Pain, strain and nothing gained

RSI and the tort of negligence

Jeff Giddings

The frequent failure of RSI claims in the 1980s exposed the inability of the common law to adequately deal with novel claims.

The duty of care imposed on employers to provide a safe workplace for their employees was expanded by several decisions of the High Court of Australia in the mid-1980s.[1] However, a range of other factors have meant that many injured workers have remained unable to obtain adequate compensation for work-related injuries caused by employer negligence.

This article will focus on the significant difficulties encountered by workers suffering from repetition strain injury (RSI). As well as various institutional factors which limit the effectiveness of our legal system in handling such claims, RSI sufferers have encountered additional obstacles including:

- the 'invisible' nature of many RSI-related conditions;
- the sensationalised and cynical approach of much of the media to RSI; and
- the perceived greater incidence of RSI among women, particularly those from non-English speaking backgrounds.

The systemic inadequacies of the law of negligence

The common law of negligence is preoccupied with apportioning blame for an event, whatever that may be, some time after its occurrence. If an objective of this system is to prevent such accidents occurring, then it is clearly ineffectual. Quite simply, it involves 'closing the stable door once the horse has bolted'.

Plaintiffs seeking to recover damages for their employer's negligence may encounter any or all of the difficulties of proof, contributory negligence, time limits, costs risks, loss assessment and court delays.

Such factors will never be entirely addressed by case law developments alone: legislative action and the allocation of additional resources to the legal system will be required. The 'employer duty of care' cases decided by the High Court in the mid-1980s recognised the importance of accident prevention and viewed it as the employer's responsibility.

They took their cue from the safety statutes which had been enacted in all Australian jurisdictions during the 1970s and 1980s. The court placed great faith in the flexibility of the common law but it must be asked whether there is, in fact, sufficient flexibility to deal with these sorts of problems.

The difficulties which have been encountered by RSI sufferers in pursuing common law negligence claims appear to have been most significant for workers from white collar industries. Injuries arising from repetitive lifting and twisting movements which also involve objects of substantial weight have been more readily accepted by courts as compensable injuries.

The rapid pace of technological development in relation to coding and word processing machinery during the 1960s and 1970s meant that people engaged in such work were using equipment which necessitated a great number of keystrokes. However, it seems clear that these technological developments were not matched by improvements in the ergonomic features of the machines used.

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What is RSI?

Repetition strain injury was defined by the National Occupational Health and Safety Commission in 1986 as follows:

> A collective term for a range of conditions characterised by discomfort and persistent pain in muscles, tendons and other soft tissues, with or without physical manifestations. RSI is usually caused or aggravated by work, and is associated with repetitive movement, sustained or constrained postures and stroke/or forceful movements. Psycho-social factors including stress in the working environment, may be important in the development of RSI.[2]

The history of the incidence of RSI has been a matter of considerable dispute, especially within the medical profession. Such dispute primarily relates to whether the condition actually exists. Hunter J. H. Fry in 1985 described RSI as going back to Shakespeare's time and cited weavers' and spinners' cramp from that age as early examples of the condition.[3] By contrast, Mark Awerbuch in 1986 argued strongly that the existence of such a condition had not been proven.[4] This medical disagreement has created serious difficulties for RSI sufferers making damages claims.

There are two early RSI cases from New South Wales relating to conditions which arose during the late 1970s. Both decisions saw plaintiffs recover at least some compensation. In *Lashford v Plessey Australia Ltd* (unreported decision, New South Wales Supreme Court, 25 March 1982) Justice Roden heard conflicting medical evidence and ultimately decided that on the balance of probabilities the plaintiff, a process worker, had sustained some damage to the median nerve on her right arm and that this had been sustained through her work. Importantly, there was evidence that carpal tunnel syndrome was a condition known to result from repetitive work and there was a lack of any other explanation of the relationship between the plaintiff's injury and her work.

It was noted that the plaintiff had failed to undergo recommended treatment for her condition and this, together with her failure to seek other employment which would not have involved repetitive work, meant she had failed to take reasonable steps to mitigate her loss. As a consequence, a period of only 12 months was set as the time after which the plaintiff ought to have sought employment once again even though it was acknowledged by Roden J that medical treatment is 'frequently not the most pleasant of experiences'.

In *Janice Marie Holmes v Merck Sharp and Dohme (Australia) Pty Ltd* (unreported decision, New South Wales Supreme Court, 2 September 1983), the plaintiff worked on a production line involving a bottle checking operation which required her to make repetitive twisting movements of her wrists. The plaintiff's injury was accepted by Justice Reynolds as being of a serious nature. (In fact, she spent four weeks in hospital after leaving work in late June 1979.) Reynolds J further accepted that the defendant had been negligent in that the system of work was unsafe.

