

HIGH COURT OF AUSTRALIA

HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

ROBYN CHRISTINE FELLOWES

APPELLANT

AND

MILITARY REHABILITATION AND COMPENSATION
COMMISSION

RESPONDENT

Fellowes v Military Rehabilitation and Compensation Commission

[2009] HCA 38

23 September 2009

B8/2009

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 4 August 2008 and, in their place, order that:*
 - (a) *the appeal to that Court be allowed with costs;*
 - (b) *the decision of the Administrative Appeals Tribunal made on 7 September 2007 be set aside and, in its place, there be a direction that the respondent determine the amount payable to the applicant for review by the Tribunal assessed under ss 24 and 27 of the Safety, Rehabilitation and Compensation Act 1988 (Cth) in respect of an injury, being a right knee condition resulting in a degree of permanent impairment of the applicant of 10% as assessed under Table 9.5 of the applicable Guide to the Assessment of the Degree of Permanent Impairment; and*
 - (c) *the respondent pay the applicant's costs of the review by the Administrative Appeals Tribunal.*

On appeal from the Federal Court of Australia

Representation

P J Hanks QC with R F King-Scott for the appellant (instructed by Slater & Gordon Lawyers)

T M Howe QC with L A Walker for the respondent (instructed by Australian Government Solicitor)

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

CATCHWORDS

Fellowes v Military Rehabilitation and Compensation Commission

Workers' compensation – Injury resulting in permanent impairment – Under s 24 of *Safety, Rehabilitation and Compensation Act* 1988 (Cth), where "an injury to an employee results in a permanent impairment", respondent liable to pay compensation "in respect of the injury" – Amount of compensation fixed by degree of permanent impairment resulting from injury as assessed under Guide to the Assessment of the Degree of Permanent Impairment ("Guide") – Guide provides that "[w]here two or more injuries give rise to the same impairment a single rating only should be given" – Appellant previously compensated for injury to left knee resulting in permanent impairment – Whether appellant entitled to compensation for separate injury to right knee resulting in permanent impairment to same degree – Whether "degree of permanent impairment" refers to impairment of whole person or impairment to particular part of person's body.

Words and phrases – "degree of permanent impairment", "impairment", "injury", "permanent impairment", "resulting from".

Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 4(1), 24, 28, 142, 147.

Guide to the Assessment of the Degree of Permanent Impairment, 1st ed (1989).

1 HAYNE, HEYDON, CRENNAN AND BELL JJ. The appellant enlisted in the Australian Army on 11 November 1986. In 1986, she suffered a left knee injury. As a result of work-related factors, the left knee injury left the appellant with no loss of range of movement of the left knee but with permanent difficulty with grades and steps, as distinct from distances. In 1987, the appellant suffered a right knee injury. As a result of work-related factors, the right knee injury left the appellant with no loss of range of movement of the right knee but with permanent difficulty with grades and steps, as distinct from distances.

2 Is the appellant entitled to compensation for each injury? Or, because the second injury does not affect her ability to walk to any significantly greater extent than the first injury, is she not entitled to compensation for the second injury? These reasons will show that she is entitled to compensation for each injury.

3 In December 2005, the appellant applied to the respondent, the Military Rehabilitation and Compensation Commission ("the Commission"), for compensation for each injury under the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the SRC Act"). The claims made by the appellant related to injuries sustained in connection with defence service before the commencement of the *Military Rehabilitation and Compensation Act* 2004 (Cth). That Act did not govern the appellant's claims. It was common ground that the appellant's claims are governed by the SRC Act. The Commission had to determine the claims under s 142 of the SRC Act.

4 It is not disputed that, if the appellant suffered no permanent impairment other than that attributable to the injury to her left knee, she would be entitled to compensation in respect of a 10% level of impairment of the whole person assessed in accordance with the then applicable "Guide to the Assessment of the Degree of Permanent Impairment" prepared pursuant to s 28 of the SRC Act. It is likewise not disputed that, if the appellant suffered no permanent impairment other than that attributable to the injury to her right knee, she would have the same entitlement.

