SUPREME COURT OF QUEENSLAND

CITATION:	*Karanfilov v Inghams Enterprises P/L* [2000] QCA 348
PARTIES:	**LJUPCO KARANFILOV** (plaintiff/respondent) v **INGHAMS ENTERPRISES PTY LTD** ACN 008 447 345 (defendant/appellant)
FILE NO/S:	Appeal No 4992 of 2000 DC No 963 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 92(2) DCA
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 August 2000
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2000
JUDGES:	de Jersey CJ, McPherson JA, Mullins J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**Appeal allowed with costs. Plaintiff's proceedings in the District Court struck out with costs. Plaintiff granted an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973.**
CATCHWORDS:	WORKERS' COMPENSATION – ENTITLEMENT TO AND LIABLITY FOR COMPENSATION – PERSONS ENTITLED TO COMPENSATION – DEPENDANTS – RIGHT OF DEPENDANTS TO COMPENSATION – where plaintiff was spouse of injured worker claiming damages for loss of consortium – whether *WorkCover Queensland Act* 1996 had abolished common law claim STATUTES – INTERPRETATION – CONSIDERATION OF EXTRINSIC MATTERS – LEGISLATIVE HISTORY OF ACT – construction of s 253(3) in light of statutory definition of "damages" in s 11 – whether inherent inconsistency between s 52 and s 11 of *WorkCover Queensland Act* 1996 – whether s 316 of the Act is an additional confirmation of the exclusion of consortium claims EMPLOYMENT LAW – RIGHTS AND LIABILITIES AS BETWEEN EMPLOYER AND THIRD PERSONS – LIABILITIES OF EMPLOYER – OTHER MATTERS

Bonser v Melnacis [2000] QCA 13, considered
Pyneboard v Trade Practices Commission (1982) 152 CLR 328, considered
Re Mount Isa Mines Limited [1994] 2 Qd R 62, considered
Sargood Bros v Commonwealth (1910) 11 CLR 258, considered
Scott v Moses (1957) 75 WN (NSW) 101, considered

Acts Interpretation Act 1954 (Qld), s 32A, s 32AA
Appeal Costs Fund Act 1973 (Qld), s 15
Law Reform Act 1995 (Qld), s 13
WorkCover Queensland Act 1996 (Qld), s 4(2), s 5, s 6, s 9, s 11, s 12, s 32, s 34, s 50(1), s 50(2), s 52, s 135(1), s 252, s 253(1), s 253(3), s 262, s 302, s 316
Workers' Compensation Act 1990 (Qld)
Workers' Compensation Acts 1915 – 1962 (Qld), s 8, s 9A
Workers' Compensation Acts Amendment Act *1962 (Qld), No 29, s 5*

COUNSEL: K D Dorney QC with K F Holyoak for the applicant
R J Douglas SC for the respondent

SOLICITORS: Tutt & Quinlan for the applicant
Sciacca's Lawyers for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of McPherson JA and Mullins J. I agree with the orders proposed by their Honours.

[2] As to the construction of s 253(3) of the *WorkCover Queensland Act* 1996, I agree with the reasons of McPherson JA. The provision abolishes any entitlement to pursue a consortium claim, a matter the legislature apparently considered should be addressed directly lest the already tight terms of sub-s (1) otherwise left room for doubt.

[3] I should express my view that the word "damages" in s 52, headed "Employer's obligation to insure", is to be interpreted strictly in accordance with the s 11 definition of "damages" – that is, including the definite article. I agree with Mullins J's paragraph 46.

[4] As to s 316, I agree with Mullins J that the provision should be read as additional, specific confirmation of the exclusion of consortium claims.

[5] **McPHERSON JA**: In 1997 Zaklina Karanfilova, who is the wife of the plaintiff, was working in the chicken boning room of the defendant's premises at Murarrie, when she was injured. As a result, her husband, who is the plaintiff and the respondent to this appeal, brought proceedings in the District Court claiming damages for loss of consortium of his wife. The injury she sustained is alleged by the plaintiff to have been caused by breach of contract, negligence, or breach of

statutory duty on the part of the defendant employer in failing to provide a safe system of work.

[6] The defendant applied to dispose of the proceedings summarily by striking out the plaintiff's claim. It did so essentially on the ground that the *WorkCover Queensland Act 1996* has abrogated his right to recover damages for loss of the consortium of his wife. The application came before Boulton DCJ who, after carefully considering the provisions of that Act, refused to strike out the proceedings. The question is of some general importance and, although his Honour's decision was interlocutory, this Court gave leave to appeal against it.

