CITATION: *Corrie v Metcash Trading* [2012] NTMC 046

PARTIES:	RODNEY PHILLIP CORRIE
	v
	METCASH TRADING LIMITED
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Interlocutory
FILE NO(s):	21112528
DELIVERED ON:	18 September 2012
DELIVERED AT:	Darwin
HEARING DATE(s):	13 September 2012
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

WORKERS REHABILITATION & COMPENSATION ACT – whether a sequelae to a primary injury is, of itself, so much a part of the primary injury that it does not engage the provisions of Part 6A, Division 1 of the Act.

WORK HEALTH COURT RULES 9.01(3)(c) and 9.01(3)(e) – whether a worker in his pleading must particularise both the nature of the injury or disease, and the nature of the disability suffered as a result of that injury or disease.

REPRESENTATION:

Counsel:

Worker:	Mr Grove
Employer:	Mr Boland

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2012] NTMC 046
Number of paragraphs:	25

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21112528

BETWEEN:

RODNEY PHILLIP CORRIE
Worker

AND:

METCASH TRADING LIMITED
Employer

REASONS FOR JUDGMENT

(Delivered 18 September 2012)

Mr J JOHNSON JR:

1. This is an interlocutory Application by the worker in the substantive proceeding to amend his Statement of Claim[1]. On 26 July 2012 the worker's solicitor informed me that such amendment was necessary prior to the matter being listed for hearing, and I left it to the parties to attempt to agree the form and content of their respective amended pleadings.

2. When the matter next came back before me on 30 August 2012 I was informed by the parties that the employer objected to the worker's amended pleading on grounds, inter alia, that it asserted a 'new' psychiatric injury and that injury needed to be mediated prior to the employer agreeing to its inclusion by amendment.

3. Shortly thereafter, on 10 September 2012, the worker filed an interlocutory Application seeking leave to amend his Statement of Claim in the form annexed to an accompanying affidavit. By that stage the employer had, by

[1] The worker's initial Statement of Claim was filed in the Court on 4 August 2011.

letter dated 10 September 2012, articulated a number of further objections to the pleading but, by the time the Application came on before me for hearing on 13 September 2012, the parties had confined their divergence to two main issues of contention.

4. The first issue was this: where a worker suffers a sequelae to a primary injury, is that sequelae of itself so much a part of the primary injury that it does not, as a matter of law, engage the provisions of Part 6A, Division 1 of the Act.[2]

5. The second issue was: should a worker in his pleading be required to particularise both the nature of the injury or disease, and the nature of the disability suffered as a result of that injury or disease.[3]

First Issue

6. Part 6A of the Act is headed "Dispute Resolution" and Division 1 is headed "Mediation". I think it will be suffice for the purpose of these reasons if I recite the two key sections in Division 1 that arise for consideration in this interlocutory dispute.

7. Section 103B defines "dispute" in the following way:

> For the purposes of this Division, a dispute arises where a claimant is aggrieved by the decision of an employer:
>
> (a) to dispute liability for compensation claimed by the claimant;
>
> (b) to cancel or reduce compensation being paid to the claimant; or
>
> (c) relating to a matter or question incidental to or arising out of the claimant's claim for compensation.

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[2] That is, a requirement for the worker to be formally in dispute with the employer as to the sequelae, and to have that dispute mediated as a pre-condition to commencing proceedings upon it.

[3] Rules 9.01(3)(c) and 9.01(3)(e) of the *Work Health Court Rules*.

8. Section 103J(1) makes mediation of any such "dispute" a pre-condition to the commencement of proceedings:

> Subject to subsection (3)[4], a claimant is not entitled to commence proceedings under Division 2 in respect of a dispute unless there has been an attempt to resolve the dispute by mediation under this Division and that attempt has been unsuccessful.

9. Counsel for the worker, Mr Grove, cited the following central tenets in support of his contention that section 103J(1) was not engaged by the worker's subsequent pleading[5]:

- The definition of "injury" in the Act is a broad one, and "includes a "disease" which is defined to include "a physical or mental ailment, disorder or morbid condition, whether of sudden or gradual development..."[6]

- "If the worker is asserting that an injury is a consequence of another injury, the worker must prove what he or she asserts. Plainly, a physical injury may have consequences beyond the actual injury to the specific part of the body originally injured and, if so, they are part of the original injury. But whether or not such sequelae are part of the original injury requires proof of a causal connection".[7]

- "...the expression "dispute liability for compensation" in s 103B(a) is so close to the expression "dispute liability for compensation" found in section 85(1)(c) that I think it is clear that the draftsman had in mind, when referring to "dispute liability for compensation claimed by the claimant" in s 103B(a), that a claim had been made in accordance with s 82 which had been disputed in accordance with s 85(1)(c). A letter written to an employer is not "a claim" because s 82(1)(a) requires a "claim" to be "in the approved form" "[8].

