CITATION: *Hand v Alcan Gove Pty Ltd* [2007] NTMC 041

PARTIES:	JASON RICHARD HAND
	v
	ALCAN GOVE PTY LIMITED
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Court
FILE NO(s):	20614894
DELIVERED ON:	29 June 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	16 & 17 April 2007
JUDGMENT OF:	Dr J Lowndes SM

CATCHWORDS:

PERMANENT IMPAIRMENT COMPENSATION – WHETHER SURGERY IS AN INJURY – CONSTRUCTION OF THE PERMANENT IMPAIRMENT PROVISIONS OF THE WORK HEALTH ACT – WHOLE PERSON PERMANENT IMPAIRMENT – THE APPLICATION OF THE AMERICAN MEDICAL ASSOCIATION GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT

Work Health Act sections 3, 70, 71 and 72

Pengilly v NTA [2006] NTSC 19 applied
NTA v Pengilly [2004] NTCA 4 applied
D & W Livestock Transport v Smith No 264/1992 distinguished
D & W Livestock Transport v Smith (1994) 4 NTLR 160 applied
Canute v Comcare (2006) 229 ALR 445 distinguished

REPRESENTATION:

Counsel:

Plaintiff:	Mr McDonald QC
Defendant:	Mr Grant QC

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Morgan Buckley

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 041
Number of paragraphs:	326

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

No. 20614894

[2007] NTMC 041

BETWEEN:

JASON RICHARD HAND
Plaintiff

AND:

ALCAN GOVE PTY LIMITED
Defendant

REASONS FOR DECISION

(Delivered 29 June 2007)

Dr LOWNDES SM:

THE NATURE OF THE PROCEEDINGS AND ORDERS SOUGHT

1. The present proceedings give rise to some interesting and important issues of law. Basically, the worker seeks a number of rulings, referable to lump sum entitlements pursuant to section 71(1) of the *Work Health Act*:

(i) A ruling that any one, or some, or all of certain surgical procedures performed on the worker in January and September 1992, February 1993, July 1995, May 2000, May and August 2001 and February 2004 were injuries within the meaning of the definition in section 3 of the *Work Health Act*;

(ii) A ruling that lump sum payments made to the worker pursuant to s 71(1) of the Act in 1995 and 2002 on account of his percentage permanent impairment of the whole person arising from the injury

should have been calculated at 208 x the appropriate weekly earnings rather than 104 x the appropriate average weekly earnings;

(iii) A ruling that the 20% permanent impairment of the whole person assessed in respect of the worker's knee dysfunction set out in the report of Dr Colin G Mills dated 18 December 2005, relates to the worker's replaced knee, which constitutes a different injury from the knee injury assessed and compensated for in 1995 and 2002, although one arising from the injury;

(iv) A ruling that each of the assessments made by Dr Mills in his report dated 18 December 2005 of 7% permanent impairment of the whole person for pain and 5% of the whole person for scarring and cosmetic defects in respect of the worker arising from the injury, are assessments in respect of permanent impairment aspects of the worker arising from the injury which had not previously been assessed or compensated for in 1995 and/ or 2002.

The worker also seeks concomitant orders, which are as follows:

(i) An order that the worker is entitled to further sums for his percentage permanent impairments of the whole person than he was paid in either or both of 1995 and 2002, in such amount as the Court determines; and

(ii) An order that the worker is entitled to further sum or sums for his current percentage permanent impairment of the whole person as assessed by Dr Mills in his report dated 18 December 2005, again in such amount as the Court determines.

2. The worker also seeks an order that the employer pay to the worker his costs of assessments conducted by Dr J Begg, Dr J Meegan and Dr G Mills in the total amount of $1,925, together with interest thereon pursuant to s 109(1)

of the Act. Finally, the worker seeks an order for costs of and incidental to the proceedings.

CONSOLIDATED PLEADINGS

3. In order to assist the Court in making its determination, the Court was provided with a set of consolidated pleadings based on the Worker's Amended Statement of Claim dated and filed 16 April 2007 and the Employer's Amended Defence dated and filed 16 April 2007. The contents of that document are as follows:

The Statement of Claim

SC1. The Worker was born on 12 April 1968 and is currently aged 38 years.

D1. The Employer admits the allegations contained in paragraph 1.

SC2. The Employer was formerly known as Nabalco Pty Limited and changed its name to Alcan Gove Pty Limited on or about 3 June 2002.

D2. The Employer admits the allegations contained in paragraph 2.

SC3. At all material times the Employer was a body corporate capable of suing and being sued in its corporate name and style.

D3. The Employer admits the allegation contained in paragraph 3.

SC4. On or about 3 April 1990 the Worker commenced employment with the Employer as a utility serviceman within its Maintenance Department at Nhulunbuy in the Northern Territory of Australia.

D4. The Employer admits the allegation contained in paragraph 4.

SC5. On or about 8 August 1991 the Worker sustained an injury ("the injury").

Particulars

Severely damaged left knee joint.

D5. The Employer admits the allegations contained in paragraph 5.

SC6. The Worker made a claim under the *Work Health Act* in respect of the injury and the claim was accepted by the Employer.

D6. The Employer admits the allegations contained in paragraph 6.

SC7. On 22 August 1991 as a consequence of the injury the Worker underwent a lateral meniscectomy to his left knee performed by orthopaedic surgeon Mr S Baddeley.

Particulars

Arthroscopy and removal of torn lateral meniscus.

D7. The Employer admits the allegations contained in paragraph 7.

SC8. On 15 October 1991, Section 11 of the Work Health Amendment Act (No. 2) 1991 came into force, amending Section 71 of the *Work Health Act*. This had the effect of lowering the threshold for a permanent impairment entitlement from 15% to 5%, and of doubling the multiplier of average weekly earnings from 104 x average weekly earnings to 208 x average weekly earnings.

D8. The Employer admits the allegations contained in paragraph 8.

SC9. On 8 April 1992, the Work Health Amendment Act (No. 2) 1991 Amendment Act 1992 was assented to and by Section 2 thereof it was deemed to have come into operation immediately before the

commencement of the Work Health Amendment Act (No. 2) 1991, on 15 October 1991.

D9. The Employer admits the allegations contained in paragraph 9.

SC10. Section 3 of the Work Health Amendment Act (No. 2) 1991 Amendment Act 1992 repealed Section 14 of the Work Health Amendment Act (No. 2) 1991, and substituted a new Section 14 in that Act ("the New Section 14").

D10. The Employer admits the allegations contained in paragraph 10.

SC11. The New Section 14 in sub Section (1) thereof provided that Section 11 of the Work Health Amendment Act (No. 2) 1991 applied only to and in relation to an injury suffered by a Worker after the commencement of the Work Health Amendment Act (No. 2) 1991, on 15 October 1991.

D11. The Employer admits the allegations contained in paragraph 11.

SC12. In January 1992 as a consequence of the injury, the Worker underwent a ligament reconstruction of the left knee with ligament staple fixation.

D12. The Employer admits the allegations contained in paragraph 12.

SC13. The surgery performed on the Worker's left knee on January 1992 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D13. The Employer denies the allegations contained in paragraph 13.

SC14. On 2 September 1992 as a consequence of the injury, the Worker underwent further arthroscopy of the left knee with chrondroplasty and removal of staples from the previous reconstruction.

D14. The Employer admits the allegations contained in paragraph 14.

SC15. The surgery performed on the Worker's left knee on 2 September 1992 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D15. The Employer denies the allegations contained in paragraph 15.

SC16. On 13 February 1993 as a consequence of the injury, the Worker underwent further arthroscopic surgery involving a revision of left and anterior cruciate reconstruction, in which the surgeon Dr R Atkinson used a segment of patellar tendon to reconstruct the anterior cruciate ligament.

D16. The Employer admits the allegations contained in paragraph 16.

SC17. The surgery performed on the Worker's left knee on 13 February 1993 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D17. The Employer denies the allegations contained in paragraph 17.

SC18. On 24 March 1995 as a consequence of the injury, the Worker underwent steroid injections in the left knee to reduce pain and inflammation.

D18. The Employer denies the allegations contained in paragraph 18, and says that on 18 May 1995 the Worker's left knee was infiltrated with depo-Steroid and anaesthetic.

SC19. On 11 July 1995 as a consequence of the injury, the Worker underwent further surgery, namely arthroscopy which noted a minor lesion of the femoral condyle and tibial plateau.

D19. The Employer admits the Worker underwent arthroscopy on 11 July 1995, says that the arthroscopy disclosed a minor tear of the anterior aspect of the left lateral meniscus and some changes to the femoral condyle and tibial plateau, and otherwise denies the allegations contained in paragraph 19.

SC20. The surgery performed on the Worker's left knee on 11 July 1995 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D20. The Employer denies the allegations contained in paragraph 20.

SC21. In a medical report dated 12 September 1995, Adelaide orthopaedic surgeon, Dr Robert Atkinson advised the Work Health insurer TIO that as a consequence of the injury the Worker had a 15% permanent impairment of the whole person.

D21. The Employer admits the allegations contained in paragraph 21.

SC22. Shortly after September 1995, the Employer paid the Worker the sum of $9,901.32 purportedly being his percentage permanent impairment entitlement pursuant to Section 71 (1) of the *Work Health Act.*

D22. The Employer admits the allegations contained in paragraph 22.

SC23. The Employer calculated the sum of $9,901.32 by taking 15% of 104 x $634.70 being average weekly earnings in 1995.

D23. The Employer admits the allegations contained in paragraph 23.

SC24. The Worker's correct entitlement in 1995 to payment for his percentage permanent impairment of the whole person arising from the injury in accordance with Section 71 (1) of the *Work Health Act* should have been calculated at 15% of 208 x $634.70, namely $19,802.64, and the Worker claims the shortfall, to be calculated on the basis of average weekly earnings in the year in which payment is made.

D24. The Employer denies the allegations contained in paragraph 24 and says that the permanent impairment payment was properly made in respect of the injury pleaded at paragraph 5.

SC25. On 10 April 1997 as a consequence of the injury the Worker underwent a further arthroscopy of the left knee to excise a fibrous band in the left patello-femoral joint and remove loose bodies in the joint, a partial meniscectomy in the joint and a chrondroplasty of the lateral compartment and patello-femoral joint articular surfaces.

D25. The Employer admits the allegations contained in paragraph 25 save that it says the procedure was performed on 17 April 1997.

SC26. The surgery performed on the Worker's left knee on 10 April 1997 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D26. The Employer denies the allegations contained in paragraph 26.

SC27. On 10 May 2000 as a consequence of the injury, the Worker underwent further surgery namely open wedge osteotomy in an effort to restore knee function.

D27. The Employer admits the allegations contained in paragraph 27.

SC28. The surgery performed on the Worker's left knee on 10 May 2000 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D28. The Employer denies the allegations contained in paragraph 28.

SC29. On 16 May 2001 as a consequence of the injury, the Worker underwent a further arthroscopic examination of the left knee.

D29. The Employer admits the allegations contained in paragraph 29.

SC30. Omitted.

D30. Omitted.

SC 31. The surgery performed on the Worker's left knee on 10 May 2000 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D31. The Employer denies the allegations contained in paragraph 31.

SC32. In August 2001 as a consequence of the injury, the Worker underwent lower femoral osteotomy of the left knee involving extensive fixation by means of plates and screws.

D32. The Employer admits the allegations contained in paragraph 32.

SC33. The surgery performed on the Worker's left knee in August 2001 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D33. The Employer denies the allegations contained in paragraph 33.

SC34. By report dated 18 July 2002 to the Territory Insurance Office, Adelaide orthopaedic surgeon, Dr David J Marshall assessed that the Worker was then suffering a 30% permanent impairment of the whole person as a consequence of the injury.

D34. The Employer admits the allegations contained in paragraph 34.

SC35. Shortly after July 2002, the Employer paid to the Worker the sum of $12,754.56 purportedly being his percentage permanent impairment entitlement pursuant to Section 71 (1) of the *Work Health Act.*

D35. The Employer admits the allegations contained in paragraph 35.

SC36. The Employer's calculation of the sum of $12,754.56 was based on its reducing the 30% permanent impairment assessment to 15%, by virtue of the previous assessment of a 15% permanent impairment assessment provided by Dr Atkinson in 1995, and then allowing the Worker 15% of 104 x $817.60 being average weekly earnings in 2002.

D36. The Employer admits the allegations contained in paragraph 36.

SC37. The Employer's calculation of the Worker's entitlement to a lump sum by way of his percentage permanent impairment of the whole person in 2002 was incorrect. The correct calculation should have been 30% of (208 x $817.60) - $9,901.32 = $41,116.92. The Worker

claims the shortfall to be calculated on the basis of average weekly earnings in the year in which payment is made.

D37. The Employer denies the allegations contained in paragraph 37.

SC38. In the alternative to the preceding paragraph, the correct calculation of the Worker's entitlement in 2002 to a lump sum for a 30% permanent impairment of the whole person should have been 30% of (104 x $817.60) - $9,901.32 = $15,607.80. The Worker claims the shortfall to be calculated on the basis of average weekly earning in the year in which payment is made.

D38. The Employer admits the allegations contained in paragraph 38, and says that it paid the Worker the shortfall of $2,853.24 plus interest of $1,049.99, a total amount of $3,903.23, on 29 March 2006.

SC39. On 12 February 2004 as a consequence of the injury, the Worker underwent a total left knee replacement.

D39. The Employer admits the allegations contained in paragraph 39.

SC40. The surgery involving the total left knee replacement performed on 12 February 2004 was an "injury" as defined in Section 3 of the *Work Health Act* in that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

D40. The Employer denies the allegations contained in paragraph 40.

SC41. The Employer paid all the Worker's expenses in respect of medical, hospital, radiological, anaesthetic, surgical, rehabilitation and pharmaceutical services which arose in respect of each of the surgical procedures pleaded herein, from and including 28 August 1991 to and including the total knee replacement on 12 February

2004, in accordance with the Employer's obligations to the Worker under the *Work Health Act*.

D41. The Employer admits the allegations contained in paragraph 41.

SC42. Over the years following the occurrence of the injury on 8 August 1991 to and for some time after the total left knee replacement on 12 February 2004, the Worker suffered from symptoms of psychological injury as a consequence of chronic pain and incapacity for work arising from the injury.

D42. The employer does not admit the allegation contained in paragraph 42.

SC43. The Worker consulted Adelaide psychiatrist Dr Jules Begg in March 2005 for an assessment of any current percentage permanent impairment of the whole person arising out of the injury.

D43. The Employer admits the allegations contained in paragraph 43.

SC44. Dr Jules Begg provided a report dated 15 March 2005 addressed to Ward Keller setting out his assessment of the Worker's percentage permanent impairment of the whole person as a result of psychological injury arising from the injury, and charged $715 inclusive of GST for that report.

D44. Save that it admits the Dr Begg charged $715 for the report, the employer denies the allegations contained in paragraph 44 and relies on the content of the report.

D45. Dr Begg concluded in his report dated 15 March 2005 that the Worker had previously suffered, but no longer suffered, significant symptoms of psychiatric injury as a consequence of the injury, and that he had a 0% permanent impairment of the whole person in respect of any psychological injury as a consequence of the injury.

D45. The Employer denies the allegations contained in paragraph 45 and relies on the content of the report.

SC46. After the injury on 8 August 1991 through to some time after the left knee replacement on 12 February 2004, the Worker routinely took strong analgesic medications to control pain and discomfort as a consequence of the injury.

Particulars of Medication

Anti-inflammatories and pain killers including opiates such as codeine.

D46. The Employer admits the allegations contained in paragraph 46.

SC47. As a consequence of the medication the Worker took to control his pain as a result of the injury, and in particular as a consequence of long term use of opiate based medication, the Worker suffered from severe digestive upsets, mainly in the form of chronic constipation with occasional severe diarrhoea.

D47. The Employer does not admit the allegations contained in paragraph 47.

SC48. In March 2005 the Worker consulted Adelaide physician Dr John Meegan for the purpose of obtaining an assessment of the Worker's percentage permanent impairment of the whole person as a result of digestive problems as a consequence of the injury.

D48. The Employer admits the allegations contained in paragraph 48.

SC49. Dr John Meegan provided a report dated 17 March 2005 to Ward Keller in relation to his assessment of the Worker's percentage permanent impairment of the whole person in respect of digestive problems as a result of the injury, and he charged $412.50 inclusive of GST for that report.

D49. The Employer admits the allegations contained in paragraph 49.

SC50. Dr John Meegan concluded in his report dated 17 March 2005 that although the Worker had previously suffered from digestive problems as a result of medication taken for pain arising from the injury, he no longer needed to take such medication and no longer suffered digestive problems to any significant extent and he had a 0% permanent impairment of the whole person as a result of digestive problems associated with the injury.

D50. The Employer denies the allegations contained in paragraph 50 and relies on the content of the report.

SC51. The Worker consulted Adelaide specialist occupational physician Dr Colin G Mills in November 2005 in order that Dr Mills might provide an assessment of the Worker's permanent impairment of the whole person as a consequence of the injury and following the left knee replacement.

D51. The Employer admits the allegations contained in paragraph 51.

SC52. Dr Mills provided a report dated 18 December 2005 to Ward Keller providing assessments of the Worker's percentage permanent impairment of the whole person in respect of pain, in respect of scar and cosmetic defects, and in respect of the knee dysfunction, and Dr Mills charged $797.50 inclusive of GST for the consultation and report.

D52. The Employer admits the allegations contained in paragraph 52.

SC53. Dr Mills in his report dated 18 December 2005 found that the Worker had suffered a 7% permanent impairment of the whole person as a consequence of the injury, because of pain.

D53. The Employer admits the allegations contained in paragraph 53.

SC54. Dr Mills in his report dated 18 December 2005 found that the Worker had suffered a 5% permanent impairment of the whole person as a result of the injury in respect of scarring and cosmetic defects.

D54. The Employer admits the allegations contained in paragraph 54.

SC55. Dr Mills in his report dated 18 December 2005 found that the Worker had suffered a 20% permanent impairment of the whole person on account of his persisting knee dysfunction.

D55. The Employer admits the allegations contained in paragraph 55.

SC56. Section 70 of the *Work Health Act* and Regulation 9 of the *Work Health Regulations* together prescribe the 4th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment as being the prescribed guides for the purpose of performing an assessment of percentage permanent impairment of the whole person under the *Work Health Act* ("the prescribed Guides").

D56. The Employer says that the Fourth Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment has been the prescribed Guide since the promulgation of Regulations No 50 of 1993, and otherwise denies the allegations contained in paragraph 56.

SC57. At the rear of the prescribed Guides are Combined Values Charts for the purpose of determining the total percentage permanent impairment of the whole person in cases where more than one assessment of percentage permanent impairment is made in respect of different impairments arising out of an injury.

D57. The Employer admits the allegations in relation to the Fourth Edition, and otherwise does not admit the allegations contained in paragraph 57.

SC58. When the Combined Values Chart in the prescribed Guides is applied to Dr Mill's assessment of 20% for the knee dysfunction and 7% for pain, a resultant is achieved of 26%.

D58. The Employer admits the allegations in relation to the Fourth Edition, and otherwise does not admit the allegations contained in paragraph 58.

SC59. When the Combined Values Chart in the prescribed Guides is applied to the resultant of 26% and to Dr Mill's assessment of 5% in respect of scarring and cosmetic defects, a further resultant is achieved of 30%.

D59. The Employer admits the allegations in relation to the Fourth Edition, and otherwise does not admit the allegations contained in paragraph 59.

SC60. When the Combined Values Chart of the prescribed Guides is applied to Dr Mill's assessment of 7% for pain and 5% for scarring and cosmetic defects, a resultant is achieved of 12%.

D60. The Employer admits the allegations in relation to the Fourth Edition, and otherwise does not admit the allegations contained in paragraph 60.

SC61. In respect of the assessment of the Worker's percentage impairment of the whole person carried out in 2005 by Dr Mills, the Worker claims to be entitled to a further lump sum payment pursuant to Section 71 (1) of the *Work Health Act* being 30% of (208 x $1,039.00 being average weekly earnings in 2006) = $64,833.60, or 30% of (208 x average weekly earnings in the year in which payment is made).

D61. The Employer denies the Worker has an entitlement as alleged in paragraph 61 or at all.

SC62. In the alternative to the preceding paragraph, the Worker claims to be entitled to a further lump sum pursuant to section 71 (1) of the *Work Health Act* being 30% of (208 x $1,039.00) less the 2002 payment of $12,754.56 and less the 1995 payment of $9,901.32 = $42,177.72.

D62. The Employer denies the Worker has an entitlement as alleged in paragraph 62 or at all.

SC63. In the further alternative to the two preceding paragraphs, the Worker claims to be entitled to a further payment pursuant to Section 71 (1) of the *Work Health Act* in respect of the previously unassessed and previously uncompensated 7% for chronic pain and 5% for scarring, being 12% of (208 x $1,039.00) = $25,933.44, or 12% of (208 x average weekly earnings in the year in which payment is made).

D63. The Employer denies the Worker has an entitlement as alleged in paragraph 63 or at all.

SC64. The Worker has sought payment by the Employer of a further lump sum pursuant to Section 71 (1) of the *Work Health Act* in respect of the assessments of permanent impairment of the whole person in each of 1995, 2002 and 2005, and has also sought recovery of his costs in obtaining the three reports relevant to determining the assessments in 2005.

Particulars

23 February 2006 – letter from Ward Keller for the Worker to Hunt & Hunt for the Employer

D64. The Employer admits the allegations contained in paragraph 64.

SC65. The Employer declined to make any further payment to the Worker, other than an incorrectly calculated payment of $2,853.24 in respect of the incorrect calculation arising from the permanent impairment payment made in 2002, and has declined to pay the Worker his costs arising out of obtaining the up to date permanent impairment assessments in 2005.

Particulars

23 March 2006 – letter Hunt & Hunt for the Employer to Ward Keller for the Worker

D65. The Employer admits that it has declined to make any further payment to the worker in respect of permanent impairment, save and except the payment pleaded at paragraph 38 hereof and says that it has paid the Worker his costs arising out of obtaining the permanent impairment assessments in 2005.

Particulars

(a) 5 December 2006 – letter Hunt & Hunt for the Employer to Ward Keller for the Worker.

(b) 15 December 2006 – letter Hunt & Hunt for the Employer to Ward Keller for the Worker.

SC66. The Employer did not make any application pursuant to Section 72 (3) of the *Work Health Act* for any reassessment of the percentage impairments of the whole person determined by Dr Colin Mills, within 28 days or at all. Solicitors for the Worker and the Employer thereafter engaged in discussions in writing relevant to the legal issues arising from the circumstances as pleaded herein.