[7] The parties have co-operated in having the question raised by the defendant decided in a summary way. For present purposes it is accepted that the wife was a "worker" within the meaning of s 12 of the *Act* of 1996; that what she suffered was an "injury" in terms of s 34; that the defendant was an "employer" within s 32; and that the plaintiff's action was to recover damages at common law for loss of consortium.

[8] In support of the submission that the plaintiff's claim is not maintainable, the defendant relies principally on s 253 of the *Act*. Section 253(3) provides:

> "(3) To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker".

To determine whether s 253(3) operates to abolish the plaintiff's right of action for loss of consortium resulting from the injury to his wife, it is necessary to begin by asking whether the plaintiff is a person "not mentioned in" subsection (1) of s 253. Section 253(1) is introduced by saying that "the following are the only persons entitled to seek damages for an injury sustained by a worker". This is followed by four paragraphs (a), (b), (c) and (d) which identify different categories of persons. Each of the first three refer to a worker with respect to whom some procedural step has been taken. In s 253(1)(a) it is that the worker has received a notice of assessment from WorkCover; in (b), it is that the worker's application for compensation has been allowed, but not assessed for permanent impairment; in (c), it is that the worker has not lodged an application for compensation. Paragraph (d) of s 253(1) refers not to the worker as such, but to dependants of a deceased worker whose injury resulted in death.

[9] The plaintiff is not within any of those categories of persons. He was not the worker; and his wife, who was the worker, has not died as a result of her injury. It follows that the plaintiff is not one of the only persons entitled to seek damages for the injury sustained by her in 1997. If there is any doubt about that conclusion, it is removed by s 253(3), declaring that s 253(1) abolishes the entitlement of a person like the plaintiff to seek damages for injury to the worker who is his wife. On the face of it, therefore, the plaintiff's claim ought to have been struck out.

[10] This is, however, to reckon without the definition of "damages" in s 11(1) of the Act. That word is used in both s 253(1) and s 253(3), and the meaning ascribed to it in s 11(1) is:

> "… damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay the damages to -

(a) the worker; or
(b) if the injury results in the worker's death - a dependent of the deceased worker."

The expression "creating, independently of this Act, a legal liability …" is no novelty in Queensland legislation of this kind. It was used in the *Workers' Compensation Acts Amendment Act* of 1962, No 29, s 5, which introduced s 9A into what then became the *Workers' Compensation Acts*, 1915 to 1962. Before the amendment of those *Acts* in 1962 an employer was by s 8 "legally liable" under the *Acts* to pay workers' compensation in the traditional sense of a prescribed amount calculated according to a fixed scale. An injured worker was entitled to be paid that amount out of the State Accident Insurance Fund, which was funded by insurance premiums paid by all employers, who were required by the *Acts* to insure themselves against that liability. After the 1962 amendment an injured worker was still entitled to compensation out of the Fund; but s 9A(1)(b) conferred on an injured worker the right to receive out of the Fund the amount of damages which an employer was liable to pay in respect of that injury, and against which the employer was also required to insure. The effect was to extend the system of compulsory insurance to cover the employer's liability at common law for damages to an insured worker. The way in which s 9A(1) of the *Acts*, as amended in 1962, designated this common law liability was to describe the damages as being awarded against an employer "under circumstances creating also, independently of this Act, a legal liability in the employer to pay damages" in respect of the injury to the worker.

[11] The current *Act* of 1996, under which this question now arises, maintained the dichotomy between workers' "compensation" in the traditional sense and "damages" at common law, as well as preserving much of the previous structure of the old *Workers' Compensation Acts*. By s 135(1) compensation is still payable "under this Act" for an injury sustained by a worker, and by s 50(1) an employer is legally liable for it. By contrast, s 50(2) provides that:

"(2) This Act does not impose any legal liability on an employer for damages for injuries sustained by a worker employed by the employer, though chapter 5 regulates access to damages."

The effect of that provision is to confirm that an employer's liability for "damages", as distinct from the liability for compensation, for injuries sustained by a worker remains a liability at common law arising or created "independently of the Act". It is not a creature of the Act, or a liability created or arising under it.

