

# SUPREME COURT OF QUEENSLAND

CITATION: *Jose Cesar GAMERO v The ANI Corporation Limited* [2000] QSC 028

PARTIES: **JOSE CESAR GAMERO**  
(applicant)  
v  
**THE ANI CORPORATION LIMITED**  
(ACN 000 421 358)  
(respondent)

FILE NO: 667 of 2000 Brisbane Registry

DIVISION: Trial Division

DELIVERED ON: 2 March 2000

DELIVERED AT: Brisbane

HEARING DATE: 11 February 2000

JUDGE: Shepherdson J

ORDER: **Orders by way of relief to be discussed with counsel.**

CATCHWORDS: MASTER AND SERVANT – Construction of Statutes – *WorkCover Queensland Act 1996* – application under s305 for leave to commence proceedings – whether applicant "a person mentioned in" s253(1) of the Act and therefore entitled to seek damages for injury.

*Bonser v Melnaxis & Anor* [2000] QCA 13 – Judgment 8/2/2000 referred to.

COUNSEL: Mr J S Douglas QC with Mr Rangiah for applicant  
Mr Hoare for respondents

SOLICITORS: Murphy Schmidt for applicant  
Bradley & Co for respondent

- [1] **SHEPHERDSON J:** This applicant has sought an order that pursuant to s305(1) of the *WorkCover Queensland Act 1996* (as amended) he be granted leave to bring a proceeding against the respondent despite non-compliance with the requirements of s280 of the Act.
- [2] The applicant has relied on three affidavits of Luke Thomas Murphy a partner in Murphy Schmidt solicitors, who act for the applicant and the respondent has relied on an affidavit of Dell Patricia Stevens.
- [3] The following facts and matters emerged from the material before me:

1. The applicant was born on 13 January 1960.
2. On 11/11/1996 he began employment with the respondent as a foundry assistant and ceased working for the respondent on 3/3/1998.
3. On 13 May 1998 Gamero instructed his solicitor Mr Murphy that on or about 25 February 1998 he had begun experiencing right shoulder pain when manoeuvring manganese bushes at his work.
4. On 3/3/1998 the applicant signed an application for Workers' Compensation. A photocopy of this application is Exhibit LTMO1 to Murphy's affidavit filed 28 January 2000. This application shows (inter alia):
  - (i) that the applicant suffered a right shoulder strain (see answers to Q22 and 23);
  - (ii) that this right shoulder strain happened on the workshop floor at 538 Tarragindi Road, Salisbury on 25/2/1998 (see answers to Q24 and 25)
  - (iii) that the injury happened in the middle of a shift (see answer to Q30)
  - (iv) the applicant answered Q31 "Explain what you were doing at the time and how the injury happened?" by writing "positioning a casting for cutting – strained shoulder".
5. I should add that in para 10 of his affidavit filed 28/1/2000 Murphy described what, on his instructions from the applicant, the applicant was doing on or about 25/2/1998 when he was allegedly injured.
6. Gamero's application for compensation was accepted and benefits paid.
7. On 19 August 1998 WorkCover referred to the Orthopaedic Assessment Tribunal under s437 of *WorkCover Queensland Act 1996* the claim for compensation which Gamero had made. Exhibit LTM02 to Murphy's affidavit filed 28/1/2000 is a copy of the Tribunal's reference and findings. It appears from LTMO2 that the Tribunal heard representations from Ms A Moody on behalf of the claimant, that there was a clinical examination and the Tribunal had available to it medical evidence and other material which is set out in Exhibit LTMO2. Exhibit LTMO2 which is dated 19 August 1998 concludes:
 

"The Tribunal determined that:

  - (1) The worker has sustained a degree of permanent impairment; and
  - (2) (a) The degree of permanent impairment resulting from the injury of 25 February 1998 is three (3) per cent; (1401) and
  - (b) The nature of the impairment is right rotator cuff lesion

There is a complaint of pain and restrictive movement in the right shoulder  
 There is a painful arc of abduction in the right shoulder.  
 There is significant crepitus on circumduction  
 X-Rays of the right shoulder and the cervical spine is (sic) considered to be normal

Ultrasound is recorded as showing buckling of the sub-acromial bursa and some free fluid."

Exhibit LTM03 to Murphy's affidavit filed 28 January 2000 is a photocopy notice of assessment from WorkCover dated 7 September 1998 addressed to the applicant Gamero. It shows the date of injury to have been 25 February 1998 and the injury "strain right shoulder". The notice of assessment said that it had been determined as a result of Gamero's medical assessment by a Medical Assessment Tribunal that he had sustained permanent impairment from his injury, that the degree of permanent injury attributable to the injury was 3 per cent, that the WRI was 2.40 per cent and that the amount of lump sum compensation to which he is entitled is \$2,775. The notice of assessment said "This is a non-certificate injury" and offered payment of lump sum compensation in the amount of \$2,775. The notice of assessment said that Gamero "must make an assessment about the offer of lump sum compensation" and Gamero was asked to indicate his election by ticking one of three boxes in the notice of assessment, signing and returning the notice to WorkCover. No election has yet been made.

