

Insurance Insights

Case Note: *Bergin v Queensland Cork & Timber Solutions Pty Ltd* [2019] QDC 141

A cautionary tale: The risks of failing to test a witness' evidence before trial, and the benefits of requesting a plaintiff commit to a version of events at the outset of a claim

Bergin v Queensland Cork & Timber Solutions Pty Ltd [2019] QDC 141 is a decision recently delivered by Her Honour Judge Vicki Lory in the District Court of Queensland which highlights the importance of diligently reviewing a plaintiff's medical and any prior claim history, and ensuring expert witnesses are instructed with a complete history. It also demonstrates that doubt raised by inconsistencies in the plaintiff's instructions can lead to the reliability of any expert evidence flowing from those instructions also being challenged.

Background

The plaintiff, Mr Bergin, was employed as a floor sander for the defendant company. He allegedly suffered an injury to his right hand and psychiatric injury after ripping up timber floorboards over two days, and commenced a common law claim for damages against the defendant.

The reliability of the plaintiff's evidence was called into question at trial as the histories about the mechanism of injury which were given in his Notice of Claim for Damages, Statement of Claim and medical experts differed to his evidence at trial.

In his Notice of Claim for Damages and Statement of Claim the plaintiff described injuring his right hand after holding a crow bar in his left hand and repeatedly hitting it with a hammer held in his right hand to get under the flooring. This was also the understanding that the medico-legal experts had as to the mechanism of injury.

At trial the plaintiff abandoned the mechanism of injury described in his Notice of Claim, Statement of Claim and explained to the doctors, and gave evidence that frustrated by his initial work method he had proceeded to grab the jemmy bar and forcefully ram it under the flooring using both of his arms and then levering the floor up. He continued with this method. His right palm swelled up that afternoon, but went away overnight. He returned to the job the following day and went back to the lifting up the floor for about an hour, when his right hand swelled up again, at which time he called his employer and ceased work.

Plaintiff's Previous Injuries and Claim

The plaintiff had previously made and been compensated in relation to a worker's compensation claim in NSW arising from an incident in November 2006 which had resulted in a tendon injury to his left hand and subsequent diagnosis of chronic regional pain syndrome in his left hand and arm and depressive illness. In that claim he alleged the injuries had resulted in a significant incapacity for work. By 2012 he had spent all of the settlement funds he received for that claim.

The plaintiff's first attempt to return to work after 2006 was between 2011 and 2012. Between then and his employment with the defendant he made three attempts to return to work lasting only short periods. He attempted work as a self-employed floor sander, performing approximately one month's work over a seven month period, working one day a week as a labourer for a brick layer for a period, and working as a domestic cleaner for three months from July 2012. He then commenced working for the defendant in April 2013.

Plaintiff's History to Medical Experts

A number of medical experts gave evidence at trial. Critical to the decision was that while the judge accepted that the plaintiff was attempting to give an honest account of what occurred, a number of factors impacted on the reliability of his evidence, including the different mechanisms of injury described by the plaintiff in his Notice of Claim for Damages and Statement of Claim compared with his evidence at trial, and the different histories and details given to the medical experts who gave evidence at trial.

The judge found that the plaintiff's lack of candour with the doctors affected the weight she could give their opinions, particularly those on which he relied on to prove his case. In reaching her decision Her Honour discussed the discrepancies in the evidence which demonstrated that the plaintiff had not been forthright with the experts about the impact his left arm injury was having on him at the time of the subject incident, or his history of psychiatric issues attributable to his 2006 left arm injury, both of which had been affecting the plaintiff in late 2012.

The plaintiff failed to mention seeking strong pain medication in 2012 and using marijuana and alcohol to self-medicate (he denied illicit drug use to a number of experts). He had described that his left arm injury was causing a modest impact on him at the time of the incident, but had been seeking Endone and Oxycontin in late 2012 stating to his treating doctors that Endep and Tramal were not really working.

He made an application to Centrelink in 2012 for the Disability Support Pension which was accepted on the basis of his depression and left arm problems, and was interviewed and assessed by a psychologist for Centrelink in November 2012 in relation to that application.

He informed Dr DeLeacy, psychiatrist, that while he had been depressed after his 2006 left hand injury he had overcome that depression. Dr DeLeacy was not aware of the plaintiff receiving counselling through a trauma clinic in 2008, or his low mood and depressive symptoms in late 2012 and being prescribed medication for depression. The plaintiff reported that he could not participate in various sporting activities, but failed to mention to that he had not been able to do so since the 2006 injury.

Dr De Leacy was also not informed that the plaintiff had lost all of his money and in late 2012 a stressor was his homelessness at that time. Unsurprisingly, at trial Dr DeLeacy conceded that had he been given a complete history it would have impacted his assessment of whether the plaintiff had any permanent impairment from a psychiatric injury arising from the subject event.

Dr Alfred Chung, psychiatrist, initially diagnosed the plaintiff with an adjustment disorder with depressive symptoms, but changed his opinion after being given further material for consideration, which included medical records of the plaintiff's attendances at a number of general practitioners and the contents of his application to Centrelink in November 2012 for the Disability Support Pension. Dr Chung revised his opinion and found that the plaintiff did not suffer an adjustment disorder from the subject incident.

The plaintiff did not mention to the medical experts his limited work history between 2006 and 2013, and that in the six and a half years prior to the subject incident he had only worked for the three short periods.

In addition to the issues with the plaintiff's evidence that went to the potential quantum of the claim, in respect of liability, the judge found that *'the general catch-all claims of negligence'* of failing to take reasonable precautions to avoid a foreseeable risk of injury to the plaintiff given his lack of experience; exposing him to the risk of injury which it knew or ought to have known; failing to provide a safe system of work and failing to provide safe equipment did not assist the plaintiff.

He had been assigned a relatively simple task and been shown how to lift the flooring. Angered by the ineffectiveness of the method he was instructed to employ he chose a different method. The Judge held that a reasonable person in the position of the defendant, considering the expense and inconvenience of providing any greater degree of training and assistance, would not have taken any further action. The plaintiff's claim was dismissed.

Lessons

This case serves as a reminder that a considered review and comparison of a plaintiff's medical history, instructions given to experts, the plaintiff's sworn version of events in pre-proceedings claim documents including any statutory declarations, and the pleadings and evidence at trial can cast doubt on the plaintiff's credibility, which may also impact upon the weight given to expert evidence based on those instructions. It also demonstrates the importance of obtaining detailed instructions at the outset of a claim, and testing a witness' evidence prior to trial to identify any inconsistencies to avoid the veracity of their evidence being challenged at trial.

This article was written by Principal, Scott Ames and Senior Associate, Alexis Pidcock. Please contact us if you have any questions or would like more information.

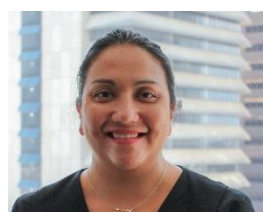


Scott Ames

Principal

+61 7 3220 9310

sames@meridianlawyers.com.au



Alexis Pidcock

Senior Associate

+61 7 3220 9304

apidcock@meridianlawyers.com.au

Disclaimer: This information is current as of August 2019. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.