

**COURT:** SUPREME COURT OF TASMANIA

**CITATION:** *Barrett v State of Tasmania* [2013] TASSC 69

**PARTIES:** BARRETT, Kylie Marie  
v  
STATE OF TASMANIA

**FILE NO:** 662/ 2013

**DELIVERED ON:** 18 November 2013

**DELIVERED AT:** Burnie

**HEARING DATE:** 18 September 2013

**JUDGMENT OF:** Blow CJ

**CATCHWORDS:**

Workers Compensation – Assessment and amount of compensation – Amount of compensation during incapacity – Lump sum payments – Effect of legislative changes – Guidelines issued by WorkCover Tasmania Board – New version of guidelines for assessment of percentage impairment issued after injury.

*Workers Rehabilitation and Compensation Act 1988* (Tas), ss72(1), 164C.

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, followed.

*Clement v D Davis & Sons Ltd* [1927] AC 126; *Kraljevich v Lake View and Star Ltd* (1945) 70 CLR 647; *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 32 at 42; *Fenton v J C Hutton Pty Ltd* [1972] Tas SR (NC 11), distinguished.

Aust Dig Workers Compensation [358]

**REPRESENTATION:**

***Counsel:***

**Worker:** R J Phillips

**Employer:** A R McKee

***Solicitors:***

**Worker:** Phillips Taglieri

**Employer:** Director of Public Prosecutions

**Judgment Number:** [2013] TASSC 69

**Number of paragraphs:** 30

**KYLIE MARIE BARRETT v STATE OF TASMANIA**

**REASONS FOR JUDGMENT**

**BLOW CJ  
18 November 2013**

1 This case concerns a worker named Kylie Barrett. She suffered a back injury in the course of her employment in February 2004. She was employed by the government of the State of Tasmania. Her injury resulted in a permanent physical impairment. Some years after the date of the injury, she made a claim for a lump sum payment of workers compensation in respect of her permanent impairment, pursuant to s71 of the *Workers Rehabilitation and Compensation Act 1988* ("the Act"). To quantify the amount payable to her, it was necessary for her permanent impairment to be "assessed at a percentage of the whole person" pursuant to s71(1)(b). By virtue of s72(1)(a), that assessment had to be made in accordance with guidelines issued by the WorkCover Tasmania Board. The necessary assessment was undertaken in February 2013 by a medical assessor accredited by that Board, Professor Teddy. He determined that the worker's level of whole person impairment was 5% if assessed using the guidelines that were in force when she was injured, but 20% if she were assessed using the most recent guidelines issued by the Board.

2 The worker contends that her level of impairment should be assessed using the most recent guidelines. The employer, ie the State, contends that her level of impairment should be assessed using the guidelines that were in force on the day of her injury. The worker has referred her claim for lump sum compensation to the Workers Rehabilitation and Compensation Tribunal. Pursuant to s58 of the Act, the Tribunal has stated a case for the opinion of this Court in relation to the issue as to which guidelines are applicable to the worker's claim.

3 The issue for determination is set out in par8 of the stated case in the following terms:

- "8 The issue to be determined by the Court is whether the assessment of a whole person impairment determined pursuant to s72 of the Act is to be determined by reference to:
- (a) The date of the suffering of the compensable injury;
  - (b) The date of the assessment of the whole person impairment (in this case the assessment conducted by Professor Teddy); or
  - (c) At some other and, if so, what date."

**The legislation**

4 The concept of a "percentage of whole person" impairment was introduced into the Act with effect from 1 July 2001 by the *Workers Rehabilitation and Compensation Amendment Act 2000*. In respect of injuries on or after that date, the lump sum compensation payable under s71 to a worker with a permanent impairment has depended upon the extent of that impairment "assessed as a percentage of the whole person". And in respect of injuries since then, the availability of common law damages has depended upon the extent of a worker's permanent impairment being at least a certain "percentage of the whole person". From 1 July 2001 until 30 June 2010, s138AB(8) fixed a minimum of 30%. Common law damages were not available to workers without that degree of permanent impairment. As from 1 July 2010, s138AB(3) has fixed a minimum of 20%.

