CITATION:	*Ah-Quee v Heytesbury Beef Pty Ltd* [2004] NTMC 095
PARTIES:	AJAY AH-QUEE
	v
	HEYTESBURY BEEF PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Court
FILE NO(s):	20205914
DELIVERED ON:	23 December 2004
DELIVERED AT:	DARWIN
HEARING DATE(s):	19 – 26 March 2004
JUDGMENT OF:	Mr John Lowndes SM

CATCHWORDS:

WORK HEALTH -- COMPENSABILITY OF PSYCHIATRIC INJURY -- AGGRAVATION AND/OR EXACERBATION OF PUTATIVE PSYCHOSIS -- PSYCHIATRIC REACTION TO PHYSICAL INJURY -- RESULTANT INCAPACITY – ASSESSMENT OF THE CREDIBILITY OF A WORKER SUFFERING FROM A PUTATUVE PSYCHIATRIC ILLNESS – CLAIM FOR DEPENDANT CHILDREN BY A WORKER WHO DENIES HAVING CHILDREN – *WOKK HEALTH ACT* ss 3 & 53

Whisprum v Dixon [2003] NCA 48;
State Authority (NSW) v Earthline Applied Constructions Pty Ltd [1999] HCA 3;73 ALTR 30.6 applied
Federal Broom Co Pty Ltd v Semlitch (1964) 110 CLR 626 applied
Darling Island Stevedoring & Lighterage Co Ltd v Hankinson (1967) 117 CLR 19 applied
Kirkpatrick v Commonwealth of Australia (1985) 62 ALR 533 applied
Fernandez v Tubemakers of Australia Ltd [1975] 2 NSWLR 190

REPRESENTATION:

Counsel:

Worker:	Mr Barr QC
Employer:	Mr Southwood QC

Solicitors:

Worker:	Halfpennys
Employer:	Morgan Buckley

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 095
Number of paragraphs:	261

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

No. 20205914

BETWEEN:

AJAY AH-QUEE
Worker

AND:

HEYTESBURY BEEF PTY LTD
Employer

REASONS FOR DECISION

(Delivered 23 December 2004)

Mr LOWNDES SM:

THE NATURE OF THE PROCEEDINGS

1. As disclosed by his amended Statement of Claim dated 16 February 2004, the worker is seeking weekly payments of compensation relating to an accident which occurred on 22 June 1997, arising out of or during the course of his employment. As a result of that accident the worker suffered an injury to his right knee. Further, the worker claims that he suffered a mental injury which was caused by the right knee injury. The worker claims that he is and has been totally incapacitated, or alternatively partially incapacitated, as a result of the injury to his knee and consequent mental injury.

The worker seeks the following relief:

1.1 A determination as to the amount of the worker's 'normal weekly earnings' within the meaning of s49 of the *Work Health Act*.

1.2 Compensation for the past in respect of all periods of incapacity for which compensation has not been paid or fully paid.

1.3 Interest pursuant to s109 of the *Work Health Act*.

1.4 Costs.

2. The worker and employer have admitted the following facts for the purposes of these proceedings:

2.1 At all material times the worker was a worker within the meaning of the *Work Health Act* and was employed by the employer as a general station hand;

2.2 The worker commenced employment with the employer on 19 June 1997 and

2.3 On 22 June 1997 the worker suffered an injury to his right knee arising out of or during the course of his employment.

3. The parties acknowledged that the Work Health Court was bound by the decisions of the Supreme Court in *Hastings Deering (Australia) Ltd v Smith* [2004] NTSC 2; *NT Drilling vMcFarlan* [2004] NTSC 23 which hold that superannuation is to be included in the calculation of normal weekly earnings.[1] In light of the binding force of those decisions, and the pending appeal before the Court of Appeal in *Hastings Deering (Australia) Ltd v Smith*[2] the parties reached the following agreement as to the calculation of normal weekly earnings:

3.1 If superannuation is included in the calculation of normal weekly earnings, the worker's normal weekly earnings were $489.60; but

3.2 If superannuation is not included in the said calculation, then worker's normal weekly earnings were $478.82.

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[1] Note, however, the employer made quite lengthy submissions as to why superannuation should not be included in the calculation of normal weekly earnings: see pp 21-24 of the written submissions of Mr Southwood QC dated 16 August 2004. The purpose of such submissions was "to reserve the employer's position pending the Court of Appeal's decision in *Hastings Deering (Australia) Ltd v Smith*: see p 24 of counsel's written submissions.

[2] That appeal has since been determined by the Court of Appeal which upheld the decision of Thomas J in *Hastings Deering v Smith* (supra).

The indexed value of the amount referred to in (1) above in 2004 is $653.61, while the indexed value of the amount referred to in (2) above in 2004 is $639.22.[3]

4. As is apparent from its Defence dated 15 March 2004, the employer denies the worker's allegation that he suffered a mental injury arising out of his employment. The employer pleads that at all material times (including times predating the injury) the worker has suffered from a paranoid psychosis being either a delusional disorder or paranoid schizophrenia, and that if the worker is incapacitated for work (which is denied) then the worker has been incapacitated for work as a result of his paranoid psychosis. The employer asserts that such a psychiatric condition is not compensable under the *Work Health Act*. Furthermore, the employer denies that the worker is and has been partially incapacitated as a result of his right knee injury and mental injury. Accordingly, the employer denies the relief claimed by the worker.

5. Pursuant to its Counterclaim, the employer pleads that since the worker returned to work on or about 13 October 1997 the worker has ceased to be incapacitated for work as a result of any injury arising out of or during the course of his employment with the employer. Further and in the alternative, the employer asserts that since 4 September 2003 the worker has ceased to be incapacitated for work as a result of any injury arising out of or during the course of his employment with the employer. Further and alternatively, the employer pleads that since the worker returned to work on or about 13 October 1997 the worker has been only partially incapacitated for work and has been capable of earning wages equal to or greater than his normal weekly earnings. Further and in the alternative, the employer claims that since 4 September 2003 the worker has been only partially incapacitated for work and has been capable of earning wages equal to or greater than his normal weekly earnings. Further and alternatively, the employer asserts that since the worker returned to work on or about 13 October 1997 the worker

[3] See p 1 of Mr Southwood's further written submissions dated 22 October 2002.

has been only partially incapacitated for work, and has been capable of earning wages in alternative employment including but not limited to a courier driver, a taxi driver, a console operator, a handyman and storeman. Further and in the alternative, the employer pleads that since 4 September 2003 the worker has been only partially incapacitated for work, and has been capable of earning wages in alternate employment including but not limited to a courier driver, a taxi driver, a console operator, a handyman and a storeman. Further and alternatively, if the worker has been incapacitated for work (which is denied) then such incapacity is as the result of the worker's paranoid psychosis. Any such incapacity is non-compensable. Further and in the alternative, if the worker is incapacitated for work as a result of the condition of his right knee (which is denied), the worker is not entitled to payments of compensation for any such incapacity as any ongoing incapacity of the worker's right knee has been caused by the worker's mistreatment of his right knee including but not limited to his continual wearing of a brace on his right knee.

With respect to its Counterclaim, the employer sought a number of rulings:

5.1 That the worker ceased to be incapacitated for work on 13 October 1997, or alternatively, on 4 September 2003.

5.2 That the worker ceased to have a loss of earning capacity on 13 October 1997, or alternatively, on 4 September 2003.

5.3 In the alternative, that from 13 October 1997, or alternatively 4 September 2003, the worker has been only partially incapacitated for work and a ruling as to the extent, if any, of the worker's loss of earning capacity (which is denied).

5.4 Alternatively, that the worker is incapacitated for work as a result of his paranoid psychosis which is non-compensable pursuant to the *Work Health Act.*

5.5 In the alternative, that the worker is not entitled to payments of compensation pursuant to the *Work Health Act* as his ongoing knee condition (which is denied) and any incapacity caused thereby (which is denied) is the result of the worker's mistreatment of his right knee.

5.6 That the worker ceased to be entitled to payments of compensation pursuant to the *Work Health Act* on 13 October 1997.

5.7 Alternatively, that the worker ceased to be entitled to payments of compensation pursuant to the *Work Health Act* on 4 September 2003.

THE WORKER'S APPLICATION FOR LEAVE TO AMEND THE STATEMENT OF CLAIM

6. Mr Barr QC, who appeared for the worker, sought the Court's leave to amend the relief sought in prayer 2 of the worker's amended statement of claim as follows:

> " 2. Compensation for the past in respect of all periods of incapacity for which compensation has not been paid or fully paid by the employer, *such compensation to be assessed and calculated having regard to the fact that the worker throughout has been the father of 2 children who are 'prescribed children' within the meaning of s65(13) Work Health Act, namely Stephany, born 5 June 1993 and Tiffany Kate born 26 March 1995*."[4]

The basis for the application and the arguments in support of leave being granted are set out at pages 23 – 24 of Mr Barr's written submissions dated 1 July 2004.[5] The employer opposes the application for the reasons set out in the written submissions of Mr Southwood QC dated 16 August 2004.[6]

The application is somewhat problematical, and cannot be properly considered and ultimately determined without undertaking a close and

[4] The proposed amendment appears in italics.
[5] See also pp 4-5 of Mr Barr's written submissions dated 27 August 2004.
[6] Refer to p 21 of those submissions.

careful examination of all the evidence adduced in these proceedings. I, therefore, propose to defer consideration of the application for leave to amend until I have dealt with the worker's Statement of Claim (as presently pleaded) and the evidence relating thereto.

THE ISSUES

7. The following issues arise for consideration in these proceedings:

7.1 Whether as a result of his knee injury the worker was and remains incapacitated for work at all and, if so, what is the extent of any such incapacity for work;[7]

7.2 Whether the worker has suffered and continues to suffer a loss of earning capacity as a consequence of his knee injury;[8]

7.3 Whether the worker's right knee injury and it consequences, including pain, physical incapacity and loss of employment etc caused a mental injury in the form of a psychiatric reaction (severe adjustment disorder with depression, anxiety and paranoid thinking) to the right knee injury;[9]and if so, whether the worker was and is incapacitated for work as a result of such psychiatric reaction and the extent of any such incapacity for work;[10]

7.4 Whether the worker has suffered and continues to suffer from a loss of earning capacity as a result of a psychiatric reaction to his knee injury;[11]

7.5 Whether the worker's right knee injury caused an aggravation and /or exacerbation of the worker's putative paranoid psychosis (delusional disorder or paranoid schizophrenia) by reason of which the worker

[7] See p 1 of the written submissions of Mr Southwood QC dated 16 August 2004.
[8] See again p 1 of Mr Southwood's written submissions dated 16 August 2002
[9] See p 1 of Mr Barr's written submissions dated 1 July 2004.
[10] See p 1 of Mr Southwood's written submissions dated 16 August 2004.
[11] See p 2 of Mr Southwood's written submissions dated 16 August 2004.

suffered and still suffers incapacitating delusions as to pathological processes relating to his right knee, that is to say, delusions as to missing muscles, crumbling bones and internal haemorrhaging;[12] and, if so, whether the worker was and is still incapacitated for work by reason thereof, and the extent of any such incapacity.

7.6 Whether the worker has suffered and continues to suffer from a loss of earning capacity as a result of any aggravation and/or exacerbation of his putative psychiatric condition;[13]

7.7 Whether the worker was and is still incapacitated for work as a result of the combination of his right knee injury of 22 June 1997 and consequential mental injury (either in terms of a psychiatric reaction to the knee injury or an aggravation and/or exacerbation of his psychiatric condition);[14] and, if so, the extent of any such incapacity for work.[15]

7.8 Whether the worker has suffered and continues to suffer from a loss of earning capacity as result of the combined physical and mental injury.

8. The multiple issues arising in this case relate to the nature of the injury suffered by the worker, any incapacity for work arising therefrom (total or

[12] See p 1 of Mr Southwood's written submissions dated 16 August 2004. See also p 1of Mr Barr's written submissions dated 1 July 2004 where counsel for the worker puts the issue thus:

" If the worker developed paranoid psychosis independently of his knee injury – before or after the injury – did his knee injury aggravate, accelerate, exacerbate or cause to deteriorate the worker's putative paranoid psychosis?"

[13] See p 2 of Mr Southwood's written submissions dated 16 August 2004.

[14] See p 1 of Mr Barr's written submissions dated 1 July 2004.

[15] See again p 1 of Mr Barr's written submissions dated 1 July 2004.

partial[16]), periods of incapacity[17] and the amount of compensation that should be paid to the worker

9. Yet a further important issue in this case "is the extent of the worker's pre-injury capacity for work and in particular whether the worker had a limited capacity for work prior to the work injury because of either his anti-social personality or his pre-existing psychiatric injury".[18]

THE EMPLOYER'S ARGUMENT [19]

10. The employer argues that the worker is no longer incapacitated for work (other than work of the heaviest type undertaken by a station hand) as result of the significant injury to his right knee which occurred during the course of his employment on 22 June 1997. The employer argues that the worker's symptoms and disabilities have substantially resolved. Although the worker experiences some residual symptoms as a result of the injury to his knee, those symptoms do not result in an incapacity for the type of work that Mr Ah Quee was capable of performing before the injury.

11. The employer further argues that the worker no longer suffers from a loss of earning capacity as a result of the injury to his knee. The employer says that Mr Ah Quee is able to earn in employment reasonably available to him equal to or more than his indexed normal weekly earnings.

12. There are three theoretical strands to the employer's argument in relation to the worker's psychiatric condition (that is, delusional disorder or paranoid schizophrenia): (1) the condition predates the worker's knee injury; (2) the condition developed independently of the knee injury and (3) the condition

[16] As to the issue of total or partial incapacity see pp 1-2 of Mr Barr's written submissions dated 1 July 2004..
[17] See again pp 1-2 of Mr Barr's written submissions dated 1 July 2004. See also p 2 of Mr Southwood's submissions dated 16 August 2004 where counsel says that the present case raises two issues, namely (1) whether the worker ceased to be incapacitated for work as a result of the knee injury he sustained by 13 October 19997 when he returned to work or alternatively by 4 September 2004 and (2) whether the worker ceased to be incapacitated for work as a result of nay injury arising out of or during the course of his employment on 22 June 1997 by 4 September 2004.
[18] See p 1 of Mr Southwood's written submissions dated 16 August 2004..
[19] See pp 3-4 of Mr Southwood's written submissions dated 16 August 2004.

did not result in any diminished capacity for work having regard to the worker's pre-injury psychiatric condition. There is considerable overlap between the individual strands in the employer's argument, each tending to support the other.

13. The employer argues that any adjustment disorder that the worker may have suffered as a result of the injury to his knee was minor and transient, and therefore has ceased.

14. Finally, the employer argues that the injury sustained to the worker's knee in June 1997 did not cause an aggravation or exacerbation of his pre-existing psychiatric condition of delusional disorder or paranoid schizophrenia.

15. Accordingly, the employer asserts that the worker was not entitled to continuing payments of compensation from 27 December 1997 onwards, except for the brief period he was incapacitated as a consequence of undergoing surgery. The employer says that Mr Ah Quee has no ongoing entitlement to weekly payments of compensation.

16. Consonant with its argument, the employer primarily seeks the following orders:

    16.1 A ruling that the worker ceased to be totally incapacitated for work on 13 October 1997.

    16.2 A ruling that the worker ceased to have any loss of earning capacity as a result of his injury on 13 October 1997.

    16.3 A ruling that the worker is not entitled to ongoing payments of compensation pursuant to the *Work Health Act* (NT) and that he ceased to be so entitled on 13 October 1997.

    16.4 The worker's application is dismissed.

16.5 The employer's counterclaim is upheld.

THE EVIDENCE RELATING TO THE WORKER'S PHYSICAL INJURY ON 22 JUNE 1997 AND POST-INJURY CAPACITY FOR WORK

17. On Sunday 22 June 1997, while the worker was helping to muster cattle riding a motor bike, he was thrown from the bike and injured his right knee. Subsequently, Mr Ah Quee was hospitalised from 26 to 30 June 1997 at Alice Springs under the care of Mr Schmidt, orthopaedic specialist.

The right knee injury consisted of "acute chondral injury to the patella; attenuation of posterior cruciate ligament; damage to articular cartilage flap on the femoral condyle; avulsion facture lateral tibial spine".[20]

Mr Ah Quee underwent arthroscopy at the Alice Springs Hospital on 27 June 1997. That was followed by extensive physiotherapy in Bundaberg.[21]

The employer's insurer (TIO) asked CRS in the Northern Territory to co-ordinate a return to work. As part of his rehabilitation, Mr Ah Quee was given a hinged knee brace to provide general support and lateral knee stability.[22]

Dr Donley (general practitioner) certified the worker fit to return to work.[23] However, the return to work program proved unsuitable for the reasons that follow.

According to the Return to Work program prepared by CRS, Mr Ah Quee was to do "fencing work – driving property vehicle. Alighting from vehicle, using rammer to put fence pickets in ground, standing and walking demands. No squatting, no heavy lifting for full-time or as fencing duties are available".

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[20] See pp 4-5 of Dr Jackson's report (Exhibit W9).
[21] See the report of CRS's Julie Osterberry dated 30 September 1997 (part of Exhibit W23).
[22] See the report of Trevor McLaren (physiotherapist) dated 8 October 1997 (part of Exhibit W 23)
[23] See the report from Crofton Medical Centre (part of Exhibit W23).

On 28 October 1997 the worker reported to Dr Baker that his right knee was sore, made worse by his having to put his right foot awkwardly when walking, causing sharp pains over the medial aspect of his knee.

Subsequently, on 24 November 1997, Mr Ah Quee was assessed by Erica Whitehead, a physiotherapist at Tennant Creek hospital. Ms Whitehead examined the worker's right knee and found it "mildly oedematous (swollen), both intra and extra articular. Flexion 0 degrees to 100 degrees flexion with pain at end of range in the medial aspect of the knee. He complains a 'clunck' within his knee joint as he flexes at 30 degrees and again at 60 degrees. On palpation he was tender over the medial joint line. Gait was compromised at the assessment as he had accidentally kicked a tree stump earlier in the day".

As part of her assessment, Ms Whitehead recorded that Mr Ah Quee "felt that he had deteriorated since his return to work with increased oedema, pain and limp of his right knee". She also recorded that the worker expressed considerable concerns about possible "amputation" or further "total knee reconstruction if his knee did not improve".

On 25 November 1997, Dr Baker reduced the worker's hours of work.[24] However, as pointed out by Mr Barr (at p 8 of his written submissions dated 1 July 2004), it appears that Anthony Lagoon Station closed down from on or about 1 December 1997, resulting in there being no appropriate or available work for Mr Ah Quee.[25]

On 11 December 1997, Mr Ah Quee was reviewed by Mr Schmidt who reported in these terms:

> "To physical examination he has a gross thigh wasting. He can contract his quadriceps but is just able to do a straight leg raise, indicating severe thigh weakness. His patella is irritable, his extension is limited by pain by 5 degrees and he can only flex to

[24] See Dr Baker's report dated 17 December 1997 (Exhibit W23).
[25] See Exhibit W23, CRS Rehabilitation Report dated 27 November 1997.

about 100 degrees before he is limited by anterior knee pain. He has mild medial and posterior instability.

Ajay has a knee which is strong enough to walk only with the aid of crutches. He is unfit for work until such time as he obtains a normal level of strength for the job he has to do.

I feel his return to work protocols unrealistic both with the knowledge of what is required on station work and expectations of what Ajay can do. His medical supervision has been by a visiting medical practitioner to the Barkley homestead which has been agreeing with the rehab protocols."

