CITATION:	*Northern Territory of Australia v Yao* [2024] NTSCFC 1 IN THE MATTER of an appeal under the *Return to Work Act 1986* (NT)
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA v YAO, Lie
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERENCE from the Supreme Court exercising Territory jurisdiction
FILE NO:	2022-01845-SC
DELIVERED:	22 March 2024
HEARING DATE:	14 April 2023
JUDGMENT OF:	Grant CJ, Kelly and Brownhill JJ

CATCHWORDS:

WORKERS COMPENSATION – Reasonable management action – Onus of proof

Referral of questions of law to the Full Court pursuant to s 21(1) of the *Supreme Court Act* – Whether employer or worker bears legal and evidential onus of proof that mental injury is excluded by reason of s 3A(2) of the *Return to Work Act* – Operation of provision is to lay down general rule of liability for injury and introduce by way of exclusion mental injury caused by special element in form of reasonable management action – Employer

pleaded reasonable management action as defence to worker's claim – Legal onus on employer to prove defence – Both parties carried an evidential onus.

Return to Work Act 1986 (NT) s 3A

Australian Telecommunications Commission v Barker [1990] FCA 700; 12 AAR 490, *Beezley v Repatriation Commission* (2015) 150 ALD 11, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, *Bushell v Repatriation Commission* (1992) 175 CLR 408, *Catholic Education Office of WA v Granitto* [2012] WASCA 266, *Comcare v Martin* (2016) 258 CLR 467, *Comcare v O'Dea* (1997) 150 ALR 318, *Corbett v Northern Territory of Australia* [2015] NTSC 45, *Currie v Dempsey* (1967) 69 SR (NSW) 116, *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635, *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, *Hart v Comcare* (2005) 145 FCR 29, *Horne v Sedco Forex Australia* (1992) 106 FLR 373, *Metropolitan Coal Co Ltd v Pye* (1936) 55 CLR 138, *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21, *O'Brien v Sacred Heart Primary School* [2000] VCC 44, *Parker & Anor v Q-Comp* [2008] QSC 175, *Purkess v Crittenden* (1965) 114 CLR 164, *Robertson v Territory Insurance Office* [2005] NTSC 74, *SA Mental Health Services Inc v Margush* [1995] SASC 5246, *Swanson v Northern Territory of Australia* [2006] NTSC 88; (2006) 204 FLR 392, *Vines v Djordjevitch* (1955) 91 CLR 512, referred to.

REPRESENTATION:

Counsel:

Appellant:	D McConnel SC with J Nottle
Respondent:	K Sibley

Solicitors:

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Respondent:	Halfpennys Lawyers

Judgment category classification:	B
Number of pages:	35

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

Northern Territory of Australia v Yao [2024] NTSCFC 1
No. 2022-01845-SC

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA

Appellant

AND:

LIE YAO

Respondent

CORAM: GRANT CJ, KELLY & BROWNHILL JJ

REASONS FOR JUDGMENT
(Delivered 22 March 2024)

THE COURT:

[1] The respondent to the present proceedings brought a claim in the Work Health Court seeking compensation for mental injury arising out of or in the course of his employment with the appellant. The respondent was successful in prosecuting his claim in the Work Health Court and the appellant has appealed that decision to the Supreme Court.

[2] The grounds of appeal include an assertion that the trial judge erred in law in deciding that the appellant bears the legal and evidentiary onus of proof

that the respondent's mental injury was caused by reasonable management action.

[3] The judge hearing the appeal has referred the following questions of law for determination by the Full Court.

(1) Did the trial judge err in law in deciding that the appellant (employer) bears both the legal and evidential onus of proof that any mental injury suffered by the respondent (worker) is excluded by reason of s 3A(2) of the *Return to Work Act*?

(2) Did the trial judge err in law in deciding that the onus on the appellant requires the appellant to prove each of the following:

(a) the conduct of actions complained of by the respondent constitute 'management action' as defined in s 3 of the *Return to Work Act*; and

(b) the management action was taken on reasonable grounds; and

(c) the management action was taken in a reasonable manner; and

(d) the reasonable management action wholly or primarily caused the mental injury?

The relevant statutory provisions

[4] The question of which party bears the onus of proof in the determination of whether a mental injury is caused by reasonable management action is a matter of substantive statutory construction involving the relevant provisions of the

Return to Work Act 1986 (NT) ('the Act'). The term 'injury' is defined in s 3A of the Act in the following terms.

> **3A Injury**
>
> (1) An injury, in relation to a worker, is a physical or mental injury arising out of or in the course of the worker's employment and includes:
>
> (a) a disease; and
>
> (b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease.
>
> (2) Despite any other provision of this Act, a mental injury is not considered to be an injury for this Act if it is caused wholly or primarily by one or more of the following:
>
> (a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer;
>
> (b) a decision of the worker's employer, on reasonable grounds, to take, or not to take, any management action;
>
> (c) any expectation by the worker that any management action would, or would not, be taken or any decision made to take, or not to take, any management action.

[5] The term 'management action' is defined broadly in s 3(1) of the Act in the following terms.

> ***management action***, in relation to a worker, means any action taken by the employer in the management of the worker's employment or behaviour at the workplace, including one or more of the following:
>
> (a) appraisal of the worker's performance;
>
> (b) counselling of the worker;
>
> (c) stand down of the worker, or suspension of the worker's employment;
>
> (d) disciplinary action taken in respect of the worker's employment;
>
> (e) transfer of the worker's employment;
>
> (f) demotion, redeployment or retrenchment of the worker;
>
> (g) dismissal of the worker;
>
> (h) promotion of the worker;

(i) reclassification of the worker's employment position;

(j) provision to the worker of a leave of absence;

(k) provision to the worker of a benefit connected with the worker's employment;

(l) training a worker in respect of the worker's employment;

(m) investigation by the worker's employer of any alleged misconduct:

(i) of the worker; or

(ii) of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness;

(n) communication in connection with an action mentioned in paragraphs (a) to (m).

