

# A Significant Contributing Factor Presented by Mr Frank Lippett

## Legislation

Section 32(1) of the *Workers Compensation and Rehabilitation Act 2003* (WCRA) provides:

“An injury is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.”

Section 34(1) of the *WorkCover Queensland Act 1996* required initially that employment had to be “the major significant factor causing the injury.” A subsequent amendment altered the wording to that which was later imported into the WCRA. That wording is in line with that in other Australian jurisdictions, excepting that in some states the word ‘substantial’ is used instead of ‘significant’.

## Meaning of the Phrase

It might be useful to first mention what the phrase does not mean. It has from time to time been suggested in several jurisdictions that it either dilutes or even makes redundant the requirement that the injury arise out of or in the course of employment. Those notions have been consistently rejected.

As recently as March, the Queensland Court of Appeal said in *Newberry v. Suncorp Metway Insurance Ltd* (2006) QCA 48 (per Keane JA with whom de Jersey CJ and Muir J agreed):

“Further, there is no warrant in the language of s32 of the WCRA for reading the words “if the employment is a significant contributing factor to the injury” as lessening the stringency of the requirement that the injury “arise out of the employment”, as was suggested in the course of argument on the appeal. It is clear, as a matter of language, that the words “if the employment is a significant contributing factor to the injury” are intended to be a requirement of connection between employment and injury additional to each of the requirements that the injury occur in the course of employment or arising out of the employment. It cannot, in my respectful opinion, sensibly be read as lessening the stringency of the latter or increasing the stringency of the former.”

In relation to what it does mean, the High Court considered the issue in 1964 in *Federal Broom Co Pty Ltd v. Semlitch* (110 CLR 626). That case involved a consideration of the *New South Wales Workers' Compensation Act* of 1926, which provided:

“Injury means personal injury arising out of or in the course of employment and includes –  
(b) The aggravation, acceleration, exacerbation, or deterioration of any disease where the employment was a contributing factor to such aggravation”.

At page 632, Mr Justice Kitto said:

“Where it is possible to identify as a contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, some incident or state of affairs to which the worker was exposed in the performance of his duties and to which he would not otherwise have been exposed, I see no misuse of English in condensing the statement of the fact by saying simply that the employment was a contributing factor to the aggravation etc. It is in that sense that I should understand the language of the definition.”

And at page 641, Mr Justice Windeyer said:

“Was this aggravation or deterioration contributed to by her employment? This requirement of the Act is not satisfied by showing only that a worker suffering from some disease would or might have suffered less severely if he had not been employed at all. When the Act speaks of ‘the employment’ as a contributing factor it refers not to the fact of

being employed, but to what the worker in fact does in his employment. The contributing factor must, in my opinion, be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed.”

In context then, ‘**employment**’ refers to what the worker does in the employment, not to the fact of being employed at the relevant time.

The replacement of ‘the’ with ‘**a**’ indicates that there can be more than one significant factor, and that is how the Queensland and other similar legislation has been interpreted.

In *University of Tasmania v. Mary-Anne Cane* (1994) 4 Tas R 156, the Tasmanian Supreme Court said:

“A Tasmanian worker who shows that her disease arose out of her employment, must also establish that such disease was one to which her employment contributed to a substantial degree” the word “substantial” as used in the Act, s25(1)(b) is used in a relative sense. There is a recognition that there may be other causes for the disease. Indeed it may be possible to say in any given circumstances that there are a number of “substantial” factors causing a particular condition”.

In *Pleming v. Workers Compensation Board of Queensland* (1996) 152 QGIG 1181, Mr Justice de Jersey said, referring to the facts of the case before him:

“There is obviously at least one other contributing factor and on the evidence before the Magistrate that was certainly the major factor. There could be room, in theory, for another significant factor”.

In *Mercer v. ANZ Banking Group* (2000) NSWCA 138, the New South Wales Court of Appeal said, referring to the word “substantial” which appears before “contributing factor” in that state’s Act:

“remembering that word is used in a relative sense, recognising that other causative factors may be present. Section 9 does not require that the employment must be “the” substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a particular condition”.

‘**Significant**’, according to the Macquarie Dictionary, means “important; of consequence”. There is no reason why the word should be given other than its ordinary dictionary meaning. Whether any particular matter is a **contributing factor** depends on the circumstances of each individual case; and different minds might legitimately reach different conclusions.

By way of example, it might be interesting to consider the case of *Favelle Mort Limited v. Murray* (1975) 133 CLR 580.

Mr Murray was a project engineer employed by Favelle Mort Ltd. In 1968 he was sent from Sydney to New York to work as a supervisor of the company’s cranes which were being used in the construction of the World Trade Centre building. While in New York, he was attacked by a virus and developed encephalitis.

Judge Langsworth, the chairman of the Workers’ Compensation Commission (N.S.W.) rejected Mr Murray’s compensation application. In his view, the contraction of the virus was as common a risk in Sydney as it was in New York; and there was no evidence that the employment especially exposed him to risk of viral infection. Mr Murray appealed to the Court of Appeal, which decided that employment was a contributing factor.

The employer appealed to the High Court. The appeal was dismissed. The Court held, in effect, that Mr Murray was only in New York because his employer required him to be there, and that he probably would not have contracted the virus had he not been in that place at that time. (principally Barwick C.J. at page 584, Mason J at page 599 and Jacobs J at page 601).

It is suggested that it is debatable whether the Court would reach the same conclusion now, three decades later, in the circumstances of our present world environment.

## How the Issue is to be Determined

In each case, it is a question of fact for the decision-maker. Some decided cases offer useful guidance in the approach to be taken.

