PARTIES:	MITCHELL DAVID McMILLAN BARLOW (by his next friend CHRISTINA BARLOW) v HELI-MUSTER PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 10 of 1997 (9418052)
DELIVERED:	27 November 1997
HEARING DATES:	8 October 1997
JUDGMENT OF:	GALLOP A/CJ, MILDREN and BAILEY JJ

CATCHWORDS:

Workers Compensation – For what injuries compensation is payable – Employment risks – Appeal – s53 Work Health Act – application for compensation by son of deceased worker – s3(1) Work Health Act – definition of "injury" – Whether injury sustained by deceased worker "arose out of or in the course of his employment".

Work Health Act 1986 (N.T.) ss3(1), 4(1)(b), 4(7), 53

Workers Compensation – s3(1) Work Health Act – definition of injury indicates circumstances where injury occurs while worker "is travelling by the shortest convenient route between his place of residence and his workplace".

Workers Compensation – s116 Work Health Act – Distinction between questions of fact and questions of law – Errors of law that may occur in fact finding process – Decision reviewable on basis of error of law only where inference drawn could not have been reasonably drawn.

Tracy Village Sports & Social Club v Walker (1992) 111 FLR 32 – Referred
Wilson v Lowery (1993) 4 NTLR 79 at 84–85 – Referred

Workers Compensation – Appeal – s116 Work Health Act – Whether stipulated address was deceased worker's "place of residence" at the "relevant time" – Relevant time was at the time when worker embarked upon his journey to his workplace **not** at the **time of his death** – Magistrate erred in law in addressing issues of deceased's residence **as at** the time of his death.

Buric v Transfied PBM Pty Ltd (Unrep) SC NT, Mildren J, 24 December 1992 - Followed
Commissioner of Inland Revenue v Lysaght [1928] AC 234 at 250 – Followed
Commissioner of Taxation v Miller (1946) 73 CLR 93 at 97–98, 100–101, 103–104 – Followed
Gregory v Deputy Federal Commissioner of Taxation (WA) (1937) 57 CLR 774 – Followed
Levene v Commissioner of Inland Revenue [1928] AC 217 at 223 – Followed

Workers Compensation – Injuries "arising out of and/or in the course of employment" – Workplace – Change in terminology used from "employment" to "workplace" – whether a place is a 'workplace' is a question of fact – Deceased worker did not have any "fixed workplace" hence the "whole area, scope or ambit of his employment" needed consideration – Appeal allowed and Work Health Court order set aside.

Employees Compensation Act 1930–1956 (Commonwealth)
Work Health Act 1986 (N.T.) – s62

Adcock v The Commonwealth (1959–60) 103 CLR 194 at 209 – Followed
Alice Springs Abattoirs Pty Ltd v Finn (1983) 48 ALR 283 – Referred
The Australian Coastal Shipping Commission v Averell (1969) 122 CLR 348 at 351 – Referred
Commonwealth v Wright (1956) 95 CLR 536 at 552 – Referred
Norwest Beef Industries Ltd v Janides (1983) 77 FLR 119 – Referred

REPRESENTATION:

Counsel:

Appellant:	Mr J Waters
Respondent:	Mr T Riley QC

Solicitors:

Appellant:	Turner and Deane
Respondent:	Hunt and Hunt

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BAI97035

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

No. AP 10 of 1997
(9418052)

ON APPEAL from the Judgment of Chief Justice Martin in proceeding number 37 of 1996

BETWEEN:

MITCHELL DAVID McMILLAN BARLOW (by his next friend CHRISTINA BARLOW)
Appellant

AND:

HELI-MUSTER PTY LTD
Respondent

CORAM: GALLOP A/CJ, MILDREN and BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 27 November 1997)

GALLOP ACJ.

I have read the judgment of Bailey J in draft form. I agree with his Honour's conclusions and reasons and have nothing to add.

MILDREN J

The facts and issues to be decided in this appeal are set out in the judgment of Bailey J, which I have had the advantage of reading. I agree with his Honour's conclusion that the appeal must be allowed, and with the orders he proposes, but as I have arrived at the same conclusion by a different route it is necessary that I state my own reasons.

Whilst I agree that the question of whether or not the flat at the home of the deceased's parents was the deceased's place of residence at the time he began his journey is a question of fact, it is my opinion that the primary facts found by the learned Magistrate, and the facts not in dispute, could only lead to one inference, and, moreover, there were no facts upon which a different inference could be drawn.

