Un v Schroter & Ors [2002] NTSC 2

PARTIES:	UN, Salomi v SCHROTER, Peer trading as POVEYS AND CARNEY, Jodeen AND NORTHERN TERRITORY LEGAL AID COMMISSION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICITON
FILE NO:	100 of 1998 (9810057)
DELIVERED:	10 January 2002
HEARING DATES:	5 – 9 March 2001, September 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

NEGLIGENCE

Legal practitioners – breach of duty of care – failure to advise as to work health claim – lost chance to pursue proceedings – whether liable in contract and tort – causation – damages.

CONTRACTS

Legal practitioners – breach of contract – implied term to exercise reasonable care and skill

Work Health Act 1986 (NT), s80, s 182

Astley v Austrust Ltd (1999) 197 CLR 1, followed
Mutual Life and Citizens Assurance Co v Evatt (1970) 122 CLR 556, followed.
Lillicrap v Nalder & Son (1993) 1 All ER 724, considered.
Griffiths v Evans (1953) 2 All ER 1364, distinguished.
Vulic v Bilinsky (1983) 2 NSWLR 472, considered.
Hawkins v Clayton (1987) 164 CLR 539, followed.
Central Trust Co v Rafuse 31 DLR (4th) 1987, 481, considered.
Macpherson v Kevin J Prunty & Associates (1983) 1 VR 573, applied.
Jones v Dunkel (1959) 101 CLR 298, followed.
Commercial Union v Ferrcom (1991) 22 NSWLR 389, applied.
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, applied.
Kitchen v Royal Air Force Association (1958) 1 WLR 563, applied.
Johnson v Perez (1988) CLR 351, applied.
Nikolaou v Papasavas Phillips & Co (1988) 166 CLR 394, applied.

REPRESENTATION:

Counsel:

Plaintiff:	J Reeves QC
First & Second Defendants:	M Grant
Third Defendant:	J Tippett

Solicitors:

Plaintiff:	Ward Keller
First & Second Defendants:	Cridlands
Third Defendant:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	mar0135
Number of pages:	57

Mar0135
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Un v The Lawyers [2002] NTSC 2
No. 100 of 1998 (9810057)

BETWEEN:

SALOMI UN
Appellant

AND:

PEER SCHROTER trading as POVEYS
First Defendant

AND:

JODEEN CARNEY
Second Defendant

AND:

NORTHERN TERRITORY LEGAL AID COMMISSION
Third Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 10 January 2002)

[1] The plaintiff claims damages from each of the first and second defendants (the Alice Springs solicitors) and the third defendant (the Commission) in their capacity as legal practitioners, alleging that they failed to advise as to her eligibility to claim compensation under the Work Health Act 1986 (NT) ("the work health claim"). That is alleged to have arisen from instructions

which she gave them in relation to an event which occurred in the early days of May 1995.

[2] The causes of action pursued against the Alice Springs solicitors are in breach of contract and breach of duty of care. The High Court has recently confirmed that where there is a contract for services there is an implied promise to exercise reasonable care and skill in the performance of the relevant services (*Henderson v Merrett Syndicates Limited* (1995) 2 AC 145 at p 193 and p 194). "The implied term of reasonable care in a contract for professional services arises by operation of law" per Gleeson CJ, McHugh, Gunnow and Lehane JJ in *Astley v Austrust Ltd* (1999) 197 CLR 1 at p 22. That is because whenever a person gives information or advice to another person upon a serious matter where that person realizes or ought to realize, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other, and it is reasonable for the other to act on the information or advice, the person giving it is under a duty to exercise reasonable care in so doing, per Barwick CJ in *Mutual Life and Citizens Assurance Co v Evatt* (1970) 122 CLR 556 at 572-3.

[3] As against the Commission the claim is cast in breach of duty of care.

[4] As against all defendants the plaintiff says that as a consequence of the separate breaches alleged she lost a chance to pursue proceedings for the recovery of compensation under the Work Health Act ("the Act"). It is alleged that the first defendant is vicariously liable for the acts of the second

defendant and the Commission is vicariously liable for the acts of two employed legal practitioners Ms Cox and Ms Collier (formerly Davidson). In neither case is it alleged that the employer was otherwise liable.

[5] The defendants all deny liability and there is significant difference as between them and the plaintiff as to her loss should she be successful in establishing liability against any of them.

[6] The plaintiff says that she was a worker who suffered a physical or mental injury arising out of or in the course of her employment in early May 1995, which resulted in or materially contributed to an inability or limited ability to undertake paid work (s 53 and definitions), and that she was entitled to be paid by her employer compensation as is prescribed and to receive other benefits under the Act. (Hereafter "incapacity" denotes inability or limited ability to undertake paid work).

[7] Although the language employed can be confusing, it seems to me that the procedure prescribed by the Act requires:

1. Notice of injury to be given as soon as practicable (s 80(1)).

2. Such notice may be given by way of a claim for compensation (s 80(2)).

3. The claim for compensation is to be in an approved form (s 82). It sets in train the involvement of the employer's insurer (s 84) and

requires the employer to accept liability, defer accepting liability or dispute liability (s 85).

4. The Work Health Court has power to hear and determine claims for compensation (s 94(1)(a)) and a person may commence proceedings before the Court "for the recovery of compensation", by application in the prescribed form (s 104).

5. Proceedings for recovery (s 104) shall not be maintainable unless the claim for compensation (s 82) has been made within six months after the occurrence of the injury (s 182). There are exceptions (s 182(3)).

[8] A worker suffering an injury would be wise to give notice of injury as required, and make a claim for compensation within six months after the occurrence of the injury.

[9] The plaintiff says that the Alice Springs solicitors firstly, and later the Commission, failed to recognise from her instructions and other material conveyed to them that the circumstances may have brought her within the provisions of the Act such that no claim for compensation was made as required (s 80, s 82 and s 182). With the assistance of her present solicitors she made an attempt, unsuccessful before the Work Health Court and on appeal to this Court, to obtain relief from that default and her claim for damages here includes the costs associated with those proceedings.

[10] The evidence of the plaintiff as to the events upon which she relies as the foundation of her claim under the Act is uncontested, the man allegedly involved having died, and there being no other witness to the event. Her evidence is that she worked as a traffic controller (or "lollipop girl") for the company Primary Producers Improvers Pty Ltd ("PPI"). She was engaged in that work at a remote area in the Territory, south of Alice Springs, where the employer was carrying out road works. The employees lived together in a work camp. The man was a grader driver, her foreman, employed by the same company. She said that he had been making sexual comments towards her for some time. On 1 May 1995 she fell sick whilst at work and lay down in a utility vehicle nearby. The man came to the vehicle, grabbed her by the neck from behind, kissed her on the face against her wishes, grabbed her by a breast or breasts "very hard" and then in her groin again "very hard" so that it hurt. She says that he made suggestions which she regarded as disgusting and he indicated that she should go to his bed and wait for him intending that he should have sex with her later on. She did not.