5 In January 2007, after review and revocation of prior determinations to the contrary, the Commission determined that it was liable to pay the appellant compensation for the injury to her left knee on the basis that she had a 10% whole person impairment. In February 2007, the Commission accepted liability for the injury to the appellant's right knee but, in March 2007, determined that it was not liable to pay compensation for permanent impairment in relation to this injury because the appellant had already been compensated for a 10% whole person impairment. The Commission was asked to review this determination but affirmed it.

Hayne J
Heydon J
Crennan J
Bell J

2.

6 The appellant applied to the Administrative Appeals Tribunal for review of the Commission's decision. The Tribunal affirmed¹ the decision. The appellant appealed to the Federal Court of Australia against the Tribunal's decision. The Full Court of the Federal Court (French, Moore and Lindgren JJ) dismissed² the appeal. By special leave, the appellant appeals to this Court.

The SRC Act

7 The appellant's entitlements to compensation depend upon the proper construction and application of the SRC Act. Section 24 of that Act, so far as now relevant, provided at the times relevant to this matter:

- "(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.

1 *Re Fellowes and Military Rehabilitation and Compensation Commission* (2007) 97 ALD 220.

2 *Fellowes v Military Rehabilitation and Compensation Commission* (2008) 170 FCR 531.

3.

- (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."

Section 147 of the SRC Act provided, in effect, that for defence-related claims, references to "Comcare" are to be taken as references to the Commission but that it is the Commonwealth that is liable to pay amounts due under the Act.

8 Some of the terms used in s 24 (notably "injury", "impairment" and "permanent") were defined in s 4(1) of the SRC Act. Those definitions provided:

"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.

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.

...

permanent means likely to continue indefinitely."

Hayne J
Heydon J
Crennan J
Bell J

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The Guide

9 The "Guide" mentioned in s 24(5) was prepared under s 28 of the SRC Act. Among other things, the Guide set out criteria by reference to which the degree of the permanent impairment of an employee resulting from an injury was to be determined and the methods by which the degree of permanent impairment, as determined under those criteria, was to be expressed as a percentage.

10 The Guide specified what it referred to as the "percentage whole person impairment" attributable to different levels of impairment of parts of the body. In particular, Table 9.5 of the Guide provided, in relation to "**Limb Function – Lower Limb** (Percentage Whole Person Impairment)":

"%	DESCRIPTION OF LEVEL OF IMPAIRMENT
10	Can rise to standing position and walk BUT has difficulty with grades and steps
20	Can rise to standing position and walk BUT has difficulty with grades, steps and distances
30	Can rise to standing position and walk with difficulty BUT is limited to level surfaces
50	Can rise to standing position and maintain it with difficulty BUT cannot walk
65	Cannot stand or walk".

The decisions below

11 In the Administrative Appeals Tribunal, the Deputy President concluded³ that, although the appellant had sustained "two separate and distinct injuries that each give rise to a liability upon the Commission to pay compensation", s 24(5) of the SRC Act required that compensation be determined having regard to the degree of permanent impairment identified by reference to the Guide, and that the Guide "directs explicitly that two or more separate injuries that give rise to the same impairment result in a single rating of impairment". The reference to explicit direction in the Guide was a reference to an introductory section of the Guide entitled "Principles of Assessment", which said, under the heading "Combined Impairments":

3 (2007) 97 ALD 220 at 228 [34].

5.

"It is important to realise that impairment is system or function based and that a single injury or disease may give rise to multiple loss of function. When more than one table applies to a single injury separate scores should be allocated to each functional impairment. *Where two or more injuries give rise to the same impairment a single rating only should be given.*" (emphasis added)

12 In the Full Court of the Federal Court, French and Lindgren JJ concluded that the Tribunal made no error in its decision. Their Honours concluded⁴ that it would not have been open to the Tribunal to determine that the degree of permanent impairment resulting from the second injury (the injury to the appellant's right knee) was of the class "[c]an rise to standing position and walk BUT has difficulty with grades and steps". Moore J joined in the orders proposed by French and Lindgren JJ but did so on the footing⁵ that he was bound to follow the earlier decision of the Full Court of the Federal Court in *Comcare v Van Grinsven*⁶.