18. On 16 January 1998, the worker travelled to Darwin where he was seen and examined by Dr Jackson, orthopaedic specialist. Dr Jackson expressed the view that Mr Ah Quee should be referred to an orthopaedic surgeon for further investigations and treatment.[26] Dr Jackson was of the opinion that the worker had sustained a "moderately severe injury" to his right knee, combined with degenerative changes in the medial compartment of the right knee.[27]

19. The worker underwent a second arthroscopy at Royal Darwin hospital on 2 March 1998, which was performed by Mr Baddeley, orthopaedic surgeon. The surgeon reported that Mr Ah Quee had "a complete tear of the posterior cruciate ligament with a tear of the anterior portion of the medial meniscus and some damage to the articular surface on the retropatellar surface".

Evidence was presented to the Court concerning the residual incapacitating effects of the worker's right knee injury, in particular quadriceps wasting[28] and loss of movement.

Dr Jackson gave evidence as to observation and measurement of the worker's right and left thigh muscles as at 21 October 1998:

[26] See Dr Jackson's report dated 21 January 1998 (Exhibit W9).
[27] See Dr Jackson's report dated 3 February 1998 (Exhibit W9).
[28] That is quadriceps muscles in the right thigh.

> "right thigh muscle circumference 47cm, left thigh muscle circumference 50 cm."[29]

This is to be compared with the observation and measurement undertaken by Dr Jackson on 12 June 2002:

> "right thigh muscle circumference 45cm, left thigh muscle circumference 48cm."[30]

According to the report from Professor Ehrlich[31] dated 13 October 2003 (Exhibit W8), "girth measurements reveal the right thigh to be 2-3cm thinner than the left".

20. However, the evidence from Professor Marshall in is in stark contrast to the body of evidence from Dr Jackson and Professor Ehrlich in relation to muscle wasting. Professor Marshall made a statement to the effect that there was no muscle wasting as at 4 September 2003.

21. It is not easy to reconcile the conclusion reached by Professor Marshall[32] with the findings made by Drs Jackson and Ehrlich; however, the evidence given by Professor Marshall under cross-examination may go some way towards explaining the marked divergence in opinion. Professor Marshall's examination was conducted under less than ideal circumstances, that is, with a less than fully cooperative patient.

22. What is significant is that Professor Marshall conceded the possibility that a detectable difference – for example 2-3 cm of muscle wasting of the right thigh - might have been noted at a later time under better conditions of examination and with a more cooperative patient.

23. Professor Ehrlich made the following comments in relation to loss of movement to the worker's right knee:

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[29] See Dr Jackson's report dated 21 October 1998 (Exhibit W9).
[30] See Dr Jackson's report dated 12 June 2002 (Exhibit W9).
[31] Professor Ehrlich examined the worker as a consultant engaged by the employer.
[32] Professor Marshall examined the worker a consultant engaged by the worker's solicitors.

> "The right knee has full extension but there is pain on attempting full flexion and this was not persevered with…"[33]

The Professor went on to express the following opinion:

> "There is loss of some knee movement, some quadriceps deficit and it appears that he has enough internal derangement of the knee joint to stop it from functioning satisfactorily. There may be some underlying progressive osteoarthritis as well, but up-to-date x-rays are required for establishing this aspect of the diagnosis."

24. Following his review of the worker in March 2002, Dr Jackson reported:

> "Mr Ah Quee does remain incapacitated for employment. Given the known pathology in his knee, he must have at least a partial incapacity for employment and, given the known pathology, he is almost certainly not fit to resume work as a station hand…"[34]

Dr Jackson went on to say:

> "…on physical grounds, he should be able to undertake some form of light sedentary work. He would require some restrictions which would include the fact that he should not be required to weight bear on his right leg for any length of time or undertake any running, kneeling, squatting or twisting around…"[35]

Dr Jackson disagreed with the suggestion made during cross-examination that Professor Marshall had found no structural abnormality in the worker's right knee. He said: "…to state that he had no structural abnormality is just not acceptable." Dr Jackson was of the opinion that the knee was not normal and the cruciate rupture would not heal and would be permanent.

25. On the issue of capacity for work, Dr Jackson thought the worker could work as a parts dismantler/caretaker in a caryard. The doctor envisaged Mr Ah Quee living on site in a caravan, dismantling motor vehicles, for example removing mirrors and door handles.

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[33] See Professor Ehrlich's report dated 13 October 2003(Exhibit W8).
[34] See Dr Jackson's report dated 14 March 2002 (Exhibit W9).
[35] See Dr Jackson's report dated 14 March 2002(Exhibit W9).

26. Dr Jackson had some reservations about the worker gardening, as he would not be able to get down on his hands and knees due to the condition of his knee. Although Dr Jackson believed that the worker was capable of performing many aspects of gardening for example riding or sitting on a ride on mower to mow the lawn; but that there were some aspects that he would have difficulty performing.

27. Dr Jackson agreed that Mr Ah Quee would be able to cope with light courier work. He also expressed the view that the worker could do the work of a handyman at a childcare centre.

28. Dr Jackson considered that lifting weights in the range of 10-15 kilograms would be within the worker's physical capabilities. The doctor suggested that Mr Ah Quee could lift 20 kilograms – an upper limit – on a one-off basis, but not repetitively. In his report dated 21 January 1998 (Exhibit W9) Doctor Jackson said that the worker could at least attempt bore maintenance work.

29. Professor Ehrlich was of the opinion that the worker should be able to do sedentary work and also work requiring him to be "up and about", provided that he did not have to climb on difficult terrain, or up steep stairs or ladders. The Professor thought that Mr Ah Quee could do some gardening work which did not involve a lot of shovelling and pushing heavy wheelbarrows. Professor Ehrlich thought that the worker would be able to do light courier work as well as working in a junkyard, provided he did not have to lift heavy gear boxes or perform physically demanding tasks.

30. Professor Ehrlich made two positive findings, namely, pain on attempting full flexion of the right knee and quadriceps wasting.[36]

31. Professor Marshall said that the only work restrictions he would impose were heavy lifting or heavy manual work because of the worker's right knee

[36] See pp 156-157 of the transcript and Professor Ehrlich's report, Exhibit W8.

weakness.[37] He said that heavy lifting should be limited to 10 kilogram weights.[38]

32. Professor Marshall agreed that the worker could do the work of a light courier driver and a car dismantler.[39] The Professor stated that there were no signs of persisting work-related injury effects and that the worker was certainly not incapacitated on physical grounds for employment.[40]

33. There was also evidence from the worker himself as to his physical capacities.

34. Mr Ah Quee told doctors in Cairns that he intended to travel and that he was spending time working on his Volkswagen Camper before embarking on an around Australia trip.[41] Mr Ah Quee informed Dr Brown that he only takes Pandaol occasionally, that he goes fishing for barramundi or spray paints his car.[42] The worker also told Dr Brown that he would probably go to Tasmania and fish for a while.[43]

35. Mr Ah Quee told the Court that he had looked for gardening work at Banka Banka and that he had applied for 6 or 7 other jobs that included station help, station caretaker and driver.[44] The worker also told the Court that he had purchased a boat to repair.[45]

36. On 30 September 1997, Mr Ah Quee told Erica Whitehead at CRS that his pain levels had reduced and that he had recovered right knee function so as to be able to assume the squat position.[46]

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[37] See Professor Marshall's report dated 4 September 2003(Exhibit E14).
[38] See Professor Marshall's report dated 4 September 2003 (Exhibit E14).
[39] See p 36 of the transcript.
[40] See Professor Marshall's report dated 4 September 2003 (Exhibit E14).
[41] See Exhibit E24.
[42] See Dr Brown's report dated 8 March 2004 (Exhibit E15).
[43] See Exhibit E15.
[44] See pp 38-45 of the transcript.
[45] See pp 36-37 of the transcript.
[46] See p 135 of the transcript.

37. As pointed out by Mr Southwood,[47] there is also a body of evidence which shows that since the accident the worker has performed a variety of work:

> "(i) fencing work as part of the worker's return to work program on Anthony Lagoon Station;
>
> (ii) repaired old motors for people on Pamela Vawdrey's property at Watsonville;[48]
>
> (iii) panel beating his car;[49]
>
> (iv) fixed his car wheels;[50]
>
> (v) building a new campervan;[51]
>
> (vi) redoing bearings, bushes and brakes;[52]
>
> (vii) washed the exterior of cars;[53]
>
> (viii) repaired cars including in and under cars in confined spaces;[54]
>
> (ix) used a power drill to fix a number plate to a vehicle;[55]
>
> (x) repaired a solar panel;[56]
>
> (xi) transported goods and bits and pieces;[57]
>
> (xii) spray painting a bull bar and a vehicle;[58]
>
> (xiii) repairing and fitting a bull bar to a motor vehicle;[59]
>
> (xiv) bought and traded motor vehicles;

[47] See pp 15-16 of counsel's written submissions dated 16 August 2004.
[48] See Exhibit 24, p 373
[49] See p 35 of the transcript.
[50] See again p 35 of the transcript.
[51] See p 35 of the transcript.
[52] See p 36 of the transcript.
[53] See p 106 of the transcript.
[54] See pp 106-118 and 304 of the transcript. See also the surveillance video (Exhibit E19).
[55] See p 305 of the transcript.
[56] See p 123 of the transcript.
[57] See p 124 of the transcript.
[58] See Exhibit 19. See also the evidence of William Bacon at pp 302, 303 and 304 of the transcript.
[59] See Exhibit 19. See also the evidence of William Bacon at pp, 302 and 303 of the transcript.

(xv) welded a steel frame and carried the steel frame and sheets of metal from the top of his vehicle to his annex;[60]

38. In addition, there was also the video surveillance evidence (Exhibit E19) which provided a source of objective evidence as to the level of the worker's capacity - or incapacity - for work. Exhibit 19, inter alia, revealed the worker undertaking a number of the activities referred to above or activities of a similar nature.

39. Finally, Mr Bacon, the surveillance agent, gave oral evidence of his observation of the activities undertaken by the worker while under surveillance. His evidence in chief was as follows:

39.1 In 2002 Mr Bacon was asked to conduct surveillance inquiries of the worker.

39.2 At the time he was supplied with a photograph of Mr Ah Quee whom he identified in court during the course of the hearing.

39.3 At that time he conducted surveillance of the worker at the Nook Caravan Park in Darwin on two separate occasions. The first occasion was the period 16 to 21 August 2002. The second occasion was for the period 10 to October 2002. He made contemporaneous notes on both occasions.

39.4 In relation to the surveillance carried out on 17 August 2002 Mr Bacon used two cameras, one being a handheld camera and second being set up in a static position.

39.5 Mr Bacon first sighted the worker on 17 August 2002 at 11.21am. He saw Mr Ah Quee exit his caravan and walk to the toilet block. He saw him subsequently return to his caravan site and then return to the toilet block where the worker appeared to be doing his washing or laundry. Mr Bacon saw Mr Ah Quee hanging his clothing on the

[60] See pp 144 and 312 of the transcript.

communal clothesline adjacent to the toilet block and laundry area. He observed Mr Ah Quee return to his caravan site just prior to 1.00pm where he began to water the grass and gardens about his caravan site. The worker was seen to both stand and on occasions sit down to water certain areas extensively, "tending to walk from position to position and sit down to water".[61] Mr Bacon made further observations of the worker at approximately 11.37am. At that time the worker was seen moving from his caravan site to a concrete car park where he proceeded to rub down a detached bullbar with what looked and sounded like sandpaper. Mr Bacon then saw the worker return to that location and use a spray can to spray paint the bullbar. The worker continued to spray paint the bullbar and then walked to his vehicle and reversed it a short distance. He subsequently returned to the bullbar and lifted a small ladder, placed it to one side and arranged several standard house bricks on a concrete platform. Mr Bacon then observed Mr Ah Quee push the bullbar under a jerry can and begin to rub the bullbar with a wire brush on its lower portion. The worker returned to spray painting the bullbar and he then raised another portion of the bulbar, and placed it on top of a car ramp so that it was raised above the concrete. Mr Ah Quee then continued to spray paint the bullbar. He used a wire brush to prepare the bullbar for spray painting. Mr Bacon said that he next observed the worker at 1.54pm when he put the bullbar upright on the bricks and the car ramp so that it was raised above the concrete. He again proceeded to again spray paint the bullbar. At that point Mr Bacon replaced the static camera tape and left the caravan park.

39.6 Mr Bacon said that he returned to the caravan park at 6.36pm on 17 August 2002. He said that at just before 7.00pm the worker and a companion approached a yellow Patrol. Mr Bacon said that he was

[61] See p 302 of the transcript.

unable to see exactly from his location what they were doing, but he could hear what sounded like a powered sander being operated. Mr Bacon could see Mr Ah Quee moving about the vehicle and talking to his companion, however it was dark at that stage and Mr Bacon did not have a clear view of what they were actually doing. Mr Bacon then departed .

39.7 Mr Bacon said that on 18 August 2002 he again conducted surveillance of the worker. Again he used a handheld camera and a static camera. Mr Bacon saw Mr Ah Quee exit his caravan and walk to the toilet block just after 8.00pm. The worker soon returned to his vehicle, entered it and drove off. The worker did not return to the caravan park until after 10.00am. He and another male inspected the bullbar. The worker then used what appeared to be sandpaper to rub the body of the vehicle near the front left wheel for about two minutes. He did that alone, without the assistance of the other male. Mr Bacon then saw the worker sit down on a stool and continue to rub the side of the vehicle with the sandpaper for the next nine minutes. Mr Ah Quee then walked to his caravan and returned with a can of spray paint with which he sprayed the side of the vehicle, which he had earlier prepared. That lasted about two minutes. Mr Bacon then observed the worker walk around the far side of the vehicle. Although Mr Bacon could not see what the worker was doing, he heard him spray painting the other side of the vehicle. Mr Bacon then saw Mr Ah Quee walk back to the left side of the vehicle and sit down on his stool, continuing to spray paint that side of the vehicle, which was visible to Mr Bacon. Mr Bacon then saw the worker walk around to the far side of the vehicle where he laid down. At just after 11.00am, he was seen underneath the vehicle, spray painting while laying on the ground or along the side of the vehicle. Mr Bacon next saw the worker stand up and move to the rear of the

vehicle where he again laid down on the ground, apparently spray painting the underside of the vehicle. The worker stood up again and walked around to the rear of the vehicle where he again laid down. At that point Mr Bacon moved into position to observe the worker's expected departure. The worker had moved around to the driver's side of the vehicle, but at 11.16am Mr Bacon again observed Mr Ah Quee laying down at the left side of the vehicle. The worker then sat up again. At about 11.12am Mr Bacon had observed the worker standing up and clutching his left knee as if he was in pain. Mr Bacon said that it was at 11.23 am that he saw the worker standing at the back of the patrol. However, he could not see him on the right side of the vehicle when he walked around. Mr Bacon said that the rear doors of the patrol were open. The worker was standing at the rear of the vehicle; however Mr Bacon was not "100% sure what he was doing back there, he appeared to be engaged in some sort of activity",[62] but he did not know what that was. Mr Bacon's next observation of the worker was that he returned to his van at about 11.40am and subsequently at 12.13pm he returned to the rear of his vehicle and examined the back of that vehicle. The worker then walked to the front of his van and returned, trailing an extension cord behind him. Mr Ah Quee was seen to walk around the vehicle again. The worker was observed holding a power drill which he used to affix a number plate above the rear of the vehicle, up near the roof. Mr Ah Quee spent about 13 minutes performing that activity. Mr Bacon stated that the worker then walked back to his van and about five minutes later returned to the vehicle where he continued affixing the number plate. Mr Bacon said that he did not leave the surveillance site until 8.45pm that day. Between 1.03pm and the time he left Mr Bacon did not make any further observations of the worker.

[62] See p 305 of the transcript.

39.8 Mr Bacon again conducted surveillance duties on 19 August 2002, commencing at 5.30am. Once again a handheld camera and a static camera were used. Mr Bacon said that he did not see the worker directly that day. He said that on that day film was taken by static camera which he retrieved at the end of the day.

39.9 Mr Bacon said that he next conducted surveillance of the worker on 12 October 2002. Both a handheld camera and a static camera were used that day. On that day Mr Bacon first saw the worker at approximately 9.30am. He was observed at that time speaking to another resident of the caravan park. Mr Ah Quee was next observed walking around the rear of his vehicle, driving his vehicle and then reversing it up to the annex to his caravan. Although he could not see him directly, Mr Bacon said that Mr Ah Quee appeared to be pushing a sheet of steel onto the grass from the annex. The sheet of steel was taken from the roof of the worker's vehicle. Mr Bacon said that he observed the worker and another resident of the park move the sheet of steel underneath the annexed area of his vehicle. The worker and the other person were seen carrying from the annexed area a large welded steel structure, like a set of shelving. They carried it towards the grassed area. The worker was later joined by a third male, an elderly resident of the caravan park. The three of them flipped the sheet of steel over and then carried it underneath the annexed area. The three of them were next seen carrying the metal frame back underneath the annexed area. Mr Bacon was not able to discern why the metal frame and the sheet of steel were carried to that location because "the claimant's caravan area had a number of blue tarps set up, so I had restricted view of underneath there".[63] Next, Mr Ah Quee was observed removing the sheet of steel from the top of his vehicle and carrying it over his head back underneath the annex. As to any

[63] See p 312 of the transcript.

further observations made of the worker on 12 October 2002, Mr Bacon said: "The claimant spent some time watering the area whilst sitting down largely, then by 1 o'clock or 1.00pm he parked his vehicle parallel to the road in front of the annexed area and I saw the claimant removing a black case – a small black case of some kind from the back of his vehicle and taking it into the annexed area. Subsequently on 12 October 2002, Mr Bacon saw the worker going to and from the toilet/shower block area.

40. During cross-examination Mr Bacon gave the following evidence.

41. Mr Bacon acknowledged that on 18 August 2002 at 11.12am he noted as follows: "The claimant rolled onto his hands and feet, he then straightened his knees and pushed up with his hands. The claimant then held his knees briefly while leaning possibly because of pain before he walked with an obvious limp around the rear of the Patrol." Mr Bacon agreed that Mr Ah Quee was holding both of his knees, and not just his left knee.

42. Mr Bacon agreed that the metal sheeting that was moved on 12 October 2002 could be described as "light metal sheeting". He went on to say that it was a thin piece of steel sheeting.

43. The witness said that the long straight members forming part of the steel structure which was being carried by the worker with the assistance of another male would probably have been no larger than an inch or two. He went on to concede that they possibly could have been less than an inch by inch.

44. During re-examination, Mr Bacon said that on 16 August 2002 he saw the worker go to the toilet block and return. On 20 August he observed the worker spending some time late morning watering his yard around the block. In the late afternoon he saw Mr Ah Quee retrieving a shifter from his vehicle. He added that he saw the worker depart in his vehicle, walk within

the caravan park presumably to some other site and return to his vehicle for several periods of time. Mr Bacon said that on 21 August 2002 he saw the worker in the morning sitting at the footstep of his caravan. He left the surveillance site at 12.30pm. On 11 October 2002 at about lunchtime, Mr Bacon said that he could hear "the sounds of sawing or a similar sound coming from within the annexed area".[64] He went on to say that he could hear what sounded like the sawing of wood. He went onto add: " hand sawing and at about 1 o' clock he exited his annexed area and washed his legs with a hose, and I saw him have a cigarette at that time and the claimant carried a stool and sat down just partially in my view so I was unable to determine exactly what he was doing at that time, he was just sitting down". Finally, on 11 October 2002 Mr Bacon observed the worker at about 2.00pm carrying a bag of rubbish over towards the toilet block area. For the rest of the day he did not observe much activity on the part of the worker. Mr Bacon said that he did not see Mr Ah Quee on 13 October 2002, but heard sounds of cooking and possibly a radio or TV coming from inside his caravan. However, he did say that the worker drove from the caravan park at about 6.30pm and returned at about 7.30pm, carrying two white plastic shopping bags. As for 14 October 2002, Mr Bacon did not see Mr Ah Quee.

