CITATION: *Dickin v NT TAB [2003] NTMC 014*

PARTIES:	GAIL DICKIN
	v
	NT TAB
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20201609
DELIVERED ON:	12 June 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	15 July 2002, 24 February 2003
JUDGMENT OF:	H B Bradley CM

CATCHWORDS:

WORKERS COMPENSATION -- WORK HEALTH -- INCAPACITY -- FORM 5 -- ESTOPPEL

Whether injury or disease – validity of Form 5 – whether employer estopped by s 108 agreement from later denying facts forming the basis of the agreement.

Work Health Act 1986 (NT) s 4, s 69, s 108

Collins Radio constructors Inc v Day (1998) 143 FLR 425 - referred to

Rupe v Beta Frozen Products [2000] NTSC 71 – referred to

REPRESENTATION:

Counsel:

Plaintiff:	Mr O. Downs
Defendant:	Mr R. Davies

Solicitors:

Plaintiff:	Priestly Walsh
Defendant:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	014
Number of paragraphs:	83

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20118064

[2003] NTMC 014

BETWEEN:

GAIL DICKIN
Worker

AND:

NT TAB
Employer

REASONS FOR DECISION

(Delivered 12 June 2003)

Mr HUGH BRADLEY CM:

BACKGROUND

1. These proceedings are brought by the worker Ms Gail Dickin against the respondent NT TAB Pty Ltd (the TAB) seeking a continuation of weekly payments under the Work Health Act 1986. For purposes relevant to this case the worker had been in receipt of weekly compensation since a fall at work on 28 November 1995. Payments were ceased pursuant to a Form 5 notice served by or on behalf of the TAB on or about 8 January 2002. The worker has since, and is still continuing to receive interim payments pursuant to orders of the Court.

2. Ms Dickin now aged 46 years commenced employment with the TAB in or about 1981. She commenced as a telephone operator quickly becoming a supervisor and subsequently promoted to management level before suffering the fall in November 1995. During her time with the TAB she separated

from her husband, brought up two daughters, held down full time work and also undertook outside duties at the greyhound track and at the Fannie Bay Race Course. She also took casual work home from the TAB to give part time work to herself and her daughters. She was in other words a woman who was proving herself in a difficult world. Ms Dickin says that she was treated badly by some of her male co-workers and as a result suffered stress from harassment sustained during the period 1991 to November 1995. It was in November 1995 when she fell over at work and never returned to her employment after that day. Ms Dickin claims compensation on the basis of incapacity arising from the fall. It seems the disability is alleged by Ms Dickin to be contributed to by the work environment and in particular the work load she undertook or was expected to undertake and from the inappropriate treatment of her by male employees at the TAB. During and subsequent to her employment she made some unsuccessful anti-discrimination claims in relation to this behaviour.

3. Apart from some part time voluntary work intended as part and parcel of rehabilitation Ms Dickin has not been employed since 28 November 1995. On or about 8 January 2002 she was issued with a Form 5 notice indicating the payments would be ceased after 14 days. The relevant reasons given in the notice were:

> "• you have ceased to be incapacitated for work as a result of your work related injury of 28/11/1995,
>
> • as per the attached certificates from Dr Timney and Dr Kutlaca both dated 17/12/2001."

Accompanying the Form 5 was a letter and medical certificates setting out in some further detail the background to the cessation of payments.

4. The fall said to precipitate this claim was of itself a fairly simple affair. It seems that Ms Dickin was carrying a fairly large box of pens with strings attached into her work place from home when, as she entered the work place

environment, she tripped and fell. In some places it is suggested that the fall was a result of a dizzy spell. In any event there appears to be no contest as to the workers' description of the mechanics of the fall in that she fell forward on top of the cardboard box she was carrying causing it to crush slightly and also on to her side. She said that as a result of the fall she sustained injuries to her elbow, shoulder and neck.

THE ISSUES

5. The issues arguably raised by the pleadings in this matter and accepted by counsel as requiring determination by the court are:

5.1 Whether the Form 5 is a valid notice pursuant to s 69 of the Work Health Act.

5.2 If yes, is the case asserted in the Form 5 made out on the merits.

5.3 If no to question one then has the employer made out a counter claim which is agreed between the parties to be in effect the same as that which is asserted in the Form 5 namely that on or before 8/1/02 the worker had ceased to be incapacitated from work as a result of her fall on 28/11/95.

6. Certain further issues arose during the case and submissions. Some were evidential issues, some issues of law. I have noted these as follows.

6.1 Issues as to admissibility of certain evidence which was taken "de bene esse"

6.2 The question of whether an issue of estoppel existed as to the injuries suffered at work and as to the cause of those injuries by reason of a previous agreement reached between the parties and registered with the court pursuant to s 108.

6.3 A question of whether the incapacity, if any, was due to an injury or disease and whether that injury or disease was one which accrued by way of a gradual process.

7. There is no counter claim in this case in the form which has become customary in recent times to the effect that if it is not found that the worker has ceased to be incapacitated at the time of the Form 5 then at that time, or some subsequent time, the worker became able to earn an amount equal to or greater than the amount of the normal weekly earnings indexed in accordance with the Act. The reason for this is historical in so far as the proceedings are concerned and arises because the employer was given late notice of the worker's intention to challenge the validity of the Form 5 on technical grounds. Given the lateness of this notice the employer was given leave to file the counter claim limited in the way described above [5.3].

8. Essentially therefore the task of the court (by agreement of counsel) is to determine whether Ms Dickin was incapacitated at all on 8 January 2002. It is agreed that no question of partial incapacity arises in this case. The onus, which is accepted by the employer is to prove on the balance of probabilities that on 8 January 2002 the worker was neither totally nor partially incapacitated within the context of Part V of the Act as a result of the work related injuries sustained on 25/11/95. On the pleadings the parties have agreed that if it is proved the worker was partially incapacitated at that time then the worker is nevertheless entitled to full payments of compensation to date and continuing until lawfully stopped or varied.

9. The particulars of the claim assert that injuries including stress, depression, anxiety and physical injuries were all "sustained" on 28 November 1995 presumably by a fall which was not specifically mentioned in the pleadings but about which evidence was given during the course of the hearing. The worker expressly abandoned the pleading that on that date she sustained an aggravation, acceleration or deterioration of a pre existing anxiety

condition. I note that, not withstanding this, it seems that this concept formed the basis of much of the workers case. I note that "injury" is defined in the Act to include an "aggravation acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease". For the purposes of this case I have therefore accepted evidence as to her prior condition and allow that as an alternative to her being able to prove that her alleged incapacity resulted solely as a result of the fall which as will be seen seems to me to be quite improbable. In other words I am allowing the applicant to present her case on an alternate basis that her incapacity is caused by an aggravation etc of the pre-existing condition.

FORM 5 – VALIDITY

10. Whilst there have been a number of amendments to s 69 in recent years at the relevant date, 8 January 2002 s 69 provided:

s 69(1) Cancellation or reduction of compensation subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom is payable has been given –

(a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and

(b) a statement in the approved form –

(i) setting out the reasons for the proposed cancellation or reduction;

(ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may apply to the Authority to have the dispute referred to mediation;

(iii) to the effect that if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;

(iv) to the effect that, if the worker wishes to appeal the worker must lodge the appeal with the Court within 28 days after

receiving a certificate issued by the mediator under section 103J(2); and

(v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful.

s 69(2) Subsection (1) does not apply where –

(a) the person receiving the compensation returns to work or dies;

(aa) the person receiving the compensation fails to provide to his or her employer a certificate under section 91A within 14 days after being requested to do so in writing by his or her employer;

(b) the medical certificate referred to in section 82 specifies that the person receiving the compensation is fit for work on a particular date, being not longer than 4 weeks after the date of the injury in respect of which the claim was made, and the person fails to return to work on that date or to provide his or her employer on or before that date with another medical certificate as to his or her incapacity for work;

(c) the payments of compensation were obtained by fraud of the person receiving them or by other unlawful means; or

(d) the Court orders the cancellation or reduction of the compensation.

s 69(3) Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work.

s 69(4) For the purpose of subsection (1)(b), the reasons set out in the statement referred to in that subsection shall provide sufficient details to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced.

