CITATION: *Shepheard v Northern Territory of Australia* [2013] NTMC 013

PARTIES:	KEVIN SHEPHEARD
	V
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	21134657
DELIVERED ON:	23 April 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	21 January 2013
JUDGMENT OF:	Dr John Lowndes

CATCHWORDS:

WORK HEALTH- BURDENS OF PROOF- DUX LITIS
S69 Workers Rehabilitation and Compensation Act
June D'Rozario and Associates Pty Ltd v Makrylos [1993] 112 FLR 314 considered
Harris V AGC (Insurances) Ltd 91984) 38 SASR 303 considered
Edwards v Airpower Pty Ltd No AP123 of 1995 considered
Ju Ju Nominees Pty Ltd v Carmichael [1999] 9 NTLR 1 applied

REPRESENTATION:

Counsel:

Worker:	Ms Sibley
Employer:	Mr McConnel

Solicitors:

Worker:	Priestleys
Employer:	Hunt and Hunt

Judgment category classification:	B
Judgment ID number:	
Number of paragraphs:	36

IN THE LOCAL COURT OF
DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21134657

BETWEEN:

KEVIN SHEPHEARD
Worker

AND**:**

NORTHERN TERRITORY OF AUSTRALIA
Employer

REASONS FOR JUDGMENT

(Delivered 23 April 2013)

Dr John Lowndes SM:

THE PRELIMINARY PROCEDURAL POINT: DUX LITIS

1. The parties have approached the Court seeking a ruling as to which party should be dux Litis at the hearing of these proceedings, which is to commence on 13 May 2013 and to continue for the succeeding four days.

2. Given that the manner in which the parties have pleaded their respective cases has an important part to play in determining which party is to be "dux Litis", the Court's attention is immediately drawn to the workers Statement of Claim and the employers Notice of Defence and Counterclaim and the worker's Reply and Defence to the Counterclaim.

THE PLEADINGS

3. In his Statement of Claim the worker takes issue with the s69 Notice of Decision cancelling payments of weekly benefits on a number of grounds.

4. The reason given in the notice for cancellation is that the worker is "fit to return to pre-injury duties with no further treatment". The worker claims that he is unable to return to worker as he continues to suffer from the effects of his injury and remains totally incapacitated for work – or in the alternative partially incapacitated for work as a result of the injury.[1]

5. The worker also alleges that the s 69 notice is invalid because the Notice of Decision, in breach of s 69(4), provided insufficient information for the worker to fully understand the reasons for cancellation and, in breach of s 69(3), the accompanying medical certificate failed to state that the worker had ceased to be incapacitated for work.[2]

6. The worker has confined his case to an appeal against a cancellation of benefits pursuant to s 69 of the *Workers Rehabilitation and Compensation Act*.[3]

7. The worker seeks the following orders:

    1. A finding that the worker is totally, or in the alternative, partially incapacitated for work.

    2. A declaration that the Notice of Decision is invalid.

    3. A re-instatement of payments of weekly compensation in accordance with the Act.

    4. An order that the employer pay interest on arrears of compensation pursuant to s 89 and 109 of the Act.

    5. Costs.

8. In its Notice of Defence to the Statement of Claim, the employer asserts that the worker has ceased to be incapacitated for work as a result of the relevant injury; and further says that the worker does not have a reduced physical capacity for actually doing work in the labour market in which he was

[1] See paragraphs 10 and 11 of the Statement of Claim.
[2] See paragraphs 13 and 12 of the Statement of Claim.
[3] This is discussed later at p 9.

working, or might reasonably be expected to work. The employer denies the invalidity of the s69 notice, and says that the notice complied with the requirements of s69(4) and the accompanying medical certificate conformed with the requirements of s69(3).

9. By way of its counterclaim, the employer asserts that the worker has ceased to be incapacitated as a result of the relevant injury. In the alternative, the employer says that the worker has been partially incapacitated for work, and has a capacity to undertake suitable alternative employment. The employer seeks the following orders:

    1. A declaration that the worker has ceased to be incapacitated for work.

    2. In the alternative to the first order sought, a declaration that the worker is presently partially incapacitated for work and has been fit to undertake alternative duties since at least 24 August 2011.