13 As French and Lindgren JJ rightly observed⁷, it was not in issue in the present matter that the second injury suffered by the appellant "must have resulted in some further impairment, in the sense that [the appellant] must have been at least somewhat worse off after the second injury than she was immediately beforehand". Nonetheless, French and Lindgren JJ concluded that the effect of the legislation, in this case, was that an employee who suffered a work-related injury causing her deleterious consequences was not entitled to compensation. This conclusion was held⁸ by their Honours to follow from the necessity to make allowance for the appellant's existing permanent impairment when determining the degree of permanent impairment "resulting from" the second injury. Their Honours held that this outcome was required by the earlier

4 (2008) 170 FCR 531 at 539 [35].

5 (2008) 170 FCR 531 at 543-544 [55]-[56].

6 (2002) 117 FCR 169.

7 (2008) 170 FCR 531 at 539 [32].

8 (2008) 170 FCR 531 at 539 [33].

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Heydon J
Crennan J
Bell J

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decision of the Full Court in *Comcare v Van Grinsven*⁹ and not denied by this Court's later decision in *Canute v Comcare*¹⁰.

Injury and impairment

14 As this Court pointed out in *Canute*¹¹, "[t]he concept of 'an injury' is a term of pivotal importance in the structure of the [SRC] Act". Section 24(1) provided that where an injury to an employee results in a permanent impairment, Comcare (or in this case the Commonwealth) is "liable to pay compensation to the employee in respect of the injury". As the Court also pointed out¹² in *Canute*, three observations may be made about the concept of 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."

15 It was not disputed that the appellant had suffered two injuries. Each injury resulted in a permanent impairment in the sense that each injury resulted in permanent damage to, or loss of the use of, a part of her body. Each injury caused damage to, or loss of the use of, a different part of the body: in one case the left knee; in the other, the right. The central question in the appeal is that presented by s 24(5) of the SRC Act: how was "the degree of permanent impairment of the employee resulting from" the second injury to be determined "under the provisions of the approved Guide"?

The competing arguments

16 The appellant submitted that, each injury having led to a separate impairment, the degree of permanent impairment of the employee that resulted from the injury was determined by looking to the consequences that followed

9 (2002) 117 FCR 169.

10 (2006) 226 CLR 535; [2006] HCA 47.

11 (2006) 226 CLR 535 at 539 [8].

12 (2006) 226 CLR 535 at 540 [10].

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from that injury. The consequences to be identified, so the appellant submitted, were the consequences that followed from the particular impairment as that term is defined in the SRC Act. In this case, because there were two injuries and two impairments, two amounts of compensation should be awarded.

17 By contrast, the respondent submitted that what was to be determined under s 24(5) was the degree of permanent impairment *of the appellant*, fixed by reference to Table 9.5 of the Guide. That table classified the impairment of the appellant's capacity to undertake the activities of daily living resulting from the second injury as the same as that which followed as a result of the first. Accordingly, so the respondent submitted, the degree of impairment resulting from the second injury, when assessed in accordance with the Guide, should be assessed as 0%, a result expressly contemplated by s 28(5) of the SRC Act¹³.

18 Resolution of the competing arguments depends, in the end, upon how the word "impairment" should be read when used in the phrase found in s 24(5) ("the degree of permanent impairment of the employee resulting from an injury") recognising that the determination called for by s 24(5) is a determination of degree "under the provisions of the approved Guide". Is "impairment" to be understood in that phrase as referring back to s 24(1) and its provision that Comcare (here the Commonwealth) is liable to pay compensation to an employee in respect of an injury "[w]here an injury to an employee results in a permanent impairment"? In particular, is the reference to "permanent impairment of the employee" found in s 24(5) a reference in the circumstances of this case to permanent damage to, or loss of the use of, a part of the employee's body, as the definition of "impairment" would suggest? Or, as the respondent submitted, should s 24(5) be read as directing attention to impairment of the particular employee as a whole person rather than to damage to, or loss of the use of, a particular part of the body? Is that reading of s 24(5) required, as the respondent further submitted, by the Guide?

19 In *Canute*, this Court pointed out¹⁴ that the definition of "impairment" in the SRC Act is not expressed in terms that require assessing impairment on a

13 Section 28(5) provided:

"The percentage of permanent impairment or non-economic loss suffered by an employee as a result of an injury ascertained under the methods referred to in paragraph (1)(c) [the methods set out in the Guide] may be 0%."

14 (2006) 226 CLR 535 at 541 [11].