8. On 1 November 1999 Murphy Schmidt wrote to WorkCover a letter in which they sought a conditional damages certificate under s182D(4) of the *Workers' Compensation Act* 1990 (as amended). The letter also said:
 

"Our client is presently endeavouring to comply with the pre-court procedures pursuant to the *WorkCover Queensland Act* 1996 relating to those part of his injuries sustained after 1 February 1997. After compliance with these procedures we will if necessary issue a further claim and statement of claim covering this period of our client's employment."
9. That letter which is Exhibit LTM06 to Murphy's affidavit filed 28 January 2000 was accompanied by an application for damages certificate signed by Luke Murphy on behalf of the applicant. A photocopy of that application is part of Exhibit LTM06 and it shows:
  - (i) in answer to Q32 "When did the event occur?" the answer given was "Over time from 11/11/96"; [the date he began work for the respondent]
  - (ii) Q33 "Where did the event happen?" was answered – "Workshop floor 538 Tarragindi Road, Salisbury";
  - (iii) Q34 "Explain what the worker was doing at the time and how the injury happened?" was answered "Welding and gas cutting various types of bushes";
  - (iv) Q35 "Did you stop work because of this injury?" was answered "Yes – Friday 27/2/98";
  - (v) Q37 "What is the nature of the injury?" was not answered" but Q38 "What part of the body was injured?" was answered "right shoulder".
10. It is apparent that the date of injury (25/2/98) stated in the application for compensation signed by the applicant on 3/3/1998 has been altered in the application for the conditional damages certificate and that save for the

application for injury on 25 February 1998 there has not been any application for compensation for injuries sustained from 1/2/1997 to 3/3/1998 when he ceased work for the respondent.

11. Exhibit LTM07 to Murphy's affidavit filed 28/1/2000 is a photocopy of a conditional damages certificate issued by WorkCover to the applicant on 9/11/99. As Exhibit LTM07 says "This conditional damages certificate is issued pursuant 182D of the *Workers' Compensation Act 1990*". The certificate described date of event causing injury as "11/11/96". This latter date must be incorrect – it is the date he began working for the respondent.
12. No conditional damages certificate has been sought under the *WorkCover Queensland Act*.
13. Exhibit LTM08 to the affidavit of Murphy filed 28/1/2000 is a photocopy of a claim filed in the Brisbane Registry of the Supreme Court of Queensland on 10/11/1999 and accompanying statement of claim. The first plaintiff shown there is the present applicant Gamero, the second plaintiff is his wife Aida Luz Gamero and the defendant is the abovenamed respondent the ANI Corporation Limited. Although in para 15 of his affidavit filed 28/1/2000 Murphy swears that this claim and statement of claim were filed to protect the applicant's right to claim common law damages for the period of his employment from the date he commenced his employment to 31 January 1997, I regret to say that examination of the statement of claim shows this statement in para 15 to be incorrect.
14. The action which is S10064/99 discloses in the statement of claim an allegation that on or about 25 February 1998 at the respondent's Salisbury premises the applicant while performing his duties for the respondent suffered an injury to his right rotator cuff. The statement of claim alleges that the applicant's injury was caused by breach of contract and/or negligence of the defendant.
15. The statement of claim then proceeds to plead later (in para 18) that on 9/11/1999 the first plaintiff was issued with a conditional damages certificate "for this injury" pursuant to s182D of the *Workers' Compensation Act 1990* (as amended). The words "for this injury" in para 18 can only refer to the injury allegedly suffered on or about 25 February 1998.

It appears to me that the action S10064/99 purportedly begun in reliance on the certificate under s182D of the *Workers Compensation Act 1990* (as amended) in fact is an action for damages for personal injury where the injury pleaded occurred after 1 February 1997 (the date on which *WorkCover Queensland Act 1996* came into force). The action on its face does not accord with Murphy's claim in para 15 of his above affidavit. As I have already mentioned the s182D certificate specifies the date of the event causing the injury as 11/11/1996. I understand this is the date on which the applicant first commenced work for the respondent. It is apparent on the face of the pleading that action S10064/99 does not rely on an event on 11.11.1996. In my view, although not essential for the disposition of the present application before me, the applicant's solicitors should correct the statement of claim promptly.

