PARTIES:	ROBERT HICKS
	v
	BRIDGESTONE AUSTRALIA LIMITED
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP5 of 1996
DELIVERED:	29 May 1997
HEARING DATES:	12 and 13 May 1997
JUDGMENT OF:	MARTIN CJ, GALLOP AND MILDREN JJ

CATCHWORDS:

APPEAL - Workers compensation - Questions of law - "Injury" - "Incapacity".

APPEAL - Application to amend pleadings refused - Review of Magistrate's discretion - Amendments to plead total and partial incapacity.

Work Health Act, ss3, 53, 85(1)(a), 89, 104, 107, 109(2), 116
Supreme Court Act, s51(1)

Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239
Wilson v Lowery (1993) 110 FLR 142
Williams v Metropolitan Coal Co Ltd (1948) 76 CLR 431
Cropper v Smith (1884) 26 Ch D 700
Clough and Rogers v Frog (1974) 48 ALJR 481
Queensland v J L Holdings Pty Ltd (1997) 71 ALJR 294
The Commonwealth v Verwayen (1990) 170 CLR 394
Ramton v Cassin (1995) 38 NSWLR 88
Cohen v McWilliam (1995) 38 NSWLR 476
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
Bryant v Commonwealth Bank of Australia (1995) 130 ALR 129

REPRESENTATION:

Counsel:

Appellant:	Mr S Southwood
Respondent:	Mr T Riley QC

Solicitors:

Appellant:	Cridlands
Respondent:	Ward Keller

Judgment category classification:	B
Number of pages:	19

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP5 of 1996

BETWEEN:

ROBERT HICKS

Appellant

AND:

BRIDGESTONE AUSTRALIA LIMITED

Respondent

CORAM: MARTIN CJ, GALLOP AND MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 29 May 1997)

MARTIN CJ and GALLOP J: This is an appeal against an order of a single Judge of this Court dismissing an appeal from the Work Health Court which had rejected the appellant's claim for compensation on total incapacity rates arising out of an injury at work sustained on 17 March 1992 and refused an application to amend his claim so as to seek compensation for partial incapacity for work. By application dated 29 November 1992, the appellant claimed compensation in the Work Health Court claiming that he suffered an injury in the course of his employment by the respondent. The claim was that initially he was totally incapacitated for work from 17 March to 5 April 1992 (for which he had been paid compensation) and again from

26 June 1992 and continuing. He returned to work with the respondent on 6 April 1992. The appellant sought orders that on the basis of total incapacity for work he was entitled to,

> *(i) Weekly payments of compensation from 26 June 1992 and continuing;*
> *(ii) Additional payments for late weekly payments pursuant to s89 of Work Health Act;*
> *(iii) An order that the Employer pay interest pursuant to s109(2) of the Work Health Act;*
> *(iv) In addition to an order for interest pursuant to s109(2) of the Work Health Act, an order that the Employer pay punitive damages of up to 100% of interest awarded pursuant to s109(2) of the Work Health Act;*
> *(v) An order that the Employer take all reasonable steps to provide the Worker is suitable (sic) employment or, if unable to do so, to find suitable employment with another employer;*
> *(vi) An order that the Employer, so far as is practicable, participate in efforts to retrain the Worker;*
> *(vii) Medical, surgical and related expenses;*
> *(viii) Costs taking into account the efforts of the Worker made before the making of this application in attempting to come to an agreement about the matter in dispute with the Employer.*

By its answer, the respondent admitted employment and admitted that the appellant was incapacitated for work between 17 March and 5 April 1992 as alleged in the appellant's statement of claim but did not admit that the appellant was totally incapacitated for the whole of that period. Further, the respondent denied, inter alia, that the appellant was totally incapacitated for work from 26 June 1992 and, accordingly, that the appellant was entitled to the relief set out above.