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Bell J

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"whole person" basis. Rather, the definition is expressed in terms conveying a disaggregated sense. As the Court said¹⁵ in *Canute*, "[t]extually, the Act assumes that 'an injury' may result in more than one 'impairment'". Likewise, it must follow that more than one injury may result (and often will result) in more than one impairment.

20 It may be accepted that, as the respondent submitted, s 24(5) requires determination of the degree of permanent impairment of an employee resulting from an injury "under the provisions of the approved Guide". It may also be accepted that, as the respondent submitted, s 28(1) of the SRC Act authorised Comcare to prepare a Guide setting out:

"(a) criteria by reference to which the degree of the permanent impairment of an employee resulting from an injury shall be determined; [and]

...

(c) methods by which the degree of permanent impairment ... as determined under those criteria, shall be expressed as a percentage".

To that extent, the respondent's submission, that the Guide controls the assessment of the degree of permanent impairment, may be accepted. But, as pointed out in *Canute*¹⁶:

"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".

21 Once it is accepted, as it was in *Canute*, that the SRC Act hinges about the concept of "injury" and that "impairment" is to be identified in terms of effect on bodily parts, systems or functions, it follows that the appellant's arguments are to be accepted and the respondent's rejected. The conclusion reached by the Tribunal could be supported only by reading s 24(5) as directing, or permitting, Comcare to provide in the Guide for determination of the degree of permanent impairment resulting from an injury *by reference to the pre-existing capacities of the particular applicant for compensation*.

¹⁵ (2006) 226 CLR 535 at 541 [11].

¹⁶ (2006) 226 CLR 535 at 542 [14].

22 The argument that s 24(5) directs an approach of that kind (referred to in argument as a "whole person" approach) was expressly rejected by this Court in *Canute*¹⁷ and the respondent did not seek to reopen what was decided in that case. Rather, the respondent sought to emphasise that s 24(5) required application of the Guide and that s 28(1)(a) required Comcare to state, in the Guide, the criteria by reference to which the degree of permanent impairment resulting from an injury was to be determined.

23 The respondent submitted that there were two reasons to conclude that the Guide required determination of the degree of impairment resulting from an injury by reference to the pre-existing capacities of the particular applicant for compensation. First, the respondent pointed to the repeated references in the Guide to "percentage whole person impairment". Secondly, the respondent pointed to the statement made in the introductory section of the Guide which is set out earlier in these reasons, that "[w]here two or more injuries give rise to the same impairment a single rating only should be given".

24 The references in the Guide to "whole person impairment" identify the "methods by which the degree of permanent impairment [resulting from an injury is] expressed as a percentage"¹⁸. The percentages stated in the Guide describe "the extent of each impairment as a percentage value of the functional capacity of a normal healthy person"¹⁹. The references to "whole person impairment" that are found in the Guide do not direct attention to the effect of an injury or disease on a particular individual. On the contrary, the effect to be assessed is by reference to the functional capacities of a normal healthy person.

25 The statement in the Guide, that "[w]here two or more injuries give rise to the same impairment a single rating only should be given", must be understood as directing attention to an impairment as that term is defined in the SRC Act. That is, the reference to the "same impairment" must be understood in terms of the particular identified effect on particular bodily parts, systems or functions. Contrary to the respondent's submission, this statement in the Guide is not to be understood as requiring a single rating to be given whenever each of two injuries

17 (2006) 226 CLR 535 at 542 [15].

18 s 28(1)(c).

19 *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (1989) at 4.

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is assessed as yielding the same degree of impairment of two separate parts of the body.

26 The text of the Guide is therefore to be construed as providing that the whole person impairment to which it directs attention requires comparison with the "functional [capacities] of a normal healthy person" rather than the capacities of the particular applicant as they existed immediately before the injury in question. The reference to two injuries causing the "same impairment" requires attention to the particular identified effect on bodily parts, systems or functions that is said to have resulted from the two injuries. It is, therefore, not necessary to consider, in this case, the application of the principle, stated²⁰ in *Canute*, that if there were some conflict between what is required by the SRC Act and what is provided by the Guide, it is the Act that must be given priority.

