33/00; [2000] VSC 457

SUPREME COURT OF VICTORIA

PATTERSON v ROYAL & SUN ALLIANCE ASSURANCE (AUSTRALIA) LTD

Hedigan J

19, 24 October 2000

CIVIL PROCEEDINGS – INSURANCE – INCOME PROTECTION POLICY – PAYMENTS TO BE MADE WHERE POLICY-OWNER TOTALLY DISABLED – PAYMENTS TO BE MADE WHERE PERSON UNABLE TO WORK MORE THAN TEN HOURS PER WEEK – MEANING OF "WEEK" – EVIDENCE THAT PERSON WORKED MORE THAN TEN HOURS PER WEEK ON SOME OCCASIONS – PERSON ALSO MANAGED HOBBY FARM AND SMALL VINEYARD – CLAIM DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

P. entered into a policy of insurance with R & SAA Ltd ("company") whereby the company agreed to pay monthly benefits if P. became totally disabled from employment. The definition of 'total disability' was "Unable to work in your usual occupation for more than ten hours per week due to sickness or injury". P. was a self-employed carpet cleaner and carpet layer and developed back disabilities which reduced his working capacity. As a result of a claim, the company paid P. monthly benefits on the basis of total disablement that is, inability by P. to work more than ten hours per week in his occupation as a carpet cleaner. When the company ceased payments on the basis that P. was no longer totally disabled within the meaning of the policy, P. took action in the Magistrates' Court to recover the total disablement payments said to be owing.At the hearing, P. indicated that on some occasions he worked more than ten hours in a week as a carpet cleaner. P. also said that he managed his hobby farm of 70 acres with cattle and a small vineyard. The magistrate dismissed P's claim. Upon appeal—

HELD: Appeal dismissed.
(1) In relation to the meaning of "week" in the definition of 'total disability', the policy applied to a self-employed carpet cleaner who might work when he chose. The parties would hardly have intended the Sunday to Saturday calendar week to apply. Any seven consecutive days including weekends was more likely, whatever day was selected as its commencing point.

(2) It was open to the magistrate on the evidence to conclude that P. worked more than ten hours per week on a not insignificant number of occasions during the relevant period. In those circumstances, it was open to find that P. had not established that he was so unable to work that he was totally disabled within the meaning of the policy.

HEDIGAN J:

1. This is an appeal by the plaintiff against the decision and order made by the Magistrates' Court at Wangaratta on the first day of May 2000. The plaintiff's claim was for non payment by the defendant of monthly payments said to be due under a policy of insurance with the defendant (entitled an Income Protection Policy) entered into on 6 December 1994 to commence on 15 February 1995 and to expire on 15 February in the year 2013.

2. The purpose of the policy was to provide monthly benefits to the plaintiff on the happening of defined events subject to the conditions of the policy. Essentially for the purposes of this case that meant payment to the plaintiff of defined benefits if he became totally disabled from employment. The definition of total disability was "Unable to work in your usual occupation for more than ten hours per week due to sickness or injury", and the plaintiff was not working more than ten hours in any other occupation.

3. The policy also made provision for benefits in the case of partial disablement on the basis that the insured could work more than ten hours but was limited by injury or sickness to working less hours than prior to the partial disabling event so as to diminish earnings.

4. The plaintiff was a carpet cleaner by occupation and apparently from time to time a carpet layer. He was self employed, and developed back disabilities which ultimately reduced his working capacity. There does not appear to have been any specific incident but this does not matter because the insurer accepted that he had sustained injury within the meaning of the policy.

5. The plaintiff made a claim under the policy when his working capacity was seriously reduced in 1995. He received monthly benefits from the insurer from 2 April 1996 to 2 August 1998 on the basis of total disablement, that is, unable to work more than ten hours per week in his occupation as a carpet cleaner.

6. At that time the defendant ceased payments on the basis that the insured was no longer totally disabled within the meaning of the policy. The plaintiff-appellant commenced proceedings in the Magistrates' Court claiming total disablement payments from 2 August 1998 to 1 June 1999, the date of commencement of proceedings.

