CITATION: *QBE Insurance (Australia) Limited V Territory Insurance Office* [2017] NTLC 033

PARTIES:	QBE INSURANCE (AUSTRALIA) LIMITED V TERRITORY INSURANCE OFFICE
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	21419370
DELIVERED ON:	21 December 2017
DELIVERED AT:	Darwin Local Court
HEARING DATES:	19 June 2017, 20 June 2017, 21 June 2017, 22 June 2017, 23 June 2017 & 5 September 2017.
JUDGMENT OF:	Chief Judge John Lowndes

CATCHWORDS:

WORK HEALTH – DEPARTURE FROM PLEADINGS AT THE HEARING – BASIS ON WHICH THE HEARING WAS CONDUCTED – WHETHER LEAVE TO AMEND PLEADINGS NECESSARY

Banque Commerciale SA En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279 applied
Valeriani v Gibson [1963] NSWR 1430 considered
B Cairns Australian Civil Procedure 10th edition

REPRESENTATION:

Counsel:

Appellant:	Mr Churilov
Respondent:	Mr Doyle

Solicitors:

Appellant:	Roussos Legal Advisory
Respondent:	Sparke Helmore (Adelaide)

Judgment category classification:	B
Judgment ID number:	[2017] NTLC 033
Number of paragraphs:	39

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

No. 21419370

BETWEEN:

QBE INSURANCE (AUSTRALIA) LIMITED
Plaintiff

AND:

TERRITORY INSURANCE OFFICE
Defendant

REASONS FOR DECISION

(Delivered 21 December 2017)

CHIEF JUDGE LOWNDES:

INTRODUCTION

1. The applicant commenced proceedings in the Work Health Court pursuant to s 126A (2)(b) of the Return to Work Act (the Act) seeking an order that the respondent reimburse the applicant the sum of $91,587.78, being statutory compensation paid by the applicant for the period from 27 August 2013 to 13 February 2014 to, or for, Craig Webber (the worker) in discharge of the liability of Airnorth (the employer) under the Act, following acceptance of the worker's claim for compensation in accordance with s 126A(1) of the Act.

2. The hearing of this matter commenced on 19 June 2017. At the conclusion of the hearing the court heard submissions from counsel for the parties in relation to a number of issues relevant to the determination and apportionment of liability between the insurers – including the nature of the injury or injuries suffered by the worker during the course of his employment.

3. As part of his submissions, Mr Doyle (counsel for the respondent) made the following submissions:

(a) As a result of witnessing the aftermath of the crash on 22 March 2010 the worker suffered a mental injury (within the meaning of s 3(1) of the Return to Work Act) which was in the nature of an undiagnosed or subclinical or subsyndromal PTSD – albeit not a "full blown" PTSD. The March 2010 injury made the worker more vulnerable to developing a "full blown" PTSD and/or a comorbid psychiatric illness.

(b) The promotion of the worker to the position of operations manager in May 2012, and the subsequent departure of Ron Pratt at the end of 2012, and the worker's increased workload and responsibilities, caused the worker to suffer further mental stress. These increasing stressors made the worker even more vulnerable to developing a full-blown PTSD and/or a comorbid psychiatric illness.

(c) On or about 25 or 26 July 2013 the worker suffered a further mental injury arising from his involvement in planning process for the Exercise Flame, and in particular his involvement in the second of two planning meetings. Such involvement caused further mental stress, resulting in the immediate onset of a full blown PTSD and symptoms associated with a comorbid major depressive disorder. The worker was re-traumatised as a result of the meeting and suffered symptoms more intense than any that had been experienced since the 2010 crash. The injury which was suffered on or about 25 or 26 July 2013 was in the nature of an aggravation of the March 2010 injury and produced immediate incapacity for work and the need for medical treatment.

(d) The worker suffered a further mental injury at the time of the second planning meeting (the July 2013 injury. This injury was an acute injury, rather than an injury occurring "…by way of a gradual process over a period of time",[1] or an injury in the nature of an aggravation, acceleration, recurrences or deterioration of a pre-existing injury, specifically the March 2010 injury. The July 2013 injury included the manifestation of symptoms associated with a comorbid major depressive disorder. The worker suffered impairment and partial, and ultimately total, incapacity for work immediately following the July 2013 injury.

