CITATION: *Tania Marie Luxford & Others v Gebie Civil & Construction Pty Ltd* [2014] NTMC 031

PARTIES: TANIA MARIE LUXFORD
First Applicant

AND

TANIA MARIE LUXFORD as litigation guardian on behalf of

SHAR-NAE MARIE LUXFORD

TIANNA ROSE LUXFORD and

AQUA-JANE LEE LUXFORD

Second, Third and Fourth Applicants

AND

GEBIE CIVIL & CONSTRUCTION PTY LTD

Respondent

TITLE OF COURT: WORK HEALTH

JURISDICTION: Work Health

FILE NO(s): 21225890

DELIVERED ON: 18 December 2014

DELIVERED AT: Darwin

HEARING DATES: 19, 20, 21, 22 and 23 May 2014, 14 and 15 August 2014, 2 September 2014, 15 September 2014, 25 and 26 September 2014.

JUDGMENT OF: JMR Neill

CATCHWORDS:

WORK HEALTH – SECTION 62 DEATH CLAIM - "INJURY" AND APPLICATION OF SECTION 57- TEST FOR A CONSEQUENTIAL INJURY – "MATERIALLY CONTRIBUTED TO BY" AND "RESULTS FROM" IN THE ACT – SECTION 89 INTEREST IN DEATH CLAIMS

Workers Rehabilitation and Compensation Act – sections 3, 4(5), 4(6A) and 4(8), 53, 57, 62 and 89 considered
Van Dongen v Northern Territory of Australia [2009] NTSC 1 applied
Newton v Masonic Homes [2009] NTSC 51 applied
Treloar v Australian Telecommunications Commission (1990) 26 FCR 316 applied
Kooragang Cement Pty Ltd v Bates (1994) 35 NSWLR 452 applied
Swanson v Northern Territory (2006) 204 FLR 392 applied

REPRESENTATION:

Counsel:
Applicants: Michael Doyle
Respondent: Duncan McConnel

Solicitors:
Applicants: NT Law
Respondent: Hunt & Hunt

Judgment category classification: A
Judgment ID number: 031
Number of paragraphs: 125

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21225890

BETWEEN:

TANIA MARIE LUXFORD & OTHERS
Applicants

AND:

GEBIE CIVIL & CONSTRUCTION PTY LTD
Respondent

REASONS FOR JUDGMENT

(Delivered 18 December 2014)

Mr John Neill SM:

Introduction

1. Peter John Luxford ("the Worker") was born on 11 November 1967 and died on 9 November 2011, two days before his 44th birthday.

2. The Worker worked for the Respondent as a truck driver and machinery operator on Groote Eylandt from 26 November 2010 ("the employment").

3. On 9 March 2011 the Worker suffered a right wrist injury in the course of the employment ("the wrist injury"). The Respondent accepted this as a compensable work injury. The Worker underwent medical, surgical and rehabilitation treatment for the wrist injury and was consequently incapacitated for work for about 6 months. He resigned from the employment with effect on 26 September 2011, without ever having returned to work with the Respondent.

4. The Worker committed suicide when he hanged himself on 9 November 2011 (“the death”).

5. Tania Marie Luxford (“Mrs Luxford”) is the widow of the Worker. Shar-Nae Luxford born 25 April 1996, Tianna Rose Luxford born 26 February 1998 and Aqua-Jane Lee Luxford born 3 March 2000 are the children of Mrs Luxford and the Worker (“the children”). The children were all under the age of 18 years at the date of the death and at the date of commencement of these proceedings on 10 July 2012. Shar-Nae Luxford attained the age of 18 years on 25 April 2014 but her two younger sisters are still not legally adults.

6. Mrs Luxford and the children are hereafter referred to jointly as “the Applicants”.

7. The Applicants claim benefits arising from the death pursuant to section 62 of the *Workers Rehabilitation and Compensation Act* (“the Act”). Subsection 62(1) relevantly provides “…where the death of a worker results from or is materially contributed to by an injury, there is payable…” and various benefits are prescribed. Subsection 62(1)(b) makes benefits payable specifically to “the worker’s dependants”.

8. The Respondent conceded that the Applicants are the Worker’s dependants as defined in subsection 49(1)(a) of the Act, for the purpose of subsection 62(1)(b) of the Act – transcript 19 May 2014 page 17.8.

9. Rule 5.07(2) of the *Work Health Court Rules* provides: “Before determining an application under section 62 of the Act, the Court must be satisfied that all persons who are or may be entitled to claim as dependants have come to its attention”.

10. Prior to the hearing of these proceedings the Court was informed by the Applicants’ legal representative that the Worker had two other children from relationships prior to his marriage to Mrs Luxford. Both these

children were adults at the date of the death ("the adult children"). I directed that the adult children be contacted by the Registry of the Work Health Court at Darwin ("the Court") and informed of these proceedings and invited to participate if they so wished. The Registry contacted each of the adult children and recorded each contact. One adult child, Ms Amy Lee Coller, emailed the Court saying she wished to be involved, however she was not heard from again. The other adult child Mr Adam Smith, also known as Adam Luxford, gave no indication that he wished to be involved. Neither adult child filed an appearance in these proceedings. Both adult children were called at the commencement of the hearing but neither of them appeared. Neither adult child communicated further with the Court.

11. I am satisfied that all persons who are or may be entitled to claim as dependants have come to the attention of the Court. I am satisfied it is appropriate now to determine this application under section 62 of the Act with the involvement solely of the Applicants who I find were each a dependant of the Worker at the date of the death on 9 November 2011.

