BAE Systems Australia Ltd v Rothwell [2012] NTSC 52

PARTIES:	BAE SYSTEMS AUSTRALIA LTD v ROTHWELL, Mark Edwin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 5 of 2011 (20917242)
DELIVERED:	31 July 2012
HEARING DATES:	30 March 2012
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	The Work Health Court

CATCHWORDS:

WORKERS COMPENSATION – Appeal against order by Work Health Court – past gratuitous attendant care services amount to "costs incurred" – unreasonable delay by employer – rate of interest under s 109(1) – award for punitive damages under s 109(3) discretionary – whether costs to be paid on solicitor and client basis

Appeal allowed on question of punitive damages and costs; otherwise dismissed.

Interpretation Act s 55, s 62,
Supreme Court Rules o 63,
Workers Compensation Act (SA)
Work Health Court Rules r 23,
Workers Rehabilitation and Compensation Act s 3, s 4, s 53, s 65, s 75, s 78, s 85, s 87, s 89, s 109, s 116,

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR; *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Griffiths v Kerkemeyer* (1989) 52 SASR 102; *Grincelis v House* [2000] 201 CLR 321; *Keating v Global Insulation Contractors* [2011] NTMC 02; *Kennedy Cleaning v Petkoska* (2000) 200 CLR 286; *Maddalozzo v Maddick* (1992) 84 NTR 27; *Metro Meat Ltd v Banjanovic* (1989) 52 SASR 102; *NSW Sugar Milling Co-operative Ltd v Manning* (1998) 16 NSW CCR 606; *Richfort Pty Ltd v Baluyut* (1999) 9 NTLR 58; *Wormald International v Aherne* NTSC; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310; referred to

REPRESENTATION:

Counsel:

Appellant:	Mr Walsh QC
Respondent:	Mr Lindsay

Solicitors:

Appellant:	Hunt and Hunt Lawyers
Respondent:	Povey Stirk Lawyers & Notaries

Judgment category classification:	B
Judgment ID Number:	BLO 1209
Number of pages:	39

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

BAE Systems Australia Ltd v Rothwell [2012] NTSC 52
No. LA 5 0f 2011 (20917242)

BETWEEN:

BAE SYSTEMS AUSTRALIA LTD
Appellant

AND:

MARK EDWIN ROTHWELL
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 31 July 2012)

Introduction

[1] This is an appeal by the employer, BAE Systems, against Orders made on 27 September 2011 in the *Work Health Court*. An appeal from an order of the *Work Health Court* is confined to questions of law.[1]

[2] The relevant background concerning the injury and proceedings is set out in the learned Work Health Magistrate's Reasons for Judgement.[2] The summary of evidence in His Honour's reasons is primarily focused on the

---

1 S 116(1) *Workers Rehabilitation and Compensation Act*; how a question of law is distinguished from a question of fact has been dealt with in *Waylexson Pty Ltd v Clarke* (2010) 25 NTLR 168 at 176 and 185. If the ultimate fact involves the application of a legal standard, the conclusion concerns a question of law. Generally, the question of whether the facts fall within the provision of a statute is a question of law.

2 "Reasons", paras [1] – [3].

evidence that was given by the respondent worker's wife.[3] The respondent's wife and various of their 11 children provided attendant care services for the worker over all periods when he was not an in-patient in a hospital or rehabilitation centre, from about 29 September 2008. His wife also provided those services while the worker was a hospital in-patient from 29 May 2008 to September 2008. The care was described as involving a significant number of hours each day to feed him, clean him (with reference to double incontinence), dress, prepare meals, assist with eating, physiotherapy and a significant range of personal assistance necessary as a result of physical and cognitive disabilities arising from the work injury.

[3] The range of personal services were provided gratuitously, without contract or other arrangement for reimbursement for the value of the services provided.

[4] Broadly, the appeal concerns the question of the employer's liability to pay for the value of the past attendant care services gratuitously provided by the wife and family members as well as various awards of interest, punitive damages and an award for solicitor/client costs. In relation to the past attendant care the employer was ordered to pay the sum of $274,680. That sum was agreed between the parties subject to the Work Health Court ruling on whether as a matter of law, s 78 of the *Workers Rehabilitation and Compensation Act* (the Act) required the compensation be paid.

---

3 Reasons para [11].

[5] The Work Health Court ordered the respondent worker was entitled to past attendant care services pursuant to s 78 of the Act calculated over the period 22 May 2008 to 6 September 2011. Future payments for attendant care have been agreed. As to ongoing attendant care an Order was made by the Work Health Court that the appellant employer pay the equivalent of 13 hours per day attendant care at commercial rates while family members provide care.

[6] The appeal challenges the following orders made for interest and punitive damages: an order for interest pursuant to s 109(1) of the Act on the sum of $274,680 calculated over the period 19 August 2008 to 6 September 2011 inclusive, at the rate of 20 percent per annum[4]; an order for interest pursuant to s 109(1) of the Act on the worker's entitlement to past weekly benefits pursuant to s 65 of the Act which accrued over the period 19 August 2008 to 9 September 2008 inclusive, calculated at the rate of 20 percent per annum[5]; an order for punitive damages pursuant to s 109(3) of the Act in respect of the past attendant care services agreed in the sum of $274,680, fixed at 100% of the amount of interest calculated in accordance with s 109(1) interest;[6] and an order for punitive damages pursuant to s 109(3) of the Act in respect of the worker's past weekly benefits which accrued over the period 19 August 2008 to 9 September 2008, fixed at 100% of the amount calculated in accordance with s 109(1) interest.[7]

---

4 Order 1(b) 27 September 2011.
5 Order 1(d) 27 September 2011.
6 Order 1(e) 27 September 2011, referrable to Order 1(b).
7 Order 4, 27 September 2011.