16. Murphy's second affidavit which was one of two sworn by him and both filed on 3 February 2000 discloses:

- (a) on 12/11/1998 Murphy Schmidt received a report dated 10 October 1998 from Dr Gervin Samarawickrama the applicant's treating general practitioner. A photocopy of that report is Exhibit LTM01 to Murphy's affidavit filed 3/2/2000. In that report the doctor said that the applicant's history and clinical findings are consistent with rotator cuff tendonitis.
- (b) on 31/1/2000 Murphy received from Dr Samarawickrama a further report dated 31/1/2000 and that report tersely read:  
 "Further to my report dated 10 October 1998 I wish to state his rotator cuff tendonitis has arisen as a result of heavy physical activity during the period of his employment."
- (c) on 29/9/1998 the applicant attended Murphy Schmidt's offices with an interpreter for the purposes of obtaining details to enable the notice of claim for damages to be drafted. Murphy swears that at that time he advised the applicant, through the interpreter, that upon lodging a notice of claim for damages any right the applicant had to accept the offer of lump sum compensation received from WorkCover would be lost forever and he also explained to the applicant that before he, Murphy could provide the applicant with a recommendation on whether to accept the offer of lump sum compensation from WorkCover or pursue a common law claim for damages, investigations would need to be undertaken to establish whether there had been negligence on the part of the respondent and further that at the time of the attendance on 29/9/1998 the applicant was attempting to obtain employment and was also continuing to receive medical treatment for his shoulder pain.
- (d) That over the next 12 months Murphy says (based on hearsay from his articulated clerk Anastasia Moody) that the applicant had obtained employment with seven different companies, all named in the affidavit. The first of these was ANI (presumably the abovenamed respondent) at Runcorn as a welder and grinder. Para 8 of Murphy's affidavit sets out the different capacities in which the applicant had been employed.
- (f) That on 22/10/1999 the applicant attended at Murphy's offices accompanied by an interpreter, that arrangements had been made for the applicant to attend at Murphy's offices as during one of his earlier attendances the applicant had instructed that he had commenced employment with the respondent in November 1996 and accordingly the three year limitation period was approaching and Murphy Schmidt needed the applicant's instructions on whether he wished to institute proceedings for common law damages or not.
- (g) That during the attendance on 22/10/1999:
  - (i) Murphy was instructed that the applicant's injury had remained unchanged over the past 12 months, that the applicant had continued attending his local general medical

practitioner on a regular basis for acupuncture treatment and that he had an appointment to attend an orthopaedic surgeon on 28/10/1999.

- (ii) Murphy informed the applicant that [as set out in para 12 of his affidavit filed on 28/1/2000] Murphy Schmidt had written to the respondent requesting its permission to conduct an inspection of its premises where the applicant had been employed;
  - (iii) the applicant provided up-dated instructions to assist in finalising a notice of claim for damages and that Murphy told him that before he, Murphy could recommend he lodge the notice of claim, he strongly recommended that an inspection take place of his former work place so that he could then make a fully informed decision on whether to pursue a common law claim for damages or accept the offer of lump sum compensation.
17. Murphy swore in his affidavit filed on 3/2/2000 that "No response has yet been received to my requests that the applicant and his representatives be permitted to conduct an inspection of the premises at which he was employed".
18. Exhibit LTM04 to Murphy's affidavit filed 28/1/2000 is a letter dated 19/10/1999 which Murphy Schmidt wrote to the respondents and it relevantly said:

"We have been instructed to act on behalf of Jose Gamero in a claim for damages for injuries sustained during the course of his employment with your corporation at its operations at 538 Tarragindi Road Salisbury our client was employed at Salisbury between 11 November 1996 and 3 March 1998.

It would assist us to properly particularise our client's statement of claim if we were permitted to inspect the premises where our client was working when he sustained his injury.

We understand however that your corporation no longer operates at Salisbury. You might kindly confirm that our understanding is correct.

If our understanding is correct you might kindly provide us with details of who now operates the Salisbury site and whether gas cutting, the work our client was performing at the time he sustained his injuries are still performed at Salisbury.

If you are unable to provide us with the above information you might kindly advise whether gas cutting is performed at another of your corporation's premises. If so it would assist us if we were permitted to inspect those premises. If your

corporation is agreeable to an inspection taking place you might kindly advise us of convenient times and dates."