The Pleadings

12. The hearing commenced on 22 May 2014. The pleadings then were the Applicants' Further Amended Statement of Claim dated 19 May 2014 ("the S of C") and the Respondent's Amended Notice of Defence dated 19 May 2014 ("the Defence").

13. The Applicants had filed a Reply to an earlier Defence on 2 April 2014. They did not file an amended Reply. That Reply should have been amended, not to raise or respond to any new issues but simply to reflect numbering changes and deletions in the Defence. The Reply should have been amended to change its reference in paragraph 2 to paragraph 9 of the earlier Defence to paragraph 8 of the final Defence; it should have been amended to change its reference in paragraph 4 to paragraph 12 of the

earlier Defence to paragraph 11 of the final Defence; and it should have been amended to delete its paragraph 6 responding to paragraph 19 of the earlier Defence, which paragraph was deleted in the final Defence. I proceed as if the Reply had been amended to make those non-contentious adjustments.

14. The Applicants pleaded in paragraph 9 of the S of C that the death "resulted from or was materially contributed to by an injury or injuries arising out of or in the course of the employment".

15. The injury or injuries in question were identified in paragraphs 10, 11 and 12 of the S of C.

16. The Respondent denied paragraph 9 of the S of C in paragraph 8 of the Defence. It went on to plead that the death resulted from or was materially contributed to by the act of hanging rather than from any one or more of the injuries pleaded by the Applicants, and it pleaded that this act of hanging was not an injury arising out of or in the course of employment.

17. The Respondent further pleaded that because this act of hanging was deliberately self-inflicted, any remedy was barred pursuant to section 57(a) of the Act. Section 57 of the Act provides:

> "Compensation is not payable under this Part in respect of an injury to a worker:
>
> (a) that was deliberately self-inflicted; or
>
> (b) (not being an injury resulting in his or her death or permanent or long-term incapacity) attributable to his or her serious and wilful misconduct".

18. The Applicants pleaded in the Reply that the act of hanging arose out of the matters pleaded in paragraphs 9 to 14 of the S of C. That is, that the act of hanging was not the injury but the consequence of a work-related injury. They pleaded in the alternative that the act of hanging was not *deliberately*

self-inflicted because the Worker's psychological condition robbed him of volition.

19. The Applicants pleaded the wrist injury in paragraph 10 of the S of C as a work injury and the Respondent admitted this in paragraph 9 of the Defence.

20. The Applicants pleaded in paragraph 11 of the S of C that the Worker suffered "psychological stress as a result of the right wrist injury, its treatment and consequent disabilities and the adverse effects and limitations on his capacity for work and lifestyle". This is a claim that the psychological stress was a consequence of the work-related and accepted wrist injury.

21. The Respondent denied paragraph 11 of the S of C in paragraph 10 of the Defence.

22. The Applicants pleaded additional psychological stress in paragraph 12 of the S of C. They pleaded: "From time to time throughout the course of the employment" the Worker "suffered additional psychological stress as a result of…" acts or omissions by the Respondent pleaded in sub-paragraphs 12.1 to 12.5 inclusive as happening both before and after the wrist injury. This paragraph 12 pleading claims additional psychological stressors separate from those pleaded in paragraph 11 of the S of C.

23. This pleading "throughout the course of the employment" as enlarged by the further words "as a result of" is sufficiently a pleading that the additional psychological stress arose out of or in the course of the employment.

24. The Respondent in paragraph 11 of the Defence denied paragraph 12 of the S of C. It denied the Worker suffered the additional psychological stress at all, or if it existed, denied it was an injury suffered out of or in the course of the employment.

25. The Respondent further pleaded in the alternative that if there was such an injury (which it denied) it occurred as a gradual process over time and the employment did not materially contribute to its development. This is a reference to sub-sections 4(5) and 4(8) of the Act.

26. The Respondent went on in paragraph 11 of the Defence to deny or traverse the Respondent's acts or omissions pleaded by the Applicants in paragraphs 12.1 to 12.5 of the S of C and to plead that in any event these acts or omissions involved management of the accepted injury claim and thus any psychological stress did not occur out of or in the course of the employment.

27. Finally, the Respondent pleaded that even if the additional psychological stress did exist and even if it had occurred out of or in the course of the employment (both of which were denied) then the Respondent's actions were reasonable administrative action such that the additional psychological injury was not an injury as defined in section 3 of the Act.

28. In paragraph 13 of the S of C the Applicants pleaded that "in consequence of the wrist injury and the psychological stress particularised in paragraphs 11 and 12 above, the deceased suffered a major depressive disorder".

29. The Respondent denied the major depressive disorder and its consequential relationship with any psychological stress injury, in paragraph 12 of the Defence.

30. In paragraph 14 of the S of C the Applicants pleaded: "As a result of the major depressive disorder the deceased committed an act of suicide resulting in his death on 9 November 2011".

31. The Respondent denied this, again in paragraph 12 of the Defence.

32. In summary the Applicants' case was that the Worker suffered three separate injuries arising out of or in the course of the employment. These

were i) the wrist injury on 9 March 2011, which the Respondent accepted, ii) the psychological stress suffered as a consequence of the right wrist injury ("the consequential injury") which consequential injury the Respondent denied, and iii) the psychological stress suffered other than as a consequence of the right wrist injury ("the non-consequential injury") which non-consequential injury the Respondent also denied.

33. The Applicants' case was that the psychological stress in either ii) or iii) amounted to a major depressive disorder. The Respondent denied this.

34. The Applicants' case concluded that the Worker's death by suicide on 9 November 2011 resulted from or was materially contributed to by the major depressive disorder. The Respondent denied this.