45. Finally during re-examination, Mr Bacon was asked whether he observed any other occasions (apart from 18 August 2002 at 11.18am) when the worker was holding his knees and apparently in pain. Mr Bacon replied that he did not see the worker on any occasion clutching his knees in that way; however, he said that the worker "almost always walked with a distinctive limp at times".[65]

[64] See p 318 of the transcript.
[65] See p 318 of the transcript.

THE EVIDENCE CONCERNING THE WORKER'S PRE-INJURY PERSONALITY, PSYCHIATRIC STATE AND CAPACITY FOR WORK

46. Before turning to an examination of the evidence relating to the worker's mental injury – defined either in terms of a psychiatric reaction to the physical injury or a aggravation and/or exacerbation of a paranoid psychosis – it is useful to examine the evidence relating to the worker's pre-injury personality and psychiatric state, so as to put the alleged mental injury in proper context and to enable a proper consideration of the employer's argument in relation to the psychiatric aspects of the worker's injury.

47. The evidence shows that in the several years prior to the accident at work on 22 June 1997, Mr Ah Quee's mental state was not such as to incapacitate him for work. In particular he was able to obtain employment with the employer and was working in that employment at the time of the accident. However, Mr Ah Quee did present with a history of some symptoms and episodes of mental illness with one instance of mental illness (with physical symptoms) which required him to be admitted to hospital. The evidence also indicated that during his teens, Mr Ah Quee spent time in a mental hospital or institution as a result of having sniffed paint or inhaled some other deleterious substance, such as glue – although this was vehemently denied by the worker. The worker had a substance abuse problem, having either sniffed petrol or butane gas. Consequently he was placed in the WHOS institution for the period 27 December 1984 to 15 February 1985.[66]

48. Exhibit 24 (p 8) revealed the following admission or presentation which provides some insight into the state of the worker's mental health prior to the date of the accident :

> "16.1.92 'Psych Assessment of worker at Maryborough Hospital, following history of severe pain from herpes zoster opthalmics, (exh W16) which had required hospital admission and treatment: - 'Personality disorder with impulsivity, extreme defensiveness and (I believe) psychotic potential."

[66] See p 85 of the transcript.

The same exhibit (p 75) provided further insight into the worker's pre-accident mental state:

> "22.02.93 Transferred to Royal Brisbane after referral from Hervey Bay Hospital – gradual onset of right-sided weakness after appendicectomy ('… no response to painful stimuli to R arm and leg'), with pattern of weakness and distribution of numbness not consistent with organic disease. Diagnosis of conversion disorder made by Dr Joan Lawrence, psychiatrist. The worker rapidly recovered."[67]

49. Exhibit 24 (p 411) provided yet further information in relation to the worker's mental state:

> "27.3.95 Worker (now employed as groundsman and handyman for 'Able Little Learners') recently denied access to daughter. Court order. Recent upset at work (GP Dr's notes) 'Teary++depressed ++', 'no formal thought disorder'. Major depression."

50. There is a body of expert evidence which shows that prior to the work related injury the worker had an anti-social personality and had suffered from paranoid schizophrenia.[68] The worker also suffered from a personality disorder, conversion disorder and major depression. Mr Ah Quee hated people[69] and often had to escape, that is, get away by himself.[70]

51. Following a psychological assessment conducted on 16 January 1992 the worker was found to have a personality disorder with impulsivity and extreme defensiveness. The worker was also found to have a potential for developing psychosis. According to Exhibit 24, Maryborough, p110), it was suggested that the worker leave home.

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[67] See also the evidence of Dr Lawrence who confirmed that the worker was suffering from a classic conversion disorder, the symptoms of which are not intentionally produced or feigned, as distinct from conscious malingering. Note the acceptance by Dr Brown, during cross-examination, that conversion symptomatology is typically of short duration, and that in the case of persons hospitalised with conversion disorder, the symptoms will in most cases remit within 14 days.

[68] See Professor Yellowlees' report dated 4 April 2004 (Exhibit E10). See also Dr Kenny's oral evidence at page 320 of the transcript confirming that mental health history.

[69] See p 9 of the transcript.

[70] See p 81 of Exhibit E24.

52. Following an appendectomy that was performed on 14 February 1993, Mr Ah Quee presented at Maryborough hospital with a strange paralysis of his right side. Exhibit 24 (p 27) reveals that the worker was hyperventilating and complaining that he appeared to have lost consciousness. The worker was transferred to Brisbane where he was initially kept under observation and eventually transferred to the hospital's psychiatric ward. There, Dr Lawrence reached the following diagnosis: impairment disorder, gross unmet dependency needs, denial, secondary gain from avoiding conflict with wife, probable hostility towards mother and [questionably] gain from social security.

53. During the period 27 to 30 March 1995 Mr Ah Quee sought and received treatment from Dr Burrows, a general medical practitioner in Queensland. The doctor diagnosed the worker as suffering from major depression. Mr Ah Quee was either considering or wishing to harm his wife. Consequently, Dr Burrows had prescribed aropax and serapax.[71]

54. Dr Kenny gave evidence as to the worker's psychiatric profile prior to the accident. He was of the opinion that the worker's medical history was not only consistent with a person who has had a long standing mental disturbance in terms of personality and behaviour but also consistent with a diagnosis of paranoid schizophrenia.[72] At page 321 of the transcript Dr Kenny expressed the opinion that Mr Ah Quee may have been able to cope mentally prior to the accident, "but he was sort of on the fringe".

55. The evidence shows that Mr Ah Quee was during his early years in the care of the Salvation Army and Catholic priests. Apparently, he had been found work by either the police or priests. Mr Ah Quee had attempted to get into and remain in the Army Reserve but had failed.

[71] See Exhibit 24 Torquay family practice, p 411.
[72] See p 322 of the transcript.

56. The Court was given a history of the worker's relationship with other persons – both in a domestic and employment context – over the years prior to the work related injury.

57. During late 1991 and early 1992, when he was aged 23 years, the worker lived with his mother. On 22 December 1991 she tried to get her son psychiatric help. According to Exhibit E24 (p192) she had told Maryborough hospital that her son had been confabulating, was unable to keep his job and was acting strangely at home. Again according to Exhibit E24 (p110) the mother had reported that her son had manipulative control over her. Furthermore, the evidence is that on 12 February 1993 the worker was discharged from Hervey Bay hospital into the care of his mother.[73]

58. Evidence was adduced as to the worker's relationship with Pamela Vawdrey. Mr Ah Quee appears to have gone where she obtained work, for example Anthony Lagoon Station. Ms Vawdrey and the worker ended up living on her 75 acres near Watsonville, Qld while she worked as a cook in a local pub.[74]

59. Then, there was the evidence relating to Mr Ah Quee's relationship with two of his employers, Able Little Learners and Pitstop.

60. At page 76 of the transcript, the worker gave the following evidence:

> "I was living with the Whiteheads and Ms Anderson at Hervey Bay and in their place at the Gold Coast."

61. Karen Whitehead gave the following evidence concerning her relationship with the worker:

> "…I told him to go back to Bundaberg because we were paying him, he was losing most of his wages that we paid him to child maintenance, and Paul and I were supporting him accommodation and a house that we had in Hervey Bay, we couldn't do it long term.

[73] See p 242 of Exhibit 24.
[74] See p 345 of Exhibit E 24.

> …he lived with us there at 10 Ben Street and he also lived with us on the Gold Coast."[75]

At p 256 of the transcript she gave this additional evidence concerning the worker:

> "He lost interest in himself for a period of time when we had him on the Gold Coast and after when he started to work for us, he took – we had his hair cut and he started to shower more regularly and he was very tidy and then he went – he just deteriorated."

62. The worker gave this evidence as to his relationship with Pitstop:

> "what I can remember of Pitstop was Mrs McDonald would deliver my pay packets once a week and I would work on a Tuesday and I actually lived with Mr McDonald's brother out on the coastline there because I used to go fishing out there a lot and either – it was just more economical to live where his brother was.
>
> …as far as I can remember I'd have a set amount of cars to do on Tuesday and if I took 30 hours to do that set amount of cars 12 or 5 hours, then I stayed until it got done and then I went fishing because I was on x amount of dollars per hour and if I worked a 30 hour day, well there is $300 just for that one day and if it went overnight and into the next day as long as I had not had my quota for that week done."[76]

THE EVIDENCE CONCERNING THE WORKER'S MENTAL INJURY

63. Before embarking upon an examination of the evidence referable to the "mental injury" aspect of the worker's claim, it is useful to set out the state of the pleadings in relation the "mental injury" issue.[77]

Amended Statement of Claim paragraphs 10 and 11

> "The worker subsequently suffered a mental injury arising out of his employment with the employer.

[75] Refer to p 255 of the transcript.
[76] See p 193 of the transcript.
[77] This approach was taken by Mr Barr at pp 12 –13 of his written submissions dated 1 July 2004.

Particulars of mental injury

> Severe adjustment disorder with depression, anxiety and paranoid thinking, caused by the right knee injury, in that it was a psychiatric reaction to the right knee injury.
>
> The worker is and has been totally, alternatively partially incapacitated as a result of his right knee injury and mental injury."

Employer's Answer to Amended Statement of Claim and Employer's Counterclaim paragraph 10

> "The employer denies the allegations pleaded in paragraph 10 of the Claim as if each were set out seriatim and specifically denied. Further, the employer pleads that at all material times (including times predating the injury) the worker has suffered from a paranoid psychosis being either a delusional disorder or paranoid schizophrenia and that if the worker is incapacitated for work (which is denied) then the worker has been incapacitated for work as a result of his paranoid psychosis. Such a psychiatric condition is not compensable under the *Work Health Act* or at all."

Worker's Reply to Employer's Answer paragraph 2

"Further, as to paragraph 10 of the Answer, the worker says as follows:

2.1 The worker does not admit that at all material time (including predating the injury to his right knee) he has suffered from a paranoid psychosis as alleged, whether characterised as Delusional Disorder or Paranoid Schizophrenia.

2.2 If the worker suffered from a paranoid psychosis predating the injury to his right knee, same did not incapacitate him for work, and in particular for the work duties admitted in paragraph 3 of the Answer, namely mustering, stock handling in the yards and transporting cattle by truck, in the period 19 June to 22 June 1997.

2.3 If the worker suffered from a paranoid psychosis predating the injury to his right knee, whether characterised as Delusional Disorder or Paranoid Schizophrenia, then further or in the alternative to the

mental injury pleaded in paragraph 10 of the Amended Statement of Claim, the right knee injury caused an aggravation and/or exacerbation of the worker's paranoid psychosis whereby the worker commenced to suffer and still suffers new and incapacitating delusions as to pathological processes occurring within his right knee, namely, delusions as to missing muscles, crumbling bones and internal haemorrhaging.

Such aggravation and/or exacerbation of the worker's paranoid psychosis is at law an injury to the worker arising out of his employment with the employer."

Employer's Counterclaim paragraph 20

"Further and alternatively, if the worker has been incapacitated for work (which is denied) then such incapacity is as the result of the worker's paranoid psychosis. Any such incapacity is non-compensable."

Worker's Defence to Counterclaim paragraph 11

"The worker denies the allegations contained in paragraph 20 of the Counterclaim. The worker refers to the matters pleaded in paragraph 10 of the Amended Statement of Claim and paragraph 2.3 of the Reply above and says that his incapacity is as a result of :-

11.1 the physical injury to his right knee, psychologically accentuated by the worker's severe adjustment disorder with depression, anxiety and paranoid thinking; further or alternatively

11.2 the worker's paranoid psychosis as aggravated and/or exacerbated by the worker's right knee injury and the consequences thereof.

The worker's overall incapacity is compensable under the *Work Health Act*."

64. I now proceed to set out in some detail the expert evidence relating to the worker's alleged mental injuries

65. Dr Kenny (whom Professor Yellowlees acknowledged to be "a particularly experienced and competent psychiatrist") examined the worker as a consultant engaged by the employer. The worker was seen by Dr Kenny on three separate occasions, being 7 December 1998, 25 February 2002 and 31 August 2003. Dr Kenny prepared five reports concerning Mr Ah Quee, all of which were tendered as Exhibit W7.

I propose to deal with the various observations and opinions which appear in those reports before proceeding to outline the oral testimony of Dr Kenny.

66. In his report dated 22 December 1998 (part of Exhibit W7), Dr Kenny said that he was fairly sure that Mr Ah Quee was suffering from a paranoid schizophrenic illness. He was inclined to the view that the knee itself was "sufficient to render him unfit for any of the sorts of employment of which he would be capable were it not for his injury". Dr Kenny went on to say:

> " …I believe that this man has a significant physical problem and that it is sufficient to render him unemployable… he has a physical problem and that it is probably going to continue to bother him, to render him unfit for manual work, and therefore leave him unemployable".

67. In the same report Dr Kenny stated:

> " …I believe it is most likely this man has a significant underlying psychiatric condition, that he is somewhat grandiose, paranoid and I believe that the litigation process provides a focus for him and inflames his paranoid thinking.
>
> The litigation process is an extremely powerful agent in its own right in participating paranoid thinking and in this man, I believe that it has certainly contributed."

68. In his report dated 25 February 2002 Dr Kenny said that he did not think the worker was deliberately fabricating and he stood by his assertion that the

worker probably suffers from an underlying schizophrenic illness. However, the doctor entertained some reservations about the diagnosis because of his awareness of the ways in which the litigation process can complicate a person's presentation.

69. In the same report Dr Kenny stated:

> "Indeed whether or not he has this underlying schizophrenic illness that I believe him to have his litigation process has become the focus of his concern. In this way the whole litigation process is clearly inflaming the situation to a great extent."

70. Dr Kenny went on to say that Mr Ah Quee had suffered a significant knee injury and it was easy to lose sight of that in view of his overall presentation. He added:

> "I accept that he has continuing problems at least in his knees but I suspect that there is a major functional psychological accentuation of those difficulties."

71. Later in the same report, Dr Kenny opined:

> "I am also inclined to accept that the symptoms he has as a result of that in themselves are sufficient to restrict the forms of employment of which he would be capable but, of course, I refer to those more versed in physical medicine on that issue.
>
> But, I do make the point that his psychiatric status would make it very difficult for him to find employment. Indeed, it may well be that his psychiatric problem shifts him from being fit only for light work to being unemployable.
>
> Now, any accentuation of his psychiatric problem/state is a complication of the litigation process… in which he has become enmeshed since his injury."

72. Finally Dr Kenny said:

> "The injury itself has probably made a minimal – if – any contribution to the aggravation or development of his psychiatric status.

> Any aggravation is due to his involvement in this legal process, his concerns about being unreasonably paid, unreasonably looked after etc…
>
> … the incident caused him a physical injury which restricts his ability to do ordinary employment and his psychiatric status massively interferes with the process of his rehabilitation and the possibility of obtaining alternative employment."

73. In his report dated 31 August 2003 Dr Kenny adhered to his diagnosis of underlying schizophrenic illness.

74. He said that had no idea of how much the history that was given to him by Mr Ah Quee was true. He said, however, that he was not suggesting that the worker was deliberately misrepresenting, but the worker had delusional beliefs, and it was difficult to separate the truth from the delusional material.

75. Dr Kenny was sure that any physical problems the worker had were "accentuated by his psychological reaction determined by the compensation process and the frustrations that so commonly arise therefrom…"

76. The doctor believed that although the worker was unfit for manual work he was from a purely physical point of view capable of doing a reasonable range of other work. However, given his attitude, his behaviour and underlying psychiatric problems, Dr Kenny considered the possibility of him obtaining other work was minimal.

77. In his report dated 5 September 2003, Dr Kenny again diagnosed the worker as suffering from an underlying schizophrenic illness.

78. The doctor went on to say:

> "Well there is a physical problem outside my area of expertise. I think he has an underlying schizophrenic illness, but I suppose we would have to describe his psychiatric reaction as a severe adjustment disorder with depression, anxiety and paranoid thinking, complicating his overall presentation."

79. Towards the end of his report, Dr Kenny said that, in light of the worker's psychiatric condition, he was unable to make any recommendations as to suitable work that Mr Ah Quee might be able to undertake. As to any workplace duties that the worker could/could not perform given his current psychiatric condition, Dr Kenny responded thus: " I say this man is completely unemployable in view of his psychiatric status at this stage."

80. In his final report dated 24 September 2003, Dr Kenny expressed the view that the worker demonstrated "longstanding psychiatric problems with underlying personality disorder and most likely a paranoid schizophrenic illness – or at least delusional disorder"

81. In his oral evidence, Dr Kenny said that the term "adjustment disorder" simply refers to a person's reaction to a given situation.[78]

82. Dr Kenny was of the view that the worker had an underlying paranoid schizophrenic illness.[79] He went on to say that Mr Ah Quee's reaction to the overall situation was, in fairly arbitrary terms, due 50% to the physical injury and 50% to the compensation/litigation process.[80]

83. When referred to various references in his reports to a suspicion that the worker had a pre-existing paranoid illness or delusional illness, Dr Kenny gave the following evidence:

> "…it's more than a suspicion. I think it almost goes as far as to say beyond reasonable doubt. The only reason I've expressed a qualification reservation about, is that I have not – I don't have clear evidence for how he was functioning beforehand. Extrapolating back from the nature of his condition, I'd be astonished if he didn't have severe and continuing and pre-existing psychiatric disturbance."[81]

[78] See p 111 of the transcript.
[79] See p 111 of the transcript.
[80] See p 111 of the transcript.
[81] See p 112 of the transcript.

84. Dr Brown's view that the worker's paranoid predisposition resulted in an exaggerated reaction on the part of the worker to his injury and subsequent events was put to the doctor. In relation to that Dr Kenny said:

> "…I think it's reasonable to consider that in the light of his paranoid – his schizophrenic illness, I think it's probably reasonable to consider that his physical injuries may loom somewhat large and become the focus of his paranoid thinking. I think that's the way I would like to formulate that. But you can formulate this in a whole lot of different ways. It's one of the interesting, difficult issues here."[82]

85. In relation to his reference in one of his reports to "psychological accentuation of the physical injury" Dr Kenny said that "that's another way of saying the same thing".[83]

86. Dr Kenny gave evidence to the effect that in the case of psychologically accentuated knee symptoms, they are real to the sufferer.[84]

87. Dr Kenny was asked what he thought of Dr Brown's dismissal of the possible diagnosis of "adjustment disorder with depression and anxiety". Dr Kenny replied thus:

> " … I don't have any concern about that. The term adjustment disorder is basically a term and as far as I am concerned enables us to tie part of the reaction into a certain situation. I'm certainly not saying that adjustment disorder is his major problem… But I think that it is reasonable to consider in someone like Mr Ah Que, who has an underlying severe psychiatric disturbance, may have other psychological problems complicating the injury that precipitates him into the situation. So far as I'm concerned it's a logical issue. I don't have particular concern if Dr Brown doesn't like the term, doesn't use it. …I think it's an academic issue…of little significance."[85]

88. Dr Kenny was asked that when he ascribed the label "adjustment disorder with depression and anxiety" to the worker's condition did he have any

[82] See p 122 of the transcript.
[83] See p 112 of the transcript.
[84] See p 112 of the transcript
[85] See p 112 of the transcript.

evidence or signs of depression. The doctor said that there he observed the following:

> "depression in his presentation…certainly a lowering of his mood…a sense of helplessness and hopelessness…not alternating with, but mixed up with all this hostility and paranoid thinking…he was leading a depressed and depressing life style by this stage… there was a considerable element of depression."[86]

89. At page 113 of the transcript, Dr Kenny said that people who suffer from delusional illnesses can be depressed as well as being ebulliently happy from time to time.

