BAE Systems Australia Ltd v Rothwell [2013] NTCA 3

PARTIES:	**BAE SYSTEMS AUSTRALIA LTD**
	v
	ROTHWELL, Mark Edwin
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP7 of 2012 (20917242)
DELIVERED:	1 March 2013
HEARING DATES:	11 February 2013
JUDGMENT OF:	RILEY CJ, MILDREN and KELLY JJ
APPEALED FROM:	BLOKLAND J (No LA5 of 2011)

CATCHWORDS:

WORKERS' COMPENSATION — Entitlement to 'costs incurred' for 'other rehabilitation' — Whether past gratuitous attendant care services amount to 'costs incurred' — *Workers Rehabilitation and Compensation Act 2008* (NT) s 78(1).

STATUTORY INTERPRETATION — Plain meaning — Purposive interpretation — Interpretation of 'beneficial' legislation — Ambiguity — Whether phrase 'costs incurred' ambiguous — Whether other interpretations open where plain meaning is clear — *Workers Rehabilitation and Compensation Act 2008* (NT) s 78(1).

COSTS — Discretion to make costs orders — Solicitor and client costs — Whether open to Work Health Court to award costs on solicitor and client basis — *Work Health Court Rules 1999* (NT) r 23.02, r 23.03.

COSTS — Indemnity costs — Principles regarding award of indemnity costs— Employer's duty to consider claim promptly — Unreasonable

delay by employer — *Workers Rehabilitation and Compensation Act 2008* (NT) s 109 — *Supreme Court Rules* o 63.28.

Interpretation Act 1978 (NT) s 62A
Supreme Court Rules o 63.28
Workers Compensation Act 1987 (NSW) s 60, s 60AA
Workers Rehabilitation and Compensation Act 2008 (NT) (formerly *Work Health Act 1986* (NT)) s 73, s 78, s 109
Work Health Court Rules 1999 (NT) r 23.02, r 23.03

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27
Balfour v Balfour [1919] 2 KB 571
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225
Griffiths v Kerkemeyer (1977) 139 CLR 161
Hawkins v Bank of Chicago (1992) 7 ACSR 349
J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers [No2] (1993) 46 IR 301
Litherland Urban District Council v Liverpool Corporation (1958) 1 WLR 913
MacDonald v Travelers Indemnity Co of Canada (1987) 42 DLR (4th) 204
Northern Rivers Charity Racing Association v Lloyd [2002] NSWCA 129
NSW Sugar Milling Cooperative Ltd v Manning (1998) 44 NSWLR 442
Ragata Developments Pty Ltd v Westpac Banking Corporation (Unreported, Federal Court of Australia, 5 March 1993)
Re Rhodes (1890) 44 Ch D 94
Smith (Committee of) v Wawanesa Mutual Insurance Co (1998) 168 DLR (4th) 750
Wilson v Wilson's Tile Works Pty Ltd (1960) 104 CLR 328
Woodruffe v Northern Territory of Australia (2000) 10 NTLR 52

REPRESENTATION:

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Judgment category classification:	A
Judgment ID Number:	Ril1301
Number of pages:	56

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

BAE Systems Australia Ltd v Rothwell [2013] NTCA 3
No. AP7 of 2012 (20917242)

BETWEEN:

BAE SYSTEMS AUSTRALIA LTD
Appellant

AND:

MARK EDWIN ROTHWELL
Respondent

CORAM: RILEY CJ, MILDREN and KELLY JJ

REASONS FOR JUDGMENT

(Delivered 1 March 2013)

RILEY CJ:

Introduction

[1] On 28 May 2007 the respondent (the 'worker') suffered a compensable injury for the purposes of the *Workers Rehabilitation and Compensation Act 2008* (NT) (the Act)[1] in the course of his employment with the appellant (the 'employer'). When the matter eventually came on for hearing in 2011, liability to pay compensation was conceded by the employer. The argument before the Work Health Court focused on the extent of the entitlement available to the worker under the Act.

[1] In 2007 the Act in force was known as the *Work Health Act 1986* (NT).

[2] The injury suffered by the worker was described as a 'sudden bleeding into his brain' which resulted in him being left with 'severe and permanent cognitive and physical disabilities due to brain damage.'[2] The worker was, at the time of suffering the injury, a married man with 11 children. In the proceedings his wife was his litigation guardian. She gave evidence as to the attendant care services provided to the worker by herself and her children. Those attendant care services included feeding the worker, cleaning him (he was noted to be 'doubly incontinent'),[3] dressing him, preparing his meals and assisting him to eat, providing physiotherapy and exercise and services of those kinds. In relation to those services the magistrate made the unchallenged finding that they were:

> [A]n essential part of his rehabilitation directed to recovering and maintaining his health generally, and his flexibility and his capacity to stand or transfer himself from bed to chair to car etc - his physical condition - and to keep him clean and content and as involved as possible with his family and to continue to live at home - his social condition.[4]

[3] The magistrate concluded that the services were provided by the family members gratuitously and 'without any contract or other binding arrangement to reimburse them for the value of the services provided.'[5]

[4] The parties before the Work Health Court agreed that, if a statutory basis was found for the worker to recover the value of past gratuitous attendant

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2 *Rothwell v BAE Systems* [2011] NTMC 039 at [2].
3 Ibid at [11].
4 Ibid at [27].
5 Ibid at [11].

care services, the value of those services was $274,680. There was no dispute that the worker suffered a permanent incapacity and that the services provided by the family were both reasonable and necessary.

[5] The worker claimed compensation for the past gratuitous attendant care services pursuant to the provisions of s 78 of the Act which is in the following terms:

> 78 Other rehabilitation
>
> (1) Subject to this section, in addition to any other compensation under this Part, an employer shall pay the costs incurred for such home modifications, vehicle modifications and household and attendant care services as are reasonable and necessary for the purpose of this Division for a worker who suffers or is likely to suffer a permanent or long-term incapacity.
>
> (2) Without limiting the matters which may be taken into account in determining what are reasonable and necessary home modifications, vehicle modifications and household and attendant care services in a particular case, there shall be taken into account:
>
> (a) in relation to home modifications:
>
> (i) the cost, and the relevant benefit to the worker, of the proposed modifications;
>
> (ii) the difficulties faced by him or her in:
>
> (A) gaining access to;
>
> (B) enjoying reasonable freedom of movement in; or
>
> (C) living independently in,

his or her home without the proposed modifications;

(iii) the likely duration of his or her residence in the home;

(iv) where the home is not owned by the worker, the permission of the owner;

(v) the likely cost of reasonable alternative living arrangements; and

(vi) the likely psychological effect on the worker of not having the proposed modifications made;

(b) in relation to vehicle modifications:

(i) the cost and relevant benefit to the worker of the proposed modifications;

(ii) the difficulty faced by him or her in:

(A) driving or operating;

(B) gaining access to; or

(C) enjoying freedom and safety of movement in,

the vehicle without the proposed modifications;

(iii) alternative means of transport available to him or her; and

(iv) the effect of the modifications on his or her likelihood of obtaining and retaining gainful employment;

(c) in relation to household services:

(i) the extent to which household services were provided by the worker before the relevant injury and the extent to

which he or she is able to provide those services after that date;

(ii) the number of household family members, their ages and their need for household services;

(iii) the extent to which household services were provided by other household family members before the relevant injury;

(iv) the extent to which other household family members or other family members might reasonably be expected to provide household services for themselves and for him or her after the relevant injury; and

(v) the need to avoid substantial disruption to the employment or other activities of the household family members; and

(d) in relation to attendant care services:

(i) the nature and extent of the worker's injury and the degree to which that injury impairs his or her ability to provide for his or her personal care;

(ii) the extent to which such medical services and nursing care as may be received by him or her provide for his or her essential and regular personal care;

(iii) where he or she so desires, the extent to which it is reasonable to meet his or her desire to live outside an institutional environment;

(iv) the extent to which attendant care services are necessary to enable him or her to undertake or continue employment;

(v) any assessment made, at the request of the insurer, by persons having expertise in the worker's rehabilitation;

(vi) any standard developed or applied by a government department or public authority in respect of the need of disabled persons for attendant care services; and

(vii) the extent to which a relative of the worker might reasonably be expected to provide attendant care services to him or her.

(3) An employer shall not be liable to pay the costs incurred for home modifications except where the worker for whose benefit the modifications are or are to be carried out is severely impaired in his or her mobility or ability to live independently within the home.

(4) In this section ***attendant care services***, in relation to an injured worker, means services (other than medical and surgical services or nursing care) which are required to provide for his or her essential and regular personal care.

[6] The employer argued that the worker was not entitled to compensation under the section because the words 'pay the costs incurred for such … attendant care services' required that there be costs that had been incurred before an entitlement to compensation arose. It was submitted that s 78 is to be construed as an indemnity provision and, as the past attendant care services were provided gratuitously by members of the family, such costs were not recoverable under this section.