35. The Applicants did not plead any additional or alternative mental injury other than the major depressive disorder. They did not run their case at hearing on any basis other than the major depressive disorder. Accordingly major depressive disorder is the only psychiatric diagnosis the Court needs to consider as being available on the evidence.

The Issues

36. Mr McConnel for the Respondent in final submissions abandoned the issue of any deliberately self-inflicted injury. He conceded that the issue to be determined was whether the death of the Worker resulted from or was materially contributed to by a psychological injury, namely the wrist injury together with the consequential injury, or the non-consequential injury alone, or some combination of the two. He conceded that none of these injuries could raise the possibility of being deliberately self-inflicted – transcript 26 September 2014 page 2.5 to 2.8.

37. I am satisfied that this concession was properly made in that the Worker's act of hanging himself and the resultant death should be seen as one single

outcome requiring consideration as to its genesis in the circumstances of this case and the applicable law.

38. The following issues remain to be determined:

i) whether leading up to the time of the death the Worker was suffering psychological stress diagnosable as a major depressive disorder;

ii) if the answer to i) is "no" then the Applicants must fail and the Application must be dismissed;

iii) if the answer to i) is "yes" then the next issue will be whether the Worker suffered the major depressive disorder as a consequence of the accepted wrist injury or, if not, whether he suffered that disorder otherwise arising out of or in the course of the employment;

iv) if the answer to iii) is "no" then the Applicants must fail and the Application must be dismissed;

v) if the answer to iii) is "yes" then the final issue will be whether the death resulted from or was materially contributed to by the major depressive disorder, within the meaning of subsection 62(1) of the Act.

The Onus

39. The Respondent's original acceptance of the wrist injury was an acceptance of all the Worker's injuries and their consequences arising from that injury on 9 March 2011. The Applicants do not have to prove that any consequential major depressive disorder arose out of or in the course of the employment. This is so because the original claim was a blanket claim covering all eventualities of the wrist injury and the possibility of there being secondary consequences to that injury was within the reasonable contemplation of the Respondent – see *Keith Van Dongen v Northern Territory of Australia* [2009] NTSC 1 per Southwood J at paragraph [43].

40. Even so, both the existence of any later arising major depressive disorder and that it was a consequence of the right wrist injury must still be proved on the balance of probabilities. It is not for the Respondent to disprove either of these matters. The Applicants bear both the legal and evidentiary onus of proving each matter – see *Newton v Masonic Homes* [2009] NTSC 51 per Mildren J at paragraph [24].

41. In relation to any non-consequential injury, the Applicants bear the onus of proving i) the existence of any major depressive disorder; ii) that it arose out of or in the course of the employment; and iii) if it occurred by way of a gradual process over a period of time, the Applicants will have to prove pursuant to subsection 4(8) of the Act that the employment materially contributed to that injury in that it was the real, proximate or effective cause of that injury.

42. To the extent it might arise, the Respondent, not the Applicants, will bear the legal and evidentiary onus of proving that any non-consequential injury was the result of reasonable administrative action.

Evidence Generally

43. The Worker is deceased and was not available to give first-hand evidence and be cross-examined about the wrist injury or his reaction to it and/or the progress of its treatment. Some evidence was available in the form of documents and records created by the Worker, either contemporaneously or some weeks or months after relevant events. There could be no testing of any such evidence of his state of mind or how he felt about different events in or arising from the employment.

44. Documentary evidence is of course unable to be tested by cross-examination unless the authors are available. Evidence of what other people said may not be admissible or it may be admissible for a limited purpose.

45. Mrs Luxford gave evidence and was cross-examined about her recollections of i) what the Worker had told her, ii) what she had seen him do, and iii) what she had observed about him, at different times, as well as iv) her own direct evidence of events involving her.

46. There was some live evidence from witnesses to events involving the Worker and this was able to be tested by cross-examination.

47. There was documentary and live medical evidence concerning the treatment of the Worker for the right wrist injury, the outcome of the treatment and the Worker's concerns about that, including his suffering wrist pain. The medical practitioners involved in that were available for cross-examination.

48. There was documentary medical evidence of the Worker's having suffered a previous, unrelated work injury to his lower back in January 1995 leading to a chronic pain disorder. There was documentary psychiatric evidence of a diagnosis in December 2000 that the Worker was then suffering a major depressive disorder as a consequence of that back injury, the consequential pain and the effects on his life.

49. The Worker was never assessed or treated by a specialist psychiatrist in relation to the employment or the wrist injury of 9 March 2011 or any subsequent psychological stress, or any subsequent major depressive disorder. There was evidence from his treating health service providers about his mental state.

50. The reports of as well as the live evidence at the hearing from two specialist psychiatrists were based upon their assessments of the Worker derived for the most part from secondary and tertiary sources. Neither psychiatrist ever met the Worker or had any clinical experience of him. Their professional opinions concerning the Worker were able to be tested by cross-examination but some of the material on which they based their

opinions was not able to be tested and so was of variable weight and reliability.

51. Section 110A of the Act provides:

> "(2) The proceedings of the Court under this Division shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and the *Work Health Administration Act* and a proper consideration of the matter permits.
>
> "(3) Subject to this Act and the *Work health Administration Act*, the Court in proceedings under this Division is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit".

The Division referred to in this section is Division 2 and it relates to proceedings before the Court.

52. Notwithstanding the significant evidentiary and procedural difficulties arising in the circumstances of this case the hearing proceeded before me over 11 days of evidence and submissions with commendable practicality and marked by courtesy and efficiency on the parts of both counsel. Essentially no time at the hearing was lost in arguments about the admissibility of evidence. This approach allowed the Court to be as fully informed as the circumstances could permit.