11. The validity of the Form 5 notice was raised on behalf of the Worker. The Form 5 notice (exhibit E28) was a three page document broadly in compliance with the required form. Some argument could be had as to the way in which it advised the Worker of the requirements set out in s 69(1)(b) but this was not argued on behalf of the Worker and I am satisfied that the words used were sufficient compliance in the sense contemplated by the full

Court in *Collins Radio Constructors Inc v Day* 143 FLR 425 at 430. The Form 5 was accompanied by two medical certificates and a letter. The operative words of the Form 5 read:

> "With regard to your claim for payment of benefits as prescribed under the *Work Health Act*, you are hereby advised that your employer NT TAB acting on the advise of the Territory Insurance Office hereby:-
>
> *cancels payments of weekly payments to you pursuant to s 69 of the Work Health Act. This cancellation will be effective in 14 days from your receipt of this notice.*

The reasons for this decision are;-

- ***You have ceased to be incapacitated for work as a result of your work related injury on 28/11/1995.***
- ***As per the attached certificated from Dr Timney & Dr Kutlaca both dated 17/12/2001".***

12. As indicated above the Form 5 was accompanied by medical certificates. The certificate signed by Dr Kutlaca read as follows:

> "MEDICAL CERTIFICATE
>
> I David D Kutlaca Medical Practitioner (qualification), hereby state that I have examined the Worker Gail Dicken on 6/12/01 (date) in relation to his/her work injury.
>
> As a result of that examination I CERTIFY that the Worker has ceased to be incapacitated for work as a result of the work injury.
>
> Dated 17th day of December 2001
>
> Signature".

13. The certificate by Dr Brian Timney is identical terms except that the date of examination was 29/10/01.

14. I note in passing that the Form 5 is no longer prescribed in the regulations however it is now an authorised form presumably subject to change. One wonders how parties can confirm the correct form except by somewhat risky

process of asking an employee of Work Health authority to provide an appropriate form.

15. The Worker says that the Form 5 must fail because it does not address the physical incapacity and that both Doctors, Kutlaca & Timney, were psychiatrists and do not address the physical injuries.

16. The issue of a Form 5 has been considered a number of times by this Court and by the Supreme Court of the Northern Territory. The principle decisions in recent years are *Collins Radio Constructors Inc v Day* (1998) 143 FLR 425 and *Rupe v Beta Frozen Products* [2000] NTSC 71. In *Collins* the Court of Appeal considered a medical certificate the relevant portion of which read "I hereby certify that she is no longer totally incapacitated". That certificate was said to fail to comply with s 69(3) because it added the word "totally" and omitted the words "for work". The Court of Appeal substantially upheld the decision of His Honour the Chief Justice who had asked himself the question whether strict compliance is required of s 69(3). The Court held that His Honour was correct in deciding that there should be such strict compliance. The Court went on to say;

> "For the reasons given by the learned Chief Justice, we think that the answer to the question must be "yes", and that it is clear beyond question that the requirements of s 69(3) as to the contents of the certificate may not be ignored. However, we would not go so far as to say that a form of words other than those prescribed by the subsection could never amount to compliance. If, for example, Dr Awerbuch had certified that the appellant was "capable of returning to employment full time and all forms of employment for which she had any previous experience" this, or some other suitable words would convey the same meanings as "ceased to be incapacitated for work". We do not think that it was the intention of the Legislature that only that the precise words chosen by the Legislature and no others conveying the same meaning would suffice. Obviously those who draft these certificates would be wise to follow the words of the statute, but they are not to be treated as possessing special magical powers which other words to the like effect do not. It is not necessary to decide whether words conveying the same meaning comply "strictly" or "substantially" with the subsection.

> However, in this case, the words chosen in the certificate do not convey the essential meaning for the two reasons previously identified".

17. In *Rupe* the question of the validity of the certificate arose because the Doctor had relied on an earlier examination where he had noted that the injury was not yet stable and that the Worker needed ongoing physiotherapy. Approximately four weeks later the Doctor signed a certificate to accompany the Form 5 notice and did so apparently on the basis that he believed by that time that the Worker would have fully recovered. His Honour Riley J said;

> "The question that then arises is whether there has been compliance with s 69(3) of the Work Health Act in this matter given the evidence and the findings of His Worship in relation to the certificate of Mr Sen. In my opinion there has not, the document relied on to support the Form 5 was not what it reported to be. It complied with the requirement of form in s 69 of the act but in truth what Mr Sen did not do was certify that the worker had ceased to be incapacitated for work as at 25/11/98. At its highest Dr Sen speculated that such would be the case that is not what s 69 required. The section requires certification that "the Worker *has* ceased to be incapacitated for work" i.e. this certificated must speak effectively of the Workers recovery at the time the s 69 notice to discontinue weekly payments is issued. It cannot be known what opinion Mr Sen may have formed had he examined the Worker on or near the date of this certificate.

18. An examination of the evidence and the reports reveal that Drs' Kulaka & Timney are both qualified Medial Practitioners and as such are qualified to give the certificate referred to in s 69(3). Both Doctors reviewed an extensive body of reports dealing with both the physical and psychological issues relating to the Worker see exhibits E33 and E34. Both Doctors took a history which included the four motor vehicle accidents and the results thereof. They must therefore have had some regard to the physical impact of these at least. Whilst it appears that Ms Dicken may have made little mention of the fall to these Doctors they would have been aware of it from the material read by them. Indeed Dr Kutlaca makes reference to that fact in his report. Both doctors refer to the complaint of neck pain. Both Doctors

had the benefit of a report specifically from Dr Cameron dated 3/3/98 (exhibit E6) who found "no evidence of any ongoing disability or problem in either the right shoulder or elbow joint at this stage".

19. The question for me to decide is whether the Form 5 complies with the requirement of s 69. The decisions referred to provide guidance but no definitive statement on the issue facing this Court. The principles to be drawn from the cases establish that Form 5 must:

    19.1 Give 14 days notice of the intended cessation

    19.2 Be in accordance with the approved form

    19.3 Provide the information required by s 69(1)(b)

    19.4 Be accompanied by a medical certificate to the effect that "the person has ceased to be incapacitated for work"

    19.5 Provides sufficient detail to enable the Worker to understand fully why the amount of compensation is being cancelled or reduced.

20. It is perhaps because of this last requirement that the Insurers have opted to give a covering letter which gives the Worker some further background information. The Workers arguments identified above that the Form 5 fails to address the issue of physical incapacity and that the Form 5 are completed by psychiatrists only are almost one and the same. I was referred also by the Workers counsel to that paragraph of the judgement of Riley J in *Rupe* which is set out above. I therefore accept that the Worker also complains that the certificates are not contemporaneous with the examination. I do not accept the arguments relating to the certificates being granted by the psychiatrists only. The doctors are medical practitioners and they certified as required by the act. They are in fact as fully trained as any GP who is likewise entitled to provide such a certificate for the purposes of s 69. Such an argument taken to the extreme would require an orthopaedic surgeon to

sign a certificate in respect of a back injury and other specialists according to the tenor of the injury or injuries sustained by the Worker. In my opinion the Act does not require the Employer to go that far. In this case the Worker has been clearly told that there is no incapacity for work and that is the reason why payments have been ceased.