19. I feel I am bound to say that in the above quoted passage can be found the reasons why the applicant's request to inspect the premises has met with no response. The respondent no longer operates at the Salisbury premises at which the applicant was apparently injured on 25 February 1998.
20. Murphy's third affidavit – also filed on 3 February 2000 – dated 1 February 2000 swears that on 1/2/2000 he caused to be given to WorkCover an application for a conditional damages certificate pursuant to s265(4) of the *WorkCover Queensland Act 1996*. This application (a copy is Exhibit LTM 3.1) was signed by Luke Murphy on behalf of Gamero.
21. In answer to Q32 "When did the event occur?" is written "Over period of time first consultation see Q39". Q39 "When and where did the worker first seek medical treatment in relation to this injury?" was answered "Friday 27/2/98 Dr Heggerty 53 Avison Street, Moorooka". Q37 "What is the nature of the injury?" was answered "rotation cuff tendonitis" and the answer to Q38 shows "right shoulder".
22. The affidavit of Dell Patricia Stevens a Damages Case Manager employed by WorkCover and filed by leave on 11/2/2000 shows:
  - (a) WorkCover's file 970042827 was opened following receipt by WorkCover on 3/3/1998 of Gamero's application for compensation claiming that he had suffered a right shoulder strain on 25/2/1998.
  - (b) Stevens identifies Exhibit LTM01 to Murphy's affidavit filed on 28/1/2000 as being that application.
  - (c) Exhibit DS1 is a true copy of a Conditional Damages Certificate issued on 28/1/2000 "pursuant to section (262, 265, 270) of the *WorkCover Queensland Act 1996* on the basis that there is an urgent need to bring proceedings for damages."
  - (d) Exhibit DS1 shows:
    - (i) date of event causing injury 25/2/98
    - (ii) statutory claim No 970042827
    - (iii) "A Conditional Damages Certificate is issued when WorkCover is not satisfied that:
      - the person was a "worker" when the injury was sustained; or
      - the worker has sustained an "injury" within the terms of the Act; or
      - the worker's degree of permanent impairment has been assessed in the way mentioned for the injury under Chapter 3, Part 9 of the Act.

This certificate allows proceedings to be commenced, however, the proceedings are stayed until the above matters are resolved. When the above matters have been resolved,

WorkCover may issue a Damages Certificate which will allow you to continue proceedings.

Please note that you must comply with Chapter 5 of the Act to continue proceedings."

23. Stevens affidavit and particularly Exhibit DS1 show that the only injury to Gamero which WorkCover appears to have accepted and for which a claim for compensation was made was a right shoulder strain suffered on 25/2/1998.
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- [4] Not only that, but it is clear from the material before me that Gamero has not made any claim or lodged an application for compensation for injuries suffered between 1/2/1997 and 3/3/1998 (save for the injury on 25/2/1998) – I shall call this "injury over a period of time".
  - [5] If I am correct in saying that the evidence shows no such application for compensation lodged by Gamero, Gamero in respect of "injury over a period of time" falls within the class of persons entitled to seek damages for an injury sustained by him as a worker, specified in s253(1)(c) of the *WorkCover Queensland Act 1996*.
  - [6] I shall shortly review relevant parts of that Act and will set out s253 but for the time being I note that the present state of affairs appears to have been brought about by a failure by Gamero to lodge the application for compensation to which I have referred. Murphy Schmidt must have been aware from other cases they handled and which were argued before me on 11 February 2000 that WorkCover had issued notices of assessment for injury suffered "over a period of time".
  - [7] I turn now to the *WorkCover Queensland Act 1996* but before referring to the actual provisions I refer to the decision of the Court of Appeal of the Supreme Court of Queensland in *Bonser v Melnacic & Another* [2000] QCA 13 in which judgment was delivered on 8 February 2000. The court there heard an appeal against a refusal by a District Court judge to issue a third party notice. The appeal raised important issues concerning the effect of certain provisions of the *WorkCover Queensland Act*. In discussing the principal issue the Court there said (in para 3):  
"Until 1 July 1997 [most provisions were in operation from 1 February 1997] by which time the WorkCover Queensland Act 1996) ("the WorkCover Act") was in operation the respective rights inter se of the plaintiff, the employer and the third party were regulated in a tolerably well understood manner under the Law Reform Act 1995 and its predecessor the Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act 1952. The WorkCover Act introduced a new system limiting the rights of plaintiffs to bring claims against employers for common law damages. The Act focuses attention upon liability between plaintiff and employer. No thought seems to have been given to the position between employers and third parties. The present case is one where an injured plaintiff has no present right to bring proceedings for damages against his employer because he fails to satisfy certain requirements specified in the WorkCover Act.



Arguably both the employer and the third party were guilty of negligence causing the plaintiff's injuries. The question is this: in such a case is the third party precluded from obtaining contribution from the employer?"

