

SUPREME COURT OF QUEENSLAND

CITATION: *Thomas Borthwick & Sons (Australia) Pty Ltd v Ataera*
[2014] QCA 123

PARTIES: **THOMAS BORTHWICK & SONS (AUSTRALIA)
PTY LTD**
ACN 006 525 104
(applicant)
v
SHARMANE ATAERA
(respondent)

FILE NO/S: Appeal No 644 of 2014
DC No 57 of 2011

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Mackay

DELIVERED ON: 27 May 2014

DELIVERED AT: Brisbane

HEARING DATE: 19 May 2014

JUDGES: Muir and Morrison JJA and Dalton J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The application for leave to appeal be refused with costs.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – GENERALLY – where the respondent was employed by the applicant in its meatworks as a “print term operator” – where the respondent packed product of the meatworks into boxes for shipment – where the respondent developed carpal tunnel syndrome first in her right hand and then later in her left hand – where the respondent alleged that her work as a print term operator exposed her to a risk of developing carpal tunnel syndrome and that her injury was caused by the negligence of the applicant – whether the primary judge’s finding that the respondent would probably not have developed the condition had an adequate rotation system been in place lacks sufficient evidentiary support – whether the primary judge’s finding that the respondent’s work as print term operator caused the development of the condition in her left wrist lacks sufficient evidentiary support

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied

COUNSEL: G Diehm QC, with N Jarro, for the applicant
R Myers for the respondent

SOLICITORS: Bruce Thomas Lawyers for the applicant
Shine Lawyers for the respondent

- [1] **MUIR JA: Introduction** The respondent, when about 22 years of age, was employed by the applicant in its meatworks as a “print term operator”, packing product of the meatworks into boxes for shipment. She developed carpal tunnel syndrome in the right hand in about August 2009 and a little later in the left hand. She commenced proceedings in the District Court against the applicant alleging that:
- her work as a print term operator exposed her to a risk of injury and, in particular, the risk of developing carpal tunnel syndrome; and
 - her injury was caused by the negligence and/or breach of contract of the applicant through *inter alia*: failing to provide a safe system of work; failing to ensure her rotation from work as a print term operator on a regular or hourly basis in the course of a working day; failing to undertake a risk assessment in respect of the system of work; and failing to ensure that she was not exposed to an unnecessary risk of injury.
- [2] The applicant did not dispute that the respondent had developed bilateral carpal tunnel syndrome but denied that the condition was caused by the respondent’s work. The applicant denied that it was negligent or otherwise in breach of its duty to the respondent.
- [3] After a two day trial the primary judge held that:
- that the applicant failed to take reasonable care to avoid a known risk of injury in the form of carpal tunnel syndrome;
 - the applicant had failed to properly identify and assess such risk;
 - risk of injury could have been minimised by a proper system of rotation;
 - no system of rotation was in place; and
 - the applicant had failed to take reasonable care to minimise the risk of injury to the respondent.
- [4] There was also an issue of causation. In that regard, the primary judge found that the respondent would probably not have developed her condition at or about the time it occurred “had the sort of rotation system supported by Dr Olsen been implemented by the [applicant]”. He concluded that the respondent “therefore proved causation”.

A print term operator’s work

- [5] Dr Olsen, a consultant physician in occupational and environmental medicine, was one of two medical experts who gave evidence in the respondent’s case. In a report

dated 14 March 2012, Dr Olsen gave this description of the respondent's role as print term operator:

- “1. The [respondent] was supplied with a box containing a plastic bag of offal and was required to put the box on a scale;
2. If the weight was correct, the [respondent] would operate a touch screen computer close by and print out a sticker with the product codes and weights;
3. Whilst waiting for the print-out, the [respondent] would fold the plastic over the offal;
4. After the print-out was received, the [respondent] would place a sticker on the edge of the lid of the box and then place the lid on the box;
5. The [respondent] was required to stand with her arms near her waist and press down on the box to ensure that it was packed securely;
6. Pushing down on the box, the palms of the [respondent's] hands were at almost 90 degrees to the forearms as pressure was applied;
7. Once the box was packed, it would be placed on a nearby strapping machine which would automatically place straps around the box.”

[6] The information just quoted was extracted by Dr Olsen from the statement of claim but in compiling his report he relied particularly on a short DVD recording that showed an operator packing four boxes on the production line. Dr Olsen stated that the work he observed on the video would give rise to a risk of carpal tunnel syndrome in both hands. That was because “the work is very fast, it involves rapid movements of the wrist, including some flexion and extension and also ulnar deviation [and] ... there is significant finger pressure including pinch grip ... all ... over a very short cycle time”.