[7] The magistrate found to the contrary. His Honour held that the words 'costs incurred' were ambiguous and proceeded to consider the nature of the legislation and, in particular, the emphasis placed upon the rehabilitation of the worker in the legislative scheme.[6] His Honour concluded that the interpretation contended for by the employer would not promote the purpose

[6] Ibid [20]–[26].

of rehabilitation emphasised within the Act and, further, would produce an 'unjust or capricious result'.[7] His Honour went on to conclude:

> I find that s 78 of the Act is to be given a broad meaning consistent with the stated purpose of Division 4 in Part 5 of the Act, and the words 'costs incurred' are to be beneficially construed to provide a complete remedy as to the provision of reasonable and necessary rehabilitation services, including attendant care services. Their construction is not to be limited to an already existing and enforceable economic obligation but is capable of including attendant care services already provided on a gratuitous basis, provided that they were reasonable and necessary for the purposes of Division 4 of Part (5) of the Act.[8]

[8] The employer appealed the decision to the Supreme Court and on 31 July 2012 the appeal in this regard was dismissed.[9] In her reasons for decision the learned judge on appeal adopted a similar approach to the Work Health Court and concluded:

> [I]n my view the term 'costs incurred' cannot simply be read to be confined only to monetary costs actually incurred, but read in the context of this section, the Act and its purpose, (compensation and rehabilitation of injured workers), it is clear costs may be incurred through what is inherent in the provision of services by family members. In my view there is no warrant to import a proviso that there must first be a legal obligation that the recipient of the care is to 'pay'.[10]

[9] The employer has now appealed to this Court.

[10] The Act provides for rehabilitation and compensation for a worker who suffers an injury arising out of or in the course of his or her employment

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7 Ibid [26].

8 Ibid [28].

9 *BAE Systems Pty Ltd v Rothwell* [2012] NTSC 52.

10 Ibid at [36].

which, inter alia, contributes to his or her incapacity. It is a statutory scheme providing compensation and emphasising rehabilitation. It is not a scheme providing for compensation based upon common law principles.

[11] Part 5 Division 3 of the Act sets out the compensation payable under various headings. Section 73 within that Division provides for compensation for medical, surgical and rehabilitation treatment and other costs. The section is in the following terms:

> 73 Compensation for medical, surgical and rehabilitation treatment and other costs
>
> Subject to this Part and the Regulations, where a worker sustains an injury, his or her employer is liable to pay the costs reasonably incurred by the worker as a result of that injury for:
>
> (a) medical, surgical and rehabilitation treatment;
>
> (b) hospitalization and hospital treatment;
>
> (c) travelling, or being transported, to and from any place for the purpose of medical, surgical and rehabilitation treatment, hospitalization or hospital treatment;
>
> (d) where it is necessary for him or her to be accommodated away from his or her normal place of residence for the purpose of medical, surgical and rehabilitation treatment — such accommodation; and
>
> (e) attendance by a registered nurse or enrolled nurse, or by some other person, where the disability is such that the worker must have nursing or personal attendance,
>
> and such other costs as are prescribed.

[12] It is to be noted that this section requires the employer to 'pay the costs reasonably incurred by the worker' of attendance by a nurse 'or by some other person, where the disability is such that the worker must have nursing or personal attendance'. It was agreed by the parties that this is an indemnity provision.

[13] There follows Division 4 which deals with issues of rehabilitation and other compensation. The purpose of the Division is to ensure the rehabilitation of an injured worker following an injury.[11] The requirement is to ensure as far as practicable that an injured worker is restored to 'the same physical, economic and social condition in which the worker was before suffering the relevant injury.'[12] Obligations are imposed on both the employer and the worker.

[14] It is within this Division that s 78 of the Act is found.[13] The costs addressed in the section include costs of attendant care services, although limited to costs which are 'reasonable and necessary for the purpose of this Division.' The focus is therefore upon costs of attendant care services which assist in promoting the rehabilitation of the injured worker. There is nothing to suggest that the attendant care services must be provided by a professional service provider or that they cannot be provided by a family member. The costs referred to are in addition to other compensation including compensation payable under s 73.

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[11] *Workers Rehabilitation and Compensation Act* s 75.

[12] Ibid s 75(2).

[13] Set out above at [5].

[15] It is the submission of the worker that when section 78 is read in the context of the Act as a whole, including s 73 and the provisions requiring a focus upon rehabilitation, s 78 should not be regarded as an indemnity provision but rather, as Blokland J found, a provision relating to 'costs incurred in the broad sense of including the outlay of time or labour intrinsically part of providing care against a standard of reasonableness and necessity.'[14]

[16] The employer relied upon the approach adopted by the New South Wales Court of Appeal in *NSW Sugar Milling Cooperative Ltd v Manning*[15] where the Court found that the word 'cost' used in the context of the New South Wales legislation 'can have no meaning other than one which involves a financial liability on the part of the worker to pay for the services provided.'[16] As with the present matter, that case involved tragic circumstances. The Court expressed regret at the conclusion reached but found that the ordinary and natural meaning of the word 'cost', in the context of the legislation as a matter of statutory construction, was clear. Sheppard A-JA said:

> The question to be resolved is a question of statutory construction. What does the word 'cost' embrace in the context in which it is used? Just as in *Griffiths v Kerkemeyer* and *Van Gervan*, the claimant here has a need for the services in question. But to adopt that approach in the present case is to attribute to the legislature an intention to give the word 'cost' the expanded meaning which would be required in order to yield a construction which would give the word 'cost' a meaning which would embrace more than financial cost; it would equate the word 'cost' with the concept of need. Read in context, I

[14] *BAE System Ltds v Rothwell* [2012] NTSC 52 at [39].

[15] (1998) 44 NSWLR 442.

[16] Ibid 450 per Sheppard A-JA.

> do not think that this is the meaning which the word was intended to have. The plaintiff in an action at common law does not have to show, as Gibbs J held in *Griffiths v Kerkemeyer* that the need 'is or may be productive of financial loss'. Section 60 of the Act does not disclose an intention by the legislature to equate the position under the Act with that which exists at common law.
>
> Notwithstanding the very tragic circumstances of this case and the sympathy which one naturally feels for both the respondent and his wife, I am unable to perceive how the services provided by the wife could amount to 'the cost' of the treatment or service which the wife has provided voluntarily. No cost can be involved and the interpretation contended for by counsel for the appellant is not open. In my opinion, this is not a case where the Act is capable of alternative meanings. The word 'cost' in the context in which it appears in s 60 can have no meaning other than one which involves a financial liability on the part of a worker to pay for the services provided.[17]

[17] I have found that case to be of some assistance but note that the terms of the legislation are quite different from those under consideration in the present case. In my view s 60 of the *Workers Compensation Act 1987* (NSW) provides a clearer indication that it was an indemnity provision. For example, s 60(3) provided that '[p]ayments under this section are to be made as the costs are incurred, but only if properly verified.'

[18] Nevertheless, in my view, the intention of the legislature in s 78 of the Northern Territory Act is also apparent. The expression 'pay the costs incurred' is clear when read in context and can have no meaning other than one which involves financial liability on the part of the worker to pay for services provided (to borrow from the observations of Sheppard A-JA above). The use of the word 'incurred' strongly suggests that financial cost

[17] Ibid at 449.

is involved. That is the ordinary and natural meaning of the words. There is no warrant to give the expression a wider meaning so as to embrace more than the financial cost. To do so would be to equate the word 'cost' with 'need' as discussed in *Griffiths v Kerkemeyer*.[18]

[19] Further, as the employer submitted, the use of the word 'costs' suggests the specific rather than the abstract. The singular expression 'cost' would more readily lend itself to a broader, abstract meaning including non-financial loss.

[20] The reference in s 78(2) of the Act to future costs of 'proposed modifications' to a home or vehicle does not detract from this interpretation. Such a future 'cost' may be 'incurred' by the worker, or another, contracting for those modifications and thereby creating the necessary financial liability.

[21] It will be noted that s 73(2) of the Act makes the employer liable to pay the 'costs reasonably incurred by the worker' whereas s 78 refers only to liability for 'costs incurred'. In my opinion, the explanation for the difference is that the costs referred to in parts of s 78 are likely to be incurred by persons other than the worker. For example, the owner of the home or vehicle that may require modification as a consequence of the injury to the worker, may be a person other than the worker. Contrary to the submission on behalf of the worker the difference in the wording does not

[18] (1977) 139 CLR 161.

lend support to the interpretation proposed by the worker. Similarly, contrary to the submissions of the worker, the fact that the matters in relation to which the employer may be required to make payment pursuant to the terms of s 73 of the Act may overlap with those covered by s 78 of the Act does not lead to a conclusion that s 78 must be given a wider application. There will remain an overlap no matter what interpretation is placed upon the two sections.

[22] Finally, I agree with Kelly J at [114]–[118] below that a consideration of the objects of the Act does not support the interpretation of the provision pressed by the worker.

[23] In my opinion, the appeal should be allowed on the basis that the judge erred in law in finding that the employer was required to compensate the worker for the value of past gratuitous attendant care services. The order for payment should be set aside. It follows that the interest awarded in favour of the worker must be recalculated and I would invite the parties to either agree the fresh calculation or, in the absence of agreement, to make written submissions.

