

Brogan v Territory Insurance Office Board [2009] NTSC 16

PARTIES: DOLORES JANE BROGAN,
LUCY GERARDINE CAMPBELL-
BROGAN,
KATE CAMPBELL-BROGAN,
EMMA CAMPBELL-BROGAN,
SAMARA BLURTON,
SIMONE BROGAN AND
JESSICA ANN BROGAN

v

TERRITORY INSURANCE OFFICE
BOARD

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: M2 of 2006 (20622738)

DELIVERED: 22 April 2009

HEARING DATES: 28 and 29 July 2008

JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

MOTOR ACCIDENTS – COMPENSATION – Reference under s 29(1) of Motor Accidents (Compensation) Act (NT) – injuries not the result of an accident as defined by s 4 of the Act – internal physiological process is not an occurrence on a public street – reference is dismissed – no benefits payable to the applicants under the Act – s 22 and s 23 of the Act not satisfied

Augusto v Board of Territory Insurance Office (1990) 66 NTR 1; *The Commonwealth v Hornsby* (1960) 103 CLR 588; *Government Insurance Office of New South Wales v King* (1960) 104 CLR 93; *Kelly v R* (2004) 205 ALR 274; *Project Blue Sky v ABA* (1998) 194 CLR 355; *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation (No 2)* (1980) 29 ALR 333, applied

Government Insurance Office (NSW) v R W Green & Lloyd Pty Ltd (1965) 114 CLR 437; considered

Dickinson v Motor Vehicle Insurance Trust (1987) 163 CLR 500; *Fawcett v B.H.P. By-Products Pty Ltd* (1960) 104 CLR 80; *Shannon v Territory Insurance Office* (1993) 3 NTLR 144; *State Government Insurance Commission v Stevens Bros. Pty Ltd* (1984) 154 CLR 552, referred to

REPRESENTATION:

Counsel:

Appellant:	R Wild QC
Respondent:	M C Livesey QC

Solicitors:

Appellant:	Ward Keller
Respondent:	CridlandsMB

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

Brogan v Territory Insurance Office Board [2009] NTSC 16
No M2 of 2006 (20622738)

BETWEEN:

**DOLORES JANE BROGAN,
LUCY-GERARDINE CAMPBELL-
BROGAN,
KATE CAMPBELL-BROGAN,
EMMA CAMPBELL-BROGAN,
SAMARA-LEE BLURTON,
SIMONE BROGAN AND
JESSICA ANN BROGAN**
Applicants

AND:

**TERRITORY INSURANCE OFFICE
BOARD**
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 22 April 2009)

Introduction

- [1] This is a reference under s 29(1) of the Motor Accidents (Compensation) Act (the Act¹). The applicants are aggrieved by a determination of the

¹ References to “the Act” hereafter are to the Motor Accidents (Compensation) Act as it stood in 2005 and 2006 prior to the amendments made by Act No. 9 of 2007 which was assented to on 17 May 2007 and commenced on 1 July 2007.

Board of the Territory Insurance Office² to uphold the designated person's decision to reject their application for benefits under Part V³ of the Act.

- [2] The applicants are the surviving spouse of Martin James Campbell, who is deceased, and her six children. Mr Campbell died of heart failure on Blue Water Road, Melville Island on 30 October 2005. Before he died Mr Campbell kick-started his motorcycle on Blue Water Road and then rode the motorcycle on the road. After Mr Campbell died the applicants applied for lump-sum compensation in respect of his death and for dependent children's benefits under s 22 and s 23 of the Act.
- [3] The Board made its determination on 8 August 2006. Both the Board and the designated person determined that no benefits were payable to the applicants because the injuries sustained by Mr Campbell were not the result of an accident as defined by s 4 of the Act⁴.

The issues

- [4] The principle issue is: was Mr Campbell's unmet need for increased blood flow which occurred when he kick-started his motorcycle on Blue Water Road an occurrence on a public street? That is, can an internal physiological process be an occurrence on a public street within the meaning of the definition of "accident" in s 4 of the Act? Resolution of this issue

² Hereafter, "the Board".

³ Payments in respect of death; no claim was made for funeral expenses.

⁴ As s4 of the Act stood at the time of Mr Campbell's death; the definition of accident has since been amended. The definition of accident is now contained in s4A of the Act. Section 4A was inserted by the Motor Accidents (Compensation) Amendment Act 2007 being Act No. 9 of 2007 which commenced on 1 July 2007.

involves a consideration of what limits, if any, are to be found in the expression “an occurrence on a public street”.

- [5] In my opinion, no benefits are payable to the applicants under the Act and the reference should be dismissed. The requirements of s 22 and s 23 of the Act have not been satisfied. An internal physiological process is not an occurrence on a public street. There was no accident on Blue Water Road.

