CITATION: *Karen Alison Power v HSE Mining Pty Ltd* [2004] NTMC 5

PARTIES:	KAREN ALISON POWER
	v
	HSE MINING PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20205642
DELIVERED ON:	30 January 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	9 – 12 September 2003
JUDGMENT OF:	Mr J Lowndes

CATCHWORDS:

FAILURE TO GIVE NOTICE -- WHETHER WORKER'S CLAIM BARRED BY TIME -- NOTION OF MUTUALITY -- FAILURE TO MITIGATE -- WHETHER SUPERANNUATION PART OF NORMAL WEEKLY EARNINGS

Work Health Act, 55, 80, 104, 182

Tracey Village Sports and Social Club v Walker (1992) 111 FLR 32, applied;
Foresight v Maddich (1991) 79 NTR 17, applied;
Roh Industries v Trepic (1989) 52 SASR 158, considered;
Cleveland v Paspaley Pearling Pty Ltd [1999] NTSC 65, considered;
Lindner v Normandy Gold Pty Ltd (2000) NTMC 028, considered;
Tanner v Anthappi Pty Ltd (2000) NTMC 004, considered;
Ansett Australian v Van Nieuwmans (1999) 9 NTLR 125, considered
Smith v Hastings Deering (Australia) Ltd [2003] NTMC 029, followed.

REPRESENTATION:

Counsel:

Worker:	Mr Grant
Employer:	Mr Bryant

Solicitors:

Worker:	Ward Keller
Employer:	Cridlands

Judgment category classification:	A
Judgment ID number:	[2004] NTMC 5
Number of paragraphs:	234

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

No. 20205642

BETWEEN:

KAREN ALISON POWER
Worker

AND:

HSE MINING PTY LTD
Employer

REASONS FOR DECISION

(Delivered 30 January 2004)

Mr J Lowndes SM:

The nature of the proceedings

1. This is an application made by the worker pursuant to the provisions of the *Work Health Act* (NT) whereby the worker seeks the following orders:

1.1 That the employer pay weekly benefits to the worker in accordance with the Act over the period from the date of termination of the worker's employment to date of order.

1.2 That the employer pay to the worker interest pursuant to s 189 and/or 109 of the Act in respect of arrears over the period from and including 14 February 1998 to and including 24 March 1998.

1.3 That the employer pay the worker weekly benefits pursuant to the Act from the date of order and continuing in accordance with the Act.

1.4 That the employer pay the worker's entitlement to medical, surgical and like expenses pursuant to s 73 of the Act, and travel expenses relevant to such medical expenses, at all times from 9 October 1996 to date of order.

1.5 That the employer pay the worker's medical and like expenses, including relevant travel expenses, from the date of order in accordance with the Act.

1.6 That the employer pay the worker's costs of and incidental to the proceedings at 100% of the Supreme Court Scale, to be taxed in default of agreement.

The issues

2. The following matters are admitted:

2.1 The worker was a "worker" within the meaning of the *Work Health Act*, that the worker's normal weekly earnings in terms of wages were $1,122.00, that the worker was involved in an accident on 9 October 1996[1], that the worker sustained an injury as a result of that accident and that injury arose out of or in the course of the worker's employment.

2.2 The worker suffered post traumatic stress disorder as a result of the accident.

2.3 The accident was reported to the employer.

2.4 The worker served a claim form on 2 February 1998, that liability was initially deferred and subsequently disputed, and that no payments were made as required by s 85(4) (b) of the Act

2.5 The matter proceeded to mediation on 12 March 2002.

[1] The circumstances of the accident are dealt with more comprehensively below at pp 2-3.

3. In addition, the employer admits a failure to institute benefits following notification of the deferral. Accordingly, the employer admits liability to pay such benefits which are in the amount of $4,480.

4. The employer denies a number of matters, which therefore remain the subject of dispute:

    4.1 Although the employer admits that it paid superannuation to the worker at the rate of 6%, it denies that such payments formed part of the worker's normal weekly earnings.

    4.2 The employer asserts that the worker abandoned her employment.

    4.3 The employer denies that the worker suffered from major depression, but says that if she did it was sustained due to other causes including, but not limited to, the circumstances of the cessation of employment, and reasonable administrative or disciplinary action taken by the employer.

    4.4 The employer denies that the worker suffered any incapacity as a result of the accident and subsequent injury.

5. In addition, the employer asserts that the worker's claim is barred by the operation of ss 182 and 104 of the *Work Health Act.*

6. The employer's counterclaim also gives rise to further areas of contention:

    6.1 The employer claims that the worker failed to bring the claim within six months.

    6.2 In the alternative to its denial that the worker suffered any incapacity as a result of the accident and subsequent injury, the employer says that any incapacity from which the worker suffered was partial only, and the worker was able to earn equal to or in excess of her normal weekly earnings and

6.3 The employer alleges that the worker has failed to mitigate her loss.

The facts

7. The circumstances surrounding the accident were undisputed.

8. The worker commenced employment with the employer in or about September 1996 as a "haulpac" driver. The job involved collecting the raw product of excavation works at the Ranger uranium mine at Jabiru and driving it to unload at a processing point.

9. On 9 October 1996 the worker was performing these duties when she was involved in a motor vehicle accident involving another haulpac.

10. The worker subsequently completed an incident/hazard report describing the circumstances of the accident, namely, that the driver of the other vehicle lost control on a wet road on his way back from the unloading dump, whereupon he collided with vehicle being driven by the worker. During this incident the worker was confronted with the terrifying image of the tray of the other vehicle colliding out of control with the cabin of the vehicle she was driving.

11. As a consequence of the collision, the worker struck her head on the roof of the cabin and her leg was crushed against the underside of the steering wheel. Following the accident, the worker received medical treatment at the mine's medical centre.

12. There were, however, some variances in the evidence as to the precise time that the worker returned to work after the accident. The worker testified that on the day following the accident she was suffering significant pain and was unable to perform work duties. The worker stated that she then attended on a general practitioner in Jabiru, and x-rays were taken. Mr Akers, former managing director of Howard Springs Earthmoving Pty Ltd (the worker's

direct employer) suggested that the x -rays were taken on the day of the accident.

13. On the state of the evidence, I am satisfied on the balance of probabilities that the worker returned to work either on the day following the accident or the day thereafter.

14. The next contentious matter related to the worker obtaining leave to be absent from work to attend a social function in Darwin. [2]

15. In that regard, the worker gave evidence that approximately nine days after the accident she received approval to travel to Darwin for the purpose of attending a friend's birthday celebration on the Saturday. The arrangement was that she was to travel back to the mine, the following day, namely, on the Sunday. The worker testified that on the Sunday morning, the person with whom she was intended to travel back to the mine, Jason Carter, presented in an intoxicated state. She stated that was unwilling to travel back with him. The worker said that she was too late to catch the bus back to the mine. She advised the mine, by telephone, that she would back the following day.

16. The worker went on to testify that she returned to mine by bus the following day, that is, Monday 21 October, 1996. She said that following her return to the mine and while sitting at the front of her accommodation, putting on her boots, she was advised by the cleaner that she had been sacked, and was required to vacate the premises and mine site. The worker said that she then caught the bus back to Darwin.

17. Mr Akers gave evidence to the effect that at all times he had dealt with Jason Carter in relation to the proposed absence from work, it being the case that both the worker and Carter were seeking leave of absence. Mr Akers testified that Mr Carter had told him that the leave was required to attend a

[2] This matter relates to the pleading of abandonment of employment in the employer's Defence.

wedding. Mr Akers told the court that at no time did he hear from the worker regarding her inability to return to the mine on the due date. Mr Akers stated that he became aware of difficulties at the worker's accommodation on Wednesday, 23 October 1996, at which time it was apparent that the worker had vacated those premises.

18. In addition to the discrepancies between the accounts given by the worker and Mr Akers, Exhibit 1, the radiology report dated 21 October, 1996, indicated that the worker was in Darwin on Monday 21 October 1996, the day she said that she returned to the mine site.

19. Although there are these variances in the evidence relating to the manner and circumstances surrounding the cessation of the worker's employment, I agree with the submission made by Mr Grant, counsel for the worker, that the disputed matter is not relevant to these proceedings, as defined by the pleadings:

> "First, whilst the pleading of abandonment is made in the employer's Defence in response to an allegation by the worker of termination of employment, it is not otherwise pleaded that the circumstances of the worker's termination has any consequence in terms of her entitlement under the *Work Health Act* ("the Act"). Secondly, it is quite apparent from the medical evidence that upon full development of her psychiatric condition, the worker would have been unable to continue in her employment." [3]

20. However, as submitted by Mr Grant, the divergence between the account given by the worker and that given by Mr Akers does not weaken or undermine the version given by the worker to the extent that it should not be accepted in preference to the account given by Mr Akers.

21. In all the circumstances, it would be wrong to treat the possibility – even probability - that Mr Carter had told Mr Akers that leave was required to attend a wedding, rather than a birthday party, as a matter tending to

[3] See pp 5-6 of Counsel's written submissions.

undermine the worker's credibility in relation to her testimony as to the reason for absence of leave or to her version of subsequent events.

22. Little can be made of the fact that Mr Akers did not hear from the worker, explaining her failure to return to the mine site on the due date. At no time did the worker say or suggest that she had spoken to Mr Akers. The worker simply said that she had telephoned the mine. She may have spoke to any one of a variety of personnel, including a receptionist. The worker was not cross-examined as to the identity of the person to whom she reported her difficulties. Nor did the employer seek to adduce evidence tending to contradict the relevant part of the worker's testimony.

23. The fact that Mr Akers became aware of difficulties at the worker's flat on Wednesday 23 October 1996 is not inconsistent with the worker having vacated the premises on 21 October, and returned to Darwin the same day, after having been informed by the cleaner that her services were no longer required.

24. One might think it peculiar that the worker would accept the word of a cleaner, a person with no apparent authority to communicate the fact that one's employment had been terminated. Equally, it might be thought strange that the worker did not take issue with the propriety of her sacking, and personally confront Mr Akers, at least with a view to obtaining an explanation for the termination of her employment.

25. However, despite this aura of strangeness, the worker has at all times been consistent in her account that she was advised of the cessation of her employment by the cleaner: see the histories contained in the medical reports.[4]

26. In all the circumstances, it would be wrong to treat Exhibit 1 as in any way weakening or undermining the credibility of the account given by the

[4] See p 4 of Mr Grant's written submissions.

worker. Again, the submissions made by Mr Grant are helpful in alerting the tribunal of fact to the dangers of misusing an equivocal piece of evidence:

> "That the radiologist's report is dated 21 October 1996 provides no evidence that the film was taken on that day. It is quite conceivable that the film was taken at an earlier time and the report generated on 21 October 1996. In this respect, it is noted that the worker had x-rays taken at Jabiru on the day of the injury or the day after. One possible scenario is that the x-ray film was sent to the Radiology Department of the Royal Darwin Hospital for interpretation, there being no resident radiologist in Jabiru. One would expect in the course of that process that there would be some delay between the taking of the film and the subsequent interpretation. This scenario would also explain why the report carries the typed notation "JABIRU" at its heading. The x-rays at Jabiru were taken by the mine's doctor. The employer has not discovered or produced any other report in relation to those x-rays. This scenario is consistent with the worker's obviously genuine evidence to the effect that she had not had x-rays taken at the Royal Darwin Hospital."[5]

27. For the foregoing reasons, I prefer and accept the worker's evidence as to the circumstances surrounding the cessation of her employment.

28. The next part of the chronology is undisputed, and can be found to have occurred as a matter of fact. After leaving the mine site the worker remained in Darwin for approximately one and a half weeks whilst she was making arrangements to collect her son, who was staying with his grandparents in Derby, and to relocate to Perth. The worker travelled to Derby where she made arrangements for her son to be sent to Perth once she had arranged permanent accommodation there. After relocating to Perth, the worker was joined by her son.

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[5] See p 5 of counsel's written submissions. See also the following alternative submissions made by counsel (at p 5) which are not quite as compelling, bearing in mind the worker's denial that she had x-rays taken in Darwin:
" …. the taking of x-rays in Darwin on 21 October 1996 is not inconsistent with the worker's evidence. That evidence is to the effect that the worker returned to the mine site on that day and forty-five minutes thereafter returned to Darwin on the bus. That would have given sufficient time to attend at the hospital in Darwin on the same day for the purpose of having the x-rays taken."

29. Once the worker arrived in Perth, she began employment as an escort. The worker undertook that employment as a matter of financial necessity, having no other means of supporting herself and her son. The worker maintained that employment intermittently throughout 1997, 1998 and possibly into early 1999.

