 ALR 153, considered.

REPRESENTATION:

Counsel:

Appellant:	Mr Walsh
Respondent:	Mr Hiley QC

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

No. AP7 of 1993

BETWEEN:

CRESTWOOD PHOENIX DARWIN PTY LTD and THE NOMINAL INSURER
Appellants

AND:

SAVASTI KAMARAKIS
Respondent

CORAM: THE COURT

REASONS FOR JUDGMENT

(Delivered 23 December 1996)

Consideration of the issues on this appeal and cross-appeal calls for constant reminder that:

- The language of the *Workmens Compensation Act* (the Act) (since repealed) requires careful and detailed consideration in its application to the facts found upon the evidence.

- The appeal from the Workers Compensation Court (the Court) is limited to questions of law. In that we include not just the appeal from the Court to the Supreme Court, but that from the Supreme Court to this Court. The latter appeal is limited to reviewing whether the intermediate appellate tribunal made an error of law in its determination of the questions of law, the subject of the appeal to it. As to the role of this Court see: *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239, per Gallop J. at p241.

In its application to this case the essential features of the Act are that:

1(a) A worker

(b) who is totally or partially incapacitated for work

(c) by injury

(d) by accident arising out of or in the course of the worker's employment

(e) is entitled to prescribed weekly payments (s7 and sch2, par1A and 1B)

2(a) If the incapacity for work (whether total or partial) is permanent, a worker or former worker receiving or entitled to receive weekly payments

(b) may apply to the court to redeem the liability for that weekly payment by the payment of a lump sum (sch2 par12)

(c) where such an application is made the court may order such

amount as may be determined by it to be paid or invested or otherwise applied for the benefit of the applicant (par12A)

3(a) If a worker receiving a weekly payment

(b) ceases to reside in Australia

(c) he shall thereupon cease to be entitled to receive any weekly payment

(d) unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature ... (par13).

4(a) If the worker sustains a loss of a leg below the knee

(b) compensation is payable (s10(1A) and Part II of the Third Schedule).

5. For the purposes of 4 above, the loss of a specified part of the body is deemed to include

(a) the permanent loss of the use of that part, or

(b) the permanent loss of the efficient use of that part in and for the purposes of his employment at the date of injury.

It is not disputed that the respondent was a worker who suffered injury arising out of or in the course of her employment with the appellant company and that The Nominal Insurer is liable for payment of any compensation due to her under the Act.

Not the least of the difficulties which have arisen in the proceedings has flowed from a draft award prepared by the Court which was apparently contrary to findings expressed in the published reasons. Efforts were made to resolve the discrepancies by this Court referring the matter back to the Court after his Honour in the Supreme Court had attempted to resolve the problem. It being found that the formal award had never been taken out, it was open to the Court to amend the reasons. (See for example *Salvatore Lapa (No. 2)* (1995) 80 A Crim R 398). It did so in such a fashion as to conform with the draft award. It thus became clear that the draft award reflected the Court's intentions and a purported certificate of the award later provided to this Court confirms the contents of the draft. We say "purported" because the certificate does not strictly comply with the rules.

The certificate of the award (leaving aside extraneous matters) evidences an award for the payment of:

- compensation pursuant to par1A of sch2, that is, weekly payments calculated on the basis that the respondent was totally incapacitated for work by the injury from the date of the accident for much of the period up to the date of the hearing.

- compensation pursuant to s10 based upon "loss of leg below knee" (for the purposes of her employment at the date of the injury).

- redemption of weekly payments pursuant to par12 of sch2 based upon actuarial calculations for a female aged 51 (as at the date of the hearing) and ceasing at her death.

A short chronology may be useful:

18 August 1940	The respondent was born in Greece.
26 July 1985	The ankle injury was sustained. Fixation of the fracture was achieved by means of a steel plate and screws. Her weekly wage at the time was $184.35.
July 1986 to October 1986	She resumed her pre-injury employment.
November 1986	She went to Greece and has never been employed thereafter.
May 1987	She returned to Australia.
July 1987	First consulted Dr Johnstone.
May 1988	Consulted Dr Glynatsis.
July 1988	Operation to remove screws from her ankle.
September 1992	Award made by the Court.

The grounds of appeal before his Honour (as allowed by amendment) were these:

"1. The Court erred in law in awarding weekly payments of

compensation to the Respondent in respect of the period November 1986 to March (sic) 1988.

PARTICULARS

1.1 The Court failed to make a finding that the Respondent's absence from any work between November 1986 and March (sic) 1988 was by reason of incapacity caused by the subject injury.

