Van Dongen v NTA [2009] NTSC 1

PARTIES:	KEITH VAN DONGEN v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 22 of 2007 (20104578)
DELIVERED:	23 January 2009
HEARING DATES:	16, 17, 18, 19 March 2008
APPEAL FROM:	M Little SM
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

WORKERS COMPENSATION - mental injury - appeal against judgment delivered by Work Health Court - claim for compensation confined to physical injuries, no evidence contributed to mental injury - employer given no notice of date on which mental injury occurred - appeal dismissed.

Workers Rehabilitation and Compensation Act (NT) ss3, 80 (1) (2), 81(d), 103, 182(3)
Crimes (Victims Assistance) Act (NT)

Burns v The Commissioner of Railways (1939) WCR 115
D & W Livestock Transport v Smith (1994) 4 NTLR 169
Maddalozzo v Maddick (1992) 84 NTR 27
Perfect v Northern Territory of Australia (1993) 107 FLR 428
Prime v Colliers International (NT) Pty Ltd (2006) 204 FLR 220
Rivard v Northern Territory of Australia (1999) 129 NTR 1
Van Dongen v Northern Territory [2005] NTSC 4
Van Dongen v Northern Territory of Australia (2005) 16 NTLR 169
Van Dongen v NTA (No. 2) [2007] NTMC 59
Wattyl Australia Pty Ltd v York Unreported NTSC Angel J 4/7/1997

REPRESENTATION:

Counsel:

Appellant:	I Morris
Respondent:	S Gearin

Solicitors:

Appellant:	M Heitmann
Respondent:	Collier & Deane

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Van Dongen v NTA [2009] NTSC 1
No 22 of 2007 (20104578)

BETWEEN:

VAN DONGEN,
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 23 January 2009)

Introduction

[1] This is an appeal[1] against a judgment of the Work Health Court dismissing the appellant's application for workers compensation for a mental injury which was said to have arisen as a result of various assaults that the appellant sustained during the course of his employment as a police officer in the Northern Territory Police Force. The judgment appealed from was delivered by the Work Health Court on 31 August 2007.

[2] The appellant seeks the following orders:

[1] The appeal brought under s 116 of the Workers Rehabilitation and Compensation Act (NT).

- The findings of the learned magistrate are set aside.

- A finding that the injury of July 1999 was the sequelae of the five assaults sustained by the worker in the course of his employment.

- In the alternative, a finding that the injury of July 1999 was a new injury.

- In the further alternative, a finding that the injury of July 1999 was materially contributed to by each of the five assaults.

- A finding that the worker was entitled to payments of compensation.

- The worker is entitled to costs of the appeal and the hearing at first instance.

Background to the appeal

[3] As this is the second appeal that the appellant has brought to this Court in relation to application No. 20104578, which he filed in the Work Health Court on 21 March 2001, it is necessary to set out the background to the appeal in some detail.

[4] From 20 January 1986 to 24 June 1998, the appellant was employed as police officer in the Northern Territory Police Force. He was based at a number of different police stations, some more remote than others, including Maningrida, Alice Springs and Yulara. He performed operational duties. During the course of his employment the appellant was assaulted on a number of occasions. Of relevance to this appeal, he was assaulted

12 August 1996 (the first Curtis incident), 9 November 1996 (the second Curtis incident), 23 April 1997, and 2 February 1998 (the Jingo incident).

[5] On 12 August 1996 the appellant and another police officer travelled to Mutitjulu where they attempted to arrest an offender, Bob Curtis, who was armed with an offence weapon. They were unsuccessful. As a result of the first Curtis incident the appellant suffered a mental injury. He did not suffer any physical injuries. On 9 November 1996 while arresting Bob Curtis the appellant was punched to the stomach and scratched. He was also kicked in the arm and the offender threatened him and his children. He received cuts and bruises. On 23 April while attempting to arrest an offender, the appellant was bitten on his thumb by the offender and he suffered two puncture marks. On 2 February 1998 while attempting to arrest an offender, whose name was Jingo, the worker received injuries to his leg, chest and hands. The offender, who was armed with a knife, resisted arrest and he punched the appellant to the chest and shoulder area about five times.

[6] On 13 August 1996, the appellant made an Accident/Injury Report to the respondent in which he notified the respondent that on 12 August 1996, he had been assaulted by one Bob Curtis at Mutitjulu and as a result of the assault he had suffered a psychological injury to his mind. The appellant did not lodge a claim for workers compensation for the mental injury he sustained on 12 August 1996 in the prescribed form until 27 November 2000. Instead, on 11 August 1997, he made a claim for compensation, under the Crimes (Victims Assistance) Act (NT).

[7] After each of the assaults on 9 November 1996, 23 April 1997, and 2 February 1998 the appellant made a separate claim for worker's compensation being respectively claims no. 92556, 92558 and 95770. He did so before he left the Northern Territory Police Force. Each of the appellant's claims for workers compensation only referred to the physical injuries that he suffered as a result of the relevant assault. No reference was made to any mental injury. Each claim for workers compensation was accepted by the respondent.

[8] Until he resigned from the Northern Territory Police Force, the appellant continued to perform operational duties. He did so despite being partially incapacitated for operational duties as a result of the mental injury he suffered on 12 August 1996. Although he knew he was partially incapacitated for work, the appellant elected to remain in the role of an operational police officer and to receive the increased entitlements which the position attracted. The appellant did not tell the respondent that he had been partially incapacitated for work as a result of his mental injury and he did not undergo any medical or other treatment for his mental injury while he remained in the Northern Territory Police Force.

[9] On 2 September 1997, more than a year after he sustained his mental injury, the appellant was assessed by a psychologist, Mr Michael Tyrrell, for the purposes of his application under the Crimes (Victims Assistance) Act. Mr Tyrrell diagnosed that as a result of the assault on 12 August 1996, the appellant was suffering from an Adjustment Disorder with mixed emotions

including depression. It was Mr Tyrrell's opinion that the appellant may require counselling and medical oversight to address his symptoms. Further, without such assistance, the appellant's mental condition was at risk of consolidating into a more substantial and impairing depressive syndrome. On 25 September 2007, Mr Tyrrell provided the appellant's then solicitors with his report.