Particulars

(a) 28 March 2006 – letter Ward Keller for the Worker to Hunt & Hunt for the Employer.

(b) 6 April 2006 – letter Hunt & Hunt for the Employer to Ward Keller for the Worker.

(c) 12 April 2006 – letter Ward Keller for the Worker to Hunt & Hunt for the Employer.

(d) 19 April 2006 – letter Hunt & Hunt for the Employer to NT WorkSafe in relation to no formal mediation being undertaken.

D66. The Employer admits that it did not make any application pursuant to section 72 (3) of the *Work Health Act* and otherwise denies the allegations contained therein.

SC67. The Worker seeks the following remedies:

67.1 A ruling that any one, or some, or all of the surgical procedures undergone by the Worker in January 1992, September 1992, February 1993, July 1995, April 1997, May 2000, May 2001, August 2001 and February 2004, were injuries within the meaning of the definition in Section 3 of the *Work Health Act*.

67.2 A ruling that the calculations in each of 1995 and 2002 of the Worker's entitlements to a lump sum pursuant to Section 71 (1) of the *Work Health Act* on account of his percentage permanent impairment of the whole person arising from the injury should have been calculated at 208 x the appropriate average weekly earnings rather than 104 x the appropriate average weekly earnings.

67.3 A ruling that the 20% permanent impairment of the whole person assessed in respect of the Worker's knee dysfunction set out in the report of Dr Colin G Mills dated 18 December 2005, relates to the Worker's replaced knee which is a different injury from the knee injury assessed and compensated for in 1995 and 2002, although one arising from the injury.

67.4 A ruling that each of the assessments made by Dr Colin G Mills in his report of 18 December 2005 of 7% permanent impairment of the whole person for pain and 5% of the whole person for scarring and cosmetic defects in respect of the Worker arising from the injury, are assessments in respect of permanent impairment aspects of the Worker arising from the injury which had not previously been assessed or compensated for in 1995 and/or 2002.

67.5 An Order that the Worker is entitled to further sums for his percentage permanent impairments of the whole person than he was paid in either or both of 1995 or 2002, in such amount as this Honourable Court determines.

67.6 An Order that the Worker is entitled to a further sum or sums for his current percentage permanent impairment of the whole person as assessed by Dr Colin G Mills in his report dated 18 December 2005, in such amount as this Honourable Court determines.

67.7 An Order that the Employer pay to the Worker his costs of the assessments carried out in 2005 by Dr Julian Begg, Dr John Meegan and Dr Colin G Mills in the total sum of $1925.00.

67.8 An Order that the Employer pay interest pursuant to Section 109(1) of the *Work Health Act* in respect of the sum of

$1,925.00, calculated from and including 24 February 2006 to the date of payment of the sum of $1,925.00, at 10.5% per annum or such other rate as this Honourable Court might determine.

67.9 An Order that the Employer pay the Worker's costs of and incidental to these proceedings and of and incidental to the dispute giving rise to these proceedings at 100% of the Supreme Court Scale to be taxed in default of agreement.

D67. The Employers denies that the worker is entitled to relief as claimed in paragraph 67 or at all.

CHRONOLOGY

4. The Court was also provided with a chronology of material events and relevant legislative changes to the *Work Health Act* to facilitate its adjudicative task. That chronology is reproduced below:

12 April 1968	Worker born. Currently 38 years old.
3 April 1990	Worker commenced employment with Employer as a utility serviceman.
8 August, 1991	Worker sustained an injury namely, severely damaged left knee joint ("the injury").
	Worker made a claim under the *Work Health Act* which was accepted by Employer.
22 August 1991	Worker underwent a lateral meniscectomy to his left knee as a result of the injury. The Worker underwent an arthroscopy and removal of a torn lateral meniscus.

15 October, 1991	Section 11 of the *Work Health Amendment act (No 2)* 1991 came into force amending section 71 of the *Work Health Act.*
8 April, 1992	*The Work Health Amendment Act (No 2)* 1991 *Amendment Act* 1992 was assented to. By Section 2 thereof it was deemed to have come into operation immediately before the commencement of the *Work Health Amendment Act (No 2)* 1991, on 15 October, 1991.
January, 1992	As a consequence of the injury the Worker underwent a ligament reconstruction of the left knee with ligament staple fixation.
2 September, 1992	As a consequence of the injury the Worker underwent further arthroscopy of the left knee with chondroplasty and removal of staples from the previous reconstruction.
13 February 1993	As a consequence of the injury the Worker underwent further arthroscopic surgery involving a revision of left and anterior cruciate reconstruction in which surgeon Dr R Atkinsonson used a segment of patelloas tendon to reconstruct the anterior cruciate ligament.
24 March 1995	Worker undergoes steroid injection treatment to left knee which involved infiltration.
11 July 1995	The Worker underwent further surgery which noted a minor tear/lesion of the femoral and tibial plateau.
12 September 1995	Medical report of orthopaedic surgeon Dr Robert Aitkenson advising TIO that [as a consequence of the

	injury], the Worker had a 15% permanent impairment of the whole person.
Shortly after	
September 1995	Employer paid the worker the sum of $9,901.32 purportedly being his percentage permanent impairment entitlement pursuant to Section 71 (1) of the *Work Health Act.* The Employer calculated the sum of $9,901.32 by taking 15% of 104 x $634.70 being average weekly earnings in 1995.
10 April, 1997	As a consequence of the injury the Worker underwent a further arthroscopy of the left knee to excise a fibrous band in the left patello-femoral joint and remove loose bodies in the joint, a partial meniscectomy in the joint and a chondroplasty of the lateral compartment and patello-femoral joint articular surfaces.
10 May, 2000	As a consequence of the injury, the Worker underwent further surgery namely open wedge osteotomy in an effort to restore knee function.
16 May, 2001	As a consequence of the injury, the Worker underwent a further arthroscopic examination of the left knee and underwent a repeat tibial osteotomy of the left knee.
August, 2001	As a consequence of the injury, the Worker underwent lower femoral osteotomy of the left knee involving extensive fixation by means of plates and screws.
18 July 2002	Report to TIO of Dr David J Marshall assessed Worker as having a 30% permanent impairment of the whole person as a consequence of the injury.

Shortly after July 2002	Employer paid to the Worker the sum of $12,754.56 purportedly being his percentage permanent impairment entitlement pursuant to Section 71 (1) of the *Work Health Act*.
12 February, 2004	As a consequence of the injury, the Worker underwent a total knee replacement.
March, 2005	Worker consults Dr Jules Begg psychiatrist.
15 March, 2005	Report of Dr Jules Begg setting out his assessment of the Worker's percentage impairment of the whole person as a result of psychological injury arising from injury.
March 2005	Worker consults Adelaide physician Dr John Meegan.
17 March 2005	Report of Dr John Meegan in relation to his assessment of the Worker's percentage permanent impairment of the whole person in respect of digestive problems.
November 2005	Worker consults occupational physician Dr Colin G. Mills in order that he might provide an assessment of the Worker's permanent impairment of the whole person as a consequence of the injury and following the left knee replacement.
18 December 2005	Dr Mills provides a report to Ward Keller providing assessments of the Worker's percentage permanent impairment of the whole person in respect of pain, in respect of scar and cosmetic defects and in respect of knee dysfunction.

Dr Mills found that the Worker suffered a 7% permanent impairment of the whole person as a consequence of the injury because of pain, 5 % permanent impairment of the whole person as a result of the injury in respect of scarring and cosmetic defects, 20% permanent impairment of the whole person on account of his persisting knee dysfunction.

ADMITTED FACTS

5. There was no dispute as to the previous permanent impairment payments made to the worker:

- In his report dated 12 September 1995, Dr Atkinson, an orthopaedic surgeon, assessed the worker's permanent impairment at 15% of the whole person. In or about September 1995 the worker received from the employer the sum of $9,901.32 on account of that assessment. That figure was arrived at by applying the then statutory formula: 15% x 104 x 634.70(average weekly earnings).

- In his report of 18 July 2002, Dr Marshall, an orthopaedic surgeon, calculated the worker's permanent impairment at 30% of the whole person. In accordance with that assessment, in or about July 2002, the employer paid the worker a further permanent impairment payment of $12,754.56. Average weekly earnings in 2002 were $817.60. Accordingly, the formula applied was 15% (the additional impairment) x 104 x $817.60.

6. It is also agreed between the parties that in his report dated 18 December 2005, Dr Mills, occupational physician, assessed the worker's permanent impairment at 7% of the whole person with respect to pain, 5% of the whole

person in relation to scarring and cosmetic deficits and 20% of the whole person in respect of persisting knee dysfunction.

THE COURT BOOK

7. With the consent of both parties a "Court book" was tendered (Exhibit 1). The exhibit contained the following documents:

- Medical reports of Dr Robert Atkinson, Orthopaedic Surgeon, dated 8 June 1995 and 12 September 1995.
- Medical reports of Dr David Marshall, Orthopaedic Surgeon, dated 6 May 2002, 5 July 2002 and 18 July 2002.
- Medical report of Dr Jules Begg, Psychiatrist, dated 15 March 2005.
- Medical report of Dr John Meegan , Physician, dated 17 March 2005.
- Medical report of Dr Colin G Mills, Occupational Physician, dated 18 December 2005.
- American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (4th ed) – Combined Values Chart.

8. The Court Book also contained various pieces of legislation:

- *Work Health Act* (NT) Part V Division 3 Subdivision C – Compensation for Permanent Impairment (pre 15 October 1991 – before the commencement of the *Work Health Amendment Act* (No 2) 1991.
- *Work Health Act* (NT) Part V Division 3 Subdivision 3 Subdivision C – Compensation for Permanent Impairment (post 15 October 1991 – after the commencement of the *Work Health Amendment Act (No 2) 1991*.

- *Work Health Amendment Act* (No 2) 1991 (No 59 of 1991).

- *Work Health Amendment Act* (No 2) 1991 Amendment Act 1992 (No 8 of 1992).

THE RELEVANT LEGISLATION AND STATUTORY PROVISIONS

9. The relevant parts of the current scheme for compensation for permanent impairment are as follows:

Section 70: Definition

> In this Subdivision 'permanent impairment' means an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than 5% of the whole person.

Section 71: Compensation for Permanent Impairment

> "(1) In addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at a percentage of the whole person equal to not less than 15% shall, subject to subsection (2), be paid compensation equal to that assessed percentage of 208 times average weekly earnings at the time the payment is made.
>
> (2)…
>
> (3) In addition to any other compensation payable under this Part, where a worker suffers permanent impairment assessed at a percentage of the whole person equal to less than 15%, the worker shall be paid compensation equal to the percentage specified in column 2 of the Table to this section of the relevant assessed percentage of permanent impairment specified opposite in column 1 of 208 times average weekly earnings at the time the payment is made.

TABLE

Column 1 Degree of permanent Impairment	Column 2 Percentage of compensation payable
Not less than 5% but less than 10%	2
10%	3
11%	4
12%	6
13%	8
14%	12
(4)….	

Section 72: Assessment of permanent impairment

…

(5) The costs incurred in carrying out an assessment or reassessment under this section shall be paid by the employer.

10. In order to contextualise the worker's application it is necessary to set out the legislative history of the permanent impairment provisions of the *Work Health Act*.

11. The permanent impairment provisions were substantially amended by the *Work Health Amendment Act* (No 2) 1991. The amendments took effect on 15 October 1991. As at the date of the worker's injury – 8 August 1991- the permanent impairment provisions were as follows:

1. Section 70 of the Act defined "permanent impairment" as meaning " an impairment or impairments assessed, in accordance with the prescribed guides, as being an impairment, or combination of impairments, of not less than 15% of the whole person".

2. Section 71(1) provided that "in addition to any other compensation payable under this Part, a worker who suffers permanent impairment assessed at a percentage of the whole person equal to not less than 15% shall, subject to subsection (2), be paid compensation equal to that assessed percentage of 104 times average weekly earnings at the time the payment is made".

3. Section 71(2) provided that " a worker who suffers permanent impairment assessed at not less than 85% of the whole person shall be paid compensation of 104 times average weekly earnings at the time the payment is made".

12. The other difference was that under the previous regime there was no table in relation to impairments between 5% and 14%.

13. As at the date of the worker's injury, the prescribed guides was the second edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment . With the passage of Regulations 22 of 1993, the third edition of the AMA Guides became the prescribed guides. Following the passage of Regulations 50 of 1993 the 4th edition became the prescribed guides, which has current application.

14. As succinctly put by Mr Grant QC, the employer's counsel, "the transitional provisions contained in backnote 2 to the Act, as subsequently amended by the *Work Health Amendment Act* (No 2) 1991 *Amendment Act* 1992, provide relevantly that the amendments to the permanent impairment regime apply only to and in relation to an injury suffered by a worker after the commencement of the amending legislation (ie 15 October 1991)".[1]

15. Returning to the relevant provisions of the Act, s 3 defines "impairment" as meaning "a temporary or permanent bodily or mental abnormality or loss caused by an injury".

16. The term "injury" is defined in s 3 to mean:

[1] See [6], p 4 of Counsel's written submissions.

A physical or mental injury arising before or after the commencement of the relevant provision of this 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,
>
> but does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment.

17. Section 53 of the Act provides relevantly that where a worker suffers an injury that results in or materially contributes to his or her impairment, there is payable by the employer to the worker such compensation as is prescribed. That compensation is prescribed by ss 70, 71 and 72 of the Act.

THE MEDICAL EVIDENCE

18. It is proposed to set out the salient aspects of each of the medical reports relied upon by the worker in these proceedings.

The medical reports of Dr Atkinson

19. In his report dated 8 June 1995 Dr Atkinson confirmed the prior diagnosis, namely that of "anterior cruciate reconstructed knee, articular surface degeneration particularly laterally with the possibility of a neuroma in the lateral scar". The doctor proffered a satisfactory prognosis, although precluding heavy lifting, weight bearing work activities on rough and uneven ground. He attributed the worker's symptoms to the work incident of August 1991. He recommended no further treatment. Although the doctor considered that the worker's condition may improve regarding his recent pain, he believed his underlying symptoms would not improve. He expressed

agreement with Dr Cornish's assessment of the level of the worker's permanent disability which was set at 20% for the left lower limb.

20. In his second report dated 12 September 1995, Dr Atkinson stated that he had reviewed the worker on 6 July 1995. He then noted that the worker continued to experience lateral pain and was tender on the lateral joint line of the left knee. The doctor noted some changes to the articular surface and agreed with Dr Cornish that a further arthroscopy was reasonable. The arthroscopy was performed on 11 July 1995, noting a minor tear of the anterior aspect of the left lateral meniscus, as well as some changes to the femoral condyle and tibial plateau. Post operatively, the worker was reviewed on 2 August 1995, showing good progress.

21. Dr Atkinson reviewed the worker on 30 August 1995. His left knee was found to be satisfactory. It showed stability and the recent arthroscopy revealed a stable reconstruction, with minor changes to the surface and a relatively minor meniscus tear. The doctor advised the worker that he would not be symptom free, bearing in mind the nature of the injury.

22. Dr Atkinson concluded his report with the following opinion:

> As an overall assessment of permanent residual disability, I would consider this patient has a 35% loss of function of the left knee in total and I would translate that into 15% permanent impairment of the body as a whole, resulting from his work injury.

The medical reports of Dr Marshall

23. In his report dated 6 May 2002 Dr Marshall noted that the worker had undergone further surgery to his knee in August 2001. He remarked that the osteotomy carried out had been slow to unite, but was now progressing well. He noted that the worker continued to have symptoms referable to his arthritic knee, but at this stage no further treatment was envisaged, though ultimately the worker may require a total knee arthroplasty.

24. Dr Marshall stated that the current diagnosis is persisting symptoms as a result of the progressive nature of the worker's osteoarthritis. The doctor noted that as a result of the recent surgery the alignment of the worker's leg was satisfactory. However, he remarked that the surgery had not been satisfactory in that the worker experienced continuing symptoms. Recent x-rays revealed that the osteotomy was uniting well.

25. Dr Marshall expressed the opinion that the worker was permanently restricted in relation to his previous work and would never be able to be involved in heavy labouring work in the future.

26. In his second report dated 5 July 2002, Dr Marshall stated that he had reassessed the worker's whole body disability according to the AMA Guidelines Fourth Edition, and had calculated the worker's whole body impairment at 30%.

27. In his third report dated 18 July 2002, Dr Marshall referred the worker's compensation insurer to various parts of the AMA Guidelines by way of explaining his calculation of 30% whole body impairment.

The medical report of Dr Begg

28. In his report of 15 March 2005 Dr Begg, after reviewing the worker's history, reported that from the time of his injury until the knee replacement in 2004, the worker had suffered repeated episodes of a significant level of depression. Dr Begg's opinion, as at the date of his report, was that the worker did not currently suffer from depression. He was of the view that the worker did not suffer from a psychiatric condition, and for the purpose of determining compensation his psychological state could be considered to be stable.

The medical report of Dr Meegan

29. In his report dated 17 March 2005, Dr Meegan reviewed the worker's history. The doctor reported that the worker now only suffers mild and intermittent knee pain, having shown a marked improvement since the total knee replacement.

30. The results of his examination of the worker were as follows:

> On examination there was normal gait. There is a large anterior and lateral scar at the knee about 30 cm in length for each scar. There is left quadriceps wasting. There is some swelling of the knee in relation to the knee replacement. There is bilateral knee valgus and a fixed deformity at the left knee of about 5 degrees and flexion was limited to about 90 degrees. He was not complaining of knee pain today without specific tenderness at the knee although the knee was warm to touch compared to the right knee.

31. Dr Meegan concluded that there was no whole person impairment in relation to liver function, stomach or digestion.

The medical report of Dr Mills

32. In his report dated 18 December 2005, Dr Mills reported on the worker's symptom history, his surgical history and his present symptoms regarding his head, shoulders, elbows, wrists, mid back, low back, hips, right knee and left knee.

33. With respect to his left knee symptoms Dr Mills stated that the worker suffers "pain 50% of the time, 25% severe, pain from 2 to 3 out of 10 on a scale of 10 aggravated by steps, stairs, uneven surfaces, inclined pains and operating of clutches on some vehicles".

34. Dr Mills reported that the worker was unable to "run, jump, hop, skip, ride a bicycle, kick or play football or play active sport with his children".

35. The doctor stated that in the past the worker's pain had required him to take methadone and morphine under the care of Dr Meegan. His only current medication was panadeine forte and beers at night.

36. Dr Mills reported that the worker was depressed and tearful. He also complained of diminished libido.

37. The doctor's examination of the worker revealed the following:

> Straight leg raising right 90 degrees, left 80 degrees. The right knee was normal, the left knee had 2 linear scars, one 36 cm long the other 30cm long. There was a 10 cm long scar over the left hip from a bone graft harvester.
>
> A 2 cm oblique scar over the medial aspect of the right knee, medial aspect and several scars consistent with puncture wounds. The range of extension of the knee was from 95 degrees and he was unable to walk on tip toe.

38. Under the heading "Comment" Dr Mills made the following assessments in relation to the worker:

> Mr Jason Hand had disabilities for:
>
> pain; he used a narcotic analgesia and alcohol to control pain
>
> scarring; extensive scars around right knee, small scars on the left hip
>
> right knee dysfunction.
>
> These estimated as:
>
> Pain: Using the 4th Edition American Medical Association Guides to the Evaluation of Impairment Chapter 15, 7%.
>
> Impairment for Physicians Chapter 13, 5%.
>
> Right knee dysfunction: Using the 4th Edition American Medical Association Guide to Impairment for Physicians, Chapter 13, Table 64, 20%

39. Under the heading “Opinion” Dr Mills stated:

> Mr Jason Hand had significant sequelae from an accident in Darwin in 1991. He has been left with:
>
> leg pain, that affects his capacity for enjoying life and working and increases the risk of a recurrence of his depression
>
> cosmetic scars on the right knee and left hip
>
> right knee dysfunction.
>
> He will require further surgery to the right knee, each expected to last up to a maximum of 15 years. They may well need to be replaced much earlier which means there will be at least several more surgical procedures to the right knee.

40. Under the heading “His Disability” Dr Mills made the following assessments:

> 7% whole body for pain
>
> 5% whole body for scar and the cosmetic effects
>
> 20% whole body for right knee dysfunction.

41. Dr Mills’ report concluded thus:

> In forming my opinion I assumed the history given by Jason Hand accurate and acknowledge the opinions you provided.
>
> I, Colin Mills, declare that I have made all the enquiries which I believe are desirable and appropriate and that no matters of significance other than those specified, which I regard as relevant have, to my knowledge, been withheld from the Court.

THE FOURTH EDITION OF THE AMERICAN MEDICAL ASSOCIATION GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT

42. It is useful to set out those parts of the fourth edition of those Guides that are relevant to the assessments made by the medical practitioners in this case.

43. Chapter 2 of the Guides deals with “Records and Reports”. This Chapter “describes how the Guides can help provide consistent and reliable acquisition, analysis, communication and utilisation of medical information”. The Chapter states that “the major objective of the Guides is to define the assessment and reporting of medical impairments so that physicians can collect, describe and analyse information about impairments in accordance with a single set of standards”.

44. According to the Chapter (2.1), “the first step in assessing an individual’s impairment is gathering thorough and complete historical information on the medical condition(s) and then carrying out a medical evaluation supported by appropriate tests and diagnostic procedures”. The Chapter states that “a proper medical evaluation accurately documents the individual’s clinical status”.

45. The second step is an analysis of the history and the clinical and laboratory findings “to determine the nature and extent of the impairment or dysfunction of the affected body part or system”.

46. The third step is “comparing the results of the analysis with the criteria specified in the Guides for the particular body part, system or function”.

47. The Chapter (2.2) establishes a set of rules for evaluating permanent impairment:

> In general, the physician should estimate the extent of the patient’s primary impairment or impairing condition, that is, the condition that seems to be of most concern to the patient. The estimate should be based on current findings and evidence. It may be necessary to refer to the criteria and estimates in several chapters if the impairing condition involves several organ systems. In that case, each organ system impairment should be expressed as a whole-person impairment; then the whole-person impairments should be combined by means of the Combined Values Chart (p 322). The general philosophy of the Combined Values Chart is explained in Section 3.1, Chapter 3(p 15).
>
> If the physician believes that the patient has two significant, unrelated conditions and that the extent of each should be estimated, this may be

> done. The whole – person impairment estimates for the two separate conditions then would be combined into an overall impairment estimate using the Combined Values Chart.

48. The Chapter proceeds to say that "a 95% to 100% whole person impairment is considered to represent almost total impairment, a state that is approaching death".