1.2 Alternatively, if the Court made the finding referred to in paragraph 1.1, it was made in circumstances amounting to an error of law by reason of the following:

1.2.1 The Respondent's evidence that she had made the decision to travel to Greece before she decided to stop work at the Phoenix Hotel;

1.2.2 The Respondent was absent from Australia in Greece from November 1986 until May 1987;

1.2.3 The Respondent returned to Australia due to the fact that her husband became ill and required assistance from her.

1.2.4 The Respondent's evidence that (inter alia) she could not go to work in the period after May 1987 because her husband was ill;

1.2.5 The opinion of Dr Johnstone in 1987 that the Respondent was fit for work as a cleaner;

1.2.6 The fact that subsequent to May 1987 and up to March (sic) 1988 when she consulted Dr Glynatsis she had, aside from a consultation with Dr Johnstone in July 1987, no medical treatment despite assisting in the care of her husband;

1.2.7 By reason of the foregoing the evidence was inconsistent with and contradictory of the finding and/or the true and only reasonable conclusion from the evidence contradicted the decision;

2. The Court erred in law in the exercise of its discretion pursuant

to clause 12A of the Second Sechule (sic) of the Act is (sic) fixing a lump sum of $196,915.00 in redemption of the Appellant's liability to make weekly payments of compensation.

PARTICULARS

2.1 The Court erred in law in finding that the Respondent was a worker entitled to receive a weekly payment in the future;

2.2 The Court failed in the exercise of its discretion to have regard to the fact that by reason of the Respondent residing in Greece she might be disentitled by operation of clause 13 of the Second Schedule of the Act to weekly payments of compensation into the future;

2.3 The Court erred in law in failing to discount the capitalised amount of the Respondent's weekly payments to take account of contingencies when it said that such reduction should be made;

2.4 The Court erred in law in the calculation of the amount of the weekly payments to which the Respondent was entitled in that:-

2.4.1 Having found that the Respondent was permanently and partially incapacitated for work the Court calculated the amount of compensation by reference to clause 1(A) (sic) of the Second Schedule instead of clause 1(B) (sic);

2.4.2 Alternatively, the Court failed to apply the statutory formula in clause 1(B)(b) to calculate the amount of weekly compensation in that it failed to identify the amount which the Respondent was able to earn in some suitable employment or business and failed to calculate or apply the proviso contained in clause 1(B)(b).

2.5 Alternatively, if the Court found that the Respondent was totally incapacitated for all employment then such finding was inconsistent and contradictory of the evidence and/or contradicted by the true and only

reasonable decision on the evidence so as to constitute an error of law.

3. The Court erred in law in finding that the Respondent had suffered a permament (sic) and total loss of the lower left leg in and for the purpose of her employment.

PARTICULARS

3.1 The Appellant repeats paragraph 2.5 above."

The reference to "March" 1988 should be read as "May" 1988, being the date upon which the respondent first saw Dr Glynatsis after her return to Australia from Greece. We have been unable to find any significance for a date in March 1988.

Paragraphs 2.4 and 2.5 must now be read in the light of the amended wording of the Court's findings that the respondent was totally incapacitated for work by the injury.

His Honour allowed the appeal in so far as:

. the award of weekly compensation covered the period from November 1986 to March (sic) 1988; and

. the amount of compensation awarded under s10.

In all other respects the appeal was dismissed.

The grounds of appeal and cross-appeal to this Court are:

"GROUNDS OF APPEAL:

2. The learned Judge erred in failing to hold that the awarding of a lump sum redemption of liability for future weekly payment was vitiated by errors of law.

    2.1 By reason for the respondent's professed intention to return to Greece the Court could not have been satisfied that the respondent had an on-going entitlement to weekly payments since an application pursuant to paragraph 13 of the Act was likely. One of the necessary conditions for the exercise of the Court's power to order redemption was therefore not satisfied.

    2.2 The issue of the respondent's residency and the applicability of paragraph 13 of the Act to the respondent's entitlement to weekly payments was not a matter which could await the event of the determination of the Court.

    2.3 The learned Judge erred in failing to find that the fixing of the amount of the lump sum was discretionary and that the respondent's residency in Greece was relevant as a contingency when settling the lump sum.

    2.4 The learned Judge erred in holding that the possible future effect of paragraph 13 did not operate as a contingency to be taken too (sic) account where the respondent was never a worker receiving a weekly payment.

3. The learned Judge erred in failing to hold that the wrong statutory formula had been applied to ascertain the weekly amount for the purpose of redemption under paragraph 12A of the Act.