Here both doctors provided their certificates a short time after an examination; in the case of Dr Kudlaca 11 days and in the case of Dr Timney approximately 7 weeks. Unlike *Rupe* there is no suggestion that there is any change of circumstances or an original belief at the time of examination that the Worker was still incapacitated. The time span between examination and report can be explained purely by the fact that both reports were awaited before a decision taken by the Employer to issue a Form 5 notice and therefore request the medical certificates to accompany it. Having agreed to the sequence of events and, having heard the doctors' evidence I am satisfied that they expressed their views in the certificates dated 17/12/01 as the then present state of affairs.

21. In my view a Worker does not need to receive a complete medical diagnosis to "understand fully" why the compensation has been cancelled. In this case it is abundantly clear that the Employer alleges that the Worker had ceased to be incapacitated for work. The only other question that could, on the face of it, arise is that these certificates are expressed in the sense that the cessation of incapacity is from any incapacity which arose as a result of work related injuries on 28/11/95. In my view the addition of those extra words "as a result of your work related injury of 28/11/95" does not invalidate the certificate. The certificate is clear on its face and that there is little or no prejudice to the Worker. She has continued to receive interim payments and her claim and entitlements have been fully explored firstly by the parties and now by the Court. It would in my view be inappropriate to lift the requirements for compliance of s 69 to a level which is unrealistic. I therefore find that not withstanding a period of days or weeks between

examination and signing the certificate and not withstanding the nature of the certificates given and the specialty of the doctors giving it that the certificates are valid certificates under s 69(3) and that the Form 5 is a valid notification of the Employers intent. I note in passing that the letter accompanying the Form 5 reiterated that payments of weekly compensation would cease within 14 days after service. The letter goes on to say that the Employers liability for "ongoing medical treatment has ceased from the date of this letter". It can be seen that s 69(1) stipulates that "an amount *of compensation under this subdivision* shall not be cancelled or reduced unless…". It is clear therefore that the section relates only to weekly compensation. Payments of other forms of compensation are not protected by the provisions of s 69.

ISSUE ESTOPPEL

22. A procedural or evidential issue surrounded the effect of a memorandum of agreement (exhibit W14) signed by and on behalf of the parties and dated 3 July 1997. That document was in the form contemplated by s108 of the Act and was an agreement by the employer to pay weekly compensation to the date of the deed and continuing. The worker argues that the effect of the document is to prevent the employer ever denying that the worker suffered the injuries or diseases listed at paragraph (d) of the document (issue estoppel). Predictably the employer does not agree.

23. The Memorandum of Agreement dated 3 July 1997 and signed by the parties was recorded by this court on the 7 July 1997. The agreement between the parties was in proceedings numbered 9600706 and could be said to be an agreement which resolved that earlier litigation. In effect the employer agreed that the worker had nil capacity to earn at the time and agreed to make up some back payments, some medical expenses and legal costs. The document set out that the injury or contraction of a disease occurred on or about 28 November 1995, that the injury or disease was "stress, depression,

anxiety; injured elbow, injured shoulder, aggravation of pre-existing whiplash condition" it further went on to set out the statement to the effect that "the employer shall pay the worker weekly payments of compensation of $634.02 until cancellation or reducing those payments in accordance with the Work Health Act.

24. The exhibit, W14, consists of copies of the Notice of Recording the Memorandum of Agreement, the registrars recommendation and consent to the abridgement of time and document entitled "Memorandum of Agreement". The form of memorandum generally follows the format of Form 10 contained in rules of court promulgated by a previous Chief Magistrate on 24 April 1987. The Form 10 contains introductory words to the effect that the worker and employer have entered into an agreement which is annexed to the pro-forma memorandum. The Memorandum of Agreement signed by the parties in this case generally follows Form 10 but contains the words "the worker and employer have entered into an agreement which is set out in this document". Such practice was, to my recollection, fairly common at the time. The document goes on to contain "particulars" of the workers claim as contemplated by Form 10. The particulars mentioned above concern the date of the injury, the particulars of the injury and the promise to continue weekly payment are all contained in various paragraphs under the heading relating to particulars of the workers claim. No where in the document is the agreement between the parties separately and distinctly set out. It is necessary for the reader to presume the nature and extent of the agreement which was made by the parties at the time. The actual words of the document interpreted liberally, require on the part of the employer that it will pay the continuing weekly payments and the method of calculation of a total amount of $8 427.26 which was to be paid to the worker. Other areas of the document are strictly said to be particulars of the claim.

25. The document itself is argued by the worker to be an admission by the employer that the worker has suffered the stated injuries on or about the 28 November 1995 and that there is now an issue estoppel in relation to that matter. As I understand the argument it is said that the issue estoppel arises by virtue of the document itself and by virtue of s 108(6) which provides that "a memorandum, on being recorded under subsection (5), is enforceable as if it were a determination of the court". I am unable to accept this argument. Firstly the document itself, read literally, does not necessarily imply an admission by the employer of the facts asserted by the worker in this case. Secondly the issues were not ones decided by a judicial officer after receiving evidence or formal admissions of fact. Finally because s 108 (6) speaks only of the enforcability of the agreement rather than the nature and effect of the document itself. I mean by this that s 108 (6) appears to focus on the payment of agreed compensation.

26. For these reasons I find that the employer is not by virtue of W14 limited in the arguments which are now available to it.

INJURY OR DISEASE

27. As indicated an issue which arose in argument but not on the pleadings is whether the incapacity alleged as a result of her psychiatric condition is an "injury" or "disease". If the injury was one which occurred by way of a gradual process or was a disease then the employer argues that the worker must establish that her employment "materially contributed" to that condition. At the date of the injury the relevant portions of s 4 provided:-

> 4 (5) "An injury shall be deemed to arise out of or in the course of a worker's employment where it occurred by way of a gradual process over a period of and the employment in which he or she was employed at any time during that period materially contributed to the injury".
>
> 4 (6A) "Subject to this section, a disease shall be taken not to have been contracted by a worker or to have not been aggravated,

accelerated or exacerbated in the course of the the worker's employment unless the employment in which the worker is or was employed materially contributed to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation".

4 (8) "For the purposes of this section, the employment of a worker shall not be taken to have materially contributed to an injury or disease or to an aggravation, acceleration or exacerbation of a disease unless the employment was **a** real, proximate or effective cause of the injury or disease or to the aggravation, acceleration or exacerbation of the disease, as the case may be." (emphasis added)

28. Subsequently but prior to 8/1/02 the Act was amended so that s 4(8) now reads:

> 4 (8) "For the purposes of this section, the employment of a worker is not to be taken to have materially contributed to –
>
> (a) an injury or disease; or
>
> (b) an aggravation, acceleration or exacerbation of a disease,
>
> unless the employment was **the** real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation". (emphasis added)

The sections are very similar and perhaps the most substantial change being to the description. "**a** real, proximate or effective cause" to "**the** real, proximate effective cause". I have not been addressed on the significance of this change however the later version appears to me to require a greater contribution by the employment before the injury or disease can be said to have materially contributed i.e. it places a greater onus on the employer.