The evidence

- [6] In support of their case the applicants tendered a folder of documents which contained the statements of Matthew Palmer, Dolores Jane Brogan, John Lawrence Long, Miriam Veronica Cubillo, Gagetan John Dunn, Ralph Mungatopi, Dennis Henry, Police Constable Nathan Mamo, Police Constable Paul Maccioni, the records of Mr Campbell from the Pirlangimpi Health Centre, a statutory declaration of nurse Christopher Binks, the toxicology report of Dr Timothy Lawrence Scott, the autopsy report of Dr Terrence John Stinton and two medical reports of a cardiologist, Professor Aubrey Pitt. Oral evidence was also led from Professor Pitt and Ms Brogan. Only Ms Brogan and Professor Pitt were cross examined.
- [7] During her cross examination Ms Brogan described the route from Pirlangimpi to Kiluimpini Swamp and the route from Kiluimpini Swamp to Rangunini. She stated: there was no plan for Mr Campbell to return to Pirlangimpi before travelling to Rangunini; and she did not know why he travelled back towards Pirlangimpi before he died. She marked on a map:

the road to Kiluimpini Swamp, the road to Rangunini, the location where Mr Campbell was when he was seen kick-starting his motorcycle by Mr Long and Mrs Cubillo, and the location where Mr Campbell's body was found on the side of Blue Water Road.

- [8] During his oral evidence in chief, Professor Pitt stated it was significant that: Mr Campbell had survived the development of the thrombosis occluding his left circumflex coronary artery without any major symptoms; on the morning of 30 October 2005, Mr Campbell felt well enough to undertake the travel to Kiluimpini Swamp and Rangunini on his motorcycle; Mr Campbell died a very short time after he was seen kick-starting his motorcycle by Mr Long and Mrs Cubillo; Mr Campbell's action of kick-starting his motorcycle on Blue Water Road (at the location 2 kilometres East of where Mr Campbell's body was found) was a causative factor of his death; and the only difference between his opinion as to the cause of Mr Campbell's death and Dr Sangster's opinion as to the cause of death was that Dr Sangster was of the opinion that as a result of kick-starting his motorcycle the night before Mr Campbell may have already been suffering from a minor rhythm disturbance of his myocardium which may have increased the risk of heart failure.

- [9] During his cross examination, Professor Pitt stated: Mr Campbell's death was a sudden death; his death was so quick that there was no myocardial

infarction⁵; despite the thrombosis in the left circumflex coronary artery there was still blood flow to Mr Campbell's myocardium⁶; the thrombosis was not in the acute stage when Mr Campbell died; ischemia is not infarction; ventricular fibrillation occurs due to a fluctuation or change in the electrical current which controls the contractions of the left and right ventricles of the heart; there was no evidence of heart muscle death, scarring or fibrosis; there was a temporal relationship between Mr Campbell kick-starting his motorcycle on Blue Water Road and his death; the cause and effect between kick-starting the motorcycle and Mr Campbell's death was apparent; Mr Campbell is likely to have suffered ischemia which triggered a disorganising electrical current or unstable electrical activity that resulted in ventricular fibrillation; during ventricular fibrillation the heart muscle does not pump blood to other parts of the body it just quivers; no contraction of the heart muscle or no pumping of blood by the heart results in unconsciousness and then, within three minutes, irreversible brain damage and death.

[10] In support of its case the respondent tendered the medical report of a cardiologist, Dr John Sangster, and three maps of Melville Island which showed the routes travelled by Mr Campbell and Ms Brogan and their three children on Melville Island on Sunday 30 October 2005. Dr Sangster was not cross examined.

⁵ Death of the heart muscle.

⁶ Heart muscle.

The facts

- [11] Mr Campbell was a resident of the Territory. He was born in Darwin on 6 March 1963 and died on 30 October 2005. He was 42 years of age when he died. He lived continuously with the first applicant, Ms Brogan, as husband and wife from 1994 until his death. They lived at Pirlangimpi on Melville Island.
- [12] Ms Brogan and Mr Campbell had three children, Lucy-Gerardine Campbell-Brogan, Kate Campbell-Brogan and Emma Campbell-Brogan. They were all under 16 years of age when Mr Campbell died. Ms Brogan also had three children from previous relationships, Samara-Lee Blurton, Simone Brogan and Jessica Ann Brogan. Samara-Lee Blurton turned 18 years of age shortly after Mr Campbell died. All of Mrs Brogan's children were treated by Mr Campbell as members of his family. All of the applicants were primarily dependent on him for financial support and Mr Campbell stood in loco parentis to each of the children. There was no issue in the proceeding about the applicants' dependency on Mr Campbell. However, there was no evidence before the Tribunal that Samara-Lee Blurton was a full time student when Mr Campbell died. She was 17 years of age when he died.
- [13] Mr Campbell was employed full time as a grader operator by the Tiwi Islands Local Government. He graded unsealed roads on Melville Island. He was a hard worker with a good employment history.

