Imhoff v IBM Australia Limited [2001] NTSC 23

PARTIES:	IMHOFF, STANLEY JAMES
	v
	IBM AUSTRALIA LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA19 of 2000
DELIVERED:	11 APRIL 2001
HEARING DATES:	26 March 2001
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	B. Cassells
Respondent:	J. Tippett

Solicitors:

Appellant:	Ward Keller
Respondent:	Morgan Buckley

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Imhoff v IBM Australia Limited [2001] NTSC 23

No. LA19 of 2000

IN THE MATTER of an Appeal under the Work Health Court

BETWEEN:

STANLEY JAMES IMHOFF
Appellant

AND:

IBM AUSTRALIA LIMITED
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 11 April 2001)

[1] On 20 May 1991 Mr McGregor SM found that the appellant had suffered an injury to his back in the course of his employment with the respondent. That injury was suffered on 17 February 1982. He also found that there was a series of other injuries suffered by the appellant during the course of his employment with the respondent and these were all "aggravations, accelerations, exacerbations, recurrences or deteriorations of the pre-existing injury".

[2] At the invitation of the appellant Mr McGregor SM ordered the payment of medical expenses. He made no declaration as to the obligation of the respondent to make payments of future compensation noting that there would always be arguments as to whether any future disability was causally related to the 1982 injury "or is causally related to something new".

[3] The appellant continued to work for the respondent until May 1993 when he retired for medical reasons. During the period of his continued employment he was, on occasions, paid compensation under the *Work Health Act*. Subsequent to his retirement he continued to be paid compensation.

[4] On 26 October 1996 the respondent ceased making payments of compensation. The respondent said that the cessation followed a return to work by the appellant. The appellant commenced proceedings in the Work Health Court in which he sought, inter alia, "payment of compensation as for total incapacity and/or partial incapacity from the 26th day of October, 1996 until the present day".

[5] The matter came before Mr Wallace SM who delivered judgment on 22 June 2000. He found that the respondent's cessation of

payments to the appellant was not in accordance with *Work Health Act* and that there had been no return to work by the worker. However his Worship went on to find that "the worker had suffered no injury within the meaning of the Act". He dismissed the application of the appellant. He observed:

> "In short, on the evidence before me (aside from Exhibit 13, Mr McGregor's judgment) I could not be satisfied that any of the incidents of injury to Mr Imhoff which occurred in the course of his work with IBM involved damage to his back responsible for the incessant pain he has been complaining of since 1985."

[6] The basis of the finding that the appellant suffered no injury within the meaning of the Act is to be found in the evidence of an orthopaedic surgeon, Mr Tony Blue. Mr Blue gave evidence in December 2000 that it could then confidently be said that the injury suffered by the worker in 1982 was of a kind that was of limited duration. Whatever the nature of that injury it was one from which the appellant would have made "a full and complete recovery". There was no internal disc derangement of the spine of the appellant as he had previously thought. As at 1996 there "was no significant disc derangement in Mr Imhoff's spine".

[7] The earlier findings of Mr McGregor SM accepting evidence of "intrinsic disc damage in 1982" suffered at work had been made

upon the evidence of medical specialists who appeared before him. Those findings were available on the evidence and were not subject to any challenge by way of appeal. Mr Blue told Mr Wallace SM that since the time of that hearing the existence of intrinsic disc damage could be excluded because of advances in medical investigation techniques, particularly the development of magnetic resonance imaging (MRI). In addition other investigations undertaken over the intervening period confirmed that intrinsic disc damage was not the cause of the appellant's problem. The effect of that evidence from Mr Blue was that, as at the time of the hearing before Mr Wallace SM and for the purposes of that hearing, the incapacity said to have been suffered by the appellant (if any) as at the date the respondent ceased payments was not related to the injury that occurred on 17 February 1982 as found by Mr McGregor SM. Mr Wallace SM accepted that evidence. In the circumstances it followed that the incapacity (if any) had not been shown to be work related.

The Appeal

[8] The appellant appealed to this Court against the findings of Mr Wallace SM. The appeal centered upon two matters. The first complaint was that the evidence of Mr Blue should not have been

received or considered because it was not relevant to any issue raised in the pleadings. The second was that the learned Magistrate should have held that the respondent was estopped from going behind or leading evidence contrary to the findings of Mr McGregor SM.

