CITATION:	*Renee Krum v Darwin Greyhound Association of the NT Inc* [2023] NTWHC 5
PARTIES:	Renee Krum
	v
	Darwin Greyhound Association of the NT Inc.
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	CIVIL
FILE NO(s):	2020-00141-LC
DELIVERED ON:	30 March 2023
DELIVERED AT:	Darwin
HEARING DATE(s):	6 to 9 April 2021, 10 September 2021
DECISION OF:	Judge Macdonald

CATCHWORDS:

Return to Work Act 1986 (NT) – s 69, s 104; Sequela

Return to Work Act 1986 (NT)

Lee v MacMahon Contractors Pty Ltd [2018] NTCA 7
Laminex Group Pty Ltd v Catford [2021] NTSC 92
Newton v Masonic Homes Inc [2009] NTSC 51

REPRESENTATION:

Counsel:

Worker:	Mr B O'Loughlin
Employer:	Mr D McConnel SC

Solicitors:

Worker:	Halfpennys
Employer:	HWL Ebsworth Lawyers

Decision category classification:	B
Decision ID number:	2023 NTWHC 5
Number of paragraphs:	49

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

No. 2020-00141-LC

BETWEEN:

Renee Krum

Worker

AND:

Darwin Greyhound Association of the NT Inc

Defendant

REASONS FOR DECISION

(Delivered 30 March 2023)

MACDONALD LCJ

Background

1. On 22 November 2002, Ms Renee Krum (the Worker) was employed by the Darwin Greyhound Association of the NT Inc (the Defendant) in office administration and hospitality duties, and was a "worker" within the meaning of the *Return to Work Act 1986* (NT) (RTW Act).[1] On that date the Worker fell from a stool while adjusting a television and fractured her left and right wrists. Hospitalisation and remedial surgery ensued, including taking bone from her left knee to assist the open reduction and internal fixation to the left wrist, together with a skin graft. Further surgery to the Worker's leg was also subsequently required, due to infection.

2. The Greyhound Association's work health insurer was Territory Insurance Office (the Employer), who accepted liability for the injuries to the Worker's wrists and consequent injury to her leg, and commenced payment of benefits under the RTW Act, being weekly benefits and medical and rehabilitation costs.

3. The physical injuries (Injuries) and consequent surgery caused the Worker significant pain. It is also fair to conclude that, for whatever reason(s), the respective hopes and expectations of the Worker and Employer did not meet happily in relation to management of the injuries and consequent claim.

4. Sometime in early 2003 the Worker first saw a psychiatrist, Dr Petros Markou, who informed the Employer that the Worker was suffering a "*major depressive episode*" which he considered was "*completely related to the injuries that she has sustained while at work*".[2] The Worker then saw a number of other psychiatrists over the ensuing 18 or so years,

[1] At that time the Worker's surname was *Thompson*, as will be apparent from various of the documentary evidence at hearing.
[2] Exhibit W18 - Folio 1

with the Employer neither expressly accepting or denying liability for any secondary or consequential psychological or mental injury (Sequela) of the physical injury for which it accepted liability.

5. On 21 November 2019, the Employer issued a notice under section 69 of the RTW Act reducing the Worker's weekly benefits to $392.37 per week (the Notice). The basis of the Notice was essentially that each of an occupational physician and a consultant psychiatrist, namely Dr Robin Mitchell and Dr Wasim Shaikh respectively, had opined that the Worker had capacity to work 20 hours per week.

The Pleadings

6. The Worker sought mediation in relation to the Notice, which occurred on 7 January 2020 with no change to the Employer's position resulting. The Worker then commenced proceedings by statement of claim filed in the Work Health Court, such that it was the Notice which precipitated the proceeding.[3]

7. As is often the case in complex worker's compensation matters, the pleadings progressed through a number of iterations. Ultimately the pleadings comprised an Amended Statement of Claim filed by the Worker on 28 April 2021 (Claim) and a Further Amended Notice of Defence (Counterclaim)[4] filed by the Employer on 15 September 2021, with a Defence to Counterclaim (Defence to Counterclaim) filed by the Worker on 23 March 2021 remaining extant.[5]

8. On the question of "injury" within the meaning of the RTW Act, paragraph 3 of the Claim pled the (physical) Injuries, and then paragraph 4A of the Claim essentially asserts that as a consequence of the accepted physical injury "..*from at least 2005 the Worker suffered a consequential mental injury*", being the Sequela referred to above. Paragraph 4C of the Claim then contends that "*The Worker has been totally incapacitated by the* [Sequela] *and is entitled to weekly benefits for incapacity*…" due to the Sequela. That pleading is understood to be in relation to the point in time of the Notice and ongoing. Paragraph 6B also contends that the Sequela had by "*on or about September 2020 … developed to also include a Generalised Anxiety Disorder*".

