

HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
KIRBY, CALLINAN, HEYDON AND CRENNAN JJ

KENNETH CANUTE

APPELLANT

AND

COMCARE

RESPONDENT

Canute v Comcare
[2006] HCA 47
28 September 2006
S154/2006

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 16 December 2005, and in their place order that:*
 - (a) *Order 1 made by Hill J on 1 April 2005 be varied so that it reads:*
 1. *The decision of the Administrative Appeals Tribunal dated 21 June 2004 be set aside and in place thereof direct that Comcare determine an amount payable to the Applicant assessed under ss 24 and 27 of the Safety, Rehabilitation and Compensation Act 1988 (Cth) in respect of an injury, being an adjustment disorder with anxious and depressed mood resulting in a degree of permanent impairment of the Applicant of 10 per cent as assessed pursuant to Table 5.1 of the Guide.*
 - (b) *Appeal otherwise dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

L T Grey with J P Masic for the appellant (instructed by Carroll & O'Dea)

P J Hanks QC with B H J Dube for the respondent (instructed by Phillips Fox
Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal
revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Canute v Comcare

Workers compensation – Injury and impairment – Liability of Comcare to pay compensation in respect of an injury which results in a permanent impairment pursuant to s 24 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Act") – Where Comcare required to determine the degree of permanent impairment resulting from an injury under the approved Guide – Where s 25(4) of the Act provides that no further compensation payable in respect of a subsequent increase of less than 10 percent in the degree of impairment where Comcare has made a final assessment of the degree of permanent impairment of the employee – Where the worker sustained a physical injury to the back and also a mental injury being a post traumatic stress disorder – Where the mental injury manifested itself later in time than the physical injury – Whether s 25(4) of the Act precluded Comcare from being liable to pay compensation in respect of the mental injury because it resulted in an increase of less than 10 percent in the degree of impairment of the employee.

Statute – Statutory construction – Whether repugnancy arises between s 24 and s 25(4) of the Act in circumstances where something is both an injury and produces a subsequent increase in the degree of permanent impairment of the employee.

Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 4, 14, 24, 25(4).

1 GUMMOW ACJ, KIRBY, CALLINAN, HEYDON AND CRENNAN JJ. This appeal from the Full Court of the Federal Court (French and Stone JJ; Gyles J dissenting)¹ raises a question of the construction and application of Div 4 of Pt II of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Act"). The issue involves the proper principles to be applied in determining the liability of Comcare under the Act in respect of a psychiatric injury sustained by the appellant employee, Mr Canute, subsequently to an initial physical injury he suffered. Both injuries arose out of, or in the course of, his employment.

2 The appellant had claimed, and was awarded, lump sum compensation in respect of the physical injury. The majority of the Full Court reversed the orders of Hill J² setting aside a determination made by the Administrative Appeals Tribunal ("the AAT"). The AAT had denied to the appellant further lump sum compensation in respect of the psychiatric injury.

3 If the appellant is successful in this Court, the effect in ordinary circumstances would be to restore the orders made by Hill J, setting aside the AAT's decision and remitting the matter for redetermination. However the appellant also seeks an order to substitute the decision which the AAT should have made. Before looking to the facts, it is necessary to consider the legislation; without an appreciation of the legislation, the course of events does not assume its significance.

The Act

4 The Act establishes the Commonwealth workers' compensation scheme for Commonwealth employees who suffer injury or illness in the course of their employment. Part II of the Act is entitled "Compensation" and is the principal substantive part providing for the circumstances in which Comcare is liable to pay compensation to an injured employee. At the relevant time, s 14(1), which is contained in Div 1 of Pt II, provided that:

"Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment."

1 *Comcare v Canute* (2005) 148 FCR 232.

2 *Canute v Comcare* (2005) 40 AAR 327.

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2.

Succeeding divisions of Pt II make separate provision as to the quantum of compensation for which Comcare is liable in different categories of "injury": "Injuries resulting in death" (Div 2); "Injuries resulting in incapacity for work" (Div 3); and "Injuries resulting in impairment" (Div 4).