90. Dr Kenny gave the following evidence as to the distinction between delusional disorder and paranoid schizophrenia:

> " …whether the two things are legitimately different, I think is uncertain. But the concept of delusional disorder refers basically to the presence of pure delusions that are not bizarre. So, you know, you might have a delusion – the classic one of course is the delusional disorder that occurs in a jealous man with his wife. You have a delusional disorder, for example, believing his wife has affairs and so on. …once a person with that moves beyond those sorts of delusions, which are sort of understandable, into the bizarre ones, such as Mr Ah Quee had where he believed that the United Nations was going to come to the Northern Territory and deal with his problem, but he thought he would die before that. I think we're getting into the bizarre. And I think it's more appropriate then to see that as delusions occurring in a setting of paranoid schizophrenia. So if the bizarre quality of the delusions, in this sort of situation , that's shifted into a diagnosis of paranoid schizophrenia. If as well, you have some auditory hallucinations, and as far as I concerned, there's no evidence of that with Ajay Ah Quee then the diagnosis becomes clearer."[87]

91. Dr Kenny said that Dr Brown had come down on the side of a paranoid schizophrenic illness with delusions in that setting.[88]

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[86] See p 112 of the transcript.
[87] See p 113 of the transcript.
[88] See p 113 of the transcript.

92. The doctor told the Court that he had noticed a marked difference between the worker's presentation when he examined in 1998 and when he saw him in 2003.[89] The first time he saw Mr Ah Quee his delusions were most bizarre and it was then he made a diagnosis of paranoid schizophrenia. As` to subsequent observations Dr Kenny gave the following evidence:

> " …his delusional material and I assume it's delusional, included such things as bleeding into a joint and delusion about his own health….that could be consistent with just a delusional disorder. But…his presentation on the second and third times, was less extreme and I have to say, the last time I saw him, I thought there was more of a depressive affect in his presentation than there been on the other occasions."[90]

93. Dr Kenny said that on the last occasion he saw the worker he was considerably less aroused and much less aggressive or hostile.[91]

94. Dr Kenny agreed that the worker insisted that his knee had got worse and complained of osteoarthritis, osteoporosis and continuing haemorrhage in the knees, taking blood from the liver and other organs.[92] Dr Kenny was then asked to what extent these delusions (assuming them to be delusions) affected the worker's ability to cope with his injury. He gave this evidence:

> "Well he genuinely believes those things…adversely affects his ability to cope with his injury, but more particularly, in terms of co-operating with anything that he sees as rehabilitative, I think is a problem. And I think that's the real difficulty with those beliefs."

95. At pages 114-115 of the transcript Dr Kenny gave the following evidence:

> "…there's three possibilities, basically. One is that he has a severe injury and is restricted as a result. Another one is that he has no injury and isn't restricted. Another one and a very common one, is that he has some minor injury and his participation is accentuated by his psychological belief, if you like, that his symptoms – that makes his symptoms more severe….there's s fourth one … that the patient

[89] See p 113 of the transcript.
[90] See p 114 of the transcript.
[91] See p 114 of the transcript.
[92] See p 114 of the transcript.

> is lying … if there is a psychological accentuation underlying the physical condition, it certainly doesn't make the underlying physical condition easy to treat. In fact a psychological accentuated physical condition is probably much closer to being untruthful than a severe physical problem. That's not because he's not genuine in his presentation."

96. During cross–examination, Dr Kenny agreed that in relation to the assessment of Mr Ah Quee's three factors were essentially at play: (1) the knee injury itself; (2) an underlying predated psychiatric condition and (3) a possible adjustment disorder following the injury.[93] The doctor also agreed that the underlying or predated psychiatric condition is likely to be paranoid schizophrenia or some delusional disorder close to paranoid schizophrenia.[94] In that regard he agreed with Professor Yellowlees about the worker's pre-existing or underlying paranoid schizophrenia and that the worker's pre-injury behaviour was consistent with the formulation of paranoid schizophrenia.[95]

97. Dr Kenny believed that Mr Ah Quee's adjustment disorder was not a major problem and was secondary to other issues.[96]

98. In relation to the paranoid schizophrenia or the delusional order Dr Kenny agreed that the worker was not a good historian.[97] He also agreed that Mr Ah Quee was unable to precisely date when that condition occurred.[98]

99. The doctor also agreed that it was unclear whether that condition was of itself disabling, though he said that was likely to have been.[99] Dr Kenny suggested that Mr Ah Quee may have been able to cope but he was sort on the fringe until his accident.[100] However Dr Kenny said that had no idea of

[93] See p 320 of the transcript.
[94] See p 32 of the transcript.
[95] See pp 320, 322 of the transcript.
[96] See p 321 of the transcript.
[97] See p 321 of the transcript.
[98] See p 321 of the transcript.
[99] See p 321 of the transcript.
[100] See p 321 of the transcript.

how well the worker was functioning or not functioning due to the lack of an adequate history from the worker.[101]

100. On the assumption that the worker had a substance abuse problem, for the period December 1984 - February 1995 was in house with an organisation "We Help Ourselves", obtaining substance abuse counselling, had a personality disorder together with a psychotic potential in 1992, was admitted to hospital in 1993 where he was diagnosed as suffering from a conversion disorder, and finally that in 1994 and 1995 the worker developed a morbid belief that his wife was sleeping with another man and subsequently developed a suicidal ideation, Dr Kenny was asked whether that history confirmed his view of the predating paranoid schizophrenia. The doctor answered as follows:

> "Well what I can say that it certainly indicates a prolonged period of disturbed behaviour at the very least, there's not enough in that to say the paranoid schizophrenia was continuing right through that time. But unfortunately his diagnostic category are not set in stone and the boundaries between them are often vague as it's always one of the problems we run into, but that history is certainly consistent with a man who's had a long standing disturbance in terms of personality behaviour etc and I think that it's consistent with the formulation that he had a paranoid schizophrenic illness."[102]

101. At page 322 of the transcript it was put to Dr Kenny that the worker had categorically denied having been married at all and denied having had children with his marriage partner (when he had in fact been married and had children by that marriage). Dr Kenny responded as follows:

> "…I think that it's consistent with his delusional material but of course it might mean that he's just lying about it, although I don't understand why he would necessarily lie about that in these circumstances. But when you think of some of the other things he claims which are quite bizarre and quite obviously crazy, it doesn't surprise me particularly that he might deny certain other parts of his

[101] See p 321 of the transcript.
[102] See p 322 of the transcript.

> life. I mean I don't think that's inconsistent with the formulation of him having a paranoid schizophrenia."[103]

102. Dr Kenny expressed the opinion that it was unlikely that Mr Ah Quee was a malingerer, though he accepted that one could not categorically exclude malingering.[104] However, the witness said that if the worker denied he was married with a view to avoiding maintenance payments that was much more likely to indicate a malingerer.[105]

103. During re-examination, Dr Kenny said that the worker's history neither supported nor refuted a diagnosis of paranoid schizophrenia.[106]

104. At page 325 of the transcript Dr Kenny was asked about the nature of the episode in early 1995. His evidence was as follows:

> "…it relates it more like this to his separation and everything that follows therefrom and again I would have to say that is neither supportive nor refuting of the concept of having a paranoid schizophrenic illness. Perhaps if I can say that one of the things we often find is that if you have somebody who has major impairment personality functions who will have periods of depression, substance abuse, all that and at some stage they develop into a paranoid schizophrenic – it becomes obvious that what you've really got is an underlying psychiatric schizophrenic illness and in particular issues that you refer to in that context neither refute or support the diagnosis."[107]

105. Again at page 325 of the transcript Dr Kenny was asked whether the fact that the worker recovered very quickly from the episode of conversion disorder – within two weeks – said anything for or against the proposition as to the existence of a paranoid schizophrenia or a delusional disorder. Dr Kenny stated:

> " …once again individually that neither supports or refutes the diagnosis, but conversion disorder is not an uncommon phenomenon

[103] See p 323 of the transcript.
[104] See p 323 of the transcript.
[105] See p 323 of the transcript.
[106] See p 324 of the transcript.
[107] See p 325 of the transcript.

> and it can occur in someone with schizophrenia or not or an otherwise healthy person. So you're certainly not consistent – it's not inconsistent with it… that particular episode would not be – it's certainly the manifestation of any schizophrenic illness but it does demonstrate the degree of vulnerability to react in that sort of way, demonstrating at least an underlying personality vulnerability but not supportive or refutive of the diagnosis of paranoid schizophrenia at this stage."[108]

106. In relation to the worker's denial that he was ever married, Dr Kenny gave this evidence:

> " … I really don't know why he did deny his previous marriage and there are several potential reasons why he may have. One might be part of delusional material – I suspect that somewhat unlikely under the circumstances, the other one is that he was naively continuing to lie about something he'd lie about in the past and I suppose the other one is he might have blocked her out from his mind, but I suspect the last of those three is unlikely… it sounds to me as though he was caught out in something and continued to respond in this naïve and inappropriate way about it. Not having discussed it with him I really can't speculate beyond that …"[109]

107. Finally, the proposition was put to Dr Kenny that notwithstanding the worker's belief that his wife had been unfaithful she was, in fact, not unfaithful would that indicate one way or another paranoid schizophrenia. The doctor said that "it tends to move further towards the fact it was a delusional issue, but of course the belief that a wife is unfaithful is not necessarily delusional even if she is faithful… but it certainly moves in that direction".[110]

108. In his letter of 24 September 2003 addressed to the employer's solicitors, Dr Kenny stated:

> "But it does seem clear that the injury he sustained – and it seems no doubt that has been a genuine injury – has precipitated him out of employment. So what we end up with then is a very vulnerable man who has suffered a physical injury and that has even further

[108] See pp 325 - 326 of the transcript.
[109] See p 326 of the transcript.
[110] See p 327 of the transcript.

> restricted his activities and hence may have rendered him unemployable."

109. Professor Yellowlees who examined the worker at the request of the employer prepared reports which became Exhibit E10.

110. In his report dated 4 April 2004 Professor Yellowlees expressed the opinion that Mr Ah Quee was suffering from schizophrenia. He went on to say:

> "I have no doubt whatsoever that Mr Ah Quee's psychiatric illness, which appears to have been developing gradually, and getting more severe, over a number of years, and which has essentially only been partially treated… has been adversely affecting his chances of any good physical rehabilitation from his knee injury. Indeed it is very hard to see how he will have any good result from rehabilitation until his psychiatric illness is treated…"

111. In the same report Professor Yellowlees made the following observation in relation to the Royal Brisbane Hospital admission in February 1983:

> "There was no evidence of psychosis mentioned in the case notes at this time, but it is not unusual for patients who are in the early stages of developing a psychosis to present with other psychiatric syndromes, such as conversion disorder, as a precursor to their psychotic illness."

112. In his report dated 25 February 2002, Professor Yellowlees expressed the view that there was little doubt that the aetiology and manifestation of Mr Ah Quee's psychiatric condition predated his work related injury of 22 June 1997. He went on to say that in light of the worker's behaviour in 1993, which was very strange, "it may well have been that at that time he was already developing an incipient psychosis which was not clinically obvious". Professor Yellowlees added:

> "From a clinical perspective it is common for patients to have a prodromal period of up to several years where their psychotic symptoms gradually become worse prior to them presenting with other symptoms of psychosis and I believe that this is the most likely clinical scenario in Mr Ah Quee's case."

113. In the same report the Professor stated:

> "I have no doubt that even if Mr Ah Quee did not have any physical injuries he would be totally unfit for any form of work purely as a consequence of his present untreated psychiatric condition. When I saw him in April 2001 he was floridly psychotic and unable to give a good account of himself and as such would certainly not have been fit for any form of paid employment whatsoever."

114. As to whether the worker's work related injury in its sequelae has aggravated, accelerated or exacerbated his psychiatric condition, Professor Yellowlees expressed the following opinion in his report of 25 February 2002:

> "The question of the interaction between Mr Ah Quee's work related injury and his psychiatric condition is really one of conjecture. It is certainly generally accepted that physical illnesses of injuries, particularly those causing chronic pain, tend to make pre-existing psychiatric disorders somewhat worse. It is also well accepted that such physical illnesses can accelerate or aggravate the development of psychiatric illnesses. In Mr Ah Quee's case he has certainly had a significant physical injury, and consequent pain, and he has obviously become distressed by his pain, and has been unable to accept a full regime of treatment for primarily psychiatric reasons. Having said this I'm really speaking in theoretical terms because it is impossible to be certain as to the interaction between his physical injury and his psychiatric illness, but common sense, if nothing else, would suggest that the pain and distress from his injury would have had at least a minor adverse effect on his psychiatric condition."

115. In the same report, Professor Yellowlees was of the view that the worker's psychiatric condition would "certainly of itself render him unable to undertake profitable employment at this time, also when I saw him last April".

116. Professor Yellowlees gave the following oral evidence concerning the worker's paranoid schizophrenia and adjustment disorder:

(i) Mr Ah Quee's paranoid schizophrenia was by itself sufficient to incapacitate him.[111]

(ii) Adjustment disorder is completely different from paranoid schizophrenia.[112] However, people who suffer from schizophrenia may also suffer adjustment disorders.[113] Adjustment disorder is a condition of short duration and usually lasts a few months.[114]

(iii) The adjustment disorder may have worsened Mr Ah Quee's schizophrenia for a relatively short period of time.[115]

117. Professor Yellowlees said at page 6 of the transcript dated 24 March 2004:

> " I wouldn't argue at all that the actual adjustment, and depression related to the adjustment, from the physical illness would cause the schizophrenia."

118. During cross-examination, Professor Yellowlees accepted the observation made by Dr Kenny that Mr Ah Quee had a significant underlying psychiatric condition, rendering him psychiatrically vulnerable to adverse life occurrences.

119. Under cross-examination, Professor Yellowlees gave this evidence:

> "…he has essentially two sets of major illnesses; he has schizophrenia which in my opinion is unrelated to his injury, and he has the physical injury itself, and then he has the psychological adjustment to the physical injury and of course that psychological adjustment to the physical injury as I covered in my report can make the schizophrenia which has coincidentally (developed) somewhat worse."[116]

[111] See p 4 of the transcript dated 24 March 2004.
[112] See p 5 of the transcript dated 24 March 2004.
[113] See p 5 of the transcript dated 24 March 2004.
[114] See p 5 of the transcript.
[115] See p 6 of the transcript.
[116] See p 6 of the transcript.

120. During cross–examination, Professor Yellowlees gave the following evidence as to the worker's psychiatric condition:[117]

" Q: Assume for the moment that prior to his knee injury he never suffered from delusions that he was haemorrhaging into his knees, that he had osteoporosis and bones leaking calcium, that he didn't suffer from the belief or delusion that he had missing muscles. So that all these things have eventuated since the injury. Would you agree then that the new injury - the physical injury - has provided a focus for his pre-existing illness and has created these new delusions on his part?

A: I think that's very likely, certainly… it's well described that people who have psychotic symptoms tend to develop those symptoms in a socially appropriate way for them… nowadays a lot of people believe that they have computers stuck inside their heads. In the past the used to believe it was God or the devil that was controlling their mind. And so it's not at all uncommon for people with painful injury to misattribute the particular views to that injury.

Q: In terms of simple causation would you agree that that's a product of the pre-existing illness and the advent of the new injury?

A: It's an interaction between the two absolutely. And then that is precisely why I say in my report that this is entirely possible."

121. During re-examination, Professor Yellowlees stated that regardless of any post-injury delusions that Mr Ah Quee might have suffered from, the worker was and would have been incapacitated as a result of his paranoid

[117] See p 7 of the transcript.

schizophrenia in any event.[118] He added: "I mean this is just one relatively small part of his delusional system".[119]

122. Dr Brown, psychiatrist, who examined the worker at the request of the solicitors for the employer, gave evidence in these proceedings. His report dated 8 March 2004 became Exhibit E 15 in these proceedings.

In that report Dr Brown considered differential diagnoses: adjustment disorder, delusional disorder, paranoid schizophrenia and malingering.

Dr Brown expressed the opinion that the worker has a paranoid psychosis being either a delusional disorder or a paranoid schizophrenia.

The doctor concluded that Mr Ah Quee either had a delusional disorder or paranoid schizophrenia in 2000.

Dr Brown said that the factual evidence as well as the worker's presentation justified a diagnosis of a paranoid psychosis. He thought that it mattered little whether the specific diagnosis was delusional disorder or paranoid schizophrenia.

123. At pages 18-19 of his report Dr Brown dealt with the issue of a pre-existing condition and exacerbation:

> "The issue as to whether a knee injury would be sufficient stress to cause a psychiatric condition like schizophrenia or a delusional disorder. The easiest way to resolve this would be to ascertain if he was diagnosed with either of these conditions prior to the injury or demonstrated bizarre behaviour before which could not be explained otherwise.
>
> I note that Professor Yellowlees after examining the provided historical clinical records concluded in his report of 25 Febraury 2002 that he had little doubt that the aetiology and manifestation of Mr Ah Quee's psychiatric condition pre-dated his work injury. ..

[118] See p 8 of the transcript dated 24 March 2004.
[119] See p 8 of the transcript dated 24 March 2004.

If he had no significant previous psychological condition then aggravation of a pre-existing psychological condition would not be relevant. However, accepting that he had an existing paranoid psychosis then the situation is that he is likely to get emotionally worked up with events that he perceives as adverse and from Mr Ah Quee's history these have been interactions with TIO and apparently some medical examiners. There is also the matter of the police in Queensland. From Professor Yellowlees' report this also includes his employer and staff of the Mental Health Services in Queensland.

In this case the underlying determinant is that he is over-sensitive in interactions due to his paranoid tendencies or delusions and so can misattribute and misinterpret statements and actions and over-react to these. Also aspects of such experiences may become incorporated in an organised system of delusions. This not to say that some of his interactions may not have been based on unreasonable behaviour by others but that his paranoid pre-disposition has resulted in an exaggerated reaction. Given that he had a pre-existing paranoid psychosis then in my opinion the focusing of this on the treatment of his injury is not the result of his injury but the product of his psychotic illness or paranoid predisposition."

124. Dr Brown went on to say:

"Any significant stress can exacerbate a paranoid psychosis just as any such stress can cause an Adjustment Disorder in non-psychotic persons. However, this is little more than a superimposed reaction and in either case may involve transient conversion symptoms and episodes of depression and anger but it is not the cause of the psychosis. Thus any contribution from such stress would not be a substantial factor.