At the time of his death the deceased was employed by the respondent as a helicopter engineer. His employment required him to live at Victoria River Downs Station in the Northern Territory in accommodation provided by the employer which consisted of a "customised" room in a house with shared bathroom facilities. The accommodation provided to him was integral to his employment; if he ceased his employment, he would no longer be able to use the accommodation. He was required by the terms of his employment to perform his work, which was helicopter maintenance work "at various locations ... wherever the helicopters are ..." When he was not performing his duties elsewhere, he worked at a hangar or workshop approximately 2 minutes

walk from the house in which he resided. There is no specific evidence of this, but it is a matter of common knowledge of which judicial notice can be taken, that Victoria River Downs has been for many years, and still is, a very large cattle station in the north west of the Northern Territory. Obviously the helicopters operated by the respondent were used for, inter alia, mustering cattle. The evidence was that on about 18 or 20 December 1992, the deceased took leave. Because the deceased worked at least 6 days a week, and long hours, and was required to work on Sundays if there was an emergency, he was entitled to 6 weeks' annual leave on full pay. However, the common practice was for the respondent's engineers to return to the station in March, when the season began again. The evidence was that there was no set date for the deceased's return, and he would return either when called upon to do so, or by arrangement with the Chief Engineer.

The deceased was born in Millmerran on 23 January 1966 and was educated in Queensland. After leaving school he began an apprenticeship as an aircraft engineer with East Coast Helicopters at Caloundra. At that time he lived at home with his parents at Buderim. In 1988 or 1989 after finishing his apprenticeship, the deceased went to Adelaide for a year. During this period he met a young woman called Naomi with whom he formed a relationship. The respondent was born as a result of his relationship in 1991. In 1989, the deceased's parents built a house on a small property in Kanowran Road at Glass House Mountains, Queensland. Separate to the main house occupied by his parents, was an attached self-contained flat which was built for the deceased to reside in. In 1990, the deceased and Naomi went to Queensland

and lived in the flat. Thereafter, he lived for short periods at other locations for about 7 or 8 months in total, but immediately before obtaining employment with the respondent in June 1991, he was living in the flat again. In June 1991 he went to the Northern Territory and commenced his employment with the respondent. In November 1991 he returned on leave to live in the flat again whilst undertaking some studies at Caloundra. Later that month, he returned to Victoria River Downs as part of the skeleton staff there during the wet season. It is not entirely clear, but it appears that at some stage Naomi and the deceased separated and she went to live in Melbourne, and took the child with her. In June 1992, the deceased made a short trip to Melbourne, presumably to visit Naomi and the child, before returning to VRD. On about 23 December 1992, he returned to the flat, and lived in it until just prior to the end of December when he went to Sydney to undertake a course. Whilst attending the course the deceased visited Naomi and his child in Melbourne. In very early February 1993 he returned to the flat. Just after that, Naomi and the child came to the Glass House Mountains and stayed in the deceased's parents' house for two weeks. The deceased lived in the flat until he left it on Wednesday, 3 March 1993, following a request by his employer to return to his work at VRD. According to the respondent's Chief Engineer, Mr Waddingham, he telephoned the deceased at his parent's home and left a message for the deceased to call back. The deceased rang him the following day. Mr Waddingham said that he told the deceased that he needed him back as soon as he could get back. The deceased rang Mr Waddingham again shortly thereafter, saying that he was "about to head off to come back up to VRD". Mr Waddingham knew that the deceased would ride to VRD on his

motorcycle, and estimated that he would arrive at about mid Saturday, 6 March 1993.

As to the flat, at the time the deceased left it, he left behind much of his personal belongings, including motorcycle trophies, sporting equipment, clothes not required for his work, magazines and books and other items of a personal nature. The evidence was that apart from the deceased, no one else had ever lived in the flat. Some of the deceased's private mail was still directed to the flat. This included mail to do with banking, motor vehicle registration, child welfare and some personal letters. Some of this mail was forwarded to the deceased at VRD; the rest was kept until he returned. Most of the deceased's "operational mail to do with DCA and material of that nature" went to VRD.

As to the room in the house at VRD, it was pleaded by the appellant and admitted by the respondent that the deceased, at the time of his death, was a resident of the Northern Territory, and that he retained "his primary dwelling house and employment" in the Territory.

On Wednesday, 3 March 1993, the deceased left the flat on his motorcycle. He was murdered on or about Thursday, 4 March 1993 at Corella Creek Camp, Flinders Highway, Queensland. It is not now in contest that the deceased had been travelling by the shortest convenient route from the flat to VRD.

Was the flat the deceased's place of residence at the time of his death?

The learned Magistrate's reasons for answering that question in the negative are set out in the judgment of Bailey J. There is no doubt that a person can have more than one place of residence at the same time: see the authorities referred to by Bailey J. Apart from the room at VRD, there was no evidence that the deceased had any other place of residence at the time of his death, apart from the flat. The learned Magistrate inferred that, because the accused was a young man, independent of his parents, that flat was a "convenient place to stay whilst he was not working or undertaking courses or whilst visiting his parents" and that the flat was "holiday accommodation which he used on a fairly regular basis, but not ... his place of residence." But this, with respect, is not supported by any evidence whatsoever. There is no evidence that, at the time immediately before his death, the deceased's stay at the flat was merely to visit his parents whilst on holiday. This overlooks the evidence that he had nowhere else to go whilst on leave, that he was living in the flat for over a month before his return to VRD, that he kept his personal belongings there, had much of his personal mail sent there, that the flat was built for him to live in and was never occupied by anyone else. But more than that, there was simply no evidence that the flat was just a convenient place to stay whilst on holidays. Nor is there any evidence to support the finding that he used that flat as "holiday accommodation". There are many people who work for long periods of time in places remote from their homes, and who return home only when leave permits; people in the armed services during time of war and people with overseas postings who leave their families behind, are

obvious examples. In no sense could one characterise their homes as "holiday accommodation", merely because they lived there only when their duties permitted. And there can be no difference if the person concerned is single, if he or she has an established residence.