5 The present case is concerned with compensation for injuries resulting in impairment, pursuant to Div 4 of Pt II. Section 24 is the principal section in that division, and provides:

- "(1) Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.
- (2) For the purpose of determining whether an impairment is permanent, Comcare shall have regard to:
 - (a) the duration of the impairment;
 - (b) the likelihood of improvement in the employee's condition;
 - (c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and
 - (d) any other relevant matters.
- (3) Subject to this section, the amount of compensation payable to the employee is such amount, as is assessed by Comcare under subsection (4), being an amount not exceeding the maximum amount at the date of the assessment.
- (4) The amount assessed by Comcare shall be an amount that is the same percentage of the maximum amount as the percentage determined by Comcare under subsection (5).
- (5) Comcare shall determine the degree of permanent impairment of the employee resulting from an injury under the provisions of the approved Guide.
- (6) The degree of permanent impairment shall be expressed as a percentage.
- (7) Subject to section 25, if:

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- (a) the employee has a permanent impairment other than a hearing loss; and
- (b) Comcare determines that the degree of permanent impairment is less than 10%;

an amount of compensation is not payable to the employee under this section.

(7A) Subject to section 25, if:

- (a) the employee has a permanent impairment that is a hearing loss; and
- (b) Comcare determines that the binaural hearing loss suffered by the employee is less than 5%;

an amount of compensation is not payable to the employee under this section.

(8) Subsection (7) does not apply to any one or more of the following:

- (a) the impairment constituted by the loss, or the loss of the use, of a finger;
- (b) the impairment constituted by the loss, or the loss of the use, of a toe;
- (c) the impairment constituted by the loss of the sense of taste;
- (d) the impairment constituted by the loss of the sense of smell.

(9) For the purposes of this section, the maximum amount is \$80,000."

6

Section 24(1) is the general provision imposing liability upon Comcare to pay compensation where an injury results in a permanent impairment. However, s 24(4) renders s 24(5) the central provision. Section 24(5) requires Comcare to determine "the degree of permanent impairment of the employee"; this is to be expressed as a percentage (s 24(6)). The compensation payable under s 24(1) is the equivalent percentage of the "maximum amount" (s 24(3), (4), (9)), subject to the threshold in s 24(7). The content of the phrase the "degree of permanent impairment of the employee" is not specifically stated in the Act; that is left to the "approved Guide" (s 24(5)), discussed later in these reasons.

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Heydon J
Crennan J

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7 Some attention must now be given to the defined terms. For the purposes of this appeal, important defined terms within s 24 are "injury" and "impairment" together with "permanent".

"Injury"

8 The concept of "an injury" is a term of pivotal importance in the structure of the Act. Section 24(1), set out above, provides that Comcare's liability to pay compensation arises in respect of "an injury". Further, Comcare's liability pursuant to s 24(1) also arises with respect to "an injury" which results in "a permanent impairment". Section 4(1) provides:

"injury means:

- (a) a disease suffered by an employee; or
- (b) an injury (other than a disease) suffered by an employee, being a physical or mental injury arising out of, or in the course of, the employee's employment; or
- (c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), being an aggravation that arose out of, or in the course of, that employment;

but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment."

Sections 6, 6A and 7 are facultative provisions; they indicate (in a non-exhaustive fashion) when an injury may be treated as having arisen out of, or in the course of, employment for the purposes of the Act. This operation is not called in question in this appeal.

5.

9 The definition of "injury" requires some elaboration. Separate provision is made as to the meaning of "disease"³, in terms similar to those pertaining to physical or mental injuries within pars (b) and (c) of the definition of "injury". The primary concept in the definition of "disease" is "ailment", meaning "any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)". The appellant's case is that his adjustment disorder met this description and so was "an injury" within the "disease" category. This was accepted by all members of the Full Court⁴.

10 At this juncture, three things may be observed about the concept of "an injury". First, the Act does not oblige Comcare to pay compensation in respect of an employee's impairment; it is liable to pay compensation in respect of "the injury". Secondly, the term "injury" is not used in the Act in the sense of "workplace accident". The definition of "injury" is expressed in terms of the resultant effect of an incident or ailment upon the employee's body. Thirdly, the term "injury" is not used in a global sense to describe the general condition of the employee following an incident. The Act refers disjunctively to "disease" or "physical or mental" injuries and, at least to that extent, it assumes that an employee may sustain more than one "injury". The use in s 24(1) of the indefinite article in the expression "an injury" reinforces that conclusion.