Much more likely is that the individual incorporates aspects of the injury into their delusional system. I also note that his delusions may not be confined to aspects about his injury as they may have involved police being imprisoned and from Professor Yellowlees' report they have involved mental health staff and officials such as parliamentary members in Queensland. It is most unlikely that these aspects are related to his injury and so they serve to indicate how whatever is occurring to thwart Mr Ah Quee may become a focus of his paranoid tendencies if not become incorporated into his delusions. This is a common occurrence with paranoid individuals and particularly paranoid psychotics and the conclusion is not that the situation causes the exacerbation but his illness has incorporated it. In this regard the paranoid reactions or delusions may be transitory and

> replaced by others as the situation is no longer salient or the delusions may persist as part of an elaborating delusional system."

125. In his report, Dr Brown went on to deal with the possibility of an adjustment disorder:

> " If one cannot justify making the diagnosis of a paranoid psychosis in a case like Mr Ah Quee then the diagnosis is an Adjustment Disorder where his symptoms are coloured by paranoid attributes. That is the individual becomes paranoid when under stress from any actual or perceived thwarting. In this case the cause of this would be the perceived stresses of the time which may be actual from the injury or could come more from paranoid misattributions. In my opinion he has never suffered from a severe Adjustment Disorder with depression, anxiety and paranoid thinking and if he had it would have been more the result of his paranoid attributions."

126. Dr Brown expressed the opinion that the worker's "paranoid psychosis has not been caused or significantly exacerbated by his injury it has just come to be focused on it". He went on to say: "In my opinion his knee injury of 22 June 1997 was not the cause of his paranoid psychosis and he does not suffer from any psychiatric condition the result of his knee injury." He added: "He suffers from a paranoid psychosis, which from the information of Professor Yellowlees pre-dated his knee injury and the cause of this is his psychological constitution arising from (1) genetic and (2) early developmental factors".

127. In his report, Dr Brown expressed this opinion:

> "In my opinion his knee injury has not exacerbated or aggravated his psychiatric condition to any significant extent and any effect would have been transient…
>
> In my opinion his worker's compensation claim process and its administration has become incorporated into his delusional system rather than be the cause of it."

128. Dr Brown's report also dealt with the worker's fitness for employment. He was of the view that the worker was not fit for any form of work as "a result of a combination of factors the main one being his paranoid psychosis".

129. In his report dated 8 March 2004, page 23 Dr Brown expressed the view that there was a significant degree of malingering on the part of the worker. In his report dated 24 March 2004, page 2, (Exhibit 15) the doctor stated that it may well be that apart from some residual knee symptoms his presentation is now for the main part malingered rather than delusional.

130. Dr Lawrence, a specialist psychiatrist, gave evidence that she was a consultant psychiatrist at Royal Brisbane Hospital in February 1993, at which time she saw the worker.

131. At that time she made a diagnosis of conversion disorder. Dr Lawrence described that condition as follows:

> "A conversion disorder is the current classification under DSM4 terminology for what used to be called a hysterical condition, that is, a condition which may present with physical symptoms for which there is no physical or organic cause to be established, but for which there is a psychological basis for the condition and in which there's no other psychiatric disorder present to account for those symptoms."[120]

132. The worker gave evidence concerning various pathological processes which he perceived to be occurring within his right knee – missing muscles, crumbling bones leaking calcium and bone marrow, bones that will not seal like normal bones and internal haemorrhaging into the knee. However, the evidence points to these perceptions or beliefs being delusional.[121]

133. Over the years, Mr Ah Quee has reported these perceived pathological changes to various doctors.

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[120] See p 210 of the transcript.

[121] See Professor Yellowlees' evidence at p 3 of the transcript to the effect that the worker's beliefs as to various pathological changes in the knee are largely delusional.
See also the following exchange between counsel and Professor Yellowlees at p 7 of the transcript:

" Q: As a psychiatrist if there is no physical evidence would you also describe that as a delusion.
A: Yes, can't recall report was but there is a suggestion that Ajay's unusual views about his physical disorder were one of the reasons he didn't want to attend rehab. I seem to recall. Haven't read it recently but some issue about him either insisting on continuing to keep his plates on or some other issue which appeared to be related to his seemingly psychotic views of knee injury."

134. He had told Dr Kenny that his operations had not stopped the (alleged) haemorrhage into his right knee.[122] The worker subsequently told Dr Kenny that his knee had got worse, and that he had osteoarthritis and osteoporosis.[123] The worker also complained to the doctor of continuing haemorrhaging taking blood from the liver and other organs.[124]

135. The worker had complained to Dr Jackson that Mr Baddeley, the orthopaedic surgeon, had neglected to give proper attention to full muscle tears or muscles which had become detached from his bones in the right knee.[125] Mr Ah Quee had further complained to Dr of "recurrent internal haemorrhaging" into his right knee and that he was bleeding to death.[126] He also complained to the doctor of suffering from osteoporosis and osteoarthritis.[127]

136. Finally, the worker had informed Professor Ehrlich that he had been told he had developed osteoporosis and that his bones were crumbling.[128]

THE EVIDENCE AS TO EMPLOYMENT OR WORK REASONABLY AVAILABLE TO THE WORKER

137. The following evidence was adduced at the hearing in relation to work reasonably available to the worker.

138. Darryl Scott Eva gave evidence that the worker would earn about $40,000 to $50.000 per anum as a courier driver.[129] This equates to a weekly wage of between $ 769.23 and $961.53.

139. Exhibit 21 referred to, inter alia, an advertised position for qualified gardener. The position required a certificate in horticulture. The job

[122] See p 2 of Dr Kenny's report dated 22 December 1998.
[123] See p 2 of Dr Kenny's report dated 25 February 2002.
[124] See p 2 of Dr Kenny's report dated 25 February 2002.
[125] See p 2 of Dr Jackson's report dated 14 March 2002.
[126] See p 3 of Dr Jackson's report dated 14 March 2002.
[127] See p 4 of Dr Jackson's report dated 14 March 2002.
[128] See p 2 of Professor Ehrlich's report dated 13 October 2003.
[129] See p 308 of the transcript.

requirements were to perform general duties as well as property maintenance, cleaning and other tasks as required. The position paid $16.20 per hour which works out at $648 per week (on the basis of a 40 hour week). The worker had given evidence that he had obtained certificates in gardening and landscaping. [130]

140. According to Exhibit 21, the position of Campground attendant at Kings Canyon was advertised in February 2004. The job required the successful applicant to be responsible for the maintenance of the campground area including lawns, pool and kitchen areas as well as general maintenance, with some contact with resort guests. The position paid $31,500 per anum, that is $605.76 per week.

141. John Chisholm gave evidence that employment as an auto wrecker and parts dismantler, including care taking duties, is available.[131] The witness described the nature of the work as follows:

142. Mr Chisholm said that he had a current employee who was earning $500 per week and in addition, in consideration of after hours light duties – "walk around the boundary or be seen there" – received free accommodation including air-conditioning and whitegoods.

143. Spencer Wayne Smith gave evidence that employment as a tow truck driver for a wrecker's yard is reasonably available.[132] The witness told the Court he had obtained his employment as a tow truck operator within the last year, earning $500 per week.

144. Exhibit 21 referred to a position as cattle station gardener which was advertised in March 2004. The job requirements were for a full time permanent gardener to live at the station, with knowledge of gardening, mowing lawns and handyman maintenance. The position provided single

[130] See p 1 of the transcript.
[131] See pp 267-269 of the transcript.
[132] See pp 329-330 of the transcript.

accommodation. The position paid $80 per day, resulting in a weekly wage of $400 plus accommodation.

145. In addition to the above evidence, the employer tendered evidence of two awards – the Transport Worker's Award and the Automotive Services (Northern Territory) Award - that provide for minimum conditions of employment in work that the employer says the worker is capable of undertaking: see Exhibit 22. That exhibit contained only an extract of each award. For the sake of completeness the employer provided the Court with the entire awards.[133]

146. The employer provided, in tabulated form, details of the work (as per the Transport Worker's Award) it says the worker is capable of doing.[134]

147. The employer asserts that the worker is capable of performing the type of work detailed in the award .As to the availability of such work the employer sought to rely on the evidence of Daryl Eva and the various positions listed in Exhibit 21, for example, driver/store person – Jape Nominees.

148. Similarly, the employer claims that the worker is capable of performing the range of work detailed in the Automotive Services (Northern Territory) Award. Once again the information was tabulated.[135] The employer says that the evidence of John Chishom[136] and the positions listed in Exhibit 21- for example panel beater, apprentice motor mechanic, counter sales/spare parts and auto glazier – establish the availability of such employment.

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[133] These were attached to the employer's further submissions on availability of work dated 21 October 2004.
[134] The table appears on page 3 of the employer's further submissions on availability of work dated 21 October 2004. The identified positions are driver of a 3 axle vehicle exceeding 13.9 tonnes, driver oil tractor, radio operator, forklift driver (5-10 tonnes), weighbridge attendant, driver of a forklift up to 5 tonnes or 2 axle rigid vehicle, loader-freight forwarder, two motor driver, general hand, greaser, cleaner yard person, vehicle washer and detailer, motor driver's aasisitant/furniture remover's assistant. Adjacent to each of those positions details of casual wage, permanent wage, allowances, total casual and total permanent appeared.
[135] The table is to be found on page 5 of the employer's further submissions dated 22 October 2004. The table provides details of work and designated duties, casual wage, permanent wage, allowances, total casual and total permanent.
[136] See pp 267-269 of the transcript.

149. On page 6 of its further submissions on availability of work dated 21 October 2004, the employer makes the following submission:

> "Based on the foregoing matters, the worker has no continuing loss of earning capacity if the most profitable employment reasonably available to him is taken into account. The table below sets out the loss of earning capacity calculations for all of the positions/awards categories listed above."

150. On page 7 of its submissions the employer made the following submission with reference to the evidence concerning work reasonably available to the worker and the table which appears on page 6 of the submissions:

> "If the Court does not accept the submission on behalf of the employer that the worker has suffered no loss of earning capacity since 22 December 1997 and if the Court does not accept that the worker could do the job of a courier driver or a qualified gardener , then the worker still only suffers from a partial loss of earning capacity with minimal shortfall from his indexed normal weekly earnings as evidenced in the table above, and the worker's weekly payments should be reduced to no more than say $25.09 per week (campground attendant)."

151. The worker replied to the employer's supplementary submissions on availability of work.[137] On page 3 of his final submissions on behalf of the worker, Mr Barr prepared a table setting out various job/position descriptions – auto wrecker/parts dismantler ("stripper"), truck driver, recovery truck, courier driver – and with respect to each of those Mr Barr dealt with the worker's capacity to carry out the duties attaching to those positions and the reasonable availability of those positions as disclosed by the evidence.

[137] See the worker's final submissions dated 23 November 2004.

ASSESSMENT OF THE EVIDENCE AND RELEVANT FINDINGS

The credibility of the worker

(a) General Principles

152. This part of the decision discusses the notion of credibility – referable to the worker – and the general principles that govern the assessment of a witness' credibility.

153. Both Counsel gave considerable attention to the credibility issue in this case;[138] and justifiably so. In any case where a worker brings an application under the *Work Health Act* and the application is contested, the worker's credibility will almost invariably be an issue. However. in the present case, the credibility of the worker assumes greater significance than is normally the case due to some special circumstances, which, inter alia, include the worker's mental state – both past and present - and a number of statements or assertions made by the worker "which the Court may well find are/were not true and correct in fact" .[139] Given the very unusual nature of the present case, it is imperative that the Court approach the necessary task of assessing the worker's credibility with extreme care, and employ the appropriate forensic tools during such process of assessment.

154. At the outset, it is important to establish what is meant by the credibility of a witness.

155. The word "credibility" identifies a process of assessment directed at whether a witness's asserted recollection (or lack of recollection) is genuine.[140] Credibility is to be distinguished from "reliability", which involves a separate assessment – whether "the witness's genuine recollection truly

[138] See pp 2 – 4 of Mr Barr's written submissions dated 1 July 2004. See pp 4 -9 Mr Southwood's written submissions dated 16 August 2004
[139] See p 2 of Mr Barr's written submissions dated 1 July 2004.
[140] See The Honourable Justice Giles " The Assessment of Reliability and Credibility" (1996) 2 TJR 281.

describes what was said, done, heard, seen or thought ".[141] According to this distinction, a witness cannot be adjudged reliable unless he or she is a truthful witness; however, even a truthful witness can be unreliable.[142]

156. In the present proceedings, the primary focus is on the worker's credibility – whether his asserted recollection (or lack of recollection) of certain events is genuine (or truthful).

157. Mr Barr has usefully referred to recent judgments of the High Court of Australia which contain valuable pronouncements in relation to the assessment of credibility of witnesses.[143]

158. In *Whisprun v Dixon* [2003] HCA 48 at para 119 et seq, Kirby J made the following statements and observations:

> "119 *Lies and Civil proceedings:* Some judges in the past regarded untruthful evidence – even about peripheral or irrelevant matters – as fatal to a litigant. Most judges today understand that the evaluation of evidence involves a more complex function, requiring a more sophisticated analysis. Courts, after all, are not venues for the trial of the parties' morality or credibility, as such. As judges often explain to juries in criminal trials, people sometimes tell lies in court and elsewhere for extraneous and irrelevant reasons, having nothing to do with the legal issues in the trial. If this is true in criminal trials, it is equally true in civil trials. What is important is not proof of untruthfulness, as such, but the significance (if any) of any demonstrated falsehoods for the issues at trial. That significance can only be judged when measured against the entirety of the relevant testimony. By its logical force, that testimony may well require that falsehoods be ignored as irrelevant or immaterial to the decision-maker's ultimate conclusion. In particular cases, it may require the decision-maker, within the pleadings, to consider and decide a case different from – or even contrary to – that advanced by the party, because such is the legal entitlement of the person concerned.
>
> 120 Obligations of this kind recognise the ultimate duty of the decision-maker in an Australian court to decide a case according to law and the substantial justice of the matter proved in the evidence,

[141] See The Honourable Justice Giles, n 140 .
[142] See The Honourable Justice Giles, n 140.
[143] See pp 2-3 of counsel's written submissions dated 1 July 2004.

> not as some kind of sport or contest wholly reliant on the way the case was presented by a party. Litigants are represented in our courts by advocates of differing skills. Litigants are sometimes people of limited knowledge and perception. Occasionally, they mistakenly attach excessive importance to considerations of no real importance. In consequence, they may sometimes tell lies, or withhold the entire truth, out of a feeling that they need to do so or that the matter is unimportant or of no business to the court. This is not to condone such conduct. It is simply to insist that, where it is found to have occurred, it should not deflect the decision-maker from the substance of the function assigned to a court of law."

159. Similar observations were made by Justice Giles in his paper "The Assessment of Reliability and Credibility" (1996) 2TJR 281:

> "…a witness may not be telling the truth on one subject, perhaps to protect the witness's own interests affected by that subject, but giving a genuine and accurate recollection on another subject which does not have an effect on the witness's own interests."

160. Demeanour also may be relevant to an assessment of the credibility of a witness. The following observations and statements made by the High Court in *State Authority (NSW) v Earthline Constrcutions Pty Ltd* [1999] HCA 3; 73 ALJR 306 (Gaudron, Gummow, Kirby, Hayne and Callinan JJ) are pertinent to the present discussion:

> "There is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new. In *Societe D'Avances Commercial (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co* (The "Palitana") 108, Atkin LJ remarked that 'an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

161. The thrust of those observations and statements is that the assessment of a witness's credibility is more assisted by a close and careful examination of the actual evidence given by a witness, viewed in the overall context of the evidence presented by the party relying upon that witness's evidence and the

evidence presented in the opposite party's case, than by resort to the appearance and demeanour of the witness for the purposes of evaluating his or her credibility. The credibility, or lack thereof, of a witness, is often best assessed by reference to unassailable objective evidence, should such evidence be found to exist.

(b) the assessment of the worker's credibility

162. At pages 4-9 of his written submissions, Mr Southwood submitted that the worker was a totally unreliable witness, whose evidence ought to be rejected. He described the worker as being evasive and obfuscatory, as being dissembling throughout his evidence and controlling: he told the doctors who examined him and the court only what he wanted to say often refusing to answer specific questions.

163. Mr Southwood relied upon expert opinions as to the worker's reliability: for example both Dr Kenny and Professor Yellowlees considered Mr Ah Quee to be an unreliable historian. Counsel also relied upon the following opinion expressed by Dr Brown:

> "Little reliance should be placed on crucial aspects of his account of his past psychiatric, medical, occupational and personal history unless verified independently such as from the records of the time. Given this it must be suspected that a significant component of malingering could be likely in his current presentation. It may well be that apart from some residual knee symptoms his presentation is now for the main part malingered rather delusional."[144]

Dr Brown gave the following evidence as to the worker's demeanour, upon which Mr Southwood relied as being relevant to the assessment of the worker's reliability and credibility:[145]

> "I can well understand the concern of such examiners and he did make a threat to me and against others should he not attain the outcome he wishes. Such conditional threats are unusual in the case

[144] Refer to Exhibit E 15 report dated 24/3/04, p 2.
[145] See p 4 of Mr Southwood's written submissions dated 16 August 2004.

> of behaviour motivated by delusions and it is for this reason that I believe that there could be a significant degree of malingering in Mr Ah Quee's case…
>
> …in some parts of the interview and mainly at the start he made angry comments which were directed at the insurer and the medical practitioners who had assessed him for the insurer. These included some threats of violence against representatives of the insurer and medical examiners. I suspected that some of this might have been aimed at intimidating me as they were not of the intensity that I have usually experienced as emanating from the paranoia and delusions of dangerous psychotics and he readily settled and could be assuaged after making his angry threats and diverted from them."[146]

164. Mr Southwood relies upon the following statement made by the worker as a demonstration of the worker's erroneous belief that he was entitled to be paid compensation, regardless of whether his injury may not be productive of incapacity: "From 1997 through to 1999 is when I was really actively looking for employment because I was just not getting paid what I was promised".

165. Mr Southwood sought to rely upon a series of alleged lies with respect to his work history, his level of current incapacity, his capacity to do work, his return to work program, his psychiatric problems prior to the injury, the extent of his physical disabilities, his military history, his marital and domestic relationships, his substance abuse as a juvenile and recreational pursuits.[147]

166. In relation to his pre-injury work history, I am not reasonably satisfied that the worker deliberately lied about the stability of the employment he engaged in prior to his injury. What prima facie might present as mendacity, might in fact been mere exaggeration of an innocent type engendered by the worker's psychiatric condition. However, having said that, I find myself unable to accept his entirely subjective view as to the stability and

[146] Refer to Exhibit E 15, report dated 8/3/04, p 23.
[147] These are dealt with at pp 5- 8 of Counsel's written submissions dated 16 August 2004.

constancy of his pre-injury work history. I consider that prior to his injury the worker was just coping and was "on the fringe"[148]

167. Mr Southwood submitted that Mr Ah Quee had exaggerated his level of current incapacity, as demonstrated by a series of answers to questions directed at the cause of his limitations and inability to work.[149] In my view, it would be unsafe – even applying the civil standard of proof – to rely upon those answers as being demonstrative of lies. Any exaggerated view of his present incapacity for work may well be the product of his psychiatric condition and, therefore, not capable of being labelled deliberate falsehoods.

168. For similar reasons, extreme care also needs to be taken in relation to the alleged lies regarding the worker's capacity to work, his psychiatric problems, his return to work program, the extent of his disabilities as a result of the knee injury, his military career, his substance abuse as a juvenile and recreational activities such as going fishing in his boat.