49. Under the sub heading "Pain" the Guide states:

> In general, the impairment percents shown in the chapters that consider the various organ systems make allowance for pain that may accompany the impairing condition. Chronic pain, also called the chronic pain syndrome, is evaluated as described in the chapter on pain (p 303).

50. According to Chapter 2 (2.3) the Guides "attempt to take into account all relevant considerations in estimating or rating the severity and extent of permanent impairment and the effects of the impairment in terms of the individual's everyday activities". It is stated that "an impairment should not be considered 'permanent' until the clinical findings, determined during a period of months, indicate that the medical condition is static and well stabilised".

51. Chapter 2 (2.4) also deals with the preparation of reports:

> A clear, accurate and complete report is essential to support a rating of impairment.

52. The following information is expected to be included in the report – medical evaluation, analysis of the findings and comparison of the results of analysis with the impairment criteria.

53. The medical evaluation should include "a narrative history of the medical condition(s) with specific reference to onset and course of the condition, symptoms, findings on previous examination(s), treatments, and responses to treatment, including adverse effects".

54. The evaluation should also include the results of the most recent clinical evaluation.

55. The report should contain an assessment of the patient's current clinical status together with "a statement of plans for future treatment, rehabilitation and re-evaluation.

56. The report should contain diagnoses and clinical impressions.

57. Finally the report should estimate the expected date of full or partial recovery.

58. In relation to the analysis of findings, the report should provide "an explanation of the impact of the medical condition(s) on life activities". The types of affected activities should be listed.

59. The "medical basis for concluding that the condition and the patient's symptoms have or have not become stable" should be explained.

60. The chapter goes on to say that "an explanation should be given of the medical basis for concluding that the individual is or is not likely to suffer sudden, subtle or other incapacitation as a result of a change in the condition".

61. The report should also provide "an explanation of the medical basis for concluding that the individual is or is not likely to suffer injury or harm or further impairment by engaging in activities of daily living or other activities necessary to meet personal, social and occupational demands".

62. Finally, the analysis of findings should include the following:

> Any conclusion that restrictions or accommodations are or are not warranted with respect to daily activities or activities that are required to meet personal, social and occupational demands should be explained. If restrictions because of risks to the patient or others, or accommodations, are necessary, an explanation of their expected outcome and value should be provided.

63. In relation to the comparative exercise Chapter 2 prescribes the following approach:

> 1. A description should be given of specific clinical findings related to each impairment, with reference to how the findings relate to and compare with the criteria described in the applicable Guides chapter; reference should be made to the absence of, or the examiner's inability to obtain, pertinent data.
>
> 2. An explanation of each impairment value with reference to the applicable criteria of the Guides should be included.
>
> 3. A summary list of impairment estimates in percents should be included.

64. The next relevant part of the Guides is Chapter 13, which deals with the subject of "Skin".

65. The preface to Chapter 13 reads:

> This chapter provides criteria for evaluating the effects of permanent impairments of the skin and its appendages. These are considered especially in terms of the effects they may have on an individual's ability to carry out daily activities, including those related to employment.

66. The Chapter (13.1) defines "permanent impairment of the skin" as "any anatomic or functional abnormality or loss that persists after medical treatment and rehabilitation and after a length of time sufficient to permit regeneration and other physiological adjustments". The Chapter goes on to say that "a permanent impairment is unlikely to change in the near future".

67. The Chapter (13.2) proceeds to deal with the methods of evaluating impairment:

> In evaluation of a permanent impairment related to a skin disorder, the actual functional loss should be the prime consideration, although the extent of the cosmetic involvement also may be important. Impairments of other body systems, for instance, behavioural problems restriction of motion or ankylosis of joints and respiratory, cardiovascular, endocrine or gastrointestinal tract disorders, may be associated with skin impairments. When there is a permanent impairment of more than one body system, the extent of the whole -person impairment related to each system should be evaluated, and the estimated impairment percentages should be combined

using the Combined Values Chart to determine the person's total impairment…

In determining the appropriate impairment class (Table 2, p 280) for an affected individual, the physician should primarily consider the impact of the skin condition on the individual's daily activities.

68. Chapter 13 (13.5) specifically deals with scars.

69. Chapter 15 deals with the assessment of pain and makes the following basic assumptions:

> The Guides is intended to provide a standard method of analysis for evaluation of impairing conditions. Fundamental to the Guides is that it applies only to permanent impairments, which are defined as those that are stable and unlikely to change in future months because of medical or surgical therapy…
>
> In general, the impairment percents given in the tables and figures applicable to permanent impairments of the various organ systems include allowances for pain that may occur with those impairments.
>
> In considering pain, it is prudent to list the following assumptions:
>
> 1. Pain evaluation does not lend itself to strict laboratory standards of sensitivity, specificity and other scientific criteria.
>
> 2. Chronic pain is not measurable or detectable on the basis of the classic, tissue-oriented disease model.
>
> 3. Pain evaluation requires acknowledging and understanding a multifaceted, biopsychosocial model that transcends the usual, more limited disease model.
>
> 4. Pain impairment estimates are based on the physician's training, experience, skill and thoroughness. As with most medical care, the physician's judgment about pain represents a blend of the art and science of medicine, and the judgment must be characterised not so much by scientific accuracy as by procedural regularity.

70. The Chapter goes on to deal with the task of assessing impairment due to pain:

> The important task of evaluating impairment due to pain is difficult but not impossible. Physicians initially may feel uncomfortable evaluating pain, but they regularly employ similar methods and approaches in arriving at diagnostic and therapeutic judgments. Physicians generally are

> comfortable making decisions on the basis of probabilities backed up by experience and stated in terms of reasonable medical certainty. Pain should be evaluated by physicians who are conversant with the disorder.

71. Chapter 15(15.2) defines “pain”. After dealing with various definitions of “pain” the Guide states:

> Embodied in the definitions above are the following concepts. Pain is subjective and cannot be measured objectively. Pain evokes negative psychologic reactions such as fear, anxiety and depression. Pain is perceived consciously and is evaluated in light of past experience. People usually regard pain as an indicator of physical harm, despite the fact that pain can exist without tissue damage, and tissue damage can exist without pain.

72. The Chapter (15.3) then deals with “Pain, Impairment and Disability”:

> The Guides defines impairment as the loss, loss of use or derangement of any body part, system or function. Thus, impairment is defined on an anatomic, physiologic or psychological basis. This definition operates at the organ level and presumes a disease model that involves endogenous systems and generally is independent of the external milieu. In this narrow context, it would be difficult to consider pain an impairment.
>
> But the Guides interprets the definition of impairment to involve also interfering with the individual’s performance of daily activities. In this broader context, impairment is at the level of the individual, is based on the illness model and is viewed as being dependent on personal needs and the demands of the external milieu. In this context, pain may be viewed as an impairment that should be assessed according to the individual’s residual functional capacity. Chronic pain and pain-related behaviours are not, per se, impairments, but they should trigger assessments with regard to ability to function and carry out daily activities.

73. “Functional capacity evaluation” involves “examining an individual as the individual performs activities in a structured setting”. The Guides go on to say:

> It does not necessarily reflect what the individual should be able to do, but rather what the individual can do or is willing to do at a given time. Functional capacity depends especially on motivation, cognitive awareness, behavioural factors, and sincerity of effort, and these characteristics have a major impact on the functional capacity assessment (FCA).

> The functional capacity assessment, which is performed by or under the supervision of the physician, varies according to the physician's training, experience, skill, competence and understanding of the assessment processes. A great need exists for a valid, accurate, reliable and relevant instrument for performing the FCA, one that is based on the full range of abilities and activities of normal persons.

74. Chapter 15 (15.6) deals with the clinical assessment of "pain". This part of the Guides begins with the following statement:

> Assessing the magnitude of the patient's pain and pain-related impairment requires a multidisciplinary approach based on the bio- psychosocial model. In general, the assessment calls for the traditional approach of the physician. However, assessing chronic pain is a complex and lengthy process that usually requires hours if not days to complete. In difficult cases, it may be appropriate to enlist the aid of physicians specialising in pain medicine.

75. The Chapter then prescribes the steps that should be taken to guide the examination of a patient with a complex pain problem:

> 1. Review all available medical records and diagnostic studies. Communication with previous health providers may be needed.
>
> 2. Obtain a complete medical history from the patient, speaking with persons in close contact with the patient as needed. Include a family, work and social activities history. List affected daily activities (see p 313).
>
> 3. Document all current complaints and pain history. The pain history should include a description of onset, location, quality, progression, character, intensity, variability, frequency, duration, migration pattern, precipitating and aggravating factors, epi-phenomena, treatment, medications and other interventions used and results.
>
> 4. Perform a complete physical and neurologic examination.
>
> 5. Arrange appropriate ancillary studies, for instance, roentgenographic, magnetic resonance imaging and electromyographic studies.
>
> 6. Psychological testing is an integral part of evaluating pain.
>
> 7. Formulate a diagnostic impression based on the accumulated information. This assessment should refer to the cause and

classification of the pain, description of the bio –psychosocial impact and prognosis.

8. Estimate the extent of the pain and impairment using the procedures described in section 15.9 (p 311) and other parts of the Guides as appropriate**.**

76. Chapter 15 goes on to address the 8 diagnostic characteristics of chronic pain – duration, dramatisation, diagnostic dilemma, drugs, dependence, depression, disuse and dysfunction. According to the Guides, the presence of two or more of those characteristics is considered to establish a presumptive diagnosis of chronic pain syndrome.

THE WORKER'S SUBMISSIONS

The written submissions

77. Mr McDonald QC submitted that the lump sum payment made to the worker in September 1995, which had been calculated at 15% of 104 x $634.70, should have been 208 x average weekly payments at the time payment was made, having regard to the amendments effected by the *Work Health Amendment Act* (No 2) of 1991, effective as from 15 October 1991. The amending legislation had the effect of doubling the multiplier of average weekly earnings from 104 x average weekly earnings to 208 times average weekly earnings.

78. Mr McDonald submitted that if the Court ultimately accepted that primary submission, "then the calculation to correct the shortfall will be 15% of 208 x $1,033.80 (being average weekly earnings in 2007 when the payment will be made) less the $9,901.32 originally made".[2]

79. Counsel relied upon the judgment of Mildren J in *Pengilly v Northern Territory of Australia* [2003] NTSC 19 at paragraph 13 as well as the judgment of the Court of Appeal in *Northern Territory of Australia v*

[2] See [8] and [9], p 3 of Counsel's written submissions.

Pengilly [2004] NTCA 4 at paragraphs 10 and 11 as authority for the Court calculating the shortfall in respect of the September 1995 permanent impairment assessment.

80. The facts in that case were that the appellant worker sustained an injury to her right arm in the course of her employment. Following surgery in relation to the injury, she contracted dermatitis. Liability for compensation under the Act for the injury and the dermatitis was accepted by the employer.

81. The appellant sought compensation for permanent impairment. The parties agreed that the appellant would be entitled to a payment pursuant to s 71 of the Act. The agreed amount was $60, 685.04, which represented 43% of the assessed percentage of 208 times average weekly earnings calculated at the time of payment. The figure of 43% was arrived at as follows. The appellant's impairment of the whole person resulting from the dermatitis was agreed to be 24%, while her impairment of the whole person resulting from her carpal tunnel syndrome was agreed to be 25%. This combination of impairments translated into a permanent impairment equal to 43% of the whole person.

82. Following payment of the lump sum for permanent impairment, the appellant sought to reopen the claim. The request was denied and the issues between the parties were determined by the Work Health Court. The Court rejected the appellant's claim on the merits. An appeal to the Supreme Court was dismissed. However, the Work Health Court held the making of an agreement in respect of permanent impairment did not prevent further application being made for payments if the permanent impairment, as assessed under the prescribed guides, is significantly increased or a new impairment arises.

83. Subsequently, the appellant's dermatitis deteriorated whilst her carpal tunnel syndrome resolved. With respect to her dermatological condition, a medical panel certified that the appellant had a 60% permanent impairment of the

whole person. A dispute then arose as to how the appellant's entitlement was to be calculated.

84. When the matter came before the Work Health Court the presiding magistrate held that the appellant was entitled to 60%- 43% = 17% of the relevant average weekly earnings at the time of payment. The appellant appealed the Court's decision. There being no issue about whether or not a second claim could be made, the sole issue related to the calculation of the claim.

85. The appellant's primary submission was that she was entitled to be paid 60% of the relevant average weekly earnings – that is the sum of $102,036. The alternative submission was that she was entitled to $41,351.44, calculated by applying the following formula: $102, 036.00 (ie $170,060 x 60%) - $60,684.56.

86. The respondent submitted that the calculation performed by the Court was correct – 17% of $170,060(ie 208 x` current average weekly earnings), which equalled $28,910.

87. Mildren J, who heard the appeal, stated;

> I think it is clear that the appellant cannot recover $102,036.00 without in some way accounting for the fact that she has already been compensated. Any payment made in the past by the respondent to the appellant must amount to a pro tanto discharge of the respondent's liability, unless there is a presumption of advancement operating to negate that conclusion, or there is evidence of a gift or other consideration given. Otherwise, the respondent would be entitled to recover from the appellant the amount already paid, on the basis of a total failure of consideration. There is no presumption of advancement and no evidence of a gift or other consideration given. The amount was paid in respect of her entitlement under s 71 of the Act and, therefore, must be brought into account. I therefore reject the first of the appellant's submissions.[3]

88. His Honour then went on to consider the two alternative arguments advanced by the appellant: the first being that only the assessed loss for the

[3] [2003] NTSC 19 at [11].

dermatological condition should be considered and the second being that she is entitled to $41,351.44.

89. In approaching the matter from first principles, Mildren J considered that the appellant's argument that, whilst the worker's increased loss for the dermatitis must be compensated for, the recovery of the carpal tunnel syndrome cannot be brought into account, overlooked the plain language of s 71(1) of the Act:

> Whatever may have been the components of her loss in1997, the percentage permanent impairment of the whole person was 43% - it is now 60%; the plain language of s 71(1) entitles her to $170,000 x 60%, less whatever sums she must bring into account by way of prepayment. [4]

90. His Honour went on to say:

> At common law, the quantum of loss is calculated by a reference to the value of the loss at the time of the loss, and courts now have a statutory power to award interest to the time of payment to compensate the plaintiff for loss of the use of the money. ..Because s71 requires the assessment to be made by reference to the time of payment, the respondent submits that any loss caused by delay in finalising the payment, or the loss of use of the money, is compensated for. This is one explanation for the requirement in s 71 that the loss is to be calculated at the time of payment. If this is a correct explanation, as the respondent contends, an intention on the part of the legislature not to compensate the appellant twice for her loss should be inferred, and, in order to achieve that intention, s71 should be read so as to entitle her to now receive the difference between the percentage losses.
>
> However, it is not always the case that a loss has stabilised to such a degree that a percentage of permanent loss of the whole person can be calculated immediately. The loss may be very severe initially, but recover gradually until it becomes sufficiently stable for an assessment to be made. Or, the impairment may worsen, as happened in the case of the appellant's dermatitis. The concept of "permanent impairment" under the prescribed guides is one "considered unlikely to change substantially by more than 3% in the next year with or without medical treatment. But the words "unlikely to change", whatever be their precise meaning, recognise that change is still a possibility – as happened in this case. In the case of a condition which has stabilised immediately, any delay in payment may be seen as compensation for the loss of the use of the money, but the same

[4] [2003] NTSC 19 at [13].

> does not apply to conditions which have gradually got worse or gradually got better.
>
> In the case of a gradually worsening condition, if there is only one payment and the payment is calculated at the date of payment, there is a over-compensation inherent in the calculation if the explanation is that the date of payment was chosen to compensate for loss of the use of the money. The opposite consideration is open when the condition gradually gets better.
>
> Furthermore, where there is unreasonable delay in the acceptance of a claim or, or the payment of, compensation, the Court may award interest under s 109 of the Act. In the case of a claim or payment under s 71, the Court would have power to award interest calculated from the date that the claim ought to have been accepted, or the payment made. In addition, a worker who has an entitlement to compensation under s 71 which has not been paid, may, under s 97(2A), apply to the Registrar for a certificate of the amount payable under s71. If that certificate is filed in the Local Court, the Clerk of the Local Court shall enter judgment for the amount of compensation owing. Local Court judgments also bear interest until payment is made. These provisions tend to suggest that "the date of payment" in s 71 does not literally mean the actual date of payment, but the day payment is agreed to be made, or ought to have been made. The fact that interest can be awarded on top of the payment due under s 71 is a strong indicator that the date of payment method of calculation was not intended to compensate for the loss of the use of the money.
>
> These factors tend to suggest that the date of payment method of calculation was chosen for the practical reason that, until there is sufficient stabilisation in the injury, the amount of compensation cannot be accurately calculated. There is, therefore, no sufficient reason to depart from the ordinary language of s71(1) and arrive at the amount of the present loss by reference to the difference between the loss of impairments at the relevant times, as the respondent's contention would require. In addition, this being remedial legislation, a construction giving the worker the most complete remedy consistent with the language employed, and to which the words are fairly open, must be given to s 71: see *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at [28].[5]

91. The employer appealed the decision of Mildren J. In dismissing the appeal, the Full Court (constituted by Martin(BR) CJ, Angel and Bailey JJ) found and held as follows:

> As the Act does not specifically address the present situation where a second claim is made following a previous payout in respect of

[5] [2003] NTSC 19 at [14] – [18].

> earlier permanent impairment arising from the same injury, the answer as to how the previous payment is to be taken into account must be found as a matter of statutory construction and general principle. It is not simply a question of "construing the Act beneficially towards the worker" nor of "general equitable principles of fairness'…
>
> In our opinion, it is a mistake to approach the issue from the point of view that the appellant has discharged 43% of its current liability. Pursuant to s 71 the employee is entitled to compensation for a 60% permanent impairment assessed in today's terms ("at the time the payment is made"). By way of contrast, the employer discharged a liability in respect of 43% permanent impairment that existed in 1997. The employee's present claim is a new claim for 60% permanent impairment that exists today. It is not a claim under s 71 for an additional percentage for the increased incapacity over and above the 43% incapacity that existed in 1997. The concession that the respondent in 2001 can sue for compensation on the basis of 60% permanent impairment carried with it the concession that the appellant did not finally discharge its liability in respect of 43% of the respondent's current permanent impairment by its payment in 1997. Counsel for the appellant expressly disavowed any res judicata with respect to the 43% impairment.
>
> Viewed in this way, the employee is entitled to compensation based upon the 60% permanent impairment and, because the impairment arises out of the same injury which resulted in a 43% in 1997 and for which the employer compensated the employee, the employer is entitled to set off the amount paid in 1997 in pro tanto discharge of its later liability.[6]

92. Mr McDonald submitted that the July 2002 lump sum payment, which had also been calculated at 104 x the then average weekly earnings, was in error for the following reasons:

> The assessment on this occasion was a 30% permanent impairment. The employer deducted the 15% from the 1995 assessment and calculated the worker's 2002 entitlement to be the remaining 15 % of the relevant calculation. However, this was the wrong approach. The correct approach was determined by the Court of Appeal *Northern Territory of Australia v Pengilly* (supra) which is to take the entire 30% of the relevant multiplier (either 104 or 208 x) of average weekly earnings in the year in which payment is made then deduct any previous permanent impairment made in respect of the same injury.

[6] [2004] NTCA 4 at [9] – [11].

> The employer has conceded that it did make an error of this type (see paragraph 38 of the Amended Defence) and purported to correct the underpayment by making a further payment on 29 March 2006, after the commencement of these proceedings. However, the employer once again miscalculated this shortfall. It paid the worker the amount of the shortfall in 2002, plus an amount by way of interest. The correct approach in 2006 should have been to take 30% of the relevant multiplier x average weekly earnings in 2006 and then deduct the payment made in 2002 for the 2002 assessment of permanent impairment. Because this was not done we now need to calculate the worker's correct entitlement in 2007 rather than 2006 because of the wording of subsection 71(2) of the Act as interpreted by both Mildren J and the Court of Appeal in *Pengilley*.
>
> On 12 February 2004 Mr Hand underwent a total replacement of his injured left knee. The operation was successful as appears from the report of Dr Colin Mills dated 18 December 2005. Following this total knee replacement Mr Hand has a 20% permanent impairment of the whole person due to left knee dysfunction. Prior to the total knee replacement he had a 30% permanent impairment of the whole person due to left knee dysfunction: see report of Dr David Marshall dated 18 July 2002.
>
> Dr Mills further found that following the total replacement of Mr Hand's left knee, Mr Hand had a 7% permanent impairment of the whole person due to chronic pain in the left knee and a 5% impairment of the whole person due to surgical scarring about the left knee: see Statement of Claim paragraphs 53, 54 and 55.
>
> It is important to note that Mr Hand's percentage permanent impairment of the whole person had never previously been assessed in respect of either chronic pain or scarring. Mr Hand has never been compensated for these permanent impairments.
>
> The three permanent impairment percentages found by Dr Mills when the Combined Values Chart in the prescribed Guides is applied total 30%, not 32%. This is the same overall percentage permanent impairment found by Dr Marshall in his report dated 18 July 2002, but it is also important to understand that this is not a mere coincidence – we are in fact dealing with different assessments of different impairments, and if the worker's submissions are accepted, of different injuries. [7]

93. In order to legally contextualise the worker's submissions Mr McDonald took the Court to the relevant law.

94. Counsel referred the Court to the decision of Angel J in *D & W Livestock Transport v Smith* No 264/1992 delivered 9 September 1993. He relied upon

[7] See [12] – [17], pp 4-5 of Counsel's written submissions.

his Honour's construction in that case of the definition of "injury" in section 3 and section 53 of the Act. Mr McDonald submitted that based "on the analysis of Angel J in *D & W Livestock Transport v Smith* (supra), then each of the major surgeries carried out after 1992 was a new injury and the total knee replacement on 12 February 2004 was plainly a new injury for which the worker has not been compensated".[8] Counsel stressed the centrality of his Honour's decision to the resolution of the present case as well as the fact that the decision was binding on this Court.[9]

95. In *D & W Livestock Transport v Smith* (supra) the worker was injured in 1985 in the course of his employment. Following the injury the worker underwent surgery – a splenectomy - during which he received a blood transfusion. The worker was paid worker's compensation in relation to his physical injuries, including the splenectomy.

96. The worker subsequently returned to work, but ceased employment about 12 months later. Approximately 4 years later the worker was diagnosed as suffering from hepatitis C, which he had contracted as a result of the splenectomy performed on him some 5 years earlier, and cirrhosis of the liver. The worker then made a claim under the Act seeking compensation with respect to the hepatitis C and consequential cirrhosis of the liver.

