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2018 Special Edition Case Update

The Full Supreme Court of South Australia has its say on the new causation test under the Return to Work Act

On 17 April 2018 the Full Court of the Supreme Court of South Australia handed down its decision in *The State of South Australia v Roberts* [2018] SASCFC 25. This was the first time the new causation provisions implemented as part of the changes brought about in 2015 by way of the *Return to Work Act 2014* ('the Act') were considered at this level of the workers compensation jurisdiction.

Facts

The facts of the *Roberts* case will be well known to many. Ms Roberts was a TAFE employee who developed an inflammatory polyarthritis condition as a consequence of being bitten by a mosquito while she was staying in remote location accommodation provided by her employer. The accommodation she was staying in was less than ideal, including no protection being afforded from mosquitos at night – where it was found she was most likely bitten by a disease carrying insect.

The Lower Court Findings

Both a single Judge, and subsequently the Full Bench, of the South Australian Employment Tribunal had found in favour of Ms Roberts. Essentially, the findings were that the worker's condition had developed out of her employment, and of which her employment was the significant contributing cause. On appeal by the State of South Australia (on behalf of the employer) the Full Court of the South Australian Supreme Court confirmed that decision. In doing so, the Full Court set out a number of guiding principles relative to the general issue of causation, and the specific legislative provision concerned.

As a reminder, section 7 of the Act states as follows:

"(1) This Act applies to an injury if (and only if) it arises from employment.

(2) Subject to this section, an injury arises from employment if -

(a) in the case of an injury other than a psychiatric injury -

(i) the injury arises out of or in the course of employment and the employment was a significant contributing cause of the injury; and

(b) in the case of a psychiatric injury -

(i) the psychiatric injury arises out of or in the course of employment and the employment was the significant contributing cause of the injury; and

(ii) the injury did not arise wholly or predominantly from any action or decision designated under sub-section (4)."

THE FULL COURT'S DECISION

With reference to the above causation provisions, the Full Court set out the following findings, in dismissing the State of South Australia's appeal:

(1) When a question of causation is considered in the context of a statutory compensation regime, the issue must be decided by reference to the statutory text construed and applied in a manner which best effects its statutory purpose.

(2) The additional requirement in the second limb section 7(2)(a) that "employment was a significant contributing cause of the injury" is intended to exclude entitlement to compensation where employment was not a cause but merely the occasion for the injury, or where employment was not in any real or meaningful sense responsible for the injury.

(3) Employment will be a significant cause of an injury if it is an **important or influential cause**. This necessitates an evaluative judgement on the part of the decisionmaker and careful identification and consideration of all relevant facts and circumstances surrounding the injury and the employment of the worker.

(4) A "but for" test cannot be the sole determinant of causation under the second limb of section 7(2)(a), however, it can be applied as part of the reasoning process in arriving at a decision on causation.

(5) The second limb of section 7(2)(a) does not require that a worker's employment must have exposed them to a greater risk of injury, but if it does it may well be persuasive.

In perhaps the clearest indication of the approach that the Courts now take in relation to the question of causation, and how to apply the applicable policy underlining the new legislative provisions, compared to previous legislative provisions, is the understanding that the 2015 amendments were intended to preclude the payment of compensation to workers who might be injured in circumstances where the fact an injury occurred at the place of employment was "mere happenstance".

The Full Court referred to previous decisions of the High Court where it was found a vomiting attack at work which caused a rupture of a worker's oesophagus, and their unfortunate death, but which had nothing to do with that worker's employment was compensable, and another case where a worker suffered a cerebral aneurysm at work, due to a form of congenital susceptibility, but where there was nothing about the employment that caused the injury concerned yet the injury was still compensable. In both of those cases, the injuries concerned were considered to have arisen "in the course of employment", but were events of "mere happenstance". In the circumstances, and based on the decision in *Roberts,* anything that occurs that is more than "mere happenstance" will require an assessment of the possible causal connection between an event and its effects.

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The Full Court also spent some time considering whether the "but for" test (a concept long discussed in relation to the law of negligence) was an appropriate test to apply when it came to consideration of the issue of "significant contributing cause". The Full Court held that the "but for" test might be of assistance in evaluating a causation issue, but probably only where it would provide a clear answer to the question concerned, because of the limited facts and circumstances surrounding what might have occurred in any particular case, but will be of little assistance in cases where there might be multiple causes that need to be considered in assessing causation.

Considerable attention was also given to what was considered to be the key operative word in the text of section 7(2)(a) of the Act, being the word "significant". The Full Court held that for employment to be a significant cause of a worker's injury, it needs to be an "important or influential cause". The Full Court went on to say that if a worker was to establish their employment is a significant contributing cause of their injury, then this is likely to also satisfy the first part of the legislative provision concerned, requiring that an injury arise out of or in the course of employment as well. However, and conversely, if employment is not a significant cause, then it probably would not satisfy the first leg of the test as to arising out of employment. In other words, a worker who cannot establish that their injury arose out of, or in the course of, their employment will inevitably be unable to satisfy the requirement that their employment was also a significant contributing cause of their injury.

Consideration was further given to the question of whether the fact of a place of employment might expose a worker to a greater risk of injury should become a relevant consideration. The Full Court found if there is no difference in the level of risk between a worker being bitten by an infected mosquito at home, as opposed to somewhere else, then this is not to the point. To find otherwise would be to add an additional statutory requirement to the significant contributing cause criteria. Conversely, the fact that a place of employment would indeed create a greater risk would be a relevant factor.

The Full Court's findings will, to a degree, also apply to workers whose claim is based on sustaining a psychiatric injury, although of course the causation test is slightly different insofar as employment needs to be the significant contributing cause in the case of a psychiatric injury. Nonetheless, the Full Court's analysis of what is considered "significant" in any particular case is equally applicable to physical as well as psychiatric injuries.

On a side issue of interest, keen followers of previous High Court decisions, and notably the notorious *PVYW* case, will be interested in the judgment of Kourakis CJ in *Roberts*, where he seemed to equate what happened to Ms PVYW to engaging in an "extreme sport" while injured at night in her employer paid for accommodation!

In conclusion, perhaps the most significant takeaway point from the Full Court's decision is its confirmation that the new causation test is somewhat more onerous than the causation test applying under the previous legislation, but is not such a narrowing of the gateway to compensation that might have been anticipated by various stakeholders when the Act was introduced. Injuries of "mere happenstance" that occur at work will not be considered compensable. Injuries in almost any other circumstance will give rise to a risk of compensability being found if an injured worker can show their employment is an "important or influential" cause of their injury.

Should you have any queries regarding the impact of this decision on your claims management processes, then please do not hesitate to contact us.

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