9. The Employer by paragraph 4A of its Counterclaim denies any Sequela whatsoever, both prior to and following 21 November 2019.[6] Logically, the Employer also contends that from or before 21 November 2019 the Worker has not been totally or partially incapacitated for work due to any Sequela. By paragraph 5 of the Counterclaim the Employer maintains or confirms the validity and effect of the Notice. The Counterclaim also denies that the Worker is entitled to any relief sought and contends that the Claim should be dismissed with costs. Paragraphs 1 to 10 of the Employer's Counterclaim are then reiterated for the purpose of its counterclaim, and both s 69(2)(d) and s 104 of the RTW Act are expressly invoked.

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[3] The proceeding is an "*appeal*" under s 69, as compared with an "*application*" under s 104 of the RTW Act.

[4] The first 10 paragraphs of that pleading comprise the Employer's defence, and then proceeds by paragraphs 11 through to 17 to plead an amended counterclaim. That counterclaim calls up and repeats paragraphs 1 to 10, in readiness for the possibility that the Notice may be found invalid.

[5] It is noted that paragraph 4A of the Worker's Amended Statement of Claim pleads "a consequential mental injury within the meaning of the Act", and that some issue concerning WPI was touched on in submissions, although not including s 13A of the RTW Act.

[6] With an alternative that if any Sequela existed, it did not affect the Worker's entitlement to weekly compensation paid up until 5 December 2019.

10. The remainder of the Counterclaim pleads that the Worker has since 21 November 2019 been capable of working part-time at a level of 20 hours per week or, alternatively, some lesser number of hours to be determined. The effect of the Employer's pleadings is that the Worker is only partially incapacitated and that none of that acknowledged incapacity is the product of the Sequela alleged by the Worker.[7]

11. The Worker's Defence to Counterclaim repeats the pleadings of her Claim and essentially denies the Counterclaim, reiterates the alleged Sequela, and then pleads total incapacity "as a result of the Injury and/or the Mental Injury", so the physical injury and/or the Sequela.

The Hearing and Evidence

12. As would be expected with any claim of its age, significant administrative and medical documentation in the matter has been generated over time. The exhibits tendered at hearing ran to well in excess of 500 pages, despite the parties' counsel and solicitors having been discerning in what was necessary and relevant.

13. A hearing book comprising much of the documentation referred to was tendered at the commencement of the hearing and became Exhibit W1. A further 21 exhibits were tendered during the course of the hearing, variously by the Worker and Employer, and marked consecutively and accordingly.[8]

14. The hearing commenced on 6 April 2021 and proceeded over 4 days, with the evidence concluding on 9 April 2021. The Court also had the benefit of counsel's extensive written submissions, orally supplemented and highlighted to the court on 10 September 2021.

15. The Worker gave evidence first, taking the whole of 6 April 2021. Occupational physician Dr Peter Wilkins, the Worker's general practitioner Dr Antonio De Sousa, and psychiatrist Dr Ashish Takyar were then called by the Worker on 7 April 2021 and cross-examined. The Worker's further evidence was from her husband, Mr Scott Krum on 8 April 2021. The Employer then called evidence from occupational physician Dr Robin Mitchell, occupational psychologist Justin Clark, and psychiatrist Dr Wasim Shaikh. Other expert evidence was tendered by consent. The evidence also included surveillance footage from around 16 May 2014 through to 19 May 2014, 6 April 2015, 19 November 2016 through to 22 November 2016, 17 February 2019 and 18 March 2020.

The Issues

16. Having regard to the pleadings, evidence and counsel's extensive submissions which the Court had the benefit of, I consider the issues for determination resolved to the following primary questions. Issues concerning onus are also discussed below, the conclusions on which inform the manner in which the issues are characterised.

    (i) Was the s 69 Notice valid in its terms and effect?

    (ii) Did the Employer accept liability for the asserted Sequela?

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[7] Which position is consistent with the content and purported effect of the Notice.

