[2002] QSC 251

State Reporting Bureau

Queensland Government
Department of Justice and Attorney-General

Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 3275 of 2002

THANITH SUKKHATHAMMAVONG Plaintiff

and

COOK FREEZE PTY LTD Defendant

BRISBANE

..DATE 01/08/2002

JUDGMENT

h Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: The plaintiff, who was born on 1 March 1955, claims damages for personal injury, physical and mental, from the defendant, his former employer. He alleges that as a result of the negligence and, or alternatively, breaches of statutory duty of the defendant, he developed excessive degenerative changes in his lumbar spine at the L2-3, L3-4 and L4-5 levels. The breaches of statutory duty alleged are of clause 25(1) of Rule 1 under the Factories and Shops Act of 1960, of s.9(1) of the Workplace Health and Safety Act 1989, and of ss. 26 and 28 of the Workplace Health and Safety Act 1995. The excessive degenerative changes have resulted, the plaintiff alleges, in pain, suffering and inconvenience and other loss including impairment of his earning capacity, and a major depressive disorder.

It was common ground between the parties that the plaintiff began working for the defendant, a food processor, at its plant at Wacol, Queensland, in April 1981, and ceased doing so in May 1997.

The defendant denies that it is liable to compensate the plaintiff. It denies that it was guilty of negligence or of breaches of statutory duty and that the plaintiff developed the excessive degenerative changes in his lumbar spine as a result of his working for it. I should mention now that issues raised in paragraphs 10A and 10B of the defence in reliance on provisions of the WorkCover Queensland Act 1996 (paragraph 10A) and the Workers' Compensation Act 1990 (paragraph 10B) were abandoned in the course of the trial.

At the Wacol plant large quantities of food were cooked and otherwise prepared and packed. Machines and utensils used in the processes were washed and rubbish was disposed of. The plaintiff began working in the wash-up and rubbish rooms. He worked in those rooms from April 1981 to 1991 or 1992, when he began working at the kettle bank. After that, from late January 1997 until he finished working for the defendant, he was on the packing or production line.

The plaintiff alleges that he was required to handle various pieces of equipment used at the plant in such a way as to cause him injury. In the wash-up room the work was dismantling, cleaning, and re-assembling parts of machines used in the cooking process, and cleaning and scrubbing out a number of steel bins after tipping them on their sides and, when finished, tipping them back onto their bases. As the issues were refined in the course of the trial, the plaintiff's case concerning machines in the wash-up room was confined to tasks in relation to machines which Dr Ian Low, specialist in occupational medicine, made reference as having heavy parts which, when handled, could cause injury to the spine of the handler: the burger machine and the filler machine. The plaintiff alleges that when he was working in the rubbish room he was required to handle other heavy equipment, and was required to haul bins full of rubbish on a trolley jack from various parts in the plant to the rubbish room. He also alleges he was required to tip the bins onto their sides when they were in the rubbish room so that the contents could be emptied into large receptacles. The

plaintiff alleges that when he was working at the kettle bank he was required to lift baskets and cartons of ingredients, to scoop up diced pumpkin with a bucket from a large bin and then to tip the contents into the kettles, and to pull wheeled steel bins full of food from under kettles over grates in which wheels sometimes were caught. The plaintiff's case concerning his work on the packing or production line was that, although the work was lighter than that in the other areas, he was required to bend, twist, and scoop ingredients quickly and repetitively. His case, in which substantial reliance was placed on Dr Low's evidence, rested primarily on evidence of his work in other areas.