- [14] Mr Campbell smoked 20 cigarettes a day and cannabis about once a week. At one time he was a heavy drinker. His consumption of alcohol decreased after he began living with Ms Brogan and in 1997 he stopped drinking alcohol. He stopped drinking alcohol after Ms Brogan gave birth to their first child. He drank four or five cans of Coca Cola a day.
- [15] For five years before his death, Mr Campbell complained to Ms Brogan of neck aches and lower back pain. His aches and pains increased over the years. He put his neck ache and back pain down to the hard work of a grader driver. Apart from these complaints he seemed to be in good health. He was not overweight. He did not suffer from chest pains or a shortness of breath.
- [16] Mr Campbell was 187 cm tall and he weighed 72 kilograms. He was a tall, thin man. He and his family spent a lot of their recreational time fishing and hunting for magpie geese, ducks and buffalo.
- [17] On Saturday 29 October 2005, Mr Campbell took delivery of an unregistered and uninsured, second-hand 250cc Yamaha off-road motorcycle. He went for a ride on his motorcycle after work that evening. The motorcycle did not have an electric starter. It required kick-starting. It was difficult to start. Mr Campbell had to give the motorcycle four or five kicks before it started.
- [18] After riding his motorcycle on 29 October 2005, Mr Campbell complained to Ms Brogan about “feeling funny” and of having a “racing heart”. He could feel the beats of his heart in his chest. He said, “I must give those cigarettes

up”. This was the first and only time he complained to Ms Brogan about these symptoms. During her oral evidence in chief, Ms Brogan said that Mr Campbell only complained to her about these symptoms on one occasion.

[19] On the morning of Sunday 30 October 2005, Mr Campbell road his motorcycle to Kiluimpini Swamp where he was met by Ms Brogan and their three youngest children who travelled to the swamp in a motorcar. Before she left home, Ms Brogan saw Mr Campbell trying to kick-start his motorcycle three or four times before it started. Mr Campbell and his family travelled to the swamp to see if there were any birds at the swamp.

[20] When Ms Brogan met Mr Campbell at the swamp he was happy and in good spirits. They stayed at Kiluimpini Swamp for about five minutes.

Mr Campbell did not get off his motorcycle while he was at the swamp. As there was very little water and no birds at Kiluimpini Swamp, Mr Campbell and Ms Brogan decided to leave Kiluimpini Swamp and go to another swamp called Rangunini. Ms Brogan and the three children travelled by motorcar to Rangunini. Mr Campbell did not arrive at this destination.

[21] In order for Mrs Campbell and her three children to get to Rangunini from Kiluimpini Swamp, it was necessary for them to travel west along the road to Kiluimpini Swamp back towards Pirlangimpi for slightly more than one kilometre, then turn right and travel in a northerly direction for about 15 or 16 kilometres, and then again turn right and travel in a north easterly direction for four or five kilometres.

[22] At about 11.40 am on 30 October 2005, two of Mr Campbell's friends, Mr John Long and Mrs Miriam Cubillo, who were travelling in their motorcar, saw Mr Campbell near the turn-off to the road to Kiluimpini swamp. He was standing by his motorcycle and trying to kick-start it. By the time Mr Long and Mrs Cubillo stopped to see if he needed assistance, Mr Campbell had started his motorcycle. They asked if he needed assistance. He said, "Keep going, I'm alright". The location where Mr Long and Mrs Cubillo saw Mr Campbell kick-starting his motorcycle is a location about two kilometres west of the turn-off to Rangunini.

[23] Just before 12.50 pm on 30 October 2005, Mr Campbell's body was found slumped over his motorcycle on the side of Blue Water Road which is a public street as defined in the Motor Vehicles Act⁷. His body was found about two kilometres west of where Mr Long and Mrs Cubillo saw Mr Campbell kick-starting his motorcycle. Police and ambulance officers were called but Mr Campbell did not respond to Cardio Pulmonary Resuscitation. He died shortly after he was seen kick-starting his motorcycle.

[24] There were no visible signs of injury to Mr Campbell. The motorcycle appeared to have slowly come to rest with Mr Campbell attempting to control it. The motorcycle travelled for about 20 metres without the brakes being applied before falling on its left side. Police officers who attended

⁷ There was no issue about Blue Water Road being a public street. Nor was there an issue about whether the road to Kiluimpini Swamp was a public street.

the scene saw drag marks in the dirt road that were likely to be caused by Mr Campbell's left foot being dragged along the ground as the motorcycle was coming to a stop. Mr Campbell may have been using his left foot to slow and steady the motorcycle. The motorcycle did not collide with another motor vehicle or any other object.

[25] The location where Mr Campbell's body was found on the side of the road is about one and a half to two kilometres from the centre of Pirlangimpi. Mr Campbell's travels after he left Kiluimpini Swamp tend to suggest that instead of travelling towards Rangunini he was travelling back towards Pirlangimpi. Mr Livesey QC sought to rely on the inference that Mr Campbell was travelling back to Pirlangimpi to establish that Mr Campbell was already feeling ill and his heart had started to fail before Mr Long and Mrs Cubillo saw him kick-start his motorcycle near the turn-off to Kiluimpini Swamp. Mr Livesey said that such a conclusion was not excluded on the balance of probabilities. If this was the case, Mr Livesey argued, Mr Campbell's death could not be said to arise out of an occurrence on Blue Water Road.

