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. ▶

The County Court made Practice Directions and Orders in the cases taken to the Court of Appeal which were designed to shorten the process of dealing with serious injury applications. The Orders were designed to allow the majority of serious injury applications to be dealt with "on the papers". As the Court of Appeal has noted there is some vagueness in that term but it appeared that the County Court contemplated most matters would be dealt with on Affidavit material and with medical reports but in most cases there would be no cause for viva voce evidence nor indeed submissions either orally or in writing. In the reasons given for the Orders made the County Court Judge stated:

"It is proposed that as from the 16 February 1998 all applications to the Court for Serious Injury Certificates pursuant to the Transport Accident Act or the Accident Compensation Act whether by way of Originating Motion; or in a Writ in combination with a claim for damages, will be dealt with "on the papers", namely, that each such application be decided solely on the Affidavit material and exhibits filed by all the parties concerned with such application. In the event that a Judge comes to the conclusion that the issue of "serious injury" cannot be decided on the Affidavit material alone, the Plaintiff/Applicant and Defendant should be given the opportunity to be heard. By contrast, whenever a Judge concludes on such material the Plaintiff's/Applicant's application succeeds, that Judge should prepare written reasons and notify the parties accordingly."

Applications for leave to appeal made in respect to these Orders and judicial review of the Orders was also sought.

The County Court Rules themselves provided for determination of some issues by provision of Affidavit material. Rule 40, however, also provided that the parties or the Court itself could seek an order that the Deponent be examined before the Court.

The Court of Appeal, therefore, found that the Practice Directions and Orders of the Court contravene its own rules and went on to note:

"The nature of this issue to be tried is such that, if evidence is to be given by Affidavit, fairness will often require that one side be able to cross-examine those who have made Affidavits relied on by the other side. What fairness requires in any given case can be decided only in the light of circumstances of that case, including in particular the Affidavit material. It is not conducive to a fair trial that the trial of the issue should be approached with a predisposition against the permitting of cross-examination."

The Court went on to consider what the nature of the Court's Rules were and whether they could constrain Practice Directions.

The Court of Appeal said:

"But the question which r.40.04(2) requires to be considered is not whether the issue cannot be decided on the Affidavits alone but whether the Court should, in all the relevant circumstances of the particular case, Order otherwise for the purpose of the Rule. The Rules of natural justice are concerned with what is required for a fair trial."

The Court of Appeal found that unfairness existed because:

"While the axe will fall on the Respondent without warning, it will not fall on the Applicant without giving him a chance to take evasive action. What is sauce for the Respondent goose must, however, be sauce for the Applicant gander."

While the Court of Appeal accepted there were good reasons for the County Court trying to deal with its increased case load it noted:

"While the volume of litigation and the resulting considerations of case management may lead to the imposition of control that were not necessary in a more leisured age and may affect the outcome of particular applications, no Court can be heard to say, in circumstances like the present, that the press of business prevents it from giving cases a proper hearing, so that its procedures must be modified. "

The Court of Appeal concluded:

"Every Court must ensure that Trials before it are conducted in accordance with the principles of natural justice, and these principles require the giving of a reasonable opportunity to dispute your opponents case and to present your own...The orders were also erroneous in that, contrary to the requirements of r40.04(2) and natural justice, they provided in an anticipatory way that cross-examination should not take place unless the Trial Judge so ordered."

The Court of Appeal found that a range of administrative remedies were available to set the orders aside.

Conclusion

There is great pressure for Courts to handle cases efficiently and reduce Courts lists by developing case management procedures. The Court of Appeal have issued a timely reminder that consideration must still be given to notions of natural justice and fairness to parties.

The Court of Appeal correctly pointed out that there are other solutions to the Courts case load which includes legislative amendments and the appointment of further Judges.

The granting of a serious injury certificate is the key to a litigants right to claim Common Law damages and the possibility of increasing the Defendant's liability to compensation. The Court of Appeal noted that this is not an insignificant matter and both parties retain a right to have the matter determined in a just manner.

Unreported decision of the Supreme Court of Victoria, Court of Appeal (Brooking, Tadgell and Buchanan JJA) delivered 12 March 1998. ■

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Workers Compensation Special Interest Group - Queensland Branch

The Queensland Branch of APLA is commencing a Special Interest Group for Workers Compensation. An inaugural meeting will be held shortly to formalise the group and commence preparations for a number of initiatives that face it, particularly urgent action in relation to needed reforms of our existing WorkCover Legislation in light of the forthcoming State Election.

Would those Queensland members who are interested in joining this Special Interest Group please contact the Queensland State Convenor, Simon Morrison of Shine Roche McGowan, Brisbane by phone 07 3229 6777 or fax 07 3229 1999.