[7] In Dr Olsen's opinion the work he described was “associated with a risk that a person could develop carpal tunnel syndrome”. In his opinion, “risk management should have been used to control that risk and had this been performed diligently, then it is entirely likely that [the respondent] would not have sustained the injury”.

The central issues for determination

[8] The outcome of the appeal depends upon whether the findings:

- that the respondent would probably not have developed the condition at or about the time at which she did develop it, had the sort of rotation system supported by Dr Olsen been implemented by the applicant; and
- that the respondent's work as print term operator caused the development of the condition in her left wrist,

lack sufficient evidentiary support.

- [9] Counsel for the applicant challenged Dr Olsen’s opinion that had there been proper procedures put in place it was likely that the respondent would not have sustained her injury. The procedures advocated by Dr Olsen were appropriately scheduled job rotations so that the operator was exposed to her role for one half day every second day. In his opinion, the longer the operator was away from the role the smaller the risk of injury.
- [10] The weight of Dr Olsen’s evidence in his report was challenged on the grounds that his opinions were premised on incorrect facts. Dr Olsen accepted in cross-examination that he assumed that the respondent had not been afforded any rotation from her primary role at relevant times and that the role was “machine paced”; that is, work the pace of which is determined by the pace set by a machine. He stated that workers who are not machine paced take breaks far more often than machine paced workers are able to do and have “greater opportunities to take breaks as needed or wanted”.
- [11] The primary judge found that although the respondent’s work was not “... machine paced in the strict sense ... it was similar to being machine paced in that there was practical pressure for her to deal with the boxes as they turned up on the conveyor belt”. That finding is supported by Dr Olsen’s oral evidence.
- [12] Dr Olsen was cross-examined about the difference between his understanding about rotation at the time he prepared his report and the evidence of the respondent in that regard. The respondent’s evidence was to the following effect. During a working day, at unpredictable times, the foreman would order the respondent away from the machine to assist others packing the boxes to be processed through the machine. She would spend from half an hour to an hour providing such assistance two to three times a day. Her work rate depended on the speed at which the boxes came to her from the packers. She remembered the work as “going fast more than [she could] remember it going slow”.
- [13] In cross-examination the respondent accepted that during most working days she would “contribute to making up the boxes” and that this was light work. She initially accepted that she would spend between a third and a half of the working day making up boxes but later corrected her evidence saying, “maybe not a third of the day, but probably 20 minutes making the boxes”. She accepted that the average number of boxes processed a day was 600 to 700 and that packing the offal was repetitive work.
- [14] Dr Olsen accepted in cross-examination that there was an obvious difference between the facts in relation to rotation on which his report was based and the evidence but explained:

“... if there’s just ad hoc [rotation] ... depending on how much is coming through on the line, then it may be very useful or very helpful, or it may not. It’s hard for us to say until we know to what extent that’s the case. I recommended, I think, half a day on the strapper out of two days with one and a half days spent on something – it can still be packing, but it ought to be something which is not similar to what’s done on the strapper, obviously.

It needs – so using different skills and different hand movements – for example, not as rapid and avoid pinch gripping and also avoiding

a pushing with the palms of the hands. So if you're able to tell me that the jobs that she was given didn't involve pinch gripping and didn't involve pushing with the palms of the hands on – against resistance, then I would say that if it was – depending on how much time you tell me that she was there, say, in a week, I would obviously be happy to give an amended opinion.”

- [15] The cross-examination continued. Dr Olsen accepted that the packing of offal by weighing it and placing it in boxes would be suitable for job rotation. He accepted also that a task which didn't involve a pinch grip was to be recommended, as was a job which did not involve “pushing with the palms of the hands against resistance”. Whether other repetitive activities would offer suitable rotation, according to Dr Olsen, would depend on the repetition rate. He said that gripping heavily or very firmly was a risk factor. The cross-examination then concluded with questioning relating to the injury to the left hand.
- [16] There was no further exploration of what would provide suitable work on rotation.
- [17] There was no challenge on appeal to the primary judge's findings that:
- the risk to the respondent of acquiring carpal tunnel syndrome could have been minimised by a proper system of rotation; and
 - no such system was in place.
- [18] The finding that the respondent would probably not have developed the condition at or about the same time had the sort of rotation system supported by Dr Olsen been implemented by the applicant was challenged. However, the finding was justified by the evidence.
- [19] Dr Olsen stated, in effect, in his report that had risk management been used and its requirements diligently applied, “it is entirely likely that [the respondent] would not have sustained the injury”. That opinion was not challenged in cross-examination.
- [20] Counsel for the applicant, who was not one of the counsel who appeared on the appeal, sought to erode the weight of this opinion by establishing that some of the factual bases for it were wrong. However, when regard is had to Dr Olsen's cross-examination, it may be seen that he did not resile from the opinion when acquainted with the respondent's evidence and cross-examined on aspects of the work done by the respondent on rotation.
- [21] It was apparent that, in Dr Olsen's opinion, the rotations provided to the respondent, were less than ideal in the overall relief they gave from working at the print term machine because of their sporadic, unscheduled nature and the variability of their duration.
- [22] It was argued that such opinions were in conflict with Dr Olsen's otherwise clear evidence that, even with the system of rotation he proposed, there was still a risk of developing carpal tunnel syndrome. Dr Olsen, however, did not accept that the reduction in risk as a result of what he described as “ad hoc” rotation negated his opinion. As discussed earlier, any such reduction arose entirely by chance and the practices adopted fell far short of the ideal.