30. However, the worker's evidence to the effect that her average earnings during that period were $300 per week was challenged during cross – examination. All things considered, including, in particular, the candour with which she gave her testimony, I accept the worker's evidence as to her earnings during the relevant period and her supporting testimony. She told the court that immediately upon her arrival in Perth, she went to Kalgoorlie to work as a prostitute. The worker gave evidence of the high earning rate of prostitutes in Kalgoorlie, and said that she had travelled to Kalgoorlie to make as much money as possible within a short period of time in order to establish herself in Perth. According to the worker, there was fierce competition within the industry in Perth and once operating expenses were paid and periods of inactivity were taken into account, her average weekly earnings in Perth were about $300. The worker conceded that she could have earned more had she been prepared to provide a wider range of services.

31. The final part of the chronology is uncontradicted and accepted by the court. The worker met her current partner in late 1998 or early 1999. On account of her own personal attitudes the worker felt she was unable to continue employment as an escort, once she became involved in the relationship with her new partner; and in any event the vocation was not one that would have been supported by her partner. The worker and her partner had a child in 2000. Since early 1999, the worker has not undertaken paid employment.

The worker's failure to give notice of the psychiatric injury: ss 80 and 82 Work Health Act

32. Although the employer did not press the allegation in paragraph 18 of the Counterclaim that the worker failed to give notice of the psychiatric injury, it is useful to deal with that aspect in order to contextualise the issues that remain in dispute, and to facilitate the determination of those issues.

33. Assisted by the detailed submissions made by Mr Grant,[6] I am of the view that notice of the accident and physical injury given by the worker to the employer on 9 October 1996 was sufficient to fulfil any notice requirement with respect to the subsequent psychiatric injury: see *Federal Broom Co v Semlitch* (1964) 110 CLR 626; *Anthony Edwards v Henry Walker Contracting Pty Ltd* [2000] NTMC 026; *Henry Walker Contracting Pty Ltd v Edwards* [2001] NTSC 16; *Shorey v PT Ltd* [2003] HCA 27. The psychiatric injury was consequential upon the physical injury, and formed part and parcel of the original physical injury, in respect of which proper notice was given.

Whether the worker's claim is barred by time: ss 104 and 182 Work Health Act

34. The worker's claim gives rise to the threshold issue of whether she is precluded from maintaining proceedings with respect to the injury, comprising a physical injury and a consequent psychiatric injury, by operation of ss 182 and 104 of the *Work Health Act.*

35. Despite initial reservations, the worker ultimately conceded that the present proceedings are governed by s 104(3) of the Act, as at 10 March 1998, which was to the following effect:

> "Proceedings in respect of a decision of an employer under section 69 to cancel or reduce an amount of compensation or under section 85 to dispute liability for compensation shall be commenced not later

[6] See pp 13-18 of counsel's written submissions.

than 28 days after notice under the section in respect of the decision is received by the claimant."

36. Section 104(4) provides as follows:

> "The failure to make a claim within the period specified in subsection (3) shall not be a bar to the commencement of the proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause."

37. Section 182(1) of the Act provides:

> "Subject to subsections (2) and (3), proceedings for the recovery under this Act of compensation shall not be maintainable unless notice of the injury has been given before the worker voluntarily left the employment in which he or she was injured and unless the claim for compensation has been made -
>
> (a) within 6 months after the occurrence of the injury or, in the case of a disease, the incapacity arising from the disease ;or
> (b) in the case of death, within 6 months after the advice of the death has been received by the claimant."

38. Section 182(3) reads:

> "The failure to make a claim within the period specified in subsection (1) shall not be a bar to the maintenance of the proceedings if it is found that the failure was occasioned by mistake, ignorance of disease, absence from the Territory or other reasonable cause."

39. It is clear that the worker failed to commence proceedings within the 28 day period specified to in s 104(3). It is also clear that the worker failed to make a claim for compensation within the 6 month period specified in s 182(1). The worker seeks to explain both failures and to obtain appropriate relief by relying on the excuse provisions of ss 104(4) and s 182(3), which are in identical terms. In both cases, the worker relies upon the excuses of ignorance of disease, absence from the Territory and other reasonable cause. On the formulation in *Tracey Village Sports and Social Club v Walker*

(1992) 111 FLR 32, the excuse of mistake is not open to the worker, as conceded by the worker's counsel.[7]

40. I propose to deal first with the employer's assertion that the proceedings are not maintainable as the worker failed to make a claim for compensation within the prescribed 6 month period.

41. As Mr Grant submitted, the relevant time frame for the inquiry in relation to the matters set out in s 182(3) is that period of time commencing on the date of the injury and expiring 6 months after the date of the injury.[8] This proposition is consistent with the approach taken in relation to s 104(4) of the Act. It is well established that the only period in respect of which an explanation in terms of s 104(4) of the Act is required is that period of 28 days immediately following the receipt of the notice of decision pursuant to s 104(3), and any delay after the expiration of that period and before the commencement of proceedings for compensation is not relevant for the purposes of s 104(3) of the Act: *Murray v Baxter* (1914) 18 CLR 622; *Tracey Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Quaylee v Grace Removals* (unreported, Work Health Court 10 May 1995)

42. In relation to the excuse of ignorance of disease, the worker's evidence is that although she appreciated that her mood and disposition was different following the accident, she was entirely unaware of the notion of "mental injury", and also unaware that the difference in her mood and disposition might be characterised as a "disease". That remained the position for the 6 month period following the injury. The true nature and effect of her mental condition only became apparent to her after she formed a relationship with her current partner, late 1998 or early 1999, and after she sought psychiatric help.

[7] See p 19 of counsel's written submissions.
[8] See again p 19 of counsel's written submissions.

43. The medical evidence adduced in these proceedings was to the effect that there can often be a delay between the precipitating event and the onset of full symptoms.

44. In light of the worker's evidence and the medical evidence, Mr Grant submitted that the worker did not realise until later (when the condition did not desist) that she would be required to make a claim for compensation.

45. As to whether the worker can avail herself of the excuse of ignorance of disease, the following passage taken from the judgment of Pollock MR in *Fenton v Owners of Ship Kelvin* (1925) 2 KB 473 at 483 provides some guidance, albeit referable to the excuse of "reasonable cause":

> "…there may be a number of graduations, questions of degree, as to whether or not the workman was apprised so clearly of his condition, its origin and its future, as to compel him or throw upon him the duty of giving notice. When, however, the true measure of the situation is only arrived at by lapse of time and by confidence in the diagnosis which arises from the progress of the disease, particularly where the injury is what may be called latent, then I think that the workman is more readily excused. But the measure of these degrees, the estimate of these graduations are questions of fact which are for the learned county court judge."

46. The exculpatory explanation sought to be relied upon involves ignorance of disease. "Disease" is defined in s 3 of the *Work Health Act* as including "a physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development and whether contracted before or after the commencement of part V". "Ignorance" is not defined, and presumably is to be accorded its ordinary meaning, namely, lack of knowledge or information referable to a particular subject matter.

47. The often fine line between ignorance and mistake was adverted to in *Garratt v Tooheys Ltd* [1949] WCR 80 (NSW Workers Compensation Commission):

> " Mistake means a fault in opinion or judgment, or an unintentional error of conduct; it could include a misconception on the requirement of notice or claim. Ignorance is not the same as mistake, the later conception connotes mental processes revolving around some facts or circumstances and an erroneous belief or act resulting therefrom. In short, there cannot be mistake without some knowledge. Not to know the law simpliciter, not to know the requirement of notice or claim, is insufficient excuse. The mistake contemplated by the statute may be one of law or fact or mixed law and fact. The line between not knowing and being mistaken is finer than the finest gossamer thread."

48. Similarly in *Dietrich v Dare* (1978) 21 ALR 210 at 221-222 Gallop J) made the following observations:

> " When a worker knows the law to the degree that it provides that in the case of injury in his employment he is entitled in some circumstances to compensation and bona fide applies his mind with the information in his possession and knowledge to the question of the application of the law, as he knows it, to the facts of his own particular case, and misconceives his true position in law or fact, or in both combined, he is not ignorant, but mistaken, although his mental processes may not reach the standard which would be ascribed to a reasonable man."

49. The third and final element of the excuse under consideration is that the failure to make a claim was "*occasioned"* by ignorance of disease. The meaning of the word "occasion" in this context was considered by Mr Trigg SM in *Bonifazo v Jape Furniture Pty Ltd* (unreported, Work Health Court, 2 February 2001, p 18):

> " According to the Concise Oxford Dictionary of Current English (eighth edition) the word 'occasion' has as part of its meaning: an 'immediate but subordinate or incidental cause of; bring about esp. incidentally. Therefore the worker has the onus of satisfying me on the balance of probabilities that (during the relevant period) he thought certain things, that at least one of those thoughts was a mistake and that mistake was an 'immediate but subordinate or incidental cause' of him not commencing a claim within the required 28 days."

50. I consider that the diagnosed psychiatric injury, namely, post traumatic disorder satisfies the definition of disease in s 3 of the Act. In my opinion, it

is proper to take into account the worker's educational background and apparent intellectual capacity in determining whether, in fact, she was ignorant of her disease. The more educated or intelligent a person is, the more likely it is that they will be aware of the nature of a condition from which they are suffering. Conversely, a person with limited education or intelligence may have a diminished understanding – indeed be ignorant – of any disease from which they are suffering. Of course, the personal attributes of the worker must be considered in the context of all the evidence relating to the postulated explanation for the delay. In the present case, the worker's evidence as to her state of mind relative to her medical condition must be considered as well as the nature of the diagnosed psychiatric condition and the onset of its symptoms.

51. I have considered the oral submissions made by Mr Bryant (counsel for the employer) to the effect that the worker was following the cessation of her employment afflicted by and presumably aware of such debilitating symptoms that she found it necessary to self medicate in order to cope with the every day activity of driving a motor vehicle; and the presence of such symptoms indicated the existence of a psychiatric condition, and by reason thereof the worker is precluded from relying upon ignorance of disease as an excusing condition.[9] This submission fails to recognise the subtle distinction between awareness of symptoms and awareness of a disease manifested by those symptoms. One may be aware of certain symptomatology, and yet lack knowledge that they are suffering from a disease. One may fail to appreciate that those symptoms indicate – indeed constitute – a disease.

52. In my opinion, after having regard to the worker's own evidence, the medical evidence and the personal attributes of the worker I am satisfied on the balance of probabilities that the worker did not become cognisant that she had suffered psychiatric injury – a disease - until late 1998 or early

[9] These submissions can be found at page 232 of the transcript.

1999, considerably more than 6 months after the occurrence of the injury. Accordingly, I am satisfied on the balance of probabilities that the worker's failure to comply with the time requirements of s 182(1) was occasioned by ignorance of disease.

53. The worker also sought to rely upon absence from the Territory as an excuse for failing to make a claim for compensation within the required 6 month period.

54. The evidence shows that the worker was absent from the Northern Territory from a time some three weeks after the accident. She left the jurisdiction to see her son, he having been on her mind during the course of the collision. The worker eventually relocated to Perth, with the result that she lost contact with her former employer, and therefore lost the primary means by which she might become aware of her worker's compensation entitlements. Furthermore, she was unable to readily procure a Northern Territory worker's compensation claim form. According to the worker's evidence, it was not until about one year after the accident that she was advised and assisted by her friend with respect to her possible entitlements and the procedure for making a claim.

55. Mr Bryant, counsel for the employer submitted that the delay in bringing any claim or application was not occasioned by the worker's absence from the jurisdiction:

> " …there is no indication that her absence from the jurisdiction was in any way the cause of the failure to make a claim, or commence proceedings. The simple fact of the matter is that after she became aware of her legal rights, and – she ultimately – or she obtained a claim form, simply by writing from Western Australia to the employer in the Northern Territory and in consequence got a claim form.
>
> And when it came time, she decided to press the application. She consulted Northern Territory solicitors. She – in particular in 2002, and there's no indication that her absence in Western Australia, up until her return to Darwin in relatively recent times, has in any way impaired or hindered her ability to instruct her present solicitors in

respect of her claim. There's simply no indication, in my submission, that there has been any resulting impairment caused by her absence interstate."[10]

56. It is, of course, for the worker to satisfy the Court as to any excusing condition upon which she seeks to rely. In the end the Court must be reasonably satisfied on the balance of probabilities that the delay was occasioned by the worker's absence from the jurisdiction. Whether or not the Court can reach that level of reasonable satisfaction will depend upon the cogency of the evidence in relation to the matter in issue. In my opinion, where a worker relies upon absence from the jurisdiction as an excusing condition, the worker must establish that the circumstance of being absent from the Territory operated to prevent him or her from becoming apprised of their possible entitlements and making a claim within the prescribed time period.