[11] The next day she made ready for and went to work. The man was very angry and verbally aggressive towards her, which made her upset. The incident was referred to management and in essence she was told that because the man was such a valuable employee and the two of them could not continue to work together, she would have to go. Arrangements were made for her to return to Alice Springs where she was to be given a plane ticket to Darwin. It was suggested that a job might become available for her in Katherine.

She did not consider that that was fair. It was the man who had offended and she was the one who had lost her job.

[12] It is important to know that the plaintiff is a slightly built lady of Indonesian origin who has lived in Australia for some years. Her command of the English language is not as good as a native born Australian, but nevertheless she appeared to understand the questions put to her in the course of the hearing and I was able to understand her answers notwithstanding her accent and less than perfect grammar. The answers were generally responsive, indicating an understanding of the questions. An interpreter was available at least during some periods whilst she was giving evidence. In the events which followed the incident she was assisted from time to time by an interpreter, particularly in relation to documents. However, her background, the fact that English was not her native language and the circumstances under which she came to seek their advice, as known to them, required the legal practitioners dealing with her to take special care to gather detailed information regarding the circumstances surrounding her complaints from her or elsewhere. In the words of Dillon LJ in *Lillicrap v Nalder & Son* (1993) 1 All ER 724 at 728-29 the plaintiff was entitled to expect solicitors to take a much broader view of the scope of the retainer and their duties.

Facts - the Alice Springs Solicitors

[13] When the plaintiff arrived in Alice Springs she went to the Police Station, reported the sexual assault and then to the Alice Springs Hospital. She was

accompanied by Ms Malathi (variously spelt in the transcript), an interpreter. She was also accompanied by Caroline Geaghegan, a social worker. At the hospital she was attended by Dr Lu in relation to a bruise or lump in her left breast. The next morning, 4 May, she went with Ms Geaghegan and Ms Malathi to see Ms Carney, the second defendant. Her evidence as to what happened upon that interview was, "I report everything happened about sexual assault in the camp". She said she was there for more than one hour, and although she did not specifically remember them being with her then, she said that Ms Malathi and Ms Geaghegan were always with her. The plaintiff thinks she returned the following day to see Ms Carney when she was told that she had claims for unfair dismissal and sexual assault. Before going to Darwin she said she remained in Alice Springs because the police wanted her to stay for a report and that every day Ms Malathi or sometimes Ms Geaghegan would pick her up and take her to see Caroline Woodward at the Equal Opportunities Office.

[14] When the plaintiff arrived in Darwin she went to the Commission. She first saw Ms Cox and gave evidence that she said, "I come here – I have sexual assault happen in Alice Springs and I already go to Povey and Povey and police send me to here because I live in Darwin".

[15] Ms Carney's evidence disclosed her qualifications as a legal practitioner who had some years practice in the Work Health jurisdiction at the time she was consulted by Ms Un. She was aware of time limits for the taking of steps contained within the Act. The plaintiff first came to see her on 4 May

having been referred by Caroline Woodman who worked at the Sexual Assault Referral Centre. When the plaintiff came to her office she was accompanied by Ms Geaghegan, a sexual assault worker. The plaintiff did most of the talking, she was very angry, very distressed and wanted a lawyer to help her. She was outraged because she had been the victim of a sexual assault which had happened at her workplace and the perpetrator was allowed to remain at work whereas she was dismissed. They talked about the unfairness of her dismissal in those circumstances. The plaintiff indicated she wanted her job back, but that that was not possible because she was aware that the man who had assaulted her was not going to be removed by the employer. She said that the plaintiff had told her that she wanted to return to work. She said she received no documents from either the plaintiff or Ms Geaghegan on that occasion.

[16] On 5 May the solicitor wrote to PPI advising that she acted for the plaintiff, "who has instructed us that she was sexually assaulted whilst in your employ by a fellow employee … ." The date of the assault was identified and the circumstances of the plaintiff's dismissal referred to. The company was informed that the solicitors were considering the remedies available. The solicitor was subsequently provided with copies of statements made to police, one by the plaintiff and the other by Mr Causon, a fellow employee at the time of the assault. Those documents were considered by the solicitor for the purpose of advising the plaintiff, but she said they did not add anything to her understanding of events as relayed by the plaintiff.

[17] Looking at the plaintiff's statement, it described the nature of her job with PPI and the assault made upon her by the deceased at the place of her employment. She described in detail the nature of the assault and the suggestions made by the deceased thereafter. She told how she did not tell anyone about the assault on the night of the day it had occurred, but that she started working again the next day out on the road when she was approached again by the deceased, broke down and cried. Mr Causon stopped and she told him about what had happened. It appears from that statement that it was made on the day upon which the plaintiff went to Alice Springs. The copy statement of Mr Causon confirmed that he came across the plaintiff at the side of the road crying, that she had complained to him about the deceased's conduct and that she was very upset. That was before her employment was terminated. The solicitor took her own statement from Mr Causon on 8 May. It does not seem to take the matter further, except in so far as it would appear to be directed at the circumstances surrounding the termination of the plaintiff's employment.

[18] By letter to the plaintiff of 10 May, the second defendant acknowledged that the plaintiff had instructed her in relation to a sexual assault which occurred on 1 May and "it is appropriate that we outline the legal remedies available and identify matters that require your immediate attention in order to action such remedies". The Alice Springs solicitors admit in their Defence that the plaintiff sought professional legal advice concerning the sexual assault. The remedies suggested were an action in the Industrial Relations Court relating

to unlawful dismissal, where attempts could be made to obtain a payment of compensation on the basis that the termination was "harsh, unjust, or unreasonable" ("the unfair dismissal claim"). Instructions were sought, inter alia, in relation to salary and allowances which had been received whilst in that employment. The advice was that the maximum amount of compensation which might be awarded was the equivalent of six months salary. It was also suggested that proceedings be taken in the Human Rights Commission under the Sexual Discrimination Act ("the sex discrimination claim") which, inter alia, could also award compensation. Thirdly, advice was given concerning a claim which could be made under the Crimes (Victims Assistance) Act ("the crimes compensation claim"). Further information was given in regard to those remedies. As that letter shows those solicitors expected to be paid for their services. The letter concluded noting "your language difficulties" and suggesting that the plaintiff have someone assist her to read the letter "and provide us with your further instructions". It concludes, "We shall take no action until we receive your further instructions".

[19] The evidence of Ms Carney was that in considering these matters she had paid regard to what she viewed as the nature of the injury which had been suffered by the plaintiff, that was, the bruise to her left breast. As to economic loss, it was the opinion of the solicitor at the time she gave the advice that the plaintiff would not be able to recover under that head

pursuant to the crimes compensation claim because she was not aware of any economic loss.

