

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

McLAUGHLIN & CO. PTY. LIMITED

V.

BRINNAND

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY, 28th MAY 1965

A. C. Brooks, Government Printer, Melbourne

G.7639/60

McLAUGHLIN & CO. PTY. LIMITED

v.

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ORDER

Appeal allowed with costs. Order of Supreme Court set aside. In lieu thereof order that the question asked be answered "No", that the case stated be remitted to the Workers' Compensation Commission with that answer, and that the respondent in the Supreme Court pay the costs of the proceedings in that Court.

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JUDGMENT

BARWICK C. J.

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As a result of an amendment made in 1960 to the Workers' Compensation Act, injury within the meaning of that Act includes

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

this being the relevant portion of Section 6(1)(b).

The present respondent had been employed by the appellant for many years as a storeman. The Workers' Compensation Commission found that the malignancy of a tumour which appeared in his upper leg was aggravated by his work, though the Commission was not able to find that it was caused by that work. The Commission further found that his permanent incapacity which supervened upon surgical treatment of the tumour and its further development resulted from the aggravation of the malignancy of the tumour which had been caused by his work in the appellant's employ. The question before this Court is a narrow one, namely, whether there was any evidence before the Commission which would warrant the finding that the incapacity resulted from the aggravation.

The material facts are few. A tumour developed in the respondent's leg at or near a point where it was frequently bumped in the course of his work. It progressed to the point where its presence became discernible because of its protusion under the skin. As the real nature of the tumour could not be determined by mere external examination, the tumour was excised and a biopsy performed. This established

the malignancy of the tumour. The site of the tumour was not subjected to any further traumatic excitement by the work of the respondent. But the tumour again appeared. There was evidence from which it could be concluded that some of the malignant cells which formed the tumour and whose malignancy had been aggravated were left behind after the surgical operation, with the result that what later appeared was a recrudescence of the same "aggravated" tumour. Further surgical treatment was then undertaken. On this occasion a wider excision was made and pathological examination of what was removed resulted in a diagnosis that the tumour was a sarcoma of the muscle which is called a rhabdomyosarcoma. A little later a hard swelling which made itself manifest at the site of the surgical treatments was diagnosed as a recurrence of the malignant tumour. The only treatment open was a high amputation of the respondent's thigh. In my opinion, it could be found on this evidence that it was parts of the original tumour in its aggravated condition which remained throughout, notwithstanding the attempts to completely excise it.

The question then, it seems to me, is whether there is any evidence on which the Commission could find that there was a causal relationship between the aggravation of the malignancy of the tumour and the ultimate permanent incapacity, bearing in mind that the onus is on the worker to show that the incapacity resulted from the aggravation of the malignancy of the tumour rather than from the malignancy itself.

The commencing point for any examination of the evidence is that the respondent's work did aggravate the malignancy of the tumour. This finding by the Commission is not challenged. The next consideration is that the incapacity of the respondent began at a date, 1st December, which is another finding of the Commission which is not

challenged. Was there evidence upon which it could be found that the incapacity at the time it began resulted from the aggravation of the malignancy of the tumour?

There were several descriptions given by the medical witnesses of their understanding of the process by which the malignancy of such a tumour both extended the area of its influence and accelerated the pace of its development. It seems that malignant cells of this nature multiply by division and in geometric progression. The rate at which this division takes place - which I take to include both the time a particular division takes place and the frequency with which further divisions occur - can be aggravated by trauma, according to views which the Commission was entitled to accept. In other words, the rate of division, or multiplication of cells by division, and the rate at which they invade surrounding tissue, can be accelerated by traumatic excitement. The finding of aggravation of the malignancy of the tumour by the work the respondent did in the appellant's employ, work which involved traumata at the site of the tumour, means that the rate at which the malignancy progressed towards the terminal point which eventually involved the respondent's incapacity for work, was accelerated by the work. From these facts, it seems to me, it might be said that as the work aggravated the malignancy so as to make it spread more widely and to develop more quickly to the point where the only remaining check to its further advance was an amputation of the leg, the incapacity at the time it actually supervened resulted from the aggravation. The timetable of the incapacity was set by the work though the malignancy, unaggravated, must have advanced at some time to that point because of the inevitability of the ultimate result of the malignancy of the tumour.

