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The nature and extent of the duty of care owed by the Crown to employees involved in work entailing risk of psychiatric injury

The High Court by a majority of 4:3 has overturned a decision awarding damages to a constable in the NSW Police Service as a result of psychiatric injury she received after experiencing highly traumatic events in the aftermath of a stabbing. The High Court's decision has important implications for Australian Government departments and agencies that employ staff required to undertake work that entails the risk of psychiatric injury because of its potentially dangerous or traumatic nature and/or involves responsibilities which potentially conflict with the safety of employees.

New South Wales v Fahy

High Court of Australia, 22 May 2007
[2007] HCA 16

In August 1999 the plaintiff was a constable in the New South Wales Police Service. She had joined the service in February 1996 and in the course of her duties had attended many traumatic incidents, including a number of fatalities. On 25 August 1999 she was on patrol in a police truck with another officer who was senior to her (Senior Constable Evans). At about 9:00pm Constable Fahy and Senior Constable Evans were directed to investigate a hold-up alarm at a shopping centre. When they arrived they were told that there had been a hold-up and that someone had been injured. Constable Fahy and Senior Constable Evans were told that the victim had walked to the medical centre about 50 metres away. There was a trail of blood on the footpath.

At the medical centre the receptionist directed the officers to a treatment room where a doctor was attending to the victim. Constable Fahy went into the room but Senior Constable Evans did not. The doctor was dealing with a stab wound to the victim's chest. Constable Fahy asked the doctor what she could do to help and was told to look at the victim's left side. Constable Fahy discovered that the victim had suffered another very deep laceration which extended from his left armpit to his waist. He was bleeding profusely and his ribs were exposed. Constable Fahy tried to stop the bleeding by first applying dressings and then holding the wound together whilst at the same time trying to comfort the victim, determine where the ambulance was, concentrate on the victim's description of the offenders, relay that via her radio and listen to what the victim (who was evidently fearing death) was telling Constable Fahy about his wife and children.

NSW had admitted that 'an employer owes a duty to its employees to take reasonable care for the employee's safety.' The case was therefore primarily concerned with whether it had breached this duty of care. The primary basis for Constable Fahy's claim that it had breached its duty of care was that she had been left alone in the treatment room with the doctor and the wounded victim when her immediate superior had no operational or other

sufficient reason which required him to leave her alone. A psychiatrist called to give evidence at the trial spoke of Constable Fahy's perceiving herself 'to be abandoned by her partner or buddy' and said that 'the absence of her buddy' was 'the decisive factor' in the development of a post-traumatic stress disorder.

The NSW District Court found for Constable Fahy on this basis, awarding $469,893 in damages. Its decision in relation to liability was upheld unanimously in the NSW Court of Appeal (per Spigelman CJ, Basten JA and MW Campbell AJA). NSW was granted special leave to appeal to the High Court on the condition that the orders for costs in favour of Constable Fahy made at trial and in the Court of Appeal were not to be disturbed and that NSW should pay her costs of the appeal to the High Court.

The High Court's decision

Gummow and Hayne JJ, and Callinan and Heydon JJ wrote joint judgments. Gleeson CJ, Kirby and Crennan JJ each wrote dissenting judgments.

Each dissenting judgment suggested that it was open to the trial judge on the available evidence to find that Senior Constable Evans' conduct in leaving Constable Fahy alone in the doctor's room and therefore exposing her to the trauma of the victim without any help from her partner was, in the absence of a good reason for doing so, both negligent and a cause of her psychiatric injuries.

Both majority joint judgments suggested that such a conclusion failed to take proper account of the statutory framework[1] for the performance of police duties and the special nature of police work. What seemed to be the most important factor militating against a conclusion that NSW had breached a duty of care to Constable Fahy was the tension between fulfilling the police force's functions and protecting police officers.

Gummow and Hayne JJ stated (at [76]) that:

- the effect of a finding of negligence against NSW would be that the protection of fellow officers was more important than the performance of duties imposed on police officers
- to require officers to choose between attending to their duties or staying to support a colleague would seek to qualify the statutory responsibilities imposed upon police officers, and
- neither of these outcomes was appropriate.

Callinan and Heydon JJ also stated that a number of the special aspects of police work militated against a finding that the defendant had breached the duty of care. These included:

- that police officers could be expected to, and did, not infrequently, encounter a need to deal alone with events of the kind that occurred in this matter (at [209])
- events might call for the carrying out of several tasks simultaneously by a police officer (at [209])
- exposure to danger and stress were almost as necessary concomitants of civil law enforcement as they were of military service (at [209])
- perhaps most importantly, the fact that police resources were finite, and the deployment at or about a place of criminal activity, and elsewhere as a consequence of it, was a matter for decision and adaptability at the time and in the circumstances prevailing (at [210]),

— Constable Fahy's experience as a police officer could reasonably be expected to have enabled her to perform alone the task that she did without suffering psychiatric illness (at [210]).

