Recent developments in disease cases

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An injured worker can recover the usual benefits available under the *Workers Compensation Act* if he/she establishes he/she is suffering from a disease of gradual onset, to which the employment was a contributing factor.

For that purpose, s.15 of the *Workers Compensation Act* provides:

(1) If an injury is a disease which is of such a nature as to be contracted by gradual process –

(a) the injury shall, for the purposes of this Act, be deemed to have happened –

(i) at the time of the worker's death or incapacity; or

(ii) if death or incapacity has not resulted from the injury – at the time the worker makes a claim for compensation with respect to the injury; and

(b) compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due.

Section 15 also provides that contribution may be obtained from any earlier employers (not insurers) who, during the 12 months preceding the worker's death or incapacity or the date of the claim (as the case requires), employed the worker in any employment to the nature of which the disease was due, shall be liable to make to the employer by whom compensation is payable, such contributions as, in default of agreement, may be determined by the Commission.

In cases were contribution arises, then this is usually determined on a time on risk basis.

Section 16(1) of the *Workers Compensation Act* provides for circumstances where an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease and provides the same contribution regime as is permitted in Section 15.

A distinction can be drawn with respect to a claim for weekly compensation benefits and where a claim is made for lump sum compensation. The deemed date of injury for a claim for weekly benefits as a result of a disease will be the date of the first incapacity whereas the deemed date of injury for a claim for lump sum compensation will be the date upon which the claim was duly made. Obviously both these positions can produce anomalies with respect to particular employment scenarios.

Previously, in circumstances where a claim for weekly compensation benefits or lump sum compensation arises with respect to an employment period involving the same employer, little difficulty arises, assuming an injured worker can convince the Workers Compensation Commission that he/she is in fact suffering from a disease contracted by gradual onset and his/her employment is employment to the nature of which the disease was due. Contribution issues should not arise if only one employer is involved.

However, what might reasonably have been taken by practitioners in this area to be settled law, is now subject to a recent Court of Appeal decision – *SAS Trustee Corporation v. Pearce* [2009[NSW CA 302 (24 September 20009).

In that matter, the Respondent to the Appeal (the injured party) joined the NSW Police Force in 1982 and over a period of some 20 years was exposed to a number of confronting and traumatic experiences outlined in some detail in the majority Judgment of Basten JA (Beazley JA concurring) at paragraphs 51-55.

Briefly, these may be outlined as follows:

- Pearce as early as 1984 discovered, and recovered, two drowned children.
- In 1985 he was involved in a dramatic helicopter rescue attempt and was injured whilst covering the body of the person being rescued.
- In 1987 he was the victim of an assault having been recognised in a Hotel, as a Police Officer.
- In January 1988, he was attacked by an axe-wielding assailant and fatally wounded the assailant with his firearm.
- Over succeeding years, he was involved in incidents involving the use of firearms including assisting in a siege situation in 2000.

After 1 January 2002, there were other incidents including:

- In September 2003, he was again involved in a siege at Glen Innes during which time the individual poured a large volume of petrol into the body of his car parked next to a petrol station bowser and ultimately ignited the car after having sat in the vehicle all night, with a lighter in his hand. Pearce was involved in removing the burning body from the car in an unsuccessful attempt to save the person's life.
- In 2004, whilst conducting a search of a large marijuana crop and only being armed with pistols, shots were fired by an offender with a rifle.
- Further siege incidents occurred involving Pearce to some degree.

In late February 2005, Pearce commenced a period of sick leave from which he did not return and finally in September 2006 he was discharged on medical grounds, for psychological injuries (hurt on duty).

Pearce sought from the Appellant (SAS Trustee Corporation) a "gratuity" equivalent to the lump sum payment that would have been available to him had he fallen under the terms of the *Workers Compensation Act 1987* (NSW).

On 1 January 2002, amendments to the *Workers Compensation Act* provided lump sum compensation benefits for non-economic loss including loss resulting from a psychological injury. Section 323 of the *Workplace Injury Management and Workers Compensation Act 1998 (NSW)* provided for a deduction from any such payments for a previous injury or pre-existing condition and transitional provisions to the amendments allowed a reduction for any proportion of permanent impairment due to something that occurred prior to the commencement of the amendments.