But there are passages in the evidence of the medical witnesses which could be read as saying that, although the work had aggravated the malignancy of the tumour so that it grew larger more quickly than it otherwise would have done, yet the treatment and the ultimate result which did in fact take place would have occurred at the time they did occur whether or not the malignancy had been aggravated. I must confess that I have great difficulty in understanding how the aggravated malignancy of the tumour would advance no more and no faster than the same malignancy without aggravation, having regard to the explanation of the processes of the division and multiplication which was given in the evidence. The composition of these two pieces of oral evidence, it seems to me, was a matter for the Commission. His Honour effected the accommodation in the following passage which I quote from his judgment which was made part of the stated case :

"What may have happened in relation to the tumour apart from trauma, seems to me to be irrelevant, at any rate, at this stage of the case. At the best it could be said, as I view the facts, that there is a probability that at some time in the future the cancerous condition would by its own idiopathic processes have reached a stage where the surgical measures resorted to by Drs. Marnie and Sturrock in turn, would have to be resorted to. It is fairly clear on my findings as to aggravation that the removal by Dr. Marnie of the tumour found by him was causally related to the aggravation of the cancerous condition by work.

On the other hand, on the face of it, it would appear that a second tumour, the one removed by Dr. Sturrock 'just grew'. But this overlooks

the fact that the growing may be causally related to the previous aggravation whilst at work, and on this aspect of the matter Professor Magarey's evidence again sheds helpful light. Malignant tumours apparently grow by infiltration of their neighbouring tissues, and not by mere expansion; that is, as I understand the evidence, they enter into the surrounding tissue as part of that tissue, which as it were becomes a host for them, and upon which in a sense, their continued growth depends. The more there is damage to the surrounding tissue the greater there is of the likelihood of spread, and spread gives rise to spread. I think this is the idea of the condition put in lay terms.

Be this as it may, Professor Magarey when asked what he meant by aggravation, indicated that he meant the rate of multiplication of the disease cells, and the rate of spread. (See page 52 of the transcript).

On this view, then, the traumata received at work by the applicant not only caused the spread of a cell multiplying process, which might or might not have been alleviated by the removal of the tumour in the first instance, but also caused the rate of multiplication in the cell multiplying process to be increased. It is clear that all the malignant tissue was not removed, either upon Dr. Marnie's or upon Dr. Sturrock's intervention. Some confirmation of the theory of increased rate of multiplication is afforded by the fact that a lump reappeared within two weeks of Dr. Marnie's operation. One has to bear in mind also, that a surgical intervention itself, although undoubtedly the proper and desirable course to be taken, does constitute trauma, and can in that way be an aggravating

factor.

On my view of the facts then, applicant presented to Dr. Marnie with a malignancy whose rate of multiplication had been increased by trauma sustained at work. Dr. Marnie's treatment had not succeeded in removing the malignancy, and thereafter it continued with an increased rate of multiplication, making it necessary for Dr. Sturrock to remove a newly formed tumour. He in turn did not succeed in removing the malignancy, although he substantially removed the tumour, and the malignancy has apparently gone on increasing so that amputation has become imperative.

On this view of the facts it seems to me that the incapacity following not only Dr. Marnie's operation, but that following Dr. Sturrock's results from an aggravation brought about by the applicant's sustaining knocks in his employment."

In my opinion, the evidence was susceptible of being understood in a sense which would support this conclusion by the learned Commissioner. I think he was entitled to acquit the medical witnesses of making so contradictory a statement as that the work accelerated the malignant condition but that acceleration had no bearing on the time at which incapacity due to the condition occurred. The matter is not by any means free from difficulty but, having considered the whole of the material which was put before the Commission, I am of opinion that there was evidence before him upon which his Honour could find that the aggravating quality of the work upon the malignancy of the tumour was not exhausted at the point of time that an attempt was first made to excise the tumour, but that it continued as a factor inducing the ultimate incapacity to occur on the 1st December. In my opinion, the appeal should be dismissed.

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JUDGMENT

KITTO J.

