CITATION:	*Mark Raymond Casey v Northern Territory Police, Fire and Emergency Services* [2024] NTWHC 3
PARTIES:	Mark Raymond CASEY v NORTHERN TERRITORY POLICE, FIRE AND EMERGENCY SERVICES
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	2023-02707-LC
DELIVERED ON:	8 July 2024
DELIVERED AT:	Darwin
HEARING DATE(s):	8 May 2024
DECISION OF:	Judicial Registrar Gordon

CATCHWORDS:

WORK HEALTH - practice and procedure – amendment of pleadings – leave to amend pleadings – material facts - insufficient particulars – modern approach to case management

Return to Work Act 1986
Work Health Court Rules 1999

Banque Commerciale SA v Akhil Holding Ltd [1990] HCA 11
Barclay Mowlem Construction Ltd v Dampier Port Authority & Anor [2006] WASC 281
Dare v Pullham [1982] HCA 70
H. 1976 Nominees Pty Ltd v Galli and Another (1979) FCA 74
MacDonnell Shire Council v Miller [2009] NTSC 46
Motor Accidents Compensation Commission v Toyota Motor Corporation Australia Ltd and Another [2023] NTSC 65
Northern Territory of Australia v John Holland [2008] NTSC 4
Stephen Nibbs v Australian Broadcasting Corporation [2010] NTSC 52
Whelan v John Fairfax & Sons Ltd (1988) 12 NSWLR 148

REPRESENTATION:

Counsel:

Worker:	Mr Moses
Employer:	Mr Roper SC

Solicitors:

Worker:	Kapetas Legal
Employer:	Finlaysons

Decision category classification:	B
Decision ID number:	[2024] NTWHC 3
Number of paragraphs:	54

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

No. 2023-02707-LC

BETWEEN:

Mark Raymond Casey

Worker

AND:

Northern Territory Police, Fire & Emergency Services

Employer

REASONS FOR DECISION
(Delivered 8 July 2024)

JUDICIAL REGISTRAR GORDON

1. The Worker, by way of Interlocutory Application filed 28 March 2024, seeks, inter alia, leave to file and serve an amended Statement of Claim. The Employer opposes the Court granting leave.

2. The Worker relies on the Affidavit of Suzi Kapetas filed 28 March 2023 and in particular, annexure "B" therein, the final draft Amended Statement of Claim, for which leave it sought. While the Employer relies on the Affidavit of David Langdon Sweet filed 7 May 2024, and in particular, correspondence from the Deponent to the Worker's legal representative dated 5 December 2023[1] which comprehensively outlines the Employers objections to the amendments sought by the Worker[2] and which was referred to extensively during submissions.

3. The crux of the Worker's substantive claim, for which he seeks compensation, is at paragraph 55 of the Amended Statement of Claim, the 'Fourth Injury'. Counsel for the Worker submitted that the logic of the claim is that the allegedly compensable injury:

[1] Affidavit of David Langdon Sweet filed 7 May 2024 at Annexure "E"
[2] Albeit an earlier draft than the one the subject of this application.

"*…was an aggravation, exacerbation, recurrence, or deterioration of the First Injury and/or the Second Injury and/or the Third Injury."*[3]

4. The Worker pleads a series of incidents and events which give rise to the alleged psychological workplace injury, which arose over a period of time, as is often the case with psychological injuries. There was no frank event which triggers the injury, rather compounding and cumulating experiences, arising in or out of the course of his Employment, which are now causative of incapacity.

5. The Worker submits that it is open and reasonable for the Worker to plead an 'open case', not limiting the ways in which the Court might find for the Worker by teasing out a number of permutations, multiple ways in which the compensable injury may have come to pass. The Employer submits that the pleading is manifestly deficient, embarrassing and demurrable[4].

6. Both parties agreed that the legal principles in relation to pleadings are well settled and much instructive case law is available to the parties and the Court.