The decision at first instance

[6] During the trial at first instance, the appellant had contended that as a matter of both construction and logic the legal onus of establishing that the injury was not caused wholly or primarily by reasonable management action remained on the respondent as the worker. That contention was put on the basis that the entitlement to compensation depended on the worker proving an injury. To prove an injury, the worker was required to satisfy the definition of 'injury' within the Act, including the exclusionary provisions in s 3A(2) which form part of the definition of injury. On the appellant's argument, that required the worker to positively identify that the events that caused the injury arose 'out of or in the course of the worker's employment' and that they were not caused wholly or primarily by 'management action' in the relevant sense. The trial judge's analysis and findings on that issue are as follow.

I have found only one specific consideration by any Court of section 3A generally and of subsection 3A(2) specifically since their introduction on 1 October 2015. That is the Decision of Judge Armitage in the Work Health Court in *Harris v NT of A* [2019] NTLC 3 ("*Harris*"). In paragraph 7 of *Harris* Judge Armitage said as follows:

> *"Accordingly, s 3A creates a defence to a claim for mental injuries caused solely or primarily by reasonable management action. In other words, where the worker establishes that a mental injury has arisen out of or in the course of the employment (which in this case is accepted), the entitlement to compensation will be defeated if* ***the employer establishes*** *(my emphasis) that the mental injury was wholly or primarily caused by reasonable management action. Accordingly,* ***the Employer must satisfy the Court that*** *(my emphasis):*
>
> *(i) the conduct of actions complained of by the worker constitute management action as defined in section 3; and*
>
> *(ii) the management action was taken on reasonable grounds; and*
>
> *(iii) the management action was taken in a reasonable manner; and*
>
> *(iv) the reasonable management action wholly or primarily caused the mental injury."*

Judge Armitage in *Harris* provided no analysis of the question of which party bore the onus, and the passage I have quoted in the preceding paragraph suggests that the question had not been argued before her and that she proceeded on the uncontested basis in that case that the employer bore the onus.

The underlying issue has been considered by superior courts. In *Millar v ABC Marketing and Sales Pty Ltd* ("*Millar*") [2012] NTSC 21 Mildren J of the NT Supreme Court discussed from first principles the onus of proof in what have been termed "avoidance" cases. He said the general rule is "*he who asserts must prove*" and this usually involves an evidential as well as a legal onus on the same party. He cited with approval *Currie v Dempsey* (1967) 69 S.R. (NSW) 11 where Walsh JA said at page 125:

> *"The burden of proof in establishing a case lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element of his cause of action, for example if its existence is a condition precedent to his right to maintain the action. The onus is on the Defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claims, which prima facie, the plaintiff has."*

> In the present case I consider that the essential elements to be established to meet the definition of "injury" and thus of the Worker's cause of action are as set out in subsection 3A(1) of the Act, namely that he sustained a physical or mental injury and that it arose out of or in the course of his employment. There are no other elements to be proved identified in subsection 3A(1). The question of reasonable management action is identified as a separate issue set out in a separate subsection. Subsection 3A(2) is not part of the initial definition of "injury" set out in subsection 3A(1). Rather, it calls for consideration of a further state of affairs after the definition of "injury" has been met, and then only in respect of a mental injury, which, if established, would constitute a good defence - that is, an "avoidance" of the Worker's claim.
>
> Subsection 3A(2) as it now appears in the Act has made some changes to the exclusion question in the definition of "injury" from the previous definition. However, I can see nothing in these changes or in the overall language or scheme of section 3A of the Act as a whole or in subsection 3A(2) specifically which might require a change to the previous approach by NT courts to the question of onus. Because subsection 3A(2) presents a somewhat different version of the exclusion previously contained in subsection 3(1) of the Act, the superior court Decisions of *Swanson* and *Corbett* are not strictly binding on this Court in considering the new subsection. Even so, I consider the Decisions of the Northern Territory Supreme Court and of the Work Health Court identified above continue to represent the correct approach in the Northern Territory to "avoidance" cases, including the onus arising by virtue of subsection 3A(2) of the Act.
>
> I rule that where an employer seeks to rely on subsection 3A(2) of the Act to exclude a claimed mental injury then that employer bears both the legal and evidential onus of proving the exclusion.
>
> I rule that discharging that onus requires the employer to prove each of the four elements identified by Judge Armitage in paragraph 7 in *Harris* which I have set out in paragraph 179 above. I rule that the Employer bears that onus in this proceeding.[1]

[7] It is common ground that if the trial judge was wrong in that analysis, such that the answer to any of the questions of law referred to the Full Court is 'yes', there has been an error of law, the appeal should be allowed and the

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1 *Yao v Northern Territory of Australia* [2022] NTWHC 004 at [179]-[185].

matter referred back to the Work Health Court to be determined according to law.

The nature of the 'management action' provision

[8] The issue raised by the questions referred is whether the words of s 3A(2) of the Act amount to a condition precedent to any entitlement to compensation such that a worker is required to prove that the subsection does not apply, or whether that subsection creates an exception or exclusion to a general entitlement to compensation which the employer may rely upon as a defence such that the employer bears the onus of establishing the defence. That general point of distinction concerning the onus of proof was considered in *Vines v Djordjevitch*, in which the High Court said that where a statute provides:

> an … exclusion which assumes the existence of the general or primary grounds from which the liability … arises but denies the … liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter …[2]

[9] That principle was revisited by the High Court in *Director of Public Prosecutions v United Telecasters Sydney Ltd*, in which Brennan, Dawson and Gaudron JJ said in the criminal context that where the scope of a provision is cut down 'by way of definition rather than by way of proviso, exception or saving … there is no reason to suppose that … the legislature intended that the subsection should operate without limitation unless an

2 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519.

accused brought himself within the terms of [the exclusionary provision]'.[3]

Similarly, Toohey and McHugh JJ said that:

> When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso turns on whether it is part of the total statement of the obligation. If it is, the onus in respect of the qualification, exception or proviso is on the party asserting a breach of the obligation. If it is not, the party relying on the qualification, exception or proviso must prove that he or she has complied with its terms.[4]