    3. A declaration that the worker has an earning capacity that is equivalent to or exceeding his indexed normal weekly earnings as at 24 August 2011 to date and continuing.

    4. In the alternative to the third order sought, a declaration as to the level of the worker's earning capacity as at 24 August 2011 to date and continuing.

    5. The worker's application be dismissed.

    6. The worker pay the employer's costs of and incidental to the proceedings to be taxed at 100% of the Supreme Court scale in default of agreement.

10. By way of reply and defence to the employer's counterclaim the worker denies the allegations made in the counterclaim and denies the employer is entitled to the relief sought in the counterclaim.

THE PARTIES' SUBMISSIONS

11. Both oral and written submissions were made by the parties on 14 January 2013. The worker's submissions were to the effect that the employer should

be dux Litis. The employer, on the other hand, submitted that the worker should be dux Litis.

12. After hearing the submissions the Court reserved its decision on the question of dux Litis.

THE COURT'S RULING ON DUX LITIS

13. The question as to which party should be dux Litis – that is to say who should begin, or proceed first, at the substantive hearing[4] – is a matter of practice and procedure; and any ruling in relation to the matter is of a discretionary nature.[5] Usually, for sound practical reasons, the order of adducing evidence and addressing is "left in wide terms to the discretionary decision of the court of trial, with any indicative general rules being subject to any directions given by that court: see for example, the structure of R 49.01 of the Supreme Court Rules (NT)".[6]

14. In *June D'Rozario and Associates Pty Ltd v Makrylos* [1993] 112 FLR 314 Thomas J dealt with the question of dux Litis in a civil suit for monies due and owing for work done by the plaintiff for the defendant:

> The court may give directions as to the order of evidence and generally as to the conduct of the trial. Order 49.01 of the Supreme Court Rules.
>
> In the absence of a direction the plaintiff begins if the plaintiff has the burden of proof on a question and the defendant begins if the defendant has the burden of proof on all questions. Order 49.02 (a) and (b) of the Supreme Court Rules.

[4] The Latinism "dux Litis" appears to be peculiar to the legal language of South Australia and the Northern Territory, and it conveniently designates the order of adducing evidence, and addressing: see *Kyrpeos v Nalbalco* [1999] NTSC 60.
[5] See *Edwards v Airpower Pty Ltd* No AP 213 of 1995 per Mildren J. However, it must be noted that although the question of "dux Litis" is a matter of practice and procedure, the often related and antecedent question as to where the onus of proving a particular issue lies is determined partly by substantive law and partly by the way the parties have pleaded their respective cases: see *Currie v Dempsey* [1967] 2 NSWLR 532 at 539 per Walsh JA; *Kypreos v Nalbalco Pty Ltd* [1999] NTSC 60.
[6] See *Kypreos v Nalbalco Pty Ltd* [1999] NTSC 60.

The long standing rule of procedure is that, where the plaintiff bears the legal onus of proof on any question, the plaintiff has the benefit and burden of going first: *Mercer v Whall* (1845) 5 QB 447, 114 ER 1318; *Brown v Lethbridge* (1876) 14 SCR NSW 315; *Portelli v Port Waratah Stevedoring Co Pty Ltd* (1959) VR 195.

One of the tests to be applied in deciding the order of evidence is to ask who has the onus of establishing the central affirmative proposition in the proceedings: *Harris v AGC (Insurances) Ltd* (1984) 38 SASR 303 per Olsson J at 308. It is not necessary to have regard to the substance of the issues and not to technical form: *Phipson on Evidence* 13 ed paragraph 4.05.

In this matter the plaintiff's claim is for monies due and owing by the defendant for work done by the plaintiff.…The defendant has admitted liability but disputes the quantum of the claim.

In his counterclaim the defendant claims:

1. The plaintiff was, through its agent, negligent in its advice to the defendant.

2. The plaintiff is liable for damages for the loss sustained.

The plaintiff disputes liability and quantum on the defendant's claim.