The application was heard by the Magistrate in the Work Health Court commencing on 22 November 1993 and concluding on 25 November 1993. The

Magistrate refused the appellant's claim for compensation. He delivered written reasons for judgment and at the end of those written reasons he expressed his grounds for refusing the application in the following terms,

> *The worker had clearly failed to prove his case before me on the balance of probabilities.*
>
> *Of the four issues identified by Mr McCormack (counsel for the appellant), at the commencement of the hearing, I make the following findings:*
>
> 1. *The worker had failed to satisfy me on the balance of probabilities that he suffers from any injury;*
>
> 2. *The worker has failed to satisfy me on the balance of probabilities that he suffers from any injury arising out of the incident on 17 March 1992;*
>
> 3. *The worker has failed to satisfy me on the balance of probabilities that he is totally incapacitated for work as the result of any injury;*
>
> 4. *The worker has failed to satisfy me on the balance of probabilities that he is not capable of earning any amount during normal working hours if he were to engage in the most profitable employment, if any, reasonably available to him.*

In context, these findings must be taken to refer to the period from the date of the accident to the date of trial.

The appellant appealed to the Supreme Court pursuant to the right of appeal conferred by s116 of the *Work Health Act* which provides for an appeal to the Supreme Court on a question of law. On the hearing of that appeal, counsel for the appellant identified the errors of law as being of three types namely,

(i) the decision by the Work Health Court that the appellant had not established that he had suffered an injury within the meaning of s53 of the *Work Health Act*; (ii)

(ii) that he had not established that the injury sustained had resulted in incapacity; and

(iii) (iii) the refusal of the Work Health Court to allow a late amendment to the appellant's claim to allow him to rely on an alternative basis for compensation namely, partial incapacity for work.

The Supreme Court dismissed that appeal and affirmed the decision of the Work Health Court dated 3 December 1993 dismissing the appellant's claim. The appellant now appeals to this Court pursuant to s51(1) of the *Supreme Court Act*. It is well established that the nature of an appeal pursuant to s51(1) of the *Supreme Court Act* is as set out in *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 and in *Wilson v Lowery* (1993) 110 FLR 142 namely, that on appeal to the Court of Appeal, it would be inappropriate to allow the appeal on any basis other than a question of law in the same way as the restricted appeal from the Work Health Court to the Supreme Court. Gallop J expressed that opinion in *Tiver Constructions* (supra) and in a separate judgment, Martin and Mildren JJ expressed a similar opinion. They said that an appeal pursuant to s51(1) is restricted to a question of law and an appeal from that court to a Court of Appeal obviously cannot be on any other question particularly one involving a question of fact. That decision was followed in *Wilson v Lowery* (supra).

On the hearing of this appeal, counsel for the appellant relied on the same grounds of appeal as relied upon before the Supreme Court.

The right of a worker to compensation is prescribed by s53 of the *Work Health Act* in the following terms,

> *Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his –*
>
> *(a) death;*
>
> *(b) impairment; or*
>
> *(c) incapacity,*
>
> *there is payable by his employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed.*

Injury

In addressing the factual question of whether the appellant suffered an injury within the meaning of s53, the Magistrate held that it was necessary for the Work Health Court to determine on the balance of probabilities what actual injury the appellant had incurred on 17 March 1992. It appears from his written reasons that in the course of final submissions he had posed that very question to counsel appearing for the parties.

Counsel for the respondent submitted to the Magistrate that the evidence was insufficient to enable the Work Health Court to decide on the balance of

probabilities what the actual injury was on 17 March 1992. Counsel for the appellant submitted on the other hand that it was not necessary to be specific and that all the Work Health Court had to find was that there was an injury at work without specifically finding what that injury was.

The Magistrate rejected that latter submission. He further held that it was necessary for the appellant to establish a physiological change in order to establish that he had suffered an injury. He went on to say that the medical evidence did not enable him to find that any physiological change had occurred in the appellant's back or any part of his back on 17 March 1992. That finding was made notwithstanding an admission on the pleadings that an injury had occurred to the appellant on 17 March 1992 (although not admission of the type of injury that had been sustained) and notwithstanding that there was also in evidence (exhibit 3), a letter dated 27 March 1992 from the respondent's insurance company to the appellant accepting liability for compensation pursuant to s85(1)(a) of the *Work Health Act*.