In the case of a single person, it may be that the place where they work and reside is the only home they have. It is not unusual for a single person who lives and works on a ship, for example, not to have any other particular place to live, and at times of leave, he or she might be expected to take a few clothes and personal items to stay for a short period in a room at a hotel, a rented room or resort. But there was no evidence that something like this had occurred in the case of the deceased.

I accept that, whether or not the flat was the deceased's "place of residence" is a question of fact; but if there are facts upon which it is open to conclude that the flat was his place of residence, and no facts upon which it is open to conclude that it was not, and the fact-finder reaches the wrong conclusion, that is an error of law.

As Rich J put it, in *Commissioner of Taxation v Miller* (1946–47) 73 CLR 93 at 100-101:

> "The decision of the Board which is challenged in the present case is that one Miller, during a relevant period, was a resident in the territories of New Guinea and Papua. The word "resident" is not a term of art denoting a field with precisely defined boundaries. Like the word "negligent," it is an ordinary English word extending over a field the boundaries of which

> constitute a broad limbo with blurred edges. In many cases, including most of those which become subjects of litigation, the question whether a person is a resident of a place, like the question whether he has been negligent, depends not upon the applicability of some definite rule of law, but upon the view taken by a tribunal of whether he comes within a field which is very loosely defined. The question is ordinarily one of degree, and therefore of fact. There are, however, cases (in litigation, exceptional) in which, upon the facts deduced from the evidence of the tribunal no other conclusion is possible than that the propositus is within or without the field, as the case may be, ill-defined though it is. In these cases, the question whether propositus is necessarily within or necessarily without the field is regarded as one of law: cf. *Noble v Southern Railway Co*."

On the facts of this case, no other conclusion is possible other than that the flat was the deceased's place of residence at the time of his death.

Was the deceased travelling between his place of residence and his workplace?

I agree with Bailey J, for the reasons he gives, that the learned Magistrate and the Chief Justice erred in concluding that the deceased's workplace was the hangar at VRD, and in overlooking the extended definition of "workplace" in s4(7) of the Act; and I agree with Bailey J that, on the facts, the only conclusion open is that he was in fact travelling to his workplace. Further, even if the workplace had been the hangar, it is, in my opinion, not open to conclude that he was not travelling thereto. The facts are that he was requested to return to his work as soon as possible, and was travelling by the shortest convenient route to VRD. As he never arrived, it cannot be known what would have happened when he would have arrived. But as he was on call

seven days a week, 24 hours a day, it is only reasonable to assume that, as soon after his arrival as possible, he would have reported for duty. The respondent's office was, according to the evidence, at the hangar. Even if he had stopped off at his room first to unload his motorcycle, on the evidence his ultimate destination was the hangar; any possible stop-over at the room was, at best, likely to be a minor interruption to his journey: see s4(2). In my opinion, it is relevant to consider the question, what was the purpose of his journey? As Fullagar J said, in *The Commonwealth v Wright* (1956–57) 96 CLR 536 at 553:

> "… I am inclined to think that the purpose of the journey to or from the specified place would not have been an irrelevant consideration, and that a case where a journey to or from that place had no relation to the duties to be performed at that place might have been held to fall outside the section."

That remark was only obiter, but with respect, I agree. It is obvious that, in order to ascertain whether a person is travelling from one fixed place to another in circumstances where he never reaches his intended destination, considerable light will be thrown upon the question if one were to consider the purpose of the journey. Here the purpose of the journey was to answer a call by his employer to return to work. That being the principal purpose of the journey, I do not see how it is open to conclude that he was not travelling to his workplace.

The learned Magistrate seems to have been influenced by the evidence of Mr Waddingham that he would probably have resumed his duties on the following Monday. But this is what he said:

> "I first estimated he would arrive around the middle of the day on the Saturday in which case, unless there was something particularly urgent happening, I would have told him to go and unpack his bags, make himself comfortable, and Sunday would have been his day off and he would have started on Monday. That would be what I expected to happen. He probably would have started on the Monday. That would be what I expected to happen but like I say, when we were there we were on call 24 hours a day 7 days a week, so if something urgent happened it (sic) could well have arrived, stepped off his motorcycle and started working with his tools. It just depended on what's happening at the time."

There is no evidence that, whatever was in Mr Waddingham's mind, was known to the deceased. It is not relevant to this question what was in Mr Waddingham's mind, unless it can be shown that the deceased had a similar intention. This was not shown. Further, even on Mr Waddingham's account, he expected the deceased to report to him for duty as soon as he arrived. In those circumstances, given that the office was at the hangar, that is most likely where he would have gone. There is no basis, in my opinion for a finding that he was not travelling to his place of employment.