[10] The determination has been said to turn ultimately on whether the exception contains a matter which is 'in substance a fresh enactment, adding to and not merely qualifying that which goes before'.[5] That distinction is not always an easy one to make. As French J observed in *Bropho v Human Rights and Equal Opportunity Commission*:

> While the incidence of the burden of proof of the exemption was not contested on the appeal it is not, in my opinion, a question that should be regarded as settled. Whether an exemption from a statutory liability is to be demonstrated by the person upon whom it is sought to impose the liability is a matter of substantive statutory construction not a mere matter of form. The constructional choice which typically arises in such cases was identified long ago by Lord Mansfield in *R v Jarvis* (1756) 1 East 643:
>
> > … it is a known distinction that what arises by way of proviso in a statute must be insisted upon by way of defence by the party accused; but, where exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them.

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3 *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 601.

4 *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 611-612.

5 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 274-275, citing *Rhondda Urban District Council v Taff Vale Railway Co* (1909) AC 253 at 258.

> Professor Julius Stone observed that in the case of a statutory cause of action "… it is frequently a matter of some refinement to decide where the burden is placed" — J Stone and WAN Wells, *Evidence — Its History and Policies*, (1991), p 699. The substantive rather than the formal nature of that distinction was referred to in *Dowling v Bowie* (1952) 86 CLR 136 and also in *Vines v Djordjevitch*, where it was said (at 519):
>
> > … whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies.
>
> See also *Banque Commerciale SA en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285 and *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257 where Dawson, Toohey and Gaudron JJ said:
>
> > The distinction does not depend on the rules of formal logic: *Dowling v Bowie*. Rather, the categorization of a provision as part of the statement of a general rule or as a statement of exception reflects its meaning as ascertained by the process of statutory construction.[6]

[11] That constructional choice has also been the subject of consideration by the High Court in the workers' compensation context. The decision in *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* involved the proper construction of a provision in the *Workers' Compensation Act 1926-1942* (NSW), which provided that 'where a worker has received injury without his own default or wilful act on any daily or other periodic journey mentioned in the Act', the worker or his dependants in case of his death shall receive compensation from the employer.[7] The matter at issue was whether the onus was on the dependants of the deceased worker to prove that the injury was received 'without the worker's own default or wilful act', or on the

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6 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [75].

7 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* [1945] HCA 22; (1945) 70 CLR 635.

employer to establish that the injury was the result of some fault on the part of the worker.

[12] The majority (Rich, Dixon, McTiernan and Williams JJ, Starke J dissenting) held that notwithstanding the form of the provision, which suggested that the absence of the worker's own default or wilful act was a precondition to the entitlement to compensation, it should be interpreted as providing a ground for excluding or disqualifying the applicant from the benefit of the section so that the onus of proof was on the employer to prove that the injury was caused by the worker's own default.

[13] Justice Rich noted the employer's contention that the form in which the provision was drafted treated the absence of default or wilful act as part of the description of the injury, with the consequence that the burden of negativing default was placed on the worker or his dependants. His Honour stated that this contention ran contrary to the decision of the Privy Council in *Metropolitan Coal Co Ltd v Pye*[8] in relation to the definition of 'injury' in workers compensation legislation which included 'a disease … other than a disease caused by silica dust'.[9] The Privy Council had determined that a worker who proved a disease arising out of and in the course of his employment did not bear the further onus of establishing that the disease was not caused by silica dust. Rather, the onus rested on the employer to

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8 *Metropolitan Coal Co Ltd v Pye* (1936) 55 CLR 138 (reversing the decision of the High Court in *Pye v Metropolitan Coal Co Ltd* (1934) 50 CLR 614).

9 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 638.

prove that the disease in respect of which the worker would otherwise be entitled to compensation was in fact a disease caused by silica dust.

[14] In the application of that principle, Rich J concluded that the substantial meaning of the provision had to be weighed against the form of its expression. That substantial meaning was to lay down a general rule of liability for injury, and to introduce by way of exclusion the case of an injury caused by a special element in the form of default or wilful act on the part of the worker. His Honour ultimately found that they were things which 'according to the sense of fairness and justice which inspires the common law, we usually require to be proved against not disproved by the worker'.[10]

[15] Justice Dixon (as his Honour then was) addressed the question in the following terms:

> The answer depends upon the interpretation of the provision. For the burden of proof is a legal consequence of the nature of the qualification placed by the words "without his own default or wilful act" upon the general conditions of liability stated in the clause. If these words are but part of the legislative attempt to define the conditions upon which the worker's right to compensation arises, then, like all other ingredients or elements in a cause of action or title to claim, proof of the fulfilment of the conditions they describe must lie with the claimant. But if the true nature of the qualification is to introduce new matter, not as part of the primary grounds of liability, but as a special exception or condition defeating or answering liability otherwise existing, then the onus of proof lies with the party setting up default or wilful act by way of answer.
>
> The form in which the clause is cast, no doubt, favours the view that the words in question express part of the description of the primary or

10 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 639.

> general grounds of liability. For they occur in the formulation in a single proposition of the conditions in which the worker or his dependants "shall receive compensation from the employer." But, although in such a question the form in which an enactment is thrown is a consideration of much importance, it is by no means decisive. The substance of the provision must be considered and weight must be given to the nature of the general conditions laid down and to the substance and real effect of the particular qualification. Further, an interpretation is to be preferred which will give the provision an operation consistent with the principles of the common law. Notwithstanding the form of the clause, I think that the considerations of substance show that the qualification, expressed by the words "without his own default or wilful act," amounts to a particular exception or answer, the proof of which lies upon the employer.[11]

[16] Justice Dixon then identified the three matters which led to that conclusion.[12] The first was that the existence of default or wilful act did not go to the character of the journey or the definition of injury. It was to introduce a new factor concerning the cause of the injury, such that the primary grounds of liability remained true but the consequence was avoided by the addition of that new and special fact.