The cross-appeal

[24] In the Work Health Court the magistrate ordered that the employer pay the worker's costs subsequent to 19 July 2008 'on the solicitor and client basis'.[19] In the Supreme Court the judge concluded that the Work Health

[19] *Rothwell v BAE Systems Australia Ltd* [2011] NTMC 39 at [98].

Court did not have power to order a party to pay another party's costs on a solicitor and client basis and therefore set aside the order.[20] This conclusion was not challenged. Her Honour found that, in the circumstances of the case, no order for indemnity costs should be made as there was not the requisite degree of misconduct by the employer.[21] The worker has cross-appealed submitting that her Honour erred in not exercising her discretion in favour of awarding costs on an indemnity basis.

[25] In reaching her conclusion the judge reviewed the findings of the magistrate and overturned the conclusion that the conduct of the employer was 'reprehensible' in all the circumstances.[22] In so doing, it was noted that the magistrate had made an error as to the date upon which a particular medical report was received by the employer. Although the report was dated 25 August 2008, it was not received by solicitors for the employer until 26 July 2010. The worker pointed out that, notwithstanding the error, the finding of the magistrate that there had been unreasonable delay remained. It was submitted that her Honour should have gone on to consider whether an enhanced costs order should be made in all the circumstances. Her Honour should have undertaken the task of assessing whether the factual circumstances of the case were sufficient to justify departure from the ordinary rule as to costs. This did not occur.

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[20] *BAE Systems v Rothwell* [2012] NTSC 52 at [84].

[21] Ibid.

[22] Ibid [24].

[26] It is not in dispute in these proceedings that the starting point is that costs should be taxed on the standard basis.[23] In order for costs to be taxed on the alternative indemnity basis there must be some special or unusual feature in the case. The authorities relevant to the exercise of the discretion were helpfully reviewed by Sheppard J in *Colgate-Palmolive Company v Cussons Pty Ltd*[24] where it was confirmed that the awarding of costs is in the discretion of the court, but the discretion must be exercised judicially. Indemnity costs may be awarded in a variety of circumstances, and the categories in which such orders may be made are not closed or rigid. Examples of circumstances where costs may be ordered on an indemnity basis include where a party has pursued a matter which, on proper consideration, should have been seen to be a hopeless case[25] and where there was undue prolongation of a case by groundless contentions.[26]

[27] In her reasons for decision the judge observed:

> Although his Honour proceeded on the factual error that Mr Brophy's report had been received by the employer in August 2008, in my view there was a significant amount of other material to justify a conclusion of unreasonable delay, his Honour having found that in any event there was reliable material in support of the claim. Mr Brophy's report did not support the employer's hypothesis. There was no evidence to support the employer's theory.[27]

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[23] *Supreme Court Rules* o 63.28.

[24] (1993) 46 FCR 225 at 231–4.

[25] Ibid 231, quoting French J in *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers [No2]* (1993) 46 IR 301, 303.

[26] *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 at 231–2, quoting Davies J in *Ragata Developments Pty Ltd v Westpac Banking Corporation* (Unreported, Federal Court of Australia, 5 March 1993).

[27] *BAE Systems Ltd v Rothwell* [2012] NTSC 52 at [67].

[28] Her Honour went on to conclude that the delay from 19 August 2008 to 6 September 2011 was unreasonable and she confirmed that interest under s 109 (1) of the Act should be paid.[28] Her Honour then concluded that, whilst the delays were unreasonable, they could not be characterised as 'reprehensible'.[29] In those circumstances her Honour declined to find that this was a proper case to award punitive damages. There is no challenge to that finding.

[29] In dealing with the costs issue the judge went on to say:

> For reasons similar to those given for allowing the appeal against punitive damages, I would allow the appeal against an order for solicitor and own client costs. His Honour declined not to allow costs on the standard basis because of the conduct of the employer. I have found that although there was unreasonable delay there was not misconduct to the degree found by his Honour. Once again, the mistaken belief about the date of receipt of Mr Brophy's report had some relevance to the findings. In determining costs his Honour referred to the same reasoning he had used in ordering interest under s 109(1) and s109(3). The conclusion on the employer's conduct, aside from generally [sic] delay, could not have been made on the correct material. I will allow this ground of appeal and instead order there be costs on the standard basis.[30]

[30] The worker submitted that it is apparent from those reasons that her Honour did not consider the issue of awarding indemnity costs in light of the principles discussed above. I agree. The worker then submitted that an order for indemnity costs was justified because there was a duty on the employer

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[28] Ibid [70].

[29] Ibid [75].

[30] Ibid [84].

[30] Ibid.

to consider and decide the claim promptly but the employer was guilty of unreasonable delay as found by the magistrate and confirmed by her Honour. The delay had a significant impact upon the worker and this impact was reasonably foreseeable by the employer. The employer positively denied the claim of the worker in its entirety until 24 August 2011. Further, it was noted that the employer only acknowledged liability just seven days before trial. The employer had not explained why it changed its position at that late time.

[31] The employer submitted that the conclusion of her Honour that the conduct of the employer could not be characterised as ‘reprehensible’ in the context of considering punitive damages, a conclusion which has not been challenged, meant her Honour was correct to refuse indemnity costs. Further, the employer submitted that it was justified in maintaining its defence of the claim to past gratuitous attendant care services and, in that regard, it could not be said that the employer's case was hopeless.

[32] In my opinion an award of indemnity costs is an appropriate response in all the circumstances of the case. Her Honour noted the finding of the magistrate that there was reliable material in support of the claim and that Mr Brophy's report did not support the employer’s hypothesis. There was, her Honour observed, no evidence to support the employer's theory. Further, in denying liability in its entirety, the employer proceeded without evidentiary support for its position, it did not pursue the report of Mr Brophy to clarify the position and it only made appropriate admissions at a

very late stage of the proceedings without explanation. Whilst the employer had an arguable issue in relation to the assessment of compensation for attendant care services, this issue only came into focus at the hearing of the case once liability had been acknowledged. Until that time it was but a small part of the proceedings.

[33] I would have allowed the appeal in relation to this issue and ordered that costs of the proceedings for the relevant period be paid on an indemnity basis.

MILDREN J:

[34] On 28 May 2007, the respondent, who was then 57 years of age, was employed by the appellant. On that day, he experienced a sudden bleeding into his brain. This happened on a working day when he was at his usual workplace. He was taken by an ambulance to the Alice Springs Hospital where his condition deteriorated. That same day, he was evacuated to the Royal Adelaide Hospital. Ultimately, he was left with severe and permanent cognitive and physical disabilities due to brain damage. Because of his cognitive disabilities, adult guardians were appointed for him on 18 July 2007 under the provisions of the *Adult Guardianship Act 1988* (NT).

[35] The respondent made a claim under the then *Work Health Act 1986* (NT), which is now the *Workers Rehabilitation and Compensation Act 2008* (NT) ('the Act'), on 20 November 2007. Initially, the appellant deferred its response pursuant to sub-section 85(1)(b) of the Act. Subsequently, it

disputed the respondent's claim by a Notice of Decision and Rights of Appeal dated 29 January 2008.

[36] On 22 May 2009, the respondent commenced proceedings in the Work Health Court. His wife, Barbara Rothwell, was appointed as litigation guardian on 24 August 2010.

[37] The appellant defended the proceedings and denied liability to the respondent's claim until 24 August 2011 when, by its solicitor, it consented to an order in the following terms:

> The worker suffered an injury, namely, a ruptured blood vessel in the brain, which resulted in or materially contributed to his incapacity and is entitled to compensation pursuant to the *Workers Rehabilitation and Compensation Act*.

[38] This became an order of the Work Health Court on 29 August 2011. The proceedings had been listed for hearing before the Work Health Court for five days from 5 September 2011. The parties were able to resolve most of the issues remaining between them by 5 September 2011. The remaining issues were completed by a hearing which lasted a little over one day, concluding early on 6 September 2011.

[39] On 6 September 2011, formal orders in respect of the resolved issues were entered in Work Health Court. The appellant accepted all of the respondent's claims for ongoing compensation and most of his claims for past compensation. Three issues remained to be determined by the Work Health Court. These issues were:

(1) Is the respondent entitled to be paid compensation by the appellant for the value of past attendant care services provided for him even though he did not have to pay for them (past gratuitous attendant care services)?

(2) Was it unreasonable for the appellant to delay accepting the respondent's claim after any and, if so, what date, and did the employer's delay warrant punishment and/or deterrence (interest on past benefits)?

(3) Should the appellant pay the respondent's legal costs at a higher rate than the standard basis (solicitor and client costs)?

[40] The value of the respondent's entitlement to past attendant care services, pursuant to s 78 of the Act, calculated over the period from 22 May 2008 to 6 September 2011 was agreed to be the sum of $274,680.00. There was no agreement that the respondent were entitled to that sum. The learned Magistrate found, after considering the provisions of the Act with some care and a number of relevant authorities, that the respondent was entitled to be paid for the value of the gratuitous attendant care services provided by the respondent's family. Accordingly, his Honour ordered that the appellant pay the agreed sum of $274,680.00 to the respondent for past attendant care services pursuant to s 78 of the Act, as well as interest pursuant to s 109(1) of the Act on that sum. His Honour awarded other amounts for interest, as well as punitive damages. These orders were not the subject of an appeal or cross-appeal in this Court, although they were the subject of an appeal to the Supreme Court.