[10] On 26 September 1997, Mr Tyrrell wrote a letter to the appellant's general practitioner, Dr Ross Pertkin, enclosing a copy of his report to the appellant's solicitors. Mr Tyrrell recommended to Dr Pertkin that the appellant should give consideration to his career options and, if his mood did not change, obtaining further mentoring and, if necessary, a medical approach to his condition.

[11] On 18 February 1998, the appellant again saw Mr Michael Tyrrell. He told Mr Tyrrell: he planned to leave the Northern Territory Police Force; he had received broken ribs as a result of the Jingo assault; he did not want to get hurt again; his symptoms were not a problem but he felt angry; and he had learned to be more cautious.

[12] In April 1998, the appellant took three months leave and he travelled to Perth in Western Australia. He resigned from the Northern Territory Police Force on 9 June 1998. He did so while he was on leave. His resignation took effect on or about 24 June 1998. The appellant subsequently obtained employment in Perth as an investigator with the Public Advocates Office.

[13] Between June 1998 and July 1999 the appellant's mental state fluctuated up and down. His mental state deteriorated in or about July 1999 as he was suffering from severe depression. His general practitioner in Perth referred him to a psychiatrist, Dr Peter Blythe, for treatment of his depression. He was prescribed anti-depressant medication and in August 1999 the appellant was admitted to the Perth Clinic for two weeks for treatment of his mental state. He completed a Cognitive Behavioural Therapy Program. In October 1999, the appellant re-presented at the Perth Clinic for a follow up treatment session. On 19 November 1999, he again presented at the Perth Clinic for a 12 week follow up session and he continued to take anti-depressant medication for his mental condition.

[14] On 7 December 1999, the appellant wrote a letter to the Territory Insurance Office in the following terms:

> […]
>
> I have left the employment of the Northern Territory Police Service as of 28/06/1998. I now reside in Perth, […]. In the last years of my service I was subject to a number of assaults which eventually led me to resigning from the Police Service. In total there were 6 claims to the T.I.O. for assaults to me. The last of those assaults occurred on 02/02/1998. Your claim number 104029 refers. I can provide the other claim numbers if required.
>
> Since leaving the Police Service I have needed to seek the help of medical professionals in coping with the effect these assaults have had on me. To date I have paid for these services myself. It has become apparent to me that the need to seek such professional help is a direct result of these assaults, in particular the above mentioned one of 02/023/199. As such, I ask that you re-open your file and

accept payment for the further medical expenses associated with this matter.

[…]

The last correspondence I had with the T.I.O. regarding this matter is attached for your information. It is dated 17/04/1998. At that particular time I was 2 weeks into a three-month holiday and residing in Western Australia. I did not return to work but left the service on those holidays. As such, I did not reply to the letter sent by your office and the assumption was made to close the file. In fact I did not receive the letter until well after the 14 day period had expired as it was sent to Yulara and not forwarded to me until much later. In any case that mattered very little as I had decided to put those incidents and my career with the Police Service behind me.

Unfortunately, I have not been able to do this and am in need of the above stated professional help.

[…]

[15] Prior to 7 December 1999, the appellant had made no claim for workers compensation for any mental injury that he suffered as a result of the various assaults he sustained during the course of his employment with the Northern Territory Police Force.

[16] On 13 December 1998, a case co-ordinator employed by the Territory Insurance Office replied in writing to the appellant's letter dated 7 December 1998. The appellant was informed that the Territory Insurance Office had received his letter. However, the Territory Insurance Office was unable to accept liability for the appellant's treatment until they had received a reply from the Northern Territory Police Force and the appellant had been medically assessed.

[17] Subsequently, the Territory Insurance Office arranged for the appellant to be assessed by a psychiatrist, Dr Les Ding. On 9 February 2000, the appellant was assessed by Dr Ding and, on 16 February 2000, Dr Ding provided his report to the Territory Insurance Office. In his report Dr Ding stated:

> Mr Van Dongen is a 39 year old ex-policeman who developed clinical features in the course of [1996] which were consistent with the diagnosis of a moderately severe major depressive episode.
>
> Although he was inclined to attribute his psychological deterioration to [the Curtis incident] specifically, it is almost certain that there has been a cumulative adverse psychological response over the preceeding years in being exposed to traumatic and personally threatening situations in the course of his work.
>
> I am of the opinion that the work-related stress was the predominant factor in Mr Van Dongen's psychological decompensation and therefore it is quite understandable that Mr Tyrrell, the psychologist, should have diagnosed Adjustment Disorder with mood features.
>
> It was not until he was commenced on treatment with the anti-depressant Efexor, shortly followed by a course of cognitive behavioural therapy, that he began to make rapid improvement. He is now well on the way to recovery and there are very few residual depressive symptoms which do not appear to hamper his function in any significant way.

[18] Between 16 February 2000 and 26 November 2000, various correspondences passed between the appellant and the Territory Insurance Office, and the appellant's then solicitors and the Territory Insurance Office. On 20 November 2000, mediation was held under s 103C of the Workers Rehabilitation and Compensation Act[2] (the Act). At the mediation the parties

[2] It is likely that the matter was referred to mediation by the Authority in accordance with s 103D of the Workers Rehabilitation and Compensation Act (NT).

agreed that the appellant would lodge a prescribed claim form for workers compensation for his mental injury with the respondent. On 27 November 2000, the appellant lodged a claim for workers compensation in the prescribed claim form with the respondent. He claimed compensation for weekly benefits and medical expenses for injuries to his ribs, arms, face and for a mental injury. In the claim form the appellant stated that his most serious injury was depression which arose out of the various assaults the appellant sustained over a period of 12 years during the course of his employment with the respondent. The appellant stated that the assaults occurred in highly stressful situations, some in life threatening situations.