5 The worker's entitlement to a lump sum by way of compensation for her permanent impairment is conferred by s71(1)(b), which reads as follows:

**"71 Compensation for permanent impairment**

(1) In addition to any other compensation payable under this Act, the amount of compensation payable under this section to a worker who suffers permanent impairment resulting from an injury which entitles the worker to compensation under this Act is to be calculated as at the date of the injury as follows:

(a) ...

(b) a worker who suffers permanent impairment assessed at a percentage of the whole person of between 5% and 70%, inclusive, is entitled to compensation calculated in accordance with the following formula:

$$\{18 + [6.1 \times (WPI - 5)]\} \times BS$$

where —

*WPI* is the percentage of whole person impairment;

*BS* is the basic salary;

..."

6 The basic salary for each calendar year is fixed by the relevant Minister, and notified in the Gazette: s66. When s71(1) requires compensation for a permanent impairment "to be calculated as at the date of the injury", that means that the base salary for the year during which the injury occurred is to be used in the calculation.

7 The method of assessing permanent impairment as a percentage is governed by s72(1), which reads as follows:

**"72 Assessment of degree of impairment**

(1) An assessment of a degree of impairment is to be undertaken by a medical assessor in accordance with —

(a) any relevant guidelines issued by the Board; or

(b) if there are no such guidelines, the AMA Guides; or

(c) if there are no such guidelines and the AMA Guides are not applicable or are unsuitable, any method as may be prescribed.

(2) In assessing a degree of impairment of an injury —

(a) regard is not to be had to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, the physical injury; and

(b) the degree may comprise a combination of impairments arising out of the same incident or occurring on the same date assessed together using the combination tables in the AMA Guides; and

(c) if a worker presents for assessment in relation to injuries which occurred on different dates, the impairments are to be assessed separately; and

(d) an impairment arising otherwise than from the injury is not to be taken into account in assessing the degree of the impairment resulting from the injury."

8 The term "AMA Guides" is defined in s3. It refers to a publication by the American Medical Association. No method has ever been prescribed pursuant to s72(1)(c).

9 Section 72(1) has been in its present form since 1 July 2001. Since then, the Board has issued three sets of guidelines for the purposes of s72(1)(a). Counsel referred to them as Versions 1, 2 and 3. Version 1 was issued in November 2001. Version 2 was in use from about April 2011, and was

obviously intended to replace Version 1. Version 3 took effect on 1 October 2011, and was obviously intended to replace Version 2.

10 Apparently the introduction of Version 2 was so sloppy that there was controversy as to whether that set of guidelines had been "issued" within the meaning of s72(1)(a) at all, and, if so, as to when the issuing occurred. Because of that controversy, validating legislation was enacted.

11 As a result, the Act now contains s164C. That section contains the following relevant subsections:

"(2) Any guidelines for the assessment of permanent impairment under this Act in force before 1 April 2011 are to be taken to have been revoked immediately before that day.

(3) The April 2011 guidelines are to be taken —

(a) to have been validly issued by the Board on 1 April 2011 and to have been in effect as guidelines for the assessment of permanent impairment under this Act on and from that date until immediately before 1 October 2011; and

(b) to have been revoked immediately before 1 October 2011.

(4) The October 2011 guidelines are to be taken to have been validly issued by the Board on 20 September 2011 and to have taken effect as guidelines for the assessment of permanent impairment under this Act on and from 1 October 2011.

(5) Nothing in this section is to be taken to prevent the Board revoking the October 2011 guidelines.

(6) An assessment of permanent impairment is not made, or to be taken to have been made, under this Act or the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011* unless —

(a) if the assessment was undertaken on or after 1 April 2011 and before 1 October 2011, it was made in accordance with the April 2011 guidelines; or

(b) if the assessment was undertaken on or after 1 October 2011 and before the date on which this section commences, it was made in accordance with the October 2011 guidelines."

12 That section commenced on 30 August 2012. It follows that subs(6) thereof applies only to assessments undertaken between 1 April 2011 and 30 August 2012. It does not apply to the assessment in this case, which was undertaken in February 2013.

### Interpretation of the legislation

13 The only issue in this case is whether the worker had to be assessed using the original guidelines (Version 1) or the October 2011 guidelines (Version 3). The answer to that question depends on the interpretation of ss71(1)(b), 72(1)(a) and 164C.

