CASE NOTES

Lump sum payments under Comcare legislation where an injury has occurred before the commencement of the Act


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Department of Defence v West
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Introduction

Even though a Government employee injured before the 1st December 1988 (commencement of ***Safety Rehabilitation and Compensation Act 1988****, hereinafter referred to as "the Act") may in some circumstances still bring common law proceedings as a result of the decision in* ***Georgiadis v Australian and Overseas Telecommunications Corporation*** *(1994) 179CLR 297, there will be many employees who will not have common law entitlements, or will not be able to get extensions of time at this late stage.*

Many such employees may suffer from a loss of function or use of part of their body which may be permanent. The question which arises, is whether such employees are entitled to any lump sum payment under the Act.

The earlier legislation, governing Government employees entitlements, did not provide for any lump sum payment for permanent impairment arising from injuries such a spinal injuries, or from psychiatric disability. There has, therefore, been significant argument as to whether such employees may be entitled to a lump sum payment under Section 24 of the Act as the said provision provides for compensation for permanent impairment to the back or permanent impairment arising from psychiatric illness.

A recent decision of the Federal Court namely, *Department of Defence v West* (31 July 1998) has reviewed the authorities in this area and outlined the entitlement of such employees.

The earlier decisions

The first important decision was that of the *Federal Court in Blackman v Australian Telecommunications Corporations (1990) 12 AAR Page 11.* The Court had to consider Mr Blackman's impairment which arose out of exposure to asbestos. He was diagnosed as suffering from mesothelioma in November 1988. The Administrative Appeals Tribunal determined that his impairment had occurred before 1 December 1988 and that he was not entitled to a lump sum under Section 24 of the Act because of Section 124(3). The Federal Court upheld that decision finding that the substantial deterioration in the condition after 1 December 1988 was not a fresh impairment. The Federal Court found at page 14:

> "If the contention of....the applicant is correct, then each time an impairment worsens significantly, there is a new impairment within the meaning of the 1988 Act. We cannot read the relevant provisions in this way. The scheme of the Act in particular of Sections 24 and 25, is not that as a disease progresses, the aggravation of this consequences constitutes a series of new impairments, each giving rise to a separate liability to pay compensation .... As an impairment worsens, further rights to compensation may accrue under Section 25, but not because there is another distinct impairment."

Following the *Blackman* decision, it appears that it would be difficult to argue that a permanent impairment had arisen after the commencement of the Act where the initial injury or disease occurred prior to the said commencement.

The matter was again considered in the well-known case of *Brennan v Comcare (1994) 50FCR 555.* Mr Brennan had suffered a series of back injuries between 1972 and 1986 and had undergone surgery prior to the commencement of the Act. Following the commencement of the Act his condition deteriorated significantly. The Federal Court overturned the earlier Administrative Appeals Tribunal decision and found that a permanent impairment occurs not when a medical condition stabilises, as had been argued and accepted in the Tribunal, but when the condition becomes permanent, namely when it is likely to continue indefinitely. Mr Justice Burchett did, however, explore the operation of Section 124(3) and Section 24 of the Act and in so doing pointed out that a single injury such as a back injury can sometimes lead to losses manifesting themselves in different parts of the body or in an increase in impairment in a part of the body over time. He said in his judgment:

"It will be observed that subsection (2) talks about "a permanent impairment" and "that impairment". This language is consistent with the analysis I have made of Section 24 and with the notion that there may be a number of impairments arising at different times out of the same injury. Had parliament intended to exclude the operation of the 1988 Act wherever an injury had resulted in any permanent impairment arising before the commencing date, it could easily have done so. Instead what parliament did provide was carefully linked to a particular impairment. Only where the impairment occurred before the commencing date do the exclusionary provisions of subsection (3) operate. Unless they do, subsection (1) holds sway, and an impairment is compensible under the 1988 Act."

