CITATION:	*Metcalfe v Northern Territory of Australia* [2008] NTMC 038
PARTIES:	JAMES RAYMOND METCALFE v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Act
FILE NO(s):	20627224
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JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

WORKERS COMPENSATION – WORK HEALTH ACT (NT) – STATUTORY INTERPRETATION – EFFECT OF SUPERANNUATION BENEFIT ON WEEKLY PAYMENTS – WHETHER BENEFIT "AS A RESULT OF INJURY" – WHETHER AGREEMENT IS "INDUSTRIAL AWARD OR AGREEMENT" – WHETHER NON-FINANCIAL CONTRIBUTIONS ARE RELEVANT

Work Health Act (NT) ss 3, 54
Social Security Act (1947) (Cth).
Superannuation Act 1976 (Cth)
Anti-Discrimination Act
Superannuation Guarantee (Safety Net) Act
Work Place Relations Act (1996) (Cth)
Superannuation Guarantee (Administration) Act

Wilson v Wilson's Tile Works Proprietary Limited (1960) 104 CLR 328
Foresight Pty Ltd (trading as Bridgestone Tyre Services) v Maddick (1991) 79 NTR 17
Loizos v Carlton and United (1994) 94 NTR 31
AAT King's Tours Pty Ltd v Hughes, (CA)(NT), 3 October 1994, unreported
HWE Contracting Pty Ltd v Young [2007] NTSC 42
Palumpa Station Pty Ltd v Fox (1999) 132 NTR 1
Rose v Secretary, Department of Social Security (1990) 92 ALR

Kennedy & Ors v Anti-Discrimination Commission of the NT and Ors [2006] NTCA 6
Victims Compensation Fund Corporation v Brown and Others (2003) 201 ALR 260
CIC Insurance Limited v Bankstown Football Club Ltd (1997) 187 CLR 384
Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104
Watson v Ramsay [1960] NSWR 462
*National Insurance Company of New Zealand Ltd v Espagne (*1960 – 1961) 105 CLR
Commissioner of Taxation v Sculley (2000) 201 CLR 148
Redding v Lee (1982 – 83) 151 CLR 117
Scott v Sun Alliance Australia Limited (1993) 178 CLR 1
Catlow v Accident Compensation Commission (1989) 176 CLR 543
Mills v Meeking (1989-1990) 169 CLR 214
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Creighton and Stewart, LabourLaw, 4th edition, 2005, The Federation Press at 294

REPRESENTATION:

Counsel:

Worker:	Mr McDonald QC
Employer:	Mr Barr QC

Solicitors:

Worker:	Ward Keller
Employer:	Hunt and Hunt

Judgment category classification:	A
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IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 29627224

[2008] NTMC 038

BETWEEN:

JAMES RAYMOND METCALFE
Worker

AND:

NORTHERN TERRITORY OF AUSTRALIA
Employer

REASONS FOR DECISION

(Delivered 30 May 2008)

JENNY BLOKLAND CM:

Introduction

1. This Work Health case primarily involves various issues of interpretation and application of s 54 *Work Health Act*. Both solicitors at a pre-trial mention of the matter and Senior Counsel for the parties at the hearing advised the Court, (and I readily accept), there is no reported case or other identifiable authority bearing directly on the section. In general terms s 54 *Work Health Act* limits entitlement to workers' compensation in certain circumstances where the worker is entitled to be compensated for the injury under another law or benefit from a superannuation scheme, save for a benefit financed by employer contributions made under an industrial award or agreement or by the worker's contributions.

2. The issues between the parties have been narrowed significantly since the original pleadings were filed. The uncontested facts are that the Worker at all material times (from 1 July 1984) was a member of the Northern

Territory police force. The Worker was injured on or about 26 February 1999 when he slipped and fell in the course of employment suffering the following injuries: supraspinatus impingement of the left shoulder; bruising and abrasion to his face; soft tissue injury to his neck and bruising and swelling to both knees. The Worker underwent surgery and sustained a second injury, namely diffuse brain injury with loss of cognitive and motor functions and atrial fibrillation requiring long term medication. The Worker's claim under the *Work Health Act* was accepted by the Employer.

3. The Worker was unable to continue in his employment and was retired from work with the Employer on the ground of invalidity. It is accepted the Worker has been and is currently totally or partially incapacitated for work. Normal Weekly Earnings are now agreed to be $1,166.63 and an order will be made reflecting that agreement.

4. From 1 July 2002, the Worker ceased employment and commenced receiving the ComSuper invalidity pension. The question is whether s 54 *Work Health Act* applies in these circumstances. If it does, it allows the Employer recovery of certain payments in accordance with s 54 (3) *Work Health Act*. Section 54 *Work Health Act* provides as follows:

> **54. Entitlement to compensation under other laws**
>
> (1) This section applies where, as a result of an injury caused to a worker, the worker or his or her dependants –
>
> (a) are entitled to –
>
> (i) compensation or damages under an applicable law; or
>
> (ii) a benefit from a superannuation scheme established under an applicable law, other than a benefit financed by an employer's contributions made under an industrial award or agreement or by the worker's contributions; and

(b) would, but for this section, be entitled to compensation under this Part.

(2) A person is not entitled to compensation under this Part if, in respect of the injury –

(a) compensation or damages have been paid or recovered under the applicable law; or

(b) an award of compensation or judgment for damages has been made, given or entered under the applicable law.

(3) Where, in respect of the injury –

(a) a person receives compensation under this Part; and

(b) the person –

(i) is paid or recovers compensation or damages under the applicable law;

(ii) obtains an award of compensation or judgment for damages under the applicable law;

(iii) accepts a payment into court, or settles or compromises a claim, under the applicable law; or

(iv) is paid or is entitled to receive a benefit from a superannuation scheme established under the applicable law (other than a benefit financed by an employer's contributions made under an industrial award or agreement or by the worker's contributions) because of incapacity resulting from the injury,

the worker's employer is entitled to recover from that person the amount determined in pursuance of subsection (4).

