PARTIES:	CASTROL AUSTRALIA PTY LTD
	AND:
	VERONICA MARY MITCHELL
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE NO:	No. 98 of 1995
DELIVERED:	31 August 1995
HEARING DATES:	25 August 1995
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Worker's compensation - For what injuries is compensation payable - Employment risks - "Arising out of an/or in the course of the employment" - Employee's duties required extensive travel - No fixed workplace - Fatal motor vehicle accident whilst on work trip - Whether primary purpose of journey to return home - Work Health Act 1986 (NT) s53 -

Worker's compensation - Entitlement to and liability for compensation - Persons entitled to compensation - Motor vehicle accident - Whether "Journey provisions" apply to a worker who suffers and injury while journeying from his place of employment to his residence - Work Health Act 1986 (NT) s4(2A)

Insurance - Motor accidents compensation legislation - Fatal motor vehicle accident whilst employee on work trip - Whether "injury" arose out of an "accident" pursuant to Motor Accident Compensation Act 1979 (NT) ss4(1)(b), (2A) -

Worker's Compensation - Proceedings to obtain compensation - Determination of claims - Need for legislative correction - Risk of multiplicity of litigation - Work Health Court should have jurisdiction over claims under Motor Accidents Compensation Act 1979 (NT) where employee suffers injury while journeying from place of employment to residence - Territory Insurance Office should be able to be joined as a party to such proceedings -

Legislation

Work Health Act 1986 (NT) ss4, 53, 116
Motor Accidents (Compensation) Act 1979 (NT) ss4(1)(b), (2A)

Cases

Commonwealth v Oliver (1962) 107 CLR 353 at 355-358, mentioned.
Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239 at 247, mentioned
Van Oosterom v Australian Metropolitan Life Assurance Co Ltd [1960] VR 507 at 511

REPRESENTATION:

Counsel:

Appellant:	Mr Walsh
Respondent:	Mr T Riley

Solicitor:

Appellant:	Elston & Gilchrist
Respondent:	Morgan Buckley

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No 98 of 1995

BETWEEN:
CASTROL AUSTRALIA PTY LTD

Appellant

AND:
VERONICA MARY MITCHELL

Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT
(Delivered 31 August 1995)

This is an appeal from the Work Health Court. The respondent, who is the dependent spouse of Leonard Kym Mitchell, (deceased), sought compensation under the Work Health Act on behalf of herself and two dependent children. The deceased was employed by the appellant as its Area Manager/Travelling Sales Representative with responsibility for the whole of the Northern Territory, except for Darwin. The deceased resided with the respondent and their children in Alice Springs. He had an office in Alice Springs at the premises of Steer Diesel. He was provided with a company car, which he needed to carry out his duties. He was permitted to use the car for personal purposes as well. The vehicle was normally garaged at his home. His employment required him to travel throughout the Northern Territory to sell and promote his employer's products and this required him to be away from Alice Springs for lengthy periods.

In October 1993, the deceased's immediate Superior was a Mr Carter who lived and worked interstate. He arranged with the deceased to come to Alice Springs to talk with the deceased about "how his territory was progressing", and how the travel was affecting his home life. He also wanted to take a "familiarisation tour of some mining sites."

His Worship found that the deceased had no choice about taking Mr Carter on this tour. Mr Carter arrived in Alice Springs on 20 October 1993. After a barbecue tea at the deceased's home, both men left Alice Springs in the appellant's vehicle to travel to the Granites Mines in the Tanami Desert. The learned Magistrate found that this was not a routine trip for the deceased, because he took his supervisor with him at his supervisor's request on a familiarisation tour, and that some of the things done on the trip were undertaken especially for his superior. The tour took Mr Carter and the deceased to various remote sites such as the Granite Mines, Byrnecut and Tanami Mines, and, on the return journey to Alice Springs, through Yuendumu. A number of the appellant's customers were visited.

Mr Carter was due to return to Alice Springs to catch a flight out on Saturday 23 October 1993. On Friday morning, 22 October, the deceased spoke to the respondent by telephone. He was informed that his brother-in-law and family were visiting. The deceased told her that he would try to make every effort to get back by Friday night. Prior to leaving Alice Springs, he had anticipated returning on the Saturday morning. Shortly after passing through Yuendumu, the deceased complained of a sinus attack, and Mr Carter took over the driving. At a place approximately 74km east of Yuendumu, whilst Mr Carter was driving, the vehicle rolled over, resulting in the deceased's death. The accident occurred at about 4:30pm. The learned Magistrate found that but for the accident they would have returned to Alice Springs before 8:30pm.

