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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A 16/79

IN THE MATTER of The Limitation Act 1950

BETWEEN JOHN WILSON SMITH of Huntly, Driver

Intended Plaintiff

A N D WINSTONE REFRACTORIES LIMITED, a duly incorporated company having its registered office at Huntly

Intended Defendant

Hearing: 17 December 1981

Counsel: D L Tompkins, Q C, and I D Todd for intended plaintiff
J A Faire for intended defendant

Judgment: Delivered on 12th March 1982

RESERVED JUDGMENT OF GREIG J

This is an application for leave to bring an action against the intended defendant, whom I shall call "Winstone's", in respect of bodily injury to the applicant.

The applicant suffers from pneumoconiosis caused by the inhalation of silica dust: the disease is also known as silicosis. That disease, according to the medical evidence before me, is a well documented and well recognised industrial disease which has become rare in New Zealand. It is caused by the inhalation of silica dust and in this case the lesions may progress without further inhalation of the dust. There is no treatment for the disease and the applicant's condition will continue to deteriorate and it is said that in a relatively short time the applicant will be very considerably disabled and his expectation of life has been shortened. The condition of the applicant was not diagnosed finally nor was he informed of any such diagnosis until October 1978. This application was made on 9 February 1979.

The crucial aspect of this case then is whether the applicant's cause of action accrued within six years before that date, namely, on or after February 1973.

The applicant was employed by Winstone's on 17 January 1963 to 19 April 1974. For about six years until 11 August 1972 he was employed in an area where bricks for use in furnaces, known as 'refractory specials',were manufactured. The applicant claims that it was in this area of employment and during this time that he was exposed to and inhaled the silica dust that caused the silicosis. On 11 August 1972 the applicant was appointed factory despatch foreman and from then until he left Winstone's employment in April 1974 he was not exposed to silica dust and it is accepted that Winstone's was not in breach of any duty that it may have owed to him in that latter period.

The evidence before me shows that the applicant was first X-rayed on 24 June 1969 and there was no abnormality in his lungs which relates to this disease of silicosis. On 1 June 1972 he was again X-rayed following what seems to have been a routine visit of the mobile X-ray unit to Winstone's factory at Huntly. Following that X-ray further X-rays were taken of the applicant on 22 and 29 June, 27 July, 31 August and 30 November 1972 and 1 March 1973. There was shown on these X-rays a lesion at the top part of the right lung which was described as "an ill-defined shadow" on the X-ray. The medical evidence for the applicant also described these X-rays as showing that his lungs were then "a little spotty". It was thought that there might be tuberculosis and some treatment was given to the applicant but tuberculosis was not confirmed. The next series of X-ray photographs were taken in 1974 and these were taken on 4 April, 4, 8 and 25 July and 2 August 1974. A percutaneous needle biopsy was also undertaken at that time but this disclosed no definite abnormality. What was shown by these X-ray photographs was that the lesion on the top of the right lung had become larger and denser and a second lesion was developing on the top of the left lung. There was some suspicion that there might be lung cancer but the examinations did not confirm

that but at that time there was a tentative diagnosis of pneumoconiosis. On 28 August 1974 a reference to that disease was recorded in the hospital notes in reference to the applicant and this tentative diagnosis was also referred at this time to the Medical Officer of Health in Hamilton because of the concern about other persons working at Winstone's factory at Huntly. It is accepted by the medical practitioner on behalf of the applicant that by October 1974 the abnormalities in the lung had progressed to a significant stage.

Apart from the X-rays a number of other tests were undertaken and, as will be seen, the applicant was examined on a number of occasions and notes were made as to his condition as it appeared to him from time to time. The tests undertaken included spirometric tests which measure the vital capacity of the lungs in forceful expiration. These tests show that in August 1972 and 1973 there was normal capacity with some slight effect which was expected with a smoker. It was not until October 1974 and thereafter that the spirometric tests show a steady and significant decrease in the lung capacity.

As far as the applicant's symptoms as told to the hospital, there is nothing significant until March 1975 when there is a suggestion of shortness of breath but even at the beginning of 1976 the applicant as far as he was aware was fit and well.

The applicant's medical adviser accepts that, with hindsight, what appeared in the X-ray in 1972 and thereafter was the early stage of the development of the fibrosis which without further inhalation of silica progressed year by year until there was clear evidence finally confirmed by a further biopsy in 1978. What that medical adviser says, on the other hand, is that until 1974 or even later there were no symptoms and if the fibrosis had remained without further progression the applicant would not have suffered any further symptoms and his general health would have been good. Winstone's on the other hand say that the changes in the applicant's illness due to silicosis were present in June 1972, were

visible and that there has been a subsequent deterioration thereafter.