[41] The learned Magistrate also ordered that the appellant pay the respondent's costs that were incidental to the proceedings and to the claim and mediation

process prior to commencing the proceedings up to and including 18 August 2008 to be taxed, in default of agreement, on the standard basis at 100 percent of the Supreme Court scale. There is no appeal from that order.

[42] His Honour also ordered that the appellant pay the worker's costs of and incidental to the proceedings on and after 19 July 2008 to be taxed in default of agreement on the solicitor and client basis.

[43] From these orders, the appellant appealed to the Supreme Court. The appeal was heard by Blokland J, who delivered judgment on 31 July 2012. The respondent filed a Notice of Contention in relation to certain matters. A number of the issues decided by her Honour are no longer the subject of complaint. The issues which remain alive by the Notice of Appeal and the Notice of Cross-appeal, which had been filed on this Court, concern two matters:

(i) Whether her Honour was correct to dismiss the appellant's appeal and the appellant was required to compensate the respondent for the value of past gratuitous attendant care services and interest thereon.

(ii) Whether her Honour was correct in allowing the appellant's appeal against the order that the appellant pay costs on the solicitor and client basis and instead awarding costs on 100 percent of the Supreme Court scale to be taxed on the standard basis.

[44] The learned Magistrate observed in his reasons that Mrs Barbara Rothwell gave oral evidence as to the attendant care services which she and her family had been providing for the respondent, their extent and why they were required, and the financial and health effects on the respondent and his

family as a result of the appellant's delay in accepting the claims. His Honour observed that she was not cross-examined and that he accepted her evidence in its entirety.

[45] His Honour summarised the evidence in these terms:

> The evidence of Mrs Barbara Rothwell was that she and various of their 11 children provided attendant care services to Mr Rothwell over all the periods when he was not an in-patient in a hospital or rehabilitation centre, from about 29 September 2008. … She also provided such services while her husband was an in-patient in Alice Springs Hospital from 22 May 2008 to 29 September 2008. This care involved a significant number of hours each day everyday to feed him, clean him (he is doubly incontinent), dress him, prepare his meals and help him to eat, provide physiotherapy and help him exercise his limbs, and the whole range of personal services necessitated by Mr Rothwell's severe physical and cognitive disabilities arising from the work injury. These services were provided by these family members gratuitously — that is, they provided such services to their husband/father without any contract or other binding arrangement to reimburse them for the value of the services provided. They provided such services freely, out of natural love and affection.[31]

[46] His Honour found on the evidence that the attendant care services of the sort provided to the respondent were

> an essential part of his rehabilitation directed to recovering and maintaining his health generally, and his flexibility and his capacity to stand and transfer himself from bed to chair to car, etc – his physical condition – and to keep him clean and continent and as involved as possible with his family and to continue to live at home – his social condition. I find that the extent of these services provided was consistent with community standards operating over the period in question, and not indicative of an unduly high standard.[32]

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[31] *Rothwell v BAE Systems Australia Ltd* [2011] NTMC 39 at [11].

[32] Ibid at [27].

[47] Further, his Honour noted that it was agreed between the parties that the gratuitous attendant care services provided by Mr Rothwell's family were reasonable and necessary for the purposes of Division 4 Part 5 of the Act.

[48] Some other findings which his Honour made were that Mrs Rothwell had been about to return to full-time work at about the time that the respondent suffered his injury. She was not able to do so and has never done so since. She has devoted herself to the respondent's care. She spent a great deal of time attending on the respondent when he was in hospital and in rehabilitation, and even more time each day after he was discharged home on 29 September 2008. She has lost potential earnings over this period.

[49] His Honour noted that her evidence was that Mrs Rothwell and her large family suffered financially as a result of the respondent ceasing to work and his not receiving weekly benefits and attendant care services under the Act. At different times, the family received the respondent's accumulated leave and sick pay. They received payments under the respondent's superannuation and the insurance policy attached to it. However, all too soon, all such sources of financial assistance were exhausted and the family was reduced to caring for the respondent at home supported solely by social security payments, plus assistance from those children who were old enough to work and assist the family. His Honour accepted that the evidence was that this was insufficient properly to meet all of the respondent's care needs, or to meet the family's needs.

[50] Further, his Honour found that because the claim was disputed and because Mrs Rothwell and her 11 children could not afford to pay for attendant care services for the respondent, the respondent's physical condition deteriorated from the time when he was discharged from the Hampstead Rehabilitation Centre to the Alice Springs Hospital on 22 May 2008, where he remained until 29 September 2008. He was not, during that time, receiving the number of hours of physiotherapy necessitated by his physical disabilities. As a result, he developed contractures in his limbs from which he has not and will never fully recover. He has a permanently reduced capacity to stand and remain standing, and to transfer himself from his bed to his wheelchair or to a chair at the table, or to assist in toileting and showering himself. This reduced capacity is greater than what it would have been if he had received ongoing physiotherapy services as required.

[51] It is against these facts which her Honour in the Court below and which we are required to consider the contentions of the parties.

The order for the payment for past gratuitous attendant services

[52] It is common ground that the test for liability is not whether the respondent has a need for those services. The question is whether he has an entitlement to receive compensation for the value of the services provided under the provisions of the Act. First, it is necessary to refer to s 73 of the Act which appears in Subdivision C of Part 5 of the Act and is set out in the judgment of the Chief Justice at [11] above.

[53] The entitlement upon which the learned Magistrate relied to found the respondent's entitlement was not based on s 72, but was based upon s 78 of the Act, which appears in Division 4 Part 5 of the Act. The heading of that Division is 'Rehabilitation and other compensation'. Section 75 of the Act is in the following terms:

> **Purpose**
>
> (1) The purpose of this Division is to ensure the rehabilitation of an injured worker following an injury.
>
> (2) For the purposes of sub-section (1), 'rehabilitation' means the process necessary to ensure, as far as is practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, economic and social condition in which the worker was before suffering the relevant injury.

[54] Section 75A is a provision which requires an employer liable under Part 5 of the Act to pay compensation to an injured worker to take all reasonable steps to provide the injured worker with suitable employment and, so far as is practicable, to participate in efforts to re-train the worker. Provision was made for an employer who is unable to provide the worker with suitable employment to refer the worker to an alternative employer incentive scheme developed by the Work Health Authority. A failure to comply with those requirements is an offence punishable by a fine or, in the case of a natural person, by either a fine or imprisonment.

[55] Section 75B is a provision requiring the worker to undertake reasonable treatment and training or assessment at the expense of the worker's

employer. A failure by a worker to reasonably undertake medical, surgical and rehabilitation treatment or to participate in the rehabilitation training or a workplace based return to work program which could enable him or her to undertake more profitable employment has the result that he or she is deemed to be able to undertake such employment and that his or her compensation under Subdivision B of Division 3 may, subject to s 69, be reduced or cancelled accordingly: see s 75B(2)–(3). Section 76 provides for additional compensation for rehabilitation, training and workplace modification as is reasonable and necessary for the purpose of Division 4 for a worker who suffers or is likely to suffer from a permanent or long-term incapacity. Section 77 provides for the payment to a worker who has suffered a significant reduction in his or her mobility as a result of suffering a permanent or long-term incapacity and who has not received the benefit of the modification of a vehicle and who could not safely drive a motor vehicle to be reimbursed by the employer of any costs incurred that are reasonable and necessary to enable the worker to achieve reasonable mobility in the community.

[56] The provisions of s 78 of the Act, under which the claim for compensation was ordered to be paid by the Work Health Court is set out in the judgment of the Chief Justice at [5] above.

[57] Counsel for the appellant has submitted that the expression ‘an employer shall pay the costs incurred for such ... attendant care services as reasonable and necessary for the purposes of this Division ...’ was limited to an item of

expenditure for which the worker had either already paid or was contractually liable to pay, and did not include the value of a gratuitous service. Considerable reliance was placed upon the decision of the New South Wales Court of Appeal in *New South Wales Sugar Milling Co-operative v Manning*.[33] In that case, the worker became a C5 quadriplegic as a result of a motor vehicle accident. He was treated at several hospitals and eventually discharged home. His wife devoted her time whilst he was in hospital to learn quadriplegic nursing. She provided exceptionally efficient caring and devoted care in looking after her husband's needs. The claim was made pursuant to s 60 of the *Workers Compensation Act 1987* (NSW). Section 60(1) then provided:

> (1) If, as a result of an injury received by a worker, it is reasonably necessary that:
>
> (a) any medical or related treatment be given, or
>
> (b) any hospital treatment be given, or
>
> (c) any ambulance service be provided, or
>
> (d) any occupational rehabilitation service be provided,
>
> the worker's employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in sub-section (2).'

[58] It is not necessary to repeat sub-section (2), but sub-section (3) provided:

[33] (1998) 44 NSWLR 442.

(3) Payments under this section are to be made as the costs are incurred, but only if properly verified.'