(4) The amount entitled to be recovered under subsection (3) is the amount determined by a Fellow of the Institute of Actuaries of Australia to be –

(a) the discounted present value of compensation paid or payable to the person under this Part; or

(b) equal to the amount of the compensation, damages, payment, settlement, compromise or benefit paid or payable to the person under the applicable law,

whichever is the lesser.

(5) Where –

(a) compensation or damages are received or are to be received by a person under an applicable law in respect of an injury to a worker; and

(b) a claim for compensation under this Part is made by a person in respect of an injury to the same worker,

unless the contrary is proved, it is to be presumed that the claim for compensation under this Part is in respect of the same injury as the compensation or damages received or to be received under the applicable law.

(6) In this section, "applicable law" means –

(a) a law of the Territory other than this Act;

(b) a law of the Commonwealth; or

(c) a law in force in a place outside the Territory.

Evidence Before the Court

5. As most factual issues were agreed between the parties, no oral evidence was called at the hearing. A number of documents were tendered by consent. Exhibit W1 contains *Documents Evidencing Agreement/Arrangements between the NT & the Commonwealth in Respect of ComSuper.*

These documents contain a statement from the Northern Territory Commissioner of Superannuation ("the Commissioner") setting out a summary of public sector arrangements between the Northern Territory and the Commonwealth over superannuation. The Commissioner explains that prior to Northern Territory self-government in 1978, public sector employees in the Northern Territory were members of the Commonwealth Superannuation Scheme (CSS) established by the *Superannuation Act* 1976 (Cth). The Commissioner's statement then traces the history of the CSS, including relevantly that since 1984, the Northern Territory Government has

been required to reimburse the Australian Government for its share of the emerging cost of the CSS pension payments. She states the Northern Territory meets that part of the liability that relates to the person's employment with the Northern Territory on or after 1984 but is not required to reimburse pensions for employees who retired before that date. The Northern Territory pays its share of CSS costs each fortnight from the Northern Territory's consolidated revenue. The statement also provides information on the relationship between the CSS, the Northern Territory and Public Authorities Superannuation Scheme (NTGPASS) and consequential arrangements made by virtue of the *Superannuation Guarantee (Administration) Act*, and the *Superannuation Guarantee (Safety Net) Act.*

6. The documents showing the inter-governmental arrangements referred to in the Commissioner's statement are:

- Letter from Prime Minister Hawke to Chief Minister Tuxworth dated 7 November 1985 outlining the need for the Northern Territory to contribute to the costs of CSS in respect of costs as they emerge after 1 July 1984 relating to the Territory Service.

- Letter from First Assistance Secretary, Social Security Division to the Northern Territory Under Treasurer dated 4 November 1985 setting out the terms for the Northern Territory meeting a proportion of the emerging cost of employer – financed benefits payable to Northern Territory employees who exited the CSS on or after 1 July 1984.

- Letters between Chief Minister Tuxworth and Prime Minister Hawke dated 18 April 1985 and 2, 7 and 28 May 1985 in relation to the Senate Standing Committee on Finance and Government Operations and the attitude of both the Territory and Federal Governments in relation to revision of the funding of CSS.

- Correspondence between Federal Ministers Walsh (4 April 1985) and Dawkins (25 October 1984) and Chief Minister Tuxworth attaching arrangements proposed by the Joint Task Group on Northern Territory Superannuation.

7. I readily find, on the basis of all documents contained in W1 as submitted by the Worker and not disputed by the Employer, that the Northern Territory made contributions to the Worker's future ComSuper entitlements in the first period from July 1978 until 1985; from 1985 as noted in the letters summarised above until 1999 and continuing to the present where the Commissioner's statement (clause 15) notes Northern Territory Government Agencies, including Northern Territory Police pay a notional payment to Northern Territory consolidated revenue of 9% of salaries for employees who continue as CSS members.

8. A number of concessions made on behalf of the Employer (Exhibit W2) are as follows:

- "The arrangements between the Northern Territory and the Commonwealth, under which the Northern Territory pays a proportion of the emerging cost of the employer finance benefits payable under the Commonwealth Superannuation Scheme to its employees who retire on or after 1 July 1984, amount to an agreement between the Northern Territory and the Commonwealth".

- "It is admitted that the worker was employed by the Northern Territory as a police officer before 1 July 1984 for the purposes of these proceedings".

- "The Worker was employed by the Northern Territory as at 1 July 1984 and was a member of the Commonwealth Superannuation Scheme on 1 July 1984".

9. Before the Court also is the "Approved Invalidity Retirement Benefit Application Form" completed by the Worker (Exhibit D3). On page three the Worker has chosen "Option 2 – A standard CPI index pension and lump sum of member and productivity components". Other information concerning taxation options are also briefly covered in this form.

General Principles Of Interpretation - *Work Health Act*

10. Each of the questions to be considered in this matter requires revisiting and integrating principles of construction of the *Work Health Act*. Emphasized in the Worker's case, is that the *Work Health Act* has been held to be remedial legislation and that ambiguities identified in the process of construction must be resolved in favour of the Worker: *Wilson v Wilson's Tile Works Proprietary Limited* (1960) 104 CLR 328, Fullagher J at 335:

> "To these considerations should perhaps be added the established principle that, where two constructions of a *Worker's Compensation Act* are possible that which is favourable to the worker should be preferred".

