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Causation and the real, proximate or effective cause

Disease claims – employment must materially contribute

Material Contribution

Usually, unlike the case of injury (where all that a worker needs do is show that it happened), a claimant for compensation needs to show employment materially contributed to a disease.

Although the definitions of injury are not identical across Federal, State and Territory workers compensation legislation, all workers compensation laws are essentially similar in that the word "injury" receives a primary definition (eg to mean mental or physical injury) followed by an extended definition dealing with diseases.

As with most workers compensation legislation, the Northern Territory *Workers Rehabilitation and Compensation Act* (WRCA) imposes additional conditions on disease claims. These are:

- the employment must materially contribute to the aggravation, acceleration or exacerbation of the disease.
- material contribution requires the employment to be the real, proximate or effective cause of the disease.

(Note: section 4(6) of the WRCA "deems" certain diseases to have been contracted by a worker in the course of his or her employment (unless the contrary is established) and those diseases are set out in schedule 1).

Formerly, no requirement for material contribution

When the predecessor to the WRCA (the (NT) *Work Health Act* (WHA)) commenced in 1987, there was no special requirement in the Northern Territory requiring employment to have materially contributed to a disease.

However, things changed in 1991 and again in 1998.

"a" real, proximate or effective cause

In 1991, an attempt was made to require work causation regarding disease claims. Sections 4(6A) and 4(8) were introduced to the legislation, and they read as follows:

- s4(6A) : "… a disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker's employment unless the employment in which the worker is or was employed materially contributed to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation."

- "s4(8) For the purposes of this section, the employment of a worker shall not be taken to have materially contributed to an injury or disease or to an aggravation, acceleration or exacerbation of a disease unless the employment was **a** real, proximate or effective cause of the injury or disease or to the aggravation, acceleration or exacerbation of the disease, as the case may be."

The Northern Territory government Minister at the time in 1991 explained the intent as follows:

> "A new subsection will be inserted into proposed section 4 dealing with whether an injury arose out of or in the course of employment. This will ensure that a causal link is established between the disease and employment. Under the present legislation, there does not appear to be any necessity for there to be a causal connection between the disease and the nature of employment, as long as the disease was contracted in the course of employment.
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> In other words, a disease may be become compensable if it occurred at work or whilst doing something reasonably incidental to employment even if no causal link is established. The amendment proposed will bring the Work Health Act in line with legislation in other jurisdictions in Australia by establishing a causal link between the injury and employment rather than a temporal connection."

That was the intent of sections 4(6) and 4(8). However, the reference to "a" (and not "the") real, proximate or effective cause in s4(8) made it ineffective.

"THE" REAL, PROXIMATE OR EFFECTIVE CAUSE

By 1998, it became apparent that the reference to "a" real, proximate or effective cause was not enough. The legislation was changed again to ensure the employment was "the" (and not just "a") real, proximate or effective cause of the injury or disease.

On 20 May 1998, section 4(8) was reformed as follows:

- "(8) For the purposes of this section, the employment of a worker is not to be taken to have materially contributed to —

  (a) an injury or disease; or

  (b) an aggravation, acceleration or exacerbation of a disease,

  unless the employment was **the** real, proximate or effective cause of the injury, disease, aggravation, acceleration or exacerbation." (emphasis added)

The government Minister said the intention was as follows:

> "An area in which the Act will be tightened is in relation to the requirement that employment must materially contribute to the contraction of a disease and to injuries that occur by way of a gradual process. In future, a worker will only be entitled to compensation where the employment was the real, proximate or effective cause of such an injury. This means the worker will not be entitled to compensation where the employment was only a minor contributing factor to the injury."

During the debate in Parliament at the time, one of the Members of Parliament observed: "The key change is from the words `a real, proximate or effective cause′ to `the real, proximate or effective cause′. It is a simple change in language terms, but it potentially carries with it very strong implications."

What does "real, proximate or effective cause" mean?

The terms "real, proximate and effective" are read both independently, or together, according to the usual rules of statutory interpretation. The following terms may be defined as:

- "real" – not trivial; the actual or significant cause of the injury.
- "proximate" – the immediate cause, not necessarily that closest in time to the event; the initial event in a chain of events.
- "effective" – a direct causal or physical link.

Accordingly, properly applied, "the real, proximate or effective cause" formulation would provide for a higher hurdle of causation than "material contribution."

Examples:

- the worker's employment may be the real cause of the injury where a worker is employed as a furniture removalist and is required to perform repetitive heavy lifting over three years which results in back pain and related symptoms. He may in fact have an underlying degenerative desiccation of the disc which has not become symptomatic, however, the real (significant, actual or important) cause of the injury is the worker's heavy lifting over three years.
- a worker is employed as a nurse and is required to wash his hands numerous times each day and to wear latex gloves. Over the course of several years, the worker suffers an injury in the form of a contact dermatitis, brought on by sensitivity to latex and chemicals used during hand washing. The exposure of several years results in a psoriasis of the skin. When the Worker is not exposed to latex or other chemicals, the condition subsides. Work could be said to be the effective cause of the disease.
- A worker is employed as a remote area nurse. The Nurse is threatened by a patient who is holding a gun. The worker is described by her co-workers as being an anxious person normally and has in the past been treated for anxiety and depression. She is able to perform her duties until the incident. Following the incident the worker is said to suffer from an anxiety disorder which forces her to stop work and seek psychological and psychiatric treatment. The Worker's employment is the proximate cause of the anxiety condition.

Some questions to ask:

- is the work the *real* cause of the disease? Is there some other disease or physical process involved which has caused it? How significant is it?
- is work the *proximate* cause of the disease? Does the injury or disease naturally follow as a consequence of the work performed? Does the injury follow on from the work? Is there a chain of events, related to the work performed by the worker, which ends in the disease process? Are there any significant gaps between work and the onset of symptoms?

- is the work the effective cause? Does the disease follow as a natural consequence of the work performed? Has the work been the particular influence which brings about the pathology?

Some diseases might end up as injuries

Depending on the facts and the medical evidence, some diseases may progress to injury, potentially relieving the claimant from proving material contribution by work.

In High Court cases of:

- Zickar (a 21 year old man who collapsed at work following the rupture of a cerebral aneurism), the High Court decided that although the formation of an aneurism is a disease process, its rupture was an "injury" and not a "disease".

- Petkoska (the worker suffered an underlying rheumatic mitral valve disease, which is a narrowing of the mitral valve which predisposes such a person to rhythm disturbances; she sustained a stroke at work). The employer argued the stroke was "merely the culmination or climax of a progressive disease". The Court disagreed and determined the stroke, a sudden physiological change, was an injury. The Court explained that if the evidence proved the stroke suffered by the worker was "merely the culmination or climax of a progressive disease", then it would not be compensable as an injury and the worker would have to prove work caused the disease.

It is important for the medical evidence to be clear on whether what occurred is an injury (a sudden change or disturbance to the physiological state) or a disease process.

As Justice Kirby said:

- in *Zickar* and again noted in *Petkoska*, consideration needs to be given to the precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change.

- the High Court's decision "does not necessarily mean that every catastrophe connected with a progressive disease will fall within the definition of 'personal injury' … whether, in the case of a progressive disease, leading inevitably to a sudden or identifiable pathological change, it can be said that such change constitutes a 'personal injury' can be left to determination on a case by case basis."

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