HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

BRENNAN TAYLOR RESPONDENT

State of New South Wales v Taylor [2001] HCA 15
15 March 2001
S46/2000

ORDER

1. *Appeal allowed.*

2. *Set aside the Orders of the Court of Appeal of New South Wales made on 2 June 1999 and in place thereof order that the appeal to the Court of Appeal be dismissed.*

3. *The appellant to pay the respondent's costs of the appeal to this Court and of the proceedings before the Master, and before Murray AJ and before the Court of Appeal.*

On appeal from the Supreme Court of New South Wales

Representation:

L King SC with R A Stanton for the appellant (instructed by P W Turk & Associates)

A J Leslie QC with J O Anderson and A O Leslie for the respondent (instructed by Steve Masselos & Co)

CATCHWORDS

State of New South Wales v Taylor

Workers' Compensation – Election between permanent loss compensation and damages – Where worker seeks to revoke election to claim permanent loss compensation and to commence proceedings for recovery of damages – Where s 151A(5) of the *Workers Compensation Act* 1987 (NSW) limits the availability of revocation of such election – Whether par (c) of s 151A(5) is satisfied if, at the time of the election, a reasonable person in the position of the injured person would have no cause to believe that further deterioration of the condition would probably occur.

Statutes – Interpretation – s 151A(5)(c) of *Workers Compensation Act* 1987 (NSW) – meaning of "no reasonable cause to believe".

Words and phrases – "believe" – "would".

Workers Compensation Act 1987 (NSW) s 151A.

1 GLEESON CJ, McHUGH AND HAYNE JJ. Section 151A of the *Workers Compensation Act* 1987 (NSW) relevantly enacts:

> "(2) A person to whom compensation is payable under this Act in respect of an injury is not entitled to both:
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> (a) permanent loss compensation in respect of the injury, and
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> (b) damages in respect of the injury from the employer liable to pay that compensation,
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> but is required to elect whether to claim that permanent loss compensation or those damages.
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> …
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> (5) If:
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> (a) a person elects to claim permanent loss compensation in respect of an injury, and
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> (b) after the election is made, the injury causes a further material deterioration in the person's medical condition that, had it existed at the time of the election, would have entitled the person to additional permanent loss compensation, and
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> (c) at the time of the election, there was no reasonable cause to believe that the further deterioration would occur,
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> the person may, with the leave of the court and on such terms (if any) as the court thinks fit, revoke the election and commence proceedings in the court for the recovery of damages in respect of the injury."

2 Section 151A(1) declares that "***permanent loss compensation*** means compensation under Division 4 of Part 3 (Compensation for non-economic loss)".

3 The principal question in this appeal is whether par (c) of s 151A(5) is satisfied if, at the time of the election, a reasonable person *in the position of the injured person* would have had no cause to believe that further deterioration of the medical condition would probably occur. This is the construction placed on

the paragraph by the majority of the Court of Appeal in the present case[1] and by the majority of that Court in the earlier case of *Francis v Dunlop*[2].

4 In our opinion, the construction placed on the paragraph by the two decisions of the Court of Appeal is erroneous with the result that the appeal must be allowed. Section 151A(5)(c) requires the court to determine whether it would be unreasonable for a person to believe that the evidence before the court, concerning the applicant's condition at the time of election, demonstrated that the further deterioration would occur. The reasonable cause for belief is determined by reference to the evidence before the court concerning the applicant's condition at that time and expert opinion as to what the medical prognosis for that condition was at that time. What the applicant knew or ought to have known is irrelevant. If the court determines that it would not be unreasonable for a person to believe that the further deterioration would occur, the application for revocation fails.

The material facts

5 In 1992, the respondent ("the worker") injured his back[3]. He made a claim in the Compensation Court for permanent loss compensation for the consequences of his injury. On 19 September 1994 his claim was settled. In November 1994, he banked the settlement cheque of $22,000. By accepting that payment, he irrevocably elected to forgo any right to claim damages in respect of his injuries, subject to s 151A(5)(c) of the Act.

6 By October 1995, the worker's condition had significantly deteriorated from the time when he made his election. In that month, he commenced an action in the Supreme Court of New South Wales for damages in respect of his injuries[4]. In 1997, he applied to the Supreme Court for leave under s 151A(5) to commence the action for damages and for an order that the proceedings "be deemed to have been validly commenced"[5].

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1 (1999) 46 NSWLR 322.

2 Unreported, 16 December 1998.

3 (1999) 46 NSWLR 322 at 324 [12].

4 (1999) 46 NSWLR 322 at 324 [13].

5 (1999) 46 NSWLR 322 at 325 [14].

7 Master Greenwood gave leave to proceed under s 151A(5). His decision was reversed by Murray AJ who held that "there was ample evidence available to the [worker] … to show that there was reasonable cause to believe that the further deterioration would occur"[6].

8 The Court of Appeal (Giles JA and Sheppard AJA, Handley JA dissenting) set aside the decision of Murray AJ and ordered that the "Master's grant of leave to revoke the election be confirmed". All judges of the Court of Appeal held that it was the reasonable belief of the worker or a person in the position of the worker that is the criterion upon which s 151A(5)(c) operates. However, Handley JA thought that an applicant for revocation could not succeed if "there was *some* reasonable cause to believe that [the further deterioration] would or might occur"[7]. His Honour said that "[o]n the medical evidence available to the worker and his advisers at the date of his election and his own awareness of his deteriorating condition he failed … to establish that there was no reasonable cause to believe that the further deterioration would occur"[8]. Because that was so, his Honour held that the application for revocation must fail.

9 Giles JA said that[9]:

> "[T]he effect of par (c) is that it must be asked whether a reasonable person knowing what was known or ought to have been known to the worker would expect the further deterioration in fact suffered by the worker as something more probable than not."

Applying this test, his Honour found that the evidence failed to establish that a reasonable person would expect the further deterioration to occur. Subject to one matter to which we will refer, Sheppard AJA agreed with the reasons of Giles JA.

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6 Unreported, Supreme Court of New South Wales, 18 September 1997 at 9.

7 (1999) 46 NSWLR 322 at 324 [8] (original emphasis).

8 (1999) 46 NSWLR 322 at 324 [10].

9 (1999) 46 NSWLR 322 at 332 [43].

The belief of the injured person or a person in his or her position is not relevant in applying s 151A(5)(c)

10 The text of s 151A(5)(c) does not support the view that the belief of the injured person or a person in his or her position is relevant in determining whether leave to revoke should be granted. The opening and subordinate clause of the paragraph makes no reference to the belief of the injured person or, for that matter, any other individual. It is expressed in objective and impersonal terms. It does not state the criterion to be that "at the time of the election, the injured person had no reasonable cause to believe that the further deterioration would occur". It does not require a search for the belief of any particular individual. It does not require any person or entity to suffer action, to be acted upon or to be the object of action. The opening clause of s 151A(5)(c) is, therefore, not expressed in the passive voice. It has a subject, and that subject is "no reasonable cause to believe"[10]. In contrast, the subject of the principal clause is "a person" (ie the person injured).

11 The omission of the injured person as the subject of the subordinate clause was obviously deliberate. We do not think that it is a rational possibility that the parliamentary drafter, although intending that person to be the subject of the subordinate clause, left the matter to inference. That would mean that the drafter intended the subject of the subordinate clause to be "no reasonable cause to believe [on the part of the person injured]", but failed to name part of the subject. Then, having failed to name "the person injured" as the subject of the subordinate clause, the drafter immediately identified that person as the subject of the principal clause in the same sentence. Parliamentary drafters, like every one else, make mistakes. But we cannot believe that the drafter of s 151A could be so incompetent or inefficient that he or she would fail to identify the belief of the injured person as the relevant belief if that was the parliamentary intention. It follows that the belief of the injured person, reasonable or otherwise, is not the criterion on which leave to revoke depends. For the same reasons, the belief of a reasonable person in the position of the injured person is irrelevant.