11. His Honour Justice Mildren expressly applied *Wilson v Wilson's Tile Works Proprietary Limited* (cited above) to the *Work Health Act* (NT) in *Foresight Pty Ltd (trading as Bridgestone Tyre Services) v Maddick* (1991) 79 NTR 17 at 24 as did Kearney J, presiding in the Court of Appeal in *Loizos v Carlton and United* (1994) 94 NTR 31 at 33:

> "I bear in mind that the Act is a remedial statute, and accordingly its provisions should be interpreted in a benign and liberal manner, and a construction most favourable to the worker is to be preferred where any ambiguity exists: *Foresight Pty Ltd v Maddick* (1991) 79 NTR 17 at 24. I have no real substantial doubt that the words "immediately before" in their context in s 65(3) plainly and unambiguously bear only a temporal meaning; I consider this view was also held by Martin J".

12. Further, as would be expected, the objects of the Act have been held to be significant in the construction of its specific provisions (*AAT King's Tours Pty Ltd v Hughes*, (CA)(NT), 3 October 1994, unreported, dealing with the construction of s 49, Normal Weekly Earnings). Further, the Worker submits this approach was recently confirmed in *HWE Contracting Pty Ltd v Young* [2007] NTSC 42 at para 48, where His Honour Justice Riley commenting on the construction of s 49(2) *Work Health Act* stated:

> "The decision is consistent with long established and accepted authority characterising such benefit as part of the remuneration of the worker. Had it been the intention of the legislature to change that longstanding approach one would expect the use of plain language to that effect. Any uncertainty arising out of the use of the word "allowance" in s 49 of the Act should be resolved consistently with the beneficial nature of the legislation".

13. A further example of this approach concerning allowances is found in *Palumpa Station Pty Ltd v Fox* (1999) 132 NTR 1 at 6 by Bailey J:

> "Such a construction accords with the ordinary and usual meaning of the word "allowance" and is consistent with a broad and liberal interpretation of the Act in favour of the worker".

14. Counsel for the Employer readily accepts the principles advanced by the Worker, however argues that the beneficial interpretation approach is confined to those parts of the *Work Health Act* that confer a benefit. Counsel for the employer submitted it would be the wrong approach if the Court simply applied a liberal and beneficial construction to every single part of the *Work Health Act*, particularly if that was applied to parts of the *Work Health Act* that are intended to abolish or modify the common law principles. In making this submission counsel for the Employer also noted that there was a problem in the Employer's argument with reliance on *HWE Contracting Pty Ltd v Young* because s 49(2) *Work Health Act*, may be an example of an exception in a remedial Act which ought not to invoke the preference for the beneficial construction. It was conceded *HWE Contracting Pty Ltd v Young* was a Court of Appeal decision declaring s 49(2) *Work Health Act* a beneficial provision.

15. The Court was referred to *Rose v Secretary, Department of Social Security* (1990) 92 ALR at 521 concerning the definition of "income" in the context of s 3 *Social Security Act* (1947) (Cth). At page 524 the Full Court of the Federal Court stated:

> "We were referred in argument to various principles of construction of statutes including the principle that remedial legislation should be

> constructed beneficially. The Act is a remedial provision in that it gives benefits to persons and thereby remedies Parliament's perceptions of injustice. It calls for no narrow or pedantic construction; but, as mentioned earlier, it contains both enabling and excepting provisions which do not therefore necessarily require beneficial interpretation. It depends on the particular statutory provision and an analysis of its language and purpose. Aids to construction, including the principle of liberal interpretation of the remedial provisions, are generally involved when there is some ambiguity on the face of the particular statutory provision. That is not the case here with the definition of "income" in its introductory general words with which this case is concerned".

16. This passage was cited with approval in *Kennedy & Ors v Anti-Discrimination Commission of the NT and Ors* [2006] NTCA 6 concerning one point of a number raised in argument, namely, whether the Top End Womens Legal Service (TEWLS) could succeed in its defence to a discrimination claim by the aid of s 41(2) *Anti-Discrimination Act* (NT) exempting "a person" who in certain instances performed activities "on behalf of an association". His Honour Mildren J held that if the Legislature had intended that s 41(2) should apply to the association itself it could have said so. Applying *Rose v Secretary, Department of Social Security*, His Honour said "This is an exception contained in a remedial Act. It is therefore not appropriate to give s 41(2) a beneficial construction". Care must be taken in applying this case to the present as clearly with respect if His Honour had broadened the category for exceptions, it potentially would defeat the objectives of the *Anti-Discrimination Act* in narrowing the circumstances in which aggrieved persons could bring a complaint of discrimination. In other words, interpreting exceptions such as discussed in *Kennedy & Ors v Anti-Discrimination Commission* too broadly would impinge on the beneficial nature of the legislation. To this extent, the two principles emphasised by both counsel are related.

17. In *Victims Compensation Fund Corporation v Brown and Others* (2003) 201 ALR 260, in the context of the *Victims Support and Rehabilitation Act* (NSW) which gave effect to a statutory scheme of compensation for victims

of crimes of violence, Heydon J, with whom all other Judges agreed criticized the majority of the Court of Appeal (NSW) stating at 268:

> "The majority considered it to follow that the legislation should be construed by taking "a liberal approach"……
>
> The "remedial and beneficial objectives" argument to begin consideration of issues of construction by positing that a "liberal", "broad", or "narrow" construction will be given tends to obscure the essential question, that of determining the meaning the relevant words used require. Although the purpose of the Act is beneficial, it does not follow that recovery is contemplated for every act of violence or every consequence that could be described as an injury…….The legislation confers benefits, and no doubt it should not be construed restrictively, but in dealing with specific limited words like those of c/5, it is not open to apply much liberality of construction. It is difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of legislative language. As Spigelmen CJ said: "The issue before the Court is the determination of the circumstances in which compensation is payable". The legislation has endeavoured to define these circumstances in precise language which does not permit universal recovery; and hence "[t]he Court is not required to give the most expansive possible interpretation of such circumstances".

