

“DID YA WIN?”

THE (UN)SUCCESSFUL RURAL WORKPLACE SEXUAL HARASSMENT COMPLAINANT

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ABSTRACT

In this paper we examine the variables that appear to impact the outcome of sexual harassment complaints. We have analysed 68 sexual harassment matters heard across Australia over the six year period between 2005 to 2010. In doing so, we have ascertained the apparent differences between the urban cases and the rural cases which might account for the relatively high percentage of successful rural matters. We did this in two ways. We first investigated whether the nature of the workplace and the type of harassment complained of differed between the urban and rural cases and if so, how these attributes might correlate with an upheld complaint. We also looked at the presence or absence of variables found in other studies to correlate with success (age, ethnicity, prompt reporting, corroboration, credibility as a witness).

I INTRODUCTION

In the following paper we are examining what elements contribute to a successful outcome for a sexual harassment complainant. In comparing urban with ‘rural’ or ‘regional’ or as ‘non-metropolitan’ workplaces¹ outcomes for another research project, we discovered that rural complainants were successful in 8 out of the 11 (73%) as compared to only 40% of the urban workplace matters (23:57).² This is a significant difference in outcome and raises the

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¹ We are defining ‘rural’, ‘regional’ or ‘non-metropolitan’ as townships that are located at least 30kms from the nearest metropolitan centre with populations of less than 70,000. Gympie – approximately 160 km north of Brisbane and population is approximately 16,454; Mooloolaba – approximately 100 km north of Brisbane and population is approximately 17,500; Bribie Island – approximately 65 km north of Brisbane (over connecting bridge) and population is approximately 15,595 in total; Mossman – approximately 75 km north of Cairns and population is approximately 1800 people; Bourke – approximately 800 km north-west of Sydney and population is approximately 3,500 people; Avalon – approximately 9 km from the small town of Lara, which is approximately 62 km south west of Melbourne and population is approximately 8179; Maitland – approximately 163 km north of Sydney and 32 km north-west of Newcastle and population is approximately 61,431; Richmond – approximately 65 km from Sydney CBD and population is approximately 5560; Norfolk Island – approximately 2-2.5 hours flight time from Sydney or Brisbane and population is approximately 2,000 plus; Adelaide Hills – approximately 40 km from Adelaide and population is approximately 69,000 plus; Huonville – approximately 38 km south-west of Hobart, population is approximately 1600.

² Skye Saunders and Patricia Easteal ‘Sexual Harassment in Rural Australia: Predicted Nature, Reporting, Employment Policies and Legal Response’, presented at the National Rural Regional Law and Justice Conference, Warrnambool, 19- 21 November 2010. Note though rural success did not translate into higher compensation. Of the cases found in favour of complainants, 87% of rural cases and all of the urban ones resulted in monetary damages. The significantly higher urban mean amount (\$37,739 compared to \$20,866) could be the effect of a couple of urban cases such as *Lee v Smith & Ors* [2007] FMCA 59 and *Poniatowska v*

question of ‘Why?’ We look here at what differences were apparent between the urban cases and the rural sample that might account for the higher percent of rural matters upheld. Firstly, we identify if the nature of the workplace and the type of harassment differed between the urban and rural cases and if so, how these attributes might correlate with an upheld complaint. Secondly, we look at the presence or absence of variables found in other studies to correlate with success (age, ethnicity, prompt reporting, corroboration, credibility as a witness). A brief overview of these previous findings is presented next.

A Correlates of credibility and success

‘Reasonableness’ is a part of the test for whether an action or environment constituted sexual harassment. For instance, s 28A of the *Sex Discrimination Act 1984* (Cth) states that:

- 1) For the purposes of this Division, a person sexually harasses another person (the person harassed if:
 - (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
 in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

However, it must be noted that:

Many commentators ... argue that the reasonableness standard is itself gendered; that it is male experiences, views and perspectives that are embodied in the notion of reasonableness and how it is applied.³

Accordingly, in determining what is ‘reasonable’ and indeed in assessing whether the behavior was sexual and unwelcome and resulted in humiliation, it would seem from prior research of sexual harassment judgments that it is often the identity, history and behaviour of the complainant that is scrutinised and evaluated.⁴ The most credible female victims are those for whom it is difficult to impute any provocation.⁵ Youth can enhance the complainant’s credibility if the alleged harasser is older.⁶ In both rape and harassment, whether the victim witness is deemed believable has also been found to be a consequence of the victim or the complainant’s behaviour before, during and after the assault or incident. For instance the ‘credible’ victim fights back,⁷ reports immediately⁸ and is consistent in her evidence,⁹ is able

Hickinbotham [2009] FCA 680 in which the employer respondent was ordered to pay exceptionally high amounts: \$387,422 and \$466,000 respectively. Lower compensation in rural cases could be a consequence too of less loss in future earnings or it could be reflective of a less punitive attitude in rural cases.

³ Fiona Pace ‘Concepts of “Reasonableness” in Sexual Harassment Legislation: Did Queensland get it Right?’ (2003) 3(1) *QUT Journal of Law and Justice* 189, 192.