97. When the matter came before the Work Health Court, the presiding magistrate found that the worker had contracted hepatitis C through a blood transfusion received as a result of an injury arising out of or in the course of his employment. The Court made an award in favour of the worker. The employer appealed the decision of the Court on a number of grounds.

98. In the Work Health Court the employer had raised a jurisdictional objection, which turned on the 1991 amendments to s 189 of the *Work Health Act*.

[8] See [20], p 6 of Counsel's written submissions.
[9] See [25], p 7 of Counsel's written submissions.

99. The amendment to s 189, which was effected by Amendment Act (No 3) 1991, commenced on 1 January 1992. The worker's claim was filed on 12 December 1991.

100. Section 189(3) limited claims for compensation made under the Work Health Act "in respect of an injury to or death of a person arising out of or in the course of the person's employment before the commencement of this Act" to claims where compensation has not been paid "in respect of that injury or death" either under the repealed Act, any other law in the Territory relating to the payment of compensation or at common law.

101. In the Work Health Court the employer had argued that the amendment blocked the claim. It argued that the worker was not entitled to compensation under the Work Health Act. The reason for that was that before the worker's claim was decided the Work Health Amendment Act had come into operation and that legislation operated retrospectively. The magistrate had rejected that argument

102. The judge on appeal, Angel J, upheld the employer's contention. His Honour considered that the amendment was procedural and therefore had retrospective operation. However, his Honour went on to find that despite the retrospectivity of the amendment, Parliament did not intend to cut off access to the improved benefits for pre Work Health claimants who had not been compensated, despite the receipt of past compensation. Angel J held that the worker's 1991 claim for compensation involved a new injury not compensated for, which took the claim outside the purview of the amendment. Accordingly, the employer's appeal was dismissed.

103. Referring to s 189(3), his Honour stated:

> The section was enacted to ensure that no person could be compensated for the same injury twice. If a new injury arises from the same incident, or indeed the old injury is exacerbated or recurs, and under s 53 the worker is able to claim afresh for compensation, then it is not that injury which has been compensated for but a previous injury. If a worker has returned

> to work and compensation payments have ceased, there is nothing to stop him from commencing a new claim in the future if that injury recurs or indeed if another injury arising therefrom surfaces.
>
> ... the 1991 claim for compensation is a claim for a new injury which has not been compensated for, therefore it is outside the scope of s 189(3)…
>
> …despite s 189(3) operating retrospectively, it does not operate to exclude claims for which compensation has never been received, even though some prior compensation may have been paid for the initial injury.[10]

104. The decision went on appeal to the Court of Appeal constituted by Kearney, Priestly JJ and Gray AJ: see *D & W Livestock Transport v Smith* (1994) 4 NTLR 169.

105. In dismissing the appeal, the Court held that the amendment to s 189 of the Act applied to cases arising on and after January 1992, and therefore the worker was entitled to bring his compensation proceedings and have them decided under the *Work Health Act* 1986 (NT) as it stood as at 12 December 1991.

106. As pointed out by Mr McDonald, the Court of Appeal had no need to consider the ground of appeal appealing Angel J's finding that there was a "new injury". However, individual members of the Court had something to say about the concept of "injury", in the context of subsequent surgical procedures.

107. Kearney J made the following observation at 170:

> Even if s189(3) has retrospective effect, it is arguable that the term "injury" in s 189(1), (2) and (3) embraces, in terms of *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29, the "secondary consequences [of the initial injury] adverse to the injured person…" that is, in this case, it embraces the HCV which has resulted in the respondent's present and uncompensated total incapacity. If "injury" is construed in this commonsense way, the appellant would appear to be outside the scope of s 189(3) on the facts, as in no real sense has he been compensated "in respect of [his] injury", and the appeal would fail.

[10] No 264/92 at [54] – [58].

108. Priestley J made the following remarks at 172:

> It has been recognised for many years in workers compensation law that when a surgical procedure, such as the splenectomy in the present case, has been carried out to remedy or alleviate an injury compensable under the worker's compensation legislation, the total condition resulting from the injury and the surgery is to be attributed to the original injury, so long as the operation was reasonably undertaken by the worker: see per Mason JA in *Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Mahony v J Kruschick (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 529.

109. Priestley J noted that counsel for the employer and the worker agreed that the "new injury" point had not been mentioned by either party before Angel J. Priestley J said at [173]:

> Whether this meant that it was not open to Angel J to decide the case on point, as the employer contended, could be a matter for some difficulty for this court to decide.

110. Mr McDonald submitted that Priestley J was making observations as to causation: his Honour's comments were not directed to "the question of whether a surgical procedure amounted to a new injury for the purposes of the *Work Health Act*."[11] Counsel submitted that the issue in the present case was not one of causation, as the employer apparently did not deny that the various surgical procedures performed on the worker were attributable to the original injury.[12] Mr McDonald further submitted that the cases cited by Priestley J were causation cases.[13]

111. Mr McDonald submitted that "Angel J specifically dealt with a new development arising out of the original injury, in that case a transfusion of blood resulting some years later in hepatitis C, and this amounted to a new injury for the purposes of the *Work Health Act*".[14]

112. Relying upon Angel J's analysis of the concept of a "new injury" in *D & W*

[11] See [27], p 8 of Counsel's written submissions.
[12] See [27], p 8 of Counsel's written submissions.
[13] See [28], p 8 of Counsel's written submissions.
[14] See [29], p 8 of Counsel's written submissions.

Livestock Transport v Smith (supra), Mr McDonald argued that by parity of reasoning the major surgical interventions in the worker's case were new injuries.[15]

113. Proceeding from that premise, counsel made these submissions:

> Mr Hand has had three different permanent impairment assessments:
>
> (1) 1995
>
> (2) 2002
>
> (3) 2005
>
> These permanent impairment assessments relate to three separate injuries on the basis of Angel J's analysis in *Smith* because of the major surgery which occurred after 1992, after 1995 and after 2002. The sequence of major surgeries culminated in the total left knee replacement which is the third injury. The assessment of Dr Mills in 2005 is in relation to this separate injury and for the permanent impairment assessment of which Mr Hand has never been compensated.
>
> Each of the permanent impairment assessments in 1995, 2002 and 2005 was in respect of a separate injury. This is because major surgery was performed on Mr Hand's left knee between 1992 and 1995; between 1995 and 2002; and finally when the knee was replaced in 2004. These surgeries are set out and admitted in the pleadings.
>
> If it is accepted by the Court that these three assessments in 1995, 2002 and 2005, or any one or more of them are in relation to new injuries, then there are two consequences:
>
> (1) They are injuries which occurred after 15 October 1991. Therefore, in their assessment we must use the 208 x multiplier; and
>
> (2) The previous payments for permanent impairment are not to be set off; because we are not dealing with permanent impairment assessments do not "arise out of the same injury": see *Pengilly* at paragraph 11.
>
> As the Court of Appeal decisions at paragraph 11 and that of Mildren J at paragraphs 9 and 10 in *Pengilly* (supra) make clear, the obligation to set

[15] See [42], p 11 of Counsel's written submissions.

off amounts paid only arises if the payments are for the same injury.[16]

114. Mr McDonald then put to the Court five different scenarios under which the worker says he is entitled to compensation. Those scenarios are set out in Attachment "A" to these reasons for decision.

115. The first scenario is that the worker's permanent impairment entitlements are to be calculated at 104 x average weekly earnings rather than 208 x average weekly earnings, with the previous lump sums paid in 1995 and 2002 being set off.

116. The second is that the worker's permanent impairment entitlements are to be calculated at 104 x average weekly earnings rather than 208x average weekly earnings, with the previous lump sums paid in 1995 and 2002 not being set off.

117. The third scenario is that the worker's permanent impairment entitlements are to be calculated at 208 x average weekly earnings rather than 104x average weekly earnings, with the previous lump sums paid in 1995 and 2002 being set off.

118. The fourth is that the worker's permanent impairment entitlements are to be calculated at 208 x average weekly earnings rather than 104 x average weekly earnings, with the previous lump sums paid in 1995 and 2002 not being set off.

119. The fifth and final scenario is that the worker's permanent impairment entitlements assessed back in 1995 and 2002 are to be calculated at 104 x average weekly earnings rather than 208 x average weekly earnings, with the lump sum paid in 1995 being set off from the lump sum payable in 2002, but if the worker's permanent impairment entitlement following the total left knee replacement in 2004 is to be calculated at 208 x average weekly

[16] See [42] – [45], pp 11-12 of Counsel's written submissions.

earnings rather than 104 x average weekly earnings, with the lump sum paid for the two earlier assessments not being set off.

120. The calculations relevant to each of these scenarios is set out in Attachment "A" to these reasons for decision.

Additional oral submissions

121. Mr McDonald made the point that it has already been considered and determined that under the *Work Health Act* an injured worker may claim for and be paid for a percentage permanent impairment of the whole person pursuant to s 71 of the Act more than once arising out of the same original injury.[17] Counsel further pointed out that that had in fact occurred in the present case.[18] The worker had been paid 2 lump sums for the percentage impairment of the whole person pursuant to s 71: the first in 1995 in respect of bio – mechanical impairment dysfunction of the knee (15%) and the second in 2002 being 30% impairment in respect of bio-mechanical dysfunction in the knee. [19]

122. Mr McDonald submitted that a worker may have different entitlements to a further payment or payments in respect of his or her percentage permanent impairment of the whole person at different times.[20] Furthermore, counsel submitted that it was open to a worker to seek a further lump sum payment pursuant to s 71 for a new injury giving rise to a permanent impairment.[21] Consistent with that, Mr McDonald submitted that the subsequent surgery undergone by the worker after the original injury in 1991 and the total left knee replacement in 2004 are new injuries for which the worker has not been

[17] See p 8 of the transcript
[18] See p 8 of the transcript.
[19] See p 8 of the transcript.
[20] See p 10 of the transcript.
[21] See p 8 of the transcript

compensated or at the very least for which he has only been partially compensated.[22]

123. Dealing with the five different scenarios put to the Court, Mr McDonald said that even if the Court rejected all of the worker's arguments, the worker was still entitled, applying the *Pengilly* formula, to a shortfall in the sum of $5,500.[23]

124. In relation to the second scenario formulated by the worker, Mr McDonald conceded that it was not the worker's case and was a most unlikely scenario.[24]

125. Counsel submitted that the third scenario was based on the assumption that the surgery undergone by the worker amounted to a new injury.[25]

126. In relation to the fourth scenario, Mr McDonald made this submission:

> The worker's case is clearly scenario four. But even though you're still entitled to a shortfall on scenario three. That is, if the court finds that Angel J' judgment is binding upon it and our legal construction arguments find favour, then there's no set off, they are new injuries.[26]

127. With respect to the fifth scenario, counsel submitted:

> Scenario five is if… you take the view that…look all the surgeries that took place after 1991 to 1995, then between 1995 and 2002 and even after 2003, were not new injuries but clearly the total replacement of the left knee was, then that's scenario five, applying Angel J.[27]

THE EMPLOYER'S SUBMISSIONS

The written submissions

128. In relation to the worker's claim that the permanent impairment payment

[22] See p 8 of the transcript.
[23] See p p 23 of the transcript.
[24] See p 23 of the transcript.
[25] See p 24 of the transcript.
[26] See p 24 of the transcript.
[27] See p 24 of the transcript.

made in September 1995 should have been $19,802.64 - calculated by applying the formula 15% x 208 x $634.70 - Mr Grant QC submitted that the "resolution of this claim depends upon whether the worker sustained any 'fresh' injury after 15 October 1991 [the commencement date of *Work Health Amendment Act* (No 2) 1991], or whether the impairment was caused by the original injury occurring on 8 August 1991".[28] Mr Grant submitted that incapacity or death resulting from subsequent surgical procedures made necessary by an injury are generally considered to result from the injury.[29] Counsel submitted that there is no reason in principle or logic why the same approach should not be applied to impairment; and accordingly, "any impairment arising from the surgeries performed, or any deterioration experienced" after 15 October 1991 should be treated as having resulted from the original injury.[30]

129. Mr Grant sought to distinguish *D & W Livestock Transport v Smith* [1993] NTSC 67 from the present case. He submitted that that case "involved the proper construction of s 189 of the Act, which provided that a worker could not make a claim for compensation under the Act where compensation had previously been paid under the former legislation".[31]

130. Counsel further submitted that "even accepting Angel J's analysis, in the present case there has been no fresh and separate injury such as the contraction of hepatitis C".[32] Mr Grant submitted that in any event the Court was not bound by his Honour's analysis of "injury" in *D & W Livestock Transport v Smith* (supra).[33]

131. Mr Grant pointed out a number of aspects of the decision of the Court of Appeal in *D &W Livestock Transport v Smith* (supra). The first is that the

[28] See [14], p 5 of Counsel's written submissions.
[29] See [14], p 5 of Counsel's written submissions.
[30] See [14], p 5 of Counsel's written submissions.
[31] See [15], p 5 of Counsel's written submissions.
[32] See [16], p 6 of Counsel's written submissions.
[33] See [17], p 6 of Counsel's written submissions.

"new injury" argument was not raised by either the employer or the worker before Angel J; nor was the issue the subject of submissions.[34] The second is that the Court of Appeal determined the appeal on an entirely different basis – namely that the amending legislation was found not to have retrospective effect.[35] The third is that the decision contains obiter that raises doubts as to the correctness of the analysis undertaken by Angel J.[36]

132. With respect to that third aspect, Mr Grant noted and relied upon the observation made by Priestley J in *D & W Livestock Transport v Smith* (supra) at 172 to effect that the total condition resulting from an injury and subsequent remedial or alleviate surgical procedures is usually treated as being attributable to the original injury.[37]

133. Mr Grant also relied upon the legal propositions formulated by Mason JA in *Migge v Wormald Bros Industrries Ltd* (supra):

> (a) an existing incapacity "results from" the original injury if it follows, and is caused by, that injury, and may properly be held so to result even if some supervening cause has aggravated the effects of the original injury; and
>
> (b) if the existing incapacity ought fairly to be attributed to a new cause which has intervened and ought no longer to be attributed to the original injury, it may properly be held to result from the new cause and not from the original injury.[38]

134. Applying the first of those propositions to the present case, Mr Grant argued that "there can be no doubt that the impairment resulted from and was caused by the original injury".[39] As for the second proposition, Counsel submitted that the worker did not seek to argue, nor adduce any evidence,

[34] See [17], p 6 of Counsel's written submissions.
[35] See [17], p 6 of Counsel's written submissions.
[36] See {17], p 6 of Counsels' written submissions.
[37] See above, p 34.
[38] See [19], p 6 of Counsel's written submissions.
[39] See [20], p 6 of Counsel's written submissions.

that the "relevant incapacity ought no longer to be attributed to the original injury".[40]

135. At [21], page 7 of his written submissions, Mr Grant made the following submission:

> The better view is that *Migge v Wormald Bros Industries Ltd* is persuasive authority for the proposition that the sum total of the worker's impairment is referable to the original injury and, accordingly, any assessment of permanent impairment was properly made in accordance with the regime that applied as at the date of the original injury.

136. Mr Grant dealt with the worker's alternative argument that as "injury" is defined by s 3 of the Act to include an aggravation, acceleration, recurrence, exacerbation or deterioration of a pre-existing injury, the subsequent surgical procedures gave rise to "fresh" injury:

> That definition does not cut across the general principle that surgery and its consequences are properly attributed to the original injury. The general principle is consistent with the treatment of compensation for surgical procedures in s 73 of the Act, ie the entitlement is referable to the primary incident causing injury.[41]

137. Mr Grant submitted that the worker's contention that the surgical procedures had caused an aggravation or exacerbation of the original injury suffers from the following evidentiary deficits:

> (a) there is no evidence that the impairment claimed was "caused by" the subsequent surgeries;
>
> (b) there is no evidence of aggravation, etc or that such aggravation attributable to the surgeries has been anything other than temporary, and both the permanency of the worker's impairment and its level are best seen as referable to the initial injury;
>
> (c) if the surgeries did constitute fresh injuries, there is no evidence that each individual injury (surgery) gave rise to impairments greater than the threshold requirement of 5% of the whole person.[42]

[40] See [20], p 6 of Counsel's written submissions.
[41] See [23], p 7 of Counsel's written submissions.
[42] See [24], p 7 of Counsel's written submissions.

138. Counsel also submitted that there was a procedural bar to the maintenance of the proceedings in so far as the proceedings rely upon the extended definition of "injury" in s 3 of the Act:

> S 182 of the Act provides that proceedings for the recovery of compensation shall not be maintainable unless the claim for compensation has been made within six months after the occurrence of the injury.[43]

139. At [25], pages 7 -8 of of his written submissions, Mr Grant made these submissions:

> There are significant conceptual difficulties, with broad ramifications, attending the proposition that the matters identified in this case occurring after 15 October 1991 each constitute a new injury in circumstances where the underlying condition has obviously been present since the date of the injury.
>
> (1) If the worker's contention is accepted, normal weekly earnings are "reset" as at the date of each injury, with negative ramifications in relation to the level of entitlement to compensation for incapacity.
>
> (2) If the worker's contention is accepted, a worker not previously so may be brought within the regime under s 65(2) of the Act, which commenced in 2002.
>
> (3) Insofar as the worker might argue that the progression of the worker's knee dysfunction, assuming such a progression, constitutes a fresh injury, a new "injury" would arise at each point of the progression and, taken to absurd lengths, a new injury would arise every minute.

140. In relation to the worker's second claim that the permanent impairment payment made in July 2002 should have been calculated by applying the formula – 30% x`208 x $807.60 minus the previous payment of $9,901.32 – Mr Grant pointed out that this claim was predicated on the view that the Act as amended applied. In relation to this claim counsel repeated the submissions he made with respect to the worker's first claim.

[43] See [24], p 7 of Counsel's written submissions.

141. With respect to the worker' complaint that even applying the pre- 15 October 1991 regime he had received an insufficient payment,[44] Mr Grant made the following submission:

> On 29 March 2006, the employer made a further payment of $2,853.24 (plus interest of $1,049.99), in respect of the 2002 permanent impairment assessment in conformity with the method of calculation prescribed by the Supreme Court, and subsequently by the Court of Appeal, in *Pengilly v Northern Territory of Australia (No 2)* NTSC 91 and *Northern Territory of Australia v Pengilly* [2004] NTCA 4: see paragraph 38 of the Defence; paragraph 65 of the Statement of Claim. That payment was made on the basis that the pre-15 October 1991 regime applies.[45]

142. As regards the worker's third claim that he is entitled to the costs of procuring the three further permanent impairment assessments during 2005, Mr Grant says that on 15 December 2006 the employer paid those costs, as pleaded in paragraph 65 of the Defence.[46]

143. Mr Grant made extensive submissions in relation to the fourth claim made by the worker that he is entitled to a further permanent impairment payment based on Dr Mills assessment being either:

(a) 30% x 208 x $1039.00 (average weekly earnings, 2006) in the amount of $64,833.60; or

(b) $64,833.60 less the permanent impairment payments made in 1995 and 2002; or

(c) 12% x 208 x $1039.00 in the amount of $25,933.44, being the previously unassessed and uncompensated assessment for chronic pain (7%) and scarring (5%).[47]

144. In relation to each of these calculations, Mr Grant made the following submissions:

> Calculation (a) is based on the contention that : (i) the Act as amended applies and; (ii) the worker is entitled to a further 30% impairment

[44] See Worker's scenario 1 in Attachment "A".
[45] See [29], p 8 of Counsel's written submissions.
[46] See [31], p 8 of Counsel's written submissions.
[47] See [32], p 9 of Counsel's written submissions.

payment over and above the 30% permanent impairment payment previously made.

Calculation (b) is put on the same basis, but accepts that the worker must account for the payments previously made in 1995 and 2002.

Calculation (c) is put on the same basis, but seeks compensation only in respect of chronic pain and scarring.[48]

145. For the reasons put forward in relation to the worker's first claim, Counsel submitted that the Act as amended did not apply. Accordingly, the claim should fail at the outset.[49]

146. However, assuming the Act as amended does apply, Mr Grant made the following submissions which appear at [38] – [49], pp 9-12 of his written submissions:

> The Atkinson assessment prepared on 12 September 1995 states only that the work has a "35% loss of function of the left knee in total and I would translate that into 15% permanent impairment of the body as a whole". Previous reports by Dr Atkinson speak of numbness and paraesthesia, drop foot, articular surface changes, nerve irritation and pain. The worker had undergone one surgical procedure prior to that assessment, and had clearly suffered pain as a result of injury.
>
> The Marshall assessment of 5 July 2002 states only that the worker "has a 30% whole body impairment". The subsequent explanation of 18 July 2002 attributes the impairment to muscular atrophy, loss of range of motion, arthritis, remedial and lateral meniscectomies, multiple scarring of the leg and various osteotomies. The report also states that a partial knee replacement would not affect the level of the worker's permanent impairment. Previous reports dated 27 June 2001 and 6 May 2002 speak of "continuing pain", "previous pain", attempts "to relieve his pain", and the possibility that his pain may become "severe".
>
> The Mills report of 18 December 2005 assesses 7% for chronic pain, 5% for scarring, and 20% for right knee dysfunction. The assessment is expressed to have been conducted in accordance with the Fourth Edition Guides. It is common ground in the pleadings that the application of the Common Value Tables translates the total of these assessments to 30% of the whole person.

[48] See [33] – [35], p 9 of Counsel's written submissions.
[49] See [36], p 9 of Counsel's written submissions.

The only procedure which the worker underwent between the assessment of 5 July 2002 and the subsequent report of 18 December 2005 was the joint replacement. The Mills report notes that following the joint replacement the worker's "knee pain lessened considerably". There is no attempt to relate the description of, or assessment for, scarring to the joint replacement procedure in 2004. There is no attempt in the report to suggest that the allowance for right knee dysfunction is additional to the 30% allowance made in July 2002.

The assessment contained in the Mills report does not have to be taken at face value. It is permissible for the Court to analyse assessment reports for the purpose of determining whether they have been compiled in accordance with the prescribed guides, and whether they support the claim for a further payment for permanent impairment: see *Pengilly v Northern Territory of Australia* [1999] NTSC 131.

The Mills assessment in relation to pain does not take into account the fact that the impairment percentages shown in the Chapters that consider the various organ systems make allowance for pain that may accompany the impairment conditions: see paragraph 2.2. Accordingly, any allowance made by Mills, or previously, in relation to right knee dysfunction would include an allowance for the pain that accompanies the dysfunction. It is only when the patient has a chronic pain syndrome that some further evaluation in respect of pain is warranted.

