

SUPREME COURT OF QUEENSLAND

CITATION: *Trumino v Coles Group Ltd* [2017] QSC 211

PARTIES: **LAWRENCE TRUMINO**
(*Applicant*)
v
COLES GROUP LIMITED
(*Respondent*)

FILE NO/S: SC No 309 of 2017

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 1 September 2017 (ex tempore)

DELIVERED AT: Cairns

HEARING DATE: 1 September 2017

JUDGE: Henry J

ORDERS: **1. I declare pursuant to s 10 of the *Civil Proceedings Act 2011* (Qld) that:**

(a) the applicant is a person referred to in s 237 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) as entitled to seek damages for injuries sustained as a worker; and

(b) s 237 does not prevent the applicant in seeking such damages from seeking damages for psychiatric or psychological injury or for more than one injury;

2. Liberty to apply on the giving of two days' notice in writing; and

3. I will hear the parties as to costs, if costs are not agreed, at 10 am on 29 September 2017.

CATCHWORDS: WORKERS' COMPENSATION – PERSONS ENTITLED TO COMPENSATION – SECTION 237 WORKERS' COMPENSATION AND REHABILITATION ACT 2003 (QLD) – where applicant received two notices of assessment – where one notice of assessment related to physical injuries and another psychological injuries – where applicant's total DPI for physical injuries was over threshold – where applicant's DPI for psychological injuries was under

threshold – where court held that once threshold was crossed the applicant was entitled to claim for both physical and psychological injuries

Civil Proceedings Act 2011 (Qld) s 10

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 179, s 185, s 188, s 189, s 193, s 237

Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013 (Qld) s 237

COUNSEL: G Mullins for the applicant
J McClymont for the respondent
SOLICITORS: Maurice Blackburn Lawyers for the applicant
Minter Ellison for the respondent

- [1] **HENRY J:** The applicant seeks a declaration, pursuant to s 10 *Civil Proceedings Act 2011* (Qld), that he is entitled in an action for common law damages to claim damages for a subsequently caused psychiatric injury in addition to physical injuries sustained in the course of his employment with the respondent on or about 12 May 2014.
- [2] The applicant was employed by the respondent as a filler at Coles at Cairns Central Shopping Centre. On 12 May 2014, he allegedly sustained injuries in a slip and fall on frozen water in the department's freezer storage room sustaining injuries to his lower back. He lodged a statutory workers' claim with the respondent's self-insurer. The claim was accepted on 29 May 2014.
- [3] Associate Professor Williams assessed the respondent and diagnosed an L5/S1 disc prolapse. He performed surgery on the applicant's spine on 14 August 2014.
- [4] The applicant subsequently developed urinary and erectile dysfunction.
- [5] Dr Paul Licina, spinal surgeon, assessed the applicant on 22 April 2015. He assessed the applicant's permanent impairment in respect of his lower-back injury pursuant to s 179 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("the Act"). He assessed 16 per cent degree of permanent impairment ("DPI") with respect to the lower-back injury.
- [6] Dr Ballenden, consultant occupational physician, assessed the applicant's bladder and erectile dysfunction pursuant to s 179 of the Act on 27 July 2016. He assessed 15 per cent DPI for the bladder dysfunction and five per cent impairment for the erectile dysfunction. Adopting the 16 per cent DPI assessment of Dr Licina, the total DPI for the physical injuries was 35 per cent.
- [7] Dr Caniato, psychiatrist, examined and assessed the applicant on 25 August 2016. He noted the applicant had a long history of pre-existing psychiatric and psychological problems. He observed, inter alia:
- "Ultimately, whether Mr Trumino's impairment is in keeping with and consistent with the physical injury is best addressed by the appropriate tribunal and/or body. From a psychiatric point of view, I have previously

postulated that Mr Trumino has an adjustment disorder secondary to the back injury. This is considered a psychological reaction secondary to a physical injury. Since the physical injury remains, I would accept that an adjustment disorder remains a primary work-related diagnosis.”

- [8] The medical assessment tribunal for psychiatric aspects of the Act’s regime convened on 10 November 2006 to assess the applicant’s psychiatric condition. It determined he suffered adjustment disorder with depressed mood in remission and assessed one per cent DPI resulting from the injury.
- [9] On 30 November 2016, the respondent issued two notices of assessment. One, in respect of the applicant’s physical injuries, identified 35 per cent whole person impairment, specifically, L5/S1 disc prolapse at 16 per cent DPI, urinary dysfunction at 15 per cent DPI, erectile dysfunction at five per cent DPI and proximal fracture of the fifth metacarpal of the left hand at zero per cent DPI. The other notice was in respect of the psychiatric condition and it identified the assessed injuries and/or conditions as an adjustment disorder with depressed mood in remission with a DPI of one per cent.
- [10] The *Workers’ Compensation and Rehabilitation and Other Legislation Amendment Act* was passed on 29 October 2013. It contained some amendments altering s 237, which imposes a threshold for claims. That section has been amended since but we are presently concerned with the amendments made in that era.
- [11] As it applies in this case, s 237(1) provides:
 “The following are the only persons entitled to seek damages for an injury sustained by a worker –
 (a) the worker, if the worker –
 (i) has received a notice of assessment from the insurer for the injury and the DPI for the assessed injury is more than five per cent; or
 (ii) has a terminal condition;
 (b) a dependent of the deceased worker, if the injury results in the worker’s death.”
- [12] In the present case, the applicant received the two notices of assessment. One, on form 185.2013.04, as I have mentioned related to his assessment for physical injuries and it gave notice “the degree of permanent impairment (DPI) for your physical injury/injuries is: 35 per cent.” The other, related to his “psychiatric/psychological injury”, gave notice “the degree of impairment (DPI) for your psychiatric/psychological injury is: one per cent.”
- [13] It can be seen immediately that the applicant’s total DPI for his physical injuries carries him well past the five per cent threshold in s 237(1), thus entitling him to seek damages for his injury. Once that threshold is crossed, it might be thought a potential plaintiff would be at liberty to seek damages for the totality of the injury for which he alleges his employer is liable. However, the parties disagree about that.