29. I accept the earlier version of the section as applicable to the claim. If the condition complained of is not a disease nor one which occurred by way of a graduate process then it seems that a lesser amount of contribution is sufficient to satisfy the requirement of the Act for the purpose of the workers claim.

30. In this case I keep in mind that the burden is on the employer to establish the facts necessary to justify the cessation of payments. A relevant question would nevertheless appear to be whether or not the alleged incapacity is caused by an injury or disease. An "injury" includes "disease" but the reverse does not necessarily apply although I note that a "disease" is defined so as to include a physical ailment with a sudden or gradual development.

31. The critical paragraphs of the particulars of claim are (3) and (5) which read as follows:

> 3. "On 28 November 1995 ("the date of the injury") the Worker sustained injuries whilst in the course of her employment with the Employer ("the Injuries").
>
> 5. As a result of the injuries the worker has been and continues to be incapacitated for employment.
>
> **PARTICULARS OF INJURIES**
>
> 5.1 stress;
>
> 5.2 depression;
>
> 5.3 anxiety;
>
> 5.4 injured elbow;
>
> 5.5 injured shoulder;
>
> 5.6 aggravation of pre existing whiplash condition ("the injuries")".

32. I note that for some unexplained reason it is paragraph 5 that recites the injuries which were said in paragraph 3 to have been sustained. Curiously there is no mention of the fall about which the evidence in this case seemed to centre. Accepting the descriptions of the alleged injury it is clear that both physical and psychiatric conditions are alleged in paragraph 5 to be the injuries sustained on 28 November 1995 as asserted in paragraph 3. They would therefore seem to be alleged to be of sudden occurrence. The physical components would normally and properly be described as injuries.

The only event we know of on 28 November 1995 is the fall. Therefore, the conditions complained of as least so far as the pleadings are concerned seem to be better categorised as an "injury" and should be treated as such for the purposes of determining the rights of the worker. As indicated earlier I am accepting within the definition of "injury" the concept of an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease" as that is part of the definition of an "injury" in the Act. Accepting this then it seems to me that it is appropriate to regard for the purposes of this case all of the complaints as an injury within the meaning of the Act and an injury or injuries which are not such as have been sustained by way of a gradual process. If I am wrong about this then it may be the issue could, in limited circumstances effect the outcome. I therefore indicate that (for reasons which will become evident during the discussion of the evidence) I find that the fall suffered on the 28 November was **a** but not **the** proximate or effective cause of the incapacitating injury or disease entitling the worker to compensation pursuant to the provisions to s 53.

33. The question may in fact be academic since, when it all boils down, this case relates to the question of cessation of benefits actually being paid as at 8 January 2002. The real question and issue in dispute (absent the legalese) is whether on 8 January 2002 there was any incapacity for work and if so did that incapacity arise out of or in the course of the workers employment as alleged.

EVIDENCE TAKEN DE BENE ESSE

34. During the course of the hearing some of the evidence was taken "de bene esse" that is, provisionally, to depend on the outcome of arguments as to admissibility. In the event there was no substantial objection to the evidence, and so I allow it and it has been considered along with all the other evidence.

THE EVIDENCE

35. The worker says in her pleadings that as a result of her fall she was, on 8 January 2002, incapacitated for work by virtue of her physical or mental state. She argues that she suffered ongoing physical incapacity as a result of the injuries sustained to her elbow shoulder and neck in the fall at work. It is also asserted that she suffers from a mental state variously described as anxiety state, stress, chronic stress, panic attacks, depression, post traumatic stress disorder, social phobia, paranoia, personality pathology and abnormal illness behaviour. Like the condition, the symptoms thereof were similarly diverse.

36. Dealing first with the physical injuries to the elbow shoulder and neck. I note that the worker no longer claims to be suffering from any problem with the elbow. It seems that that matter resolved itself quickly and has not presented an ongoing problem. There is no credible evidence as to any relevant incapacity in the sense defined in the Act so far as the shoulder is concerned and I so find that there is no incapacity arising from those injuries. The injury to the neck is argued to continue to cause a problem. In answer to a question from me as to the basis of the neck injury causing a disability or incapacity I was informed that pain and headaches caused the incapacity but there is little or no medical evidence or direct statements from the worker to support this. It is said that complaints of this nature are exacerbated or intensified by the worker's psychiatric condition. I accept this may be true but there are other matters to be considered.

37. Ms Dickin has had more difficulties in her life than most, both physical and emotional. On the physical side she has had a number of significant motor vehicle accidents likely to affect her wellbeing. She has for example had motor vehicle accidents in 1986, 1988, April 1995 and May 1997. Each of these are described as accidents which are likely to have caused somewhat greater impact on her body than did the fall of 28 November 1995. Ms

Dickin complained of whiplash type injuries in respect of most of these accidents. In fact she had a motor accidents compensation claim against the TIO at or about the same time as her claims for work health were proceeding.

38. Ms Dickin specifically complained of whiplash type injuries in respect of the accidents. It seems that such evidence as there is of any empirical kind indicates no pathology other than the usual age related deterioration was observable after the fall at work. The accident of 1997 would seem to be a likely contributor to any problems with her head and neck. In that accident she alleges that she was driving with her daughters when she was "T Boned" by a car said to be travelling at approximately 140km an hour. In light of this evidence and the other medical evidence supporting the fact that there is little or no difficulty with her physical condition I am satisfied to the required standard that there is no incapacity arising from physical injuries sustained in the course of her employment.

39. The more complex psychiatric issues relate to the effect of her diverse symptomatology and whether her condition (however it may be described) as at 8 January 2002 arose as a result of or was exacerbated by the fall on the 28 November 1995. The relevant background seems to be that the worker says she was a competent person coping with the stresses of life until her employment with the TAB. Her case is that starting some time shortly prior to 1991 she was treated poorly by fellow employees and in particular men; one of whom is said to have made crude suggestions as to how she could improve her life. This employment environment is said to have led to a susceptibility to psychiatric injury which was triggered by the fall.

40. Her case is supported by Dr Maclaren who saw her shortly after the fall. In his evidence and in his medical reports dated 20 December 1995, 25 January 2002, and 25 September 2002 he attributes her mental state to be a result of

her employment and the fall. In his report dated 20 December 1995 (Exhibit W10) the doctor opined

> "this lady currently shows features of a chronic stress reaction with some panic attacks and secondary depression. She is somewhat predisposed to develop this type of disorder as a result of her mildly anxious obsessional personality and her rather overdeveloped sense of responsibility. Major predisposing factors are however, the work conditions as described. The actual precipitating factor to her present condition would appear to be a fall which she sustained as a result of a dizzy spell which was part of her stress reaction. The worker identified as contributing factors outside herself, a sense of persecution in the workplace and lack of support by management.
>
> Her account is highly consistent as she, like all her siblings, appears to have (*done)* quite well in life until quite recently. The only symptoms of mental disorder she describes are related to her present employment and therefore it would appear most unlikely that she has a predisposition to develop adult mental disorder. As a result, it would appear that work related factors are causally significant in the development of her present illness and no other factors can be implicated." (italics added)

41. Ms Dickin says that the problems at work persisted throughout the period from shortly prior to 1991 through to the date of her departure from the TAB on 28 November 1995. It seems however that despite consulting her personal doctor (Dr Meadows) in this period she has (contrary to what she apparently told Dr McLaren) complained about her employment on only two occasions that are relevant to this stage of the history. The first of these was in 1991 when the doctor recorded "domestic and work hassles". The second time such a complaint was made was not on the day of the fall when she consulted Dr Meadows but approximately one week after the fall when she was already off work and making or about to make a claim for compensation.