I consider that the plaintiff should be dux Litis in these proceedings for the following reasons.

There are obviously a number of issues for decision in the substantive hearing. However, one of the central affirmative propositions in the proceedings is the quantum of the plaintiff's claim, the onus of which lies upon the plaintiff. The defendant bears the onus of proof on the question of negligence alleged by the defendant and the quantum of damages for any loss sustained as a result of any such negligence on the part of the plaintiff.

Counsel for the plaintiff argues that the defendant should proceed dux Litis so that the plaintiff will be able to answer the claim for alleged negligence. I am not persuaded that is a reason to depart from the well established practice that the plaintiff is dux Litis where the plaintiff bears the legal onus of proof on any question, in this case the quantum of the plaintiff's claim.

Nor am I persuaded that in the context of this case the correct test to apply is that set out in *Abrath v Northern Eastern Railway Company* (1883) 11 QBD 440 Bowen LJ at 456. That is who will succeed if no evidence is called by either party at the outset of the trial.

> Finally, there is no evidence, or circumstances, which suggest that the plaintiff will be unfairly prejudiced if the plaintiff proceeds dux Litis.
>
> The established principles and the rules of this court provide that the plaintiff will proceed first where the burden of proof on a question rests on the plaintiff.
>
> I do not consider there is reason in this case to depart from the established principle.

15. A similar approach was taken by Kearney J in *Kypreos and Nalbalco Pty Ltd* [1999] NTSC 60, which relevantly concerned proceedings in the Work Health Court.

> The question of who should be "dux Litis" in an action, or in a particular issue in an action, is intimately linked with the identification of the central proposition in issue, and of the party on whom the legal burden of proving that proposition lies. See, for example, *June D' Rozario & Associates Pty Ltd v Makrylos* (1993) 112 FLR 31 at 315. Generally, but not always, the person against whom a verdict would be given if no evidence were called on either side, is entitled and bound to begin. To determine who is to be "dux Litis" the question should always be: what is the fairest and most effective method of resolving the issues in question? A court of trial needs to have discretion in deciding this question. Various practices have developed in determining who is to be "dux Litis" in worker's compensation cases in other jurisdictions: see *Simpson Ltd v Arcipreste* (1989) 53 SASR 9 at 13, 22 -23; and *Harris v AGC (Insurances) Ltd* (1984) 38 SASR 303 at 308. These cases show that there is no general rule that the worker must always be "dux Litis"; and that usually the party bearing the onus of proof of the central proposition has the right and duty to begin.

16. This approach was also taken by Southwood J in *Robertson v TIO* [2005] NTSC 74.

17. In *Edwards v Airpower Pty Ltd* No AP 213 of 1995 Mildren J had occasion to consider the question of dux Litis in proceedings brought in the Work Health Court. [7]

18. According to the Amended Statement of Claim, the appellant suffered a back injury in the course of his employment. He claimed compensation under the Work Health Act from the respondent. The respondent accepted his claim

and made payments to the applicant. By a Form 5 notice, and pursuant to s 69 of the Act, the employer reduced weekly benefits payable to the appellant on the grounds set out in the notice. The notice alleged that the applicant had partially recovered from his injury and was fit to resume his duties as a service manager for the respondent. The appellant appealed this decision to the Work Health Court.

19. The appellant also brought other claims in his application to the Work Health Court. These claims included an order that the respondent take reasonable steps to provide the appellant with suitable employment and re-training and an order for arrears of compensation for medical and other treatment and for re-training expenses. The respondent denied the appellant's entitlement to any of the relief claimed.

