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Insurance Insights

Recent Applications in personal injuries claims impacted by COVID-19

Evidence and Transfer – A summary of recent Decisions of the Supreme Court in Central Queensland

Key takeaways

- Plaintiff will undergo medico-legal examination by video conference due to COVID-19 travel restrictions
- Is the Defendant's request for medico-legal examination unreasonable or unnecessarily repetitious?
- Plaintiff's Application for broad orders to inspect unidentified loaders dismissed
- Considerations of the Court in an Application to transfer proceedings to another jurisdiction

Was the Defendant's request for medico-legal examination unreasonable or unnecessarily repetitious?

Orders made allowing for the impact of COVID-19 travel restrictions on medico-legal examinations

Tyndall v Kestrel Coal Pty Ltd [2020] QSC 56 is a recent decision by His Honour Justice Graeme Crow in the Rockhampton Supreme Court, delivered on 31 March 2020, concerning applications made by both the Plaintiff and the Defendant seeking orders to obtain further evidence. The action concerned a worker's compensation claim arising from circumstances where the Plaintiff allegedly suffered vibration-induced white finger syndrome as a result of operating either a Jug O Naut or Eimco loader at the Kestrel Coal Mine between 1 September 2015 and 1 May 2016.

The Defendant sought orders for the Plaintiff to be compelled to undergo examination by a vascular surgeon and rheumatologist. The Plaintiff opposed the examination by a vascular surgeon arguing that it was unnecessary, as he had attended upon a vascular and endovascular surgeon who had provided reports to the Defendant (the Plaintiff had obtained his own reports from another vascular and endovascular surgeon). The reports obtained by the Defendant were from the Plaintiff's treating surgeon whom the Plaintiff was referred to by his general practitioner. WorkCover Queensland had obtained these reports, which His Honour considered entirely appropriate given their statutory obligation to provide rehabilitation, which may require the need to take and act upon advice provided by the treating surgeon.

Section 282 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCRA) provides for an insurer to require a worker to undergo medical examination and assessment, except where it would be unreasonable or unnecessarily repetitious. In considering the request for the Plaintiff to undergo examination by a vascular surgeon, His Honour followed the decision of Jones J (retired Judge of the Supreme Court of Queensland in Cairns) in *Ratcliffe v Raging Thunder Pty Ltd* [2010] QSC 60.

Adopting the approach of Jones J in *Ratcliffe* he considered medical reports already obtained by the parties in order to determine whether the requested examination was unreasonable or unnecessarily repetitious. His Honour observed that causation in this case was "particularly vexed", and well described in the reports of Dr Robert Ivers, consultant orthopaedic surgeon, who had provided opinion and diagnosed the Plaintiff with vibration induced white finger disease. In regards to causation, Dr Ivers was of the view that a vascular surgeon would be the most appropriate specialist to provide an opinion, as the answers sought '*were not easily and reasonably provided by any specialist because of the nature of this pathology.*' His Honour further noted that Dr Cameron Mackay, hand and reconstructive surgeon, also commented on the difficulties in determining causation of the Plaintiff's condition.

The available medical evidence suggested that the white finger disease which the Plaintiff suffered from, was an uncommon variant of Reynaud's phenomenon, which involved pre-existing conditions and work-related aggravation as to its provenance. There were further difficulties around the Plaintiff's future prognosis and the effects of the pre-existing conditions on the disease.

His Honour observed that pursuant to r424 of the *Uniform Civil Procedures Rules 1999* (Qld) the rules concerning expert evidence did not apply to the witness evidence of a treating surgeon. He concluded that in this case it was neither unreasonable or unduly repetitious for the Plaintiff to attend on an independent vascular surgeon for the purposes of the Defendant obtaining a medico-legal report, and so ordered.

In making the orders, regarding the examination and assessment of the Plaintiff by both a rheumatologist and vascular surgeon, His Honour allowed for the possibility that the Plaintiff would not be able to personally attend the examination due to the COVID-19 travel restrictions. His Honour ordered that in such circumstances the assessments were to be undertaken by video conference and for the Plaintiff to submit to any pathology requested by the specialists.

It will be interesting see how any medico-legal evidence obtained by video conference, in light of the COVID-19 travel restrictions (particularly where the plaintiffs are located in regional areas), is viewed by the Court when such matters proceed to trial, especially where another party's expert has had the benefit of a physical examination of the plaintiff. Where possible, it would seem prudent to arrange for the medical expert to undertake a physical examination of the plaintiff prior to trial, after the COVID-19 restrictions are lifted.

Plaintiff's Application to inspect the Defendant's loaders dismissed

The Plaintiff's Application in the same matter *of Tyndall v Kestrel Coal Pty Ltd*, included a request for broad orders seeking to inspect and obtain vibration readings from the Defendant's Jug O Naut and Eimco loaders. The Defendant did not oppose the inspection occurring, but requested the Plaintiff provide specific information about the circumstances of the inspection, including who would attend, the name and

qualifications of any expert, how it was proposed the Plaintiff's work conditions would be replicated to take vibrations readings, and whether an expert report would be produced following the inspection.