[20] The plaintiff called to see the solicitor on 12 May when she signed an application in relation to the unfair dismissal claim, at which time the solicitor went through the contents of the letter of 10 May, although the plaintiff did not have that letter with her. The claim in the Industrial Relations Court of Australia sought "compensation" by way of remedy. It was Ms Carney's opinion at that time, based on the plaintiff's instructions, that that claim was the most suitable option available to her. The solicitor and the plaintiff did not meet again as the plaintiff went to Darwin, although they spoke on the telephone on two or three occasions.

[21] The solicitor became aware that the plaintiff had attended on the Commission. There was communication between Ms Carney and the Commission in relation to the conduct of the proceedings taken or to be taken by the plaintiff in accordance with the Alice Springs solicitors' advice. It is plain on Ms Carney's evidence that at no stage during her direct contact with the plaintiff nor with the Commission thereafter, did it occur to her that the plaintiff possibly had a work health claim. As part of her preparation for the matters, which she had undertaken on behalf of the plaintiff, Ms Carney sought a report from Ms Woodman to support the crimes compensation claim, but when informed in July 1995 that the Commission did not intend to fund her to continue in that application she withdrew that request. The solicitor spoke to the plaintiff by telephone on

17 July saying that the solicitor was then only acting in relation to the unfair dismissal claim, suggesting that the plaintiff should instruct a lawyer in Darwin and saying that she would speak to Legal Aid.

[22] On 18 July the Alice Springs solicitors forwarded to the Commission a police report, medical certificate (and attached medical receipts) statement of the plaintiff to police, statement of the plaintiff to the Human Rights and Equal Opportunities Commission, statement of Peter Causon, statement of Peter Causon to police, a draft application and a letter from the Alice Springs police.

[23] The medical certificate which was forwarded by the Alice Springs solicitors to the Commission was that signed by Dr Lu, a doctor at the Alice Springs Hospital on 3 May. The doctor thereby certified that she had examined the plaintiff and in the doctor's opinion the plaintiff was suffering from "sexual assault – physical, emotion injury" (?). It also indicated that the plaintiff was unfit for full duties for the period from 1 May 1995 to 24 May 1995. A receipt was dated 4 May 1995 for Temazepan tablets and another from a Dr Pannell for a consultation on that day. Just when and from whom those documents came into the possession of the Alice Springs solicitors is not entirely clear, but they were held by them at a time when they were still instructed by the plaintiff and acting in her interests. The plaintiff's general instructions to those solicitors to advise her regarding her remedies had not been terminated before those documents came into their possession. They were forwarded to the third defendant on about 18 July 1995.

[24] I find that neither the plaintiff nor anyone on her behalf conveyed anything to Ms Carney concerning her incapacity to undertake paid work for a period other than by the documents referred to. On the information available to Ms Carney and the actions about which she advised, the plaintiff could be expected to recover her loss of income for that period.

Facts - the Commission

[25] The third defendant is constituted pursuant to the Legal Aid Act 1990 (NT). Its function, as defined in s 7 of the Act, is to provide legal assistance in accordance with the legislation. It is apparent that it was so acting in its dealings with the plaintiff. It has the same liability for acts or omissions by an officer in the course of the performance of the officer's duties as a master has for the acts or omissions of his or her servants (s 56). It is not contended that either Ms Cox or Ms Collier were not officers. Such an officer when practising as, or performing any of the functions of, a legal practitioner, in pursuance of the Legal Aid Act should observe the same rules and standards of professional conduct and ethics as those that a private legal practitioner is, by law or the custom of the legal profession, required to observe in the practice of his or her profession. Further, such an officer is subject to the same professional duties as those to which a private legal practitioner is subject (see s 13 of the Act).

[26] The granting of an application by a person for legal assistance may be on the basis that the assistance will be provided without charge or subject to

conditions such that the person pays the full amount of or a contribution of a specified amount towards the cost to the Commission of providing the assistance (s 29). In this case the assistance was provided without charge.

[27] The plaintiff's evidence was that she went to the office of the Commission in Darwin on about 13 May and there saw Ms Cox. Ms Cox is a legal practitioner employed by the Commission. She said that she told Ms Cox that she had come to see the Commission because "I have sexual assault happen in Alice Springs and I already go to Povey and Povey and police send me to here because I live in Darwin". She said that Ms Cox just wanted her to tell her story so she did that and she was then asked to come back when called upon. The plaintiff said that she told her story "honestly about what happened, sexual assault" and she was looking for justice.

[28] In cross-examination the plaintiff agreed that when she spoke to Ms Cox she was very angry and upset about being sacked adding, "and sexual assault problem too" and that she was seeking justice because she had been sacked and sexually assaulted. The evidence of the plaintiff as to what passed between her and Ms Cox is not contested, as Ms Cox did not give evidence.

[29] At the relevant time Ms Stone was employed by the Commission as the manager of assignments. She had never met the plaintiff, but identified Ms Cox as being the senior criminal practitioner at the Commission. Ms Stone identified a "Legal Advice Form" Exhibit P4 as being the form completed when a person sought advice from the Commission during what

was termed "the clinic session". Such sessions were held regularly and the practice in 1995 was for a member of the public attending upon the Commission to complete one of the forms, which led to their being referred to the solicitor on duty at the time. They were each given the opportunity of a private interview and had approximately fifteen minutes to provide the basic facts concerning their matter. The purpose of the procedure was, as Ms Stone put it, "a sifting device to enable people to get preliminary legal advice in relation to their matter …". Legal practitioners employed by the Commission took it in turns to be available at clinic sessions, and according to Ms Stone it was a little unusual for Ms Cox to be on duty given that she was a senior criminal lawyer employed by the Commission. It depended upon who was available at the time. No charge was made for such a consultation.

[30] The Legal Advice Form relevantly discloses that the plaintiff nominated the name of the other party as the deceased and that her problem was "sexual assault". The instructions as noted by Ms Cox were briefly that the plaintiff was working for PPI, on 1 May the deceased sexually assaulted her, the next day she was sacked and she was scared and too upset to return to work. She told Ms Cox how on 3 May she had reported the matter to management, they offered her extra money to fly back to Darwin, they took her to Alice Springs where she went to the police station to make a report and then to the doctor at the Alice Springs hospital. The advice noted on the form was, "needs legal aid to assist in investigating action for damages for – unfair

dismissal, HREOC action and crimes comp". It is not the case for the Commission that it was being asked for assistance to simply fund or take over the matters then in the hands of the Alice Springs solicitors. The plaintiff sought separate advice.