I accept that as part of the plaintiff's duties in the wash-up room, the rubbish room, and at the kettle bank, the plaintiff was required to handle heavy objects. When he was employed in the wash-up room his duties included cleaning the burger machine. Its bowl, which weighed thirty-five to forty kilograms, was awkward to handle. To remove it, the plaintiff used a step ladder. With one foot on the ladder and the other on the frame of the machine and using both hands, he lifted the bowl off for cleaning. To replace the bowl after it had been cleaned he adopted a similar position. It is not possible to be precise as to how often the plaintiff undertook that task or other tasks. According to the plaintiff, on most days the burger machine required cleaning quite frequently: on average, twice to four times a day. Mr Phonesavanh Lavarn, who worked in the wash-up room for three weeks in 1986, said that it was cleaned twice a day, but possibly that it was

cleaned three days a week. According to Mr Peter Ran, who was employed by the defendant from January 1982 until December 1993, it would be cleaned on an average twice or three times a week. Mr Ran worked in the wash-up room "as a worker" for only three months, however, so that by April or May 1982 when he became a supervisor of all the cleaning procedures, he was no longer there in the capacity of worker. There were about four workers in the wash-up room, but I accept that the plaintiff probably was called upon to dismantle, clean, and re-assemble the burger machine more than the others because for most of the time he was in the wash-up room, he was the employee with the most experience in performing that task.

In addition to the task of handling the bowl on the burger machine, the plaintiff was required to lift and otherwise handle other heavy objects while he was employed in the wash-up room: three heavy plates, two of which weighed about twenty-five kilograms and a third more (probably forty-five to fifty kilograms), bowls on two filler machines which each weighed about twenty kilograms, and wheeled steel bins weighing ninety to 110 kilograms. The bins were first washed inside and out, and after that, the cleaner was required to tip them on to their sides so that valves at the bottoms of the bins could be washed. In the course of a day ten to twenty or more bins were cleaned in that way, sometimes four to six times for each bin.

When the plaintiff was working in the rubbish room he was at times required to lift damaged bins filled with food scraps

onto trolley jacks. The design of the bins was such that the relevant parts of the trolley jack could slide underneath the bin, but, in the case of damaged bins, it was necessary to lift the bins to allow the trolley jack to slide into place. He was also required to tip the bins on to their sides to empty them.

The plaintiff's duties were rotated between the wash-up room and the rubbish room, one month being allowed in each. The duties in the wash-up room too were rotated between the cleaning of the steel bins and the other work, one month being allowed for each.

When the plaintiff began work at the kettle bank he was employed as a cleaner and cook's assistant. Later, in 1994 or 1995, he became a cook specializing in cooking soup. The kettle bank was a line of about fifteen elevated kettles of three sizes which hung from a raised working platform. Four to six people worked at the kettle bank. Ingredients were usually packed in boxes weighing up to thirty kilograms brought to the kettle bank on a pallet by forklift, although some came in steel bins. The pallets were left either on the platform, or near it on the concrete floor near the kettle bank. The contents of the boxes were emptied into the kettles to be cooked. If the boxes were left on a pallet on the platform, the boxes were, of course, close to the kettles, but if they were left on a pallet on the floor, the boxes were carried up stairs to the platform. If ingredients came to the kettle bank in steel bins, the bins were dragged to the

kettles and the ingredients then transferred to the kettles, either by means of boxes, or of buckets. Once the cooking was finished, the contents of the kettles were emptied into large steel bins placed under the kettles which were then dragged out from underneath the kettles and the kettles were cleaned. The bins underneath the kettles had wheels, but from time to time the wheels were caught in grates in the floor.

Mr Lavarn worked on the kettle bank for three months in 1994. He gave evidence that the cooking began at 6.00 a.m. and the plaintiff started work at 10.00 a.m., after most of the ingredients had been put in the kettles. The plaintiff's principal work was as a cleaner, Mr Lavarn said. Ms Pauline Fraser, a leading hand employed by the defendant, worked on the kettle bank from 1990 or 1991 for ten years. She too gave evidence that the plaintiff started work later than 6.00 a.m: she said 9 or 10.00 a.m. for three or four years beginning in 1993. While Ms Fraser's account of the plaintiff's duties indicated that the work of handling heavy objects expected of the plaintiff on the kettle bank was less onerous than the plaintiff had asserted, it still showed that substantial such handling was required.