[7] Finally, it is argued the *Work Health Court* was in error to order the employer pay the worker's costs on the solicitor and client basis.

The conclusion of the *Work Health Court* that past gratuitous attendant care services amounted to "costs incurred" under s 78 *Workers Rehabilitation and Compensation Act*.

[8] As well as the parties agreeing the value of past gratuitous attendant care services for the relevant period at $274,680, both parties accepted the services provided were reasonable and necessary.[8] His Honour determined the past services provided amounted to "costs incurred" as he construed s 78 of the Act.

[9] For comprehension of these reasons and to properly appreciate the context of particular words within s 78 *Workers Rehabilitation and Compensation Act*, it is useful to set out the section in its entirety:

> **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:

[8] Reasons at [14] for the type of services provided, Reasons at [11].

(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.

[10] In concluding the worker was entitled to compensation for the provision of past gratuitous attendant care services, His Honour acknowledged any such entitlement must be found in the Act. The Act is a code. There is no common law entitlement.[9] His Honour found s 78(1) of the Act provided a statutory basis for the entitlement.

[11] The appellant contends the words "costs incurred" in s 78(1) of the Act meant that there must exist monetary costs and that they must have been actually incurred; that it was an error to ground an entitlement to compensation in the value of services provided when there was no enforceable obligation in existence requiring the worker to pay the providers of the services.

[12] Introducing the argument on appeal the employer raised s 53 of the Act, emphasising the point that the obligation on an employer to pay compensation for work injuries, (resulting or materially contributing to impairment or incapacity), is confined to payments to the worker. Section 53 is said to represent a limitation on compensation payable; the Act does not provide for compensation at large. Section 53 must be complied with but it does not have a significant bearing on the meaning to be attributed to s 78. Section 53 is expressed to be "subject to this part", (Part 5) which in turn incorporates s 78. An award for attendant care services found to be "reasonable and necessary" under s 78(2) does not of itself undermine or contravene s 53.

---

9 Reasons at [8].

[13] It was argued His Honour was in error by finding ambiguity in s 78. The result was said to be that the term "costs incurred" assumed a meaning contrary to what was intended: that "cost" was treated as meaning the "cost" of sacrifice, loss or outlay of time of the carer even though no monetary costs were incurred.

[14] The approach taken, erroneously it was argued, equates the expression "costs incurred" with services provided that at common law were acknowledged as compensable in *Griffiths v Kerkemeyer*.[10] *Griffiths v Kerkemeyer* permitted compensation for personal services even though the cost for the services was not paid and never would be.

[15] If the Work Health Court had attempted to replicate or conflate a statutory award for workers compensation with damages under the principles confirmed in *Griffiths v Kerkemeyer*, that would be an error. It is clear the Act does not incorporate remedies sounding in common law damages. That was clear to the Work Health Court. His Honour did not conflate common law damages with Work Health entitlements. His Honour was primarily concerned with the construction of "costs incurred" within s 78 and within the context of the Act.

[16] On behalf of the appellant employer the Court was reminded that parliament had decided it was only benefits of particular defined types that form the basis for compensation; the Act provides a no fault scheme and as I

---

[10] (1977) 139 CLR 161.

understand the position put, regard must be had to the important decisions that might be expected to be made by employers and insurers in an environment of some clarity. I accept this consideration is a reasonable background and contextual matter, however s 78 provides for compensation for costs incurred over and above weekly benefits over a range of modifications and services that by their nature can only be assessed on a case by case basis. I accept payments for compensation of this nature may not be as predictable as weekly benefits based on normal weekly earnings, nevertheless the Act provides for them in defined circumstances.

[17] The limiting criteria "reasonable and necessary" throughout s 78 regulates and limits the amount of compensation. The Act clearly anticipates there will be costs associated with attendant care and household services in relevant circumstances. Section 78(1), (2)(d) and (4) specifically refers to the provision of essential and regular personal care. It seems well within the bounds of what would be expected that such care of an injured person would be provided by either family members or by professional carers. That does not of course provide a concluded answer on the 'costs incurred' interpretation question, but care by family members is hardly out of the ordinary course of what might be anticipated in the circumstances of serious injury requiring care.

[18] It was argued His Honour was in error by utilising principles of interpretation that inappropriately emphasised the beneficial construction approach to remedial legislation; that His Honour provided enhancement of

the ordinary words "costs incurred" to mean something like "the costs incurred including non-monetary costs" or "the value of non-monetary costs incurred by others to the benefit of the Worker".

[19] It was suggested the approach of the *Work Health Court* was influenced by adopting the terminology used on behalf of the worker to the effect that s 78 would be "riddled with inconsistencies"[11] if the employer's construction was adopted; that these alleged rather than genuine inconsistencies led to the approach taken by His Honour. It was submitted adherence to primary canons of statutory interpretation such as considering the purpose of the Act, using the ordinary meaning of ordinary words and consistency with the intention of parliament would have led to the interpretation contended for by the appellant.