Damage is the gist of the action to be brought by the applicant. The fact that the alleged breach or breaches by Winstone's ceased beyond the six year period does not matter so long as the damage occurred within the six year period. The fact that the applicant may not have known of the damage is not relevant. A question is how much damage is required for the cause of action to accrue.

Both counsel relied as their principal authority on Cartledge v E Jopling & Sons Ltd (1963) AC 758. That is a case of silicosis in which the plaintiffs failed because lung damage had occurred before the six year period began. Shortly after that case the relevant legislation in the United Kingdom was amended and further amendments have been made to the English Limitation Acts to provide for cases such as this. Cartledge's case remains authority and has been treated as relevant in Anns v Merton London Borough (1978) AC 728, and in Mount Albert Borough v Johnson (1979) 2 NZLR 234, for two examples. I quote a number of passages from the speeches of Their Lordships in Cartledge's case:

> Lord Reid at 771:
> "...a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer".
>
> Lord Evershed M R at 774:
> "...the cause of action from such a wrong accrues when the damage - that is, real damage as distinct from purely minimal damage - is suffered."
>
> Lord Morris of Borth-y-gest at 775:
> "...the appeal proceeded upon an acceptance of the findings that there were no breaches of duty after October 1, 1950, which caused any appreciable damage to the men concerned...The evidence

established, however, and it was held, that lung damage had been caused before the stage was reached at which the existence of the disease would have been detectable on X-ray examination."

Lord Pearce at 777:

"In the present case, therefore, the causes of action did not accrue until some actionable injury was caused to the plaintiffs by the defendants' breach of duty."

And at 779:

"It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree.... It is a question of fact in each case whether a man has suffered material damage by any physical changes in his body. Evidence that those changes are not felt by him and may never be felt tells in favour of the damage coming within the principle of de minimis non curat lex. On the other hand, evidence that in unusual exertion or at the onslaught of disease he may suffer from his hidden impairment tells in favour of the damage being substantial. There is no legal principle that lack of knowledge in the plaintiff must reduce the damage to nothing or make it minimal."

And at 781:

"The cause of action accrued when it reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done."

On or before February 1973 there was visible damage to one lung which it is now known was the condition which has resulted in silicosis. At that time tuberculosis alone was suspected and it was not until more than a year later that there was any suspicion of silicosis. The applicant himself was not only unaware of his condition but felt no effects

whatsoever in impairment of his general good health. If steps had been taken then by way of action the result must have been a failure in that there was no actionable damage, no compensatable injury for which damages could have been given. At that stage then, in my view, the effect on the applicant was negligible and insignificant and it was not until 1974 that the damage had occurred for which the cause of action accrued. My conclusion, therefore, is that the cause of action accrued within the six years before February 1979 and the applicant is not debarred by s 4 (1) of the Limitation Act 1950 from bringing his action.

The next question is whether it is just to grant leave under s 4 (7) of the Act in the circumstances of this case. Clearly there has been little delay since October 1978 when the applicant was first notified of the disease. It should be recorded that the delay in bringing this matter to hearing is fully explained by the fact that the applicant referred the question of his rights to the Accident Compensation Commission and it was not until after an unfavourable decision from that body that the matter could be pursued further in this Court. It is plain that until October 1978 the applicant was in ignorance of his condition and of any rights that he might have had. There is, of course, a distinction between mistake as provided for in the proviso to the subsection and ignorance and this has recently been noted by Somers J in Moot v Crown Crystal Glass Ltd (1976) 2 NZLR 268. There is, however, in my view other reasonable cause for the delay. There is no suggestion that Winstone's will be materially prejudice by the delay and indeed I should note that Winstone's did not argue that this was not a just case under the subsection for the grant of leave.

In the circumstances then leave will be granted to the applicant to issue his proceedings on the terms of the draft statement of claim now filed in this application, such claim not to be amended, except for the amount of damages, without leave of the Court.

The applicant is legally aided and in all the circumstances of this case I will not make any order as to costs.

Solicitors for the intended plaintiff: Fry, Wilson, Todd & Co (Huntly)

Solicitors for the intended defendant: Stace, Hammond, Grace & Partners (Hamilton)