[23] The primary judge's finding that the condition in the respondent's left wrist was caused by her work as a print term operator was challenged by reference to the evidence of both Dr Olsen and Dr Coleman.

[24] The applicant placed reliance on Dr Olsen's opinion that there needed to be a temporal connection between the performance of work and the onset of the syndrome. In response to it being suggested to him that there was a "very tenuous cause and effect connection between the print term operator's work and the problems on the left side", he responded:

"It's – on the [indistinct] but I'd be interested in a bit more detail, I think, before I say that, I mean, yes, I think a month is a bit a long. It probably depends how much she was doing in that month. Why was she on selective duties ...

But, yes, no, I will concede I have to say that [indistinct] carpal tunnel syndrome, of course, is usually [indistinct] so if she did develop left sided carpal tunnel when she was on light or selective duties and if there really were a low risk for carpal tunnel syndrome then she certainly had a susceptibility, but combining that with the previous four months of work we're probably in uncharted territory in this in saying – for me to say – so I think I'd prefer to say – it's probably not possible to say that with certainty, if that's what you're asking."

[25] Asked if the fact that the onset of the syndrome on the left side occurred one month after the respondent ceased normal work and was on light, non-repetitive duties showed a "tenuous connection" between the normal work and the symptoms in the left hand, Dr Olsen answered:

"My hesitation in agreeing with it is that we don't know what influence the previous four months work might've actually contributed to the – even to the late onset – I don't think anyone could give you a true and honest answer to that question. So [indistinct] not sure."

[26] The evidence of Dr Coleman relied on by the applicant was as follows:

"So if – you certainly – the left side could have just been coincidence. You can't say it wasn't. But if she was – if she was predisposed, as I think we agreed she was because of her age, her gender, her weight, then she was working using both hands for a period. The main hand was the right hand [indistinct] started, but then gradually it builds up. Possibly, one argues sometimes, that if the right hand's a problem, they use the left hand more. That's a bit debatable whether that's real or not, but in theory they probably do use it a bit more than their dominant hand. So there's sort of a lot of factors. It is – it is a bit grey, and I – I can't be dogmatic about the fact that – of why she got it in her left hand. The only thing that you can say is that there would have been a partial increase predisposition because of the repetitive activities she had done prior to it starting in the left hand."

- [27] That passage offers some support for the primary judge's findings, particularly as Dr Olsen accepted that the respondent had some predisposition to the syndrome. Dr Coleman accepted that the respondent's weight, age and gender also increased her risk of contracting the syndrome.
- [28] Also the passage on which the applicant relied did not occur in isolation. Earlier in the cross-examination, Dr Coleman had said that the respondent had informed him of "symptoms worse on the right to the left". It seems Dr Coleman was referring to symptoms in the left hand when the respondent was performing light duties.
- [29] Dr Coleman also referred to a "cumulative effect" in which there is a gradual build up before the symptoms become obvious.
- [30] The primary judge, perhaps with Dr Coleman's evidence in mind, stated that he suspected that "the greater problem in the right side masked any symptoms in the left for a time". He found that even if that was not the case, the work the respondent was doing as print term operator was a cause of the development of the condition in the left wrist.
- [31] The primary judge heard the medical experts give their evidence. He heard and observed other witnesses' evidence. The expert evidence accepted by the primary judge and his findings in respect of it cannot be described as "glaringly improbable" or "contrary to compelling inferences in the case".¹ The findings are in fact supported by the evidence.

Conclusion

- [32] For the above reasons I would order that the application for leave to appeal be refused with costs.
- [33] **MORRISON JA:** I have had the advantage of reading the reasons of Muir JA and agree with his Honour's reasons and the order he proposes.
- [34] **DALTON J:** I agree with the order proposed by Muir JA, and with his reasons.

¹ *Fox v Percy* (2003) 214 CLR 118 at 128.