7. The defendant denied liability on the basis that he was not totally disabled. The claim was for some $17,390 for lost benefits in the period. A claim for a declaration was apparently withdrawn or abandoned. The plaintiff gave evidence to support his claim for disablement and as part of his case produced some self-kept records in writing, recording hours worked over a period including the period under dispute.

8. The record was not kept for the whole of the period of the benefits paid but was commenced in 1997. The submission of counsel for the appellant, Mr Bell, who also appeared for his client in the Magistrates' Court, was to the effect that the diary showed they were kept Sunday to Saturday and did not exceed ten hours per week "except on the odd occasion."

9. The plaintiff claimed that if he did work more than ten hours a week he regretted it because his back became sore and painful. It was also stated that during the period of receipt of benefits when he worked more than ten hours per week, the insurer adjusted his benefit for the extra earnings occasioned by the extra hours. He also gave evidence that he lived on 70 acres, ran a few cattle and had a small vineyard on the property but worked less than an hour a week working on his farm.

10. The Magistrate found that the appellant was a frank witness and gave balanced answers. He did not however, specifically accept or act on any particular piece of evidence save for part of the diary. The plaintiff called an orthopaedic surgeon, Mr Leitl, who examined the plaintiff first on November 24 1998 and later again on 16 June 1999.

11. Dr Leitl, whose report was in evidence stated the plaintiff had degenerative lumbar disease and that his back would worsen. He also said it was his opinion and I quote, that, "He is unlikely to be able to work in his usual occupation for more than ten hours per week" and that he fell within the definition for that reason.

12. Mr Bell put it to me that Dr Leitl was a treating doctor. This is clearly incorrect. The appellant was referred to him for medico-legal opinion after the insurer stopped the benefits and there was no treatment given that I can perceive. Moreover, as Mr Christie for the insurer argued, Mr Leitl never addressed the relevant period at all but only the future.

13. The plaintiff in the Magistrates' Court did not call his general practitioner who was involved throughout nor the first orthopaedic surgeon involved during the relevant period. When the plaintiff closed his case the defendant indicated that it would not call evidence. Full arguments were addressed to the court, with reference to relevant authorities. The case was run over three days, not three full days however. The Magistrate did not reserve but gave reasons which, like the evidence, was recorded. The reasons were reproduced as an exhibit on this appeal.

14. The Magistrate unfortunately did not set out in any orderly way his findings of fact, nor did he detail the specifics of his view of the meaning of the definition of total disability. This is the way of magistrates who run busy courts, and, by and large, avoid intellectual exposition, extended reasons and orderly analysis. I have had on many occasions in other judgments to refer to the difficulties occasioned on appeal by the laconic nature of the articulated reasons. It is regrettable in this case (which had been so thoroughly argued over three days at some considerable expense to the parties) that His Worship did not deliver more extended findings in his reasons.

15. Notwithstanding that, it is by no means impossible to determine what conclusions he had reached although he did not pronounce them all. The Magistrate dismissed the plaintiff's claim.

He concluded in effect that the key words of the policy were capable of clear understanding, that is, inability to work more than ten hours in any week constituted disablement.

16. He was not aided by consideration of the words "partial disablement" apparently. He seemed to view "a week" as a period of seven consecutive days not necessarily commencing on a Sunday. He addressed this because it had been apparently put that a week meant Sunday to Saturday as calendars set it out, so that if the plaintiff worked more than ten hours but say from Wednesday to Tuesday, that that arguably did not count against the appellant.

17. His Worship referred to the diaries, and in particular, identified a week's work commencing on Sunday 8 November 1998 for a period of 11 hours. He stated this was right in the middle of the period under review and went on to say,

> "It is quite clear the definition that the court must use is that totally disabled means that you are unable to work in your usual occupation for more than ten hours per week due to sickness or injury, and I will only go that far." (my emphasis)

18. The appellant appealed and the questions formulated by the Master are as follows:

> (a) Did the Magistrate err in law in his construction of Clause 1.3 of the relevant policy?
>
> (b) Having regard to the whole of the evidence could a reasonable magistrate properly instructed feel the appellant was capable of working more than ten hours per week in his usual occupation?
>
> (c) Did the learned Magistrate err in law in failing to consider Clause 5.4 of the policy?