[26] The respondent bears the evidentiary burden of establishing that Mr Campbell was travelling back to Pirlangimpi because his heart had already started to fail. In my opinion, the respondent has not discharged this evidentiary burden. There is any number of reasons why Mr Campbell may have been travelling back to Pirlangimpi. For example, he may have wanted to get some more cigarettes or his rifle to go duck shooting at Rangunini.

Mr Campbell did not complain of feeling unwell when he saw Ms Brogan at Kiluimpini Swamp and he did not complain to either Mr Long or Mrs Cubillo that he was feeling unwell. Nor did he ask them for their assistance to get back to Pirlangimpi. I find it most unlikely that Mr Campbell was travelling back to Pirlangimpi because he was already suffering from the initial stages of heart failure before he kick-started his motorcycle near the turnoff to Kiluimpini swamp.

[27] On post mortem, it was discovered Mr Campbell had pre-existing coronary artery disease. The finding at autopsy about his coronary arteries was: “The coronary arteries including the main trunks and major branches showed extensive atheroma. On examination of the circumflex branch of the left coronary artery, a 1 cm length of occluding organising thrombosis was identified at its origin. The atheroma at other sites had produced stenosis estimated maximally at 60%.”

[28] In his autopsy report Dr Stinton stated that the significant findings were:

- Superficial abrasions of the right knee, but no other evidence of recent trauma;
- Clinically significant coronary artery disease (coronary atherosclerosis), with the complete blockage of one of the major heart arteries (coronary artery thrombosis);
- Fluid accumulation in the lungs, consistent with acute heart failure; and
- A fracture of the sternum in a manner consistent with attempted cardio pulmonary resuscitation

[29] In his report dated 2 October 2007 Dr Pitt stated:

The information concerning the difficulty in starting the motorcycle and the report of the police findings of drag marks on the road to slow down or stop the motorcycle suggest in my opinion that shortly before his death Mr Campbell was subject to quite significant physical exertion.

...

At autopsy Mr Campbell was found to have significant coronary artery disease that is atheromatous plaques in his coronary arteries. The most significant finding was a long organising thrombosis occluding the left circumflex branch of the coronary artery. Extensive disease was present in the other arteries but it is stated in the autopsy report that there was no area of narrowing greater than 60 %. This is indicative of only moderate narrowing of the other vessels.

Importantly there was no macroscopic evidence of myocardial infarction, that is, an area of heart muscle death. ...

...

The circumstances of death of Mr Campbell are typical of patients with extensive coronary disease. He died suddenly. The mechanism of sudden death under these circumstances is nearly always due to sudden impairment of blood supply to the heart muscle and the development of the fatal rhythm disturbance of ventricular fibrillation. Under these circumstances it is common that there is no evidence of heart muscle damage or myocardial infarction. ...

...

Based on the limited evidence available ... the likely sequence of events is that the thrombus commenced possibly the night before his death when his partner reported Mr Campbell complaining of feeling unwell and a racing heart. The next day with the thrombus occluding the coronary artery the effort of riding his motorcycle including the effort of kick starting it; presumably having started the motorcycle he developed cardiac symptoms and the effort of trying to stop the motorcycle including the drag marks of his left foot further contributed to the fatal event. It is well documented in the medical literature that in patients with underlying coronary artery disease

significant physical exertion is a cause of sudden and unexpected death.

...

There is no doubt that the cause of death was coronary artery disease and the immediate precipitating factor was an occlusive thrombosis in the left circumflex coronary artery. Almost certainly this resulted in the development of the fatal rhythm disturbance of ventricular fibrillation.

It is well recognised that sudden death in patients with underlying coronary artery disease may be precipitated by physical exertion. In my opinion the difficulty in attempting to start his motorcycle and the difficulty in bringing his motorcycle to a halt when presumably symptoms arising from his heart had commenced are likely to have contributed to his death.

[30] In his report dated 15 July 2008 Professor Pitt stated:

In my opinion on the balance of probabilities, the effort of kick starting his motorcycle just prior to his death resulted in the circumstances of a cardiac event, most likely the rhythm disturbance of ventricular fibrillation that resulted in sudden death. ..., had Mr Campbell not undertaken that activity it is likely that he would not have died on that day.

[31] In his report dated 20 May 2008, Dr Sangster stated:

I agree that the cause of death was coronary artery disease. It would appear most likely that Mr Campbell suffered a sudden arrhythmia (most likely ventricular fibrillation) to cause his death. This arrhythmia did not appear to have been caused by an acute coronary thrombosis with or without infarction. The organizing thrombosis found in the circumflex artery ... would have caused a chronic reduction of the coronary artery blood flow. This would then mean any sudden strenuous activity would be capable of producing ischemia which itself may have then precipitated fatal arrhythmia. The presence of borderline left ventricular hypertrophy would also exaggerate this risk.

...

... The effect of the occlusive thrombosis in reducing coronary artery blood flow in a person with diffusely diseased coronary arteries would have made the myocardium vulnerable to ischemia and conditions of increased demand for oxygen (e.g. strenuous exertion) with subsequent risk of fatal arrhythmia.

In this particular incidence, increased demand [for oxygen] could be caused by vigorously trying to start the motorcycle or pushing it for a long distance. If the person was already experiencing an increased heart rate due to arrhythmia (e.g. atrial fibrillation), he would be even more vulnerable to fatal arrhythmia with increased activity.