"Impairment"

11 Section 24(5) of the Act is expressed in terms of "the degree of permanent impairment of the employee". This expression is said by Comcare to reflect an approach of assessing impairment on a "whole person" basis. However the definition of "impairment" is not expressed in those terms. Section 4(1) provides:

3 Section 4(1) provides:

"disease means:

(a) any ailment suffered by an employee; or

(b) the aggravation of any such ailment;

being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth or a licensed corporation."

4 (2005) 148 FCR 232 at 234, 253.

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"impairment" means the loss, the loss of the use, or the damage or malfunction, of any part of the body or of any bodily system or function or part of such system or function;

...

permanent means likely to continue indefinitely".

The definition of "impairment" (and by extension the concept of "permanent impairment") is expressed in terms of effects on bodily parts, systems and functions. This disaggregated sense of the word is reinforced by the use of the indefinite expression "a permanent impairment" in s 24(1). Textually, the Act assumes that "an injury" may result in more than one "impairment".

12 Content is given to the expression "degree of permanent impairment of the employee" by reference to the *Guide to the Assessment of the Degree of Permanent Impairment* ("the Guide"), to which s 24(5) refers. The Guide is subordinate legislation which is to be prepared by Comcare and approved by the Minister pursuant to s 28 of the Act. Section 28(1) stipulates that the approved Guide set out:

- "(a) criteria by reference to which the degree of the permanent impairment of an employee resulting from an injury shall be determined;
- (b) criteria by reference to which the degree of non-economic loss suffered by an employee as a result of an injury or impairment shall be determined; and
- (c) methods by which the degree of permanent impairment and the degree of non-economic loss, as determined under those criteria, shall be expressed as a percentage."

It is the first edition of the Guide which is relevant to these proceedings⁵, and it is this which is identified in references in what follows to "the Guide".

5 The first edition of the Guide was approved by the Minister of State for Industrial Relations by notice dated 27 July 1989. It was revoked pursuant to s 28(2) of the Act on 1 September 2005 in respect of claims under ss 24, 25 or 27 of the Act received after 28 February 2006, as set out in the *Guide to the Assessment of the Degree of Permanent Impairment* prepared by Comcare by instrument dated (Footnote continues on next page)

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13 Part A of the Guide is concerned with permanent impairment, and Pt B is concerned with non-economic loss. Part A gives effect to the definition of "impairment" in s 4(1) of the Act by a structure which compiles descriptions of impairments into groups according to body system and by expressing each impairment as a percentage value of the functional capacity of a normal healthy person. The Guide then contains a "Combined Values Chart" in Table 14.1. This enables each impairment expressed as a percentage to be combined "to give the total effect of all impairments ... as a percentage value of the employee's whole bodily system or function". The Guide claims, in this way, to import the notion of "whole person impairment" from the American Medical Association's Guides.

14 However, it is important to remember that recourse to the criteria and methodologies set out in the Guide is only necessary once the key statutory criterion of the occurrence of "an injury" (which resulted in at least one permanent impairment) has been fulfilled. The Guide is to be approached through the prism of each "injury". The terms of s 24(5) are quite clear; Comcare is to assess the degree of permanent impairment of the employee "*resulting from an injury*". Similarly, in s 24(7), the threshold permanent impairment of the employee of 10 per cent affects the amount of compensation payable "under this section"; that is, "in respect of the injury" (s 24(1)).

15 The scheme of the Act proceeds in this way from the occurrence of "an injury", in the defined sense. As previously remarked, the Act assumes that more than one "injury" may occur. Therefore it is not correct to say that s 24(5) imports a "whole person" approach to the determination of the degree of permanent impairment. That ignores the centrality of "an injury" to the scheme upon which Comcare's liability to compensate depends.

Section 25(4)

16 It is appropriate first to refer to s 25(1). This makes provision for an employee to request Comcare to make an interim determination in certain circumstances. Upon receiving such a request, Comcare "shall" make an interim determination of the degree of permanent impairment and compensation payable in respect thereof. Section 25(2) is in similar terms to s 24(4) and mandates the

1 September 2005, and approved by the Minister on 30 September 2005. A motion in the Senate to disallow the second edition of the Guide was negatived on 29 March 2006.

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percentage for the amount to be awarded. Section 25(3) provides for adjustments to be made when a final determination is made after an interim determination.