57. Knowledge of legal rights and the making of a claim usually go hand in hand. A claim is usually engendered by knowledge of one's rights. In the present case, I am reasonably satisfied that the worker's absence from the Territory impaired or hindered her ability to acquire knowledge of her possible entitlements to worker's compensation. The worker presented as a fairly simple natured person who was ignorant of her legal rights. In those circumstances, one would think that the prospect of her becoming apprised of her possible entitlements would be greater had she remained in the Territory. For example, there may have been continuing exposure to the employer. Certainly, the employer would have been far more accessible to the worker for the purposes of obtaining advice as to her possible entitlements and the procedure for making a claim. But most importantly, continuing residence in the Territory would have had the potential to bring the worker into contact with local people[11] with relevant knowledge which

[10] See counsel's oral submissions at p 232 of the transcript.
[11] It should be borne in mind that by national standards, the population of the Northern Territory is very small, and the despite its vast distances the Territory can be considered, in relative terms, to be a closely knit community.

could have been passed onto the worker within a much shorter period of time.

58. In my opinion, the circumstance of the worker being absent from the Territory – the tyranny of distance - operated to prevent her from becoming apprised of her possible entitlements and making a claim within the time prescribed by s182(1). Accordingly, the excuse of absence from the jurisdiction has been made out.

59. The worker also sought to rely upon the excuse of "other reasonable cause". As pointed out by Mr Grant, this particular excuse "accommodates any matter which the reasonable person in the street might consider good cause for a failure to make a claim within the specified period." [12]

60. This particular excuse received consideration by the Full Court in *Black v South Melbourne* [1963] VR 34 at 38:

> " The next question is whether there was 'reasonable cause' for the failure to give notice. The inquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression ' reasonable cause' appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable. In *Quinlivan v Portland Harbour Trust,* [1963] VR. 25 at p 28, Sholl J; used these words: 'the subsection means to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man.' " [13]

61. In *Tracey Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 40 Mildren J dealt with what amounts to "other reasonable cause" :

> "A hope and expectation that a worker might make a complete recovery may amount to reasonable cause as a matter of law. In *Fenton v Owners Ship Kelvin,* Pollock MR said (at 481):

[12] See p 20 of counsel's written submissions.
[13] This test was further approved by the Full Court in *Melbourne and Metropolitan Tramways board v Witton* [1963] VR 47. See also *Cowie v S.E.C. of Victoria* [1964] VR 788 at 792 per Gowans J. The test was more recently approved in *Commonwealth of Australia v Connors* (1989) 86 ALR 247 at 252 per Northrop and Ryan JJ.

‘Efforts have been made from time to time to give some indication of what is ‘reasonable cause’. It is impossible, of course, to give an inclusive definition of it, but in *Webster v Cohen Brothers* (1913) 6 BWCC 92 at 97, to which our attention has been drawn, Buckley L J says: “ We must distinguish between two different sets of facts: in the one the workman says, “if things continue as they, I shall never be required to give notice of any claim for compensation.”; that might be reasonable cause for not giving notice. The other state of facts is: the workman says to himself, “I have had an accident, the results of which are serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for compensation at all.'’ That is not reasonable cause for the failure to give notice of the accident.’

The learned Master of the Rolls went on to say that there could be difficulty in appreciating the line of demarcation between these two contrasted statements, but that, in cases where the injury is latent, difficulty of diagnosis and perhaps prognosis, it is easier to find that there was reasonable cause. Later (at 483) he concluded:

‘A belief that the injury is trivial is a good excuse for not giving notice. The cases supporting that are to be found in W A Wills, *Workmen’s Compensation Acts,* (23rd ed, 1925), p 122. If we start with this fact, and take the other cases, such as *Egerton v Moore* [1912] 2 KB 308 or *Webster v Cohen Brothers*, I think it is plain there may be a number of graduations, questions of degree, as to whether or not the workman was apprised so clearly of his condition, its origin and its future, as to compel him or throw upon him the duty of giving notice. When, however, the true measure of the situation is only arrived at by lapse of time and by the confidence in the diagnosis which arises from the progress of the disease, particularly where the injury is what may be called latent, then I think that the workman is more readily excused. But the measure of these degrees, the estimate of these graduations are questions of fact which are for the learned county court judge…..’

Atkin LJ (at 490-491) similarly considered that a back strain, not though to be serious, might be a reasonable cause for delaying the giving of notice.

A similar finding was upheld by the High Court in *Butt v John W Eaton Ltd* (1920) 29 CLR 126, the court also holding that there was evidence to support the finding.

> There is also authority for the proposition that ignorance of the law, when combined with other factors, may be enough to amount to 'reasonable cause': *Melbourne & Metropolitan Tramways Board v Witton* [1967]VR 417."

62. In relation to "reasonable cause" Mr Grant made the following written submissions:

> "As stated in the context of absence from the jurisdiction, the worker's evidence is that she was ignorant of her disease in the material sense. She appreciated that she was different in terms of her mood and disposition following the accident. She was entirely unaware that the difference in her mood and disposition might be characterised as a disease. In other words, the worker did not realise until later (when the condition did not desist), that she would be required to make a claim. Accordingly, the true measure of the situation was 'only arrived at by lapse of time and by the confidence in the diagnosis which arises from the progress of the disease'. This is consistent with the medical evidence, which was uniformly to the effect that in such cases there often be a delay between the precipitating event and the onset of full symptoms. These circumstances qualify as reasonable cause for the purposes of an extension of time."[14]

63. I agree with these submissions, and find that the circumstances outlined therein constitute a "reasonable cause" and therefore provide an excuse for the worker's failure to make a claim for compensation within 6 months after the occurrence of the injury.

64. On the matter of "reasonable cause", Mr Grant made the following further written submissions:

> "There are two further matters often sought to be characterised as reasonable cause in this context. They are impecuniosity (and a consequent inability to seek legal advice), and an ignorance of the law. Whilst it would appear from the discussion in *Tracy Village* that ignorance of the law will not constitute 'mistake' in the material sense, the court did observe that there is authority for the proposition that ignorance of the law, when combined with other factors, may be enough to amount to 'reasonable cause': *Melbourne Tramways Board v Witton* (1963) VR 417. There can no doubt in this case that the

[14] See p 22 of Counsel's written submissions.

> worker was ignorant of the law. Combined with that fact, the worker had an expectation that she would recover, the condition was not diagnosed until she saw Dr Booth in 1999, and the worker was reluctant to talk about the matter until that time. These matters in combination constitute reasonable cause."[15]

65. I also find myself in agreement with these submissions. Accordingly, I find that the combination of circumstances referred to in the submissions qualify as a "reasonable cause", and provide the worker with an excuse for failing to make a claim for compensation within the time prescribed by 182(1) of the *Work Health Act.*

66. In summary, the worker has satisfied this Court that her failure to make a claim for compensation within 6 months after the occurrence of the injury was occasioned by (1) ignorance of disease; (2) absence from the Northern Territory and (3) other reasonable cause. It follows that the worker's failure shall not be a bar to the maintenance of the proceedings for compensation commenced by the worker in this Court. Those proceedings are therefore maintainable.

67. Based on the evidence and the conclusions drawn in relation to s 182(3) of the Act – bearing in mind that the very same excuse provisions that operate in the context of s 182 also have application to s 104 - the worker's failure to commence proceedings within the 28 day period prescribed by s104(3) of the Act is excused on the three grounds of ignorance of a disease, absence from the Northern Territory and other reasonable cause.[16]

68. For the sake of completeness, I deal with Mr Grant's submission that there are two further reasons why the worker's failure to commence proceedings should be excused pursuant to the provisions of s 104(4) of the Act:[17]

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[15] See p 23 of Counsel's written submissions.
[16] Note that the relevant period for considering the excuses prescribed by s 104(4) is the 28 day time period itself: see above, p 8.
[17] See p 24 of counsel's written submissions.

> "First, after the claim was made and during the relevant 28 day period after the disputation by letter dated 10 March 1998, the worker had left everything in the hands of her friend and husband, and in those of Slater and Gordon.
>
> Secondly, the letter of 10 March 1998 disputing liability (exhibit W5) made the following representation:
>
> 'As a sign of our support for the mediation process, the 28 day time limit applicable for lodging an application to the Work Health Court will be waived until such time as the mediation process has been completed or terminated by us.'
>
> It is no account that the worker did not make application for mediation for some four years. Neither did the employer, and the only period for considering reasonable cause is the 28 day time period itself. Moreover, when the matter was eventually referred to mediation, the employer participated without demur and did not seek to resile from its representation. Those circumstances provide another reasonable cause to excuse the worker's failure. Alternatively, the employer is estopped from reliance on the time bar."

69. In relation to the first submission made by Mr Grant, Mr Bryant submitted that "it cannot be said that it is objectively reasonable for the purposes of the section to simply allow, the times within which the claim is to proceed to pass by, by leaving the conduct of her legal rights in the hands of an unqualified person." [18] Mr Bryant went on to submit:

> "There's no suggestion that the friend and husband were legal practitioners. All that seems to have happened is that she sought the advice of a friend. She's filed - the friend has assisted. And she's potentially relied on that friend. That's not a reasonable ground in my submission. It might be different if the person from whom she sought advice was a legal practitioner, it would be reasonable perhaps for a worker to leave the conduct of her affairs in the hands of a legal practitioner. That may be the situation. But in this case, I make the point that there is really no evidence to indicate that that was so.
>
> At least in respect of the relevant period. We know nothing in this case about the status of the plaintiff – of the worker's legal

[18] See p 233 of the transcript.

> representation in the relevant period from 10 March 1998 until – for the 28 days thereafter. The name of Slater and Gordon has been thrown around. We don't know what her instructions to them were. We don't know whether they were continuing to act at that stage. We don't know whether their instructions were confined to some minor aspect of the case, even – or in simply providing the claim form.
>
> We have the evidence that's, I think, in early – when the claim form was completed, it was, I think it was completed in the offices of Slater and Gordon, but we simply know nothing. And there is no basis upon which this court can find that at that stage, in respect of this claim, during the relevant period, the worker was represented by lawyers."[19]

70. In my opinion, the submissions made by Mr Bryant have force. In my view, the evidence is not sufficiently cogent to establish "reasonable cause" in the terms submitted by Mr Grant.

71. In relation to the second submission made by Mr Grant, Mr Bryant submitted[20] that the letter dated 10 March 1998 had to be read in conjunction with the Form 5 notice which stated:

> " If you wish to contest our decision, you must apply for mediation within 14 days from the date of this notice, or lodge an application to the Work Health Court within 28 days from the date of this notice."

72. Mr Bryant submitted that the effect of the correspondence was that if the worker applied for mediation within 14 days, the employer would not insist on the 28 day period. Mr Bryant argued that the letter of 10 March did not extend the time in which to bring the mediation. Counsel submitted:

> "It's not saying , look at any time in the future when you apply for a mediation, we will forget about the time limit."

73. Mr Bryant said that the fact that the employer subsequently participated in mediation in 2002 was of no significance because the employer was obliged to do so by law.

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[19] See p 103 of the transcript.
[20] These oral submissions appear at pp 233 –234 of the transcript.

74. Mr Grant made a counter submission to the effect that the "whole basis of the employer's case in relation to the time bar arising, is that the mediation provisions were not in place at the time of the relevant disputation, back in March 1998."[21]

75. Mr Grant went on to submit that there was no scheme of mediation under the *Work Health Act* back in March 1998. The statutory scheme of mediation did not commence until 1 August 1999. The crux of Mr Grant's submission was:

> "There was no statutory requirement for mediation, so in my submission, my friend can't pull himself by his boot straps in relation to the representation in the letter by saying, well, the worker's failed to comply with the mediation requirement, therefore, the representation in relation to not relying on the limitation period, doesn't take effect.
>
> There was no mediation requirement in the Act. For some anomalous reason, it had been inserted in the form, but the form is of no account whatsoever. So… insofar as that's identified as a basis upon which the employer seeks to be released from the representation they've made in that letter, it has no foundation. And it's inconsistent with their fundamental premise in relation to…"[22]

76. In answer to the Court's inquiry – "…where there's a representation usually a person relying upon that acts to their detriment - Mr Grant made the following submissions, which appear at pages 235-236 of the transcript:

> "If one is talking about estoppel….if one is talking about reasonable cause however, it is a matter that's properly taken into account in the absence of that – you know fundamental changing in position. Now, you know, we can see … that the evidence in relation to precisely what the worker's response was to that representation, is a little unclear. It was certainly sent to her friend, who had conduct of the matter on her behalf and probably, we say, on the balance of probabilities, referred to Slater and Gordon who had conduct of the Work Health matter at the relevant time.