In summary this unfortunate man was at significant risk of sudden arrhythmic death as a result of his coronary artery disease, particularly if he undertook any strenuous activity, and especially if he had been experiencing symptoms of a racing heart.

[32] The opinion of Dr Sangster about the cause of Mr Campbell's death accords with the opinion of Professor Pitt. The essence of Professor Pitt's opinion is the strenuous activity of kick-starting the motorcycle just prior to Mr Campbell's death resulted in the rhythm disturbance of ventricular fibrillation which resulted in sudden death. The essence of Dr Sangster's opinion is the sudden strenuous activity of kick-starting the motorcycle produced ischemia which then precipitated fatal arrhythmia.

[33] I understand the evidence of the cardiologists to be that, most likely, the strenuous physical activity of kick-starting the motorcycle created an increased demand for oxygen and blood to be supplied to Mr Campbell's myocardium. That is, more oxygen was required by the myocardium because it was necessary for the myocardium to work harder than usual when Mr Campbell kick-started his motorcycle. The increased demand for oxygen and blood placed greater physical pressure on Mr Campbell's

coronary arteries which led to a critical constriction or contraction in the lumen of the arteries which were already partially obstructed as a result of significant coronary artery disease or atherosclerosis. Alternatively, Mr Campbell's diseased coronary arteries were incapable of providing a sufficient supply of blood to meet the increased demand for oxygen in the myocardium. The impairment of blood supply and oxygen to the myocardium, in turn, triggered an uncoordinated or unstable electrical current within Mr Campbell's heart and the development of ventricular fibrillation. The ventricular fibrillation or quivering throughout the lower chambers of the heart resulted in the ventricles not being able to contract and pump blood from the heart – heart failure or cardiac arrest – and ultimately death.

[34] I accept the evidence of Professor Pitt and Dr Sangster. The heart failure suffered by Mr Campbell which resulted in his death was not simply the natural progression or culmination of his underlying antecedent heart disease. The physical exertion undertaken by Mr Campbell when he kick-started his motorcycle shortly before he died materially contributed to his death.

The relevant provisions of the Motor Accidents (Compensation) Act

[35] The applicants' entitlement to the payment of benefits under the Act is subject to the definition of "accident" in s 4 and the provisions of s 7 and s 22 of the Act as in force at the time of Mr Campbell's death.

[36] As this reference concerns events in the Territory and an unregistered and uninsured motorcycle the second and third limbs of the definition of “accident” in s 4(1)(a)(ii) and s 4 (1)(b) are not applicable. So far as is relevant to this reference, “accident” was defined in s 4 of the Act to mean an occurrence on a public street, caused by or arising out of the use of a motor vehicle, which results in the death of or injury to a person.

[37] So far as is relevant to this reference, s 7 of the Act stated, where a resident of the Territory dies in or as a result of an accident that occurred in the Territory there is payable to his spouse and any dependent child such benefits as are provided for in the Act. The principal purpose of s 7 of the Act is to specify the requisite nexus with the Territory that must be established before benefits are payable to a person under the Act.

[38] Section 22 of the Act states:

- (1) Subject to section 37, where the death of a qualifying person results from or is materially contributed to by an injury suffered in or as a result of an accident⁸ that occurred in the Territory or in or from a Territory motor vehicle, there is payable –
 - (a) to the person liable to meet the expense of the qualifying person’s funeral, a funeral benefit equal to –
 - (i) the cost of the funeral; or
 - (ii) 10% of the annual equivalent of average weekly earnings,

⁸ An occurrence on a public street caused by or arising out of the use of a motor vehicle: s 4 of the Act.

whichever is the lesser amount, and

(b) for the benefit of the qualifying person's spouse or dependent child or dependent children, or a spouse and a dependent child or dependent children –

(i) the prescribed proportions; or

(ii) in the case of a dependent child or dependent children such proportions as the Board determines on an application under subsection (2), having regard to the relative needs and degrees of dependency of the dependent child or dependent children,

of an amount equal to 156 times average weekly earnings at the time the payment is made. (*See* back note 6)

(2) For the purposes of subsection (1)(b), a person claiming to be a spouse or a dependent child of the deceased may apply to the Board for a determination under that subsection.

(3) For the purposes of subsection (1)(b)(i), the prescribed proportions are those specified in column 2 of the Table in respect of the spouse or dependent child or dependent children specified opposite in Column 1 of the Table.

TABLE

Column 1	Column 2
Dependants	Proportion
Spouse	100%
One child	100%
2 or more children	Equally between children
Spouse and one child	10% to child, balance to spouse
Spouse and not more than 5 children	5% to each child, balance to spouse
Spouse and more than 5 children	25% divided equally between children, balance to spouse

[39] The provisions of s 22(1) of the Act govern the entitlement to payment of the benefits referred to in s 21(1)(a), s 21(1)(b) and s 23 of the Act. The general provisions of s 7 of the Act must give way to the specific provisions contained in the stem of s 22(1) of the Act⁹. Section 7 is a qualifying provision. Satisfaction of the requirements of s 7 renders payable such benefits as are provided for in the Act. Once the requirements of s 7 of the Act are satisfied, it is necessary to go to s 22 to find the criteria under which benefits are payable upon the death of a qualifying person¹⁰. If s 7 of the Act were to apply in its entirety it would neutralise the specific requirements of s 22(1) of the Act. That was not the intention of the legislature.