17 The operation of s 25(4) is at issue in this appeal. It must be read together with s 25(5), which has an almost identical structure. The two sub-sections state:

"(4) Where Comcare has made a final assessment of the degree of permanent impairment of an employee (other than a hearing loss), no further amounts of compensation shall be payable to the employee in respect of a subsequent increase in the degree of impairment, unless the increase is 10% or more.

(5) If Comcare has made a final assessment of the degree of permanent impairment of an employee constituted by a hearing loss, no further amounts of compensation are payable to the employee in respect of a subsequent increase in the hearing loss, unless the subsequent increase in the degree of binaural hearing loss is 5% or more."

It is clear that s 25(5) is intended to represent a particular qualification to the more general rule expressed in s 25(4). Both those sub-sections attained their present form following amendments made in 2001, when specific provision was made in Div 4 of Pt II for hearing loss⁶. At the same time, sub-ss (7) and (7A) of s 24, which impose threshold percentage levels of impairment before compensation is "payable", were amended to their present form. Those two sub-sections are expressed to be "subject to section 25", and are displaced where an interim determination of the degree of impairment of the employee is made pursuant to that latter section.

18 Sub-sections (4) and (5) of s 25 do not immediately affect the scheme of interim payment of compensation provided for by s 25. They speak in terms of a "final assessment of the degree of permanent impairment of an employee", implicitly referring to the determination required to be made by Comcare under s 24(5) of the Act, which, it again is to be emphasised, is to be performed with reference to "an injury". For this reason, all the members of the Full Court regarded s 25(4) as a rider, qualifying s 24⁷, and in a sense this is correct.

6 *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2001* (Cth), Sched 2, Pt 9, Items 54-55.

7 (2005) 148 FCR 232 at 252, 253.

The facts

19 The facts relevant for the purposes of this appeal are undisputed and fall into quite a narrow compass. The appellant was born in 1957 and was employed by the Department of Defence as a civilian contractor engaged in cleaning and maintenance duties. He injured his back in the course of his employment on 19 February 1997 and again on 7 September 1998. The appellant was unfit for work for approximately three weeks following the first incident, and for two years following the second incident.

20 On 4 November 1998, the appellant lodged a claim for rehabilitation and compensation with Comcare, citing the second incident as the occasion of his injury. Comcare allowed his claim on the basis that he had sustained work-related "aggravation of displacement of intervertebral disc-lumbar sustained on 7/9/1998". Comcare accepted liability up to and including 7 June 1999, and told the appellant that further medical evidence would be required to support a claim for compensation beyond that date.

21 On 14 September 1999, the appellant lodged with Comcare a claim for permanent injury compensation. On this form the appellant's doctor recorded a diagnosis of his condition as "L5/S1 spondylolisthesis", and described his impairment as "[c]hronic severe back pain radiates down (R) leg". The assessing medical practitioner, Dr Lewington, assessed the appellant as having a 15 per cent whole person impairment with respect to his back injury and a 10 per cent whole person impairment with respect to his right leg. However, he assessed that 50 per cent of the appellant's condition was attributable to a condition pre-existing the work injuries. Accordingly, by letter dated 9 February 2000, Comcare made "an award of 12% whole person impairment" under s 24 of the Act, based upon the Combined Values Chart in the Guide. This amounted to \$13,731.28. Comcare also awarded the appellant \$15,876.80 for non-economic loss under s 27 of the Act.

22 On 4 July 2002, the appellant lodged a second claim for permanent injury compensation. This form, which was lodged after the appellant had been referred to a psychiatrist, recorded a diagnosis of "1) L5/S1 spondylolisthesis" and "2) Adjustment disorder with depression" and described the impairment as "1) chronic severe low back pain" and "2) ongoing depression". By letter dated 29 September 2002, Comcare denied liability on the basis that the appellant had not shown an increase in whole person impairment of at least 10 per cent, as required by s 25(4) of the Act. An internal reconsideration within Comcare requested by the appellant affirmed that decision.

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The AAT decision

23 The appellant sought review of Comcare's decision by the AAT. The AAT accepted that s 25(4) of the Act required the showing of an increase of at least 10 per cent to the degree of whole person impairment upon which the first award of compensation had been made. It found that the appellant's adjustment disorder "is a 10 per cent whole person impairment assessed under Table 5.1 of the Guide". However, the AAT concluded that:

"Mr Canute has a permanent impairment of his back and subsequently permanent impairment arising out of the same physical injury but producing a psychological sequelae. Hence multiple impairments arising from the same incident, a physical impairment and a psychological impairment."