[21] See p 235 of the transcript.
[22] See p 235 of the transcript.

> But…insofar as those people and organisations, relied on the representation, that's a reliance that can be sheeted home to the worker. But, …other reasonable cause, doesn't – within the meaning of the exculpatory provisions, doesn't require that there be necessarily, an express acknowledgment by the worker of a shift of position, in response to the representation. Estoppel may, but reasonable cause doesn't."

77. The fundamental difficulty with the worker's reliance upon the contents of the letter dated 10 March 1998 as an exculpatory circumstance is that there is no sufficiently cogent evidence which shows that the worker, either personally or by her agents or servants, relied upon the representation contained in the correspondence and conducted her affairs in light of that representation. It must be borne in mind that it is for the worker to satisfactorily explain the failure to comply with the statutory time requirements. It is incumbent upon the worker to demonstrate how the letter of 10 March 1998 was in some way instrumental in her failing to make an application to the Work Health Court within the 28 day period. I fail to see how the worker can discharge that burden without adducing cogent evidence that the letter of 10 March 1998 operated upon her mind, or that of her agents or servants, in such a manner as to provide a satisfactory explanation for her failure to comply with the time requirement. Accordingly, the contents of the letter dated 10 March 1998 do not provide "other reasonable cause" as a basis for excusing the worker's failure to commence proceedings within the prescribed 28 day period.

The nature of the worker's injury and her incapacity

78. All the expert medical witnesses called by the parties in these proceedings agreed that the worker had sustained post traumatic stress disorder accompanied by symptoms of anxiety and depression as a consequence of the accident. However, what is in dispute is the severity of the worker's symptoms and the extent to which the symptomatology has disabled and continues to disable the worker.

79. The worker gave evidence that she had difficulties driving motor vehicles, had intrusive thoughts of the accident and any driving activity reactivated her unpleasant memories of the accident. The worker also gave evidence to the effect that she self-medicated with alcohol following her move to Perth. The worker testified that she no longer has a separate vehicle and drives only when necessary, but is uncomfortable doing so. She said that she never drives if her husband is available. Furthermore, she is highly nervous as a passenger and has difficulties commuting on public transport.

80. As to the wider impact of the mental disorder, the worker gave evidence to the effect that she has experienced irritability, impatience, alienation, social withdrawal, memory deficit, a heightened fear of death and injury and a sleep disorder. Finally, she gave evidence of having experienced difficulty reintegrating into the work force on account of these effects.

81. I propose to summarise the evidence of each of the expert witnesses, as the worker's evidence cannot be evaluated in isolation, and must be assessed in light of the medical evidence.

82. Dr Booth, a consultant psychiatrist, gave evidence on behalf of the worker. The doctor's report became Exhibit W10, while his clinical notes became Exhibit W11. Exhibit W12 was Dr Booth's further report, which consisted of a summary of a telephone discussion between the doctor and the worker's solicitor.

83. During his telephone conversation with the worker's solicitor, Dr Booth had proffered a diagnosis of major depression. During the course of his evidence, the doctor rescinded that diagnosis and stated that the correct diagnosis was post traumatic stress syndrome because of the additional features of the worker's symptomatology – her phobia for driving. Dr Booth stated:

> "She says that she is panicky and anxious , that when parking or being parked she closes her eyes and recognises herself as a total

> danger to herself and others. Psychologically Karen can still see and hear the accident as clear as if it had happened yesterday. She ruminates and dislikes talking about it as she didn't like talking about it with me. She said that while talking with me her pulse rate had gone up and she was feeling sick and her palms were sweaty. These are the additional features of post traumatic stress syndrome which is basically a subcategory of depression, so it's depression with certain added features …"

84. Dr Booth said that those features were additional to the cause of depression itself:

> "She has trigger responses from the environment which precipitate thoughts and feelings of the actual traumatic event and that is particularly when driving. And she obviously ruminates about it and generally has a heightened sense of arousal, which are features of post traumatic stress syndrome."

85. Dr Booth went on to say:

> "She presents with the general symptoms of depression with those super added features which suggest post traumatic stress disorder as opposed to an ordinary depressive disorder."

86. The doctor gave evidence to the effect that the worker is still likely to suffer from the phobia or anxiety. As to the basis of that opinion he stated:

> " Generally the injury – well, firstly the disorder is a compensable disorder and compensable disorders are notoriously refractive (/) treatment. Secondly, the outcome with the post traumatic disorder is problematic anyway. So there are two factors, one is the diagnosis; (2) is the special circumstances within which the disorder originated."

87. Dr Booth stated that it is not possible to express a general opinion as to the duration of these types of disorders.

88. The doctor stated that he would not expect the worker to be successful in finding or maintaining employment because of the symptomatology associated with her post traumatic disorder. In that regard he said that driving and transportation would be quite a problem. Her social and

cognitive functioning would also be somewhat reduced. Dr Booth stated that such reduction would impact negatively upon the worker's ability to find and maintain employment. The doctor was unable to say how long that particular effect may last.

89. Dr Booth said that on the basis of what he had been told by the worker he would probably not have expected her to return to driving a motor vehicle. However, the doctor was unable to express any opinion as to whether the worker would have any difficulty travelling on public transport.

90. The following exchange took place between the witness and cross-examining counsel at page 50 of the transcript:

> "Q: In respect of this particular condition, the normal prognosis would be, would it not, for the further the condition became remote from the traumatic event, the less impact it would have upon the person's ability or disability?
>
> A: Possibly.
>
> Q: You would not expect it to significantly increase over the years as a 'complete' proposition.
>
> A: Not to significantly increase…"

91. The witness said that the condition either ameliorates over time or the person accommodates and "just gets on with living with their symptoms without complaint."

92. Dr Booth gave evidence that the worker had ceased to attend at his rooms for any further treatment. The doctor said that he would have expected the worker to have benefited by continuing further medication.

93. Dr Booth stated that he had indicated to the worker by 26 March 1998 that it would be good for her to continue with medication. The doctor expressed the view that if the worker had since that time ceased taking medication, her recovery would be slower. He added that her recovery "might continue".

94. It was put to Dr Booth that it would be inconsistent with a person having such a phobic condition to drive vehicles recklessly or at excessive speed. Dr Booth's reply was as follows:

> " Well, driving a car, it's fairly necessary aspect of living in Australia and I understood that she had actually driven, possibly using alcohol as a sedation on several occasions until such point as she lost her licence for traffic matters…
>
> I would say two things, one is the need for personal transportation; the other is the fear of the method of transport and obviously, until she lost her licence she chose to try to conquer her fear.
>
> Just as she had conquered her fear when the first aid officer told her to get back into her truck. That was a temporary conquering of her fear or in the method of transportation."

95. The following exchange occurred between the witness and cross-examining counsel at the foot of page 52 of the transcript:

> "Q: … If a person has a phobia about motor vehicles and the possibility of a motor vehicle accident, one feature you will have with them is that they will be anxious in driving a motor vehicle, if they drive a motor vehicle, and will be cautious in the manner in which they drive a motor vehicle.
>
> A: Well, in general you are correct. In her case, she was incautious and excessive in her use of speed, etc, that she lost her licence."

96. Dr Booth did not appear to be of the view that the worker's driving history militated against the phobia or its severity:

> "…speaking to the woman herself she describes the fear she has but there was an overpowering need to be transported from A to B and in so doing she broke the rules, repeatedly, as a consequence of her anxiety."

97. The witness said that in 1999 the worker had a reduced capacity to engage in social activities. He agreed that that may not now be the case.

98. Dr Booth went on to say that the condition from which the worker suffered generally creates some form of social impairment – "loss of sociability,

shyness, inability to communicate, socialise, enjoy other people's company, loss of sense of humour, all that sort of social niceties."

99. During re-examination, Dr Booth said that reckless driving, speeding and driving under the influence were consistent with a person suffering from a phobia in relation to driving motor vehicles and self-medicating with alcohol to relieve the anxiety associated with driving a vehicle.

100. The second doctor to give evidence on behalf of the worker was Dr Febbo, a consultant psychiatrist. Two letters of referral and two reports from the psychiatrist became Exhibit W14.

101. Dr Febbo said that he had reached a diagnosis of post traumatic disorder in relation to the worker. The witness gave evidence to the effect that the overall presentation of the worker was in keeping with post traumatic stress disorder. He added that there was some depression associated with the condition.

102. Dr Febbo repeated the opinion expressed in his report dated 23 July 2002 to the effect that the worker's psychiatric condition would be "associated with a partial incapacity in relation to social and occupational functioning."

103. The witness confirmed his earlier view that the worker was irritable and that irritability may have an impact on work involving contact with the public.

104. Dr Febbo gave the following evidence in relation to the worker's incapacity with respect to social and occupational functioning:

> "….some of the symptoms that she described, may well, have an impact on her ability to work and you know, the example you give in relation to irritability, if she's within a setting where she'd be constantly coming into contact with members of the public, she becomes irritable, that might impact on her work. So she becomes tearful for example, at times. That might impact on her work. So, as a general level, there would be that degree of, you know, possible incapacity."

105. When asked whether the fact that the worker had worked intermittently as an escort following the accident would bear upon his diagnosis, prognosis and opinion in relation to incapacity, the doctor stated:

> " I think I make two points about that. First of all, I suppose, there is a – one has to take that into consideration when you look at her level of incapacity. That she was able to involve herself in that type of work over a period of time. That's the first point. The second point is that I didn't get that history and I suppose because I didn't get that history, there was an issue of how reliable is my history given that that significant component of the history was not obtained by me. So having made that point, you know, I can understand that she would probably feel, you know, concerned and hesitant about disclosing that type of history."

106. The doctor went on to say that that history did not change his opinion in relation to the precipitating event for the post traumatic stress disorder – "assuming that history is reliable…"

107. Dr Febbo stated that the history given did not change his opinion in relation to the symptoms of post traumatic disorder. However, he said that she may be capable of doing more than he initially thought.

108. The witness said that the fact that the worker presently drives a short distance twice a week as necessary to take he child to a child care facility did not change his opinion at all in relation to the incapacity arising from the worker's difficulties with driving:

> " I think again given the history I obtained, I think it would be – there would be significant impact on her ability to work in an area where the driving was the – or was required in her work. If her work involved driving to work, then I will say that, you know, she would be capable of doing that, or at least, she would be able to proceed towards that particular situation."

109. The doctor agreed that that would depend upon various factors – the length of the journey, the period over which she would be required to drive and prevailing traffic conditions. However, the doctor made the point that she would be able to do more over a period of time.

110. Dr Febbo confirmed that he had recommended counselling with a clinical psychiatrist to decrease the intensity of her symptoms. The doctor said that he was not aware of the insurers coming back to him in relation to that aspect. He was never asked to make any arrangements in relation to such counselling.

111. During cross-examination, Dr Febbo said that there are other possible explanations for the onset of the worker's depressive symptoms. He agreed that there may be other factors in the worker's life causing the onset of those symptoms, unrelated to the motor vehicle accident.

112. Dr Febbo formed the view that issues of stress relating to her son were having a negative impact on her mental state.

113. The witness stated that the worker's irritability would be a potential hurdle to her being employed. When asked whether that irritability arose out of the motor vehicle accident, the doctor stated: " I thought that that was one component of her presentation…"

114. The following exchange took place between the witness and cross-examining counsel at page 89 of the transcript:

> " Q: If in fact she'd had long standing problems of dealing with people that would tend to minimise, well, tend to go against that proposition. Namely, that the accident had caused her to have ongoing irritability?
>
> A: Well, I mean, the irritability and some of the depressive symptoms, particularly if they were present prior to the motor vehicle accident, and then that would suggest that component of the presentation, at least a significant degree, was unrelated to the motor vehicle accident."

115. Dr Febbo agreed with the proposition that if the worker was no different in terms of the level of irritability after the accident than she was before, then the accident had no impact on her irritability.

116. The witness said that the worker had not reported the presence of any other stressors.

117. Dr Febbo said that he had not recorded the fact that the worker had had an abortion in 1998. However, he was of the view that such an event would have been a source of significant stress. The doctor said: " I would imagine that would have had a negative impact on her mental state."

118. The doctor agreed that the severity of the illness of post traumatic stress disorder can vary. As to the driving aspect, the witness stated:

> " … if she was able to drive a motor vehicle a lot more than, you know, that would suggest perhaps that the symptoms weren't as significant or as severe."