19. I have said in many cases the formulation of the questions of law that must arise to warrant an appeal cannot dominate the legal issues to be determined on the appeal. They are formulated in the absence of the opposite party and in my experience frequently misconceive the true issues and pay insufficient attention to the applicable principles.

20. The arguments advanced for the appellant may be summarised as follows: one, the Magistrate decided that to work more than ten hours, for example, 11 hours, in one week precluded the whole claim for the whole period and that that was a misconstruction of the words of the policy. Reliance was placed on well known cases to which I do not need to refer in any detail but including *Australian Casualty Co Limited v Federico*[1], including statements of Gibbs J at 520.

21. Second, if there was ambiguity in the language of the policy, it was put that it had to be construed *contra proferentem*. The submission was that there was ambiguity in the language but that the Magistrate wrongly thought there was not and so fell into error.

22. Three, the Magistrate was in effect, obliged to accept Dr Leitl's opinion, there being no contrary opinion in the evidence.

23. Four, the Magistrate wrongly concluded that a week might be reckoned on the basis of any seven days, set of Sunday to Saturday.

24. Fifth, the Magistrate should have considered Clause 5.4 of the policy which was concerned with breaks in disability, and how that "stop/start" clause in relation to applicable excesses might be considered as an aid in construction of other clauses.

25. In my opinion none of these submissions are persuasive. The issue in this case was one of fact and it is to be doubted, once the reasons are read and understood, if there was any relevant question of law at all. Of course, in all cases questions of fact lie against a legal matrix but that does not necessarily mean that there is a question of law involved for the purposes of the appeal.

26. "Total disablement" naturally involves construction issues but that is not the point here. The Magistrate found that it meant what it said. Mr Bell criticised the Magistrate regarding the language, as saying he thought it was free from ambiguity. I do not hold the view that the Magistrate was making any general pronouncements as to principles of construction. Even if he were, I do not take the view that he misconstrued the meaning of the relevant clause. The words

in their meaning are not complex and few persons other than lawyers would seek to invest them with complexity. The application of the clause to the relevant situation is more difficult but that is really a question of what facts were found or were open to be found.

27. I do not find it necessary to revisit long understood principles of construction and questions as to the meaning of words, the intention of the parties, reading the contract of insurance as a whole and the like.

28. The issue committed to the Magistrate was one of fact – the ability of the appellant to work in his usual occupation. More specifically and more correctly – had the plaintiff satisfied the Magistrate that he was unable to work for more than ten hours per week in his usual occupation? This the plaintiff failed to do. The appellant here sought to point to a vice in the reasoning by arguing that the Magistrate found against his case on the basis of one week of more ten hours. I do not accept that the Magistrate did so confine himself. I construe the Magistrate as having used that evidence as an exemplar of the evidence, indicating that the plaintiff was able to work more than ten hours per week as a carpet cleaner. In my view that is the explanation and meaning of his phrase, "And I will only go that far." That is, "That is all I will specifically refer to." It would by no means be unusual for a magistrate, particularly in a country town, to avoid saying more than he or she had to in order to fairly deal with a case.

29. It is clear that it was part of the evidence and open to be acted on that the plaintiff worked more than ten hours in a week on more than one occasion. I have already referred to the plaintiff's own evidence that he did with an accompanying reduction in the bare benefit. It was clearly in evidence that he could and did work more than ten hours a week as a carpet cleaner.

30. Counsel for the respondent drew attention to other examples of this. One, from 1/10/98 to 7/10/98 in excess of 11 hours and two, sixteen and a half hours in a period of seven days from 5/11/98 to 11/11/98. These were drawn from the plaintiff's diaries but these were not weeks commencing on a Sunday.