12 The form of the subordinate clause in s 151A(5)(c) is explained by the fact that it is for a court to determine whether "there was no reasonable cause to believe that the further deterioration would occur". That fact, together with the omission of any reference to the injured person's belief, suggests that the court

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10 See eg *Macquarie Dictionary*, 1st ed at 1792, "there", n 10 "(used to introduce a sentence or clause in which the verb comes before its subject): *there is no hope*"; cf *The Shorter Oxford English Dictionary*, vol 2 at 2281, "There", n 4.

examines all relevant evidence concerning the medical condition at the time of the election and all relevant evidence that throws light on the prognosis of the condition at that time. If the court holds that the applicant has failed to prove that there was "no reasonable cause to believe that the further deterioration would occur", it must refuse the application. If it holds that the applicant has proved that there was no reasonable cause for such a belief, it may, but not must, give the applicant leave to revoke the election.

13 Hence it is the court's view of all the evidence and not the injured person's belief, reasonable or otherwise, that is decisive. On this view, the test for the court is: given the medical condition of the applicant at the time of the election and the expert opinions as to its prognosis at that time, would it be unreasonable for a person to believe that the condition would further deteriorate as it had? The applicant for leave must prove a negative. He or she must show that it would be unreasonable for a person to hold that belief. The applicant will *prima facie* discharge that onus by tendering evidence indicating that such a belief could not be reasonably held. If a *prima facie* case is established, the employer has the evidentiary burden of showing that there exists another body of evidence that indicates a contrary conclusion. Ultimately, it is for the court to determine whether "there was no reasonable cause to believe that the further deterioration would occur" in accordance with the test that we have formulated.

14 In determining the issue of "no reasonable cause to believe", the court does not determine whether, as a matter of probability, there was cause to believe that the further deterioration would occur. To approach the section in that way is to invert the negative proposition that it contains. On the evidence, two opposite beliefs may have been reasonably open as to whether the further deterioration would occur. If there was, the application for revocation fails. If on the whole of the evidence, whatever its source or sources, the court concludes that it would not be unreasonable to believe that the further deterioration would occur, the applicant fails. It is irrelevant that, on the same body of evidence, it would also be reasonable to believe that the further deterioration would not occur. In a case where the evidence admits of two reasonable, but opposing, conclusions, the applicant has failed to show that there was no reasonable cause to believe that the further deterioration would occur.

15 As a matter of grammar, this construction of the paragraph is more persuasive than the construction adopted by the Court of Appeal. Giles JA, who gave the leading judgment, recognised that this was so, saying that the analysis that he adopted "may risk departure from the words of par (c), to which the Court must be true, but the legislature has used singularly awkward language"[11]. It is

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11 (1999) 46 NSWLR 322 at 332 [44].

true that the notion of "reasonable cause", although often used in legal instruments, is an awkward expression. A cause is a cause is a cause. Beliefs about causes may be reasonable, but causes are neither reasonable nor unreasonable. They are facts even if, as current legal doctrine insists, they often involve value judgments[12]. In par (c), "no reasonable cause to believe" means "no cause for reasonably believing". But otherwise, nothing in the language of par (c) is awkwardly expressed as a matter of grammar or syntax, unless one approaches the paragraph with the preconception that the legislature intended the reasonable belief of the injured person to be the relevant criterion.

16 The only indication that the reasonableness of the injured person's belief might be the criterion upon which the paragraph operates is that the issue of leave to revoke the election arises in a context where the injured person has made the election. But if the injured person's belief was the relevant criterion, then the reasonableness of that belief would have to be judged either by what he or she knew or by what he or she knew or ought to have known[13]. If the reasonableness of the belief depended only on what the injured person knew, it would often mean that leave could be granted even though the medical evidence and opinions pointed irresistibly to the conclusion that that person's condition would further deteriorate in the way that it did. However, the introduction of the concept of reasonableness makes a wholly subjective interpretation of the paragraph untenable.

17 The Court of Appeal judgments accept that the issue of "reasonable cause to believe" cannot be confined to what the applicant knew. But once the subjective interpretation is rejected, the fact that the injured person makes the election provides little, if any, support for the construction that it is that person's belief that must have been reasonable. That is because rejection of the subjective interpretation means that the applicant for revocation may be held to the election even though, given his or her knowledge, it is unfair to hold him or her to that election. But over and above that consideration, the grammar and syntax of the paragraph contradict the construction which the Court of Appeal placed upon it.

18 In any event, once it is recognised that the Court of Appeal's construction of s 151A(5)(c) may result in the applicant's election being judged by reference to facts and circumstances outside that person's knowledge, there could be no justification for narrowing the cause of belief to those facts and circumstances of

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12 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506.

13 cf *George v Rockett* (1990) 170 CLR 104 at 112, 116.

which the applicant ought to have been aware. Indeed, in the present case Giles JA appears to have accepted that this was so. His Honour said[14]:

> "The worker must prove a negative, and at least in theory must prove the entire field of relevant human knowledge in order to say that the belief is not reasonably available. Assuming that the legislature did not mean to impose such a burden, how is the field of knowledge delimited? It clearly goes beyond the worker's actual knowledge, and extends to regard to the opinion of his medical advisers *and others such as the doctors qualified for the employer for the purposes of the claim* for permanent loss compensation. Does it include the opinion which a further eminent doctor would have given if consulted? That the context is the worker's election suggests that the field of knowledge is that which was known or ought to have been known to the worker, but what the worker ought to have known is a slippery concept." (emphasis added)

19 However, his Honour said that it was unnecessary to determine what is the relevant "field of knowledge" because[15]:

> "In the present case there was no issue over the field of knowledge: it comprised the opinions of the appellant's treating doctors and the doctors who examined him for medico-legal purposes, plus his own account of his condition."

20 Sheppard AJA expressed "some concern with that part of the judgment of Giles JA which commences with his statement that, at least in theory, the worker must prove the entire field of relevant human knowledge in order to say that the belief is not reasonably available"[16]. His Honour thought that what the court "must do is to consider the medical opinions which were available at the time the election was made, the advice given to the employee and the employee's reaction to that advice"[17]. And, in dissent, Handley JA thought "the question must be answered in the light of the information known or reasonably available to the worker and his legal and medical advisers"[18].

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14 (1999) 46 NSWLR 322 at 332 [40].

15 (1999) 46 NSWLR 322 at 336 [54].

16 (1999) 46 NSWLR 322 at 339 [67].

17 (1999) 46 NSWLR 322 at 339 [68].

18 (1999) 46 NSWLR 322 at 323 [4].

21 These differing views as to the relevant field of knowledge are the product of the attempt to confine the "no reasonable cause to believe" criterion to the reasonable belief of the worker or a person in the worker's position. Once it is recognised that the court decides as an objective fact whether there was no reasonable cause to believe, any evidence that is relevant to that issue is admissible. Whether the evidence was or was not available to the worker is irrelevant.

22 Because the Court of Appeal has erred in its construction of s 151A(5)(c), the judgment of that Court must be set aside.

Order

23 At no stage of the present case has any level of the Supreme Court applied the correct test for determining an application under s 151A(5). So the question arises as to whether the appropriate order is to allow the appeal and remit the matter to the Supreme Court to be dealt with according to law or whether the Court should restore the orders made by Murray AJ. If there had been any doubt about the credibility of the medical experts in this case, it would no doubt have been appropriate to remit the matter. But the parties conducted the case before the Master, Murray AJ and the Court of Appeal on the basis that the opinions of the various doctors were honestly held. That being so, this Court should not put the parties to the cost of a further hearing because to our minds it is clear that the worker's application for leave to revoke the election must be rejected.

24 Dr Nott, who was a treating doctor, said in a report dated 3 March 1994, that it was "too early for a final opinion on permanent impairment, as [the worker] may improve, or deteriorate or further surgery may in fact totally relieve his problem". Dr Sengupta, another treating doctor, said in a report dated 27 June 1994 that "[t]he long term prognosis, at this stage, remains guarded, as his condition may deteriorate and he may require further surgical treatment". Dr Evans who examined the worker and reported to his solicitors in November 1993 said that the prognosis "is uncertain".

25 In the light of this evidence and the evidence concerning the worker's further deterioration, the worker failed to prove that, at the time he made his election, "there was no reasonable cause to believe that the further deterioration would occur". On this evidence, it would not be unreasonable to believe that the further deterioration that occurred would occur.

