

## **STATE OF NEW SOUTH WALES v FAHY (S341/2006)**

Court appealed from: New South Wales Court of Appeal

Date of judgment: 4 April 2006

Date of grant of special leave: 1 September 2006

Ms Fahy is a police officer with Post-Traumatic Stress Disorder ("PTSD"). She developed that condition after attending the aftermath of an armed robbery where she treated a person with serious injuries. Ms Fahy subsequently brought a modified claim for common law damages pursuant to the *Workers Compensation Act 1987* (NSW).

On 28 February 2005 Judge Graham held that Senior Constable Evans, who arrived at the scene with Ms Fahy, was negligent in failing to assist her as she attended the victim. His Honour further held that an Inspector who arrived shortly afterwards was also negligent. This was due to the insensitive way in which he dealt with Ms Fahy. In addition, Judge Graham held that the State of New South Wales ("the State") was negligent in failing to provide her with appropriate counselling and support. His Honour held that those acts and omissions materially contributed to the onset of Ms Fahy's PTSD.

On 4 April 2004 the Court of Appeal (Spigelman CJ, Basten JA & Campbell AJA) unanimously held, in relation to the duty of care, that an employment relationship is one that gives rise to a duty of affirmative action. Their Honours further held that the law also recognises a duty of affirmative action from one employee towards another in police officers. The Court found that Senior Constable Evans' failure to provide Ms Fahey with appropriate support involved a breach of such a duty. Justice Campbell however held that the Inspector had not breached any duty of care to avoid the risk of psychiatric injury.

With respect to causation, Chief Justice Spigelman and Justice Campbell held that the primary cause of Ms Fahy's PTSD was her exposure to the victim in the doctor's surgery. Her attendance at the scene of the armed robbery was however a contributing factor. The onus therefore shifted to the State to establish that Ms Fahey's injury would have occurred regardless. Justice Basten however held that Ms Fahy's experience of tending to the severely wounded victim would have probably caused a psychological condition anyway. It was also likely that her condition would have been less severe without the State's failure to provide reasonably safe conditions of employment.

With respect to damages, Chief Justice Spigelman and Justice Campbell held that the State was liable for the whole of the injury for which its conduct had materially contributed. Justice Basten however held that Judge Graham should have sought to identify that proportion of the harm suffered by Ms Fahy which was properly attributable to the State's breach of its duty of care. If that exercise was not available, the trial judge should have reduced the damages to take account of the possibility that some level of disability would have occurred without the State's negligent conduct.

All Justices however held that Ms Fahy's failure to take her prescription anti-depressant medication meant she did not take all reasonable steps to mitigate her loss. The loss attributable to her employer therefore needed to be appropriately reduced.

The grounds of appeal are:

- The Court of Appeal was wrong when it found that the duty of care of the Appellant as employer included a duty of one employee to take affirmative action to take reasonable care to prevent injury to another employee.
- The Court of Appeal failed to identify the content of the Appellant's duty of care to the Respondent.
- The Court of Appeal was wrong to hold that the injury suffered by the Respondent was reasonably foreseeable.
- The Court of Appeal was wrong to find that the Appellant had breached its duty of care to the Respondent.

On 13 October 2006 the Appellant filed a summons, seeking leave to add the following as a ground of appeal:

- That the Court of Appeal erred in following the decision in *Wyong Shire Council v Shirt* (1979-80) 146 CLR which is wrong and should no longer be followed.