His Honour then went on to discuss the situation where there was an impairment before the commencing date in say one limb put a new impairment say in another limb after the commencement date. In his view the new impairment is compensible under the 1988 Act. He also found that where a permanent impairment has deteriorated to such an extent as to constitute a further impairment within the meaning of the 1988 Act that further impairment should be compensible. As he said:

"This must mean that such an increase will constitute, in the eye of the statute, a fresh impairment, for the original impairment will have been the subject of final assessment under Section 25(4)..."

In *Comcare v Levett (1995) 60FCR 14* the Full Court held that where a back injury had not resulted in an impairment prior to 1 December 1988 but had subsequently led to a permanent impairment after that date, the injured employee was entitled to compensation under Section 24 and was not disentitled because of Section 124(3). The Court referred to the decisions in *Blackman* and *Brennan* and appeared to agree with the comments made in *Brennan* about the *Blackman* decision. At pages 19 and 20 the Full Court said:

"(The Court in Brennan) express the view that Blackman should be treated with some caution especially on the question of whether a gradual worsening of a condition can or cannot be seen as involving a fresh impairment... We share that view."

The Federal Court decision in *Department of Defence v West*

This case involved facts which may be considered to be similar to those in the *Brennan* case. The injured employee suffered a back injury in October 1968. He underwent three surgical procedures in 1970, 1974 and 1984. For some time after the 1984 surgery the applicant's condition appeared to have resolved by 1988 he was again suffering back pain. Since December 1988 there had been a significant deterioration of his back condition with increased pain and loss of movement. Prior to the hearing of the appeal the parties had reached agreement that the applicant had suffered a 10% permanent impairment of his spine pursuant to table 9.6 as at ▶

December 1988. The parties also agreed that as at December 1996 (and continuing) the applicant suffered a 20% permanent impairment in relation to the lumbar spine. There was also agreement about a permanent impairment relating to the legs. For the sake of this paper I will confine the summary to the discussion of the back condition itself. It can be seen by the agreement reached between the parties that the factual situation could be distinguished from a situation where there was an injury prior to 1988 with no permanent impairment but subsequent permanent impairment after the commencement of the Act, and that there was argument that the situation fell, to some extent, within the comments made in the *Blackman* decision where there is a gradual deterioration of an impairment after the commencement of the Act where the impairment had in fact been present before.

The Court decided by majority of two to one that the further impairment to the back was compensible. The minority decision of Heerey J adopted the decision in *Blackman*. His Honour found that:

> "The impairment of the respondent's back which commenced in 1968 has not disappeared. It still continues. It could not be said that the respondent now has two impairments in relation to his back."

The majority, O'Connor and Merkel J disagreed. Merkel J in his judgment (which was adopted by O'Connor J), summarised the authorities dealt with above in the following way:

> "*The gradual worsening of a permanent impairment in accordance with its natural progress does not constitute a series of new impairments each giving rise to a separate liability to pay compensation: see *Blackman* at 14 and *Brennan* at 570-571 per Gummow J; cf *Brennan* at 558-9 per Burchett J;
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> *The observation in *Blackman* at 14 that a permanent impairment which worsens significantly or is such that the variation between it and the earlier permanent impairment is substantial does not result in a new permanent impairment is to be approached "with some caution": see *Brennan* ... and *Levett*.
>
> The present case requires resolution of the question left unresolved in the current state of the authorities, that is, whether a deterioration in a permanent impairment which existed as at 1 December 1988 is capable of constituting a new permanent impairment. The caution expressed in relation to *Blackman*.... suggests a reluctance to accept that a substantial variation, or a significant deterioration, in a person's permanent impairment is incapable of constituting a permanent impairment which is different to that which existed prior to the variation or deterioration."

The Court then proceeded to consider whether a permanent impairment can occur incrementally over time. The Court noted that the Tribunal had suggested that such a construction accords with the beneficial nature of the legislation and is likely to be fairer and more consistent. Mr Justice Merkel at page 22 of the decision

IUD case results in losers all round

Chris Merritt
Law Correspondent

The weirdness of the Australian legal system may well have reached its zenith yesterday when Justice Vince Bruce handed down his judgement in the nation's biggest product liability case.