26 The appeal must be allowed. The order of the Court of Appeal must be set aside, and in lieu thereof should be substituted an order that the appeal to that Court should be dismissed.

27 However, the appellant has succeeded in this Court on a ground that was added, by leave of the Court, during the course of the worker's argument. It was a condition of the grant of that leave that, if the appellant succeeded on the new ground, it must pay the worker's "costs in this Court and in all the courts below". Because of the construction that we have given to s 151A(5), the appeal would not have succeeded on the original ground of appeal filed. The original ground of appeal accepted that the s 151A(5)(c) issue had to be determined by reference to "a reasonable person in the position of the worker at the time the election is made", a proposition that we have rejected. It follows that the appellant must pay the respondent's costs in this Court and in all levels of the Supreme Court.

28 KIRBY J. The problem presented by this appeal[19] seems, at first sight, to be nothing more than the elucidation of the meaning and effect of a "straightforward statutory provision"[20]. But once that threshold is passed, and the bleak task of construction is commenced, the reader is confronted by the "singularly awkward language"[21] of the provision. It has resulted in sharp differences of opinion in the New South Wales courts and now in this Court.

29 The different opinions demonstrate[22], I believe, that it is impossible to provide a meaning for the statutory language that will command universal assent. All that can be done is to offer an authoritative decision which, in the absence of further legislation, will settle, for the time being, the way in which judges in New South Wales are to approach the application of the statute.

30 The provision to be construed is s 151A(5) of the *Workers Compensation Act* 1987 (NSW) ("the Act"). The sentence which has caused all the trouble is found in par (c) of that sub-section, in the context of a provision affording power to a court, "as [it] thinks fit", to revoke an election previously made by a person to claim "permanent loss compensation"[23] in respect of a compensable "injury"[24], instead of the "recovery of damages in respect of the injury"[25]. Only if the court grants such leave can the obstacle presented by the election be removed and the worker be entitled to pursue proceedings to recover damages[26].

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19 From a judgment of the Supreme Court of New South Wales (Court of Appeal): *Taylor v State of New South Wales* (1999) 46 NSWLR 322 ("*Taylor*").

20 *Taylor* (1999) 46 NSWLR 322 at 337 [62] per Sheppard AJA.

21 *Taylor* (1999) 46 NSWLR 322 at 332 [44]; cf reasons of Gleeson CJ, McHugh and Hayne JJ at [15].

22 *Taylor* (1999) 46 NSWLR 322 at 332 [44]. To like effect, see *Francis v Dunlop* unreported, Court of Appeal of New South Wales, 16 December 1998 ("*Francis*") per Fitzgerald AJA at 6-7 cited in *Taylor* (1999) 46 NSWLR 322 at 333 [46]; see now the reasons of Gleeson CJ, McHugh and Hayne JJ at [4], [10]-[21] and those of Callinan J at [95]-[101].

23 The Act, s 151A(1) defines this as "compensation under Division 4 of Part 3 (Compensation for non-economic loss)".

24 The Act, s 4.

25 The Act, s 151A(5).

26 The section is set out in the reasons of Gleeson CJ, McHugh and Hayne JJ at [1] and in the reasons of Callinan J at [89].

31 The critical precondition for the grant of leave is that:

> "(c) at the time of the election, there was no reasonable cause to believe that the further deterioration would occur".

32 What does this precondition mean? How is it to be applied in cases where the worker seeks to change course and pursue a damages claim in place of the permanent loss compensation which was earlier elected? What are the consequences of the construction of the paragraph for the circumstances disclosed in the present appeal?

Facts and earlier dispositions

33 The background facts and earlier proceedings are explained in the reasons of Callinan J[27]. Stated very broadly, the purpose of s 151A(5) of the Act is to allow a person, otherwise debarred by election from recovering damages in respect of an injury, to pursue that course where there has been an unexpected deterioration in the person's medical condition. It is therefore appropriate to identify clearly how that "medical condition" stood when the election was made and what the expectations then were as to its likely future course.

34 In the present case, such expectations were explored at trial before the Master, from whom relief under s 151A(5) was first sought. The expectations were traced to the prognoses contained in the contemporaneous medical reports and in the oral evidence of Mr Taylor ("the worker"). The latter never denied that the medical reports in question had been brought to his notice by the legal practitioners advising him at the time of his election[28]. Accordingly, it can be safely assumed that the opinions of the medical practitioners who were treating the worker, or who were retained by his legal advisers to give evidence on his behalf, were available to him.

35 At and before the time the worker made the election he was advised by solicitors and counsel. A number of reports were given to the worker's solicitors expressing prognoses as to the likely future course of his back disability. A surgeon, Dr Evans, qualified to give evidence, in a report of 19 November 1993, stated that the prognosis was uncertain: "He still has a degenerate, damaged L4/5 intervertebral disc, and could suffer further prolapse of this, particularly if he attempts heavy lifting. There is also some degeneration of the L3/4 disc, and this

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27 Reasons of Callinan J at [77]-[92].

28 Noted by Giles JA in *Taylor* (1999) 46 NSWLR 322 at 329 [29] citing Murray AJ on appeal from the Master.

also could prolapse." Dr Nott, in a report of 3 March 1994, stated that it was "... too early for a final opinion on permanent impairment [to be given] as [the worker] may improve or deteriorate". Dr Sengupta, in a report of 27 June 1994 stated that the worker's "... long term prognosis, at this stage, remains guarded as his condition may deteriorate and he may require further surgical treatment". With the benefit of those medical opinions, and legal advice, the worker made the election to settle his claim and to receive permanent loss compensation. The election was perfected in November 1994 when he received and banked a cheque in payment of the agreed sum of compensation.

36 In addition to the foregoing medical reports, the worker agreed, in cross-examination before the Master, that it had been explained to him by his lawyers, that by accepting the compensation payment, he had chosen not to "go down the path of common law damages". He acknowledged that his back and leg had become "more troublesome over time". He accepted that, in June 1994, five months before the election, Dr Sengupta had referred him to a pain management specialist. That specialist, Dr Cox, increased the dosage of pain medication on 15 August 1994 when the worker told him that his problems were "getting a bit worse, rather than a bit better". The worker also agreed to the cross-examiner's question that, following the election: "All that really happened was there was a continuation of your gradually worsening problems?" However, he stated that he "did not think it would get as bad as it ended up".

37 As Callinan J has explained[29], the Master granted leave to the worker to revoke the election and consequential leave extending the time within which he could sue the State of New South Wales ("the employer"). From this interlocutory order, the employer successfully appealed to a judge of the Supreme Court. The worker then successfully appealed to the Court of Appeal. However, in that Court, Handley JA dissented, adhering to an opinion about the meaning and effect of s 151A(5) of the Act that he had earlier expressed, also in dissent, in *Francis*[30]. By special leave, this appeal now comes to this Court to resolve the differences of opinion found in the earlier judicial attempts to elucidate the sub-section.

38 I will not repeat the summary which Callinan J has given of the divergent opinions about s 151A(5) of the Act that have emerged, notably in the Court of Appeal[31]. However, I wish to add to the chronicle some extracts from the reasons of Priestley JA in *Francis*. His Honour, in explaining why he agreed in

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29 Reasons of Callinan J at [85].

30 Unreported, Court of Appeal of New South Wales, 16 December 1998 at 1.

31 Reasons of Callinan J at [88]-[92].

the disposition of that case which Fitzgerald AJA proposed (and disagreed with the approach of Handley JA) latched onto the word "believe" appearing in par (c). He said[32]:

> "When the question the provision puts into the mind of the objective observer at the time of the election is stated in the present tense, that question becomes 'Is there any reasonable cause to believe a particular further deterioration will occur?' (Unless the person seeking the court's leave to revoke the election discharges the onus to show the answer to the question is no, the condition will not be fulfilled.)
>
> It seems to me that for a person to *believe* that something will occur that person must not only think that the thing will occur but also accept as a truth that it will occur. This is my own understanding of the word in its context here. To check whether my understanding is either consistent with or conflicts with recorded uses of the word, I have looked at The Oxford English Dictionary".