[12] With this in mind, it is possible to return to s 253. It is in chapter 5, which, according to s 50(2), regulates "access to damages". It will be recalled that by s 253(3) any entitlement of a person not mentioned in s 253(1) "to seek damages for an injury sustained by a worker" is declared to be abolished. Read in conjunction with the meaning ascribed to "damages" in s 11(1), s 253(3) would look like this; that is to say, s 253(1):

"… abolishes any entitlement of a person not mentioned in [s253(1)] to seek **damages** *for an injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay the damages to*

(a) a worker …

for an injury sustained by a worker."

When the definition of **damages** is engrafted on to s 253(3) and that provision is read in context of the legislative history of the phrase "creating, independently of this Act, a legal liability", the apparent effect in the present case is that s 253(3) confirms that s 253(1) abolishes any entitlement of the plaintiff in this case to seek damages for injury sustained by the plaintiff's wife in circumstances creating a common law liability in the defendant to pay damages to the plaintiff's wife.

[13] According to the plaintiff, however, the result is that s 253(3) becomes meaningless because any damages for loss of consortium for the injury to the plaintiff's wife at common law are, or would be, payable not to her, but to the plaintiff; or, if not meaningless, s 253(3) becomes so uncertain in meaning that it cannot be safely assumed that the intention was to abolish the plaintiff's common law right to damages for loss of his wife's consortium resulting from the injury she sustained at work. On the other hand, if it is possible to make sense of s 253(3), then it is the duty of the Court to do so. A provision in an Act of Parliament is not to be regarded as so uncertain as to have no meaning, and the Court is bound to find some meaning capable of being ascribed to it. See *Scott v Moses* (1957) 75 WN (NSW) 101.

[14] For my part, I do not consider that there is much difficulty in understanding s 253(3) if the legislative history of the expressions it uses are borne in mind. The principal question to be asked is whether an injury has been sustained by a worker in circumstances creating, independently of the Act of 1996, a legal liability in the worker's employer to pay damages to a worker for injury sustained by the worker. Given the facts admitted or assumed for this purpose in the present case, the answer to that question must, I consider, be Yes. The plaintiff's wife was injured in circumstances creating, independently of the Act of 1996, a legal liability in the defendant to pay damages to her for her injury. That being so, s 253(3) confirms that s 253(1) abolishes the entitlement of a person not mentioned in s 253(1) to seek damages for that injury. The plaintiff is a person not mentioned in s 253(1). It follows that his entitlement at common law to seek damages for loss of consortium for the injury sustained by his wife is not sustainable.

[15] The only difficulty in the way of this interpretation is that the definition of damages in s 11(1) does not refer to "a legal liability … to pay damages" to a worker. As Mr Douglas SC for the plaintiff emphasises, in defining "damages", s 11(1) speaks of damages for injury sustained by a worker "in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay *the* damages to (a) the worker ..". His submission is that "the damages" necessarily refers to the same damages as those being defined in s 11(1); and, for that reason, it is not possible to adopt the interpretation of s 253(3) which I have suggested. That would, I agree, certainly be the natural meaning of the definition when read in the ordinary way. So to read it would, however, make nonsense of s 253(3); for, as I have said, the damages recoverable by the plaintiff for loss of consortium are payable to him and not to his wife.

[16] When, however, one finds a difficulty like this in a statute, it still remains impermissible to reject the provision as having no meaning and therefore void. Instead, it is necessary to turn to such interpretational aids as can be found elsewhere. Section 32AA of the *Acts Interpretation Act 1954* says that a definition in or applying to an Act applies to the entire Act. The definition in s 11(1) therefore

applies to s 253(3) of the *Act* of 1996 as it does to other provisions of that statute. But s 32A of the *Acts Interpretation Act* provides that definitions in an Act apply "except so far as the context or subject matter otherwise indicates or requires". Section 32AA is therefore subject to the limitation or qualification imposed in s 32A. In my opinion, it is not possible to apply the definition of damages in s 11(1) to s 253(1) in a completely literal way. Either the definite article *the* must be omitted in interpreting it, or it must be treated simply as inapplicable to s 253(3). That course is justified by the fact that otherwise s 253(3) would be rendered meaningless. Something has to give way. It would not make sense to ascribe to it the meaning that s 253(3) abolishes (or confirms the abolition of) any entitlement of a person not mentioned in s 253(1) to seek damages for an injury sustained by a worker in circumstances creating a common law liability in the worker's employer to pay *those* damages to the worker for an injury sustained by him or her. Since there is no such liability at common law, it is not possible to see what function s 253(3) could perform if it is interpreted in that way. Because, therefore, the context otherwise indicates or requires, I would, in applying it to s 253, read the definition of damages in s 11(1) by omitting the definite article "the" before the work "damages" in that provision.