⁴ Patricia Easteal and Keziah Judd ‘“She Said, He Said” Credibility and Outcome in Sexual Harassment’ (2008) 31(5) *Women’s Studies International Forum* 336.

⁵ *Ibid*, 347.

⁶ Deb Tyler and Patricia Easteal ‘Sexual Harassment in the Tribunals: The Credibility Gap’ (1998) 23 (5) *The Alternative Law Journal* 211.

⁷ Mary Heath ‘Women and Criminal Law: Rape’, in Patricia Easteal (ed) *Women and the Law in Australia* (LexisNexis, 2010) 88, 90.

⁸ *Ibid*, 90. This implies that delay in reporting is ‘indicative of fabrication’ according to Caroline Taylor *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) 278.

⁹ Patricia Easteal and Keziah Judd, above n 4.

to particularise¹⁰ and testifies either in a non-aggressive and not too 'smart' manner or makes an argumentative presentation coupled with confidence.¹¹

Prior research has also highlighted the expected correlation between corroboration and a successful outcome.¹² In the context of sexual harassment matters, corroborative evidence can be used to prove (under a civil standard) that the incident(s) of harassment took place and/or that the action or behaviour caused the individual humiliation and distress. In fact, the absence of corroboration often leads to the matter being declined for conciliation and to the dismissal of complaints in the Federal (Magistrates') Court since it is 'word against word'.¹³ Studies have shown it is normative to have witnesses in these matters who provide evidence that the complainant had an appropriate emotional, physical health and/or psychological response to the harassment¹⁴ with the voice of an 'expert' being the most compelling.¹⁵

B METHODOLOGY

We focused on a sample of sexual harassment matters heard across Australia over the six year period of 2005 to 2010 that were found using the online legal database AustLII, searching with the keywords 'sexual' AND 'harassment'. Of those identified, some were not suitable for inclusion in our analysis since they were leave or other procedural matters.¹⁶ The following findings reflect data from the 68 cases determined to be relevant for our analysis. Note that, given the small size of the sample, results must be seen as suggestive only. The cases were heard in New South Wales, Queensland, Victoria, Tasmania, South Australia, Western Australia and the Commonwealth. There were no reported sexual harassment matters in the Australian Capital Territory or the Northern Territory in the time period examined.

II DIFFERENCES BETWEEN URBAN AND RURAL CASES: POSSIBLE CORRELATES OF SUCCESS

A 'Hard at it' – The workplace

Only one rural complainant (9%) was from a professional occupation compared to 16% of urban complainants.¹⁷ This rural matter was unsuccessful as were 78% of the urban professional complainants. A higher percent of urban complainants were employed in a clerical role: only one of the 11¹⁸ rural as compared to 14 of the 57 urban. Although the rural complainant was successful, clerical workers in urban areas tended to have their complaints

¹⁰ Patricia Easteal and Christine Feerick 'Sexual Assault by Male Partners: Is the License Still Valid?' (2005) 8 (2) *Flinders Journal of Law Reform* 185, 202.

¹¹ Denise Lievore 'Victim Credibility in Adult Sexual Assault Cases,' (2004) *Trends and Issues in Crime and Criminal Justice* No 288 (Canberra: Australian Institute of Criminology) 4.

¹² Deb Tyler and Patricia Easteal, above n 6, 215.

¹³ *Ibid.*

¹⁴ Patricia Easteal and Keziah Judd, above n 4, 338.

¹⁵ *Ibid.*, 342.

¹⁶ We have also excluded those in which the geographical area is unclear since we are comparing urban and rural matters.

¹⁷ This includes lawyers, teachers, social workers and a doctor. Of these nine professional urban complainants, seven were unsuccessful matters. Of the 41 'other' (non- professional) urban matters, 25 were unsuccessful (61%).

¹⁸ *Cross v Hughes & Anor* [2006] FMCA 976.

dismissed: of the 14 relevant cases 12 were unsuccessful (86%). A further two of the 11 complaints (18%) categorised as being ‘rural’ took place in the retail industry.

There was also a relatively higher proportion of rural complainants employed in the hospitality sphere: three worked in hotels and one in a club. One example was *Fischer v Byrnes* in which a ‘mature age’ female Gympie hotel employee, Ms Fischer, was ‘subjected to ongoing humiliation and intimidation on an almost daily basis for a period of approximately 5 months.’¹⁹ Ms Fischer began to feel ‘degraded, dirty and upset’ when Mr Byrne also began regularly ordering her to go and ‘make up a room’ and then to ‘be on the bed’ for him.²⁰ In ‘response to her query about what he would like for a meal’ Mr Byrnes would declare that he wanted sex. On other occasions he would say to her that he wanted ‘you on toast’ or ‘you on a plate’ or ‘a head job would do’.²¹

It is possible that ‘blue collar’ employers like these are less likely to provide working environments that ‘discourage harassment from occurring in the first place, that have a just way of dealing with the harassment that does occur, and that are open to the scrutiny of the public justice system when they fail.’²² Possibly of interest is that almost half of the rural employers (45%) were deemed liable for the actions of their employees in contrast to only about one third of employers in the urban cases (32%). This finding needs to be understood in the context of another study, which found that the Federal Court and Federal Magistrates Court was interpreting the two tests of vicarious liability broadly.²³ Therefore when an employer is found to be liable it is a good indication that their policies and practices are not reasonably addressing the harassment.²⁴ Perhaps that failure contributes to positive judicial outcomes for the rural complainants.