14 One must begin by considering the wording of those provisions. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at par[47], Hayne, Heydon, Crennan and Kiefel JJ said (omitting footnotes):

"This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

15 Section 164C(2) clearly requires that any guidelines in force before 1 April 2011 – and that must include Version 1 – "are to be taken to have been revoked immediately before that day". One must therefore take Version 1 to have been revoked. Counsel for the employer argued to the effect that this subsection means only that such earlier guidelines must be taken to have been revoked in respect of injuries occurring on or after 1 April 2011, but that is not what the subsection says. The ordinary literal meaning of the subsection is that Version 1 ceased to apply to any injury or assessment as from that date.

16 Section 164C(4) requires that the October 2011 guidelines, ie Version 3, "are to be taken to have been validly issued ... and to have taken effect as guidelines for the assessment of permanent impairment under this Act on and from 1 October 2011". One must therefore take them to have been validly issued, and to have been in force at the time of Professor Teddy's assessment in February 2013. Counsel for the employer argued to the effect that this subsection meant only that the October 2011 guidelines (Version 3) must be taken to have taken effect in respect of injuries occurring on or after 1 October 2011, but that is not what the subsection says. The ordinary literal meaning of this subsection is that Version 3 became applicable to all assessments undertaken as from that date, and not just to some of them.

17 The general purpose and policy underlying the Board's function of issuing guidelines for the assessment of permanent impairment can be deduced from the provisions of the Act. There is no provision that spells out the underlying purpose and policy. Section 10(1) states that one of the Board's functions is "to issue guidelines for the assessment of permanent impairment under this Act", but is silent as to the purpose of the Board having that function. However, it is clear that Parliament decided in 2000 to institute a new system for the assessment of compensation in respect of permanent impairment that applied to both physical injuries and injuries to mental health. Workers were to be compensated according to the extent of their impairments, and that was to be achieved by assessing the extent of a worker's impairment as a percentage of total impairment of the whole person. There needed to be guidelines that applied to all parts of the body, all sorts of injuries, all levels of severity, and combinations of different medical conditions. The function of the guidelines is to facilitate an assessment that is just and equitable, having regard to particular injuries and their consequences.

18 The Act expressly empowers the Board only to "issue" guidelines. It does not say whether the Board has the power to revoke, amend, or replace issued guidelines. However the *Acts Interpretation Act 1931* provides as follows in s22:

**"22 Power to make regulations, &c, includes power to rescind, &c**

Where an Act confers a power to make any proclamations, rules, orders, regulations, or other instruments of a like nature, the power shall be construed as including a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary any such instrument."

19 Guidelines issued by the Board under s10(1) are a species of delegated legislation. They are instruments to which s22 applies. The Board therefore has the power to rescind, revoke, amend or vary its issued guidelines.

20 It is appropriate for the Board to revise its guidelines from time to time in order to remove anomalies, to improve upon provisions that result in workers receiving compensation that appears excessive or inadequate, to take account of changing medical practices, or to take account of new medical knowledge. (I do not intend this to be an exhaustive list.) When guidelines are revoked and replaced for such purposes, the objective is to make them more just and more equitable, rather than to increase or decrease the benefits to workers. When the guidelines are changed, by means of revocation and replacement, for such purposes, the objective is to refine the system of assessing percentage impairments so as to make the assessments fairer. It follows that changes to the guidelines

might sometimes result in compensation for some medical conditions becoming less generous. Counsel for the worker told me that that had occurred in relation to one medical condition.

21 It was not suggested by counsel for the employer that the changes made to the guidelines, when Versions 2 and 3 were issued, were made for any purpose other than making them fairer. I do not see it as the role of the Board to make the compensation available under the Act more generous generally or less generous generally by means of changes to the system of assessing percentage impairments. Those sorts of changes are matters for Parliament. It can therefore be inferred that the primary purpose, if not the sole purpose, of changes to the guidelines is to make them fairer, particularly with regard to changing medical practices and medical knowledge. That is a factor that weighs in favour of the legislation being interpreted in the manner contended for by counsel for the worker.