[8] The Exhibits Register or "Log" refer. The court also had the benefit of councils extensive written submissions

(iii) Did the Worker sustain the asserted Sequela and, if so, was it out of or in the course of employment?

(iv) If so, does the Worker suffer any incapacity for work as a result of the Sequela?

(v) If so, to what extent is the incapacity partial or, alternatively, total?

17. The Employer's acceptance of the physical injury sustained 22 November 2002 was communicated to the Worker by letter dated 10 December 2002.[9] It may be accepted that the extent of the injury properly the subject of the claim then expanded to include the physical consequences of a graft taken from the left leg for the purpose of surgically addressing the fractured to the left wrist, and associated pain. Those aspects were not the subject of any contention on the pleadings which, in terms of injury, focused on the Worker's allegation of a secondary or consequential psychological or mental injury (Sequela), and associated relevant procedure prescribed by the RTW Act.

18. The initial focus of the pleadings was the validity or otherwise of the s 69 Notice dated 21 November 2019. The Employer bears the burden of proving the validity of the Notice.[10]

19. The s 69 Notice and associated documents comprised folios 15 to 30 of Exhibit W1 and precipitated the proceeding. The first page of the Notice states that the decision to reduce the amount of weekly benefits payable is "*in relation to your claim for compensation dated 6 December 2002 (the claim) for bilateral fractured wrists (the injury) suffered on 22 November 2002*" and noted that the Employer "*accepted the claim on behalf of the employer for bilateral fractured wrists*". The Notice then refers to a report of occupational physician Dr Robin Mitchell dated 23 April 2019, including that he "*reported as follows*";

A9.4 Do you agree with the current certificate of capacity and/or the Worker's reported restrictions on work capacity? If not please provide your reasons.

No. There is no current capacity certificate however Mrs Thompson has survival spondylosis and, as a consequence, her capacity for some physical activities is reduced. That reduction in capacity has been taken into account in my recommended restrictions.

And

In a job which has physical requirements within my recommended restrictions this is Thompson will not be placing stress on her neck of the nature that might limit her capacity to work full-time hours. That is to be compared to a job with physical demands exceeding my recommended restrictions where, due to pain or other symptoms resulting from stress on her neck she would not be fit for full-time work and would be expected to have a reduced capacity for hours to work, with the capacity depending on the nature of the job and the associated physical demands.

20. Immediately following the above paragraphs in A9.4 Dr Mitchell seals off his opinion with; "*While Mrs Thompson considers herself unfit for work, in my opinion based on the reasons given above she has a current physical capacity to work full-time hours in jobs which are within my recommended restrictions, and for which Mrs Thompson is otherwise qualified*."

[9] Being, at that stage, "*fractured left distal radius and right scaphoid*" - Folio 14 of Exhibit W1.

[10] *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [26].

The reader would generally conclude that the "*reasons*" referred to would be based on the facts set out immediately above and associated with the reasons and ultimate opinion.[11]

21. It is noted that the report of Dr Mitchell dated 23 April 2019 to which the Notice refers correctly describes the Worker's physical injuries at paragraph A2.2, but at A9.4 descends to the above. The Worker was provided with a copy of Dr Mitchell's report prior to the Notice being issued in November 2019, and it is also noted that Dr Mitchell subsequently corrected or 'explained' the misdescription of the Notice by reports dated 22 January 2020 and 21 October 2020.[12]

22. However, in my view it is also significant that on 27 November 2019 the Worker wrote to the Employer following receipt of the Notice. That letter begged to differ with a large number of propositions and conclusions contained in Dr Mitchell's April 2019 report and reports of other clinical and professional practitioners involved in management or consideration of the Worker's injuries, rehabilitation and capacity. Amongst those things, the letter refers to paragraph A9.3 and states; "*It is at this point I believe Dr Robin Mitchell is reporting on someone else. He is stating that I could work a full week and overtime but is saying I have **cervical spondylosis** and not placing **stress on her neck**. My neck has never been part of my claim. I have been unable to work at all for 17 years and have to take 16 tables* (sic) *a day just to get by. I believe Dr Robin Mitchell is now reporting on another case and his points are therefore null and void because of this. This makes all those reporting after him irrelevant because it is misinformation*".[13]

23. The prescribed and other requirements concerning s 69 notices have been discussed in a large number of the authorities, significantly by the NT Court of Appeal in *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7, most recently applied in *Laminex Group Pty Ltd v Catford* [2021] NTSC 92.[14]