42. To further complicate the issue there are other matters which pose some doubt on the workers history and on the accuracy of Dr Mclaren's diagnosis. When confronted in cross examination with the fact that she had not complained to the family doctor for almost five years about the ongoing

harassment and stress from the work environment the workers response appeared to me, as I watched her, to be hastily constructed. She stated that she did not mention these problems to her doctor because she believed the doctor to know one of the staff members involved. The staff member concerned was not identified and the reason given appeared to me to be an unlikely one. On the evidence it seems that the worker did not seek any alternative medical assistance during those intervening years.

43. The worker's evidence is that she has suffered from ongoing harassment and she made harassment claims through the anti discrimination commission. It seems that these claims for harassment were not substantiated. I was given little evidence of a psychiatric condition, illness, absence from employment or things likely to lead to a conclusion that she was in fact suffering from a psychiatric disorder, other than anxiety and an obsessional personality prior to the 28 November 1995. If the claim is to rest on the exacerbation of a pre existing anxiety state there seems to me that there must be some evidence of the existence of that state.

44. Apart from allegations of heavy work loads, harassment and the lack of response to her complaints it seems that Ms Dickin was under a lot of external pressure in the period leading up to the cessation of her employment. It seems also that none of these matters were described to Mr Maclaren who in cross examination accepted that the accuracy of the given history is critical to the diagnosis. Matters which were affecting her life at the time outside of the work environment and which would have been a strain on many people include:

44.1 the fact that she was bringing up two difficult teenage daughters as a single woman;

44.2 one of her daughters, with two young children, was living in a violent relationship;

44.3 her 15 year old daughter was believed (as I find relevantly, on the evidence of Mr Boakes), on the Saturday prior to her departure from work to be suffering from drug abuse and to be pregnant;

44.4 a series of motor vehicle accidents resulting in claims for whiplash;

44.5 possible two prior suicide attempts (referred to by the worker during her stay in a psychiatric hospital in NSW in 1997);

44.6 possible pre 1996 marijuana use;

44.7 long hours of employment in and outside her job with the TAB;

44.8 a marriage breakdown and the consequential arguments over property;

44.9 police enquires in 1995 into her own and her daughter's involvement regarding burglaries and stolen property; and

44.10 her older daughter Renee leaving her two children in the custody of her partner's parents and going to South Australia to live with her father.

45. It seems that none of these matters were told to Dr Mclaren when the full history was given to him in December 1995. On the doctor's evidence he didn't find it necessary to retake the history on subsequent occasions. On the evidence it seems to me that this circumstance is consistent with a tendency on the part of the worker to seek to blame her work environment for all the problems in her life. As will be seen from her history subsequent to November 1995 her problems did not cease after the cessation of employment but they have continued if not magnified.

46. It will be obvious from the above that I have concluded that I am unable to accept the workers' statements to this court and to the doctors regarding the reasons for her disability if any. Regrettably, I have concluded that I am unable to rely on the workers evidence at all where it is unsupported by

other reliable evidence. The reasons for this are manyfold and include the considerable discrepancies between what she told this court and what she told other courts while under oath in relation to proceedings concerning an assault by her daughters' partner (Mr Long) upon her then partner (Mr Allmich). I am satisfied that whatever is the truth about the assault itself she is likely to have then told the truth about the then irrelevant surrounding circumstances especially since they sit better with other evidence before this court. Her retelling of the events of 1995 and 1996 to this court so far as her employment, her relationship with Mr Allmich and problems with her family were all told it seems to me to highten the probability that her employment and specifically the fall was solely or mainly responsible for her alleged incapacity. A glaring example of the manipulation of medical witnesses seems to me to have occurred when she first spoke to Doctor Mclaren approximately three weeks after the fall and one week after she had lodged her claim for work health compensation. The doctor, a competent psychiatrist took a history from the patient and learnt nothing of the matters listed above which are as the doctor conceded, and I find, relevant to her mental wellbeing. In particular I find, on the evidence of Mr Boakes whom I accept as a witness of truth, that on 18 November 1995, the very Saturday before the fall, the worker came to her place of employment when she was not rostered on for duty; she had her 15 year old daughter Kelly with her. She was distressed, red eyed and puffy and told Mr Boakes that her daughter was pregnant and involved with drugs. She wanted to take her daughter for rehabilitation and so asked for Monday off work. This was approved and then after a further phone request she was given Tuesday off as well. She returned to work on Wednesday two days before the fall. Notwithstanding this traumatic situation she caused Dr Mclaren to conclude that she was doing "quite well in life" and that her symptoms of mental disorder were related to her present employment and further that the actual precipitating factor to her condition was the work environment.

47. She also apparently told the Doctor Mclaren that she saw her GP a number of times over the last year or so and was given hypnotics. Dr Meadows makes no mention of this and his treatment of her during that period seems to be for issues unrelated to work. Dr Meadows certainly confirmed that there were no work related complaints between 1991 and the week after her fall in 1995.

48. The worker also told Dr Mclaren that she suffered a similar bout to this (difficult times at work), in 1991, but got over that without any loss of work and without specific treatment. All the evidence including that of Ms Dickin is that in 1991 she took six months off work without pay and took on alternative employment as a camp cook. It seems on the evidence also, that in 1991 Ms Dickin told different things to her doctor and to her employer.

49. In addition to those matters affecting her mental well being prior to the fall in 1995 it seems that Ms Dickin's life subsequently has continued to be both physically and emotionally difficult. She:

    49.1 has remained unemployed and in receipt of compensation with the attendant supervision and the attempts at rehabilitation about which she has complained;

    49.2 shortly after the fall it seems that she entered into a relationship with a man who on her own evidence lead her into a highly indulgent cannabis habit, was a violent personality and was physically and sexually violent to her so that at the end of the relationship she tried or, (depending on which version is accepted) wanted to stab him;

    49.3 felt the necessity to visit her elder daughter's residence regularly during 1996 to ensure the safety of that daughter and her grandchildren who apparently still suffered at the hands of a violent partner (Mr David Long). In her sworn evidence in committal proceedings against Mr Long she said

"….. just as I walked in the door, Daniel slammed her (the daughter) in the face and hit her – smashed her head up against the wall in the kitchen and I said to him what did you do that for?"….and he said "…….mind your own fucking business, it has got nothing to do with you…..". (parenthesis added)

Later in evidence in the Supreme Court she said of that incident

"….it was not a mild concern. I am a mother. I was fearful for my daughter, after seeing her bashed half to bloody death, and my grandchildren"

Before me Ms Dickin said she cold not recall the event or giving the evidence. I am unable to believe this.

49.4 she was present, on 7 March 1996, and witnessed her partner, Mr Allmich being very seriously beaten by Mr Long with a baseball bat resulting in a considerable period of hospitalisation;

49.5 in 1996 and again in 1997 Ms Dickin was required to give evidence in criminal proceedings against Mr Long. She later, in subsequent civil proceedings told Mr Hutton, who I accept, that she had lied in giving evidence as to who had produced the weapon which was used in the fight between the two men;

49.7 was so concerned generally regarding the welfare of the daughter and grandchildren that she had reported the violence to police and to child welfare authorities;

49.8 sustained injuries in a major motor vehicle accident in May 1997;

49.9 suffered a major emotional disturbance brought on, by her account, as a result of cannabis abuse, addiction to a prescribed drug and the prospective separation from her partner whist travelling in NSW. This episode resulted in her admission first to hospital in Wollongong and

then to Kenmore Psychiatric Hospital under a section of the NSW mental health legislation;

49.10 generally suffered ongoing health issues throughout the period 1995 to 2001; and

49.11 was in 2001 diagnosed and operated on for the removal of a benign brain tumour.