27 It is, nonetheless, important to make the further point that, on its proper construction, s 24(5) of the SRC Act directs attention to the degree of impairment that results from the injury resulting in the impairment identified in s 24(1). The two sub-sections of s 24 are not to be read as requiring or permitting a different identification of "impairment" in their respective applications. In the application of both sub-sections the focus must fall upon "the loss, the loss of the use, or the damage or malfunction"²¹ of a part of the body or a bodily system or function or part of a bodily system or function. And in the present case there were separate losses of use of, or damage to, two parts of the body.

28 In this last connection, the respondent submitted that, despite there having been separate injuries to each knee, there was in fact only a single effect on (a loss of use of) a bodily function (the function of using the lower limbs). It may be doubted that the function of using the lower limbs is properly described as a bodily function. But even if the words could be understood as extending thus far, the respondent's argument, on examination, is no more than a restatement of the argument that the degree of impairment to be determined under s 24(5) is the degree of impairment as a whole person of the particular applicant for compensation. For the reasons already given, that construction should be rejected.

20 (2006) 226 CLR 535 at 548 [37].

21 s 4(1), "*impairment*".

11.

29 It also follows that the decision of the Full Court of the Federal Court in *Comcare v Van Grinsven*²², upon which both the Tribunal and the Full Court relied in the present matter, was wrongly decided and should be overruled.

Conclusion and orders

30 For these reasons, the appeal to this Court should be allowed with costs. The orders of the Full Court of the Federal Court made on 4 August 2008 should be set aside. The appellant submitted, and the respondent did not submit to the contrary, that in these circumstances the appropriate consequential orders were to order that in place of those orders of the Full Court of the Federal Court there be orders that:

- (a) the appeal to that Court be allowed with costs;
- (b) the decision of the Administrative Appeals Tribunal dated 7 September 2007 be set aside and in its place there be a direction that the respondent determine the amount payable to the applicant for review by the Tribunal assessed under ss 24 and 27 of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) in respect of an injury, being a right knee condition resulting in a degree of permanent impairment of the applicant of 10% as assessed under Table 9.5 of the Guide;
- (c) the Commission pay the applicant's costs of the review by the Tribunal.

²² (2002) 117 FCR 169.

31 KIEFEL J. The facts and the statutory provisions relevant to this appeal are set out in the reasons of the majority. I regret that I am unable to agree with those reasons.

32 Section 24(5) is central to the provisions of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the SRC Act") concerning the compensation of employees²³. The sub-section requires Comcare to determine "the *degree* of permanent impairment of the employee *resulting* from an injury" (emphasis added). That determination is to be undertaken under the provisions of a Guide prepared pursuant to the SRC Act. No question arises on this appeal as to the validity of the Guide in question²⁴. It is to be read with the SRC Act, as part of a statutory scheme²⁵.

33 The method employed by the Guide in assessing the degree, or level, of impairment is to determine the effect of the permanent impairment upon the employee's ability to function. The provisions of the Guide will be discussed later in these reasons. The particular type of impairment suffered by the appellant was assessed as producing a loss of 10 per cent of the function of her lower limbs. The appellant had previously been assessed as having that loss of function and that level of impairment after she had suffered an injury to the left knee, for which she was compensated, and before the injury in question, that to her right knee. The injury in question did not increase her loss of function as measured by the Guide. A conclusion that the degree of impairment found *resulted* from the second injury, as s 24(5) requires, is therefore not possible. As a result, no compensation is payable, as the Full Court of the Federal Court held²⁶.

34 Some observations concerning s 24(5), and s 24 as a whole, are necessary before further consideration is given to the Guide. It may be observed that s 24(5) involves three steps. The first two are the identification of an injury suffered by an employee and whether permanent impairment flows from that injury²⁷. The third, that with which this appeal is concerned, is to determine the degree or extent of that impairment which results from the injury.

23 *Canute v Comcare* (2006) 226 CLR 535 at 539 [6]; [2006] HCA 47.

24 *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (1989).

25 *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd* (1934) 52 CLR 85 at 89; [1934] HCA 54; *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at 110 [19]; [2008] HCA 38.

26 *Fellowes v Military Rehabilitation and Compensation Commission* (2008) 170 FCR 531 at 539 [33] and 540 [39] per French and Lindgren JJ.

27 *Canute v Comcare* (2005) 40 AAR 327 at 334 [30] per Hill J.