BAILEY J

Background

This appeal arises from the rejection by Martin CJ of an appeal against the dismissal by the Work Health Court of a claim by the appellant for benefits under the Work Health Act ("the Act") arising from the death of his father.

It is not a matter of dispute that at the time of his death the deceased was a worker within the meaning of the Act and that the respondent was his employer.

Section 53 of the Act provides that where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his death, there is payable by his employer to the worker's dependants such compensation as is prescribed. Section 3(1) of the Act defines injury to mean, in the context of the present case, "…a physical…injury …arising…out of or in the course of his employment…".

The phrase "out of or in the course of his employment" lies at the heart of the present appeal and is defined by section 4(1)(b) of the act to include circumstances where the injury occurs while the worker:

> "(b) is travelling by the shortest convenient route between his place of residence and his workplace;".

Section 3(1) of the Act defines "workplace" in the absence of a contrary intention to mean "a place, whether or not in a building or structure, where workers work". In the case of section 4 of the Act, a contrary intention **is** apparent by the inclusion of sub-section (7) of section 4:

> "(7) In this section —
>
> 'workplace', where there is no fixed workplace, includes the whole area, scope or ambit of the worker's employment."

The effect of the definition in section 4(7) is to provide an extended meaning of the word "workplace" as defined by section 3(1) of the Act in

circumstances “where there is no fixed workplace”: a matter to which I will return later in these reasons.

The background to the appellant’s rejected claim for compensation and to this appeal generally may be conveniently taken from the judgment of Martin CJ:

> “The deceased had commenced his travels from his parents’ home near the Glasshouse Mountains in Queensland.
>
> It appears that the deceased met his death on or about 4 March 1993 at Corella Creek Camp, Flinders Highway, Queensland and it is not an issue before this Court as to whether he was then travelling by the shortest convenient route between the two prescribed places.
>
> Her Worship held that the deceased was not travelling from his place of residence, and further, that he was not travelling to his ‘employment’, (that is not the test). She had set out s4(1)(b) at the commencement of her reasons, but not the definition.”

I interpose here to add that the correct test, as Martin CJ discussed at some length in his reasons for judgment, was whether the worker was travelling by the shortest convenient route between his place of residence and his **“workplace”**, rather than his “employment”.

> After setting out the grounds of appeal, Martin CJ continued:
>
> “The deceased commenced work with the respondent at VRD in 1991 and worked there until Christmas 1992. The place at which he worked was Victoria River Downs Station (“VRD”) where he had accommodation in a room of a house which was described as ‘customised’, with shared bathroom facilities. His work was that of a helicopter engineer and that work was carried out in a hangar or workshop, being a separate building to the accommodation block and about two minutes walk from it. The deceased had been on holidays from his employment from December until immediately prior to commencing the journey to return to VRD. There

was no date set for his return prior to this departure on holidays; he was contacted when his services were again required, and then set out to return. Whilst on leave, personal belongings were left in the room at VRD. When asked to return no date had been fixed for commencement of work. It was anticipated he would arrive on the Saturday following his departure from his parents' home. In the ordinary course he would be given the opportunity to unpack and have Sunday off work before starting work on the Monday. If something urgent had happened, however, he could well have been directed to return to work immediately upon his arrival. The accommodation at VRD was dependent upon the deceased, and others like him, having a job with the respondent. The contact telephone number, which the deceased had left with his employer, was that of his parents' home.

The deceased's father told how he and his wife had built a house at the Glasshouse Mountains in which there was incorporated a separate flat for their son to occupy. It consisted of a shower, toilet and a large room which was utilised as a bedroom and sitting room. The deceased had lived in that flat prior to commencing work with the respondent in June 1991. He had returned to the flat in November 1991 whilst he undertook a theory course and returned later that month to VRD. He was not seen again at the Glasshouse premises until just prior to Christmas 1992 when he remained for about a week. He then went to Sydney to undertake courses and returned in early February, remaining until early March when he commenced the journey to VRD in the course of which he met his death. In early 1993 the appellant and his mother, who was estranged from the deceased, had come to stay with the deceased's parents, but not in the flat. The flat had never been used by anyone other than the deceased between 1991 and the time of his death. Depending upon its nature, mail addressed to the deceased either went to VRD or to the Glasshouse Mountains property. The deceased's father also gave evidence of the deceased having lived at other properties for periods of months between 1988 and the time he came to live in the flat prior to first going to VRD."

I note that in his summary of the evidence, Martin CJ refers to the deceased's work as a helicopter engineer having been "carried out in a hangar or workshop, being a separate building to the accommodation block and about two minutes walk from it". While there was evidence about the workshop and accommodation block at VRD, it may also be a matter of significance that the

chief aircraft maintenance engineer employed by the respondent, when asked what duties the deceased had and where he carried them out, gave the following reply:

> "He was an engineer for Heli-Muster. That's normally entails work based at Victoria River Downs doing work which involves flying away to various locations wherever the helicopters are and basically he done the maintenance all right …".