[19] On 27 December 2000, the respondent issued a notice of decision about the appellant's claim for workers compensation dated 27 November 2000. The respondent decided to reject the appellant's claim for workers compensation. The respondent disputed liability on the ground that the appellant's claim related to an injury for which he had previously sought compensation, namely the appellant's claim for workers compensation that was lodged for the assault on him by Jingo on 2 February 1998.

[20] On 26 March 2001, the appellant filed an application for workers compensation in the Work Health Court. The application was defended by the respondent. In its amended notice of defence and counterclaim dated 4 December 2003, the respondent disputed liability to pay workers compensation on a number of grounds including - the appellant did not give the respondent notice of his mental injury in accordance with s 80 of the

Act: notice had not been given as soon as reasonably practical, nor had it been given prior to the appellant voluntarily leaving his employment with the respondent; the appellant failed to lodge a claim for workers compensation for his mental injury with the respondent within the time stipulated by s 182 of the Act: no claim had been lodged by the appellant within six months of the occurrence of the mental injury; the appellant had not suffered an injury arising out of or in the course of his employment with the respondent; in the alternative, if the appellant had suffered an injury, it did not render him, nor did he remain, incapacitated for work as a police officer in the Northern Territory Police Force; and, in the further alternative, if the appellant had suffered an injury, the injury had resolved.

[21] In response to that part of the respondent's counterclaim which was based on s 80 and s 182 of the Act, the appellant pleaded the following in its further amended reply and defence to counter claim dated 8 December 2003:

> 4. In relation to paragraphs 1(c) and 1(d) of the employer's counterclaim the worker says:
>
> (aa) He gave notice of injury in accordance with section 80 of the Act on or about 13 August 1996 as pleaded in paragraph 4(aa) of the amended statement of claim.
>
> Further or in the alternative:
>
> (a) He first became aware of the true nature and extent of his condition while he was receiving medical treatment following his mental breakdown in July 1999 as particularised in paragraph 4(d) of the statement of claim.

(b) He made a claim for compensation on or about 7 December 1999 ('the claim') as particularised in paragraph 6(a) of the statement of claim.

(c) The claim is deemed to be a notice of injury ('the notice') pursuant to section 80(2) of the Work Health Act ('the Act').

(d) In the circumstances, the notice was given as soon as practicable in accordance with section 80(1) of the Act.

(e) Further to the above, the want of the notice before he voluntarily left his injury (*sic – taken to mean employment*) was occasioned by reasonable cause.

Particulars

The worker repeats and relies upon the facts and matters alleged in paragraph 4(a) above.

(f) His mental breakdown in July 1999 was an injury as that term is defined in section 3 of the Act in that he suffered from the aggravation, acceleration, exacerbation, recurrence or deterioration of the pre-existing injury particularised in paragraph 4 of the statement of claim.

(g) The claim was made within six months of him suffering the injury as described in paragraph (f) above.

(h) In the alternative to paragraph (g) above, if the claim was not a proper claim for compensation the failure to make the claim within 6 months of July 1999 was occasioned by reasonable cause.

Particulars

The conduct of the employer's insurer, the TIO, as particularised in paragraphs 6(b), (c) and (d) of the statement of claim led him to believe that compensation would probably be paid to him.

(i) In the alternative to paragraphs (f) to (h) inclusive above if his injury occurred on or about 12 August 1996, his failure to make a claim within 6 months of that date was occasioned by reasonable cause.

Particulars

The worker repeats and relies upon the facts and matters alleged in paragraph 4(a) above.

[22] The respondent did not object to the above pleading on the ground that the appellant had set up a pleading in his reply that was radically inconsistent with the appellant's further amended statement of claim.

[23] The appellant's application for workers compensation was first heard by the Work Health Court on 8, 9, 10, 11 and 12 December 2003. The appellant conducted his case in the Work Health Court on the following basis: he had sustained a mental injury on 12 August 1996; he had given notice of his mental injury to the respondent in accordance with ss 80 and 182 of the Act on 13 August 2003, when he gave the Accident/Injury Report to the respondent; the relevant six month period for the purposes of lodging a claim for workers compensation in accordance s 182 of the Act was the six month period after 12 August 1996; there was reasonable cause as to why the worker had not lodged a claim for workers compensation with the respondent within the six month period after 12 August 1996; the mental injury suffered by the appellant was a developing injury which meant that the worker's condition had deteriorated overtime; the appellant remained

partially incapacitated for work and had received and was in need of further medical treatment.

[24] On 11 and 12 December 2003, during the first hearing in the Work Health Court, Senior Counsel for the appellant submitted to the Work Health Court that the following matters provided a basis for the appellant being excused under s 182(3) of the Act for other reasonable cause from making a claim for workers compensation within the relevant six month period, being the period from 12 August 1996 to 12 February 1997. First, the appellant said in his evidence that he was waiting to arrest Bob Curtis and he was hoping the arrest of Mr Curtis might bring an end to the symptoms he was experiencing as a result of his mental injury. Secondly, he was hoping that he could put it all behind him and that he would not be subjected to the same stress again as he would not place himself in a similar situation to the first Curtis incident. Thirdly, he suffered no loss of earnings and no expense during the six month period after 12 August 1996. He received no medical treatment or psychological treatment for which he had to pay. Fourthly, he first became aware of the seriousness of his condition when he spoke to Mr Tyrrell in September 1997 for the purposes of obtaining a psychological report for his application for compensation under the Crimes (Victims Assistance) Act. Fifthly, the appellant's condition was a debilitating condition that developed from a series of incidents dating from 12 August 1996, with the final incident being the Jingo incident in February 1998. Sixthly, the appellant

first became aware of the true nature of his condition in 1999 when he suffered the breakdown following his move to Western Australia.