(e) Both the March 2010 and the July 2013 injury, insofar they related to the worker's PTSD condition, were an acute injury and one which did not occur "by way of a gradual process over a period of time".

[1] Section 8(5) of the Act.

(f) Insofar as the worker's injury was in the nature of a comorbid major depressive disorder, that injury was an injury which occurred "by way of a gradual process over a period of time" (or a disease).

4. Mr Churilov (counsel for the applicant) objected to the respondent's submissions that the worker suffered an acute injury on or about 25 or 26 July 2013, rather than an injury occurring "by way of a gradual injury over a period of time", on the grounds that at the hearing of the proceeding the respondent – at variance with the pleadings - ran its defence and counterclaim on the basis that:

(a) The worker suffered a mental injury as a result of his exposure to the plane crash on or about 22 March 2010 (the first injury); and

(b) The worker suffered a second injury by way of a gradual onset aggravation of the first injury arising out of his post 30 June 2010 employment.

5. Counsel for the applicant contended that as the applicant ran its case on that basis, the respondent is precluded from seeking to make submissions in relation to an entirely different case – one which is predicated on the occurrence of an acute injury in July 2013.

6. Whether or not the respondent is able to rely on its submissions concerning a July 2013 acute injury, or conversely is precluded from relying upon those submissions, can only be determined by closely examining the basis upon which the parties conducted their case. In particular close attention must be given to the matters upon which each party opened its case and the issues that each party identified as being central to the determination of the proceedings.

THE PLEADINGS AND DEPARTURE FROM THE PLEADINGS AT THE HEARING

7. In order to put the point of contention in proper perspective, the pleadings of the parties insofar they relate to the nature of the injury or injuries

suffered by the worker (being material facts giving rise to the present proceedings) need to be briefly stated.

8. In its Further Amended Statement of Claim (which was filed on 5 December 2016) the applicant pleaded that the worker suffered a mental injury in the course of his employment with the employer as a result of being present at the scene of a plane crash on 22 March 2010. It further pleaded that the worker made a claim for worker's compensation in respect of that injury on 9 September 2013.These material facts were relied upon by the applicant in support of its application pursuant to s 126A(2)(b) of the Act.

9. In its Further Amended Defence and Counterclaim (which was filed on 10 March 2017) the respondent admitted that on 9 September 2013 the worker made a claim for compensation for a mental injury suffered in the course of his employment with the employer. The respondent also admitted that on or about 22 March 2010 there occurred a plane crash involving one of the employer's aircraft. The respondent further admitted that the worker attended at the scene of the crash a short time after the incident, and observed the aftermath of the crash at some distance from the wreckage. However, the respondent denied that the worker suffered a mental injury only as result of his attendance at the crash scene. The respondent further denied that the claim was made in respect of, or confined to, the incident that occurred on or about 22 March 2010. The respondent admitted that the employer was liable to pay compensation to or for the worker and said that such liability arose in the following circumstances:

   (a) compensation was payable in respect of incapacity and impairment resulting from or materially contributed to by an injury or disease suffered by the worker (within the meaning of s 3(1) of the Workers Rehabilitation and Compensation Act (WRCA));

   (b) that injury or mental disease was in the nature of a mental injury or mental disease or aliment or disorder or morbid condition (within the meaning of s 3(1) of the WRCA);

(c) such mental injury or mental disease occurred by way of a gradual process over a period of time (within the meaning of s 4(5) of the WRCA);

(d) any such mental injury or mental disease (and consequential incapacity and impairment) was materially contributed to by the worker's employment with the employer, and in particular by the nature and conditions of the worker's employment during the period 1 July 2010 to 9 September 2013 (including the demands of his workload and additional responsibilities as operations centre manager) and/or his involvement and/or knowledge of, leading up to, during and following the employer's participation in "Exercise Flame";

(e) the worker's post 30 June 2010 employment duties and/or his involvement in "Exercise Flame" were the real, proximate or effective cause of such mental injury or mental disease (in accordance with s 4(8) of the WRCA);

(f) in the alternative, any such mental injury or mental disease (and consequential incapacity and impairment) was materially contributed to by the worker's employment and in particular by the March 2010 incident and the post 30 June 2010 duties and/or involvement in "Exercise Flame";