The Evidence of Mrs Luxford Specifically

53. Counsel for the Respondent submitted that there were significant inconsistencies between the history given by Mrs Luxford to Dr Ewer and her evidence at trial, and significant inconsistencies between that history and/or her evidence and evidence and records of other witnesses. He submitted that these inconsistencies "…cannot be explained away as being the result of the widow's emotional state at the time of interview. They go beyond a failure to accurately recall, or simple mistakes" – see Outline of Employer's Submissions (undated) paragraph 6.

54. I do not agree with this submission.

55. I had the opportunity to assess Mrs Luxford's evidence and her demeanor over days in the witness box and under cross-examination. I accept that there were some inconsistencies but in my view this was to be expected in the circumstances. I would have been more concerned if Mrs Luxford's evidence had been word-perfect. In my view her narrative was essentially consistent with other evidence before the Court and she was doing her best to relate the relevant history as she understood and recalled it. I accept her evidence overall.

The Existence of Psychological stress

56. By medical certificate dated 9 September 2011 orthopaedic surgeon Dr Christopher Morrey who had been treating the Worker's right wrist cleared him to return to suitable restricted work duties from that date, with the prospect of a return to unrestricted duties from 9 November 2011.

57. However, Dr Morrey was more guarded in a report he wrote to GP Dr McLeod also on 9 September 2011. In that report he said:

> "He is now almost six months since he had his reconstruction of his right scapholunate ligament. He has been coming along slowly and at some periods of time he struggled and other times he has gone really well. I think things are settling down and he is well on his way to making a good recovery. He lacks the last 10 or 15 degrees of dorsi flexion and palmar flexion in either direction but has full supination and pronation. He had an episode of severe pain about six weeks ago when he was mowing the lawn. He also had a little pain when he was out fishing. **I think his wrist is going to behave like when you fix an ankle fracture as the six to twelve months after injury your ankle could swell up for no reason at all** (my emphasis). He needs to continue just doing his exercise, he does not need any formal therapy any more and I have cleared him to return to his full duties but he should probably avoid driving the semi trailer with the trailer attached to it as this requires a lot of manual lifting that just may undo things at the moment. We will review him in three months time for a final assessment at that time".

58. I am satisfied on the balance of probabilities and I find that the Worker was suffering psychological stress over at least the period from June 2011 up to the death on 9 November 2011. There was ample evidence of the Worker's state of mind for me to arrive at this conclusion, including but not limited to the following:

i) June to August 2011 - he was fearful about returning to work, about his wrist leaving him unable to carry out his work duties if he did return, and he was concerned about not being able to support his family – affidavit of treating physiotherapist Jared Harris exhibit W17;

ii) appearing "quite down and glum" in July/August 2011 – statement of treating masseuse Barbara Deery exhibit W21;

iii) mid 2011 up to death – Mr Wayne Crapper described the Worker and himself as "best mates". He said "I think I knew Pete really well". He said that the Worker and he saw each other four or five times a week at their respective houses. He described the Worker as "happy-go-lucky" and as having a great sense of humour and as having a kind heart and being willing to do anything for anyone. However he saw the Worker's personality change after the right wrist injury, particularly in the last two or three months before the death. Mr Crapper made these observations: "His mood got a lot worse. He lost all his happiness. He did not smile any more. His eyes were dull. He wasn't the same bloke. He just became more and more like a shutdown man. He started to look totally withdrawn. He wouldn't talk to me like he did before. When he did talk he would talk about shit. He would say strange things. He would talk about anything besides dealing with his real issues and with himself. He would just get up and snap. He said to me that he felt so useless he couldn't support his family any more. He didn't feel like a bloke any more. He would say to me "Mate, I'm not a fucking man any more, I can't provide for my family". He would say it every time we were together…I just watched him go downhill." – exhibit W10;

iv) 3 October 2011 – "In a bad way – wrist remains problematic – has ongoing pain – feels let down by the entire situation – feels work has shafted him – things not good at home – close friend recently died – refer for psychological help" – notes of treating GP Dr Cameron McLeod exhibit W14;

v) 3 October 2011 – diagnosis of “current adjustment disorder with depressed and anxious mood” – referral letter Dr McLeod to psychologist Mr Crispian Jones - part of exhibit W20;

vi) 8 October 2011 – “…depression that was directly linked to his work injury, his subsequent difficulties in accessing treatment & his ongoing issues with post pain treatment. Things were not good at home because of this. From my referral letter one can see that the major focus is the work related nature of his mental health issues & that he had a current work cover claim… In my mind it is clear cut.” – email Dr McLeod to the Worker’s lawyer part of exhibit W13;

vii) October 2011 – BDI-11 assessment (Beck Depression Inventory – second edition) conducted around 5 October 2011 revealing “a severe level of depressive symptomatology evident” – report psychologist Mr Crispian Jones to the Applicants’ lawyer – part of exhibit W20;

viii) October/November 2011 – telephone conversation between the Worker and his brother in which the Worker mentioned he had a life insurance policy and that this might be worth more to his family than he was – statement of Mark Fenton exhibit W6;

ix) evidence generally of Mrs Luxford given before the Court covering the period from about June 2011 until the death as to the Worker’s complaints of wrist pain and her observations of his increased irritability, unusual tiredness, poor appetite, deterioration in concentration and memory, loss of interest in doing much other than simply watching television, lack of motivation, withdrawn behaviour, and increased and persisting use of marijuana; and

x) evidence specifically by Mrs Luxford given before the Court that by October 2011 she was aware that the Worker was very depressed and he was saying she would be better off without him with the result that she was very afraid that he was going to commit suicide.