The defendant argued they had exercised reasonable care to protect workers including the implementation of a system of rotation of work. Reynolds J concluded that if a rotation system had been introduced it was not adhered to and, as would subsequently be held in *McLean v Tedman* (1984) 56 ALR 359 at 364 (per Mason, Wilson, Brennan and Dawson JJ), the employer's responsibility goes beyond simply putting such a system in place.

The injuries in these cases were suffered before the massive increase in the attention given to RSI during the early 1980s. This coincided with a substantial increase in the number of white collar workers, particularly key board operators, who were making claims for conditions associated with RSI. Given the lengthy delays involved in the progression of common law negligence claims to a court hearing, there had been a great deal of public debate regarding the existence of RSI before such claims came before the courts. This appears to have created further difficulties for plaintiffs.

Quinlan and Bohle note that the media coverage of RSI issues has 'frequently been characterised by sensationalist reporting in which extreme opinions on the origins of the RSI problem, and solutions to it, have been given greater attention than the official pronouncements of health professionals, the government and the courts'.[5] They note this has done little to encourage a balanced assessment of the RSI problem by the general community.

The big battle

The Commonwealth, one of the employers most affected by common law claims for RSI injuries, has taken a very vigorous and calculated approach to its defence of these claims. This was clearly dictated by the potential liability to the Commonwealth if such claims were successful. The Minister for Finance in 1987, Senator Peter Walsh, estimated that potential liability at $600 million.[6]

The Commonwealth engaged Richard Stanley, QC, to advise as to the proper defence of such claims against instrumentalities including the Australian Taxation Office, Australia Post and the Australian Bureau of Statistics. By the time the Commonwealth's defence strategy was being prepared there had been considerable union activity regarding the RSI issue. This coincided with, for example, an increase in RSI reports within the Tax Office from none in 1978, one in 1979 to 127 in 1982. An industrial campaign was conducted by the Tax Office Branch of the Federated Clerks Union during late 1981 and much of 1982 in relation to the RSI issue. This union involvement was carefully exploited by the Commonwealth in its defence of these claims.

The legal advice received by the Commonwealth highlighted the need to draw on experts from overseas if it was to be established that the system of work was not an unsafe one or, at least, was one that the Commonwealth could not reasonably have foreseen would injure its employees. This was based, to a considerable extent on the views of several Australian ergonomists, including Professor David Ferguson who had detected

the phenomenon of repetitive strain injury well before tenosynovitis became a household word.

The Commonwealth sent counsel on an extensive overseas study tour, taking in the United States of America, Canada and the United Kingdom, to enable similar workplaces to be evaluated in terms of the incidence of RSI. As is outlined in the detailed advice provided after the tour, many of the ergonomists consulted 'were extremely critical of the [Taxation Office] workplace and the system of work and considered that these, during the relevant periods, did not satisfy ergonomic requirements and were conducive to injury.[7] In relation to the supposed absence of RSI at keyboard operations overseas, it was noted that a plaintiff who properly prepared their case could argue that no conclusions could be drawn from such an absence of complaints by reason of differences in the physical work station, the system of work and the forms of employment. In particular, it was noted that in the United States, 80% of the relevant employees were casuals and there were also disincentives against reporting injuries.[8]

The Cooper case

The Commonwealth's legal advice proposed that the claim to be initially disputed should be carefully selected. The 'selected plaintiff' should not have had surgery and should allege only a nebulous tenosynovitis or such like. It was also noted that if the plaintiff could be discredited by film this would be of considerable significance. It was correctly noted that many prospective plaintiffs would treat the first case litigated by the Commonwealth as a 'test case'.[9] This is very telling, as in the 'test case', *Cooper v Commonwealth* (unreported, Victorian Supreme Court, 25 March 1987), the jury needed only 57 minutes after a 25 day trial to decide that the plaintiff had not suffered an injury. The selection of this particular case seriously questioned the existence of RSI as a genuine injury and this, no doubt, deterred many other prospective plaintiffs.

It would appear that Susan Cooper's case was not particularly strong. She had not undergone surgery, her doctors were reliant on her explanation of the pain she suffered, and she had been filmed performing tasks inconsistent with her evidence.[10] Although a solicitor involved in the case stated to the author that the case was 'as strong as any at that time', other labour lawyers disagreed strongly with this view. Indeed, it was said (although not on the record) that the solicitor who originally had the running of the matter, had in fact written on the outside of the file 'must not run'.