35 The determination of the degree of impairment is critical to the payment of compensation. Section 24(5) requires the degree of impairment to be assessed in accordance with the Guide and that the degree of impairment so determined must result from the injury in question. Section 24(7) provides that, subject to some exceptions, where the degree of impairment is determined to be less than 10 per cent, no compensation is payable.

36 The Impairment Tables in the Guide are said to be based on an evaluation of a "whole person impairment" drawn from the American Medical Association's Guides. That evaluation is "a medical appraisal of the nature and extent of the effect of an injury or disease on a person's functional capacity and activities of daily living."²⁸ The "extent of each impairment" is expressed as a percentage value by reference to "the functional capacity of a normal healthy person."²⁹

37 Part A of the Guide contains Tables which have, as their subject for assessment, various bodily systems and functions, to which a person's condition may be referable, and disorders, both physical and psychiatric. Each Table contains a heading, referable to a disorder, or a bodily system or function. The reference under each heading to "Percentage Whole Person Impairment" is the conclusion, expressed in a percentage as s 24(6) requires, of the effect of the impairment in question upon the employee's ability to function, as explained in the Guide.

38 In some Tables the "description of level of impairment", which appears against the percentage value, refers to particular activities or aspects of daily life which are unable to be undertaken or are rendered more difficult because of the impairment. With respect to "Miscellaneous Ear, Nose and Throat Disorders", to take an example, a figure of 60 per cent is given for "[v]ertigo which interferes with all activities to the extent that only self care can be managed but all other activity is impossible"³⁰. In other Tables the level of impairment is described by reference to the impairment itself, for example the extent of the loss of range of movement of an ankle, hip or knee in Table 9.2. The assessment, which is said

28 *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (1989) at 4.

29 *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (1989) at 8.

30 *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (1989) at 24, Table 7.2.

to be "in accordance with the range of joint movement"³¹, is nevertheless of the impairment of the person's ability to function.

39 The appellant's impairment was assessed under Table 9.5, "Limb Function – Lower Limb (Percentage Whole Person Impairment)". The description of the level of impairment which the appellant was found to suffer is "[c]an rise to standing position and walk BUT has difficulty with grades and steps". That represents the appellant's loss of function, in daily life. The impairment so described has regard to the use of the lower limbs together. The level of impairment described above gave rise to a Percentage Whole Person Impairment of 10 per cent. That is the same level of impairment that the appellant previously suffered as a result of the injury to her left knee.

40 The method of assessment of the degree of impairment under Table 9.5 may be contrasted with that under Table 9.2, referred to above. Table 9.2, which determines a person's loss of ability to function by reference to the limit to the range of movement of a joint of the lower limb, involves an assessment of a single limb. It was common ground that that Table was inapplicable to the appellant's condition.

41 The comparator for the assessment, under the Guide, of loss of functional capacity and the effect upon daily activities is said to be the functional capacity of a normal healthy person. But this does not mean that the employee in question is assumed to be a normal healthy person at the date of the injury in question and that no regard is to be had to any pre-existing functional limitations. The determination under s 24(5) and the Guide is as to the extent of that person's permanent impairment, by reference to their capacity to function, which *resulted* from the injury.

42 The "whole person impairment" referred to in the Guide is a conclusion, expressed as a percentage, of the extent to which a person's ability to function in daily life has been impaired. Whilst having that broader perspective, it is nevertheless an assessment of the particular condition suffered by the person which amounts to a permanent impairment under the SRC Act. In the appellant's case the assessment with respect to her right knee was of a degree of permanent impairment of 10 per cent of her functional capacity, which is to say of "the whole person". But that represented no change in her existing capacity, which was already impaired to the same degree by virtue of the injury to her left knee. The degree of impairment assessed with respect to the right knee cannot be said to have "resulted from" the injury.

31 *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (1989) at 31.

43 In *Canute v Comcare* it was pointed out that the definition of "impairment" in the SRC Act is not given in terms of an impairment of a "whole person"; rather the word "impairment" was expressed in a disaggregated sense, in terms of effects on bodily parts, systems and functions³². However, the question as to the *degree* of impairment is one different from that as to whether the person has an impairment of a particular part of their body or of a particular bodily system or function. It involves a further enquiry, as to the effect of that particular impairment upon the person's ability to function, in accordance with the Guide.