Major Depressive Disorder

59. The issue I must now consider is whether the psychological stress I have found in the preceding paragraph amounted on the balance of probabilities to a major depressive disorder.

60. Dr Marty Ewer has been a medical practitioner since 1983 and a specialist psychiatrist since 1990 – *curriculum vitae* exhibit W24. There was no dispute and I find that Dr Ewer is an appropriately qualified and experienced expert in the field of psychiatry.

61. Dr Ewer was retained on behalf of the Applicants to review the Worker's history and provide his opinion on the Worker's psychiatric state and its likely cause leading up to and at the time of the death. He was provided with two briefs of relevant material being parts of exhibit W2. He met with and took a detailed history from Mrs Luxford as summarised in his first and main report dated 25 October 2013 which is to be found in volume 3 of exhibit W1 at page 67.

62. Dr John Roberts is also a psychiatrist. He has been a medical practitioner since 1969 and a specialist psychiatrist since 1974 – *curriculum vitae* exhibit E25. There was no dispute and I find that Dr Roberts is an appropriately qualified and experienced expert in the field of psychiatry.

63. Dr Roberts was retained on behalf of the Respondent for essentially the same purpose as Dr Ewer. He too was provided with voluminous relevant material. He was not afforded the opportunity to meet with or take any history from Mrs Luxford. He provided his opinion in three reports. The first was dated 6 January 2014 and this was based on the material provided to him as his brief, including the first report of Dr Ewer dated 25 October 2013. Dr Roberts's first report can be found in volume 3 of exhibit W1at page 125.

64. Dr Ewer said at page 39.5 of his first report that: "Mild to moderate stressors can precipitate psychiatric illness in vulnerable people. In the medico-legal setting it is important that this vulnerability be supported by objective data…". He was able to identify such objective data in this case, namely the Worker's previous psychiatric history.

65. The Worker had been previously diagnosed as suffering from a major depressive disorder. Psychiatrist Dr P.W. Burvill made this diagnosis in a report dated 28 December 2000 addressed to a Perth lawyer who then represented the Worker. Dr Burvill noted that the Worker had suffered a work injury on 31 January 1994 which affected his lower back. Dr Burvill considered the Worker's then psychiatric problems were related to his pain and physical disabilities which themselves were the result of the work injury. Dr Burvill said he had "major reservations about his prognosis, both in the intermediate and long term. It appears that his pain and physical disabilities are chronic in nature, and as his psychiatric state is so closely involved with these, it will necessarily also be chronic" – exhibit W1 volume 4 of 5 at page 88.

66. Dr Ewer went on to say at page 40.5 of his first report: "Mr Luxford was predisposed to developing depression in 2011 given his past history of depression which was sufficiently severe to warrant treatment with an antidepressant over a number of years and which was sufficiently severe for him to be referred to a psychiatrist. He was predisposed to becoming depressed in 2011 given his vulnerable personality structure".

67. Dr Roberts agreed with the idea of vulnerability to depression. He said at page 6.6 of his report dated 6 January 2014: "The best predictor of future depression is previous depression, Mr Luxford would have been by virtue of this pre-existing history a person vulnerable to developing depression especially in the context of marijuana and excessive alcohol use by virtue of the history of previous depression".

68. Dr Roberts considered in the light of the Worker's previous depressive illness and evidence about his somewhat obsessional personality that the Worker had probably suffered from a personality disorder. Dr Ewer felt a more correct description would be "maladaptive personality traits". Importantly, in Dr Ewer's opinion either personality type predisposed the

Worker to increased psychological vulnerability. He said at page 10.1 of his third report "I would see this as him presenting to GEBIE with a significant vulnerability and predisposition to developing depression which means he was more vulnerable to developing depression once he was physically injured".

69. Dr Ewer diagnosed the Worker as suffering from a major depressive disorder in 2011 – report 25 October 2013 at page 35.4. He came to this diagnosis "based upon a reasonable degree of medical probability". He concluded the Worker was probably suffering from this major depressive disorder before the death of the Worker's friend Noel on 10 September 2011 – report page 36.2.

70. He based this diagnosis in part on the history of previous major depressive illness and increased vulnerability to developing depression in the future. He also based it on the history provided to him by the sources identified by him and particularly from Mrs Luxford, and on the DSM IV text – report page 34, 35. He found on the basis of this history that the Worker "was depressed most of the time, for nearly every day in parts of 2011. She gave a history that her husband had lost interest in most activities. He had a significant sleep disturbance. He was irritable, agitated and aggressive. She said his energy was low nearly every day. She said he felt worthless and she reports a history consistent with his memory and concentration deteriorating. Her history suggests he became indecisive. I note he committed suicide in in November 2011" – report page 35.5.

71. This history accorded with the diagnostic criteria under the heading "Major Depressive Disorder" in DSM-5 which was handed up to the Court at the hearing as an *aide memoire,* in that it identified five or more of the listed symptoms having been present during at least the same two week period and included not merely one but both of the essential symptoms of (1) depressed mood and (2) loss of interest or pleasure. No issue was made

before me of any differences between DSM-IV and its successor DSM-5 in the relevant diagnostic criteria for major depressive disorder.

72. Dr Roberts did not agree with the diagnosis of major depressive disorder. In particular, the evidence of the Worker's looking for, finding and commencing not one but three employments in late September/early October 2011 was in Dr Roberts's opinion inconsistent with that diagnosis. Dr Roberts's opinion in this first report was that the Worker on 8 and 9 November 2011 was suffering "an acute disturbance" associated with alcohol and medications or drugs rather than any chronic condition – see report 6 January 2014 generally and page 10.3 and 10.9 particularly.