The High Court's decision in Shirt was not overruled

In the course of NSW's special leave application, the High Court invited it to amend its notice of appeal to request the High Court to overrule its previous decision in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (Shirt). Shirt has for over 25 years authoritatively stated how a Court or Tribunal must set about deciding whether there has been a breach of duty of care.[2]

Despite Callinan and Heydon JJ's statement that the justification for overruling Shirt was very strong (see [224–225]) they held that it was not necessary for the decision of the case to do so. The other judges indicated that Shirt should not be overruled. However, the High Court's decision included a number of comments suggesting that the test in Shirt had been improperly applied in the past. This is best summarised by Gleeson CJ's statement (at [7]) that:

> There have been occasions when judges appear to have forgotten that the response of prudent and reasonable people to many of life's hazards is to do nothing. If were otherwise, we would live in a forest of warning signs. That, however, does not warrant reconsideration in this case of what was said by Mason J (in setting out the Shirt test).

These and other similar comments could prove useful to the Commonwealth in defending claims for personal injuries.

Voluntary assumption of risk

Interestingly, Gummow and Hayne JJ suggested that the fact that police officers must confront traumatic incidents in the course of their duties and the nature of their work entails the risk of psychiatric injury occasioned by such traumatic incidents raises the question of whether Constable Fahy had voluntarily assumed the risk of such injury but this had not been raised by NSW in defence of Constable Fahy's claim. Voluntary assumption of risk is a basis for denying a duty of care is owed. Such comments might be thought to raise questions of whether the Commonwealth should give consideration to pleading voluntary assumption of risk in defending claims brought by employees whose work places them in dangerous situations or gives rise to a strong risk of witnessing traumatic events. However, Kirby J poured very cold water on such an idea, stating as follows ([at 88]):

> Various other issues, or potential issues, can likewise be ignored. Thus, no one until the proceedings reached this Court ever suggested the possibility that a police constable might be excluded from recovery on the basis of negligence by reference to the notion of voluntary assumption of risk (*volenti*).[3] If we have reached a stage in the law of employment and quasi-employment in Australia that this nineteenth century concept is to be revived for this purpose, notwithstanding all the legal reasoning that argues to the contrary,[4] specifically in the case of police[5] and like employment,[6] a specific argument to that effect would be necessary. Unsurprisingly, in my view, no such argument was advanced in this appeal.

Implications

In *Sullivan v Moody* (2001) 207 CLR 562 the High Court held that a duty of care should not be imposed where to do so would be inconsistent with other competing considerations (see in particular [62–64]).[7] However, Australian Government departments and agencies will normally be found to owe a duty of care to its employees to take reasonable care for their safety. The major precedent value of the High Court's decision in *Fahy* therefore appears to

be that such competing considerations can provide a strong basis for denying that any such duty of care has been breached.

This principle provides important guidance for Australian Government departments and agencies, with functions comparable to those of the NSW Police Force, that face the prospect of negligence actions by employees who have suffered personal or psychiatric injury. Departments and agencies responsible for providing defence, security and/or intelligence or law enforcement functions appear to be those most likely to be involved in cases where these issues arise.

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2007/20.html

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Notes

1 Set out in the *Police Service Act 1990* (NSW).

2 What has become known as 'the Shirt calculus' directs Court or Tribunal to ask two questions: (1) Would a reasonable person in the defendant's position have foreseen that the conduct postulated involved a risk of injury to the plaintiff or a class of persons including the plaintiff?; and (2) if so, what would a reasonable person do by way of a response to such a risk? The perception of that response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action in any other conflicting authorities which a defendant may have. The test of foreseeability, in the context of breach of duty, has been described as 'undemanding' (see *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 and Mason J in *Shirt* (1980) 146 CLR 40 at 44). In recent years Justices McHugh, Callinan and Heydon have been highly critical of this basis for determining negligence and suggested that it should be revisited by the High Court.

3 Cf. reasons of Gummow and Hayne JJ at [71]; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 58–59 [40], 65 [57].

4 See eg *Bowater v Rowley Regis Corp* [1944] KB 476 at 481; *Burnett v British Waterways Board* [1972] 1 WLR 1329; [1972] 2 All ER 1353; Blackburn, '"Volenti Non Fit Injuria" and the Duty of Care', (1951) 24 Australian Law Journal 351.

5 *Attorney-General for Ontario v Keller* (1978) 86 DLR (3d) 426.

6 *Ogwo v Taylor* [1988] AC 431 (fire service).

7 This principle has been followed in a number of subsequent decisions – see for example *Tame v State of New South Wales* (2002) 211 CLR 317 at 335 [25]–[27]; *State of New South Wales v Paige* [2002] NSWCA 235 and *SB (by her litigation guardian) v NSW* [2004] VSC 513.

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