39 After setting out the dictionary meanings, Priestley JA concluded that, in the context, the word "believe" used in s 151A(5)(c) of the Act meant "accept as true" – a meaning more affirmative and definite than the construction urged for the employer and accepted by Handley JA both in *Francis*[33] and in this case[34]. Handley JA considered that the word "believe" in par (c) meant no more than "think". He considered that the context excluded notions of "faith, trust, or existing fact"[35]. He emphasised the negative and objective terms in which the statutory text is expressed.

Common ground

40 Despite the significant differences in the approaches adopted in the Supreme Court, there was considerable common ground which had the merit of narrowing the contest between the parties.

41 First, it was not contested in this Court that all of the preconditions for the provision for leave under s 151A(5) of the Act had been fulfilled save for the

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32 *Francis* unreported, Court of Appeal of New South Wales, 16 December 1998 at 1-2 (original emphasis).

33 Unreported, Court of Appeal of New South Wales, 16 December 1998 at 6 per Handley JA.

34 *Taylor* (1999) 46 NSWLR 322 at 324 [8].

35 *Francis* unreported, Court of Appeal of New South Wales, 16 December 1998 at 6.

dispute about the application of par (c). Thus the contest which had engaged the Court of Appeal, as to whether par (b) had been satisfied, does not trouble this Court[36].

42 Secondly, it was common ground that the onus of establishing satisfaction of the precondition in par (c) rested on the worker. Moreover, because par (c) is stated in negative terms, the worker was obliged to prove the negative proposition there expressed[37]. The difficulty of doing this, unless the ambit of the paragraph were confined by reference to its context and apparent purpose, was noted by Giles JA[38].

43 Thirdly, it was accepted that the test to be applied was neither expressed, nor intended, to confine attention to the subjective belief of the person who had made the election as to whether further deterioration would occur in his or her medical condition[39]. It was accepted, correctly in my view, that the paragraph takes the reader to objective considerations. No other construction would be consistent with the presence of the phrase "no reasonable cause".

44 Fourthly, the language of par (c) is not to be artificially dissected. The words of the paragraph must be read as a whole[40]. They convey a composite idea. As has been remarked in other cases, the sentence, and not the word, is the usual medium of communication in the English language[41]. It is a mistake, to which lawyers are prone, to subject sentences uncritically to textual examination, word by word, leaving the analysis at that. This approach carries the risk of imposing an artificial meaning on the communication of ideas by language. The proper course is to read the entire sentence under consideration and to reflect upon the overall impression which all of the words in it make on the mind of the decision-maker.

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36 *Taylor* (1999) 46 NSWLR 322 at 327-328 [24]-[27].

37 *Taylor* (1999) 46 NSWLR 322 at 323 [4] per Handley JA, 332 [40] per Giles JA.

38 *Taylor* (1999) 46 NSWLR 322 at 332 [40].

39 *Taylor* (1999) 46 NSWLR 322 at 323 [4] per Handley JA, 332 [40] per Giles JA; cf reasons of Gleeson CJ, McHugh and Hayne JJ at [16].

40 *Taylor* (1999) 46 NSWLR 322 at 332 [43] per Giles JA.

41 *R v Brown* [1996] AC 543 at 561 applied *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397.

Approach to construction: legislative history

45 *Earlier election provisions*: It is useful to commence the examination of the legislative provision in issue with a reminder of its context and history. Election between entitlements has a long history in workers' compensation legislation, both in England[42] and in Australia[43]. In the predecessor to the Act, the *Workers' Compensation Act* 1926 (NSW), elections by a worker were originally provided both in respect of lump sum payments in lieu of periodic compensation[44] and in respect of remedies at common law in lieu of statutory benefits[45]. There were similar election provisions in the workers' compensation statutes of the Commonwealth, the Territories and other States[46].

46 The construction of election provisions often produced acute divisions of judicial opinion. These concerned, amongst other things, the extent to which a person, making such an election, must be aware of the choice being made and of the considerations relevant to that choice, before it could be said that an

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42 See eg *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 referring to the *Workmen's Compensation Act* 1925 (UK), s 29(1) providing an "option" to workers to pursue compensation under the Act or take proceedings independently of the Act.

43 *Harbon v Geddes* (1935) 53 CLR 33; *Latter v Muswellbrook Corporation* (1936) 56 CLR 422; *Union Steamship Co of New Zealand Ltd v Burnett* (1937) 56 CLR 450; *O'Connor v S P Bray Ltd* (1937) 56 CLR 464; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *Chang Jeeng v Nuffield (Australia) Pty Ltd* (1959) 101 CLR 629 at 642, 644-645.

44 *Workers' Compensation Act* 1926 (NSW), s 16(1), as originally enacted. By the *Workers' Compensation (Amendment) Act* No 66 of 1964 (NSW) such elections were abolished.

45 *Workers' Compensation Act* 1926 (NSW), s 63(2), as originally enacted. By the *Workers' Compensation (Amendment) Act* No 21 of 1953 (NSW), s 7, the provision for election was repealed. As in the United Kingdom Act, the election was originally expressed in terms of an "option", on the part of the worker, to "proceed under this Act or independently of this Act".

46 The following federal Acts, as originally enacted, provided for a variety of elections to be made: *Commonwealth Employees' Compensation Act* 1930 (Cth), s 9(1)(d) (alternative remedies) and s 15 (election between benefits under the Act and under a determination by the Public Service Arbitrator pursuant to the *Arbitration (Public Service) Act* 1920 (Cth)); *Seamen's Compensation Act* 1909 (Cth), s 10(a).

"election", as contemplated by the statute, had been effected[47]. It is interesting to recollect a suggestion made in this Court in 1936, in a context not entirely dissimilar to the present, that the legislation in question should be amended to "remove the difficulties which have been suggested"[48]. Those words can be compared with the remarks more recently expressed, in relation to the obscure language of s 151A(5)(c) of the Act[49]. However, in 1936, as now, this Court, and the other courts involved, have to do their best with the language which Parliament has chosen.

47 *History of s 151A of the Act*: The history of this election provision was invoked by the employer to strengthen its argument that a purposive construction of par (c) would uphold Handley JA's conclusion that elections in favour of one remedy or the other should ordinarily be final. According to Handley JA, escape from the consequences of such an election "was intended to be quite difficult"[50].

48 In its original form, the Act abolished common law remedies against employers in respect of injuries sustained after its commencement[51]. The Minister, explaining this measure, stated that it was taken in order to contain the costs of workers' compensation insurance and to make investment in the State more attractive to potential employers[52]. However, in 1989, the New South Wales Parliament retrospectively restored the right to damages at common law[53]. This restoration occurred upon terms which restricted the recovery of damages to "seriously injured workers"[54]. The provisions of s 151A were enacted amongst the foregoing amendments which established the new regime for damages claims. That regime imposed severe restrictions upon recovery.

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47 *Latter v Muswellbrook Corporation* (1936) 56 CLR 422.

48 *Latter v Muswellbrook Corporation* (1936) 56 CLR 422 at 434.

49 *Francis* unreported, Court of Appeal of New South Wales, 16 December 1998 at 4 per Priestley JA.

50 *Taylor* (1999) 46 NSWLR 322 at 324 [7].

51 The Act, s 149(1), as originally enacted.

52 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 May 1987 at 12205-12206.

53 *Workers Compensation (Benefits) Amendment Act* 1989 (NSW).

54 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 August 1989 at 8820.

49 The employer submitted that such restrictions could fairly be described as "tough and unsympathetic [to workers] by comparison with the common law". The amending provisions, enacted in 1989, included those providing for repayment of workers' compensation benefits in full (even if a discount were to be imposed in the common law damages for contributory negligence)[55]; restricting recovery of damages for non-economic loss falling below a specified threshold[56]; providing a higher discount rate for future losses than is usual to common law claims[57]; limiting recovery for gratuitous domestic assistance[58]; extending the defence of contributory negligence to claims based on breach of statutory duty and for death claims, formerly exempt from that defence[59]; reversing the onus of proof of mitigation of damage and placing it upon the plaintiff[60]; restricting the recovery of interest[61]; excluding the recovery of exemplary or punitive damages[62]; and otherwise altering the position of the worker plaintiff in ways which a judge of the Supreme Court of the State described as "draconic"[63].