31. Moreover, whilst the Magistrate thought that the plaintiff was frank, he did not say that he accepted all of his evidence. He did say that he would not add the farm time to the usual occupation time. It was however, well open to the Magistrate in determining the critical question as to the ability to work in his usual occupation to take account that the plaintiff managed his hobby farm of 70 acres with cattle and a small vineyard whilst allegedly unable to work ten hours a week as a carpet cleaner. Moreover, the plaintiff's records, the diary, was kept by him with no independent checking. The Magistrate did not elaborate his view of the clause but this is not surprising; it was barely capable of further elaboration. This was not a case of such ambiguity that the *contra proferentem* principle has any sphere of application to operation.

32. Insofar as the evidence of Dr Leitl's opinion is concerned the Magistrate was not obliged to accept that opinion, once he took into account the other matters. I have already referred to the fact that Dr Leitl's evidence did not address the critical period.

33. The Magistrate made no mention of the failure of the plaintiff to call his general practitioner nor the original treating orthopaedist (who was unnamed) but it was open to him to take account of it within the principles of *O'Donnell v Reichard*[2].

34. Dr Leitl agreed in evidence that his opinion was formed on seeing him on 16/06/99, a date after the period. So far as the "week" argument is concerned, it appears only to have been relevant with respect to working periods of more than ten hours in the seven day period commencing mid week or early in the week.

35. In *Dunlop Perdriau Rubber Company Ltd v Federated Rubber Workers' Union of Australia*[3], Mr Justice Dixon as he then was, stated with respect to the word "week" that it was capable of meaning a calendar week commencing on a Sunday, or any consecutive seven days, or the week observed by the employer in the calculation of wages, or the five days Monday to Friday, that is a week for an award, or other possible meanings.

36. This was an insurance policy with respect to a self employed carpet cleaner who might

work when he chose. Much of his work was apparently done cleaning car carpets and the like. The parties would hardly have intended the Sunday to Saturday calendar week in my view. Any seven consecutive days including weekends is more likely, whatever day is selected as its commencing point.

37. But little turns on this. The Magistrate saw the plaintiff, saw his records and knew from his own evidence that he worked more than ten hours on a not insignificant number of occasions in the period. It was well open to him to conclude that the plaintiff had not established to his satisfaction that he was so unable to work that he was totally disabled within the meaning of the policy.

38. I am also of the view that the Magistrate's construction of the defining clause was not incorrect. So far as the third question is concerned, it appears to be common ground that no party ever referred to Clause 5.4 much less advanced any argument concerning it. Mr Bell's argument was not all that easy to understand but I deem it to be along these lines that since the policy in Clause 5.4 provided for in the circumstances there referred to for a resumption of entitlements without excess, after a period of over ten hours weekly working, the construction that one week was sufficient was wrong. I already indicated that I do not accept the Magistrate acted on that narrow basis alone.

39. However Clause 5.4 applies only when there is an accepted disability. More fundamentally the question should not have been permitted in the circumstances if the Master knew them (which may be doubted) where there was an entirely fresh point not only never mentioned in the lower court but apparently not even thought of. I therefore conclude that it was not competent on the appeal for the question of law to be raised and allowed. See *University of Wollongong v Metwally*[4] and more recently in this court, the decision of McDonald J in *Emer v The Queen Victoria Womens Centre Trust*[5].

40. It should be borne in mind, lest there be any doubt about it, it is not the task of this Court to find the facts. That task was performed by an experienced magistrate to whom that view of the facts was clearly open. Accordingly the appeal must be dismissed, the appellant to pay the respondent's costs of the appeal.

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[1] [1986] HCA 32; (1986) 160 CLR 513; (1986) 66 ALR 99; (1986) 60 ALJR 460; (1986) 4 ANZ Insurance Cases 60-712.
[2] [1975] VicRp 89; (1975) VR 916.
[3] [1931] HCA 33; (1931) 46 CLR 329 at 341.
[4] [1985] HCA 28; (1985) 60 ALR 68; (1985) 59 ALJR 481 at 483.
[5] (1999) VSC 115.

APPEARANCES: For the appellant Patterson: Mr J Bell, counsel. Constable Connor, solicitors. For the respondent: Mr D Christie, counsel. Landers & Rogers, solicitors.