- [8] A little later the Court of Appeal dealt with the effect of the *WorkCover Act* and said:

"(7) The WorkCover Act made substantial changes to the rights of plaintiffs to bring claims for damages for personal injuries incurred in the course of their employment. It will be necessary to set out a number of the relevant provisions. It will facilitate their reading if an indication is given of the apparent structure of the new systems. A workers entitlement 'to seek' such damages no longer exists unless the worker has received a specified notice of assessment from WorkCover, or in the case of a worker who has not lodged any application for compensation for the injury, a damages certificate. The worker's rights and the necessary procedures that must be followed vary according to whether the worker has sustained a 'certificate injury' or a 'non-certificate injury'. A 'certificate injury' is a serious one resulting in a work related impairment of 20 per cent or more while 'non-certificate' injuries are those resulting in work related impairment of less than 20 per cent. A worker with a non-certificate injury must elect either to accept a lump sum payment offered by WorkCover or to sue the employer for damages (except if under S259(4). By contrast a worker with a certificate injury has the right to accept lump sum compensation payment and also to receive with a claim against the employer for damages."

- [9] The Court of Appeal then set out a number of sections from the *WorkCover Act* but it is unnecessary for me to set them out in the same way. Some of the sections will appear in these reasons and I shall refer to comments by the Court of Appeal on particular sections.

- [10] Section 11 provides:

"(1) '**Damages**' is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the workers' 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

(2) A reference in sub-s(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."

- [11] Section 50 which appears in "**Chapter 2 – EMPLOYER'S OBLIGATIONS** Part 1 – Employers Legal Liability reads:

"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."

[12] This reference to chapter 5 is to "**Chapter 5 – Access to Damages**" which is the most important chapter for present purposes.

[13] Chapter 5 is itself divided into 12 parts and the following parts contain provisions relevant to the present application:

**Part 1 – Interpretation and application** (contained in sections 250 to 252 both inclusive)

**Part 2 – Entitlement conditions** (contained in ss 253 to 274 both inclusive)

**Part 5 – Pre-court procedures** (contained in ss 279 to 291 both inclusive)

**Part 6 – Settlement of claims** (contained in ss 292 to 300 both inclusive)

**Part 7 – Start of court proceedings** (contained in ss 301 to 310 both inclusive)

[14] I shall mention aspects of the above parts:

**PART 1 – INTERPRETATION AND APPLICATION (Sections 250-252 both inclusive)**

[15] Section 250 provides (inter alia) that in Chapter 5 "damages certificate" means a certificate under s 262, 265 or 270 given to a claimant by WorkCover that entitles the claimant to seek damages. Section 250 also defines "claimant" as "means a person entitled to seek damages"; section 253, to which I shall shortly come gives a "general limitation on persons entitled to seek damages".

Section 252 reads:

"**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."

**PART 2-ENTITLEMENT CONDITONS (Sections 253-274 both inclusive)**

[16] This part has a number of divisions and I refer to the following:

**Division 1-Limitations on persons entitled to seek damages**

[17] This division has two sections – ss 253 and 254. In *Bonser* the Court of Appeal described s253 as "the key section" in Part 2 a description with which I respectfully agree.

- [18] Section 253 is headed "**General limitation on persons entitled to seek damages**" and s 253 provides:

"**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.

- [19] In my view, in respect of the applicant's claim to have suffered injury from 1 February 1997 to 3 March 1998 and excepting the injury of 25/2/1998, the present applicant appears to be entitled to seek damages because of compliance with s253(1)(c) provided that WorkCover is satisfied that he has sustained an injury over the period of time

- [20] "Injury" is defined in s34 of the *WorkCover Act* and appears in "PART 4 – BASIC CONCEPTS" . It is important to note that s 253(1) lists four classes of person (with two subdivisions of the persons in s 253(1)(a)) as "the only persons entitled to seek damages". Each of these persons is a "claimant" within s 250. Subsequent divisions of "**Part 2 – Entitlement conditions**" bear on claimants who are persons mentioned in each of the classes of person in s 253(1).

- [21] **Divisions 2 and 3 of Part 2** apply to persons mentioned in sections 253(1)(a)(i) and 253(1)(a)(ii) respectively and I shall later mention these divisions.

**Division 4 of Part 2 - "Claimant whose application for compensation was allowed".**

- [22] This Division contains three sections – 261, 262 and 263. Section 261 provides that Division 4 applies to a claimant who is a person mentioned in s 253(1)(b). The present applicant is not such a person.

- [23] Section 262 provides:

"**262.(1)** The injury sustained by the claimant must be assessed in the way provided for under chapter 3, part 9.

(2) The claimant can not seek damages until WorkCover gives the claimant a notice of assessment and the claimant has complied with the requirements of chapter 3, part 9, division 3.

(3) However, WorkCover may give the claimant a conditional damages certificate if there is an urgent need to bring proceedings for damages and the claimant's permanent impairment has not been assessed or agreed.

(4) If a conditional certificate is given, the claimant may start proceedings for damages for the injury, but the proceedings are stayed until WorkCover makes the certificate unconditional and the claimant complies with parts 5 and 6.

(5) WorkCover must make the certificate unconditional when the claimant has been assessed and has been given a notice of assessment."