    3.1 The Court expressly found "partial and permanent incapacity" and the learned Judge was therefore in error to characterise this finding as a slip in the absence of any direct finding of total incapacity.

3.2 The learned Judge erred in holding that he did not consider that there was no evidence to warrant a finding of total incapacity as from March (sic) 1988. In the absence of an express finding of total incapacity and in the presence of an express finding of partial incapacity the correct inference is that there has been an error not that there has been a slip and the learned Judge was in error in failing to so find."

"GROUNDS OF CROSS-APPEAL

1.1. The decision to set aside the award by the Court below of weekly compensation for the period from November 1986 to March (sic) 1988;

1.2. The decision to set aside the finding by the Court below that the Respondent suffered a permanent and total loss of the efficient use of her left leg below the knee for the purposes of her employment at the date of the injury.

GROUNDS:

2.1 The learned Judge erred in holding that there was no evidence to support the finding of the Court below that the Respondent was incapacitated by injury in the period between November 1986 and March (sic) 1988. (p61.5).

2.2 The learned Judge erred by misinterpreting the medical evidence in relation to the Respondent's capacity for work between November 1986 and March 1988.

2.3 The learned Judge erred in deciding that there was no evidence to support the finding of the Court below that the Respondent suffered a total and permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury. (p73.3)

2.4 The learned Judge erred in deciding that the Court below found that the Respondent's permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury was a partial loss. (p73.5)

2.5 The learned Judge erred in assessing that the Respondent's permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury was a partial loss. (p73.6)

2.6 The learned Judge erred by holding that the "true and only reasonable conclusion contradicted the decision" test could be treated as equivalent to:- there was no evidence to support the decision. (pp61.2, 72.9, 73.1)"

Weekly Compensation

As to the weekly compensation, his Honour found that there was no evidence to sustain the Court's finding that the respondent was incapacitated by injury in the period specified by him.

The respondent cross appeals to this Court against his Honour's finding, and it is convenient to deal with that issue at the outset. There is no present argument concerning the correctness of the Court's award of weekly compensation for the period from the date of the accident until November 1986, nor for the period from March (sic) 1988 to the date of the award. His Worship did not deal with the question of incapacity for work in such discreet periods of time as that. The period in question is that between the respondent's departure for Greece in November 1986 and the date upon which she was seen by Dr Glynatsis in May 1988 shortly after returning to Australia. She had also been seen by Dr Johnstone, surgeon, in July of that year, and on two subsequent occasions. As to the respondent, she had given evidence of having returned to work in July 1986 and continuing until October 1986. She said she did that because of the needs that she had, and she wanted to give it a go and see if she could work. She said that prior to returning to work she had

been in pain, but because the hours were only about two or three hours a day and it was not very busy, she wanted to try and see how she would go. She had previously been at home attempting housework, but said she had only been able to stand up for half an hour to an hour, and then had to sit down until her pain went away. She said that during the period that she was employed she was in pain and always used to lean on her other foot, and that she stopped work in October 1986 because of the pain. She said that, usually at night time, her foot was all swollen up and she could not sleep. Her evidence was that she went to Greece in about November because her daughter telephoned her from there saying that she was pregnant, and since she had lost her first baby the respondent went to Greece to help her with the fresh pregnancy. During the period between her ceasing employment in October 1986 and leaving to go to Greece in about November she said that she stayed at home and that she could not work at all because she was experiencing pain in her ankle. During the period she was at home she felt better because when resting the pain was not so bad (compared with when she was working). The respondent said that she returned in May 1987 because she was informed that her husband was ill with heart problems, and in the meantime she had stayed with her daughter, assisting in making tea for her and doing light work. She said that heavy work was done by her sister-in-law, but nonetheless her left ankle was feeling worse when she was in Greece because it was cold and that used to affect the injured spot because she was always feeling pins and needles and having pain. (See generally the evidence of the respondent at pp17-19 Appeal Book).

The general surgeon, Dr Johnstone who was consulted by her in July 1987, that is, about two or three months after she returned from Greece, expressed the opinion that she was capable of working as a cleaner, and that although it was difficult to answer, he thought she had probably been so capable prior to her departure for Greece in November 1986. Those opinions are expressed in his report after his initial consultation in July 1987. In his evidence before the Court he said that he came to that opinion from the history he had taken and his examination of the respondent. In later reports he was of the opinion that she was probably not fit to work as a cleaner, the earliest of those reports being September 1988. He accepted the proposition that it would be fair to say that during the period that he had been seeing her she had deteriorated. When specifically asked to compare his opinion of July 1987 and his later views and to explain what caused him to change his mind, he said that that was caused by the fact that there had been no improvement in the intervening period.