50 Viewed from the perspective of the foregoing legislative history, the employer argued that s 151A of the Act was hardly likely to have evidenced a legislative purpose to facilitate easy circumvention of a properly executed election to pursue statutory compensation and to abandon entitlements to common law damages. Such a construction was, so it was suggested, still more unlikely when it was remembered that the present Act had greatly expanded the statutory benefits in the form of permanent loss compensation[64] when compared with the schedule of lump sum benefits provided under the pre-existing workers'

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55 The Act, s 151B.

56 The Act, s 151G.

57 The Act, s 151J.

58 The Act, s 151K.

59 The Act, s 151N.

60 The Act, s 151L.

61 The Act, s 151M.

62 The Act, s 151R.

63 See *Leonard v Smith* (1992) 27 NSWLR 5 at 9 per Allen J.

64 Under the Act, ss 66-67.

compensation legislation[65]. Relevantly to the present case, the Act now provides for lump sum compensation for neck and back injuries and for pain and suffering, none of which was covered by the former schedule of lump sum entitlements[66]. In these circumstances, the employer submitted that a person electing between the two forms of benefit had a very serious choice to make. By its nature, that choice would sometimes be less than clearcut. Only the future would show whether a wise, or a mistaken, election had been made. Because it was part of the policy of the Act to promote finality, as much in the interests of a worker as of an employer, the inference which this Court was invited to draw was that which Handley JA had drawn: elections under the Act were intended to be final. Revocation of elections was intended to be exceptional. Leave to permit such revocation was intended to be difficult to obtain.

Approach to construction: beneficial legislation?

51 The parties strongly disagreed about the approach that was to be taken to elucidate the meaning of s 151A(5) of the Act. For the worker, it was urged that the sub-section should be construed in a way protective of his entitlements to common law damages and thus with a construction of par (c) which resolved any ambiguities in favour of ease of revocation, rather than one that made revocation more difficult to obtain. Some support for this argument was voiced in the Court of Appeal by Sheppard AJA[67].

52 The employer, on the other hand, argued that the real purpose of s 151A(5) of the Act, and thus of par (c), was to be derived from the immediate context. True, damages at common law were restored; but in a much attenuated form and subject to the many alterations and restrictions listed. In this setting, and especially remembering the substantial added benefits provided in the form of statutory compensation[68], effecting the imputed will of Parliament would not necessarily result in enlarging the entitlement to damages of a person who had previously made an election for statutory compensation. The fact that election was provided for and, once made, unless lawfully revoked, was a bar to the recovery of damages, indicated that the general policy of the Act was thereafter to favour statutory compensation rights over damages.

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65 *Workers' Compensation Act* 1926 (NSW), s 16.

66 The Act, Table to Pt 3, Division 4.

67 *Taylor* (1999) 46 NSWLR 322 at 338-339 [65]-[66] with reference to such cases as *Bist v London & South Western Railway* [1907] AC 209 at 211, *McDermott v Owners of SS Tintoretto* [1911] AC 35 and *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 436, 437.

68 Including the right to seek reassessment of statutory compensation.

53 The legislative history – and the debate about the proper approach to ascertaining the meaning of s 151A(5) – are illuminating. However, the light shed by the illumination is faint indeed. As the competing submissions about the approach to be taken show, there is no conclusive argument that compels a construction of par (c), one way or the other. To the employer one can say: it is true that the restoration of common law damages is deliberately limited, but that does not resolve the controversy as to whether the limit reaches so far as to require the construction of par (c) urged for the employer. To the worker one can say: the restoration of common law damages was intended to benefit workers; but that leaves undecided the question whether elections between benefits, often competitive, should be more easily revoked, as the worker submitted or rarely permitted, as the employer urged.

Approach to construction: effecting the purpose of s 151A(5)

54 The usual starting point for any task of statutory interpretation is to ascertain the imputed purpose of Parliament. The disputed provision should be construed to achieve that purpose[69]. It is true that the purpose of s 151A(5) of the Act can, at one level of abstraction, be viewed as that of upholding elections made under the Act, keeping those who make elections (and receive the benefits that flow from them) to their bargain; defending the finality of settlements and litigation; and promoting the closure of files and the psychology of post-election self-reliance.

55 Against these considerations, it is clear that Parliament recognised, in s 151A(5) of the Act, that mistakes can sometimes occur in elections between entitlements having very grave consequences. Medical conditions can unpredictably deteriorate. The belief of persons making elections may have been affected by undue optimism. Their elections may have been influenced by an unequal bargaining situation in the litigious setting. Furthermore, Parliament could have treated all elections as final. Had it done so, this would doubtless have resurrected the jurisprudence of earlier times addressed to the quality and content of the "election" decision[70]. Instead, Parliament has afforded an escape route, but one only available upon conditions. It has entrusted revocation to a court. It has afforded a number of gateways. They are obviously intended to discourage meritless applications. Yet the power of revocation was clearly provided with the object and expectation that it would be exercised in proper

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69 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

70 eg *Harbon v Geddes* (1935) 53 CLR 33 and *Latter v Muswellbrook Corporation* (1936) 56 CLR 422.

cases. It would be a mistake to confine those cases, on general grounds, to a class narrower than required by the express terms of the paragraph.

56 In a sense, the many qualifications and restrictions imposed on the award of common law damages, following their restoration, themselves imported practical limitations on the pursuit of revocation of an election once made. Together with the legal conditions expressed in s 151A(5) of the Act, it may be expected that such restraints will keep in check meritless applications. This is another way of saying that revocation by a court of an election was afforded to be used where applicable. Invoking it should not be "too difficult", to adapt and modify Handley JA's expression.

Meaning of s 151A(5) of the Act

57 I accept that the arguments for the construction of the Act respectively advanced by the majority and minority in the Court of Appeal, and by the parties before this Court, are fairly evenly balanced. In the end, it is by analysis of the language of the paragraph in which Parliament has expressed its purpose, rather than by reference to general considerations and competing approaches to the statutory language, that I have come to my conclusion. That conclusion accords generally with that which Callinan J has reached.

58 First, I would accept the reasoning of Giles JA that some limitation on the "reasonable cause" that is relevant within par (c) is necessary. Otherwise, if that phrase were given an entirely objective construction, it would require attention to be given to the opinions of the employer's medical experts, previously unknown scientists or experimenters at the cutting edge of the medical problem in question. This would be so although the person who made the election was completely and reasonably unaware of such knowledge[71]. The context affords the means to limit the considerations to which the "reasonable cause" mentioned in s 151A(5) of the Act refers. That context is an application to revoke an election earlier made by an individual on information known or available to that individual but only where it is established that there has been "a further material deterioration in the person's medical condition"[72]. Only if that precondition is proved does the puzzle presented by par (c) fall to be resolved.

59 This consideration, in my view, answers the added ground of appeal which the employer was permitted to rely on during the argument of the appeal. Given the statutory context, and the purpose of the power conferred on a court, a suggestion that the criterion to be applied might be wholly objective and totally

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71 *Taylor* (1999) 46 NSWLR 322 at 332 [40].

72 The Act, s 151A(5)(b).

unconcerned with the knowledge of the person making the election at the time of the election is unconvincing and must be rejected.

60 Secondly, I accept the force of Callinan J's argument[73] that, on the face of things, the use of the adjective "reasonable" to qualify "*cause*" rather than *believe* was apparently deliberate. Otherwise, had it been intended to adopt a criterion of the reasonableness of the belief of the person making the election at the time it was made, there would have been no need to refer to "cause" at all.

61 The word "believe" must be read in context. Obviously it means something more than having a "suspicion", entertaining a "speculation", or a "fear". The word should not be equated to a firm conviction. That might be a suitable meaning, perhaps, in the sense of a belief in a religious faith. But that meaning would be liable, in the present context, to deprive par (c) of any real utility as one of the conditions which the applicant for revocation of an election must establish. Belief in that sense, concerning medical prognostications, would rarely if ever be attained. Nonetheless, in the ordinary meaning of the word "believe", it certainly connotes a greater sense of expectation than "think", which Handley JA proposed as a synonym. The word "think" appears but twenty-five words later in s 151A(5)(c) of the Act. Had it been Parliament's purpose to denote no more than "think", it could easily have said so. Instead, it used the word "believe". That is a word that sits higher in the scale of human expectations.

