

# Workplace sexual assault leads to damages

***Sapwell v Lusk and Lusk trading as Clarity by Gerber & Lusk Optometrists* [2010] QSC 344 per Atkinson J delivered 15 September 2010**

By Adam Tayler

The plaintiff, Michelle Sapwell, was an experienced optical technician who, in 2005, was employed at an optometry practice. The optometry practice was known as Clarity Optometrists (the shop), and was situated in a pleasant neighbourhood strip shopping area in Nash Street, Rosalie, an inner suburban area of Brisbane. Ms Sapwell was often there on her own during her working hours which, at the time of the incident, were 10 am to 6pm, Tuesday to Friday.

While there were security measures in place to protect the shop overnight, no particular security measures were in place to protect the safety of shop employees during the day time. A regular customer was a man of about 70 years of age who attended about once a week with his wife to have his glasses repaired. His name was Mr Bart. On Tuesday 18 January 2005 at about 5pm Mr Bart came into the shop and this time, for the first time, he was alone. Ms Sapwell was also on her own. Once Ms Sapwell had fitted his glasses, she took Mr Bart's glasses into the back section of the shop to effect the necessary repairs. She was unaware that Mr Bart had followed her into the back section of the shop. Mr Bart sexually assaulted her.

Ms Sapwell had experienced prior sexual trauma as a child, and this attack triggered numerous prior trauma memories. Some months later, and prior to the criminal trial of the assailant, Mr Bart and his wife visited the shop again and stood outside, staring at the plaintiff. Ms Sapwell was once again alone in the shop at the time. She subsequently broke down and has not returned to work since.

In allowing the claim, Her Honour Justice Atkinson stated that the injury was entirely foreseeable. In referring to the duty to protect employees from the criminal acts of others found to have existed in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,<sup>1</sup> Her Honour also stated:

"It is the very nature of the non-delegable duty of care of an employer to his or her employees that give rise to

that duty which does not exist in the ordinary neighbour situation where there is no general duty to prevent third parties doing harm to another."

Quite simple mechanisms of a lockable door to the back office and a laser beam to set off an alarm when crossed would have been enough to reduce the risk of harm that was foreseeable. Both mechanisms were relatively inexpensive.

Her Honour allowed expert evidence from Richard Jennings over an objection by the defendant about the assessment and implementation of measures that can be undertaken to protect employees from criminal behaviour or to promote their security. Her Honour's reasons considered the appropriate tests in relation to admissibility of that evidence.

It was not contested that the psychiatric illness suffered was a foreseeable consequence of the breach of duty. Judgment was entered for the plaintiff in the amount of \$390,558.82.

This case has been a timely reminder that psychiatric injury claims are ones that can and should be pursued successfully. It did not rely on any breach of statutory duty, because of the amendments earlier this year to the *Workplace Health and Safety Act 1995*, whereby the private right of action for a breach of the employer's obligation to ensure workplace health and safety was removed retrospectively by government. Whether the decision will be appealed has yet to be seen. ■

**Note:** 1 [200] HCA 61 at 26.

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