119. The following exchange took place at page 90 of the transcript:

> "Q: In this case she was able to return to work and to perform her duties driving large trucks..in particular she was driving at the time of the accident for a period of between five and ten days, is that significant?
>
> A: Well, it can be significant, but not necessarily. I mean, sometimes one don't, you know, there's been a delay between the onset of symptoms of post traumatic stress disorder and the actual event – precipitating event.
>
> Q: …But if in fact her symptoms manifest themselves immediately, you would find it unusual, would you not, that a person could return to that sort of work and do it without apparent difficulty?
>
> A: Look, it's possible, I mean, some people can still experience some symptoms early and then those symptoms can get worse."

120. Dr Febbo said that given the difficulty the worker had in driving a motor vehicle it would be unusual for her to take on a journey from Darwin to Perth.

121. When asked whether the fact that she was a passenger on a motor bike during that trip would change his view, the doctor stated:

> " Well, again, I mean… travelling - my understanding of travelling on a motor bike, would be, that would be quite a you know, significant and at times, probably a frightening experience, so again, it goes to the whole issue of what degree of incapacity, if any, there is, you know."

122. The following exchange occurred at page 93 of the transcript:

> "Q: And in fact, that was the situation, she travelled on a motor bike over an extensive period of – an extensive distance, it might be that you – would indicate to you that she may have little if any, capacity as a result of this trauma?
>
> A: Well, that may be the case. Again, I'd need to clarify it."

123. The doctor went on to say that a "number of people who have had an accident and then developed symptoms related to the accident, a number of those people are somewhat over cautious whilst driving." He said that that was a common feature of the condition.

124. When it was put to the doctor that it would be unusual for a person with the condition to become involved in speeding and receiving convictions for driving at excessive speed, Dr Febbo stated:

> " Well, as I have said, you know, in my experience I find people who have developed symptoms of post traumatic stress disorder and you know, symptoms related to trauma, if anything, they're overly cautious."

125. The witness said that he could not recall obtaining any history from the worker concerning difficulties with travelling on public transport. He said that she would have more difficulty driving a vehicle than commuting on public transport. The doctor could not think of any reason why she couldn't use public transport for the purpose of going to and from work.

126. Dr Febbo expressed the opinion that a number of people do improve with this condition over a period of time where there is a specific trauma which is short lived, and where there's "stability in terms of .psychiatric disorder predating it". He said that there would be a likelihood of improvement,

particularly, "if there is additional input with a clinical psychologist and some sort of treatment strategy." However, the doctor went on to say that "in some people, of course, … the condition just becomes chronic, but…again there's potential for improvement." The doctor agreed that on a worst case scenario, people remain "as they generally are, not improving, but they certainly don't deteriorate."

127. The following exchange occurred at page 92 of the transcript:

> "Q:… if the position was that not only had the worker continued driving after the accident, but also even after her termination of employment, wanted to continue driving trucks, that would suggest also that the severity of the condition was minor?
>
> A: Well, it would deduce you know, that the – I mean, that's one – I mean, I suppose the problem that arises in that situation, is that then you know, one does become quite concerned about the reliability of the history that I obtained. And then, you know, the comments I made in relation to diagnosing severity, would be questionable."

128. In his report dated 21 July 2002, Dr Febbo said that "Ms Power has a young child and there may well be motivational factors involved in whether she decides to return to work or not." Elaborating upon that statement, the doctor said:

> "… what I mean, was that a .. mother with a young child may not wish to return to work and that in itself will be an issue that will-that may well stop her from pursuing rehabilitation and so forth, in order to get back to work."

129. Dr Febbo was of the view that the fact that the worker had worked as an escort would affect his view as to her capacity for work. When it was put to the doctor that the worker may not in fact have any incapacity for work, he said:

> "….I mean, I suppose for me to sort of go that next step and sort of say, she was – you know, she's capable of working full stop. Then I would have to ask her about .. those sorts of… particulars she's experienced in the course of her work as an escort. Whether she

> experienced any difficulty when she, you know, went to work, made contact with people of the public. Again it's- I mean, I can say, in general terms, it suggests that her level of incapacity is lower… in order to explore that and to make any specific comments beyond that, I need to get more information."

130. The doctor agreed that it may be that the worker was not as incapacitated as he thought she was.

131. During re-examination, Dr Febbo said that it may be the case that some people can experience symptoms early but then other symptoms will not manifest until later in time after the precipitating event. The doctor added that "there might be changes in severity in the condition over the course of time."

132. The following exchange took place at pages 93 -94 of the transcript:

> "Q: ..against that background, the proposition that my friend put to you that riding on a motorcycle from Darwin to Perth would be inconsistent with incapacity or the existence of any condition, that would depend very much on how long after the accident that trip took place and whether or not the full symptoms of the post traumatic stress disorder had come into effect?
>
> A: …I think that's correct to a degree. I mean, I suppose, there'll be certain things that one would find surprising. You know, if one's got – you know, degree of post traumatic stress disorder, you know, I mean, for example, I have seen people who have been involved in prison riots and – now their position might fluctuate in terms of the severity, however, there's always a degree of phobia, if you like, in relation to prison, you know, so there is always a level of the condition prevalent, if you know what I mean. Particularly after the symptoms have commenced….
>
> And the other point that I think is important to make, is that in order to make those sorts of comments to the sickness it's important that the history is reliable. And… that's what the problem is that… there are two things that obviously I have not been bale to explore, which would been very useful to explore so that, you know, the diagnosis and prognosis could have been…. a realistic one."

133. Dr Febbo said that it was reasonable to say that in the case of a person in the position of the worker, it would be necessary for her, in determining whether to undertake a particular journey, to balance the necessity for transport against the fear of the particular mode of transport.

134. The following exchange occurred at page 94 of the transcript:

> "Q: … if that hope and expectation of driving trucks was something that was expressed within a matter of days after the accident, is it fair to say that it's possible that at that particular point in time, so early after the precipitating event, that symptoms may not have become entrenched, so as to render that hope and expectation unrealistic?
>
> A: Yeah, that's fair comment, yes."

135. The doctor told the court under cross-examination that it was quite possibly the case that the termination of the worker's pregnancy was not necessarily a significant stressor, four years later in 2002.

136. Dr Febbo said that it was possible that an anxiety arising out of fear of travelling in motor vehicles might lead a sufferer of post traumatic stress disorder to self medicate with alcohol to alleviate that anxiety. He also said that it is possible that such self medication might lead to episodes of bad driving.

137. The following exchange took place at pages 95-96 of the transcript:

> "… I want you to make a number of assumptions in relation to the worker's work as an escort after the accident. She was in a situation of financial need. In that she had no readily available means of earning income. Over the time she worked ad an escort after the accident, she experienced difficulties with both her employers and the people she worked with and some clients. As a consequence of those difficulties, she worked with no fewer than six different establishments over that period of time… making those assumptions… if they're keyed into the diagnostic picture, there would be no reason to consider that work as an escort, necessarily meant that this woman did not have an incapacity for employment, by reason of the post traumatic stress disorder?

> A: I think… if in the course of her work, whatever work that might be, there would be significant difficulty, then that would suggest that there is a degree of incapacity, yes."

138. Dr Febbo went on to say that the fact that she moved from one establishment to another could be explained by her incapacity. He added :

> "… I would imagine that there other reasons why she could move as well. So incapacity is a possible reason…"

139. The third doctor called in these proceedings was Dr Main, a general psychiatrist. Two reports prepared by the doctor became Exhibit W 16.

140. Dr Main told the Court that on the basis of the worker's symptoms and presentation his diagnosis was that of post traumatic stress disorder of moderate intensity.

141. At page 130 of the transcript the doctor gave evidence of markers of post traumatic stress disorder, and related those to the worker's condition. The witness went on to describe how the accident and its consequences had caused significant distress and impairment in terms of the worker's social and cognitive functioning:

> " … the main thing that she was talking about was that she had become overall a more fearful person – that she had become more than protective of her son. That a general sense of well-being had diminished, and particularly do things of feeling hyper-ventilative and more irritable."

142. Dr Main expressed the opinion that the worker's sense of alienation, her irritability, anger and avoidance of certain places and activities operated as some limitation on her ability to undertake paid employment.

143. The witness went on to say that the main limitation the worker reported on in relation to her ability to undertake paid employment was her difficulty with driving motor vehicles:

> " in my opinion that is her main restriction in her ability to work and her ability to travel from place to place. I didn't form an opinion that she was severely impaired in her ability to interact with other people."

144. Dr Main agreed that the worker's impairment would tend to have an impact on her functional capacity in the general workplace, if she was required to interact with members of the public and other staff members.

145. After discussing predisposing and perpetuating factors in relation to the worker's condition, Dr Main stated:

> "It's my opinion that if she had not had the motor vehicle accident, she would not have developed the post traumatic stress disorder."

146. Dr Main was of the view that the worker's experience working as an escort did not make a significant difference to her psychiatric or psychological condition:

> "Ms Power described her work as an escort, she saw as a necessary thing to do as a result of financial difficulties. And she didn't describe to me any traumatic experiences in her work as an escort, which would lead me to believe that that contributed to her post-traumatic stress disorder."

147. The following exchange took place between the witness and examining counsel at page 132 of the transcript:

> "Q: The evidence before this court is that at present the worker does drive as a matter of necessity, a short distance – a matter of minutes, twice a week to take her young daughter to a child activity facility. Now does that history of driving otherwise impact on your opinions expressed in the report?
>
> A: It would be interesting to know whether she experiences any of the anxiety symptoms in that shorter drive, but no I don't think it changes my view that – it would support the view that she's less capable of driving than she was prior to the accident."

148. During cross-examination, Dr Main said that he had not asked the worker about any difficulty that she may have had in using public transport to get to

a job. The doctor thought that the worker would be capable of getting to and from work. He added :

> " There may be some increase in level of her anxiety in doing so, but I think that it would be a manageable level."

149. The following exchange occurred between the witness and cross-examining counsel at pages 136 - 137 of the transcript:

> "Q: And in respect of any social impairment that she may have had as a result of this condition, you would see that as being also within manageable levels, such as it would not preclude her from – it, of itself, would not preclude her from taking employment which she would otherwise be fit for?
>
> A: Yes, I think that's correct."

150. At page 137 of the transcript, Dr Main gave evidence concerning the worker's sense of anger over the circumstances surrounding her dismissal from her employment. He also gave evidence of her childhood experiences which he believed were relevant to her reaction to the accident, her job loss and the manner in which her employment was terminated.

151. Dr Main said that he would expect the condition of post traumatic stress disorder to ameliorate in time. He agreed that in the majority of cases "the more remote from the traumatic event the more the body deals with it"; but he added that that was not true in all cases of post traumatic stress disorder.

152. The doctor expressed the view that the worker was a person who was improving and who was likely to improve in the future.

153. The witness said that the fact that the worker had travelled form Darwin to Perth on a motor cycle suggested that the worker had relative comfort in undertaking that journey. When asked whether the fact of her having undertaken that trip would have assisted in determining the severity or otherwise of the symptoms she reported, Dr Main said:

" Well, yes it would have some determination in the severity at that time. It's not possible I guess, for me to conclude on the information that she provided to me as to whether or not her symptoms increased subsequent to returning to Perth or Derby. That is not unknown in people with post traumatic stress disorder to have a delay in the onset of the symptoms."

154. He went to say that at that point in time the condition may not have been to the fore, and escalated subsequently. However, he agreed that the fact that she undertook such a journey would be very significant and relevant to any assessment of her degree of disability at the time.

155. The following exchange occurred at the top of page 139 of the transcript:

"Q: It would lead you to the conclusion that her condition in respect of impairment in use of motor vehicles and being on the road, was much less than she was saying it was ?

A: Yes. Other than that proviso I've already given you – to the level of distress she might describe in doing the act of driving."

Q: A person suffering this sort of condition would have a fear or a phobia about driving a motor vehicle would you expect to be a cautious driver, if and when they drove a motor vehicle would they not?

A: No. In my experience, that's not necessarily the case. Certainly they may be hyper-vigilant, but I certainly have experience of people being quite the opposite in fact. That they become more reckless in their driving."

156. The doctor added even to the point of driving at excessive speeds.

157. The following exchange then took place between the witness and cross-examining counsel:

"Q: If… she had told you the first time you saw her that she wanted to get back to driving a haulpack, you would find that a particular significant event in terms of assessing her impairment?

A: Well, no not necessarily – I think there's quite a difference between wanting to do and being able to do it. I think she still would

like to be a haulpack driver. That was the impression I got of her description of the enjoyment of the job."

158. The final expert witness in these proceedings was Dr Connaughton, an occupational physician, who was called by the employer. The two reports prepared by the doctor became Exhibits E5 and E6.