62 By inference, Parliament used the word "believe" to indicate recognition of the fact that persons required to make elections of the kind with which s 151A(5) of the Act is concerned will normally have access to medical reports stating prognoses. Of their nature, such reports cannot usually be certain about their predictions. A fear, an apprehension and even a suspicion of the possibility that deterioration in a medical condition would occur will therefore not, without more, establish that there was a reasonable cause to *believe* that such deterioration would happen. This was the view of the paragraph that Priestley JA adopted in *Francis*[74]. I agree with him.

63 Thirdly, it is important to note the word "would", appearing in par (c). Obviously, it was appropriate to use a word in the conditional tense because the postulate of the paragraph is that "a further material deterioration in the person's medical condition" has been established[75]. Paragraph (c), in a sense, turns the

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73 Reasons of Callinan J at [100].

74 Unreported, Court of Appeal of New South Wales, 16 December 1998 at 1-4.

75 Under s 151A(5)(b) of the Act.

clock back to consider what was the position at the time of the election. If the purpose of Parliament had been to exclude revocation of an election where mere possibilities, as distinct from likelihood, were taken into account, the word "would" in par (c) would probably have appeared as "might". The word "would" addresses attention, instead, to a real likelihood of further deterioration that, for reasonable cause, *would* have produced a "belief" that (by inference) was, or should have been, taken into account in *making* an election "at the *time* of the election".

64 It is true that, in most matters of medical prognostication, it is impossible to predict the future with certainty[76]. But the two key words in par (c) that contribute to a composite meaning of the paragraph, different from that which Handley JA preferred, are "believe" and "would". Each of those words suggest that the paragraph does not require rejection of an application for revocation of an election, where there has been "further material deterioration in the person's medical condition", simply because the possibility of future deterioration was mentioned in medical reports at the time of the election. More is needed. What is required is the formulation of a requisite *belief* and, for reasonable cause, that such belief rose to the anticipation of a real likelihood that "the further deterioration *would* occur". If the applicant for revocation can prove that there was no reasonable cause at the time of the election for a conclusion so expressed, the precondition in par (c) will be established. If the applicant cannot prove this, the application for revocation of the election must fail.

65 Fourthly, there is a further word in par (c) to be noticed (as it was in the Court of Appeal). This is the definite article ("the") used in reference to "*the* further deterioration". It would have been possible to omit that word altogether. In that event, *any* "further deterioration" would have had to be taken into account. But because the word "the" appears in the paragraph, it identifies the precise further deterioration that is to be considered by reference to the "time of election". This is "the" deterioration already referred to in par (b) of s 151A(5).

66 Fifthly, it is necessary to look back on the foregoing reasoning to ensure that I have not fallen into the trap of dissecting the words of par (c) and adopting a meaning of them insufficiently attentive to language of par (c) read as a whole. I do this mindful of my acceptance of the need to avoid artificial verbal analysis and considering the obstacle which Parliament has placed, by way of a precondition, upon the circumstances in which a court might revoke an election and permit the person who made it to commence proceedings for recovery of damages.

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76 cf *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643.

67 I do not believe that I have made that mistake by giving too much weight to the words "believe", "would" and "the", or the work that I take them to perform. If it had been the object of Parliament to provide that the election should not be revoked by a court where, at the time it was made, on the information available to the person making it, it would have been reasonable to expect or anticipate that a further deterioration of some kind might occur, such a provision could easily have been drafted. Instead, a different and more nuanced precondition to revocation of the election was enacted. It is one which moderates the subjective belief of the person making the election by reference to there being "no reasonable cause". It obliges attention to be given not to "further deterioration" at large but to "*the* further deterioration" that in fact has transpired. And it then asks not whether there was "no reasonable cause to believe" that such deterioration *might* occur but whether such deterioration *would* occur.

Proper approach to applying the precondition for revocation

68 A decision-maker, faced with the question of whether the condition to revocation in par (c) of s 151A of the Act has been made out, must therefore first identify the state of the person's medical condition at the time when the election was made. Then the decision-maker must identify the "further material deterioration in the person's medical condition"[77] that has since occurred. It is then necessary to return to the time when the election was made and to ask a hypothetical question. Having regard to the information known, or reasonably available, to the person making the election, can it be said that there was no reasonable cause at that time to believe that the further deterioration which has in fact occurred would occur?

69 The reference to "no reasonable cause" takes the decision-maker beyond the subjective beliefs of the person who made the election, although obviously those beliefs are still relevant because of the context and purpose of the facility for revocation of the election which the sub-section enlivens. The fact that the person did not subjectively believe that further deterioration of the kind described would occur is not conclusive. But neither is it fatal to an application for revocation that medical reports, or other reasonable cause, existed at the time of the election suggesting that *some* deterioration in the medical condition *might* occur in the future. If a "reasonable cause" was present at the time of the election which elicits a belief, in the sense of a clear opinion, that the further deterioration *would*, as distinct from *might*, occur the person seeking revocation of the election will fail to establish the precondition laid down in par (c). In each case, the decision-maker will be required, where revocation is sought, to consider the state of knowledge at the time of the election and to evaluate, at that time, the state of belief of the person who made the election. This will be done not solely by

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77 The Act, s 151A(5)(b).

reference to subjective considerations (which might have been clouded by undue optimism or inveterate foolhardiness). It will have to consider any cause that existed at the time of the election and was known, or reasonably available, to that person suggesting the possibility of the material deterioration in the person's medical condition. Then, so far as that cause was a reasonable one, it will be fatal to the claim for revocation if it was such as to produce a *belief* that the deterioration *would* occur.

70 For my own part, I prefer this description of the approach which s 151A(5) of the Act mandates to that expressed by Giles JA in *Taylor*[78]. I do so because, as his Honour recognised, his formula departed from the words of par (c). It gave less attention than I would to the use of the word "believe"[79]. That word requires that, retrospectively, the Court must consider whether, for reasonable cause, predictions or fears of deterioration rise to the level of a belief. And that is something more than a thought or a fear, or a suspicion, or a concern.

71 To the extent that the "deterioration" that has in fact occurred was within the medical prognoses contemplated at or before the time of election, it may be anticipated that a person seeking revocation of the election will have significant difficulties in qualifying under par (c). But to the extent that deterioration is substantial, was not clearly envisaged (or envisaged at all) at or before the election or, if anticipated by others was not mentioned in the information known or provided to the person making the election, it may be expected that par (c) will more easily be satisfied.

72 Paragraph (c) of s 151A of the Act is not easy to apply, given its ungainly language, negative onus, expression in the passive voice and ambiguity in the words used. But its application is more likely to be correct if its purpose is kept steadily in mind. It is a precondition for relief from an otherwise binding election. It provides for relief, in the terms expressed, by reference to material further deterioration in the medical condition of the person concerned beyond that in fact suffered at the time when the election was made. It operates by reference to the absence of a reasonable cause to *believe* (not think) that *the* deterioration that in fact occurred (not any deterioration) *would* (not might) occur.

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78 (1999) 46 NSWLR 322 at 332 [43].

79 A similar view was expressed by Priestley JA in *Francis* unreported, Court of Appeal of New South Wales, 16 December 1998 at 2-4.

Application of construction to the case and conclusion

73 Once the foregoing construction of s 151A(5)(c) of the Act is adopted, it follows that, in my view, the conclusion of the majority in the Court of Appeal was correct. Having regard to the actual deterioration which occurred in the worker's medical condition, after the worker's election was made, it was open to the courts below to conclude that no reasonable cause was shown to *believe* that *the* deterioration *would* occur as it did. Some deterioration was anticipated both by the worker's medical advisers and by the worker himself. But deterioration to the significant extent that happened was not expected. At least it was open to the judges who came to that conclusion to so decide. No error of law has been shown in their conclusion. That conclusion should therefore be confirmed.

