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## RANKIN ELLISON CASE NOTES

### Positive responsibility on the worker to prevent risk of harm?

*Melanie Sills v State of New South Wales* (10 May 2018) NSWDC

It is well established that an employer owes a non-delegable duty of care to its employees to protect them from harm. However, the District Court of NSW recently propounded that in determining whether an employer has breached its duty, it is necessary to also consider the positive responsibilities cast on the injured worker.

#### Material Facts

The Plaintiff, Melanie Sills ("Plaintiff"), was formerly employed as a police officer by the NSW Police Force ("NSWPF"), an entity of the State of New South Wales ("Defendant"). In the course of her general duties, the Plaintiff was required to respond to suicides, fatal motor vehicle accidents, fatal drug overdoses, infant fatalities, and fatal house fires among various other violent crimes.

The Plaintiff went on sick leave from 18 August 2006 to 8 September 2006 after suffering a work related panic attack and developing psychiatric symptoms. She temporarily returned to work on restricted duties, during which time she consulted a Police Medical Officer ("PMO") and a police Psychologist, before ultimately resuming her general duties.

Shortly after her return to general duties the Plaintiff took several weeks of sick/annual leave, before falling pregnant and being transferred to station duties. The Plaintiff alleged further traumatic exposure upon her resumption of general duties in 2009.

In 2010 the Plaintiff successfully applied for a position in the Exhibits Office. She alleged further exacerbation of her symptoms as a consequence of exposure to blood stained

weapons and clothing, materials used in suicides, and foul smelling items such as soiled clothing.

The Plaintiff alleged that she had developed Post-Traumatic Stress Disorder, Major Depressive Disorder, and Anxiety Disorder as a consequence regular exposure to traumatic incidents during her engagement with the Defendant. She initially commenced action against the NSWPF for work injury damages, before subsequently amending her claim so as to sue the Defendant as the responsible entity for the negligent acts of the Commissioner for Police and his Officers.

#### District Court Proceedings

The Defendant conceded that it owed a non-delegable duty of care to the Plaintiff to protect the Plaintiff from psychological injury. Further, it admitted that within the Tuggerah Lakes Local Area Command and at all relevant times it was reasonably foreseeable that its police officers might suffer psychological injury as a result of traumatic exposure.

The primary issues for determination at trial were:

1. Whether the Plaintiff had sufficiently pleaded the scope and content of the duty of care owed by the Defendant.
2. Whether the Defendant breached its duty of care.
3. Whether any such breach by the Defendant caused the Plaintiff's psychological injury.

The Plaintiff contended that the NSWPF breached its duty of care by failing to properly follow its established system of

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work, particularly in the circumstance where it had identified the Plaintiff as an officer at risk of suffering psychiatric harm.

With respect to breach of duty, Judge Mahoney stated that the Court must have regard to the responsibilities cast on both the employer and the employee. The Plaintiff's primary submission was that the NSWPF failed to implement the PMO and police Psychologist's recommendations that, upon the Plaintiff's return to full general duties, it appoint a mentor to monitor her welfare and facilitate a course of psychological counselling.

The reasonableness of the Defendant's actions was determined in the context of what occurred thereafter. The Plaintiff intentionally deceived the PMO in respect of her psychological symptoms so as to reobtain her appointments. It was accepted by the Court that there was a negative stigma about mental health within the NSWPF and that a frank disclosure to the PMO may have stunted the Plaintiff's career progression and/or fractured her professional relationships. Regardless, the Court found that as a consequence of the false disclosure, the Defendant was not aware of the full extent of the Plaintiff's condition.

Whilst working in station duties there was no reason to follow the recommendations of the PMO and/or the police Psychologist because she was no longer being exposed to traumatic incidents. Once the Plaintiff returned to general duties policing work in 2008 the need for any monitoring, mentoring, or counselling had long since passed.

Upon being identified as an officer at risk in 2009, the Plaintiff was expressly offered psychological assistance and support by the Command. The Plaintiff rejected that offer on the fictitious basis that she was receiving independent counselling outside of her employment. Later in that year the Plaintiff commenced taking sick leave in excess of her entitlements. When questioned about her leave she made no disclosure of psychological injury as a result of her police work. Further, the Defendant was not notified of the Plaintiff's unsuccessful suicide attempts in 2010 and 2011. At

all material times the Plaintiff was aware of the support services available to her but made no effort to utilise same.

In those circumstances, Judge Mahoney determined that it was a reasonable response for the Defendant to do nothing in respect of the PMO and Psychologists' recommendations. His Honour therefore concluded that the Defendant acted reasonably and did not breach its duty of care. Judgment was entered for the Defendant.

Nonetheless, it was found that the Plaintiff's traumatic exposure in the course of her general duties police work was clearly causative of her PTSD.

#### Implications

This Court did not depart from the well founded principles of negligence. The salient point of this decision is that the Plaintiff had an onus at law to notify the Defendant of her risk of injury. Since the Defendant was not put on notice of that risk, it was not reasonably expected to take any action to prevent the materialisation of same. Evidently, in considering whether an employer has breached its non-delegable duty of care it is imperative to also consider whether the injured worker has satisfied his/her obligations to negate the risk of harm.

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