There had been a considerable number of RSI claims which had been settled by the Commonwealth before the *Cooper case*. There were two labour law firms which were conducting most of these actions, Slater and Gordon, and Maurice Blackburn & Co. There was significant rivalry, with both wanting to run the 'first big case'. Meetings had been conducted between these lawyers and the relevant unions (Federated Clerks Union (Tax Office Branch), Australian Public Servants Association and the Australian Postal and Telecommunications Union) with a view to selecting the appropriate case to run. There was also discussion as to which was the most appropriate State in which to run the hearing. Unfortunately, these meetings did not result in a unified strategy. As with the lawyers, it appears that each of the unions wanted it to be one of their members who would achieve the first big victory.[11]

In the running of her case, Susan Cooper had the support of her union, the Federated Clerks Union (Tax Branch). It is interesting to note the comment of the trial judge, Justice Southwell that the jury 'might have been excused for thinking at times, that this was not a case between the plaintiff and her employer, but it was a case where two giants with apparently unlimited resources and an abundance of time were locked in mortal combat'.[12] Cooper's union involvement was targeted by the Commonwealth. She was described as a pawn in the union's RSI strategy. Her doctors were similarly depicted with suggestions that they were influenced by the fact that they received a considerable amount of medico-legal work from the plaintiff's solicitors.[13] The Commonwealth sought to capitalise on the apparent lack of understanding of RSI within the general community. Hopefully, the community now has a better understanding of RSI such that if the *Cooper case* were decided today, her injury would have been recognised.

Foreseeable injury

In another unsuccessful claim, that of *Phipson Nominees Pty Ltd v French* (1988) Aust. Torts Reports, para 80-196, the full Federal Court upheld an appeal by Phipson Nominees, the service company of a firm of solicitors, from a decision of the ACT Supreme Court.

The plaintiff's main contention was that her employer had failed to take reasonable steps to reduce the likelihood that she would suffer RSI. The plaintiff had warned her employer that if steps were not taken to reduce her workload, she would have to stop work due to RSI. The plaintiff did, in fact, stop work in February 1984.

The majority held that it was not negligent for the employer to have failed to direct workers to immediately report such problems. They noted there was evidence that giving people cause to worry about their physical condition can be harmful. Further, they held that it could not be negligence for the defendant to have a very busy office requiring considerable effort from personnel. Unfortunately, no yardstick was provided for determining where considerable effort from personnel ends and exploitation begins. These judges clearly had little understanding of the nature of office work and of the manner in which office staff can be overborne by employers.

The dissenting judgment of Miles J provides, in my view, a far more balanced approach to the issue of RSI. The test of foreseeability used was that the plaintiff was required to prove that the defendant, aware in a vague sort of way of concern in the community that keyboard operators were at risk of RSI, should have realised that if the plaintiff continued to work under the conditions about which she was so vehement in her complaints, then there was a real possibility that she too would fall a victim to RSI. This test is much more reasonable than that applied by the majority who considered that the plaintiff was required to prove that the precise injury she suffered must have been foreseeable.

The majority indicated that they were not making any general conclusion either expressly or implicitly as to whether, and if so to what extent, working very hard and for long hours at word processing or similar work can cause soft tissue or other injuries. Leave to appeal to the High Court was sought but refused on the basis that the Full Federal Court's decision was one on the facts and did not involve questions of law. The plaintiff's solicitors had felt caught, in a tactical sense, in relation to the leave application. They wanted to see RSI treated by the court in the same way as any other injury and therefore felt precluded from arguing that there were important matters of law in relation to the nature of injury which required the High Court's consideration.[14]

Delay in claiming

A 1985 New South Wales case highlights a particular difficulty faced by plaintiffs in RSI common law claims — the reluctance to report injury. This reluctance to report is most prominent where the worker's medical condition gradually worsens rather than arising from one single event. In *Dousi v Colgate Palmolive Pty Ltd* (1986) Aust. Torts Reports, para 80-015, Master Greenwood of the NSW Supreme Court agreed to extend the time within which the plaintiff was able to bring an action in negligence because the plaintiff was unaware that there had been alternative work systems available to her employer which would have reduced the risk to her of RSI. Master Greenwood held this to be a material fact regarding her cause of action.

The plaintiff had developed pain during 1979 but did not seek legal advice, despite several periods off work in receipt of worker's compensation payments in the period up until October 1983. The plaintiff did not seek legal advice until she was advised by her employer that, pursuant to company policy, her employment would be terminated when her absences from work, which were covered by workers compensation payments, reached a total of 52 weeks. The plaintiff's overwhelming concern was the retention of her job rather than seeking compensation for the pain caused by her injury. This reluctance to report injuries is likely to be most pronounced among lesser skilled workers, particularly those whose employment prospects are further impeded by their lack of English skills.