[17] Although in the present case the question of reasonable management action is incorporated into the provision which first defines injury in general terms, it is on proper characterisation a new factor involving causation.

[18] The second matter identified by Dixon J was that the new and special fact was described negatively, and as a general rule the proof of a negative is not imposed on a party.

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11 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 643-644.

12 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 644.

[19] Again, in the present case the stipulation or qualification has the negative formulation that mental injury is not an injury if caused wholly or primarily by reasonable management action. Casting the onus of proof on the worker would require the proof of a negative.

[20] The third matter identified by Dixon J was that the new factor involved fault or misconduct, which will generally only defeat a right when alleged and proved. Although the conception of reasonable management action in the Act is not framed in terms of fault or misconduct, in practice and in evidentiary terms it will almost invariably involve assertions of that type against the worker.

[21] Justice McTiernan expressed the general principle in these terms:

> The answer to this question is governed by the interpretation of the words "without his own default or wilful act." If the words "without his own default or wilful act" are to be interpreted as a condition precedent to the right which is created by s. 3, the onus is on the applicant to prove that the injury was received without the worker's own default or wilful act. But if the words are to be interpreted as providing a ground for excluding or disqualifying the applicant, whether a worker or any dependant, from the benefit of the section, the onus is on the employer to prove that the injury was received by the worker's own default or wilful act. [13]

[22] His Honour concluded that construction question did not depend merely on the formal arrangement of the words in the relevant section, but was to be answered having regard to the intention underlying the legislative scheme. In the application of that intention, it would be a departure from the

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13 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 645.

principles of the legislation to make a worker's conduct a condition precedent to the right to receive compensation. His Honour endorsed earlier New South Wales authority in finding that a condition for the absence of fault on the worker's part was not a factor which must be established by the worker as a necessary ingredient of a right to compensation.[14]

[23] The present matter falls to be determined having regard to those general principles concerning the legal onus of proof.

Decisions on analogous provisions in other jurisdictions

[24] In conformity with those general principles, up to this point in time the cases and practice in the Northern Territory have proceeded on the basis that once the worker has established that an injury arose out of or in the course of employment, the employer will then bear the onus of establishing any assertion that the injury was the result of reasonable management action. Those cases and practice are discussed later in these reasons. A number of other Australian jurisdictions have provisions in varying terms excluding injuries caused either wholly or substantially by reason of reasonable administrative or disciplinary action. However, the approach to the question of legal onus in relation to those provisions is neither uniform nor settled.

[25] The progenitor of s 3A of the Act was the definition of 'injury' in s 4(1) of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*

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14 *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 645-646.

(Cth), which came into operation on 1 December 1988.[15] The definition excluded injuries suffered by an employee as the result of reasonable disciplinary action taken against the employee, reasonable administrative action in relation to the employee, or a failure on the part of the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

[26] The *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (Cth) made significant amendments to the exclusions in the definition of 'injury' with effect from 13 April 2007. The definition of 'injury' was transferred to a new s 5A, which uses similar terms to s 3A of the Act but is quite differently structured. Subsection 5A(1) defines injury with reference to the common conceptions of injury *simpliciter*, disease and aggravation, and then immediately excludes injury suffered 'as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment'. Subsection 5A(2) then provides a non-exhaustive definition of the term 'reasonable administrative action'.

[27] There is a large body of authority in the federal jurisdiction dealing with the construction and operation of those exclusionary provisions in their various forms since 1988. However, no authority has been identified in that jurisdiction which addresses the questions of law which have been referred to this Court. That may be attributable to the fact that under the

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15 The title of that Act was amended to the *Safety Rehabilitation and Compensation Act 1988* with effect from 24 December 1992.

Commonwealth scheme neither the original decision-maker, nor the Administrative Appeals Tribunal as the review tribunal, exercises judicial power. As the Full Federal Court observed in *Australian Telecommunications Commission v Barker*:

> [T]he Tribunal spent some time in dealing with questions as to onus or burden of proof as discussed in cases such as *Commonwealth v Muratore* [(1978) 141 CLR 296]; *McDonald v Director-General of Social Security* [(1984) 1 FCR 354] and *Re Twyman and Commonwealth* [(1987) 13 ALD 402]. Likewise, in this appeal, counsel for Mrs Barker based his address on issues as to onus of proof. Yet, common law concepts of onus of proof are rarely appropriate for the Administrative Appeals Tribunal even in compensation cases, as was pointed out in *McDonald v Director-General of Social Security* and *Reitano v Commonwealth* noted in (1985) 9 ALN N201.[16]

[28] The case of *Commonwealth v Muratore* which is referred to in that passage involved an application to the Workers' Compensation Commission of New South Wales for judicial review of the decision of a delegate of the Commissioner for Employees' Compensation. The delegate had determined to reduce the weekly compensation previously paid to the employee on the assertion that he was able to earn a specified weekly amount in some suitable employment or business. The Workers' Compensation Commission, and ultimately the High Court, held that the Commonwealth bore the onus of proof of matters entitling it to have the original determination varied. Although the Full Federal Court in *Barker* accepted that general approach to the fact-finding process would have application in apposite circumstances, the Court also stated that *McDonald v Director-General of Social Security*

16 *Australian Telecommunications Commission v Barker* [1990] FCA 700; 12 AAR 490 at [18].

was good authority for the proposition that there is no legal onus of proof in proceedings before the Administrative Appeals Tribunal.

[29] The prevailing approach under the Commonwealth structure is that each of the Commission, the Board and the Administrative Appeals Tribunal is an administrative decision-maker, the relevant decision-maker is under a duty to arrive at the correct or preferable decision according to the material before it, and reviews before the Tribunal are inquisitorial in nature.[17] While it is correct in one sense to say that a party who may be affected by the determination must satisfy the requirements in the statute, that is only to recognise the operation of the legislative scheme under which the benefit or interest is sought rather than to impose an onus of proof.[18] Under the Northern Territory scheme, the power to determine applications for compensation and related matters is reposited in the Work Health Court, which exercises judicial power as a court of record and pleadings.[19] Although those principles concerning the legal onus of proof in the Commonwealth context have no direct application to proceedings before the Work Health Court, they do explain the dearth of Commonwealth authority concerning which party bears the legal onus of establishing whether an injury has been suffered as a result of reasonable administrative action.