18. In the course of interpreting s 54 *Work Health Act*, in general terms I have approached the various problems revealed by firstly having foremost in mind the ordinary meaning of the words – the meaning that reasonably and spontaneously comes to mind on a plain reading of the text. At the same time I bear in mind that words of the statute must be understood in their context. The High Court stated in *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408:

> "…The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy ….Instances of general words of a statute being so constrained by their context are numerous….Further, inconvenience or improbability of result may assist the court in preferring to the

> literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent".

19. Further, as put by McHugh J in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 196:

> "The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood without conscious advertence by reason of their common language or culture".

20. The *Work Health Act* abolished actions for damages at common law by workers against employers (s 52 *Work Health Act*); repealed the previous Workmen's Compensation Act and introduced a no fault compensation scheme for workers injured out of or in the course of their employment. It also established the Work Health Authority, the Work Health Court and dealt with a number of matters concerned with obligations of employers and workers with regard to occupational health and safety and rehabilitation. The nature of the compensation has been described as an income maintenance scheme, the aim being to ensure the worker is placed in the same or at least similar position as they would have been but for the injury. Section 54 *Work Health Act* must be seen in this light. It seeks to regulate compensation payable under the *Work Health Act* when the worker, in certain circumstances has the benefit of other entitlements. The circumstances in which another entitlement may impact to the detriment of the payments received by the worker under the *Work Health Act* are regulated by s 54. Section 54 *Work Health Act* is drafted against a background where there is no possibility of a Worker having obtained an award of damages against an employer. It recognises there may be superannuation schemes or other benefits applicable that provide specifically for benefits to be paid due to incapacity as a result of injury. Given the common law principles applicable at the time of the enactment of the *Work Health Act*, in my view, characterizing s 54 *Work Health Act* as a

prohibition on "double dipping" is too narrow in its context – that may be an effect of the section in certain circumstances but the section does far more than act as a prohibition to "double payment".

Is the Worker's entitlement to receive the ComSuper Invalidity Pension "as a result of an injury caused to the Worker".

21. On this question the Employer seeks a number of rulings, The issue receiving the most attention in these proceedings is the contention that the Worker's entitlement to receive the ComSuper Invalidity Pension is "as a result of an injury caused to the worker" and "because of incapacity resulting from the injury" within the meaning of s 54(1) and s 54(3)(b)(iv) *Work Health Act*. On the contrary, the Worker seeks a ruling that his entitlement to the benefit (being the ComSuper Invalidity Pension) does not arise as a "result of an injury caused to [him]" within the meaning of s 54(1) *Work Health Act*. The Worker argues that s 54 *Work Health Act* cannot apply to his circumstances unless the entitlement is "as a result of an injury caused to the worker". The Worker's argument is that this is a precondition to the restrictions imposed by the rest of s 54 *Work Health Act*.

22. In support of the Worker's argument that his entitlement to the pension is not "as a result of the injury", counsel for the Worker has drawn on a number of authorities from other contexts dealing with comparable dilemmas at both common law and under various statutory regimes. I keep firmly in mind that it is the words of the *Work Health Act* in its appropriate context that prevail. The approaches in other jurisdictions and contexts still have some influence in resolving this issue by way of comparison.

23. On behalf of the Worker it is argued that receipt of superannuation or other pension *occasioned* by an injury is not the same as entitlement "as a result of [that] injury". It is argued certain set-off cases assist in highlighting the difference between receipt of a benefit due to entitlement and the impact of an injury on the timing of receipt of the benefit.

24. In *Watson v Ramsay* [1960] NSWR 462, an issue arose in an action for damages for negligence brought by a plaintiff who was entitled to a pension under the *Superannuation Act*. A ruling was sought on cross-examination concerning questions sought to be asked to establish details of the pension on the basis that the defendant's case was that loss of earnings should be regarded as the difference between the plaintiff's active pay and his superannuation. That line of questioning was disallowed by Justice Brereton. His Honour's view was that a superannuation scheme consisting of contributions made either by the employee, the employer or both should be considered an entitlement to money earned or saved day by day during the employee's active service. His Honour noted that superannuation payments are made in consideration of service to an employer and if payable before retiring age, it is not payable in recognition of any injury that may have caused the retirement, but rather is payable because the employee by their work were entitled to it. At 463 His Honour states:

> "The employee makes contributions during his service in the form of compulsory deductions from his salary. The employer also contributes, and to my mind its contribution is properly to be regarded as deferred salary for which liability may cease in certain events. Were the contribution wholly paid by the employee, it could clearly be said to be a form of a compulsory saving and the employee could achieve precisely the same provision for his future by some form of insurance quite distinct from the superannuation scheme with which he is involved. The fact that part is paid by the employer does not, to my mind, make the slightest difference. The existence of a superannuation scheme to which both parties contribute is one of the incidents of the employment offered by the employer which has the effect of making terms of employment more attractive and of encouraging continuity of employment. The same result could perhaps be achieved by the payment initially of a larger salary with no superannuation fund, thus enabling the employee to make his own arrangements to provide for the event of his retirement, or with a fund to which the employee only contributes, but in that event the removal of the contingency upon which the employer's share is payable removes the inducement to continue in the employer's service. Looked at in this way the entitlement to a pension is an entitlement to money earned or saved day by day during the