Systems of work

The important recent case of *Abalos v Australian Postal Commission* (1990) 96 ALR 354 was decided by the High Court in November 1990. The plaintiff a mail coding machine operator, was successful in her appeal to the High Court which reinstated a trial judge's finding that Australia Post had failed to properly supervise her with a view to ensuring she adopted an appropriate posture to minimise the risk of RSI. In a judgment with which the four other presiding judges (Mason CJ, Dean, Dawson and Gaudron JJ) agreed, McHugh J held that the plaintiff's injury was reasonably foreseeable. Further, he said that the question on the foreseeability issue:

> was not whether the omission to provide proper supervision gave rise to a foreseeable risk of injury. It was whether the conduct of the defendant in requiring the plaintiff to work in this system gave rise to a reasonably foreseeable risk of injury. If it did, the plaintiff was exposed to an unnecessary risk of injury. [at 364]

McHugh J referred to the evidence of Professor Ferguson which, in his view, appeared to establish a clear case of negligence on the part of the defendant in relation to its failure to redesign the system of work. Professor Ferguson had appeared as a witness in a number of RSI trials and his significance in this case lay in the fact that in the early 1970s he had conducted a survey of mail coders at the request of Australia Post. Ferguson had been appalled at what he considered to be the inhumane production line operations in the coding room and he further noted that 'apart from minor adjustments to the "unsatisfactory workstation", the whole system needed to be redesigned' (at 356).

The defence put forward by Australia Post regarding supervision was, in effect, that the system was so poorly designed that greater training and/or supervision of the coders would not have reduced the risk of injury. Clearly, this argument, which had been accepted by the NSW Court of Appeal, could not have been run if the plaintiff had pleaded the defendant's failure to redesign the system as a particular of negligence. Fortunately for the plaintiff, this omission made no difference given the finding of negligence regarding the failure to adequately supervise.

Causation

The case was then remitted to the NSW Court of Appeal to resolve the outstanding issues. There the plaintiff was successful (*Australian Postal Commission v Abalos* , unreported decision, New South Wales Supreme Court, Court of Appeal, 1 November 1991). One interesting matter is raised by Mahoney J in relation to the question of causation. In response to matters put by the defendant's counsel which were submitted to show the unlikelihood of injury to the plaintiff's right arm, he noted that there was evidence in respect of the injury to the plaintiff's left arm and stated that once it was accepted that there had been injury to the right arm, then, 'there being no other reason established for the condition of the right arm, it is proper to infer that the state of affairs giving rise to the risk in fact caused the injury' (at 5). This is clearly a very different approach to that which was taken in the *Cooper case* and the *Phipson Nominees case* where the plaintiff was being required to prove the precise cause or connection between her employment and the injury.

It is interesting to note that the Commonwealth defended this claim strenuously and at no point made any offers of settlement. Counsel's view was that it was most likely that a reasonable offer of settlement would have been accepted by the plaintiff.[15]

Future directions

It appears that the incidence of RSI in Victoria is now decreasing and has been doing so since the mid-1980s. The number of RSI claims being received by the Victorian Accident Compensation Commission has been falling each year since 1985-86 with the exception of 1988-89.[16] There were 1303 claims in 1991-92, which is less than half the 2675 claims in 1985-86. While this has no doubt been contributed to by job redesign and other preventive measures, it is quite likely that the questioning of the status of RSI as a real injury in the publicity surrounding the *Cooper case* has resulted in considerable under-reporting.

The number of claims made by women has dropped each year since 1985-86. The number of claims by men has been falling since 1988-89 and is now almost identical to the number of claims being made by women (647 claims compared with 656 in 1991-92). These figures show the clear fall in the

number of claims but also highlight that RSI remains a matter requiring ongoing preventive work if it is to be further reduced and, if possible, eliminated.

Since the mid-1980s, there has been a far greater emphasis placed by unions and employers on work redesign to remove as far as possible, the exposure of workers to continuous repetitive work. For example, the Australian Postal and Telecommunications Union (as it then was) had commenced negotiations to redesign Australia Post's mail sorting systems in 1984,[17] some six years before the High Court considered Mrs Abalos' claim.

The report 'RSI in the Australian Public Service' was released in 1985 by the National Task Force on RSI.[18] This was followed, in May 1986, by the release of the National Occupational Health and Safety Commission paper 'RSI: A Report and Model Code of Practice'.[19] This report referred to a comprehensive prevention strategy encompassing eight main elements:[20] work organisation, job design, task design, task variation/work pauses, work adjustment periods, workplace and environmental design, technology selection in equipment design, education and training. It must be questioned whether non-unionised, private enterprise workplaces are likely to take into account these eight elements of the prevention strategy. Despite this concern, there have clearly been gains made in relation to the understanding of the condition of RSI which can be built on.

