[2013] HCATrans 274

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne

No M68 of 2013

B e t w e e n -

THE HERALD & WEEKLY TIMES LIMITED

Applicant

and

LYNETTE PATTISON

Respondent

Application for special leave to appeal

KIEFEL J
BELL J

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 8 NOVEMBER 2013, AT 2.00 PM

MR S.A. O'MEARA, SC: If the Court pleases, I appear with **MR R.D. KUMAR**, for the applicant. (instructed by Wisewould Mahony Lawyers)

MR M.F. FLEMING, SC: If the Court pleases, I appear with **MR A.D.B. INGRAM**, for the respondent. (instructed by Melbourne Injury Lawyers)

KIEFEL J: Yes, Mr O'Meara.

MR O'MEARA: Your Honours, the point of importance relied upon by the applicant in the present application concerns the construction and proper application of the statutory term "injury" in the *Accident Compensation Act* 1985 of this State. It is a term which arises and applies to practically every case run under this Act and especially the County Court of this State. It had a settled interpretation in a Court of Appeal case called *Georgopoulos v Silaforts*. In our submission, in the present case, the court departed without overruling or, indeed, referring to *Georgopoulos* and thus created a bind for the County Court judges of the State, and we will explain what that bind is.

The factual background of the case can be briefly stated. It is confined and is not controversial. The respondent from about 1983 developed lung disease caused by passive smoking in her workplace at the Herald & Weekly Times. That caused her to cease work in 1990. Her symptoms were, and at the time of trial remained, breathlessness, wheezing, tiredness, cough and production of sputum. In the 20 intervening years, different diagnoses were proffered by general practitioners at different times. They included chronic bronchitis, acute sinusitis. They did not, until at the earliest 2006, and not then until 2008, include any element of emphysema. Prior to December 2010 the applicant had not sought leave to commence - - -

KIEFEL J: When you say "element of emphysema", that tends to suggest that emphysema is some subset of the other illnesses, but in fact it is a quite distinct condition with different consequences.

MR O'MEARA: There was no evidence to that effect in this case.

KIEFEL J: That is the finding of the Full Court, is it not?

MR O'MEARA: Yes, and it was made without evidence. The evidence in the present case is best seen in the report of Dr Burdon, the respiratory physician, and that appears in the application book at 109.

KIEFEL J: Did not the Full Court rely on the evidence of Dr Fisher?

MR O'MEARA: Yes, and it did so, your Honour, in circumstances where Dr Fisher's evidence as to diagnosis had been not relied upon by the primary judge, and it had not been relied upon by the primary judge for reasons which his Honour the primary judge referred to at paragraphs 18 to 21 of the reasons.

KIEFEL J: So to what extent would this matter require this Court to review the medical evidence and in light of the Full Court's findings?

MR O'MEARA: There are factual errors; we cannot escape that. There are findings - - -

KIEFEL J: I am sorry; I should say the Court of Appeal, not the Full Court.

MR O'MEARA: Quite. We cannot escape and, indeed, we refer in our application to errors of fact made, we say, by the Court of Appeal. For the most part, as we read our opponent's written work, no issue is taken with those errors of fact. I am told now that issue is taken with them, but I can explain – I can by example take the Court to one of them, and it is in the central paragraphs of the Court of Appeal's reasons at paragraph 6 at application book 35 where the court found that:

> the applicant knew before 24 December 2007 that she was 'labouring under major symptoms of an increasingly incapacitating lung disorder'. She also knew, because she was so advised by her specialist consultant respiratory physician, Dr Sasse, that, in his opinion, the lung disorder was chronic asthma.

Now, the primary judge found, and there was no contest about it, at application book 16, paragraph 34, that:

> Dr Sasse first saw the plaintiff in March 2009.

The finding at paragraph 6 is simply unsustainable because the applicant had not seen Dr Sasse at the time at which the Court of Appeal found that she is said to have formed a belief on the basis of what she is told by Dr Sasse.

BELL J: Accepting that, I think there was evidence that she had been diagnosed with a lung disorder, at times described as chronic asthma, at times as something else.

MR O'MEARA: Yes.

BELL J: But not emphysema.

MR O'MEARA: Until 2006 and that was, we might say, tentative, and then Dr Fisher said in 2008 that he more confidently diagnosed emphysema following a lung function test. It was that evidence that the primary judge was concerned about at paragraph 41 of his reasons, which appears at application book 18 where his Honour referred to Dr Fisher's evidence that he concluded that the lung function test could only be emphysema. But later in the cross-examination he was taken to the opinions of others, including Dr Sasse, Dr Burdon and Dr Trembath, none of whom referred only to emphysema and Dr Fisher who, as his Honour explained earlier in the reasons, had been the subject of a serious medical procedure prior to giving evidence, drifted in accepting all of the diagnoses. He did not confidently claim it was one or the other in his evidence. He was prepared to accept everybody else's diagnoses.

BELL J: I am sorry, I may have misunderstood this, but is there an issue that the respondent suffers, amongst perhaps a range of conditions, with emphysema.

MR O'MEARA: No.

