JAMES CATLIN, VIC

Multiple causes, malingering and misconstruing

Shorey v PT Pty Ltd [2003] HCA 27

In *Shorey v PT Limited*, the court could only accept the preponderance of expert evidence that the plaintiff's symptoms were 'bizarre and without an apparent physiological explanation'.

The plaintiff was ultimately successful in relation to injuries that would be barred by the statutory provisions referred to in the Victorian Court of Appeal case of *Lincoln*.[1]

BACKGROUND

The plaintiff's severe disablement arose from a fall at a shopping centre in 1988. Her disablement, principally profound paraplegia from 1993, was not immediate but developed over time.

Psychological reaction to her minor injuries was the predominant cause of her disablement, leading the judge to remark: 'She can walk if she wants to but she does not walk.'

Three major post-injury psychosocial episodes were arguably causative, creating the principal appeal grounds: Was the disability genuine or was the plaintiff a malingerer? Were the disabilities caused by the fall in question and the associated negligence of the defendants?

The New South Wales Court of Appeal[2] agreed with the primary judge's finding in relation to the first question, based on the principles in *Abalos v Australian Postal Commission*.[3]

The court found for the defendant on the second question and reduced damages from $555,212 to $68,911.

DECISION

The first question was not considered by the High Court, but its consideration of causation demonstrated the difficulties tribunals face regarding the malingering question.

The plaintiff claimed she was unable to use her legs, but the evidence showed that she could crawl, had calluses on her feet and did not have muscle wastage in her thighs and calves.

Her provable injuries from the fall included secondary psychological complications of conversion disorder or chronic hysteria, chronic pain disorder and chronic depression.

The plaintiff had pre-existing back problems from a laminectomy and discectomy and was old enough for natural degenerative problems. Her back problems commenced shortly after her husband's death. The primary judge found the physical and psychological factors 'intertwined'.

The High Court found the Court of Appeal had strayed into a 'search for single cause'. The court restated the principles in *March v Stramare (E&MH) Pty Ltd*[4] that it is enough for a claimant to show 'a cause'. It also referred to the eggshell skull rule that the defendant must 'take the plaintiff as it finds her'.[5]

CAUSATION - EXPERT EVIDENCE MISCONSTRUED

A significant basis for the appeal was a psychiatrist's testimony. At one stage of the proceedings he said to the primary judge: 'I withdraw everything I have said then.'

The psychiatrist also conceded that his original opinion had been formed without knowledge of a material fact (the impact on the plaintiff of her husband's death), and agreed that he would prefer to see the plaintiff armed with that information.

The defendant characterised both these statements as a withdrawal, or at least a significant qualification, of the psychiatrist's opinion.

Another expert in spinal medicine and surgery had also relied on the psychiatrist's evidence. In the Court of Appeal's view, the withdrawal of opinion prevented the primary judge from being able to rely on either expert.

The High Court found the psychiatrist's comment was in fact 'a semi-humorous remark' in response to judicial interjection.

Otherwise, Gleeson CJ and McHugh and Gummow JJ held that 'a concession by an expert witness of the possibility that an opinion may be incorrect...does not amount to an abandonment of the opinion'. They added that the extent of qualification 'may depend on an assessment of the witness by trial judge'. PL

James Catlin is a member of the Victorian Bar **PHONE** (03) 9225 8141
EMAIL jdcatlin@vicbar.com.au

Endnotes: **1** See pp37-39 of this issue of *Plaintiff*. **2** *PT v Shorey* [2001] NSWCA 127. **3** (1990) 171 CLR 167. **4** (1991) 171 CLR 506 at 511. **5** *Watts v Rake* (1960) 108 CLR 158.