Delays in the legal system may mean that conditions in any industry are very different by the time a claim is heard from what they were when the incident or incidents which gave rise to the claim occurred. For example, the pain which Mrs Abalos felt began in 1977 yet her case was not finally resolved by the NSW Court of Appeal until November 1991, 14 years later. Susan Cooper and Ms French had to wait more than four years after stopping work before their claims were determined.

Conclusion

The common law has fallen far short of dealing effectively with many employer negligence claims. RSI sufferers have had to deal with:

- the invisibility, in many instances, of their condition;
- the reluctance of much of the medical fraternity to accept the existence of a condition which they could not verify in the traditional fashion;
- the prejudices of the judiciary (this was particularly the case in *Phipson Nominees v French*);
- the strenuous efforts by employers, particularly the Commonwealth Government, to portray the condition as part of a trade union run agenda; and

  the reluctance of workers to report the existence of an injury when they feared that such reporting would result in the loss of their job.

The supposedly novel nature of such claims in the early 1980s saw them treated with considerable scepticism. This situation was exacerbated by the fact that, at that time, the overwhelming majority of claimants were women, and by the sensationalist treatment of RSI by the media.

There is now a greater community awareness of the problem of RSI and the focus on preventive strategies has turned the tide such that the number of claims made will continue to decline. Sadly, those who have been or who in future become afflicted by the condition are likely to receive little comfort through the pursuit of common law negligence actions.

References

1. See the following cases: *Kondis v State Transit Authority* (1984) 55 ALR 225 (the non-delegable duty owed by employers to employees extended to cover tasks performed negligently by independent contractors); *McLean v Tedman* (1984) 56 ALR 359, (employers owe a duty not only to put in place a safe system of work but also to take reasonable steps to ensure compliance with that system); *Stevens v Brodribb Sawmilling Co. Pty Ltd* (1986) 63 ALR 513, (the obligation to prescribe a safe system of work extended to cover independent contractors in some circumstances).
2. National Occupational Health and Safety Commission, *Repetition Strain Injury: A Report and Model Code of Practice*, Australian Government Printing Service, May, 1986, p.7.
3. Fry, H., 'Overuse Injury (or RSI) — It's Been Around Since Shakespeare's Day', (1985) *Australian Law News*, October, p.28.
4. Awerbuch, M., '"Overuse" or "Repetition Strain" Injury — Another Medical View', (1986) *Australian Law News*, January/February, p.31.
5. Quinlan, M. and Bohle, P., *Managing Occupational Health and Safety in Australia, A Multidisciplinary Approach*, 1991, p.135.
6. *Age*, 8.4.87, p.1.
7. *Age*, 8.4.87, p.1.
8. *Sydney Morning Herald*, 7.4.87, p.6.
9. *Sydney Morning Herald*, 7.4.87, p.6.
10. McDonald, M., 'RSI — A Case Study', (1988) 62 *LIJ* 11, 1093 at 1095.
11. Personal interview with Domenica Whelan, Senior Industrial Officer, ACTU, 18 September 1992.
12. *Cooper v The Commonwealth*, jury charge by Southwell, J p.5.
13. McDonald, M., above, pp.1095-6.
14. Telephone interview with Pamela Burton, Barrister, 29 September 1992.
15. Telephone interview with Andrew Barrie, Barrister, 30 September 1992.
16. Accident Compensation Commission, Report produced by June Polglaze, Research Officer Statistics.
17. See ref.11 above.
18. *Repetition Strain Injury in the Australian Public Service*, Task Force Report, Australian Government Printing Service, 1985.
19. National Occupational Health and Safety Commission, ref.2 above.
20. National Occupational Health and Safety Commission, ref.2 above, p.52.

Inaugural Client Interviewing Competition For Law Students

In February 1993 the inaugural round of a 'client interviewing' competition for law students studying professional practice was held at the University of Wollongong. The winners were the team from Monash University, Richard Kervin and Trudy Edmondson, and they went on to compete in the international round of the competition in Calgary, Canada, in April. Even though there was no grading after first and second, rumour has it that they came a close third.

The competition is expected to continue and develop further. Next year's national round will be held at Bond University and the international round in Glasgow.

It is good to see skills training at undergraduate level being encouraged by such a competition. My congratulations to the Monash team.

Ross Hyams

Ross Hyams (coach) is the Co-ordinator, Monash Oakleigh Legal Service.