[25] On 24 March 2004, the presiding magistrate delivered the Reasons for Decision of the Work Health Court. Her Honour dismissed the appellant's application. She held that the appellant's claim for workers compensation was not maintainable, as contrary to s 182 of the Act, he had not made the claim for workers compensation within six months after the occurrence of his mental injury and his failure was not occasioned by reasonable cause. During the course of her Reasons for Decision the presiding magistrate made the following findings of fact, which are summarised in par [8] of the Reasons for Decision of Mildren J in *Van Dongen v Northern Territory of Australia*[3]:

> (1) the appellant sustained a mental injury on 12 August 1996 which arose out of or in the course of his employment with the Northern Territory Police Force;
>
> (2) the appellant gave notice to his employer of that injury by way of the accident/injury report (Exhibit W4) which fulfilled the notice requirements of s 80 Work Health Act (NT);
>
> (3) the appellant was partly incapacitated as defined in s 3 Work Health Act (NT) during the six month period which he was required to commence a claim for compensation, that is to say, the period from 12 August 1996 to 12 February 1997;
>
> (4) during that period the appellant was not able to carry out all his duties as an operational police officer although he nevertheless received increased entitlements for undertaking operational duties which, in part, he could not undertake, and further, that these were

[3] (2005) 16 NTLR 169

matters of which the appellant was aware and his employer was unaware;

(5) the appellant did not incur any medical expenses or suffer any loss of earnings during the relevant six month period;

(6) no claim for compensation was brought within the six month period after the occurrence of the injury as required by s 182(1)(a) Work Health Act (NT);

(7) the appellant voluntarily left his employment with the Northern Territory Police Force to return to Western Australia;

(8) for the purposes of s 182(3) Work Health Act (NT) there was no "other reasonable cause" for the appellant's failure to make a claim for compensation within the relevant six month period in respect of the injury of 12 August 1996.

[26] The presiding magistrate also found:

> […] within the six month period the appellant had no treatment and did not seek to obtain a medical opinion as to whether or not he had a psychological injury or to diagnose the nature of any injury. […] at no stage did the appellant seek any medical attention or seek to have his symptoms documented or treated. […] nothing was said to the appellant's employer sufficient to put the employer on notice that the appellant should be taken off operational duties or that he was suffering a mental injury. […] the appellant hoped that his symptoms would end but that did not transpire. […] the [appellant] hoped to put matters behind him. […] the [appellant] hoped that in his work he would not be subjected to the same sort of stress again but that in all the circumstances of the case that was unreasonable. […] the appellant lodged work health claims in relation to separate incidents both before and after the [injury on 12 August 1996] and that during the relevant six month period he had lodged a work health claim in respect of [a second incident. Both injuries were concerned with the arrest of the same person.] […] the appellant was not an immature person. As at 1996 he was 35 years of age. He was able to seek

assistance for compensation claims prior to and during the relevant period. He was educated to University level.[4]

[27] The appellant filed an appeal in the Supreme Court against the decision of the Work Health Court which was delivered on 24 March 2004. The appeal was heard by Angel J. His Honour delivered his Reasons for Decision on 11 February 2005. He held as follows:

> I agree with the conclusion of the learned magistrate that the appellant failed to establish on the balance of probabilities other reasonable cause for not lodging a claim in respect of the 12 August 1996 incident within the relevant six month period. He was found to have knowingly incurred an injury which incapacitated him from work. He was incapacitated from doing the job for which he was paid. To his knowledge he was only fit for work of a non — operational type for which the pay was less. That entitled him to compensation for the difference. In my opinion the learned magistrate was fully entitled to take account of the full circumstances of the case. The appellant was duty bound to apprise his employer of the situation. By not coming forward as the learned magistrate found and seeking assistance, the appellant did not give his employer the opportunity to take steps for his rehabilitation. As the learned magistrate pointed out the Work Health Act (NT) is a scheme which aims to rehabilitate workers as well as compensate them. On the findings of the learned magistrate the appellant was entitled to compensation under the Work Health Act (NT) during the six month period.
>
> The first and third grounds of appeal should be dismissed.
>
> In ordering dismissal of the appellant's claim for compensation the learned magistrate apparently overlooked the further issues raised by para 4 of the appellant's Further Amended Reply to Defence and Counterclaim in relation to the appellant's 1999 mental breakdown and the requirements of s 182 Work Health Act (NT) in regard thereto. Those issues centred upon the appellant's mental breakdown in the latter half of 1999 which was said to arise out of his employment with the Northern Territory Police Force. In these circumstances the appellant ought to have the opportunity to re-

[4] *Van Dongen v Northern Territory* (2005) 16 NTLR 169, per Mildren J at par [8].

> agitate those issues before the learned magistrate. Findings of fact relevant to those issues not having been addressed by the Work Health Court it is inappropriate that I seek to determine those matters on appeal. The order dismissing the appellant's claims for compensation should be set aside. I will hear the parties as to the appropriate formal orders and as to costs.[5]

[28] On 3 March 2005, the appellant filed an appeal in the Court of Appeal against part of the judgment of Angel J. The respondent did not cross appeal against the orders of Angel J setting aside the order of the Work Health Court and referring the matter back to the Work Health Court.

[29] On 13 October 2005, the Court of Appeal dismissed the appellant's appeal to the Court of Appeal. The Court of Appeal, in essence, concluded that during the period between 12 August 1996 and 12 February 1997 the appellant knew he could not carry out all of the duties required of him as an operational police office and his condition was getting worse. The appellant was aware of all of the relevant circumstances which entitled him to make a claim for workers compensation for his mental injury but, for his own reasons, he chose not to make a claim. The effect of the judgment of the Court of Appeal was that the matter was eventually referred back to the Work Health Court in accordance with the orders of Angel J.

[30] On 7 March 2006, the Work Health Court made the following orders:

> 1. [The matter is] adjourned to 26 and 27 at 10am for hearing [...] in Alice Springs Court.
>
> 2. The [appellant] file amended pleadings by 28 March 2006.

[5] *Van Dongen v Northern Territory* [2005] NTSC 4 at pars [19] to [21].