Accordingly, in one of the three rural dismissals, the employer’s lack of liability was stressed:

For staff has demonstrated that it has a Code of Conduct covering employee behaviour which prohibits, amongst other behaviour, sexual or other unlawful harassment in the workplace. Forstaff has established that the existence and content of the Code of Conduct is covered in the induction of all employees. It is widely known amongst employees that Forstaff policy is that pornographic material is not permitted at the workplace.²⁵

B ‘I barely even touched her’ – The nature of the alleged harassment

Eight of the rural matters (73%) involved more than one type of sexual harassment as compared to 34 of the urban cases (60%). Most of the rural multiple manifestations did include a sexually permeated environment. A sexually permeated workplace might be one in which pornographic material was obviously displayed or in which rude jokes were frequently

¹⁹ *Fischer v Byrnes* [2006] QADT 33.

²⁰ *Ibid*, [9].

²¹ *Ibid*, [11].

²² Christine Parker, ‘Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation’ (1999) 5 *Australian Journal of Human Rights* 6
<<http://www.AustLII.edu.au/journals/AJHR/1999/6.html>>.

²³ That the harassment took place ‘in connection with employment’ and that all reasonable steps had been taken by the employer to prevent the behaviour from taking place: Patricia Eastal and Skye Saunders ‘Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases’ (2008) 33(2) *Alternative Law Journal* 75.

²⁴ *Hunt v Rail Corporation of New South Wales* [2007] NSWADT 152, [197], citing *Dee v Commissioner of Police and Anor* [2003] NSWADT 217.

²⁵ *Mohican v Chandler Macleod Ltd (Anti-Discrimination)* [2009] VCAT 1529, [56].

told. A high occurrence of this type of workplace in rural workplaces was not unexpected, given the prevalent rural culture marked by an ethos of masculinity and male dominance.²⁶

It is possible that having experienced more than one type of harassment is more likely to result in success for a complainant: Of the 23 successful urban matters, 16 involved more than one type of harassment (70%). Five of the eight rural complaints upheld included multiple manifestations whilst in two of the rural cases where the complainant was unsuccessful, the sexual harassment alleged was limited to unwelcome verbal remarks.

In the test for harassment the judicial officer must ensure that the offending behaviour could be defined as an ‘unwelcome sexual advance, or an unwelcome request for sexual favours.. or other unwelcome conduct of a sexual nature in relation to the person harassed.’²⁷ It makes sense that there would be a correlation between number of incidents or types of harassment and a positive finding for the complainant because of the presence of a range of behaviours which might constitute sexual harassment. In one of the two rural matters that were dismissed, the court’s dismissal appears to have arisen from the question of whether the alleged behaviour was a one-off incident and therefore neither sexual nor serious enough to cause distress:

The issue is whether it was conduct of a sexual nature. It will not always be immediately apparent whether an attempted or actual kiss constitutes conduct of a ‘sexual nature’. It depends on the context. Mr Slym said that it was a one-off incident; he attempted to place the kiss on Ms Brown’s cheek and did not embrace or restrain her or attempt to do so. If that account is accepted, we do not believe that the conduct could be said to have the necessary sexual character. In addition, it seems to us that the second element of the test would not be satisfied, that is, a reasonable person could not have anticipated that Ms Brown would have been offended, humiliated or intimidated.²⁸

C ‘What are you askin’ me for?’ – Who is the harasser?

In almost all of the rural cases (10:11), the alleged offender was in a senior position to the complainant as compared to 44 of the 57 (77%) of the alleged urban offenders. In seven of the eight matters in which the claim of sexual harassment was upheld, the respondent was in a position of seniority. About three quarters (17:23) of the successful urban complainants were in a junior position to the harasser. Perhaps judicial officers were more likely to interpret action by a person with more power than the recipient of the behaviour as constituting ‘circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or *intimidated*.’²⁹ The case of *Cross v Hughes & Anor*³⁰ is an example.

Ms Cross was employed as an office administrator. In the course of her employment, she experienced sexual harassment by her boss, Mr Hughes, who was the sole shareholder of the company. He indicated that she was to accompany him to Sydney for business to assist with

²⁶ See for example Sanjay Sharma and Susan Rees ‘Consideration of the Determinants of Women’s Mental Health in Remote Australian Mining Towns’ (2007) 15 (1) *Australian Journal of Rural Health* 1; Elaine Barclay et al (eds) *Crime in Rural Australia* (Federation Press, 2007); Russell Hogg and Kerry Carrington *Policing the Rural Crisis* (The Federation Press, 2006).

²⁷ *Sex Discrimination Act 1984* (Cth), s 28A(1)(a), s 28A(1)(b).