The Mills assessment of pain does not comply with Chapter 15 of the Guides:

1. There is no evidence that Mills is a physician who is conversant with chronic pain syndrome: see paragraph 15.1.

2. There is no evidence of a complete physical and neurologic examination: see paragraph 15.6.4.

3. No psychological testing was undertaken: see paragraph 15.5.6.

4. There is no evidence of appropriate assessment content to describe and assess the degree of impairment: see paragraph 15.8.

5. There is no delineation between the impairment attributable to the decreased ability to carry out daily activities by reason of the pain and the impairment attributable to the decreased ability to carry out daily activities by reason of the right knee dysfunction: se paragraph 15.8.

The Mills assessment of scarring does not comply with Chapter 13 of the Guides:

1. There is no indication of functional loss attributable to the scarring and no consideration of cosmetic involvement: see paragraph 13.2.

2. There is no evaluation of the impact of the scarring on the worker's daily activities: see paragraph 13.5.

3. There is no analysis of the change in or increase to the level of scarring already compensated under the 2002 assessment.

4. The assessment would appear to make allowance for scarring to the right knee.

It is not possible to "hive off" the assessments made in respect of pain and scarring. Even if it is accepted that the worker's condition gives rise to permanent impairment in a number of organ systems, or that the patient has two significant, unrelated conditions (which is not borne out on the evidence), the Guides require the separate whole person impairment estimates to be combined into a single overall impairment estimate using the Combined Values Chart: see Chapter 2.2. Section 71 of the Act allows compensation for permanent impairment of the whole person. It does not allow for separate compensation in respect of separate whole person impairment estimates, and in particular not in circumstances where those assessments relate to the same condition; in this case the worker's left knee dysfunction.

Even if the Mills assessment is accepted at face value, it does not assess the worker's permanent impairment of the whole person above the 30% at which the worker was assessed, and for which he was paid, in 2002. To allow some further payment for permanent impairment in circumstances where there has been no net increase to the worker's whole person impairment would be contrary to the provision in s71(1) of the Act, and contrary to general principles of fairness and equity.

On the basis of what is contained on the face of the Mills assessment:

1. There is no evidence of an impairment beyond the 30% whole person impairment assessment conducted in 2002. At most, there is a suggestion that his impairment resulting from the right knee dysfunction has reduced from 30% to 20%, and that permanent impairments constituted by chronic pain and scarring (undescribed in terms of their provenance, their relationship with the previous assessments, and existence as at the date of the previous assessments) make up the balance of the 10% whole person impairment in accordance with the Common Value Tables;

2. There is no evidence to support an entitlement to a further payment assessed on the basis of present average weekly earnings, whether the permanent impairment payments previously made are deducted or not; and

3. The worker has previously been compensated expressly for scarring and impliedly for pain, and there is no evidence to support a claim for some deterioration in his condition in relation to chronic pain and scarring since the assessment in 2002.

The worker has no entitlement under Claim 4.

Additional oral submissions

147. Mr Grant submitted that the 1991 amendment did not undermine "the guiding principle that compensation is payable in respect of whole person impairment which requires the whole person to be considered for the purposes of calculating any compensation".[50]

148. Furthermore, he submitted that the new regime only applies to injuries occurring after 15 October 1991 that cause permanent impairment.[51]

149. Mr McDonald submitted that compensation for permanent impairment is payable only if the impairment is caused by an injury arising out of or in the course of employment and the injury results in or materially contributes to the impairment.[52]

150. Dealing with the various impairment assessments made in this case, Mr Grant submitted that there was clearly some increase in the level of the worker's impairment between 1995 and 2002 to 30 %.[53] However, he argued that between 2002 and 2005 the assessed whole person impairment remained the same – at 30%.[54]

151. In relation to the increase in impairment between 1995 and 2002 Mr Grant made this submission:

> …it may be tempting … to accede to … the proposition that there was somehow a fresh injury during that intervening period which stands by itself, and injury in the form of surgery, and that that injury has given rise

[50] See p 26 of the transcript.
[51] See p 26 of the transcript.
[52] See p 27 of the transcript.
[53] See p 29 of the transcript.
[54] See p 29 of the transcript.

> to the increase in the permanent impairment… it is quite feasible… that the worker might sustain an injury and then by reason of the natural progression or otherwise of that injury sustain an increase in the level of impairment deriving from that injury without there being any particular incident or happening or occurrence that might be characterised as a fresh or a new injury underlying that increase in impairment.
>
> …it is crucial in this case to… always bear in mind that one is only entitled to a payment for impairment in the event that that permanent impairment is caused by injury. And it's crucial to bear in mind that there is a distinction between impairment and injury in that it is possible to have an increase in one's impairment in the absence of any new happening, incident, event or injury. And it is possible to have no increase in impairment notwithstanding a number of incidents or events that may be properly characterised as injuries in accordance with the legislation.[55]

152. Mr Grant argued that the Court could draw "an interpretative inference from those cases that deal with the attribution of incapacity from surgery to initial injury, together with the fact that the definition of injury when it speaks of aggravations and exacerbations doesn't deal with the issue of surgery when one might expect it to have done".[56] Mr Grant went on to submit:

> … [the court] can draw a further inference from the scheme of the Act as a whole. Particularly s 73 where it speaks of compensation for ameliorating surgical intervention consequent upon the injury… the inference there is that if it is something that falls within the ambit of s 73, then any corollary or consequence of that particular action taken pursuant to or in respect of which a worker has an entitlement under s 73, forms part of the original injury because the entitlement to compensation flows, of course, from the entitlement to the surgery and to be compensated for that surgery all flow from the original injury. It's part and parcel of the original injury.[57]

153. Referring to paragraph 24 of the Statement of Claim – that is the claim that the permanent impairment payment made in 1995 should have been on the basis of 208 x AWE – Mr Grant made the following submission:

> …that raises this one discrete issue. And that is whether there were injuries prior to the 1995 assessment, a fresh injury or injuries prior to the 1995 assessment post dating 15 October 1991 that are properly characterised as new injuries so as to attract the amended regime which

[55] See p 29 of the transcript.
[56] See p 29 of the transcript.
[57] See p 30 of the transcript.

> injuries, if they are properly characterised as new injuries, caused permanent impairment.[58]

154. Counsel outlined the employer's response, which, in essence, was that "the total condition resulting from the original injury and the surgeries is to be attributed to the original injury for the purposes of ss 70 and 71". [59]

155. More particularly, Mr Grant submitted that it was "not appropriate under the scheme of the legislation to characterise the further surgeries so as to invoke the operation of the regime which applies post – 15 October 1991".[60]

156. In relation to the argument that the surgical procedures aggravated the worker's original injury, counsel submitted that between August 1995 and September 1995 the only surgical procedures that post dated 15 October 1991 were the ligament reconstruction and the arthroscopy – a revision of the reconstruction.[61] Mr Grant submitted that the first procedure, by its very nature, would not be expected to give rise to permanent impairment – indeed one would expect that it would ameliorate the worker's condition.[62] As regards the second procedure, it was also submitted that by its very nature it indicated improvement rather than deterioration. [63]

157. Counsel made the following submission as to the complexity of the worker's argument:

> …it is difficult to in terms of the worker's argument to identify precisely what the injury was. Was it five injuries or was it one injury occurring over a period of time? And in respect of each injury what was the percentage of permanent impairment flowing from each injury? And to what extent did that permanent impairment exceed the permanent impairment that the worker was suffering following the surgery on 22 August 1991 prior to the amendment of the legislation which was the

[58] See p 32 of the transcript.
[59] See p 32 of the transcript
[60] See p 32 of the transcript.
[61] See p 32 of the transcript.
[62] See p 32 of the transcript.
[63] See p 32 of the transcript.

> initial arthroscopy and the removal of the torn lateral meniscus. So there are all sorts of evidentiary difficulties that present…[64]

158. Although the employer did not take the s 182 point, Mr Grant submitted that "this is really together with a whole lot of other issues symptomatic of the difficulties with the construction that they promote, that AWE is reset, that there is an issue arising in terms of whether or not s 65(2) as amended in 2002 applies given that a fresh injury has arisen, a question arises as to whether a fresh claim has to be put in every time".[65]Counsel argued that these types of issues "militate, on a reading of the Act as a whole, against the construction" advanced by the worker.[66]

159. Counsel submitted that if the worker's contention is accepted and there is a new injury every time which subsumes the original injury or displaces the original injury, "normal weekly earnings are reset as at the date of each injury, or would be":

> … s49 and the definition of normal weekly earnings there, it's plain .. that on any of the paragraphs there (a) to (d), if a worker has been in receipt of compensation, as in this worker's case, a number of years, and then by reason of an attempt to gain another advantage under the legislation enters into the fiction that a fresh injury has arisen, he's thrown back on the calculation of normal weekly earnings in accordance with s 49… there's no doubt… that remuneration as it appears in that definition of normal weekly earnings doesn't include worker's compensation for example.
>
> … so on a strict and literal interpretation of the legislation, if you follow the worker's argument through you are going to have zero normal weekly earnings in those circumstances because the injury arises of course at the date of the surgery rather than at the date of the original injury.[67]

160. Counsel also argued that the worker's argument had ramifications in relation to s 65(2) of the Act:

> It was amended in 2002 and it has very, very significant ramifications for workers and employers. Because you'll see from s 65(2) that for people caught by this particular provision, loss of earning capacity, that is people

[64] See p 33 of the transcript.
[65] See p 44 of the transcript.
[66] See p 44 of the transcript.
[67] See p 50 of the transcript.

> whose injuries arise after 2002, loss of earning capacity is the difference between indexed normal weekly earnings and the amount the worker is reasonably capable of earning. You'll see from placitum two there, regardless whether or not that employment is available to the worker.
>
> … there are great forensic advantages to the employer and forensic disadvantages to the worker arising out of that amendment. Because of course under the old regime and under the new regime for the first 104 weeks, the question of the reasonable availability of the employment has to be established by the employer.
>
> If you follow the worker's argument through and the relevant injury, well the time of injury is reset to the time of surgery there will be circumstances in which the worker not previously subject to the new regime would be subject to the s 65(2)(b)(2) regime, with the difficulties that present there.
>
> So the worker is seeking to take advantage of one particular and strained reading of the definition of injury in order to secure an advantage in relation to permanent impairment, leading to all sorts of difficulties in relation to the impact that will have on normal weekly earnings, the assessment of loss of earning capacity… and the issue of claims, the requirement in s 182 to lodge a fresh claim in respect of each of these purported new injuries, the difficulties to which that potentiality gives rise.
>
> …the one.. rational logical appropriate and reasonable way of overcoming those sorts of consequences is to adopt an interpretation of the legislation which is consistent with the already existing jurisprudence in relation to incapacity and causation. An interpretation of the legislation that would see the consequences of surgery consequent upon a primary injury attributable to that injury and not subject to artificial constructions and propositions to the effect that those surgeries themselves form stand alone or stand apart injuries.[68]

161. Mr Grant submitted that another difficulty with the worker's argument is that "if the worker is entitled every time he or she undergoes surgery to come back and get a reassessment, the worker will invariably get an increase in the amount payable in respect of the permanent impairment" – because in an inflationary economy average weekly earnings will always increase. [69] And that would be the case notwithstanding that there has been

[68] See pp 50 -51 of the transcript.
[69] See p 51 of the transcript.

no increase in the level of permanent impairment.[70] Mr Grant says that the present case is a prime example:

> We have a whole person impairment assessment done in 2002 and it comes in at 30%. We have a subsequent assessment done in 2005 and it also comes in in terms of whole person impairment at 30%. But because of the increase in AWE between 2002 and 2005, the worker comes back on the worker's argument and receives an increase despite there being , or receives further payment despite there being no increase in the level of the whole person impairment… that is a situation that could go on ad infinitum every time a surgical procedure was undertaken. And that clearly can't be the appropriate approach to the construction of the legislation.[71]

162. Counsel identified yet a further problem in relation to the worker's construction:

> The maximum whole person impairment that can be paid is obviously 100%... In fact anything over 85 or 90% is considered to be as good as dead basically, and that's provided expressly in the Guides.
>
> If as the worker contends in one of its scenarios there is no requirement to set off earlier impairment assessments, then the possibility is that the combination of whole person impairments that might be made over the life of the worker's impairment or incapacity as a result of the injury, could easily exceed 100%.
>
> In this case… if you accept the high water position… the worker is entitled to the 30% presently assessed in 2002 without any set off in respect of the 30 % assessed and paid in 2002, with the result that there is a 60 % whole-person impairment that's payable in respect of what is effectively the same dysfunction or the same injury, and that is an injury to the left knee.
>
> And that…can't be how the legislation is intended to work because… you can see the obvious difficulties that present there in terms of a rapid exceeding of the 100% whole person impairment allowance. Which would make the whole thing a nonsense. [72]

163. Mr Grant sought to distinguish the decision of Angel J in *D & W Livestock Transport v Smith* (supra) on two bases. The first was that his Honour's conclusion that the contraction of hepatitis C was an injury in its own right

[70] See p 51 of the transcript.
[71] See pp 51 -52 of the transcript.
[72] See p 52 of the transcript.

was in relation to incapacity arising from an injury – his Honour did not deal with or consider whether the new injury caused a permanent impairment.[73] The second was, unlike the situation in *D & W Livestock* , the present case did not involve a fresh and separate injury. [74]

164. In relation to whether the decision of Angel J was binding on this Court, Mr Grant observed that the Court of Appeal determined the matter on quite a different basis to the one arrived at by the judge at intermediate level.[75] Counsel submitted that ratio of the Court of Appeal did not incorporate the analysis undertaken by Angel J.[76]Accordingly, Mr Grant argued that "there is no question.. that this court is not bound by the determination that was made at the intermediate level…"[77]

165. In advancing the argument that the sum total consequences of injury and surgery are all attributable to the original injury, Mr Grant submitted that in the present case there was no suggestion that the relevant impairment ought no longer be attributed to the original injury.[78] He specifically pointed out that, for the purposes of the 1995 and the 2002 assessments, no attempt was made in submissions to draw a distinction between or explain precisely what proportion of the impairment was referable to the subsequent surgeries and what proportion of the impairment was referable to the original injury.[79] Mr Grant went on to submit:

> If the impairment follows upon the surgery in a temporal sense, and even if the impairment follows upon the surgery in a causal sense, if the surgery is referable to the original injury it is all for the purposes of calculating normal weekly earnings, assessing medical expenses and assessing permanent impairment payable attributable to the original injury and calculated accordingly.[80]

[73] See p 46 of the transcript.
[74] See p 46 of the transcript.
[75] See p 47 of the transcript.
[76] See p 47 of the transcript.
[77] See p 47 of the transcript.
[78] See p 49 of the transcript.
[79] See p 49 of the transcript.
[80] See p 49 of the transcript.

166. Counsel submitted that this represented a fair and simple construction of the permanent impairment scheme under the *Work Health Act*, which was not plagued by "the sort of difficulties that present in the strained interpretation that is promoted by the worker".[81]

167. Mr Grant submitted that "it's conceptually difficult to characterise surgery as an injury or as an aggravation or acceleration or occurrence or exacerbation or deterioration of an injury".[82] He went on to say:

> Surgery is a curative or a restorative or a remedial medical process that's applied to a worker as a result of an original injury. It's not properly characterised as falling within that extended definition of an injury for that reason. It's conceptually repugnant.
>
> …if subsequent injuries were to be properly characterised as new injuries or stand alone and separate injuries for the purposes of the legislation, there would be some provision in the definition to that effect. But of course there is not.
>
> …[s73] gives rise to an inference only, an inference in the proper construction of legislation only, that in circumstances where the legislature upon the happening of an injury has provided expressly for compensation for surgical procedures to ameliorate that injury, that it has not intended that the surgical procedures themselves which are undertaken pursuant to that regime would stand alone as separate injuries for the purpose of the legislation, particularly not for the purposes that the worker seeks to pursue here."[83]

168. In relation to claim 2, Mr Grant says that the worker wants the Court to "make the assessment as if there never had been any payment in 2002, as at 2007 figures, and to require the employer to make the payment on that basis" : see scenario one in par (b).[84] Counsel submitted that such a method of calculation penalises the employer to the tune of a further $5,700. [85]That penalty derives from the fact that "the method of calculation that's postulated by the worker totally ignores the fact that the bulk of the

[81] See p 49 of the transcript.
[82] See p 49 of the transcript.
[83] See pp 49 – 50 of the transcript.
[84] See p 56 of the transcript.
[85] See p 56 of the transcript.

payment, 80% of the payment, was made in 2002". [86] Mr Grant says that that "ignores the fact that the supervening decision in Pengilly illuminated what the appropriate calculation was intended to be."[87] Counsel submitted that the appropriate means of addressing the shortfall was the approach taken by the employer which was " to pay in accordance with 2002 dollars and provide interest because… it wasn't a case of there being no payment in 2002 at the date of the assessment."[88] Mr Grant stressed that there had been a payment in 2002 at the date of the assessment.[89] The error – in hindsight – was that the payment was not in accordance with the formula subsequently laid down by the Court of Appeal in *Pengilly*. [90]Mr Grant submitted that to require the whole payment to be made again or to be calculated again on the basis of 2007 figures would be contrary to principle.[91]

169. Mr Grant said that the only other issue that arises in relation to claim 2 is "whether the payment is properly made on the basis of 104 x average weekly earnings or 208 x`average weekly earnings".[92] Counsel argued that for the reasons advanced in relation to claim 1 the appropriate formula was 104x average weekly earnings.[93]

170. Mr Grant said that claim 3, which related to the payment of medical expenses in the sum of $1925, was no longer an issue as those expenses had been paid by the employer.[94]

171. Counsel submitted that like claim 1, claim 4 was the substantive claim. Mr Grant said that claim 4 postulated that the worker was entitled to "the whole of the 30% whole person impairment assessment conducted by Dr Mills

[86] See p 56 of the transcript.
[87] See p 56 of the transcript.
[88] See p 56 of the transcript.
[89] See p 56 of the transcript.
[90] See p 56 of the transcript.
[91] See p 57 of the transcript.
[92] See p 57 of the transcript.
[93] See p 57 of the transcript.
[94] See p 60 of the transcript.

without any set off in respect of previous payments made. [95] The claim assumed that the pre 15 October 1995 regime applied, so that the appropriate multiplier was 208 x.[96]

172. In relation to claim 4 counsel argued that the only reason for any differential between the permanent impairment assessment of 30% in 2002 and the 30% assessment in 2005 was the increase in average weekly earnings.[97] Mr Grant submitted that the Act compensates for whole person impairment and if the level of impairment has not changed, then there is no basis for any further payment.[98] He submitted that "the whole purpose of the Act – or of the s 71 mechanism – as is apparent from the wording of s 71 and the incorporation of the guides is to compensate for the whole –person impairment".[99] Mr Grant argued that the permanent impairment provisions of the Act were not intended to operate where there was only an increase in average weekly earnings and no increase in the level of impairment.[100]

173. Mr Grant said that in relation to claim 4 there was an attempt to hive off pain and scarring.[101] Counsel said that it was not possible under the Act to hive off scarring and pain because of the fundamental principle underpinning compensation for permanent impairment, which was to compensate for whole person impairment.[102] Mr Grant argued that in the case of an impairment that impacts upon a number of body systems or parts of the body a medical practitioner is required to apply the combined value tables in order to arrive at that whole person impairment assessment.[103] Counsel submitted that when that methodology is applied to the present case in relation to the worker's knee dysfunction and the claimed further

[95] See p 61 of the transcript.
[96] See p 61 of the transcript.
[97] See p 61 of the transcript.
[98] See p 61 of the transcript.
[99] See p 61 of the transcript.
[100] See p 61 of the transcript.
[101] See p 61 of the transcript.
[102] See p 61 of the transcript.
[103] See p 61 of the transcript.

impairment in relation to scarring and pain, the assessment does not exceed the 30% permanent impairment previously compensated.[104]

174. Mr Grant proceeded to make submissions regarding the relationship between the operation of the *Work Health Act* and the Guides to the Evaluation of Permanent Impairment and the application of those Guides to the medical evidence relied upon by the worker.[105]

175. Counsel referred to Chapter 2 of the Guides which provides for the proposition that when "one has a number of organ systems involved, one needs to derive a single whole person impairment figure".[106] Mr Grant argued that that was in accordance with s 71 of the Act "because it doesn't allow for a number of payments to be made in respect of different organ systems or different complaints".[107] He said that it was obvious from the adoption of the phrase "payment for whole impairment" in s 71 that that was what was intended.[108]

176. Mr Grant went to refer to issue of pain and its treatment in the Guides:

> …what the Guides provide is that in general the impairment percent shown in the chapters that considered the various organ systems make allowance for the pain that may accompany the impairing conditions. Chronic pain, also known as chronic pain syndrome, is evaluated as described in the chapter on pain. …what that's saying … is that if somebody has a dysfunction in their knee which gives rise to a whole-person impairment, that dysfunction as it is quantified in the charts, in the nature of permanent impairment, also includes an allowance for pain.[109]

177. Continuing to deal with Chapter 2 of the Guides, counsel said that "the guiding consideration in rating the whole-person impairment is the effects of the impairment in terms of the individual's everyday activities".[110] He said that the Guides contemplate that a person's condition may change for the

[104] See p 61 of the transcript.
[105] See p 61 of the transcript.
[106] See p 62 of the transcript.
[107] See p 62 of the transcript.
[108] See p 62 of the transcript.
[109] See p 62 of the transcript.
[110] See p 63 of the transcript.

better or the worse.[111] Mr Grant submitted that the Court could draw one of two conclusions from the fact that Dr Mills assessed the worker's knee dysfunction at 20% in 2005 whereas the whole person assessment in 20002 was 30%:

> The first is that there's been a significant improvement in the workers' impairment of the left knee. The alternative is that there has been an attempt by the doctor to assess individually bare knee dysfunction in terms of the lack of mobility, pain and scarring. … but….when one combines those three particular assessments you get an assessment of somewhere between 29 and 30 % of the whole person, which … is the assessment which was performed in 2002. So either there has been an improvement in the condition or there's been that sort of exercise undertaken by Dr Mills. Either way… it doesn't found any claim for a further payment for permanent impairment.[112]

178. At pages 65 -66 of the transcript Mr Grant made submissions to the effect that medical reports used to support permanent impairment needed to conform to the Guides in the general sense.

