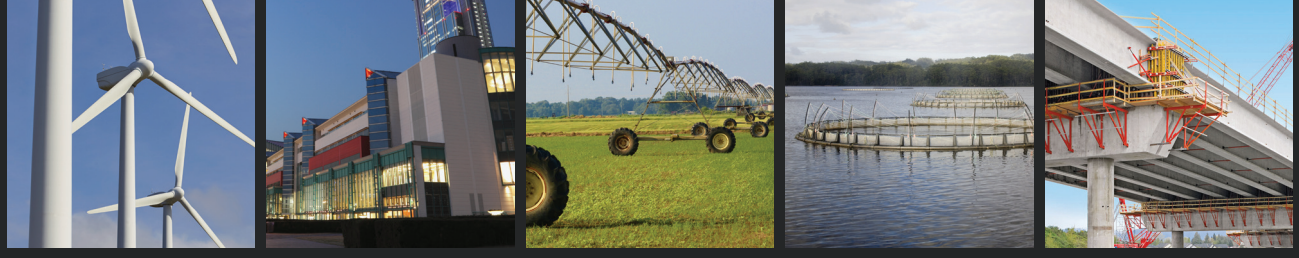

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Workers Rehabilitation & Compensation Tribunal

CASE COMMENTARIES ▪ Aug 2016

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Reasonably Arguable Case — "Serious and Wilful Misconduct"

FACTS

The worker injured his left foot whilst operating a forklift at work at approximately 1.00pm on Boxing Day 2015. He was taken to the Royal Hobart Hospital for treatment on the day. A sample of urine was taken from the worker whilst at the hospital which showed a positive result for cannabis.

The hospital records contained a document completed by the worker whilst in hospital which recorded that he had his '*last drink*' at around 11.00am that morning and that he was also a smoker of marijuana. The examination notes stated that he '*looked well*' and there was no reference to him showing effects of alcohol or drug use.

The employer's Code of Conduct stipulated that employees were not to work under the influence of alcohol and non-prescribed drugs and that a breach of this rule could result in instant dismissal.

On the basis of the above information, the employer disputed liability for the worker's claim by relying on s25(2)(a)(i) of the Act alleging that the worker's injuries were attributable to his serious and wilful misconduct, being his cannabis use.

At the hearing of the dispute the worker did not deny using cannabis however he stated that he was not influenced by the drug at the time of the injury. He stated that his last contact with cannabis was when he had '*a little bit*' on '*a couple of days*' prior to the injury.

REASONS FOR DETERMINATION

The commissioner determined that a reasonably arguable case did not exist as the evidence fell far short from showing that the worker's injury may arguably be attributable to his misconduct, being his cannabis use. This was primarily on the basis that the employer had no evidence touching upon the effect of the cannabis on the worker to sufficiently link that to the injury. Additionally, the commissioner had undertaken his own enquiries and had an understanding that a urine drug test is able to detect the non-psychoactive element of cannabis but not the psychoactive element (i.e. the element that causes the effect of the drug). The employer did not dispute this.

PRACTICAL IMPLICATIONS

This decision serves as a reminder that the evidence in support of a reasonably arguable case finding needs to materially address the grounds for dispute and will be insufficient if it only goes so far that it still requires other unproven factors to be assumed by the Tribunal.

In that respect, it also reminds us of the ability of the Tribunal to inform itself of matters not addressed in the case before it.

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HENDREX v KEATING [2016] TASSC 20

(Click here to view case)

Expert evidence which depends upon other expert evidence

FACTS

The Defendants, Mr and Mrs Keating, employed the Plaintiff, Mr Hendrex, to remove and replace roof cladding at the front of their residence.

Mr Keating provided a ladder as a means to access the roof. The ladder was extendable, but on this occasion it was erected so as to resemble the letter A when viewed from the side.

The ladder, erected in this way, did not quite reach the height of the roof. This made the descent from the roof quite awkward. The awkwardness of the descent was compounded by the fact that the Plaintiff descended in a front-facing manner rather than turning to face the ladder before climbing down.

The Plaintiff fell from the ladder while attempting to descend and injured his wrist, shoulder and most seriously, his head. He brought an action in negligence alleging that the Defendants had failed to take reasonable precautions for his safety.

Medical evidence adduced by the Plaintiff suggested that the Plaintiff had a permanent incapacity for work as a result of his head injuries. Medical evidence for the Defendants essentially suggested that the Plaintiff was exaggerating his symptoms and that there was no neurological damage that could explain his symptoms.