169. Equally, there may well be an explanation for the worker's apparently blatant lies about being married to Mr Hitchens and his denial of having had children to her, which removes his behaviour from the realm of deliberate falsehoods.[150]

170. In the final analysis, it is my view that the major problem with Mr Ah Quee's evidence is not his lack of credibility but the inherent unreliability of that evidence due to his longstanding underlying psychiatric condition, which has undeniably complicated his life and events occurring during that life. Due to that inherent unreliability, it is necessary for the Court to rely upon independent objective evidence (which includes expert opinion evidence) in order to properly – and indeed fairly - assess the merits of the worker's claim.

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[148] See the evidence given by Dr Kenny at p 321 of the transcript.
[149] See pp 5-6 of Counsel's written submissions dated 16 August 2004.
[150] See Dr Kenny's evidence referred to above at pp 37, 38 and 39.

The surveillance video and concomitant evidence

171. The employer relied upon surveillance video (Exhibit 19) and the evidence of Mr Bacon as demonstrating the worker's physical capacity for work. In particular, Exhibit 19 showed the worker getting in and under a vehicle. The video exhibit also showed the worker spray painting a bullbar and a vehicle.[151] Exhibit 19 also showed Mr Ah Quee repairing and fitting a bullbar to a motor vehicle.[152] Finally, the video showed the worker carrying a steel frame and sheets of metal from the top of his vehicle to his annex at the caravan park.[153]

172. Mr Southwood made the following submission:[154]

> "The video material (Exhibit 19) which has been tendered showed the worker doing many of the above activities (these are referred to at pp15-16 of Mr Southwood's submissions dated 16 August 2004) without restriction (see also the evidence of William James Bacon at TT 298-307; 311-320)"

Mr Barr, counsel for the worker, made the following submissions in relation to the video surveillance evidence:[155]

> "The most significant thing to note about the video evidence (which was taken on 12 October 2002 and 17-19 August 2002) is that the worker was shown to be quite seriously incapacitated throughout – he always walked with his characteristic limping gait; he moved quite awkwardly; he had difficulty rising from the sitting position; and he required help with some of the activities in which he engaged, such as lifting a frame.
>
> The video evidence was entirely consistent with the worker's own evidence – in –chief. (He there told the Court that he could manoeuvre his aluminium boat on to and off the roof rack on his vehicle; and he told Dr Brown that he spray paints his car (see Exhibit 15)). The worker's incapacity was effectively highlighted in terms of his limping, his awkwardness, the slow 'non commercial'

[151] See also the evidence of Mr Bacon at pp 302, 303 and 304 of the transcript.
[152] See also the evidence of Mr Bacon at pp 302 and 3003 of the transcript.
[153] See also the evidence of Mr Bacon at p 312 of the transcript.
[154] See p 16 of Counsels' written submissions dated 16 August 2004.
[155] See pp 11-12 of Counsels' written submissions dated 1 July 2004.

> pace at which he went about the tasks he carried out, the low intensity and low output. The impression was of someone pottering or tinkering. He appeared genuinely physically disabled in the unguarded moments depicted.
>
> Significantly, the video evidence was not shown to any of the employer's or worker's expert medical witnesses in examination or cross-examination. This is consistent with the video evidence itself being consistent with the worker's history(ies) and presentation(s) to medical examiners.
>
> Clearly, in terms of all the evidence on 'physical incapacity', the worker remains incapacitated (partially incapacitated) for work as a result of the injury of 22 June 1997.However, the worker's case is that he also suffered and suffers mental injury as a result of his knee injury, which (whether taken by itself or combined with the worker's knee injury and physical incapacity) renders him totally incapacitated for work."

173. The video surveillance evidence and the accompanying evidence of Mr Bacon is relevant to the determination of the worker's post-injury capacity for work.

174. Although the video and Mr Bacon's evidence has the worker performing a variety of activities, I find myself unable to accept Mr Southwood's submission that he was seen performing those activities <u>without restriction</u>. I agree with Mr Barr's observations and characterisation of the worker's movements as depicted on the video. Mr Ah Quee most certainly did not present as a "ball of energy": the level and intensity of the activity engaged in by the worker could in no way be described as dynamic. In my opinion, the worker's movements displayed a significant degree of physical incapacity, the indicia of which were his limping gait, the clutching of his knees on one occasion (whilst apparently in pain), the slow, casual pace at which he moved and engaged in physical activity and his low level of efficiency and productivity. Watching Mr Ah Quee move and work was very much like "watching slow drying paint dry". The worker most certainly did not perform the various tasks depicted on the video without restriction. In

my opinion, his movements were significantly restricted and hence displayed a significant degree of physical incapacity.

175. It is, of course, not uncommon in proceedings under the *Work Health Act,* where an employer seeks to rely upon video surveillance evidence to present that evidence to expert medical witnesses with a view to eliciting their opinion as to the worker's physical capacity for work. That course was not taken in the present case. The Court is without the benefit of expert opinion evidence based on what is depicted in Exhibit 19. In those circumstances, the Court is left to rely upon its own ordinary powers of observation, taking into account its experience of the normal range of movements enjoyed by human beings without a physical incapacity and general levels of efficiency and productivity attributed to such individuals. Of course, a good deal of common sense needs to be applied during the observation – making process. The nature of the physical injury suffered by the worker needs to be carefully considered – that which is being observed must be put in the context of the alleged injury.[156] In my opinion, it is inherently probable that the knee injury suffered by the worker could result in the type of restricted movements and low level output displayed by the worker on the video. In my view, the worker's presentation on the video is entirely consistent with a person who has suffered a knee injury and who is still suffering from the incapacitating effects of that injury.

The assessment of the medical and psychiatric evidence

(a) Mental Injury and aggravation and/or exacerbation of a disease under the Work Health Act

176. The present proceedings give rise to a number of complex and difficult issues relating to the concept of "mental injury", the notion of "aggravation and/or exacerbation" in the context of mental injury and the doctrine of

[156] As`pointed out by Dr Kenny in his report dated 25 February 2002 , Mr Ah Quee suffered a significant knee injury, and it is easy to lose sight of that fact.

causation. It is useful to examine and discuss the present state of the law in relation to these various issues before moving on to consider the merits of the worker's claim.

177. Mental injury is clearly compensable under the *Work Health Act* provided the other preconditions for entitlement to compensation are established, in particular that the injury resulted in or materially contributed to incapacity.[157]

"Injury" is defined as follows:

> "'Injury', in relation to a worker, means a physical or mental injury arising before or after the commencement of the relevant provisions of the Act out of or in the course of his or her employment and includes –
>
> (a) a disease and
>
> (b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease…"[158]
>
> "Disease" is defined 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".

178. The alleged psychiatric reaction to the worker's physical injury characterised as a " severe adjustment disorder with depression, anxiety and paranoid thinking", if established to the satisfaction of the Court, would constitute a mental injury for the purposes of the definition of "injury" in s 3 of the *Work Health Act*. Similarly, if proven, the alleged aggravation and /or exacerbation of the worker's pre-existing paranoid psychosis (diagnosed in terms of either a delusional disorder or paranoid schizophrenia) would constitute an aggravation and/exacerbation of a pre-existing disease for the purposes of the definition.

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[157] See s53 *Work Health Act.* "Incapacity" is defined in s 3 of the Act as meaning "an inability or limited ability to undertake paid work because of an injury".
[158] See s3 *Work Health Act*.

179. The facts and reasoning of the High Court in *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 are instructive in relation to the compensability of a mental injury under work health legislation.

180. The worker in *Federal Broom* suffered from chronic schizophrenia. The worker suffered a physical injury as a result of an accident on 1 December 1960, occurring during the course of her employment; and that physical injury resulted in incapacity for work up to the beginning of 1961. She received worker's compensation in respect of that physical injury. The worker's pre-existing psychiatric condition became acute after the accident and remained unchanged up to February 1962. The worker's schizophrenia had been latent for some years prior to the accident. Following the accident, she developed delusions of suffering great pain in her lower right side, which she claimed rendered her unable to work.

181. As to the alleged connection between the psychiatric injury and the worker's employment – and also the worker's physical injury on 1 December 1960 – Windeyer J made the following observations:

> "I pass to the next, and I think more difficult, question, was this aggravation or deterioration contributed to by her employment? This requirement of the Act is not satisfied by showing only that a worker suffering from some disease would or might have suffered less severely if he had not been employed at all. When the Act speaks of 'the employment' as a contributing factor it refers not to the fact of being employed, but to what in fact the worker does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it is performed. In this case it was said that the employment was a contributing factor in the worsening of the disease, because the applicant focused her delusions of pain and discomfort upon her right side which she believed she had hurt when lifting a tea chest in the course of her work. A minor physical strain she magnified in her irrational imagination into a serious and continuing derangement of her internal organs. The incident directed, or redirected, her hypochondrical attention to her abdominal muscles. But said the applicant, all that it did was to focus her existing delusional tendencies in a particular way: it was a cause of her condition only in

> the sense that it acted as a precipitant. That may be true: nevertheless, Doctor Ellard agreed that ' something obviously happened in December to her to cause a change in her life."

182. The line of reasoning employed by his Honour and subsequent finding was consistent with the determination of the other members of the Court. The Court held that in determining whether there had been an aggravation, acceleration exacerbation or deterioration of the worker's disease – a functional mental illness – the underlying illness could not be separated from its symptoms, and the finding by the Worker's Compensation Commission that there had been an aggravation, acceleration, exacerbation or deterioration of the disease was open on the evidence. The Court also held that it was open to the Commission to find that the work –related injury precipitated the new delusion and that the worker's employment contributed to the worsening of the disease.

183. The concepts of "aggravation" and "exacerbation", in the context of Work Health legislation, have been the subject of detailed judicial consideration elsewhere and on other occasions.

184. The word "aggravation" means simply to increase the "gravity of" (Oxford Dictionary).[159]

185. The notion of "aggravation" of a disease was discussed by Taylor J in *Darling Island Stevedoring & Lighterage Co Ltd v Hankinson* (1967) 117 CLR 19 at 31. Referring to the NSW statutory definition of "injury" qua aggravation of disease,[160] his Honour stated:

> "Whilst I agree that compensation in respect of incapacity resulting solely from the aggravation of an existing disease must be limited to the incapacity produced by the aggravation it by no means follows

[159] See Hill & Bingeman, *Principles of the Law of Worker's Compensation* (Law Book Company Ltd, Sydney, 1981), p 36.
[160] As pointed out by Mr Barr at p 21 of his written submissions dated 1 July 2004, this definition was in very similar terms to that under the *Work Health Act* (NT).

that the aggravation of a disease may not, itself, cause permanent incapacity."[161]

186. In *Hankinson's* case, Taylor J said that the aggravation of the disease had resulted in permanent incapacity and it was immaterial that if the aggravation had not occurred total incapacity or death would have resulted from the natural progress of the disease.[162]

187. The question whether there has been an aggravation of a pre-existing injury or disease is essentially one of fact.[163]

188. The notion of exacerbation, in relation to a pre-existing disease, was discussed at some length by Kitto J in *Federal Broom v Semlitch* (1964) 110 CLR 626 at 633-634:

> "Before this Court the contention has been put again which was put to the Supreme Court, that the evidence did not support a finding that the delusion causing the respondent's incapacity for work was anything more than an effect, or a symptom, or a manifestation of the underlying mental disease. It was said that the only permissible conclusion on the evidence of the expert witnesses was that the disease itself, as distinguished from the particular delusions to which it gave rise from time to time, was not made any worse by the incident of 1 December 1960, and that therefore the definition of 'injury' is not satisfied in this case. The argument took it for granted that the collection of substantives in the definition -–aggravation, acceleration, exacerbation and deterioration – could be rolled into one…[at 634]. To pursue that discussion, however, seems to me to risk distraction from the real point of the case. The four substantives are not synonymous with each other, and a court should assume that it is for the differing shades of meaning of which they are susceptible that the draftsman has chosen to employ them at all. They are not all given their true force by asking simply whether the disease has been made worse. Moffitt J placed at least some of his emphasis upon the word 'exacerbation', and it seems to me that word is the critical word for this case. As applied to a disease it is properly used to refer to effects which the disease produces in the victim rather than the

[161] Mr Barr submits that " this is a case in which the knee injury has caused long-term, possibly permanent, aggravation of the worker's psychiatric state. There is both exacerbation and aggravation": see p 22 of counsel's written submissions dated 1 July 2004.
[162] (1967) 117 CLR 19 at 31.
[163] See *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 637 per Windeyer J.

> advance of the disease itself to a more serious stage of its development. 'A temporary increase in the violence of the symptoms of a disease' is the medical sense of the word according to Funk and Wagnall's Standard English Dictionary. In the Oxford English Dictionary may be found illustrations of the use of the word as referring to particular manifestations of a diseased condition. It is not a technical word, requiring scientific explication or application. It is an ordinary English word to be applied by the Court to the proved facts. Once it was established, as it was established beyond question before the Commission by the evidence of the psychiatrists who were called, that the incident of 1 December 1960 acted upon a pre-existing condition of mental illness (a disease) to produce a delusion causing incapacity for work, the respondent had made a clear case of exacerbation of her mental disease, according to the ordinary meaning of the word. Moffitt J was right, I think, in saying: 'There is an exacerbation of a disease where the experience of the disease by the patient is increased or intensified by an increase or intensifying of the symptoms. This word is directed to the individual and the effect of the disease upon him rather than being concerned with the underlying mechanism'… Equally, where an untoward occurrence in a worker's employment causes a pre-existing mental disorder to manifest itself in a new delusion, it seems to me proper to say that there is an exacerbation of the mental disorder."

189. The decision in *Kirkpatrick v Commonwealth of Australia* (1985) 62 ALR 533 is also instructive in relation to the relevant law. The Federal Court held that the Commonwealth was not bound to pay compensation to the worker in relation to a compensation neurosis that developed out of an allegedly disabling condition, which was not itself compensable. The fact that the worker had a genuine belief that the pain in his right leg was related to the injury to his coccyx may have been a powerful factor in the development of the neurosis, but it did not follow that the worker's employment was operative in producing the neurosis. The Court held that a distinction has to be drawn between, on the one hand, the sequelae making a sick mind sicker and contributing to incapacity, and, on the other hand, a sick mind latching on to the factors so described that, in one sense, they play a role in the illness, but not in such manner as to add to the existing incapacity.

As pointed out by Mr Barr at page 3 of his written submissions in reply dated 27 August 2004, the Full Federal Court in *Kirkpatrick* (supra at p 537) distinguished that case from *Federal Broom v Semlitch* :

> "The applicant's case is to be contrasted with cases such as *Federal Broom v Semlitch* ...and *Migge v Wormald Bros Industries Ltd*...In the former case a work accident aggravated a previous schizophrenic condition by producing a new delusion. Kitto J (at p 634) said: 'Where an untoward occurrence in a worker's employment causes a pre- existing mental disorder to manifest itself in a new delusion, it seems to me proper to say that there is an exacerbation of the mental disorder.'

In the latter case, Mason JA (as he then was) whose dissenting judgment was approved upon appeal to the High Court, referred to a work accident and hospitalisation to which it led as having 'set in motion the delusional condition' from which the worker thereafter suffered (page 43). In both of these cases, the work incident was actually operative as a factor in producing the worker's condition. That condition happened to be one involving delusions, but it was no delusion that the work incident produced the relevant mental effect. In the present case, on the other hand, the worker suffered a condition of leg disability, to which the work had not been a contributing factor."

(c) The expert evidence concerning the alleged injury

190. It is the employer's case that although the worker sustained a significant injury to his right knee, that injury has ceased to be totally incapacitating for the worker and it is no longer productive of a loss of earning capacity.[164] The employer claims that the worker has a considerable capacity for work, and that he is only partially incapacitated for work in that he cannot do the heaviest duties of a station hand.[165] The employer says that the worker can

[164] See p 14 of Mr Southwood's written submissions dated 16 August 2004.
[165] See p 16 of Mr Southwood's written submissions dated 16 August 2004.

undertake employment as a parts dismantler or courier driver or car detailer and the other types of employment identified in Exhibits 21 and 22.[166]

191. In support of its contention that the worker has only a limited reduced capacity as a consequence of his work related physical injury the employer relies on the evidence of Drs Ehrlich, Jackson and Marshall.[167]

192. In terms of the evidence relating solely to the worker's physical injury, the worker agrees with the proposition that he is only partially incapacitated as a consequence of the physical injury of 22 June 1997. However, that concession needs to be put in proper perspective. It is the worker's case that in addition to the physical injury he suffered and continues to suffer a mental injury as a result of his knee injury,[168] which (whether taken by itself or combined with the knee injury and physical incapacity) makes the worker totally incapacitated for work. Put another way, the worker says that given both the psychiatric and physical medicine, the worker has been and remains totally incapacitated for work.[169]

193. Given the thrust of the worker's argument, the psychiatric evidence presented in this case assumes critical importance and requires close and careful scrutiny.

194. The expert psychiatric evidence presented in this case was not only complex, but also disclosed a considerable degree of disagreement between the various expert witnesses. Furthermore, as is not uncommon in cases like the present, the expert witnesses were called upon to express their opinion as to various causal relationships, and in expressing their views in relation to such issues and other matters they tended to proffer opinions which were often qualified and couched in terms falling short of either certainty or

[166] See p 16 of Mr Southwood's written submissions dated 16 August 2004.
[167] The evidence of these three doctors was outlined above, pp 11-14.
[168] The alleged mental injury is characterised as either a psychiatric reaction to the physical injury or an aggravation and/or exacerbation of a paranoid psychosis.
[169] See p 22 of Mr Barr's written submissions dated 1 July 2004.

probability, that is to say, in terms of possibility.

195. Given its nature, the Court needs to approach, examine and consider and evaluate the evidence, from a particular perspective that possesses two distinct aspects. First, there is a difference between legal reasoning and medical or scientific reasoning on issues of causation.[170] Secondly, there are some ground rules for dealing with evidence which does not venture beyond the bare possibility of a given occurrence or state of affairs, particularly in the context of causation. In that respect regard needs to be had to what was said in *Fernandez v Tubemakers of Australia Ltd* [1975] 2 NSWLR 190 at 193-194 per Reynolds JA:

> "In cases, of which I think this is certainly one, where expert medical evidence is necessary to establish a causal sequence, an expert may express an opinion that there is a relationship. He may express it firmly, he may express it in terms of probability or possibility, or he may expound or explain the aetiology and leave the tribunal of fact to infer the probable relationship on the whole of the facts. When a medical witness speaks of a probability of a causal relationship, he is himself drawing an inference based on medical knowledge and the facts known to him.
>
> There is no doubt that, if a medical witness expressed a view that there is a connection, or that there is probably a connection, between the suggested cause and the result, a case is made out for consideration of the issue by the tribunal of fact. Difficulty arises when an expert witness speaks only in terms of possibility in circumstances where it can be seen that he declines to draw the inference which the lay tribunal is invited to draw. It seems to me that the answer to the question which is posed in such cases begins with an understanding of the real content of the medical opinion relied upon. An expression of opinion that a condition could or might be related to a suggested cause will have different meanings in different contexts. If nothing is known as to the aetiology of a

[170] See Travers "Medical Causation" (2002) 76 ALJ 258 at 260 -261 where the author discusses the following cases: *Henville v Walker* (2001) 75 ALJR 1410; *Barnes v Hay* (1988) 12 NSWLR 337; *Alexander v Cambridge Credit* (1987) 9 NSWLR 310; *March v Stramere* (1991) 171 CLR 506. At 259 the author says:

" The legal concept of causation differs from philosophical and scientific notions of causation:

' In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence'"

> condition or disease, no cause can be excluded as a matter of logic, and so it might be said that any suggested cause might have or could have caused it. In such a case the assertion is not in the full sense an expression of expert opinion and has no probative force.
>
> If very little is known of the relevant aetiology, a similar expression of opinion may mean that present scientific knowledge does not exclude the possibility of a causative relationship. If much is known and the knowledge is explained and expounded to the tribunal of fact, an expression which does not pass beyond possibility may be regarded as a precise and guarded scientific statement which leaves the ultimate question or probability to the tribunal to pronounce upon, having regard to all the facts.
>
> I have made these observations in order to show that it is impossible to generalise in respect of an expert opinion which does not travel beyond a possible causal connection."