> employee's active service, earned day by day but not to be paid until he retires.
>
> It may be that as a result of an accident this retirement is accelerated. The payment of the pension, therefore, begins earlier if the superannuation scheme so provides. But if it so does provide, this is no less a benefit earned by past work than a pension payable only at a specified age. A superannuation scheme of the type involved here is therefore to my mind completely analogous to a policy of accident or sickness insurance taken out in the employee's favour with his employer instead of with an insurer. Whether paid by him wholly, or paid for partly by him and partly by his employer, it is none the less to my mind provided in consideration of his service to his employer; and where superannuation becomes payable before the normal retiring age, it is not payable in recognition of any injury which may have caused such retirement, or in order to alleviate any loss of earnings, thereby occasioned, or as a discretionary payment or act of grace; it is payable simply and solely because the employee has by his work bought his entitlement to it; if it were not paid, and he sued for it, the fact that he had recovered damages for his injury from his employer or anyone else could not conceivably be pleaded in bar in that action. It is put by the defendant here that the plaintiff's actual financial loss, as a result of his injury, is the difference between his salary and his pension; and this is true. If he recovers as damages his full salary, he will be better off. The defendant could have avoided this, if it wished by refraining from retiring him. In any case precisely the same situation would arise where a plaintiff had insured himself against loss of earnings arising through accident. In that case it could never be argued that the provision he had made for himself was to be assessed in mitigation of damages; and in my opinion his participation in a superannuation scheme, albeit "compulsory" (that is, if he chooses to enter the employer's service), is in the same sense a provision made by the employee for himself.

25. Counsel for the Worker drew the Court's attention to a decision of the Full Court upholding His Honour's ruling on this point: (*Watson v Ramsay* [1961] NSWR 619 at 637).

26. In the *National Insurance Company of New Zealand Ltd v Espagne (*1960 – 1961) 105 CLR at 569, in the context of assessing damages for negligence, the question arose concerning the relevance of an invalid pension for permanent blindness pursuant to the *Social Services Act* 1947 – 1957 (Cth). The principles concerning pensions and other benefits received by the victim

of a tort were considered. In holding that the social security benefit should be disregarded in the assessment of damages, Chief Justice Dixon took into account that there were a number of general benefits available to injured persons which "lighten the momentary burden of illness". His Honour also spoke of benefits conferred independently of the existence of the right of redress and that some benefits may be seen as pure benevolence. He noted that in some circumstances the benefit may be both independent and cumulative on whatever right of redress the injured person has (at 573). His Honour discussed one case (at 581) where a sailor's pension was disregarded when assessing damages for the defendant's negligence as it was held that the plaintiff did not receive his pension "because of the accident" but "because he was a sailor and the accident was no more than the occasion for the payment of the pension". Counsel for the Worker urges a similar approach be taken here.

27. It was pointed out that in construing the relevant provision under the *Social Services Act* (587) Justice Windeyer stated that the *Social Services Act* alone did not provide a clear answer to the issue of what was meant by "enforceable claim against any person under any law or contract for adequate compensation…" His Honour noted that as the Act itself did not provide a clear answer, aid must be sought from consideration of the cases and principles. After considering a number of settings including cases under *Lord Campbells Act* Windeyer J approved of Brereton J's approach in *Watson v Ramsay* and concluded as follows (at 599):

> "What finally emerges? Phrases such as *causa causans*, collateral matter and so forth being discarded, how are we to ascertain what is remote? Is there a governing principle in all these cases? So far as any rules can be extracted, I think they may be stated, generally speaking, as follows: In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other that the defendant are not to be regarded as mitigating his loss., if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and the express or implied terms of that contract they were to be provided

> notwithstanding any rights of action be might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages. The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in the consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather that by cause.

28. In *Commissioner of Taxation v Sculley* (2000) 201 CLR 148 the question concerned a person severely injured in a motor vehicle accident on 10 July 1992. Since 1989 she had been employed by the Royal Automobile Club of Victoria ("RACV") and had been a member of its superannuation fund for the same period. As a result of her injuries she was incapacitated for remunerative employment. She received a lump sum total and permanent disablement benefit from the superannuation fund in 1993. The sum received was reduced initially by a small amount of tax. The Commissioner of Taxation assessed a further portion for tax purposes and Ms Sculley sought a ruling that this second taxed component should not have been included as assessable income as the original lump sum payment was excluded from the definition of "eligible termination payment". The question before the High Court was whether the payment could properly be characterized as "consideration of a capital nature for, in respect of, personal injury to the taxpayer". The majority (Gaudron A CJ, McHugh, Gummo and Callinan JJ) considered the question to be the meaning of "consideration" and the meaning, in that context of "for, or in respect of". The majority cited with approval Brereton J in *Watson v Ramsay* [1960] NSWR 462 and stated the payment from the superannuation fund could not

be said to be compensation "for or in respect of the personal injury" as (amongst other reasons):

> "… the very similarity of benefits for death, retirement, resignation, retrenchment and dismissal to those for total and permanent disablement deny that the purpose of a payment is concerned with the value of any injury sustained by an employee (at 168)".
>
> "Moreover ordinarily it is not the purpose of superannuation schemes to compensate for personal injury, although that may sometimes be the effect of certain payments. This point is recognised in the principle that damages for loss of earning capacity and personal injury claims are not to be reduced by payments received pursuant to a superannuation scheme".

29. The majority also referred to statements of principle from the Court in *National Insurance Co of New Zealand Ltd v Espagne* (169), in particular noting Justice Windeyer's statement (cited above):

> "[T]he decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined...by what under his contract the plaintiff had paid for…The test is by purpose rather than by cause".

30. Similarly the majority relied also on Dixon CJ (cited above):

> "There may be advantages which accrue to the injured plaintiff, whether as a result of legislation or of contract or of benevolence, which have an additional characteristic. It may be true that they are conferred because he is intended to enjoy them in the events which have happened. Yet they have this distinguishing characteristic, namely they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him".

31. The majority also rejected an argument that cases regarding set-off of superannuation payments against damages for personal injury are irrelevant because of the context of *Sculley* that involved the construction of a taxing statute. Their Honours' confirmed that terms such as "in respect of" must

take their meaning from their context. In relation to set-off cases the majority stated "in our opinion, however the set-off cases, while not conclusive in the present context are not relevantly distinguishable".