[59] The expression 'medical or related treatment' was defined by s 59 to include a range of treatments by professional persons such as medical practitioners, dentists, etc; therapeutic treatment given by direction of a medical practitioner and care (other than nursing care) of a worker in the worker's home directed by a medical practitioner having regard to the nature of the worker's incapacity. The New South Wales Court of Appeal unanimously construed the word 'costs' within the meaning of s 60 in its ordinary and natural meaning. Although sympathetic to the claim, Meagher JA said that the section was an indemnity section which empowered the making of orders that the employer pay his employee's bills. His Honour said that this was the obvious primary meaning of the word 'costs' and was also what was required by paragraphs (b), (c) and (d) of s 60 and the obvious meaning of most of the paragraphs of the definition in s 59.

[60] Stein JA said that the principle in *Griffiths v Kerkemeyer*[34] had no place in s 60. He could see no legislative intent to the contrary. Nor did he think that this was a case of two competing constructions being open and the most advantageous one to the worker being applied in accordance with *Wilson v Wilson's Tile Works Pty Ltd*.[35] Sheppard A-JA held that the word 'costs' in the context in which it appeared in s 60 could have no meaning other than

[34] (1977) 139 CLR 161.

[35] (1960) 104 CLR 328, 328–35.

the one which involved an actual liability on the part of the worker to pay for the service that he provided.

[61] *Manning*'s case was distinguished by the New South Wales Court of Appeal in *Northern Rivers Charity Racing Association v Lloyd*.[36] In that case, the mother of a person who suffered brain damage and other severe injuries in a horse riding accident whilst in the employ of the appellant provided 24-hour a day care. The services she provided fell within the meaning of s 59 of the Act and constituted 'medical or related treatment' as defined by that section. In that case, the mother sought to be compensated by the employer's insurer for her services. She claimed weekly allowances and increases in those allowances as well as sending an invoice to the insurer for the services rendered. In that case, Ipp JA, with whom the other members of the Court agreed, noted that by reason of the serious brain damage sustained by the worker, she did not have the requisite mental capacity to enter into an express contract. The services provided by the mother were 'necessaries' under the general law. Therefore, the mother was a supplier of necessary services for someone in need, who lacked the legal capacity to contract for them. In such circumstances, an obligation may be implied on the part of the incapacitated person to pay the person who supplied the services. Ipp JA held that the expression 'implied contract' should be eschewed in relation to the supply of necessaries to an incapacitated person as it is inappropriate and can be misleading. His Honour found that there was a fundamental

[36] (2002) 23 NSWCCR 526.

difference between the admittedly voluntary services supplied to the worker in *Manning*'s case (who had the full capacity to contract) and services supplied for the incapacitated worker in this case. His Honour held that the trial Judge rightly treated the cardinal issue as being whether, in providing the services, the mother intended to charge her daughter for the services on the basis that the daughter would be legally bound to pay for them. His Honour observed that mutual promises made in the ordinary course of domestic relationships do not ordinarily give rise to an action on a contract: *Balfour v Balfour*.[37] Similarly, in *Re Rhodes*,[38] a woman of unsound mind was confined in an asylum for more than 20 years at a cost of 140 pounds per year. Her private income was no more than 96 pounds per year and her brother paid the deficiency out of his own pocket. After his death, the brother's son, who was his executor, did likewise, and the deficiency was made out partly by him and partly by the brother's son's siblings. After the woman's death, the executor of the woman's brother, on behalf of himself and his brother and sisters, claimed repayment of the monies which had been paid over the years to make up the deficiency. The claim failed, the Court of Appeal presuming that the brother had paid for his sister for many years out of affection, and so had the executor and his brother and sisters. None of them had given any indication that he or she was to be repaid. Thus, the deficiency had been provided under circumstances from which no implied obligation could arise. His Honour noted that the presumption referred to in

[37] [1919] 2 KB 571.

[38] (1890) 44 Ch D 94.

Balfour v Balfour and applied in *Re Rhodes* is rebuttable and, in this case, the evidence was sufficient to rebut the presumption.

[62] Subsequently, the *Workers Compensation Act 1987* (NSW) was amended to include in s 60AA(3) a provision that compensation was 'not payable under the section for gratuitous domestic assistance unless the person who provides the assistance lost income or foregone employment as a result of providing the assistance'.

[63] Counsel for the appellant argued that the words in s 78(1) were clear and unambiguous. In effect, his submission was that s 78 by the same reasoning was an indemnity provision, notwithstanding that it is plain that the wording allows for the quantification of the expenditure before it is actually incurred. Section 78(3), refers to home modifications that 'are or are to be carried out', and s 78(2)(b) refers to proposed modifications to a motor vehicle.

[64] Counsel for the respondent submitted that the actual decision in *Manning* was distinguishable because both the learned Magistrate and Blokland J were correct in finding that additional compensation payable under that section is not an indemnity provision. It was further submitted that Blokland J was correct in deciding that the terms 'costs' and 'costs incurred' are capable of bearing multiple meanings depending on the context in which they are used. The context is revealed, first and foremost, by examining the Act as a whole and that, when read together, the provisions of s 78

necessarily contemplate that, in order to advance the rehabilitation of the injured worker, it may be necessary for family members to provide 'household and attendant care services' which would not be reasonable to expect them to provide without remuneration. This remuneration therefore represents 'a cost incurred' because it would not be reasonable to obtain these services on any other basis. Further, it was submitted that s 73 is an indemnity provision which already provides for indemnity for 'rehabilitation treatment' given by recognised professionals or by 'some other person'. Thus, it was put that in relation to attendant care, this includes 'costs reasonably incurred by the worker as the result of the injury' within the meaning of s 73(e). Therefore, if s 78 was confined to operate as an indemnity provision only, it would be redundant. Further, Mr Wyvill referred to the fact that s 73 specifically refers to 'the costs reasonably incurred by the worker', whereas the words 'by the worker' have not been incorporated into s 78. It was submitted that this difference was deliberate and that the costs for which compensation is payable under s 78 are not necessarily confined to those incurred 'by the worker'. It may extend to the reasonable costs of care provided and therefore incurred by family members. This difference answered a submission that the Magistrate's and the Judge's construction equated 'costs' with need. It was also a further reason why s 78 is not confined to legal indebtedness.

[65] Further, it was put that this construction would promote the purpose and object of Division 4 of the Act, namely, rehabilitation as defined in s 75. It

would encourage family members to continue to support the worker in complying with his or her duty under s 75(b) even though the employer may not be complying with its duty.

Disposition

[66] The question is, of course, one of statutory construction and this must begin with a consideration of the text itself. As was noted in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*,[39] the surest guide to the legislative intention is the language actually employed in the text. The meaning of the text may require consideration of the context which includes the general purpose and policy of the provision, in particular, the mischief it is seeking to remedy. In this context, s 62A of the *Interpretation Act 1978* (NT) provides that in interpreting the provisions of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

[67] I accept also that the expression 'costs incurred' is capable of a number of different meanings depending on the context in which it is found. Clearly, in the case of an indemnity provision, such as was considered in *Manning*'s case, it may be restricted to a cost for which an invoice has been sent and paid; it may extend to cover a cost for which there is a contract or other liability to pay, but not yet paid. In other cases, it may also include a future liability which has not yet been incurred, but which is likely to be incurred

[39] (2009) 239 CLR 27 at 46 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

in the sense that there probably will be an actual professional charge by some third person for the service in the future: see, for example, the discussion by Campbell J in *Smith (Committee of) v Wawanesa Mutual Insurance Co*;[40] *Hawkins v Bank of China*;[41] *Litherland Urban District Council v Liverpool Corporation*.[42] At the other extreme, Osler J in *MacDonald v Travelers Indemnity Co of Canada*[43] was called upon to construe s 3107 of the *Michigan Insurance Code*[44] which provided:

> 3107. Personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

[68] In that case, the Court was required to reach a determination as to the point in time at which expenses were incurred 'for a terribly disabled young woman'. His Honour said:

> I have not been referred to any case or to any other authority in which the word 'incur' has been specifically defined or dealt with. The ordinary meaning of the word is given in the *Shorter Oxford Dictionary* as 'to run into; to render oneself liable to'. In the context of the Michigan Statute, it does not seem to me that the word implied a strict necessity to be legally obligated to make payments before expenses could be said to have been incurred.

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40 (1998) 168 DLR (4th) 750 at 754–7.

41 (1992) 26 NSWLR 562 at 571–2 per Gleeson CJ.

42 (1958) 1 WLR 913 at 916–18.

43 (1987) 42 DLR (4th) 204.

44 See ibid at 209 where the provision is set out in the judgment.

> Suppose, for example, Lynne MacDonald had not had the support of her family and had been destitute. She could never have made payments with respect to her care or rehabilitation and, thus, made herself entitled to be reimbursed. It seems to me that if a reasonable necessity for the item claimed is established and the cost of obtaining such a service or product is shown, the expense may be said to be incurred and the obligation to pay within 30 days must then be assumed by the defendant.