It may be observed that the AAT here treated the concept of "injury" as co-extensive with the workplace incident which produced the impairments. As indicated earlier in these reasons, the term "injury" is not so defined by the Act.

24 Applying the Combined Values Chart in the Guide, the AAT found that combining the 12 per cent whole person impairment in respect of the back injury (which had been the basis of the earlier award of compensation) with the 10 per cent whole person impairment found in respect of the adjustment disorder produced a whole person impairment of 21 per cent. Since this was not a 10 per cent increase on the 12 per cent whole person impairment on which the previous award had been made, the AAT determined that no further lump sum compensation was payable.

The decision of Hill J

25 The appellant sought review of the AAT decision in the Federal Court. Hill J found in the appellant's favour. On 1 April 2005, orders were made setting aside the decision and remitting the matter to the AAT for redetermination⁸. Hill J held that the AAT had erred in failing to consider whether the chronic adjustment disorder was itself "an injury" for the purposes of the Act. His Honour remarked that⁹:

8 (2005) 40 AAR 327 at 336.

9 (2005) 40 AAR 327 at 336.

11.

"The fact that the two injuries were caused by a single event ... is not a relevant question under the Act. The Act is concerned with injuries, not incidents."

This is correct, having regard to the considerations discussed earlier in these reasons.

26 Hill J concluded that it would be wrong to treat two separate injuries, each having different impairments, as one injury for the purposes of the Act, because¹⁰:

"[t]he measure of compensation is determined by reference to percentage impairment. However, the right to compensation is created by the occurrence of an injury."

His Honour concluded that the AAT had fallen into error because it characterised the adjustment disorder merely as "psychological sequelae" of the back injury, without considering whether it itself was "an injury".

The Full Court judgment

27 On appeal to the Full Court, the majority (French and Stone JJ) held that, while the AAT had erred, it had come to the right result. The error identified by the majority was not the same as that identified by Hill J. The majority acknowledged that the adjustment disorder was "plainly" an injury for the purposes of the Act¹¹. For the majority, the error by the AAT was in assuming that an injury which is consequential upon a compensable injury is necessarily to be treated as an increase in the level of impairment attributable to that injury without addressing the relevant question; this was whether the adjustment disorder was an "impairment". Having posed that question, the majority answered it affirmatively and supported the application by the AAT of s 25(4).

28 In his dissenting reasons, Gyles J endorsed the reasons of Hill J and added some reasons of his own. His Honour essentially was of the view that there was no ground for not applying s 24 to the psychiatric injury, given it was "an injury"

10 (2005) 40 AAR 327 at 336.

11 (2005) 148 FCR 232 at 234.

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Heydon J
Crennan J

12.

for the purposes of the Act, and that, on its proper construction, s 25(4) could not affect this conclusion.

The submissions on appeal

29 On appeal to this Court, the appellant supported the reasoning of Hill J and of Gyles J that the Act requires Comcare to determine separately the impairments arising from each injury. The appellant submitted that, since the adjustment disorder was "an injury" resulting in a separate impairment, s 24 should have been applied and that should have been the end of the inquiry. Given the primacy of the concept of "injury" within the compensatory scheme, the terms of the Act mandate the operation of s 24 in respect of that "injury", in the manner for which the appellant contends. Such an outcome has both logic and simplicity to commend it. Where something is "an injury", why should not the quantum of compensation payable in respect of it be determined in the same manner for that "injury" as for any other?

30 The effect of the reasoning of the majority in the Full Court, supported by Comcare on this appeal, denies that outcome. The reasoning must be examined, resulting as it does in disapplying s 24 (and indeed s 14(1)) of the Act to something which, on its face, is within the terms of that section.

31 As previously indicated, the Full Court majority found error in the AAT having proceeded on the basis that an injury which is consequential upon a compensable injury is necessarily to be treated as an increase in the level of impairment attributable to that injury without addressing the relevant question of whether the adjustment disorder was an "impairment"¹². The manner in which the majority put what they saw as the relevant question was inaccurate, because it departed from the terms of s 25(4). That paragraph does not inquire as to whether there is a new "impairment" resulting from the previous injury; it inquires as to whether there has been a "subsequent increase in the degree of impairment [that is, permanent impairment of an employee]". That question can only be answered by reference to the Guide (s 25(4)). In practice, and in circumstances such as those that obtain here, the occurrence of a new impairment will invariably lead to an increase of that nature by operation of the Combined Values Chart. The reasoning of the majority indicates that in substance this is what they meant¹³.

