

Stress, colon cancer and workers' compensation

THERE ARE IMPORTANT DISTINCTIONS to be made between the inquisitorial process of a tribunal, such as the South Australian Workers Compensation Tribunal, and the adversarial process of the courts. To quote the renowned English Law Lord, Lord Devlin:

In the [adversarial process], the judge presides at the trial, directs the proceedings and rules on the law; he is not there to hold an inquiry. It is quite different from the [inquisitorial process] where witnesses are summoned by the court and examined by the judges, the role of counsel being to tender a witness, and ask supplementary questions.¹

A tribunal is inquisitorial. It can ask its own questions of the witnesses called, and may have the capacity to commission its own expert advice and call its own witnesses. Often a tribunal has several people sitting on it; one is usually legally qualified, but others may be experts from the field that is the basis of the proceedings.

Whereas claims for compensation for personal injuries arising out of a defendant's negligence are brought in civil courts and determined by common law processes, in Australia the most common areas of injury — work- and transport-related accidents — are covered by "statutory" schemes. These are arrangements by which claims for compensation are assessed under specific legislation, rather than at common law.

Many statutory workers' compensation schemes were not established simply as narrowly defined insurance schemes, but were given flexibility to provide social benefits. For example, *Lord Campbell's Act*,² enacted in England in 1846, was intended to overthrow the ruling made under common law in 1808³ that damages for the death of a human being could not be claimed by another person. The Act was passed to protect the widows and orphans of men killed in industrial accidents by providing, through statute, access to compensation for loss of the income of a bread winner — compensation that could not be obtained at common law. Many people would think that Mrs Simpson, the applicant in the case described by Spigelman,⁴ had a right to bring her claim for compensation for her husband's death. That right does not exist at common law, but is provided by statute.

In the courts, the claimant (civil) or the Crown (criminal) has the burden to prove its case, and the benefit of the doubt falls to the defendant. The major difference in the meaning of "doubt" between the criminal and civil courts is that, in a criminal court, the test is "beyond reasonable doubt", a much tougher test than the civil court's "on the balance of probabilities". *Simpson v South Australia (Department of Correctional Services)* was heard in the South Australian Workers Compensation Tribunal, but the test was still "on the balance of probabilities".

The claimant in the *Simpson* case introduced medical evidence that it was a "common observation" (acknowledged not to be a proven scientific fact) that there was a link between stress and cancer. In most workers' compensation schemes, compensation will be paid if work caused, aggra-

vated or accelerated the injury — that is, either caused or was a "significant contributing factor" to the injury.

The phrase "significant contributing factor" appears in much workers' compensation legislation. It was defined in the Victorian County Court⁵ as meaning a factor whose contribution was "more than de minimis but less than a major or dominant factor". Not a very high hurdle to jump!

Paragraph 70 of Judge McCusker's decision in the *Simpson* case underscores the test he applied:

A careful examination of the material available in this case indicates, *on the balance of probabilities* [my emphasis], that the worker's employment contributed to the cancer that caused his death.

Doctors are often dismayed at the difference between the standard of proof required in civil cases (the balance of probabilities) and the medical/scientific standard. Many have the perception that judges (and tribunals) award compensation to claimants seen as needy — redistributive justice, in which money is taken from rich defendants (more specifically, their insurers) and given to the unfortunate.

Therefore, many doctors would be dismayed at the *Simpson* judgment. Most would believe that any relationship between stress and cancer is at best tenuous, and certainly not proven to the standard required of science. They are also incensed when judges make decisions in intensely technical areas of medicine, saying that judges are no more qualified to decide purely medical issues than doctors are to decide legal issues.

Most Australian states now adopt a different approach to resolving medical disputes raised in workers' compensation claims. In South Australia, the medical issue was determined by the tribunal. In Victoria, Queensland and Western Australia, such disputes are resolved by referral to a multi-doctor medical panel or medical tribunal. Doctors are appointed to any one panel on the basis of the nature of the injury. For example, impairment arising from a back injury might be assessed by a panel consisting of an orthopaedic surgeon, a neurosurgeon, a psychiatrist and an occupational health physician. If the *Simpson* claim had been referred to a medical panel, the panel would probably have comprised a colorectal surgeon, a gastroenterologist, an oncologist and an immunologist, or similar, with acknowledged expertise in the area. These doctors would have used their existing knowledge, and would have viewed the expert opinions provided by the parties, critically analysed them, and checked the references cited, before forming a collective view.

In contrast, the adversarial process encourages the use of medical "gladiators", who are selected because their opinion advances the client's cause. Multiple opinions, for and against, are put into evidence. This leaves judges (or juries) in the position of having to decide between competing schools of medical or scientific opinion. The most famous Australian example of the difficulty lay juries (and judges) experience when assessing expert evidence is the handling of

the forensic evidence in Lindy Chamberlain's trial for the murder of her baby, Azaria. The trial, held in the Supreme Court of the Northern Territory, resulted in Mrs Chamberlain being wrongly convicted of murder in 1982.

Much of Judge McCusker's judgment in the *Simpson* case is a critical analysis — by a lawyer (ie, the judge) — of the many medical opinions put into evidence by both the claimant and the defendant, leading to a final decision as to whose opinions he preferred. An inquisitorial medical tribunal approach encourages individual doctors to act genuinely as *independent* medical experts (removing any perceived taint as medical “guns for hire”, or, as it has been quaintly put, “rent-a-quacks”), and the final opinion is developed on a multidisciplinary collegiate basis.

Opinions of the Victorian Medical Panels, the Western Australian Medical Assessment Panels and the Queensland Medical Assessment Tribunals are, by statute, final and binding. For example, section 68(4) of Victoria's *Accident Compensation Act 1985* states:

The opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person irrespective of

who referred the medical question to the Medical Panel or when the medical question was referred.

If South Australia had such a system, a panel of medical experts would have assessed Mr Simpson's medical records and the expert evidence submitted both in support and rebuttal of the claim, made its own investigation of the literature, and come to an informed medical view. The panel would have had access to advice regarding the legal tests required by the appropriate statute. Whether the panel would have reached the same view as the judge cannot be said. But at least the medical basis for the claim would have been seen to have been thoroughly reviewed by truly independent medical experts — and a medical decision (subject to the law) made on a medical issue.

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1. Devlin P. Easing the passing: the trial of Dr John Bodkin Adams. London: Faber and Faber, 1985; 71.
2. *Lord Campbell's Act — An Act for compensating the families of persons killed by accidents* (1846) 9 & 10 Vict c 93.
3. *Baker v Bolton* (1808) 1 Camp 493 [170 ER 1033].
4. Spigelman AD, Dwyer P. Is there a link between work-related stress and colorectal cancer? *Med J Aust* 2004; 180: 339-340.
5. *Meddis v Victorian WorkCover Authority* (County Court, Rendit J, 24 April 1996). □