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In this somewhat difficult case I have come to the conclusion that there was no evidence to support the award which the primary Judge made in favour of the worker. If the relevant incapacity for work had arisen upon the first surgical intervention, that which Dr. Marnie performed, it may well be that the evidence would have justified a finding that acceleration of the disease due to the repeated bumping of the respondent's leg in the course of his employment was a partial cause of that incapacity. I am prepared to assume so. But whether the bumping advanced the time at which the second surgical intervention became necessary, and (this is the real question) whether the bumping either was a cause of the necessity for the amputation or advanced the time at which the amputation had to be performed, are questions upon which I cannot find in the evidence any foundation for an answer in favour of the worker.

I would therefore allow the appeal. I refrain from more elaborate discussion of the case because I have had an opportunity of reading the judgments of Menzies and Owen JJ. and I agree with them.

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MENZIES J.

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The question of law referred by Judge Wall of the Workers' Compensation Commission to the Full Court was as follows: "Was there any evidence on which the Commission could find that the incapacity for work which the Applicant was suffering on the first day of December, 1961 resulted from the aggravation of the condition of rhabdomyosarcoma from which he was found to be suffering?" At the hearing of the appeal, some question arose as to whether this was the question which ought to have been asked, but I do not pursue that enquiry because the question asked is the only matter with which we are concerned.

The Full Court answered the question in the affirmative, and we must decide whether it was correct in so doing.

The facts are fully set out in the judgment of Owen J., with which I agree, and I propose to do no more than deal with what I regard as the evidence of critical importance.

The medical testimony upon which the respondent relied particularly before this Court was that of Dr. Sturrock and Professor Magarey. Dr. Sturrock said:

"Q. Once this started irrespective of whether he pushed boxes with his leg or not he would have had to have all the treatments that you gave him?

A. Yes.

Q. And he would have had to have it at approximately the same time?

A. I think so, yes.

Q. So first of all he would have had to have his biopsy?

A. Yes.

Q. Secondly he would have had to have that operation that was unfortunately unsuccessful?

A. Yes.

Q. And he would have to have his leg amputated if that operation was unsuccessful - There is nothing else to do?

A. Yes, that is correct.

Q. There is no criticism involved in that at all, doctor, you understand that?

A. Yes.

Q. And it would have had to take place at about the same time?

A. Yes".

Professor Magarey's evidence was as follows:-

"Mr. Sullivan: Q. The situation, I suppose, is that once a man comes along with a rhabdomyosarcoma it is going to infiltrate and grow no matter what you do?

A. Do you mean in the absence of adequate surgical treatment?

Q. Yes.

A. Yes, that is correct.

Q. It is inevitable?

A. Yes.

Q. And then at the first moment a man presents himself with such a condition surgical treatment is called for?

A. Here again I am not a surgical specialist but if it was mine I would demand it.

Q. They get the thing as far as they know and it seems to be all right for a while, there is no further trauma, it

seems to be all right for a while and then it recurs and now they are going to take his leg off. Would the trauma, prior to the first operation, have anything to do with that rate of growth and necessity for removing the leg?

A. I think there is only one thing we can say about the recurrence, it recurred because there were some cancerous cells still left there after the first operation.

Q. It has nothing to do with trauma?

A. Nothing to do with the original trauma.

Q. And the pre-injury trauma?

A. I think I have expressed my opinion on that one already. I do not think trauma has had anything to do with the initiation.

Q. The initiation or its subsequent recurrence?

A. This is a hard one because we may be sort of splitting cells a little bit. Supposing a surgeon decides to take a tumour out and there is some trauma attached to it before he removes it, it may have moved a couple of cells further away than he intended to go and so when he does the operation it may have spread that little extra bit the result of previous trauma. I find this difficult to answer but I do not really think that previous trauma would have much to do with its recurrence after surgical removal".

Both these passages from the evidence show that neither witness considered that any acceleration in the growth of the tumour brought on by the respondent's practice of pushing cartons into place with his leg - a practice which came to an end before 25th July 1961 when Dr. Marnie operated for the first time to excise the tumour - contributed to the incapacity from which the respondent was suffering on 1st December 1961 when he ceased work to undergo a further operation by Dr. Sturrock on 12th December 1961. According to the evidence,

the need for a second operation - which, in turn, was not successful but was followed by an amputation - was not due to any acceleration in the spread of the tumour brought about prior to July 1961 by the appellant's practice of pushing cartons with his leg but occurred simply because the first operation was not successful in removing the tumour entirely.