First, the judge quit. Then the official "winner" of the case – the Nutrasweet company – turned out to be the real loser.

By choosing to defend its Copper-7 Intra-Uterine Device against a massive damages claim, the Nutrasweet company has been left with a legal bill that is believed by those close to the case to be somewhere between $15 million and $20 million.

The financial position of the nine women who started – and lost – this argument is much healthier.

Their lawyer, Dr Peter Cashman, declined to discuss how much the case had cost him and how he had financed it.

But his comments indicate that he has run the case "on spec", taking on a multimillion-dollar liability in the hope of being paid from the winnings.

"Like most plaintiff firms we are not in the habit of charging our clients for the work that we do during the course of it because most of them cannot afford to pay," Dr Cashman said yesterday.

While Nutrasweet will receive some compensation for its legal costs, it won't be much and it won't be coming from Dr Cashman's clients.

Because these women were partly funded by the NSW Legal Aid Commission, Section 47 of the NSW Legal Aid Commission Act means their liability is capped at $12,500 each.

And that liability will be met not by the women, but by the commission.

So after spending at least $15 million in order to win the fight that these women started, the most that the company can expect to receive is a little more than $112,000 of taxpayers' money.

"This is a scandal," said Clayton Utz partner Mr Stuart Clark, who led the Nutrasweet legal team.

While he was "very, very happy" to have headed off a claim that could have cost the company at least $300 million in damages, Mr Clark is not happy about what he sees as the demise of the "loser pays" rule.

"What happens is that the Legal Aid Commission comes along and even though it doesn't run the case, they use the legislation to protect plaintiffs from adverse costs orders," he said.

Yet according to Dr Cashman, that is exactly the outcome that was intended by the law of NSW.

"I don't think Clayton Utz can be heard to complain, because in a sense they have been the beneficiaries of this litigation" through the massive amount of work it had generated, he said.

In his view, Nutrasweet should not complain too much as it had received the advantage of tax deductions for legal expenses.

So, according to Dr Cashman: "In many respects the defence of this claim has been subsidised by the public purse and the taxpayers."

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then said the following:

> "A loss of the entitlement conferred under Sections 24 and 25 by reason of Section 124(3) only occurs when the permanent impairment the subject of the claim is then **the** permanent impairment that the employee suffered as at 1 December 1988. On my reasoning and that of Burchett J in *Brennan*, where a change in a permanent impairment occurring after the commencement date is such that, quantitatively and qualitatively, it is properly to be characterised as the further or new impairment occurring after the commencement date it is compensible by a lump sum payment under Sections 24 and 25. That conclusion is consistent with the language used and with the statutory policy to be discerned from Sections 24, 25 and 124 of providing benefits to workers in respect of **further permanent impairment that occurs after the commencing date irrespective of whether the injury that resulted in the impairment occurred before or after the commencing date**. It also avoids capricious and arbitrary outcomes under Workers Compensation legislation, which is of a remedial nature and should be construed liberally."

The Court went on to indicate that in deciding whether there has been a new impairment as a result of the worsening or deterioration of an earlier impairment (and earlier injury) there will always be a need to look at the facts of each case. Indeed, Mr Justice Merkel indicated that in some cases a gradual worsening of a condition may not result in separate or further impairments. In each case it will be necessary to establish whether the permanent impairment existing at the date of commencement "has deteriorated to an extent that it is properly to be characterised as a further or different impairment to that which existed at the commencement date."

It will be incumbent on lawyers acting for injured Government employees to make sure that the evidence which is obtained supports the type of distinction suggested by the majority in this case. Unless there is evidence as to the change in the quantity and quality of the impairment after the commencement date, there is always a risk that a Tribunal or Court may find that there has simply been a gradual worsening of an impairment which has not resulted in a new or different impairment. I suggest, however, that it is now clear that those injured before the commencement date may still be entitled to lump sum payments if the appropriate evidence can be provided showing either a permanent impairment commencing after the commencement date (*Brennan*) or a worsening of an earlier permanent impairment to such an extent as to comprise a new impairment which is therefore compensible (*West*). ■

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