¹² (2005) 148 FCR 232 at 234, 252-253.

¹³ (2005) 148 FCR 232 at 252.

32 For the majority, it was critical that the "injury" constituted by the adjustment disorder could also be described as contributing to a "subsequent increase in the degree of impairment" attributable to the earlier back injury in respect of which a final determination had been made (for the purposes of s 25(4)). This was possible because of the breadth of the statutory definition of "impairment". In those circumstances, the majority construed the Act as requiring that the relevant condition only be treated as going to "impairment" and not as a separate "injury" resulting in an impairment. Upon that reasoning the injury constituted by the adjustment disorder did not give rise to a separate liability under s 24 of the Act because it was also an impairment resulting from the back injury.

33 The majority identified a legislative policy to support this construction with reference to two considerations. First, their Honours referred to the importance of the "whole person" approach in the scheme of the Act, referring to the Minister's Second Reading Speech, where he said¹⁴:

"Under the existing Act [the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth)], lump sum payments are made on the basis of a table of maims, with the level of payment being determined having regard to the loss, or loss of the efficient use, of various parts of the body. That approach has been abandoned and the level of payments in future will be determined using a 'whole person' approach, similar to that used under the *Veterans' Entitlements Act* 1986."

Secondly, the majority referred to a legislative policy of imposing limits on recoverable compensation¹⁵. Comcare submits that s 25(4) should be construed as a further limit on recoverable compensation, applying in cases where multiple impairments result from the same "injury".

Construction of the Act

14 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 April 1988 at 2193.

15 (2005) 148 FCR 232 at 252.

Gummow ACJ
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Heydon J
Crennan J

14.

34 Reduced to its essentials, the conclusion of the Full Court majority depended upon the proposition that¹⁶:

"the policy of [the Act] seems to require such an injury to be treated as an aspect of the impairment created by the initial injury".

It is clear from the context that what was being referred to was what the majority described as a "consequential injury", a notion supported by Comcare in terms of "primary" and "secondary" injuries. Comcare's case depends upon confining the meaning of "injury" to exclude such "consequential injuries". However, there is no foundation in the Act for any such distinction between "an injury" and a consequential or secondary injury. Neither of these qualifiers finds any expression in the Act. The Act speaks exclusively in terms of "an injury".

35 In effect, the majority appears to have discerned a repugnancy or conflict between s 24 and s 25(4). That is said to arise in the particular circumstance where something can answer the description of "an injury" and also would, if it were taken into account in a s 25(4) inquiry, produce a "subsequent increase in the degree of impairment" from that found by Comcare in a "determination of permanent impairment of the employee" made in respect of a different injury.

36 However, there is no relevant conflict between the provisions. As Gyles J demonstrated in the Full Court, it is possible to construe the reference in s 25(4) to a "subsequent increase in the degree of impairment" as referring to an increase based upon increases in the same kind of "impairment" which had rendered Comcare liable and upon which the final assessment had previously been made¹⁷. His Honour referred to s 25(5) as an expression of that very construction, albeit with greater particularity (making special provision with respect to one kind of permanent impairment). In referring to increases in the degree of impairment, s 25(4) does not include a separate "injury" resulting in a separate permanent impairment which must be individually assessed. Since the adjustment disorder had nothing to do with the impairments previously assessed by Comcare resulting from the back injury, s 25(4) was inapplicable. If this construction is open, why should the Court regard s 24 and s 25(4) as repugnant in the circumstances of this case, as Comcare would have it? The approach of Gyles J is not only plausible, but preferable. It gives effect to the terms of s 24, and produces a separate assessment in respect of each injury.

16 (2005) 148 FCR 232 at 252.

17 (2005) 148 FCR 232 at 253.