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17 *Bushell v Repatriation Commission* (1992) 175 CLR 408 per Brennan J at 424-425; *Comcare v O'Dea* (1997) 150 ALR 318.

18 *Beezley v Repatriation Commission* (2015) 150 ALD 11.

19 *Work Health Administration Act 2011* (NT), s 12; *Horne v Sedco Forex Australia* (1992) 106 FLR 373 at 379.

[30] The appellant's reliance on authorities such as *Hart v Comcare*[20] must be considered in light of the fact that they are dealing with the administrative decision-making processes under the Commonwealth legislation. That case involved whether an adjustment disorder suffered by the employee was materially contributed to by her failure to obtain promotion. The Full Federal Court held that the injury was attributable to that failure notwithstanding that there may have been other operative causes, and it followed that the adjustment disorder was not an 'injury' as defined. The Court stated:

> There was no debate that the factual findings made by the Tribunal amount to a conclusion that the disease or injury suffered was as a result of the failure to obtain the promotions.
>
> In order to succeed, the appellant must assert, as she does, that operative causes are not excluded and that given the provision's purpose some modifier should be read into the words to restrict the effect of the exclusion to circumstances where there were no other employment related causes. We do not agree. The operation of the provision had the evident purpose of removing from the field of compensation a disease, injury or aggravation which was a result of something. We see no evident purpose to remove from the field of compensation a disease, injury or aggravation which was only a result of that thing. The words do not readily admit that construction. The cases on multiple causes in tort or general law do not assist that enquiry.[21]

[31] The reference to the appellant worker 'asserting' that operative causes were not excluded was to an argument concerning statutory interpretation made in the course of the appeal on the basis of the undisputed factual findings made by the Tribunal. The Court's observation in that respect in no way suggests that

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20 *Hart v Comcare* (2005) 145 FCR 29.

21 *Hart v Comcare* (2005) 145 FCR 29 at [21]-[22].

the appellant worker bore the legal onus of establishing that the injury was not caused by her failure to obtain promotion.

[32] Similarly, *Comcare v Martin* has nothing to say about the onus of proof in relation to administrative action. The passage relied upon by the appellant identifies only that the legislative purpose of ensuring that reasonable human resource management actions not give rise to liability would be defeated if the operation of the exclusion was dependent upon the subjective psychological drivers of the employee's reaction.[22] If anything, the description in that case of the relevant operation of s 5A of the the *Safety, Rehabilitation and Compensation Act* as an 'exclusion' would suggest that the party seeking to take the benefit of the exclusion would bear the onus were the matter to be determined in the exercise of judicial power.

[33] The authority from the other Australian jurisdictions which have similar exclusionary provisions is sometimes instructive, but the interpretation of each provision will depend upon its particular terms.

[34] In *SA Mental Health Services Inc v Margush*, the South Australian Full Court considered that part of the *Workers Rehabilitation And Compensation Act 1986* (SA) which provided that an illness or disorder of the mind caused by stress is compensable if and only if: (a) stress arising out of employment was a substantial cause of the disability; and (b) the stress did not arise wholly or predominantly from reasonable disciplinary action, reasonable

22 *Comcare v Martin* (2016) 258 CLR 467 at [46].

administrative action or the failure to obtain a promotion, transfer or benefit. Chief Justice Doyle (with whom the other members of the Court agreed) stated:

> It is my opinion that s 30(2a) of the Act places the burden upon the Worker to prove the matters identified by that subsection. The structure of the subsection suggests this. The subsection specifies the circumstances under which a particular type of disability is compensable. Such a disability is compensable "if and only if" the circumstances specified in sub-paragraph (a) and sub-paragraph (b) are established. Each paragraph is essential to the compensability of the disability. There is no particular reason to regard the paragraphs as having a different operation. Each of them states a qualification which must be established if the relevant disability is to be compensable. In my opinion the structure of the subsection suggests that it states matters to be established by a claimant for compensation, and not a basis of liability followed by some grounds of exculpation or exclusion of liability: cf *Vines v Djordjevitch* [1955] HCA 19; (1955) 91 CLR 512 at 519.[23]

[35] The result in that case recognised both the unique and emphatic nature of the statutory language; and a structure which strongly suggested that the worker bore the onus of establishing both the causal nexus between the stress-related condition and the employment (which is where the onus of proof of that matter will ordinarily lie in workers' compensation law and practice), and that the condition did not result from reasonable administrative or disciplinary action or a relevant failure. The relevant provision has since been amended, and there is no South Australian authority dealing with the question of onus in the amended form.

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23 *SA Mental Health Services Inc v Margush* [1995] SASC 5246 at [12]. That approach was subsequently adopted by members of the Full Court without further analysis in *WorkCover Corporation (SA) v Summers* (1995) 65 SASR 243 and *Keen v Workers Rehabilitation and Compensation Corporation* (1998) 71 SASR 421.