50. In her subsequent visits to Dr Maclaren in December 1996 and the 1 February 2002 (shortly after the Form 5 was served upon her) it seemed that she did not mention most of these matters either and those that were mentioned in the doctor's report seem to be down played. In light of the limited and distorted history given to Mr Maclaren, it seems that much of his opinion, as he himself has acknowledged would have to be re-evaluated including his view that her ongoing symptoms are "a direct continuation of the original injury which to my understanding was December 1995" – see exhibit W12.

51. Dr Maclaren's evidence at the hearing was to the effect that even if you accept all of the other stressors in Ms Dickin's life you still can't exclude the fall and the work environment in 1995 because all relevant matters continue to have some effect upon the patient. Elsewhere in his evidence the doctor has agreed that any or all events could be argued to fall into insignificance. Dr Maclaren indicated that he accepted what he was told by the worker and it seems that he may thereby have fallen into error.

52. Dr Meadows the worker's GP gave evidence. He has treated her since her arrival in Darwin about 20 years ago. He also accepted the patients' word and assigned her mental state to the workplace stressors of which she complained. This was even though he knew some more about her family and personal problems. It seems that he too has focused on the compensation claim because in 1997 when told of her distress in having to go back to court

he presumed this to mean her work health claim when in fact this occurred after her work health claim had (for the time being) resolved and the relevant court proceedings causing her distress were those relating to an assault on her ex partner and in which she later stated she had lied.

53. The doctor says his notes, of the 1991 stress related claim, say "domestic and work hassles – need time out". It can be seen here that the work problems were placed in second priority. Dr Meadows has and continues to accept his patient's word and has recently issued 12 month work health certificates for the years 2002 and 2003. In answer to a question from me the doctor gave the best description of the reasons why it is alleged that Ms Dickin is incapacitated for work. His answer indicated that she was constantly anxious, she was agoraphobic, always had pain in the head and neck, she was unable to take medication, prone to anger and frustration, had a fear of driving and angry about the lack of closure about the work health process. She had tried to work and do courses but has had to give it up and her mental state was such as that she was not able to hold down a job.

54. Dr Meadows in his report dated 8.1.1996 (W23) said

> "in the context of this claim there is extreme relevance to the work situation. **Her home life is the best it has been for sometime and therefore there appears to be no other current stressors** that would make her leave work and the sole source of income except for the harassment she has received at work." (emphasis added)

It seems that the doctor has overlooked or was not aware at the time of such matters as the 15 year old pregnant daughter seeking assistance for drug addiction or even the problem cited by the doctor in evidence with regard to allegations of illegal activity with regard to property and the problems with the older daughter Renee and the abuse that she was sustaining from her violent partner. To be fair, in cross examination, the doctor conceded that all the factors were relevant to her condition but he stuck to the view that it

was her work situation and the fall which were precipitants to her incapacity to earn an income.

55. The doctor also mentioned that a month before giving evidence the worker had advised him that she would be returning to Scuba Diving when the case comes to a close. Such a course seems to me to be unlikely if the defendant truly suffers in the way she described her mental and physical state.

56. Mr Allmich the boyfriend/partner of the worker during 1996 and 1997 gave evidence on behalf of the employer. I am cautious as to whether he was seeking to deliberately harm Ms Dickin's case but I am reasonably confident that he gave an honest account of his view the relationship between himself and Ms Dickin. When asked about this issue it seems that he was asked to give evidence by the employer only a week or so before hearing and I surmise he would not have known of the issues which have become important in this particular case. I accept therefore that, except as to some matters where I assessed him to be exaggerating, much of his evidence was the truth as he saw it.

57. I accept his evidence that the relationship between he and Ms Dickin commenced in or about the Christmas, New Year period of 1995 not withstanding Ms Dickin's strong assertions to the contrary. Her assertions before this court were contrary to the evidence given by her to the court of summary jurisdiction and the Supreme Court in relation to the trial mentioned above. It appears, on Mr Allmich's account that the relationship was an active sexual one from fairly early on and that they both heavily used cannabis during the bulk of their relationship. Although Mr Allmich has given evidence as to statements made by Ms Dickin as to her prior use of cannabis I am not prepared to make any specific finding with regard to that.

58. Mr Allmich indicated the relationship began as a result of an introduction agency. He confirmed also the details of the rather horrific assault which was inflicted on him by Mr Long on 7 March 1996 resulting in his

hospitalisation for several weeks. The event was clearly a violent and significant event in the life of anyone having to witness it as Ms Dickin did. Mr Allmich also spoke of the general concern which Ms Dickin had for the safety for her daughter and grandchildren in the company of Mr Long. He told the court that shortly after he came out of hospital he and Ms Dickin went to Queensland on a Motoguzzi motorcycle. Ms Dickin was a pillion passenger and they drove to Rockhampton taking approximately two weeks to make this journey. A short while later they returned to Darwin and reviewed their situation. It appears that they later made a decision to move; they decided to sell some property in Howard Springs and travel South. Their journey south was delayed by the motor vehicle accident which Ms Dickin had in May 1997. It seems that the insurers paid for the damage sustained to Mr Allmich's bus and Ms Dickin flew to Adelaide to purchase an alternate vehicle and they drove back together. Shortly after they went South again going down through the centre of Australia to Adelaide and then around to the southern NSW coast where they stayed at Moruria for a while. It was during this trip apparently that an argument developed resulting in Ms Dickin being sent to the mental institution in NSW in August 1997.

59. An issue which achieved some prominence in Mr Allmich's examination and cross-examination related to his telling of the story of financing their trip south. It seems that it was understood that if Mr Allmich left work he would have no income and Ms Dickin was not prepared to support him. He said that although he had returned to work after the assault Ms Dickin had suggested that he should get on sickness benefits making a claim for stress arising from the effects of the assault. He alleged that Ms Dickin told him that it was easy to see to see a psychiatrist to exaggerate his existing symptoms and to get a certificate sufficient to enable him to get a certificate. He said that he was told to tell the psychiatrist that he did not like going out and he suffered from anxiety, sleeping problems and nightmares. He said that she "coached me on what to say and how to say

it". Ms Dickin in her evidence denied these allegations saying that all she did was to tell him to speak the truth about these conditions to see whether he was entitled to benefits. On matters relevant to the mental health of the applicant Mr Allmich stated that during their time together they smoked a lot of marijuana, that the only problem Ms Dickin expressed about her employment was that she did not like the boss, that David Long was alleged to have had sex with both of Ms Dickins' daughters and bragged about it to Ms Dickin and made other crude remarks to her. He believed that she had more problems with her children than she did with her work environment. Mr Allmich said that although their relationship split up he had nothing but the highest regard for Ms Dickin even though they had only met on one occasion since their separation. During cross examination Mr Allmich asserted that he had been told by Ms Dickin that David Long had assaulted her daughter Renee in front of her. That was contrary to the evidence given by Ms Dickin to this court but consistent with the evidence given Ms Dickin in the proceedings in the court of summary jurisdiction and the Supreme Court in relation to Mr Long's assault upon Mr Allmich (refer paragraph [49.4]).