²⁸ *Brown v Richmond Golf Club & Anor* [2006] NSWADT 104, [30].

²⁹ Seniority though was just one of a number of variables that seemed to affect the outcome. Thus only 17 of the 44 ‘more senior’ urban matters were successful matters (39%); five of the nine ‘equal position’ matters were successful (56%) and the single ‘more junior’ matter was unsuccessful.

³⁰ *Cross v Hughes & Anor* [2006] FMCA 976.

some meetings. When she arrived at the hotel she was aghast to discover that ‘she was booked into a single hotel suite with two bedrooms with the first respondent.’³¹ Later that day she was informed that there were actually no meetings scheduled for the next day and it was ‘suggested to her that she and the first respondent attend a live sex show. She refused.’³² This suggestion was made a number of times the following day. During this trip, the respondent made other offensive and unwelcome remarks and stripped to his underpants and had ‘placed his pillows on her bed’.³³ As discussed further later in this article, the complaint was upheld.

III VARIABLES FOUND IN OTHER RESEARCH THAT CORRELATE WITH OUTCOME

A ‘She’s a feisty young thing’ – Age

As mentioned earlier, extreme youth has been found to correlate with success in sexual harassment matters. In the current project, our ability to analyse this variable was limited by the lack of specificity about age in the judgments.³⁴ Of the matters in which age was mentioned in the urban dataset, five complainants were between the ages of 16 to 19 years of age – that is 9%, whilst in 18% of the rural cases (two of the 11) the extraordinary youth of the complainants was mentioned.

For example, in a 2006 Queensland case three young female complainants (all aged 15 or 16) were employed in a Mooloolaba news agency.³⁵ They were subjected to numerous incidents of sexual harassment involving unwelcome sexual touching of the complainants’ bottoms, being exposed to pornographic images by the employer and being subject to unwelcome verbal sexual harassment such as the employer telling one employee, ‘I think your boobs would be tear drop shape and you would have perky nipples.’³⁶ The harasser was ordered to pay \$24,437.00 (plus costs) to the first complainant, \$23,305.00 (plus costs) to the second and \$21,819.00 plus costs to the third complainant.

B ‘She just doesn’t get it’ – Ethnicity

As we found with ‘age’, judges seemed to only comment on ethnicity when there was something ‘significant’ to say about it—that is judges did not specifically say that a complainant was from an ‘Anglo’ background whereas they might if the person was non-Anglo. For instance, of the rural cases *Salt & Anor*³⁷ was the only matter in which ethnicity was mentioned. It was one of the three rural matters in which the person alleging harassment lost. The complainants, Mr Shaw and Ms Salt were both from an Aboriginal background and employed as teachers at Bourke Public School. Amongst other complaints, Ms Salt reported that she had been the victim of sexual harassment when her superior, Mr Loxley, was said to have ‘unbuttoned his trouser button in front of her’ and taking his shirt out before ‘stuffing it back in.’³⁸ The court held that:

³¹ Ibid, [14].

³² Ibid.

³³ Ibid, [16].

³⁴ It may be that age is only mentioned when it is of ‘significance’ by falling outside of the ‘expected’ norms.

³⁵ *Dale, Larkin and Loffler v Shearer and Anor* [2006] QADT 1.

³⁶ Ibid, [69].

³⁷ *Salt & Anor v NSW Department of Education and Training* [2006] NSWADT 326.

³⁸ Ibid, [72].

... the failure to adequately deal with the culture of hostility and distrust that developed between Mr Shaw and Ms Salt and the rest of the staff at Bourke Public School is evident in the way in which a petition was circulated by the staff ...³⁹ The staff friction that developed over time was often seen as the fault of Ms Salt and Mr Shaw rather than of other staff members.⁴⁰

In contrast to the rural sample, about one quarter of the urban matters (15:57 – 26%) involved non-Anglo complainants. Most were either from East or South Asia. In seven of the 15 the complainant was successful (47%) as compared to 38% of the Anglo urban complainants. This relatively high success rate for non-Anglos does not correlate with the relative high dismissal rate found in earlier research.⁴¹ One case, *Nguyen v Frederick*,⁴² though does provide an example of how language barriers can impact on credibility and may be indicative of a contributor to the lower success rate for urban complainants. The judge included discussion of the respondent's view of the 'significant inconsistencies' in the quality of the complainant's evidence possibly derived from whether she was writing on her own without assistance or with help. Perhaps then the non-Anglo complainants in the first study whose complaints were dismissed could have been less fluent English-speakers than those in the current sample.

C 'She never said nothin'' – Promptness of reporting

The judicial officers did not always comment on when the harassment was reported. Prompt reporting was mentioned in only 20 of the 57 urban matters (35%) as compared to seven of the 11 rural cases (64%). As we would expect, a higher percent of the matters in which the complainant reported quickly were successful: in six of these rural seven, the complaint was upheld.⁴³ The case of *Frith v The Exchange Hotel & Anor*⁴⁴ is an example.