22 The October 2011 guidelines (Version 3) contain the following statement in their foreword:

"On (insert date) [sic] the WorkCover Tasmania Board approved the third edition of the Guidelines and agreed that this version will apply to all assessments undertaken on or after 1 October 2011 and to all asbestos related diseases that fall under the jurisdiction of the *Asbestos Related Diseases (Occupational Exposure) Compensation Act*."

23 In my view s10(1), which gives the Board the function of issuing such guidelines, empowers the Board to specify what assessments a particular set of guidelines will apply to, without any implied restriction concerning the dates of workers' injuries. There is no reason to regard s10(1) as being subject to any such restriction. The underlying purpose or object of s10(1) is to empower the Board to regulate the assessment of compensation for permanently impaired workers. If the Board did not have the power to revise and update its guidelines in respect of all permanently impaired workers, that would be inconsistent with the purpose or object of s10(1). A purposive interpretation of that provision is required: *Acts Interpretation Act*, s8A(1).

24 If the submissions of counsel for the employer are correct, the doctors who undertake assessments of permanent impairment would now have to apply three different sets of guidelines to three different categories of injured workers, according to which of the three versions of the guidelines was in force at the time of each worker's original injury. In my view that would be absurd.

25 It is clear from a long line of authority that, subject to any provision or indication to the contrary in the legislation, a worker's entitlements to compensation are governed by the legislation in force at the time of his or her injury: *Clement v D Davis & Sons Ltd* [1927] AC 126; *Moakes v Blackwell Colliery Co* [1925] 2 KB 64; *Kraljevic v Lake View and Star Ltd* (1945) 70 CLR 647; *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 32 at 42; *Fenton v J C Hutton Pty Ltd* [1972] Tas SR (NC 11) (34/1972, Neasey J). That principle certainly applies to the calculation of the amount of compensation payable under s71 to a worker with a permanent impairment that has been assessed at a particular percentage of the whole person. However it would be inappropriate to follow that line of cases when determining which version of the guidelines applies to a particular assessment because of the express provisions of s164C. I need not consider what the situation would have been if s164C had not been enacted and Version 3 had been silent as to its applicability.

26 Counsel for the employer relied on the *Acts Interpretation Act*, s16(1), which provides as follows:

"(1) Where an Act repeals any other enactment then, unless the contrary is expressly provided, such repeal shall not —

...

- (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed;

...

- (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid —

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed as if the repealing Act had not been passed."

27 That provision applies to subordinate legislation by virtue of s5 of that Act. However it does not apply if it is "inconsistent or repugnant to the true intent and object of the particular Act or regulation to be interpreted" because of s4(1)(a) of that Act. I very much doubt that a provision relating to the assessment of a percentage of permanent impairment in a set of guidelines published by the Board confers or imposes any "right, privilege, obligation, or liability" to which s16(1) applies. See *Huddleston v Commissioner for Railways* (1951) 51 SR(NSW) 226; *Queensland Trustees Ltd v Brisbane City Council* [1958] Qd R 518; *Noonan v Brisbane City Council* [1958] Qd R 593; *Doro v Victorian Railways Commissioners* [1960] VR 84. However there can be no scope for the operation of s16(1) in face of the express provisions of s164C and the passage that I have quoted from the foreword to Version 3 of the guidelines.

28 The question that I have to decide was considered by the Workers Compensation and Rehabilitation Tribunal in *V v MMG Australia Ltd* [2013] TASWRCT 7. Chief Commissioner Carey decided the point in favour of the employer in that case, basing his decision on *Clement v D Davis & Sons Ltd* (above) and s16 of the *Acts Interpretation Act*. I have reached the opposite conclusion.

29 There is no reason not to give the words of s164C their ordinary literal meaning. Consideration of the nature and purpose of the relevant guidelines, the absurd consequences of a contrary interpretation, and the provision in the foreword to Version 3 of the guidelines as to their applicability, confirms that the ordinary literal interpretation of s164C is appropriate.

## Conclusion

30 For the reasons stated, I determine, as the opinion of the Court, that the assessment of a whole person impairment pursuant to s72 of the *Workers Rehabilitation and Compensation Act* 1988 is to be undertaken by reference to the date of the assessment of the whole person impairment. I order that the stated case be remitted to the Tribunal with this opinion of the Court on the question submitted in that case.