In this regard, as Martin CJ noted, Ms Deland SM sitting as the Work Health Court did not appear to have had reason to doubt or reject any of the evidence. The evidence was not disputed; she discussed it and drew inferences from it. I am in no doubt she accepted the evidence of the chief engineer, set out above; a matter I will return to later in these reasons.

The Appeal

The essence of the appeal is that the learned magistrate erred in finding that the flat at Kanowran Road, Glasshouse Mountains, Queensland ("the flat") was not the deceased's "place of residence" and erred again in finding that at the time of his death that the deceased was not travelling from that place of residence to his "workplace".

The Approach of Martin CJ

Martin CJ held that the question of whether or not the flat was the deceased's place of residence is a matter to be decided by inference from the primary facts. In his Honour's judgment the "primary facts as found by her Worship admitted several conclusions, and the conclusion she reached was one

of fact not law". Accordingly, Martin CJ held that an appeal against the learned magistrate's finding of fact did not lie under section 116 of the Act. He was of the view that the learned magistrate had erred in relation to the question of treating the test for the destination of the deceased's travel as being his "employment" rather than his "workplace", but concluded that in the result the error made no difference because upon the evidence "he was not travelling to a place where workers work, he was travelling to a place where workers lived when they were not working".

Questions of Law and Questions of Fact

In his reasons for judgment, Martin CJ referred to the difficulty in distinguishing between questions of fact and questions of law for the purposes of appeals pursuant to section 116 of the Act: see *Wilson v Lowery* (1993) 4 NTLR 79 at p84–5 where the Court of Appeal adopted what was said by Mildren J in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32. Martin J emphasised that:

> "…if there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute, there is an error of law and that is so whether the fact said to have been found was a primary fact or a secondary fact. But it is not sufficient that an Appellate Court would have drawn a different inference from the facts; the question is whether there were facts upon which the inference might be drawn, and it is only if the fact finding tribunal draws an inference which cannot reasonably be drawn that it errs in point of law such that its decision can be reviewed."

As his Honour noted, the words "place of residence" are not technical legal words requiring to be construed before the statute can be applied for the

facts found by the learned magistrate. The words are ordinary English words and are used in their common understanding:

> "It is a matter about which minds might differ involving a question of judgment or degree; the inference drawn by her Worship may not be the only one that could be drawn, but it was not unreasonable for her to draw it."

Accordingly, as I have noted, Martin CJ held that the learned magistrate's conclusion that the flat was not the deceased's place of residence was one of fact not law.

I would, with respect, endorse the learned Chief Justice's approach to the distinction between questions of fact and questions of law. However, in applying that distinction to the findings of the Work Health Court in the present context, I consider the learned Chief Justice may have overlooked a crucial aspect of the learned magistrate's findings. The learned magistrate concluded her analysis of her findings of fact with the words:

> "On the evidence before me, I am not satisfied, on the balance of probabilities, that it can be said the worker 'resided' at Kanowran Road, Glasshouse Mountains **at the time of his death.**" (emphasis added)

The issue to be decided by the learned magistrate, however, was **not** whether the deceased resided at the flat at the time of his death, but rather whether the flat was his residence at the time when he embarked upon the journey to Victoria River Downs ("VRD").

Mr Riley QC, on behalf of the respondent, submits that nothing turns upon the learned magistrate's loose language in referring to the question

required to be answered by section 4(1)(b) of the Act. In his submission, the reference to the deceased not residing at the flat at the time of his death is no more than a slip of the tongue; he submits that it is clear from her reasons as a whole that her Worship had addressed the proper question.

It hardly needs to be said that if Mr Riley is wrong in this assessment and that the learned magistrate addressed herself to the "wrong" question, this raises a question of law susceptible to appeal in accordance with section 116 of the Act.

Was the Flat the Deceased's Residence at the Relevant Time?

In considering whether the learned magistrate addressed herself to the correct issue, it is obviously important to examine the precise terms of her findings of fact.

The learned magistrate began by accepting that a person can be resident in more than one place at the same time: *Gregory v Deputy Federal Commissioner of Taxation (WA)* (1937) 57 CLR 774; *Commissioner of Taxation v Miller* (1946–47) 73 CLR 93; *Levene v Commissioners of Inland Revenue* [1928] AC 217 at p223; *Buric v Transfield PBM Pty Ltd* (1992) 5 NTJ 2193 at 2203. She then continued:

> "I note the age of the worker in this case, he was a young man who had for the preceding three or four years prior to his death, worked and lived in a number of places. He returned to his parents' home on an irregular basis. I note, however, he permanently left personal property in **the flat in which he resided when he returned to stay with them.**
>
> I note at times when living within the Glasshouse Mountains area, **he did**

not always reside at his parents' home, but lived in other houses. In this regard, he would seem to be a fairly typical young man of an age when he was independent of his parents, but maintaining significant contact with them.

It is certainly not unusual for young adults in such a situation to return home to their parents and to stay in the parents' home whilst on vacation.

To a certain extent, the worker's intention with respect to his place of residence may be of some significance in determining whether he in fact resided at his parents' property in the Glasshouse Mountains.