24. Section 69 requires that the Notice be a statement including; "*setting out the **reasons** for the proposed … reduction*" and, crucially, that "*the reasons set out in the statement … shall provide **sufficient detail** to enable the worker to whom the statement is given to **understand fully** why the amount of compensation is being … reduced*" (**emphasis** added).[15] It is noted that an objective test is to be applied in the application of s 69, including having regard to the prudent course of a worker consulting an appropriate legal practitioner for explanation and advice.[16]

25. The other clinical and professional views referred to in the Notice post-dated Dr Mitchell's report, and it may be inferred that each of them had and read Dr Mitchell's report for the purpose of forming their opinions. It cannot be assumed or inferred that all contributors to the content of the Notice, including Dr Mitchell, simply proceeded on the basis that the erroneous reference to cervical spondylosis (and physical consequences which flowed from it) was to be ignored. Due to its date of issue, it can also confidently be concluded that the first page of the Notice accurately describing the Worker's primary physical injuries was not before Dr Mitchell or others as part of their consideration, so is of no assistance in that regard.

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[11] Akin to the logic previously demanded by *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743.
[12] Folios 193 to 198 and 203 to 221 of Exhibit W1.
[13] Second folio of Exhibit W4.
[14] *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7, and the authorities cited at [21], and paragraphs [37] to [39].
[15] Sections 69(1) and (3) of the RTW Act.
[16] *Newton v Masonic Homes Inc* [2009] NTSC 51, [16].

26. The Notice provided extensive information, with an apparently important "*detail*" being patently incorrect. In my view, the misdescription was foundational and had the capacity to affect or infect Dr Mitchell's "*reasons*" and opinions and those of other clinicians and professionals involved. The error had a definite prospect of impacting the "*reasons*" for the reduction set out in the Notice. The misdescription, when provided to the Worker, also constituted significant information likely to prevent, rather than enable, the Worker "*…to understand fully why the amount of compensation is being … reduced*". That would be so even on obtaining the advice or explanation of a legal practitioner, who would be unlikely to shed any acceptable clarity on the relevant "*detail*" or the "*reasons*".

27. The Court of Appeal's statements concerning the extent to which s 69 notices must comply with the provisions are apt to the subject Notice.[17] The misdescription of the Worker's injuries prevented and full or proper understanding of the rationale and basis for Notice, even with assistance from a lawyer.

28. For those reasons I consider that the Notice was invalid and of no effect.[18] Regardless, the effect of the pleadings is that the issues otherwise properly raised by the pleadings are to be determined.[19] That is particularly in relation to the Sequela "*mental injury*" asserted by the Worker.

29. It is also my conclusion that, other than to essentially deny any mental health issue being relevant to the partial incapacity which the Notice acknowledged, the Notice did not engage with the asserted Sequela which the Employer was on notice of.[20] Although the Worker probably had no alternative given the manner in which the Employer had approached the mental health issues throughout the life of the claim and at the time of serving the Notice, it is also my conclusion that the Worker's 'appeal', through their pleadings, broadened the issues for determination of the Work Health Court.[21] In my view the proceeding bears significant similarity to a usual s 104 Application, which the Worker had capacity to bring at any time during the life of the claim.[22]

30. The first indication of the alleged Sequela was in letters of Psychiatrist Dr Petros Markou in February and March 2003.[23] Those letters were to the Worker's then GP, Dr George Chong-Wah following referral, and noted symptoms of depression and that an anti-depressant had been prescribed. The Employer then had the Worker examined by Consultant Psychiatrist and Psychologist Dr Philip Brown on 6 August 2003. Dr Brown's opinion in August 2003 was that the Worker "*… has developed an Adjustment Disorder of mild severity as the result of the limitations from a series of complications from her fractured wrists. She is emotionally over reacting to her situation and has not resolved her anger. Her psychological condition is the result of her employment as it is the direct effect of*

[17] *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [21], citing *Collins Radio Constructors v Day* (1998) 143 FLR 425 and *Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1

[18] Noting that determination has no regard for a query concerning who had signed the Notice, or any possible issue concerning certification which, on a plain reading of s 69(3) only applies to cancellation of benefits, although *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [21](a) and (c) indicate otherwise.

[19] Requiring remaining issues raised by the Amended Statement of Claim of 28 April 2021, the Further Amended Notice of Defence (including Amended Counterclaim) dated 15 September 2021 and the Defence to Counterclaim dated 23 March 2021.

