The end of an era *Rizza* revisited

More than 10 years after sustaining the original injury a compensation case is finally settled. By Harry Gill

Corrado Rizza sustained a back injury on 11 September 1992 during the course of his employment. His litigation underwent more twists and turns than the average mountain brook, but was finally laid to rest when settlement was achieved on 14 February 2003. While the law governing the case is of little relevance today, the proceeding itself is of jurisprudential interest due to its unusual nature.

The problem for Mr Rizza was that he did not consult solicitors until 14 March 1996.

Section 135A of the *Accident Compensation Act* 1985 (the Act) precluded a worker from claiming damages for pecuniary loss if the injury occurred before 1 December 1992 (the date on which the Kennett government revamped the workers' compensation system in Victoria). However, s135A(2)(b) did allow an exception to this general rule where the injury was a serious injury and arose before 1 December 1992 but the incapacity arising from the injury did not become known until on or after 1 December 1992. The defendant made application shortly after the issue of proceedings on the basis of the accepted County Court practice to interpret "incapacity" as meaning any absence from employment which resulted in payment of compensation for that injury. As the plaintiff had had a handful of days off work between September and November 1992, the defendant's application was successful.

The plaintiff took the matter before the Court of Appeal. The Court of Appeal agreed with the plaintiff's contention to the effect that "incapacity" in this provision meant incapacity amounting to serious injury. As the plaintiff's condition had been troublesome but manageable until about 1995, it was readily arguable that he was not aware that he had a "serious injury" within the meaning of the Act until that time. However, an eleventh-hour amendment to the Notice of Appeal claimed that the plaintiff fell foul of s135B(3) of the Act, namely that claims for damages in respect of injuries sustained before 1 December 1992 must be issued on or before 30 June 1994.

The *Rizza* appeal was heard concurrently with appeals on identical issues in *Walker* and *Collins*. Collins was successful in the Court of Appeal because he had in fact issued proceedings before 30 June 1994. Rizza and Walker applied for special leave to appeal to the High Court, but Rizza withdrew after Walker's application was denied on 11 May 1999.

This left Rizza and Walker without any further recourse. Numerous submissions were made to various politicians on the grounds that it was grossly unfair to deny access to common law to these parties. In Rizza's case, proceedings were not issued by 30 June 1994 simply because his condition had not deteriorated to the extent where he felt he needed legal recourse and he was reluctant in any event to undertake that path.

Nevertheless, Rizza and Walker had lost all rights to obtain damages until the Labor government's reform package in 2000 which re-introduced common law rights for injured workers. Included in this package was s135B(1AA) which provided that the requirement to issue proceedings by 30 June 1994 did not apply to proceedings in respect of an injury to which s135A(2)(b) would otherwise apply.

Furthermore, s135B(1AC) specifically declared that the abolition of the requirement for issuing proceedings by 30 June 1994 affected "the rights of the parties in the proceedings known as *Rizza v Fluor Daniel GTI (Australia) Pty Ltd* and *In-Line Courier Systems Pty Ltd v Walker* (1998 VSCA 131)".

There was still a requirement for the plaintiffs in those cases to prove that they had a "serious injury" within the meaning of the Act. The writer's understanding is that the defendant accepted that Walker did have such an injury and that that matter resolved relatively soon after the legislative amendment. However, the defendant was not persuaded that Rizza had a serious injury. Hence, an application was made to the County Court to reinstate the proceeding which that Court had previously dismissed with subsequent support from the Court of Appeal and High Court. The County Court acceded to this proposal and the matter came on for trial commencing 10 February 2003.

Happily for Mr Rizza, the trial went well for him. By the fourth day of trial, the defendant was finally persuaded to make an offer which was considered adequate to Mr Rizza. This brought to an end a most unusual piece of litigation, some seven years after Mr Rizza first issued proceedings and more than 10 years after he sustained his injury. ●

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