7. The Worker relies on the Decision of Associate Justice Luppino in *Motor Accidents Compensation Commission v Toyota Motor Corporation Australia Ltd and Another*[5] ("*MACC v Toyota*") in support of the following general principles:

   a. The test for leave to amend pleadings is whether the amendments are so bad at law to allow them would be futile and lead to inevitable failure;
   b. The court, assessing amendments, is not concerned with the merits of the amended pleadings;
   c. Modern case management will allow for discretion in allowing a non-compliant pleading and minor or technical defects would not be a barrier to leave to amend; and
   d. Pleadings which provide context are allowable.

8. The Employer relied on *Banque Commerciale SA v Akhil Holding Ltd*[6] noting (references omitted):

   "*The function of pleadings is to state with sufficient clarity the case that must be met. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness."*

[3] Draft Amended Statement of Claim at paragraph 55(c), Annexure "B" to the Affidavit of Suzi Kapetas filed 28 March 2024
[4] Transcript of proceedings dated 8 May 2024 at page 10
[5] [2023] NTSC 65
[6] [1990] HCA 11

9. Pleadings are the fundamental foundations of a claim, as stated in *Dare v Pullham*[7] (reference omitted):

> "*Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party fair opportunity to meet it; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at trial; and they give a defendant an understanding of a plaintiff's claim… the relief which may be granted to a party must be founded on the pleadings."*

10. Counsel for the Employer also highlighted the burden for the Claimant to state their case in a fulsome manner, it is not for the responding party to assume or deduce the case to be met. As submitted by Mr Roper for the Employer *'it's not what we know, it's what you allege. We might have a very different view of the world to the party pleading against us, and in this case, that is so."*[8]

11. As espoused by the Supreme Court in New South Wales in *Whelan v John Fairfax & Sons Ltd*[9]:

> "*Where the Defendant seeks to ascertain the case to which he must plead and which he is called upon to meet at trial, the question is not whether he has adequate knowledge of the actual facts; it is a question of whether he has adequate knowledge of what the plaintiff will allege to be the facts, for that is the case he must meet".*

12. And endorsed by Master Luppino (as he then was) in *Stephen Nibbs v Australian Broadcasting Corporation*[10]*:*

> *"… it is not a question of whether the Defendant has adequate knowledge of the actual facts. The question is whether the Defendant has adequate knowledge of* ***what the Plaintiff will allege to be the facts****."* (my emphasis).

13. The Work Health Court is a court of pleadings where pleadings are a '*means to an end*',[11] the principles set out above in relation to Plaintiff and Defendant parties apply with equal force and gravitas to litigants in the Work Health Court, albeit, as noted by the Worker, through the lens of modern case management principles and priorities.

14. The Employers complaints in relation to the proposed Amended Statement of Claim are extensive and multi-faceted. The Employers submission is that the pleadings fail to perform the functions of a proper pleading[12]. Ultimately the Employer argues that the

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[7] [1982] HCA 70
[8] Transcript of proceedings dated 8 May 2024 at page 11
[9] 12 NSWLR 148
[10] [2010] NTSC 52 at 51
[11] *Imhoff v IBM Australia Limited* [2001] NTSC 23 per Riley J at 16
[12] Transcript of proceedings dated 8 May 2024 at page 10

Statement of Claim ought to be reduced to paragraphs 1 to 5 and to 55 and what follows. A reduction of the pleadings from 63 paragraphs (not including sub-paragraphs) to 14.

15. Broadly, the Employer argues that the offending paragraphs do not go anywhere, by in large, they do not contain a prayer for relief; they result in excessive permutations which leave the Employer guessing the case to be met; they lack the required particulars for the Employer to effectively defend the allegations and contest the claim and some pleadings appear to be in anticipation of a 'reasonable management action defence'.

16. The correspondence annexed to the Affidavits relied upon clearly shows that extensive attempts have been made by the parties to resolve the pleadings dispute, prior to the current application. Indeed, counsel for the Worker noted correspondence well in excess of the length of the draft amended pleadings, had been provided by the Employer. It is safe to say the parties could not be further apart on their assessment of the draft amended pleadings and their compliance with form and function.