159. Dr Connaughton gave evidence that an occupational physician performs two roles: (1) assessing work related injuries, illness and ill health and (2) assessing fitness for work or for a rehabilitation program following illnesses or injuries.

160. The witness told the Court that when he attended upon the worker on 6 April 1998 he discerned some symptoms suggesting post traumatic stress disorder.

161. The witness gave evidence that in cases of post traumatic stress disorder there can be a delay between the occurrence of the precipitating event and the onset of symptoms.

162. Dr Connaughton said that, in light of the worker's apparent psychiatric condition, he was surprised at her driving history. He stated: "I thought it was incongruous action."

163. The witness gave evidence of having received information from the worker that she felt less anxious driving after she had a drink. The doctor agreed that it was possible the worker was self medicating with alcohol to relieve the anxiety she felt driving or being involved with motor vehicles. The doctor added: " I didn't pursue that aspect of her history in any great detail, but… that's a possibility."

164. The witness went on to agree that self medication in that form might lead to inappropriate driving behaviour.

165. At page 156 of the transcript, Dr Connaughton said that in relation to the impact of the worker's psychological symptoms on her ability to undertake

paid employment he would not defer to the opinion of a consultant psychiatrist. He said: "That was my opinion on the basis of the information that I have and that is still my opinion." Dr Connaughton went on to say that he would not defer to the opinion of a consultant psychiatrist in relation to her fitness to return to work as a truck driver. Although the doctor conceded that a consultant psychiatrist had a higher degree of training in the diagnosis of psychiatric conditions and generally psychiatrists have greater exposure to the treatment of persons suffering from psychological injury, he explained his position in these terms:

> "The assessment of fitness to return to work is – involves different questions to the management of psychiatric disorders. They are different questions in terms of diagnosis and management, as distinct from assessing fitness to return to work. For assessing fitness to return to work one needs to have a knowledge and understanding of the work requirements in addition to diagnosis and treatment."

166. The doctor went on to say that "you don't need to be a psychiatrist to assess or consider the question of fitness for work."

167. Finally, Dr Connaughton stated that he had made a diagnosis of post traumatic stress disorder long before she saw a psychiatrist. He went on to say: " so I don't think I agree that you need to be a psychiatrist to make that diagnosis."

168. The medical evidence in this case was completed by the tender of the following reports: the report of Dr Dalrymple (Exhibit E7), the report of Dr Rogers (Exhibit E8) and the three reports of Dr Slinger (Exhibit E9, E10 and E11).

169. In my view, the evidence clearly establishes the following:

    169.1 that the worker suffered a physical injury to her leg and post traumatic disorder as a consequence of the accident and

169.2 that both those injuries arose out of or in the course of her employment with the employer.

170. I am reasonably satisfied on the balance of probabilities that the accident was, to use Mr Grant's terminology, "the real, proximate and effective cause of the worker's post traumatic stress disorder and depressive symptoms." This is made patently clear by the evidence of Dr Main. I am similarly satisfied on the evidence that the worker's psychiatric injury was not attributable to some other cause, that is, the circumstances in which the worker left her employment, reasonable administrative or disciplinary action or the termination of the worker's pregnancy in 1998. In coming to that conclusion, I have accepted the submissions made by Mr Grant at page 26 of his written submissions.

171. As previously noted, the points of contention are:

171.1 the extent to which the effects of the worker's psychiatric injury have persisted and

171.2 whether that psychiatric injury was, and remains, of such a nature as to preclude the worker from undertaking certain employment activities.[23]

172. Counsel for the employer submitted that although the evidence shows that the worker had some problems of a psychiatric nature since the occurrence of the accident and in respect of the accident, the degree of severity of the worker's symptomatology and the extent to which those symptoms are disabling is open to debate.

173. In order to establish an entitlement to worker's compensation, it must be proved to the satisfaction of the Court that the injury suffered by the worker

[23] These contentious issues are adverted to by Mr Grant at page 26 of his written submissions.

has resulted in or materially contributed to an “incapacity" within the meaning of the *Work Health Act*.

174. “Incapacity” is defined in s3 of the Act as meaning “an inability or limited ability to undertake paid work because of an injury.” “Injury”, of course, includes a psychiatric injury: see the definition of “injury” in s 3 of the Act.

175. The notion of incapacity was considered by Mildren J in *Foresight v Maddick* (1991) 79 NTR 17 at 19:

> “ The right to receive weekly compensation under the Act depends upon there being, inter alia, incapacity (see s 53) which, in broad terms, is productive of financial loss to the worker (see s 64 and s 65). However, neither the above definition of incapacity nor the other provisions of the Act require or compel a conclusion that all incapacity ceases once a worker is able to return to employment which is as well paid as that which he would have earned but for the injury. A person might have the capacity to work in several fields of employment. Supposing, as a result of an injury, he loses the ability to work in all of those fields except one, and he obtained employment in the one field left open to him with the result that there is no financial loss. It could not be said that the worker no longer had a limited ability to undertake paid work because of his injury. The receipt, post injury, of the same or higher wages than that received pre-injury has long been rejected as sufficient to deny the existence of partial incapacity for work: see *Thompson v Armstrong & Royce* (1950) 81 CLR 585; *Arnotts Snack Products v Yacob* (1985) 155 CLR 171; 57 ALR 229; *Watkins v Renata* (1985) 8 FCR 65 especially at 68-69; 61 ALR 153 especially at 156-157.”

176. In my view, the evidence adduced in these proceedings establishes, on the balance of probabilities, that the effects of the worker’s psychiatric injury have persisted to the date of the hearing and are continuing, such that the worker has a limited ability to undertake paid work. At the very least, the worker is unable to undertake paid employment as a truck driver – her pre-accident occupation. That is sufficient to establish that the worker has a limited ability to undertake paid employment, and has suffered and continues to suffer an incapacity within the meaning of the *Work Health Act*.

177. That finding is supported by the evidence of Dr Booth, Dr Febbo and Dr Main, as well as the evidence of the worker.

178. Dr Booth was of the opinion that the worker could not drive for a living. According to his report (Exhibit W12) and his oral evidence, it was the doctor's expectation that the worker would not be successful in finding and maintaining employment due to the symptomatology associated with her psychiatric condition. Dr Booth was of the opinion in March 1999 that the worker had a reduced capacity for employment because of the symptomatology of her condition, and would be likely to have a reduced capacity for the foreseeable future. The evidence given by the doctor at the hearing did not diverge from the opinion expressed in Exhibit W12.

179. As Mr Grant points out, Dr Booth was the only expert medical witness in this case who had treated the worker in a therapeutic setting. He had seen the worker on a number of occasions during which he had prescribed medication, counselled her and otherwise treated her. Because of that doctor-patient relationship, I believe that special weight should be accorded to Dr Booth's evidence. I accept the doctor's evidence, including his opinion and prognosis as to the worker's reduced capacity for employment.

180. Dr Febbo was of the opinion that the worker's psychiatric condition would be associated with a partial incapacity in relation to social and occupational functioning. The doctor was of the view that the extent of her incapacity would depend upon her response to treatment. Dr Febbo was of the view that the worker's condition would significantly impact upon her ability to work in an area which required her to drive motor vehicles. Furthermore, the doctor was of the opinion that the impairment of the worker's social and occupational functioning would also limit her ability to undertake paid employment in fields which required contact with members of the public.

181. Although there was not that special doctor –patient relationship between the worker and Dr Febbo, and the worker was examined by the doctor in a

medico-legal context (at the request of the employer on instructions from its insurer), I accept the evidence given by the doctor. It is generally consistent with Dr Booth's evidence in terms of the worker's reduced capacity for employment, in particular the limitations imposed on the worker driving motor vehicles for a living.

182. There is also a degree of common ground between Dr Main and the two earlier mentioned medical practitioners. In his report W16, Dr Main expressed the opinion that the worker's psychiatric condition "does incapacitate her for employment". It was the doctor's further opinion that the worker "may be able to perform alternative work duties, specifically those which do not require her to operate a vehicle". Though, it is noted that Dr Main believed that the worker would be in a position "at some time in the future to return to her normal work duties but this would require her receiving specific treatment for her post traumatic stress disorder." In his later report dated 14 June 2002, Dr Main stated that "Ms Power's post traumatic stress disorder has affected her capacity for employment and continues to do so." It was Dr Main's opinion that the worker was not fit to return to work in occupations involving driving motor vehicles. But again, the doctor expressed the opinion that the worker's capacity for employment would improve with the administration of treatment, and further treatment might permit her to return to her pre-accident occupation. In his oral evidence Dr Main stated that the worker's impairment would tend to have an impact on her functional capacity in the workplace in environments which required her to have contact with members of the public.

183. Although Dr Main's prognosis was good and far less guarded than that put forward by Dr Booth, he was clearly of the view that the worker presently had a reduced ability to undertake paid employment and more particularly was unfit to engage in employment involving the driving of motor vehicles. I accept Dr Main's evidence as to the worker's present capacity for employment.

184. Although there might be some differences of opinion between Drs Booth, Febbo and Main as to the extent of the worker's incapacity and her ability to undertake some employment, all three medical practitioners agree that the worker has a reduced capacity for employment, and share the view that the worker is not fit to return to her pre-accident occupation, and would be unable to undertake employment which required driving motor vehicles.

185. Turning to Dr Connaughton, his evidence was not keeping with the evidence of the other three doctors. His report – Exhibit E5 – set the tone, wherein he expressed the opinion that the worker was fit to perform her pre-accident occupation as a truck driver on a full time basis. That view was perpetuated in his report – Exhibit E6. There Dr Connaughton stated that although the worker does have some minimal residual symptoms of post traumatic stress disorder from the accident, they are not at a level which would preclude her from continuing to drive – or returning to truck driving. He went on to conclude that any incapacity for work which the worker may have is unrelated to injuries suffered during the accident in 1996. The doctor adhered to those opinions during the evidence he gave at the hearing.

186. I reject the evidence given by Dr Connaughton for the following reasons. While duly acknowledging the doctor's qualifications, medical expertise and the role of an occupational physician, Dr Connaughton is not a specialist psychiatrist. In the present case, the worker's incapacity for employment is said to arise from a psychiatric condition. As Mr Grant points out,[24] "the existence and extent of that incapacity is to be discerned by an assessment of the severity of her psychiatric symptoms". Furthermore, "assessment undertaken by the specialist psychiatrists who gave evidence during the course of the hearing was directed exclusively to that issue. The assessment undertaken by Dr Connaughton was not." [25] It is also significant that during the course of his evidence Dr Connaughton was not prepared to defer to the

[24] See page 28 of his written submissions.
[25] See again p 28 of Mr Grant's written submissions.

opinion of a consultant psychiatrist on the issue of the worker's ability to undertake paid employment. The doctor was not even prepared to make some concessions in relation to the evidence given by the three psychiatrists in these proceedings.

187. As Dr Yolande Lucire observes, "a psychiatrist's mode of interpretation is a broader view of the patient's difficulties, one which takes into account both the mind and the body".[26] In my view, the present case required the adoption of a psychiatric mode of interpretation. With due respect, Dr Connaughton failed to apply, or adequately apply, such a mode of interpretation to the present case. What was of some concern was the doctor's somewhat surprising remark that one does not have to be a psychiatrist to make a psychiatric diagnosis. I accept that Dr Connaughton is an expert in the field of assessing fitness for work following an illness or injury. However, what I cannot accept is that such an assessment can be made without a detailed knowledge and understanding of the dynamics and effects of psychiatric disorders such as post traumatic stress disorder. In the case of persons suffering from a psychiatric condition, capacity for employment can only be properly assessed in light of the diagnosis, the likely progress or decline of the condition, its susceptibility to treatment and the general prognosis – all of which are matters within the expertise of a psychiatrist. I resolve the difference of opinion between Dr Connaughton and the three psychiatrists in favour of the latter, having preferred their evidence for the reasons just given.

188. As for the other medical reports tendered in these proceedings little, if anything turns, upon those as those reports were primarily directed to the relationship between the worker's physical injuries and capacity for work.

[26] See Dr Yolande Lucire "The Expert Witness Self-Examined" in Winfield (ed) *the Expert Medical Witness* (The Federation Press, Sydney, 1989), p 101.

189. Finally, there is the worker's evidence in relation to her injury and consequent incapacity.

190. I agree with Mr Grant that any evaluation of the worker's evidence should be made in light of her diagnosed psychiatric condition – paying due regard to her memory deficit associated with her condition – and the fact that she presented as a fairly unsophisticated individual. Having regard to those matters, I accept her as a credible, and ultimately, truthful witness. In my opinion, her credibility did not suffer as a result of her having failed to disclose to certain doctors her work as an escort nor for any other reason.[27] Accordingly, I accept the worker's evidence as to the general nature and effects of her psychiatric injury and her consequential incapacity. Those aspects are supported by a significant body of psychiatric evidence.