- [14] The respondent contends s 237 not only confines who may seek damages to someone who has exceeded its five per cent DPI threshold, it also confines that person to seeking damages for the injury the subject of the notice which gave rise to the more than five per cent DPI and not for some other injury.
- [15] The respondent contends that because the applicant had received two notices and only one of them involved a DPI assessment more than five per cent, he can only pursue a damages claim in respect of the injuries in that notice. That is, even though he has crossed s 237's threshold, he is said to be precluded from now pursuing a damages claim including a component for the psychiatric/psychological injury because the DPI assessment was less than five per cent for that particular injury.
- [16] The argument assumes the words of s 237 impose a future constraint on the injuries for which a worker who crosses s 237's threshold can claim but that is not what s 237 says. It contains no such constraint.
- [17] The words of s 237 are concerned to limit which persons are entitled to seek damages. Section 237(1) commences "the following are the only persons entitled to seek damages for an injury sustained by a worker...". The balance of s 237(1) refers to aspects or levels of injury purely as a device to identify the persons in question, not to limit the composition of their future claim.
- [18] Section 237's emphasis on identifying the persons who can claim for damages is equally as obvious in s 237(5) which provides:
"To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker."
- [19] That subsection was literally enacted to "remove any doubt" that s 237 seeks to confine the persons who can pass its threshold by abolishing the right of a person "not mentioned" in s 237(1) to seek damages for an injury sustained. The applicant clearly is a person mentioned in s 237(1) for, even without reliance on the addition of his assessment for psychiatric/psychological injury to his assessment for physical injury, his assessment for physical injury is well above the five per cent threshold. Once past the s 237 threshold, the applicant joins the ranks of the persons s 237 allows to seek damages for injuries sustained by a worker. Having allowed him to pass, s 237's work is done. It does not control the future conduct or limits of the applicant's claim.
- [20] Very considerable time was taken in argument in examining other provisions of the Act, particularly those dealing with the methodology of dealing with assessments for psychiatric or psychological injury and assessments for physical injury, such as s 179. There is, no doubt, a difference in that methodology as between physical and psychiatric/psychological assessment processes but its significance lies in matters of process, see, for example, ss 188, 189 and 193.
- [21] It is important the Act's seeming pattern of procedural constraint in confining the early choices or elections the injured worker can make regarding potential compensation and how the worker may in the future be bound by such choices is not wrongly assumed to

carry over as an ongoing constraint upon those who survive its administrative processes and actually qualify as persons who are entitled to seek damages for injuries sustained as workers. There is nothing in those procedural provisions which suggest their constraints carry over into s 237.

- [22] I note for completeness, and in deference to the time spent on it in argument, that s 185, the provision under which the notice of assessment referred to in s 237 is given, does not contemplate the giving of separate notices. That the approved notice of assessment form referred to in s 185(1) has apparently being designed as two separate forms, one for psychological/psychiatric injury, one for physical injury, is doubtless informed by the pre-litigation administrative processes to which I have referred. But that cannot change the meaning of s 185 and more particularly, for the reasons I have explained, has no present bearing on s 237.
- [23] A declaration will not ordinarily be made unless there is utility in it. That the resolution of this controversy can wait for trial is no answer to this application because there actually remains a settlement conference to occur pursuant to the Act's requirements. It cannot be conducted in a properly informed way without knowing the answer to the issue that has arisen between the parties. I accept, for that reason, that there is utility in making a declaration.
- [24] The declaration sought is in terms slightly broader than realistically is required to quell the present controversy and than is called for by my reasoning. I will modify it to reflect my reasoning. In the event, for reasons I cannot presently predict, the modified form of declaration is not sufficient to quell the controversy, I will give liberty to apply with a view to entertaining further submissions if needs be.
- [25] My view is that costs should follow the event but no particular submissions were made on that. In the event that costs are not agreed, I will hear the parties as to costs at 10 am on 29 September 2017. Out of town parties have leave to appear by telephone.

Orders

- [26] My orders are:
1. I declare pursuant to s 10 of the *Civil Proceedings Act 2011* (Qld) that:
 - (a) the applicant is a person referred to in s 237 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) as entitled to seek damages for injuries sustained as a worker; and
 - (b) s 237 does not prevent the applicant in seeking such damages from seeking damages for psychiatric or psychological injury or for more than one injury;
 2. Liberty to apply on the giving of two days' notice in writing; and
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