SHAW as Executrix of the Estate of the late EDWARD COLCLOUGH v ROTHMANS OF PALL MALL AUSTRALIA LTD

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

PRIESTLEY, MEAGHER and SHELLER JJA

10 February 1997, 14 March 1997

[1997] NSWCA 281

WORKERS COMPENSATION — liability causation — total incapacity — whether causal connection between injury received during period when required by employer to smoke and later incapacity — Workers Compensation Act 1926 PRACTICE — applications — evidence — whether fresh evidence admissible — Supreme Court Act 1970 s75A (7)-(9) — principles to be applied

An application for weekly compensation was brought by the executrix of a deceased worker's estate, alleging total incapacity from the date of ceasing work to the date of death. The worker, who was employed by the respondent from September 1959 to September 1972, died in 1982 from emphysema. The trial Judge considered whether the emphysema was employment related, and if so, whether it produced incapacity for work, and made an award in favour of the respondent employer.

The point of the appeal was whether there was evidence sufficient to require a finding of a causal connection between the injury, received while the deceased worker was a sales representative for the respondent employer from 1959 to 1961 when he was required to smoke, and his incapacity in 1977. He was a moderate to heavy smoker throughout his life, having begun the habit in the 1940s, and he probably suffered some degree of emphysema before 1958. He was also a moderately heavy drinker before his time of employment with the respondent, and his drinking increased during this time. The appellant claimed the trial Judge erred in holding that the evidence did not enable him to determine that any incapacity was due to the deterioration of the deceased's emphysema, or that there was no evidence which could lead him to a view on the question of such incapacity as may have been caused by the deterioration of his emphysema.

The appellant applied to adduce further evidence to mend a gap in the evidence which was decisive below, and meant that the medical practitioners, who treated the deceased worker before his death and supplied reports, expressed no opinion as to his incapacity or the cause of it. The evidence could have been obtained with reasonable diligence for use at the trial. This application failed.

Held:

The mere proof that injury occurred which predisposed a worker to subsequent incapacity or death will not, of itself, be sufficient to establish that such incapacity or death "results from" a work injury. A commonsense evaluation of the causal chain is required. The trial Judge did not err in finding causation not proved, but even if he did, the error was not one of law.

Workers Compensation Act 1926 s6(1), s7(l)(a), s6(4), s6(4A), s9(1), Court Act 1984 s32(1)

Compensation Court (Amendment) Act 1989 Sch 4 s5(1), (2)

Supreme Court Act 1970 s75A (7)-(9)

The Council of the City of Greater Wollongong v Cowan (1955) 93 CLR 435 at 444 per Dixon CJ, and Kooragang Cement Pty Ltd v Bates (1994) 35 NSWLR 452 at 463-4 per Kirby P applied; Fisher v Hebburn Ltd (1960) 105 CLR 188 at 199 per Kitto and Menzies JJ referred to.

Priestley JA I agree with Sheller JA.

Meagher JA In this matter I have had the advantage of reading the judgment of Sheller JA. I agree that the appeal should be dismissed for the reasons set out in that judgment.

There is, however, one additional matter which I think deserves mention. In reply, learned counsel for the appellant saw fit to say this:

"As far as I know from 1964 when the United States Surgeon General published a report about linking smoking and cancer and emphysema and the like, this respondent has denied and disputed that smoking has any effect on emphysema at all.... Nevertheless, the respondent proclaims that they apply large amounts of money into research into the matter "

Before making this utterance he looked behind him to reassure himself that members of the Press were in Court.

There was no evidence before the Court proving any of the assertions contained in this passage of Counsel's submissions which I have quoted. That can perhaps be explained by the circumstance that they were irrelevant to the issues raised by the appeal.

In my view this performance was as improper as it was distasteful.

Sheller JA

INTRODUCTION

Edward Colclough, to whom I shall refer as "the deceased worker", was born on 14 September 1920 and died on 16 April 1982 from emphysema. From 21 September 1959 to his resignation on 30 September 1972 the deceased worker was employed by the respondent, Rothmans of Pall Mall Australia Ltd. On 1 July 1986 his wife, the appellant Susan Shaw, as executrix of his estate, brought an application in the Compensation Court for weekly compensation from an unspecified date in 1972 until the day before his death, 15 April 1982, alleging total incapacity from the date of ceasing work to the date of death. His Honour Judge O'Meally heard the application in early 1989 and on 5 April 1989 made an award in favour of the respondent. By notice of appeal filed on 2 May 1989 the appellant appealed from that award.

The appellant alleged that in the course of his employment the deceased worker was required to smoke in order to promote the respondent's cigarettes. An allegation that he was also encouraged to consume excessive amounts of alcohol was not pressed. In the application the following work injuries were alleged: cirrhosis of the liver, chronic bronchitis, emphysema and bronchietosis.