191. In relation to the worker's capacity for employment there are some residual issues that need to be put to rest. These are dealt with by Mr Grant at pages 29-30 of his written submissions:

> " The suggestion was also put that the worker's driving record was inconsistent with any anxiety in relation to vehicles. The worker's evidence was that she was self-medicating with alcohol to relieve her anxiety. All doctors expressed the view that such behaviour would explain the worker's driving record. Dr Main also noted that in his experience, persons suffering from post traumatic stress disorder as a result of a motor vehicle accident could in fact tend to be more reckless as a result of the condition.
>
> The fact that the worker presently uses a vehicle in limited circumstances is not inconsistent with the diagnosis of injury and incapacity. As Dr Booth observed, it is a question of balancing the fear of that form of transport against the necessity for the transport. The other psychiatrists observed that it could not be said the worker had no impairment in relation to vehicles in circumstances where driving a vehicle caused anxiety symptoms.

[27] Other possible reasons for doubting the worker's veracity are dealt with and, in my opinion, effectively disposed of by Mr Grant at p 30 of his written submissions.

> Similarly, the fact that the worker continued driving trucks for approximately one week following the injury, and rode on the back of a motorcycle to Perth some three weeks after the injury, does not militate against a finding that the worker sustained a post traumatic stress disorder and consequent incapacity as a result of the motor vehicle accident. All doctors who gave evidence during the course of the hearing suggested that this was explicable by reference to the fact that in such conditions there is a delay between the precipitating event and the onset of symptoms."

192. The fact that the worker drove and rode on a motor cycle shortly after the accident combined with the worker's poor driving record, and her continuing use of a motor vehicle in limited circumstances do not undermine the body of psychiatric evidence which establishes the worker's inability to drive motor vehicles and thus her limited ability to undertake paid employment: in fact those three specified circumstances are consistent with the worker's incapacity.

193. Entitlement to worker's compensation in accordance with Part V of the *Work Health Act* is dependant upon the injury resulting in or materially contributing to the worker's incapacity: see s 53 of the Act. I am satisfied that the injury suffered by the worker resulted in or materially contributed to the worker's incapacity as dealt with above. That, in my opinion, is clearly established by the weight of the evidence.

Loss of earning capacity

194. The employer contends that the worker is not entitled to compensation for incapacity because she has not suffered any loss of earning capacity on the basis that she has been reasonably capable of earning more than her normal weekly earnings since the accident.

195. The relevant provisions of the Act as regards loss of earning capacity are ss 64 and 65. According to s 64, where a worker has any demonstrated form of incapacity, he or she shall be paid, during the initial 26 weeks period, the difference between their normal weekly earnings at the time of the injury

and the amount that he or she actually earned during the period. Section 65(1), which deals with the period following the initial 26 week period, provides that a worker shall be paid compensation equal to 75% of his or her loss of earning capacity or 150% of average weekly earnings at the time the payment is made, whichever is the lesser amount. The reference to "150% of average weekly earnings" is not relevant in this case.

196. Section 65(2) defines "loss of earning capacity" as meaning:

> "the difference between the worker's indexed normal weekly earnings and the amount, if any, he or she is from time to time capable of earning in a week in work he or she is capable of undertaking if he or she were to engage in the most profitable employment, if any, reasonably available to him or her, and having regard to the matters referred to in section 68."

197. Section 68 of the Act provides:

> " In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3)[28], regard shall be had to –
>
> (a) his age;
>
> (b) his experience, training or other existing skills;
>
> (c) his potential for rehabilitation training;
>
> (d) his language skills;
>
> (e) the potential availability of such employment;
>
> (f) the impairment suffered by the worker; and
>
> (g) any other relevant factor."

[28] Section 75B(3) provides:
" Where a worker so required under subsection (1) unreasonably refuses to present himself or herself for assessment of his or her employment prospect, he or she shall be deemed to be able to undertake the most profitable employment that would be reasonably possible for a willing worker with his or her experience and skill and who has sustained a similar injury and is in similar circumstances, having regard to the matters referred to in section 68, and his or her compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly."

198. As stated above, the worker has established to the satisfaction of the Court that she has been partially incapacitated since the date of injury. As discussed by Martin CJ in *Northern Cement v Ioasa* (unreported, NTSC, 17 June 1994) at 11-12, it now falls to the employer to establish the amount that the worker is reasonably capable of earning:

> "There is a distinction to be made between the onus resting upon the worker to show partial incapacity for work, in the sense of suffering from some inability to undertake paid work because of an injury, and the amount which the worker is reasonably capable of earning within the parameters of section 65(2)(b). in respect of the quantification of loss of earning capacity, it is up to the employer to point to evidence in the case minimising his liability in monetary terms. It would be unreasonable to require the worker to prove an opened ended negative, such as that he was not capable of earning an amount which he chooses to rely upon. Once there is evidence to demonstrate incapacity and loss of earning capacity on the part of the worker, then minimising the financial consequence of such findings rests with the employer."[29]

199. Accordingly, it is incumbent upon the employer in the present case to establish on the balance of probabilities:

199.1 that there was work reasonably available to the worker;

199.2 that the worker was capable of undertaking that work; and

199.3 the amount the worker would have earned in that employment.

200. In my view the employer has failed to discharge the requisite burden.

201. It is clear from the provisions of s 75A(1) of the Act that an employer should introduce an injured employer to employment with a view to returning him or her as nearly as possible to their economic circumstances prior to the injury:

> " An employer liable under this Part to compensate any injured worker shall

[29] This principle was applied by the Work Health Court in *Fox v Pulumpa* (1999) NTMC024 per Mr Trigg SM, p 51.

201.1 take all reasonable steps to provide the injured worker with suitable employment or,

201.2 so far as is practicable, participate in efforts to retrain the worker."

202. It is clear on the evidence that the employer has failed to provide the worker with suitable alternative employment or to retrain the worker. It follows that the employer is unable to avail itself of steps taken pursuant to s 75A(1) of the Act in order to prove the availability of profitable employment.

203. I accept the submission made by Mr Grant that the evidence in this case falls well short of satisfying the requirement of a probability that employment was reasonably available to the worker.[30]

204. The employer sought to rely upon awards and labour market figures from the Australian Bureau of Statistics to prove that there was employment reasonably available to the worker. In my view, that body of evidence is not sufficient to satisfy the burden cast upon the employer. The evidence is of a far too general – non-specific - and hypothetical nature. Regard must be had to the provisions of s 68 of the *Work Health Act* which requires the assessment of employment reasonably available to a worker to be made in light of, inter alia, the potential availability of employment and the worker's skills, training, experience and other relevant factors. In this case, other relevant factors include: (1) the worker's impaired numeracy skills; (2) the worker's inability to continue employment on account of her present personal and domestic circumstances; and (3) the inability of the worker to undertake employment entailing any heavy work or extended periods of standing or sitting.

205. Mr Grant drew the Court's attention to the distinction made in *Passmore v Plewright* (unreported, Northern Territory Supreme Court, Martin CJ, 4

[30] See p 35 of Mr Grant's written submissions where the following authorities are cited: *Normandy Mining Pty Ltd v Horner* [2000] NTSC 79 at paragraphs [21] –[25]; *McAllister v Kormilda College* [2003] NTMC 033 per Mr Bradley CM.

April 1997) between work reasonably available to a worker and work that a worker is physically capable of doing.[31] Mr Grant submitted that that principle could be extrapolated to the present case:

> "Prior to the injury the worker held steady employment as an escort. During her time in Darwin before travelling to Sydney she was employed by the one agency. In Sydney she was employed by two agencies over a period of two years. She only moved from the first agency because of transport difficulties. Upon her return to Darwin she was self-employed. When the worker relocated to Perth following the injury she had difficulties maintaining employment as an escort due to her injury. She was brought into conflict with clients, co-workers and employers. She was employed in no fewer than six establishments over a period of two years. On the medical evidence, this history is attributable to the symptoms of the post traumatic stress disorder as they manifested in irritability, alienation, social withdrawal and impatience. The worker's evidence in relation to that symptomatology remained unchallenged. Following the establishment of her present relationship, it was unreasonable to expect the worker to continue in that employment. Against that background, it cannot be said that employment as an escort is reasonably available to the worker."

206. Mr Grant further submitted that "the fact that the worker was forced to undertake employment as an escort upon her return to Perth in circumstances where it was necessary to provide some means of support for herself and her son substantiates the case that there was no other profitable employment reasonably available".

207. The evidence, in my view, supports the following findings of fact in relation to the issue of most profitable employment:

207.1 the most profitable employment reasonably available to the worker between the time she arrived in Perth and the beginning of her

[31] In that case the worker had been employed as a labourer for eight months following an ankle injury. The employer argued that those circumstances represented the amount the worker was capable of earning in the most profitable employment reasonably available to him. The worker gave evidence that he could do the work but that it caused him pain.

present relationship was her employment as an escort earning $300 per week[32] and

207.2 employment as an escort was no longer reasonably available to the worker after 1 January 1999.[33]

208. Accordingly, the employer has failed to discharge the burden of proving that there was profitable employment available to the worker.

The principle of mutuality

209. The employer sought to argue that, in the circumstances of the present case, the *Work Health Act* imposed mutual obligations on the employer and the worker. According to s 75A(1), the employer has the obligation of endeavouring to find suitable alternative employment for an injured worker. So much is clear. However, the employer argued that there was an implied obligation on the worker, in the present case, to notify the employer of her claim within the specified time and not to keep the employer in ignorance of her need to have work made available to her. The employer argued that by reason of the worker's failure to discharge that implied obligation, the employer had been deprived of the opportunity either to assess the position and make appropriate allowances or to provide the worker with suitable alternative employment. In other words, the statutory obligation cast upon an employer by s 75(A)(1) is predicated upon an implied obligation on the part of an injured worker to facilitate an employer's discharge of its statutory obligation.[34] Put another way, a worker must put an employer in a

[32] I note the submission made by Mr Grant at p 36 of his written submission to the effect that whilst there is an argument that the worker was not able to earn $300 per week for the entirety of a period by reason of the disrupted employment history attributable to her injury, "it is open to the Court to find that the most profitable employment available to her yielded $300 per week for the whole period".
[33] As pointed out by Mr Grant, the date of cessation of her employment as an escort is unclear, but it is more probable than not that she ceased working in that capacity between late 1998 and early 1999. The fixation of the date of cessation of employment as 1 January 1999 appears to be both just and convenient in all the circumstances.
[34] See Mr Bryant's oral submissions at pp 184 –187 of the transcript.

position where it is able to consider action pursuant to s 75(A)(1) of the Act.

210. In support of the mutuality argument, Mr Bryant relied upon the decision in *Roh Industries v Trepic* (1989) 52 SASR 158. In that case, which was concerned with the operation of s 67 of the *Workers Compensation Act* (SA), the Court held that an employer's obligation to make suitable work available pursuant to s 67 comes into existence only if the employer is aware or ought to be aware that the worker "is or at least may be partially incapacitated " [35] or "is partially incapacitated".[36] The onus is on the employer to prove compliance with s67, including proof of facts which may operate to negative the obligation to make work available.

211. It is important to bear in mind that the doctrine of mutuality, as Mr Grant points out, "developed primarily in South Australia and New South Wales in the context of worker's compensation legislation that imposed a strict obligation on an employer to provide employment to a partially incapacitated worker. If the employer failed to discharge that obligation, the worker was deemed to be totally incapacitated and the employer was obliged to pay compensation on that basis." [37]

212. The decision in *Roh Industries v Trepic* must be approached and treated in light of the fact that the Court was dealing there with a particular statutory framework, quite different from the statutory structure of the *Work Health Act* (NT).

213. Against that backdrop, Kearney J in *Cleveland v Paspaley Pearling Pty Ltd* doubted that the doctrine of mutuality had any place in the Northern Territory legislation:

[35] Per King CJ.
[36] Per Legoe J.
[37] See p 39 of Mr Grant's written submissions.

> " I have had some difficulty in considering the ambit of the submissions on appeal. The authorities to which I have been referred at pars [62]-[66] are concerned with specific provisions in various Compensation Acts, which have no close counterpart in the *Work Health Act*. I have some doubt as to whether the principle of mutuality is applicable to the Act, but the question would have to be considered in relation to specific provisions."