179. In relation to Dr Marshall's report in 2002, Mr Grant observed that it provided no basis for concluding that there was a permanent impairment relating to the osteotomy or arising from that surgery.[113] There was also no basis for finding that the level of impairment following the surgery was better or worse than it was prior to the surgery.[114]

180. Turning to Dr Mills' report, Mr Grant referred to the rather confusing reference to the right knee, rather than the left knee.[115]

181. Counsel made the following observations in relation to Dr Mills' report:

> …there's no distinction drawn between the functional impairment due to pain brought on by steps, stairs, uneven surfaces and inclined plains and the functional impairment that's due to the general dysfunction in the knee. And that's important when we get to the relevant part in the guides and indeed there has been no attempt to draw a distinction between those

[111] See p 63 of the transcript.
[112] See p 63 of the transcript.
[113] See p 66 of the transcript.
[114] See p 66 of the transcript.
[115] See p 76 of the transcript.

> activities of daily living and functions that the worker can undertake or rather can't undertake because of his knee, and those that he can't undertake because of pain.
>
> …there's a very brief reference to pain using narcotic analgesia, scarring, extensive scars around the right knee, small scars on the left hip – which is inconsistent with the observations made on examination where he notes that the left knee had two linear scars, one 36 centimetres long and the other 30 centimetres long, but notes a two centimetre oblique scar over the right knee. Scarring, right knee dysfunction, no description as to the nature of that impairment in the right knee dysfunction. And then we have a bald estimate of 7% for pain. No discussion of the extent to which that pain is - that allowance of pain is necessitated because it's over and above the pain accommodated in the allowance for knee dysfunction. Five percent for scaring, again no description and 20% for right knee dysfunction.[116]

182. Mr Grant submitted that no attempt was made by Dr Mills "to distil those individual assessments into a single assessment of whole person impairment as is required by the Guides".[117]

183. Referring to Chapter 13 of the Guides, which deals with scarring, Mr Grant observed that there was no indication in the report as to whether the 5% assessment for scarring is "referable to the impairment caused by the scarring as opposed to the knee dysfunction, on his ability to carry out daily activities or whether it's purely referable to cosmetic deficit."[118] Counsel remarked on the silence of the report in that regard.[119]Furthermore, it was pointed out by Mr Grant that the report provided no explanation for concluding that the condition was stable and unlikely to change.[120]

184. Mr Grant submitted that there was no evidence in Dr Mills' report that the 20% for knee dysfunction as assessed by him was wholly separate and different to the 30% that was assessed and allowed for in 2002.[121] Counsel submitted that Dr Mills was assessing precisely the same knee dysfunction

[116] See p 76 of the transcript.
[117] See p 76 of the transcript.
[118] See p 77 of the transcript.
[119] See p 77 of the transcript.
[120] See p 77 of the transcript.
[121] See p 77 of the transcript.

that was assessed in 2002 save that the worker had since undergone a total knee replacement.[122] Mr Grant said that there was no suggestion in Dr Mills' report that the knee replacement had a deleterious effect on the worker's whole person impairment.[123]

185. Counsel also submitted that on the face of Dr Mills' report the worker's pain had improved considerably since the knee replacement.[124] Furthermore, it was submitted that the report did not disclose any increase in whole person impairment.[125]

186. Mr Grant went on to submit that there was no discussion in Dr Mill's report of actual functional loss as a result of the scarring.[126] He also submitted that no attempt was made to identify to which surgical procedures the scarring related.[127] Furthermore, counsel pointed out that "no consideration was given to the impact the scarring [had] on daily activities"; nor was any attempt made to "classify it in accordance with Table 2…in terms of any analysis or description as required in Chapter 2 of reports that are prepared for [that] purpose".[128]

187. Counsel argued that it was not possible to hive off pain and scarring as attempted to be done on behalf of the worker.[129] Mr Grant pointed out that the Guides required that "if impairment from a skin disorder is to be considered along with a component based on any other organ system – which Dr Mills appears to have done – both components first must be expressed as a whole person impairment percent and then combined".[130]

188. In relation to Dr Mills' assessment of pain, Mr Grant pointed out that there

[122] See p 77 of the transcript.
[123] See p 77 of the transcript.
[124] See p 77 of the transcript.
[125] See p 77 of the transcript.
[126] See p 78 of the transcript.
[127] See p 78 of the transcript.
[128] See p 79 of the transcript.
[129] See p 79 of the transcript.
[130] See p 79 of the transcript.

was no reference to the duration of the doctor's examination of the worker. Nor was any attempt made in the report to estimate the nature or the extent of the worker's pain having regard to psychological testing.[131]

189. With respect to Dr Mills' report and the worker's fourth claim. Mr Grant submitted as follows:

> ...there is absolutely no evidence of an impairment beyond the 30% whole person assessment conducted in 2002. The only real reading available is that there's been some diminution in his permanent impairment resulting from the knee from 30% to 20% and possibly that this particular doctor has embarked upon the task of assessing pain and scarring as a task separate to that global assessment of the dysfunction resulting from the knee. If the doctor has done that he certainly hasn't done it in accordance with the guides.[132]

190. Finally, Mr Grant submitted that the Court could not be satisfied on the evidence available that any permanent impairment from which the worker presently suffers is referable to any of the surgeries undertaken by the worker since 15 October 1991, and that the only inference open to the Court is that all of those surgical procedures were intended to ameliorate the worker's condition.[133] Counsel submitted that the inference to be drawn was that there had been an improvement rather than a deterioration or an increase in the level of impairment as a result of the knee replacement.[134]

THE WORKER'S ORAL SUBMISSIONS IN REPLY

191. After making brief submissions in relation to the s 182 issue to the effect that the worker was precluded from raising the procedural bar, Mr McDonald submitted that the employer's submission with respect to scenario 1 was simply wrong.[135] He submitted that what the employer did

[131] See p 81 of the transcript.
[132] See p 82 of the transcript.
[133] See p 82 of the transcript.
[134] See p 82 of the transcript.
[135] See p 88 of the transcript.

was not in accordance with the law, and at the very least the worker is entitled to the scenario 1 payment.[136]

192. The submission went thus:

> The submission is wrong because it fails to comply with the two Pengilly decisions… And that is Mildren J' decision Pengilly at paragraphs 9, 10 and 13 and the Court of Appeal's analysis and endorsement of Mildren J in paragraphs 10 and 11 of that decision.
>
> The insurer cannot second guess the law as laid down in those cases. The correct way of how that compensation was to be paid was in accordance with the Pengilly formula. Now that just wasn't done. And we're correcting this insufficient payment in accordance with Pengilly there has to be at the time of payment in 2007 as Mr Neil's calculations in the worker's scenario number 1 sets out. And the correct figure was 30 percent x 104 times $1033.80 being the average weekly earnings now, less the $12,754.56 and less the $3,903.23 which totals $5,695.45.[137]

193. Mr McDonald submitted that, on the basis of the decision of the High Court in *Canute v Comcare* (2006) 229 ALR 445, the employer's construction of the permanent impairment provisions of the *Work Health Act* was conceptually wrong.[138] Counsel submitted that the decision in *Canute* supported the worker's argument, because of the similarities between the permanent impairment regime of the *Safety Rehabilitation and Compensation Act* (Cth) – which was judicially considered in *Canute v Comcare* (supra) – and the permanent impairment provisions of the *Work Health Act*.[139]

194. It is useful to examine the decision of the High Court, in light of the Commonwealth legislative scheme, in order to put the worker's submissions in proper context.

195. The facts in *Canute* were that the appellant injured his back in the course of his employment in 1997, and again in 1998. He was unfit for work for about

[136] See p 88 of the transcript.
[137] See p 88 of the transcript.
[138] See p 88 of the transcript.
[139] See pp 89 -96 of the transcript.

3 weeks following the first incident and for 2 years following the second incident. In late 1998, the appellant made a claim for compensation, relying upon the second incident as the occasion of his injury. The respondent allowed the claim on the basis that he sustained a work related aggravation of displacement of invertebral disc-lumbar. Comcare accepted liability up and to including June 1999. In September 1999 the appellant made a claim for permanent injury compensation. The appellant's medical practitioner recorded a diagnosis of his condition as "L5/S1 spondylolisthesis" and described his impairment as "chronic severe back pain radiates down (R) leg". The assessing practitioner assessed the appellant as having a 15% whole person impairment with respect to his back in jury and a 10% whole person impairment with respect to his right leg. However, he assessed that 50% of the appellant's condition was attributable to a condition pre-existing the work injuries. Accordingly, Comcare made an award of 12% whole person impairment under s 24 of the Act, based upon the combined values chart in the Guide. In July 2002, the appellant lodged a second claim for permanent injury compensation. The recorded diagnosis was " L5/S1 spondylolisthesis" and "adjustment disorder with depression". The impairment was described as "chronic severe low back pain" and ongoing depression". Comcare denied liability on the basis that the appellant had not shown an increase in whole person impairment of at least 10% as required by s 25(4) of the Act.

196. The statutory regime was that established under the *Safety Rehabilitation and Compensation Act* (Cth). The relevant parts of the Act are as follows.

197. Section 14(1) of the Act provided:

> Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

198. Section 24 provided:

(1) Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.

(2) For the purpose of determining whether an impairment is permanent, Comcare shall have regard to:

(a) the duration of the impairment;

(b) the likelihood of improvement in the employee's condition;

(c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and

(d) any other relevant matters

(3) Subject to this section, the amount of compensation payable to the employee is such amount, as is assessed by Comcare under subsection(4), being an amount not exceeding the maximum amount at the date of the assessment.

(4) The amount assessed by Comcare shall be an amount that is the same percentage of the maximum amount as the percentage determined by Comcare under subsection (5).

(5) Comcare shall determine the degree of permanent impairment of the employee resulting from an injury under the provisions of the approved Guide.

(6) The degree of permanent impairment shall be expressed as a percentage.

(7) Subject to section 25, if:

(a) the employee has a permanent impairment other than a hearing loss; and

(b) Comcare determines that the degree of permanent impairment is less than 10%;

an amount of compensation is not payable to the employee under this section.

(7A) Subject to section 25, if:

(a) the employee has a permanent impairment that is a hearing loss; and

(b) Comcare determines that the binaural hearing loss suffered by the employee is less than 5%;

an amount of compensation is not payable to the employee under this section.

(8) Subsection (7) does not apply to any one or more of the following:

(a) the impairment constituted by the loss, or the loss of the use, of a finger;

(b) the impairment constituted by the loss, or the loss of the use, of a toe;

(c) the impairment constituted by the loss of the sense of taste;

(d) the impairment constituted by the loss of smell.

(9) For the purposes of this section, the maximum amount is $80,000.

199. Section 25 provided:

(4) Where Comcare has made a final assessment of the degree of permanent impairment of an employee (other than a hearing loss), no further amounts of compensation shall be payable to the employee in respect of a subsequent increase in the degree of impairment, unless the increase is 10% or more.

200. The High Court reviewed each of the earlier decisions in the case, beginning with the AAT decision.

201. The AAT found that the appellant's adjustment disorder was "a 10% whole person impairment assessed under Table 5.1 of the Guide".[140] The AAT concluded that the appellant had "a permanent impairment of his back and subsequently a permanent impairment arising out of the same physical injury but producing a psychological sequelae".[141] It found "multiple impairments arising from the same incident, a physical impairment and a psychological impairment".[142] The High Court observed that the AAT had treated the concept of "injury" as co-extensive with the workplace incident which

[140] 229 ALR 445 at 451.
[141] 229 ALR 445 at 451.
[142] 229 ALR 445 at 451.

produced the impairments.[143] The High Court pointed out that the term "injury" is not so defined by the Act.[144]

202. Applying the combined values chart in the guide, the AAT found that combining the 12% whole person impairment in respect of the back injury with the 10% whole person impairment in respect of the adjustment disorder produced a whole person impairment of 21%.[145] As that was not a 10% increase on the 12% whole person impairment previously compensated, the AAT held that no further lump payment of compensation was payable.[146]

203. On appeal to the Federal Court, Hill J held that the AAT "had erred in failing to consider whether the chronic adjustment disorder was itself an "injury" for the purposes of the Act".[147] His Honour remarked that:

> the fact that the two injuries were caused by a single event… is not a relevant question under the Act. The Act is concerned with injuries, not incidents.[148]

204. The High Court agreed with that proposition.[149]

205. Hill J concluded that "it would be wrong to treat two separate injuries, each having different impairments, as one injury for the purposes of the Act because:

> …the measure of compensation is determined by reference to percentage impairment. However, the right to compensation is created by the occurrence of an injury."[150]

206. His Honour concluded that "the AAT had erred because it had characterised the adjustment disorder merely as 'psychological sequelae' of the back

[143] 229 ALR 445 at 451.
[144] 229 ALR 445 at 451.
[145] 229 ALR 445 at 451.
[146] 229 ALR 445 at 451.
[147] 229 ALR 445 at 452.
[148] 229 ALR 445 at 452.
[149] 229 ALR 445 at 452.
[150] 229 ALR 445 at 452.

injury, without considering whether it itself was 'an injury' ".[151]

207. On further appeal to the Full Court, the majority of the Court held that although the AAT had arrived at the right result, it had erred.[152] While the Court accepted that the adjustment disorder was plainly "an injury" for the purposes of the Act, the AAT erred in that it assumed "that an injury which is consequential upon a compensable injury is necessarily to be treated as an increase in the level of impairment attributable to that injury without addressing the relevant question" – which was whether the adjustment disorder was an "impairment".[153] The majority answered that question in the affirmative and supported the AAT's application of s 25(4) of the Act.[154]

208. In allowing the appeal from the decision of the Full Court of the Federal Court, the High Court held that s 25(4) of the *Safety Rehabilitation and Compensation Act* was not applicable because the appellant's psychiatric condition was not part of the impairment previously assessed by the respondent.[155] The Court held that the reference in s 25(4) of the Act to "a subsequent increase in the degree of impairment" is to an increase in the same type of impairment in respect of which liability has been accepted, and does not embrace a separate "injury" that results in a separate permanent impairment which is required to be individually assessed.[156] The Court also concluded that "it is the occurrence of 'an injury' which both actuates and defines the ambit of Comcare's duty pursuant to s 24 of the Act".[157] The High Court went on to hold that the Act only adopts a "whole person impairment" approach in relation to permanent impairments that result from each injury.[158] Accordingly, that approach could not be used to deny the

[151] 229 ALR 445 at 452.
[152] 229 ALR 445 at 452.
[153] 229 ALR 445 at 452 -453.
[154] 229 ALR 445 at 453.
[155] 229 ALR 445 at 455.
[156] 229 ALR 445 at 453 and 454-455.
[157] 229 ALR 445 at 455
[158] 229 ALR 445 at 455

applicability to a condition such as the appellant's depressive condition.[159] Finally, the Court held that there is no foundation in the Act for importing a distinction between "an injury" and a consequential or secondary injury.[160]

209. Mr McDonald submitted that in the present case there had been a new or consequential injury in the *Canute* sense, and the worker's permanent impairment following the entire knee replacement and the other surgeries entitled him to a separate assessment.[161]

210. Counsel went on to submit that the surgery in 2004 "has to be a new injury…because there was nothing left from the original crushing injury; and that's where my friend says well you've only got 30%, you're out of court because it's still the same".[162]

211. Mr McDonald submitted that, like the *Safety Rehabilitation and Compensation Act*, the *Work Health Act* only adopted a whole person impairment approach with respect to permanent impairments resulting from each injury.[163]

212. With respect to the employer's criticism of Dr Mills' report in terms of it failing to conform with the Guides, Mr McDonald made these submissions:

> …when you read Dr Mills' report, we say objectively, it's abundantly clear and certainly tolerably clear that he was addressing himself as a physician and his expertise was not challenged and he was not sought to be called. Nor was he sought to be called to test his clinical findings that he has followed the guides …[164]

213. As to the aspects of everyday living raised by Mr Grant, Mr McDonald made the following submission in relation to Dr Mills' report:

> At page 3 he sets out symptom history and then previously he sets out the occupational history, symptom history, general health and then previously

[159] 229 ALR 445 at 455.
[160] 229 ALR 445 at 454.
[161] See p 96 of the transcript.
[162] See p 97 of the transcript.
[163] See p 96 of the transcript.
[164] See p 98 of the transcript.

> the operative: 'In 2004 a joint replacement by Dr David Marshall, knee pain lessened considerably'. So he's clearly in terms of that Chapter 2 considering the issue of knee and pain. He deals with present symptoms, then he goes to the right knee, left knee pain 50 percent of the time, 25 percent severe pain from 2 to 3 to 10 on a scale of 10 aggravated by…what we say is there is evidence backing up … the division of his report into 5, 7 and 20. And these steps, stairs, uneven surfaces, these are the things that you encounter in everyday life. 'He is unable to run, jump, hop, skip, ride a bicycle, kick or play football, play any sport with his children'. Again, everyday activities.[165]

214. Mr McDonald said that the Guides should not be used in " a pedantic way".[166] He submitted that "the report [had] to be looked at as a document in its entirety". [167]

215. Counsel also pointed out that Dr Mills separated the worker's various disabilities and gave estimates using the Guides by reference to the appropriate Chapters.[168]

216. Mr McDonald said that the Court could infer that part of Dr Mills expertise as a physician was being able to use the Guides. [169]

THE WORKER'S ORAL SUBMISSIONS IN REPLY

217. By way of reply to the worker's submissions in relation to the relevance of the *Canute* decision to the construction of the permanent impairment provisions of the *Work Health Ac* , Mr Grant pointed out that s 25 of the *Safety Rehabilitation and Compensation Act* contained a special statutory mechanism for returning to court in the event of an increase in the level of impairment.[170] Mr Grant stressed the need for the Court to properly consider and have regard to the context in which the decision was made.[171] In

[165] See p 98 of the transcript.
[166] See p 98 of the transcript.
[167] See p 98 of the transcript.
[168] See p 98 of the transcript.
[169] See p 99 of the transcript.
[170] See p 99 of the transcript.
[171] See p 99 of the transcript.

particular, he stressed the need for the court to carefully consider the contents of paragraphs 17 and 36 of the High Court's decision.[172]

THE PRIMARY ISSUES TO BE DETERMINED

- **Whether one, or some, or all of the surgical procedures undergone by the worker in January 1992, September 1992, February 1993, July 1995, April 1997, May 2000, May 2001, August 2001 and February 2004 were injuries within the meaning of the definition of section 3 of the *Work Health Act*.**

218. It is practical to deal with this issue at the outset because the outcome of the various claims made by the worker depends upon whether any of the surgical procedures performed on the worker constituted an "injury" for the purposes of the *Work Health Act* – in particular the permanent impairment provisions of the Act.

219. The worker relies upon the decision of Angel J in *D & W Livestock Transport v Smith* (supra) in seeking a ruling that any one, or some, or all of the surgical procedures undergone by the worker in January 1992, September 1992, February 1993, July 1995, April 1997, May 2000, May 2001, August 2001 and February 2004, were injuries – indeed "fresh" or "new" injuries - within the meaning of the definition of s 3 of the *Work Health Act*. The worker says that *D & W Livestock* (supra) is binding on this Court and entirely applicable to the issue or issues in the present case.

220. In my opinion, the decision is binding on this Court. The fact that the "new" injury argument was not raised before Angel J and addressed by the parties in submissions, does not undermine the status of the decision, unless of course the decision was impugned on those grounds and overturned by the Court of Appeal. Indeed, the Court of Appeal did not examine the "new" injury point and determined the matter on a different basis. Although it is

[172] See pp 99-100 of the transcript.

true that any ratio that the Court of Appeal decision may have does not incorporate the analysis by Angel J, there is nothing other than obiter that might suggest that his Honour's analysis was incorrect. However, what must be borne in mind is that the decision of Angel J in *D& W Livestock* was derived from a particular set of facts and based on a discrete set of issues.

221. Although the decision of Angel J is binding on this Court, the facts and issues in the present case can be clearly distinguished from the facts and issues in *D & W Livestock* (supra). Accordingly, the Work Health Court is not bound to follow and adopt the judicial analysis and reasoning that underpinned the judgment of Angel J. The Court is free to undertake whatever analysis it considers proper according to law and to adopt whatever chain of reasoning it considers appropriate in determining the issues in these proceedings. However, that is not to say that the decision of Angel J may not have persuasive weight in resolving the particular issues in the present case; but his Honour's decision needs to be considered along with any other persuasive strand of authority.

222. As noted earlier in these reasons for decision,[173] the facts in *D & W Livestock* were that following a work related injury, the worker underwent a splenectomy during which he was given a blood transfusion. Several years later he was diagnosed as suffering from hepatitis C, which was found to have been contracted in the operation that had been performed on him. As also noted earlier,[174] Angel J held that the hepatitis C constituted a "new" injury for the purposes of the *Work Health Act.*

223. The worker seeks to argue by analogy that the various surgical operations performed on him, either individually or collectively, amounted to a "new" injury for the purposes of the Act – more precisely for the purposes of the permanent impairment provisions of the *Work Health Act*. In my opinion,

[173] See above, p 50
[174] See above, p 51

the argument suffers from a deductive fallacy in that it is based on a false analogy.

224. Clearly, both the hepatitis C contracted by Mr Smith in *D & W Livestock* (supra) and the various surgeries performed on Mr Hand in the present case were causally connected with the original work related injury. However, Mr Smith's hepatitis C can be distinguished from the surgical operations undergone by Mr Hand. The hepatitis C contracted by Mr Smith constituted an entirely different injury to his original work related injury. Mr Smith began with a physical injury – a severely damaged left knee - which required him to undergo a splenectomy and a subsequent blood transfusion. As a result of those medical procedures he ended up contracting hepatitis C, which, in turn, resulted in cirrhosis of the liver. The hepatitis C constituted a separate and independent injury from the original injury. It therefore constituted a "new" injury – in the words of Mr McDonald, it amounted to a "new development arising out of the original injury".[175] By way of contrast, the surgical operations performed on Mr Hand cannot properly be characterised as "a new development arising out of the original injury". The operations were directly linked to the original physical injury, in much the same way as the splenectomy performed on Mr Smith was directly connected to his physical injury. In both cases, the surgery is to be viewed as a necessary or reasonable medical response to a physical injury – as medical or surgical treatment of a work related injury. To the extent that it is proper to characterise the various surgical operations performed on Mr Hand as "injuries", those "injuries" were not separate from and independent of the original injury. It would be a complete misnomer to describe them as separate and "new" injuries.

225. Apart from this factual basis for distinguishing the present case from *D & W Transport v Smith* [1993] NTSC 67, it needs to be noted that the analysis by

[175] See p 8 of Counsel's written submissions.