REASONS FOR DETERMINATION

The Court found that the Defendants owed the Plaintiff a duty of care as occupiers of the premises and also because the Plaintiff was engaged by them as an independent contractor. The court rejected an argument that the Defendant owed a duty of care by virtue of section 15 of the *Workplace Health and Safety Act 1995* (Tas).

The Court found that the Defendants had breached their duty of care by erecting the ladder in the A position instead of extending it to its full length and securing it with rope. The deficiency in the height of the ladder led to a reasonably foreseeable increase to the risk of injury.

The court also found however, that the Plaintiff had not taken reasonable care for his own safety by failing to request that the ladder be fully extended and secured and beyond that, by climbing down the ladder in an unsafe way (facing outwards instead of towards the ladder). The Court apportioned the Defendants' liability at 60% — both had been equally at fault for not taking reasonable steps in relation to the configuration of the ladder and the Plaintiff took an extra 10% because of his careless conduct.

The evidence in relation to the Plaintiff's wrist and shoulder injuries was almost entirely accepted by the Defendants and the Court.

The most contentious point was the evidence in relation to the extent and effect of the Plaintiff's head injuries. The Plaintiff's medical evidence was more or less accepted by the Court. The chief

medical witness was a consulting neurologist and the other primary witness was a consultant neuropsychologist.

The Defendants' medical evidence was almost entirely rejected. The chief witness for the Defendants was a neurosurgeon, Dr Coroneos. His evidence contained erroneous references to other documentary medical evidence, which were set out in detail by the trial judge. Dr Coroneos also disagreed profoundly with evidence given by the Plaintiff's witnesses without adequate justification. Most damningly of all, cross examination revealed that Dr Coroneos had been suspended from practice for a fraud conviction and then again for an undisclosed reason, which he claimed he could not recall.

The factual mistakes in Dr Coroneos' reports combined with his poor credibility led the trial judge to remark that he was "not prepared to attach any weight at all to any opinion expressed by him as to any point in controversy".

Another important witness for the Defendants — Mr Perros, a consultant neuropsychologist — was found to be evasive and uncooperative when his attention was drawn to a mistake in his report. Mainly for this reason the Judge was not impressed by his evidence either.

Mr Perros and almost all the other medical witnesses for the Defendant relied heavily upon the reports of the Dr Coroneos as a basis for their opinions. The wholesale rejection of Dr Coroneos' evidence by the trial judge had a domino effect and all but completely destroyed the Defendants' medical evidence.

PRACTICAL IMPLICATIONS

Expert witnesses should be chosen carefully, not just on the basis of their formal qualifications, but also in relation to matters affecting credibility. Extra care and attention must be paid in the case of testimony which will form a basis for further evidence or opinions.

Wherever practicable medical experts should conduct their own examinations and make their own observations to avoid a flow on effect if foundational evidence is rejected.

Courts are unlikely to be impressed by evidence which is diametrically opposed to competing evidence, but does not justify or at least adequately acknowledge the divergence of opinion. It may be tempting to retain a "yes man", but the weight attributed to the resulting evidence, if it does not at least attempt to grapple with competing views, is likely to be minimal.

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MILITARY REHABILITATION AND COMPENSATION COMMISSION v MAY [2016] HCA 19

(Click here to view case)

Test for "injury (other than a disease)" under the *Safety, Rehabilitation and Compensation Act 1988* (Cth)

FACTS

Mr May was an Officer Cadet in the RAAF. He was required to undergo a series of vaccinations in the course of his employment. He suffered a number of adverse reactions from those vaccinations, including "low immunity, fatigue, illness, dizziness". The dizziness was ongoing and serious enough to be described as vertigo. These symptoms (the vertigo in particular) effectively resulted in Mr May's premature discharge from the military.

In his initial compensation claim, Mr May contended that he had suffered an injury other than a disease (**injury simpliciter**) and an injury, which is a disease. On appeal to the High Court, the claim was narrowed to focus upon the contention that he had suffered an injury simpliciter.

The result of the evidence was that there was no identifiable physiological pathology; "no biological mechanism consistent with a vaccine generating an immune response". It was accepted that Mr May's reports of his "constellation of symptoms" were genuine; there was no suggestion that Mr May was malingering. It was also accepted that the symptoms had serious consequences and that there was a temporal relationship between the vaccinations and the symptoms.

REASONS FOR DETERMINATION

The issue for the High Court was whether Mr May's symptoms alone, absent some underlying diagnosable physiological change, constituted an "injury (other than a disease)" for the purposes of section 4(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The Court evaluated existing judicial definitions and explanations of the concept of an injury simpliciter.