[31] Ms Stone's evidence was that such a document was returned to registry and resurfaced if further clinic advice was required or if the person subsequently lodged an application for legal aid. The plaintiff then applied for legal assistance (Exhibit 3D1) providing details of the matter in which legal assistance was sought as "sexual harassment". As to her then employment, she filled out the form so as to disclose that she was unemployed, that PPI was her last employer and that the employment was terminated on 3 May. Asked, through the form, if she needed an interpreter, she responded "No" and supplied requested details of her financial position in support of her application. The form required an answer to the question as to whether there were any special circumstances affecting her financial situation and she replied "yes – not working anymore". That application was signed by the plaintiff and is dated 17 May 1995. After consideration of that application, the grant of aid was refused in relation to the unfair dismissal claim, the crimes compensation claim was referred to Ms Collier, a solicitor employed by the Commission and the matter of an application to the Human Rights and Equal Opportunities Commission was to remain with Ms Stone pending further clarification.

[32] In cross-examination Ms Stone did not accede to the proposition that the purpose of the clinic was to identify the legal entitlements of the client, pointing out that the interview time was limited to fifteen minutes, the facts extracted and the opportunity of the solicitor to give appropriate advice was limited. It was a "civil clinic". Ms Cox was identified as the senior criminal lawyer, but the plaintiff's concerns were thereafter dealt with within the Commission upon the basis of Ms Cox's assessment as determined at the closing of her interview. In re-examination Ms Stone said that it was always open to "extend the grant of aid to cover other areas that any investigations of her matters would have given rise to".

[33] No attempt was made to obtain further information from the plaintiff as to the details surrounding the assault and dismissal and their consequences with a view to reviewing the remedies which could be available as identified by Ms Cox.

[34] The plaintiff was seen by Ms Collier. She was admitted to practice on 11 January 1995 and her duties as solicitor with the Commission included appearances in the Magistrates Court, she did a "bit of clinic" and crimes compensation matters for which legal aid had been granted. At the time the plaintiff's work was assigned to her she had been admitted as a legal practitioner for four months. She had had little instruction in the course of her university studies and had received no training during the course of her articles in relation to the Work Health Act. She had no experience in the field at all and thus knew nothing about the time limits imposed by the Act.

In dealings with the plaintiff she did not go beyond the possible remedies identified by Ms Cox and considered her duty to be to act for the plaintiff in accordance with the grant of aid. In so far as she recalled seeing the documents sent to the Commission by Ms Carney in mid July 1995, the information conveyed together with other information on the Commission file was only considered in the context of the work that Ms Collier was doing.

[35] Ms Collier secured for the plaintiff a grant of aid in relation to pursuing the unfair dismissal claim for which aid had been initially refused. It is not evident that had a solicitor in the position of Ms Collier recognised that a person such as the plaintiff possibly had a remedy other than that which had been recognised at the clinic, it could not have been drawn to the attention of superiors at the Commission with a view to seeking advice or pursuing an application for aid. Whether the Commission would grant aid to enable the possibility to be examined further is not to the point.

[36] After completion of Ms Collier's evidence it was discovered that a document on the Commission's file contained a photocopy of the medical report of Dr Lu of 3 May 1995. By consent, that matter was taken up with her by the solicitors for the Commission and her responses were contained in an affidavit sworn on 10 September 2001. She confirmed that handwriting on the report was hers and when asked whether it was likely that she had read it said:

> "I have no recollection of reading the medical report, however, I accept I must have seen the document. However, it did not alert me to any work health claim. All the certificate would have meant to me was that Amy had seen a doctor and I could get a report at some later time from the doctor to support her crimes compensation claim in the course of preparing that application".

[37] By consent the affidavit of Ms Collier was accepted as evidence in the case and since it was received after the close of the other evidence all parties were granted liberty to make further submissions in the light of what it disclosed. None were received.

[38] There is no evidence to suggest that the plaintiff ever sought advice from Ms Collier as to her possible remedies beyond those suggested by Ms Cox. Nor does it appear that Ms Collier held herself out as being a person who could give that advice.

[39] It is established that neither Ms Cox nor Ms Collier adverted to the possibility of the plaintiff having any rights arising under the Work Health Act and as a consequence she was not advised of the temporal requirements as to the giving of notice of claim.

Legal Considerations - Generally

[40] I have paid regard to the following authorities and writings.

[41] *Griffiths v Evans* (1953) 2 All ER 1364 concerned a solicitor who had been assaulted by a man who had only discussed with him the question of obtaining weekly payments of compensation in consequence of an injury at

work. It did not occur to the solicitor that his client might also have a right at common law because what the client discussed with him surrounded the question of weekly payments of compensation. At p 1368 Somervell J said he found the question of negligence a difficult one

> "The variety of matters with which a solicitor has to have some familiarity increases annually. The case may well be on the borderline, but I am not satisfied that the plaintiff has made out a case of negligence".

On the other hand, Denning LJ was clearly of the opinion that the solicitor ought to have considered whether the man had a claim at common law, p 1369: "Every solicitor ought to know that there is all the difference in the world between a case where the employer is to blame and a case where he is not." His Lordship did not think it was right for the solicitor to escape by saying that, "You only consulted me about workman's compensation, not about common law damages". Romer LJ was of the view that:

> "The problem which the plaintiff presented to the defendant came within this special and potentially difficult field of enquiry, and I cannot think that it was negligent of the defendant not to apply his mind to another, and totally different, field as well."

And further at p 1372:

> "The plaintiff said in his evidence that he asked the defendant to advise him on his position generally; and, indeed, if, in fact, he had wanted general advice nothing could have been easier than for him to have asked for it".

In his Lordship's view the plaintiff's failure to ask for general advice meant that he had not satisfied his Lordship that the defendant's omission

amounted to an actionable neglect of his professional duty. Here, the plaintiff did seek general advice.

[42] Lord Denning's view was reflected in the decision of Miles J in *Vulic v Bilinsky* (1983) 2 NSWLR 472 where his Honour considered the extent of the duty of a solicitor taking instructions from an injured worker to advise on and, if necessary, take such steps as were reasonable to obtain monetary recompense for injuries received in the course of employment. It was held that in those circumstances the solicitor should consider whether or not the claim should be made under workers compensation legislation or at common law. It was not up to the client to specify which claim the client desired to make.

[43] In *Hawkins v Clayton* (1987) 164 CLR 539 Deane J at p 575, in the context of considering the liability of a solicitor in tort for negligence, drew upon what was said by Windeyer J regarding an architect in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at p 84:

> "He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practicing their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person"

His Honour added that which finally came to be resolved *in Astley v Austrust* (1999) 197 CLR 1: "This liability can be said to arise either from a breach of his contract or in tort".

[44] The Supreme Court of Canada reiterated the solicitor's duty of care in the context of contractual liability and as a matter of common law from the relationship of proximity created by the retainer in *Central Trust Co v Rafuse* 31 DLR (4th) 1987, 481 at 524. The court noted that a solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need for further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. At p 524 reference is made to Charlesworth and Percy on Negligence, 7th Edition (1983) at p 577,and p 578 where it is said:

> "Although a solicitor is not bound to know the contents of every statute of the realm, there are some statutes, about which it is his duty to know. The test for deciding what he ought to know is to apply the standard of knowledge of a reasonably competent solicitor."