> "If her condition then remained roughly as it was when I'd seen her on the initial occasion and there was no improvement, there was obviously deterioration and she wasn't getting any better". (AB p72)

He was then asked: "So were you making an assumption in July '87 that you would expect an improvement from what your observation was of her?" He answered: "I was expecting an improvement when I initially examined her,

yes". He was then asked: "Was your opinion as to her employability as a cleaner based on that assumption?", and he answered "Yes". The medical evidence from Dr Johnstone, Dr Glynatsis and Mr Schmidt, orthopaedic surgeon, called by the appellants, touched upon these matters and ranged over a variety of other subjects including wasting of the respondent's calf muscles, crepitus, osteoarthritis, what could be seen or not seen in sundry X-rays and the interpretation of various examinations, including restrictions on range of movement in the ankle. It is clear that his Worship preferred the evidence of Dr Johnstone. His Worship found (AB p172) that he could not discount the screws, which remained in place anchoring the malleolus, as not being a source of pain; he accepted the evidence of Dr Baddeley that the screws were a source of pain, and surgical intervention was required for their removal. His Worship expressly said that he was satisfied the applicant had experienced pain from that source until August 1988 when they were removed and "that the pain did not cease". He found that the most probable and likely cause of the continuing pain was that some soft tissue damage was the ultimate stimulus for it and said:

> "I am satisfied that her condition is uncontrived but is of physical origin and has resulted in the applicant being unfit to perform housemaid's duty and has resulted in her being permanently unable to resume those duties". (AB p173)

At p175 as part of his assessment process in relation to the appropriate award he said:

> "I am satisfied that on all the evidence the injury to the applicant's ankle prevents her from performing the former work as housemaid and domestic cleaner in a hotel situation".

As already indicated, his Worship's award for weekly compensation covered the whole of the period after she ceased work in October 1986 until the day of assessment. His general findings expressed in the way set out above, and his award, amply justify his Honour's view that his Worship was satisfied that the respondent's cessation of work in October 1986 and non resumption in May 1987 or at any later time, was caused by her incapacity to work through her injury ... "It is implicit in the thrust of his judgment". We agree. However, having reviewed the matter his Honour expressed the view that:

> "It seems clear and uncontradicted from the evidence which his Worship accepted that the respondent's condition was degenerative; as it progressively deteriorated, her pain from her injury increased until she was incapacitated. There is to my mind no evidence to sustain the finding that she was incapacitated by injury in the earlier period November 1986 - March (sic) 1988." (AB p241)

He said that certain evidence which it appears was second-hand, but nevertheless admitted before his Worship, was not probative and added: "That error of law vitiates that decision". It appears his Honour also thought that certain other evidence upon which his Worship apparently relied was not probative. It is to be noted that s6D of the Act provided that at the hearing of

the proceeding, the procedure of the Court was, subject to the Act, within the discretion of the court. Assuming, with respect, however, that his Honour was correct in pointing to deficiencies in parts of his Worship's reasoning derived from part of the evidence before him, the position remains that there was evidence upon which his Worship could rely, and obviously did rely, to make his award. There was the evidence of the respondent, which of itself was not contradicted, and when considered as a whole, that of Dr Johnstone.

In argument in support of the cross appeal the respondent pointed to the fact that there was no dispute now that she was totally incapacitated from the time of the accident until July 1986 and from May 1988 onwards and remains so. It is put that to conclude that for some seventeen months in between those two substantial periods of incapacity she was not incapacitated at all was not open. It is not necessary to go into that argument because, as has already been pointed out, his Worship's findings are clear enough and there is evidence to support them. That being so, there is no error of law. The cross appeal is allowed. That is, subject to consideration of the appeal. It is unnecessary to consider whether his Honour erred by holding that the "true and only reasonable conclusion contradicted the decision" tests could be treated as equivalent to:- there was no evidence to support the decision. However, as his Honour pointed out, the "no sufficient evidence test" had not been accepted by the High Court (*Australian Broadcasting Tribunal v Bond & Ors* (1990) 170 CLR 321 per Mason CJ. at pp355-357).

Award under Section 10

As to the award under s10, the Court had said:

> "… pursuant to 10(5) and 10(6) of the second schedule, I'm satisfied that on all the evidence the injury to the applicant's ankle prevents her from performing the former work as housemaid and domestic cleaner in a hotel situation. This injury has resulted in partial but permanent loss of the efficient use of the leg below the knee for the purpose of her employment at the date of the injury, or more succinctly, you can say that 100 percent of 65 percent of 61,358."