[36] The courts in Victoria appear to have adopted something of a hybrid approach when dealing with the section in the *Accident Compensation Act 1985* (Vic), which provided that compensation is not payable in respect of a stress injury 'unless the stress did not arise wholly or predominantly' from what might be compendiously described as reasonable administrative action. The appellant draws attention to the fact that the Victorian provision has the clear appearance of an exclusion rather than forming part of the definition of injury. Having regard to the general principles which have already been described, that formal characterisation is by no means decisive. In *O'Brien v Sacred Heart Primary School*, the County Court stated:

> I have a very clear view of what the outcome in this case should be: it will not turn on the onus of proof. However, my opinion is as follows. First, the defendant has the onus of satisfying the court on the balance of probabilities that the employer took reasonable action in a reasonable manner to dismiss the plaintiff. If the court is so satisfied, the plaintiff bears the onus of satisfying the court on the balance of probabilities that the stress did not arise wholly or predominantly from such action: cf. *State of Victoria v. Blythman*, Nathan J [1999] VSC 498; *Finn v. State of Victoria and MMI Workers Compensation (Victoria) Ltd*, Judge G.D. Lewis, 6 October 2000; *Gaweda v. Stone Container (Australia) Pty Ltd*, [1998] AILR 669; *WorkCover Corporation (SA) v. Summers* (1995) 65 SASR 243; *Beattie v. State of Victoria*, a decision of my own of 2 August 1999.[24]

[37] It is plain from the introductory sentence that this analysis of the respective onera did not form part of the *ratio decidendi*. Even if it did, the Victorian provision under consideration in that case was unique in that it contained the double negative that compensation is not payable in respect of a stress injury unless the stress did not arise wholly or predominantly from

24 *O'Brien v Sacred Heart Primary School* [2000] VCC 44.

reasonable administrative/disciplinary action. The practical effect of the County Court's formulation concerning onus is that the employer bore the initial onus of establishing that the injury claimed by the worker was referable to reasonable administrative or disciplinary action. If that onus was discharged, the worker then bore the onus of establishing that the injury did not arise wholly or predominantly from that action. That is little different to the ordinary position in workers' compensation law and practice by which the worker will carry the onus of establishing that the injury arose out of or in the course of employment.

[38] In *Parker & Anor v Q-Comp*,[25] the Queensland Supreme Court considered the definition of 'injury' in s 32 of the *Workers' Compensation and Rehabilitation Act 2000* (Qld). A separate subsection within that definition provided that injury did not include a psychiatric or psychological disorder arising out of or in the course of reasonable management action. The Industrial Magistrate had found that the applicant worker had the onus of proving on the balance of probabilities that the management action was unreasonable. The Industrial Magistrate's determination did not address the question of which party had the onus of proving that the injury was, or was not, caused by management action.

[39] The relevant question before the Supreme Court was whether a subsequent review body had committed jurisdictional error in determining the need for a

25 *Parker & Anor v Q-Comp* [2008] QSC 175.

temporal connection between the management action and the psychiatric or psychological disorder. The Court did not deal directly with the question of onus. The subsequent decisions of the Industrial Court of Queensland in *Simon Blackwood (Workers' Compensation Regulator) v Mana*[26] and *Fuller v Simon Blackwood (Workers' Compensation Regulator)*[27], on which the appellant also relies, state without analysis or authority that the worker carried the onus of demonstrating that the event said to precipitate the injury did not constitute reasonable administrative action. Again, those decisions were silent on the question of which party bore the onus of establishing that the disorder was attributable to management action in the first place.

[40] In *Catholic Education Office of WA v Granitto*,[28] the Western Australian Court of Appeal was concerned with the definition of 'injury' in the *Workers' Compensation and Injury Management Act 1981* (WA), which excluded a disease caused by stress wholly or predominantly arising from dismissal, discipline or the failure to obtain a benefit unless, in effect, that action was 'unreasonable and harsh on the part of the employer'. There was no real dispute that the employee's injury was caused by stress associated with what may conveniently be described as disciplinary action. An arbitrator, and then subsequently a commissioner, had found that the worker had failed to discharge the onus of proving that the disciplinary action was not the sole or predominant cause of the stress-related condition. The Court

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26 *Simon Blackwood (Workers' Compensation Regulator) v Mana* [2014] ICQ 27 at [25].

27 *Fuller v Simon Blackwood (Workers' Compensation Regulator)* [2016] ICQ 12 at [12].

28 *Catholic Education Office of WA v Granitto* [2012] WASCA 266.

of Appeal observed only that the determination of who bore the onus of proof on that issue was not disputed by the employee, and did not conduct any analysis or make any determination in relation to that matter. [29]

[41] That review of the authorities reveals that the decision of the South Australian Full Court in *SA Mental Health Services Inc v Margush* is the only determination by a superior court in Australia that a worker bears the legal onus of establishing that a psychological injury did not result from reasonable administrative or disciplinary action. The decision of an intermediate court of appeal in another Australian jurisdiction will ordinarily be highly persuasive, but the fact that both provisions contain similar exclusions with the same policy underpinning does not dictate the same result. The language and structure of the South Australian provision is markedly different in the manner already described. The issue which presents in this jurisdiction is the substantive statutory construction of s 3A of the Act, which must be conducted on its own terms. That is an exercise which must also be conducted having regard to the general principles concerning onus in the workers' compensation context which were laid down by the High Court in *Darling Island Stevedoring*.

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29 *Catholic Education Office of WA v Granitto* [2012] WASCA 266 at [68]-[76]. The decision was subsequently cited without further analysis by the District Court in *Pilbara Iron Company (Services) Pty Ltd v Suleski* [2017] WADC 114 as authority for the propositions that the worker has the onus of proving that one of the excluded matters was not wholly or predominantly the cause of the stress, and that any disciplinary action was unreasonable and harsh.

The proper construction of s 3A of the *Return to Work Act*

[42] The essential question is which party to an application for compensation bears the legal onus of establishing that the mental injury claimed by the worker is not a compensable injury because it was caused wholly or primarily by reasonable management action. Subsection 3A(1) of the Act contains a definition of 'injury' which is capable of standing alone. In fact, the definition of 'injury' as originally enacted was in those terms before the Act was later amended to incorporate qualifications in relation to 'reasonable administrative action', 'reasonable disciplinary action' and 'failure … to obtain a promotion, transfer or benefit'. Those qualifications have subsequently been replaced by the compendious description of 'management action'. As a matter of statutory form at least, subs 3A(1) states the general or primary grounds on which injury may be established (and from which the liability to pay compensation arises), while the exceptions in subs 3A(2) of the Act operate to deny liability in a particular case by reason of additional or special facts concerning reasonable management action.