[20] His Honour found ambiguity within s 78 given that in determining the reasonableness and necessity of "costs incurred" for home and vehicle modifications,[12] the relevant provisions specifically refer to "proposed modifications". That phrase was taken as meaning modifications proposed but not yet implemented, and in respect of which costs necessarily have not yet been incurred. The appellant argued that future costs, must still be "costs incurred" in the sense that the worker must be legally obliged to pay them. His Honour was of the view the employer's argument could not be reconciled with the narrow interpretation advanced that limited an

---

11 Reasons at [13].
12 S 78(2)(a)(i)(ii); s 78(2)(b)(i)(ii) *Workers Rehabilitation And Compensation Act*.

employer's obligation to reimbursement of costs in the sense of being "already incurred and paid, or at least payable in a legally binding sense".[13]

[21] Adopting similar reasoning, His Honour found s 78(3) of the Act admitted of the same ambiguity given the "costs incurred" refer to home modifications which are "or are to be" carried out, thus tending to point against the construction urged on behalf of the employer.

[22] Having found ambiguity His Honour had regard to the section heading "Other Rehabilitation",[14] on the basis it formed part of the extrinsic material that may be utilized in construction when there is ambiguity.[15] His Honour found that attendant care services are "rehabilitation" for the purpose of Division 4 of Part V of the Act.[16] Utilising s 62A *Interpretation Act* requiring preference be given to a construction that promotes the purpose or object of the Act, His Honour identified the purpose expressed in s 75 referrable to Division 4, noting in particular that rehabilitation means the process "necessary to ensure" ... "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".[17]

---

13 Reasons at [16].
14 His Honour acknowledged the heading was not enacted or amended after 1 July 2006, hence did not form part of the Act: s 55(2) *Interpretation Act*.
15 S 62B(1)(b); s 62B(2)(a) *Interpretation Act*.
16 Reasons at [20].
17 Reasons at [21] and [22].

[23] His Honour drew on Mildren J's comments in *Maddalozzo v Maddick*[18] to the effect that there is a heavy emphasis in the Act on the rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation. Reliance was placed on the need to apply the beneficial construction "so as to provide the most complete remedy of the situation with which they are intended to deal and which are consistent with the actual language employed and to which its words are fairly open".[19]

[24] Drawing on his interpretation of the words "costs incurred" when considered in the light of the s 75 meaning of "rehabilitation", the particular Division, the Act as a whole, and in the light of the remedial nature of the Act, His Honour found the term "costs insured" included the reasonable and necessary attendant care services provided but not paid for or payable by the worker.[20] His Honour found the interpretation argued for on behalf of the employer would not provide for the most complete remedy with which the Act intended to deal. Further, the narrow interpretation in His Honour's view would produce an unjust or capricious result.

[25] The appellant maintains s 78(2)(d) is an indemnity provision empowering the making of orders that an employer pay a worker's bill; that the plain meaning of "cost incurred" is referrable to actual costs expended by the worker; that the approach by the learned Magistrate was impermissible in extending the meaning of what would ordinarily be understood by the term

---

18 (1992) 84 NTR 27, at [22].
19 *Thompson v GEMCO Ltd* [2003] NTCA 05 at 8, Mildren J.
20 Reasons at [25].

"cost incurred". It is asserted the plain meaning of those words, particularly when used together should be recognised and that there is nothing in the structure or policy of the Act to justify a conclusion that s 78(1) provides anything more than an indemnity.

[26] It is acknowledged that dealing with specific words of limitation does not always admit liberal construction even in relation to legislation that confers benefits.[21] I was reminded it is not permissible to create an ambiguity, and in any event preferring a particular construction does not warrant judicial redrafting of a provision. That is accepted; as is the point that "No legislation pursues its purposes at all costs".[22]

[27] I was referred to *NSW Sugar Milling Co-operative Ltd v Manning*[23] concerning the then New South Wales workers compensation legislation. An award for compensation was made for the value of services rendered to the worker by his wife and family. It was acknowledged the award would have fallen within the ambit of *Griffiths v Kerkemeyer* principles if it had been a case governed by the common law. The Court concluded no "cost" was involved in the 20 years of provision of gratuitous services to a seriously injured worker. The particular provision allowed compensation for "the cost ... of the service". The section was held to be in the nature of an indemnity provision empowering the making of orders that the employer pay the employee's bills; that was the extent of the primary meaning given

---

21 *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260 at 263, citing Spigelman CJ's dissenting judgement in the NSW CA with approval.

22 Reproduced in Pearce and Geddes, Statutory Interpretation in Australia, 7th edition at 37.

23 (1998) 16 NSW CCR 606.

to the word "cost". It was held *Griffiths v Kerkemeyer* had nothing to do with the section and that to give the word "cost" an expanded meaning would equate "cost" with the concept of "need". In the context of the New South Wales statute it was concluded "cost" was not intended to have that meaning.[24]

[28] The assessment of whether "costs incurred" are reasonable and necessary under the Northern Territory Act, does require, in one sense, an assessment of need. Implicitly "reasonable and *necessary*" incorporates some aspect of "need". Section 78(2)(d)(iv) also speaks of whether such services are "necessary".