- [24] The references in sub-s 262(4) to Parts 5 and 6 are to Part 5 (pre-court procedures) and Part 6 (settlement of claims) of "CHAPTER 5 – ACCESS TO DAMAGES" and the reference in s 262(1) to Chapter 3 Part 9 is a reference to "Entitlement to Compensation for Permanent Impairment."

**Division 5 of Part 2 - "Claimant who has not lodged application for compensation".**

- [25] Section 264 which appears in division 5 reads:

"This division applies to a person mentioned in s 253(1)(c)."

- [26] In my view division 5 does apply to the present applicant. I mention particularly s 265 in Division 5 because it contains provisions similar to s 262(3) and (4) as to the issue of conditional damages certificates. I mention s 265 also because it and s 262 and s 270 disclose the legislature's intention to empower WorkCover in the circumstances to which those sections apply to give a conditional damages certificate whether or not a proposed claimant has applied for compensation and in order that a damages suit of a claimant to whom those sections apply not be prejudiced by expiry of a time limitations statute.

- [27] Section 265 which is headed "**Access to damages if no previous application for compensation**", reads:

"**265.(1)** The person may seek damages for the injury only if WorkCover gives the person a damages certificate under this section.

(2) The person must apply in the approved form to WorkCover for the certificate but only for the purpose of seeking damages.

(3) WorkCover may only, and must, give the certificate if-

- (a) WorkCover decides that the person was a worker when the injury was sustained; and
- (b) WorkCover decides that the worker has sustained an injury; and
- (c) the worker's degree of permanent impairment has been assessed in the way mentioned for the injury under chapter 3, part 9, division 2.

(4) However, WorkCover may give the person a conditional damages certificate if there is an urgent need to bring a proceeding for damages and WorkCover is not satisfied about the matters in subsection (3).

(5) If a conditional certificate is given, the person may start a proceeding for damages for the injury, but the proceeding is stayed until WorkCover makes the certificate unconditional and the person complies with parts 5 and 6. [again a reference to pre court procedures and settlement of claims in parts 5 and 6 of Chapter 5]

(6) WorkCover must make the certificate unconditional when it is satisfied about the matters mentioned in subsection (3).

(7) If WorkCover makes a decision under subsection (3)(a), a person aggrieved by the decision may have the decision reviewed under chapter 9. [Chapter 9 (Reviews and appeals)]

(8) If WorkCover makes a decision about a matter mentioned in subsection (3)(b) and a person does not agree with the decision, WorkCover must refer the matter to a medical assessment tribunal for decision.

(9) If WorkCover makes a decision about a matter mentioned in subsection (3)(c) and a person does not agree with the decision, WorkCover must-

- (a) refer the matter to a medical assessment tribunal for decision; and
- (b) ask the tribunal to decide if the claimant has sustained a degree of permanent impairment resulting from the injury."

(The comments in square brackets are mine)

## Division 6 - Dependants

- [28] This division which contains sections 268 to 272 (both inclusive) applies to a claimant who is a person mentioned in s 253(1)(d) (see s 268).

### **"Claimant may seek damages only in particular cases**

**269.** The claimant may seek damages only if WorkCover-

- (a) has paid compensation to the dependants of a worker under chapter 3, part 10 (Chapter 3 (Compensation), part 10 (Compensation on worker's death) for the worker's death; or
- (b) if an application for compensation has not been made-gives the claimant a damages certificate under this division."

- [29] Section 270 which is headed "Application for damages certificate" contains provisions which are similar to certain provisions in sections 262 and 265. Section 270 reads:

### **"Application for damages certificate**

**270(1)** For section 269(b), the person must apply in the approved form to WorkCover for a damages certificate.

(2) WorkCover may only, and must, give the certificate if WorkCover decides that-

- (a) the deceased was a worker when the relevant event happened; and
- (b) the worker sustained an injury in the event; and
- (c) the injury caused the worker's death

(3) However, WorkCover may give the person a conditional damages certificate if there is an urgent need to bring a proceeding for damages and WorkCover is not satisfied about the matters in subsection (2).

(4) If a conditional certificate is given, the person may start a proceeding for damages for the injury, but the proceeding is stayed until WorkCover makes the certificate unconditional and the person complies with Parts 5 and 6.

(5) WorkCover must make the certificate unconditional when it is satisfied about the matters mentioned in sub-section (2).

(6) If WorkCover makes a decision under subsection (2)(a), a person aggrieved by the decision may apply to have the decision reviewed under chapter 9 (Chapter 9 (Reviews and appeals)).

(7) If WorkCover makes a decision about a matter mentioned in subsection (2)(b) or (c) and a person does not agree with the decision, WorkCover must refer the matter to a medical assessment tribunal for decision."