37 Even if there was a relevant conflict in these circumstances, the approach by the Full Court majority to resolving that supposed conflict *reversed* the hierarchy of the provisions of the Act¹⁸. It is true that the Guide seeks to provide for the assessment of "the degree of permanent impairment of the employee" on a whole of person basis. But, as indicated earlier in these reasons, s 24(5) of the Act imposes a duty upon Comcare to determine "the degree of permanent impairment of the employee *resulting from an injury*". It is the occurrence of "an injury" which both actuates and defines the ambit of Comcare's duty pursuant to s 24 of the Act. Once that duty has been performed, sub-ss (3) and (4) of s 24 operate, in a self-executing way, to quantify the amount of compensation payable by Comcare. That amount is payable in satisfaction of Comcare's liability which arises "*in respect of the injury*" under s 24(1). The Act only adopts the "whole person impairment" approach with respect to permanent impairments resulting from each "injury". That "whole person" approach cannot properly be used to deny the applicability of s 24 to something which corresponds to the legislative definition of an "injury". The statutory criterion of an "injury" is antecedent to the concept of "whole person" impairment, not the other way around.

38 Comcare's preferred construction of the Act also distorts the statutory definition of "injury" in a further way. The task of determining for the purposes of s 25(4) whether there has been "a subsequent increase in the degree of impairment" necessitates reference to the Guide, by reason of s 24(5). But, it is to be recalled, the inquiry mandated by that sub-section is as to the degree of permanent impairment of the employee "*resulting from an injury*". To treat as going to that inquiry something which independently satisfies the statutory definition of "an injury" tends to conflate into one all injuries suffered after one workplace incident. The flow-on effect in terms of s 24 thereby distorts the concept of "injury" so as to assume the sense of the totality of the effects of a workplace accident, contrary to the terms of the definition.

39 It should be added, for completeness, that the policy of the Act, discerned by the majority in the Full Court, of restricting liability to pay compensation, does not assist Comcare. The Act does impose limits upon Comcare's liability to pay compensation. Section 24(4) provides that lump sum compensation must be a percentage, and not exceed the "maximum amount", of \$80,000 and sub-ss (7) and (7A) of s 24 deny compensation unless the degree of permanent impairment

18 cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

Gummow ACJ
Kirby J
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Heydon J
Crennan J

16.

exceeds a specified threshold percentage. However, this policy does not dictate that something which falls within the definition of "an injury" in respect of which Comcare's liability arises, ought to be excluded from the definition. Nor is it of any relevance to the proper construction of the Act that, as Comcare pointed out, the approach for which the appellant contends operates to his advantage but may operate to the disadvantage of other claimants in other circumstances.

40 These conclusions mean that it is unnecessary to consider the appellant's alternative argument. This was that, if the psychological injury were to be treated as an "impairment" which attracted the operation of s 25(4), then there had been no "final assessment" for the purposes of that section. Further written submissions were received from both Comcare and the appellant on this point, but it need not be pursued.

Conclusion and orders

41 For the foregoing reasons, the appeal should be allowed with costs. In his Notice of Appeal, the appellant seeks orders effectively substituting the decision the AAT ought to have made. It is said that it would be futile to remit the matter to the AAT where all the parties accept that the adjustment disorder was "an injury" and there is a finding by the AAT with reference to the Guide that that injury resulted in a degree of permanent impairment of 10 per cent.

42 Comcare emphasised that there had been no appeal or cross-appeal by the present appellant to the Full Court against the orders made by Hill J. However, had the AAT directed itself to the question of whether the adjustment disorder was an "injury" for the purposes of the Act, as Hill J found it ought to have done, there was only one order it properly could have made, given the assessment of the impairment proceeding from the adjustment disorder. That was the view of Gyles J in the Full Court¹⁹, and it should now be accepted.

43 The following orders should be made:

- (1) Appeal allowed with costs.
- (2) Set aside the orders of the Full Court of the Federal Court of Australia made on 16 December 2005, and in their place order that:

19 (2005) 148 FCR 232 at 254.

Gummow ACJ
Kirby J
Callinan J
Heydon J
Crennan J

17.

- (a) Order 1 made by Hill J on 1 April 2005 be varied so that it reads:
- "1. The decision of the Administrative Appeals Tribunal dated 21 June 2004 be set aside and in place thereof direct that Comcare determine an amount payable to the Applicant assessed under ss 24 and 27 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) in respect of an injury, being an adjustment disorder with anxious and depressed mood resulting in a degree of permanent impairment of the Applicant of 10 per cent as assessed pursuant to Table 5.1 of the Guide."
- (b) Appeal otherwise dismissed with costs.