(g) the incapacity for work giving rise to the employer's liability to pay weekly benefits to the worker arose only from 9 September 2013 or at the earliest from July/August 2013;

(h) any impairment giving rise to the employer's liability to pay other compensation to the worker only arose from July/August 2013;

(i) by reason of s 4(5) of the WRCA, the injury in respect of which the employer was liable to pay compensation must be deemed to have occurred in or about July , August or September 2013; and therefore the liability to indemnify the employer rests entirely with the applicant;

(j) in the alternative, if the worker were injured as a result of each of the March 2010 incidents, the post 30 June 2010 employment duties and/or the "Exercise Flame" involvement, the worker's incapacity and impairment resulted from or was materially contributed to by each.

10. Finally, the respondent says that in accepting liability on behalf of the employer it did so on the basis that the worker had sustained an injury on

29 August 2013, as set out in its determination letter dated 13 September 2013.

11. Notwithstanding the pleadings, it is clear that both parties conducted the hearing in a manner that departed from, and was different from, that which arose on the pleadings. This was evident from the opening of both counsel which foreshadowed the issues to be determined by the Court.

12. It is well established that "pleadings are only a means to an end, and if parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest".[2]

13. As pointed out in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286-287 per Mason CJ and Gaudron J:

> Ordinarily, the question whether the parties have chosen some issue different from that disclosed as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference.

14. In the present case, the Court's task is to distil from the opening of each counsel the nature and extent of the departure from the pleadings and the real issues to be determined by the Court. The question is on what basis did the parties choose to depart from the pleadings and meet each other on different issues? This question is to be addressed from an objective viewpoint. In other words, what did the Court understand to be the position of the parties in relation to the real issues that were to be ventilated and adjudicated upon at the hearing.

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[2] *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in Liquidation)* (1916) 22 CLR 490, 517 per Isaacs and Rich JJ. See also the following observations made by Mason CJ and Gaudron J in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286-287:

> "the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities'.

15. The purpose of an opening address is to give the court a general view of the issues and the evidence.[3] An opening should state the nature of the case and summarise the evidence that the party intends to adduce.[4] Its purpose is to provide a general notion of what will be proved in evidence.[5] The opening should also raise any point of law on which the case depends, though matters of law should be kept to a minimum.[6]

16. During the course of his opening, counsel for the applicant noted that the respondent's case had shifted to one which unequivocally accepted that the worker suffered a mental injury as a result of being exposed to the plane crash in March 2010,[7] followed by a subsequent injury in the nature of an aggravation which arose either as a result of his involvement in "Exercise Flame" or participation in other employment duties.[8] Counsel proceeded to point out that it was incumbent upon the respondent to show that the aggravation injury was materially contributed to by the employment, as the injury was put as a "gradual process injury".[9] The applicant's counsel took no issue with this change in the respondent's case and was apparently prepared to meet the respondent's case on this new basis.

17. During the course of his opening, counsel for the respondent stated that there was no longer any issue between the parties that the worker suffered an injury within the meaning of the relevant provisions of the Act, or a disease (noting that injury includes disease), as a result of his exposure to the plane crash in march 2010.[10] Counsel also accepted that the respondent was dux litus in respect of establishing a second injury or at least an aggravation of the original injury (as per the pleadings).[11]

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[3]B Cairns *Australian Civil Procedure* 10th ed at [16.170].
[4]Cairns n 3 at [16.170].
[5]*Valeriani v Gibson* [1963] NSWR 1430 at 1434-1436.
[6]Cairns n 3 at [16.170].
[7]See pages 12- 13 of the transcript of the proceedings on 19 June 2017 (the transcript).
[8]See page 22 of the transcript.
[9]See page 22 of the transcript.
[10]See page 6 of the transcript.
[11]See page 6 of the transcript.

18. Counsel went on to say:[12]

> …ultimately it's the case of the respondent that there were two separate sources of liability attaching to the employer in respect of events in 2010 on the one hand and events after July 2010 on the other, and that both – so there was an injury and an aggravation which ultimately contributed to the incapacity which the worker suffered in 2010.