[29] In *Metro Meat Ltd v Banjanovic,*[25] analysis was made of the then South Australian *Workers Compensation Act,* particularly a provision making the employer "liable to pay as compensation to the worker such reasonable expenses incurred as a result of his injury". It was held that for the worker to recover expenses it was necessary to prove that the expenses had been "incurred". That case concerned a question over whether certain treatments or procedures were recognised and appropriate diagnostic procedures. The Act under question referred to "reasonable expenses incurred". The focus of the decision is on the reasonableness of the services. Although the court found the expenses must be "incurred" the conclusion is not sufficiently

---

24 *NSW Sugar Milling Co-operative Ltd v Manning* (above) at para [27].
25 (1989) 52 SASR 102.

elaborated on to provide assistance here. In any event "expense" tends to point more strongly towards a monetary expression of value than "cost".

[30] I accept on some issues there may be comparative value in terms of an approach or trend evident by virtue of these decisions, however I also adopt what was noted in *Metro Meat Ltd v Banjanovic,* "I do not think that assistance can be gained from the use of other expressions used by other draftsmen in other acts".[26]

[31] 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.[27] 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.

[32] "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

---

26 *Metro Meat Ltd v Banjanovic* (above) at 105, per King CJ.

27 cf *Victims Compensation Fund v Brown* (above) where the words in question there were clearly signifying the limits of the benefit "...if the symptoms and disability persist for more than six weeks".

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.

[33] The Macquarie Dictionary definition of the single word "cost", (as highlighted by Counsel for the respondent), does not restrict cost to price. The ordinary meaning includes "sacrifice, loss, outlay of time, labour, trouble ..." Similarly, "incurred" is not restricted to legal liability in ordinary usage. The following definitions are given of 'incur' in the Macquarie Dictionary: 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. The use of the compound expression, especially in the context of the Act does not in my view support a narrow interpretation.[28]

[34] In my view His Honour provided additional reasons within the structure of the Act and section as a whole supportive of the interpretation he adopted. Broadly, His Honour's approach was consistent with the liberal approach historically taken to the interpretation of the Act. I do not see His Honour distorting the purpose of the Act or the meaning of the words. It is an approach and a result that would in my view be expected.[29] As already

---

[28] I was referred by analogy to *Catto v Hampton Australian Limited (In Liquidation) & Ors* [2008] SASC 231, where multiple meanings were found. In the context of indemnity legal costs it was found to mean costs actually paid. The context of professional costs is readily distinguished.

[29] There are many examples of this approach with respect to the Act. His Honour placed particular reliance on *Maddolozzo v Maddick* (1992) 84 NTLR 27; *Thompson v GEMCO Ltd* [2003] NTCA.

noted, I agree with His Honour's view there is some ambiguity in the expression "costs incurred".

[35] It has long been accepted that words of a statute must be understood in their context. Words do not exist in a legal vacuum or in limbo. This was made clear in *CIC Insurance Ltd v Bankstown Football Club Ltd*:[30]

> "The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy. Instances of general words of a statute being so constrained by their context are numerous ... Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conform to the legislative intent".

[36] 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".

[37] 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

---

30 (1997) 187 CLR at 408.

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.

[38] 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.

[39] 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.

[40] I would not allow ground one of the appeal.

Ground Two – Section 109(1) Interest – Unreasonable Delay

[41] Section 109(1) provides the Work Health Court must order interest against an employer if it is satisfied the employer has caused unreasonable delay in accepting a claim for or paying compensation. His Honour ordered s 109(1) interest on the sum of $274,680 (the agreed amount for past attendant care) calculated over 19 August 2008 to 6 September 2011 inclusive, and on weekly benefits at the rate of 20 percent per annum.[31]

[42] I will not summarize all of the material provided on Appeal, but some history is required.

[43] It needs to be appreciated the injury, the onset of which manifested at work[32] occurred on 28 May 2007; the claim was submitted (with a medical certificate describing the collapse at work, and some signs of subarachnoid haemorrhage) on 20 November 2007; proceedings were commenced on 22 May 2009. The employer by notice dated 28 November 2007 deferred accepting liability under s 85(1)(b) of the Act. As His Honour pointed out, the purpose of deferral under the Act is to permit further investigation of the claim. There was no material before His Honour as to the employer's investigations between November 2007 and 29 January 2008. The employer's hypothesis in a general sense was that the bleed causing incapacity may have occurred, not at work but later in hospital. Even if not

---

31 Reasons at [76].

32 The day the respondent Worker experienced a sudden bleeding into the brain.

strictly a hypothesis, this was the point the employer appears to have wanted proof on before accepting the claim. The claim was not accepted until 27 August 2011, shortly after an order was consented to confirming the injury was compensable under the Act.

[44] A letter of 18 February 2008 was sent to the Neurologist, Professor Burns, by the employer's solicitor seeking a report as to what was likely to have occurred. Professor Burn's opinion in his report of 6 March 2008 was that it was "highly likely" the worker's neurologic illness began at work; the most likely diagnosis was intra-ventricular haemorrhage.[33] Professor Burns said he was uncertain about the diagnosis.[34] A further report was sought four months later[35] by the employer. That report was provided on 15 July 2008.[36] Professor Burns said he "assumed" the worker's deterioration while at Alice Springs Hospital was due to a continued bleeding. He also said "It seems highly probable that his illness did begin at work". His Honour found the employer's hypothesis was put in doubt by this report. Clearly, it was.