17. I don't accept that the Employers position is contradictory and cannot stand, as submitted by the Worker. My understanding of the Employers position is it is an argument in the alternative, firstly it is unnecessary to plead injuries one, two and three, for which no relief is claimed, hence the pleadings could be dramatically reduced, as outlined in paragraph 14 above. But, alternatively, if you are to plead these injuries and their contributing factors, it must be done so in a manner where material facts and particulars are adequately and fulsomely plead so the Employer understands the case to be met.

18. At the conclusion of his opening submissions Mr Roper, for the Employer made the following observations:

> *"But our respectful submission is simply that, at the end of day, one shouldn't give leave to replace a deficient pleading with a* (sic) *another deficient pleading.*
>
> *Nothing is going to be achieved by that. What this court should do is simply refuse leave, but make an order allowing for my learned friend's instructor to put a further pleading to us, or to make a further application to amend, in the absence of the ability to consent. We can make it clear that unless that pleading remedies the deficiencies we have identified, we're not going to consent, so a further application might be required.*
>
> *And in that context, in the provision of your written reasons, it might assist both parties for you to point out where some of these amendments should be directed and what is appropriate and inappropriate to plead, so that we're not coming back with exactly the same document and exactly the same complaints."*

19. I share this view. For the reasons set out below, leave will not be granted for the draft Amended Statement of Claim to be filed in its current form. I have reviewed the pleadings and the submissions of the parties in order to make findings, observations and directions

that will hopefully be conducive of a resolution of the dispute (at least in relation to the pleadings) and progression of the substantive proceedings.

20. Turning then to the draft Amended Statement of Claim, and the first matter complained of, that being the pleadings in relation to the First Injury.

21. There are set out in full (original emphasis):

> *3. The Worker worked in the Major Crash Investigation Unit of the Employer for 13 years from 2006 to 2019 ("the **Major Crash Work**").*
>
> *4. In the course of the Major Crash work the Worker attended at and investigated several hundred crashes of motor vehicles, many of which involved fatalities ("the **Crash Investigations**").*
>
> *5. In the course of the crash investigations the Worker was exposed to stressful and traumatic events and situations ("the **Traumatic Exposure**")…*
>
> ***The First injury***
> *6. Between 2008 and 2009 the Worker suffered a mental injury within the meaning of s 3A of the Return to Work Act ("the **Act**") ("the **First Injury**")*
>
> *Particulars of the First injury*
> *Major Depressive Episode*
>
> *7. The First injury was caused by the Traumatic Exposure.*

22. The Worker has plead a cascading series of events giving rise to the First injury.

23. In short, 'Major Crash Work' undertaken from 2006 to 2013 caused the Worker to undertake 'Crash Investigations', resulting in 'Traumatic Exposure' and thus the First Injury, being a Major Depressive Episode was suffered between 2008 and 2009.

24. This pleading immediately falls foul of the findings in *MACC v Toyota:*[13]

> "*I agree with the Defendants in respect of the pleading in paragraph 7D. That paragraph pleads facts which occurred after the subject motor vehicle accident and that is after the punitive cause of action arose. They cannot be material facts for that reason and must be evidence."*

25. I accept the Employer's submission that events in the course of 'Major Crash Work' which spanned 13 years, concluding in 2019, being causative of an injury in 2008-2009 is a

[13] *Motor Accidents Compensation Commission v Toyota Motor Corporation Australia Ltd and Another* [2023] NTSC 65 at 57

nonsense[14]. No event beyond 2010 can be said to have contributed to the diagnosis of Major Depressive Disorder received prior.

26. I also acknowledge that this misstep can be rectified with ease. This however, is not the end of the Employers objections. The Employer questions the relevance of the First Injury, noting no relief is claimed for same and arguing the first injury appears "*entirely irrelevant to any of the matters in issue in the extant proceedings"*[15].

27. The relevance or role of the First Injury appears to arise at paragraphs 13 and 55(c) of the draft Amended Statement of Claim. At paragraph 13 the 'Traumatic Exposure' established by paragraph 5 above is linked to 'Continuing Trauma Effects' in paragraph 13, which the Worker then pleads he was continuing to suffer at the time of the allegedly compensable injury (the Fourth Injury). Although I note the 'Continuing Trauma Effects' are plead as a contextual not causative factor in relation to the Fourth Injury.