No firm arrangements had been made as to where Mr Carter would stay on the Friday night. The learned Magistrate found that Mr Carter would not have stayed at the deceased's home, and that the deceased's duty or task required him to convey Mr Carter to a place in Alice Springs, where he could find accommodation for the night. There was no evidence to suggest

that the men intended to call at any other places between the place of the accident and Alice Springs. His Worship also found that the purpose of the journey at the time of the accident "was to get his boss accommodated because only then would he be in a position to finish work, go home and enjoy his brother-in-law's company." His Worship found that the injury arose out of or in the course of his employment and that he had not stopped working at the time of the accident, and, implicitly, that this did not depend upon the journeying provisions of the Act. Consequently he found in favour of the respondent and made an award of compensation.

The appellant's contention, both before me and in the Court below, was that the deceased at the time of the accident, was travelling between his workplace and his place of residence, that the "injury" was sustained in an "accident" as defined in the Motor Accidents (Compensation) Act, and accordingly the injury did not arise out of or in the course of his employment. The appellant submitted that the only question was whether the primary purpose of the journey was to return home from his workplace, and, on the facts as found, this question could not admit of any other answer than 'yes'. Accordingly, so the appellant contended, the learned Magistrate fell into error because he asked the wrong questions, and it did not matter that he was still in the course of his employment at the time.

In order to understand the appellant's submissions it is necessary to refer to the relevant provisions of the Act.

Section 53 of the Act provides for the payment of compensation to a worker's dependents "where a worker suffers an injury" that results in his death. Section 3(1) defines "injury" to mean "a physical ... injury arising ... out of or in the course of his employment."

Section 4 provides:

> "4. OUT OF OR IN THE COURSE OF EMPLOYMENT
>
> (1) Without limiting the generality of the meaning of the expression an injury to a worker shall be taken to arise "out of or in the course of his employment" if the injury occurs while he -
>
> (a) [not relevant]
>
> (b) is travelling by the shortest convenient route between his place of residence and his workplace;
>
> (c) to (g) [not relevant]
>
> (2) [not relevant]
>
> (2A) Notwithstanding subsection (1), an injury to a worker shall be taken not to arise "out of or in the course of his employment" if the injury is sustained in an accident, as defined in the Motor Accidents (Compensation) Act, which he -
>
> (a) [not relevant];
>
> (b) except as provided in subsection (2B), is travelling in circumstances referred to in subsection (1)(b) or (g); or
>
> (c) [not relevant]
>
> (2B) to (6A) [not relevant]
>
> (7) In this section - ...
>
> "Workplace", where there is no fixed workplace, includes the whole area, scope or ambit of the worker's employment.
>
> (8) [not relevant]"

Section 4(2A) was inserted into the Act by amendment proclaimed to take effect on 15 October 1991.

The appellant's contention was that the deceased's injury was sustained in an "accident" as defined in the Motor Accidents (Compensation) Act, ("MACA Act") that he was travelling in the circumstances referred to in s4(1)(b), and that, consequently the injury resulting in his death did not rise out of or in the course of his employment, and that the learned Magistrate erred in not so finding. An important part of this submission was that s4(2A) applied, notwithstanding that the respondent did not have to rely upon s4(1)(b) in order to show that the worker's injury arose out of or in the course of his employment. In support of this argument, the appellant relied upon the opening words of s4, "without limiting the generality of the meaning of the expression ...."

The respondent's submissions were

(1) there was no evidence upon which a finding that the injury was sustained in an "accident" as defined in the MACA Act could be made;

(2) Section 4(2A) applied only where the worker or his dependants needed to rely upon s4(1)(b) (the journeying provision), the respondent did not rely upon the journeying provision, the Magistrate's finding that the injury arose out of or in the course of his employment did not rely upon the journeying provision, and therefore s4(2A) did not apply;

(3) that in any event, this was not a case where the journeying provision could apply because the worker was not travelling between his place of residence and his workplace at the time of the accident; and

(4) no error of law has been shown on the part of the learned Magistrate.