74 In view of the fact that a majority of this Court has reached an opposite conclusion, and that this Court (like earlier courts below) is divided on the meaning of s 151A(5) of the Act, it may be timely for those who have responsibility for such things to reconsider the section. This may be especially so as the construction now adopted is one that has not heretofore recommended itself to any of the many judges who have considered the provision. It is, as the majority in this Court acknowledge, one that has not been considered, still less applied, at any level of the Supreme Court that has considered the matter to date[80]. Section 151A(5) represents a legislative provision which mixes, in two short lines of the statute book, obscure concepts and incomplete ideas. Obscurity often prevails where the passive voice is used in legal drafting, leaving the identification of the subject of the verbs deployed to judicial guesswork[81]. Where this is done, different guesses will be made resulting in significantly different outcomes. If I still believed in the fiction of the "intention of Parliament" (which I do not) it would be sorely tested by this case. If many judges have experienced so much difficulty in explaining par (c) of s 151A(5) of the Act, and how that paragraph is intended to operate in practice, what the legislators "intended" at the time of its enactment, can only be a matter of speculation. It is time to bury that unconvincing fiction and this appeal illustrates why[82]. It may also be time to reconsider the terms of the section and to consider whether the outcome now decided is truly that which was "intended".

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80 Reasons of Gleeson CJ, McHugh and Hayne JJ at [23].

81 see *Chappel v Hart* (1998) 195 CLR 232 at 251 [46].

82 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 387; *Scott v Davis* (2000) 74 ALJR 1410 at 1433 [128] per Gummow J; 175 ALR 217 at 248, noted in Young, "Current Issues: Legal fictions", (2000) 74 *Australian Law Journal* 795 at 796.

Order

75 The appeal should be dismissed with costs.

76 CALLINAN J. This appeal calls for the construction and application of s 151A(5)(c) of the *Workers Compensation Act* 1987 (NSW) ("the Act") to an election by the respondent to accept payment of permanent loss compensation.

Factual background

77 The respondent worked as a cleaner at Blacktown Girls' High School. On 19 October 1992 he injured his back while lifting garbage bins there. He was absent from work for several weeks from that date. He consulted his general practitioner who found that the lifting had caused a prolapse of a degenerative disc in his back. The doctor prescribed physiotherapy and anti-inflammatory tablets. There was little improvement and the respondent was referred to Dr Atish Sengupta, a specialist orthopaedic surgeon on 30 October 1992.

78 A CAT scan undertaken in 1992 showed a disc bulge at L4-5 but no obvious nerve root damage. The respondent attempted to return to work more than once, but these attempts exacerbated the pain. A further CAT scan on 23 February 1993 confirmed the disc bulge. Dr Sengupta advised a percutaneous discectomy which was performed on 2 June 1993. That procedure improved the respondent's condition. He then suffered occasional pain and discomfort in his back and legs, but to a lesser extent than previously. The respondent returned to light duties at work on 23 August 1993.

79 On 3 August 1993 the respondent's solicitors filed, in the Compensation Court of New South Wales, an application for permanent loss compensation under the Act. Dr N J Nott, on 3 March 1994, expressed the opinion that the respondent was likely to be left with a permanent disability of his back of about 20%. On 19 September 1994 the respondent was awarded permanent loss compensation of $22,000 on the basis of a permanent impairment of 18% of his back[83], a loss of use of 4% of his right leg[84] and pain and suffering[85]. In accepting payment of that sum the respondent completed his election to claim permanent loss compensation, and lost, subject to s 151A(5)(c) of the Act, any right that he might have had to recover damages in respect of his injuries[86].

80 The respondent continued to be troubled by pain and consulted medical practitioners after his claim for compensation had been resolved. His pain

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83 s 66.

84 s 66.

85 s 67.

86 In acceptance of that compensation, the respondent was taken to have made an election that was irrevocable except with leave of the Court.

worsened and extended to the calf of his left leg. He was referred to a pain management specialist, Dr Peter Cox, on 17 October 1994, who concluded that he "seemed fairly stable without having made significant improvement", and was "working four hours a day". By 12 December 1994 however, it was Dr Nott's opinion that the respondent had a disability of 60% of his back.

81 By February 1995 the respondent was experiencing more frequent and severe pain in the back and legs. In that month he underwent a discographic examination. It showed a degenerative and ruptured disc at the L4-5 level. Dr Sengupta recommended surgical exploration and excision of the disc and fusion at the L4-5 level. The respondent ceased all work in March 1995. By August 1995 Dr Sengupta strongly recommended fusion. He was of the opinion that the respondent was unfit for any kind of work. In September 1995 the respondent was referred to Dr Roberto Garofali, a behavioural psychologist, and began therapy for feelings of insecurity, anxiety and depression.

82 The respondent was also examined by Dr Richard Evans and Dr W D Sturrock for medico-legal purposes. Dr Evans examined him in November 1993 and April 1995, and recorded that his back was more painful and stiff at the later examination than at the earlier examination, and that, on the later occasion he had "more troublesome and constant pain in the left leg". Dr Sturrock's opinion differed from those of his colleagues. He found that although the respondent had experienced some degenerative changes he was quite fit for work and needed no surgical or other special treatment.

Proceedings

83 In October 1995 the respondent commenced proceedings in the Supreme Court of New South Wales claiming damages in respect of his injuries.

84 The appellant's defence was filed in January 1996 and included that the respondent had not obtained the leave of the Court to bring proceedings, and that he was therefore not entitled to maintain them.

85 In April 1997 the respondent applied by notice of motion in the proceedings for leave, and for an order that the proceedings "be deemed to have been validly commenced". On 3 June 1997 Master Greenwood found that the respondent's injury undoubtedly caused a further material deterioration to his medical condition, and, because he was satisfied that the plaintiff met the criteria stated in s 151A(5)(c), granted leave pursuant to that section.

86 The appellant appealed from the decision of the Master. Its notice of appeal challenged the grant of leave pursuant to s 151A(5) on grounds of error of fact and law. On 18 September 1997 Murray AJ allowed the appeal in relation to the grant of leave pursuant to s 151A(5). It was his opinion that there was ample evidence available to the respondent, and which should have been apparent to the

Master, to show that there were reasonable grounds to believe that the further deterioration would occur. The basis of this opinion was that there were statements in the medical reports which, his Honour assumed, would have been available to the respondent and which "[revealed] that the [respondent's] condition prior to and at the time of his election *might well have deteriorated*, and that further surgery was at the very least, possible"[87]. His Honour accordingly ordered that the respondent's notice of motion be dismissed and that the proceedings be struck out.

The Appeal to the Court of Appeal of New South Wales

87 The respondent appealed to the Court of Appeal of New South Wales (Handley and Giles JJA and Sheppard AJA)[88]. The appeal (Giles JA and Sheppard AJA; Handley JA dissenting) was upheld on 2 June 1999.

88 The division in the Court of Appeal reflected the same divergence of opinion with respect to the effect of s 151A(5)(c) as had arisen in that Court earlier between Handley JA and the majority there (Priestley JA and Fitzgerald AJA) in *Francis v Dunlop*[89].

89 Section 151A(5) provides as follows:

"(5) If:

(a) a person elects to claim permanent loss compensation in respect of an injury, and

(b) after the election is made, the injury causes a further material deterioration in the person's medical condition that, had it existed at the time of the election, would have entitled the person to additional permanent loss compensation, and

(c) at the time of the election, there was no reasonable cause to believe that the further deterioration would occur,

the person may, with the leave of the court and on such terms (if any) as the court thinks fit, revoke the election and commence proceedings in the court for the recovery of damages in respect of the injury."

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87 Emphasis added.

88 *Taylor v State of New South Wales* (1999) 46 NSWLR 322.

89 Unreported, 16 December 1998.

90 In construing the words "there was no reasonable cause to believe that the further deterioration would occur", Handley JA adhered to his earlier opinion in *Francis v Dunlop* and applied a test which was effectively the same as that adopted by Murray AJ.[90] His Honour continued[91]:

> "A 20 per cent chance of something occurring can, in my view, be described both as a chance that it would occur and as a chance that it might occur. In such a case it cannot be said, in my view, that there was no reasonable cause to believe that it would occur."