32. Counsel for the respondent emphasised the importance of reading the section as a whole and submitted s 54(3)(iv) *Work Health Act* does not use the phrase "as a result of an injury" but rather "because of incapacity resulting from the injury". Contrary to the Worker's position, (that the Employer submits is based solely on the entitlement arising separately and independently of the superannuation scheme without regard to the injury), the Employer argued the *entitlement* arises as a combination of two matters, namely the underlying superannuation scheme and the injury itself. Counsel for the respondent submitted that s 54 *Work Health Act* was directed at the prevention of "double dipping" or "double payment". Counsel argued the section calls for focussing on the coincidence of benefits that arise because of one injury.

33. Counsel for the employer agrees that applicable common law principles provide a context in which s 54 *Work Health Act* was enacted particularly that the *Work Health Act* effectively abolished common law claims by a worker against an employer. The submission on behalf of the employer was s 54 *Work Health Act* must be seen as generally disentitling injured workers to the benefit of workers compensation and superannuation scheme benefits unless the superannuation scheme is financed by the employer's contributions made under an industrial award or agreement or by the worker's own contributions (the exception in s 54(1)(ii)). The Court was reminded that underlying this area of the law was the principle that in the assessment of compensatory damages the injured party should receive compensation in the amount which would put the injured party in the same position as they would have been had the tort not been committed. It was noted that at common law it was generally accepted that some benefits were to be enjoyed independently of and in addition to the rights to damages. The

employer agreed the relevant legal principles are as stated by Justice Windeyer in *The National Insurance Co of New Zealand Ltd v Espagne* (sited above at 599 - 600) and as stated in *Redding v Lee* (1982 – 83) 151 CLR 117 at 138 by Mason and Dawson JJ.

> "It would be unjust and unreasonable to reduce the damages of the prudent plaintiff who insures himself against accident by allowing the premiums which he paid and the proceeds of the policy to ensure for the benefit of the tortfeasor and make the existence of the insurance the occasion for giving the plaintiff a lesser award of damages than he would have obtained had he not been insured. If he had not taken up the policy his assets would not have been depleted by the payment of premiums and his damages could not then have been reduced by reference to the greater worth of his assets (*Parry v Cleaver).*
>
> Again, it has been acknowledged that it would be unjust and unreasonable to reduce damages on account of benefits received by the plaintiff resulting from benevolence…….
>
> A similar comment may by made about pension and superannuation benefits whose purpose is to ameliorate the plaintiff's situation irrespective of his right to recover compensation against the tortfeasor. For this reason no distinction should be drawn between pension and superannuation benefits to which the plaintiff has contributed and those to which he has made no contribution, although there is a stronger reason for refusing to reduce the plaintiff's damages on account of payment which he has himself made, thereby diminishing the assets which he otherwise owns."

34. The employer accepts at common law a plaintiff could have the benefit of both full damages for loss of earning capacity and their pension or superannuation scheme benefits, particularly if they contributed to the funding of the benefits. The Employer agrees that the *Work Health Act* overall is beneficial legislation, however emphasises that s 52 abolished common law rights.

35. It was submitted on behalf of the Employer that s 52 is a clear expression of statutory intent. In this context where the *Work Health Act* was set up as a no fault scheme, the Court is urged to bear in mind that other common law

notions such as the principles in the common law cases were modified accordingly and that that is what occurred and is the very purpose of s 54 *Work Health Act*. Counsel for the Employer submits that whether the Act is conceptualised as limiting compensation entitlements or providing a collateral benefit to employers for not having to make those payments, the effect is the same. It was also submitted it was something of a device or misleading to suggest that it was by virtue of the underlying scheme rather than the injury that enabled the Worker to obtain the superannuation benefit. Noting Chief Justice Dixon's comments as referred to by the Worker at 571 and 572, the Employer emphasised the following passage at 572:

> "To inquire whether the advantage is collateral or not seems to me to ignore the fact that *ex hypothesi* the advantage arises because the plaintiff suffered injuries. To say it is *res inter alios acta* appears difficult when the very man injured is one of the parties between whom the thing is done; how can he come within the word "*alios*"? To say the injury is only a *causa sine qua non*, while the precedent or additional conditions whence the advantage arises from *causa causans,* seems to me simply to be the expression of a voluntary preference for one of two essential factors which must combine in producing the result and to bring it forward at the expense of the other which is correspondingly pushed back. The problem however certainly does not admit of the exclusion of all causation from its elements".

36. It was submitted that this passage recognises the problem of attempting to privilege one cause over the other and that in the current case there are two essential factors which must combine being the entitlement to the benefit and the compensable injury and that when there is a coincidence of those two facts, the section is enlivened. It is submitted that although the Worker's submissions in relation to the status of the common law are correct, it must be sharply distinguished when the position of s 54 *Work Health Act* is considered as s 54 specifically dealt with pension entitlements or entitlements under a superannuation scheme and in certain circumstances ensures there will not be double compensation. The Employer submits this is why s 54 is specific as to the source of finance of the benefits which may

lead to exemption from recovery. The Employer also argued that clearly the benefit was a result of an injury and that it was wrong to characterise the position as early retirement or retirement for any other reason but the injury as the Worker elected invalidity retirement.

37. Although the application s 54 *Work Health Act* to the circumstances of this case requires placing the section in context, I don't necessarily agree that on a plain reading it is ambiguous – it may be ambiguous only in the general sense of determining its scope and applicability. From this point it is not necessary to commence the process via the presumption that on the question of applicability, if there is doubt, there must be resolution in favour of the Worker. Section 54 *Work Health Act* was enacted against a background of case law identifying that the contributions from either or both the employer and employee are generally treated as distinct *vis a vis* an award of damages or even in relation to some statutory schemes. Reference is made in the cases to the general reason being that superannuation comprises earnings and savings for the future.