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[4] Not here applicable.

[5] Rule 8.04 of the *Work Health Court Rules*.

[6] *Hicks v Bridgestone Australia* (1996), unreported decision of the Court of Appeal, per Mildren J at page 9.

[7] *Newton v Masonic Homes Inc* [2009] NTSC 51, per Mildren J at [25].

[8] *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83, per Mildren J at [22].

- "...it seems to me that ordinarily a worker should not be required to make a further claim for workers compensation for any incapacity which results from a sequelae or secondary consequence of an original injury. This is because there is a reasonable cause for not doing so: the original claim form is ordinarily a blanket claim form which covers such an eventuality and the possibility of there being secondary consequences to any injury is within the reasonable contemplation of the employer"[9].

- In any event, section 103J(1) of the Act is a 'procedural' provision[10] and, if the worker is found to be in breach of that section, the jurisdiction of the Court is not thereby ousted. Subject to any untenable prejudice to the employer, it retains jurisdiction to waive any such breach and proceed to determine the totality of the dispute between the parties.[11]

Consideration

10. It is plainly apparent that the worker in this proceeding, having already attempted to resolve the primary dispute between the parties[12] and that attempt having failed[13], has met the crucial pre-condition in section 103J(1) of the Act to commence proceedings.

11. It is now asserted by the worker that a psychiatric injury has arisen as a sequelae to the primary injury. It is my opinion, and albeit on a relatively concise survey of the cases referred to me by Mr Grove, that subject to causal connection being asserted[14], a sequlae is a component part of the primary injury from which it flows and so much a part of that primary injury

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[9] *Van Dongen v NTA* [2009] NTSC 1, per Southwood J at [43].

[10] *Johnston v Artback NT: Arts Development & Touring Inc* [2010] NTMC 071, per Lowndes SM at [18].

[11] See also Rules 1.12, 3.04(1) and 20.02 of the *Work Health Court Rules*.

[12] Notice of Decision dated 28 February 2011 and letter to the Authority from the worker's then solicitors, 'Aussie Law Consultants', dated 7 March 2011, indicating that the worker was aggrieved by the employer's decision.

[13] Certificate of Mediation dated 5 April 2011

[14] And ultimately established if that component of the claim is to succeed.

that it does not require a further application for compensation and the generation of a separate dispute in order to litigate it.

12. Put another way, the proceeding is on foot by virtue of the failed mediation conducted on 1 April 2011. No further reference to, or compliance with, section 103J(1) is necessary to found the jurisdiction of the Court notwithstanding that, in the interim, a sequelae has come to pass.

13. A difficulty that arises on the facts in this particular case is that there is presently no expert medical evidence going to a causal connection between the primary injury and the alleged sequelae. I am not told the reason for that but I presume it to be that the worker is currently living on a disability support pension and unable to fund an expert report.

14. But, in my view, if the worker fails on that element of his claim, then so be it: there would likely be costs consequences as a result. In my experience it is not uncommon for a worker to fail on one or more of the asserted limbs of entitlement and quantum in his statement of claim, but that won't necessarily be fatal to his or her claim as a whole. A worker and his or her legal advisors may have a firm opinion as to a sequelae but, because of a lack of resources or some other reason, lack the present capacity to test its diagnosis and causality by expert medical opinion. In my view, a worker should not thereby be deprived of setting up that element of entitlement by his or her subsequent pleading, and it serves the purpose of putting the employer on notice.[15]

15. The employer complains that such an interpretation would mean that it is deprived of the opportunity to be put on notice of the alleged sequelae; make a decision about liability; and then to either mediate that decision if it is unfavourable to the worker or save the work of defending it if it is not.

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[15] Rules 8.03 and 8.04 of the *Work Health Court Rules*.

16. Having been deprived of such opportunity the employer will then be forced to expend additional resources to meet the sequelae element of the worker's case, and those additional resources will be thrown away if the sequelae is abandoned or not ultimately made out. Tactically, it is conceivable that a worker could plead a sequelae and then sit on his hands and let the employer expend resources with a view to defeating it. That may, of course, pose some prejudice to an employer but any such prejudice must, in my opinion, ultimately be remedied by an order for the costs thrown away of such endeavour.