While His Honour felt that the inspection and testing of the relevant equipment under pertinent conditions were in the interests of justice as required by r250 of the UPCR, the difficulty was that the Plaintiff sought broad orders in regards to inspection and testing. The Plaintiff was seeking liberty, on 7 days' notice to the Defendant, to conduct and undertake inspection and testing of the Jug O Naut and Eimco loaders referred to in his Further Amended Statement of Claim, with such testing to include the operation of the loaders above and below ground. However, the Further Amended Statement of Claim did not identify specific loaders, and at the time of hearing, such loaders had not yet been identified.

His Honour found it was therefore not clear which loaders were to be tested, where they would be tested, the circumstances under which they would be tested and by whom they would be tested. It was also unknown what interference the inspection and testing might have on the Defendant's mine operations. Observing the strict obligations on the Defendant, in respect of health and safety as set out in the *Coal Mining Safety and Health Act 1999* (Qld) and its subordinate legislation, His Honour felt that the further information required by the Defendant was reasonable, so that the parties could agree on the proper conditions to be imposed on the testing. In the absence of such information he considered it improper to exercise his discretion to make the broad orders sought, and dismissed the Plaintiff's request.

Additionally, as it was clear from the Plaintiff's Application that the expert evidence had not been finalised, he also dismissed their request for the matter to be set down for trial.

Considerations of the Court in an Application to transfer proceedings to another jurisdiction

Tickner v Teys Australia Biloela Pty Ltd [2020] QSC 62 is another recent decision by His Honour Justice Crow in the Rockhampton Supreme Court, delivered on 7 April 2020, involving an Application by the Defendant in a worker's compensation claim to have the matter transferred from the Supreme Court of Rockhampton to the District Court at Rockhampton. The Application was made on the basis that the amount claimed by the Plaintiff clear of the WorkCover refund meant that the claim fell within the jurisdiction of the District Court. The orders were sought pursuant to s 25(2) *Civil Proceedings Act 2011* (Qld) which His Honour described as conferring an 'unfettered, broad and unconstrained discretion' to transfer proceedings.

The Plaintiff opposed the Application to transfer the proceedings. His Honour found that based on the damages claimed in the Plaintiff's Statement of Claim, the amount the Defendant (employer) would be legally liable to pay, was the amount clear of the refund to WorkCover, which fell within the jurisdictional limited of the District Court.

His Honour observed that this alone was sufficient to transfer the proceeding, and that competing features needed to be considered when determining whether the discretion provided by s25(2) ought to be exercised.

His Honour's observations in determining not to exercise the discretion and keep the matter in the Supreme Court of Queensland in Rockhampton are interesting for Defendants to bear in mind when contemplating a similar application. His Honour's decision was based on the following considerations:

- It will usually be in the interests of justice to transfer a proceeding from the Supreme Court to the District Court where the claim is within the jurisdiction of the District Court as the legislature has sought to strike a balance between the workloads of the various courts. In ordinary times, where a proceeding falls within the jurisdiction of the District Court it ought to be heard by the District Court and, if there are no other relevant factors, the discretion to transfer the matter from the Supreme to the District Court ought to be exercised in favour of the transfer.

- This case has 'evolved in times which cannot be said to be ordinary times'.

- His Honour felt there were factors which militate against the transfer to the District Court, namely that:

    i. the proceeding has some degree of complexity;

    ii. the plaintiff has suffered a serious brain injury;

    iii. the damages claimed in the Statement of Claim total $843,729.75, however with the reduction required by s270 WCRA the reduced amount is currently a sum less than the District Court limit;

    iv. depending upon the conduct of the trial, the amount particularised as the claim is not necessarily the upper amount of an award which could be made in the plaintiff's favour;

    v. when the matter is ready for trial it will receive a trial date in the Rockhampton Supreme Court many months in advance of any availability in the District Court in Rockhampton;

    vi. the plaintiff was injured on 20 July 2016, almost four years ago, and is suffering personal and financial hardship; and

    vii. there are limited adverse costs consequences to the defendant in litigating in the Supreme Court. Section 318 WCRA limits any adverse consequences of costs in a proceeding in the Supreme Court by requiring cost orders to be made in accordance with the District Court scale.

Having regard for these issues, His Honour found that the Applicant/Defendant had not discharged the onus on it to show that it was in the interests of justice to transfer the Application, and the Application was therefore dismissed.

Relevant to this decision, His Honour commented on the impact of COVID-19 and the case evolving in times which could not be said to be 'ordinary times'. Another factor influencing his decision was that prior to the impact of COVID-19, the District Court was burdened by a large back log of criminal trials, due to the

suspension of jury trials (because of COVID-19), it was foreshadowed that this might further affect the backlog of criminal trials in the District Court.

It is also clear that in determining whether it is in the interests of justice to transfer the proceedings, the Court must consider the impact on the parties to the proceeding. In this case, any adverse costs consequences could be addressed by costs orders, and the Plaintiff, who was suffering personal and financial hardship, would see the end of the matter sooner by receiving an earlier trial date if the matter remained in the Supreme Court.

This case note was written by Principal, Dennis Cronin, and Senior Associate, Alexis Pidcock.

If you would like details on the implications of the cases summarised, please contact Dennis and Alexis for further information.

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