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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

MUNCE v VINIDEX TUBEMAKERS PTY LTD

Moffitt P, Hutley and Glass JJA

28 November 1974 — [1974] NSWLR 235

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES BY EMPLOYEE – UPON DOCTOR'S ADVICE EMPLOYEE FAILED TO UNDERGO OPERATION – AGGRAVATION OF, AND MITIGATION OF, DAMAGE – WHETHER ONUS OF PROOF ON THE PLAINTIFF OR DEFENDANT.

Plaintiff refused to submit to an operation to fuse his knee joint. The effect of this operation (as arthrodesis) was said to eliminate the pain in the joint at the cost of stiffening in a fixed position; once fused, it could not be unfused. The Trial judge directed the jury that the onus was on the defendant to show (a) that the damage was being aggravated by the unreasonable refusal have the operation; and (b) that he could mitigate the effects of the accident if he had the operation.

HELD: Appeal dismissed.
1. Where a disputed question comes under the heading of damages the plaintiff will normally bear both. But on the question whether his condition would in any event have been the same either at the trial or at some future time, assuming no injury by the defendant, the defendant has the burden of introducing evidence. This evidentiary burden arises because once the plaintiff proves that he was not disabled before injury there is a presumption of fact in his favour that no condition existed threatening future incapacity.

2. In relation to the matter before the jury, namely, whether the burden of proof that the plaintiff's refusal to undergo the fusion operation was unreasonable, His Honour's direction that the burden lay upon the defendant was correct.

GLASS JA: ... There can be no doubt that when the judge has reached the stage of charging the jury he is instructing them in terms of the legal burden. The evidentiary burden is no longer relevant, serving as it does the sole purpose of controlling a decision by the judge as to what issues have been effectively raised for jury consideration. When the issue has in his view been raised and its decision is being left by him to the jury, the location of the burden of proof informs them which party will fail if the balance of the evidence is not in his favour.

The two burdens are sometimes separately located, sometimes not. Where a disputed question comes under the heading of damages the plaintiff will normally bear both. But on the question whether his condition would in any event have been the same either at the trial or at some future time, assuming no injury by the defendant, the defendant has the burden of introducing evidence (*Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164; [1966] ALR 98; 39 ALJR 123). This evidentiary burden arises because once the plaintiff proves that he was not disabled before injury there is a presumption of fact in his favour that no condition existed threatening future incapacity (*ibid* at 171), That presumption will be displaced if, but only if, the defendant introduces evidence which, if accepted, would establish the nature of the pre-existing condition and its likely future course (*ibid* at 168). Assuming the issue has been effectively raised by the introduction of such evidence, the plaintiff has the ultimate onus of persuading the jury of the extent of the injury done to him by the defendant. The phenomenon of the split onus is well understood in criminal law where, for example, the accused must introduce evidence or other material at the trial capable of proving self-defence before the issue is effectively raised for jury consideration. Thereafter, the Crown must exclude that possibility beyond reasonable doubt.

There is authority of long standing which establishes an exception to the principle that the plaintiff bears the onus of proving all matters relating to damages. The exception relates to any disputed question which is truly a matter of mitigation of damage. In relation to questions properly so classified the defendant is subject to both burdens. He must not only introduce evidence that the plaintiff has failed to minimise his loss but also persuade the jury that the balance of

testimony favours this conclusion (*Adams v Ascot Iron Foundry* (1968) 72 SR (NSW) 120 at 131, 140; [1968] 3 NSWR 305).

In the field of personal injury litigation, an issue of this kind will normally be raised by an allegation that some action on the part of the plaintiff will reduce his damages and that his failure to take such action is unreasonable. If a defendant so persuades the jury it will then be their duty to assess the plaintiff's damages on the footing that he has taken the hypothetical action and been endowed with its hypothetical benefits. In *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158 at 159; [1961] ALR 333; 34 ALJR 186 Dixon CJ upholds the exceptional principle that the defendant must prove mitigation and cites the failure of a plaintiff to submit to an operation as a question governed by that principle. He makes it clear that the defendant bears both burdens with respect to any issue of mitigation in his allusion to a presumption of law.