Section 116 of the Work Health Act confines appeals to this Court to errors of law. The respondent did not contend that, if the appellant's contention was correct, error had not been established. It was common ground that if error had been established, this Court should then decide the case on the basis of the unchallenged findings before the learned Magistrate, and reach its own conclusions.

It is convenient to deal with the arguments concerning the construction to be given to s4 first, upon the assumption that this was an "accident" as defined. Mr Walsh QC of counsel for the appellant submitted that the mischief which the legislature had designed to remedy when it introduced s4(2A) into the Act in 1991 was to place the burden of meeting claims arising out of road "accidents" as defined in the circumstances envisaged upon the statutory scheme set up by the MACA Act, notwithstanding that the worker did not have to rely upon s4(1)(b) of the Act. This was made clear by the opening words of s4, to which I have referred, above. Consequently, if, as a matter of fact, the worker is travelling home, his claim is against the MACA Scheme, and not his employer. The question must therefore be, in a case where there is no fixed workplace such as this, what is the purpose of the journey? If the purpose, or one of the purposes of the journey is to go home, there is no claim against the employer, even if, at the time of the accident, there is also a work purpose to the journey. Consequently, even if the worker was still working at the time of the accident, if the worker's journey was, in truth, a trip home to his residence, the employer was not liable. The journey, so the argument went, must be looked at in a broad and practical way, so as to ascertain its real purpose.

The expression 'out of or in the course of his employment' is well known in workmen's compensation legislation. Its origins may be traced to the Workmen's Compensation Act, 1897 (UK)

which used the expression "injury by accident arising out of and in the course of his employment." This expression, in very broad terms, originally required proof of both a temporal and causal connection between the injury and the work, although the notion of the temporal connection was judicially extended to a wide field of activities incidental to the employment: see, for example the discussion by Dixon CJ in The Commonwealth v Oliver (1962) 107 CLR 353 at 355-358. The requirement of the double connection with the employment was replaced in most jurisdictions several decades ago, so that proof of either would suffice. There was evidence in this case which the learned Magistrate accepted which placed this deceased's accident as being in the course of his employment, as that expression is understood today. His Worship found, in effect, that his employment had not ceased. He was returning with his superior to Alice Springs, on the last leg, perhaps, of the familiarisation tour. He had yet to assist his superior to find accommodation for the night. He was not free to go about his own business. In my opinion this finding was clearly open to the learned Magistrate: cf. Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239 at 247. That being so, the respondent did not have to rely upon the extended meaning given to the expression 'arising out of or in the course of the employment' by s4(1)(b). This was not, as Mr Riley QC, submitted, a journeying case at all. The journeying provisions were inserted into workmen's compensation legislation because journeys from home to the workplace and back did not, except rarely, fall within the expression; consequently s4(1)(b) extended the circumstances upon which the employer was liable, by, in effect, deeming an injury occurring whilst on such a journey to be an injury within the meaning of the Act.

However, I consider that, despite the history of the provisions which point towards the construction urged upon me by the respondent and accepted by the learned Magistrate, the language employed by the draftsmen is clear. If the injury

occurs whilst the worker is on a journey from his place of employment to his residence, the worker is not entitled to compensation under the Act. I consider that this construction is to be preferred because first, s4(2A) uses the expression "an injury to a worker shall be taken not to arise ..." If the draftsman had intended to exclude s4(1)(b), he would have said 'an injury to a worker shall not be taken to arise..." The draftsman has made a more positive statement; if the injury occurred in circumstances referred to in s4(1)(b), etc., liability under the Act is excluded. Secondly, if this interpretation is correct, it is difficult to see what other choice of words other than those used could have better expressed that intention. Thirdly, s4(2A) is a separate subsection of s4, rather than drafted as a proviso to s4(1)(b). Fourthly, s4(2A) begins with the words 'notwithstanding subsection (1)', which, in turn, begins with the words 'without limiting the generality of the meaning of the expression...' Finally, this is a simple, practical test, the answer to which can be reached without having to consider complex questions as to whether or not the worker's injury otherwise would have arisen out of the course of his employment. Accordingly I consider that the learned Magistrate was in error in his approach to the legislation.

The next question is, error having been shown, what conclusion ought properly to have been reached on the learned Magistrate's findings of fact. Assuming that the accident was an "accident" as defined by s4(2A), the proper question ought to have been whether the deceased had been travelling by the shortest convenient route between his place of residence and his workplace.