JUDGMENT BELOW

Judge O'Meally defined the two issues in the case as:

(a) whether the deceased worker's emphysema was employment-related, and

(b) if so, whether it produced incapacity for work.

The deceased worker served in the RAAF from August 1940 until 26 October 1945. During his service he took up smoking. By the time he left the air force he was smoking twenty to forty cigarettes per day. The trial Judge found that having begun the habit he was a moderate to heavy smoker throughout his life. He probably suffered some degree of emphysema before 1958. The connection between emphysema and smoking is well established. The emphysema which caused the death of the deceased worker was undoubtedly caused by his smoking. The trial Judge was not satisfied that his emphysema was caused by his employment. However s6(1) of the Workers Compensation Act 1926 (the Act), which was accepted as the applicable compensation legislation, also defined

"Injury" to include the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to such aggravation, acceleration, exacerbation or deterioration.

The respondent employed the deceased worker in the following capacities: from September 1959 until August 1961 as a sales representative; from August 1961 until 1964 as advertising secretary; from 1964 until July 1971 as the secretary of the Rothmans National Sports Foundation; and thereafter, until he resigned, in the respondent's head office at Granville and as a clerk in the New South Wales sales branch.

The respondent employed only smokers as sales representatives. The trial Judge found that while the deceased worker was so employed, part of his duty was to promote the respondent's tobacco products. To do this he was expected to smoke not only cigarettes produced by the respondent, but also cigarettes produced by its competitors, in circumstances where he could extol the virtues of the former and express opinions about the competitors' tobacco products.

According to his Honour, the only evidence was that emphysema is dose related and that "for as long as one continues to smoke after contracting emphysema, the condition will progress. Whilst the condition is irreversible, if one abandons the practice of smoking, deterioration of lung function would slow down to what Dr Young called 'a normal rate'." Thus a situation existed where the expected, indeed encouraged, smoking of the deceased worker, whilst a sales representative, would have caused a deterioration in his emphysema. It may indeed have accelerated it and there may have been both aggravation and exacerbation of the disease.

The trial Judge was not satisfied that during the deceased worker's employment after he ceased to be a sales representative in 1961, the respondent expected or encouraged him to smoke. There were other problems. Before he began employment with the respondent he was a moderately heavy drinker as well as a moderately heavy smoker. While he was advertising secretary, his drinking increased to the extent that he was spoken to from time to time about this habit. Because of his drinking habits and their interference with his work as advertising secretary, his superior supported his move to the Sports Foundation. Some time after he started work at the Sports Foundation, his drinking was seen to interfere with his work. His Honour said that none of the members of the Sports Foundation smoked, nor was any employee of the Foundation required to smoke. There was no basis upon which it could be said that the deceased worker was obliged, encouraged or expected to smoke whilst working for the Sports Foundation. Nor was he required, encouraged or expected to smoke while working at head office.

The deceased worker's resignation from the respondent's service was not brought about by emphysema. After he left he attempted to run an art gallery for a period of between one and twelve months. He sought assistance from the Department of Veterans Affairs. Gradually his emphysema and alcoholism took complete control. At various stages he sought other employment and obtained what, for him, would have been hard and demeaning occupations for short times. In 1970 the appellant and the deceased worker separated. The two children of the marriage lived with the, appellant. Contact between the appellant and the deceased worker was spasmodic. His health deteriorated until he died in Concord Repatriation Hospital. According to the evidence of Dr Young, which his Honour accepted, the deceased worker was probably incapacitated for work for a period

of five years before his death. His Honour said "[T]he cause of that incapacity is by no means clear." The trial Judge summarised his conclusions in the following way:

"I have, I think, made it clear that I am satisfied that the applicant has established that Mr Colclough suffered injury, being the deterioration of emphysema as a result of the encouragement and expectation that he would smoke and did smoke as a sales representative for the respondent between September 1959 and August 1961. I am not satisfied that he was required, expected or encouraged to smoke at any time thereafter. Thus, his employment thereafter was not a contributing factor to the deterioration of his condition of emphysema. The applicant has established the first of the issues presented for my consideration.

The evidence however, does not enable me to determine that any incapacity was due to the deterioration of his emphysema. Medical practitioners who treated him before his death have supplied reports but no expression of opinion as to his incapacity or of the cause of it is contained within those reports.

The estate of the deceased would be entitled to compensation only for such incapacity as may have been caused by the deterioration of his emphysema. There is no evidence which could lead me to a view on that question and in the result the applicant has failed to satisfy me that any incapacity resulted from the injury which I have found."

