Equal Opportunity Tribunal of NSW (EOT) 18 of 1997

Mitchell v South Sydney Junior Rugby League Club Limited

Terry Stern, Sydney

This recent decision of the EOT will be of interest to plaintiff lawyers for a number of reasons, one being the significant amount of the damages awarded.

The applicant alleged discrimination on the grounds of sex and victimisation in the area of employment. The applicant was represented by Stern & Tanner instructing Kylie Nomchong and the respondent by Heaney Richardson & Nemes instructing Stephen Rothman SC. The case was heard over 6 days in late 1997 and judgement was delivered on 3 February 1998.

The applicant, fundamentally, alleged that she was a victim of two separate campaigns of verbal and physical sexual harassment by two employees of the respondent, that she made formal complaints and, as a result was subjected to victimisation by other employees. She further complained that the respondent took no effective action to prevent sexual harassment or victimisation in the work place.

The applicant relied on Section 24(1) of the *Anti-Discrimination Act 1987* (the Act) and on the decision in *O'Callaghan v Loeder & Anor (1984) EOC 92-024* which is to the effect that conduct of the nature complained of, i.e. unwelcome sexual advances, is contemplated by Section 24 of the Act.

The applicant also argued that the applicant was entitled to rely on a single incident as constituting harassment for the purposes of the Section.

The EOT held (at page 32) that:-

"The provisions of Section 53 apply to make the respondent responsible for the acts of...its employee...who victimised the complainant after she made the complaints about sexual harassment in the work place of the respondent."

The EOT further noted that:-

"even where the employer...has a relevant sexual harassment or anti-discrimination policy, unless the employer takes adequate and sufficient steps to police and enforce that Policy, then the employer is failing in its obligations...and will be held responsible..." (at page 33)

Costs do not follow the event in the EOT. In this case, the EOT exercised its discretion to award costs under Section 114(2) of the Act. The EOT accepted the complainant's submission that she has sought the Orders on grounds of Public Policy which had an interest in:-

"...ensuring that such a large work place with the predominance of women in supervised positions be made safe. On the basis that the relief sought took this case out of the ordinary and places a public policy issue in the hands of the Tribunal." (at page 34)

The EOT awarded the applicant general damages of $30,000 for humiliation, intimidation, loss of weight, loss of appetite, loss of sleep, nervousness, aversion to men, strong sense of disillusionment and stress.

The EOT also ordered the payment of special damages for economic loss of $23,400 and costs of $17,500. ■

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Anderson v Mount Isa Basketball Association Inc

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This unreported decision of the Queensland Court of Appeal handed down on 3 October 1997 may be of some interest to personal injury lawyers specialising in the sports injury arena. In a majority decision, the Court found for the Plaintiff, overturning the decision of the trial judge.

The Plaintiff was 22 at the time of her accident and had played basketball at school until age 15. Over those years she also acted as referee in a number of school basketball games but received no instruction in refereeing. She did not take up basketball again for several years until 1990 when she commenced playing C Grade in Mt Isa.

There was frequently an insufficient number of referees available and the appellant, amongst others, volunteered to referee and from that time on she refereed at least one game on the night on which

she played. The appellant was to be paid $4.00 per game she refereed.

Whilst refereeing one such game the ball was thrown towards the appellant's end of the court so she commenced to run backwards, whilst keeping her eyes on the play, and whilst doing so she fell and suffered breaks to both wrists.

The Court of Appeal had no trouble establishing the existence of a duty of care as the appellant's relationship with the respondent resembled one of employer and employee requiring a safe system of work. On the basis of evidence before the trial judge the majority also found the risk of injury to be plainly foreseeable.

Davies JA and Demack J determined the main factors to be considered in considering whether there was a breach of the duty include the magnitude of the risk, the degree of probability of its occurrence, the expense and the difficulty and inconvenience of taking alleviating action. The alternative system was identified as clear instruction by the respondent to the appellant of the dangers of running backwards. Mrs Wright, a more experienced referee, gave evidence that in her younger days, she used to run backwards and another much more experienced referee said to her "if you don't want to hurt yourself stop running backwards". She took that advice and, on the evidence before the trial judge, so to would have the appellant, had she been advised of the danger of running backwards.

Perhaps the learned trial judge thought that not only the risk of running backwards but the greater safety of running sideways were so obvious to anybody in the appellant's position that it was not unreasonable on the respondent's behalf to fail to provide instruction about that. Their Honours felt, however, that it was one thing for a person such as the appellant, in the course of a rational discussion about the possible danger of running backwards to appreciate that danger and advert to the possibility that running sideways is a safer alternative. It is quite another for such a person in the absence of any such prior discussion or instruction, to advert to that danger and the way to avoid or minimise it, when in the heat of the game she is required to move quickly away from the play whilst keeping her attention on the play.

The Court of Appeal held that, having regard to the inexperience of the appellant and her obligation to concentrate her attention on the play whilst positioning herself, a reasonable person in the position and with the knowledge of the respondent would have provided some instruction along the lines which Mrs Wright received. It followed that the respondent in the circumstances was negligent in failing to give that instruction and that that negligence caused the appellants injuries.

Mackenzie J in dissent was of the view that it would be setting the level of the duty of care too high to require the respondent to warn a person with the plaintiff's background that there were dangers associated with running backwards. His Honour was therefore of the opinion that the appeal should be dismissed.

The Appeal was allowed with costs. ■

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The limits of practice directions

Palmer Tube Mills (Aust) Pty Ltd & Anor v Semi Semi
Transport Accident Commission & Anor v David Mark Streicher
Transport Accident Commission & Anor v Peter Aust

Geoff Coates, Warrnambool

The Victorian Court of Appeal, in a matter which can be called Semi Semi had to consider whether Practice Directions made by the County Court were in breach of its own rules or denied natural justice.

For many years it has been necessary for Plaintiffs to show that they have a "serious injury" before they can take common law action, where their injuries attracted the provisions of the statutory compensation schemes for motor vehicle accidents and work injuries. Serious injuries are demonstrated when there is a greater then 30% impairment when assessed under the second edition of the *American Medical Association Guide to Permanent Impairment* or where the injury otherwise fits the criteria set out descriptively in the serious injury definitions.

Both schemes allow for determination of the serious injury issue by the Courts. This can be done either by normal summons or by an Originating Motion. In legislation commencing 12 November 1997 the Kennett Government introduced amendments which prohibited Common Law actions being made for work injuries which occurred after 12 November 1997 and provided a deadline of 12 November 2000 for the issuing of common law proceedings for all injuries that occurred prior to that date.

There are already serious delays in applications before the Court for serious injury and the amendments caused a further influx of cases and created anticipation of a considerably larger number of applications being made in the future.

The County Court became concerned, as were most practitioners, that the Court would be unable to deal with the volume of serious injury applications by the deadline set by the Government. This would mean that many workers maybe deprived of an opportunity to claim damages. ▶