[45] Professor Burns suggested the employer obtain an opinion from Mr Brophy in relation to the possibility of the later bleed. The employer requested the advice from Mr Brophy by letter of 13 August 2008.[37] The letter refers, in effect to the employer's hypothesis, or the uncertainty held by the employer about whether the injury occurred at work.

---

33 AB 16.
34 AB 16.
35 AB 19, 30 June 2008.
36 AB 20 – 22.
37 AB 23 – 25.

[46] An important concession made on Appeal is that Mr Brophy's report, although dated 25 August 2008 was not received by solicitors for the employer until 26 July 2010. His Honour proceeded on the erroneous basis it was received almost two years earlier. This information about receipt of the report did not appear to be available, alternatively was not made clear to His Honour at the hearing. The sequence of events is that a letter from the employer's solicitor to Mr Brophy dated 28 June 2010 noted there had been no response from the request for a report of 13 August 2008.[38] Mr Brophy's report of 25 August 2008 was then faxed to the employer.

[47] The employer then sought a further medical opinion when a solicitor for the employer phoned Mr Brophy. A telephone attendance of 6 April 2011 between the solicitor for the employer and Mr Brophy notes a discussion when Mr Brophy confirmed the haemorrhage could be considered an injury within the legal definition and that it resulted or materially contributed to his impairment.

[48] The employer's first Defence, filed on 31 August 2009, as noted by His Honour[39] positively denied the rupture of the blood vessels occurred at the time of his collapse at work. His Honour found this was contrary to the reports that had been received by that time. Particular reference was made to Mr Brophy's report. Save that Mr Brophy's report of 25 August 2008 had not been received by the employer, in my view that finding is still open.

---

38 AB 28.
39 Reasons at [68].

While Professor Burn's reports do not completely exclude the possibility of a non-causally connected bleed, it must have been clear there was an injury at work with perhaps the full extent of contributions to incapacity under the Act not as a certainty determined. Nevertheless, clearly there was a work based injury on the available material.

[49] The worker served a report in support of the claim from Associate Professor Chambers dated 14 May 2011.

[50] The appellant employer suggested the delay in accepting the claim could be justified in part because of lack of relevant procedural steps taken by the worker. The Act is particular about obligations of employers; it is no answer in my view that the worker took no specific action on the pleadings that would have prevented the employer's delay. The appellant employer's Defence (August 2009) was a denial; effectively alleging the injury, a blood vessel rupture, did not occur at the time of the worker's collapse at work but rather when he was no longer in the course of employment, (possibly in hospital or later). In a letter of 10 July 2008,[40] the respondent worker's solicitor had inquired as to whether the employer was suggesting the injury identified did not develop at work.

[51] I agree with the respondent worker's argument that the pleadings effectively amounted to a factual dispute thus removing any realistic possibility of a successful summary judgment or strike out application. None of this shifts

---

40 AB 33.

the burden of proof but if the employer's delayed assessment and therefore acceptance of the claim leads to unreasonable delay, there are consequences.

[52] Section 109 of the Act should be interpreted as a coercive provision, its purpose being to ensure compliance with the Act is taken seriously. An employer may well put a worker to proof, however, if unreasonable delay results, s 109(1) interest must inevitably follow. The Act provides the machinery for the deferral of acceptance of liability. Non compliance with the regulatory processes of the Act has s 109 consequences, a feature of the structure of the Act.

[53] In my view His Honour was correct to conclude the employer had no case to justify delay on the basis of a defence grounded in the concept of "disease" under the Northern Territory Act concerning the interpretation of s 4(6A) and (8) of the Act. His Honour found there was no analysis of s 4(6A) and (8) offered on behalf of the employer which might have distinguished the approach under the Act from that taken by the High Court in *Kennedy Cleaning v Petkoska*.[41] In *Kennedy Cleaning* the High Court confirmed the approach taken to the concept of "injury" in *Zickar v MGH Plastic Industries Pty Ltd*[42] concluding an injury would ordinarily be compensable without meeting the "disease" pre-conditions. The existence of an alternative and additional definition of compensable disease does not lead to a narrowing or reading down of the definition of injury. The fact of an

41 (2000) 200 CLR 286.
42 (1996) 187 CLR 310.

established connection between sudden physiological change and underlying disease process does not prevent the physiological change being distinct from the disease.

[54] I agree with respect with His Honour's analysis of "injury" in s 3 of the Act that includes a disease. That inclusion does not mean consideration must be given to s 4(6A) and (8) which are limited to disease. These are specifically to be considered when there is no injury but there is disease. The Work Health Court in *Keating v Global Insulation Contractors*[43] determined the Act produced the same result as that taken in some other jurisdictions, establishing that when a physical injury in the course of employment occurs, there is no need to consider the concept of underlying disease. Although there had been no judicial consideration of subsections 4(6A) and (8) until June 2011 when *Keating v Global Insulation Contractors* was decided, any significant point of distinction under the Northern Territory Act from the High Court's approach in similarly structured legislation remains elusive.[44] Whatever hesitation there may have been over the legal position, I agree with His Honour's conclusion that this could not have justified the delay in accepting the claim. In my view it was an appropriate matter for consideration in the early stages but could not possibly justify the magnitude of the delay after August 2008.