[20] The Notice refers to Dr Wasim Shaikh's report of 26 August 20219, but simply advises that "*He cannot justify a psychiatric basis for your reported incapacity for work*".

[21] Through the facts pled by paragraphs 4A, 4B, 4C and (ultimately) 6A.

[22] Being "*proceedings before the Court for the recovery of compensation under Part 5 or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation*".

[23] Part of Exhibit W18.

complications and consequences of her injury at work". There then followed over the ensuing 17 years or more, involvement of a number of psychiatrists concluding a range of diagnoses, as is common in the field. The Employer met the cost of the Worker's treatment and medication in that regard.

31. It was not substantively suggested by the Employer that they were not 'on notice' of the alleged Sequela. Had the court been required to determine the issue of "notice", it could have confidently been found.[24] The real procedural issue for determination is whether the Employer had at any time over the life of the claim accepted liability for the Sequela alleged.

32. The Worker's submissions point to a range of evidence indicating the Employer had accepted liability for the Sequela.[25] In my view the Worker's position has greatest weight in the context of the Employer having effectively paid "*compensation*" in respect of medical expenses apparently incurred in relation to the alleged Sequela.[26] That the Employer also required the Worker to attend and submit to a number of medicolegal psychiatric examinations directed to diagnosis and causation is also relevant.

33. The Employer was fully aware of the asserted Sequela, however awareness of potential liability cannot simply translate to acceptance of actual liability.[27] The various documentation and statements from the Employer referred to in paragraphs 7.5 to 7.14 of the Worker's Submissions dated 13 August 2021 do not amount to unequivocal acceptance of liability for the Sequela. The reference to resolution of the Employer's "*refusal to accept liability for psychological counselling*" reads primarily as a commitment to meet the costs of treatment, which it did, rather than general liability for the Sequela. A willingness by an employer's insurer to meet medical expenses incurred, regardless of whether the issue of liability has been unequivocally resolved, does not *per se* amount to 'acceptance'.[28] Similarly, it is not my conclusion that any of the weekly benefits paid by the Employer can be specifically and directly attributes to the asserted Sequela.

34. In relation to consequential or secondary injury, there is no requirement to comply with some provisions or processes of the RTW Act which apply a primary injury.[29] That reality, together with the Employer's conduct in this matter, produced uncertainty in the Worker's position. The Employer sought and received extensive psychiatric opinion in relation to diagnosis and aetiology over an extended period of time, which opinions advised of psychological issues of clinical significance, and their connection to the physical injury for which liability had been accepted. Despite the capacity in a worker to make application under s 104 of the RTW Act, had a finding of deemed acceptance been open, the court would have been strongly inclined.[30]

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[24] See *Van Dongen v Northern Territory of Australia* [2009] NTSC 1 at [41], *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [24], and *Sunbuild Pty Ltd v LCJ & Anor* [2020] NTSC 38 at [12] to [13] concerning accepted procedure.

[25] Worker's submissions dated 13 August 2021 at paragraphs 7.3 to 7.18.

[26] Section 3 of the RTW Act defining "*compensation*" in very broad terms. The Employer also sought various medicolegal expert evidence from psychiatrists, which generally concluded up until 2019 that mental health issues consequent on or secondary to the physical injury, existed.

[27] *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [34] and [35].

[28] *Lee v MacMahon* (supra).

[29] *Lee v MacMahon Contractors Pty Ltd* [2018] NTCA 7 at [23] to [27] and *Sunbuild Pty Ltd v LCJ & Anor* [2020] NTSC 38 at [11] to [13].

[30] Compare s 4 and s 80(2) of the RTW Act. I also note that any "estoppel" which might possibly be raised would require express pleading.

35. Nonetheless, I do not find that the Employer accepted liability for the asserted Sequela. It therefore falls to the Worker to prove the Sequela and any incapacity arising from that.[31] That is particularly due to the conclusion that, by their pleadings, the Worker's Claim widened the scope of the proceedings.[32]

36. As noted, the Worker adduced her evidence first at hearing. The Worker's oral evidence was the subject of extensive and critical cross-examination and, subsequently, written submissions, including putting her credit in issue directly.