In the course of her work as an employee of the Exchange Hotel in a North Queensland country town (where she also lived) Ms Frith was sexually harassed by Mr Brindley, a director of the hotel company.⁴⁵ The harassment was manifested when he offered to drive her to Cairns so that she could attend her aunt's funeral. En route, he described times when he had hired prostitutes and taken them to a hotel.⁴⁶ He then insisted on making accommodation arrangements for her in Cairns, telling her that she could 'pay him back' when she returned to the workplace.⁴⁷ He booked a single room for them both to stay in overnight, saying that, 'There was only one room left available.'⁴⁸ That evening when they were in their separate beds, 'Mr Brindley told her that she was perfect for the job but she would have to please him personally as well as professionally as he was a man of power who had to have his needs met.' He then said words to the effect that 'if she did not have sex with him, that she could not work for him.'⁴⁹

³⁹ Ibid, [50].

⁴⁰ Ibid, [49].

⁴¹ Patricia Easteal and Keziah Judd, above n 4.

⁴² *Nguyen v Frederick* [2006] WASAT 14.

⁴³ Fifty-five percent of urban matters reported immediately were upheld compared to only 18% of those who were noted as not having been reported promptly.

⁴⁴ *Frith v The Exchange Hotel & Anor* [2005] FMCA 402.

⁴⁵ Ibid, [3].

⁴⁶ Ibid, [16(o)].

⁴⁷ Ibid, [16(p)].

⁴⁸ Ibid, [16(q)].

⁴⁹ Ibid, [16(s)].

Ms Frith testified that ‘she was horrified by his words and that she grabbed her bag and ran out of the bedroom while still wearing her pyjamas.’⁵⁰ Whilst in a distressed state in the hotel lobby, she met two strangers who helped her and following this encounter she telephoned one of the managers of the hotel to report the harassment. At the manager’s insistence, she then phoned Mr Brindley’s wife to tell her about the encounter before fleeing the hotel and, having nowhere to go, ultimately went to the police station to report the situation. This action of immediate disclosure correlates with perception of credibility.

D ‘Everyone knows she’s a liar’ – Corroboration

Eight of the 11 rural complainants (73%) and 72% of urban complainants had witnesses to corroborate their claim. All of the rural complaints with witnesses were upheld. While just over half (54%) of the urban cases with witnesses were upheld, in only one of the 16 without witnesses was the complainant successful. It appears that, as expected, corroborative evidence is important.

The chance of success were increased by a family member testifying about the effects of the harassment and/or what the complainant had disclosed:

I also found the evidence given by the Complainant’s parents and witnesses to be reliable and I accept their evidence. I note that despite Mr and Mrs Supplice’s relationship with the Complainant they struck me as having an objective perspective in relation to the Complainant and their observations of her. For example, they gave evidence that demonstrated that they had been critical of their daughter’s reluctance to work until she confided in them and told them about the comments the First Respondent had been making to her.⁵¹

As in another rural matter, the family member may be able to testify as an eye-witness to the harassment.⁵² In this example, a hairdresser who was employed on a part-time basis in a Maitland hair salon went to her workplace accompanied by her teenage daughter in order to get her pay. ‘The complainant’s daughter recalled that whilst she and her mother stood waiting for the pay packet, her mother’s employer “put the pay packet down the front of his pants. He was laughing thinking it was funny.”’ She deposed that her mother’s employer then said words to the effect of:

Oh wait I have a better idea’ and ‘undid the fly on his pants and stuck the pay packet in his open fly. He lent back on his chair with his hands behind his head in a suggestive manner ...’⁵³

In addition to providing corroboration, the daughter’s presence was considered as relevant in the Federal Magistrate’s reasoning: ‘It did occur in front of her teenage daughter. It was totally inappropriate behaviour on the part of Mr Davies.’⁵⁴

Expert evidence was relied upon in 20 urban cases (35%); in 13 of these matters (65%) the complaint was upheld as compared with success for only 27% of the urban complaints without expert witness(es). An expert testified in five of the 11 rural cases (45%): a psychiatrist in two,⁵⁵ a psychologist,⁵⁶ a general practitioner⁵⁷ and a medical report from an

⁵⁰ Ibid, [16(t)].

⁵¹ *Supplice v Skalos* [2007] TASADT 4 [23].

⁵² *Hewett v Davies & Anor* [2006] FMC 1678.

⁵³ Ibid, [2].

⁵⁴ Ibid, [19].

⁵⁵ *VM v MP, KP, K t/as P, and DS* [2009] QADT 1; *Frith v The Exchange Hotel & Anor* [2005] FMCA 402.

⁵⁶ *Hewett v Davies & Anor* [2006] FMC 1678.