60. Mr Keith Boakes gave evidence on behalf of the employer he is a commercial accountant and qualified lawyer. He worked for the TAB between 1990 and 1995. He knew Ms Dickin under a different name at the time. He said he saw her numerous times each day when at work. They spoke about personal matters and Ms Dickin apparently spoke to him of her initial problems with the marriage and that she and her husband had separated. Her husband was in the RAAF and had moved to Adelaide and there were difficulties over the property settlement. Mr Boakes said that in 1991 there was the issue of 6 months leave of absence, which he granted and he understood that she had undertaken work as camp cook for Ostojic Transport and then returned to work. This was confirmed by Ms Dickin. He was told by her that her children were a problem and that they were involved

in drugs and missing school. He spoke of the event on Saturday 18 November 1995 when Ms Dickin came to work with a child, stressed and saying that the younger daughter Kelly who was with her was involved in drugs and pregnant. She was given time off work. Mr Boakes also knew that her older daughter has two children and had told her mother that she intended to go to Adelaide without the children. Mr Boakes was unable to say if that happened but that Ms Dickin was agitated and concerned about the prospect. Ms Boakes also spoke of the practice of Ms Dickin to take home pens to drill holes in the top and attach a string. He said that it was usual for Ms Dickin to carry a bundle of such pens around in a box something similar to a photocopy paper box which could way up to 5-10 kilos.

61. Mr Boakes was accused of harassment by Ms Dickin, although the allegation was never made to him but direct to the complaints authority. He indicated that during his time at work he did not harass her nor did he see anyone else harass her although he properly conceded in cross examination that he was not beside her at all possible times.

62. In answer to questions about whether Ms Dickin was under pressure with long hours of work, he indicated that he could not recall long hours of work. Although he did remember that there were some changes put in place during 1995 where there was some additional work required but he did not recall that it was a significant amount of overtime.

63. I accept Mr Boakes as a witness of truth and it is obvious from the evidence given by these people and the reasons expressed above that I have difficulty in believing the worker and in relying on the views expressed by her medical witnesses whom I believe were kept in the dark about much of what was going on in her life. It appeared to me also that Dr Maclaren and Dr Meadows were in the role of treating doctors who accepted at face value

what their patient told them. It seems to me their views were not ones reached after an objective and forensic enquiry.

64. The evidence of the employer as to whether the worker was incapacitated by virtue of employment with the TAB was given by psychiatrists Dr Kutlaca and Dr Timney and by a neurologist Mr Cameron. Drs Kutlaca and Timney used the material in the exhibits 32 & 33 respectively as background material for the purposes of forming their views. These exhibits, comprised of a number of medical and miscellaneous reports, were tendered ultimately by consent of the both parties and without restriction as to the use the court could make of the material. I have perused the material and used it in a limited way accepting the fact that some the makers of the reports have not been called to give evidence and be cross examined. Also a number of the opinions appear to have been formed without full knowledge of the background and details of Ms Dickins personal life. The material assists in understanding the workers history subsequent to her cessation of work in November 1995.

65. A number of features are apparent:

65.1 There is little mention by Ms Dickin of the fall at work and it is not regarded as a serious issue in any of the reports of the principal psychiatric witnesses including her own Dr Maclaren.

65.2 There are inconsistent histories and complaints even on such basic things as to the amount of elbow pain, from which elbow and whether she liked school.

65.3 None of the medical reports reveal many of the significant personal pressures on Ms Dickin either before or after November 1995.

65.4 There was a significant increase in the nature of complaints between seeing Doctors Timney and Kutlaca in November and December 2001 and when she saw Dr Maclaren after receipt of Form 5 in January 2002.

65.5 It became apparent to me that there was a degree of manipulation by Ms Dickin which is acknowledged by some of the commentators. For example she told Dr Kenny, in June 1996, that her problems related to the work environment; that in 1991 she was provided with a stress certificate and took off six months without pay and has since been consulting with her doctor. Contrary to this, the state of the evidence overall is that there is a mixed story about the "stress certificate" and Dr Meadow's attendances upon her. In fact Dr Meadow's file reveals no attendances at all regarding the work environment between 1991 and after she left work in 1995;

65.6 A fairly consistent view is expressed that the main cause of Ms Dickins' incapacity is psychiatric.

65.7 That she has mentioned to a number of doctors that she has plans for a future – that seems to me to be inconsistent with her assertion that she is totally unfit for work.

65.8 That overall the rehabilitation attempts by TIO/MACA would appear to have been very badly managed.

65.9 That some reporters involved with her over time have adopted an advocacy role in relation to her recovery which is commendable in the face of the inadequate responses being made by the TIO but does not help the determination of the source of Ms Dickins problems.

66. Dr Cameron gave evidence as to her physical capacity and the gist of his evidence in examination and cross examination is that Ms Dickin has a long history of motor vehicle accidents; that she has complaints of pain " in her neck and back and, in fact all over her body, arms and legs and used superlatives to describe her agony and suffering." His examination on 2 March 1998 reveals no evidence of organic disturbance in her cervical spine. Neurologically she was normal.

67. He opines that the motor vehicle accidents are the most likely cause of any short term problems she had and that the fall at work "would have caused only local bruising. This should have resolved within a matter of days." He believes any problems she has are non organically based but could be emotional or due to stress. He had at the time of his giving evidence in court been given subsequent X-rays and an MRI taken in 2000 and held the view that the irregularities shown are no more than one would expect in a normal person of her age. He said the possibility of trauma related problems now (and I extrapolate to January 2002) are "very remote". When told of Ms Dickins long trip on the back of a motor cycle in 1996 and journey in the bus in 1997 he was of the view that she would have had to have had minimal incapacity to undertake these journeys.

68. I gather from his evidence also that the radiographic changes shown in the year 2000 were not present in the early xrays taken before or even after she finished work but before the serious motor vehicle accident in 1997. I therefore conclude that any radiological changes must be natural or due to some event after the fall in 1995.

69. On the psychiatric side all of the psychiatrists who gave evidence before the court agreed that the patients history is critical to an accurate diagnosis. Much of the trauma in Ms Dickins life appears to have been made known to them only as a result of this matter proceeding to hearing. I have already commented on the very incomplete history given to Dr Maclaren and the absence of references to her problems outside of employment. In cross examination Dr Maclaren agreed that the other relevant matters raised with him would justify a review of his opinion and that if she embarked on sexual activity about or shortly after Christmas 1995 that such a relationship was a contra indicator to the condition which he had diagnosed. I have accepted Mr Allmich's evidence that their relationship commenced at about Christmas, New Year 1995 and that sexual relations soon followed.

70. Drs Kutlaca and Timney were asked about the matters referred to above in paragraphs 43 and 48 and agreed they were relevant matters many of which they were not told about despite appropriate general enquiry. Dr Kutlaca said that the problems Ms Dickin experienced with her daughters and the beating suffered by her partner were enough alone to be capable of causing post traumatic stress disorder (PTSD). He found there was a miss match of complaints with findings on examination. He expressed the view that the other matters concerning Ms Dickin's private life were supportive of his views as expressed in his report Exhibit E1. In this report which he confirmed in evidence he says that Ms Dickin told him of the series of motor vehicle accidents had first caused the whiplash and then aggravated it. He expressed the view that to put it another way "her neck never recovered from the first accident and was aggravated by each of the others. She was unable to indicate which might have been the worst: "they were all pretty major to me". I asked her if she was still suffering from neck pain which illicited the following: "I suffer with neck pain every day – the chronic headaches. I am trying to make someone understand that the focus should not be on my head anymore".

71. I am not sure but there seems to be an assertion there by the applicant that her problems are no longer psychiatric but physical as a result of the pain and discomfit suffered by her as a result of her motor vehicle accidents. This would not appear to advance her case in these proceedings.