From the evidence before me, it would appear that the worker intended to continue to work with Heli-muster. I note that shortly before his death, he undertook a flying course in Sydney and did some engineering duties with Heli-muster. As to how long he proposed to continue working at VRD, or indeed for Heli-muster, there is no evidence before me.

It would seem from 1989 the worker had lived in the flat for a period of approximately five months during 1990 and immediately prior to commencing work at VRD in June 1991 he was also living at the flat, although it is not clear from the evidence before me as to exactly how long that was for.

In November 1991 he returned to the flat whilst he undertook a theory course but did not return there again until shortly prior to Christmas of 1992.

It is not clear to me at exactly what times the worker lived in the other houses — for example, Sahara Road, where he apparently stayed for approximately three months, and Cannondale, where he also stayed for possibly four or five months — except that they occurred after his return from Adelaide and, therefore, must be post-1988.

On the evidence before me, I am not satisfied on the balance of probabilities, that it can be said the worker 'resided' at the premises at Kanowran Road, Glasshouse Mountains **at the time of his death**.

Those premises were a convenient place to stay when he was not working or undertaking courses and whilst visiting his parents. The fact that he had no other place of residence besides his room at Victoria River Downs does not necessarily mean that his 'place of residence' was Kanowran Road, Glasshouse Mountains.

> The flat could be described as holiday accommodation which he used on a fairly regular basis, but not as his place of residence." (emphasis added)

The conclusion reached in the last paragraph above (the flat was holiday accommodation used on a fairly regular basis) does not sit easily with the finding of fact in the first paragraph (the deceased **resided** in the flat when he returned to stay with his parents).

The learned magistrate's approach appears to have been that the deceased resided in the flat while he was physically staying there, but that it was not his "place of residence" when he was elsewhere. Against this background, the manner in which the learned magistrate chose to express her inference from the primary facts that the deceased did not reside at the flat **at the time of his death** takes on real significance.

It would seem to follow from her finding (at the first paragraph above) that the deceased **was** residing at the flat immediately before embarking upon his journey to VRD (since he was staying at the flat at that time), but that he was not residing there "at the time of his death" (since he was no longer staying at the flat at that time).

I consider that the learned magistrate may have overlooked the fact that it is not the verb "resided" but the noun "residence" that was in question. There could be little room for disagreement with the learned magistrate's conclusion that the deceased was not in fact residing at the flat **at the time of his death**. Quite clearly that was so, since he was en route to VRD. But that finding says nothing as to whether the flat was his place of residence immediately before embarking upon his journey, and in that regard the learned magistrate had

made a finding that the deceased resided in the flat when he returned there to stay with his parents.

The question of whether a place is a "place of residence" is a finding of fact: see *Commissioner of Inland Revenue v Lysaght* [1928] AC 234 at 250; *Commissioner of Taxation v Miller* (1946–47) 73 CLR 93 at p97–8, 100–1, 103–4; *Buric v Transfield PBM Pty Ltd*, supra at p2203.

I consider that there was ample evidence upon which the learned magistrate could make a finding that the deceased resided in the flat when he returned there to stay with his parents. It is implicit in that finding that he was residing at the flat immediately before setting out for VRD. Such findings of fact are not susceptible to appeal under section 116 of the Act. If the learned magistrate had addressed herself to the relevant issue, I am satisfied that the only conclusion which she could have drawn from the primary facts she found was that the flat was the deceased's place of residence within section 4(1)(b) of the Act **at the relevant time** i.e. immediately before embarking upon his journey to VRD. In addressing the question of the deceased's residence at the time of his death, the learned magistrate erred in law and her conclusion that the flat was "holiday accommodation" must be set aside. Accordingly, the appellant meets the first hurdle in section 4(1)(b) of the Act in that the point of departure for his journey was his "place of residence".

Workplace

It is not a matter of dispute that the deceased was travelling by the shortest convenient route from the flat to VRD. The learned magistrate found that he was:

> "… travelling to his place of residence that being his room in the accommodation at VRD, preparatory to starting his work, but I do not consider he was travelling to his employment from his residence as is required under the Act."

The learned magistrate had particular regard to the Territory cases of *Alice Springs Abattoirs Pty Ltd v Finn* (1983) 48 ALR 283 and *Norwest Beef Industries Ltd v Janides* (1983) 77 FLR 119, both of which focus on the immediate purpose of a worker's journey. Such authorities are applications of the High Court's approach to the question of whether a worker is travelling to or from "employment" found in *The Australian Coastal Shipping Commission v Averell* (1969) 122 CLR 348 at 351:

> "In a series of cases … the Court … has established, not without dissent, that a worker can only be said to be travelling to or from his employment if there is a 'real connexion between the journey and the employment in the sense that the immediate purpose of the employee in making the journey must be either to enter upon the duties which his employment imposes upon him or to absent himself temporarily from those duties', to use the language of Fullagar J. in *The Commonwealth v Wright* (1956) 96 CLR 536. What has been found to be implicit … is the necessity for a journey from a place of abode, permanent or temporary, to a place where the duties of employment are to be performed."