[43] That operation is more readily characterised as the separate enactment of some ground of exception or exclusion to a general entitlement. To put it in the language adopted in *Darling Island Stevedoring,* the operation of the provision as a whole is to lay down a general rule of liability for injury, and to introduce by way of exclusion the case of a mental injury caused by a special element in the form of reasonable management action on the part of

the employer. Similarly, to adopt the test in *Vines v Djordjevitch*, s 3A(2) of the Act creates an exclusion which assumes the existence of the general or primary grounds for liability in s 3A(1) but denies that liability in a particular case by reason of additional or special facts, such that considerations of substance place the burden of proof on the party seeking to rely upon the exclusion. That is certainly the manner in which it was characterised by the responsible Minister in the second reading speech:

> There is currently a defence available to employers for a mental injury claim based on reasonable administrative action. It is proposed to replace the current formulation of administrative action with management action to improve guidance. The amendment provides a detailed explanation of what comprises management action and this will make the situation much clearer for employers and workers.[30]

[44] Similarly, the explanatory statement relevantly provided:

> Section 3A provides a definition of "injury" that includes a defence for a claim against the employer for mental injury if caused by management action taken on reasonable grounds and in a reasonable manner by the workers employer.

[45] Although the use of the word 'defence' is not determinative, it plainly suggests a legislative intention that the employer would carry the burden of proving that the injury is caused wholly or primarily by 'management action'. That is consistent with the approach which had been taken by Northern Territory courts prior to the 2015 amendment, at which time the definition of 'injury' was expressed not to include 'an injury or disease

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30 Second Reading Speech, Return to Work Legislation Amendment Bill 2015, Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 June 2015, 6743 (Peter Styles).

suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment'. There is no suggestion in the second reading speech or the explanatory statement of any legislative intention to alter that prior position.

[46] That formulation was considered to place an obligation on the employer to prove that the injury was the result of one of the disqualifying factors. In *Corbett v Northern Territory of Australia*, Barr J found that the employer had to prove that the worker's injury was as a result of reasonable administrative action taken in connection with the worker's employment.[31] While it is no doubt true to say, as the appellant does, that the parties in *Corbett* were in agreement on that matter, and conducted their respective cases accordingly, at the very least that agreement reflected the prevailing authority which governed the operation of the provision up to that time. In particular, in *Swanson v Northern Territory of Australia* Martin (BR) CJ stated:

> … the Magistrate was required to determine whether the [employer] had proved that the injury was suffered by the [worker] "as a result of" reasonable administrative action taken in connection with the [worker's] employment.[32]

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31 *Corbett v Northern Territory of Australia* [2015] NTSC 45 at [4]-[8].

32 *Swanson v Northern Territory of Australia* [2006] NTSC 88 at [86]; cited in *Barnett v Northern Territory of Australia* [2010] NTMC 70 at [11] and *Andreasen v ABT (NT) Pty Ltd* [2015] NTMC 026 at [27]-[33].

[47] That approach is also consistent with what was said in *Millar v ABC Marketing and Sales Pty Ltd*.[33] Although that case involved an assertion of double compensation in respect of the same injury, in the course of his reasons Mildren J explored matters of general principle concerning the onus of proof. His Honour observed that the general rule is that 'he who asserts must prove', and that party will ordinarily carry both the legal and evidential onus. In illustration of the general rule, Mildren J cited the following passage from the decision of Walsh JA in *Currie v Dempsey*, which was also relied upon by the trial judge in the present matter:

> The burden of proof in establishing a case, lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has.[34]

[48] In the application of that test also, the better characterisation is that the exclusion of injury caused by management action is not a condition precedent to the right to maintain the action in the same way that a requirement for notice,[35] default or arbitration might be. Rather, it is a

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33 *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 at [20]-[28].

34 *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125.

35 See *Maddalozzo v Maddick* (1992) 108 FLR 159 at 163, in which Mildren J held that giving notice of an injury 'as soon as practicable' under s 80(1) of the *Work Health Act 1986* (NT) was a condition precedent to the right to compensation under the Act, whereas s 182 requiring a claim to be made within six months of the occurrence of the injury, disease or death in question was a procedural section which simply placed a limitation on the maintenance of proceedings for compensation under the Act. The relevant part of s 80(1) of the *Work Health Act* provided that 'a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to or served on the worker's employer'.

matter of causation which, if established, will constitute a good defence to the claim for the employer. In *Robertson v Territory Insurance Office*, the same principle was applied in analogous circumstances with the same result:

> As the four grounds of exemption pleaded by the respondent in its further amended answer are not denials of essential ingredients in the applicant's claim but are four statutory grounds of avoidance of the applicant's claim pursuant to s 10(a) and s 9(1)(e) of the Act, the respondent bears the legal burden of proof of each of the four grounds of exemption it has pleaded in its further amended answer: *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125; *Stewart v Dillingham Constructions Pty Ltd* [1974] VicRp 3; [1974] VR 24 at 28.[36]

[49] The provisions of the *Motor Accident (Compensation) Act 1979* (NT) referred to in that passage denied the entitlement to benefits for a person who has suffered an injury while 'using a motor vehicle in such a manner that it created a substantial risk of injury to the person', or where the injury was suffered during the criminal use of a motor vehicle. It is implicit in that finding that exemptions or exceptions of that type constitute a ground of defence rather than an essential ingredient of the cause of action.

The significance of the pleadings

[50] In *Millar v ABC Marketing and Sales Pty Ltd*, Mildren J also made reference to the guidance provided by the pleadings on the question of who bears the legal onus.[37] Ordinarily, a defence which is not an essential element of the cause of action will be pleaded by the defendant, who will in turn bear the legal onus of proving that defence. By way of example, if a defendant

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36 *Robertson v Territory Insurance Office* [2005] NTSC 74 at [12].

37 *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 at [22]-[24].

wishes to assert that a plaintiff has failed to mitigate his loss, the defendant must plead that matter and bears both the evidentiary and legal burden of proof. The pleadings in the present case are instructive in that respect.