28. The First Injury is also a particular of the Fourth Injury, as follows:

> *55…*
>
> *Particulars of the Fourth Injury*
>
> *(a) A resurgence of a Major Depressive Disorder with anxious distress.*
>
> *(b) The impact on (a) of an Acute Stress Disorder.*
>
> *(c) The Fourth Injury was an aggravation, exacerbation, recurrence, or deterioration of the First injury and/or the Second injury and/or the Third Injury.*

29. The Employer argues that subsection (c) above is a material fact and not a particular. I am minded to agree. The Employer relies on the matter of *H. 1976 Nominees Pty Ltd v Galli and Another*[16] to draw the important distinction between material facts and particulars. There Northrop J established:

> "*In order to disclose a reasonable cause of action, a statement of claim must contain statements of material facts which support the claims made. Particulars are not statements of material facts; particulars perform a different purpose… The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out'…*
>
> *The function of 'particulars' under r. 6 is quite different. They are not used to fill material gaps in a demurrable statement of claim – gaps which ought to have been filed by appropriate statements of the various material facts which together constitute the plaintiffs cause of action. The use of particulars is intended to meet a further and quite separate*

[14] Transcript of proceedings dated 8 May 2024 at page 15
[15] Affidavit of David Langdon Sweet filed 7 May 2024, Annexure "E" at paragraph 2
[16] (1979) FCA 74

requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and enable him to prepare for trial"

30. Justice Northrop goes on the note that it can often be difficult to clearly distinguish between a material fact and particular and they are each capable of significant overlap.

31. Here though, I share the view of the Employer. If the Fourth Injury is to be claimed to be an aggravation, exacerbation, recurrence, or deterioration of another injury, thus the aggravation, et al. has resulted in a new, compensable injury, then in my view, it is more correctly characterised as a material fact – a fact which formulates the cause of action more so than merely a detail in the case to be met.

32. That said, I take and accept the Workers submission:

"The first complaint he makes about that is the complaint I've just mentioned; that those particulars should be pleaded as material facts. If that's the extent of his difficulty, he's not prejudiced; he knows exactly what our case is, he just thinks that formally those matters should be unitalicised and go in the - the body … or in some other paragraph rather than appear italicized there."[17]

33. It may well be that an argument for the exercise of discretion, adoption of the 'modern and flexible' case management practices espoused by Associate Justice Luppino[18], given the lack of prejudice or practical effects of the italicisation or otherwise of the pleading, may be made. Nonetheless, in my view is more correctly characterised as a material fact and so I must adopt his Honour's approach in *MACC v Toyota* "*That appears to be a material fact. Pleading of material facts in particulars is not permitted… that part of the amendment will be disallowed"*[19].

34. I note this material fact is elsewhere plead as a particular in the draft Amended Statement of Claim in relation to the Second and Third Injuries, this should be rectified throughout the claim as necessary.

35. I would also accept and adopt the Employers position that particulars should be provided of '*the date on which the First Injury was diagnosed and by whom'* and *'when and how notice was alleged to have been communicated to the Employer under s80 of the Act."*[20]

36. I should note that the *Work Health Court Rules 1999* mandate some particulars which are to form part of a claim before the Work Health Court[21], while others can be provided

[17] Transcript of proceedings dated 8 May 2024 at page 30
[18] See for instance paragraph 15 *Motor Accidents Compensation Commission v Toyota Motor Corporation Australia Ltd and Another* [2023] NTSC 65
[19] Ibid at 39.
[20] Affidavit of David Langdon Sweet filed 7 May 2024 at Annexure "E" at paragraph 15
[21] See for instance Part 8 and R9.01(3)

extrinsically, for instance in a request for further and better particulars, and their absence on the face of the pleadings may not be said to render a pleading futile. I further acknowledge that there is no application for further and better particulars on foot, however, I take the opportunity now, where an informal request for further and better particulars is in evidence before the Court[22] to endorse some of the Employer's requests. That's is not to say the issue of further and better particulars is exhausted by this decision – it is simply a timely endeavour to avoid the need further interlocutory applications. That is the case for any ongoing comments regarding particulars in this decision.