[17] Mr Douglas then submits that, if s 253 is interpreted like this, it has the consequence of abolishing the right of action of a worker who is injured in some way not creating a common law liability on the part of the employer, but on the part of someone else, such as independent contractor, or an occupier of premises, or a supplier of machinery, equipment or material that is defective. However, I do not consider that s 253 has such an effect. If, for example, a tradesman is sent by his employer to work at premises of an occupier, where he sustains injury because of a defect in those premises, he is, it may be assumed, a "worker" who is mentioned in s 253(1) and hence a person entitled to seek damages for his injury. It is true that, as against the occupier of the premises where he was injured, he will presumably not satisfy the requirements of paras (a), (b) or (c) of s 253(1). But that would not deprive him of his claim for damages against the occupier unless the circumstances are such as to create independently of the *Act* of 1996, a common law liability on the part of his employer to pay damages to him as the worker for the injury sustained. And if there were such a liability on the part of his employer, there would be no occasion for the injured worker to sue the occupier for damages for that injury. He would be able to recover damages from his employer for the injury he had sustained at the occupier's premises. If he had no right of action against his employer because of the defective state of the occupier's premises, he would still be able to sue the occupier because he would not then be claiming "damages" as defined in s 11(1) against the occupier. On that hypothesis, there would not be a common law liability on the worker's employer to pay damages to the worker. Section 253 would then not abolish his claim against the occupier.

[18] Admittedly, it is almost impossible to foresee the various permutations and combinations to which this novel legislation may give rise. But it is, to my mind, clear enough that the plaintiff in this instance is not among the "only persons" mentioned in s 253(1) of the *Act* of 1996 who can seek damages for the injury to his wife in 1997. What s 253 appears to be intended to do is to prevent more than one person (and that the worker) from seeking damages against an employer in respect of an injury to a worker. The only exception is a dependant of a deceased worker within s 253(1)(d), who is entitled to seek damages if the injury sustained by the

worker results in the worker's death. Mr Douglas says that, if that is so, a person who suffered nervous shock as a result of witnessing an accident to a worker would not be able to sue the employer for damages. That may well be one of the intended (or unintended) consequences of the *Act* of 1996, which evidently set out to limit the range of claims that could be made against an employer at common law for an injury to a worker.

[19] I have not found it necessary to consider in detail the provisions in s 316 of the Act:

> "316. A court cannot award damages of any kind under this Act to a person other than the claimant, including damages for loss of consortium as a result of the injury sustained by the worker."

Section 316 is in part 9 of the Act entitled **No Right to Particular Damages**. Superficially, it would appear to confirm the abolition of the plaintiff's rights to damages against the defendant for loss of his wife's consortium. What intrudes a doubt about this conclusion is the use in s 316 of the phrase "under this Act". As we have already seen, s 50(2) of the Act confirms that the Act does not impose any legal liability on an employer for damages for injuries sustained by a worker employed by the employer. It is therefore difficult to see why the expression "under this Act" was incorporated in s 316, when the only liability for damages for loss of consortium arises not "under this Act" but at common law "independently of this Act". But the inclusion of that expression in s 316 does not alter my opinion that the plaintiff is not a person whose entitlement to sue his wife's employer for loss resulting from an injury to his wife as the "worker" has survived the provisions of s 253.

[20] It follows in my view that the plaintiff's claim should not have been allowed to proceed. The appeal should be allowed with costs, and the plaintiff's proceedings in the District Court should be struck out with costs. The plaintiff should have an indemnity certificate under s 15 of the *Appeals Costs Fund Act 1973*.

[21] **MULLINS J**: The issue in this appeal is whether the respondent's action for damages for loss of consortium of his wife has been abolished by the *WorkCover Queensland Act* 1996 ("Act"). It is accepted by the appellant for the purpose of the appeal that the respondent's wife was a worker within the meaning of the Act who suffered an injury within the meaning of the Act during the course of her employment by the appellant. The respondent alleges that his wife was injured as a result of the breach of contract, negligence or breach of statutory duty on the part of the appellant.

[22] The submissions of both parties were directed at the interpretation of sections 253 and 316 of the Act. Those provisions need to be considered in their context in the Act.

