Recovering superannuation lost through negligent misstatement

Commonwealth of Australia v Cornwell [2007] HCA 16

By Richard Faulks

In an outcome similar to the victory of Darryl Kerrigan in *The Castle*, John Cornwell has succeeded in creating a High Court precedent that has profound implications for Commonwealth employees who have, because of the negligent advice of their employer, suffered a loss of superannuation benefits upon retirement. On 20 April 2007, the High Court dismissed an appeal by the Commonwealth and upheld the judgment for Mr Cornwell by the Supreme Court of the ACT (which had been affirmed by the Court of Appeal).

THE FACTS

The claim arose out of information given to Mr Cornwell (and numerous other blue-collar workers) from the 1960s onwards, to the effect that they were not entitled to join the Commonwealth public sector superannuation scheme. Mr Cornwell worked for the then Commonwealth Department of Transport in the ACT, in the workshop at the Kingston bus depot, over a number of years. He made enquiries of superior officers as to his eligibility to join the scheme and was told that he was not eligible and effectively never would be. He made a claim in the ACT Supreme Court where the trial judge upheld his claim on the basis of negligent misstatement, finding that incorrect statements had been made, and that Mr Cornwell had relied upon them. These statements had led to a significant loss of superannuation entitlements representing the difference between what he would have received on retirement had he joined the public sector scheme, as opposed to the more limited amount he received as a result of his contribution to a private fund.

THE MAIN ISSUES

The Commonwealth contested the matter on all issues in the trial and Court of Appeal. Mr Cornwell had to establish the existence of the representations, and their inaccuracy. Evidence adduced at trial revealed that the Commonwealth knew the true position, but that workers such as Mr Cornwell were not routinely advised of their eligibility – many were, in fact, advised to the contrary. The Court found that Mr Cornwell was never advised of the true position.

The Commonwealth also argued that the limitation period expired within six years of the making of the representation which, if upheld, would have defeated Mr Cornwell's claim and that of many others. On appeal, the Commonwealth changed its argument to maintain that the damage was suffered, at the latest, when the *Commonwealth Superannuation Act* was amended in 1976.

Mr Cornwell replied that, in fact, the loss was not suffered until the date of retirement in 1994. His legal team argued that the loss remained contingent until then.

The High Court accepted this argument and found that Mr Cornwell's entitlement was not complete until his retirement in 1994 and therefore his action was within time.

OTHER ISSUES

An outstanding question is whether a limitation period should be suspended generally while there is deliberate concealment on the part of the defendant (given the provision in the relevant *Limitation Act*). In this case, evidence suggests that although it knew of the true position concerning eligibility, the Commonwealth chose to conceal that information from workers. While this question was raised and argued throughout the trial, and in each appeal, none of the courts considered it necessary to decide on the issue, having found for Mr Cornwell on other grounds.

Another issue that remains unresolved is whether the Commonwealth owes a general duty of care to employees, which it breached by failing to provide the correct information about superannuation entitlements. Mr Cornwell's case was based purely on the narrower cause of action relating to negligent misstatement. For those who did not receive a direct statement about eligibility, the existence of the general duty of care may provide the only cause of action. A body of law suggests that this argument may be successful in subsequent cases.

WIDER IMPLICATIONS

It is clear that there are numerous employees who were given incorrect information about their eligibility to join the superannuation fund, or were never informed of their eligibility. On the current state of the law, many of those Commonwealth employees may be out of time, as they will have retired more than six years ago. They could, of course, still have a claim based on the wider duty of care and the deliberate concealment argument in appropriate cases, depending on the specific facts of their retirement. Future cases will clarify those issues.

It is appropriate, in passing, to acknowledge the significant work carried out by former past presidents of the Australian

Lawyers Alliance, Rob Davis and John Gordon, who appeared as counsel for Mr Cornwell in this matter. Both gave up significant time on a no-win, no-fee basis to assist Mr Cornwell in an extremely complex and difficult case, and I acknowledge their efforts and thank them on behalf of my firm and Mr Cornwell. ■

Richard Faulks *was solicitor for the plaintiff in this matter, and is former president of the Lawyers Alliance.* **PHONE** *(02) 6285 8085* **EMAIL** *rfaulks@stackshg.com.au*

Negligent men at work

Aston v Redcliffe City Council [2006] QCA 480

By Chris Salerno

Aston v Redcliffe City Council, a case handed down by the Queensland Court of Appeal on 17 November 2006, deals with the liability of local councils to passers-by in negligence for mishaps that can occur when their employees are mowing lawns in public spaces.

THE COUNCIL'S LIABILITY

The plaintiff was riding his bicycle on a footpath when glass fragments were thrown up by the blades of a ride-on lawnmower being operated near the footpath by the defendant's employee, a Mr Fielding. The glass punctured the plaintiff's front bicycle tyre, causing him to fall and suffer injuries.

The particulars of negligence alleged were: first, failing to attach a guard to the lawnmower; second, failing to warn the plaintiff of the presence of flying objects; third, failing to erect a physical barrier around the area being mowed; fourth, failing to take reasonable precautions for the plaintiff's safety; and fifth, exposing the plaintiff to a danger of which the defendant was, or ought to have been, aware.

The trial judge found[1] that the lawnmower had thrown glass fragments that deflated the tyre and caused the plaintiff to fall. The judge rejected the first allegation of negligence because the lawnmower had already been fitted with a guard. The second allegation was rejected on the basis that the plaintiff had seen the lawnmower in operation as he approached it. The third allegation was rejected on the basis that the cost of erecting water-filled barriers would have been too high. The fifth allegation, however, was made out because the trial judge held that Mr Fielding had disobeyed his supervisor's instructions to stop the lawnmower and to disengage the blades whenever a passer-by appeared.

The defendant was held vicariously liable to the plaintiff for damages of $60,801.10.

THE APPEAL

On appeal, the defendant argued that there was, first, no sufficient basis in the evidence for the trial judge's finding that the accident was caused by glass being thrown by the lawnmower and, second, no sufficient basis for the finding that Mr Fielding had been negligent. The Court of Appeal dismissed the appeal; the principal judgment was delivered by Keane JA, with Williams JA and Fryberg J agreeing.

On the first argument, Keane JA held that the trial judge appeared to accept the plaintiff's evidence that the accident occurred because of glass being thrown by the lawnmower, even though the trial judge did not explicitly state as much. Keane JA held that it was a rational conclusion open to the trial judge.

On the second argument, Keane JA held that since Mr Fielding had not seen the plaintiff approaching, Mr Fielding could not be held negligent or disobedient for failing to stop the mower and disengage the blades. The plaintiff then argued that Mr Fielding also disobeyed an instruction to keep a proper lookout for passers-by. Keane JA rejected this argument on the basis that operators of ride-on lawnmowers must, at certain times, devote most of their attention to safely operating them, and the plaintiff had failed to prove that Mr Fielding was able to turn his attention to him as he approached Mr Fielding.

In the end, however, Keane JA upheld the finding of negligence on the basis that temporary barriers (other than the water-filled barriers considered at trial) directing passers-by to the other footpath could have been erected at little cost.

A WARNING TO LOCAL COUNCILS

This case shows how important it is for council employees to cordon off areas they are mowing. It is insufficient, as the employee had done in this case, merely to erect a 'Men at Work' sign. ■

Note: 1 Summarised by Keane JA at paras 15-19.

Chris Salerno *recently graduated with a Bachelor of Laws (with Honours) from the University of Melbourne.* **PHONE** *0423 907 726* **EMAIL** *c.salerno@bigpond.com.*