The Pleadings

[9] The pleadings in the Work Health Court were less than satisfactory. They were the subject of many amendments. By the time the matter was finalised his Worship was dealing with a document entitled the "Further Further Amended Application" and the respondent's Answer thereto.

[10] It was the submission of the appellant that the appellant had pleaded that he suffered an injury, being that which occurred on 17 February 1982, and had then gone on to plead that the appellant "has been totally incapacitated for employment as a result of the injuries out of which the Worker's incapacity arose or materially contributed to it on numerous occasions since 1982 until the present date and continuing".

[11] It was submitted that the respondent did not raise any issue in its pleadings to the effect that the worker had not suffered the injury.

It was submitted that, absent such a pleading, the evidence of Mr Blue was not relevant to any issue raised.

[12] A similar submission had been made to Mr Wallace SM who rejected it noting that in its Answer the respondent had pleaded that "the Employer denies that the Worker continues to be totally and/or partially incapacitated for employment as a result of the injuries as alleged at par 3AC (of the statement of claim) or at all". In my opinion his Worship was correct in so deciding.

[13] Whether or not that pleading by the respondent was sufficient to place in issue the injury alleged to have been suffered by the appellant, it is clear that the parties presented their cases on the basis that the presence of a compensable injury at the time payments ceased and the relationship between any such injury and the injury of 17 February 1982 was in issue. Two medical specialists were called, being Mr P L Winstanley and Mr Tony Blue, both of whom are practising orthopaedic surgeons. They each gave evidence relating to the injury said to have been suffered by the appellant on 17 February 1982 and to the relationship between that injury and any incapacity that was being experienced by the appellant in October 1996. The appellant also gave evidence as to the occurrence on 17 February 1982 and the

subsequent history of his problems with his back from that date through to the present.

[14] The evidence of Mr Winstanley and of Mr Blue was received in December 1998. The matter was then adjourned from 16 December 1998 and the hearing was not resumed for a period of almost twelve months. It resumed on 13 December 1999. When the matter recommenced there was discussion about the pleadings and about the state of the medical evidence. After the discussion there was no application by either party to recall either of the doctors or to introduce any further evidence save for the tendering of a copy of the reasons for decision of Mr McGregor SM. There was no submission from the appellant that any prejudice was suffered by him as a result of the suggested deficiency in the pleadings.

[15] At that time, when the evidence was complete, the parties took the opportunity to amend their pleadings in order to raise the issues addressed in the course of the evidence. The amendment made by the appellant sought to preclude the respondent from denying the findings of Mr McGregor SM or leading evidence to discredit or traverse those findings. It sought to prevent reliance on the evidence by reference to issue estoppel. In the circumstances the amendment amounted to an acknowledgment that the evidence had

been received and issue joined. The application to amend was said to be "so that all proper issues are ventilated before the court". Whether the parties succeeded in raising all of the issues by their amendments may be a matter for debate. The fact that they had joined issue on this topic is not.

[16] Whilst the Work Health Court is a Court of pleadings, it must be remembered that pleadings are a means to an end. In *Gould v Mount Oxide Mines Ltd (In liq)* (1916) 22 CLR 490 Isaacs and Rich JJ said in relation to pleadings (at 517):

> "… if the parties in fighting their legal battle choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest".

[17] In *Miller v Cameron* (1936) 54 CLR 572 Latham CJ observed that evidence of matters not relevant to issues defined by the pleadings should generally speaking be ignored. However he went on to say (at 577):

> "The position, however, is very different where the evidence said to have been wrongly admitted is clearly relevant to an issue which might have been raised by the pleadings for the purpose of supporting a claim made or a defence raised, where it has been admitted without objection, where no party has been taken by surprise, and where all parties have had the opportunity of giving evidence on the matter, and a fortiori when they have used that opportunity."

[18] In the present case the issue was raised and each party had the opportunity of giving evidence in relation to it. Neither party could be said to have been taken by surprise. They fought their legal battle and neither can now "hark back to the pleadings" in order to limit the area of dispute previously traversed.