[23] The main objects of the Act are set out in sections 5 and 6 and are expressly stated to be an aid to the interpretation of the Act: section 4(2) of the Act. Section 5 of the Act deals with the establishment of a workers' compensation scheme for Queensland. Section 5(2) of the Act sets out what the main provisions of the scheme provide for injuries sustained by workers in their employment, the first of which are:

> "(a) compensation;

(b) regulation of access to damages;
(c) employers' liability for compensation;
(d) employers' obligation to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer;".

[24] The competing considerations affecting the scheme are identified in section 5(4) of the Act which provides:

"**(4)** It is intended that the scheme should-
(a) maintain a balance between-
(i) providing fair and appropriate benefit for injured workers or dependants and persons other than workers; and
(ii) ensuring reasonable premium levels for employers; and
(b) ensure that injured workers or dependants are treated fairly by WorkCover and self-insurers; and
(c) provide for employers and injured workers to participate in effective return to work programs; and
(d) provide for flexible insurance arrangements suited to the particular needs of industry; and
(e) be maintained in a fully funded state that meets insurance industry solvency standards."

[25] The objects of the Act set out in section 6 relate to protection of employers in the following terms:

"This Act –
(a) provides for the protection of employers' interests in relation to claims for damages for workers' injuries; and
(b) makes changes to the law to strengthen workers' obligations for their own safety in employment."

[26] Part 4 of chapter 1 of the Act deals with basic concepts which underlie its operation. These include accident insurance, compensation and damages.

[27] The meaning of accident insurance is set out in section 9 of the Act as:

"**9. "Accident insurance"** is insurance by which an employer is indemnified against all amounts for which the employer may become legally liable, for injury sustained by a worker employed by the employer for-
(a) compensation; and
(b) damages."

[28] The meaning of compensation is set out in section 10 of the Act. It is compensation payable under the Act for a worker's injury.

[29] The meaning of damages is set out in section 11 of the Act as follows:

"**11.(1) "Damages"** is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay the damages to-
(a) the worker; or

(b) if the injury results in the worker's death – a dependant of the deceased worker.

(2) A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under-

(a) another Act; or

(b) a law of another State, the Commonwealth or of another country."

[30] Chapter 2 of the Act deals with employer's obligations. Section 50 of the Act provides:

"**50.(1)** An employer is legally liable for compensation for injury sustained by a worker employed by the employer.

(2) This Act does not impose any legal liability on an employer for damages for injuries sustained by a worker employed by the employer, though chapter 5 regulates access to damages."

Section 50(2) of the Act therefore confirms that the common law liability of an employer for damages for injuries sustained by a worker employed by the employer continues and flags that access to damages is regulated by chapter 5 of the Act.

[31] For the purpose of this appeal, the relevant provisions of section 52 of the Act are:

"**52.(1)** Every employer must, for each worker employed by the employer, insure and remain insured, that is, be covered to the extent of accident insurance, against injury sustained by the worker for-

(a) the employer's legal liability for compensation; and

(b) the employer's legal liability for damages.

(2) The obligation to insure under subsection (1)(b) does not include an obligation to insure for an employer's legal liability for damages for which WorkCover is not authorised to indemnify the employer.

(3) The employer's liability must be provided for-

(a) under a licence as a self-insurer under part 5; or

(b) under a WorkCover policy."

[32] Chapter 5 of the Act is entitled "Access to Damages". It provides one of the significant changes effected by the Act. It confirms the continuance of the common law liability of an employer for damages for injuries sustained by a worker employed by the employer, but seeks to regulate access to damages as a means of maintaining the fund for the scheme in a solvent state.

[33] An early provision in chapter 5 is section 252 which seeks to ensure that the requirements of that chapter are regarded as substantive law and not procedural law. Section 252 provides:

"**252.(1)** If a provision of an Act or a rule of law is inconsistent with this chapter, this chapter prevails.

(2) All the provisions of this chapter are provisions of substantive law.

(3) However, subsection (2) does not affect minor variations in procedure."

[34] The appellant relies on sections 253 and 316 in chapter 5 of the Act to contend that an action for damages for loss of consortium by a spouse of an injured worker has been abolished by the Act. Those provisions are as follows:

> "**253.(1)** The following are the only persons entitled to seek damages for an injury sustained by a worker-
>
> (a) the worker, if the worker has received a notice of assessment from WorkCover stating that-
>
> (i) the worker has sustained a certificate injury; or
>
> (ii) the worker has sustained a non-certificate injury; or
>
> (b) the worker, if the worker's application for compensation was allowed and the injury sustained by the worker has not been assessed for permanent impairment; or
>
> (c) the worker, if the worker has not lodged an application for compensation for the injury; or
>
> (d) a dependant of the deceased worker, if the injury sustained by the worker results in the worker's death.
>
> **(2)** The entitlement of a worker, or a dependant of a deceased worker, to seek damages is subject to the provisions of this chapter.
>
> **(3)** To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker.
>
> ...
>
> **316.** A court can not award damages of any kind under this Act to a person other than the claimant, including damages for loss of consortium as a result of the injury sustained by the worker."