In my opinion, this appeal should succeed.

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WINDEYER J.

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It is not disputed that there was evidence on which the Workers' Compensation Commission could find that the worker's malignant disease, although not caused by his work, was aggravated by his work. The only question for us is, Was there any evidence that his incapacity resulted from that aggravation?

The effect of the Workers' Compensation Act (N.S.W.) since it was amended in 1960 is in my opinion as follows. If, without any aggravation or acceleration contributed to by his employment, a worker would have become incapacitated to the extent he was and when he was by a disease from which he was suffering, then, whether or not there was in fact any aggravation, acceleration or exacerbation of the disease, his incapacity cannot be said to result from aggravation, acceleration or exacerbation. If, on the other hand, a worker's disease is so aggravated by his employment that it causes an incapacity when without such aggravation he would have suffered no incapacity from the disease, then he is entitled to compensation. And if the effect of the aggravation is to cause a greater degree of incapacity than the disease unaggravated would have done - as, for example, if what would otherwise have been a partial or intermittent incapacity becomes a total or permanent incapacity - he is entitled to compensation for the incapacity actually occurring, for it is the result of the aggravation of his pre-existing condition; and it is immaterial that unaggravated he might still have been to some lesser degree incapacitated. If, however, the employment by aggravating his disease or accelerating its progress merely causes an incapacity of the same degree that the disease would in time have caused but causes it earlier, then it seems to me that

the resulting compensable incapacity is only that which can be said to be attributable to the aggravation or acceleration: that is to say it is the incapacity from its actual occurrence to the time when, ex hypothesi, the disease, if not accelerated or aggravated, would have produced it. It may be that these considerations are artificial in relation to fundamental ideas of medical science. Their application may present special difficulties in connection with diseases of uncertain aetiology. But it seems to me that the language of the Act forces them upon us. Bearing them in mind, I have reached the conclusion that there was no evidence to support the award in this case of continuing compensation from 1st December 1961.

The question asked in the stated case is: "Was there evidence that the incapacity which the applicant was suffering on 1st December 1961 resulted from the aggravation of the condition of rhabdomyosarcoma from which he was found to be suffering?" This when read in the context of the evidence is somewhat ambiguous. It may mean Was there evidence that the worker's pathological condition which caused him to become incapacitated on 1st December 1961 was the result of the aggravation of a disease, which not aggravated would not have incapacitated him. Or it may mean Was there evidence that, as the result of the aggravation of his condition, incapacity occurred on 1st December 1961 rather than at some later date when the disease unaggravated would have caused incapacity.

Reading the question in the first way, the answer must I think be No. I say this because I do not think that there was any finding, or any evidence that would justify a finding, that apart from aggravation by trauma the malignant condition would not have become at some time incapacitating. Reading the question in the second way, it might I think be answered Yes; for on one view the medical evidence could support an inference that the aggravation of the malignant

condition had hastened the progress which surgery failed to arrest, and thus produced an earlier incapacity than would otherwise have occurred. On that basis the applicant would in my opinion be entitled to compensation for the period of incapacity attributable to the aggravation, that being the incapacity resulting from the acceleration of the progress of the disease. But there was no attempt to assess compensation on this basis. The finding was that the applicant's incapacity, beginning on 1st December 1961 and continuing thereafter, was the result of a malignant condition having been aggravated by the way in which he was accustomed before July 1961 to perform his work. The case is not an easy one; but I have come to the conclusion that that finding cannot stand. With some regret I consider the appeal must therefore be allowed.

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OWEN J.

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This is an appeal from the decision of the Supreme Court on a case stated under the Workers' Compensation Act in proceedings in which the Commission had made an award in favour of the respondent to this appeal for the payment of compensation from 1st December 1961.