Angel J was undertaken in the context of a proper construction of s 189 of the *Work Health Act*, and it is arguable that his Honour's analysis is not binding on this Court in any event because his Honour's analysis should be taken as being confined to the construction of that particular section and as not extending to a proper construction of the impairment provisions of the *Work Health Act.*

226. Finally, it warrants noting that obiter from the majority of the Court of Appeal in *D & W Livestock Transport v Smith* (1994) 4 NTLR 169 suggests that the analysis of Angel J at the intermediate level might have been incorrect. The worker's argument rests on the validity of that analysis. If his Honour's analysis is ultimately found to be erroneous, then the worker's argument must fail to the extent that is dependent on that analysis.

227. The worker also sought to rely upon the decision in *Canute v Comcare* [2006] 229 ALR 445 in support of the contention that the various surgical procedures performed on him and their consequences constituted a "new" or "fresh" injury. The relevance of that decision to the impairment provisions of the *Work Health Act* is fully discussed later in these reasons for decision.[176] However, it warrants noting that the further injury that was diagnosed in *Canute* was an adjustment disorder which was held not to be a mere sequelae of the worker's back injury, but a separate injury producing its own impairment. Unlike the psychiatric injury diagnosed in *Canute*, the surgical procedures and their consequences in the present case were not separate from, and independent of, the original knee injury.

228. The point that needs to be made about the worker's reliance on *Canute* is that the facts in that case are not analogous to the present case: *Canute* was not concerned with the characterisation of subsequent surgical procedures and their consequences as an "injury".

[176] See below pp 106-111.

229. Having distinguished *D& W Livestock Transport v Smith* [1993] NTSC 67 from the present case, there are a number of problems with the worker's argument that the subsequent surgical procedures and their consequences constituted an "injury" within the meaning of the *Work Health Act*.

230. First, it is conceptually difficult to characterise surgical procedures as an "injury" – particularly within the context of the *Work Health Act*.

231. The ordinary dictionary meaning of surgery is "the branch of medicine concerned with treatment of injuries or disorders of the body by incision, manipulation or alteration of organs etc with the hands or instruments": see The Concise Oxford Dictionary. This is entirely consistent with Mr Grant's submission that "surgery is a curative or restorative or remedial process that is applied to a worker as a result of an original injury".[177]

232. This characterisation of surgery is consistent with case law that deals with the relationship between work related injuries and reasonable medical or surgical treatment for such injuries. The obiter from the majority of the Court of Appeal in *D& W Livestock* (supra) focused on that body of law.

233. As noted earlier,[178] Priestley J made the observation in *D & W Livestock Transport v Smith* (supra) that the total condition resulting from an injury and subsequent remedial or alleviate surgical procedures is usually treated as being attributable to the original injury.[179] This means that any condition resulting from surgery is treated as belonging to, produced by or resulting from the original injury, and regarded as part and parcel of the condition resulting from that injury. It is true that the relevant case law deals with causation and not specifically with whether a surgical procedure amounts to a "new" injury for the purposes of the *Work Health Act*. However, one can

[177] See above p 73.
[178] See above, p 53.
[179] See also *Archibald Russell Ltd v Corser* [1921] 1 Ac 351 which is authority for the proposition that incapacity which results from reasonable medical or surgical treatment for an injury results from or is materially contributed to by the injury.

extract from the case law that subsequent reasonable surgical procedures are not considered to be a novus actus interveniens - a new independent, intervening act - that breaks the chain of causation between the original injury and incapacity. By parity of reasoning, subsequent reasonable surgical procedures – even if there were to be treated as an "injury" - are so causally connected with the original injury that they cannot be properly regarded as a "new" and independent injury.

234. However, in my opinion, the existing case law does not assist the worker's argument in another significant respect.

235. I agree with Mr Grant that there is no reason in principle or logic why the approach taken by the courts in relation to injuries and subsequent surgery in the context of incapacity should not be applied to impairment cases like the present. In other words, there is no sound reason why "any impairment arising from the surgeries performed or any deterioration experienced thereafter after 15 October 1991 should not be treated as having resulted from the original injury".

236. According to s 53 of the *Work Health Act* compensation is payable to a worker who suffers an injury that results in or materially contributes to his or her death, impairment or incapacity. The section prescribes in descending order of severity the compensable effects of an injury. "Impairment" and "incapacity" are not dissimilar concepts – they are both descriptive of the limiting effects of an injury on a worker. The difference between the two concepts is merely a matter of degree. The principles of causation that govern the payment of compensation for incapacity should apply with equal force to compensation for impairment. The fact that the preconditions for incapacity are not the same as those for impairment does not provide a sufficient basis for applying one set of principles to incapacity and a different set of principles to impairment. Nor does the fact that different forms of compensation are payable depending upon whether impairment or

incapacity is established provide a justification for applying different principles of causation to the two limiting conditions.

237. The worker attempted to bring the subsequent surgical procedures within the purview of the extended definition of "injury" in s 3 of the *Work Health Act*. More specifically, the worker argued that the procedures were "required because of, and they were themselves an aggravation, acceleration, recurrence, exacerbation or deterioration of a pre-existing injury" and therefore amounted to a "new" or "fresh" injury. As Mr Grant submitted, it is conceptually difficult to regard the surgical procedures as falling within the extended definition of "injury", given the curative and remedial purposes of surgical treatment.[180]

238. Furthermore, there are two aspects that militate against the worker's argument. First, there is nothing in the definition of "injury" in s 3 of the Act that would undercut the general principle that subsequent reasonable surgical procedures and their consequences are properly attributed to the original injury. If the legislature had intended to oust the operation of this fundamental principle, then, in my opinion, it would have expressly excluded the operation of that principle by extending the definition of "injury" to include reasonable surgical treatment consequent upon a work related injury. Secondly, s 73 of the Act establishes an employer's liability to pay the costs reasonably incurred by a worker as a result of an injury in relation to, inter alia, medical, surgical and rehabilitation treatment. As Mr Grant submitted, the liability is referable to the work related injury. The terms of s73 are entirely consistent with the general principle that surgery and its consequences are properly attributable to the original injury.

239. The postulated treatment of surgical procedures and their consequences as an "injury" seems to fly in the face of the statutory obligation of a worker to undertake reasonable medical treatment: see s 75B of the Act. In my

[180] See above, pp 73.

opinion, that obligation is entirely consistent with the view that surgery and its consequences are properly attributed to the original injury. Furthermore, surgical procedures are usually performed with the consent of the worker/patient, and could properly be considered to be deliberately self-inflicted. According to s 57 compensation is not payable in respect of an injury to a worker that is deliberately self-inflicted. Therefore, if surgical procedures and their consequences were to be viewed as an "injury", then there might be some problems with the compensability of such an injury, bearing in mind the provisions of s 57. However, a worker need not concern himself or herself with the problems occasioned by the treatment of surgery as an injury in its own right, because the conventional analysis is that surgery and the consequences thereof are not an "injury", but part and parcel of any original injury, which has not been deliberately inflicted and therefore potentially compensable.

240. In my opinion, Mr Grant's submission that the construction contended for by the worker would give rise to significant conceptual difficulties, with broad ramifications[181] does not take the matter very far. The types of problems raised by Mr Grant would arise regardless of the nature of the event relied upon as constituting a "fresh" or "new" injury. Indeed, those difficulties would need to be grappled with even in those cases where there was a series of clearly identifiable "fresh" or "new" injuries. However, the conceptual difficulties identified by Mr Grant would not stand in the way of those injuries being characterised as "fresh" or "new" injuries.

241. Whether or not subsequent surgical procedures constitute an "injury" within the meaning of the Act is purely a matter of statutory interpretation. In my opinion, it is clear from a reading of the Act as a whole that the various surgical procedures performed on the worker – including the total knee replacement undertaken in 2004 - did not constitute "new injuries" nor

[181] See above, pp 61, 69-71.

injuries at all within the meaning of s 3 of the *Work Health Act*. I find accordingly.

242. I make the following specific findings in relation to the allegations pleaded in the worker's Statement of Claim:

1. The ligament reconstruction of the left knee with ligament staple fixation performed on the worker in January 1992 was not an "injury" as defined in section 3 of the *Work Health Act* in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

2. The further arthroscopy of the left knee with chrondroplasty and removal of staples from the previous reconstruction which was carried out on the worker on 2 September 1992 was not an "injury" as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

3. The further arthroscopic surgery involving a revision of left and anterior cruciate reconstruction, during which a segment of patellar tendon was used to reconstruct the anterior cruciate anterior ligament, and which was performed on the worker on 13 February 1993, was not an "injury" as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

4. The arthroscopy performed on the worker on 11 July 1995 was not an "injury" as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration,

exacerbation, recurrence or deterioration of a pre-existing injury or disease".

5. The further arthroscopy performed on the worker's left knee on 10 April 1997 was not an injury as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

6. The open wedge osteotomy performed on the worker on 10 May 2000 was not an "injury" as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

7. The lower femoral osteotomy of the left knee which was performed on the worker in August 2001 was not an "injury" as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

8. The total left knee replacement performed on the worker on 12 February 2004 was not an "injury" as defined in section 3 of the Act in the sense that it was required because of, and it was itself, an "aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

9. The various surgical procedures performed on the worker between 1992 and 2004 collectively were not an "injury" as defined in section 3 of the Act in the sense that they were required because of, and they were themselves an "aggravation, exacerbation, recurrence or deterioration of a pre-existing injury or disease".

- **The worker's first claim: the permanent impairment payment made in September 1995 should have been 15% x 208 x $634.64** [182]

243. As submitted by Mr Grant "the resolution of this claim depends upon whether the worker sustained any 'fresh' injury after the 15 October 1991, or whether the impairment was caused by the original injury occurring on 8 August 1991".

244. Having regard to the primary finding that surgery and its consequences do not amount to an "injury" within the meaning of the Act, no "fresh" or "new" injury occurred after the 15 October 1991, such as to entitle the worker to a further payment in the sum of $22,353.29 in accordance with the calculations performed in scenario 3(a) and scenario 4(a) contained in Attachment "A".

245. For these reasons I decline to make the relevant ruling sought in paragraph 67.2 of the Statement of Claim.

- **The worker's second claim: the permanent impairment payment made in July 2002 should have been either:**

  (a) 30% x 208 x $817.60 less $9,901.32 (the previous payment);[183] **or**

  (b) 30% x 104 x $817.60 less $9,901.32 (the previous payment)[184]

246. The claim set out in paragraph (a) assumes that the post 15 October 1991 regime applies. As no "fresh" or "new" injury occurred after that operative date the relevant multiplier was 104 x and not 208 x. Accordingly, that primary claim must fail.

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[182] Refer to paragraph 24 of the Statement of Claim.
[183] Refer to paragraph 37 of the Statement of Claim and scenario 3(b) and 4(b).
[184] Refer to paragraph 38 of the Statement of Claim and scenario 5(b).

247. As the pre-15 October 1991 regime applied to the payment in July 2002, it remains to consider what, if any, further payment the worker is entitled to.

248. The worker and the employer are at odds in relation to the proper method of calculation on the basis that the earlier regime applied to the payment.

249. As is apparent from the fifth scenario presented by the worker, it is claimed that the worker should have received $15,607.30, being 30% of [104 x $817.60 (AWE in 2002)] less $9,901.32, rather than $12,754.56. The worker complains that there was a shortfall of $2,853.24.

250. As is also apparent from the evidence, the employer purported to correct this shortfall on 29 March 2006 by paying the worker the additional sum of $2,853.24 plus $1049.99 interest, resulting in a total payment of $3,903.23.

251. The employer argues that such payment was made in conformity with the method of calculation prescribed by the Supreme Court, and subsequently the Court of Appeal, in *Pengilly v Northern Territory of Australia (No 2)* [2003] NTSC 91 and *Northern Territory of Australia v Pengilly* [2004] NTCA 4.

252. The worker argues that the approach taken by the employer was wrong and resulted in an underpayment in 2006. The worker says that the correct approach in 2006 should have been 30% of [104x$1039.00 (AWE in 2006)] less $9,901,32 (the previous payment in 1995) less $12,754.56 (the previous payment in 2002). The relevant mathematics are $32,416.80 - $22,655.83 = $9,760.92.

253. The worker further argues that as the insufficient payment is being rectified in 2007 the correct figure is 30% of [104x $1033.80 (AWE in 2007) less $9,901.32 less $12,754.56 less $3,903.23 = $32, 254.56 - $26,559.11 = $5,695.45.

254. This matter is not without some difficulty, because the two *Pengilly* cases do not directly deal with the factual circumstances that exist in the present case. The two *Pengilly* cases were concerned solely with the method of calculation of permanent impairment compensation in circumstances where a new claim of permanent impairment pursuant to s 71 of the Act was preceded by a previous permanent impairment payment under that provision. The cases were concerned with how the previous payment was to be taken into account. The decisions did not extend to the issue – one might say complication - that arises in the present case, that is the situation of a second payment of permanent impairment compensation, purportedly made in satisfaction of a worker's further entitlement under s 71, having been incorrectly calculated. In *Pengilly* no second payment of lump sum compensation had been made – the payment was deferred pending the Court's determination.

255. It is clear that in July 2002 the entitlement of the worker should have been calculated as follows: 30% of 104 x $817.60 (the then current AWE) less $9,901.32. The worker had a new claim for a 30% permanent impairment that existed at that time. It was not a claim under s 71 of the Act for an additional percentage for the increased impairment over and above the 15% impairment assessed and compensated for in September 1995. In July 2002 the worker was entitled to compensation based upon the 30% impairment calculated by reference to the then current average weekly earnings; and because the impairment arose out of the same injury, it was proper to set off the previous payment made in September 1995 in pro tanto discharge of the employer's later liability. However, the worker's entitlement based on the new 30% permanent impairment was not calculated in that way. Consequently, there was an underpayment in the sum of $2, 853.24.

256. I make this preliminary observation – had the worker received sum of $15, 607.30 in July 2002 he would have had no complaint. His present complaint is that he did not receive what he was duly entitled to in July 2002.

257. The additional payment of $2,853.24 in 2006 needs to be put in proper context. That additional payment sought to correct not only the shortfall, but also to remedy the worker's sense of grievance by not having received his due entitlement back in 2002. The concurrent payment of interest was intended to compensate the worker for the loss of the use of the additional $2,583.24 that should have been paid to him in 2002.

258. It is clear from the judgment of Mildren J in *Pengilly v Northern Territory Of Australia* (supra) that the "date of payment" in s 71 of the Act " does not literally mean the actual date of payment, but the day payment is agreed to be made, or ought to have been made". Of particular relevance to the present dispute is the observation made by his Honour that the fact that " interest can be awarded on top of the payment due under s 71 is a strong indicator that the date of payment method of calculation was not intended to compensate for the loss of the use of money". In my view, there is nothing in the decision of the Court of Appeal in *Northern Territory v Pengilly* (supra) which undermines – or even has a tendency to undermine - the validity of the observations made by Mildren J.

259. I make these observations. In July 2002 the employer made a payment to the worker in the sum of $12,754.56 which was apparently agreed by the parties to represent the worker's permanent impairment entitlement as at that time. That agreement implicitly accepted the method of calculation of the worker's entitlement adopted at that time. For the purposes of s71 "the date of payment" was either the date it was agreed that the worker should be paid a lump sum pursuant to s 71 or the date that such lump sum payment ought to have been made. The "date of payment" was July 2002. The worker's supposed entitlement was calculated by reference to the then average weekly earnings.

260. By way of contrast, the position in *Pengilly* was that when the matter first came before the Work Health Court there was no agreement as to the

payment of compensation, as there was a dispute as to how the amount of compensation should be paid. The "date of payment" became the date the Court of Appeal ultimately determined the manner in which the worker's entitlement was to be calculated; and that entitlement was then to be calculated in "today's terms" ie by reference to then current average weekly earnings.

261. In my opinion, although the 30% permanent impairment assessment made by Dr Marshall in July 2002 was overall incorrectly calculated, the appropriate multiplier and relevant average weekly earnings were applied in calculating the worker's entitlement to compensation. The only error was that those two factors were multiplied by 15% (the difference between 30% and 15%) rather than by 30%, followed by the deduction of the previous payment. That error was corrected by the additional payment of $2, 853.24 in 2006. The loss of the use of that money was compensated for by the payment of interest.

262. Notwithstanding that the worker did not receive the entirety of his due entitlement in 2002, he has been paid, ex post facto, in conformity with the method of calculation prescribed by the Court of Appeal in *Pengilly*.

263. The worker has not been financially disadvantaged by the delayed payment of a sum of money that equates to approximately 18% of the amount that he should have been paid in 2002 according to the *Pengilly* formula. By reason of the additional payment of $2853.24 together with interest thereon, the worker was put in the same position as if he had received the sum of S15,607.30 in July 2002, being the date of payment for the purposes of s 71 of the Act.

264. In my opinion, the Court would be acting contrary to principle and notions of fairness and equity, if it were to accept the worker's argument and recalculate the worker's entitlement according to current average weekly earnings, or, in the alternative, according to 2006 average weekly earnings.

If the Court were to recalculate the entitlement in either manner, that would result in the worker receiving a significant windfall and the employer suffering a significant detriment or penalty. I do not believe that the legislature intended s 71 to operate in such a fashion.

265. I have assumed that the calculation of interest is correct. If the amount of interest requires amendment, then I give the parties liberty to apply.

- **The worker's third claim: the cost of the further permanent assessments**

266. This claim has resolved, as the employer paid these costs on 15 December 2006. If there is any outstanding claim for interest, I also give the parties liberty to apply in relation to that issue.

- **The worker's fourth claim: a further permanent impairment payment[185]**

267. In my opinion, the worker has no entitlement under this claim for the reasons that follow.

268. The worker's claim in the sum of $64,833.60 in relation to the assessed 30% permanent impairment is predicated on the total knee replacement and its consequences not only constituting an "injury", occurring after 15 October 1991, but also being a separate and different injury to the original injury. For the reasons given earlier, the surgery performed on the worker does not fall within the definition of "injury" under the *Work Health Act*. The total knee replacement and its consequences is to be attributed to the original injury. For those reasons this primary claim must fail.

269. The worker's alternative claim in the same amount less the permanent impairment payments made in 1995 and 2002 must fail for similar reasons.

[185] Refer to paragraphs 61, 62 and 63 of the Statement of Claim.

270. The worker's claim in the amount of $25, 933.44, being the previously unassessed and uncompensated assessment for chronic pain (7%) and scarring (5%) must also fail because, as in the case of the primary claim, the claimed permanent impairments were not caused by an "injury" within the meaning of the Act, and most definitely not caused by a separate and different injury occurring after 15 October 1991.

271. For those reasons I decline to make the rulings sought by the worker in paragraphs 67.3 and 67.4 of the Statement of Claim.

- **Further remedies**

272. To the extent that the above determinations do not fully answer the five scenarios presented by the worker in support of his claim for further payments pursuant to s 71(1) of the *Work Health Act*, I find that the worker is not entitled to any further payment pursuant to the Act on the basis of any of those postulated scenarios or indeed any other scenario.

273. For the sake of completeness, I refuse to make the orders sought in paragraphs 67.5 and 67.6 of the Statement of Claim.

SECONDARY ISSUES

274. A number of issues were raised and ventilated in these proceedings, which although not crucial to the determination of the worker's application, warrant attention.

- **The scheme of compensation for permanent impairment under the Work Health Act**

275. The worker's argument was that the permanent impairment provisions of the *Work Health Act* were analogous to the permanent impairment regime of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth), which was judicially considered in *Canute v Comcare* (2006) 229 ALR 445. It was argued that like the Commonwealth statute the permanent impairment

provisions of the Northern Territory Act only adopted a "whole person impairment" approach with respect to permanent impairments resulting from each injury that a worker may suffer.

276. The employer mounted an argument that the relevant provisions of the *Work Health Act* did not embrace such an approach. Rather, the scheme of the Act is to compensate workers for permanent impairment resulting from an injury or any number of injuries on a "whole person impairment" basis. In other words, where a worker suffers a number of injuries it is not the scheme of the Act to separately compensate the worker for permanent impairment arising from each injury on a "whole person impairment" basis – the scheme is to compensate the worker on a "whole person impairment" basis referable to the injuries as a whole.

277. In order to determine whether the permanent impairment provisions of the *Work Health Act* mirror the permanent impairment regime of the *Safety, Rehabilitation and Compensation Act* it is necessary to examine both pieces of legislation very closely.

278. Although there are some similarities between the two pieces of legislation there are core differences between them which favour the employer's construction of the relevant provisions of the *Work Health Act*.

279. Section 14(1) of the Commonwealth Act provides as follows:

> Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

280. Section 24(1) of the Act provides that where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation in respect of the injury. As noted by the High Court in *Canute v Comcare* (supra), that provision makes the occurrence of "an injury" central to "the

scheme upon which Comcare's liability to compensate depends".[186] As also noted by the High Court, s 24(1) "does not oblige Comcare to pay compensation in respect of an employee's impairment; it is liable to pay compensation in respect of 'the injury".[187]

281. Section 24(5) of the Act provides that Comcare shall determine the degree of permanent impairment of the employee resulting from an injury under the provisions of the approved Guide. Again as noted by the High Court, s 24(5) is a central provision requiring Comcare to determine the degree of an employee's permanent impairment.[188] Pursuant to subsection (6), the degree of permanent impairment is to be expressed as a percentage.[189] The content of the phrase "the degree of permanent impairment" is not specifically stated in the Act, but is left to the approved Guide.[190]

282. As observed by the High Court, the definition of "impairment" in s 4(1) of the Act is not expressed in terms of assessing impairment on a "whole person" basis.[191] The definition is as follows:

> "Impairment" means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function.

283. "Permanent" is defined as meaning "likely to continue indefinitely".

284. The High Court went on to observe:

> The definition of "impairment" (and, by extension, the concept of "permanent impairment") is expressed in terms of effects on bodily parts, systems and functions. This disaggregated sense of the word is reinforced by the use of the indefinite expression "a permanent impairment" in s 24(1). Textually, the Act assumes that "an injury" may result in more than one "impairment".[192]

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[186] (2006) 229 ALR 445 at [15], p 450
[187] (2006) 229 ALR 445 at [10], p 448
[188] (2006) 229 ALR 445 at [6], p 447.
[189] (2006) 229 ALR at [6], p 447.
[190] (2006) 229 ALR at [6], p 447.
[191] (2006) 229 ALR at [11], p 449.
[192] (2006) 229 ALR at [11], p 449.