20. In relation to an interlocutory application brought in the Work Health Court the presiding magistrate made a ruling as to who was dux Litis with respect to the application by the appellant for an appeal against the employer's decision to reduce his payments. The magistrate ruled that:

> 1. The worker is dux Litis on the evidence generally.
>
> 2. At the conclusion of the evidence the employer bears the onus of proving, on the balance of probabilities, that the worker has ceased to be totally incapacitated for work.
>
> 3. At the conclusion of the evidence the employer bears the onus of proving, on the balance of probabilities,
>
> (a) that the worker is partially recovered from his injury;
>
> (b) that the worker is fit to resume his duties as service manager with the employer; or
>
> (c) that the worker's incapacity as a result of the work injury, for an unrestricted range of work is 30%; and that as a result of (a), (b) and (c) the worker has a capacity to earn at least

[7] This was an appeal from the decision of a magistrate sitting as the Work Health Court in an interlocutory matter.

> $410.30 per week in work reasonably available to him in accordance with ss65 and 68 of the Work Health Act.

21. The appellant challenged this ruling so far as the first part of the ruling is concerned as to who should be dux Litis.

22. On appeal the appellant submitted that where there is an appeal to the Work Health Court from an employer's decision to cancel or reduce payments of compensation under s 69 of the Act the employer bears the onus of proving a change in circumstances and therefore becomes dux Litis in the appeal to the Work Health Court.[8]

23. The respondent's main submission was that the appellant had raised issues in the application other than the issues concerned in the appeal, and as these issues included a claim that the appellant's incapacity was on-going, the issues were not confined to the question of the appellant's incapacity as at the date of the Form 5 notice, and therefore it could not be shown that the magistrate's discretion miscarried.

24. The appellant submitted that even in cases where the applicant has the onus of proof in relation to some issues, he should not be compelled to be dux Litis in relation to issues on which he does not bear the onus.

25. The respondent submitted that it is only where the onus of proof lies on the respondent on all issues that the respondent is dux Litis.[9]

26. In his reasons for judgment, Milden J made reference to the following passage from *Shaw v Beck* (1853) 8 Exchequer 392 at 398, 155 ER 1401 at 1403, per Pollock CB:

> Where there are several issues, some of which are upon the plaintiff and some upon the defendant, the plaintiff may begin by proving only those which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff

[8] The appellant relied on *AAT Kings Tours Pty Ltd v Hughes* (1994) 99 NTR 33 and *JH Constructions Pty v Davis* (unreported) decision of Asche CJ of 3 November 189 at page 10.
[9] The respondent relied upon *Ashby v Bates* (1846) 153 ER 984.

> may then rebut the facts upon which the defendant has adduced in support of his defence.

27. His Honour pointed out that this passage was cited with approval by Marks J in *Protean Holdings* at 190. His Honour added that he had in fact applied that approach in *Hart v Wren*.

28. However, his Honour stressed that the rule was not immutable:

> The practice is based on general convenience; it depends upon the issues raised as set out in the pleadings, and as Singleton LJ pointed out in *Beavis v Dawson* (1957) 1 QB 195 at 204:
>
> …the question arises as to what is the most convenient way of dealing with the matter in the interests of justice, in the interests of the parties and from the point of view of the court. Those interests are really all the same. If, after hearing submissions, the Judge decides that one course is preferable to another, his decision should in general be treated as final.

29. Mildren J made the point that in considering the question of convenience the court will usually give great weight to whether the applicant is called upon to prove a negative.

30. In disposing of the appeal, his Honour stated:

> Although, technically speaking, the appellant by disputing the notice would be called upon to show at the time of the notice there were no changed circumstances – that is, that the appellant remained totally incapacitated – that is not an unusual matter for a worker to have to prove in workmen's compensation proceedings and does not present the appellant with forensic difficulties. The grounds upon which the notice was given are known and the appellant is entitled to a copy of the opinion of Mr Schaeffer, upon which the notice is based.
>
> The only potential injustice to the appellant is that the appellant may lose the opportunity to make a no case to answer submission. Such submissions in civil proceedings are rarely made because the appellant can be called upon to elect, and this usually results in the submission being abandoned.
>
> In *Protean Holdings* Marks J at 191 considered the extent to which the plaintiff in that case would be called upon to prove a negative, and whether the interests of justice would best be served by calling upon the plaintiff to adduce all his evidence in disproof of a case with respect to which the plaintiff had heard no evidence.