I accept that in working for the defendant the plaintiff was required to handle heavy objects in such a way as to put him at risk of sudden acute injury of the kind mentioned in giving evidence by Dr Robert McCartney, who prepared a report dated 28 July 1997 on the plaintiff: a prolapsed intervertebral disc, a crush fracture of the vertebrae, or a severe tear of

the muscles of the back. It is important to note, however, that the plaintiff's case does not rest on any allegation that there was any incident in which, as a result of his handling an item or items of equipment, he suffered such a sudden acute injury. The plaintiff's case is, as I have mentioned, of developing excessive degenerative changes at three levels of the lumbar spine.

Degeneration of the plaintiff's spine was evident as early as 13 September 1982 when the plaintiff was twenty-seven years old. A report of an X-ray of the plaintiff's lumbar spine and sacroiliac region dated that day did not detect any bone, disc, or joint injury, but showed that the disc space between L4 and 5 was "slightly narrowed". That narrowing showed that the degeneration of the plaintiff's lumbar spine had been present for some time before 13 September 1982.

On 14 May 1997, the month the plaintiff ceased working for the defendant, he was examined by Dr McCartney to whom he complained of intermittent lumbar back pain over the previous five to six months. Dr McCartney recorded in the report to which I have referred that the plaintiff had made a claim for worker's compensation for a lumbar back condition "2 years ago", but "[a]pparently this settled after a few weeks". On examination, Dr McCartney found the plaintiff to be tender over L5-S1 with a decreased range of movement in the lumbar back. An X-ray showed "established degenerative changes with the degenerative process most marked at a narrowed L4-5 disc space which contained gas and had marginal osteophyte

formation". Those marked changes were also present in the L3-4 disc space. A computerized tomography scan performed on 16 May 1997 confirmed the degenerative disc and degenerative vertebral disease but demonstrated no disc prolapse or nerve root effect.

The plaintiff, then, suffers from degeneration of the lumbar spine which disease was evident in 1982 and has worsened with time so that from late 1996 it caused him intermittent pain. I should record here that it was not the plaintiff's case that the degeneration in his lumbar spine evident in 1982 was caused by any tasks he was required to perform for the defendant. While there was no dispute at the trial that the handling of heavy objects could cause injuries to the lumbar spine of the kind referred to by Dr McCartney, there was a difference of opinion among experts as to whether the handling of the defendant's equipment and other objects by the plaintiff was a cause of the present level of degeneration of the plaintiff's spine. I do not think it is necessary for me to summarize the views of each of the doctors who gave evidence on the subject and it will suffice if I mention two.

Dr David White, orthopaedic surgeon, examined the plaintiff on 19 November 1999, and in a report dated 23 November 1999 expressed the opinion that it seemed reasonable, in the absence of any other history of trauma, to attribute the severe degenerative change present - which Dr White regarded as considerably in excess of that which could be expected to occur during the course of a normal life's activity to the

plaintiff's age then, forty-four - "mostly to his employment". Dr White added this, however:

> "It is not possible to state with any conviction how much of his impairment is the result of natural degenerative change due to ageing or other constitutional factors. The severity of the pathology present, however, would clearly implicate some significant external factor in its development."

Dr White's opinion was then based on the premiss that the degeneration of the plaintiff's spine was greater than normal for one his age.

Another eminent specialist, Dr Alison Reid, neurologist, examined the plaintiff on 7 August 2000. In her report dated that day she recorded that plain films of the lumbar spine taken on 16 March 1999 showed marked narrowing at the L4-5 disc space with reactive sclerosis and osteophytic changes. The disc contained gas, indicating it was degenerative. Similar, but less severe, changes were seen at the L2-3 and L4-5 levels. A computerized tomography scan of the lumbar-sacral spine taken on 17 January 2000 showed degenerative changes most marked at the L4-5 level where the disc was degenerative and narrowed. There was osteophyte formation, hypertrophy at the right facet joint, and narrowing of the exit foramina. There was no evidence of any definite disc prolapse at any level. Dr Reid found that while the plaintiff had degenerative lumbar spondylosis it was her clinical impression that he was elaborating his complaints. There was in Dr Reid's opinion a significant functional overlay to his presentation. He had a very unusual gait and reported "clearly unanatomical sensory changes" in the lower limbs.