73. Dr Roberts provided a second report dated 22 January 2014 – page 145 volume 3 exhibit W1 - in which he considered evidence of the Worker's alcohol and marijuana use and expressed the opinion that the Worker's suicide was "an acute impulsive act unrelated to his employment at Gebie and was related to longstanding personality disorder factors and possibly to idiosyncratic effects of substances ingested" – page 6.8.

74. Dr Roberts provided a third report dated 8 May 2014 which is in volume 3 of exhibit W1 at page 154. In this report Dr Roberts commented further on the evidence as to the Worker's personality over many years and its relevance to any psychiatric diagnosis. This report focussed largely on the question of any causal connection between the wrist injury or the employment generally, and the death. However, Dr Roberts in this last report said at page 5.3: "The behaviour leading to Mr Luxford's death is in my view a simple continuity of longstanding, pre-existing psychiatric illness". This is very different from Dr Roberts's earlier opinion of an acute impulsive act.

75. Dr Ewer provided a second report dated 14 May 2014 which is to be found in volume 3 of exhibit W1 at page 167. In this report he commented upon the reports of Dr Roberts.

76. Dr Ewer emphasised he had been able to interview Mrs Luxford and take a detailed history from her. He noted Dr Roberts had not been given that opportunity. In Dr Ewer's opinion this put Dr Roberts at a "distinct disadvantage" in formulating his opinions – page 173.4.

77. Dr Ewer specifically disagreed with Dr Roberts that the Worker's obtaining and carrying out some work was inconsistent with the presence of a significant mental illness such as major depression. Dr Ewer said: "I treat many patients suffering from a major depressive disorder and most of them continue working. This is consistent with the literature (sources provided) where the authors discuss the ability of people suffering from major depression to work. They say that generally, in people suffering from major depression, they may be only out of the workforce temporarily" – page 173.5.

78. Dr Ewer said at page 174.8 that "Mr Luxford's depression may have fluctuated subsequent to him finishing employment with Gebie but based on the evidence I have, his depression did not fully resolve and in fact the evidence indicates that he continued to be significantly depressed, on an ongoing basis, subsequent to his employment with Gebie ending".

79. Dr Ewer concluded at page 174.9 and over the page to 175, as follows: "Whilst Dr Roberts is somewhat unclear when he refers to an "impulsive act" it is important to point out that Mr Luxford's widow felt her husband was at risk of suicide for some time prior to him committing suicide. The evidence suggests that he was becoming more depressed and that he would have been at risk of suicide for some time. This suggests to me that his suicide was not an impulsive act related to the events on the night prior to him taking his life. The most important factor which contributed to him taking his life was him suffering from a depressive disorder".

80. On page 8.2 of his report of 8 May 2014 Dr Ewer considered the statistical link between depression and suicide. He said: "Psychiatric illness is a

major contributing factor to suicide and 90% of people who commit suicide are suffering from a DSM diagnosis **and approximately 60% of people who take their lives are suffering from either a major depressive disorder or a bipolar disorder** (sources identified) (my emphasis). In summary, most people who commit suicide are suffering from a mental disorder and the most common mental disorder associated with suicide is depression".

81. I am satisfied that Dr Ewer did have a significant advantage over Dr Roberts in arriving at his opinion and diagnosis, in that Dr Ewer was able to interview and take a detailed history from Mrs Luxford whereas Dr Roberts was not.

82. I am satisfied that the evidence from Mrs Luxford identified and relied on by Dr Ewer as set out in paragraph 70 above was consistent with Mrs Luxford's evidence before the Court.

83. I am satisfied on the evidence identified by me in paragraph 58 above that the Worker was exhibiting and people in his life were noting symptoms of depression over a period of up to five months prior to the death, and particularly in October and early November 2011.

84. I am satisfied on this history and on the evidence I have identified that the Worker's suicide on 9 November 2011 was not an isolated acute impulsive act. I am satisfied it has to be seen in the context of his history and his symptomatology of depression in evidence before the Court.

85. There was no evidence before the Court from DSM IV or DSM 5 that the Worker's fluctuating mood and his finding and engaging in employment in late September and early October 2011 were activities necessarily inconsistent with a diagnosis of major depressive disorder. Dr Roberts said that in his professional opinion such activities were inconsistent with that

diagnosis. Dr Ewer expressed a contrary opinion, and provided a basis for that contrary opinion.

86. On the basis of Dr Ewer's evidence in his second report that he treats many patients with major depressive disorder and most of them continue working, and the literature he referred to which accords with that experience, I prefer Dr Ewer's opinion on the question of employment and mood fluctuation to the contrary opinion of Dr Roberts.

87. I particularly note Dr Ewer's evidence about the relationship between depression generally and major depressive disorder specifically, with suicide.

88. On the evidence of the Worker's prior history of major depressive disorder, the opinions of both psychiatric experts that he had a consequent vulnerability to further depression, the evidence of the Worker's psychological stress from mid-2011 up to the death, and the fact of his suicide on 9 November 2011, I prefer the opinion of Dr Ewer to that of Dr Roberts on the question of diagnosis.

89. I find that in the five or so months leading up to and on 8 and 9 November 2011 the Worker was suffering a major depressive disorder.

Consequential Injury

90. The concept of consequential injury is also known by such terms as secondary injury or *sequela* (in the singular) or *sequelae* (in the plural). However it may be described, it is trite that the concept is well known and accepted in workers' compensation law, including in the Northern Territory.

91. The concept of consequential injury does not specifically appear in the Act. It can however be derived from the definition of "injury" in the Act.