38. I agree with Counsel for the respondent that s 54 *Work Health Act* regulates the position post the abolition of common law claims in the Northern Territory but I do not agree with respect that the overall effect of s 54 *Work Health Act* on a worker receiving superannuation is to subject a Worker to recovery of payments under the section save for the exception under s 54(a)(ii) "other that a benefit financed by an employer's contributions made under an industrial award or agreement or by the worker's contributions". In the context of a legal system permitting access to the superannuation and pensions in addition to other payments for compensation for injury, the legislature chose to regulate or limit only those circumstances where the *entitlement* to the benefit of the superannuation scheme arises "*as a result of an injury caused to a worker*".

39. The language of s 54 *Work Health Act* is steeped in cause and effect, particularly its use of the word "result" as the condition precedent to the operation of the parts of the section that allow for adjustment of payments in certain circumstances. On all of the material before me, it is clear that Worker became *entitled* to the superannuation benefit by virtue of his work over a lengthy period for the employer, membership of the scheme and payments to the scheme by the employer. The fact that the timing of the Worker accessing the benefit to his superannuation was brought forward by the injury does not, in my view enliven the section. On examination I agree the injury became the occasion to access the superannuation benefits rather that the injury being the factor that *entitled* the worker to the benefits. It is not in dispute that the Worker was entitled to receive his superannuation benefit well before he accessed it. It is clear that injury led to his election to take the benefit when he did, but he was already "entitled" to the benefit. Being cognisant of the legal culture in which the *Work Health Act* was drafted, the Legislature could have chosen to legislate in a way that did not involve the need for the entitlement to be linked to the "result of the injury". Worded the way that it is, s 54 *Work Health Act* in part preserves aspects of principles concerning the relationship between different benefits.

40. The fact that s 54(1)(a)(ii) *Work Health Act* provides exemptions after the condition precedent is made out does not sway me from the conclusion I have come to. I would expect if a Worker did in fact become entitled to a benefit set up by an employer under an award, agreement or term of an employment contract, that would be exempt as forming part of the employment relationship. The entitlement to the benefit must be of a particular character to enliven s 54 *Work Health Act* and this one in my view is not.

41. As mentioned above, I have not thought it necessary to resort to the beneficial construction principle to resolve this issue but take some comfort in the fact that this result is consistent with that approach.

"Industrial award or agreement"

42. Given the conclusion I have come to thus far, it is not strictly necessary for me to make a decision on this and a number of other issues, however, as the parties have requested it, and if I am found to be wrong in the above conclusion I will make a ruling on this matter. The question comes down to whether the word "industrial" should apply to both "industrial award" and "agreement". If it does, the exemption to the applicability of s 54 *Work Health Act* has more limited operation to only "industrial" agreements rather than all agreements. In this case, arguably the inter-governmental agreements (see paras 5-7 above) are not what might traditionally be accepted as an "industrial agreement".

43. The Employer submits "industrial" describes both the words "award" and "agreement" and submits that those terms are frequently combined and referred to as "industrial award or agreement" in many cases decided in the context of industrial law: (eg. *Scott v Sun Alliance Australia Limited* (1993) 178 CLR 1 at 1-2; 5-6 and *Catlow v Accident Compensation Commission* (1989) 176 CLR 543 at 560). I agree with counsel's observation about the term in other contexts. It is not however determinative of the issues. Counsel also submitted the difference between an "industrial agreement" and an "industrial award" is that the agreement is reached by negotiations between the parties, while an award is a decision of an independent tribunal arbitrating a dispute between the parties.

44. Section 3 *Work Health Act* provides definitions for both "industrial award" and "industrial agreement".

> "industrial agreement" means an agreement which wholly or partly regulates terms or conditions of employment;
>
> "industrial award" means –
>
> (a) an award or determination relating to the terms and conditions of employment of a worker made under an Act; or

(b) an award or a certified agreement made under the *Workplace Relations Act 1996* of the Commonwealth;

45. The Employer notes a relevant example of an "Industrial Award" in this context would be a "determination" made pursuant to Part III of the *Police Administration Act* (NT) by the Police Arbitral Tribunal that is binding on all parties to whom it is expressed to relate. Further, it is noted that Division 2, Part III *Police Administration Act* (NT) permits the Minister and the Police Association to enter into consent agreements relating to remuneration and terms and conditions of service. It is submitted such an agreement would amount to an "industrial agreement" under s 3 *Work Health Act*. It was submitted that if the intent of the legislature was to exempt benefits financed by employer's contributions made under an industrial award, then it follows the legislature would exempt benefits made under an industrial agreement. The composite phrase is intended to acknowledge that the function of effect of the industrial awards and industrial agreements are virtually identical.

46. It is submitted on behalf of the employer that the use of the indefinite article "an" *once*, indicated that "industrial" is intended to apply also to "agreement"; if it were otherwise, it was argued, a further indefinite article would need to be placed before "agreement" so the phrase read "made under an industrial award or an agreement". It was further submitted that if the legislature had wanted to enact a clearer provision having the meaning contended for by the worker, the phrase could have been drafted as "made under an industrial award or *an* agreement *of any kind*". Counsel also pointed out that the definition of "worker" under s 3 *Work Health Act* used the phrase "agreement *of any kind*". Such a phrase could have been utilized by the legislature had it chose in s 54(1)(a)(ii). This too is a significant point but is not determinative.

47. Against this the worker argues it is not open to read the phrase as meaning "industrial award" or "industrial agreement" as such a reading would not be permitted by virtue of the rules of statutory construction, citing *Mills v Meeking* (1989-1990) 169 CLR 214 at 243-244, per McHugh J on the circumstances that justify a court including words that are not part of the statute:

> "First, the court must know, from a consideration of the legislation read as a whole, precisely what the mischief was that it was the purpose of the legislation to remedy. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission of its attention had been drawn to the defect".

