The recent decision of Williams J in *Hawthorne v Theiss Contractors Pty Ltd & Anor*[1] would firmly suggest that in many cases, WorkCover Queensland can decide for itself whether the insured employer can be sued at common law by an employee. Practitioners in the field of personal injuries would be familiar with a situation in which WorkCover has determined that a worker does not have an "injury" as defined by section 34 of the 1996 *WorkCover Queensland Act*.

WorkCover Queensland

The *WorkCover Queensland Act* 1996 does not specify whether it operates as a code of master-servant law or whether it sets out the scope of the indemnity WorkCover is to provide to employers.

There are two schools of thought as to the consequences of a decision by WorkCover Queensland that no 'injury' exists. Some camps have suggested that a right to claim damages at common law still exists but outside of the *WorkCover Queensland Act*. This would exclude a Defendant's right of recourse to indemnity from the Workers' Compensation Fund.

The other school of thought would suggest that where WorkCover determines that there is no "injury" no claim for damages at common law can be brought at all. It is this latter school of thought which has found favour with Williams J in *Hawthorne*.

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The Facts

Catherine Hawthorne was an architect employed by Theiss. In May 1994 she was assigned to work on a project in Malaysia. She was required to travel regularly to Malaysia and she would work there for up to five weeks at a time. After her return to Brisbane in January 1995, she experienced symptoms including severe tiredness and a sore throat and was diagnosed as having Cytomegalovirus ("CMV").

WorkCover accepted (under the *Worker's Compensation Act* 1990) a statutory claim from 30 January, 1995 to 30 June, 1995.

She was unable to work until February 1996 when she returned to duties but worked mainly from home. By February 1997 she began working normally and her workload increased to that which was considered to be "normal" for a person of her experience and ability.

In August 1997, Hawthorne again became ill and at the time of hearing had not worked again since. She became depressed as a result of her ongoing symptoms and her inability to work. On about 10 September, 1997, Hawthorne sought a re-opening of her earlier claim for compensation from 7 August, 1997. The re-opening was accepted and compensation paid.

In March, 1999, WorkCover referred Hawthorne to a General Medical Assessment Tribunal for assessment of both her medical and psychiatric disabilities.

The Medical Tribunal found that Hawthorne's symptoms were not due to any organic medical condition. The Psychiatric Tribunal found that Hawthorne had developed a major depressive illness with somataform features and found that she suffered from a disability of a loss of some 20% of bodily function.

WorkCover sent to Hawthorne's solicitors a cheque for $15,109.00 representing a 20% disability settlement.

Hawthorne's solicitors wrote to WorkCover on the 6 April 1999 asserting that the findings of the tribunals should be treated as recognising a fresh injury under the 1996 Act, rather than a re-opening of the original claim from 1995 which had been accepted pursuant to the 1990 (as amended) Act.[2]

Correspondence between Hawthorne's solicitors and WorkCover culminated in Hawthorne's solicitors calling for WorkCover to provide a Damages Certificate pursuant to Section 265 of the 1996 Act in relation to Hawthorne's relapse in 1997 and her psychiatric/psychological illness.

WorkCover arranged for

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Hawthorne to be examined by a psychologist. WorkCover subsequently determined that the events from June 1997 to 1 August 1997 were not the result of an "injury" within the terms of Chapter 1, Part 4 of the *WorkCover Queensland Act* 1996.

The matter was subsequently referred to a Medical Assessment Tribunal pursuant to Section 265(8) of the 1996 Act. WorkCover arranged for further medical examinations before the Tribunal hearing.

The Medical Tribunal determined that "the matters alleged for the purpose of seeking damages do not constitute an injury to the worker".

The psychiatric tribunal similarly determined "the matters alleged for the purposes of seeking damages not to constitute an injury".

In her Statement of Claim, Hawthorne alleged that her employer was in breach of duty in imposing on her a heavy workload in mid-1997 when it knew or ought to have known that because of her CMV and associated psychiatric illness, she was vulnerable and her health was likely to be adversely affected by the workload.

The Decision

The Court considered the Court of Appeal decision in *Bonser v Melnacis & Ors.*[3] The Court of Appeal in *Bonser* confirmed that unless the conditions set out in chapter 5 of the 1996 Act were complied with, a cause of action was abolished by Section 253. The Court considered the "gateways" set out in the 1996 Act through which a Plaintiff must pass, and in particular, Section 253.

"The decision seems to remove from a trial judge the power to make a determination as to whether the worker has suffered an 'injury'..."

The Court noted:-

- The definition of "injury" in Section 34 of the Act;
- The definition of "worker" in Section 12 of the 1996 Act;
- That a test requiring employment to be the "major significant factor" causing the injury is, at least in theory and possibly in practice, different from the common law test of causation expounded by the High Court in *March v Stramare Pty Ltd*;[4]
- Section 456 of the Act says "a tribunal's decision about an application for compensation referred to it is final and cannot be questioned in a proceeding before a tribunal or a Court, except under Section 454".[5]
- There was at least in theory a possibility of the review of the decision of the Tribunal under the *Judicial Review Act* 1991 where there was an Application for a Damages Certificate (as opposed to an Application for Workers' Compensation).