The joint majority judgment (French CJ, Kiefel, Nettle and Gordon JJ) considered previous statements of the High Court and, in line with those authorities, reiterated that the essence of an injury simpliciter, for the purposes of the act, is *"physiological change*" or *"the disturbance of the normal physiological state*". Their Honours gave as examples: the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery or a lesion to the brain.

The joint judgment clarified that a physiological change doesn't *have* to be "sudden" or "dramatic". Still, these considerations are relevant in determining an individual case upon its facts; a finding of injury is more likely where a physiological change is sudden and dramatic. Confusion arose on this point because the High Court has used these terms (*"sudden* and ascertainable or *dramatic* physiological change") as indicia of a compensable injury in the past.

Inferences based upon common sense have some role to play — for example, in the case of dismemberment no formal diagnosis would be required — but in cases where the relevant physiological change is not readily observable, medical evidence will be required.

The majority stated that *"subjectively experienced symptoms, without an accompanying physiological or psychiatric change, are [not] sufficient to [satisfy the definition of an injury simpliciter or an injury which is a disease*".

The reasoning in the separate judgment, delivered by Gageler J, was largely in conformity with the joint majority and the same orders were proposed by His Honour.

PRACTICAL IMPLICATIONS

Although this case concerned Commonwealth legislation, the principles stated of course apply to Tasmanian injuries.

Subjective reports of illness, even if they are genuine and accepted as such, are not enough to constitute an injury simpliciter or an injury which is a disease. In both cases there must be some underlying and medically diagnosable physiological change.

Medical evidence will be required to support a diagnosis unless that diagnosis is so obvious that it can be inferred as a matter of common sense (e.g. dismemberment).

It is possible to satisfy the definition of injury in the case of a physiological change that is not sudden or dramatic. However, the absence of these factors will require compelling evidence on the facts of the case.

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PRASAD v INGHAM'S ENTERPRISES PTY LTD [2016] QCA 147

(Click here to view case)

Negligence — Causation — The measures that the employer fail to adopt must have prevented or minimised the injuries

FACTS

The worker was employed as a process worker at a chicken processing factory. She suffered bilateral plantar fasciitis (**the condition**) and sued the employer in negligence for the injury.

The worker alleged her injury arose from the employer's negligence with respect to her working conditions. Critical to the appeal was that during part of her employment the employer had placed rubber mats on the concrete floor for the staff to stand on whilst working. The rubber mats were subsequently removed because the employer said they were a trip hazard and a hygiene risk.

The trial judge found that the employer had been negligent in removing the rubber mats without first conducting a risk assessment/putting other measures in place. However he was not persuaded that the worker's condition was the result of that negligence. The worker appealed the decision with respect to this issue. The evidence was that wearing certain footwear and using matting provided a greater protection to the development of the condition than just wearing appropriate footwear.

However, the evidence was not to the effect that it was the hardness of the surface, as distinct from the mere fact of standing, which was the crucial matter in the development of the condition. Instead, the evidence was that the link between hard surfaces and the condition was inconclusive and that there *may* be a link.

The appeal was dismissed.

REASONS FOR DETERMINATION

The appeal was dismissed because the court were not convinced that the worker had established that her condition was caused by the employer's breach of duty. This was because there was no evidence that any measure that could have been taken by the respondent would *probably* have made a difference in preventing the worker from developing the condition. Instead, the evidence was that it *may*.

The court confirmed the test is: whether a judge can conclude, as a matter of evidence and inference, that it is more probable than not that had the employer taken an action, that action would have prevented or minimised the condition.

PRACTICAL IMPLICATIONS

Whilst this is a Queensland case, the principles can apply to Tasmanian injuries.

This is a reminder of the importance in linking the negligent act to the condition suffered. That is, the Plaintiff must have evidence which casually links their condition with the negligent act of the employer. It will be insufficient if the evidence is that the negligent act may be linked to the condition as we know the test is whether the link is 'more probable than not'.

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ROBINSON HELICOPTER COMPANY INCORPORATED v McDERMOTT [2016] HCA 22

(Click here to view case)

Requirement for proof of causation is separate from proof of breach of duty

FACTS

Graham James McDermott (**McDermott**) was a passenger in a helicopter that crashed. The pilot was killed and McDermott was seriously injured. Robinson Helicopter Company Incorporated (**Robinson**) was the manufacturer of the helicopter.