His Honour said that the legislature used the form of words chosen because it was "intended to be quite difficult"[92] to obtain leave.

91 Giles JA, with whom Sheppard AJA agreed, said[93]:

> "Paragraph (c) must, of course, be read as a whole. Regard to the composite notion of reasonable cause to believe that a future event will occur, in my view, means that the further deterioration must be more than a possible event (because it can not readily be said that a possible event will occur) but not a certain event (because cause to believe and the futurity deny certainty), and that the belief must be more than suspicion (because reasonable cause should found more than suspicion) but less than complete confidence (because reasonable cause and the futurity deny complete confidence). The reference to reasonable cause connotes the existence of facts sufficient to induce the relevant belief in a reasonable person (cf *George v Rockett*[94]). Assuming without deciding the field of knowledge described above, *the effect of par (c) is that it must be asked whether a reasonable person knowing what was known or ought to have been known to the worker would expect the further deterioration in fact suffered by the worker as something more probable than not. If the answer is no, par (c) is satisfied.*
>
> An analysis such as the foregoing may risk departure from the words of par (c), to which the Court must be true, but the legislature has used singularly awkward language. The view of the effect of par (c) I

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90 (1999) 46 NSWLR 322 at 324 [6]-[8].

91 (1999) 46 NSWLR 322 at 324 [9].

92 (1999) 46 NSWLR 322 at 324 [7].

93 (1999) 46 NSWLR 322 at 332 [43]-[44].

94 (1990) 170 CLR 104 at 112.

> have expressed does not seem to me to depart from the broad purpose of par (c) earlier identified, and that par (c) can give rise to divergent interpretations is shown by the judgments in the decision of this Court in *Francis v Dunlop*." (emphasis added)

92 After analysing the medical evidence and referring to the majority judgments in *Francis v Dunlop*,[95] Giles JA added this[96]:

> "On the view of the effect of par (c) I have expressed, a reasonable person knowing the medical opinions would not expect the further deterioration in fact suffered by the appellant as something more probable than not.
>
> Taking the medical opinions together with the appellant's account of his condition, including of its continuing worsening, in my opinion, the position is the same. There was no reasonable cause to believe that the further deterioration would occur, and par (c) was satisfied."

The Appeal to this Court

93 There was initially only one ground of appeal to this Court:

> "The Court of Appeal erred in not finding that upon its proper construction s 151A(5)(c) operates to preclude a worker from revoking his or her election not to sue for damages when a reasonable person in the position of the worker at the time the election is made would think that deterioration was either likely or was a real possibility as a consequence of the injury."

This ground of appeal, in terms, accepted that it was the belief of a reasonable person in the position of the worker at the time of the election to which regard had to be had.

94 However, as the hearing proceeded, the possibility of the availability of a further argument for the appellant on the construction of the section emerged. The appellant accordingly sought, and was granted leave, on terms, to add a second ground of appeal as follows:

> "Alternatively, that on its proper construction, s 151A(5)(c) so operates to preclude a worker from revoking his or her election wherever there exists reasonable cause to believe that further deterioration would occur or was likely or was a real possibility at the time the election is made."

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95 (1999) 46 NSWLR 322 at 332-334 [45]-[49].

96 (1999) 46 NSWLR 322 at 337 [58]-[59].

95 At first sight the test posed by the relevant paragraph of the section would appear to be an entirely objective one. It does not, for example say, "at the time of the election, there was no reasonable cause *for the worker* to believe…" or "… for a reasonable worker in the position of the worker to believe". It is quite different therefore, from the provisions of Limitations statutes providing for the enlargement of time within which a plaintiff may sue, which, among other matters, direct attention to a plaintiff's knowledge and means of knowledge of a material fact of a decisive kind[97].

96 In *Francis v Dunlop* Fitzgerald AJA, who was one of the majority there, took the relevant words in this Act to have a similar meaning to some of the express language of the *Limitation Act* 1969 (NSW) by referring to the belief of a

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97 See for example *Limitation Act* 1969 (NSW) s 60E(1):

"Matters to be considered by court

(1) In exercising the powers conferred on it by section 60C or 60D, a court is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing), the court is, to the extent that they are relevant to the circumstances of the case, to have regard to the following:

(a) the length of and reasons for the delay;

(b) the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available;

(c) the time at which the injury became known to the plaintiff;

(d) the time at which the nature and extent of the injury became known to the plaintiff;

(e) the time at which the plaintiff became aware of a connection between the injury and the defendant's act or omission;

…

(g) the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received".

See also *Limitation of Actions Act* 1974 (Qld) s 31(2).

"reasonable person with the information available to the [worker]"[98] at the time when he made his election.

97 Section 151A(5)(b) makes it clear that a precondition for a revocation of an election is the occurrence of a "further material deterioration". On the finding of the Master which was open to him that certainly occurred here. How though, is the question, whether there was reasonable cause to believe that further material deterioration would occur, to be answered? What does belief mean in the context of the section? The answer to the latter question in my opinion is supplied by what was said by all members of this Court in *George v Rockett*[99] of a very similar expression, "reasonable grounds for a belief":

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."

98 Their Honours also said[100]:

> "Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

99 All of the relevant words in the sub-section need to be given their composite meaning. In my opinion, the presence of the word "reasonable" necessarily attracts consideration of the circumstances in which the existence or otherwise of cause has to be ascertained. Reasonable cause is not to be found in a vacuum. The cause must be a reasonable cause in the circumstances of the particular case. The question is how wide may the net be cast to identify the circumstances to be regarded as relevant ones. It seems hardly likely that a particular worker's means of, and access to knowledge as a basis for whatever belief he or she (reasonably) holds at the time of election, should be excluded as a relevant circumstance. If the test were in all respects an absolute or objective one then the word reasonable would have little or no work to do. "Reasonable" is not a very apt adjective to apply to a cause. The paragraph does not say, as was in all likelihood its intent, " … there was no cause or basis for a reasonable

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98 Unreported, Court of Appeal of New South Wales, 16 December 1998 at 6 per Fitzgerald AJA.

99 (1990) 170 CLR 104 at 112 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

100 (1990) 170 CLR 104 at 116.

belief, or for a reasonable person to believe, that the further deterioration would occur". "Reasonable" is an adjective apt to qualify to a state of mind, a person, or a reasoning creature, rather than an abstraction such as a cause. The way in which the test is expressed is an example of an hypallage, the transfer of the descriptive word to a different expression noun, or pronoun, from the one which it really qualifies.

100 It follows that the test cannot sensibly be taken to be an entirely impersonal and objective one. Further, were it otherwise, the existence of a piece of vital information lost or mislaid, but viewed objectively after the event of the election, and then seen to be inescapably a reasonable cause for anyone, including the worker, had he or she known of it, to believe that there would be a material deterioration, would preclude the worker from revoking the election. I have therefore formed the view that the use of the word "reasonable", transposed as it is, to qualify cause rather than belief, requires that regard be had to all relevant circumstances, including what a reasonable person in the worker's position could know and would accordingly believe. I take the draftsperson's intention to be to preclude a worker from revoking his or her election only if there existed a basis for the worker in question, acting reasonably, to hold the belief (as I have explained "belief") at the time of election, that the further material deterioration would be likely to occur. I agree with the majority in the Court of Appeal that the test is of likelihood and not possibility. The section does not use the words "might occur". Following injury almost always there will be a possibility of further deterioration, or indeed often, further material deterioration. With imagination practically anything is foreseeable. "Would" as used in this section connotes neither possibility nor certainty but probability. Among the circumstances that will obviously be relevant to the reasonableness of the worker's belief are his or her access and entitlement to information and steps taken and assistance available to ascertain what is likely.

101 The concession made in the first ground of appeal was correctly made. But that ground fails also because, as I have explained there must be an inclination of mind to a belief that there is a likelihood, and not just a possibility of further material deterioration. There was not material available to the respondent acting reasonably here to induce the requisite state of mind, that is, to believe that further material deterioration would be likely to occur.

102 I would therefore dismiss the appeal with costs.