[35] Critical to this appeal is the interpretation of the definition of damages and its application throughout the Act.

[36] The appellant submits that section 11 is a narrow definition which is broadly consistent with authorities in respect of the *Workers' Compensation Act* 1916 which held that an employer was not entitled to be indemnified by the policy of accident insurance held with the Workers' Compensation Board for a loss of consortium claim (*Re Mount Isa Mines Limited* [1994] 2 QdR 62) or, absent the extension of the definition of damages to include dependants, a dependency action (*Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642, 652).

[37] That is also reflected in the Explanatory Notes for the *WorkCover Queensland Bill* 1996 ("Explanatory Notes") which dealt with clause 11 of the Bill as follows:

> "*Clause 11* defines the term 'damages'. A worker may sustain an injury because of an employer's breach of the common law or statutory duty of care owed to the worker. The terms 'worker', 'injury' and 'employer' are defined in chapter 1. In these cases, the injured worker (or dependant of a deceased worker) is then entitled to seek damages from the employer."

[38] The respondent submits that the damages defined in section 11(1) are those payable in the worker's cause of action, being damages the employer must "pay ... to ... the worker; or ... if the injury results in the worker's death – a dependant of the deceased worker".

[39] One matter which arises in the interpretation of the definition of damages is the use of the word "the" before the word "damages" where it occurs for the second time in the definition. The respondent submits that the use of the definite article before the word "damages" where it occurs for the second time designates such damages as one and the same with what is conveyed by the word "damages" where it first occurs in the definition. The appellant submits that the introductory words in the definition of damages describe a larger set of causes of action for damages than those described by reference to a legal liability in the worker's employer to pay the damages to the worker or (if the injury results in the worker's death) a dependant of the deceased worker.

[40] The definition of damages is a basic concept to the operation of the Act, because it is used to define the extent of the indemnity under the accident insurance provided for by the Act, the extent of the employer's obligation to insure, and the subject matter of chapter 5 of the Act which regulates access to damages.

[41] With respect to the definition of accident insurance, the indemnity in respect of the legal liability of an employer for damages for injuries sustained by a worker employed by the employer is in respect of damages as defined in section 11 of the Act. Confining the definition of damages in section 11 to the causes of action specifically identified in section 11(1) is consistent with the statement made in the Explanatory Notes in respect of clause 9 where it is stated in respect of accident insurance:

> "The term is used to refer to workers' compensation coverage for employers to protect against statutory compensation for their workers and damages action taken by their workers at common law."

[42] The employer's obligation to insure which is specified in section 52(1) of the Act extends to "the employer's legal liability for damages". That must be a reference to damages as defined in section 11 of the Act.

[43] The confinement of damages to those payable in the worker's cause of action, being damages the employer must pay to the worker or (if the injury results in the worker's death) a dependant of the deceased worker, is supported by the Explanatory Notes in respect of the equivalent provision in the Bill. I therefore accept the respondent's submission as to the interpretation of the definition of damages.

[44] If it were necessary to resolve the interpretation by reference to the word "the", I consider that the definite article before the word "damages" where it occurs for the second time in section 11(1) restricts the definition of damages to the causes of action identified in section 11(1) of the Act. Because of the work which is done by this definition in defining obligations and restricting rights, it makes sense that the definition precisely identifies the causes of action covered by it.

[45] An action for damages for loss of consortium by the spouse of an injured worker is therefore not within the definition of damages in section 11(1) of the Act.

[46] On the basis of this narrow definition of damages in section 11, the effect of sections 9 and 52 is that an employer's legal liability for damages in respect of the

consortium claim of a spouse of an injured worker is not the subject of indemnity under the accident insurance required under the Act.

[47] That is consistent with the position which prevailed under the insurance schemes provided by the *Workers' Compensation Act* 1916 and the *Workers' Compensation Act* 1990: *Re Mount Isa Mines Limited* [1994] 2 QdR 62.