⁵⁷ *Cross v Hughes & Anor* [2006] FMCA 976.

unknown type of practitioner.⁵⁸ In four of the five (80%) the complainant was successful. In one of the four matters for instance, expert medical evidence was used by a very young female complainant to demonstrate that although she had suffered depression throughout her life to date, the incidents of workplace sexual harassment that she endured had aggravated her symptoms.⁵⁹ In another, the general practitioner's report was seen as corroborating 'her tearful and anxious state in the two months following the events, but does not contain any diagnoses of or opinion in relation to the existence of any clinical condition.'⁶⁰

In the rural case that was dismissed despite expert evidence, the issue was inconsistency between the expert's testimony with that of the complainant:

Dr TH, the psychiatrist engaged on behalf of the Complainant for the purpose of preparing reports for use in this proceeding, confirmed (during cross-examination) that, when he interviewed the Complainant on 23 May 2005, she told him that she had started work in July and things started to deteriorate in the first two to three months. The timeframe recorded by Dr TH is, I consider, inconsistent with that alleged by the Complainant – her version being that harassing events occurred some two to three weeks after she commenced her employment. The Complainant explained this discrepancy by saying that Dr TH must have made a mistake or that there was miscommunication between the two of them.⁶¹

The lack of an expert can also make it harder for the decision-maker to calculate damages:

A decision as to the appropriate damages for the breach of s 28B(1)(a) has been made difficult by the absence of the psychologist.⁶²

However, not having an expert witness may work in the complainant's favour as illustrated in an urban case in which the judge made an interesting statement in support of the complainant's choice not to have sought the help of an expert following her (serious) experience of being sexually harassed. In this matter, a senior doctor sexually harassed a more junior doctor.⁶³ In awarding the complainant \$100,000, the judge stated:

It was submitted that the lack of evidence of professional counselling, particularly in the immediate aftermath of the alleged event, rendered it less likely that the event had taken place at all ... In the context of the view I have formed of this Complainant, I find her refusal to seek professional assistance to be completely in character and not a fact which, in the circumstances of this case, renders it less likely that the event alleged did occur.⁶⁴

Interestingly the judge went to explain this conclusion by referring to the testimony of another witness, a friend of the complainant.

And it is not of course just complainants' witnesses that can impact on outcome. Those appearing for the respondent may influence the judicial officer in dismissing the matter. This was evident in one urban case—*Summerville v Department of Education & Training & Ors*:⁶⁵

It was not simply the number of witnesses who refuted Ms Summerville's evidence but their demeanour, their directness, and their general authenticity. The demeanour of Ms Summerville, on the other hand, and the many inconsistencies in her evidence which on their own may not have

⁵⁸ *Dale, Larkin and Loffler v Shearer and Anor* [2006] QADT 1.

⁵⁹ *Ibid*, [74].

⁶⁰ *Ibid*, [29].

⁶¹ *VM v MP, KP, K t/as P, and DS* [2009] QADT 1 [27].

⁶² *Hewett v Davies & Anor* [2006] FMC 1678 [19].

⁶³ *Tan v Xenos (No 3) (Anti-Discrimination)* [2008] VCAT 584.

⁶⁴ *Ibid*, [3].

⁶⁵ *Summerville and Department of Education & Training & Ors* [2006] WASAT 368.

been significant but when taken together did bear on her credibility and led to the conclusion that her evidence simply cannot be relied on.⁶⁶

E ‘As if anyone is gunna listen to her, anyway!’ – Credibility as a witness

In all 11 rural matters and in 49 of the 57 urban cases (86%), the judicial officer made comments about the credibility of the complainant. These remarks were sometimes about the Court’s assessment of the witness’s truthfulness in describing the sexual harassment and/or the judicial officer’s view of the believability of the seriousness of the effects of the sexual harassment. The latter was discussed in *Cross v Hughes & Anor*.⁶⁷

The evidence the applicant gave at the undefended hearing before me was essentially limited to the question of her damage. I did not find her to be an impressive witness. That is not to say that I found her to be untruthful. She simply did not provide any particularly convincing or coherent evidence in relation to the impact of these events upon her. Whilst she referred to being depressed and tearful and referred to such things as loss of appetite and increase in smoking and drinking, she was unable to provide any contextual embedment for these complaints in respect of the way in which they impacted upon her daily life. She was slow to answer the questions put to her by her counsel in respect of these matters. I take into account a nervousness associated with the giving of evidence in legal proceedings and I also take into account the fact that she may continue to find a recollection of these events distressing. But even allowing for those matters, her evidence was unconvincing as to the level of the impact of these events upon her. That is not to say that I do not accept that they had some impact. It is simply to say that she did not impress in the witness box as someone who was profoundly affected by the events described.⁶⁸

This case was undefended though and the complainant was ultimately successful and awarded \$11,822.

In some cases, the decision-makers reflected upon what constitutes an honest and credible delivery of evidence. For example in *Supplice v Skalos*.⁶⁹

I found the Complainant was an honest and reliable witness. She gave her evidence in a down to earth, forthright and understated manner without any apparent embellishment. Her account seemed limited to her recollection and she showed no signs of exaggeration or reconstruction. While there was no challenge to her account by cross-examination I scrutinised her evidence and found her evidence persuasive. I accepted the Complainant’s evidence.⁷⁰

That matter involved a 16 year old girl who worked at ‘Legs & Breasts Chicken Shop’ in Huonville, Tasmania. She was subjected to ongoing sexual harassment of a verbal nature by one of the partners in the business (who was also her supervisor) saying things like: ‘You’re just strutting your stuff so I can see your arse wobble’; ‘You’re a dick tease’; and ‘I know you want me, I can tell by the way you’re looking at me.’⁷¹ He also made remarks such as, ‘You’re a spoilt little bitch, but if that’s what you think you’ve got to do, that’s fine’ which were said to have been part of his course of conduct in harassing and humiliating her because they formed a backdrop of ‘contemptuous and belittling behaviour towards the Complainant’.⁷²

⁶⁶ Ibid, [141].