---

43 [2011] NTMC 02

44 The decision of the Work Health Court in *Keating v Global Insulation Contractors* was confirmed in *Global Insulation Contractors (NSW) P/L v Keating* NTSC 04.

[55] A further reason given to justify the delay concerned the state of the medical information available and what it established. There were some complexities in the aetiology. There was, in the background the high blood pressure the worker suffered from, which had previously been undiagnosed. As noted, the employer asserted the incapacity may have been caused other than from the bleeding in his brain suffered at work on 28 May 2007. As the incapacity must be linked to the work injury,[45] if some other medical cause arose after the particular injury on 28 May 2007, and if that other cause was the cause of or a material contribution to the respondent worker's incapacity, the employer may have been justified in continuing to dispute the claim.

[56] His Honour noted he had no evidence of steps the employer took to investigate the claim between 28 November 2007 and 29 January 2008 when it disputed the claim.[46] He referred to the correspondence between the employer and the doctors about the possibility of the injury being suffered later. At no point however did any evidence emerge that supported this possibility.

[57] His Honour rejected a submission on behalf of the respondent worker that the worker could rely on s 4(1)(e)(ii), s 4(1)(f) of the Act, as bringing any injury found to have occurred later within the definition of "out of the course of employment" as the section is limited to claims which have been

---

45 S 53(1) *Workers Rehabilitation and Compensation Act.*
46 Reasons, para [60].

accepted or deemed to be accepted, or have been invalidly disputed, or where the Court has made a determination.[47] I reject the respondent worker's contention that His Honour was in error in rejecting the worker's construction of s 4(1)(e)(ii). I agree with His Honour's analysis that the words "in connection with an injury for which he or she is entitled to receive compensation ..." in the text of s 4(1)(e)(ii) limits in ss 4(1)(e) and (f) to claims where the entitlement to receive compensation already exists. That would appear to be the clear purpose of the limitation.

[58] Mr Rothwell did not make his claim until 20 November 2007, nearly six months after the original injury. His Honour was aware of the date of the claim.

[59] His Honour accepted the employer needed to investigate during the period of deferral. The letter of 18 February 2008, (referred to earlier in these reasons) to the Neurologist Professor Burns[48] sets out the events of 28 May 2007 as known to the employer at that time. In that correspondence a solicitor for the employer points out that the employer was seeking to determine precisely when the brain haemorrhage occurred as given the worsening of the worker's symptoms in hospital it was on the employer's view at that time arguable that the haemorrhage occurred or progressed when he was no longer at work. The letter states "I advise that it is important for the employer/insurer to determine, as best as possible, and on

47 Reasons at [57].
48 AB 11.

the balance of probabilities, when the worker's haemorrhage occurred in the injury process for the purpose of considering the employer's liability for the worker's injury/claim under the NT Work Health Act".[49] The timing of the injury causing incapacity was clearly in dispute, however there was no evidence in the hands of the employer that supported this as a real possibility.

[60] His Honour found the extent and/or duration of the incapacity and impairment may have been quite limited, if the employer's alternative hypothesis was correct that a new and separate bleeding into his brain occurred when the worker was no longer at work. The finding throughout the reasons was that there was no sufficient evidence in support of the alternative hypothesis at any time. Clearly, His Honour also took the view the employer could continue to investigate its alternative hypothesis.[50]

[61] The point at which His Honour found it would have been unreasonable to delay accepting the respondent worker's claim was after the employer received and considered reliable evidence that the worker most probably suffered a rupture of a blood vessel or vessels in his brain while at the workplace on 28 May 2007. His Honour found the employer received that evidence in the Report from Professor Burns dated 15 July 2008.[51]

---

49 AB
50 Reasons at [74].
51 AB 20-22.

[62] The appellant argues that the problem with that conclusion was that His Honour earlier in the reasons found[52] Professor Burn's assumption that the work injury continued to bleed, fell short of a positive opinion on the balance of probabilities of its actual occurrence. His Honour found at that time the employer's hypothesis was put in doubt, but not definitely excluded.

[63] The statement in His Honour's reasons that the assumption by Professor Burns fell short of a positive opinion on the balance of probabilities that this is in fact what happened must be seen in the context of the reasons in their entirety and Professor Burn's second report. His Honour is saying in my view, that although there was not a positive opinion of a continued bleed, it was clear there was reliable evidence of the rupture of blood vessels or vessel in the brain while at work. As well as the assumption about the deterioration, Professor Burns says "It seems highly probable then that his illness did begin at work". I agree that the second report of Dr Burns satisfied the conditions for liability and the employer should have accepted the claim shortly after. There is no other way to interpret Professor Burn's second opinion but that it was a condition commencing at work, there being no evidence at that time of an unrelated new bleed. Properly considered in context, I conclude His Honour did not make inconsistent findings about this point.

