

CIVIL JURISDICTION

BEFORE MR. JUSTICE DEMACK

MACKAY, 19 FEBRUARY 1990

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BETWEEN:

SHIRLEY ANN WORTHINGTON

Plaintiff

-and-

THOMAS BORTHWICK & SONS (AUSTRALASIA) LIMITED

Defendant

JUDGMENT

HIS HONOUR: Mrs. Worthington was born on 3 March 1950. She commenced working for the defendant at its Bakers Creek meatworks in April 1982. She worked in various parts of the operation in which women are employed. She sustained an injury in August 1985.

When her first Statement of Claim was delivered on 12 February 1988, it was alleged that her injury was caused by repetitive lifting over a period of years. Particulars were sought and, in giving particulars, it became apparent that there was a specific incident on 1 August 1985. Thereafter, on 18 March 1988, an amended Statement of Claim was delivered. This Statement of Claim repeated the allegations of repetitive excessive lifting and also alleged negligence in respect of the specific incident on 1 August 1985.

A good deal of the evidence given at the trial related to the repetitive lifting which Mrs. Worthington was required to do. In the light of her evidence about the specific incident on 1 August 1985 and the medical evidence, which finds a direct connection between that incident and the injury she clearly sustained, it is not necessary to spend a great deal of time referring to the detailed evidence about repetitive lifting.

The specific incident on 1 August 1985 occurred when she was working in what may be described as the repacking team in the cryovac section of the meatworks. Very briefly, after the meat is removed from the bone it is packed by a team of women into cartons. Each such carton contains cuts of the same kind. Some of this meat is then sent to the cryovac section. There the cartons are unpacked by a male employee. They are taken by women and placed in the cryovac machine. Thereafter they proceed by a conveyor belt through what is called a shrinker and then come on to another conveyor belt. They are taken from this conveyor belt by a team of four women and repacked into cartons.

On the day in question the team of four women packed 757 cartons of meat for the Japanese trade. According to Mrs Worthington, whose evidence I accept, this generally represented about 80 per cent of the work that was done in the day because some meat was packed by the cryovac method for the domestic trade. This meant that in a 6-hour day the four women handled something of the order of 950 cartons.

The cartons were of differing weights, depending on the cut of meat in the carton. However, from material supplied by the defendant it appears that the cartons weighed something between an average of 15 to 27 kgs. The number of pieces of meat in each carton also varied, depending on the cut. Consequently; the weight of the individual pieces of meat being placed in the carton varied. However, as best as I can understand the evidence, it would seem that some of these pieces of meat weighed between 10 and 12 kgs.

The work station where the repacking occurred consisted of a conveyor belt that brought the meat to the station and a packing area below that conveyor belt, and in front of it. The packing area consisted of rollers in a fixed frame. Behind those rollers and underneath the conveyor belt was another set of rollers onto which the packed cartons were pushed and then taken to another part of the works.

The plaintiff and her witnesses say that the meat did not always come through the cryovac area to the repacking section in an orderly way. This meant that there would be occasions when it was not possible to pack a carton fully because a different set of cuts was beginning to arrive. When that happened the women had adopted the practice of putting part filled cartons on what is called a dead rail immediately behind where they were working.

Their method of lifting the carton around onto the dead rail and then finally retrieve it and put it back so that it could be placed on the conveyor rollers and taken away involved lifting along the axis of the carton.

I am satisfied that some time on 1 August 1985 Mrs. Worthington lifted a fully packed carton from the dead rail, swung it round to place it on the rollers where she had been working, and as she did this, she felt a sharp pain in her lower back. I am satisfied that the lifting and twisting motion involved in this action, coupled with the fact that she was lifting along the axis of the loaded carton, produced the necessary trauma to her spine to cause disc damage.