[45] There is another quote from Jackson and Powell, Professional Negligence (1982) that before a solicitor is held liable for failing to look a point up, circumstances must be shown which would have alerted the reasonably prudent solicitor to the point which ought to be researched, citing *Bannerman Brydone Folster & Co v Murray* [1972] NZLR 411.

[46] The following also appears at p 578 (citation omitted). "If a solicitor is in fact ignorant of the law on a point, he should take steps to inform himself of

it. If he considers the point to be difficult or doubtful he should inform his client of this and take his instructions on whether or not counsel's opinion ought to be taken. If the client refuses to take counsel's opinion, the solicitor is only liable "where the law would presume him to have the knowledge himself". If he takes upon himself to advise on a difficult or doubtful point without warning the client of the difficulty and suggesting that counsel's opinion should be taken, he is negligent.

[47] And further, in contentious matters it is the duty of a solicitor, on taking his client's instructions, to ascertain the relevant facts in order that he can form an opinion as to whether or not there is a right of action.

[48] Some authorities were referred to by counsel in this case to do with the knowledge which a solicitor should have regarding limitation periods, but they are not to the point since the issue here surrounds the failure of the solicitors to recognise that there was a remedy under the Work Health Act itself.

Liability of the Alice Springs solicitors

[49] What the plaintiff conveyed to Ms Carney directed her mind at once to the possible remedies about which she advised the plaintiff. The nub of the plaintiff's complaint lay against the deceased in relation to the assault and against the employer in relation to the loss of her job in circumstances which she considered to be unfair.

[50] The question is whether those solicitors having received the oral instructions and being in possession of the documents were in breach of contract, or their duty of care, in failing to also recognise that taken together they disclosed information material to a remedy possibly available to the plaintiff under the Work Health Act and advising accordingly. Amongst the information they held was that the plaintiff had been assaulted at her work place, suffered injury, had presented for work on the day following the assault, had been effectively dismissed from that employment, wanted her job back, but could not have it. She had presented at the hospital and had a certificate referring to injury and certifying that she would not be fit for work for a specified period. That certificate was not conclusive as to the extent of the injuries, incapacity or period of incapacity.

[51] The contractual relationship between the plaintiff and the Alice Springs solicitors involved an implied term that they would exercise proper skill and care. The scope of the contract was defined by the instructions given by the plaintiff and accepted by them. Those instructions amounted to a request for advice as to any and all remedies available to the plaintiff, to be ascertained by reference to the information conveyed to the solicitors. The solicitors did not place any limitation on the scope of the instructions they had accepted.

[52] The evidence shows that the solicitors did not weigh up all of that information or seek to obtain any further information directed to a possible work health claim. Such a possibility did not occur to Ms Carney in a

situation where she had been asked for general advice as to available remedies.

[53] What is put on behalf of the plaintiff is that the solicitor ought to have recognised at least a possible connection between the various facts giving rise to consideration of a work health claim, and thus the requirements as to the giving of notice of a claim including time limits.

[54] I consider Ms Carney should have recognised that there was at least a possibility of the plaintiff falling within the provisions of the Work Health Act prior to their terminating their general instructions to advise in mid July. Ms Carney should have recognised and advised the plaintiff as to that possibility and sought to obtain the plaintiff's further instructions. The first defendant is vicariously liable for her breach. All that was required to be done under the Act at that stage was the taking of a relatively simple and inexpensive step to protect the plaintiff's possible rights.

[55] The Alice Springs solicitors' duty to the plaintiff did not cease when the plaintiff went to Darwin and consulted the Commission. The obligation to the plaintiff continued at least until they had forwarded the documents to the Commission. They should have then been alert to the possibility of a work health claim and drawn the attention of the Commission to it (*Macpherson v Kevin J Prunty & Associates* (1983) 1 VR 573 per Lush J at p 582).

Liability of the Commission

[56] No cause of action is alleged as against the Commission itself. It is sought to recover against it upon the basis of its vicarious liability for the defaults of Ms Cox and Ms Collier.

[57] That there was no contract established as between the plaintiff and the Commission, or the plaintiff and Ms Cox or Ms Collier is irrelevant. Once the relationship of solicitor and client was established and Ms Cox embarked upon the giving of legal advice, then she owed a duty of care to the plaintiff in accordance with the common law of negligence. The nature of that duty is as set out in the extract of the judgment of Deane J in *Hawkins v Clayton*. Ms Cox was required to bring to the task assigned to her the competence and skill that is usual among solicitors practising their profession in the circumstances in which she interviewed the plaintiff. By giving the advice which she did Ms Cox held herself out to be competent to give it.

[58] If Ms Cox was possessed of broad experience in advising people who had suffered personal injury, then she would be expected to have at least recognised the possibility that the plaintiff had the benefit of the Work Health Act. She did not have that experience and thus should have acknowledged that and made such arrangements as were available for the plaintiff to be seen by another legal practitioner with the requisite skills (*Vulic v Belinsky* at p 486). In my view Ms Cox should have recognised, even during the short time available for the interview, that the plaintiff was

not someone who knew anything about the remedies that might be available to her. It was incumbent upon Ms Cox to have deferred her assessment of the plaintiff's possible remedies and eligibility for legal aid until more time could be given to the task either by herself or someone better skilled in that field of law.

[59] Counsel for Ms Cox relied upon the unreported decision of B W Ambrose J of the Supreme Court of Queensland delivered on 8 December 2000 in *Fortune v Bevan* with particular reference to the circumstances in which the alleged negligent advice was given. It was pursuant to a Queensland Law Society scheme described as the "twenty/twenty consultation" which his Honour described as being "that some person who sought some degree of preliminary expert advice as to whether they had a legal right or problem might for a fee of $20 discuss the matter with a solicitor for twenty minutes, who would give them what in essence would be a very preliminary advice." That matter was raised in the context of his Honour's consideration of an allegation that a solicitor who had given oral advice in the course of such a consultation was negligent in failing to follow up with written advice. It was his Honour's view that there was no duty or obligation upon the solicitor to do so. I do no consider that that case assists the third defendant.

[60] Ms Collier was assigned a particular task which she was competent to undertake. She was a newly admitted practitioner with little practical experience and was working within the confines of the remedy for which the Commission had approved a grant of aid. Unlike Ms Cox she was not

charged by her employer with the duty of giving general advice, and unlike Ms Carney she was given no instructions by the plaintiff to give general advice as to possible remedies. There is no evidence to indicate that Ms Collier held herself out as competent to give any advice other than in connection with the matters previously identified by Ms Cox and which had been assigned to her by the Commission.