[30] In summary then, in respect of each class of person described in s 253(1)(b),(c) and (d) the statute has in **Part 2 – Entitlement Conditions** provided for the issue of conditional damages certificates to enable claimants to bring proceedings for damages for the injury but decreed a stay of the proceedings until WorkCover grants an unconditional certificate and a claimant complies with Part 5 (pre-court procedures) and Part 6 (Settlement of Claims).

[31] If a conditional certificate is given under ss 262, 265 or 270 the person in whose favour it is given may start a proceeding or proceedings for damages for the injury and once started the proceeding is stayed on terms set out in each of these sections.

[32] I said earlier that I would mention persons described in subsection 253(1)(a)(i) and (ii) and I now do so. These two subsections refer to workers who have 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

"Certificate Injury" and "non-certificate injury" are defined in ss 42 and 43 of the *WorkCover Queensland Act 1996*.

[33] There is no provision in that Act empowering WorkCover to issue to a claimant under s 253(1)(a)(i) or (ii) a conditional damages certificate enabling the claimant to start proceedings for damages for the injury (see DIVISIONS 2 and 3 of PART 2 – ENTITLEMENT CONDITIONS). Claimants described in DIVISIONS 2 and 3 who cannot apply for conditional damages certificates must, as it seems to me, comply with the requirements of Parts 5 and 6 of "CHAPTER 5 – ACCESS TO DAMAGES" before they can start proceedings for damages under Part 7 – START OF COURT PROCEEDINGS: Division 1 of Part 7 contains s305 under which the present application is made and if leave is given under s305, a claimant who has not complied with the requirements of s280 of the Act may start the proceedings in Court but conditions may be imposed. I point out that in terms of s 308 (which appears in DIVISION 2 of PART 7) a claimant may, in the circumstances described in s 308, bring a proceeding for damages for personal injuries after the end of the period of limitation allowed for bringing a proceeding for damages for personal

injury under the *Limitation of Actions Act 1974*. Section 308 does not presently bear on the present application.

[34] I move now to "**PART 5 - PRE-COURT PROCEDURES**"

This part consists of sections 279 to 291 (both inclusive).

I note s 279 which reads:

**"Object of Pt 5**

**s 279.** The object of this part is to enable WorkCover to enter into early negotiations with claimants to achieve early resolution of claims for damages before the start of court proceedings."

In my view s 279 is important in construing Part 5 and its place in CHAPTER 5 – ACCESS TO DAMAGES.

Section 280 mentioned in the present application is in Part 5 and relevantly reads:

**"280(1).** Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation for bringing a proceeding for the damages under the *Limitation of Actions Act 1974*."

It is unnecessary to quote the whole of s 280 but I mention that the notice under s 280 "must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement cannot yet be made." Regulation 74 of *WorkCover Queensland Regulation 1997* is headed "Notice of Claim for Damages – Act, s280" and specifies what particulars must be included in a notice of claim under s280.

[35] Section 282 obliges WorkCover to respond to the notice in accordance with the section. In the present case it is not in issue that the present applicant has not given any notice under s 280 and noncompliance with s 280 combined with the provisions of s 305 to which I shall shortly refer has apparently resulted in the present application.

[36] I mention in passing **PART 6 - SETTLEMENT OF CLAIMS** and move on to **PART 7 – START OF COURT PROCEEDINGS**. Division 1 of this part is headed "**When claimant can start court proceedings**" and contains sections 301 to 305 (both inclusive).

[37] Relevant to the present matter I note the following provisions of Division 1:

**"Application of div 1**

**301.** This division states the conditions that must be satisfied before a claimant can start a court proceeding.

**Compliance necessary before starting proceeding**

**302.** The claimant may start a proceeding in a court for damages only if the claimant has complied with-

- (a) the relevant division under part 2
- (b) part 5, other than as provided by section 304 and 305; and
- (c) part 6; and

(d) section 303."  
(the emphases above are mine.)

Section 303 reads:

**"Claimant to have given complying notice of claim or WorkCover to have waived compliance**

**303.** The claimant may start the proceeding if any of the following have happened-

- (a) at least six months or, for a terminal condition, three months have elapsed after-
  - (i) the claimant has given a complying notice of claim; or
  - (ii) WorkCover has waived the claimant's noncompliance with the requirements of section 280; or
  - (iii) the court has made an order under section 304 or 305;
- (b) WorkCover has denied liability on the part of the employer in connection with the injury;
- (c) WorkCover has admitted liability, but is claiming contributory liability from the claimant or another party, and the claimant has given WorkCover written notice that the extent of the admission is disputed;
- (d) WorkCover has admitted liability but damages can not be agreed.