BELL J: So the difference between the primary judge and the Court of Appeal was the significance of the knowledge of the diagnosis of emphysema?

MR O'MEARA: Correct.

BELL J: What is wrong with the Court of Appeal's view in that respect?

MR O'MEARA: In *Georgopoulos*, if the Court pleases, which is in the applicant's folder of authorities, the Court of Appeal had determined – the page numbers of the book are numbered and at page number 90 of the applicant's collection of materials appears paragraphs 48 and following of the Court of Appeal's reasons in *Georgopoulos*. After referring at paragraph 48 to the terms of the definition of "injury", which is there said to be a general inclusive term, there is reference in paragraph 49 to the potential breadth of that notion and then the finding at 51 that injury:

> is a compendious term. Thus, if a worker has both his hands crushed at work he suffers 'an injury' within the meaning of the Act -

One does not parse the components of what the court in paragraph 52 has described in this and other cases as compensable injury.

BELL J: There is a time limit relating to the claim. Is that so?

MR O'MEARA: That is right.

BELL J: Now, is it necessary from *Georgopoulos* to conclude that once one knows one has symptoms, any sequelae comes within them? What I am raising with you is the practical sense that a person who is diagnosed with emphysema may well take a different view of their condition to a person who understands that they suffer from asthma or bronchitis or are plagued by persistent coughs or some other symptoms. There is a qualitative difference, including the consequences.

MR O'MEARA: Your Honour, that is certainly the flavour of the Court of Appeal's reasons in this case.

BELL J: Can you tell me why it is wrong?

MR O'MEARA: It was not the flavour of the evidence in this case.

BELL J: I see, all right.

MR O'MEARA: Because the plaintiff's evidence in this case was, "From 1990 onwards I suffered breathlessness, wheezing", all the symptoms that I took the Court to a short time ago, "and they continued to progress for a long time and I attended my GP and I was diagnosed at various times but it got worse and it put me out of work in 1990 and I never returned to work, and at the time of trial I have the same symptom complex. It has not changed". The effect of the evidence of Dr Burdon, for example, is that this is, whilst something that might be progressing, it is not, as the flavour of the Court of Appeal reasons would suggest, something that is about to dramatically deteriorate. Dr Burdon in that page of the application book which I went to a moment ago – I think it is 109 – said:

> Ms. Pattison suffers from mild chronic airways disease of the mixed emphysematous and chronic bronchitic types.

At paragraph 3 under "Opinion and Comments":

> In my opinion, Ms. Pattison's prognosis is good, in that her life expectancy will not be reduced.

Then in the last line and a half:

> In my opinion, her symptoms of cough, sputum production and breathlessness will continue indefinitely.

Now, the point of the present case was that directing attention to the terms of paragraph 135AC of the Act, which as your Honour Justice Bell correctly identifies as imposing, if you like, a bar, a time limit type bar - that is at page 72 of the book of authorities – it is said at the top of page 72 there, in that section:

> if the cause of action arose before 12 November 1997 –

so it is this case –

> and the incapacity arising from the injury was not known until after –

that time - that is this case - then –

> unless an application . . . has been made . . . 3 years after the date –

then an application is made unless the person has knowledge at a period after three years before the date of the application. It is a bit confusing, but they have to have knowledge by a certain time, the onus being on them to show that they did not have knowledge of the incapacity arising from the injury, is the effect of that section.

Now, in this case the incapacity was putting the plaintiff out of work, breathlessness, tiredness, wheezing, coughing, sputum, et cetera, and they were always the symptoms and they related the – they continued to be the symptoms in a malady which, as the plaintiff described in her evidence, was just her chest, but it never got any better and there was not any suggestion it was ever going to get any better.

BELL J: So the plaintiff said from her perspective her problems were all in her chest. Is that right?

MR O'MEARA: Correct, yes.

BELL J: Then in 2008 she was told by a doctor that what that involved in that complaint was the condition of emphysema.

MR O'MEARA: Correct.

BELL J: That, in the way the Court of Appeal saw the matter, was a relevant circumstance in the sense that there was a qualitative difference between the condition of emphysema and knowing that you have chest problems that mean that you are often short of breath and suffer other distressing symptoms?

MR O'MEARA: Yes, what the Court of - - -

BELL J: Well, now, I am just having difficulty understanding how the County Court judges are going to have difficulty with the definition of "injury" and the way it has been applied in this case. You say that there is some confusion generated.

MR O'MEARA: May I state it briefly?

BELL J: Yes, but - - -

MR O'MEARA: Because I think I might be able to.

BELL J: Very well. Can I ask if *Georgopoulos* – does *Georgopoulos* involve some acceptance of *Barwon Spinners v Podolak*?

MR O'MEARA: Yes, it does.

BELL J: Well, the Court of Appeal seems to have accepted *Barwon Spinners v Podolak* at application book 38, paragraph 12, does it not?

MR O'MEARA: Yes, it does, but the Court of - - -

BELL J: So what is the difficulty for the County Court judge?