Issue Estoppel

[19] It was the submission of the appellant that issue estoppel precluded the receipt and consideration of the evidence of Mr Blue. It was submitted that a finding central to the judgment delivered by Mr McGregor SM was the nature of the injury suffered by the appellant and "the medical evidence specifically relied on by the learned Magistrate". The history of the proceedings revealed that at various times the respondent paid compensation to the worker under the *Work Health Act* and then, after a lengthy period, the respondent ceased payments on the ground that the appellant had returned to work. The respondent challenged the cessation and it was on that basis that the matter came before Mr Wallace SM. The submission of the appellant was then in the following terms:

> "At the time of the hearing before Mr McGregor SM, Dr Blue had been of the view that the Worker suffered from the injury of which he then complained and that the injury was relevantly related to his employment with the Employer.

> That injury, as found by Mr McGregor SM is one of (sic) the same as the injury from which the Worker is currently suffering according to medical evidence called on behalf of the worker and as admitted by the Employer during the course of the hearing before Mr Wallace SM. In his evidence Dr Blue explained his shift of view on the basis that advances in medical diagnostic tools now permitted him to say that he had been in error in his earlier view. The Worker maintains that the Employer is estopped from going behind or leading evidence contrary to the findings of Mr McGregor in the first proceedings."

[20] In the course of the hearing before Mr Wallace SM the appellant relied upon both res judicata and issue estoppel. His Worship ruled that "the present case is one of, if anything, issue estoppel and not one of res judicata." In my view, that ruling was clearly correct and the appellant does not seek to challenge it at this time.

[21] In *Blair v Curran* (1939) 62 CLR 464 Dixon J addressed the distinction between res judicata and issue estoppel. In relation to issue estoppel he noted that it has application in circumstances where "for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order". He went on to say (at 532):

> "*Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.* In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the

> existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J in *R v Inhabitants of the Town of Hartington Middle Quarter* the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the ground work of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous. *… Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion.*
>
> …
>
> The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree or order or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order." (emphasis added).

[22] "The question whether there is an issue estoppel will turn not on the evidentiary facts which led to the Judge deciding in the plaintiff's favour, but on the ultimate facts, that is to say, the matters legally indispensable to the conclusion reached": *Milojevic v ROH Industries Pty Ltd* (1991) 56 SASR 78 at 87.

[23] Courts have traditionally given a narrow scope to the doctrines of issue estoppel and res judicata. This is because once estoppel applies effect must be given to it and "that effect may be to tape the mouth of truth"; *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (In Liq)* (1993) 115 ALR 377 per Burchett J at 404.

[24] In deciding against the appellant on this issue Mr Wallace SM relied upon the decision of the High Court in *O'Donnel v Commissioner for Road Transport and Tramways (NSW)* (1937-1938) 59 CLR 744. In that case the appellant claimed compensation for incapacity, namely total blindness, alleged to have resulted from personal injury arising in the course of his employment. He had suffered an injury to his right eye when he was struck across the face by a palm leaf. The worker initially sued in the Supreme Court and obtained compensation on the basis that his blindness was caused by that incident. In later workers' compensation proceedings the Commissioner sought to contend that the blow received from the palm leaf did not cause the blindness but that blindness resulted from a disease suffered by the worker. The worker claimed the Commissioner was estopped from leading evidence as to the cause of incapacity. It was submitted that the

determination as to the cause of the worker's blindness had been fundamental to the decision given in the action in the Supreme Court where it was accepted that the injury resulted from contact with the palm leaf.

[25] There was no dispute at the later date that the worker was blind and that "it is an easy inference to conclude that the blindness existing at the later date had the same cause as the blindness which existed at the earlier date" (per Latham CJ at 758).

[26] In that case Latham CJ said (at 758):

> "Now it cannot possibly be said that the Supreme Court, by a judgment relating only to a period which ended on 15th February, thereby made any direct or actual decision or determination as to any matter or state of affairs whatever which existed at a later date. That judgment did create an estoppel as to one proposition – but that estoppel cannot operate to establish by estoppel another proposition which follows from the former proposition only when that proposition is combined with others the establishment of which depends upon evidence or assumption."

