

## *Finlay v State of Western Australia* [2012] WADC 132

### Key Points

- Foreseeability of psychiatric injuries in the workplace.
- The District Court of Western Australia has reinforced and applied the decision of the High Court in *Koehler v Cerebos (Aust) Pty Ltd* [2005] HCA 15, in determining when an employee's psychiatric illness will be held to be reasonably foreseeable to an employer, and when a breach of duty will be held to have occurred.

### Background

Ms Finlay, a Level 2 administrative assistant commenced proceedings against her employer, the Department of Community Development (now the Department of Child Protection), alleging that as a result of the negligence of her employer she suffered a psychiatric injury.

At hearing, it was not in dispute that the State of Western Australia owed Ms Finlay a duty of care as her employer. The main issue before the District Court was whether a reasonable person in the position of Ms Finlay's employer could have foreseen that she was at risk of sustaining a psychiatric injury.

### The Law

The issue of foreseeability involving a psychiatric injury was examined in full. The scope of when a psychiatric injury maybe said to be foreseeable was examined in light of the decisions in *Koehler v Cerebos (Aust) Pty Ltd* [2005] HCA 15, *Tame v State of New South Wales* [2002] HCA 32 and *Nationwide News Pty Ltd v Davandar Naidu & Anor* [2007] NSWCA 377.

The court's assessment and application of these cases can be summarised as follows:

1. An employer may not be liable for psychiatric injury to an employee brought about by the employee's performance of the duties originally stipulated in the employee's contract of employment.
2. There is a presumption that an employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury that the employee considers that he or she is able to do the job.
3. It is not necessary for an employer to have foreseen the precise injury sustained or the manner in which the injury occurred. It is sufficient that the risk in question falls within a class of risks which the defendant should have foreseen.

4. The law of tort does not require every employer to have procedures to ensure that the relationship of an employee/employer does not lead to psychological distress of its employees.
5. An employer will not breach its duty of care unless a situation can be seen to arise which requires intervention on a test of reasonableness. Predictability is not enough.
6. It is accepted that some recognisable psychiatric illnesses may be triggered by stress. However, that does not make it foreseeable that a person is at risk of a psychiatric injury from stress of work.
7. The risk of an employee sustaining a recognisable psychiatric illness will be reasonably foreseeable where the risk is not far-fetched or fanciful.

## Conclusion

The following relevant facts were relied upon by the District Court in finding that the risk of Mrs Finlay sustaining a psychiatric injury was not foreseeable, and further that no breach of duty occurred:

1. Mrs Finlay's record of employment demonstrated a competent and committed employee until she received a traumatic telephone call (the triggering incident).
2. there was nothing in the documentary evidence which suggested that Mrs Finlay had an inability to cope with her duties.
3. further, prior to the telephone incident there was no diagnosis made of any form of psychiatric or psychological condition by her GP, or anyone else.
4. the work environment in which Mrs Finlay worked was at times demanding and busy, however, the demands placed on Mrs Finlay were not unreasonable and she was coping with those duties prior to the telephone call.
5. the tasks performed by Mrs Finlay were no more than the usual tasks performed by persons of her level of experience, training and competence;
6. the demands placed on her were not found to be unreasonable compared to those in comparable positions.
7. the employer took reasonable steps to minimise or eliminate the risk of psychiatric injury.

## Lessons Learnt

Where an employee suffers a psychiatric injury in the workplace, an employer will not be held liable in negligence where the risk of that employee suffering a psychiatric injury is far-fetched or fanciful, in other words it must be reasonably foreseeable.

For more information in respect of duties owed by employers to employees where stress or a psychiatric injury is in play, please contact:

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