She recorded her opinion as to the cause of the plaintiff's condition as follows:

> "Mr S has chronic degenerative lumbar spinal disease related to many factors including his sex, race, age, and constitution. He has done fairly average unskilled labouring work, but has not been subjected to chronic heavy mechanical loading on the spine, as one might see in a miner, concrete construction worker, or furniture removalist. I do not believe that this man's work activities have caused any significant aggravation of his condition. I believe that his chronic backache is due to the natural progression of the underlying degenerative disease, and furthermore, for the reasons I have discussed above, this man is elaborating his complaints, and there is an undeniable functional overlay to the overall clinical presentation."

Dr Reid elaborated her views in a further report dated 2 August 2001:

> "1. Lumbar degenerative disease is a progressive condition which may start early in life and is related to a number of factors including age, sex, race and constitution.
>
> 2. Symptoms such as back pain due to an aggravation of underlying lumbar degenerative disease may be triggered by activities within or without the workplace, such as bending, twisting or lifting. Such an aggravation caused by such incidents is temporary.
>
> 3. For the workplace to be seen to actually influence the natural progression of the underlying degenerative disease process, the worker would have to be involved in exceedingly heavy work placing mechanical loading on the lumbar spine over a very long period of time.
>
> Mr Sukkhathammavong's workplace activities did not constitute protracted heavy mechanical loading on the lumbar spine over a long period.
>
> This is a very important case and has the potential for setting a dangerous precedent. Lumbar degenerative disease is very common in our society. If workers can claim that their workplace activities have had a significant effect on the natural progression of their underlying degenerative condition, this could open a Pandora's box and floodgate of claims.
>
> I believe this case is very correctly and succinctly summarized by Dr Peter Boys in his report (11 March 1999), when he says:

> 'I believe this man's working capacities reflect the natural progression of spinal degeneration, which in all likelihood would have occurred, notwithstanding his specific work duties with Cook Freeze in the period 1981 to 1997'."

Dr Boys, orthopaedic surgeon, examined the plaintiff on the day he gave his report.

As I have said, the plaintiff was required to handle heavy objects in such a way as to put him at risk of sudden acute injury and indeed he did suffer sudden acute injury on occasions in the course of performing his duties. For example, Dr John Morris, orthopaedic surgeon who examined the plaintiff on 7 June 1997, in a report dated 16 July 1997 to WorkCover Queensland recorded that the plaintiff "had a problem with his back ten years ago. Apparently he lifted a rubbish tin and felt back pain which lasted a few weeks and then gradually settled". Dr Morris added that "[o]ver the last few years he has basically had painfree movement of the back but has had intermittent pain from time to time [sic]". Another example of an acute injury to the plaintiff's spine the effects of which settled may be found in the claim for worker's compensation made in 1995 and referred to by Dr McCartney.

In requiring the plaintiff to handle the heavy things I have referred to, the defendant was probably in breach of the duty of care it owed him and was probably guilty of the breaches of statutory duty alleged. Clause 25(1) of Rule 1 of the

Factories and Shops Act of 1960 provided that a male employee over 18 years of age should not be permitted or allowed to lift, carry, or move by hand any object so heavy as to be likely to cause risk of injury. The plaintiff was permitted or allowed to handle such things. Section 9(1) of the Workplace Health and Safety Act 1989 provided that an employer who failed to ensure the health and safety at work of all the employer's employees, except where it was not practicable for the employer to do so, committed an offence against that Act. There were practicable ways of avoiding the risk of injury to the plaintiff, including the provision of more mechanical lifting devices and changes in the system of work so that heavy objects were lifted by more than one employee. Section 28(1) of the Workplace Health and Safety Act 1995 provided that an employer had an obligation to ensure the workplace health and safety of each of the employer's workers at work.