[69] In my opinion, s 78 of the Act is not an indemnity provision, and this distinguishes this case from the decision in *Manning*. That this is so is plain from s 78(2), which clearly contemplates payment for future costs not yet incurred. Moreover, there is no provision in s 78 which requires payments for the costs incurred to be properly verified, a factor which the Court relied upon in *Manning.*

[70] In my opinion, s 78 by its terms is a remedial provision in that it provides for additional compensation. The general approach in this jurisdiction towards remedial or beneficial legislation is that the words used by the statute must be given a construction so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open. This approach is not confined to cases of ambiguity: see *Woodruffe v Northern Territory of Australia*.[45]

[71] The argument of counsel for the appellant is that the liability is encapsulated in s 78(1), whereas s 78(2) is concerned with what is reasonable and necessary. Thus, it was put that nothing in sub-section (2) could be used to

[45] (2000) 10 NTLR 52 at 62 [28].

discern the meaning to be given to the expression ‘shall pay the cost incurred’.

[72] I do not accept this submission. Plainly, sub-section (2) contemplates future costs even though they have not yet been incurred in the case of proposed modifications to a home or to a vehicle. This would suggest that a narrow construction of the expression was not intended. In relation to s 78(2)(d)(vii), the Act considered the possibility of relatives providing attendant care services and required the Court to take into account the extent to which a relative of the worker might reasonably be expected to provide such services. The implication is, (bearing in mind the opening words of sub-section (2) are that these matters are to be considered ‘without limiting the matters which may be taken to account’) that the Court might also take into account the extent to which the opposite might be the case.

[73] I consider also that it is significant that the expression ‘costs incurred’ in s 78(1) does not include the additional words ‘by the worker’ as in s 73. I think that this omission is deliberate, and is designed to give the expression in s 78(1) a wide meaning.

[74] When one considers the fact that s 78 is in Division 4 of Part 5 of the Act and that the purpose of the provision is to ensure that rehabilitation of an injured worker following injury, and the definition of ‘rehabilitation’ in sub-section (2) of s 75, this reinforces my opinion that a narrow construction ought not be given to s 78(1), because to do so would not promote the

purpose of that Division. In a case such as the present, where liability is disputed by the employer or its insurer, and the injured worker's family do not have the means to pay themselves for professional assistance, but there is a need for home care of a kind provided by Mrs Rothwell, the purposes of the Division would be enhanced by encouraging relatives to provide services in the expectation that they and the worker would ultimately benefit indirectly by compensation paid to the worker, or, to the worker's adult guardian. The appellant's interpretation would not promote that purpose and in terms of s 62A of the *Interpretation Act*, it is my view that the respondent's interpretation of the provision is to be preferred. Another factor which is telling is that, if the appellant's construction of s 78(1) is correct, the provisions of s 78(2)(d) would be redundant as the entitlement would arise under s 73(e).

[75] The appellant's argument, if it is successful, would have the consequence that there would be no liability to pay any compensation in respect of the services which were clearly needed, unless Mrs Rothwell had indicated clearly that she expected to be remunerated by rendering an account for her services along the lines of what the worker's mother did in *Northern Rivers Charity Racing Association v Lloyd*,[46] and even then, the claim may not be successful if disputed because there would be an onus on the relative to prove that there was either a binding contract (which may not be possible

[46] (2002) 23 NSWCCR 526.

with a mentally disabled worker) or a legitimate expectation of payment. The appellant's construction places a premium on legal acuity.

[76] Furthermore, the word 'costs' is not necessarily limited to a financial obligation or a liability. One of the meanings of 'costs' given in the *Shorter Oxford Dictionary* is the expenditure of time and labour. Whilst the finding of the learned Magistrate was that the assistance given by Mrs Rothwell and by members of the family was given out of natural love and affection, the circumstances were such that they could do little else, and the costs to them was both the time and labour which they incurred in providing their assistance as well as the loss to Mrs Rothwell of the opportunity of earning any income as she had planned to do.

[77] I would dismiss the appeal on this ground.

The costs issue

[78] The respondent submits that the appropriate costs order in this case was that the respondent should recover his costs of the proceedings at first instance on an indemnity basis. It was no longer submitted that it should be on the solicitor and client basis, (assuming that there is a difference).

[79] The respondent's criticism of the position of Blokland J was that having decided to allow the appeal against an order for solicitor and client costs, her Honour ought to have made an order for indemnity costs.

[80] The learned Magistrate referred to s 109(1) of the Act which provides as follows:

> **Unreasonable delay in settlement of compensation**
>
> (1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or paying compensation, it must:
>
> (a) where it awards an amount of compensation against the employer — order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded; and
>
> (b) if, in its opinion, the employer would otherwise be entitled to have costs awarded to him or her — order that costs be not awarded to him or her.

[81] The learned Magistrate found that the employer at different times (1) displayed a wilful disregard of the facts by continuing for an excessively long period not to accept the claim by relying on some alternative hypothesis which lacked any adequate evidence to support it; and in denying in its defence, that Mr Rothwell suffered a rupture of a blood vessel in his brain on 28 May 2007; (2) a wilful disregard of the law in maintaining its defence based on the concept of 'disease'; (3) unmeritorious high-handed conduct in failing to pursue any further opinion from the specialist, Mr Brophy, or other medical specialists for 23 months whilst still denying Mr Rothwell's claim, in all the circumstances.

[82] Blokland J, after reviewing the evidence, held that, although his Honour proceeded on the basis of a factual error that a certain report had been

received by the employer in August 2008, there was a significant amount of other material to justify the conclusion of unreasonable delay. Her Honour concluded after reviewing the available material that she agreed with the conclusion of the learned Magistrate that the delay was unreasonable from 19 August 2008 to 6 September 2011 and that interest under s 109(1) should be paid. There is no appeal from that part of her Honour's decision. Her Honour also found that his Honour was correct to conclude that the employer had no case to justify delay on the basis that the appellant's injury was a 'disease'. There is no appeal against that finding either and it seems to me that both of these matters really involved questions of fact to be decided by the learned Magistrate from which no appeal lies anyway. Her Honour, on the other hand, found that there was an error by the Work Health Court in finding that the employer's defence was filed after receiving a report from the specialist, Mr Brophy, because his Honour was mistaken as to the date of the receipt of that report. Consequently, her Honour disagreed that there was evidence that warranted a finding that the delay could be characterised as reprehensible.

[83] The reason why her Honour awarded costs only on a standard basis is because the Court had already awarded costs under s 109(1) of the Act which specifically provided for interest to be paid where the Court is satisfied that the employer has caused unreasonable delay in accepting the claim for or paying compensation. As no other factor was identified by her

Honour, it would appear that her Honour considered that an order for indemnity costs was not warranted.

[84] Counsel for the respondent raised other matters apart from delay in support of the cross-claim, including the statutory duty under the Act to advance the rehabilitation of the worker (including by paying compensation) and the correlative duty from BAE to consider and decide claims promptly; the impact of the delay on the respondent and his family which BAE ought reasonably to have foreseen; the fact that BAE positively denied the claim in its entirety until 24 August 2011 when putting it at its highest the material available was never better than incomplete; the fact that BAE capitulated seven days before trial and the fact that neither BAE nor its insurer put into evidence any explanation for its change of position.

[85] The general rule is that, whether or not to order taxation on the basis of indemnity costs is in the discretion of the Court. However, the exercise of the discretion to order costs over and above the ordinary is exceptional, usually reserved for cases where the losing party has been engaged in unmeritorious, or deliberate or high-handed or other improper conduct, such as to warrant the Court showing its disapproval and, at the same time, preventing the successful party being left out of pocket. Having regard to the findings of her Honour on appeal and the extent to which those matters are now the subject of appeal to this Court, I am unable to find that her Honour improperly exercised her discretion to award costs only on a party party basis. I would, therefore, dismiss the Notice of Cross-Appeal.

KELLY J:

[86] On 28 May 2007 Mark Rothwell collapsed at work while working as an instrument technician for the appellant BAE Systems Australia Ltd at Mt Everard. It later transpired that his collapse was caused by a ruptured blood vessel in the brain, what is colloquially known as a stroke. Mr Rothwell was taken by ambulance to the Alice Springs Hospital. His condition deteriorated and he was evacuated to the Royal Adelaide Hospital. He has been left with severe and permanent cognitive and physical disabilities due to brain damage as a result of which adult guardians were appointed for him under the *Adult Guardianship Act 1988* (NT) in July 2007.

[87] On 20 November 2007 Mr Rothwell, through his guardians, made a claim under the then *Work Health Act 1986* (NT), which is now known as the *Workers Rehabilitation and Compensation Act 2008* (NT) ('the Act').

[88] The appellant deferred it's response to Mr Rothwell's claim pursuant to s 85(1)(b) of the Act and, on 29 January 2008 formally disputed the claim by a notice of decision and rights of appeal.

[89] There followed a period during which reports were requested and the parties entered into negotiations and later mediation. Mr Rothwell commenced proceedings in the Work Health Court on 22 May 2009.

[90] The appellant had defended the proceeding and denied liability for Mr Rothwell's claim until 24 August 2011 when it consented to an order in the following terms:

> The worker suffered an injury, namely a ruptured blood vessel in the brain, which resulted in or materially contributed to his incapacity and is entitled to compensation pursuant to the *Workers Rehabilitation and Compensation Act*.