In *Obstoj v. Van de Loos* (W203 of 1985 unreported), the plaintiff claimed she was suffering from temporal lobe epilepsy, but there was a conflict of medical testimony as to whether or not it had been caused by a motor vehicle collision in which she had been dazed but did not lose consciousness. She had no prior history of epilepsy.

Connolly J. pointed out that whilst medical evidence was of assistance to a Court in attempting to resolve such a question of causation, it was not necessarily to be resolved by acceptance or rejection of medical testimony. His honor said: "The function of a Court of law in a situation such as this is to determine whether, for whatever reason, it is more probable than not that there is a causal relationship between the accident and the plaintiff's post-accident condition."

In *Pacific Coal Pty Ltd v. Gaudry* (CA No 268 of 1995 unreported), the Court was concerned with whether or not the plaintiff's back condition as at the date of trial was caused by a relatively minor injury he had sustained at work sometime previously. There was a marked conflict of medical testimony. Mr Justice Lee commented that it was "not the function of a Court of law to resolve questions of medical or indeed any other science."

*Adelaide Stevedoring Co Ltd v. Forst* (1940)64 CLR 538 was about a worker who died as a result of coronary thrombosis after performing at work a task which involved an unusual type and extent of exertion. The worker was not young.

At page 563, Rich ACJ, with whom the majority of the High Court agreed, said:

"I do not see why a Court should not begin its investigation, i.e. before hearing any medical testimony, from the standpoint of the presumptive inference which this sequence of events would naturally inspire in the mind of any commonsense person uninstructed in pathology. When he finds that a workman of the not-so-young standing attempts in a posture calculated by reason of the pressure on the stomach to disturb or arrest the rhythm of the heart a very strenuous task not forming part of his ordinary work and then collapses almost immediately and dies from a heart condition, why should not a Court say that there is a strong ground for a preliminary presumption of fact in favour of the view that the work materially contributed to the cause of death?"

Mahoney JA of the New South Wales Court of Appeal had this to say in *Fernandez v. Tubemakers of Australia Ltd* (1975) 2 NSW LR 190:

"The question remains whether, accepting that the trauma was a possible cause of the condition, it was open to the jury to infer that it was the actual cause of it. If the condition appeared the day after the occurrence of the possible cause, then it would normally be open to conclude that the possible was the actual cause "The state of medical skill may be such that it can be said by an expert that, if the condition occurs after such and such a period, then the possible cause is to be excluded as the actual cause. But there this cannot be done, then, if a possible cause occurs sufficiently closely related to the condition, the jury may draw the inference of causal connection "Medical science may say in individual cases that there is no possible connection between the events and the death, in which case the judge cannot act as if there were a connection. But if medical science is prepared to say that is a possible view, then the judge after examining the lay evidence may decide that it is probable. It may be the case that medical science will find a possibility not good enough on which to base a scientific deduction, but Courts are always concerned to reach a decision on probability and it is no answer, it seems to me that no medical witness states with certainty the very issue which the judge himself has to try."

President Hall provided a helpful analysis in *Groos v. WorkCover Queensland* (2000) QIC 52. On 14th January 1997 the worker threw himself backwards off a trailer to avoid being struck by a very heavy steel girder. It was a life-threatening incident, which resulted in fractures requiring a week's hospitalisation. The worker started having nightmares in which he re-lived the incident.

WorkCover Queensland did not accept that the worker suffered a psychological injury within the meaning of the term in the Act. An appeal to the Industrial Magistrate's Court was unsuccessful, and the worker appealed successfully to the Industrial Court, where the President said:

"The Industrial Magistrate seems rather to have been of the view that the appellant's condition arose out of events, in particular the appellant's inability to find employment, which occurred after his employment had come to an end.

The shortcoming in that approach is that it omits to take into account that every post-employment factor to which one might legitimately refer, is linked to the incident of 14 January 1997. The appellant lost his employment because he returned to work too early and could not cope. He could not cope because he was not fully recovered from the incident. He has not been able to obtain alternative employment because he can no longer perform the work which he is trained to perform. The appellant becomes bored, frustrated and anxious because he has nothing to do. He has nothing to do because of the unemployment. He drinks to relieve that boredom and he drinks to relieve the continuing pain of the physical injuries of 14 January 1997”.

## Legislative Assistance

Section 9A of the New South Wales Workers Compensation Act 1987, and section 5(1B) of Victoria's Accident Compensation Act 1985 provide that certain matters must be taken into account in determining whether employment was a significant contributing factor to an injury. While there is no legislative or other requirement in Queensland to consider those matters, they do provide a useful guide in the decision-making process:

- the duration of the worker's employment;
- the nature of the work performed;
- the particular tasks of the employment;
- the probability the injury, or a similar injury, would have been suffered at about the same time or at about the same stage of the worker's life, if the worker had not been at work or had not been in that employment;
- the existence of any hereditary risks;
- the state of the worker's health before the injury;
- the lifestyle of the worker; and
- the activities of the worker outside the workplace.

## Summary

Regard must be had to what the worker in fact does in the employment, not to the bald fact of being employed. There can be more than one significant contributing factors to the injury; but the employment's contribution must be of some importance.

In some cases, the medical evidence might make it plain that employment did not contribute to the injury. In other cases, it might be equally clear that employment was either the only, or the most important contributor.

In yet other cases, the medical opinions might differ but all be credible; or suggest there is no more than a possibility that employment was a contributor. In those situations it is necessary to look beyond the medical evidence. There does not always need to be a precise scientific deduction, because the Court deals in probabilities. It is necessary to consider all the surrounding circumstances. That exercise may well assist in deciding which credible medical opinion should be accepted; or enable the tribunal of fact to determine whether or not a medical possibility is indeed a probability.