Sections 304 and 305 read:

**"Court to have made declaration about noncompliance**

**304.(1)** Subject to section 303, the claimant may start the proceeding if the court, on application by the claimant dissatisfied with WorkCover's response under section 282 to a notice of claim, declares that-

- (a) notice of claim has been given under section 280, or
- (b) the claimant is taken to have remedied noncompliance with the requirements of section 280.

**(2)** A declaration that a claimant is taken to have remedied noncompliance with section 280 may be made on conditions the court considers necessary or appropriate to minimise prejudice to WorkCover from the claimant's failure to comply with the requirements of section 280.

**Court to have given leave despite noncompliance**

**305.(1)** Subject to section 303, the claimant may start the proceedings if the court, on application by the claimant, gives leave to bring the proceeding despite noncompliance with the requirements of section 280.



- (2) The order giving leave to bring the proceeding may be made on conditions the court considers necessary or appropriate to minimise prejudice to WorkCover from the claimant's failure to comply with the requirements of section 280."
- [38] Gamero claims to have suffered two injuries to which the *WorkCover Act* applies. The first was on 25 February 1998 and he has a conditional damages certificate (Exhibit DS1) issued on 28 January 2000 on the basis of "urgent need to bring proceedings for damages". What is urgent escapes me but he holds the certificate and in my view once he received that certificate, he became entitled to begin proceedings for damages for that injury. (see also my reasons for judgment in *Green v Suncorp Metway Ors* File 673 of 2000 – delivered 8/2/2000)
- [39] The second injury which I have called "injury over a period of time" is said to have occurred over a period of time – (1 February 1997 to 3 March 1998 excluding the injury on 25 February 1998).
- [40] Section 265 set out above recognises the importance of a damages certificate under s265 given by WorkCover to the person seeking damages. These certificates are of two types – conditional and unconditional. A pre-requisite for giving either type of certificate is an application to WorkCover in the approved form "but only for the purpose of seeking damages" (s265(2)). Section 265(3) is very important in the operation of s265. All of the three requirements specified in s265(3)(a)(b) and (c) must be met before WorkCover gives an unconditional damages certificate under s265. It is apparent that Gamero has not lodged an application for compensation for injury over a period of time, and so the time has not arrived where WorkCover has been called on to decide whether or not Gamero sustained an injury over a period of time. (s265(3)(b))
- [41] Once WorkCover makes such a decision then if Gamero does not agree with it WorkCover must refer the matter to a Medical Assessment Tribunal for decision (s265(8)).
- [42] Obviously it will take some time before all the requirements of s265(3) are met so that Gamero can hope to obtain an unconditional damages certificate. To meet problems which can flow from delay, the legislature has, sensibly, provided in s265(4) for WorkCover to give "a conditional damages certificate if there is an urgent need to bring a proceeding for damages and WorkCover is not satisfied about the matters in sub-section (3)".
- [43] If a conditional certificate is given the provisions of s265(5) take effect and include staying the started proceedings until WorkCover makes the certificate unconditional and the person – in this case Gamero – complies with parts 5 and 6 [of CHAPTER 5 – being "pre-court procedures" and "settlement of claims"].
- [44] In Gamero's case there is on the evidence before me an urgent need to bring his proceedings for damages for the injury over a period of time. If he is correct and it is decided by WorkCover or a Medical Assessment Tribunal that he did sustain that injury and if the other requirements of s265(3) are met, then any delay now will cause him to run the risk that the Statute of Limitations will be pleaded against him for that part of his claim from 1/2/1997 to the date when the proceeding is actually started.

- [45] In my view, WorkCover should issue immediately a conditional damages certificate under s265 in respect of the claimed injury over a period of time – the certificate will except the injury of 25 February 1998 in respect of which a conditional certificate has already been given. As I have already mentioned the applicant holds a report from Dr Samarawichrama stating Gamero's rotator cuff tendonitis has arisen as a result of heavy physical activity during the period of his employment.
- [46] I note in passing s267(1) which applies if WorkCover decides not to make a damages certificate conditional – a person who has started a proceeding on the basis of a conditional certificate must discontinue the proceeding (s267(2)).
- [47] If WorkCover does not issue the conditional damages mentioned above, then I would order that pursuant to s305, Gamero do have leave to bring the proceeding against the respondent in respect of damages for injury over a period of time as I have defined it above but that such leave will be on the following conditions:
- (a) the proceeding is stayed until WorkCover gives Gamero an unconditional damages certificate under s265;
  - (b) that within a period of time which I shall fix after hearing counsel, Gamero is to give to WorkCover a notice of claim for damages and otherwise comply with requirements of s280 of the *WorkCover Act* and the above Regulation 74 in respect of the injury suffered over a period of time;
  - (c) such other conditions (if any) as I shall fix after hearing from counsel.

I shall also hear from counsel on the matter of costs.