92. "Injury" is relevantly defined in section 3 of the Act as follows:

> "*injury,* in relation to a worker, means a physical or mental injury arising…out of or in the course of his or her employment and includes:
>
> (a) a disease; and
>
> (b) the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing injury or disease…".

93. This is a very broad definition. The use of the word "includes" means that the possible relationship of a later injury to a pre-existing injury or disease is not limited to the specified categories of aggravation, acceleration, exacerbation, recurrence or deterioration. An injury which does not come within one of those five specified categories can still otherwise arise from a pre-existing injury or disease, as a consequence thereof.

94. A psychological injury can arise in the context of a pre-existing physical injury. Although that psychological injury might be a consequence of that earlier physical injury, it cannot strictly be said to be an aggravation, acceleration, exacerbation, recurrence or deterioration of that pre-existing physical injury.

95. The fact that a consequential injury is neither defined nor specifically referred to means that the Act does not prescribe the degree of causation required for a later injury to be a consequence of a pre-existing injury. This is to be found in the Northern Territory case law.

96. In *D & W Livestock Transport v John Ernest Smith* (1994) 4 NTLR 169 in paragraph 2. Kearney J approved the idea that "injury" embraces any secondary consequences of the initial injury "adverse to the injured person".

97. In *Henry Walker Contracting Pty Ltd v Anthony Edwards* [2001] NTSC 16 at paragraph [7] Angel J dismissed the submission that a later psychiatric injury was not "part of the worker's original claim".

98. In *Rodney Phillip Corrie v Metcash Trading Limited* [2012] NTMC 046 Judicial Registrar Johnson described the relationship in apt terms. He said at paragraph [11] : "It is my opinion… that subject to causal connection being asserted, a sequelae (*sic*) is a component part of the primary injury from which it flows and so much a part of that primary injury that it does not require a further application for compensation and the generation of a separate dispute in order to litigate it".

99. The foregoing statement begs the questions of what is the test to establish the said causal connection, or what is involved in having a *sequela* "flow" from a primary injury?

100. These questions were answered in *Van Dongen v NTA* [2009] NTSC 1 by Southwood J in paragraph [39]. Although the learned judge did not set out the reasoning whereby he arrived at his test, his conclusions were clear. They established the parameters of the causative link required between a primary injury and a consequential injury and they are binding on this Court.

101. Southwood J said that the relevant primary injury must have "directly and **materially contributed** (my emphasis) to the development and persistence of the mental injury which resulted in the appellant's incapacity". He went on towards the end of paragraph [39] to find that "The appellant's Post Traumatic Stress Disorder was not a condition **resulting from** (my emphasis) the physical injuries which the appellant sustained".

102. I am satisfied that the test to be applied to the relevant causal relationship is that the primary injury must have materially contributed to or resulted in the secondary or consequential injury.

Results From/ Is Materially Contributed To By…

103. The Act uses these concepts singly or together in four places establishing the test for causation in four different circumstances. These are:

i) section 3 – the definition of "injury" does not include an injury or disease suffered by a worker "as a result of" reasonable disciplinary or administrative action;

ii) section 4(5) and (6A)– these deal with non-acute injuries or diseases arising over time and require that the employment should "materially contribute" to such injury or disease; subsection 4(8) says the employment is not to be taken to have materially contributed to an injury or disease unless the employment was the "real, proximate or effective cause" of the injury, disease etc;

iii) section 53 provides that an injured worker is entitled to compensation under the Act where the injury "results in or materially contributes to" the worker's death, impairment or incapacity; and

iv) subsection 62(1) which makes benefits payable to a worker's dependants where the death of the worker "results from or is materially contributed to by" an injury.

104. I am satisfied that the concept of material contribution for the purpose of a consequential injury and also where used in the Act elsewhere than in subsections 4(5) and 4(6A), is entirely different from and less onerous than the concept of material contribution defined in subsection 4(8) of the Act which requires that the employment be the "real, proximate or effective cause" of the injury or disease.

105. The concept of "material" contribution for the purposes of a consequential injury and elsewhere in the Act does not require proof that an injury was the real, proximate or effective cause of anything. It does not require proof that it directly caused something else or even that it was the most important factor leading to that something else. A causal connection must be established on the balance of probabilities between the one thing and the other but it will not matter if that causal contribution is large or small – see the Full Court of the Federal Court in *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316 at page 323. That

case established that there can be a material contribution even where the contribution was not the most important factor. The imposition of a "but for" test was inappropriate.

106. The alternative concept involves variations of "results from". In *Kooragang Cement P/L v Bates* (1994) 35 NSWLR 452 at 463 Kirby P. considered whether a worker's death resulted from a work injury in the context of the NSW workers' compensation legislation. He said in paragraph F: "Certainly, the notion that "results from" imports an idea of causation limited to the immediate proximate cause of incapacity or death, **has been disapproved** (my emphasis)". He went on at paragraph G to say: "Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted."

107. This approach was approved by Martin (BR) CJ of the NT Supreme Court in his interpretation of the words 'results from' where they appear in the definition of 'injury' in section 3 of the Act – see *Swanson v Northern Territory* (2006) 204 FLR 392 at paragraphs 91 to 94. Martin CJ went on to say at paragraph 100: "In my opinion the phrase should be given its ordinary and natural meaning. **A causal link is required between the administrative or disciplinary action and the injury, but does not have to be the predominant or sole cause of the injury** (my emphasis)**".**

108. I am satisfied that these approaches apply equally to interpreting the concepts of material contribution and/or "results from" where they appear elsewhere in the Act other than subsections 4(5), (6A) and (8), and where they are to be applied to consequential injuries.