72. The applicant told Dr Kutlaca that the two people that had harassed her were sacked for unsavoury reasons shortly after the claim for discrimination was rejected. When questioned further she told Dr Kutlaca that her current claim (this Work Health Claim) was for "the stress of what happened at work in 1991" with a recurrence in 1995. On this basis Dr Kutlaca surmised that her claim is a work related gender-based discrimination and harassment matter as a result of which she ceased working in 1995. Curiously there is no mention in the report of any history of a fall in 1995. In concluding his

view the doctor doubted whether Ms Dickin's ongoing complaints were underpinned by any diagnosable organic or psychiatric disorder, she was diagnostically depressed and the major presentation was one of anger and depression and he concluded

> "put another way, I was unable to support her work related complaints on the basis of a relevant psychiatric disorder and strongly suspect conscious exaggeration. I consider that any emotional sequelae of the events of 1991/95 have been worked through long ago such that her presentation at this evaluation was essentially that of her premorbid personality and involvement in compensation claim……. I am unable to support her stated inability to work from 1995….. in conclusion it should be abundantly obvious especially given the long time frame that the present "treatment" of choice is the finalisation of all outstanding compensation matters and the same unreservedly. Ms Dickin's ability to study and the use of no relevant prescribed medication tend to suggest little or no psychiatric morbidity in terms of the subject issues. Her desire to work strongly suggests positive future orientation, an excellent prognostic sign and inimical to a significantly disabling depressive disorder also a healthy desire to put the subject matter behind her and get on with life. Ms Dickin is clearly ready to return to the work force, ideally in self employment."

73. Dr Timney also gave evidence for the employer and confirmed that the patient's history is essential to diagnosis. Without it the wrong diagnosis could be made or a wrong causation attributed. In evidence Dr Timney indicated that he was not previously aware of the matters referred to in paragraphs [44] and [49]. He said the various incidents in her personal life both before and after November 1995 were significant and relevant; there were he said, a number of life events there which were singly capable of affecting her. The accumulation of these factors explains her condition. He said it was important to establish a hierarchy of importance of events. He pointed out that the ongoing family violence is much more likely to be of importance than a past employment experience. The doctor queried the integrity of the history given by Ms Dickin and found that the worker tended to minimise external events and maximise old employment events. Looking

at the whole of the evidence and watching the worker in the witness box I must say that I reached this conclusion independently.

74. The doctor acknowledged that the employment situation between 1991 and 1995 is significant because she relied on the income and a male dominated environment would not have suited her but he found it surprising given the number and severity of other life events that she still claimed that the employment was the major factor in relation to her condition. He concurred with Dr Katlaca about abnormal illness behaviour and if she had exaggerated the symptoms then, he said, that may effect the level of incapacity which he had found existed at the time that he examined her. He remained of the view that the work place events were significant at the time but the effect is reduced when removed from the environment and would play no further part after two years at the most. Like Dr Kutlaca there is no mention in his report of a fall at work in 1995. The complaints to him related to the work environment since 1991 and motor vehicle accidents. The report seems to say she attributed psychiatric problems to the work environment and neck pain to the motor vehicle accident. Other major life events were in his opinion the more likely cause of her ongoing disability. In answer to a question from me he indicated that he remained of the view that Ms Dickins still suffered from anxiety and complained of pain, lack of sleep, irritability, being moody and dizzy spells. If true he said these conditions could lead to a partial or total incapacity to work. He said that the fall at work was unlikely to effect her psychiatrically.

75. In cross examination, Dr Timney indicated that he did not think it was reasonable for Ms Dickins to suppose that the events described outside of employment were not important stressful events in her life. In his opinion Ms Dickin omitted this information from her history because she was focusing on the work related events. He said that although he asked her about family relationships she did not disclose any of this information to him.

76. Boiled down to a nut shell Dr Timney was of a view that Ms Dickin had unresolved issues but they were not work related nor were they related to work when he saw her in 2001. Whatever condition she did suffer from as a result of her work environment was time limited and long since ceased.

77. Dr Maclaren gave evidence for the Worker and accepted the importance of the accuracy of the history. He referred to and concurred in chief with the content of his reports dated 20 December 1995, 25 January 2002 and 25 September 2002 being exhibits W10, W11, W12 respectively.

78. In his report dated December 1995 the doctor described a chronic stress reaction with panic attacks and secondary depression. I have noted that when he saw her in January 2002 after the Form 5 was served there was a significant increase in the list of complaints. The doctor then described her as suffering a significant depressive state with quite disabling anxiety symptoms and moderately severe social phobia and paranoid symptoms that appear to me even on a descriptive basis to be an increase in the symptoms from that originally described shortly after her separation from employment.

79. The doctor opined in his reports and on the basis of original history taken in December 1995 that her condition arose from her employment with the TAB. In his reports too there is little mention of the fall until he gave evidence in chief before me when he said that the fall is a significant factor. The effect of his evidence is that the disorder which was set in motion by the TAB is still significant today.

80. During cross examination the doctor indicated that if Ms Dickin indicated that she had stayed home for two months after she left work then that is what he would have expected given his diagnosis of her condition at the time. He said that he would not expect her to do very much at all and would not expect her to have undertaken an active sex life. On the question of history the doctor indicated that if it were proved that the patient had told lies then one would have to be very careful as to what they say. He said that

he tends to accept what he is told by patients and is heavily dependent on what that is. Nevertheless he said that he was always on the look out for inconsistencies. The doctor indicated that he relied on Ms Dickin's description of the harassment at work and although this court never found out precisely the nature and extend of such harassment the doctor was of the view that if the harassment was minimal then he may have to review his opinion on causation. If there was no harassment then the connection between her employment and her condition is not sustainable. I interpose to say that on the evidence before me the harassment does not appear to be very serious and much of what Ms Dickin really complained about was animosity between staff and the downgrading of a position which she applied for and succeeded in obtaining. I accept, as the doctor correctly stated, that discrimination is not necessarily a matter of what happened in fact but rather, a matter of perception. The doctor persisted in affirming that Ms Dickin displayed anxiety symptoms during her time with him and that such symptoms are difficult to mimic unless someone has taken an overdose of amphetamines. He said that most people would not know the symptoms and therefore not be able to mimic them. He confirmed also however that if Ms Dickin had coached Mr Allmich as to what he should say to him to obtain a sickness certificate then that would call into question all of the information that she had given to him. After matters relevant to the personal life of Ms Dickin were brought to his attention the doctor conceded that the etiology of her condition would appear to be multi-factorial. He agreed that he would need to shrink the work factors and just say that that was only one of a number of factors causing her condition. He was still not prepared to dismiss work factors as affecting her in 2002 or at the time he was giving evidence. He told the court that there were some consistencies in her symptoms and that they were a continuation of what occurred to end her period of employment with the TAB.

81. Given all of the evidence and my assessment of it I am satisfied that the employer has established on the balance of probabilities that the worker as at 6 January 2002:-

81.1 Suffered from no physical injury or incapacity which related to her fall at work in November of 1995.

81.2 Did not suffer from any incapacitating psychiatric illness as a result of her fall of itself or by the fall aggravating a pre existing condition.

81.3 That (although it is not specifically pleaded by the worker) she suffered no disabling psychiatric condition as a result of the period of employment.

82. Overall the case under the Form 5 has been made out and the workers appeal against the decision to cease payments must fail. Should I be wrong as to the validity of the Form 5 notice then the employer has successfully made out the case in the counter claim.

83. I invite the parties to address me as to the form of orders that should follow.

Dated this 12th day of June 2003.

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Mr Hugh Bradley
CHIEF MAGISTRATE