The figures 65% of $61,358 represent the prescribed compensation for the loss of a leg below the knee. That formula was carried into the draft award and certificate. His Honour concluded that the reference to 100% was a slip, despite the Court's satisfaction that the respondent's injury prevented her from working as a housemaid. Relying instead on the Court's finding of "partial but permanent loss" of use, his Honour proceeded to assess the loss at 40% of the prescribed sum for loss of a leg below the knee. That finding by his Honour, with a view to reconciling the discrepancies between the reasons and the draft award, partly caused this Court to return the matter to the Court, it being of the view that if the matter could be rectified then it was up to the Court to do so. When the matter was returned to the Court it amended the reasons in part by deleting the words "partial but permanent" and inserting "total and permanent" thus affirming the award which it had made. The

problem is that s10(5) and (6) do not appear to contemplate a finding of total and permanent loss of efficient use.

The difficulty may be resolved by reference to what Muirhead J. said in *Gunn Developments (NT) Pty Ltd v John Robert Edwards* unreported 12 April 1977 at pp4 to 6:

"... Section 10(5) reads as follows:-

> "(5) Where a workman sustains an injury which causes partial and permanent loss of the efficient use of a part of the body specified in the Third Schedule to this Ordinance in and for the purposes of his employment at the date of the injury, there shall be payable an amount of compensation equivalent to such percentage of the amount of compensation payable under this section in respect of the loss of that part as is equal to the percentage of the diminution of the efficient use of that part."

Section 10(6) provides that such loss of a specified part of the body shall be deemed to include -

(a) the permanent loss of the use of that part; and

(b) the permanent loss of the efficient use of that part in and for the purposes of his employment at the date of the injury.

Thus a useless part, although retained on the body, is equivalent to a "loss" provided it is permanently useless -an entirely logical and a traditional extension to the compensation scheme.

Sub-section 6(b) introduces a further circumstance of entitlement. By the introduction of the words "efficient" and "in and for the purposes of his employment at the date of the injury" the Ordinance introduces another measure or test of entitlement under section 10. So the Ordinance provides the following approaches to the measure of loss of efficient use be it total or partial:-

(a) True loss, i.e. by removal of the phalanx or limb or destruction of the faculty.

(b) The part, although retained on the body is equivalent to a "loss" if it is rendered permanently useless.

(c) In determining the extent of permanent total or partial loss of efficient use the Tribunal may look to the requirements of the workman's employment at the time of injury. This introduces an employment test in addition to a solely functional test.

(d) Section 10(5) provides that a workman who sustains a permanent partial loss of a part is entitled to a fractional schedule payment arithmetically calculated as a proportionate "loss" in percentage terms of the sum payable and calculated for the entire loss of the part or faculty.

(e) The provisions of the two preceding paragraphs may combine to convert what is a permanent partial functional loss of efficient use into a total permanent loss of efficient use for the purposes of the Ordinance.

It is probable that the references to employment in section 10(5) and (6) were introduced to ensure that a workman, vulnerable by reason of the nature of his employment at the time of the injury, is entitled to have the question of permanent loss of efficient use measured not only in terms of loss of functional efficiency, but by application of such loss measured "for the purposes of his employment". This introduces an objective consideration of the injury against the actual employment at the time of the injury. If the evidence leads to a finding that the permanent loss of efficiency caused by injury to a part or faculty (although partial in medical terms) makes the workman permanently unfit for that employment, it may be argued that for the purpose of applying the schedule he must be awarded the full compensation payable for loss of that part."

The finding (as amended) and draft award convey the clear notion that the loss sustained by the respondent by the injury was the permanent loss of the efficient use of her left leg below the knee in and for the purposes of her employment at the date of the injury. His Worship's findings are not open to the view that there was but a partial and permanent loss of the efficient use of

her leg for those purposes (subs(5)). The maximum award under this heading as seen in Part II of Schedule 3 in the circumstances of the case and the Court's findings can not be properly so regarded. As to the findings, nothing else is open considering what his Worship said at AB p173.

> "I am satisfied that her condition is uncontrived but is of physical origin and has resulted in the applicant being unfit to perform housemaid's duty and has resulted in her being permanently unable to resume those duties."