37. I turn now to paragraph 15 of the draft Amended Statement of Claim 'The First Disciplinary Treatment'. The pleading is as follows (original emphasis):

> "*In 2019 the Worker was involved in a Coronial inquest where he formed the view that one of his subordinate investigating officers had been unfairly treated by a Sergeant and by an Assistant Commissioner, both in the employ of the Employer (the **Unfair Subordinate Treatment'**).*

38. The Employer questions[23]:

> "*How is the Employer to plead to what the Worker might have subjectively made of something?*
>
> *The Worker is obliged to properly plead all the material facts relevant to the alleged unfair treatment and then properly plead the fact of the same, in each instance providing the particulars necessary to inform the Employer's response*."

39. The Employer then seeks particulars of:

> *a. the coronial inquest;*
> *b. the identity of those concerned;*
> *c. the alleged treatment; and*
> *d. the criticisms.*[24]

40. I share the concerns of the Employer. It is difficult to see how the Employer can know the case it has to meet based on this pleading. It could also be argued that the pleading does not, with sufficiently succinctness, adequately define the issues for determination at the Hearing. Also, while it might be argued that the Worker was only involved in one coronial in 2019 and details of same could be readily ascertained by the Employer, in my view the pleading falls short of the requirements established by *Stephen Nibbs v Australian Broadcasting Corporation* extracted at 12 above.

41. Paragraphs 16 and 17 suffer the same deficiencies. Although the Worker claims to no longer have access to records relating to the 'Unfair Subordinate Treatment Complaint'

[22] Affidavit of David Langdon Sweet filed 7 May 2024 at Annexure "E"
[23] Affidavit of David Langdon Sweet filed 7 May 2024 at Annexure "E" at paragraph 49 -50
[24] Affidavit of David Langdon Sweet filed 7 May 2024 at Annexure "E" at paragraph 51

and the 'First Disciplinary Action' if he is relying on their existence he must have some cursory knowledge of what he says constitutes the 'Unfair Subordinate Treatment Complaint' and the 'First Disciplinary Action', even if not the primary materials relating to same.

42. He who asserts must prove. I am not satisfied that the Employer is on notice of the case to be met.

43. The Employer also questions broadly the purpose and intention of these pleadings (and a vast many others pertaining to the First, Second and Third Injuries) given that they contain no prayer for relief and are not plead as compensable injuries, rather as contributing factors to the earlier injuries, which are in turn pleaded as contextual factors relevant, but not causative, of the Fourth, allegedly compensable, injury.

44. From this, the Employer submits, comes the excessive permutations which threaten to dramatically escalate costs, discovery and the complexity of the matter. I acknowledge their concerns.

45. The Employer says the Worker should '*pin his colours to the mast*'[25] and categorically state his case with sufficient clarity, in submissions arguing:

> *"If its Dr Ho's report you rely on why can't you just says it Dr Ho's report you rely [on]… one can say we rely on this medical report. One doesn't need to set the body of the report out in full. The provision of the identity of the doctor and his diagnosis and his report is a proper particular. Everything the doctor sees might be evidence but it remains a proper particular and the authorities are clear on that."*[26]

46. Dr Ho's report[27] details causation of the alleged workplace injury and thus, the Employer submits, should be sufficient to state the Workers case without pleading the first three injures and their respective and varied causes, vastly expanding the task of the Employer in pleading its defence to the claim and complying with its obligations as to discovery.