3. The [respondent] file an answer by 11 April 2006.

[31] The orders permitting the parties to amend their pleadings were made as the parties considered the matters raised in paragraph 4 of the appellant's further amended reply to defence and counterclaim were matters which should have been pleaded in the alternative in the appellant's further amended statement of claim. Further, as a result of the decisions of the Work Health Court, the Supreme Court and the Court of Appeal there could be no reliance on the mental injury which was sustained by the worker on 12 August 1996. In the Amended Pleading of the Worker, the appellant deleted any reference to the first Curtis incident, which occurred on 12 August 1996.

[32] On 26 and 27 June 2006 and 1 December 2006, the Work Health Court heard the arguments of the parties about the issues referred back to the Work Health Court by Angel J. No further evidence was received by the Work Health Court during the course of that hearing. The issues to be determined by the Work Health Court were defined by the parties' further amended pleadings.

[33] At the hearing in the Work Health Court on 26 and 27 June 2006, the appellant's claim for workers compensation was completely recast. The appellant sought to re-argue his claim in three new ways, one of which was abandoned during the course of this appeal. The appellant's two principal arguments were as follows. First, the appellant argued that his application

for the recovery of payments of compensation was maintainable in the Work Health Court and was not barred by s 182 of the Act for the following reasons:

- The mental injury which resulted in the appellant's incapacity was Post Traumatic Stress Disorder complicated by a Major Depressive Disorder[6]. The appellant's mental injury developed as a cumulative adverse psychological response to the traumatic and personally threatening situations he experienced in the course of his work as a police officer. The traumatic and personally threatening situations the appellant experienced included the occasions on which he was assaulted on 9 November 1996, 23 April 1997, and 2 February 1998.

- More specifically the appellant's mental injury was partially a sequela or a secondary consequence of the physical injuries which he sustained following the assaults that he suffered on 9 November 1996, 23 April 1997, and 2 February 1998. Each of the physical injuries the appellant sustained as a result of being assaulted on these three occasions, materially contributed to the mental injury which resulted in his incapacity.

[6] As diagnosed by Dr McCarthy in his reports dated 29 August 2000 and 17 November 2003.

- The appellant duly made claims for workers compensation in the prescribed form for the physical injuries he received following the assaults that he suffered on 9 November 1996, 23 April 1997, and 2 February 1998. The appellant's claims for workers compensation for his physical injuries were made within the time limits prescribed by s 182 of the Act and also constituted the giving of notice of injury to the respondent in accordance with s 80 of the Act. Each of the appellant's claims for workers compensation was accepted by the respondent.

- As the appellant's mental injury was a sequela of the relevant physical injuries, the appellant was not required to give the respondent notice of his mental injury. It was also unnecessary for the appellant to make a separate claim for workers compensation for his incapacity which was the result of his mental injury. In accordance with the decisions of *Perfect v Northern Territory of Australia*[7] and *Prime v Colliers International (NT) Pty Ltd*[8], a claim for workers compensation, which was made in the prescribed form, was a blanket claim for whatever compensation a worker may be entitled to receive under the Act.

[7] (1993) 107 FLR 428 per Mildren J at 434

[8] (2006) 204 FLR 220 per Mildren at par [25]

- Proceedings can be maintained in the Work Health Court for the recovery of workers compensation for incapacity which results from a mental injury which is the sequela of other injuries, even though some of the original injuries cannot be the subject of a proceeding for the recovery of compensation in the Work Health Court: *Rivard v Northern Territory of Australia*[9]; *Wattyl Australia Pty Ltd v York*[10]. If there are several material contributors to an incapacity, and one of those contributors is disqualified as a consequence of the exclusory provisions of the Act, but the others are not, then that does not preclude an application for the recovery of compensation being maintained in respect of the incapacity which is the result of all of the material contributors to the incapacity. In the circumstances, the fact that proceedings for the recovery of workers compensation cannot be maintained for any incapacity which was purely the result of the mental injury sustained by the worker on 12 August 1996, does not preclude the appellant maintaining the application in the Work Health Court for the recovery of compensation for the incapacity which resulted from his Post Traumatic Stress Disorder, complicated by a Major Depressive Disorder.

[9] (1999) 129 NTR 1

[10] Unreported NTSC Angel J 4/7/1997

[34] Secondly, and in the alternative, the appellant argued he was entitled to maintain his application for the recovery of workers compensation in the Work Health Court, in so far as it related to the incapacity he suffered as a result of his mental decompensation in the middle of 1999. The appellant was entitled to do so for the following reasons. His mental decompensation was an exacerbation of his original mental injury. It was therefore a new injury under the Act[11]. The maintenance of such an application in the Work Health Court was not barred by the judgment of the Work Health Court which was delivered on 24 March 2004. The application was governed by the ordinary provisions of the Act. The previous finding of the Work Health Court that the appellant had failed to establish a reasonable cause for not lodging a claim for workers compensation within the prescribed time had no application to the new mental injury. Notice of the new mental injury (the exacerbated injury) was given to the respondent in accordance with s 80 of the Act as soon as reasonably practicable by way of the appellant's letter to the Territory Insurance Office dated 7 December 1999[12]. As the exacerbation of the appellant's injury occurred after he left his employment with the respondent, notice of the new mental injury could not have been given prior to the appellant voluntarily leaving his employment with the respondent. The appellant's failure to file a claim for workers compensation in the prescribed form within the six month period after 7 December 1999 should

[11] See the definition of injury in s 3 of the Act

[12] The relevant contents of the letter are set out in par [13] above.

be excused under s 182(3) of the Act. There was reasonable cause as to why a claim for workers compensation had not been made by the appellant within six months of the occurrence of his new mental injury: as a result of the reply which he received from the Territory Insurance Office to his letter dated 7 December 1999 and various other correspondence the appellant might reasonably have inferred that the respondent had his claim for workers compensation under consideration: *Burns v The Commissioner of Railways*[13].