[48] The access to damages is regulated in chapter 5 of the Act by requirements being imposed on workers (and dependants) which must be fulfilled before any action for damages is commenced. Section 253(1) of the Act sets that out by specifying the persons entitled to seek damages for an injury sustained by a worker. In summary, they are the workers (and dependants) who fulfil the access requirements set out in chapter 5. That was recognised by this Court in *Bonser v Melnacis* [2000] QCA 13, where it was held that the combined effect of the scheme introduced by the Act (with particular reference to sections 253, 262 and 302) effectively abolishes any entitlement on the part of an injured worker to commence proceedings against the employer and that such a right comes into existence only upon compliance with the prescribed steps.

[49] The issue that arises in this appeal is what is meant by "damages for an injury sustained by a worker" when used in section 253 of the Act. It should be noted that the phrase "damages for an injury sustained by a worker" is used in subsections (1) and (3) of section 253 and the word "damages" is used in subsection (2).

[50] The appellant submits that textually and by reason of the scheme of the Act, section 253 cannot be confined in its operation to damages of the kind specified in section 11(1), as otherwise section 253(3) has no work to do and is a nonsense. The appellant relies on the addition of the words "for an injury sustained by a worker" after the word "damages" in subsections (1) and (3) of section 253 and the presence of section 316 in the Act. The appellant therefore submits that "damages" has a broader and more expansive meaning in section 253, than as defined in section 11 of the Act.

[51] The respondent submits that the concept of damages as defined in section 11 of the Act is what is regulated by section 253 of the Act.

[52] It is cumbersome to incorporate the literal definition of damages taken from section 11 of the Act into sections 253(1) and (3) because of the addition of the words "for an injury sustained by a worker" after the word "damages" in those subsections. If the section 11 meaning of damages is so incorporated, it makes the words "for an injury sustained by a worker" superfluous.

[53] On the other hand, there is no doubt that in sections 50(2) and 52(1)(b) the reference to damages is to damages as defined in section 11 of the Act. Incorporation of the defined meaning of damages from section 11(1) of the Act results in the words "for an injury sustained by a worker" being superfluous in section 50(2) and the words "injury sustained by the worker for" being superfluous in section 52(1).

[54] The respondent submits that the construction contended for by the appellant would not only preclude consortium claims, but other non-derivative claims such as by the

spouse or near relative of the injured worker who may suffer psychiatric injury as a consequence of being involved in the aftermath of the worker's tortiously caused injury, or a non-worker who rescues such injured worker, but also causes of action such as those involving the use of a motor vehicle or having an interstate element which section 11(2) of the Act has expressly excluded from the definition of "damages" in section 11(1).

[55] There is no suggestion in the Explanatory Notes that section 253 of the Act was intended to have an operation in respect of actions for damages which was more extensive than the meaning given to damages in section 11. The Explanatory Notes relevantly provide:

> "*Clause 253* retains access to damages for all workers who have sustained a work related injury. It outlines the only persons who have an entitlement to seek damages and that the provisions of this chapter must be complied with."

[56] The scheme of the Act and the fundamental importance of the concept of damages to the operation of the Act support an interpretation of section 253 of the Act which relies on the meaning of damages as defined in section 11 of the Act. That results in the words "for an injury sustained by a worker" being superfluous in subsections (1) and (3) of section 253, but that should not detract from a consistent use of the term "damages" which gains strong support from the overall scheme of the Act.

[57] There is no connection between the subject matter of section 253 of the Act and that of section 316 of the Act. I cannot see how the existence of section 316 supports the interpretation of section 253(3) which is propounded by the appellant.

[58] To the extent that the appellant relies on giving meaning to section 253(3), it should be noted that section 253(3) is simply a provision inserted "to remove doubt". The operative provisions are subsections (1) and, to a lesser extent, subsection (2) of section 253. The drafter uses the device of incorporating a provision "to remove doubt" in order to confirm the interpretation of the operative provision that is intended by the drafter.

[59] In view of section 252 of the Act, it was probably unnecessary for the drafter to spell out that any person who otherwise had an action for damages within the meaning of section 11(1) of the Act who did not fall within section 253(1) of the Act was not entitled to pursue that action for damages. Section 253(3) of the Act leaves no doubt that any worker or dependant who has a cause of action for damages as defined by section 11 of the Act who does not fall within section 253(1) is not entitled to pursue that action for damages. Section 253(3) performs the function which it was intended to do – it removes any doubt about the interpretation of section 253(1).