GROUNDS OF APPEAL

The appellant abandoned the first four grounds of appeal in her notice of appeal. Though not abandoning any of the remaining four grounds of appeal Mr Francey, who appeared for her, acknowledged that the following alternative expression of ground 6 which he provided to the Court encapsulated the point the appellant wished to make:

"That his Honour erred in holding that the evidence did not enable him to determine that any incapacity was due to the deterioration of the Deceased's emphysema or that there was no evidence which could lead him to a view on the question of such incapacity as may have been caused by the deterioration of his emphysema."

The point of the appeal was whether there was evidence sufficient to require a finding of a causal connection between the injury, received while the deceased worker was a sales representative from 1959 to 1961, and his incapacity in 1977.

FURTHER EVIDENCE

The appellant tendered an affidavit made on 16 January 1997 by her solicitor, Mark Robert Turner, annexing a report of the same date by Dr Young said to set out in detail the method whereby the Court could determine the extent to which the deceased worker's incapacity was due to the deterioration of his emphysema attributable to his employment as a sales representative for the respondent between September 1959 and August 1961. The deponent acknowledged that it could be said that the evidence could have been obtained with reasonable diligence for use at the trial.

S75A (7) - (9) of the Supreme Court Act 1970 enables this Court to receive further evidence. However, where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence, except on special grounds, unless the evidence concerns matters occurring after the trial or

hearing. The Court refused the application to adduce further evidence and said it would state its reasons more fully as part of the reasons for judgment on the appeal.

The principles to be applied in considering an application to adduce further evidence have been discussed in a number of cases. No precise formula can be laid down. An important factor is the general public interest in the finality of litigation. Ordinarily it must be shown, inter alia that the evidence could not have been obtained with reasonable diligence for use at the trial; Council of the City of Greater Wollongong v Cowan (1955) 93 CLR 435 at 444 per Dixon CJ and see generally Ritchie's Supreme Court Procedure NSW [51.13A.2].

Mr Francey submitted that in the Compensation Court the substance of the appellant's case was that the respondent had encouraged or requested the deceased worker to smoke throughout the period of employment. The appellant had not particularly addressed the consequence of a finding that the respondent required or encouraged the deceased worker to smoke only when he was employed as a sales representative from 1959 to 1961. Accordingly, she did not call evidence, which would otherwise have been available from Dr Young, along the lines set out in the report tendered. In short, the appellant sought to mend this gap in the evidence, which was decisive below and meant that the medical practitioners, who treated the deceased worker before his death and supplied reports, expressed no opinion as to his incapacity or the cause of it. In my opinion, only in very unusual circumstances should an appellant be permitted to present an evidentiary case at the hearing and then, after judgment against it, seek to remedy flaws in this presentation which the judgment reveals. To allow this would strike at the heart of the principle that the litigation should be final. For these reasons it seemed to me that the application to adduce further evidence must fail.

CAUSAL CONNECTION BETWEEN INJURY AND INCAPACITY

Mr Francey stressed the established connection between smoking and emphysema and emphysema and the deceased worker's death. He referred to a concession in the respondent's submissions that there was evidence that emphysema caused the deceased worker's incapacity in 1977. That incapacity was, he submitted, total. Mr Francey further stressed that the respondent, by requiring or encouraging the deceased worker to smoke between 1959 and 1961, brought about the deterioration or acceleration of emphysema which amounted to an injury for which the deceased worker was entitled to receive compensation from the respondent "in accordance with this Act": s7(1)(a) of the Act. His consumption was elevated from one or two packs to four packs per day. However, Mr Francey accepted that it was necessary causally to relate the deceased worker's injury during this period to the total incapacity claimed from 1977 if the appellant were to be entitled to an award on this application: s9(1) of the Act. He had therefore to deal with his Honour's statement that the evidence did not enable him to determine that any incapacity was due to the deterioration, I interpolate during the period from 1959 to 1961, of the deceased worker's emphysema. An immediate problem for the appellant under the legislation relevancy in force was that an appeal was available only to a party aggrieved by an award of (the Compensation Court) in point of law or in relation to the admission or rejection of any evidence: s32 (1) of the Compensation Court Act 1984; and s5(1) and (2) of Schedule 4 of the

Compensation Court (Amendment) Act 1989, which came into force on 1 October 1989.

The appellant submitted that his Honour erred in law in holding that there was no evidence upon which a finding of causation could be based. I am not persuaded that this was the way the trial Judge decided the application.