[35] On 31 August 2007, the Work Health Court delivered its Reasons for Decision in relation to the issues referred back to the Work Health Court by Angel J. Of relevance to this appeal, the Work Health Court made the following findings and determinations:

1. As a consequence of the findings made by the Work Health Court in its Reasons for Decision which were delivered on 24 March 2004 and the judgments of Angel J and the Court of Appeal, the incident of 12 August 1996 can no longer be relied on by the appellant as a basis for maintaining an application for the recovery of Compensation in the Work Health Court[14].

2. The respondent's acceptance of liability for each of the appellant's claims for workers compensation being claims no. 92556, 92558 and

[13] (1939) WCR 115 at 116

[14] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [18]

95770, for the injuries he sustained on 9November 1996, 23 April 1997 and 2 February 1998 was attached to the following injuries[15]:

a. 09/11/96 – soft tissue (L) wrist.

b. 23/04/97 – bitten inner (R) thumb.

c. 02/02/98 – bruised chest.

3. In claims no. 92556, 92558 and 95770, the appellant only notified the respondent of the physical injuries he sustained after he was assaulted on 9 November 1996, 23 April 1997 and 2 February 1998[16].

4. The mental injury sustained by the appellant in August 1996 was an Adjustment Disorder with mainly depressive symptoms[17].

5. The mental injury sustained by the appellant in August 1996 resulted in him having an inability to fully undertake his work as a police officer. At all times after 12 August 1996, the appellant's capacity to undertake his work as a police officer was reduced because of his mental injury. The appellant's symptoms persisted throughout the remainder of his time in the Northern Territory Police Force. He was aware of those symptoms. It is possible the appellant had not fully recovered from his mental injury by the

[15] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [19]
[16] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [49]
[17] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [61] page 34

time he left his employment with the respondent. It is also possible the appellant still suffered from the symptoms of his mental condition after he resigned from the Northern Territory Police Force[18].

6. The appellant was suffering from Major Depression when he was being treated at the Perth Clinic in August 1999[19].

7. The appellant's evidence does not support a link between the five assaults pleaded in the Amended Pleading of the Worker, or any of them, and his Major Depression in 1999[20].

8. The evidence before the Work Health Court does not support a finding on the balance of probabilities that there was a causal link between the five assaults (or any of them) pleaded in the Amended Pleading of the Worker and the Major Depression the appellant was suffering in 1999. The evidence does not prove any of the five assaults contributed to the Major Depression the appellant was suffering in 1999. The onus of proof has not been discharged by the appellant[21].

9. The appellant cannot maintain an application for the recovery of compensation for any incapacity which was the result of an

[18] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [61] pages 34 and 35.

[19] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [90]
[20] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [91]
[21] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [98]

aggravation, acceleration, exacerbation, recurrence or deterioration of the mental injury he sustained in August 1996. The appellant cannot do so because the appellant did not make a claim for workers compensation for any incapacity which resulted from the August 1996 injury and he deliberately withheld information about his incapacity from the respondent. The respondent had suffered a detriment as a result of the appellant deliberately withholding information about his incapacity. The respondent was deprived of the opportunity to rehabilitate the appellant. To allow the appellant to maintain an application for the recovery of compensation for the incapacity he suffered as a result of the exacerbated mental injury, would circumvent s 182 of the Act[22].

10. The appellant has not proven on the balance of probabilities that separate and discrete mental injuries were sustained by him in 1997 or 1998 or at any later time as a consequence of the bitten thumb incident of the Jingo incident[23].

11. The appellant has not proven on the balance of probabilities that a separate and discrete mental injury was sustained by him in

[22] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [101]
[23] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [102]

November 1996 or at any later time as a consequence of the second Curtis incident[24].

12. Even if the appellant had proven on the balance of probabilities that there were mental injuries sustained as a result of the second Curtis incident, the bitten thumb incident and the Jingo incident, an application for recovery of compensation for any incapacity which resulted from those injuries would not be maintainable as they were an aggravation, acceleration, exacerbation, recurrence or deterioration of the August 1996 mental injury[25].

13. The claims for workers compensation which the appellant made as a result of the assaults sustained on 9 November 1996, 23 April 1997 and 2 February 1998 being claim numbers 92556, 92558 and 95770, which only referred to the physical injuries he sustained, were not claims for compensation for any mental injury. To look at this case without considering the fact the appellant deliberately withheld knowledge of the incapacity he suffered as a result of his mental injury from the respondent would not be a proper application of the Act[26].

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[24] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [103]

[25] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [104]

[26] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [105]

14. Until the middle of 1999 the worker had not experienced the very severe symptoms he then experienced. That is not to say he had not become aware of the true nature and extent of his condition. Being aware of the true nature and extent of a condition does not imply the person has experienced that condition. Before leaving his employment with the respondent, the appellant was aware of the true nature and extent of his mental injury. The appellant knew about the true nature and extent of his injury before his breakdown in the middle of 1999 and before he wrote to the Territory Insurance Office on 7 December 1999. There is no basis upon which to conclude that the worker was not aware of the true nature and extent of his condition before his breakdown in 1999[27].

15. The evidence before the court does not prove the psychiatric condition in mid 1999 was directly attributable to the physical injury he received from the assault in February 1998 or indeed any of the other four assaults the subject of the claims. The psychiatric condition the appellant suffered in the middle of 1999 is not properly characterised as a sequela to the physical injury the worker sustained in February 1998 or any of the five injuries

[27] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [121]

the subject of the appellant's other claims for workers compensation[28].

[36] Assuming the letter from the appellant to the Territory Insurance Office dated 7 December 1999 constituted notice of an exacerbated mental injury, the presiding magistrate does not seem to have made any findings of fact about whether the notice was given as soon as practical as is required by s 80 of the Act.

The grounds of appeal

[37] In the Notice of Appeal the appellant pleaded the following grounds of appeal:

1. The learned magistrate erred in law in finding that a worker's knowledge of his condition is relevant in determining whether the worker is entitled to compensation from an injury suffered in the course of his employment.