[60] As damages for loss of consortium by the spouse of an injured worker is not caught within the meaning of damages in section 11(1) of the Act which dictates the meaning of damages in section 253(3) of the Act, I do not consider that section 253(3) has the effect of abolishing the action for loss of consortium by the spouse of an injured worker.

[61] Section 316 of the Act is an anomalous provision. It falls within part 9 of chapter 5 of the Act which is entitled "No Right to Particular Damages".

[62] When the *WorkCover Bill* 1996 was introduced into Parliament, the Explanatory Notes described the objective of the Bill as "to introduce a wide range of reform measures to the Queensland workers' compensation system to address financial, regulatory and operational difficulties identified by the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland (the Kennedy Inquiry)". In fact, during the second reading speech the Minister, the Honourable Mr S Santoro MLA, referred to the Bill's implementing 73 of the 79 recommendations made by the Kennedy Inquiry: *Hansard*, 27 November 1996, p 4456.

[63] None of the recommendations of the Kennedy Inquiry relate to actions for damages for loss of consortium by the spouse of an injured worker. One of the recommendations was that gratuitous care awards be abolished as a head of damage at common law in respect of actions by injured workers against employers. That recommendation was implemented by section 315 of the Act and falls comfortably under the heading of part 9. Although reference was made in the Minister's second reading speech (*Hansard*, 27 November 1996, p 4460) to the abolition of common law damages awards for gratuitous services, no reference was made to any intention to abolish actions for damages for loss of consortium.

[64] The Explanatory Notes in relation to the provision which is now section 316 of the Act state:

> "*Clause 316* prevents a court awarding damages under this Act to a person other than the claimant, including damages for loss of consortium i.e. association between spouses which includes companionship, love, affection, comfort, and sexual relationship."

[65] An action for damages for loss of consortium by a spouse of an injured worker is a separate cause of action and not a head of damage such as damages for gratuitous services which (prior to section 315 of the Act) could have been awarded in an action for damages by the injured worker.

[66] There is also a difficulty with the use of the expression "under this Act" in section 316. Damages for loss of consortium are awarded at common law in the case of a claim by a husband or under section 13 of the *Law Reform Act* 1995 in the case of a claim by a wife. An action for damages for loss of consortium is not brought under the Act.

[67] The appellant therefore submits that the words "under this Act" should be read and construed as meaning "by reason of this Act" on the basis that when chapter 5 has been complied with, common law or statutory rights to sue for loss of consortium by a spouse of an injured worker are restored.

[68] The respondent submits that section 316 of the Act was included to make clear in the new statutory scheme, what had previously been found in respect of the predecessor schemes, that employers were not indemnified against and the statutory fund was unavailable for servicing a spouse's consortium claim for injury to a

worker. The respondent therefore submits that the words "under this Act" ought to be read as if they meant "from the fund maintained under this Act".

[69] Although section 316 of the Act was not foreshadowed by the recommendations of the Kennedy Inquiry, its enactment suggests legislative intention to prevent a court awarding damages for loss of consortium, presumably arising out of an injury to a worker where the common law action for damages by the worker would otherwise be regulated by the Act. The wording of section 316 does not clearly spell out that intention.

[70] There are two approaches to statutory interpretation which have relevance. It was stated in *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 279 that:

> "It is a well recognised rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction."

See also *Pyneboard v Trade Practices Commission* (1982) 152 CLR 328, 341.

[71] The other approach is that no matter how obscure a provision in a legislative instrument might be, it is the duty of the court to give it some meaning: *Scott v Moses* (1957) 75 WN (NSW) 101, 102. The respondent accepts that meaning must be given to section 316 of the Act.

[72] The position of section 316 in chapter 5 dealing with restrictions on damages does not warrant giving section 316 the meaning contended for by the respondent. That operation of section 316 proposed by the respondent is unnecessary, when the operative provisions of the Act relating to the extent of the indemnity under the accident insurance provided for by the Act make it clear that the insurance does not cover actions for damages for loss of consortium.

[73] As meaning must be given to section 316, the only interpretation which is open is that it provides for the abolition of an action for damages for loss of consortium by a spouse of an injured worker whose action for damages is regulated by the Act. It provides for the abolition not expressly, but by preventing a court from awarding damages for loss of consortium. Even though this interpretation abolishes a cause of action, effect must be given to it, when it is the only interpretation which can reasonably be given to section 316.

[74] I therefore agree with the orders proposed by McPherson JA.