On the evidence, I accept that prolonged, extremely heavy lifting resulting in heavy loading of the lumbar spine can cause aggravation of degenerative lumbar disease. Such heavy loading can occur in work required of brick layers, furniture removers, and miners. But even though the plaintiff suffered the injuries I have mentioned, I am not satisfied, having considered all of the expert evidence on the subject, that the work he was required to do was a cause of the degeneration of his spine or of any part of that degeneration. It follows that the plaintiff's claim must fail.

To comply with the usual practice in cases like this, I shall now give my assessment of the plaintiff's damages on the assumption that the defendant is in some way responsible for the plaintiff's present condition. There is a difficulty in doing that because there could be different conclusions as to the extent to which the defendant was responsible to the plaintiff. It could be argued, for instance, that the defendant is almost completely liable for the appearance of painful symptoms before the plaintiff reached advanced old age. But on my assessment of the evidence the most likely effect of the plaintiff's work in causing his pain and discomfort - if, contrary to my conclusion, it was established that it had done so - was that referred to by Dr Ronald Packer, orthopaedic surgeon, who gave evidence that the plaintiff's condition would have been as it was in February 2002 in under five years from then "irrespective of his employment".

Mr Rolls, for the defendant, made submissions on the premiss that Dr Packer considered that the acceleration of the deterioration of the plaintiff's condition might be under five years, but my interpretation of Dr Packer's evidence is, as I have indicated, that he was referring to an acceleration of the deterioration of under five years from this year, or approximately nine years from when the plaintiff ceased working for the defendant. The first relevant passage in Dr Packer's evidence is this one from his cross-examination by Mr Rolls:

"Doctor, you say that, in the opinions section of your report on page 2, this man has 'fairly advanced pre-existing and multilevel disc degeneration in the lower lumbar spine'?-- Yes.

And you later refer to that as being an underlying condition?-- Yes.

Do you see that? What do you mean when you say 'an underlying condition'?-- Well, I mean, really that he's developed this as part of his makeup, part of his constitutional condition, that it has developed over a period of time, a degenerative condition of the back.

And would he have - have had that condition irrespective of whatever he did at work?-- Yes, he would have, yes.

And are you able to say that sort of or extent of degeneration he would have had irrespective of his employment?-- I think it would have slowly developed, you know, most likely over a period of 10 to 20 years.

Mmm-hmm. Does that mean that he could have been in the same position that he's in now irrespective of his employment?-- Not necessarily as he is now, I think, but certainly within a short period of time from now.

What sort of period of time are you talking about?-- Well, under five years."

Then, in re-examination, Mr Land, for the plaintiff, returned to the topic:

"Finally, you said, when you were being cross-examined, that - these may not be your exact words, but you thought that he would have to give up work in a period that was under five years?-- Yes.

Am I correct in - do I have that in context?-- Yes, yes.

Is that an estimate that you've made?-- It's purely an estimate, yes.

Is it possible that the time-frame may be greater than five years?-- Yes, it's possible.

And I suppose it's possible it could be less?-- It could be less, yes. It's just purely a calculated estimate.

> Very well. Is it based on anything scientific or-----?-- No, it's probably based on a gut feeling."

The plaintiff has been in disabling, constant pain since he stopped working for the defendant and has been unable to work since. From March 1998 he has suffered from a chronic depression which has aggravated his perception of his pain and discomfort. The cause of the onset of the plaintiff's mental disorder was the onset of the pain and discomfort caused by the deterioration of his spine, although he had been anxious before March 1998 about the condition of his son who suffers from thalassaemia major.

I assess the plaintiff's damages for pain and suffering and loss of amenities at $35,000; $20,000 for the past, the last five years; and $15,000 for the future, the next four years.