47. The Worker submits in reply:

> *"What we've intended to do is say: "Here are all the factors we're relying on. Either one or all of them, some number of them, are the causes of this injury which we've set out there. In terms of a DSM 5* (sic) *injury; resurgence of major depressive disorder with anxious distress, impact of that on an acute stress disorder, second disorder, and then it being an aggravation, exasperation, recurrence, etcetera, of those earlier injuries." What we've done is plead our case as broadly as possible. It doesn't change the evidence. It doesn't change what my learned friend needs to do to respond to that.*

[25] Transcript of proceedings dated 8 May 2024 at page 37
[26] Transcript of proceedings dated 8 May 2024 at pages 36-37
[27] Exhibit 1 - Report of Dr Nicholas Ho dated 2 March 2023

48. I do not see that the Employers position in this regard is without substance or merit, but ultimately, the Worker, subject to complying with Rules of Court and the legal principles which guide and govern litigation, is free to make his case in the manner he sees fit.

49. The bar to refuse leave to amend is a high one, per Luppino AsJ in *MACC v Toyota* citing *MacDonnell Shire Council v Miller*[28]*:*

> "*The test to be applied requires determination of whether "…* the amendments are so obviously bad in law that it would be futile" *to allow them. Overall that means that leave will be refused if the party proposing the amendment would inevitably fail on the pleaded issue as amended"*

50. Ultimately, I do not find that the proposed pleadings regarding the earlier injuries, their contributing factors and the multiple permutations arising are doomed to fail and accordingly there will be no refusal of leave to amend in this fashion.

51. This is of course, subject to the claim being satisfactorily pleaded with the necessary material facts and particulars, noting my comments above about deficiencies in this regard and being mindful of the findings of Justice Angel in *Northern Territory of Australia v John Holland*[29], referred to by the Employer in their submissions:

> *"The statement of claim must state with sufficient clarity the case that must be met. Material allegations of fact are not to be expressed in terms of great generality. They must inform the defendants of the case they must meet and set it out with particularity sufficient to enable any eventual trial to be conducted fairly to all parties."*[30]

52. The Employer has also queried whether some elements of the pleadings are pre-emptively attempting to deal with a presumed s 3A(2)[31] reasonable management defence, likely to be relied upon by the Employer. This is, of course, improper. A Statement of Claim need not anticipate or respond to any known or presumed defences likely to be proffered by the responding party. It must state the claim only. The proper place to respond to a reasonable management action defence would be by way of Reply. The Worker should be mindful of this requirement while re-drafting.

53. I accept that the Court is adopting a more flexible case management approach and a less zealous approach to the intricacies of pleadings and this decision should not be read as an attempt for the Court to 'micro-manage' the pleadings of the Worker, rather to assist, by making determinations on the disputed pleadings to ultimately settle the issue and allow the litigation to progress. Through the bringing of the interlocutory application and its rigorous defence it was apparent that the Court should intervene in relation to appropriate pleadings in this matter.

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[28] [2009] NTSC 46
[29] [2008] NTSC 4
[30] Ibid at 10
[31] *Return to Work Act 1986*

54. As Chief Justice Martin in *Barclay Mowlem Construction Ltd v Dampier Port Authority & Anor*[32] noted:

> *"In my view, the advent of contemporary case management techniques and the pre-trial directions… should result in the court adopting an approach to pleading disputes to the effect that only where the criticisms of pleading significantly impact on the proper preparation of the case and its presentation at trial should those criticism be seriously entertained."*

55. For the reasons set out above I propose to make the following orders:

    a. The Worker's application for leave to file and serve an Amended Statement of Claim, in the form provided at Annexure "B" to the Affidavit of Suzi Kapetas filed 28 March 2024 is refused;
    b. The Worker is to provide the Employer with a further draft Amended Statement of Claim within 21 days;
    c. The Employer is to provide its consent or otherwise to the filing of the further draft Amended Statement of Claim within 21 days of receipt;
    d. Should the Employer not consent to the filing of the further draft Amended Statement of Claim the Employer is to provide in writing details of any alleged deficiencies at the time of notice of their refusal to consent;
    e. The matter is adjourned for Mention only on 21 August 2024 for review of compliance with these Orders and the potential final disposition of the Worker's Interlocutory Application;
    f. Parties are at liberty to apply in relation to the timeframes provided for in these Orders.

56. A copy of these reasons and orders will be published to the parties via email.

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[32] [2006] WASC 281 at p 84