19. If there were any doubts about the nature of the shift in the respondent's case, counsel made abundantly clear at page 50 of the transcript what the respondent's case now was:

> …it will be the respondent's case that the worker's involvement in the planning process for Exercise Flame, on the background of his pre-existing vulnerability resulting from the 2010 crash and as a result of the additional workload responsibilities, particularly difficulties …in relation to the worker's concerns over a period of time that Airnorth still had not learned the lessons properly from the crash and had not sufficiently addressed its safety manual, its operating procedures and so forth, that those matters combined with the focus on Exercise Flame aggravated his pre-existing condition to the point …that led to the onset of a full-blown psychiatric illness and the consequent incapacity and need for medical treatment that then arose.
>
> Now it's the respondent's case that that was clearly in the nature of an aggravation or acceleration or exacerbation of the worker's condition, probably a simple aggravation, so an aggravation of the original injury. There is a requirement – this injury was in the nature of a disease. It was a condition of gradual onset.

20. Counsel then proceeded to put this outline of the respondent's case in its legislative context:[13]

> ...there are legal issues that arise here, it's probably helpful for everyone to put into legal context the factual scenario that you're about to hear about. The requirement – firstly, s 4(5) is important:

[12]See page 6 of the transcript.
[13]See pages 50-51 of the transcript.

> An injury shall be deemed to arise out of the course of a worker's employment where it occurred by way of gradual process over a period of time and the employment in which he or she was employed at any time during that period materially contributed to the injury.

It would appear on the evidence that there probably was an injury at the outset but it didn't manifest itself in any incapacity or would need treatment at that time, or actual treatment at that time. The question, your Honour is going to ultimately have to ask after hearing the evidence is whether insofar as there was an aggravation, did the – well, I'll read the section. It's better to put it that way. It's subs (6A) in s 4:

> Subject to this section, a disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker's employment…was employed materially contribute to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation.

…all the respondent needs to prove is that the employment contributed to the aggravation, acceleration or exacerbation. It doesn't need to prove that it contributed to the whole thing. Importantly, of course, we know that subs(8) provides a further refinement on what is meant by "materially contributed" because at common law meant something different than …the Act now provides.

The Act provides that (8) for the purposes of this section, the employment of a worker is not to be taken to have materially contributed to: (a) an injury or disease, but importantly, "or an aggravation, acceleration of exacerbation: so its disjunctive, "unless the employment was the real, proximate of effective cause of the injury, disease, aggravation, acceleration or exacerbation".

Simply, the respondent's case, in this case, is that clearly the employment was responsible for the aggravation, acceleration or exacerbation here… The question is simply did the employment bring on the aggravation, exacerbation of acceleration at this time and we will have the argument later about what Dr Farnbach understood in the questions he was asked and likewise about Dr Shaikh when he is directly, and I have indicated will object to the evidence, where he is asked specifically was the employment the real, proximate of effective cause of the injury or aggravation and we said no.

Well that's not his call. That's your Honour's call. That's the ultimate question for your Honour to decide and it's ultimately a

> legal question, not a medical question…Your Honour ultimately has to rule on whether the requirements of the Act are met.

21. It is patently clear from the opening of counsel for the respondent that the respondent accepted an original injury, but relied upon an aggravation of that original injury by way of a gradual process.

22. Counsel's statements at paragraph 50 of the transcript are particularly illuminating. It is made clear there that the respondent intended to rely upon an aggravation of the original March 2010 injury, that aggravation having arisen from the worker's post 1 July 2010 employment duties (including additional responsibilities and workload and involvement in Exercise Flame) and being an aggravation of gradual onset as a result of a gradual process over a period of time.

23. Counsel's legal/statutory contextualisation of the respondent's case at pages 50-51 of the transcript is further illuminating in that it puts beyond doubt that the respondent intended to rely upon an aggravation injury that occurred by way of a gradual process over a period of time during the course of the worker's employment. Counsel's reference to ss 4(5), 4(6A) and 4(8) and the statutory "material contribution" test, which counsel stated needed to be satisfied by the respondent, leaves no doubt as to the nature of the case that the respondent intended to run at the hearing.

24. Counsel for the applicant appears to have taken no issue with this characterisation of the respondent's case and, despite it representing a departure from the pleadings, was prepared to proceed with the hearing of the matter on the basis of the respondent's altered position.