The plaintiff has suffered an impairment of his earning capacity. His income tax return and assessment for the last full financial year he was at work, the year that ended on 30 June 1996, shows he earned $19,116.80, or $367 per week, after the deduction of income tax. It was conceded on his behalf that he had been paid until 17 September 1997, so that he would be entitled to compensation for loss of earning capacity for just under five years in the past, and for a further four years in the future. I assess $80,000 for the past ($93,000 adjusted for contingencies) and $60,000 for the future (the five per cent. table applied to $367 per week, adjusted for contingencies).

For loss of superannuation benefits, I should allow $10,200: $4,800 (six per cent. of $80,000) for the past, and $5,400 (nine per cent. of $60,000) for the future. (On behalf of the defendant the percentages applied were not challenged.)

For necessary psychiatric treatment in the future I should allow the sum of $5,760 as sought on behalf of the plaintiff. That calculation is based on the evidence of Dr Peter Mulholland, consultant psychiatrist, that it would cost $160 per month. Three years is a reasonable time to allow for that treatment, I think: thirty-six months at $160 per month comes to $5,760.

The plaintiff's wife, Mrs Vorady Sukkhathammavong, has provided him with assistance and services since his condition worsened in 1998 with the onset of his mental disorder. She assists him, chiefly in dressing and undressing and showering. She massages him, sometimes twice a day, and now does household chores like cooking, lawn-mowing, and other gardening which he formerly was able to do. On behalf of the plaintiff, it was submitted that an assessment in respect of that assistance and those services should begin on 1 July 1998. I accept that that is a proper starting point. Taking into account contingencies, I should allow $37,500 for the past, based on ten hours per week at $20 per hour. The latter figures are based on those in reports by Work Case Pty Ltd: see exhibits 20, 21, and 34, in which commercial hourly rates up to $24.90 are given. Those rates would no doubt have included administration charges and so should be adjusted to

reflect the fact that Mrs Sukkhathammavong provides the services voluntarily. For assistance and services for the future I should, taking into account contingencies, allow $35,000. In reaching that figure I have applied the three per cent. table to $200 per week. The three per cent. table is the relevant one as Mrs Sukkhathammavong will probably provide the assistance and services: see Mott v. Fire and All Risks Insurance Co. Ltd. [2000] 2 Qd.R 34. On behalf of the plaintiff it was submitted that a component of that assessment should be something for hostel care for the plaintiff to allow Mrs Sukkhathammavong some relief from looking after the plaintiff. I am not persuaded, however, that that consideration is relevant in the next four years particularly as the psychiatric treatment proposed for the plaintiff may improve his condition.

There was no dispute that the sum assessable on the principles explained in Fox v. Wood (1981) 148 CLR 438 is $772.20.

As special damages the plaintiff claims medical, rehabilitation, and other expenses of $2,520.62 as set out in exhibit 43 about the quantum of which there was no issue, subject of course to the defendant's denying that it was liable for that sum. In the same category, also set out in exhibit 43, was $349.65 of the sum of $793.40 claimed by the Health Insurance Commission as being payable to the Commonwealth for past Medicare benefits, travelling expenses of $275, and pharmaceutical expenses of $100. Contested, however, were $443.75 of the $793.40 claimed by the Health

Insurance Commission and an item of $4,310 in respect of professional fees allegedly payable to Dr Kamalaruban Ratnam, general practitioner. Dr Ratnam's evidence was challenged but in the absence of any other evidence casting doubt on his I accept that the plaintiff does indeed owe Dr Ratnam the $4,310. Dr Ratnam also gave evidence to the effect that the $443.75 claimed by the Health Insurance Commission, which arose from fees he charged, did not relate to consultations concerning the plaintiff's back condition. I should therefore not include that sum in my assessment of the plaintiff's special damages which would then come to $7,555.27.

There will be judgment for the defendant.

...

HIS HONOUR: I order that the plaintiff pay to the defendant its costs of and incidental to the proceeding.
