Common Law Rights not necessarily abolished

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Introduction

On the 22nd October 1998 the New South Wales Court of Appeal decided in the case of *Mendez v Telstra Corporation Limited* (unreported decision of the New South Wales Court of Appeal Mason P., Handley JA. And Sheppard AJA, 22nd October, 1998).

The issue in this matter was whether a commonwealth employee could sue a commonwealth-licensed corporation in common law as a result of tortious conduct by that commonwealth-licensed corporation which occurred out of or in the course of employment.

The facts

The particular facts of the case were that the plaintiff was on her way to work on a given morning when she stepped on a Telstra manhole which allegedly collapsed causing her to suffer severe injury, loss and damage. The appellant sued at common law by bringing an action for negligence against Telstra Corporation Limited but brought no action against her employer, the Australian Postal Corporation.

The proceedings

In the District Court of New South Wales at first instance the plaintiff's proceedings were struck out on the basis that the proceedings were governed by sections 44 and 45 of the *Safety Rehabilitation & Compensation Act 1988*, and given that the plaintiff had not made any election, the Act governed the proceedings which were invalid due to the election provisions of the Act not having been invoked. Further no claim purely at common law could be made rather the threshold of damages pursuant to section 45 applied and the proceedings were accordingly struck out.

The Appeal

Leave was granted by the New South Wales Court of Appeal to appeal the decision of his honour, Robinson DCJ, and the grounds of appeal incorporated the statutory construction of the *Safety Rehabilitation & Compensation Act 1988* together with various constitutional issues which ultimately were not required to be argued.

The appeal turned squarely on the interpretation of section 6 of the Act which provides in summary that an injury to an employee will be treated as having arisen out of or in the course of his or her employment if sustained in various circumstances one of them being travelling between the worker's place of abode and place of work. Section 45, however, only caught common law actions if they strictly arose *"in the course of employment"*. In the traditional sense the words *"in the course of employment"* are applied to incorporate those acts which occurred between given hours of day to day employment for example 9.00am - 5.00pm and during given recesses.

In the case before the court of appeal, however, the clear and undisputed facts were that the appellant was on her way to work. Therefore the strict language of section 45 requiring an injury to be "in the course of employment" were not satisfied with the court holding unanimously that the provisions of the Act in so far as they govern common law proceeding did not apply to a common law liability which arose *"out of employment"* as opposed to *"in the course of employment"* which activities by and large are caught by section 45. Accordingly their honours allowed the appeal and the appellant is now permitted to proceed purely at common law against Telstra Corporation Limited without any interference with her damages by legislation.

The matter is now accordingly proceeding to trial.

Significance of the decision

The decision is significant due to a common misconception in the legal community that once a person is a commonwealth employee and sustains an injury then the provisions of the Act strictly apply. The court held in *Mendez v Telstra Corporation Limited* that this was simply not the case. A former decision of the *Commonwealth v Holland (1991) 24 NSWLR 198* was followed by their honours and affirmed as being correct when the court was assessing a matter under section 45 of the Act, namely whether "in the course of employment" as determined by the High Court in *Hatzimanolis v ANI Corporation Limited (1991-92) 173 CLR 473* were words to be interpreted as being only those injuries which occurred within the specific time of actual employment and not for injuries sustained clearly on a day of employment but outside any activity which could be described as *"in the course of employment"*.

It would appear that if a hypothetical plaintiff could establish in a journey or other claim that he/she was the victim of a tortious act arising *"out of employment"* as opposed to *"in the course of employment"* then it follows from what the court of appeal held in *Mendez v Telstra Corporation Limited* that they have arguably a pure action at common law which would not be affected by the provisions of sections 44 and 45 of the *Safety Rehabilitation & Compensation Act 1988*. ■

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