It was agreed by the Commissioner of Police that for the purposes of the "hurt on duty" claim, the date 10 November 2005 was identified as the "notional" date of injury for psychological infirmities, which if accepted by the parties, would have enabled Pearce to access an appropriate lump sum as his Whole Person Impairment claim for psychological impairment had exceeded the required 15% threshold. The Appellant declined to grant the gratuity sought by Pearce on the basis that his psychological injuries were sustained before 1 January 2002.

Pearce commenced proceedings in the District Court seeking a determination that after 1 January 2002 he had suffered whole body impairment of a sufficient order to entitle him to a lump sum compensation payment.

Hughes DCJ found that the net whole body impairment was 15.3% (after deducting 10% pursuant to s.323 with respect to injuries received before 1 January 2002) thereby entitling Pearce to a lump sum for psychological injuries after 1 January 2002 fixed in accordance with the "notional date" previously provided by the Commission of Police. SAS Trustee Corporation appealed this decision.

The issues for determination on appeal were:

- The significance of the Police Commissioner's certification of the notional date of injury;
- Whether Pearce's infirmity constituted a "disease" within the meaning of ss.15 and 16 of the *Workers Compensation Act*;
- The proper construction application of s.323 of the Workplace Injury Management and *Workers Compensation Act* 1998; and [more importantly]
- The affect of the transitional provisions.

For the purpose of this paper, it is proposed to only consider the grounds of appeal concerning the failure of Hughes DCJ to properly address the medical evidence of Dr Gertler with respect to the appropriate apportionment of permanent impairment as a result of events which occurred prior to 1 January 2002, and the effect of the transitional provisions.

Dr Gertler made an assessment under the WorkCover Guidelines of 15% Whole Person Impairment (although there appeared to be agreement that an arithmetical error had occurred in that calculation) and the assessment should have been 17% of the Whole Person as assessed by Dr Lambeth. In any event, Dr Gertler responded to a number of questions in his report and in particular:

"After arriving at your WPI assessment please indicate what proportion of the WPI, if any, would you ascribe to

(a) Any pre-existing psychological condition;

There was no evidence that Mr Pearce suffered from a psychological condition prior to the onset of the Post-Traumatic Stress Disorder and Depression.

(b) The consequential effects of any physical injury;

None.

(c) Any event that occurred before 1 January 2002.

The cardinal event was the shooting which took place in 1988. The majority of events which occurred after that time did so before 1 January 2002. As such, the proportion of WPI which can be attributed to events prior to 1 January 2002 would be almost 100%."

The Appellant advised Pearce's solicitor that it had granted payments by way of gratuity in respect of a number of injuries, but not for the "*psychological injury sustained on the notional date of 10 November 2005*". This last decision gave rise to the Appeal in the District Court in which Pearce was successful, and the subsequent Appeal by SAS Trustee Corporation to the Court of Appeal. To properly understand the Court of Appeal's decision, it is necessary to appreciate the interrelationship of the *Police Superannuation Act* and the *Workers Compensation Act*.

In the *Police Superannuation Act*, the term "hurt on duty" is defined to mean "*injured in such circumstances as would, if the member were a worker within the meaning of the Workers Compensation Act 1987, entitle the member to compensation under the Act*."

A consideration of the definition of injury in s.4 reveals that injury means personal injury arising out of or in the course of employment and can include "*a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration.*"

The Court then considered ss.15 and 16 of the Act in relation to the "*disease provisions*" and also a consideration of s.22 where compensation is to be apportioned where more than one injury occurs.

Basten JA referred to the 2001 amendments in respect to psychological injury and also s.323 providing for the deduction for previous injury or pre-existing condition or abnormality either by assessing the deduction in circumstances where it is not difficult or costly to determine, or where the assessment of the deduction is difficult or too costly to assess, then the provision of a fixed 10% impairment "unless this assumption is at odds with the available evidence". Hughes DCJ adopted this less onerous approach.