2. The learned magistrate erred in law in finding that the findings previously made concerning the worker's application under s 182(3) of the Work Health Act were to be taken into account in considering the matters contained in paragraph 4 of the further amended statement of claim.

3. The learned magistrate erred in law in finding that an application for compensation prima facie relates to "the injury" set out in the notification.

4. The learned magistrate erred in law in finding that the injury sustained by the worker in August 1996 was an Adjustment Disorder with mainly depressive symptoms when the genesis of that injury was no longer before the Court and the worker had

[28] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [122]

not been given the opportunity of making submissions or calling further evidence on that point.

5. The learned magistrate erred in law in finding that the only proof relevant to the correct diagnosis of the 1999 injury was the contemporaneous medical evidence.

6. The learned magistrate erred in law in finding that the court was unable to make a finding upon the worker's own evidence that the worker's condition in 1999 was the result of the five incidents following the Curtis incident when there was direct evidence to the contrary.

7. The learned magistrate erred in law in finding that the worker's oral evidence did not establish a link between the five injuries and the breakdown in 1999.

8. The learned magistrate erred in law in restricting the opinion of Dr Ding to supporting only a connection between the First Curtis incident.

9. The learned magistrate erred in law in so far as she found that the appropriate test for an entitlement to compensation was that the injury claimed for required to be caused by the employment.

10. The learned magistrate erred in law in finding that the worker had not discharged the onus of proving that the five assaults pleaded contributed to the injury in 1999 and/or the worker's mental condition arising from his employment.

11. The learned magistrate erred in law in finding that an aggravation exacerbation or deterioration of an injury previously suffered by the worker in the First Curtis incident could not be maintainable.

12. The learned magistrate erred in law in failing to find that the injury in July 1999 was a new injury for the purposes of the Act.

13. The learned magistrate erred in law in finding that the delay occasioned by the Territory Insurance Office in December 1999 fell outside the six month period relevant to s 182 of the Act.

14. The learned magistrate erred in law in finding that the worker's evidence did not support a link between the five assaults and the injury in 1999.

15. The learned magistrate erred in law in failing to find that the injury in 1999 was a sequela of the mental condition suffered by the worker arising from his employment with the employer.

Consideration

[38] I have considered each of the appellant's argument's in relation to each of the numerous grounds of appeal. However, in order to resolve this appeal it is unnecessary to resolve all of the appellant's arguments in relation to each ground of appeal. The appeal is best resolved by considering the validity of the appellant's two principal arguments in the Work Health Court. The arguments are set out in pars [33] and [34] above.

[39] In my opinion neither of the appellant's principal arguments can be sustained. The first argument of the appellant, which is set out in par [33] above, cannot be sustained for three reasons. First, for the appellant's first argument to be sustained it must be established that the Post Traumatic Stress Disorder, complicated with a Major Depressive Disorder which is said to have resulted in the appellant's incapacity was the secondary consequence[29] of the physical injuries which the appellant suffered on

[29] *D & W Livestock Transport v Smith* (1994) 4 NTLR 169 per Kearney J at p 170.

9 November 1999, 23 April 1997 and 2 February 1998. That is, it must be established that the soft tissue injury which the worker sustained to his left wrist on 9 November 1996, the bitten inner right thumb which the worker sustained on 23 April 1997 and the bruised chest and fractured ribs which the worker sustained on 2 February 1998 were all stressors that directly and materially contributed to the development and persistence of the mental injury which resulted in the appellant's incapacity. However, the evidence tendered in the Work Health Court does not establish that the physical injuries themselves materially contributed to the appellant's Post Traumatic Stress Disorder, complicated with a Major Depressive Disorder. Rather, the evidence establishes that the appellant's mental injury, his adverse psychological response, was precipitated by the first Curtis incident and it was materially contributed to and developed as a result of the series of traumatic incidents which were thereafter experienced by the appellant. Those incidents involved the appellant being physically attacked and threatened by violent people. It was the stress that was associated with managing and controlling those incidents which caused the appellant's mental injury. The appellant's Post Traumatic Stress Disorder, complicated with a Major Depressive Disorder was not a condition resulting from the physical injuries which the appellant sustained. The appellant's mental injury resulted from the stress associated with the traumatic incidents he experienced while employed as a police officer, not the physical injuries themselves which were relatively minor. As a result of the traumatic

incidents he experienced the appellant sustained both physical and mental injuries. The Work Health Court rightly concluded that the psychiatric condition or mental injury which the appellant suffered was not properly characterised as a sequela to the physical injuries the subject of the appellant's other claims for workers compensation. Ground 15 in the notice of appeal is not made out.

[40] The second reason why the appellant's first argument cannot be sustained is that while the making of a claim for workers compensation in the prescribed form may constitute a blanket claim for whatever compensation a worker may be entitled to receive under the Act, the reality is that the appellant deliberately elected to confine his claims for workers compensation to his physical injuries only and not to make a claim for the mental injury he sustained as a result of performing his operational duties as a police officer. He chose not to make a blanket claim for workers compensation. Instead of making a claim for workers compensation for his mental injury, with full knowledge of the nature of his mental injury, the appellant chose to make a claim for compensation under the Crimes (Victims Assistance) Act and to keep performing operational duties. As the effect of the appellant's election was to deprive the respondent of the opportunity to rehabilitate the appellant, the appellant should be held to his election.

[41] The third reason why the appellant's first argument cannot be sustained, even assuming the appellant's mental injury was a sequela of his physical injuries, is the appellant was required to give notice to the employer of his

mental injury in accordance with s 80 and s 81 of the Act. As the appellant's mental injury was a separate and discrete injury which resulted in him being partially incapacitated, the appellant was required to give notice to the respondent, as soon as practicable, of the date on which his mental injury occurred and the cause of his mental injury[30]. He failed to do so. While it may not be necessary to make a further claim for workers compensation for a sequela of an injury which results in incapacity, the requirement for a worker to give notice of injury to the employer under s 80 of the Act is a continuing obligation. Notice is required to be given of any injury, including any sequela, which results in incapacity for which compensation is claimed. There is no entitlement to compensation unless such notice is given[31].