That finding was made after a review of the evidence in support of it. Again, at p175, there is an express finding that the injury had resulted in total and permanent loss of the efficient use of the leg below the knee for the purposes of the respondent's employment at the date of the injury. His Worship erred in law in finding that the situation was that contemplated by s10(5). In our view it is a case falling within s10(1A). The fact that his Worship may have made an error of law in misapplying one provision of the Act does not mean to say that in the result he was not correct when other provisions of the Act support the award which was made in the light of the findings. For reasons already given his Honour erred in disturbing the award, but that was because of the unfortunate errors made in the Court's reasons which were later corrected at the suggestion of this Court.

<u>Incapacity for Work Generally</u>

The evidence available to and accepted by the Court as to the respondent's incapacity to work by injury is that detailed in relation to the cross appeal. It was in general terms and covered the whole of the period from

the time the respondent ceased work in October 1986 up to the date of trial. On that evidence it was open to his Worship to find that the respondent had been totally incapacitated during that period. He only specifically found that she was incapacitated for carrying out her work as a cleaner, but there is nothing in the evidence to suggest that she was capable of performing any other type of work. She had been born in Greece, had no reasonable command of the English language, no skills, and had followed no other course of employment during her life. The appellant attempted to show through the evidence of Katherine Brough that there was work available to the respondent which could accommodate her physical disability. Ms Brough conducted an employment agency for domestic house cleaning. People contact her to arrange for cleaners to go into private homes and she keeps details of persons available to do that work. The work involves cleaning, ironing and domestic duties, such as general dusting, cleaning bathrooms, kitchens and the like. Normally home owners require a set amount of work to be done during a fixed period of time. As to work breaks during the period negotiated, Ms Brough said it was generally between the client and the cleaner to establish. That type of work was readily available in Darwin and those engaged upon it would work on average 20 hours a week at an average wage of $9 per hour. She also ran an ironing service whereby the ironing is delivered to the home of the worker and done there. As to that, Ms Brough said that ironing work was available, but it was not as popular as general cleaning. The amount of ironing work varied from week to week. According to her, the fact that a person did not speak English would not be a bar to her being employed on that type of work. In cross-examination Ms Brough confirmed the nature of the

domestic work involved in somewhat more detail, and said that a person required to do that work would need to be on her feet and moving around whilst undertaking it. As to the pace at which the worker is engaged on that private domestic work, Ms Brough confirmed that it was a matter between the householder and the worker. She did not involve herself in that. It was the responsibility of the worker to find her way to the job and from job to job. In the case of a person such as the respondent who did not drive a car, then she would have to rely on public transport and that meant being able to arrange work that was accessible to that form of travel. On re-examination she confirmed that for the most part the householder was not present while the domestic work was being undertaken, and that in those circumstances it really would not matter how long it took for the worker to perform the work, although she would only be paid for the number of hours negotiated to complete it.

Although his Worship did not refer to that evidence specifically, it is clear from his findings that the respondent would not be able to engage in that work. Given the limited function of the employment agency conducted by Ms Brough and the role to be played by employers and cleaners in particular cases in fixing the precise terms of engagement, the evidence as to the availability of work which could be undertaken in that field by the respondent was insufficient to properly raise the question of her ability to do it. Amongst other things, whilst working at the motel as a cleaner, she worked in the company of her sister who assisted her with the language (AB p14).

There was no other evidence as to the availability of any kind of work which the respondent might be able to undertake and thus no other evidence of any likely weekly payments from such a source. Assuming that the appellant was seeking to demonstrate that the respondent was not incapacitated at all for work, then the Court found on the evidence available that she was. If the appellant was endeavouring to show, as an alternative, that the worker was only partially incapacitated for work, then there was no evidence of the amount, if any, by which the amount that she was earning or able to earn in some suitable employment or business was less than her normal weekly earnings (Sch2 par(1B)). The only attempt made to show there was work which she might be able to undertake and to put a figure on its value came from Ms Brough, and for reasons already given, his Worship was entitled to disregard it given his findings as to the degree of the respondent's incapacity.

As to the onus of proof in matters to do with total and partial incapacity, there is no reason to depart from what was said by Jordan CJ. in *Bryer v Metropolitan Water, Sewerage and Drainage Board* (1939) 39 SR (NSW) 321 in the following passage at p331:

> "The burden of proof lies upon the worker to establish (1) that he has received [an injury], and (2) that as a result he has sustained some incapacity for work ...: *Joy v Morton* (1922) 15 BWCC 33; *Jones v A & E Pettifer Ltd* (1929) 22 BWCC 405. When the worker establishes this, he is *prima facie* entitled to the compensation provided for by s9: *Moore v Barkey* [1923] AC 790 at 795; *McCann v Scottish Co-operative Laundry* [1936] 1 All ER 475 ... unless it appears that the incapacity is partial only, and that it is necessary to limit the weekly payments in the manner provided for by s11. The burden of proving that the incapacity established by the worker is partial only, and if so, of proving the other facts necessary to involve a limitation of payments under s11 is upon the employer: *Proctor & Son v Robinson* [1911] 1 KB 1004 (CA); *Cardiff*