⁶⁷ *Cross v Hughes & Anor* [2006] FMCA 976.

⁶⁸ Ibid, [23].

⁶⁹ *Supplice v Skalos* [2007] TASADT 4.

⁷⁰ Ibid, [23].

⁷¹ Ibid, [26].

⁷² Ibid, [61].

As illustrated in *Supplice v Skalos* there does seem to be an ideal way of giving testimony. This includes consistency, a lack of embellishment but a sufficient amount of detail (eg ‘The Tribunal found Ms Hsu’s oral evidence vague and lacking in detail ...’) ⁷³ and as illustrated in *Perry*, a certain low-key almost passive manner: emotional but not too emotional:

Generally I regarded the complainant as an unreliable witness. She was very emotional about her case and interrupted her evidence several times to cry ... upset and distressed out of all proportion to the events which occurred, or which she was describing – see for example her reaction to having a post it note put on the back of her chair as an office joke, below under the heading ‘Eat Me’.⁷⁴

These attributes or their absence were evident in other urban cases where the witnesses were seen as incredible. For instance like Ms Hsu above, the witness might be perceived as having an emotional response on the stand that shows an exaggeration of the actual complaint:

The complainant’s facial expressions, hand gestures and voice were all emotionally overwrought during her evidence. She gasped and sobbed many times. At times she became very angry: standing in the witness box, yelling, swearing, pointing aggressively at the respondent and banging one fist into her other hand or banging a thick wad of paper loudly against her hand, knee or the top of the witness box. *The emotion displayed was disproportionate to the factual matters the complainant recounted. Events are inflamed and exaggerated in the complainant’s mind and her evidence is therefore unreliable.* (emphasis added).⁷⁵

Or as in *Treacy v Williams* the complainant was seen as evasive and aggressive:

In general terms I found the Applicant Ms Treacy’s evidence lacking credibility as she was evasive and unresponsive to questions and at others provided gratuitous information. Her evidence was inconsistent and she displayed a somewhat aggressive demeanour.⁷⁶

This last quote includes a reference to consistency in testimony. This is undoubtedly a contributor to assessment of credibility. It is difficult though to analyse the frequency of judicial comment about the consistency of evidence given that sometimes judges make express comments about consistency and sometimes the consideration of such is implied. In some judgments, the element of consistency seems to be particularly weighted in the decision-making. The bottom line is that a good witness is consistent in their evidence:

Her account of what occurred sounded internally consistent and although some parts of her evidence were not contained in her witness statement this might be because the witness statement itself was not particularly detailed.⁷⁷

One more example comes from the rural matter, *Brown v Richmond Golf Club & Anor*.⁷⁸ In this case, Ms Brown complained that she had been sexually harassed when a senior member of staff, Mr Slym, ‘Called her “Babe” and stroked her hair’,⁷⁹ called her ‘Babe and Sexy’⁸⁰ and ‘kissed her in an amorous fashion without her consent’.⁸¹ He claimed that he did nothing more than attempt to give her a ‘good night kiss’. In deciding on this matter the tribunal members indicated that Ms Brown’s account was ‘broadly consistent’ with the earlier account that she had provided to the police.⁸²

⁷³ *Hsu v BHB Australia Pty Ltd trading as Far West Consulting & Anor* [2007] NSWADT 125 [57].

⁷⁴ *Perry v State of Queensland & Ors* [2006] QADT 26 [10], [13].

⁷⁵ *Foran v Bloom* [2007] QADT 31 [14].

⁷⁶ *Treacy v Williams* [2006] FMCA 1336 [15].

⁷⁷ *Laviya v Aitken Greens Pty Ltd (Anti-Discrimination)* [2010] VCAT 1233 [15].

⁷⁸ *Brown v Richmond Golf Club & Anor* [2006] NSW ADT 104.

⁷⁹ *Ibid*, [18].

⁸⁰ *Ibid*, [32].

⁸¹ *Ibid*, [18].

⁸² *Ibid*, [18].