However, it was said that there was a prima facie case sufficient to require the respondent to prove that the deceased worker's smoking during some other period of his life for which the respondent was not responsible caused or contributed to his ultimate incapacity. The appellant relied upon the passage I have quoted from the trial Judge's judgment that emphysema is dose related. On that foundation the appellant argued, by reference to a schedule to the written submissions which summarised evidence about the deceased worker's average consumption of cigarettes at various times before and after the respondent employed him, that his smoking while employed from 1959 to 1961 must have contributed to his incapacity in 1977. This was said to be a matter of commonsense: March v E & MH Stramare Pty Ltd (1991) 171 CLR 506.

In reliance upon s7(4) of the Act, which provided that where the injury was a disease which was of such a nature as to be contracted by a gradual process, compensation should be payable by the employer who last employed the worker, Mr Francey submitted that the respondent was obliged to pay the full amount of compensation for total incapacity for the whole period claimed. However, the trial Judge was not satisfied that emphysema was caused by the deceased worker's employment with the respondent. The disease was not shown to be one contracted by the deceased worker in the course of that employment and to which that employment was a contributing factor: para(a) of the definition of "Injury" in s6(1). In Fisher v Hebburn Ltd (1960) 105 CLR 188 at 199, Kitto and Menzies JJ said that the effect of the first paragraph of s7(4), upon which the appellant relied,

"...in the context of the whole sub-section is 'that, if a disease amounting to personal injury is contracted by a gradual process in an occupation, a worker so contracting it is entitled to receive from the employer in whose employ he is pursuing the occupation at the time of his incapacity, or from the last employer who before his incapacity employed him in such an occupation, compensation in accordance with the Act'. (Smith v Mann (1932) 47 CLR 426; Williams v Metropolitan Coal Co Ltd (1948) 76 CLR 431 at 448)."

S7(4A) of the Act provided that where the injury consisted in the aggravation, acceleration, exacerbation or deterioration of a disease to which aggravation, acceleration, exacerbation or deterioration the worker's employment with two or more employers had been a contributing factor, compensation should be payable by that employer who last employed the worker in such employment. In the present case there was only one such employer, and the question remains whether the incapacity claimed resulted from the injury the deceased worker was found to have received.

In the alternative, the appellant claimed compensation for a period of two years or for lesser periods of five months or three months, calculated by reference to an alleged acceleration of his total incapacity resulting from his period of employment as a sales representative, or the proportionate number of packs of cigarettes smoked by him during that period as compared with other periods in his life. The appellant relied upon arithmetical calculations derived from an

assumed straight line progression of emphysema related to the number of cigarettes smoked per day. There was no evidence to support the validity of such an assumption.

Mr Francey referred to a number of cases in support of his submission that, if there was prima facie evidence of causation, it was up to the respondent to show the extent to which other periods of heavy smoking by the deceased worker contributed to his ultimate total incapacity: Watts v Rake (1960) 108 CLR 158 at 159-160 per Dixon CJ; Purkess v Crittenden (1965) 114 CLR 164 at 167-169 per Barwick CJ, Kitto and Taylor JJ; The Darling Island Stevedoring and Lighterage Co Ltd v Hankinson (1967) 117 CLR 19 at 25, where Barwick CJ remarked that the relevant question in the case of an injury is whether incapacity resulted from it; and Sadler v The Commissioner for Railways of the State of New South Wales (1969) 123 CLR 216 at 222, where Barwick CJ pointed out that on an application for lump sum compensation for impairment of hearing, the employer must establish that the appellant already suffered a loss of hearing from a non-compensable cause.

With due respect, this line of authority does not assist in the resolution of this appeal. The appellant set out, but failed, to establish that as a result of the respondent's requiring or encouraging the deceased worker to smoke throughout his employment by the respondent, the deceased worker received injury by reason of the aggravation, acceleration, exacerbation or deterioration of his emphysema. She succeeded only in establishing that injury was so received between 1959 and 1961. This is not a case in which the appellant demonstrated that the injury found was one of a number of work-related injuries which caused incapacity. It is a case in which she failed to demonstrate to the satisfaction of the trial Judge that the work-related injury the deceased worker did receive caused or contributed to his incapacity. The device in argument of relying upon the statement that emphysema is dose related involves an assumption which in a sense begs the question in issue. The assumption is that the dose from cigarette smoking during the period from 1959 to 1961 not only contributed to the deterioration of the emphysema, but also to his incapacity in 1977. To adapt the words of Kirby P in Kooragang Cement Pty Ltd v Baies (1994) 35 NSWLR 452 at 463-4, the mere proof that injury occurred which predisposed a worker to subsequent incapacity or death, will not, of itself, be sufficient to establish that such incapacity or death "results from" a work injury. "What is required is a commonsense evaluation of the causal chain." The trial Judge was of the view that causation was not proved and I am not persuaded by the submissions that he erred. But even if he did, the error was not one of law.

CONCLUSION

In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.