214. As pointed out by Mr Grant, the principle of mutuality was subsequently addressed by the Work Health Court in *Lindner v Normandy Gold Pty Limited* (2000) NTMC 028:

> "An argument was also raised based on *Cleveland v Paspaley Pearling Pty Ltd* [1999] NTSC 65 that the principle of mutuality is not imported into the provisions of s 75A or s 75B and that s 75B is in fact a requirement to mitigate loss. Whatever may be the relationship between the *Work Health Act* and the principle of mutuality (which I note His Honour Mr Justice Kearney doubts exists) I see no need to import the concept into the determination of this case where the express provisions of s 75B(2) can be applied without the need to import notions of mutual obligation. Indeed the section could be construed to be a legislative expression of the principle to a specific situation."

215. The issue was further addressed in *Tanner v Anthappi Pty Ltd* [2000]NTMC 004 where Mr Trigg SM observed that such notions of mutuality as existed under the *Work Health Act* were confined to the "mutual obligations created in the Act (both on the employer and the worker) with the aim of rehabilitating workers back into the workforce". Mr Trigg SM went on to say that "this is in accordance with what appears to be the general policy of the Act, which is that it is a weekly compensation scheme with ongoing mutual obligations".

216. It is my considered opinion that the principle of mutuality as exists under the *Work Health Act* (NT) is confined to the provisions of s 75A and 75B. Section 75A imposes a unilateral obligation on an employer. It does not impose an obligation on the worker in the way contended by the employer in this case, or in any other way. The worker's obligation is found solely in the provisions of s 75B, which casts an onus on a worker to undertake, at the

expense of his or her employer, reasonable medical, surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, as required by the employer. Of course, the facts of the present case were not such as to require the worker to discharge her obligation pursuant to s 75B.

The alleged failure to mitigate loss

217. In paragraph 22 of its counterclaim the employer alleged that the worker had failed to mitigate her loss, that is to say, she had not actively sought employment and had not been prepared and willing to engage in employment for which she is fit.

218. Mr Bryant made the following oral submissions in relation to this issue:[38]

> Now in respect of the question of any failure to mitigate he loss. That arises of course in respect of the period commencing May 1999 where she makes it very clear in her evidence that she has ceased to be an active member of the labour force. Has no interest in doing so and presently has no interest in doing so. She has also during a period of that time been pregnant and by reason of that matter alone, has not been able to participate in the labour force.
>
> She has an obligation under law in terms of making a claim to mitigate her loss. The deliberate withdrawing from the labour market is not a discharge of that obligation. Her failure to actively seek employment. In this case we of course have no applications at all for employment. No enquiries as to any employment opportunities means the compensation that she is entitled to must be reduced by the level of income that she might otherwise have been able to earn."

219. Mr Bryant went on to explain that was why the material from the Bureau of Statistics had been tendered:

> "…we would contend that at the very least, even allowing for the fact that she has symptoms of post traumatic stress disorder, she would be able to perform what are essentially the basic level of work involving minor work and to that extent and I mean in the terms of

[38] See p 187 of the transcript.

> the award involved, much if indeed any, work concerning calculations…
>
> We would suggest that there are many simple manual labouring jobs that could be done in the community by her and that is why for example there is material for her in terms of the award relating to the hospitality industry, the clerks industry and the retail shoppers industry."

220. Further on at page 189 of the transcript, Mr Bryant submitted as follows:

> " I say that in respect of the period when it is very clear that the plaintiff has quit the labour market and has, for reasons unconnected with the injury, that element is fatal to a claim for loss of earnings. In respect of that, that would apply concerning her period following her cessation of work to become a homemaker. That is as of May 1999."

221. By way of reply, Mr Grant submitted that the *Work Health Act* (NT) does not incorporate a duty to mitigate in the nature contended for by the employer:[39]

> " There is a fleeting reference to the duty to mitigate in *Ansett Australia v Van Nieuwmans* (1999) 9 NTLR 125. For the reasons discussed below in the context of mutuality, any duty to mitigate must be found within the four corners of the legislation and finds expression in s75B of the Act. The effect of a breach of s 75B of the Act is to deem the worker able to undertake the most profitable employment that would be available to her but for the default. There can be no broader obligation. It must be borne in mind that *Van Nieumans* dealt with a failure to participate in a return to work program."

222. I agree with this submission. A worker is only required to discharge his or her statutory obligations. There is not included amongst the statutory duties imposed on a worker by the *Work Health Act* a duty to mitigate loss in the sense contended for by the employer.

223. Mr Grant went on to make the following ancillary submissions:[40]

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[39] See p 37 of counsel's written submissions.
[40] See pp 38-39 of counsel's written submissions.

" Even if there is such an obligation subsisting independently of the terms of the legislation, any assessment as to whether there has been a failure to mitigate on the part of the worker must be conducted on a subjective basis.

As the High Court observed in *Fazlic v Milingimbi Community Inc* (1982) 150 CLR 345 at 350:

'Any assessment of the reasonableness or otherwise of a worker's refusal of treatment must depend upon the worker's state of knowledge at the relevant time. This accords both with good sense and with authority. A worker's choice cannot be said to be unreasonable because he has failed to give effect to facts unknown to him.'

The same principle must apply to any question of a failure to mitigate in the context of the Act. It is clear from the evidence that the worker has genuinely felt herself incapable of engaging in employment. In the subjective sense, there cannot be said to have been a failure by the worker to actively seek employment.

Even on the application of an objective test, such findings are not available on the evidence. The market in which the worker would, prior to her injury, have been expected to seek and find employment was that of an escort, unskilled shop attendant or driver. The former is not reasonably open to her for the reasons detailed above. The impairment of the worker's social and occupational functioning by reason of her withdrawal, irritability and impatience precludes her from the second market. She is now also precluded from the latter market, and indeed any labour market in which she would be required to commute for any distance in any level of traffic, by reason of her injury and consequent incapacity. For the reasons detailed above, the employer has not been able to identify employment for which the worker is both adapted and fit."

224. I also agree with these submissions. Assuming that there is under the *Work Health Act* a general duty on the part of a worker to mitigate his or her loss, I do not believe that the evidence, on either a subjective or objective basis, establishes a failure on the part of the worker to mitigate her loss.

225. Mr Grant went on to make this submission:

"There was also some suggestion in the employer's submissions that the worker should be disentitled to compensation after 1999 on the

basis that she would not have participated in the workforce in any event by reason of her subsequent pregnancy. That matter is irrelevant to the assessment of compensation. Again, any basis for disentitlement or diminution in the amount of compensation payable to the worker must be found in the terms of the legislation. There are only such strictures as are found within the scheme of the Act. The prison example adverted to by counsel for the employer is an exemplar of the fact that such matters must find voice in the Act.[41] If it were not so, the legislature would not have found the need to legislate in relation to workers in receipt of benefits under the Act serving terms of imprisonment."

226. I find myself also in agreement with these submissions. The imprisonment exception is grounded in sound public policy. The same cannot be said of a restriction imposed on account of a worker falling pregnant. In any event, any such stricture must, in my view, have a statutory basis: no such stricture is to be found in the scheme of the Act.

227. Finally, the submission made by Mr Grant at page 39 of his written submissions[42] accords with both common sense and logic, and, in my view, affords an effective answer to the argument advanced on the part of the employer.

228. In my opinion, the employer's assertion that the worker has failed to mitigate her loss cannot succeed for the reasons set out above.

Superannuation

229. That leaves the vexed issue of superannuation.

230. Although I am not bound by the decision of another member of the Work Health Court, I find the reasoning underpinning the decision of Ms Blokland

[41] Section 65A of the Act provides that "a worker is not entitled to be paid compensation under section 64 or 65 during any period the worker is detained in a penal institution within or outside the Territory."
[42] There the following submission is made:
" The danger in the submission made by counsel for the employer is that it assumes that matters and circumstances presenting post-injury in relation to a worker's participation in the workforce would have occurred had there been on injury. It is possible, for example, that had the worker not been involved in the accident she would not have had a child. It is quite conceivably the case that but for the accident the worker would not have suffered alienation and social withdrawal and would have remained in the workforce."

SM in *Smith v Hastings Deering (Australia) Ltd* [2003]NTMC 029 compelling. Accordingly, I agree with Ms Blokland that superannuation forms part of normal weekly earnings for the purposes of the *Work Health Act* and is properly taken into account for the purpose of calculating normal weekly earnings.[43]

The Court's findings

231. I make the following findings, which are based on matters agreed between the parties and derived from the foregoing analyses and resolution of the matters in dispute in these proceedings:

231.1 The worker was a worker at the relevant time

231.2 The worker suffered a psychiatric injury on 9 October 1996 in the course of her employment with the employer.

231.3 The injury suffered by the worker has resulted in an incapacity as defined in s 3 of the Work Health Act, namely, that the worker has a limited ability to engage in paid employment. The worker's injury and continuing psychiatric condition precludes her from engaging in employment involving driving. Due to her condition she would also experience difficulty in travelling to and from work; though the degree of difficulty undertaking employment involving interaction with the public, co-employees and employers.

231.4 The worker's normal weekly earnings immediately prior to the date she first became entitled to compensation are in the amount of $1,120.00 plus superannuation at the rate of 6%, yielding a total figure of $1,189.32.

[43] Since drafting these reasons the Supreme Court has affirmed the decision of Ms Blokland SM in *Smith v Hastings Deering (Australia) Ltd*: see *Hasting Deering (Australia) Ltd v Smith* (unreported) SC (NT) delivered 22 January 2004 per Thomas J

231.5 The date on which the worker was last in the employment of the employer was 18 October 1996. The worker was incapacitated for work as a result of the injury form 19 October 1996 through to 18 April 1997, being the initial 26 week period (s 64 of the Act).

231.6 The worker's normal weekly earnings during the first 26 weeks would have been $30,922.32. The worker earned $2,500 in Kalgoorlie during the month of December 1996, and worked a further 3 weeks during early 1997, earning $300 per week. The worker's actual earnings during those periods were $3,400.

231.7 At all times after 19 April 1997: -

(i) The worker was incapacitated for work as a result of the injury out of which her incapacity arose up to and including the date of the hearing and continuing.

(ii) From 19 April 1997, the worker's normal weekly earnings indexed in accordance with s65(3) of the Act were:

(a) for the period 19 April 1997 to 31 December 1997 - $1,214.01 per week;

(b) for the period 1 January 1998 to 31 December 1998 - $1,270.37 per week;

(c) for the period 1 January 1999 to 31 December 1999 - $1,189.32 per week;

(d) for the period 1 January 2000 to 31 December 2000 - $1,382.02 per week;

(e) for the period 1 January 2001 to 31 December 2001 - $1,431.59 per week;

(f) for the period 1 January 2002 to 31 December 2002 - $1,462.90 per week;

(g) for the period 1 January 2003 to the date of hearing - $1,524.45 per week.

(iii) From 19 April 1997 through to 31 December 1998 the worker was employed intermittently as an escort. When employed, the worker's average earnings were in the order of $300.00 per week. The amount the worker was able to earn in the most profitable employment reasonably available to her during that period was $300.00. During the entirety of the period from 1 January 1999, the amount the worker has been reasonably capable of undertaking if she were to engage in the most profitable employment, if any, reasonably available to her having regard to the matters referred to in s68, is nil.

(iv) The worker's loss of earning capacity for the purposes of s65(1) if the Act is therefore:

(a) for the period 19 April 1997 to 31 December 1997 – 75% of ($1,214.01 minus $300.00) = $685.51;

(b) for the period 1 January 1998 to 31 December 1998 – 75% of ($1,270.37 minus $$300.00) = $727.78;

(c) for the period 1 January 1999 to 31 December 1999 – 75% of $1,327.63 = $995.72;

(d) for the period 1 January 2000 to 31 December 2000 – 75% of $1,382.02 = $1,036.52;

(e) for the period 1 January 2001 to 31 December 2001 – 75% of $1,431.59 = $1,073.69;

(f) for the period 1 January 2002 to 31 December 2002 – 75% of $1,462.90 = $1,097.18;

(g) for the period 1 January 2003 and continuing until varied in accordance with the Act – 75% of $1,524.45 = $1,143.34.

232. It is noted that past medical expenses are agreed in the amount of $596.35.

233. Accordingly, the Court orders that the employer pay to the worker weekly benefits (as calculated above) from the date of termination of the worker's employment to the date of these orders. The Court further orders that the employer pay to the worker weekly benefits (as calculated above) from the date of these orders and continuing until varied in accordance with the Act. The employer is also ordered to pay past medical expenses in the agreed sum.

234. I will hear the parties in relation to any consequential orders as to the amount of arrears, costs and interests.

Dated this 30th day of January 2004 .

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Mr John Allan Lowndes
STIPENDIARY MAGISTRATE