37. In both examination-in-chief and cross-examination Worker presented as distressed and anxious, but sought to give a good account of herself. The Worker persistently displayed some unusual behaviour, particularly in using pressure from her right thumb to apparently relieve discomfort or pain in her left wrist and hand. In cross-examination aspects of the Worker's evidence appeared defensive and, at times contrary. In my view the Worker's memory was objectively poor, and she was at times confused. That conclusion is open on the basis of various incomplete answers given in evidence, which were then assisted by reflection or reminder. It is noted that, on one view, a conflict existed between the Worker's evidence concerning her capacity to be out of doors and interacting with people, particularly in relation to dropping her children to primary school, and one or more answers in cross examination. However, I accept the context in which the Worker explained she understood the question and answered in, being how she was coping and functioning at the time of the hearing.

38. Given the issues in the proceeding and the confronting nature of formally giving evidence in court, I consider that the information provided by the Worker in a clinical environment when attending medical specialists and the like, would be more easily given by the Worker, and in a calmer fashion.

39. Nonetheless, a good degree of consistency existed between what the Worker has told clinicians over time and her oral evidence to the court.[33] One example was in relation to the two years the Worker spent in Wales, accompanying her serviceman husband on posting, until 2018. On return to Australia the Worker's advice to clinicians was that her existence in Wales was improved, and that she was a good deal better by the time of return. This was also freely conceded by the Worker at court. That period, including having regard to the differences in her existence and apparent perceptions, is good evidence and insight into both the Worker and the alleged Sequela.

40. The Worker's husband, Mr Scott Krum, gave evidence-in-chief by a statement tendered by consent, followed by cross-examination. It should be noted that Mr Krum has more to do with the Worker than anyone. I do note that Mr Krum can be said to have benefited financially over the life of the claim, and depending on the outcome of the Claim and

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[31] *Newton v Masonic Homes Inc* [2009] NTSC 51 at [24] and *Laminex Group Pty Ltd v Catford* [2021] NTSC 92 at [26], noting that were any s 104 Application made by the Worker, that onus would also prevail in the absence of any acceptance of liability. I take the statements in *Lee v MacMahon* (supra) at [21](e) and [43] to apply to situations where the cancellation or reduction is in relation to an accepted injury. Here, the s 69 Notice addressed the injury which had been accepted, took the position that weekly benefits had never been paid for any unaccepted Sequela, and simply relied on a psychiatric opinion to characterise the asserted Sequela as irrelevant.

[32] *Laminex Group Pty Ltd v Catford* [2021] NTSC 92 at [26], including the authorities cited at footnote 19 therein, but noting that the Worker probably had little choice but to do so in all the circumstances, the "mental injury" not having been accepted.

[33] Noting that, on one view, the Worker has been obdurate from the outset and throughout management of her claim. See Exhibits W4 for example.

Counterclaim has much to lose. Depending, it would be a simple matter to conclude his evidence to be partisan, and accord it little or no weight. However, that is not my conclusion. Mr Krum presented as honest and unguarded, but also forthright or direct. Although I accept that at times Mr Krum is engaged in employment (including away from home at times), in relation to the Worker's activities I consider Mr Krum's evidence on the Worker's functioning and capacity is both significant and accepted.

41. The medical evidence led by the Worker was generally supportive of a finding of total incapacity. I consider Dr Wilkins' evidence to be particularly reliable and significant, despite the period which had elapsed since he last examined the Worker in person. The evidence of neither Dr De Sousa nor Dr Takyar was as sound or influential in my conclusions.[34] Nonetheless, some of their evidence was significant.

42. The Employer's evidence relied heavily on the reports of Dr Robin Mitchell, extracts of the first of which were included in the body of the Notice discussed above. That report was a multidisciplinary product of the firm ECA, conducted by Expert Experts Pty Limited.[35] The professional advice provided by Mr Justin Clark and Miss Rhonda Nohra rely upon the clinical views and conclusions of Dr Mitchell, in that those members of the team carry out their assessments and functions within the medical parameters and clinical advice and conclusions provided by Dr Mitchell.[36]

43. Despite the potential confounding or confusing aspects of paragraph A9.4 in the first report as at November 2019, it was the concerted conclusion of the experts comprising the multi-disciplinary ECA team that the Worker had capacity to work 20 hours per week. That conclusion was also supported by Dr Shaikh's evidence. It should be noted that Dr Mitchell provided subsequent and clarifying reports for the purpose of determining the Worker's capacity.