[51] By Statement of Claim dated 8 October 2020, the respondent pleaded relevantly that he sustained a mental injury during the course of his employment with the appellant (paragraph 3), and that the injury arose as a result of a number of incidents which took place between June and December 2019 (paragraph 4). The Statement of Claim made no reference to reasonable management action. That is unremarkable and unexceptional. It has not been the practice in this jurisdiction for a worker in a primary application for compensation to plead not only the existence of the injury in question, but also the absence of any disentitling factor. In fact, in the great majority of cases the cause of the mental injury will be multifactorial and the worker's attribution of cause in the claim will not comprehend or contemplate management action. It is only if and when the employer alleges that the injury was caused by reasonable management action that the issue will come into focus. So it was in this case.

[52] By Notice of Defence dated 30 October 2020, the appellant pleaded relevantly:

> The Employer denies Paragraph 3 of the Statement of Claim and states that the Worker did not suffer an injury arising out of or in the course of his employment or, in the alternative, if an injury was so suffered, it is not an injury compensable pursuant to the *Return to Work Act* given any such injury (which injury is denied) was caused wholly or primarily by management actions contemplated by section 3A of the Act.

[53] The appellant ultimately filed a Notice of Defence to an Amended Statement of Claim which pleaded substantive facts and provided extensive particulars of the management actions. Those particulars concluded with the pleading that by reason of the foregoing matters the injury was wholly or predominantly caused by management action taken by the employer; and the management action was taken on reasonable grounds and in a reasonable manner by the employer. On the pleadings at least, they were matters in respect of which the appellant bore the legal onus and carried an evidentiary burden.

[54] That conclusion is reinforced by the nature of the matters traversed in the pleading. In circumstances where the establishment of the exception or exclusion depends upon matters within the exclusive or peculiar knowledge of one party, it is that party who will ordinarily bear the legal onus in relation to proof of that exception or exclusion. In the particular circumstances of this case, while the respondent was no doubt aware of the content of the interactions he personally had with the various officers and employees of the appellant which were said by the appellant to constitute the relevant management action, he was not in a position to know or prove the nature and content of the dealings between those officers and employees *inter se* which might go to both the characterisation of those dealings as management action and the reasonableness of that action. To place the legal onus on the respondent in those circumstances would be to put him in the untenable position of having to prove a negative, ie that the injury was not

caused wholly or primarily by reasonable management action, of which he did not have full knowledge.

The distinction between legal onus and evidential onus

[55] This is not to say that a worker will never bear an evidential burden, as opposed to the legal onus, in cases where it is asserted that the injury was caused by management action. As the reasons at first instance and the terms of the questions referred suggest, there is a distinction between the legal and evidential onus. The onus of proof as a matter of law and pleading requires the party which carries that burden ultimately to establish its case to the requisite standard. The evidential onus refers to the burden of adducing or pointing to evidence which demonstrates that the case is established, or not established as the case may be. As Barwick CJ, Kitto and Taylor JJ stated in *Purkess v Crittenden*, the legal onus is always stable but the evidential burden may shift during the course of the trial according to the preponderance of the evidence led.[38]

[56] That was another matter adverted to by Mildren J in *Millar v ABC Marketing and Sales Pty Ltd*.[39] His Honour stated that although one party's knowledge of the essential facts may lessen the amount of evidence required to be led by the other party in discharge of an evidentiary burden borne by it, the legal burden does not shift during that process.[40] In the workers'

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38 *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

39 *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 at [25]-[26].

40 Citing a passage from the reasons of Lord Mansfield CJ in *Blatch v Archer* [1774] EngR 2; 98 ER 969 at 970.

compensation context, a worker making a primary application for compensation (as opposed to an appeal against cancellation) will ordinarily be required to prove the essential conditions of a cause of action, namely an injury arising out of or in the course of employment that resulted in or materially contributed to his or her incapacity.[41] The worker will also ordinarily be *dux litis* in that application.

[57] In circumstances where the employer has pleaded reasonable management action, in the ordinary course the evidence which the worker adduces to address the defence pleaded by the employer in discharge of the evidentiary burden which the worker carries in relation to that issue will come largely in the course of the worker's evidence in chief and cross-examination, and otherwise in the worker's case. The evidentiary burden will then shift to the employer to adduce evidence which establishes on the balance of probabilities that the injury was caused wholly or primarily by reasonable management action. There may be cases in which an employer calls evidence in that respect which requires the worker to call evidence in rebuttal, but that need will rarely arise in practice because of the pre-trial discovery and disclosure processes.

[58] In the present case, the appellant bore both the legal onus of establishing that the injury was caused wholly or primarily by reasonable management action, and an evidential onus of producing evidence sufficient to displace,

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41 *Return to Work Act*, s 53.

in persuasive terms, the evidence already adduced by the respondent to demonstrate that it was not. However, it was not an essential ingredient of the respondent's claim to disprove that the injury was referable to management action, that the management action was reasonable in nature, and that the injury was caused wholly or primarily by that management action. The appellant pleaded the issue as a matter which, if established, constituted a good defence to the respondent's claim, and it fell to the appellant to prove that defence.

Answers to the questions of law referred

[59] The questions of law referred to the Full Court are answered as follows.

Question 1:

Did the trial judge err in law in deciding that the appellant (employer) bears both the legal and evidential onus of proof that any mental injury suffered by the respondent (worker) is excluded by reason of s 3A(2) of the *Return to Work Act*?

Answer

No, although that determination should not be understood to mean that the respondent (worker) did not also carry an evidential burden in relation to that matter.

Question 2

Did the trial judge err in law in deciding that the onus on the appellant requires the appellant to prove each of the following:

(a) the conduct of actions complained of by the respondent constitute management action as defined in s 3 of the *Return to Work Act*;

(b) the management action was taken on reasonable grounds; and

(c) the management action was taken in a reasonable manner; and

(d) the reasonable management action wholly or primarily caused the mental injury?

Answer

No, although that determination should not be understood to mean that the respondent (worker) did not also carry an evidential burden in relation to those matters.

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