By the use of this phrase in pointed opposition to presumptions of fact, he is implying, in my opinion, that there is a presumption of law favouring the plaintiff that he has not unreasonably rejected an opportunity to improve his condition. An equivalent situation exists in the criminal law so far as concerns the presumption of sanity. This is a presumption of law which places upon the accused the burden of introducing evidence as well as the onus of persuading the jury on a balance of probabilities to accept it. The judgment in *Purkess v Crittenden* (*supra*) in no way affects the Dixonian view either of the principle or its illustration (*Adams v Ascot Iron Foundry* (*supra*) at 131. The court was there concerned purely with the presumption of fact with respect to the plaintiff's pre-injury condition. The question of mitigation viz, whether the plaintiff should be assessed not on the basis of his actual condition but of some notional condition which he would have presented but for his unreasonable conduct did not arise upon the evidence nor was there any discussion of presumptions of law as distinct from presumptions fact.

Of course, the placement of the ultimate onus will hardly ever be determinative of the issue. The tribunal of fact will normally be able to reach a conclusion one way or the other on the balance of testimony, But, in the rare case where the evidence is so evenly balanced that it is impossible to decide whether the treatment will be ameliorative or whether the plaintiff's refusal is unreasonable, it is the defendant who fails and the plaintiff is assessed on his actual not on his hypothetical condition. For these reasons I am of opinion that his Honour's direction was right and that the submission fails.

During argument there was some discussion whether the direction of the trial judge might not be subjected to a different criticism. It was suggested that the plaintiff's conduct might raise a dispute which properly belonged to the issue of damages as opposed to the issue of mitigation of damages if the jury took the view that his condition had been made worse by his refusal thus far to undergo the operation. It is clear, however, that the defendant made no such case before the jury. Until a month before the hearing the plaintiff had been advised by Dr Bryan that he should not have the operation. No doubt under the influence of this evidence the defendant renounced any attempt to impugn the conduct of the plaintiff before the trial and accepted liability for all wages lost up to that time.

The discussion in the judgment of Walsh JA in *Adams v Ascot Iron Foundry* (*supra*) does recognise that difficulties may arise in deciding whether to relegate a particular disputed question to the issue of damages for proof by the plaintiff or the issue of mitigation for proof by the defendant. If, for example, the defendant introduces evidence that the plaintiff by positive exacerbation of his condition had made it worse, it would appear on principle that the defendant would be exonerated from liability for the added ingredient unless the jury is satisfied by the plaintiff that the allegation should be rejected or that his aggravating conduct was due to his pre-existing personality or a by-product of his injuries and that such intervention, however caused, was in a general way foreseeable.

But where the conduct charged against the plaintiff is not that he made his condition worse but that he refused to allow it to be improved, the question appears to display a great affinity with the mitigation rather than the damages heading, especially if the reasonableness of his attitude is open to serious debate. For reasons already given, the evidence at the trial failed to bring any such problem into focus and its resolution can conveniently be deferred to another day.

HUTLEY JA: Questions of aggravation of damages should be distinguished from questions of failure to mitigate damages, e.g., the refusal immediately after an accident to have a blood transfusion would be a case of aggravation. Not every treatment of an injury should be classed as mitigation.

There are two clearly recognised cases which have to be treated as instances of mitigation, namely, submission to an operation (*Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158 at 159; [1961] ALR 333; 34 ALJR 186) and the offer by the defendant of employment to an injured man (*Adams v Ascot Iron Foundry* 72 SR (NSW) 120 at 144 per Asprey JA). Therefore, in relation to the matter before the jury, namely, whether the burden of proof that the plaintiff's refusal to undergo the fusion operation was unreasonable, His Honour's direction that the burden lay upon the defendant is correct: (*Adams v Ascot Iron Foundry*, 72 SR (NSW) 120; [1968] 3 NSWR 305; Street: *Principles of the Law of Damages*, p42; *McGregor on Damages*, 13th ed., s212),"