On the hearing of the appeal, the Supreme Court reviewed the Magistrate's treatment of the issue of whether the appellant had suffered an injury or not and went on to say, after reviewing some authorities on the matter,

> *I consider that it is clear that in normal usage `physical injury' means `physical hurt or harm, or damage'; this connotes disturbance of the physiological state of the body - see Accident Compensation Commission v McIntosh [1991] 2 VR 253 at 256-7, per Murphy J. Physiological change is simply change to the functioning of the human body; compensable `physical injury' embraces harmful physiological change to which the employment was a contributing factor - see Kellaway v Broken Hill South Ltd (1944) 44 SR (NSW) 210 per Jordan CJ at 212 and Oates v Earl Fitzwilliam's Collieries Coy [1939] 2 All ER 498 at 502.*

`Injury' is commonly defined in workers' compensation legislation as it is in s3(1). I accept Mr Barr's submission at p19 as to the formulation of the question to be addressed. However, whether `injury' is regarded as meaning "harm or damage" or "physiological change" or "a harmful effect" or "a disturbance of the normal physiological state" does not matter; all of these expressions mean essentially the same thing. I accept the submission by Mr Tippett of counsel for the respondent that his Worship's formulation of the question did not affect the outcome. The harm or damage to the body must of course arise "out of or in the course of" the worker's employment.

Injury is defined in s3 of the Act as follows,

... "injury", in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provision of this Act out of or in the course of his employment and includes –

(a) a disease; and

(b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease,

but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment.

In our view, the evidence before a Work Health Court clearly established that the appellant suffered an injury within the meaning of s53. The injury was described by Dr Baddeley, orthopaedic surgeon, in his reports of 10 November 1992 and 8 June 1993, and in his oral evidence, as a "classic facet joint injury".

There is no authority to support the Magistrate's approach to the proof of injury. A finding of the precise physiological change was not necessary. There was evidence to support a finding of facet joint injury and the Magistrate should

have been satisfied, on the balance of probabilities, of that ingredient of the appellant's statutory right to compensation.

In failing to be so satisfied, the Magistrate made an error of law and in failing to correct that error, the Supreme Court likewise made an error of law. Far from not affecting the outcome of the claim, as submitted by the respondent and accepted by the Supreme Court, the Magistrate's finding was fatal to the appellant's claim in the Work Health Court.

However, as Starke J said in *Williams v Metropolitan Coal Co Ltd* (1948) 76 CLR 431 at 444,

> *Compensation is not payable for the injury but for loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity in the future is less than it was before the injury.*

That leads us to the second question of law raised on appeal, namely, incapacity.

Incapacity

Having held that it was necessary for the appellant to establish, on the balance of probabilities, what actual injury he incurred on 17 March 1992, and that the appellant had failed to establish that fact, the Magistrate held that, if a finding could not be made in relation to that aspect, it was impossible for him to determine what incapacity (if any) or what medical treatment (if any) reasonably or necessarily followed from that injury. Later in his reasons, the Magistrate said that he was unable to find, on the balance

of probabilities, that the worker was incapacitated either totally or partially for work as a result of an injury out of which his incapacity arose or which materially contributed to it as a result of anything that occurred at work with the respondent on 17 March 1992.

In his ruling on this aspect of the appeal to the Supreme Court, the Judge of that Court could find no fault in that line of reasoning. In our respectful opinion there were errors of law at both levels and this Court should intervene to correct those errors.

The refusal to allow an amendment of the pleadings

There was an application before the Magistrate for leave to amend the statement of claim so as to add an alternative claim for partial incapacity. In dealing with that application, the Magistrate delivered oral reasons in which he set out the history of the matter. He referred to the fact that the statement of claim had been filed on 27 November 1992, which was about one year before the matter came on for final hearing. The matter had been set down for hearing on 1 June 1993 for four days. That hearing was vacated on the application of the appellant due to the unavailability of his medical expert. The hearing was adjourned to commence on 22 November 1993 for four days and the appellant was ordered to pay the costs thrown away by reason of the adjournment. When the matter came on for hearing again on 22 November 1993, counsel for the parties respectively outlined the issues for determination. The case proceeded before the Magistrate.