[61] The plaintiff has not made out her case against Ms Collier.

[62] It may be that the Commission failed in its duty of care to the plaintiff by the way in which it conducted itself in the rendering of assistance to people who sought its services in clinic sessions. But I make no finding about that as it was not pleaded. However, whether that be so or not, it is vicariously liable for the negligence of Ms Cox.

Liability - Summary

[63] I have endeavoured to show that the circumstances giving rise to the findings of breach of contract and duty as against the respective solicitors lies in their failure to recognise the possibility that on the information conveyed to them the plaintiff had a remedy under the Work Heath Act. It does not lie in their failure to carry out instructions to advise with specific reference to the Act or in their failure to carry out instructions to give the requisite notice. It is not to the point that the injury, physical and mental, known to each of them might appear to have little consequence when it came to possible incapacity. It is notorious that what may at first instance appear

to be a relatively minor injury not giving rise to incapacity can be later found to have had that effect. Much of the evidence in the case relied upon by the defendants went to the solicitors appreciation of the plaintiff's willingness and ability to return to work the day after the assault, but that is hardly conclusive of whether the plaintiff then had or might at some future time have a right to compensation under the Act arising from the assault. The prospects of recovery of lost wages for a limited period of a month by means other than proceedings under the Act is irrelevant also. The ambit of financial compensation payable under the Act and the other benefits available to a worker may be far greater than that which is likely to be recovered or received by the other remedies.

[64] It seems to me that a solicitor confronted with a client seeking advice in relation to remedies arising from an injury sustained at the work place, especially when coupled with medical evidence that the client has suffered an incapacity as a possible consequence of the injury, should recognise that the Work Health Act may provide a remedy and thus take the required steps to preserve the client's prospects of entitlement under it. It is the primary means available in the Territory by which workers' long term financial security may be protected. The prospect of it being employed for that purpose ought not to be overshadowed by other considerations.

[65] Although notices of contribution have been given by the Alice Springs solicitors to the Commission and vice versa I am not presently asked to apportion liability between them.

Causation

[66] The plaintiff bears the onus on the balance of probabilities for showing that had she been advised about the possibility of a work health claim, she would have instructed those advising her to protect her position by the giving of the required notice within time. There was time for that to be done and no reason advanced as to why it would not have been done had the instructions been given.

[67] Unless the plaintiff has shown that she would have instructed the solicitors to protect her position by giving the required notice, she cannot show any loss due to their default. The loss, if any, would be caused by her deciding not to give those instructions. There is no direct evidence that the plaintiff would have given those instructions, but she invites this Court to draw an inference in her favour from other known facts. For example, she pursued the remedies upon which she was given advice, commenced the work health claim out of time and unsuccessfully attempted to overcome the lack of requisite notice in the Work Health Court and on appeal. The Alice Springs solicitors submit that the period to be reviewed is that commencing on the date of the assault and expiring six months later, during part of which the plaintiff had been employed; it was not until long after the expiry of that time limit that she was advised that she suffered an ongoing incapacity as a result of the injury. The plaintiff had other proceedings on foot in the meantime in the course of which she could recover for lost income.

[68] The solicitors also submit that it is not open to draw the inference sought by the plaintiff where there was no attempt to prove by direct evidence and the principles of *Jones v Dunkel* (1959) 101 CLR 298 should be applied. That is what Handley JA did in *Commercial Union v Ferrcom* (1991) 22 NSWLR 389 at 418:

> "There appears to be no Australian authority which extends the principles of *Jones v Dunkel* to a case where a party fails to ask questions of a witness in chief. However I can see no reason why those principles should not apply when a party by failing to examine a witness in chief on some topic, indicates "as the most natural inference that the party fears to do so". This fear is then "some evidence" that such examination in chief "would have exposed facts unfavourable to the party": see *Jones v Dunkel* (at 320-321) per Windeyer J. Moreover in *Ex parte Harper; Re Rosenfield* [1964-5] NSWR 58 at 62, Asprey J, citing *Marks v Thompson* 1 NYS 2d 215 (1937) at 218, held that inferences could not be drawn in favour of a party that called a witness who could have given direct evidence when that party refrained from asking the crucial questions."

[69] His Honour's observations were endorsed by Young J in *Pratt v Hawkins* (1993) 32 NSWLR 319 at 323 and Goldberg J in *White Industries v Flower and Hart* (1998) 156 ALR 169 at 227.

[70] The plaintiff was endeavouring to prove her case, she was not resisting a claim against her. Nevertheless, an unexplained failure to give evidence may, in appropriate circumstances, lead to an inference that the uncalled evidence would not have assisted her case. The explanation advanced, in submissions, for the failure was that her evidence as to what she would have done was likely to be given so little weight that there was no purpose in adducing it and it would be a waste of the Court's time to ask questions, the

answers to which were unlikely to serve any forensic purpose. I do not accept those proffered explanations. The weight to be given to the evidence is not to the point and the time of the Court is not wasted by introducing evidence going to an important part of a party's case even if the answer to the question in examination-in-chief may be confidently anticipated. That is often the case.

[71] This is not a case where direct evidence of the fact to be proved was not available in the plaintiff's case. There is no evidence that the case for either of the defendants touches directly upon the issue either, but assuming the plaintiff to have been asked and given a positive answer, then its truthfulness would have been open to be examined through cross-examination. I am not persuaded to draw the inferences sought by the plaintiff. I bear in mind *Sykes v Midland Bank Executor and Trustee Co Limited* (1971) 1 QB 113 referred to by Mason CJ, Dawson, Toohey and Gaudron JJ in S*ellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 351. Their Honours referred to *Sykes* in these terms:

> "The defendant's solicitor negligently advised the plaintiff clients and, as a result of this advice, it was alleged that they failed to take certain action. Because the plaintiffs failed to prove on the balance of probabilities that they would have acted differently had they not been negligently advised, they failed to prove that loss had been caused by the defendant's negligence. The Court of Appeal rejected the argument that the loss of a chance that the plaintiffs would have acted differently had they not be negligently advised was loss for which damage could be recovered."

[72] Their Honours distinguished *Sykes* in the context of the matter there under consideration and at p 353 suggested that *Sykes* was to be treated as a case which turned primarily on the issue of causation.

[73] Their Honours also referred to *Gates v City Mutual Life Assurance Society Limited* (1986) 160 CLR 1 and *Norwest Refrigeration Services Pty Ltd v Bain Dawes* (1984) 157 CLR 149 to the same effect. The person claiming to have suffered loss in each case was held unable to recover for lack of proof that had he been properly advised he would have taken steps such that the loss would not have followed.

[74] I consider that the plaintiff's claim here founders on the same principle. The inference she seeks to have drawn is no more likely than that advanced by the defendants.