Notwithstanding her reference to this line of authority, the learned magistrate did not focus her attention on the purpose of the deceased's journey, but rather on a difference in the terms of the legislation considered in

Finn and *Janides* when compared with the Work Health Act. The learned magistrate emphasised that the legislation considered in those earlier cases had not included a requirement that the journey commence from a worker's "place of residence"; the issue was simply whether the worker was travelling "to his employment". Accordingly, she did not consider that the deceased "was travelling to his employment from his residence as is required under the Act".

It is unclear whether the learned magistrate was of the view that the deceased was travelling "to his employment". She found that he was travelling to "…his room in the accommodation at VRD **preparatory to starting work**". This finding tends to suggest that the learned magistrate was of the view that, like the meatworker *Janides*, the deceased's initial destination (his accommodation at VRD) was incidental to his purpose in undertaking the journey from Queensland to VRD, namely to enter upon the duties of his employment. This is, however, speculation — what is clear from the learned magistrate's reasons is that her rejection of the appellant's claim was grounded upon her finding that the starting point of his journey (the flat) was not the deceased's place of residence upon her construction of the Act.

Whatever view the learned magistrate may have taken on the question of whether the deceased was travelling to his "employment" (as Martin CJ dealt with in his reasons for dismissing the appeal to the Supreme Court), is not to the point. The correct question is whether the deceased was travelling to his "workplace". As to this issue, Martin CJ referred in some detail to the significance of the Act's use of the word "workplace" as the relevant

destination of a worker's journey in contrast to its legislative forerunner which had referred to travelling to (or from) "employment".

His Honour noted that a series of cases under the *Commonwealth Employees Compensation Act* 1930–1956 had dealt with claims advanced upon the basis that the injury was caused whilst a member of the Armed Services was "travelling to or from … his employment" by the Commonwealth. At p12, Martin CJ continued:

> "The history of the Commonwealth legislation was touched upon by some of their Honours in the High Court. Earlier versions of s9A of the Commonwealth legislation referred to the "place of employment". In *The Commonwealth v Wright* (1956) 95 CLR 536 at 545 Dixon CJ said:
>
> > 'No doubt the reason why the words 'place of employment' were discarded in favour of 'employment' simply, is to be found in a fear lest an employee might, fortuitously or for some purpose of his own and independently of his duties, pay a visit to his place of employment and in the course of the journey sustain an injury. But the removal of 'place' seems to leave little else than some rather vague notice of purpose or cause of the man's movement. Travelling to the employment involves some movement by reason of the employment.'
>
> McTiernan J at p547 was of the same opinion as the learned Chief Justice and entirely agreed with his Honour's reasons; at p551 Webb J, though disagreeing in the result, said:
>
> > 'To support a claim for compensation the accident to a civilian employee must have arisen out of or in the course of his employment, or when travelling to or from his employment, that is to say, to or from a state of activity called 'employment', as distinct from the place where that activity takes place.'
>
> Fullagar J commencing at p552:
>
> > 'Before the amendments of 1951, s9A(1) spoke of travelling to and from the '*place* of employment'. The material 'travelling' was a travelling to a physical *terminus ad quem* or from a physical

> *terminus a quo*. The section also contained a third sub-section, which provided a special definition of the expression 'place of employment' in relation to members of the defence force. Even when s9A stood in that form, I am inclined to think that the purpose of the journey to or from the specified place would not have been an irrelevant consideration, and that a case where a journey to or from that place had no relation to the duties to be performed at that place might have been held to fall outside the section. It is not necessary, however, to determine that question. The section now speaks simply of travelling to or from an employment and not to or from a place of employment, and sub-s(3) has been omitted. The object of these amendments of 1951 was most probably to widen the field in one direction and to narrow it in another. At any rate, we now have an abstract *terminus ad quem* and an abstract *terminus a quo*, and it is only by reference to the purpose or occasion of the journey in relation to duties of employment that any satisfactory meaning can, to my mind, be given to the language used.'

Similarly, in *Adcock v The Commonwealth* (1959-60) 103 CLR 194 at p209, Windeyer J:

> 'The whole question is was he travelling from his employment within the meaning of s9A? That section reflects a policy common in Australian workmen's compensation statutes. The journey that a worker has to make to get to and from his place of work is treated as being within the course of his employment. The scope of the additional protection is clear enough when the statute speaks of the journey as being between the worker's place of abode and place of employment. When first enacted in 1944 s9A was in that form. The *terminus ad quem* and *terminus a quo* of the journey were specific; and the 'shortest convenient route' between them was ascertainable. But, although the meaning of the words was then clear, the section read literally could have strange results.'

His Honour went on to give examples. Whatever may have caused the Northern Territory parliament to revert to the terminology earlier used in like legislation, the fact is it has done so, and in so doing has provided a degree of certainty which was not available when the question involved travelling to or from 'employment'. (Described by Dixon CJ as a 'much criticised piece of drafting' and as 'this notoriously contentious statutory text' at 198, ibid). Whether a place is a 'workplace' is a question of fact."