The appellant gave evidence throughout the whole of the day on 22 November 1993. He continued his evidence on 23 November 1993 when his evidence concluded. There was then some further evidence on 24 November 1993. Counsel for the appellant aired for the first time the possibility of an amendment to the statement of claim and raised the possibility of partial incapacity being an issue.

Counsel for the appellant then abandoned that application and the matter proceeded without the application being formally made. The matter proceeded and on 24 November 1993, the appellant's medical expert, Dr Baddeley, gave evidence. The appellant then closed his case.

The respondent opened its case and called certain evidence. The matter was then adjourned to 25 November 1993. When the matter resumed on that day, counsel for the appellant made a formal application to amend the statement of claim so as to add an alternative claim for partial incapacity.

In rejecting the application, the Magistrate noted that the issues between total and partial incapacity were distinct and separate issues. He said that in deciding whether the application should be granted, there were a number of considerations which he had to take into account. He said that he was mindful that a party can normally amend their pleadings at any stage prior to judgment and that an amendment should not be lightly refused. He also took into account the need to consider any prejudice that might flow from the amendment and whether any such prejudice was such as could be compensated adequately by an award of costs. He included in prejudice, prejudice to the respondent. He also took account of what he described as,

> *... the good workings of this Court and the need of this Court to operate efficiently and so that listings are not delayed.*

He referred to the supervisory role of the Court. He then referred to the fact that on the medical evidence available to the appellant, he was surprised that no application had been previously made to amend the statement of claim. He thought that it was obvious to anybody properly advising the appellant that, given the terms of the report, an amendment to the statement of claim would need to be considered.

Having listened to all the arguments, he was satisfied that the respondent had conducted its case, prepared its evidence, conducted its cross-examination and prepared its whole case on the basis of the pleading of total incapacity only and if an amendment were made, substantial prejudice would be caused to the respondent. He said that if the amendment were made at that time, what had gone before in the previous three days would count for nothing and in his view the only way that prejudice could be prevented to the respondent would be to have the whole case start again. That, in his view, was totally unacceptable and went well beyond what could be compensated by an award for costs. Accordingly he refused the application to amend.

In rejecting the appeal to the Supreme Court, the learned Judge said that it was clear that the amendment would have caused the employer substantial prejudice. He adopted submissions on behalf of the respondent that the Magistrate made no error in his ruling, noting that the issues between the parties had been clearly defined and numerous preliminary conferences held pursuant to s107 of the *Work Health Act*.

He said the question of amendment had not arisen suddenly as far as the appellant was concerned, the employer had expressly relied on the appellant's conduct of the proceedings to its detriment if the amendment were allowed and the appellant had proceeded to press his claim on the basis of total incapacity *simpliciter* with full knowledge. In short, his Honour held that the Magistrate having given full consideration to the matters placed before him on the application, the ground of appeal based upon the refusal to allow the amendment was not made out. His Honour noted incidentally from s104 of the *Work Health Act*, that it was still open to the worker to bring a further application based on partial incapacity.

It was submitted to this Court on appeal that it was an error of law for the Magistrate to refuse the amendment and that error was perpetuated by the refusal of the Supreme Court to allow an appeal based on that error of law. The error identified was that of failing to give reasons why an alleged prejudice suffered by the respondent could not be cured by an adjournment on costs. It was further submitted that it was clear that the respondent had conducted its case on two main grounds,

(a) the appellant could not prove any incapacity was caused by the incident of 17 March 1992; and

(b) the appellant was partially incapacitated.

It was further submitted that the work available to the appellant was thoroughly canvassed and in the circumstances, no prejudice arose which could not be cured by an adjournment with costs.

Lastly, it was submitted that there was a failure in both the Work Health Court and the Supreme Court to give adequate weight to the prejudice that would be sustained by the appellant if the amendment was not allowed.