In this case, the appellant by paragraph 5 of the Statement of Claim asserted, and therefore must prove, in relation to one of the other claims he raised, on-going incapacity. Mr Southwood submitted that this was not really an issue because the employer had not reduced the payments to nil. However, the respondent's reply has put that matter in dispute and that question must be proved by the applicant.

31. In upholding the decision of the Work Health Court on the question of dux Litis Mildren J said that although he may not have made the same decision he did not think it had been demonstrated that the Court 's discretion had miscarried. This case demonstrates the entirely discretionary nature of a ruling on the question of dux Litis. The only fetter on the exercise of the discretion is that a ruling on dux Litis must be legitimate and reasonable – and cannot result in a substantial wrong or be unreasonable or plainly unjust.[10]

32. In the present case the employer seeks to argue that the worker should be dux Litis on a number of grounds, which may be summarised as follows:

1. The employer does not bear the onus of proof on all questions.

2. While the employer bears the burden of proving that the worker had ceased to be totally incapacitated as at the date of the section 69 notice as well as the onus of proving that the notice was valid, the worker – according to the relevant authorities – bears the onus of proving that he was partially incapacitated as at the date of the notice as well as the burden of establishing that he has a continuing incapacity for work from the date of the notice to the date of the substantive hearing.

3. The state of the evidence is such as to leave no doubt that the worker is not totally incapacitated for work, with the result that it will inevitably fall upon the worker to prove partial incapacity as at the date of the notice and an ongoing incapacity. On that basis the "central proposition in issue" – as referred to in the authorities – concerns the worker's partial incapacity for work, in respect of which the worker bears the burden of proof.

4. The balance of convenience lies with the worker proceeding first for the following reasons:

    (a) The validity of the section 69 notice is capable of being determined by reference to the notice itself, and does not

[10] See *Edwards v Airpower Pty Ltd* No AP 213 of 1995.

require oral evidence to be given by either party (with the possible exception of the worker).

(b) Even if the worker established that the section 69 notice was invalid , the employer could rely upon the pleaded counterclaim and defence to counterclaim to pursue a finding that the worker has ceased to be incapacitated for work, by reason of his earning capacity in other work. If the employer succeeds on that issue, the Court will be requested to order the effect of that finding as from the date of cancellation of payments in any event.

(c) The evidence overwhelmingly shows that the worker is not totally incapacitated for work and the real issue is whether the worker has an ongoing partial incapacity.

(d) The extent of the worker's partial incapacity for work requires the worker's evidence as to the restrictions he experiences as a consequence of his injury, his training, work experience and all of the matters upon which experts have made their assessment of his incapacity and of his earning capacity. Consequently evidence as to the worker's earning capacity can be more readily provided to the Court after the worker has given his evidence as to those various aspects.

33. After carefully considering the parties' submissions and having due regard to the general principles governing the burden of proof under the *Workers Rehabilitation and Compensation Act* ,as well as the various approaches to determining who is to be dux Litis in workers compensation proceedings, I have concluded that the employer should be dux Litis.

34. A number of factors have led me to that conclusion:

1. Despite the fact that the Statement of Claim seeks relief in the form of a re-instatement of benefits on the basis of an on –going incapacity for work (which might suggest an "action on the merits" in respect of which the worker would bear the onus of proof), the worker's Statement of Claim is confined to an appeal against a decision to cancel benefits pursuant to s 69 of the Act. [11]

[11] It is significant that the worker's response to the cancellation of his weekly compensation payments was not to make an application to the Work Health Court for a determination of liability and/or order as to the amount of compensation payable by the employer to the worker as occurred in *Northern Cement Pty Ltd v Ioasa* (unreported Supreme Court of the Northern Territory Martin CJ 17 June 1994). Had that been the worker's response in the present case then he would not have been able to resist being dux Litis.

2. In light of that characterisation of the pleadings, *Ju Ju Nominees Pty Ltd v Carmichael* [1999) 9 NTLR 1 is authority for the following propositions:

   (a) The employer carries the onus of establishing the change of circumstances warranting the cancellation or reduction of the amount of weekly compensation pursuant to s 69: *Morrisey v Conaust Pty Ltd* (1991) 1 NTLR 183 at 189; *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 190-191; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73.