48. Further, it is submitted that by reference to the definitions of "industrial award" and "industrial agreement" in s 3 *Work Health Act* have some bearing on the final conclusion. It is submitted "Industrial award" is expressed in a exhaustive manner and in paragraph (b) includes as an alternative a certified agreement made under the *Work Place Relations Act* (1996) (Cth). It is submitted the definition "*awards*" embraces industrial agreements, hence the use of the word "agreement" must have *different work to do*, that it is submitted is emphasized by the use of the disjunctive "or". This argument does not take account of the fact there are other types of industrial agreements apart from a certified agreement under the *Work Place Relations Act.*

49. It is submitted a construction that adopts the grammatical or ordinary meaning of the words should be adopted and supports the construction and context contended by the worker: (see *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-2), where the majority stated:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and

> purpose of all the provisions of the statute (45). In *Commissioner for Railways (NSW) v Agalianos* (47), Dixon CJ pointed out the "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed (48). A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals (49).
>
> .....
>
> Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision (52). In *The Commonwealth v Baume* (53) Griffith CJ cited *R v Berchet* (54) to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

50. In relation to a further argument advanced by the Employer that apart from s 54 *Work Health Act*, (if "industrial" is operative on "agreement") there is no section of the *Work Health Act* that uses the term "industrial agreement", the Worker has pointed out that s 54 (1)(a)(ii) *Work Health Act* in its current form was enacted in 1991 (*Work Health Amendment Act*, No 61 if 1991), hence the definition "industrial agreement" was enacted long before s 54 (1)(a)(ii) was in existence. It was submitted that this factor weakened the employer's argument on this point. The Worker also submits that being beneficial legislation, this ambiguity should be resolved in favour of the Worker: (see cases cited above). I have been unable to establish whether the term "industrial agreement" previously appeared in any other part of the *Work Health Act* that may have been repealed.

51. Grammatically my researches indicate the word "industrial" in this context is known as an "ambiguous modifier": (see "All Experts".com/q/General-Writing-Grammar). It is the context that must resolve the ambiguity.

52. With respect both the Employer and Worker have submitted very refined technical arguments on this point and it is difficult to isolate a matter of interpretation that will be finally persuasive. In my view the context of this exception is the most important factor. This exception, as might be expected in this context, saves certain superannuation arrangements where those arrangements have been agreed to be financed as provided in the terms of awards or agreement. Those arrangements are expressed in "industrial awards" or indeed in "agreements". If "agreements" is qualified by the modifier "industrial" it might be thought to exclude Workers who have arrangements on an individual basis, (for example individual employment contracts), between the Worker and the Employer. That would be a very odd result when the purpose of this exemption appears to be to preserve entitlements that are part of the terms of employment. Although an individual employment contract does not fit well with the traditional understanding of "industrial agreement" the definition of "industrial agreement" in the *Work Health Act* (NT) is very broad, indeed broad enough to cover a range of agreements, probably even individual contracts. I would expect that an Australian Workplace Agreement (AWA) (that after all may be struck between an employer and a single employee), (s 170 VF(i) *Workplace Relations Act* 1996) should be covered by the definition "industrial agreement", although I note the view also that the negotiation of an AWA "presupposes the existence or creation of an employment contract": (Creighton and Stewart, LabourLaw, 4th edition, 2005, The Federation Press at 249).

53. The very breadth of the definition of "industrial agreement" in the *Work Health Act* leads me in part to reject the Worker's argument on this point, plus the fact that the unqualified use of the work "agreement" by itself is devoid of satisfactory meaning in this context. I conclude "industrial" modifies the word "agreement" to the extent that the definition of "industrial agreement" in the *Work Health Act* applies. In my view the phrase is not as

narrow as that contended by the employer. It is not restricted to statutory or registered agreements.

Is the Inter-Governmental Agreement between the Northern Territory and the Commonwealth over Payment of Superannuation an "Industrial Agreement" within the meaning of the *Work Health Act* (NT)?

54. Although at the other end of the spectrum from individual agreements and contracts discussed above, I do not see that "industrial agreement" within the *Work Health Act* (NT) should be construed narrowly. There are many forms of agreement that *regulate terms or conditions of employment*. The agreements in Exhibit W1 regulate a large section of Public Sector employees or past employees in the Northern Territory concerning employer contributions for superannuation. The fact that the "agreement" under discussion is not between the employees and the employer does not diminish its capacity to regulate "terms and conditions of employment". The agreement regulates the *changes* to contributions to superannuation over time. In my view this represents a regulation of the terms of employment as it regulates the obligation of who pays the contribution and to what level. This is an appropriate occasion to resolve the question of ambiguity of application of the section in part by reference to the principles of liberal interpretation of a beneficial section. Here I note this would exempt a Worker from an exclusion.

Is the ComSuper invalidity pension a "benefit financed" by the Workers contributions" within the meaning of sub-section 54(1)(a)(ii) of the *Work Health Act*?

55. The Worker argues that this part of the exemption also covers him as he contributed to the scheme by virtue of his service over many years. Here the Worker refers to his non financial contributions: (it is conceded the Worker received his own financial contributions by way of lump sums previously). Although in my view the non-financial contributions of the Worker in a general sense are relevant to the overall construction of s 54, they are not

applicable to this exemption. I agree with the Employer that such a construction would mean that all schemes would be saved as this part of the exemption would have *no work to do*. The interpretation advocated on behalf of the Worker is rejected.

Orders

56. I will forward these reasons to the solicitors for the parties today and list the matter for mention on Monday 2 June 2008 at 9.30 am when I intend to make the relevant orders. I note a format of orders has been forwarded to me by the parties. If 2 June at 9.30 is not convenient, solicitors for the parties may contact my Chambers to list the matter at a more convenient time. I note I have not heard argument on interest or costs.

Dated this 30th day of May 2008.

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Jenny Blokland
CHIEF MAGISTRATE