17. Of course I acknowledge the trite law that pleadings define the issues in dispute between the parties and avoid surprise at trial[16] but, in my opinion, the proposed subsequent pleading of the worker in this matter does not offend that law. It pleads and particularises a relevant injury[17], puts the employer on the required notice of it, and the worker will stand or fall on its proof at trial.

Second Issue

18. Counsel for the employer, Mr Boland, was resolute that the worker's subsequent pleading must "contain clear and precise details" not just of "the nature of the injury or disease" pleaded[18], but also of "the nature of the disability suffered as a result of the injury or disease" pleaded[19].

19. Mr Grove argues that the term "disability" it not known to the workers compensation legislative structure in this jurisdiction. I have some sympathy with that submission given that there are only two occasions in the Act where the word disability occurs: one of which is a reference to the

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[16] Rule 8.08 of the Work Health Court Rules.

[17] "Aggravation, acceleration, exacerbation, recurrence or deterioration of pre-existing depression".

[18] Rule 9.01(3)(c) of the *Work Health Court Rules*.

[19] Rule 9.01(3)(e) of the *Work Health Court Rules*.

application of the Act to sailors employed on a ship[20]; and the other in the context of the need for nursing or personal attendance[21]. Similarly, the *Work Health Court Rules*, other than in Rule 9.01(3)(e), use the word "disability" only in reference to the need for, and the appointment of, a litigation guardian[22].

20. Mr Grove indicated his thought that there had been a slip of the drafter's pen and what was meant to be said was "the nature of the loss of earning capacity suffered as a result of the injury or disease". That certainly accords with my education on the structure of the Act as, quite clearly, a worker would not be entitled to compensation pursuant to Subdivision B of Part 5, Division 3 of the Act if he or she was not totally or partially incapacitated for work.

21. Looking at the entirety of Rule 9.01(3) it seems to me apparent that it attempts to schedule the content of a statement of claim by sequential reference to each of the heads of damage in Subdivisions B, C and D of Part 5, Division 3 of the Act. If that is indeed the case, it makes Mr Grove's argument that the word "disability" in Rule 9.03(e) should be taken to mean "loss of earning capacity" quite compelling.

22. Be that as it may, it is patently not for this Court, in particular in its interlocutory jurisdiction, to diverge from the plain words of the Rule. However, given the centrality of loss of earning capacity in the scheme of the Act, in my opinion it is appropriate to give the worker some leeway: always subject to the nature of the injury or disease and the nature of the loss of earning capacity suffered as a result being properly particularised.

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[20] Section 51(2) of the Act.

[21] Section 73(e) of the Act.

[22] Part 10 and Rule 4.04(g) of the *Work Health Court Rules*.

Findings

23. I find that if a worker pleads a sequelae to a primary injury for which he or she has met the pre-condition mandated by section 103J(1) of the Act, that sequelae injury is, of itself, so much a part of the primary injury that it does not engage the provisions of Part 6A, Division 1 of the Act nor, indeed, generate the requirement for a further application for compensation.

24. I also find that the worker must plead in terms of the nature of the disability suffered as a result of the pleaded injury or disease, but that it will be enough if the nature of the injury or disease and the nature of the loss of earning capacity suffered as a result is properly particularised.

25. I will exercise my discretion and order accordingly.

Orders:

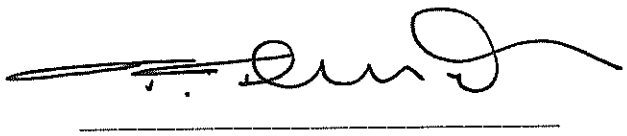
1. Pursuant to Rule 8.08, the worker has leave to file and serve the proposed Amended Statement of Claim annexed to the affidavit of Emma Nicole Schulz sworn 10 September 2012 in the form agreed between the parties at hearing on 12 September 2012 and consistent with these reasons.

2. The employer is to file and serve a Defence to the worker's Amended Statement of Claim within 14 days of service.

3. The proceeding is adjourned to pre-hearing conference for listing at 9:00am on 18 October 2012, with the worker to file and serve a Case Management Statement on or before 16 October 2012.

4. Costs reserved.

Dated this 18th day of September 2012



JULIAN JOHNSON
JUDICIAL REGISTRAR