

110. 20 of 1961 (11)
ORIGINAL
IN THE HIGH COURT OF AUSTRALIA

THE COMMONWEALTH OF AUSTRALIA

V.

FLETCHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney
on Tuesday, 14th November, 1961.

THE COMMONWEALTH OF AUSTRALIA

v.

FLETCHER

ORDER

Appeal allowed. Order appealed from
discharged. Order that appeal to County Court
be dismissed. Appellant, Commonwealth of
Australia, to pay respondent's costs of this appeal.

THE COMMONWEALTH OF AUSTRALIA

v.

FLETCHER

JUDGMENT

DIXON C.J.
TAYLOR J.
OWEN J.

THE COMMONWEALTH OF AUSTRALIA

v.

FLETCHER

This is an appeal, which lies on both fact and law, from orders of the County Court at Melbourne upholding an appeal against a decision of the Delegate of the Commissioner for Employees' Compensation who disallowed a claim for compensation made by the widow of one Geoffrey Eric Fletcher who died from cancer on 13th April, 1959. The learned County Court Judge, having upheld that appeal, made an award in favour of the applicant holding that Fletcher's death resulted from personal injury by accident arising out of or in the course of his employment by the Commonwealth. Prior to his death Fletcher was an officer of the Department of Civil Aviation and between May 1955 and January 1957 was the Officer-in-Charge of the aerodrome at Oodnadatta. He had a small congenital mole on his right arm just above the elbow and during the time he was at Oodnadatta a melanoma developed at the site of the mole and this finally led to his death. The evidence was that Fletcher's duties at Oodnadatta required him to spend about one half of his working hours in the sun and that his normal dress while at work - and no doubt also when he was off duty - consisted of shorts and a short-sleeved shirt or singlet. The evidence showed also that cloudless skies, clear atmospheric conditions and high temperatures usually prevail at Oodnadatta and that by reason of these facts the radiation of ultra violet rays from the sun is considerably greater than that which occurs in places where these conditions do not exist. In his short opening address to the learned County Court Judge who heard the application, counsel for the applicant said that he would show

that as a result of exposure to the sunlight at Oodnadatta the mole on Fletcher's arm had become sensitised and that this, either alone or combined with a knock to the mole occurring in the course of his work, had caused the melanoma to develop. No evidence was given, however, that Fletcher had received any such knock so that the case ultimately rested upon the medical evidence which was given as to the effect of exposure of the mole to bright sunlight. The first medical witness called on behalf of the applicant was Dr Stoll, a witness with a wide experience in the diagnosis and treatment of cancer. He said that statistical information suggested that exposure to sunshine had some effect in producing a melanoma. His opinion was that exposure of an area of skin to bright sunlight over a long period of time might sensitise the skin and bring about a pre-disposition to the development of a melanoma or increase an already existing disposition. He thought, however, that what he called a "trigger factor" such as a knock to a skin already sensitised by exposure was a necessary factor in the change from benignancy to malignancy. Exposure he described as a "pre-disposing factor" and injury as an "initiating factor". Dr Lubbe, a pathologist called by the applicant, thought that "there could possibly be a connection" between exposure to sunlight and the change of a benign mole to a malignant one. The first medical witness called on behalf of the Commonwealth was Dr Reid, a surgeon with long experience in dealing with melanoma. He was asked

"What in your expert experience is the probable cause of malignancy developing in a benign mole?"

and he replied

"I think that is unanswerable - we do not know."

He was then asked

"Why is it unanswerable, because your knowledge is insufficient?"

and replied

"Because there are so many factors which are

known to impose the essential change in cells which makes them behave in this anti-social fashion, not one particular factor."

He went on to say that he thought there was no evidence that the development of a melanoma "is in any way influenced by the factor of sunlight", and that:

"It is my experience that malignancy appears in congenital moles, that we are talking about, probably more commonly in the non-exposed areas such as the middle of the back and the shin. These often appear in the area of the scapula and the thighs and legs and buttocks, in places which are not normally exposed to sunlight, more commonly than do those in the exposed areas."

Dr Ewing was then called. He is a surgeon with high qualifications and wide experience. He was asked

"Do you hold any belief, yourself, as to there being any sufficient exception (sic) to disprove any association between the two - the exposure to sunlight and the development of malignancy?"

and replied

"The malignant melanoma occurs on sites which are not exposed to sunlight very frequently. The argument in relation to sunlight in our community I think, could only be stated in relation to places like the face, arms and hands; the forearms; which are exposed quite a lot to sunlight.

Malignant melanoma occurs on other situations, for example, such as the sole of the foot, which are not exposed to the sun very often; and also in parts of the trunk which are normally covered by clothing."

He was then asked

"Do you incline to the view that the critical event or incident which changes the benign mole into a malignant melanoma would be either exposure to sunlight or trauma of some kind?"

He replied

"No, Sir. I think that in the great majority of cases we are quite unaware of why it does happen."

Later he said that he thought it "highly unlikely" that the exposure of the mole to the sunlight while Fletcher was at

Oodnadatta would have been a factor in the change to malignancy and that he "would find it exceedingly difficult to believe" that exposure to sunlight would be related to that change.

On this evidence the learned County Court Judge found that the melanoma had resulted from exposure to sunlight at Oodnadatta and that this amounted to an injury by accident arising out of or in the course of Fletcher's employment there. We have found it impossible to discover what it is that is said to have constituted the "injury by accident" which brought about the condition of malignancy which developed. We would not have thought that sunburn resulting from constant exposure of part of a person's body to strong sunlight could be regarded as "injury by accident" and we fail to see why the development of a malignant condition under the skin due to exposure to sunlight stands in any different position, except of course that the one development is much more serious than the other. Assuming, however, for the purposes of the present case, that long exposure to strong sunlight resulting in the sensitisation of the skin so exposed and the later development of a melanoma is capable of being regarded as an "injury by accident" and taking a view of the evidence most favourable to the applicant, it is, in our opinion, incapable of justifying an affirmative finding that the change from benignancy to malignancy arose out of or in the course of Fletcher's employment or that the conditions of that employment caused or contributed in any way to that change. The utmost that can be said is that some parts of the evidence suggest that prolonged exposure to bright sunlight may produce a susceptibility to the development of a melanoma. But it is, in our opinion, impossible on the evidence to find that it did so in Fletcher's case or that the melanoma resulted thereupon.

In the course of the appeal counsel for the applicant suggested, somewhat faintly, that the case might be

brought under Section 10(1) of the Act as being one in which death was caused by a disease due to the nature of the employment. This was not the case sought to be made before the learned County Court Judge and in any event it finds no support in the evidence.

In our opinion the appeal should be upheld and the orders of the County Court discharged. Instead it should be ordered that the appeal to the County Court from the determination of the Delegate of the Commissioner for Employees' Compensation be dismissed. Counsel informed us that the Commonwealth had agreed to pay the applicant's costs of the appeal to this Court and an order in her favour should be made accordingly.