A small victory for injured workers

Wilson v State Rail Authority of NSW [2010] NSWCA 198 (16 August 2010)

By Martin Smith

In a decision that will have important consequences for the workers' compensation scheme in NSW, the NSW Court of Appeal recently held in *Wilson v State Rail Authority of New South Wales*[1] that workers who were injured prior to the introduction of the *Workers Compensation Act* 1987 (NSW) (1987 Act) on 30 June 1987, can bring common law proceedings against their employers without having to demonstrate a 15 per cent level of permanent impairment arising from the injury. The decision overturns the earlier decision in *Attlich v State Rail Authority of New South Wales,*[2] where the court had found that the effect of the 2001 amendments to the workers' compensation scheme was that workers must demonstrate a 15 per cent level of permanent impairment arising from the work injury in order to be able to bring common law proceedings against their employer.

BACKGROUND

The appellant (Mr Wilson) was employed by the State Rail Authority from August 1981 to January 1983, during which time he was sexually assaulted by another employee who was later convicted of offences arising out of this criminal conduct.

In February 2006, Mr Wilson lodged a workers' compensation claim and in December 2007 he commenced proceedings in the Supreme Court of NSW claiming common law damages for negligence, having been granted leave to proceed out of time. In June 2009, Justice Hidden of the Supreme Court dismissed Mr Wilson's claim for damages, on the basis that certain provisions of the *Workplace Injury Management and Workers' Compensation Act* 1998 (NSW) (1998 Act) applied, which meant that Mr Wilson's proceedings were not maintainable because they did not comply with those provisions.

On 16 August 2010, the NSW Court of Appeal (Allsop P; Giles, Hodgson, Tobias and Macfarlane JJA) upheld Mr Wilson's appeal, concluding that neither the 1987 Act, nor the 1998 Act, prevented Mr Wilson from bringing common law proceedings against his employer. The proceedings primarily turned on the issue – which was resolved in his favour – of whether Mr Wilson could bring proceedings against the State Rail Authority despite the fact that he could not demonstrate 15 per cent whole permanent impairment as a result of the sexual assaults.

THE HISTORY OF THE NSW WORKERS' COMPENSATION SCHEME

President Allsop gave the lead judgment of the Court of Appeal. As His Honour noted, Part 5 of the 1987 Act abolished the common law right of a worker to recover damages from the employer in respect of an injury for which the employer was liable to pay workers' compensation under the 1987 Act. However, in general terms, Schedule 6 of the 1987 Act provided that the prohibition on bringing common law actions did not apply to an injury received by a worker prior to the enactment of the 1987 Act (that is, prior to 30 June 1987).

Further amendments were made to the 1987 Act in 1989 (1989 Amendments), the effect of which were to reinstate the right of workers (albeit in a limited sense) to bring common law actions against their employer. In essence, the effect of the 1989 Amendments was that:

1. workers who were injured before 30 June 1987 could still bring proceedings for common law damages against their employers; and
2. workers who were injured after 30 June 1987 could bring proceedings for common law damages against their employers, although the damages that they could receive were limited in their scope and amount.

President Allsop described the situation in the following terms (at [28]):

> 'What was therefore pellucid in 1989 was that ... none of the changes to the regime for common law damages for employment injuries in 1987 to 1989 touched the recovery of damages at common law for causes of action in respect of employment injuries received by a worker before 4pm on 30 June 1987. Two regimes therefore existed – "pure" common law for causes of action in

respect of injuries that occurred before 4pm 30 June 1987 and "modified" common law damages for causes of action in respect of injuries received after that time and date.'

The next major statutory change occurred in 1998, with the introduction of the 1998 Act. Although the 1987 Act was said to be subject to the 1998 Act (and the 1998 Act was said to prevail over the 1987 Act to the extent of any inconsistency) '... no provision of the [1998] Act, substantive or transitional, purported to regulate common law causes of action in respect of injuries received before 4pm on 30 June 1987'. The introduction of the 1998 Act in 1998 brought changes to the administration of the workers' compensation regime in NSW, although the substance of the workers' compensation scheme remained largely unchanged.

In 2001, two sets of amendments were made to both the 1987 Act and the 1998 Act (2001 Amendments). Significantly, the 2001 Amendments introduced into the 1987 Act two important limitations on the ability of workers to claim common law damages from employers. Firstly, only damages for past and future lost of earnings may be awarded; damages for non-economic loss, treatment expenses and domestic care were therefore excluded. Secondly, in order to claim common law damages, a worker must demonstrate a level of permanent impairment of at least 15 per cent as a result of the worker's injury.

The 2001 Amendments also introduced into the 1998 Act certain mandatory procedural prerequisites that workers must follow before they can commence common law proceedings against their employer, even if the injury concerned was sustained before the commencement of the 2001 Amendments. One such prerequisite was that proceedings be brought in accordance with the applicable requirements of the WorkCover Guidelines, which provided that a person must have suffered a 15 per cent level of impairment arising from the injury in order to be able to bring proceedings.

In the result, President Allsop was of the view that the 2001 Amendments did not change the position established in 1987 – namely, that employees who were permanently injured before 30 June 1987 could still bring proceedings for common law damages against their employers.

It is beyond the scope of this case note to examine in detail exactly how President Allsop came to this view, given the labyrinthine nature of the statutory scheme His Honour examined. For present purposes, it is sufficient to state that His Honour was of the view that the mischief to which the 2001 Amendments was directed was the cost of common law claims made under the scheme established by the 1987 Act and the 1998 Act, and that the 2001 Amendments 'did not reach back to affect causes of action in respect of injuries received before 4pm on 30 June 1987'. As His Honour noted, it is an established canon of statutory construction that '[t]he destruction of, or imposition of a substantive restriction or limitation on, common law rights of suit for personal injury requires "very clear legislative intent"'. It would have been comparatively simple for the legislature to draft legislation 'of sufficient clarity to evince a parliamentary intention to destroy or significantly modify common law rights'. Significantly, no such step was undertaken. President Allsop was therefore of the view that *Attileh* was clearly wrong in respect of pre-June 1987 injuries, although it remained relevant for injuries occurring after June 1987.

CONCLUSION

The decision in *Wilson* represents a victory, albeit limited in scope, for workers who have suffered injuries prior to 30 June 1987 as a result of their employer's negligence. The decision once again opens the door for employees who suffered work-related injuries prior to the introduction of the 1987 Act to bring common law claims against their employers without having to address the issue of whether their level of permanent impairment arising out of the injury is at least 15 per cent. At this stage, it does not appear that the State Rail Authority will seek to appeal the matter to the High Court. Failing any successful challenge to the High Court, workers' compensation practitioners must wait and see whether the NSW legislature will attempt to intervene to overcome the effects of the decision. ■

Notes: **1** [2010] NSWCA 198. **2** (2005) 62 NSWLR 439.

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