[40] Under s 22(1) of the Act, it is necessary for the applicants to establish more than that Mr Campbell's death arose out of the use of his motorcycle on a public street. In order for the applicants to obtain benefits under the Act they must establish that, in addition to their relevant relationship with Mr Campbell and their dependency, there was:

1. the use of a motor vehicle in the Territory;
2. an occurrence on a public street caused by or arising out of the use of a motor vehicle (the occurrence);
3. an injury suffered in or as a result of the occurrence on a public street (the injury); and

⁹ *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (No 2) (1980) 29 ALR 333 at 347.

¹⁰ A person who is a resident of the Territory is a qualifying person: s 20 of the Act.

4. the death of a resident of the Territory which resulted from or was materially contributed to by the injury.

[41] The applicants must establish that there is a consequential nexus between the use of the motor vehicle, an occurrence on a public street, the injury and the death of Mr Campbell. The occurrence on a public street is a discrete event that is distinguishable from the injury and death of Mr Campbell.

[42] The payment of benefits under s 23 of the Act is subject to the criteria specified in the stem of s 22(1) of the Act. It is only by satisfying the criteria specified in s 22(1) of the Act that an applicant becomes entitled to the additional benefits provided by s 23 of the Act. Section 23 of the Act must be read together with s 22 of the Act. The benefits payable under s 23 of the Act are expressed to be in addition to the amount payable under s 22(1)(b) of the Act and the text of the operative part s 23(1) is similar to the text of the operative part s 22(1)(b) of the Act. Section 23(1) of the Act must be read in the context of the other provisions of Part V of the Act.

The applicants' argument

[43] The applicants accepted that to be entitled to the payment of benefits under the Act they had to meet the requirements of s 22 of the Act. The applicants' principal argument was:

1. Blue Water Road is a public road;
2. There was the use of a motor vehicle in the Territory – Mr Campbell kicked started, pushed or attempted to slow his motorcycle on Blue Water Road;

3. The use of the motorcycle caused or gave rise to an occurrence on Blue Water Road – Mr Campbell experienced an unmet need for an increased blood flow which was caused by or arose out of him kick-starting, pushing or attempting to slow his motorcycle;
4. Mr Campbell suffered an injury as a result of his unmet need for an increased blood flow – he suffered ischemia which precipitated arrhythmia and consequential fatal ventricular fibrillation; and
5. Mr Campbell died as a result of his ischemia, arrhythmia and consequential ventricular fibrillation.

[44] Mr Wild QC developed the applicants’ argument as follows.

[45] It was not suggested by the respondent that Blue Water Road was not a public road. The use of a motor vehicle includes starting the engine of a motorcycle preparatory to riding off. In *Government Insurance Office of New South Wales v King*¹¹ Menzies J stated:

I am not in doubt that to start the engine of a motor vehicle preparatory to driving off is part of the use of a motor vehicle itself ...

[46] The meaning of “accident” should be broadly construed. The Act should be interpreted generously because it is beneficial legislation. Legislation of this nature is to be construed, wherever possible, favourably to an applicant¹². In *Shannon v TIO*¹³ Kearney J stated:

Against this background Mr McIvor submitted that the Act was socially remedial legislation, should be construed in favour of the

¹¹ (1960) 104 CLR 93 at 99

¹² *Government Insurance Office (NSW) v R W Green & Lloyd Pty Ltd* (1965) 114 CLR 437 per Barwick CJ at 444

¹³ (1993) 3 NTLR 144 at 157

applicant, and the definition of accident should be broadly construed. It is true that “the Act should receive a broad and benign construction so as to prevent its obvious purpose from being defeated,” and “technicalities should not stand in the way of bona fide claims to benefits”: see *Jones v Motor Accidents (Compensation) Appeal Tribunal* (1988) 59 NTR 12 at 19 and 40.

[47] An occurrence on a public street is simply an incident or something that happens on a public street. Mr Campbell’s unmet need for an increased blood flow to his myocardium was something that happened or occurred on a public street. It makes no difference that the need for an increased blood flow was part of an internal physiological process. The evidence satisfied the criteria specified by the first limb of s 4 of the Act. The need for increased blood supply occurred on a public street and it arose out of the use of a motor vehicle.

[48] Mr Campbell’s need for an increased blood flow arose out of Mr Campbell’s use of his motorcycle. The expression “arising out of the use of a motor vehicle” was a broad and practical conception¹⁴ and the medical evidence established a temporal causal relationship between Mr Campbell’s physical exertion when kick-starting his motorcycle and his unmet need for an increased blood flow. The motorcycle was an old motorcycle and kick-starting the motorcycle was strenuous physical exercise.