Corporation v Hall [1911] 1 KB 1009 (CA). This burden may be discharged by material elicited from the worker or his witnesses or by evidence called on behalf of the employer. But it is for the employer to supply the necessary material to the extent to which it may not be supplied by the evidence given on behalf of the worker. When the employer desires to invoke the provisions of s11, he may take the line of endeavouring to establish that the worker is able to earn his full pre-injury average weekly wages; or he may endeavour to establish the worker's ability to earn some lesser average sum, so as to confine the amount of the compensation within two definite limits. If he chooses the former alternative, and fails because the Commission is not satisfied that the worker can earn full pre-injury average but infers that his average would be somewhat less, the employer cannot complain if the Commission then proceeds, as best it can, to perform the statutory duty imposed on it by s11. He certainly cannot complain if the Commission proceeds in the absence of any sworn evidence of definite amounts. It was for him to supply such evidence if it was available; and if it was impossible for him to obtain it, he has no ground for complaint if the Commission in its absence does the best it can with material at its disposal, including its general and local knowledge, to give him the benefit of the limitation provided for by s11": *Cardiff Corporation v Hall* [1911] 1 KB 1009 at 1016; *Roberts & Ruthven Ltd v Hall* (1912) 5 BWCC 331 at 334.

See also *Aitken v Goodyear Tyre & Rubber Co (Aust) Ltd* (1945) 46 SR (NSW) 20; *Connelly v J & A Brown & Abermain Seaham Collieries Ltd* [1946] WCR 58.

(Section 11 of the then New South Wales Act was that entitling the worker to weekly payments in the case of partial incapacity.). See also *Northern Cement Pty Ltd v Ioasa*, Martin CJ., unreported 17 June 1994.

Redemption of Weekly Payments

The matters going to the jurisdiction of the Court to entertain an application for redemption of weekly payments are set out above. The Court's

finding was that the respondent was totally and permanently incapacitated for work, and no reason has been shown why that finding should be set aside. It appears that the respondent had been receiving weekly payments until she returned to work with her former employer, but not after she ceased that employment in October 1986. The Court's finding was that she was entitled to receive weekly payments as from the time she ceased work on that occasion, and that she had continued to be so entitled up to the date of the decision. She was not then receiving weekly payments. As Nader J. pointed out in *Groote Eylandt Mining Co Pty Ltd v Albantis* (1983) 24 NTR 13 there is no express requirement in the Territory legislation as to the matters which the Court is to consider in the light of an application for redemption. Having reviewed the authorities available, his Honour there concluded at p20 that "a provision of the kind under examination confers a right upon a worker to a redemption when the conditions of the provision are satisfied. However, that right is not absolute and the Tribunal ought not make a redemption order when it would be unjust to do so". At p21 his Honour referred to factors which may effect the calculation of the lump sum based upon evidence as to likely reduction of the predicted life span of the worker. In *Watkins Ltd & Anor v Renata* (1984) 29 NTR 38 at p46 Kearney J. rejected a submission that the Tribunal there had erred in permitting a redemption in the light of findings that the worker had at that time just started to seek employment. His Honour considered that a workman had a right to redeem. However, his Honour went on to point out at p47 that there may be contingencies which should be taken into account in the assessment of the lump sum, a factor also recognised by Nader J. In *Renata* it was found that the worker had suffered partial incapacity for work. At p49

Kearney J. said that account might be taken of certain contingencies which may have affected the amount of the weekly payments, for example, that the worker may have obtained employment at such a level of wages that his weekly compensation would have been reduced, and secondly, that the weekly compensation would increase for some period or periods should his then incapacity for work become greater. In the result his Honour considered that the relevant contingencies, adverse and favourable, cancelled each other out and thus called for no alteration to the amount fixed as the lump sum in that case. The majority of the members of the Federal Court, (Toohey and Morling JJ.), on appeal, (1985) 61 ALR 153 said at 159

> "Consistent with the authorities, and having regard to the language of cl(12) of Sch 2, we are of the opinion that once the respondent (worker) sought redemption the Tribunal was required to accede to the application unless it thought that it was against his interests to do so."

Their Honours found no error in the approach adopted by Kearney J. in that case in relation to contingencies.