The Wrist Injury and the Major Depressive Disorder

109. The evidence before the Court was that the Worker was depressed in part because of the pain he experienced in his right wrist from the wrist injury. He was also depressed because of the reduced use he had of his right wrist

and his perception this meant he could not adequately support his family. I have identified some of the evidence as to pain in paragraph 53 of these Reasons at iv), vi) and ix). I have identified some of the evidence as to his perception of impaired earning capacity in paragraph 53 at i), iii) and iv).

110. There was evidence before me of other factors which were likely to have contributed to the Worker's depression, and to the major depressive disorder. These included the Worker's perception of and complaints about the Respondent's workplace being unsafe, the Worker's belief that he was a permanent employee and that the Respondent had betrayed him by denying this status, that the Respondent's supervisor Mr Green had been unsympathetic and dismissive of the Worker's injury and his pain, to name a few.

111. There was evidence before me of the Worker's personality type and his previous psychiatric history, both of which in the opinions of both psychiatric experts made him more vulnerable to further psychiatric illness.

112. Dr Ewer in both his reports noted the various contributing factors to the major depressive disorder. In his second report at page 3.6 he summarised his conclusions as follows: "His major depressive disorder was caused by a range of predisposing and precipitating factors. The precipitant was him once again being injured in the workplace in a circumstance where he believed he shouldn't have been injured. His pain and restrictions contributed to him becoming depressed". In his first report at page 41.3 Dr Ewer had expressed his opinion that the Worker's wrist pain and the restrictions arising from the wrist injury "was probably a substantial cause of his major depressive disorder".

113. The existence of predisposing and causative factors other than simply the wrist injury does not prevent the major depressive disorder from being materially contributed to by the wrist injury. It does not prevent the major depressive disorder from resulting from the wrist injury. It is not necessary

to tease out all of the contributing factors and allocate percentages to their respective contributions. All that is needed is a causal contribution or link, whether large or small. That causal contribution or link does not have to be the predominant or sole cause.

114. I am satisfied on the balance of probabilities and I find that the very fact of the occurrence of the wrist injury to this already vulnerable man, his ongoing pain, and his concerns about the impact of the wrist injury on his capacity to work and support his family, all materially contributed to his major depressive disorder. Similarly, these factors all resulted in his major depressive disorder.

The Major Depressive Disorder and the Death

115. The same causal considerations arise in this context, namely whether the death resulted from or was materially contributed to by the major depressive disorder – subsection 62(1) of the Act.

116. Mr McConnel was prepared to concede that if I did find that the Worker had suffered a major depressive disorder arising out of or in the course of the employment through either the sequela injury or the non-sequela injury or a combination of them, then Mr McConnel "can't dispute" that the death of the Worker resulted from or was materially contributed to by the major depressive disorder in the terms of section 62 of the Act – transcript 26 September 2014 page 33.1 to 33.4.

117. I have earlier preferred the opinion of Dr Ewer to that of Dr Roberts on the issue of the diagnosis of major depressive disorder. Because Dr Roberts did not accept this diagnosis he did not express an opinion on the causal connection between major depressive disorder and the death. Accordingly the opinion of Dr Ewer is the only expert opinion before me concerning this causal connection.

118. Dr Ewer expressed his opinion in his second report at page 12.4 "…that this depressive disorder contributed to him taking his life and he probably would not have taken his life but for his major depressive disorder". He summarised his expert opinion on page 13.5 as follows:

> "In summary, the evidence indicates that Mr Luxford came to GEBIE with a psychological vulnerability in the form of a past history of depression and maladaptive personality traits. He was sensitised to what happened to him at GEBIE given that he previously developed a major depressive disorder after a physical injury sustained in the workplace. That is, Mr Luxford's previous experiences made him more vulnerable to responding to a physical injury in the same way that he did before, namely by developing a major depressive disorder and by becoming angry. The literature indicates that the most common cause of a completed suicide is depression. Even though other factors may have contributed to Mr Luxford's completed suicide, including his maladaptive personality traits, in my opinion, he probably would not have committed suicide in 2011 but for his depressive disorder".

119. On the basis of my earlier finding that the Worker was suffering a major depressive disorder leading up to and on 8 and 9 November 2011, and on the basis of Dr Ewer's expert opinion based on evidence before the Court, I am satisfied and I find that the death resulted from or was materially contributed to by the Worker's major depressive disorder.

Conclusion

120. I order that there is payable to Mrs Luxford benefits in accordance with subsections 62(1)(a) and (b) of the Act and to the children benefits in accordance with subsection 62(1)(b) of the Act subject to rule 10.08 of the *Work Health Court Rules* in respect of the Third and Fourth Applicants, and to the children benefits in accordance with section 63 of the Act.

121. The parties have liberty to apply in the event of any dispute as to the calculation or payment of the benefits or any of them ordered in the preceding paragraph.

122. The Applicants sought interest pursuant to section 89 and/or section 109 of the Act.

123. I am satisfied on its plain wording that the operation of section 89 is limited to weekly payments to a worker pursuant to sections 64 and/or 65 of the Act and it has no application to benefits under Subdivision A of Division 3 of the Act (death benefits). I dismiss that claim for interest.

124. I am further satisfied that there is no evidence before me on which I could find for the purpose of section 109 of the Act that the Respondent has caused unreasonable delay in accepting the Applicants' claim for or in paying compensation. I dismiss that claim for interest.

125. The Applicants have been successful in the proceedings. I order that the Respondent pay the Applicants' costs of and incidental to the proceedings and to any mediation of the dispute prior to the commencement of the proceedings, to be taxed in default of agreement at 100% of the Supreme Court scale.

Dated this 18th day of December 2014.

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John Neill
STIPENDIARY MAGISTRATE