[49] “Injury” is not defined in the Act. In the circumstances, “injury” in s 7 and s 22 of the Act should be given its ordinary meaning. The Court should

¹⁴ *Fawcett v B.H.P. By-Products Pty Ltd* (1960) 104 CLR 80 per Barwick CJ at 87; *State Government Insurance Commission v Stevens Bros. Pty Ltd* (1984) 154 CLR 552 at 555.

have regard to dictionary definitions of injury. The Australian Oxford Dictionary defines “injure” as “do physical harm or damage to; hurt; harm or impair”. The Australian Oxford Dictionary defines “injury” as “physical harm or damage”. The Shorter Oxford Dictionary defines “injure” as “to do hurt or harm to; to damage; to impair”. The Shorter Oxford Dictionary defines “injury” as “hurt or loss caused to or sustained by a person: harm, detriment, damage”. The Macquarie Dictionary describes “injure” as “to do or cause harm of any kind to; damage; hurt; impair”. The Macquarie Dictionary defines “injury” as “harm of any kind done or sustained; a particular form or instance of harm; severe bodily injuries”.

[50] Mr Wild QC submitted that when considering injury, the Court will be assisted by the following statement of Dixon CJ in *The Commonwealth v Hornsby*¹⁵:

I therefore return to the question whether the learned County Court judge's conclusion that Hornsby suffered an injury by accident should be upheld. Had it been possible to attribute the development of the thrombosis, the consequent ischemia and the resulting paralysis to the travelling or any incident or concomitant of the journey it would doubtless be easy to isolate it as an accidental injury. That perhaps is made clear by applying, mutatis mutandis, to a journey what was said in relation to the employment by Clauson L.J. at the conclusion of the judgment he delivered for the Court of Appeal in *Oates v. Earl Fitzwilliam's Collieries Co* and by Lord Atkin in *Fife Coal Co. v. William Young*. These passages are of course not free from the influence upon the conception of accidental injury of the double condition imposed by the English legislation under which not only must there be personal injury by accident but it must arise both out of and in the course of the employment. But the relation of external causes to physiological change as ground for characterizing it as accidental injury is the point of much that was

¹⁵ (1960) 103 CLR 588 at 593 to 594

said by this Court in *The Commonwealth v. Ockenden*. The physiological disaster, however, which Hornsby encountered, so suddenly from his point of view, as he journeyed to his work was not in any degree attributable to his journey. Its causation, as its occurrence, was entirely an internal matter. Yet its nature and the physiological changes that took place must be considered. There was the sudden operation of the processes upon the man himself and the immediate "injury". The processes meant an internal occurrence that can be clearly distinguished from the pathological conditions leading up to it, one consisting in a definite impairment of a centre of control of bodily movement. My opinion has fluctuated upon the question whether these factors are enough to make it right to characterize the event as injury by accident within the meaning that has been attached to that expression. But after full consideration I have reached the conclusion that the processes leading to Hornsby's "injury" cannot be regarded otherwise than as a gradual development of a disease terminating in conformity with the character of the disease in the formation, perhaps rapid, of a thrombus. It too closely resembles physiologically and pathologically the course and incidents of the occlusion of an atheromatous sclerotic coronary artery and its consequences. Upon that we have passed judgment in *The Commonwealth v. Mackey*, following or rather applying, *Ockenden's Case*. I therefore think that the conclusion reached by Judge Moore cannot be upheld.

[51] Finally, Mr Wild QC stated that the functioning of Mr Campbell's heart was damaged or impaired by his physical exertion when kick-starting his motorcycle. As a result of his physical exertion Mr Campbell's myocardium did not receive a sufficient supply of blood, his heart was subject to an unstable electrical current and the ventricles stopped contracting or could not contract. There was a harmful physiological change or bodily change that was the result of an external cause. The harmful physiological change occurred before Mr Campbell died.

[52] In the alternative, the applicants argued that:

1. Mr Campbell kick-starting his motorcycle was an occurrence on a public street which arose out of the use of the motorcycle; and
2. The use of the motorcycle was Mr Campbell riding the motorcycle along Blue Water Road before the motorcycle stopped and had to be kick-started.

[53] The second argument requires the Tribunal to make a determination that kick-starting the motorcycle on Blue Water Road was not the relevant use of the motorcycle. The argument is contingent upon a finding that there was either a prior use of the motorcycle involving a mishap on Blue Water Road which made it necessary for Mr Campbell to kick-start his motorcycle or there was a mishap when Mr Campbell kick-started his motorcycle. A number of scenarios were raised with counsel. First, it may have been necessary for Mr Campbell to kick-start his motorcycle as the engine of the motorcycle may have stalled because Mr Campbell may have changed gears incorrectly due to his inexperience; or the engine may have simply malfunctioned. Secondly, Mr Campbell may have used the wrong technique when kick-starting his motorcycle.

Was there an accident?

[54] The applicants' first argument cannot be sustained. I accept Mr Livesey's submission that the Act is not concerned with compensation for all injuries or deaths sustained in a motor vehicle. Nor does the Act provide compensation for injury or death merely arising out of the use of a motor vehicle. In the Second Reading Speech it was stated that the compensation scheme to be established by the Act was designed to keep insurance

premium income in the Territory, reduce premiums and to produce a cost structure which could reasonably be contained¹⁶.