In the result, the Court found that the 1996 Act regulates and limits access to common law damages. It was noted that this is done so as to ensure that the scheme remains fully funded and that premiums are kept at a reasonable level.[6] The Court found that if Hawthorne established the facts alleged in her Statement of Claim, she would necessarily have established that she sustained an 'injury' within Section 34 of the 1996 Act. The only cause of the injury relied on in the Statement of Claim as giving rise to an award of damages is alleged to be the negligence of her employer in the course of her employment. "In other words the findings of fact which it would be necessary for the Court to make in order to award damages would be in direct conflict with the decision of WorkCover".

In the course of the judgement, his Honour found "primarily because the ▶

applicant to be successful in this action must establish that she suffered an injury which of necessity would be caught by the definition of injury in Section 34 of the 1996 Act, I am of the view that she does not enjoy a right to pursue a cause of action against Theiss independently of the 1996 Act."

The Plaintiff's application was dismissed.

The Anomaly

The Court itself noted the unusual nature of the legislation which gave the potential Defendant the right to determine whether or not an action could be pursued. His Honour however found that this was *"the clear import of the statute and the Courts must recognise what Parliament has decreed"*.

The decision seems to remove from a trial judge the power to make a determination as to whether the worker has suffered an "injury" within the meaning of the Act. If a finding had been made by his Honour that the *WorkCover Queensland Act* 1996 sets out the scope of claims with respect to which WorkCover must indemnify (as opposed to determining the rights of workers to make claims at all), it would have been possible for a worker to bring common law proceedings, and in the event WorkCover Queensland declined to indemnify the employer, for the trial judge to determine in third party proceedings whether an "injury" existed within the meaning of the Act and consequently whether WorkCover should carry the liability to meet any judgment in the Plaintiff's favour.[7]

Judicial Review

Decisions of the Medical Assessment Tribunal are declared to be "final" by virtue of Section 246 of the *WorkCover Queensland Act*. Nonetheless, if these decisions can be classified as "Decisions of an Administrative Character", they might still be reviewable under the *Judicial Review Act* 1991.[8] As practitioners would know, Section 20 (2) of the *Judicial Review Act* limits judicial review to review on the following grounds:-

(a) That a breach of the rules of natural justice happened in relation to the making of the decision;
(b) That procedures that were required by law to be observed in relation to the making of the decision were not observed;
(c) That the person who purported to make the decision did not have jurisdiction to make the decision;
(d) That the decision was not authorised by the enactment under which it was purported to be made;
(e) That the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
(f) That the decision involved an error of law (whether or not the error appears on the record of the decision);
(g) That the decision was induced or affected by fraud;
(h) That there was no evidence or other material to justify the making of the decision;
(i) That the decision was otherwise contrary to law.

The grounds upon which a Court might review a decision made by the Medical Assessment Tribunal do not seem to include a situation where it is contended that the decision of the Medical Assessment Tribunal was wrong at law or against the weight of the evidence.

The Consequences

The ramifications of this decision will be far reaching. No longer will a Plaintiff be able to maintain a claim against their employer if WorkCover is not satisfied that employment was the major significant factor.[9] It is not difficult to imagine examples of cases where this would cause serious injustice.

A common example might be circumstances in which a worker makes a claim for statutory benefits as a result of a back injury. WorkCover Queensland might accept the claim for payment for a period of some months but will then determine that the injury was merely an aggravation of a pre-existing degenerative condition and issue a determination that the worker no longer has an "injury" within the meaning of the Act. Practitioners in this area of law would commonly have seen this type of situation arise. By virtue of the decision in *Hawthorne*, in this example the worker would not only be precluded from making a common law claim against their employer under the Act, but would lose any entitlement to make a claim to damages outside the scope of the Act as well.

In these types of cases, no longer will the Court be the Tribunal to determine the question of fact as to whether an 'injury' has been sustained, but rather the Defendant's own insurer.

The decision in *Hawthorne* is currently under appeal to the Court of Appeal. For practitioners in the Workers' Compensation field in Queensland it will be a case of "Watch this space". PL

Footnotes:

1. Unreported, Brisbane Supreme Court delivered 2 June 2000
2. A common law claim in relation to the 1995 claim would have been statute barred.
3. unreported, 4369/99, Judgement 8 February 2000.
4. (1991) 171 CLR 506.
5. The Court did however consider that strictly speaking this provision would not apply to an application for a damages Certificate as occurred here, but would rather apply to a situation where an application was lodged for Workers' Compensation.
6. The Court in this regard noted Section 5 and considered the Minister's second reading speech and accompanying explanatory memorandum.
7. It is suggested by the Author that this is a more palatable finding in the interests of justice and one which is open to the Court of Appeal if it finds that the Act defines the circumstances in which WorkCover must indemnify, as opposed to the circumstances in which a Worker may make a common law claim.
8. Section 4 of the Judicial Review defines what are "Decisions of an Administrative Character".
9. The definition of "injury" has since been amended to require employment to be a "significant contributing factor" (Act No 17, 1999 S8).