   (b) If the employer asserts that the worker has ceased to be incapacitated for work, then it assumes the burden of proof: *AAT Kings Tours Pty Ltd v Hughes.*

   (c) If the employer succeeds in proving an assertion that total incapacity for work has ceased, demonstrating a change in loss or earning capacity, the onus of proving any partial incapacity for work passes generally to the worker: *Barbaro v Leighton Constructors Pty Ltd* (1980) 44 FLR 204 at 223; *AAT Kings Tours Pty Ltd v Hughes* at 191.

   (d) An employer is dux Litis in an appeal against an employer's decision to cancel benefits under s 69 of the Act: *J H Constructions Pty Ltd v Davis* (unreported Supreme Court of the Northern Territory Asche CJ 3 November 1989; *Northern Cement Pty Ltd v Ioasa* (unreported Supreme Court of the Northern Territory Martin CJ 17 June 1994).

3. What is significant is that the present proceedings are in the nature of an appeal against cancellation of benefits, from which it must follow that the employer is dux Litis.

4. What is also significant is that the burdens of proof borne by the worker only pass or shift to the worker in the event that the employer discharges its burdens of proof. There is no burden of proof on the worker unless and until the employer has discharged its burdens.

It is also significant that the worker did not seek, in his Statement of Claim, to widen the scope of the issues for trial beyond an appeal under s 69 of the Act. Had he done so then the worker would have faced the prospect of being dux Litis.

5. The employer's argument that as there is no doubt on the evidence that the worker is not totally incapacitated for work – and therefore the "central proposition in issue" is the extent of the worker's partial incapacity for work - is a case of "putting the cart before the horse". The Court is not in a position to form any view about the worker's total incapacity for work until it hears the evidence. At this stage of the proceedings the "central proposition in issue" relates to the change of circumstances that is said to have justified the giving of the Form 5 notice (that is the alleged cessation of the worker's total incapacity for work) as well as the validity or otherwise of the notice.

6. The employer seems to have reversed the onus of proof in its submission that even if the worker established that the notice was invalid, the employer could rely upon the pleaded counterclaim and defence to counterclaim to pursue a finding that the worker has ceased to be incapacitated for work, by reason of his earning capacity in other work. As earlier acknowledged in the employer's submissions the employer has the onus of proving that the notice was valid: it is not for the worker to establish that the notice was invalid. Putting that aside, if the notice is found to be invalid the employer can still rely on its counterclaim. However, the counterclaim having been put in dispute by the worker, the employer bears the onus of proving the matters pleaded in the counterclaim[12] and should be dux Litis in relation to those matters.[13]

7. The Court is not persuaded that the evidence as to the worker's earning capacity can be more reliably given to the Court after the worker has given evidence as to the extent of the worker's partial incapacity. But even if that were so, when one has regard to all of the other relevant considerations the balance of convenience does not lie with the worker commencing.

8. Overall the balance of convenience lies with the employer being dux Litis and the employer will not be unfairly prejudiced or otherwise suffer an injustice by commencing.

9. A ruling that the employer should be dux Litis in the present proceedings is the most convenient way of dealing with the

[12] This is consistent with the general proposition that the burden of proof rests on the party who asserts propositions of fact: - "he who asserts must prove": *Currie v Dempsey* (1967) 69 SR(NSW) 116 at 125.
[13] It is noteworthy that in *Swanson v Northern Territory of Australia* [2006] NTSC 88 at [12] it was noted by the Court that senior counsel for the employer accepted that he was dux Litis in both an appeal brought by the appellant and also on the matters raised by the counterclaim.

proceedings in the interests of justice and in the interests of the parties, as well as from the perspective of the Court.

35. Accordingly, the Court's ruling is that the employer should be dux Litis.

36. I will hear the parties as to any ancillary orders, including any order for costs.

Dated this day of 2013

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Dr John Allan Lowndes
DEPUTY CHIEF MAGISTRATE