It seems to me to be quite clear in the light of all the evidence that the system that was in operation at that time was a system which exposed the plaintiff to unnecessary risk of injury to her lower back. It was suggested to her that the dead rail was not to be used for the purpose that the women used it. However, Mr. Kahler said that it did not serve any obvious function in the overall layout of the plant other than as a place to leave

partly filled cartons. In these circumstance the situation is that the employer provided a facility which might easily be used as in fact it was used, and offered no clear instruction that this was not to be done. The practice of placing the cartons there had been going on for some time and was unchecked by the defendant. It was, therefore, an inherently dangerous system which was effectively unsupervised.

It is really beside the point that the defendant had not had any other employee suffer this particular injury. At the time, the risk of injury to backs through repetitive lifting and particularly through lifting that involved twisting was well known. The weights of the cartons were well in excess of those which by law may be lifted by a woman constantly at the work place.

An alternative system was clearly available which involved simply a better control of the way in which the various cuts of meat proceeded through the cryovac section and reached the women at the repacking point.

I am satisfied therefore that the defendant did not have in place a system of work that discharged its obligations to the plaintiff. Rather it exposed her to a significant risk of serious injury and failed to offer proper instruction in the way in which she was to carry out her work. In the circumstances then I find the defendant guilty of negligence, which caused injury to the plaintiff.

The defendant has pleaded contributory negligence. The emphasis in the defendant's case has changed during the course of the trial. As the pleadings stood at the beginning, the allegation was that the plaintiff was doing something she had been told she could not do. It appeared from remarks made by the defendants' Manager, Mr. Steen, that in the course of preparation for trial it was discovered that this contention could not be sustained. Clearly, the unsafe practice had been going on for some time and had not been altered. Consequently, the

allegations of contributory negligence originally made cannot be sustained.

It was then alleged that there was in place a system of control of the conveyor belt so if the plaintiff, or any of her fellow employees, was in the situation where it was necessary to control the flow of meat in this packing station, they had only to operate a switch and stop the conveyor belt. Mrs Worthington said she was never told anything by any employee of the defendant about such a possibility. She said the union delegate had told her that the conveyor belt was not to be turned off except in something akin to an emergency. She admitted that it was turned off from time to time but did not believe that it was permitted to stop the conveyor belt in the kind of routine situation that she was faced with. It seems to me that there is simply no evidence that any responsible officer of the defendant informed any of the defendant's employees that they could stop the conveyor belt at their own initiative simply if the work got too much for them.

The only evidence is that some advice was given by the union delegate and it would seem to me that that is hardly a way for the defendant, to discharge its obligations to the plaintiff. I am satisfied that Mrs Worthington was a very hard-working employee of the defendant, that she worked within a system which required considerable speed and dexterity, that she worked quite tirelessly, and did all she could to discharge her obligations towards the defendant. I am satisfied that given the system of work to which the defendant exposed her, she took as much care for her own safety as she reasonably could. I am satisfied that no contributory negligence has been proved.

After the pain Mrs Worthington continued working that day and indeed attended for work the following day. She then saw a doctor and was off work for three weeks. She was complaining of pain in the right upper lumbar spine, as the doctor then noted, and of right leg pain. She was treated with analgesics and rest. She returned to work after 23

August 1985. The doctor's report suggests that she was free from pain, but she says herself that she was in pain daily at work until Christmas.

I accept her evidence on this.

At this point in her life she had substantial financial obligations to meet, along with those accepted by her second husband, and I am satisfied that those economic pressures caused her to work in spite of the pain she was suffering.

The meatworks closed for the Christmas break of about two weeks. She then returned to work in January 1986 and stayed at work until April 1986. She then had three months away from work for an operation unrelated to her injury. She returned to work in June but was able to keep working only for one week. She then left work. She was at that time in constant pain in her lower back.