196. In my opinion, these observations apply equally to statements as to the existence of a particular fact, which does not necessarily raise issues of causation, for example whether a person had a pre-existing illness.

197. Travers addresses the circumstance under which a possibility (as expressed by an expert witness) may be elevated to the level of a probability:

> "If expert evidence of an opinion that exposure to A possibly causes B is properly regarded as a precise and guarded scientific statement, it is open to the judge or jury, having regard to all the facts, to treat what the expert described as a possibility as being established on the balance of probabilities for the purposes of the litigation. What a scientist may describe as a possibility in the course of precise and guarded scientific discourse, a judge or jury may regard as a probability for the purposes of civil litigation. In this way, scientific possibility may be elevated to legal probability."[171]

To my mind, these observations are rooted in common sense – a prime example of common sense reasoning - and accord with the guidelines established in *Fernandez v Tubemakers of Australia Ltd* (supra).

[171] See Travers n 170, p 262.

The expert psychiatric evidence in this case must be sieved through the filter of the aforementioned observations which establish a set of ground rules for evaluating expert evidence.

It is also essential to keep firmly in mind that the worker bears the onus of proof – both evidentiary and legal – in relation to the following matters:

1. that the worker suffered an injury within the definition of the *Work Health Act*.

2. that injury resulted in or materially contributed to the worker's incapacity and

3. that the worker was totally or partially incapacitated as a result of the injury.

198. The requisite standard of proof is the civil one, that is, the balance of probabilities. That means that the worker must show that it is more probable than not that he suffered an injury that resulted in or materially contributed to an incapacity, either total or partial.

199. The worker's primary complaint is that he suffered a mental injury in the form of a psychiatric reaction – described by Dr Kenny as a "adjustment disorder with depression, anxiety and paranoid thinking" – to the right knee injury that he sustained in the accident on 22 June 1997. In order to put the worker's claim in proper perspective – and to properly consider the merits of his claim - it is necessary to examine and assess the worker's mental or psychiatric condition prior to the accident. Was the worker suffering from a pre-existing psychiatric condition, and if so what was the nature and characteristics of that condition? That line of inquiry will, of course, traverse the secondary allegation made by the worker, namely, that he suffered an aggravation and/exacerbation of a pre-existing paranoid psychosis.

200. The evidence clearly establishes that during the several years prior to the accident the worker was not mentally well.[172] In particular he suffered from a combination of mental illnesses or disturbances: personality disorder, conversion disorder and major depression. [173] Those conditions or disturbances are supported by objective evidence in the form of medical records and by expert evidence. I am satisfied on the balance of probabilities that prior to his accident the worker had an underlying psychiatric vulnerability.[174] As to his overall state of mental health prior to the accident, it is somewhat difficult to determine how well Mr Ah Quee was functioning during that period, but I think it is fair to say that the worker was able to cope mentally, "but he was sort of on the fringe".[175]

201. The question that needs to be considered is whether the worker's pre-accident psychiatric profile extended further, encompassing a paranoid psychosis in terms of either a delusional disorder or paranoid schizophrenia.

202. Whether or not the worker was suffering from a paranoid psychosis before his accident is a question of fact. As the issue relates to the onset of an illness or disease, the question of fact is medical or scientific in nature.[176] The determination of the issue depends upon a careful examination and assessment of the expert testimony.

203. Although there was no direct or objective evidence that the worker had a paranoid psychosis prior to his accident, the expert witnesses proffered their opinions as to the likelihood of such a pre-existing psychiatric illness. Their views were strewn across the "possibility/probability/certainty" continuum.

204. Dr Brown was the most affirmative in expressing an opinion as to the likelihood that the worker was suffering from a paranoid psychosis prior to

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[172] See above, pp 26-28.
[173] See again pp 27-29 above.
[174] In that regard I accept Mr Barr's analysis and assessment of the psychiatric evidence: see Counsel's written submissions dated 1 July 2004, pp 18 and 23.
[175] See the opinion of Dr Kenny referred to above at p 26.
[176] See Travers n 170, p 259.

his accident in June 1997. He concluded that the worker had a paranoid psychosis prior to his work related injury. He considered that it mattered little whether the specific diagnosis was that of a delusional disorder or paranoid schizophrenia. He based his conclusion on the factual evidence, the worker's presentation, the opinion expressed by Professor Yellowlees that there was little doubt that the aetiology and manifestation of Mr Ah Quee's psychiatric condition pre-dated his work injury and genetic and early developmental factors.

205. Although the opinion expressed by Dr Kenny was more guarded, I consider that his evidence, when viewed in light of the other evidence, is capable of being elevated to the status of a probability, that is to say, it is more probable than not that Mr Ah Quee was suffering from a paranoid psychosis prior to his accident in June 1997. Dr Kenny was of the view that the worker demonstrated longstanding psychiatric problems with most likely a paranoid schizophrenic illness, or at least a delusional disorder. He remarked that he would be astonished if the worker did not have a severe and continuing and pre-existing psychiatric condition. The only reason why he placed a qualification on his current and past diagnosis was he lacked clear evidence of the way the worker was functioning prior to the accident.[177] But what is significant is that Dr Kenny believed that the worker's history, in particular his pre-injury behaviour, was consistent with the formulation of paranoid schizophrenia. His conclusion was that the worker's history neither supported nor refuted a diagnosis of paranoid schizophrenia. Of further significance is the fact that Dr Kenny saw the worker in December 1998, which is not too distant from the time of his accident. He was then fairly sure that the worker was suffering from a paranoid schizophrenic illness. The existence of the illness at that time lends

[177] Dr Kenny placed a further qualification on his current diagnosis because of his awareness of the ways in which the litigation process can complicate a person's presentation.

some weight – though not conclusive - to the hypothesis that the worker had a pre-existing paranoid psychosis.

206. Although Professor Yellowlees did not expressly state that the worker had a pre-existing paranoid psychosis, he was of the opinion that the worker was suffering from paranoid schizophrenia when he saw him in 2004. He believed that the condition had been developing gradually and getting more severe over the years. Furthermore, he expressed the view that there was little doubt that the aetiology and manifestation of Mr Ah Quee's psychiatric condition predated his work related injury of 22 June 1997.[178] Of further significance was the evidence given by the Professor to the effect that in light of the worker's very strange behaviour in 1993 "it may well have been at that time he was already developing an incipient psychosis which was not clinically obvious". Professor Yellowlees did not appear to attach too much significance to the absence of any reference to evidence of psychosis in clinical notes because, to use his words "it is not unusual for patients who are in the early stages of developing a psychosis to present with other psychiatric syndromes, such as conversion disorder, as a precursor to their psychotic illness". The Professor's evidence that the 1993 Brisbane Hospital admission could have been "a prodroma of a developing psychiatric disorder such as schizophrenia" has additional probative value.

207. As with Dr Kenny, I consider that the evidence given by Professor Yellowlees is capable of being elevated to an expression of opinion that it is probable that Mr Ah Quee was suffering from a paranoid psychosis prior to his accident.

208. Having taken that view of the expert evidence, I am reasonably satisfied on the balance of probabilities that the worker had a pre-existing psychiatric illness in the nature of a paranoid psychosis, though the state of the

[178] Dr Brown in part relied upon this opinion in arriving at his own opinion about the worker's pre-existing psychiatric condition.

evidence does not permit me to make a specific finding as to whether that illness was a delusional disorder or paranoid schizophrenia.

209. However, if I have erred in elevating to the level of a probability the opinion evidence given by Dr Kenny and Professor Yellowlees, then the totality of the evidence given by the three expert medical witnesses – Dr Brown, Dr Kenny and Professor Yellowlees – establishes that it is more probable than not that the worker was suffering from a paranoid psychosis prior to his work related injury.

210. I propose to defer consideration of the second limb of the worker's allegation of mental injury which is predicated upon an aggravation and/or exacerbation of the worker's pre-existing paranoid psychosis until I have considered and adjudicated upon the worker's primary allegation of mental injury, namely, that the physical injury to the worker's right knee was psychologically accentuated by the worker's severe adjustment disorder with depression, anxiety and paranoid thinking.

211. As noted earlier,[179] Dr Kenny was of the view that Mr Ah Quee was reacting (in a psychiatric sense) to (1) the injury which he received to his right knee in June 1997 and the effect of that physical injury on his life and (2) the compensation/litigation process. In other words, the adjustment disorder was caused by both the physical injury and the litigation process. According to Dr Kenny those two causal agents contributed equally to the worker's adjustment disorder. However, Dr Kenny's evidence to the effect that any adjustment disorder was not a major problem and was secondary to the worker's other issues[180] should be noted.

212. As also noted earlier,[181] Professor Yellowlees opined that Mr Ah Quee has two sets of major illness: the schizophrenia which is unrelated to his knee

[179] See above, p 35.
[180] See p 321 of the transcript.
[181] See above, pp 44-45

injury and the physical injury itself. He went on to say that the worker also has the psychological adjustment to the physical injury. The Professor said that that psychological adjustment "can make the schizophrenia which has coincidentally developed somewhat worse". The Professor further opined that adjustment disorder is completely different from schizophrenia and is a short lived disorder that usually lasts a few months.

213. Although Dr Brown was of the opinion that Mr Ah Quee has a paranoid psychosis being either a delusional disorder or paranoid schizophrenia, he was of the view that the worker had never suffered from a severe Adjustment Disorder with depression anxiety and paranoid thinking, and if he had it would be more the product of paranoid attribution.[182]

214. Mr Barr submitted that the Court should find on the evidence that the worker suffered the mental injury described by Dr Kenny and pleaded in paragraph 10 of the Amended Statement of Claim – a severe adjustment disorder with depression, anxiety and paranoid thinking, caused by the right knee injury, in that it was a psychiatric reaction to that physical injury.[183] He also submitted that the Court should find that "worker's right knee injury caused, or at least accelerated the onset of, his paranoid psychotic illness (which had previously been no more than a pre-existing psychotic tendency".[184] Mr Barr went on to submit:

> "Even if the worker's paranoid psychotic illness pre-dated or arose independently of the knee injury of June 1997, that knee injury – a genuine and moderately severe injury to the right knee – caused injury and consequent incapacity to the worker in these ways:
>
> (1) directly causing pain and incapacity;
>
> (2) exacerbating and aggravating the worker's underlying psychotic delusional illness by causing delusions that the knee injury was even

[182] See Exhibit 15- report dated 8 March 2004, p 19.
[183] See p 20 of Counsels' written submissions dated 1 July 2004.
[184] See p 20 of Counsel's written submissions dated 1 July 2004.

more severe than it was (including beliefs as to crumbling bones and haemorrhaging), thus rendering him more incapacitated and hindering his recovery;

(3) causing him of loss of his employment;

(4) causing severe adjustment disorder with anxiety, depression and paranoid thinking (as per Dr Kenny 5 September 2003)."[185]

215. Mr Southwood submitted that the Court should find that the worker has not suffered a severe adjustment disorder with depression, anxiety and paranoid thinking as a result of his knee injury.[186] He further submits that the Court should find that any adjustment disorder Mr Ah Quee may have suffered " was transient, has passed and is no longer productive of any disability or incapacity.[187] In addition, Mr Southwood submitted that the worker did not suffer an exacerbation or aggravation of his pre-existing paranoid psychosis as a result of his knee injury."[188]

216. It is for the worker to reasonably satisfy the Court on the balance of probabilities that he suffered a mental injury in terms of an adjustment disorder with the attendant characteristics. In determining whether the worker has discharged that onus, it is necessary for the Court to undertake an independent assessment of the evidence. Where there is a conflicting body of expert evidence, as is the case here, the Court must attempt to resolve the conflict and to determine, on a rational basis, which body of expert evidence is to be preferred.[189]

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[185] See p 20 of Counsel's written submissions dated 1 July 2004.
[186] See p 20 of Counsel's written submissions dated 16 August 2004.
[187] See again p 20 of those submissions.
[188] See p 20 of Counsel's written submissions.
[189] See *Wiki v Atlantis Relocations (NSW) Pty Ltd* (2004) 60 NSWLR 127 at 136. There the NSW`Court of Appeal discussed the methodology of judicial resolution of disputes between experts:

"…where the issue in dispute involves differences between expert witnesses that are capable of being resolved rationally by examination and analysis, and where experts are properly qualified and none has been found to be dishonest, or misleading, or unduly partisan, or otherwise unreliable, a decision based solely on demeanour will not provide the losing party with a satisfactory explanation for his or her lack of success. A justifiable grievance as to the way in which justice was administered will then arise."

217. It is important to reach some understanding as to the import of Dr Kenny's evidence in relation to the adjustment disorder. Put simply, Dr Kenny says that an "adjustment disorder" refers to a person's reaction to a given situation. But according to Dr Kenny that reaction, which complicates Mr Ah Quee's overall presentation, seems to be multi-layered. Dr Kenny equates that psychiatric condition with a major functional psychological accentuation of the worker's physical problems with his knees. At the same time he refers to an accentuation of the worker's psychiatric problem/state and puts that down to a complication of the compensation/litigation process in which the worker has become enmeshed since the accident. Dr Kenny was certain that any physical problems the worker had were "accentuated by his psychological reaction determined by the compensation process and the frustrations that so commonly arise therefrom…"[190] This analysis of the worker's psychiatric reaction led Dr Kenny to conclude that the physical injury and the compensation process contributed equally to Mr Ah Quee's overall reaction to the situation.

218. However, what is interesting about Dr Kenny' evidence is that he acknowledged an interaction between the worker's adjustment disorder and his underlying schizophrenic illness. In response to the hypothesis advanced by Dr Brown that the worker's paranoid predisposition resulted in an exaggerated reaction on the part of the worker to his physical injury and sequelae, Dr Kenny considered it reasonable to think that the physical injury might loom large and become the focus of the worker's paranoid thinking in light of his schizophrenic illness. He equated this scenario with a psychological accentuation of the physical injury.

It is also important to bear in mind that Dr Kenny was not emphatic about the use of the label "adjustment disorder" and considered his disagreement on the issue with Dr Brown to be largely academic. He considered its use to be merely a convenient way of tying part of the reaction into a given

[190] Dr Kenny gives as examples, concerns about being unreasonably paid and unreasonably looked after.

situation. Having said that he did not consider the adjustment disorder to be Mr Ah Quee's major problem. Dr Kenny believed that the adjustment disorder was secondary to other issues. He considered that given the worker's underlying severe psychiatric disturbance he may have other psychological problems complicating the injury. Indeed he agreed under cross examination that in relation to an assessment of the worker's condition three factors were at play, namely the knee injury, an underlying predated psychiatric condition and a adjustment disorder following the injury.

219. Some support for Dr Kenny's diagnosis of adjustment disorder can be found in the evidence of Professor Yellowlees. However, he believed that the psychological adjustment to the physical injury did not explain the worker's delusional behaviour in relation to his physical symptoms. Moreover, any support derived from Professor Yellowlees' evidence for Dr Kenny's hypothesis was further limited by the Professor's belief that the adjustment disorder would probably have been of short duration and may have worsened the worker's schizophrenia for only a relatively short period of time.[191]

220. As indicated earlier, Dr Brown categorically rejects the possibility of an adjustment disorder. Alternatively, he says that if the worker had such a condition it would have been more the result of his paranoid attributions.

221. The issue in relation to the adjustment disorder is a difficult one to resolve, given the worker's underlying, pre-existing paranoid psychosis and the worker's undeniably very complex presentation. However, having regard to the evidence given by Dr Kenny and Professor Yellowlees, I am reasonably satisfied that it is more probable than not that the worker suffered a psychiatric reaction to his physical injury which can be conveniently labelled as an adjustment disorder with anxiety, depression and paranoid thinking. However, I agree with Dr Kenny that the worker's psychiatric profile is considerably more complex and that the adjustment disorder was

[191] Dr Kenny does not appear to have expressed any view about the duration of the adjustment disorder.

not a major problem but secondary to other issues. In my view one of those issues is whether the worker's physical injury aggravated or exacerbated the worker's pre-existing paranoid psychosis; and that issue is dealt with below. In my opinion there is some overlap between the worker's psychiatric reaction to the injury and an aggravation and/or exacerbation of his predated psychiatric condition such that to some extent the former appears to be largely subsumed under the latter.

222. However, before proceeding to deal with the issue of aggravation and/ or exacerbation I should say that it is difficult to determine the duration of the worker's adjustment disorder. Professor Yellowlees was of the view that adjustment disorder is a condition of short duration and usually lasts a few months. I am inclined to accept the evidence of Professor Yellowlees in that regard. Working on the basis that the usual is more likely to be what occurred than the unusual,[192] one might conclude that it is likely that the adjustment order lasted a relatively short period of time. However, there is one aspect to the worker's psychiatric profile that indicates that the adjustment disorder was not of short duration and indeed is ongoing. That aspect relates to Mr Ah Quee's reaction (in terms of an adjustment disorder) to the situation due to the compensation/litigation process. I am referring here to Dr Kenny's opinion that any physical problems the worker had were "accentuated by his psychological reaction determined by the compensation process and the frustrations that commonly arise therefrom", as distinct from that part of the adjustment disorder caused by the physical injury itself.[193] However, there is a real issue as to whether the worker's psychiatric reaction due to the compensation/litigation process is compensable under the *Work Health Act*. It is clear that where the physical injuries on which an original compensation claims is based were not themselves compensable, the

[192] The converse of that is that the unusual does not occur that often: see Mr Justice P.W. Young " Fact Finding" (1998) 72 ALJ 21.
[193] Refer to Dr Kenny's analysis of the causative components of the worker's adjustment disorder which was referred to above at p 32.

neurosis which develops is not compensable: see CCH *Australian Workers Compensation Guide* p 3-500 par 3.470.40. The question of whether a compensation neurosis – a condition which bears some similarities to the postulated psychiatric condition of the worker – that is productive of incapacity can ever be compensable was left open in *Re Kirkpatrick and the Commonwealth* (1985) Australian Workers Compensation Case Digests 73-604; A.A.T No. N82/156, 30 January 1985. Although Mr Barr adverted to the issue – in a slightly different context – during the course of submissions,[194] Mr Southwood appears not to have turned his mind to the issue. In the absence of comprehensive argument in relation to that very interesting- and I might add germane - issue, it is my view that as a matter of strict legal principle and given the language and underlying philosophy of the injury provisions of the *Work Health Act,* a psychiatric reaction due to the compensation/litigation process, in the circumstances of the present case, is compensable under the Act, provided, of course, that it is productive of incapacity. Accordingly, it is my view that the worker not only suffered an adjustment disorder (as a psychiatric reaction to both the physical injury and the compensation/litigation process) as a result of his physical injury but continues to suffer from effects of that illness.

223. However, at the end of the day, whether or not the worker suffered an adjustment disorder with continuing incapacitating effects is not critical to the success of the worker's claim, for I am satisfied that in any event the worker suffered an aggravation and/or exacerbation of his pre-existing mental illness that is productive of incapacity.