---

52 Reasons at [64].

[64] Professor Burns did recommend the employer seek the opinion of Mr Brophy, Head of Neurosurgery at Royal Adelaide Hospital. The employer took that advice and its solicitor wrote to Mr Brophy on 13 August 2008. The employer was clearly pursuing the further injury hypothesis which had not been ruled out. Not being completely ruled out as a contribution to incapacity does not mean this was not a work injury under the Act. By this time, the employer had reliable material indicating that it was. Part of Mr Brophy's report of 25 August 2008 stated the worker's deterioration may have been the result of re-bleed in the course of the hours following the ictus. Nothing in Mr Brophy's report could lead to a conclusion there was not liability under the Act. The breadth of the relevant definitions under the Act are relevant. "Incapacity" means "an inability or limited ability to undertake paid work because of an injury". "Impairment" means "a temporary or permanent bodily or mental abnormality or loss caused by an injury".[53] If medical material at any stage had arisen to show neither the incapacity nor the impairment were causally linked to the work injury, the employer could have cancelled benefits in accordance with procedures under the Act or made an application to the Court.

[65] His Honour referred to a report of Mr Brophy's of 28 June 2008. It may be, as submitted on behalf of the employer, His Honour was referring to the report of 28 June 2010, in which His Honour notes the alternative hypothesis

[53] S 53(1) Workers Rehabilitation and Compensation Act.

is not addressed. This in my view was not material to His Honour's conclusion on the question of unreasonable delay.

[66] The respondent worker argues notwithstanding His Honour proceeded on the basis of Mr Brophy's report being received soon after 25 August 2008, the conditions of liability under the Act were met and reliable material to that effect was with the employer by 22 July 2008. In my view this argument must be correct. His Honour found the delay in accepting the claim was unreasonable by 19 August 2008. (This was 28 days after receiving the supplementary report from Professor Burns).

[67] 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 that supported the employer's theory.

[68] The period from the request by the employer for Mr Brophy's report of 13 August 2008 to 26 July 2010, (when it was received), needs to be considered. During that period the appellant employer challenged various points of pleading illustrated in correspondence between solicitors.[54] The employer did at least imply in correspondence that it had a factual basis for its defence. As between solicitors, one email from the employer states "This

[54] See eg AB 35 – 38.

may well be a matter of evidence at trial and if the employer fails to persuade the Court of its proposition on the factual evidence, then so be it".

[69] Further, there was no explanation on why there was no follow up on the part of the employer from 25 August 2008 until its follow up letter to Mr Brophy of 23 June 2010. After receiving the report on 26 July 2010 there was further delay until a communication between the solicitor for the employer and Mr Brophy on April 2011.

[70] After reviewing the available material I agree with the conclusion the delay was unreasonable from 19 August 2008 – 6 September 2011 and that interest under s 109(1) should be paid. I have come to this conclusion in the knowledge His Honour was in error in relation to the date the employer received Mr Brophy's report.

[71] It was also argued that interest ordered under s 109(1) should not be paid on the award of compensation of past attendant gratuitous care services, even if there is a finding they constitute "costs incurred". The cost of provision of the relevant services having been quantified, s 109(1)(a) makes no distinction between different forms of compensation. If unreasonable delay is found in accepting a claim the Court *must* order interest.

[72] I would not interfere with His Honour's finding and would not allow ground 2.

Ground 3 – Rate of Interest under section 109(1)

[73] His Honour ordered interest at the rate of 20%. I see no reason to interfere with that ruling. The rate of interest is not prescribed. His Honour carefully exercised the discretion, determining to set the amount of interest at 20% per annum after consideration by analogy with s 89 interest; the rate set by Mildren J in *Wormald International Aust Pty Ltd v Aherne* NT(SC),[55] (dealing with s 109(2)), and after considering the discussion concerning interest on an award of damages including the provision of care, under the general interest provisions of s 69 *Supreme Court Act* (ACT) in *Grincelis v House*.[56] I acknowledge the purpose of interest differs under s 109(1) from the general compensation purpose highlighted in *Grincelis v House*, however that is not a reason to constrain the exercise of the discretion here. His Honour also noted another matter in the Work Health Court[57] where 15% interest had been allowed on the cost of a rehabilitation report where the employer had reneged on paying. I agree with the respondent's argument that the commercial rate would not achieve the coercive objectives of s 109(1) interest. I would not allow ground 3.

Ground 4 – Punitive Damages – Section 109(3)

[74] Although I agree with the conclusion of the Work Health Court that the delay in accepting the claim was unreasonable, (even given the error made in relation to the date of receipt of Mr Brophy's report), in my view the

---

55 23 June 1995.
56 [2000] 201 CLR 321.
57 *Boland v NTA* NTMC 019, Oliver SM.

assumed lack of action on the part of the employer, after receiving a positive report of 25 August 2008, weighed heavily in relation to the decision to award punitive damages.[58] In part this led to a finding the "employer through both action and inaction behaved reprehensibly ..."

[75] On reviewing the material myself I found there was unreasonable delay for the period specified. The mistake about the receipt of Mr Brophy's report gave the facts of the delay a particular complexion beyond being 'unreasonable'. The delays were unreasonable but in all of the circumstances, cannot be characterized as "reprehensible" as His Honour found. The mistaken date about the receipt of Mr Brophy's report was a significant factor in that finding. This is particularly given His Honour thought the employer's defence was filed *after* receiving Mr Brophy's report, effectively to the contrary.[59] Had that been the correct state of affairs, it would have reflected extremely poorly on the appellant employer.

[76] Other factors such as the delay by pursuing the alternative hypothesis and pleading a defence not available at law, in this particular case were properly dealt with by the interest awarded under s 109(1).