On 30 October 1986 she was visiting a relative and went to open a gate. As she bent forward, her back, as it were, caught and she suffered extreme pain. She was immediately admitted as an in-patient to the Mater Hospital. She came under the care of Dr. Alan Cook. A CAT scan was performed on 3 November 1986. This showed normal discs at L1/2, L2/3 and L3/4, with generalised bulging, as well as a small posterior disc protrusion at L4/5. At L5/S1, there was a posterior herniation of the disc. There was no bony spinal canal stenosis, and no significant degenerative change of the apophyseal joints. At that time, the right sacro-iliac joint was injected with Depomedril and local anaesthetic. The injection relieved the pain radiating down the right leg. A lumbo-sacral brace was advised and fitted. Mrs. Worthington was mobilised and went home on 9 November 1986. Exercise was recommended and she was instructed to lose weight. She did both of these things, but the back problems continued. She was then placed on physiotherapy and given a T.E.N.S. machine. No improvement followed and on 31 March 1987 she was admitted to hospital for bone grafts. She was in hospital until 11

April 1987. She returned home, but suffered a collapse and was re-admitted and it was found that the wound was seriously infected with Staphylococcus.

After that infection was treated, she showed some improvement but then there was further deterioration. She was admitted to hospital on 17 August 1987 when the wound was re-opened and the sinuses were cleaned out. Subsequently there was an abscess at the site of the wound which was lanced. After the effects of these surgical misadventures passed she noticed she was suffering from a sharp pain on the left side. Further surgery was recommended and Mrs Worthington decided she would like that done in Brisbane because she was apprehensive about the repetition of infection.

Further surgery was performed by Dr. Robert Cook. He extended the bone grafts and removed two discs. Unfortunately, she suffered more infection after that operation. After that period in hospital from 4 July to 19 July 1988, she returned to Mackay. In May 1989 the right graft was revised which involved another period in hospital from 9 May to 29 May.

Mrs Worthington still has constant sharp pain in her right leg and hip. Dr Cook recommends that there be further surgery to fuse the right sacroiliac joint. This will mean that once that surgery is completed and the bone grafts have stabilised, the fourth and fifth lumbar vertebrae will be fused to each other and to the sacrum. The sacrum will also be partly fused to the ilium.

Assuming that all this bone stabilises, it will mean that for the bottom four inches or so of her spine she will have absolutely no movement. It would seem to me more likely than not that she will still have pain in that area from the adhesions and from scar tissue. She certainly should be pain-free so far as the pain that is caused by movement of the joints is concerned. As I understand Dr Cook it is hoped that the radiating pain down the leg will cease. Mrs Worthington, as I understand it, accepts Dr.

Cook's advice and that operation should be undertaken at some stage in the reasonably near future.

Mrs Worthington then is a woman who will be 40 next month. Prior to 1 August 1985 she was an energetic, hard-working woman who was trying to re-establish herself in a second marriage. She was working hard but apparently enjoying a range of leisure activities with her husband who was also employed by the defendant at the Baker's Creek Meatworks. They played squash once a week. They regularly went fishing in a boat that her husband owned. From time to time they went camping with their children.

She also performed the usual domestic tasks without difficulty. Now she has been unable to play squash. Various suggestions were made by counsel to Dr. Cook about what Mrs. Worthington would be able to do once her bone fusion was completed, but I don't recall it being suggested she would be able to play squash. That would seem to me to be unlikely. She does not go boating or camping, and it would seem to me again with a stiff back and the anticipated difficulties with scarring and adhesion, those pursuits are most likely closed to her in the future. Effectively, the incident has meant that she has lost the capacity to work in heavy industry that she had; she has lost the companionship with others of the work place, and her domestic and family life has been grossly disrupted. Throughout all this she has had considerable pain and, as far as I can judge, she will have pain for the rest of her life in some degree or other.

Various claims for damages have been made and I shall deal with those one by one. First of all, the past economic loss has been calculated quite precisely by Taits. I am satisfied that this is a case where that figure ought to be taken virtually in toto. As I have said, there were strong economic pressures to keep Mrs Worthington at work on a regular basis, and her husband worked at the meatworks. Consequently, the precise economic calculations that have been made do indicate the extent of her past economic loss.

The figure is \$57,752.36. She has received substantial payments from Workers' Compensation, so I will allow interest only in respect of the sum of \$7,000. I assess interest in the amount of \$1,900 and, rounding off those figures, I shall allow past economic loss including interest in the sum of \$59,650.

So far as her future economic loss is concerned, I accept Dr. Cook's opinion that, but for this incident, he would have expected her to be able to keep working until she was 60. However, during the latter five years of that time, he would expect there to be some increasing discomfort.