Damages

[75] Assuming that I am wrong in holding that the plaintiff has failed to demonstrate causation of any loss, I will proceed to assess damages. That depends firstly upon the plaintiff's chances to have wholly or partly succeeded in the action. Where the action would be certain to have succeeded, then damages are to be assessed by reference to the appropriate amount that would have been awarded on the claim in the Work Health Court. Where there is no case that the plaintiff could reasonably have ever formulated, then only nominal damages are recoverable. Where the action is in neither of those categories, the Court must assess the value of the

plaintiff's lost opportunity (*Kitchen v Royal Air Force Association* (1958) 1 WLR 563; Halsburys Laws of Australia par 250 –590).

[76] In a claim under the Work Health Act, assuming the necessary procedural conditions precedent to have been fulfilled, the applicant worker must first establish that the Act applies. Broadly, that requires proof, on the balance of probabilities that the appellant: (a) was a worker, (b) who suffered injury, (c) arising out of or in the course of his or her employment, (d) which results in or materially contributes to his or her (i) death, (ii) impairment, or (iii) incapacity.

[77] The evidence now available to this Court on the liability issue would have been available to the Work Health Court in mid 1996. It shows that the plaintiff was a worker and her evidence as to the assault on 1 May, although unusual, is credible. Her statements immediately thereafter were consistent and some corroboration is available through Mr Causon. I could only speculate as to what the deceased may have said and there is nothing to suggest that the injury was self inflicted or attributable to the plaintiff's serious and willful misconduct (s 57(1)). The assault was at the work place and if injury was suffered it was in the course of her employment (*Weston v Great Boulder Gold Mines* (1964) 112 CLR 30). There was medical evidence of injury to her left breast and emotional injury available from Dr Lu and it is not suggested that her opinion as to incapacity would not have been accepted. By 30 June 1996, there would have been available other evidence such as that heard here (but gathered later for the purposes of

this case) regarding mental injury arising from the assault leading to incapacity. That is enough to establish liability.

[78] Those elements, going to the employer's liability under the Act, being proved, the applicant's claim for the compensation prescribed in the circumstances is assessed and an award made. In the case of compensation for ongoing incapacity such an award is not, as in a common law claim for damages, a lump sum awarded once and for all. It is usually an award in respect of prescribed benefits accrued to date of assessment and unpaid, and an order for payment of weekly compensation thereafter based upon the then proven incapacity (s 64 and s 65). But that is not an end to the matter since both the worker and the employer have means available under the Act whereby the continuing compensation benefits may be increased, decreased or terminated depending upon changes in the degree of incapacity or its cessation (s 69 and s 104).

[79] The employer is also liable to pay costs reasonably incurred by the worker as a result of the injury for medical, surgical and rehabilitation treatment, hospitalisation and related costs, s 73. That liability is ongoing once the worker's right to compensation has been established and not ceased. Regular payments may be commuted with the authority of the Work Health Court (s 74). The employer liable to compensate an injured worker has an ongoing liability to provide the worker with suitable employment and to participate in efforts to retrain the worker. On the other hand, there are obligations on the worker which might be categorised under the general

heading of mitigation, to undertake medical and rehabilitation treatment and training and to present himself or herself for assessment as to employment prospects (s 75B).

[80] It is notorious that the hearing of common law actions for personal injury are often only commenced once the plaintiff's loss is reasonably capable of being assessed and that may depend, for example, upon assessment of the nature of and progress in respect of injuries sustained for which damages are sought. In the Work Health Court it is not necessary to go so far before having a claim brought on for hearing given the provisions for ongoing assessment of incapacity and adjustment of compensation payments after liability has been established.

[81] Guidance as to the approach to be adopted in a case where damages are to be assessed against a solicitor through whose negligence the plaintiff has lost some right of value, and associated issues, is to be found in the contemporaneously reported cases of *Johnson v Perez* (1988) 166 CLR 351 and *Nikolaou v Papasavas Phillips & Co* (1988) 166 CLR 394. Notwithstanding that they had to do with actions for damages for negligence in relation to the conduct of actions for damages for personal injury at common law, I consider, with respect, that the principles are generally applicable to this case.

[82] The parties are agreed that but for the solicitors negligence the trial of the plaintiff's application to the Work Health Court would have commenced on

30 June 1996. No submissions have been made as to whether there should be any different approach to the assessment of damages based upon the breach by the Alice Springs solicitors in contract and the Commission in tort. The distinction was of no consequence in the circumstances of *Perez* (per Wilson, Toohey and Gaudron JJ at p 363), and it seems that none of the parties here suggest otherwise. I will proceed on that basis.

[83] At p 366 in *Perez*, their Honours examined the process to be followed. The next consideration is whether the plaintiff would have succeeded in her application under the Work Health Act by proving a right to claim and a liability for the employer to compensate her. I have done that. There is no issue in this case as to whether the worker would get any award or continuing compensation (note the compulsory insurance provisions of the Act). The way is then open to proceed to an assessment of damages for the loss flowing to the plaintiff, the first component being the amount which the Work Health Court would be likely to have awarded on the material likely to have been before it upon the hearing of her application (I say "material" because that Court is not bound by the rules of evidence, s 110A(3)). But, as their Honours point out, that does not mean that evidence of events occurring after the notional trial date is excluded. Such evidence may be relevant in a number of ways. In the first place, it may assist this Court in placing itself in the position of the Work Health Court when a judgment was to be made of the likely continuing incapacity that would be suffered by the applicant and for which an order for ongoing compensation could be made

(see the reference to the words of Latham CJ in *Wills v the Commonwealth*). Later medical reports may assist a court in piecing together the case that could, but for the negligence, have been made out on the application. Evidence of subsequent events may also be tendered in the prosecution of a claim for aggravation of injury or other loss attributed to the negligence.

[84] Referring to *Kitchen v Royal Air Force Association* (1958) 1 WLR 563 at p 575 and p 576, Brennan J in *Perez* affirmed that if the plaintiff would have failed in the original action he has lost nothing by the negligence, if he would have succeeded, he has lost what he would have received at the time he would have received it, if it is doubtful whether or not he would have succeeded in the action, the court assessing the damages must assess as best it can on the balance of probabilities whether the plaintiff would have succeeded, and, if so, to what extent, or failed.

[85] As to the appropriate date at which damages should be assessed in a case such as this, Mason CJ in *Nikolaou* affirmed that it is the date upon which, in most cases, the personal injury action should have been determined. See also per Wilson, Dawson, Toohey and Gaudron JJ at p 404.

[86] As to the delay between the time at which the plaintiff should have received compensation had the matter been successfully fought in the Work Health Court and any award for damages now, the plaintiff submits that the effect of that delay be compensated for by the award of interest.