224. In order to establish a mental injury in the nature of an aggravation and/or exacerbation of his paranoid psychosis, the worker must prove (1) the pre-existence of that paranoid psychosis and (2) that the worker' physical injury,

[194] See p 16 of Mr Barr's written submissions dated 1 July 2004:
" … the legal process itself arose out of the injury and so any additional mental injury (defined to include aggravation, acceleration or exacerbation) as a result of the legal process likewise arises out of the injury."

namely the injury to his right knee, aggravated and/or exacerbated that mental illness.

225. As stated earlier,[195] it has been established to the reasonable satisfaction of the Court that the worker had a pre-existing paranoid psychosis – either a delusional disorder or paranoid schizophrenia.

226. It remains for the worker to reasonably satisfy the Court on the balance of probabilities that the injury to the worker's knee aggravated and/or exacerbated his pre-existing mental illness. In my opinion that burden has been discharged by the worker both in fact and as a matter of law.

227. The Court accepts the following submission made by Mr Barr which is supported by the evidence of Dr Kenny:

> "As a result of the injury and all its consequent problems, the worker's underlying pre-existing psychiatric disturbance (postulated, depending on history, as a pre-existing delusional illness) became more severe as the injury became the focus for his delusions. Dr Kenny said in evidence that he thought it reasonable that, to a person with paranoid predisposition, the physical injury would loom somewhat larger and become the focus of paranoid thinking – a psychological accentuation of the physical injury."[196]

The evidence given by Dr Kenny demonstrates the somewhat blurred boundaries between a psychiatric reaction to a physical injury and an aggravation and /or exacerbation of a pre-existing psychiatric illness, but nonetheless gives support to the worker's contention that as a result of the injury to his knee his underlying psychotic illness was aggravated and/or exacerbated by causing delusions that the knee injury was more severe than it was.

228. The evidence was that on the last occasion the worker saw Dr Kenny he had told him that his knee had got worse and the worker continued to complain

[195] See above, pp 76-77.
[196] See p 17 of Mr Barr's written submissions dated 1 July 2004.

about various physiological changes to his knees which, in opinion of the Court, clearly amount to delusions. It was Dr Kenny's evidence that these delusions created real difficulties for the worker and drastically affected his ability to cope with his injury.

229. It is important to keep in mind that the worker had during the period 1998 - 2003 consistently reported to various doctors his beliefs about internal haemorrhaging into the knee, crumbling bones and missing muscles,[197] all of which beliefs the Court finds were delusional. I am reasonably satisfied on the balance of probabilities that the worker's presentation was genuine and did not contain any element of fabrication or malingering.

230. Some support for the worker's contention can also be found in the evidence given by Professor Yellowlees on page 2 of his report dated 25 February 2004.[198] Although his evidence was expressed in conjectural terms, what he said must be put alongside the other evidence which indicates an aggravation and/or exacerbation of the worker's pre-existing illness. Furthermore, much of what Professor Yellowlees said is rooted in common sense and questions of causation are to be resolved by the application of common sense.[199]

231. Further support for the worker's contention is to be found in Professor Yellowlees' evidence to the effect that the psychological adjustment to the injury may have made the schizophrenia "somewhat worse". Although the Professor was of the opinion that the effect would have been short lived, that piece of evidence does not sit comfortably with a body of evidence, from both Dr Kenny and the worker, that indicates that the worker's physical symptoms were being intensified – becoming increasingly delusional – over a prolonged period of time.

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[197] See p 18 of Mr Barr's written submissions dated 1 July 2004.
[198] There the Professor speaks of the interaction between the worker's work related injury and his psychiatric condition.
[199] See *March v Stramere* (1991) 171 CLR 506.

232. In my view, the evidence elicited from Professor Yellowlees in relation to the interaction between the pre-existing psychiatric illness and the physical injury which appears at page 7 of the transcript of proceedings on 24 March 2004[200] is particularly enlightening, and has real probative value. That evidence is, in my opinion, supportive of the position contended for by the worker.

233. I accept the following submission made by Mr Barr which has a sound evidentiary basis:

> "In terms of causation, it does not matter whether incapacity is caused by delusions (or partly delusional beliefs) about the seriousness of the knee condition. The delusions may be caused by the underlying psychotic condition, but they are also caused by the knee injury itself. Both causes combine to cause the incapacitating delusion. The knee injury (including pain, the treatments received for it, and the physical incapacity from it) exacerbated, caused a deterioration in and aggravated the psychotic condition."[201]

I also agree with the following submission again made by Mr Barr:

> "The view of Dr Brown at pp 18/19 of his report (Exh E15) dated 8 March 2004 that the worker's paranoid predisposition has resulted in an exaggerated reaction to the injury and subsequent events may well be correct, but his statement of opinion that the worker's psychotic illness, not the injury, caused the reaction, is wrong in fact and logic. Both causes are operative causes, in combination."[202]

234. Dr Brown's evidence invites further critical analysis and comment.

235. Dr Brown expressed the opinion that the worker's paranoid psychosis had not been significantly aggravated or exacerbated by his physical injury and any effect would have been transient. This amounts to a concession that the injury did have an aggravating or exacerbating effect on the worker's pre-existing psychiatric illness. However, the persisting delusions on the part of the worker concerning physiological processes occurring within his body –

[200] This evidence was referred to at p 45 above.
[201] See pp 21-23 of Counsel's written submissions dated 1 July 2004.
[202] See p 21 of Counsel's written submissions dated 1 July 2004.

that is new delusions – points to the aggravation and/or exacerbation enduring over a lengthy period of time and continuing to date.

236. I find the doctor's hypothesis that the worker has incorporated aspects of his injury into the delusional system of his pre-existing paranoid psychosis such that his delusions are not in any way the product of his physical injury, but the result of his paranoid psychosis, most unconvincing. The argument in my view is purely semantic and inherently fallacious. The logical fallacy is exposed by the following line of reasoning: Dr Brown says that the worker's delusions may not be confined to aspects about his injury[203]and therefore delusions about his injury do not bear any logical connection to his injury. As `a matter of logic that argument cannot be sustained: it is a non sequitur. Furthermore, in my opinion, the evidence shows that it is more probable than not that the physical injury and its sequelae acted upon the worker's pre-existing paranoid psychosis, aggravating and /or exacerbating that illness, rather than the worker's delusions concerning his physical symptoms becoming incorporated within the pre-existing delusional system established as a result of the pre-existing psychotic illness. While the former scenario gives rise to a causal relationship the latter does not. I am reasonably satisfied on the balance of probabilities that there is a causal connection between the physical injury and the worker's predated psychiatric condition with the result that the injury aggravated and/or exacerbated the physical injury. In coming to that conclusion I have considered and assessed all the relevant evidence by adopting a common sense approach to the question of causation rather than applying scientific or logical theories of causation.

237. In my view, the worker's claim that he suffered a mental injury defined in terms of an aggravation and/or exacerbation of his pre-existing paranoid

[203] Indeed the worker appears to have suffered from a variety of delusions which have no factual nor logical connection with his physical injury, for example, those concerning police officers, mental health staff and members.

psychosis is made out as a matter of law.

As submitted by Mr Barr:

> "This is a case in which the knee injury has caused long term, possibly permanent, aggravation of the worker's psychiatric state. There is both exacerbation and aggravation."[204]

238. Consistent with the analysis undertaken by Kitto J in *Federal Broom v Semlitch* (supra at 633-634),[205] the evidence in this case establishes on the balance of probabilities that the incident of 22 June 1997, and the physical injury sustained on that day by the worker, acted upon the worker's pre-existing condition of mental illness (a disease) to produce a set of delusions causing incapacity for work, thereby establishing a clear case of exacerbation of the worker's mental disease.[206] Further, and again consistent with what Kitto J said in that case, the evidence establishes an untoward occurrence in the worker's employment – that is the accident of 22 June 1997 and its sequelae – which caused a pre-existing mental disorder to manifest itself in a new delusion, thereby resulting in an exacerbation of the mental disorder.

239. In accordance with the dictum of Taylor J in *Darling Island Stevedoring & Lighterage Co Ltd v Hankinson* (supra at 31), the evidence presented in this case, in my opinion, establishes an aggravation of the worker's pre-existing paranoid psychosis which of itself has caused a permanent incapacity. The worker's delusional beliefs about his physical symptoms have become enmeshed in the worker' symptomatology and become an intrinsic, permanent part of that symptomatology.

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[204] See p 22 of Counsels' written submissions dated 1 July 2004.
[205] Kitto J's judgment was referred to above at pp 62-63.
[206] I reject the submission made by Mr Southwood at p 21 of his written submissions dated 16 August 2004 to the effect that *Federal Broom v Semlitch* (supra) has no application on the basis that the whole of the psychiatric evidence shows that the incident of 22 June 1997 did not act upon the pre-existing condition of paranoid schizophrenia to produce a delusion causing incapacity for work.

240. Finally – and this is intended to address the employer's reliance on *Kirkpatrick v Commonwealth* (1985) 62`ALR 533 to support its position[207] - I agree with the submission made by Mr Barr at page 4 of his written submissions dated 27 August 2004:

> " The employer's reliance upon *Kirkpatrick* to support its position is misplaced. In the case of Mr Ah Quee, the focus of delusions involve the knee that, objectively, was seriously physically injured. To use the words of the Federal Court in *Kirkpatrick,* the knee injury 'was actually operative as a factor in producing the worker's condition."

241. In my view, the present case is analogous to the situation in *Federal Broom v Semlitch* (supra) and *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29, reversed on appeal 47 ALJR which were discussed in *Kirkpatrick v Commonwealth* (supra). The present case is entirely distinguishable from the proven facts in *Kirkpatrick v Commonwealth*.

242. There is final one aspect of the issue of exacerbation and/or aggravation that needs to be considered. That aspect arises out of Dr Kenny's evidence to the effect that Mr Ah Quee's psychiatric condition was aggravated by his involvement in the compensation/litigation process.[208] In my opinion that source of aggravation is capable of establishing the necessary causative link between the physical injury and the worker's psychiatric status because of the logical connection between the work related injury and the compensation /litigation process.[209] Accordingly, it is open on the evidence and as a matter of legal principle to find that the worker's pre-existing psychiatric condition was exacerbated and/or aggravated by the compensation/litigation process.

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[207] See p 21 of Mr Southwood's written submissions dated 16 August 2004:
" Although there might be an interrelationship between the incident on 22 June 1997 and some of the worker's delusions, this is not a case of the sequelae making the sick mind sicker and contributing to incapacity. This is merely a case of a sick mind interacting with the factors relating to the incident on 22 June 1997 without adding to the incapacity caused by the paranoid schizophrenia: *Kirkpatrick v Commonwealth* (1985) 62 ALR 533."

[208] See above, pp 33-34

[209] This particular issue was discussed earlier in relation to the worker's adjustment disorder: see pp 82-84 above.

243. However, my primary conclusion is that the worker it was the physical injury itself which aggravated and/or exacerbated the worker's pre-existing paranoid psychosis.

(d) Conclusions concerning the alleged injury

244. I make the following findings on the balance of probabilities:

244.1 The worker suffered a significant physical injury in the nature of a knee injury.

244.2 In addition, the worker suffered a severe adjustment disorder with anxiety, depression and paranoid thinking of lasting duration. That psychiatric state was caused by both the physical injury and the compensation process.

244.3 In addition to that mental injury the worker suffered an exacerbation and/or aggravation of his pre-existing paranoid pyschosis – defined either in terms of a delusional disorder or paranoid schizophrenia. The worker's physical injury exacerbated and/or aggravated the worker's predated psychotic illness by causing delusions that the knee injury was more severe than it was (including beliefs as to crumbling bones, missing muscles and haemorrhaging). Further, or in the alternative, the worker's pre-existing psychotic illness was exacerbated and/or aggravated by the compensation/litigation process.

244.4 The two different mental injuries referred to in (1) and (2) above coincided and operated simultaneously.

244.5 As at the date of the hearing of these proceedings the physical injury (and its effects) as well as the two types of mental injury and their attendant effects subsisted.

244.6 That the operative injuries and their effects have resulted in or materially contributed to the worker's incapacity.[210]

Capacity for work and loss of earning capacity

245. I am reasonably satisfied on the balance of probabilities that as a result of the physical and mental injuries suffered by the worker as a consequence of his accident at work on 22 June 1997 the worker has been and remains totally incapacitated for work.

246. In my opinion, that finding is solidly supported by the psychiatric and physical medicine.

247. The physical medicine shows that as a result of the injury to his knee the worker was and remains partially incapacitated for work.[211]

248. When one has regard to both the medical and psychiatric evidence, the inescapable conclusion is that the worker was and is totally incapacitated for work.

249. In order to be compensable the mental injury, whether described in terms of an adjustment disorder or an exacerbation and/or aggravation of a predated paranoid psychosis or a combination of the two – which is what the Court has found occurred in Mr Ah Quee's case – must be productive of incapacity.

250. Dr Kenny expressed the opinion that the worker's psychiatric condition would make it very difficult for the worker to find employment and indeed that condition may well render him unemployable.[212] Dr Kenny went on to say that the worker's psychiatric status "massively interferes with the process of his rehabilitation and the possibility of obtaining alternative

[210] The worker's incapacity as a result of those injuries is dealt with in the next section of the judgment.
[211] See above, p 70
[212] See above, p 32.

employment".[213] He expressed the view that the possibility of the worker obtaining alternative employment was minimal.[214] He subsequently shifted to the view that the worker was completely unemployable in light of his psychiatric condition.[215]

251. When considering and evaluating Dr Kenny's evidence, it is important to keep in mind the nature of the mental injuries suffered by the worker. Each of the mental injuries – and particularly in combination – rendered the worker more incapacitated than he would have been due to his pre-existing psychotic illness because their focus was on the physical injury and they accentuated the severity of that injury. Furthermore, those injuries, individually and in combination, clearly hindered his recovery from the physical injury and his rehabilitation. It is significant that while Dr Kenny believed that Mr Ah Quee was "on the fringe" prior to his accident he would have been able to cope mentally.

252. There is a death of evidence as to how well the worker was functioning prior to the accident, but as the evidence shows he was in fact suffering from a paranoid psychosis. In contrast, there is a wealth of information concerning his post – injury psychiatric state, replete with incapacitating delusions - particularly those relating to his knee injury.

253. The employer sought to show that the worker had a poor, intermittent work history prior to the accident, presumably due to his psychiatric condition, and therefore he already had a limited capacity to undertake paid employment, at least on a continuous basis. However, at the same time the employer alleged that the worker had a considerable capacity for work. The employer cannot "have it both ways". The incontrovertible fact is that, regardless of the worker's pre-accident capacity for work, he was

[213] See above, p 34.
[214] See above, p 34.
[215] See above, p 32.

periodically in gainful employment,[216] whereas after the accident he was virtually unemployed and in my opinion unemployable.

254. Professor Yellowlees viewed the worker's psychiatric condition as hindering his rehabilitation. [217] The Professor was also of the view that the worker would be unfit for any form of paid employment as a result of his psychiatric condition, if left untreated.[218] Those opinions assume special significance in light of the Court's findings as to the incapacitating effect of the worker's delusions concerning his knee injury together with the effects of the worker's psychiatric reaction to that injury.

255. Even Dr Brown was of the view that the worker was not fit for any form of employment as " a result of a combination of factors the main one being his paranoid psychosis".[219] Once it is established that the worker has suffered mental injuries (within the meaning of the *Work Health Act*) with clearly discernible incapacitating effects, the opinion of Dr Brown carries great probative force. It follows that the mental injuries suffered by the worker have resulted in or materially contributed to the worker's incapacity for work, namely, a total incapacity for paid employment.

256. The surveillance evidence presented in this case showed the worker undertaking a range of physical activities. In my opinion, that evidence does not, in any meaningful way, demonstrate a capacity to undertake paid employment in the real industrial or commercial world. The environment in which the worker was observed to be performing those activities is so far removed from the environment and the demands of paid employment as to be of little probative value. What I observed on the video was a man, who had a clear physical incapacity, merely "pottering around" – as though he had "all the time in the world" - and displaying a very minimal level of

[216] Indeed, the worker was gainfully employed at the time of the accident.
[217] See above, pp 43-44.
[218] See above, pp 43-44
[219] See above, pp 49-50

output. Most certainly, he did not present as an employable proposition.

257. My final conclusions in this case are as follows:

257.1 the worker was and remains totally incapacitated as a result of his physical injury together with his mental injuries – the adjustment disorder (being a psychiatric reaction to the physical injury and/or the compensation/litigation process) and the aggravation and/or exacerbation of the worker's pre-existing paranoid psychosis (with or without including the effects of the compensation/litigation process as part of that causative process) or alternatively

257.2 the worker was and remains totally incapacitated as a result of the physical injury together with his mental injury in terms of an aggravation and/or exacerbation of the worker's pre-existing paranoid psychosis (with or without including the effects of the compensation/litigation process as part of that causative process).

258. In the event I have erred in my conclusion that the worker was and remains totally incapacitated as a result of his injuries, and that in fact he is only partially incapacitated for work,[220] then, in my opinion the employer has failed to discharge the evidentiary burden that befalls it in accordance with the dictum of Martin CJ in *Northern Cement Pty Ltd v Ioasa* (SC (NT) 17 June 1994, unreported) as elaborated upon by the late Bailey J in *Normandy Mining v Horner* [2000] NTSC 79 para [29]:

> "With respect, I agree with the approach adopted by Martin CJ. In order for an employer 'to point to evidence… minimising his liability in monetary terms', generally speaking, the evidence would be expected to be directed to at least three matters:

[220] That is partial incapacity on account of only the physical knee injury or on account of both that injury and any mental injury found to have been suffered by the worker. In order to establish partial incapacity, loss of earning capacity on the part of the worker must also be established. If one looks at the physical injury alone it is clear that both of those aspects have been demonstrated on the evidence.

(a) the most profitable work[221] which, after the accident, the worker would be capable of undertaking;

(b) whether such work is reasonably available; and

(c) the amount which the worker is reasonably capable of earning from such work."

259. In my view the employer is unable to point to evidence in relation to the matters referred to in (a) and (b) above which go to the issue of work reasonably available to the worker. I agree with the submission made by Mr Barr:

> " The worker has not held a job of work for 7 years. The employer has deliberately not called evidence as to the worker's mental capacity to apply for , hold down and carry out a job of work, in circumstances where the worker is clearly mentally incapacitated, totally incapacitated - for work. The employer failed to ask the critical question of any of its witnesses: 'Would you employ the worker, someone with serious psychiatric as well as moderately serious knee problems?' in order to establish that the jobs of work relied on by the employer were reasonably available to the worker."[222]

RESIDUAL ISSUES

260. Unfortunately, I have not had sufficient time to consider the remaining issues in this case, namely, the worker's application to amend his claim to include a claim for "prescribed children" pursuant to s 65 of the *Work Health Act* and the worker's submissions relating to the superannuation component of "normal weekly earnings". I hope to adjudicate upon those issues shortly after I return from leave in mid January next year.

261. When I have decided those issues I will then call upon the parties to address me in relation to final orders and any consequential or ancillary orders.

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[221] See s 68 of the *Work Health Act* which sets out the criteria for assessing "most profitable employment".
[222] See p 22 of Counsel's written submissions dated 1 July 2004

Dated this 23rd day of December 2004.

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Mr John Lowndes
STIPENDIARY MAGISTRATE