



Burk v Commonwealth of Australia [2006] VSC 25

This is a decision of Harper J of the Supreme Court of Victoria which was handed down on 7 February 2006.

This case involves a claim for negligence brought by Mr Burk (“the Plaintiff”) against the Commonwealth.

Main Facts

- The Plaintiff was a 65 year old ex-Naval Air Mechanic. He was serving with the Royal Australian Navy (“RAN”) on the *HMAS Melbourne* on 10 February 1964 when that ship collided with *HMAS Voyager*.
- The Plaintiff had been ‘caught in the worst peace-time disaster in Australia’s military history.’ The bow of HMAS Melbourne had struck the midship of HMAS Voyager and had cut the ship in two. Eighty one crewmen died.
- The Plaintiff was below decks at the time but he heard the explosion and witnessed the aftermath.
- The Plaintiff resigned from the Navy in September 1967 and spent the next 18 years working as a labourer. Following this he concentrated on his interest with greyhound racing as a ‘professional dog owner and trainer’. This came to an end in 2000.
- The Plaintiff claimed that as a result of the collision he suffered Post Traumatic Stress Disorder (“PTSD”). While other psychiatric injuries were pleaded in the Writ, the Plaintiff’s case at trial was confined to PTSD on the basis this was a ‘disorder’ within the meaning of Section 5(1A) of the *Limitation of Actions Act (Vic) 1958*. He claimed he did not know of his PTSD until 1997.
- The Parties agreed that in determining whether the Plaintiff had PTSD it was appropriate to use the criteria for PTSD set out in the Diagnostic and Statistical Manual of Mental Disorders (4th Edition) (Test Revision) (“DSM-IV”)

The Decision

His Honour noted that the DSM-IV is not to be read as a statute but that it was still necessary to meet all six criteria before a patient can be properly diagnosed as suffering from PTSD. These criteria are: “(A) exposure to a traumatic event; (B) persistent re-experiencing of the traumatic event; (C) persistent avoidance of



stimuli associated with the trauma, together with numbing of general responsiveness; (D) persistent symptoms of increased arousal; (E) the duration for more than one month of the symptoms described in criteria B, C and D; and (F) clinically significant distress or impairment, caused by disturbance in social, occupational or other important areas of functioning”.

His Honour pointed out that in order to succeed at common law, the Plaintiff had to prove on the balance of probabilities that he is (or was) suffering from a *disorder*. Regard must be had to the array of symptoms as a whole and a determination made on the balance of probabilities that the overall effect is so serious that it will cause "clinically significant distress or impairment" in the relevant areas of functioning. He noted the task of diagnosis in the context of treatment is similar to this process, but not the same. Treating doctors must be conscious of inconsistencies, but they are not required to cross examine their patient nor do they have the benefit of hearing from an number of witnesses in an adversarial environment. He said he was required to consider all the evidence before the Court including expert witnesses, and then determine whether the Plaintiff has satisfied the burden of proof in demonstrating he had PTSD.

After examining the evidence in great detail and performing an analysis of the criteria and the elements of each criteria for PTSD as set out in the DSM-IV, His Honour formed the view that on the balance of probabilities the Plaintiff had only satisfied Criterion (A), and (E). The Plaintiff had not satisfied all the criteria and therefore he did not suffer from PTSD.

It appears his Honour was particularly mindful that criterion (F) requires more than symptoms which are common to most of the population at one point or another. There was a need to distinguish between normal mood disturbances and normal alterations in functioning and clinically significant symptoms. While he accepted the Plaintiff had suffered distress and stress as a result of the accident, these symptoms had not sufficiently interfered with the Plaintiff's functioning for them to be considered 'clinically significant'. He noted the Plaintiff had been able to continue his position within RAN for 3 ½ years after the accident and then had been able to maintain employment for the next two decades. While an ability to work does not disqualify a Plaintiff from satisfying criterion (F), it suggested a reasonably high level of functioning that would be inconsistent with a diagnosis of PTSD.

The proceedings were dismissed.

Implications

- An interesting aspect of this decision is the Court's apparent willingness to stand in the shoes of a psychiatrist: - evaluating the evidence, applying this to the DSM-IV criteria and deciding on an appropriate diagnosis. In most cases, it will be in the Defendants interest to encourage a Court to take a similar approach. At the very least Defendants could use this



decision to remind the Court not to delegate its judicial responsibilities to psychiatrists and psychologists. In this context the Court should be urged to look behind the opinion of expert witnesses and to evaluate their conclusions in light of all evidence received during the hearing, remembering that it is the Court's role to determine whether the requisite burden of proof has been satisfied by the Plaintiff.

- Defendants should also be encouraged to test diagnoses reached by psychiatrists supporting the existence of a psychiatric illness if such diagnoses are based on DSM-IV.
- In a separate decision involving the Voyager disaster which was handed down on 23 December 2005 by the NSW Court of Appeal, some support for this approach is found in the judgement of Handley JA (Commonwealth of Australia v Smith [2005] NSWCA 478). In his decision, Handley JA notes that over the past decade or so the application of the DSM-IV (and the earlier editions) by psychiatrists have effectively widened the boundaries of legal liability for psychiatric injuries. He notes that 'it is a matter of concern that the common law has effectively delegated law making power to professions in the psychiatric branch of medicine, and it is also a matter of concern that the body of delegated legislation should have grown so rapidly ...'
- Virtually all the disorders within the DSM-IV use similar words to those found in criterion F of PTSD. His Honour's comments about the need to identify *dysfunction* when evaluating the existence of a disorder therefore have applicability beyond a diagnosis for PTSD.
- Needless to say, each case will turn on its facts, and here the Court was confronted with a man who had been able to function in full time employment for over two decades after the incident as well as in other aspects of his life (his family, social life and hobbies). If the Plaintiff had a less robust employment history he would probably have had an easier task.
- A query in this case is whether His Honour erred in apparently elevating the criteria within the DMS-IV to the status it assumed in his reasons. While His Honour noted that the manual is not a statute, he took a very exact approach to application of the DSM-IV criteria. To date it does not appear that any appeal has been lodged.
- We note the Plaintiff in this case proceeded on the basis of only one psychiatric injury. Almost invariably those of you fighting Writs based on psychiatric injuries will be faced with a plethora of disorders and complaints upon which the claimant will seek to base his claim.

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