The respondent was employed for many years by the appellant as a storeman. His work required him to move and stack cartons containing bottles of beer and spirits and in doing so his practice was to bump or push the cartons with the side of his right leg to get them into position. In July 1961 a tumour was discovered which had developed in that part of his leg which he used to move the cartons. The tumour was excised and found to be malignant. After the operation he returned to work and in November 1961 a further tumour developed in the same place. On 1st December 1961 he ceased work and a few days later it was excised and found to be malignant. Later, yet another malignant tumour developed in the same place and his leg was amputated. It was not proved that the repeated bumping of his leg against the cartons caused the malignant growths but the finding was made that their development had been aggravated by that use of his leg in the course of his employment. The Commission found that his incapacity for work which arose in December 1961 - and it was conceded that as from 1st December 1961 he was totally incapacitated - resulted from the aggravation of the cancerous condition of his leg and that his employment was a contributing factor to that aggravation.

The question is whether there was any evidence on which it could be found that it was the aggravation of the disease

that resulted in his incapacity for work. The Supreme Court was of opinion that there was and from that decision this appeal is brought.

An incapacitated worker's right to compensation depends upon proof that he has been incapacitated for work by "injury", which is defined by s. 6 to mean "personal injury arising out of or in the course of employment" and to include "the aggravation . . . of any disease", where the employment is a contributing factor to such aggravation. A reference to s. 7(4A) shows that in such a case it is the aggravation of the disease and not the disease itself that is regarded by the Act as being the injury.

It was therefore for the respondent to prove (1) that his employment had been a contributing factor in aggravating the malignant condition of his leg and (2) that his admitted incapacity for work as from 1st December 1961 resulted wholly or in part from that aggravation. No attack is made upon the finding in favour of the respondent on the first of these issues.

In the Supreme Court their Honours considered that evidentiary material, which they set out in their judgment, sufficient to support the finding on the second of these matters was to be found in evidence given by two of the medical witnesses called at the trial. The first of these was Dr. Sturrock but, with all respect, the passages of his evidence which their Honours quoted seem to me to be directed to and to bear only upon the question whether the repeated bumping of the respondent's leg on the cartons had aggravated an existing condition of malignancy and was therefore a contributory factor to the aggravation of the disease. The only evidence given by the witness on the issue with which we are concerned on the appeal was that, irrespective of the repeated bumping of the respondent's leg against the cartons, the same operative treatment on the leg, including its amputation, as was in fact performed would have been necessary

and "would have had to take place at about the same time" since the tumours were "very malignant". The passages in the evidence of another medical witness, Professor Margarey, which were regarded by the Full Court as affording evidence of the necessary fact seem to me to go no further than that the repeated knocking of the leg against the cartons would cause the cancerous cells to multiply and spread and thus aggravate the malignant condition. This again would lend support to the view which the learned Commissioner formed that the respondent's employment was a contributing factor in aggravating the disease. Two other medical men gave evidence. The first, Dr. Marnie, was of opinion that the repeated bumping of the leg against the cartons was the cause of the malignant condition of the leg but, as I have said earlier, the learned Commissioner was not prepared to find that this was so. In the evidence of the other, Dr. Blaxland, most of which was directed to showing that the malignant condition was not caused by repeated bumping of the leg, the following appeared:

"Q. Is the situation then once he gets these cells in the absence of their being removed they are bound to multiply, are they? A. Yes, once they are malignant they will behave as malignant cells.

Q. And the position is this that the only treatment is surgery? A. I think that everyone would agree with that.

Q. I am asking you not only theoretically but from your experience as a surgeon. The situation would be this, would it not, that irrespective of any trauma that might have occurred to that early tumour it would still reach the stage when operation would be necessary? A. Yes.

Q. If he had no trauma or if he had one trauma or had one hundred traumas it would still get to that stage? A. Yes, it would continue growing, certainly.

Q. Would there be any difference in the time at which surgery would be necessary, in your view? A. I do not think there would be any significant difference in the time when surgery would be necessary particularly bearing in mind the type of trauma."

I have carefully read the evidence and while there is an abundance of material to justify the finding that the respondent's employment

was a contributing factor to the aggravation of the disease from which he suffered, I can find nothing from which it could reasonably be inferred that his incapacity from 1st December 1961 onwards resulted wholly or in part from that aggravation of the disease.

The appeal should therefore be allowed.