285. The High Court explained the interaction between an employee's degree of permanent impairment and the Guide as follows:

> Content is given to the expression "degree of permanent impairment of the employee" by reference to the "Guide to the Assessment of the Degree of Permanent Impairment" (the Guide), to which s 24(5) refers. The guide is subordinate legislation which is to be prepared by Comcare and approved by the Minister pursuant to s 28 of the Act.[193]

286. As noted by the High Court, Part A of the guide is concerned with permanent impairment, while Part B is concerned with non-economic loss.[194] Part A gives effect to the definition of "impairment" in s 4(1) of the Act by "a structure which compiles descriptions of impairments into groups according to body system and by expressing each impairment as a percentage value of the functional capacity of a normal healthy person".[195] The High Court then pointed out that the Guide contains a "Combined Values Chart", which enables "each impairment expressed as a percentage to be combined to give the total effect of all impairments…as a percentage value of the employee's whole bodily system or function".[196] Although the Guide claims to import the "whole person impairment" from the American Medical Association Guides, the High Court stressed the following:

> …it is important to remember that recourse to the criteria and methodologies set out in the guide is only necessary once the key statutory criterion of the occurrence of "an injury" (which resulted in at least one permanent impairment) has been fulfilled. The guide is to be approached through the prism of each "injury". The terms of s 24(4) are quite clear: Comcare is to assess the degree of permanent impairment of the employee "resulting from an injury". Similarly, in s 24(7), the threshold permanent impairment of the employee of 10% affects the amount of compensation payable "under this section"; that is, "in respect of the injury"; s 24(1).
>
> The scheme of the Act proceeds in this way from the occurrence of "an injury", in the defined sense, As previously remarked, the Act assumes that more than one "injury" may occur. Therefore it is not correct to say that s 24(5) imports a "whole person" approach to the determination of the

[193] (2006) 229 ALR at [12], p 449.
[194] (2006) 229 ALR at [13] , p 449.
[195] (2006) 229 ALR at [13], p 449.
[196] (2006) 229 ALR at [13[, p 449.

> degree of permanent impairment. That ignores the centrality of "an injury" to the scheme upon which Comcare's liability to compensate depends.[197]

287. It is also important to note that the Commonwealth Act makes specific provision for subsequent increase in the degree of impairment: see s 25(4) and (5). Section 25(4) assumed prominence in *Canute v Comcare* (supra). The High Court's construction of the permanent impairment provisions of the *Safety Rehabilitation and Compensation Act* was discussed earlier.[198]

288. Section 24(5) combined with s 25(4) enables workers to either make a claim for further permanent impairment compensation where there is an increase in the level of impairment resulting from an injury previously compensated for or to make a fresh claim for permanent impairment arising out of an injury that is different to an injury resulting in permanent impairment which has been previously compensated for.

289. Turning to the *Work Health Act* (NT), s 53 (1), as at the date these proceedings were commenced, provided as follows:

> Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her –
>
> (a) death;
>
> (b) impairment or
>
> (c) incapacity,
>
> there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed.

290. The first observation I make is that s 53(1), although similar to s 24(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth), is subtly different from its Commonwealth counterpart. The Commonwealth provision makes it quite clear that compensation is payable in respect of an injury,

[197] (2006) 229 ALR at [14], p 450.
[198] See above, pp 81-87.

provided that the injury has resulted in death, incapacity for work or impairment. The Northern Territory provision makes compensation payable in respect of an injury that results in or materially contributes to a worker's death, impairment or incapacity. To my mind, s 53(1) of the *Work Health Act* does not emphasise the centrality of an injury to the scheme for compensating permanent impairment in the same way as s 14(1) of the Commonwealth Act does with respect to its scheme for compensation of permanent impairment. The Northern Territory provision does not place the same emphasis on the primacy of an injury as a basis for the payment of compensation in the way that Commonwealth provision does. Unlike s 14(1) of the *Safety Rehabilitation and Compensation Act,* s 53(1) of the *Work Health Act* makes the payment of compensation under the Act dependent upon the confluence of an injury and death, impairment or incapacity. In coming to that view, I have been influenced by the conjunctive language and structure of s 53(1) of the *Work Health Act* compared with the disjunctive language and structure of s 14(1) of the *Safety, Rehabilitation and Compensation Act.*

291. This construction of s 53(1) is consistent with the Act adopting a "whole person" approach to compensation for permanent impairment in the way argued by the employer.

292. The next critical distinction between the two statutes is that unlike the definition of impairment in s 4(1) of the Commonwealth Act, the definition of "permanent impairment" in s 70 of the *Work Health Act* embraces a "whole person" approach.

293. Similarly, unlike s 24 of the Commonwealth Act, s 71(1), (2) and (3) of the *Work Health Act* – the mechanical provisions in relation to compensation for permanent impairment – expressly adopt a "whole person" approach.

294. There is nothing in subdivision C of Part V of the *Work Health Act* (ss 70, 71 and 72) which requires, or even suggests, that the assessment of

permanent impairment be undertaken by assessing the degree of permanent impairment of a worker resulting from an injury - the process required pursuant to s 24(5) of the *Safety, Rehabilitation and Compensation Act*; nor is there anything requiring or suggesting that compensation be calculated and paid according to that method of assessment.

295. Unlike the Commonwealth Act, the *Work Health Act* does not provide a specific statutory mechanism enabling a worker to make a further claim for permanent impairment compensation in the event of an increase in the level of an impairment which has been previously compensated. There is no equivalent to s 25(4) of the *Safety Rehabilitation and Compensation Act.* Nor is there an equivalent provision to s 24(5) of that Act, which empowers a worker to make a number of claims for permanent impairment arising out of different injuries. The absence of similar provisions in the *Work Health Act* is significant, because it was the existence of those provisions in the Commonwealth Act that appears to have led the High Court to conclude that the whole person approach only applied to individual injuries, and not to a series of different injuries.

296. It is accepted that the present state of the law in the Northern Territory seems to permit a worker to return to the Work Health Court for a further payment of compensation pursuant to s 71(1) of the Act, where there has been an increase in the level of impairment resulting from an injury in respect of which permanent impairment compensation has previously been paid. The existing law also appears to permit a worker to make a fresh claim in relation to permanent impairment arising from an injury which is different to a previous injury causing permanent impairment, and which has been the subject of a previous compensation payment. However, the existing authorities are silent as to how the Court should deal with a claim in the latter category. Should the Court adopt the approach that the High Court took in relation to the appellant's claim for a psychiatric condition under the provisions of the Commonwealth legislation in *Canute v Comcare* (supra)?

297. It is clear from *Pengilly* that in a case where a worker makes a claim for a further permanent impairment compensation payment pursuant to s 71(1) of the *Work Health Act,* consequent upon an increase in the level of impairment arising out of an injury, that the whole person impairment philosophy is implicitly applied in calculating the worker's entitlement. There is no warrant – either statutory or otherwise – for adopting a different approach when dealing with a "new" or "fresh" claim in relation to a different injury following the payment of compensation with respect to permanent impairment arising out of an earlier injury.

298. I agree with and adopt the employer's submissions in relation to its construction of the scheme of the Act.

299. Read as a whole the permanent impairment provisions of the *Work Health Act* do not adopt a "whole person impairment" approach only with respect to permanent impairments resulting from each injury, where a worker suffers from multiple injuries – they do not permit a separate assessment in respect of each injury, as argued by the worker in this case. The *Work Health Act* prescribes a general whole person impairment approach, which requires an assessment of the whole person in terms of permanent impairment, regardless of how many injuries a worker may suffer.

300. This approach has certain ramifications in relation to the worker's claim for permanent impairment compensation. Even if the Court had accepted that the total knee replacement undertaken by the worker in 2004 constituted a fresh "injury" for the purposes of the Act, then he would not have been entitled to any further payment of permanent impairment compensation because, according to the evidence, his level of permanent impairment appears to have remained at the same level that it was in 2002 at the time of the previous payment, namely 30%. The scheme of the Act would not sanction a further payment assessed at 30% whole person impairment over and above the previous payment based on the 30% assessment made in 2002.

In other words, the permanent impairment provisions of the Act would not entitle the worker to a total payment calculated on the basis of a 60% whole person permanent impairment.

- **The hiving off of permanent impairment assessments**

301. In his Statement of Claim, the worker sought a ruling that each of the assessments made by Dr Mills in his report dated 18 December 2005 of 7% permanent impairment of the whole person for pain and 5% of the whole person for scarring and cosmetic defects in respect of the worker arising from the injury, are assessments in respect of permanent impairment aspects of the worker from the injury which had not previously been assessed or compensated for in 1995 and /or 2002.

302. Given that the *Work Health Act* adopts a whole person permanent impairment approach to the calculation of permanent impairment compensation claims and incorporates the American Association Guides to the Evaluation of Permanent Impairment, the Court is unable to make the ruling sought by the worker. I agree with and adopt the submissions made by Mr Grant, which are to the effect that it is not possible to "hive off" the assessments made in respect of pain and scarring.[199]

303. Although the Guides permit a separate allowance for chronic pain, or chronic pain syndrome, the evidence in the present case was insufficient to support the payment of such an allowance as representing a separate permanent impairment assessment. The insufficiency of the evidence is dealt with in the next section of these reasons for decision.

304. Neither the Act nor the Guides allow scarring to be hived off as a separate permanent impairment assessment and to be made the subject of a separate permanent impairment compensation payment pursuant to s 71(1) of the Act,

[199] See above, p 65.

or as part of a global payment, pursuant to that section, for pain and scarring.

305. The other difficulty with this aspect of the matter is that the worker's claim is predicated on the 7% permanent impairment for pain and the 5% permanent impairment for scarring and cosmetic defects not having been previously assessed and compensated for in 1995 and/or 2002. As submitted on behalf of the employer, "the worker has previously been compensated expressly for scarring and impliedly for pain, and there is no evidence to support a claim for some deterioration in his condition in relation to chronic pain and scarring since the assessment in 2002". Simply put, the worker has failed to discharge the relevant burden of proof.

306. Therefore, even if the total knee replacement and its consequences – in terms of pain and scarring – could properly be considered to be "an injury" within the meaning of the Act, the worker would not be entitled to a further sum or sums for his current percentage permanent impairment of the whole person as assessed by Dr Mills in his report dated 18 December 2005, particularly in relation to pain and scarring.

- **The evidentiary difficulties in relation to the worker's claims**

307. In relation to the medical evidence presented in this case, the solicitors for the employer, by way of email dated 4 April 2007 (Exhibit 2), gave notice to the worker's solicitors in the following terms:

> We confirm that we do not require your medical experts for cross-examination, subject to the following qualifications:
>
> 1. in not requiring the medical experts for cross-examination, we do not concede that any particular opinion expressed in those reports is properly accepted by the Court for the purposes of the proceeding; and
>
> 2. we reserve the right to make submissions to the effect that the reports do not disclose an entitlement to any further payment for

> permanent impairment having regard to their content, the relevant legislative provisions and the prescribed guides.

308. The terms of that prior notice were echoed in Mr Grant's submissions.[200]

309. As referred to earlier, Mr Grant sought to impugn the accuracy and reliability of Dr Mills' report by highlighting its evidentiary deficiencies, arising primarily out of its failure to apply and follow the prescribed Guides.[201]

310. As pointed out by Mr Grant, "it is permissible for the Court to analyse assessment reports for the purpose of determining whether they have been compiled in accordance with the prescribed Guides, and whether they support the claim for a further payment for permanent impairment: see *Pengilly v Northern Territory of Australia* [1999] NTSC 131".[202]

311. Apart from the issue of the application of the Guides, expert witnesses are expected to refer to and state the assumptions of fact and evidence upon which they have based their opinions and from which they seek to draw particular inferences, so as to enable a court to evaluate the accuracy or reliability of the expert testimony. As stated by Ligertwood 4th Edition of Australian Evidence [7.68], p 505:

> The facts which form the basis of expert opinion must be capable of proof by admissible evidence. If no evidence is tendered, the whole foundation of the expert testimony may disappear, so rendering that testimony irrelevant: see *R v Haidley and Alford* [1984] VR 229 at 250-251; *Paric v John Holland Constructions Pty Ltd* (1985) 62 ALR 85.

312. The following commentary appears in Cross on Evidence 6th Australian edition, [29065], p 821:

> The facts upon which an expert's opinion is based must be available for scrutiny by the tribunal. A court can hardly be expected to act upon an opinion the basis for which is not explained by the witness expressing it.

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[200] See [12], p 5 of Counsel's written submissions.
[201] See above pp 63-66.
[202] See above p 64.

> This means that the factual basis of the opinion must be identified and proved.

313. The effect of Regulation 9(1) of the *Work Health Regulations*, read together with s 187(2) of the *Work Health Act*, is to incorporate into the regulations the whole of the text of the 4th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

314. Those Guides not only prescribe the processes of assessment, but, properly applied, provide the primary or intermediate facts upon which a medical assessment of permanent impairment is based. They also demonstrate the chain of reasoning which produced the conclusion arrived at by the medical practitioner. The Guides also provide a standard by which the reliability of an expert's opinion can be evaluated by the Court.

315. The fact that, pursuant to Rule 18.06(2) of the *Work Health Court Rules*, the medical report of Dr Mills was admissible as evidence of the doctor's opinion, the fact that no other medical evidence was presented with a view to contradicting Dr Mills' opinion, combined with the fact that the employer did not require the doctor to attend for cross-examination, does not mean that the Court is bound to accept the doctor's opinion. There must be a proper basis for the opinion before the Court can act upon that opinion as a reliable assessment of permanent impairment.

316. A fundamental difficulty with the report of Dr Mills is that it does not establish a causal nexus between the postulated injury – ie the total knee replacement – and the assessed level of permanent impairment. As submitted by Mr Grant, the impairment in question must be caused by an injury arising out of or in the course of employment; and compensation for permanent impairment is payable only if the injury results in or materially contributes to the impairment.[203]

[203] See above p 66.

317. No where in his report does Dr Mills express an opinion as to there being a causal relationship between the total knee replacement and the 30% permanent impairment assessment (either as a whole or broken down into its components) that he made in relation to the worker. In my opinion, one cannot draw an intuitive inference or presumptive (prima facie) inference from the fact that the total knee replacement caused and resulted in or materially contributed to the worker's impairment as assessed. The sequence of events "would not inspire in the mind of any common sense person" – to use the words of Rich J in *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538 at 563-4) – that the surgery caused and resulted in or materially contributed to the assessed impairment.

318. If any intuitive inference is to be drawn from the subsequent surgeries performed on the worker it is that the surgery produced positive results. Indeed, the tenor of the various reports is along those lines.

319. For the sake of completeness, I agree with Mr Grant's general submission that there is no evidence that the impairment claimed was caused by the subsequent surgeries (including the total knee replacement) performed on the worker.

320. On top of the fundamental difficulty with Dr Mills' report, there is, in my opinion, insufficient material in Dr Mills' report to show that the process of assessment adopted by him was in accordance with the Guides. In a number of respects the Guides were not followed by Dr Mills. They are generally as outlined by Mr Grant.[204] A bare statement that Dr Mills used the Guides in calculating the percentage of permanent impairment, or that one could infer from the doctor's experience that he applied the guidelines in arriving at his final assessment, is not sufficient to establish that the doctor, in fact, followed the various prescribed antecedent processes before arriving at his

[204] See above pp 63-66.

final conclusion in relation to the worker's whole person permanent impairment. By way of example, in *Pengilly* the medical practitioner's compliance with the Guides was questioned and found to be wanting.

321. The real point is that Dr Mills' report does not overtly demonstrate compliance with the Guides as set out earlier in these reasons for decision.[205] As a result the doctor's chain of reasoning is also not overtly demonstrated. In turn, this means that the primary or intermediate facts upon which the doctor's final assessment was made are not disclosed in the report. The basis for the doctor's opinion has not been established to the satisfaction of the Court. Accordingly, Dr Mills' opinion has little probative value. The doctor's assessment cannot be accepted as being reliable.

322. There is the added problem that the Court cannot be satisfied, on the evidence, that the total knee replacement gave rise to an impairment greater than the threshold requirement of 5% of the whole person. This problem also presents in relation to the earlier surgical procedures.

323. Therefore, even if the Court had been persuaded that each of the surgical procedures (including the 2002 total knee replacement) constituted a fresh injury within the meaning of the Act, and that those injuries caused and resulted in or materially contributed to a permanent impairment, the Court would not have been able to be reasonably satisfied as to the reliability of the permanent impairment assessment made by Dr Mills and that the level of impairment exceeded the 5% threshold.

DECISION

324. The worker's claim is dismissed.

[205] See above pp 35-43.

325. The parties have liberty to apply in relation to any issue concerning the calculation of interest with respect to the worker's second claim[206] and third claim.[207]

326. I will hear the parties in relation to the question of costs.

Dated this 29th day of June 2007.

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Dr John Lowndes
STIPENDIARY MAGISTRATE

[206] See above p 104.
[207] See above p 104.

ATTACHMENT A

WORKER'S SCENARIO 1

If the Worker's permanent impairment entitlements are to be calculated at 104 x average weekly earnings rather than 208 x average weekly earnings, with the previous lump sums paid in 1995 and 2002 being set off.

(a) 1995 15% Assessment

Received $9,901.32 – nothing more claimed.

(b) 2002 30% Assessment

Received $12,754.56 but should have received $15,607.30 being 30% of [104 x $817.60 (average weekly earnings in 2002)] less $9,901.32. Shortfall therefore was $2,853.24.

The Employer purported to correct this shortfall on 29 March, 2006 by paying $2,853.24 plus $1,049.99 interest, a total of $3,903.23.

This is the wrong approach and resulted in an underpayment in 2006. The correct approach in 2006 should have been 30% of [104 x $1,039.00 (average weekly earnings in 2006)] less $9,901.32 less $12,754.56 = $32,416.80 - $22,655.83 = $9,760.92.

As we are correcting this insufficient payment in 2007, the correct figure is 30% of [104 x $1,033.80 (average weekly earnings in 2007)] less $9,901.32 less $12,754.56 less $3,903.23 = $32,254.56 - $26,559.11 = $5,695.45.

(c) 2005 Assessment – Dr Mills' 30%

30% of [104 x $1,033.80 (average weekly earnings in 2007)] less $9,901.32 less $12,754.56 less $3,903.23 less the amount claimed of $5,695.45 = $NIL.

TOTAL CLAIMED UNDER THIS SCENARIO - $5,695.45

WORKER'S SCENARIO 2

If the Worker's permanent impairment entitlements are to be calculated at 104 x average weekly earnings rather than 208 x average weekly earnings, with the previous lump sums paid in 1995 and 2002 **NOT** being set off.

(a) 1995 15% Assessment

Nil claim

(b) 2002 30% Assessment

Should have received 30% of [104 x $817.60 (AWE in 2002)] = $25,509.12. In fact, received $12,754.56 in 2002 and a further $3,903.23 in 2006.

As payment of the shortfall is to be received in 2007, the calculation is 30% of [104 x $1,033.80 (average weekly earnings in 2007)] less $12,754.56 less $3,903.23 = $32,254.56 - $16,657.79 = $15,596.77.

(c) 2005 Assessment – Dr Mills' 30%

30% of [104 x $1,033.80 (average weekly earnings in 2007)] = $32,254.56.

TOTAL CLAIMED UNDER THIS SCENARIO - $47,851.33

WORKER'S SCENARIO 3

If the Worker's permanent impairment entitlements are to be calculated at 208 x average weekly earnings rather than 104 x average weekly earnings, with the previous lump sums paid in 1995 and 2002 being set off.

(a) 1995 15% Assessment

Was paid $9,901.32.

Should have been paid double this at 208 x average weekly earnings.

As payment is to be received in 2007, the calculation is 15% of [208 x $1,033.80 (average weekly earnings in 2007)] less $9,901.32 = $32,254.56 - $9,901.32 = $22,353.24.

(b) 2002 30% Assessment

Was paid $12,754.56 in 2002 and a further $3,903.23 in 2006.

Should have been paid much more on the basis of 208 x average weekly earnings.

As payment is to be received in 2007, the calculation is 30% of [208 x $1,033.80 (average weekly earnings in 2007)] less $9,901.32 less $12,754.56 less $3,903.23 less $22,353.24 = $64,509.12 - $48,912.35 = $15,596.77.

(c) 2005 Assessment – Dr Mills' 30%

As per Scenario 1 - $NIL.

TOTAL CLAIMED UNDER THIS SCENARIO - $37,950.01

WORKER'S SCENARIO 4

If the Worker's permanent impairment entitlements are to be calculated at 208 x average weekly earnings rather than 104 x average weekly earnings, with the previous lump sums paid in 1995 and 2002 **NOT** being set off.

(a) 1995 15% Assessment

As per scenario 3 - $22,353.24.

(b) 2002 30% Assessment

Was underpaid on basis of 104 times rather than 208 times.

As payment of the shortfall is to be received in 2007, the calculation is 30% of [208 x $1,033.80 (average weekly earnings in 2007)] less payments received of $12,754.56 and $3,903.23 = $64,509.12 - $16,657.79 = $47,851.33.

(c) 2005 Assessment – Dr Mills' 30%

As payment is to be received in 2007, calculation is 30% of [208 x $1,033.80 (average weekly earnings in 2007)] = $64,509.12.

TOTAL CLAIMED UNDER THIS SCENARIO - $134,713.69

WORKER'S SCENARIO 5

If the Worker's permanent impairment entitlements assessed in 1995 and 2002 are to be calculated at 104 x average weekly earnings rather than 208 x average weekly earnings, with the lump sum paid in 1995 being set off from the lump sum payable in 2002 **BUT** if the Worker's permanent impairment entitlement following the total left knee replacement in 2004 is to be calculated at 208 x average weekly earnings rather than 104 x average weekly earnings, with the lump sums paid for the two earlier assessments **NOT** being set off -

(a) 1995 15% Assessment

Received $9,901.32 – nothing more claimed.

(b) 2002 30% Assessment

Received $12,754.56 but should have received $15,607.30 being 30% of [104 x $817.60 (average weekly earnings in 2002)] less $9,901.32. Shortfall therefore was $2,853.24.

The Employer purported to correct this shortfall on 29 March, 2006 by paying $2,853.24 plus $1,049.99 interest, a total of $3,903.23.

This is the wrong approach and resulted in an underpayment in 2006. The correct approach in 2006 should have been 30% of [104 x $1,039.00 (average weekly earnings in 2006)] less $9,901.32 less $12,754.56 = $32,416.80 - $22,655.83 = $9,760.92.

As we are correcting this insufficient payment in 2007, the correct figure is 30% of [104 x $1,033.80 (average weekly earnings in

2007)] less $9,901.32 less $12,754.56 less $3,903.23 = $32,254.56 - $26,559.11 = $5,695.45.

(c) 2005 Assessment – Dr Mills' 30%

As payment is to be received in 2007, calculation is 30% of [208 x $1,033.80 (average weekly earnings in 2007)] = $64,509.12.

TOTAL CLAIMED UNDER THIS SCENARIO $70, 204.57.