[42] I add that the notice of mental injury which the appellant gave the respondent on 13 August 1996, after the first Curtis incident, was not notice of the mental injury which the appellant ultimately developed as a result of that incident and the subsequent traumatic incidents he experienced while employed by the respondent.

[43] Putting aside the particular circumstances of this case, it seems to me that ordinarily a worker should not be required to make a further claim for workers compensation for any incapacity which results from a sequela or secondary consequence of an original injury. This is because there is a reasonable cause for not doing so: the original claim form is ordinarily a

[30] s 81(d) of the Workers Rehabilitation and Compensation Act
[31] *Maddalozzo v Maddick* (1992) 84 NTR 27

blanket claim form which covers such an eventuality and the possibility of there being secondary consequences to any injury is within the reasonable contemplation of the employer.

[44] In my opinion, the second argument of the appellant, which is set out in par [34] above, cannot be sustained for the following reasons. First, the effect of the Work Health Court's findings that are set out in subparagraphs [35] 6, [35] 7 and [35] 8 above is that the Work Health Court found the breakdown which the appellant suffered in the middle of 1999 was not an exacerbation of a mental injury which occurred during or arose out of the appellant's employment with the respondent. Instead the Work Health Court found that the appellant was suffering a Major Depression that was unrelated to his work as a police officer. While the findings I have just referred to may amount to errors of fact, they do not amount to errors of law. The findings are therefore not appellable. There was some evidence upon which such findings of fact could be made and as to which the presiding magistrate stated:

> The notes from the Perth Clinic are contained in exhibit E30. That exhibit includes hand written clinical notes taken during the workers time at the Perth Clinic in August 1999. The notes from the attendances in 1999 were made by Elizabeth Rutherford, clinical Psychological Trainee. On 16/08/99 there is reference to "the onset of depression in the context of major social stressors – moving to Perth from the Northern Territory after leaving NT Police Force, moving into new house and his wife pregnant with their fourth child". While there is reference to the move from the Northern Territory, this note does not mention work related stress or make reference to any of the five assaults the subject of the claims. There are further notes made at the Perth Clinic dated … These notes do not mention stressors. At the time of his admission to the Perth

Clinic, the Worker was employed in Western Australia. On 10 September 1999 a letter was sent from the Perth Clinic to the worker's psychiatrist, Dr Blythe and this letter states in part:

> "Keith reported anxiety symptoms when talking to the group of reasons for seeking treatment for depression following a bout of flu. He reported he did not want to return to work and was experiencing a loss of confidence and anxiety in social situations. The onset of this depressive episode occurred in the context of major social stressors involving change of employment, an interstate move, and his wife pregnant with their fourth child."[32]

[…]

The contemporaneous medical material before the Court does not support the workers assertion that he told the Perth Clinic about work related incidents. It is recognised that the notes would not record everything which has been said by the worker during his time at the Clinic. The material in exhibit E30 is the only contemporaneous medical material before the court which can assist in the fact finding process as to the cause of the breakdown in 1999. The letter to the treating and referring psychiatrist does not refer to a contribution or link between the breakdown in 1999 and the five assaults the subject of the claim, nor indeed any work related stressors while the Worker was employed with the Northern Territory Police. It would seem logical that stressors that appear relevant to trained staff treating the Worker would be reported accurately to the referring psychiatrist. If they did not, treatment in the future may be counter-productive or compromised.[33]

The statement from the Perth Clinic, sent to the Workers treating psychiatrist on 10 September 1999 set out in part: "The onset of this depressive episode occurred in the context of major social stressors involving change of employment, an interstate move, and his wife pregnant with their fourth child" (E30). This statement is based upon the expertise of those treating the Worker. The report written to the Worker's treating psychiatrist on 10 September 1999 does not refer to the assaults (or any of them) as being a stressor, as contributing or being causative of the problems experienced in 1999 which led to the Major Depression developing and treatment at the Perth Clinic. The

[32] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [86]
[33] *Van Dongen v NTA* (No. 2) [2007] NTMC 59 at par [93]

material from the Perth Clinic does not link the Major Depression with any of the assaults in the five claims.

[45] The second reason why the appellant's second argument cannot be sustained is that the notice of mental injury (constituted by the breakdown in the middle of 1999) given to the Territory Insurance Office by way of the letter dated 7 December 1999 was not given as soon as practicable as is required by s 80 of the Act. While the Work Health Court made no finding about this issue, the Work Health Court did make the findings set out in sub-paragraph [35] 14 above. The effect of that finding is that there is no reason why it was not practicable for the appellant to give notice to the respondent of his breakdown immediately after he was advised by his doctors to undertake the treatment provided by the Perth Clinic or at the latest immediately the first lot of treatment he received at the Perth Clinic was completed.

[46] Although it is not necessary for me to consider ground number 14 in the notice of appeal, I make the following remarks about that ground of appeal. I accept the appellant's arguments. The fact that an application for the recovery of compensation for an original injury is not maintainable because there has been a failure to comply with the provisions of s 182 of the Act does mean that an application for the recovery of compensation for an exacerbation of the original injury is not maintainable. Section 182 of the Act does not bar the right. It bars the remedy. An exacerbation of an injury is a fresh injury for the purposes of the Act. Accordingly, any application for the recovery of compensation for an exacerbated injury is governed by

the provisions of the Act which apply to the exacerbated injury. Of course, for the purposes of assessing the amount of compensation recoverable by a worker for the exacerbated injury, in such circumstances, the worker's pre-injury earning capacity or normal weekly earnings will be the worker's earning capacity or normal weekly earnings post the original injury and prior to the exacerbation. Further, the compensable incapacity would only arise from the date of the exacerbation. That is, compensation could only be claimed from the date of the exacerbation onwards.

Orders

[47] The appeal is dismissed. I will hear the parties further as to costs.

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