44. Prior to giving evidence, Dr Shaikh had provided reports in August 2013, December 2015, November 2016 and August 2019. Typographical aspects of the reports were corrected on 9 April 2021.[37] Dr Shaikh explained his references to "*abnormal illness behaviour*", including that the Worker "*… was perhaps overstating symptomology and impairment*", so "*I, therefore, felt that there was evidence to suggest abnormal illness behaviour*". That was on the basis of various aspects, including that the Worker wore a Fitbit device which recorded 12,000 steps on the day of examination.[38] Dr Shaikh also confirmed that the possible behaviour referred to was not malingering (so for external gain) but for "*internal gain*". On the last occasion Dr Shaikh examined the Worker, being August 2019, he said; "*I struggled to justify* [any] *material incapacity as a result of her psychiatric condition I felt if she were to work*". That included on the basis that the Worker had confirmed to Dr Shaikh that she had just returned from two years in

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[34] Dr De Sousa has treated and supported the Worker for a long period of time, however is a General Practitioner rather than practising any relevant speciality, and his protective position in respect of the Worker's vulnerabilities do not appear to have advanced that part of her rehabilitation which might result in employment. Dr Takyar's steadfast or even semantic position in relation to some aspects of cross examination did not assist determination of some issues.
[35] Page 136 onwards of Exhibit W1.
[36] Transcript page 171.5.
[37] Transcript pages 202 onwards.
[38] In cross examination Dr Sheikh conceded that the 12,000 steps could be explained by the gym attendance that she reported to him in August 2019.

Wales, had engaged more and to a better capacity overseas and that her symptoms had improved while overseas.[39]

45. I also note the surveillance evidence tendered by the Employer, detailed at paragraph [15] above. That footage was not the subject of further or detailed consideration or specialist opinion by any of the medical experts called to give evidence. The Court is left to reach its own limited conclusions on viewing the footage, which was recorded over an approximate period of six years. With one definite exception, I consider most of the footage to be revealing a very little, other than a person who at times walks with a limp to the left leg, and generally slowly and predictably. It is clear that the Worker obtains some pleasure in spending leisure time with her children, as she should. In my view the only footage of significance was recorded in May 2014. At that time it is clear that the Worker was capable of lifting five bags of 'full-size' potting mix from a ground-level hardware store shelf onto the base level of a shopping trolley. Secondly she was also capable of unloading those bags into the boot of her motor vehicle. I also note that at the time of unloading into the vehicle, by the fourth or fifth bag, the Worker appeared to suffer discomfort in her left wrist. That is surmised due to the use of her right thumb to press into her left wrist, immediately following the unloading.

46. Having considered the Worker's evidence both in person at court and that adduced through clinical experts, I am satisfied to the necessary standard that the Worker has the Sequela pleaded by her claim, including that it arose out of employment. Namely, as a direct result of sustaining the physical injury for which the Employer accepted liability. In particular, I find that the Worker as that 21 November 2019 and continuing was, in addition to incapacity arising from her physical injury, suffering from the Sequela and an incapacity as a result of that Sequela. The Worker continues to suffer incapacity as a result of both the physical injury and the Sequela.

47. However, I am not satisfied to the necessary standard that the incapacity is total. That is, although significantly incapacitated, the Worker is not totally incapacitated for employment. In the circumstances of my view on the evidence, and due to the fluctuating nature of the Sequela, it is impossible to precisely define the extent of the current incapacity.

48. As matters stood in November 2019 and at the time of hearing, the incapacity resulting from the Sequela is more significant than the ongoing physical incapacity the product of the Injuries.[40]

49. Doing the best I can, my conclusion is that, with appropriate rehabilitation supports, the Worker should be capable of working 10 hours per week. Time will tell whether that degree of employment might be exceeded due to improved capacity.

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[39] Which aspects persisted for some time on return to Australia. For example, the Worker reported that she was also trying to attend the gym five times a week, and was being partially successful, to the level of three visits per week at that time.

[40] It is noted that the Employer's position through the s 69 Notice and paragraph 14 to 16 of the Counterclaim, is that the Worker is capable of "part-time" work, first quantified and 20 hours per week by paragraph 16. That position is in the context of there being no relevant Sequela.

Orders

(i) The Worker is partially incapacitated as a result of the Injury and Sequela.

(ii) The Worker is capable of undertaking work in employment for 10 hours per week.

(iii) The Worker's compensation under s 65 of the RTW Act is reduced accordingly from 7 December 2019.

(iv) The parties have liberty to apply for costs, including supported by written submissions and any Affidavit material relating to efforts to resolve, within 28 days.

(v) Any responses to written submissions are to be filed and served within 28 days thereafter.