Having regard to the Magistrate's findings about injury and incapacity, it was strictly unnecessary to consider the appellant's application to amend so as to add an alternative claim for compensation on the basis of partial incapacity. If the appellant had failed to prove injury and incapacity flowing from the injury, the question whether the appellant later became totally or partially incapacitated did not need to be decided. However, because, in our opinion, the Magistrate wrongly decided those issues against the appellant, it is necessary for this Court to consider and determine whether an amendment should have been granted.

The starting point is the well known passage of the judgment of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 where his Lordship said, at 710,

> *Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.*

Reference might also be made to the decision of the High Court in *Clough and Rogers v Frog* (1974) 48 ALJR 481. The High Court, in allowing appeals before it, adopted the words of Bowen LJ in *Cropper v Smith* (supra) and said, at 482,

> *As the defence, if established, would be a complete answer in either action, the amendments sought should have been allowed unless it appeared that injustice would thereby have been occasioned to the respondent, there being nothing to suggest fraud or improper concealment of the defence on the part of the appellants. With the exception of the suggestion of prejudice arising in respect of the loss of the possible claim against the nominal defendant, the matters relied upon by the respondent in opposition to the amendment sought go at the most to delay and irregularity only, matters which are relevant to costs but do not constitute injustice to the respondent in the sense in which that expression is used.*

In *Queensland v J L Holdings Pty Ltd* (1997) 71 ALJR 294, the High Court had to determine an appeal from a decision of the Full Court of the Federal Court affirming the decision of the primary judge disallowing a motion to amend a defence. The majority of the High Court, Dawson, Gaudron and McHugh JJ said, at 296,

> *Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.*

Later, their Honours said, at 297,

> *Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application.*

In his separate judgment, Kirby J, having reflected upon the differences of judicial opinion and evolving case law on amendments, considered the relevant approaches to pleading amendments. He itemised the circumstances which may tend to favour the consideration of indulgence to a party applying for an amendment and included a circumstance where amendment would be the only way in which the true issues and the real merits, factual and legal, can be litigated and artificiality avoided (see *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 456; *Ramton v Cassin* (1995) 38 NSWLR 88 at 91-92; special leave to appeal to the High Court of Australia refused 15 April 1996).

He also observed that departures from a court ordered timetable, whilst relevant, are not decisive (see *Cohen v McWilliam* (1995) 38 NSWLR 476 at 478, per Priestley JA), and said that orders for amendment are the servants of justice.

Lastly, Kirby J reflected, at 307,

> *Whilst taking all of the considerations relevant to the circumstances of the case into account, the judge must always be careful to retain that flexibility which is the hallmark of justice. New considerations for the exercise of judicial discretion in such cases have been identified in recent years. But the abiding judicial duty remains the same. A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or litigants generally, and on the public. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved.*

It is not an injustice to allow the amendment whereby the respondent may be found to be liable to the appellant. It may well be an injustice to

deprive the appellant of the opportunity of pursuing the claim for partial incapacity for work bearing in mind it was the respondent who called the evidence upon which that claim might be based.

We are of the firm opinion that the discretion of the Magistrate in refusing to allow an amendment to add an alternative claim for partial incapacity miscarried for a number of reasons.

First, the statutory right to compensation prescribed by s53 is predicated upon incapacity. The entitlement to compensation, whether at total or partial incapacity rates, is not differentiated in the statutory right provided by s53. Accordingly, in pleading a claim for the statutory right in strict pleading, it is only necessary to allege incapacity. The extent of the incapacity, whether total or partial, is a matter of particulars. Hence the Magistrate was considering an application to amend the particulars pleaded rather than the statutory right. It that sense he approached the exercise of his discretion in the wrong way.

Secondly, he failed to appreciate that if he confined the appellant to the claim for total incapacity as pleaded, the appellant may well have been precluded from ever making a claim for partial incapacity, see *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 and *Bryant v Commonwealth Bank of Australia* (1995) 130 ALR 129. This was a submission on behalf of the appellant to this Court. We have some doubt about whether that is a good submission but it is unnecessary to decide that question.

In our opinion, the amendment should have been allowed. In our opinion, the application to amend should, in the new set of circumstances, be allowed by

this Court in accordance with the principles set out above and in the light of findings of injury and incapacity. Such a course does not involve any irremedial prejudice to the respondent. There would be substantial prejudice to the appellant if the amendment were not to be allowed.