On the facts of this case, this resolved itself into questions as to what was his workplace, and whether he was travelling from that workplace to his place of residence. The learned Magistrate found that he was still at work, and in my opinion

that finding was open to him. His Worship did not refer to s4(7) which defines the word "workplace". Here there was no fixed workplace, as the appellant in his written outline of argument conceded. No other conclusion is reasonably open on the facts. His "workplace" therefore included the whole area, scope or ambit of his employment. In these circumstances the test is whether he was at the place where the accident occurred pursuant to his contract of employment: see Van Oosterom v Australian Metropolitan Life Assurance Co Ltd [1960] V.R. 507 at 511. The learned Magistrate's finding that he was still at work at the time of the accident leads to the conclusion that at that time he was at the place of the accident pursuant to his contract of employment and therefore he had not left his workplace. That being so, he cannot be said to be travelling between his workplace and his place of residence. It is, as Mr Riley QC submitted, as if he had had his accident on the employer's premises.

Some emphasis was placed by the appellant upon a passage in his Worship's oral judgment where he said "He (the deceased) wanted to get to his place of residence to see his brother-in-law, therefore he was going home." That passage does not impress me, taken in context, either as a finding that the deceased was travelling between his workplace and his residence, or as a finding inconsistent with his Worship's clear finding that the deceased was still working. Reading the whole passage in context, I think it more probable that his Worship was repeating a submission put to him by counsel for the appellant. In any event, the learned Magistrate then went on to say "the difficulty with this rough approach is that it is incomplete and does not take into account all the circumstances." I agree. In a colloquial sense, the deceased may have been "going home"; but in truth, he was still at work and at a place where his work had required him to be. On the facts as found by the learned Magistrate, no other conclusion is reasonably open. The appellant's submissions focused on

whether the deceased was travelling to his place of residence rather than on the question of whether he was travelling between his workplace and his residence. His Worship's findings are consistent with the deceased's immediate destination being Alice Springs, rather than his residence at Alice Springs, given the finding that it was a journey to Alice Springs for his employer's purposes. A finding that the injury occurred in the course of his employment would be inconsistent with a finding that, at the time of the accident, he was not within the area, scope or ambit of his employment. Indeed in his reasons his Worship found that he was still within the scope of his employment. Consequently, he was not travelling between his workplace, and his residence, as he had not yet left his workplace.

It is therefore unnecessary to consider whether the evidence establishes that the accident was an "accident" as defined by the MACA Act.

Finally, I draw to the legislature's attention a problem which s4(2A) has created which in my respectful opinion needs legislative correction. Where a worker suffers an injury in circumstances like the present and the real question is whether the worker is entitled to compensation under the Work Health Act or under the MACA Act, the worker is placed in the difficulty of having to correctly identify which scheme provides the compensation. The safe course is to apply under both Acts, but if the Territory Insurance Office and the employer's insurer both deny liability, the worker is forced to pursue his remedies by selecting which claim appears to him to be the stronger. If he choses to bring his claim in the Work Health Court, a finding by that court that he is excluded by s4(2A) is not binding on the Territory Insurance Office because it cannot be made a party to proceedings in that Court. Thus the Office may successfully argue in the Motor Accidents (Compensation) Appeal Tribunal, set up under the

MACA Act, (from which there is no appeal) that the Work Health Court was wrong. There is no single procedure to enable a court to decide these issues and bind the worker, the employer, and the Office in the result. Instead, the worker is faced with the prospect of a multiplicity of litigation in different jurisdictions and runs the risk of losing altogether. A worker should not be placed in this position. In a fight between insurers, there should be a single action or application to which all parties are joined, where the real protagonists, the insurers, are forced to resolve it between themselves. The worker could seek a declaration in the Supreme Court, which would bind all parties, but as there would be issues of fact to be decided, this could be both expensive and protracted, and in any event, declaratory relief does not by itself result in any enforceable judgment or order for the payment of money. A simpler solution would be to vest the Work Health Court with jurisdiction in such cases and enable the Office to be joined as a party. There may well be other solutions. The present system is Dickensian, a return to the days before the Supreme Court of Judicature Act 1873 (UK), when litigants were shuffled from one court to the next because there was no single court which had jurisdiction to resolve all issues. The appalling spectre of the re-emergence of this classical travesty needs prompt attention by the legislature.

The appeal is dismissed with costs.