He thought that this would be offset to some extent by the fact that with seniority she should have been able to obtain light employment at the meatworks. As I have indicated, there were strong economic pressures on her. Her husband is still employed at the meatworks and in his evidence indicated that he did not see himself as having any other place in the work scene. Consequently, it seems to me to be more likely than not that Mrs Worthington would have continued in the meatworks. For the purpose of the calculation, I shall assume that she had a future working life of 15 years. This takes some account of the various contingencies in the light of Dr. Cook's evidence.

It has been urged that Mrs Worthington has some residual economic capacity and particularly after she has had her fifth operation she should be able to gain employment. It seems to me that for the purposes of calculation this has to be conceded. I do not pretend to suggest what kind of work is open to her but rather take this into account in the mathematical calculation. Her present wage at the meatworks would be \$330 per week net. Taking into account whatever residual capacity there is, I would assess the present weekly loss in the amount of \$250. I find a future loss of economic capacity in the amount of \$135,000.

Special damages are referred to in two documents, Exhibit 8, which is a letter from the Workers' Compensation Board, and Exhibit 2, which is the plaintiff's statement. These do not exactly coincide and I have assumed Exhibit 8 to be the correct figure. This shows that \$18,039.10 was paid by the Workers' Compensation Board for various items of special damage, and the amount of \$5,886.12 was deducted by way of taxation installments on the weekly payments of workers compensation. This produces a total of \$23,925.22. No part of that attracts interest.

In addition, various items of medical expense were paid from health insurance funds. These amount \$15,850.56, all of which is refundable. Consequently, these need to be allowed as items of special damage, but again there is no amount of interest on these items. The total of these various amounts is \$39,775.78 and I will allow that sum as special damages.

The future operation which Dr Cook advises will cost in all \$2,695. After each of the periods in hospital, Mrs Worthington has needed help from her mother, her husband and her family. I am satisfied that she has needed something like nursing care over a period of three months after each of these operations.

The situation goes well beyond the kind of help that would ordinarily be given within the family because of some of life's misfortunes.

Mrs. Worthington's post-operative history in each case has been seriously dogged by infection and she certainly needed that care at home. These matters are always extremely difficult to assess. The parties have agreed that an appropriate rate is \$7.00 per hour. It seems to me that for the four operations I should allow help over 50 weeks for a period of 15 hours a week. This produces on the \$7.00 an hour an amount of \$5,250. I will allow interest on that sum in the amount of \$1,400. That makes a total assessment in respect of services gratuitously rendered in the past and interest in the sum of \$6,650.

In addition, when Mrs Worthington had her operation in Brisbane, her family moved to Brisbane. This had associated expenses of \$2,856. I am satisfied that this as an expense that was reasonable as part of her care. It needs to be repeated that she had previously had these difficulties after operations and went to Brisbane specifically to avoid post-operative infection. However, that did not happen and it would seem to me that if her family had not been with her, she would have needed to have extraordinary resources of courage and self-composure to have dealt with that unkind blow. So, I am satisfied that those expenses' are properly part of her treatment and care and represent a need that was created by the injuries she suffered and the treatment that was necessarily undertaken following them.

So far as pain, suffering and loss of amenities are concerned, I have already indicated the relevant matters. Mrs. Worthington is still not yet 40 and she has been through a great deal of pain and surgery. She still faces one further operation and continuing pain and loss of enjoyment of life. She also will probably need some medications over the rest of her life. Those are itemised as a specific claim. However, at this stage it is impossible to say what residual pain there will be and whether or not that will be part of her life. So, it would seem to me that that part of the claim is best included in general damages.

For pain, suffering and loss of amenities I will allow the sum of \$55,000. Interest will be paid on \$25,000 of that. I assess interest at \$6,750.

The total of the award then is \$308,376.78. A deduction must be made in respect of the Workers' Compensation payments of \$68,685.95. So, there will be judgment for the plaintiff against the defendant for \$239,690.83 together with costs to be taxed.