44 It was not necessary in *Canute* to consider what was comprehended by a determination of the degree of an employee's permanent impairment. It may be accepted that in the second step required by s 24(5), namely the identification of the impairment, regard is to be had to the definition of "impairment" contained in the SRC Act, as was done in *Canute*. But the assessment of the degree of that impairment involves the use of the Guide and the concept upon which it is based. The meaning of the term "whole person impairment" on its own may be unclear. However, the Guide explains that the "Percentage Whole Person Impairment" is a value given to the effect, or limitation, upon a person's functional capacity. That is the expression of the "degree" of the impairment for the purpose of s 24(5).

45 In *Canute* it was said that, because the SRC Act assumes that more than one "injury" may occur, it is not correct to say that s 24(5) imports a "whole person" approach to the determination of the degree of permanent impairment³³. That case concerned two different kinds of injury arising out of one incident. Statements as to a "whole person" approach should be understood in the context of the issues in that case and the argument put by Comcare as to what that approach involved.

46 The employee in *Canute* had been awarded compensation for a back injury. It was assessed under the Guide at 12 per cent whole person impairment. He subsequently claimed compensation for an adjustment disorder arising from the back condition. Comcare relied upon s 25(4) to deny liability. That section provides that where there has been a final assessment of a degree of permanent impairment, no further amount of compensation is payable unless there is an increase in that degree of impairment of 10 per cent or more. Comcare's argument, it may be inferred, was that the earlier assessment of the degree of permanent impairment of the employee extended to include the impairment for

32 *Canute v Comcare* (2006) 226 CLR 535 at 541 [11].

33 *Canute v Comcare* (2006) 226 CLR 535 at 541 [11].

which compensation was later claimed. That followed from the assessment being of the "whole person"³⁴.

47 The operation attributed to the Guide by Comcare in argument in *Canute* appears to have been that an assessment of a person's degree of impairment takes into account all injuries and consequent impairments they have suffered arising out of the one incident. That is clearly incorrect. The Guide assesses the effect of a particular impairment upon a person's functional capacity under the Table relevant to it.

48 It was not necessary for the Court in *Canute* to consider the proper operation of the Guide. The effect contended for by Comcare was plainly inconsistent with the SRC Act's identification of an injury suffered by an employee as giving rise to a claim for compensation. The Court said that the word "injury" in s 24(1) was not used to describe a workplace accident; but rather was expressed in terms of the resultant effect of an incident upon the employee's body. It was not used "in a global sense to describe the general condition of the employee following an incident."³⁵ The SRC Act assumes that a person might suffer more than one injury. The Court held that the psychiatric disorder was a separate injury giving rise to a claim for compensation³⁶.

49 In *Canute* the SRC Act was seen to comprehend two injuries arising from the same incident. The application of the Guide to the question posed by s 24(5) in this case shows that two injuries may give rise to the same degree of impairment. This possibility was recognised by the primary judge in *Canute*³⁷. Nothing said by this Court in *Canute* affects that outcome, in my respectful view.

50 A different question arises in this case from that considered in *Canute*. The focus is not upon the "injury" giving rise to a claim to compensation. It is not disputed that the appellant suffered an injury to her right knee which resulted in a condition which might be described as an impairment. The issue here focuses upon the assessment of the appellant's "degree of permanent impairment" and the requirement that that degree of impairment result from the injury. The degree, or extent, of the impairment is determined in accordance with the Guide. The Guide, by Table 9.5, determines the effect upon a person's functional capacity by reference to the operation of the person's lower limbs in conjunction with each other. In this case the first injury, to the left knee, was assessed as

34 See *Canute v Comcare* (2006) 226 CLR 535 at 541 [11].

35 *Canute v Comcare* (2006) 226 CLR 535 at 540 [10].

36 *Canute v Comcare* (2006) 226 CLR 535 at 547-548 [36].

37 *Canute v Comcare* (2005) 40 AAR 327 at 335 [34] per Hill J.

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producing a degree of impairment of 10 per cent whole person impairment. The assessment of the degree of impairment following upon the second injury was the same. It could not therefore be said that the degree of impairment so assessed *resulted* from that injury. No amount of compensation is payable.

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I would dismiss the appeal.