[55] The occurrence of an “accident” is fundamental to a person’s entitlement to benefits under the Act¹⁷. The object of the Act is to establish a no fault compensation scheme in respect of death or injury in or as a result of motor vehicle accidents. The long title of the Act states that the Act is “An Act to establish a no fault compensation scheme in respect of death or injury in or as a result of motor vehicle accidents [...]” All of the key sections of the Act providing for the payment of benefits to a person: s 7, s 13 and s 22 of the Act, specify that for a person to be entitled to the payment of benefits there must be an injury or death in an accident or as the result of an accident. Many other sections of the Act also rely on the existence of an “accident”, for example see: s 8 to s 11, s 14, s 17, s 18, s 21, s 24 to s 26, s 31, s 38, s 40A and s 41. Benefits cannot be calculated, nor exclusions applied, independently of the existence of an “accident”¹⁸.

[56] The word “accident” which appears in s 7 and s 22 of the Act was deliberately used by the legislature and the Tribunal must strive to give meaning to every word of each section of the Act¹⁹. There is a distinction between an injury or death suffered as a result of an occurrence on a public street which is caused by or arises out of the use of a motor vehicle and an injury or death which simply arises out of the use of a motor vehicle. The

¹⁶ Second Reading Speech 8 March 1979 at pages 1, 3 and 4.

¹⁷ *Augusto v Board of Territory Insurance Office* (1990) 66 NTR 1 per Angel J at 3 and 4.

¹⁸ *Augusto v Board of Territory Insurance Office* (1990) 66 NTR 1 per Angel J at 5.

¹⁹ *Project Blue Sky v ABA* (1998) 194 CLR 355 per Mc Hugh, Gummow, Kirby and Hayne JJ.

text of s 22(1) of the Act (read with the first limb of the definition of “accident” inserted²⁰ into the subsection) stands in clear contrast to the text of provisions such as s 4(1) of the Motor Vehicle (Third Party Insurance) Act (WA) which was considered by the High Court in *Dickinson v Motor Vehicle Insurance Trust*²¹. Under the latter section every owner of a motor vehicle was required to: “insure against any liability which may be incurred by him or any person who drives such motor vehicle *in respect of the death or bodily injury to any person caused by or arising out of the use of such motor vehicle* [emphasis added]”.

[57] Read in the context of the whole of the Act, the definition of “accident” contained in the first limb of s 4 of the Act denotes what is ordinarily understood to be a motor vehicle accident; that is, a mishap on a public street involving the use of a motor vehicle. The “occurrence” not the “use” is required to have a particular locus; the occurrence must be on a public street. Mr Campbell’s unmet need for an increased blood flow was not an occurrence on a public street. It was simply the physiological consequence of an ordinary use of the motorcycle. To interpret s 4 otherwise would be to fail to give meaning to every word of the text.

[58] To interpret s 4 and s 22 in the manner suggested by the applicants would be to interpret s 22 as if it provided, “where the death of a qualifying person results from or is materially contributed to by an injury *caused by or arising*

²⁰ *Kelly v R* (2004) 205 ALR 274 per McHugh J at 302.

²¹ (1987) 163 CLR 500

out of the use of a motor vehicle there is payable – [the benefits provided].”

That was not the intention of the legislature.

- [59] It is also somewhat artificial to split up the pathological process which resulted in Mr Campbell’s death and to classify part of that process as an occurrence on a public street and the other parts of the process as an injury.
- [60] Neither can the applicants’ second argument be sustained. There was no evidence about any other relevant use of the motorcycle before the Tribunal. There was no evidence about how or why Mr Campbell’s motorcycle came to a stop on Blue Water Road prior to him kick-starting his motorcycle and Mr Long and Ms Cubillo did not give any evidence about the manner in which Mr Campbell was kick-starting his motorcycle. There was nothing to suggest that kick-starting the motorcycle was anything other than an ordinary use of the motorcycle.
- [61] Had s 22 of the Act provided for compensation in the event that Mr Campbell’s death resulted from or was materially contributed to by an injury caused by or arising out of the use of a motor vehicle, I would not dismiss the reference. The evidence before the Tribunal establishes that Mr Campbell suffered an injury prior to his death and the injury materially contributed to his death. He suffered bodily harm as a result of an external cause. Mr Campbell’s ischemia, the altered electrical current in his heart and the ventricular fibrillation, that is, the permanently impaired functioning of his heart was the result of the strenuous physical exercise he engaged in

when he kick-started the motorcycle. There was the requisite relationship between an external cause and a harmful physiological change.

[62] Further, although there was no finding of brain damage by the pathologist, Professor Pitt stated during his cross examination that the mechanism of Mr Campbell's death was such that he would have suffered brain damage as a result of the ventricles of his heart ceasing to contract and pump blood to other parts of the body.

Orders

[63] The reference is dismissed and the determination of the Board is confirmed. I will hear the parties further as to costs.