The orders we propose are that the appeal be allowed, the orders of the Supreme Court and Work Health Court be set aside, the appellant have leave to amend the statement of claim so as to add an alternative claim for partial incapacity and that there be a new trial in the Work Health Court in accordance with this Court's reasons. We would also order the respondent to pay the appellant's costs of the appeal to the Supreme Court and costs of the appeal to this Court.

MILDREN J: I agree with the other members of the court for the reasons they give that it was not necessary for the appellant to establish what precise physiological change occurred in the appellant's back on 17 March 1992 to establish that he had suffered an "injury" as defined by the *Work Health Act*. The learned Magistrate erred in law, because the facts as found or not in contention relating to the question of whether or not the worker's condition amounted to an "injury" within the meaning of the Act is a question of law, (see: *Collector of Customs v Cozzolanec Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; *Cowell Electric Supply Company Ltd v Collector of Customs* (1995) 127 ALR 257; *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 329 at 245) and that question should have been answered in the appellant's favour.

Further, the definition of "injury" includes a "disease" which is defined to include "a physical or mental ailment, disorder or morbid condition, whether of

sudden or gradual development ..." The point was not raised in argument, but it seems to me that the words "physical ailment", are wide enough to include a "facet joint injury", or for that matter, a painful back condition, whatever may be the cause. *Favelle Mort v Murray* (1976) 8 ALR 649, and the authorities referred to by Kearney J and by the learned Magistrate dealt with very different statutory definitions of "injury" than that which appears in this Act. Accordingly, I would doubt whether it is necessary to establish a physiological change at all, in order to establish an injury within the meaning of the Act.

I agree also that that error infected the learned Magistrate's decision that the appellant was not incapacitated for work in the period after his dismissal from work on 26 June 1992 as a result of the injury on 17 March 1992. The learned Magistrate found (a) that the appellant's back was not producing symptoms or pain when he returned to work on 2 April 1992; (b) he could not return then to heavy work because he was at risk of injury; (c) Notwithstanding finding (b), whatever happened to his back had resolved by 2 April 1992 (despite the lack of any evidence to support this finding); (d) notwithstanding (c) the appellant still suffered pain in his lower back when he returned to full duties on about 16 April which affected his ability to perform his full duties (e) the appellant's case that the pain was related to the injury on 17 March 1992 was not made out because he could not find that he had suffered any injury on 17 March 1992 (f) the painful back may have been due, for example, to some pre-existing underlying condition which persisted, as well as a number of other possibilities which his Worship canvassed, and he could not decide which. However, there was no evidence to support any of these other possibilities, as his Worship noted. In these circumstances, had his Worship correctly addressed the question of whether the

appellant had suffered an injury, as defined, on 17 March 1992, he ought to have had no difficulty in finding that the appellant was still at least partially incapacitated for his work, in the physical sense, in that he was unable to perform the full extent of his duties when he returned to work on 2 April 1992.

I agree also that the discretion to refuse the amendment to allege partial incapacity miscarried. There was no basis for the finding of his Worship that the respondent would be prejudiced by allowing the amendment, because it would be necessary to "restart" the whole case all over again, and this prejudice could not be compensated for by an order for costs.

Counsel for the respondent suggested that a costs order would have been worthless, because of the appellant's lack of funds. There are two answers to this submission. First, that submission was not relied upon by the learned Magistrate. Secondly, there was no evidence that the appellant had no assets sufficient to meet a costs order. Further, the learned Magistrate overlooked, and did not consider, the possible prejudice to the appellant if the amendment was not granted. The principles discussed in *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589, and *Bryant v Commonwealth Bank of Australia* (1995) 130 ALR 129 applying and developing the principle expressed by Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at 115; 67 ER 319, would, at the very least, have placed the appellant in serious jeopardy of being prevented from litigating in any subsequent proceedings that he suffered partial incapacity. I agree that the amendment ought to have been allowed and must now be allowed in the circumstances presently prevailing.

I agree with the orders proposed by Martin CJ and Gallop J.