I would respectfully agree with the observations in the last paragraph above — albeit noting the comment of Fullagar J in the passage quoted from p552 of *Wright* to the effect that the purpose of the journey may not be an irrelevant consideration to the issue of whether a person was travelling to his "place of employment" (or workplace). However, I would also add that the "degree of certainty" provided by the Act's provision of a physical *terminus ad quem* must be considered in the context of the extended definition of "workplace" provided by section 4(7) of the Act where the relevant worker has no "fixed workplace". The extended meaning of "workplace" to include the "whole area, scope or ambit of the worker's employment" is apt to reintroduce an abstract quality to the *terminus ad quem* which will inevitably detract from the degree of certainty suggested by the learned Chief Justice.

Martin CJ concluded that: "Upon the evidence, he was not travelling to a place where workers work; he was travelling to a place where workers lived when they were not working". In reaching this conclusion, the learned Chief Justice would appear to have focussed upon the definition of "workplace" provided by section 3(1) of the Act (referred to earlier in these reasons: "a place … where workers work") and the evidence to the effect that the deceased's first 'port of call' would be the accommodation block at VRD.

I consider that the extended definition of "workplace" provided by section 4(7) of the Act needs to be considered in the light of the evidence of the respondent's chief engineer, Mr Waddingham, to the effect that while the deceased was "based" at VRD, his duties involved travelling to wherever helicopters required maintenance. These matters did not receive specific

mention by Martin CJ or the learned magistrate — in contrast to evidence that the deceased carried out work in a workshop, located approximately two minutes' walk from the VRD accommodation block.

Having regard to the definition provided by section 4(7), I am satisfied upon the evidence of the chief engineer that the deceased did not have a "fixed workplace" and accordingly the "whole area, scope or ambit" of his employment needs to be considered in assessing whether he was travelling between his place of residence and his "workplace" within the meaning of section 4(1)(b).

The relevant evidence, for present purposes, again came from the respondent's chief engineer, which, as I have indicated, was accepted by the learned magistrate. The learned magistrate referred to Mr Waddingham's evidence that the respondent's engineers were paid for six weeks leave, but when an engineer returned from leave tended to be very flexible. She noted that there was no set date for the return from leave of the deceased at the end of 1992 and he was contacted when the company required his return.

Mr Waddingham had testified that in the first week of March 1993 he contacted the deceased and told him that the respondent employer needed him back as soon as possible. The deceased had told Mr Waddingham that he was leaving and was heading off to return to VRD.

I reproduce the next part of Mr Waddingham's evidence by reference to the transcript:

"Q Now, can you tell us what arrangements you made for him to – so did you speak with him about when you wanted him to start work at VRD?

A Basically we wanted him back as soon as possible. There's no actual date for commencing work but once he arrived there he would be given time to unpack etcetera and then most of our work is that what we do we're on call 24 hours a day 7 days a week. Normally we have Sundays off but if there's some emergency we would work Sundays as well. It just depends on what happens. Basically, I spoke to Mark and asked him to come back up and as soon as he arrived back there it would be the normal thing to unpack your bags and back into work.

Q So he could have been at work on the same day as he arrived or the following morning?

A That's possible, it depends on how bush (inaudible). I first estimated he would arrive around about the middle of the day on the Saturday in which case, unless there was something particularly urgent happening I would have told him to go and unpack his bags, make himself comfortable, and Sunday would have been his day off and he would have started on the Monday. That would be what I expected to happen. He probably would have started on the Monday. That would be what I expected to happen but like I say, when we were there we were on call 24 hours a day 7 days a week so if something urgent happened he could well have arrived, stepped off his motorbike and started working with his tools. It just depends on what's happening at the time."

The evidence of Mr Waddingham is to the effect that:

- he wanted the deceased to return to VRD as soon as possible (to which the deceased had agreed);

- the deceased's duties required him to be on call 24 hours a day, 7 days a week;

- in the absence of anything requiring urgent attention, he expected that the deceased would not be required to work before Monday morning, having arrived on Saturday or Sunday;

- if the deceased was required to attend to something urgent, he could and would have been required to attend to it immediately upon his arrival at VRD or at any time after.

In the light of this evidence, I consider that the deceased was travelling between his place of residence and his "workplace". The "area, scope or ambit" of his employment required him to be "on call" immediately upon his arrival at VRD. Mr Waddingham's expectation that the deceased would not be required to work before the Monday after his arrival sometime during the weekend does not detract from the reality that the deceased would have been required to make himself available for work, if called upon to do so, as soon as he reached VRD. In such circumstances, I consider that the scope or ambit of his employment included any time when the deceased was at VRD (and as a consequence immediately liable to be required to perform duties under the terms of his employment).

Proposed Orders

For the above reasons, I consider that the appeal should be allowed and the dismissal of the appellant's claim by the Work Health Court set aside. I would propose that the following orders should be made:

(a) that the respondent is to pay compensation to the appellant pursuant to section 62 of the *Work Health Act* ; and

(b) that the respondent is to pay the appellant's costs of the appliction before the Work Health Court, the costs of the appeal before the Supreme Court and the costs of the appeal to this Court.
