Case Notes

Educational Employers and Foreseeable Risks of Harm
Roman Catholic Diocese of Broome v Watson [2002] WASCA 7

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Introduction

It is a well recognised principle of negligence law that an employer owes a duty of care to each and every one of his/her employees to safeguard them from reasonably foreseeable risks of injury in the workplace. While the employer's obligation is to take reasonable care for the safety of employees at the workplace, it is often the nature of the workplace that determines what the employer should be doing to respond to the duty of care that the law imposes. A workplace such as industrial factory can present almost by definition significant risks for employees and so can demand a particularly high standard of care on the part of the employer. On the other hand it is somewhat unusual to come across a case in which the schoolyard as a workplace is seen as presenting a foreseeable risk of injury to a teacher employed at the school. *The Roman Catholic Bishop of Broome v Watson* [2002] WASCA 7 (*Watson*) is such a case.

Background

The respondent was the principal of a Catholic school near Lake Gregory which is south of Halls Creek in a very remote area of northern Western Australia. In November 1996 when, in the course of her employment, she was walking on a gravel pathway in front of the school's staffroom to go to the adult education block in the school grounds, the respondent tripped over an embedded protruding rock on the pathway, fell heavily to the ground and was injured. At the time of the accident, the respondent was wearing jogging shoes and socks and was walking at a casual pace. She sued the appellant, her employer, in the District Court of Western Australia for, *inter alia*, negligence. The appellant denied negligence as well as pleading contributory negligence on the part of the appellant, but the District Court found the appellant negligent and dismissed the appellant's claim for contributory negligence. The appellant appealed to the Court of Appeal of Western Australia. In the decision of the Court of Appeal, both Wallwork J and Olsson AUJ essentially agreed with the judgment of Scott J.

Fundamentally there were two grounds of appeal. In the first instance the appellant argued that the trial judge had erred in law in failing properly to evaluate, and, in his reasons for decision, properly deal with, the evidence about the state of the path on which the respondent had fallen and

the general state of the terrain in and around the school grounds [13]. The Court of Appeal rejected the argument. Agreeing with the views expressed by the NSW Court of Appeal in *Mifsud v Campbell* (1991) 21 NSWLR 725, the WA Court of Appeal accepted that it was an incident of the judicial process for a judge to consider all the evidence in the case. However, the Court also accepted that where a judge refers to only some of the evidence in the reasons for his decision, it does not necessarily mean that the judge has failed in his judicial duty [17]. The Court of Appeal concluded that after reviewing the evidence called on behalf of the appellant and respondent at trial, it was unable to conclude that the trial judge had failed to adequately deal with the evidence [14-18].

The second ground of appeal was that the trial judge had erred in law in finding on the evidence that the appellant was negligent in failing to construct a concrete path in the area when the respondent had fallen [13]. The Court of Appeal also rejected this ground of appeal. Essential to this ground of appeal was not only the state of the pathway on which the respondent had fallen but also the meaning of a 'foreseeable risk of injury' which an employer must guard against for the safety of his employees.

Foreseeable Risks of Injury

At various locations around the school grounds some concrete pathways had been constructed. The trial judge found that the respondent had, prior to the accident, sought approval for the construction of a concrete or cement pathway to replace the pathway on which the accident had occurred. However there was no constructed pathway where the respondent was walking at the time of the accident - the pathway being used by the respondent had simply 'come into being' over a period of time and consisted simply of gravel, pebbles and stones, not unlike, the Court noted, paths that were commonplace in the Kimberley region where the school was located [21, 23]. It was also accepted that the pathway was an extensively used path, that the respondent had used the pathway six to eight times a day over a considerable period of time and that there had been no prior accidents of the type experienced by the respondent on the pathway at the school. However, it was also accepted that there had been recent heavy rains in the area and that the rock, protruding 1-1½ inches out of the ground and on which the respondent had tripped, had been exposed by wind or rain or both.

Because there had been no prior accidents of the type experienced by the respondent on the pathway in question and because the pathway, although not sealed, was not unusual in any way, counsel for the appellant argued that the risk of injury to the respondent was unlikely and that, in the light of the evidence, the appellant was not in breach of its duty of care to the respondent. The Court of Appeal agreed that the risk of injury to the respondent was unlikely, but it added that this did not mean that such a risk of injury was not foreseeable [34].

In examining the issue of when a risk of injury is foreseeable, the Court of Appeal in a sense saw risk as being on a continuum. At one end sits the time-honoured formula that a risk of injury is not foreseeable if it is far-fetched or fanciful, as proposed in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 [37]. At the other end sit those everyday risks against which the citizen in the course of daily life is required himself/herself to guard against and which therefore do not constitute the kind of risk an employer must guard against. The Court used as an example

McLachlan & Ors v Purchas & Ors [1998] WASCA 350 in which a dental nurse who, on her way to work, had slipped on an area of wet grass whilst alighting from her vehicle. The court in that case classified the risk of slipping on wet grass as the type of everyday risk an employee should himself/herself guard against and it was not, therefore, a risk of injury that was foreseeable requiring the employer to take reasonable steps to protect employees from it [35].

The Court of Appeal found that the protruding rock that had been unearthed by heavy rain or wind or both meant that the pathway frequently used by the respondent was in a changed condition and that it was a significant hazard which was not an ordinary, everyday risk of the type the respondent herself would commonly be expected to guard against. The Court concluded that the risk of injury to the respondent was therefore reasonably foreseeable. Citing *Romeo v Conservation Commissioner (NT)* (1997-1998) 192 CLR 431, the Court noted that in cases where there is a foreseeable risk of injury, it is the duty of a defendant to take steps that are reasonable to prevent the foreseeable risk becoming an actuality. It follows that if the defendant fails to take those steps and as a result the plaintiff is injured, the defendant will be in breach of his/her duty of care to the plaintiff. The Court agreed with the views of the trial court that there was indeed an effective and inexpensive solution to the foreseeable risk, viz. the construction of a pathway out of suitable materials, particularly when plans for the construction of the school indicated that pathways had been originally included in the plans and that sealed pathways had been constructed at other schools in the Kimberley region of the state. The Court concluded that had such a pathway been constructed by the appellant, the risk that brought about the respondent's injury would have been minimised or eliminated [37-40].

Conclusion

The decision of the Western Australian Court of Appeal in *Watson* is not a ground-breaking decision but it is an informative decision for a number of reasons. First, it is a reasonably straightforward exploration of what constitutes, in principle and in practice, a foreseeable risk of injury. Second, it is confirmation of the principle that an employer owes employees a duty to take reasonable care to protect them from a reasonably foreseeable risk of injury in the workplace, despite the seemingly innocuous nature of a schoolyard as a workplace. Third, it demonstrates that an education authority as employer is bound by this common law duty even in an environment that is generally seen as one of the most remote and challenging places on this vast and variable continent.