[77] An award for punitive damages under s 109(3) is discretionary. The discretion miscarried.

---

58 Reasons at [82] and [83].
59 Reasons at [68].

[78] I agree with His Honour's discussion on the purpose of any award for punitive damages as being distinct from compensatory damages. The purpose is to punish and deter.[60] "Punitive damages" is an expression taken from the common law. Save that its application may need modification in some contexts, (given the ambulatory nature of the application of the Work Health Act), I see no reason to depart from the generally accepted common law approach.[61]

[79] While this is a clear case of delay, in my view it does not reach the "reprehensible" stage as His Honour found. This conclusion was not open to His Honour. It was an error of law. Reviewing the available material independently, I find it is not a proper case to award punitive damages. The worker pointed out the evidence of significant adverse impacts on the worker and his family as a result of the delay.[62] Given the conclusions I have come to, this is not an appropriate case to further explore the dimensions of 'punitive damages' under the Act.

[80] I will allow this ground of appeal.

Ground 5 – Costs

[81] His Honour ordered costs be paid on the solicitor and client basis. The appellant contends the *Work Health Court Rules* do not permit costs in the *Work Health Court* on the solicitor and client basis. Rule 23.02 provides the

---

60 His Honour referred to *Lamb v Cutongo* (1987) 77 ALR 188 in support and the caution against double dipping in *Lackersteen v Jones and Smith and the Northern Territory*, 26 August 1983, Asche CJ.

61 The respondent's contention on this point is dismissed.

62 Reasons [93] – [95].

Work Health Court Rules and Practice Directions issued by the Chief Magistrate, and Order 63 of the *Supreme Court Rules*, "subject to the Act" apply.

[82] Rule 23.03 of the *Work Health Court Rules* provides that subject to the Act, the Rules and any other law in force in the Territory, costs are in the Work Health Court's discretion and the Court has the power to determine the extent and on what basis the costs are to be paid. Additionally, in exercising the discretion, the Court must have regard to the matters referred to in s 110 of the Act. Section 110 of the *Work Health Act* directs the Work Health Court to take into account the efforts made by the parties in attempting to come to an agreement about matters in dispute.

[83] His Honour concluded that the Work Health Court has the power independently of the *Supreme Court Rules* to determine the basis on which costs are to be paid. It was noted, payment of costs on the solicitor and client basis has its roots in the common law. His Honour concluded that Order 63 *Supreme Court Rules* is intended to exclude a costs order on the solicitor and client basis. I agree with that part of His Honour's conclusion.

[84] 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 s 109(3). The conclusion on the employer's conduct, aside from generally 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.

[85] It may not be necessary to decide, however I am not convinced the Work Health Court does have the power to order costs on the solicitor/own client basis given the reasoning of Mildren J in *Richfort Pty Lid v Baluyut*,[63] (albeit under previous *Work Health Court Rules).* His Honour found there was no express power entitling the Work Health Court to fix solicitor client costs; the rule making power was therefore constrained and the rules should not be interpreted to exceed the authority of the Act.

[86] The Rule making power and the rules have changed since *Baluyut*, however s 95 of the Act, (that applied at the time this matter was heard), does not expressly allow for solicitor/client costs. Section 95 also provides that a matter in a scale of costs in the Rules "shall not exceed an amount prescribed as costs in respect of the same or similar matter under the *Supreme Court Act*".[64] As a matter of interpretation, I conclude the *Work Health Court* did not, at the time of the hearing, have the power to order

63 (1999) 9 NTLR 58.

64 S 95(2) *Workers Compensation and Rehabilitation Act* as it was until amendment No 38 of 2011.

solicitor and client costs. I agree with reasoning in *Baluyut* that the rules must be read subject to the rule making power.

[87] I will allow this ground of Appeal. In conclusion, on the **Grounds of Appeal:**

Appeal Grounds 1, 2 and 3 are dismissed.

Appeal Grounds 4 and 5 are allowed.

First Notice of Contention (20 December 2011)

[88] The first contention is allowed; the second contention is dismissed; the third contention is dismissed; the fourth contention is dismissed; the fifth contention is allowed.

Second Notice of Contention (23 March 2012)

[89] The contention is dismissed.

Orders

[90] Set aside Order 1(e) and 1(f), and Order 4 of the *Work Health Court* of 27 September 2011.

[91] The following Order is substituted for Order 4: It is ordered the employer pay the worker's costs of and incidental to the proceedings before the Work Health Court at 100% of the Supreme Court Scale to be taxed on the standard basis in default of agreement.

[92] I will hear the parties on costs for the Appeal.

Correction to Paragraph [83] (above) of Judgment

[93] Since publishing my reasons 31 July 2012, it has come to my attention I regrettably made an error preparing those reasons in paragraph [83], indicating His Honour concluded o 63 *Supreme Court Rules* intended to exclude solicitor client costs. His Honour's conclusion was in fact the opposite: "From this I conclude that nothing in Order 63 is intended to exclude a costs order on the solicitor and client basis". With respect I do not agree with His Honour's conclusion on that point. Order 63 provides only for costs on the standard basis or indemnity basis. It is intended this correction be added to my reasons and qualifies paragraph [83]. This correction was added to these reasons on 1 August 2012.

———————————————