Speaking of similar provisions in England Fletcher Moulton LJ. in *Calico Printers' Association, Limited v Higham* (1912) 1 KB 93 at 103 said the Court:

> "is merely putting in another form the compensation which the Act has already given; and [the court] has to consider only the amount of the weekly payments, their probable duration, the probability of their being diminished or raised in the future, and the probable extent of such variation, if any."

What is there said goes not to the right to receive the payment, but the amount of the payment. Paragraph (12A) of the Schedule makes it clear that there is a discretion both as to the amount to be paid by way of a lump sum and the manner in which it is to be applied. As to calculation of the lump sum, it may follow the reasoning in *Todorovic & Anor v Waller* (1981) 150 CLR 402 and a 3% discount rate could be applied (*The Commonwealth of Australia v Blackwell* (1987) 163 CLR 428. Their Honours there drew attention to whether the employer, the Commonwealth, was liable to continue to make weekly payments until the worker's death or only until he attained the age of 65, and noted that there was no appeal from that part of the decision of the relevant tribunal resolving the question in favour of the calculated date of death.

Contingencies

See grounds of appeal numbered 2. His Honour correctly said that the problem in this case was not whether an order for redemption should be made, but in deciding what lump sum was appropriate. (AB p243). An argument on appeal to his Honour based upon the Court having a discretion as to whether to make an order for redemption, which his Honour dismissed, was not pursued before us.

The evidence relied upon by the appellant in support of this ground is that of the respondent as follows:

"I think your evidence, Mrs Kamarakis, is that both of your children are living in Darwin? --- Yes.

But even so you spend a lot of time in Greece, don't you? --- Since he [her husband] got sick we have to go for that trip because he can't stay for long time in this climate or the heat.

That's why you spend more time in Greece than you do in Australia? --- Yes.

Because you can't really live in Darwin because of his medical condition, is that right? --- Yes, that is the reason. Other than that I might have went for holiday to see my mother but mostly the trips are done because of his medical condition.

That's what you intend to do in the future too, isn't it? --- If he's well, I will. But if he gets sick or we have to return back because there's better doctors here.

See, since February 1989 you've only spent 5 months in Australia, haven't you? --- As I said from before, that's what we have to do and we come here for his medical examinations and see the children and go back again.

When this case is over you'll be going back to Greece, won't you? --- Yes, we'll go because - yes, because of his condition because the doctor also said that he has to walk but how can he walk with this heat?

So your plans for the future are that you'll only come back to Darwin either to visit your daughters or if your husband needs medical attention, is that right? --- For those reasons I'll come back.

See, Mrs Kamarakis, even if you were able to work you wouldn't be able to work in Australia anyway because you wouldn't be here, would you? --- I would've worked for little while and then the same thing again." (AB p35)

Other evidence showed that during the period from February 1989 to February 1992 the respondent had spent 31 months out of the 36 in Greece.

His Honour found that the Court had not directed its mind to the issue of whether the evidence was such that allowance should be made for the contingency that par(13) of Sch 2 might apply to the respondent in the future. There is no cross-appeal or notice of contention in respect of that. His Honour went on:

> "However I do not consider that any possible future effect of par(13) operates as a contingency to be taken into account in determining the amount to be paid under par(12A), in the circumstances of this case where the respondent was never "a worker receiving a weekly payment". Further, his Worship concluded that this was a case of total incapacity for work; accordingly, the contingency that she might work again in light of the concession above, was not a real possibility in this case. Accordingly I reject the appellant's submission." (AB p248)

The concession referred to was that made by counsel for the appellant before his Honour that the circumstances of the respondent were such that she was unlikely to be in a position to earn money in the future, at least in this jurisdiction (AB p248).

We agree that this is not a case to which par(13) has application. The words "receiving weekly payment" permit of no other consideration than weekly payment being presently received. (Compare par(12)). His Honour's further reason for dismissing the appellants argument was not necessary to determine the question, but in the light of the facts as found and looking at par(13) as if it did apply to this case, we do not disagree with his Honour's conclusion.

Order

- That the appeal be dismissed.

- That the cross-appeal be allowed.

- That the award of weekly compensation of the Court be affirmed.

- That the award of compensation pursuant to s10 of the Act by the Court be affirmed.

- That the order of the Court for redemption of the liability for the weekly payment in the sum of $196,015 be affirmed.

- That the appellant pay the respondent's costs:

  of the proceeding in the Court before Mr Hannan SM
  of the appeal to the Supreme Court from Mr Hannan SM
  of the appeal and cross appeal from the Supreme Court to this Court.

Any claim by the respondent for interest or punitive damages under s6G of the Act should be made to the Court.