[91] An order to this effect was made on 29 August 2011, a week before the date the matter was listed for hearing before the Work Health Court on 5 September 2011. One of the reasons for the long delay in resolving the matter was that a report from Dr Brophy which had been requested by the employer in August 2008 was not received by the employer's solicitors until 26 July 2010 after a number of follow up requests by the solicitors.[47]

[92] Most of the issues between the parties had been resolved by 5 September 2011 and the matter proceeded to a hearing on the remaining issue, namely whether Mr Rothwell was entitled to compensation under s 78 of the Act for attendant care services provided to him by Mrs Rothwell and other members of the family which were in the nature of gratuitous services. The learned magistrate handed down his decision in relation to that matter on 27 September 2011 at which time he also made consequential decisions in relation to penalty interest and costs. On that date the learned magistrate

[47] The date of receipt of this report became an issue on the question of costs, which is the subject of the cross-appeal.

made the orders summarised in paragraphs [40] to [42] of the reasons of Mildren J.

[93] The appellant appealed to the Supreme Court against each of those orders. The learned appeal judge dismissed the appellant's appeal against the conclusion of the Work Health Court that past gratuitous attendant care services amounted to 'costs incurred' under s 78 of the *Workers Rehabilitation and Compensation Act*. Her Honour dismissed the appeal against the award of interest under s 109(1) of the Act and allowed the appeal against the award of punitive damages under s 109(3) and the award of costs on the solicitor and client basis. Her Honour ordered instead that the appellant pay the respondent's costs on the standard basis.

[94] The appellant appeals to this Court against the dismissal of the appeal against the conclusion of the Work Health Court that past gratuitous attendant care services amounted to costs incurred under s 78 of the Act, and the respondent has cross-appealed against the decision to allow the appeal against the order for solicitor and client costs. There has been no appeal against the decisions in relation to interest and punitive damages.

[95] In dismissing the appeal against the learned magistrate's decision to order a payment for gratuitous services rendered by Mr Rothwell's family pursuant to s 78 of the Act her Honour said:

> It is the words of the *Work Health Act* that have primacy. In my view even without considering the broader context of the *Work Health Act* and the remainder of s 78 itself, the term 'costs incurred' is well

capable of multiple ordinary meanings. It is not a clear or precise term by itself, even more so when considered in the broader context of the Act. It is not clear at all the words ‘costs incurred’ are to be read as words of limitation, or should be read in the narrowest literal sense available. The words do not in my view signify a limit or cap on compensation payable. The monetary value is governed by what is reasonable and necessary.

‘Costs incurred’ may, as the employer contends, depending on the context, refer to an actual monetary cost. The section does not state ‘actual monetary costs incurred’ or ‘costs invoiced’ or any other similar phrase tending to imply monetary costs only or costs the worker is personally liable to pay. I read ‘costs incurred’ as the costs inherent in the provision of care and in context, would include costs inherent in such care that accrues over a period of time.

...

As stated, in my view the term ‘costs incurred’ cannot simply be read to be confined only to monetary costs actually incurred, but read in the context of the section, the Act and its purpose, (compensation and rehabilitation of injured workers), it is clear costs may be incurred through what is inherent in the provision of services by family members. In my view there is no warrant to import a proviso that there must first be a legal obligation that the recipient of the care is to ‘pay’.

Although not determinative of the issue, an additional consideration is the improbability of the legislature allowing on the one hand payment of compensation in circumstances where a spouse or family member has invoiced or otherwise signified an obligation for an injured worker to pay for household services or attendant care, and on the other, not to allow compensation when no such invoice or other sign of an obligation to pay is served but the same services are provided. It is also improbable that the intention was to allow an arbitrary distinction between compensation for attendant care provided following formal acceptance of a claim or order of the Court but not prior to that date when the subject care is the very same provided by the same persons and referrable to the same work place injury.

As regards context, I have also considered the submission made on behalf of the appellant that this is a no-fault scheme. In my respectful

> view that added context is not particularly influential in this case. As pointed out on behalf of the respondent, s 78 incorporates an overriding test of what is 'reasonable and necessary for the purposes of this Division'. In relation to both household and attendant care services the criteria 'reasonable and necessary' specifically refers to the reasonable expectation of provision of attendant care by relatives.
>
> I agree with the submission and contention raised on behalf of the respondent worker that the structure and purpose of s 78, located in Division IV (*Rehabilitation and other Compensation*) sets up a broad balancing process of costs incurred in the broad sense of including the outlay of time or labour intrinsically part of providing care against a standard of reasonableness and necessity.[48] (citations omitted)

[96] I cannot agree with this analysis. The learned appeal judge read 'costs incurred' as 'the costs inherent in the provision of care'[49]; or 'costs incurred in the broad sense of including the outlay of time or labour intrinsically part of providing care'[50]. I do not think such a reading is open on the plain words of the section. The Act is beneficial legislation and s 78 'must therefore be given a construction so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open'.[51] However, this does not mean that the court should assume that the legislature intended to compensate the worker for all eventualities, or warrant an approach that strains the language of the section in order to reach such a result. The first resort must be to 'the actual language employed'.

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[48] *BAE Systems Ltd v Rothwell* [2012] NTSC 52 at [31]–[32], [36]–[39].

[49] Ibid [32].

[50] Ibid [39]

[51] *Woodruffe v Northern Territory of Australia* (2000) 10 NTLR 52 at 62 [28] per Martin CJ, Mildren and Riley JJ.

[97] Section 78(1) provides:

> **78 Other rehabilitation**
>
> (1) Subject to this section, in addition to any other compensation under this Part, an employer shall pay the costs incurred for such home modifications, vehicle modifications and household and attendant care services as are reasonable and necessary for the purpose of this Division for a worker who suffers or is likely to suffer a permanent or long-term incapacity.

The remainder of the provisions of s 78 are set out in full in reasons of Riley CJ at [5].

[98] In my view there is no ambiguity whatsoever in the words in s 78(1), namely 'an employer shall pay the costs incurred for [the nominated matters]'.

[99] The words 'costs incurred' were subject to extensive discussion before the learned magistrate and then the learned judge on appeal. However those words do not occur in isolation. They are part of the phrase 'the employer shall pay the costs incurred'. It is therefore not to the point that the word 'costs' can in some contexts mean something other than a monetary value. In written submissions the respondent argued before this Court that:

> When s 78 is read in the context of the Act as a whole and particularly s 73, s 75 and s 75B, it is quite clear that s 78 is not an indemnity provision but, as the Magistrate and the Judge held, covers (in the respects relevant to this appeal) 'costs incurred in the broad sense of *including the outlay of time or labour* intrinsically part of providing care against a standard of reasonableness and necessity. (emphasis added)

[100] This argument ignores the context in which the word ‘costs’ occurs in s 78(1). The expression, as I have said, is ‘the employer shall pay the costs incurred’. In that context it is not possible to construe the word ‘costs’ as including ‘the outlay of time or labour extrinsically part of providing care’. For the employer to ‘pay the costs’ those costs must be a monetary value. One cannot *pay* ‘an outlay of time or labour’. One can pay *for* an outlay of time or labour but the ‘outlay of time or labour’ is represented in s 78(1) by the words ‘attendant care services’, not the word ‘costs’. For the sub-section to have the meaning contended for by the respondent (and found by the learned magistrate and the learned appeal judge) s 78(1) would have to read:

> Subject to this section, in addition to any other compensation under this Part, an employer shall *pay for* such home modifications, vehicle modifications and household and attendant care services as are reasonable and necessary …

That is to say the words ‘costs incurred’ would need to be deleted from the sub-section.

[101] Alternatively, one would have to substitute for the expression ‘the costs incurred’ something along the lines of ‘an amount equal to the value of’ or ‘an amount equal to the commercial costs of providing’. It is apparent that that, essentially, is what the learned magistrate ordered the employer to pay, namely an amount agreed between the parties to be equal to the value of or the commercial cost of providing the services to the appellant which were provided gratuitously by members of his family.

[102] There is nothing in the context of the Act as a whole which would require such a strained interpretation to be given to the plain words of s 78.

[103] Starting with the plain words of the section, as explained above, if the employer 'must pay the costs incurred', the 'costs' must be a monetary amount capable of being paid — not the expenditure of effort. To come within the section, those costs must have been 'incurred'.