McDermott brought a negligence claim against Robinson. The claim was based upon an allegation that the recommended maintenance procedure was deficient.

The failure of a critical component of the helicopter caused the crash. That component was affixed to the craft with four bolts. Those bolts needed to be tightened to a particular degree, specified in the manual. If any of those bolts were not properly tightened, then excess stress would be placed upon the critical component, which could cause failure of the craft.

As a safeguard against such an occurrence, the manufacturer recommended inspections of the craft after every 100 hours of operation and the use of "torque stripes". These torque stripes are like stickers, one part is placed on the bolt and another is placed on the component they affix. The two stickers align with one another in such a way that if the bolt loosens, that movement will be apparent from the resulting misalignment. The intended effect is that if misalignment is noticed, the bolt can be checked and re-tightened as may be necessary.

McDermott argued that this process was insufficient and that tightening of each bolt should have been mandated as a matter of course at every 100 hour inspection, irrespective of the state of the torque stripes.

REASONS FOR DETERMINATION

The Court identified a number of possible reasons why the bolts had not been sufficiently tightened in this case when the craft was serviced:

(i) the torque stripes weren't actually applied;

(ii) the torque stripes were applied properly, but the misalignment wasn't noticed upon inspection;

(iii) the torque stripe had deteriorated and that deterioration was the result of a process other than bolt rotation;

(iv) the torque stripes were applied, but to a greasy surface, which allowed the bolt to rotate without causing a misalignment of the stripes.

In all of these scenarios, except for (iv) the omission to tighten the bolts would have been the fault of the person servicing the craft, not the manufacturer. McDermott argued that (iv) was a real possibility and that the possibility could have been avoided by requiring tightening as a matter of course.

The High Court rejected suggestion that (iv) was a significant possibility. This was enough to dispose of the case because all the reasonably foreseeable outcomes had been catered for and so there was no breach of duty.

However, Their Honours went on to state that even if (iv) had been a real possibility it was less likely than all the other possibilities. Therefore even if Robinson had breached their duty of care by failing to prescribe a procedure which would have averted a foreseeable cause of failure, causation was not established because there were a number of other more plausible explanations for what had, in fact, caused the failure and subsequent crash in this case.

PRACTICAL IMPLICATIONS

Proof of breach of duty will not necessarily suffice to prove causation. Breach and causation are two distinct elements of an action in negligence and they must both be established for a plaintiff to succeed.

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THE TRUSTEE FOR TRIPLE THREE UNIT TRUST v L [2016] TASWRCT 12

(Click here to view case)

No requirement for medical evidence to assert alternative cause of injury at 81A hearing

FACTS

The worker took leave to undergo a prostatectomy to treat prostate cancer. After returning to work he claimed workers compensation and alleged that he suffered from severe stress as a result of:

- being treated unfairly when he initially disclosed his condition and requested leave for treatment; and
- being subjected to undue pressure upon returning from leave.

The worker did not provide any further detail or specifics in relation to the alleged unfair treatment or undue pressure.

The employer disputed liability to make workers compensation payments under s 81A of the Act.

REASONS FOR DETERMINATION

The employer faced difficulty in responding to worker's claim because it was so vague. The employer adduced evidence of a general nature from the worker's manager (**Manager**) in an attempt to address what they suspected was the alleged cause of the worker's stress.

The Manager's evidence was that the worker was being performance managed in the period leading up his cancer diagnosis. After he was diagnosed he took 3 months leave for surgery and recovery and then additional unpaid leave (after he had exhausted his leave entitlements).

The worker returned to work after he gave assurances to the Manager that he was medically fit. About a week after he returned the worker was notified that performance management would resume again once he had settled back into his position. He returned to work on 25 January 2016 and performance management was resumed on 29 February 2016.

The employer suggested that this series of events must have been the cause of the worker's condition, and argued that it was reasonable administrative action protected by s 25(1A)(c). The worker argued that the employer needed medical evidence which supported any assertions about what had caused the mental illness. The tribunal determined that *medical* evidence is not required to support an assertion of an alternative cause of a worker's mental illness at an 81A hearing. This was particularly so where the medical evidence provided by the worker was simply a medical certificate offering a diagnosis of "severe stress".

PRACTICAL IMPLICATIONS

Although some form of evidence is required to support an assertion of an alternative cause of a worker's mental illness that evidence does not have to be medical in nature.

The situation may be different where a very specific and detailed diagnosis has been put forward by a worker, which suggests a specific cause of the mental illness. In that case it may be necessary to respond with medical evidence.

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