25. During their respective openings counsel provided the Court with a Statement of Issues, which were conceded by both counsel to be similar in

content.[14] The Statement of Issues of the applicant and respondent are attached to these reasons for decision.

26. Although neither counsel referred directly, or in any detail, to their Statement of Issues, there was nothing in either statement that would detract from the content and import of the opening of either counsel.

27. Beginning with the respondent's Statement of Issues, paragraph 5 of the Statement raised a number of questions directed at the nature of the injury or injuries (or disease) suffered by the worker in the period prior to 1 July 2010 and in the period subsequent to 1 July 2010.

28. These issues were addressed by the respondent's counsel during the course of his opening. Counsel identified the nature of the injury or injuries (or disease) sought to be relied upon by the respondent.

29. Paragraphs 2 – 3 of the applicant's Statement of Issues raised similar questions as to the nature of the injury or injuries (or disease) suffered by the worker during the course of the worker's employment. The applicant's counsel addressed these issues in a similar fashion to the respondent's counsel, indicating a preparedness to meet the respondent's case based on an original injury followed by an aggravation injury occurring by way of a gradual process over a period of time.

30. At the conclusion of the hearing, counsel for the respondent submitted that the case outlined by him on behalf of the respondent during the course of his opening included reliance upon a subsequent acute mental injury, rather than an injury that occurred by way of a gradual process over a period of time.[15] In my opinion, that submission flies in the face of counsel's opening.

31. Counsel made no mention at all of an injury in those terms. An acute injury implies an injury that is associated with a specific incident, and an injury

[14] See pages 22-23 of the transcript.
[15]See pages 25-31 of the transcript of the proceedings on 5 September 2017.

that is of rapid onset. Nothing in the respondent's opening suggested that the respondent was relying upon an injury of that type.

32. Quite to the contrary, the respondent's case (as disclosed in the opening) was based on an injury of gradual onset as a result of a gradual process over a period of time – and not one which was of rapid onset and linked to a specific incident.

33. Furthermore, if in its opening the respondent was intending to rely upon an acute mental injury, the respondent would need only to prove a temporal connection between the worker's employment and the injury, and it would not have been incumbent on the respondent to establish that the employment materially contributed to the injury – namely that the employment was the real, proximate or effective cause of the injury. However, throughout the opening, counsel for the respondent continuously made reference to the "material contribution" test, and made no reference at all to the causal test of "temporal connection". The absence of any reference to the latter test indicates that the occurrence of an acute injury was not part of the respondent's case.

34. Bearing in mind that one of the purposes of an opening statement is to state what will proved in evidence, it is noteworthy that in his opening counsel for the respondent at no time stated that it was intended to call evidence or otherwise rely upon evidence to prove that the worker suffered a subsequent acute injury.

35. In my opinion, the respondent's opening did not convey – to either opposing counsel or the court - the impression that a subsequent acute injury was being relied.

36. Finally, but not least, there is nothing in the transcript to indicate that the actual hearing of the proceedings took an entirely different course, resulting in the parties choosing – either overtly or as a matter of inference - to fight the case on the basis of the worker having suffered a subsequent acute

injury. It is not apparent from either the course of evidence or exchanges between counsel and the court that the parties chose to fight the case on the basis of such an injury.

DECISION

37. It must follow that the issues that fall for determination by the court are as disclosed by the respective openings of counsel for the respondent and the applicant. Although those openings disclosed issues that were different from those disclosed by the pleadings I am satisfied that it was agreed between the parties that those issues were the issues left to be determined by the court. I am satisfied that the proposition that the worker suffered a subsequent acute injury fell outside the agreed position. Accordingly, if the respondent now wishes to rely upon such an injury, as part of its case, it is incumbent upon the respondent to make an application to amend its pleadings – that is to say to seek the leave of the court to advance and rely upon a subsequent acute injury, which is a matter that currently falls outside the agreed position of the parties in relation to the justiciable issues.

38. I give the parties leave to approach the Listing Registrar with a view to fixing a date for further submissions, including the hearing of any application to amend that the applicant may seek to make.

39. I propose in due course to hear the parties in relation to the question of costs with respect to the preliminary issue dealt with in this decision.

Dated this 21 day of December 2017

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DR JOHN LOWNDES
CHIEF JUDGE