[104] As her Honour pointed out,[52] definitions of 'incur' in the *Macquarie Dictionary* include '1. to run or fall into (some consequence, usually undesirable or injurious); 2. to become liable or subject to through one's own action; bring upon oneself'. In common parlance, in the context of monetary costs, such costs are 'incurred' when someone has become subject to a liability to pay them, either now or at some future time, absolutely or contingently. Sub-section 78(2) refers to 'proposed modifications' and that sub-section 78(3) refers to modifications that 'are or are to be carried out'. It was argued that that if the employer may be obliged to 'pay the costs incurred' for *proposed* modifications, 'costs incurred' cannot be limited to amounts which the worker (or some other person) has a legal liability to pay. That submission ignores the fact that a person may become liable to pay an amount for building modifications by entering into a contract; that

[52] *BAE Systems Ltd v Rothwell* [2012] NTSC 52 at [33]

liability may be contingent upon the works being performed in accordance with the contract, but the costs will nevertheless have been 'incurred'.[53]

[105] It is not necessary in this case to determine the precise ambit of the term 'costs incurred'. Suffice to say that if a family member provides the services without charge, no costs capable of being paid by the employer have been incurred by either the injured worker or the family member.[54]

[106] The learned appeal judge referred to the

> improbability of the legislature allowing on the one hand payment of compensation in circumstances where a spouse or family member has invoiced or otherwise signified an obligation for an injured worker to pay for household services or attendant care, and on the other, not to allow compensation when no such invoice or other sign of an obligation to pay is served but the same services are provided.

However, the question is not whether 'an invoice or other sign of an obligation to pay' has been rendered. The question is whether costs (that is to say, monetary costs capable of being paid by the employer) have been incurred in providing the services.[55]

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[53] The liability may also be contingent upon the fulfilment of other conditions: for example a building contract might provide that the obligation to have the work performed and paid for is conditional upon a decision of the Work Health Court that the employer is obliged to pay for the proposed modifications, although one imagines that, in practice, the worker or his solicitors would normally negotiate with the employer's insurer to have the proposed modifications approved before entering a contract.

[54] In such circumstances, the family member might incur costs capable of being paid by the employer, for example in purchasing materials or in transport costs. However, that is not what has been claimed in this case.

[55] It was contended that this would advantage those workers whose family members were astute enough to enter a contract with the injured worker to provide attendant services for a fee. I do not agree. Most workers are represented by a solicitor, particularly if a dispute arises. In the ordinary course one would expect the worker's solicitor to negotiate with the employer's insurer with a view to agreeing on what constitutes reasonably necessary attendant care services and what is a reasonable amount to pay for such services whether they are provided by family members or a

[107] It was submitted that, if s 78 did not apply to gratuitous services, the reference in s 78 to 'attendant care services' would have no work to do, as 'the indemnity provision' which obliges the employer to pay for professional services of this nature is contained in s 73 (e). I do not accept that submission. First, s 78 is a special provision stated to apply to a worker 'who suffers or is likely to suffer a permanent or long-term incapacity'.

[108] Second, s 78 is wider than s 73. It is not confined to 'costs incurred by the worker', but obliges the employer to 'pay the costs incurred' for the matters set out in s 78(1) without limitation as to who has incurred those costs. This has obvious application to the case of payment for the cost of home and vehicle modification since the home or vehicle in question may belong to someone else[56] (for example a spouse or parents) and the modifications in question may (not necessarily will, but may) be paid for by someone else. However, there is no reason why it ought not to apply to 'household and attendant care services' as well, and extend to the case where costs are incurred by, for example, by a parent or spouse in providing or acquiring those services.

[109] Third, it would seem to me that, although there may well be some overlap between the services covered by s 73(e) and s 78, that area of overlap will

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professional care service provider. Should a dispute arise, an agreement would be entered into with the family member or outside provider and an interim award applied for.

[56] This is expressly contemplated in sub-paragraph 78(2)(a)(iv) which provides that, where the home in question is owned by someone else, one of the matters to be taken into account is the permission of the owner.

be there whether s 78 is construed so as to cover gratuitous services or not: it is not contended that s78 covers gratuitous services *only*.

[110] Fourth, the submission contains a hidden assumption that there can be only one 'indemnity section', and if s 73 is it, s 78 cannot be. There is no warrant in the Act for any such assumption. The operative words in s 78 governing what the employer must do are in exactly the same terms as the operative words in s 73: both state 'the employer must pay the costs incurred', and go on to set out the various matters covered by each section. There is no more reason to suppose s 73 to be 'an indemnity section' than to suppose s 78 to be one. Put the other way, there is no less reason to suppose s 78 to be 'an indemnity section' than to suppose s 73 to be one.[57]

[111] In submissions before the learned appeal judge, and before this court, the respondent relied on s 78(2) which, it was contended, contemplates that, in order to advance the rehabilitation of the injured worker, it may be necessary for family members to provide 'household and attendant care services' which it would not be reasonable to expect them to provide without remuneration. Particular reliance was placed on sub-paragraph 78(2)(d)(vii) which provides that, in determining what are reasonable and necessary household and attendant care services in a particular case, there shall be taken into account (inter alia) the extent to which a relative of the worker might reasonably be expected to provide attendant care services to

[57] The same pattern is followed in sections 76 and 77 which provide that 'an employer shall pay the costs incurred' for a range of other matters in the case of a worker who suffers or is likely to suffer a permanent or long-term incapacity.

him or her. It was further contended that remuneration for such services would therefore represent ‘a cost incurred’ because it would not be reasonable to obtain these services on any other basis.

[112] In my view this conclusion does not follow from the stated premise. First, the obvious immediate purpose of s78(2)(d)(vii) is to provide guidance to a court in determining what matters fall within the expression ‘the employer shall pay the costs incurred for such … household and attendant care services as are reasonable and necessary for the purpose of this Division’ (ie rehabilitation). Not all costs incurred for such services are to be paid by the employer; only those that are ‘reasonable and necessary’ for the stated purpose. To the extent that a relative might reasonably be expected to provide the service, then a cost incurred for that service will not be found to be ‘reasonable and necessary’: in the ordinary way, family members are expected to do some things for each other without charge. If a cost is incurred in providing services which a relative could *not* reasonably be expected to provide, then, by virtue of s 78(1), the employer must pay that cost, regardless of who supplies the services — a family member or a stranger. It does not follow that if such services are in fact provided gratuitously — ie without a monetary cost being incurred — the employer is nevertheless liable to pay to the worker an amount equal to the commercial value of those services.

[113] Second, I do not see that remuneration for gratuitously provided services can be said to ‘represent a cost incurred’ simply because it would not have

been reasonable to obtain those services without paying for them. Either costs have been incurred in procuring the services, or they have not. Whether or not it would be fair or reasonable to pay for those services is not to the point; the point is whether there have been 'costs incurred' in the provision of the services which, by virtue of s 78(1), the employer must pay.

[114] The respondent also relied upon the context of the Act as a whole and contended that the construction of s 78 proposed by the respondent was more consistent with the objects of the Act than that proposed by the appellant. I do not agree. There is nothing in the Act to suggest that it is the object of the legislation to provide complete compensation to an injured worker for all the consequences of a work related injury. Quite the contrary: it is clear that the Act provides compensation limited to those matters set out in the various sections of the Act.

[115] For example, more or less complete compensation for lost income is provided for the first 26 weeks of incapacity[58]; thereafter, compensation for lost earning capacity is limited to amounts calculated in accordance with s 65 of the Act. There follow a number of sections limiting the circumstances in which amounts are claimable for lost earning capacity, and setting criteria for calculating the amount claimable.[59]

[116] Section 73 follows, pursuant to which the employer is made liable to pay the costs reasonably incurred by the worker as a result of the injury for the

[58] Section 64.

[59] Sections 65A–69.

medical, surgical and rehabilitation treatment set out in the section as well as attendance by a nurse, or other person, where the disability is such that the worker needs nursing or personal attendance.

[117] This is followed by Division 4[60] which governs rehabilitation and certain other compensation payable in the case of long term incapacity. Sections 76, 77 and 78 all deal with additional compensation payable in the case of a worker who suffers or is likely to suffer a permanent or long-term incapacity. Section 76 provides that, in such cases, the employer shall pay the costs incurred for such rehabilitation, training and workplace modification as is reasonable and necessary for the purpose of Division 4[61]. Section 77 provides that, in such cases, in certain limited circumstances set out in that section, an employer shall pay to a worker any costs incurred by the worker (in excess of those which he or she would have incurred had he or she not suffered the incapacity) as are reasonable and necessary (again for the purpose of Division 4) to enable the worker to achieve reasonable mobility in the community. Section 78, with which we are concerned, provides that, in such cases, the employer shall pay the costs incurred for such home modifications, vehicle modifications and household and attendant care services as are reasonable and necessary (again for the purpose of Division 4).

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[60] Sections 75–8.

[61] Defined in s 75 as ‘to ensure the rehabilitation of an injured worker following an injury’.

[118] In my view, the construction contended for by the respondent, whereby the phrase ‘an employer must pay the costs incurred for … attendant care services’ is extended to creating a liability in the employer to pay an amount equal to the value of gratuitous services provided to an injured worker, is not more consistent with either the purpose of the legislation or the scheme of the Act than a construction which simply applies the literal or plain meaning of the words in the section.

[119] I would allow the appeal on this ground.

The cross-appeal in relation to costs

[120] As I would allow the appeal, it follows that, in my view, the order for costs made by the learned magistrate should be set aside and all questions of costs reconsidered by this Court. There is therefore no need for me to deal with the cross-appeal, which relates to whether the costs ordered by the learned magistrate should be paid on the standard basis or on an indemnity basis. If it were necessary for me to deal with it, I would dismiss the cross-appeal. I respectfully agree with the reasoning of the learned appeal judge on this question.

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