Basten JA at 83 states:

> *"The final (and arguably critical) set of provisions in the Workers Compensation Legislation concerned the transitional provisions consequent on the enactment of the 2001 amendments. Those are to be found at Pt 18C of Sch 6 of the Workers Compensation Act. …. The new language, referring to 'an injury that results in permanent impairment' in each of ss.66 and 67 permitted claims for lump sum compensation in a range of circumstances in which such claims had not previously been available. These circumstances included, but were not limited to, psychological injury."*

The primary transitional provision provides that the amendments do not apply in respect of an injury received before the commencement of the amendments (even if the injury is the subject of the claim made after the commencement of the amendments) Sch 6 Pt 18C Clause 3(1). Subclause (2) and (3) of Clause 3:

(2) there is to be a reduction in the compensation payable and Division 4 of Part 3 (as amended by the lump sum compensation amendments) for any proportion of permanent concerned that is previously non-compensable impairment and

(3) a previously non-compensable employment is loss or impairment that is due to something that occurred before the commencement of the amendments to Division 4 of Part 3.

The Court was therefore required to determine three questions:-

(a) When was the injury "received" for the purposes of Clause 3(1);

(b) Is the loss or impairment "due to something" occurring before 1 January 2002; and

(c) If yes to (b), what proportion of the impairment is due to that? (being Clause 3(2)).

Because the date of injury is a matter to be determined in accordance with the *Workers Compensation Act*, it is necessary for the Commissioner to decide whether or not the injury is a disease contracted by gradual process, or consists in the aggravation, acceleration, exacerbation of deterioration of a disease. If the former, the Commissioner is required to determine the date by reference to s.15 of the *Workers Compensation Act* and if the latter, by reference to s.16. Whether the Commissioner in fact did decide the date of injury by application of ss.15 or 16 treating Pearce's injury as a disease, depended on the correct understanding of the date chosen and the use of the term "notional".

The majority in the Court of Appeal considered the Commissioner's chosen date to be somewhat "arbitrary". However, it was conceded that while the Commissioner in deciding the "notional date" used terminology outside the Section, that semantic difference was of no particular significance, as to describe the date of injury as "notional" implies that it is not the actual date of injury but is a supposed or assumed date, and that is consistent with the language of ss.15 and 16.

Basten JA then considered the application of the transitional provisions referred to above (an exercise not appropriately undertaken by Hughes DCJ) finding that to the extent that the Post Traumatic Stress Disorder (PTSD) constituted, was a consequence of, an injury received before the commencement of the amendments, the lump sum compensation amendments did not apply. *"However, once the Commissioner determined that the injury happened in 2005 (the notional date) because the PTSD constituted a disease within the terms of s.15 or s.16, it was an injury received after the commencement of the amendments on 1 January 2002 and the transitional provisions are then engaged."*

His Honour went on to say:

> *"The reduction required by the transitional provision turns on a causal connection between the impairment and events which occurred before the commencement of the amendments. There may be various circumstances in which an injury is received after a particular date but is 'due to something' that occurred before that date. Circumstances which engage s.15 or s.16 providing for deemed dates of injury, could also engage the transitional provision and require a reduction under Clause 3(2). They require the assessment of a 'proportion' of the impairment which is 'due to' events occurring before 2002."*

Accepting the validity of the Commissioner's Certificate as to the "notional date" of injury, His Honour concluded that the transitional provisions required a re-assessment of the effect of the injuries occurring before 1 January 2002 and those occurring after, in order to properly assess whether or to what extent Pearce's Whole Person Impairment came about as a result of injuries occurring beyond 1 January 2002. The matter was remitted to the District Court for redetermination according to law.

The conclusion arising from the *SAS Trustee Corporation v. Pearce* decision is that although there was an acceptance by the parties that the injured worker was suffering from a disease contracted by a gradual onset, for which the Commissioner of Police had determined a notional date of injury in 2005, thereby entitling Pearce to access the benefits available for psychological injuries for non-economic loss, providing such psychological injury exceeded the 15% threshold (as was the case), it is nevertheless necessary for the Court to determine the effects of the injuries occurring prior to 1 January 2002 and the extent to which they result in a Whole Person Impairment.

In Pearce's case, the overwhelming evidence is that the effects of the injuries before 1 January 2002 were considerable and on appropriate re-consideration and assessment would without doubt produce an outcome not entitling Pearce to a lump sum payment for psychological disability, notwithstanding that his injury was in the nature of a disease contracted by gradual onset.

To this date, the matter has not been re-determined.

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