Not surprisingly then, inconsistency was seen as contributing to an image of untruthfulness: 'Her oral evidence was confused and at times contradictory.'⁸³ And another:

The demeanour of Ms Summerville, on the other hand, and the many inconsistencies in her evidence which on their own may not have been significant but when taken together did bear on her credibility and led to the conclusion that her evidence simply cannot be relied on.⁸⁴

Outcome was not just influenced by perception of the complainants' credibility and/or consistency. When cases were decided against the complainant, it was not uncommon to find judicial comments about the *respondents'* credibility. For instance:

However, the onus of proof rests on Ms Salt and in a situation where Mr Loxley is believed to be just as credible as she is, it must be found that she failed to prove her case on the balance of probabilities.⁸⁵

And, in another rural workplace (*Mohican v Chandler Macleod Ltd*⁸⁶) the male complainant, employed as an aircraft maintenance engineer by Forstaff Aviation, complained that (among other issues of bullying, discrimination and victimisation) he was sexually harassed in the course of his employment by members of staff and that the sexual harassment had taken different forms. The tribunal in dismissing the complaints, concluded that:

The evidence given by Forstaff's managers, as well as all of its employees, was consistent and the Tribunal concluded that Mr Mohican's allegations that sexual acts and pornography were openly discussed at the workplace and that pornographic magazines were openly displayed at the workforce, was completely unfounded in fact.⁸⁷

IV CONCLUSION

In our sample, rural complainants were more likely to have their complaints upheld. What can we conclude from our findings about why this was the outcome? Given the small sample size, the higher success rate for rural cases could of course be an anomaly. We did find though that the rural matters were more likely to involve elements that logically could lead to judicial reasoning in their favour. These included vicarious liability by the employer, multiple manifestations of harassment and offenders in a senior role to the complainant. And, we also identified that a higher proportion of the rural cases possessed the attributes found in other research to correlate with success for complainants. These included extreme youth, Anglo background, prompt reporting, corroboration and perception of credibility in how evidence is given.

Therefore, rural cases may have a higher success rate because those matters that proceed to adjudication may constitute more solid complaints than urban cases. It is possible that rural employers are less likely to participate in conciliation so that equivalent urban matters could be settling in the complainants' favour at that stage of dispute settlement. Or, perhaps victims of harassment in a rural workplace are more disinclined to report than their urban 'sisters' and only those with the most confidence in their 'case' go ahead with reporting. Such low disclosure would fit with what we know about domestic violence in rural areas,⁸⁸ isolation

⁸³ *Zhang v Kanellos & Anor* [2005] FMCA 111, [67].

⁸⁴ *Summerville v Department of Education & Training & Ors* [2006] WASAT 368 [141].

⁸⁵ *Salt & Anor v NSW Department of Education and Training* [2006] NSWADT 326, [76].

⁸⁶ *Mohican v Chandler Macleod Ltd* [2009] VCAT 1529.

⁸⁷ *Ibid*, [60].

⁸⁸ See, eg, Margaret Alston 'Violence Against Women in a Rural Context' (1997) 50(1) *Australian Social Work* 15, 16.

and conservative attitudes about violence against women,⁸⁹ the cultural context of gossip,⁹⁰ an ethos of self-reliance and in the context of the tradition of gender role segregation in the bush:⁹¹

In all of these accounts, a similar story is told: the rural factors of distance, male-dominated institutions, concerns about anonymity and privacy, and economic considerations all affect the access that women have to specialist services (where they exist) and mainstream helping agencies, including those in the justice system.⁹²

Accordingly, one study of rural nurses found that ‘there is a culture of non-reporting, denial and minimisation of the importance of such episodes both by nurses and management.’⁹³

It makes sense then that the people in rural areas who do report are possibly those who have the strongest cases and are also likely due to their young age, multiple manifestations of the sexual harassment and the seniority of the offender, to see themselves as less vulnerable to victim-blaming or to having their victimisation minimised. Complainants’ confidence in their ‘case’ may correlate with consistency in their testimony and with delivery of a believable story with the amount of emotion seen as correlating appropriately with the degree of injury. This is extremely important since the manner of giving evidence can affect the judicial officers’ perception of witnesses’ credibility and thus ultimately affect the outcome.

⁸⁹ Alexandra Neame and Melanie Heenan ‘Responding to Sexual Assault in Rural Communities’ Briefing Paper No. 3, Australian Institute of Family Studies, (2004) 1.

⁹⁰ See, eg, Chelsea Eacott & Christopher Sonn, (2006) ‘Beyond Education and Employment: Exploring Youth Experiences of their Communities, Place Attachment and Reasons for Migration’ (2006) 16(2) *Rural Society* 199, 200, 208.

⁹¹ Margaret Alston *Women on the Land: The Hidden Heart of Rural Australia* (University of NSW Press, Kensington, 1995) 143.

⁹² Robyn Mason ‘Do Everything, Be Everywhere’ (2008) 23(58) *Australian Feminist Studies* 485, 489.

⁹³ Rosemary Green, Raeleene Gregory and Robyn Mason ‘It’s No Picnic: Personal and Family Safety for Rural Social Workers’ (2003) 56(2) *Australian Social Work* 94, 96 citing J Fisher, J Bradshaw, BA Currie, J Koltz, K Reid Serle & J Smith ‘Violence and Remote Area Nursing’ (1996) 4(3) *Australian Journal of Rural Health* 190; K Kelly, ‘Responding to Job Related Trauma in Remote Areas: Only Fools would Rush in’ in 4th Biennial Australian Rural and Remote Health Scientific Conference, Toowoomba, Queensland 1998. Proceedings, Rural and Remote Health Papers. National Rural Health Alliance, Toowoomba [CD Rom].