MR O'MEARA: Well, in effect in both accepting *Barwon Spinners*, one in *Georgopoulos* and one in the present case, they are both taking *Barwon Spinners* to stand for different things.

BELL J: They are applying a principle which they agree on to different sets of facts, surely?

MR O'MEARA: Well, they do not agree on it and the result of this case demonstrates that they could not possibly agree upon it, with respect.

KIEFEL J: The essential question issue that the application involves is one of fact, is it not? It arises because of paragraph 7 – it arises from paragraph 7 of the Court of Appeal.

MR O'MEARA: Yes, it does.

KIEFEL J: That is whether the emphysema is a disease so different in kind and consequences from those earlier diagnosed.

MR O'MEARA: Quite. It is whether it is an injury separate from the compensable injury in the Act. In this case the contention which the judge accepted, on ordinary principles, we would say, and he refers to them in

paragraph 57 of his own reasons, the contention was that the compensable injury here was a progressive disease of the lung and it was not necessary to parse what the components of that disease were. It was necessary only to identify what the incapacity arising from the injury was - the injury generally stated. In that case, the judge accepted that it was, consistently with the evidence of Dr Burdon, a mixed chronic obstructive lung disease.

Then his Honour the primary judge accepted that the respondent had knowledge of the consequences of that disease at that time – the compensable injury. Now, what the Court of Appeal did in the present case was to disaggregate the compensable injury, and it did so by separating emphysema from the other conditions which appeared in the history, which were chronic asthma and chronic bronchitis in particular, as referred to by Dr Burdon.

Now, the problem with that so far as *Georgopoulos* is concerned is that *Georgopoulos*, commencing in that paragraph at paragraph 51 of the reasons, had determined that "injury" for the purposes of this Act means compensable injury which is a compendious term and does not require the various components of an injury to be parsed. At paragraph 68, page 94 of the book of materials, the court, if you like, emphasised the point by saying that Parliament could not have intended that:

> the notion of serious injury depended upon precise medical diagnostic differentiation between the individual components of an injury suffered in the causal circumstances envisaged by s 134AB.

Again, at paragraph 71 over the page at the final sentence in paragraph 71:

> The more probable view is that Parliament's intention was that the relevant concept of injury was not to be disaggregated in this way.

Georgopoulos determined that when one looks at injury for the purposes of this Act, one looks at a compendious concept comprised by all of the physical and other features which arise causally from the incident giving rise to the injury. In this case the incident giving rise to the injury was exposure to smoke in the workplace. The compensable injury did not need to be parsed so far as – or disaggregated, as the court described in *Georgopoulos*, by looking at the different components. It was sufficient, as the primary judge did, to look at what were the features of this lung disease, whether you can identify it precisely or not, and the features of the lung disease were those symptoms which have been extant since 1990 and thus – and they were obvious. The Court of Appeal agreed that those symptoms were obvious at paragraph 5 of its reasons and it agreed with the primary judge.

BELL J: The Court of Appeal considered that:

> What the respondent did not know . . . was that, in addition to the chronic asthma or chronic bronchitis . . . she was also suffering from a further and significantly different physiological change to her respiratory system consisting of the progressive destruction of the tissue of her lungs, which would not only not mend or repair but progressively worsen -

Now, that is the Court of Appeal's conclusion on the facts at application book 39, paragraph 14.

MR O'MEARA: In our submission, Dr Burdon did not go anywhere near supporting that.

BELL J: That may be right, but when one comes back to the confusion that you suggest has been engendered in the County Court, for my own part it does not seem that that strays from any statement of principle in *Barwon Spinners* or *Georgopoulos*. It accepts the notion that one does not divvy up every symptom, but it recognises a difference between suffering what one understands to be from chronic asthma, and being informed one is suffering from emphysema.

MR O'MEARA: It does that, your Honour. The point we make about the evidence beyond that, we say the difficulty is that it does the very thing which *Georgopoulos* by in that case saying the compensable injury was a psychiatric injury together with a back injury and saying together they are the compensable injury, it does the very thing that *Georgopoulos* said should not be done and that is to disaggregate injuries that arise from the same causal mechanism, as referred to at paragraph 51 of *Georgopoulos*. That is the difficulty that arises at a trial level because of the different approach to the concept of injury. If the Court pleases.

KIEFEL J: We need not trouble the respondent.

The respondent sought leave to bring proceedings for damages in respect of an injury sustained in the course of her employment with the applicant between 1985 and 1990. The issue which arose, by reason of sections 135A(2)(b) and 135AC(b) of the *Accident Compensation Act* 1985 (Vic), was whether the respondent's incapacity arising from the injury was known to her at a particular date. The Court of Appeal held that the respondent did not have the requisite knowledge because emphysema was a disease so different in kind and consequence from those with which she had been diagnosed neither the nature or scale of the consequent long-term impairment of her lung function was known to her.

The applicant's application for special leave does not raise any question of principle. It denies the effect of this finding as relevant to the required state of knowledge and challenges other findings of fact. It does not, in our view, have sufficient prospects of success to warrant a grant of special leave. Special leave is refused with costs.

AT 2.22 PM THE MATTER WAS CONCLUDED