[27] Evatt J said (at 763):

> "What the appellant is trying to do is to eke out a conclusive determination that incapacity through blindness as at an anterior point of time can, by additional proof of absence of any change in the meantime, be converted into a conclusive determination of incapacity through blindness at a later point of time. But this method, though logically sound, is not permitted by law. Estoppel by judgment estops not only as to the res determined but also as to the fundamental issues

necessarily involved in the determination, but it does not authorise the use of each issue originally determined merely as the first but unbreakable link in establishing a separate and independent issue. In other words, as against a successful party the unsuccessful party is bound by the authoritative determination of every fundamental issue but when a distinct and separate issue arises subsequently, he is not bound to submit to the second issue being established by the combination of a former issue with additional evidence, no matter how strong such evidence may be."

[28] McTiernan J said (at 767):

"The issues concluded by the judgment were that the appellant had met with this injury, which resulted in the disability described in the findings, while on duty as a tram conductor in the respondent's service. It may well be that the respondent was estopped from contesting before the commission whether that injury arose out of and in the course of the appellant's employment and disabled him. But the appellant seeks to take a further step and say that the respondent is estopped from contesting that this injury resulted in blindness. But that is a conclusion which is to be reached, if at all, by reasoning from the matters as to which the judgment in the action creates an estoppel. The estoppel does not bar the respondent from contesting the inference which the appellant seeks to draw from these matters. If they were the only facts to be taken into consideration it may be a natural inference, perhaps an irresistible one, that the appellant's blindness should be attributed to the blow in the eye which the appellant got on duty. But what was concluded by the action did not estop the respondent from introducing evidence repelling the inference which the appellant sought to draw. The facts show that it would be an erroneous inference. … But, in any case, if it should be assumed that an issue concluded by the action in the Supreme Court was that the injury of 19th March 1933 did result in blindness because of the existence of that condition during the period covered by the judgment, it should be remembered that there was no issue in the action as to the condition of the appellant after that date. It is not

> contradictory of the judgment or of any issue concluded by the action to say that the disability, whatever it was, in respect of which the action was brought, ceased on 15th February 1935, and that the blindness after that date had an entirely new origin and was the sequel of the disease and that nothing except the disease contributed to it. …The issue in the action was whether an injury arising out of and in the course of the appellant's employment, which he received on 19th March 1933, disabled him during a period ending on 15th February 1935. I am unable to agree that the respondent was estopped before the Workers Compensation Commission from contesting the question whether the appellant's condition of blindness after 15th February 1935 resulted from any injury arising out of and in the course of his employment."

[29] In the present case the decision of Mr McGregor SM related to a claim for compensation, medical expenses and a declaration of liability as at 20 May 1991. As has been observed his Worship declined to make the declaration as to liability for future payments. He did find that the worker suffered an injury to his back in the incident which occurred on 17 February 1982. He also found that there was a series of episodes subsequent to that date which were all aggravations, accelerations, exacerbations, recurrences or deteriorations of the injury that had arisen in the course of the appellant's employment with the respondent. In so finding his Worship made "deliberate and formal" findings in relation to some evidentiary facts and also as to the ultimate facts which formed the title to the rights given. The ultimate facts were that the

worker suffered an injury to his back on 17 February 1982 and that injury occurred in the course of his employment. Further, the findings that the other incidents were all aggravations etc of the pre-existing injury were also ultimate facts. However the finding as to the nature of the injury was not necessary to the declaration of entitlement. It was but an evidentiary fact. It was not legally indispensable to the conclusion reached. There was no need to address either the nature or mechanism of the injury for the purposes of establishing the entitlement of the worker to compensation. The precise nature of the injury was a "subsidiary" or "collateral" or "evidentiary" fact of the kind described by Dixon J in *Blair v Curran* (supra at 532). In those circumstances it was not the subject of issue estoppel in these proceedings.

[30] In addition the issue before Mr McGregor SM related to the entitlements of the appellant from 17 February 1982 up until the date of the decision made on 20 May 1991. The issue before Mr Wallace SM related to similar questions but in a different period. Mr Wallace SM was concerned with the situation as at the date of cessation of payments on 26 October 1996 through to the time that he delivered his judgment on 22 June 2000. Consistent with the approach adopted by the High Court in *O'Donnel's* case

the respondent at that time was not estopped from contesting the question whether the appellant's incapacity from a back injury resulted from any injury arising out of or in the course of his employment.

[31] In my view his Worship was correct when he rejected the plea of issue estoppel in these proceedings.

[32] The appeal is dismissed.

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