[87] As in a claim for damages at common law for personal injury the Work Health Court is required to assess the evidence as to any continuing or future loss as at the date of hearing. It does not, however, quantify that loss as a lump sum. Rather, it orders that periodic compensation payments for incapacity be continued at a rate which it fixes. Either the worker or the employer may seek to have such an order varied or terminated so as to take into account changes in the worker's rights or degree of incapacity thereafter.

[88] Assuming the worker would have succeeded in proving liability and incapacity as at mid 1996, this Court must do the best it can to assess the value of her loss of chance of obtaining an order for continuing payments of compensation, including in that assessment the hypothesis that such an award may have been lawfully varied or terminated. The Work Health Court's assessment would have been made upon material which it had accepted going to the issue and its award for ongoing compensation would not have been by reference to the probability of future events because of its jurisdiction to review its orders of that kind in the light of events established in the future.

[89] As I see it, this Court's task is to find what would have occurred in the Work Health Court after mid 1996 in respect of any ongoing order for compensation, including, where called for, an assessment of the degree of probability of events occurring which could have an effect on the

employer's liability in that regard. The parties have drawn my attention to *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638. That assessment may need to be made not only in respect of the period from mid June 1996 until now, but for the future.

[90] I now turn to consider the evidence relating to compensation under the Work Health Act to which the plaintiff could have been entitled but for the negligence of the defendants.

[91] She relies upon mental injury, and the diagnosis of the nature of that injury and its relevance under the Act was sought to be established by psychiatric evidence. It is principally based upon what the plaintiff told the psychiatrists. The accuracy of the recorded history dictates whether the psychiatric opinion is well founded and whether it should be accepted on the balance of probabilities.

[92] Statements made to psychiatrists may be given in evidence if they are the foundation of the psychiatric opinion, but the statements being hearsay, if not confirmed in evidence, the expert testimony may be of little or no value (*Ramsay v Watson* (1961) 108 CLR 642 at 648-649; *Gordon v R* (1982) 41 ALR 64).

[93] The plaintiff relied upon Dr McLaren. He first saw her on 4 June 1996, thirteen months after the assault at work, but thereafter on a number of occasions both for medico legal purposes and as a treating psychiatrist.

[94] His reports to the solicitors for the plaintiff are dated 7 June 1996, 22 May 1997, 30 May 1997 and 7 August 1998. They were based solely upon what the plaintiff told him. A further report of 21 January 1999 largely commented upon a report of Dr Kalnins of 18 December 1998. A note of 22 February 2000 was after seeing the plaintiff for the purposes of compiling "a final medical legal report". Dr McLaren's report of 20 March 2000 commented upon a report of Dr Kutlaca of 24 March 1999. Doctors Kalnins and Kutlaca prepared reports for the solicitors for the defendants.

[95] Dr McLaren's opinion was primarily directed towards an assessment of the plaintiff's mental state and its effect upon her incapacity and permanent impairment. The first goes to an entitlement to compensation for loss of earning capacity, and the second to an entitlement to compensation by way of a lump sum payment under s 70 to s 72 of the Act.

[96] As at 4 June 1996 Dr McLaren was of the view that the plaintiff was "not presently fit for work". He could not provide any indication as to when she would be fit. His opinion in May 1997 was that there was then a chance of about fifty percent that her symptoms would remain sufficiently severe to preclude full time employment "for years to come". By July 1998 it was

acknowledged that as Ms Un was able to "work full time under what were clearly difficult circumstance" she had largely recovered from the early psychological problems. However, some very unpleasant behaviour she had experienced in that employment "exacerbated her early symptoms which had not entirely ameliorated". I note that the experience of which the doctor speaks had nothing to do with her employer as at May 1995.

[97] The doctor pointed to some matters special to the plaintiff which had an effect upon his ability to successfully interview her. He criticised an interpreter who accompanied the plaintiff on the first two occasions. The plaintiff tended to give answers which she thought he wanted, on most of the interviews she was distressed and things got mixed up, there were what the doctor considered to be minor inconsistencies which required revision, but he said that they were not overriding. (I take it by that he meant that they were not such as to have had any significant effect upon his opinion).

[98] The plaintiff's history as given to the doctor in interviews after June 1996 included reference to other events which, in the doctor's opinion, affected her mental condition. As of May 1997 she had come to believe that she was under threat from relatives of the deceased, her next door neighbour had been murdered and she had lost her sense of security. She told the doctor she was constantly frightened which she said affected her ability to work. In his report of 7 August 1998 the doctor recounted the plaintiff's report to him concerning her distress at unwelcome advances from a fellow employer

of Toombridge, in a remote place where she was then employed as a cook. Her father had recently died.

[99] Referring to the June report, Dr McLaren confirmed that he meant that she was unable to work when he saw her, not that she was unfit to work during the whole of the period from May 1995. He inferred that unless other factors were involved, she would have been unfit for work during the whole of that period.

[100] Considering the plaintiff's work history from the date of accident as known to him, the doctor noted that according to her she had experienced difficulties in working at night, mixing with the general public and did not like walking to her job. He assumed that the assault of 1995 was causative of her incapacity to work.

[101] The plaintiff had been employed by Toombridge between 23 February 1998 and 28 April 1998 and then from 5 May 1998 to 15 July 1998. The doctor's oral evidence was that it was a very important job, it was an ordinary job, not sheltered or supported or protected in any way, she had competed for it and won it by her own efforts. "It means more or less back to normal in terms of her employment capacity". That came to an end in the circumstances set out above.

[102] The plaintiff had told the doctor, however, that if the employer had got rid of the man she would have liked to go back. (The similarity between that and those arising in May 1995 is inescapable). The doctor saw the plaintiff on 18 September 1998, it was not the subject of any report, but at trial he said that on occasions she said she was getting casual work and applying for full time work "so the indications are that by 18 September she was probably back to normal employment capacity". I consider that evidence shows there was no ongoing incapacity after that date at the latest.

[103] At trial Dr McLaren expressed the opinion in examination-in-chief that the plaintiff's mental state had largely returned to normal, but that she was left with minor restrictions on her activities due to a persistent fear state "which restricted her employment opportunities due to an inability to go back to work in the bush".

[104] On the issue of permanent impairment, Dr McLaren's evidence was that taking into account her reported restrictions on her social life, avoidance of the Indonesian community for fear of gossip, and her occasional anger and emotion, he put that impairment at ten percent of which the May 1995 events caused six percent in his opinion.

[105] On the whole of the evidence I find that the plaintiff failed to convey to Dr McLaren the truth concerning the events which led to the formation of his opinion.

[106] For example, the evidence shows the following employment pattern after May 1995:

(a) Upon her returning to Darwin from Alice Springs, the plaintiff looked around for a casual job, maintaining that she was very stressed. She had to support her young son. She obtained a job in about June as a cleaner working two hours per day from 5pm to 7pm five days a week, earning in the order of $12.50 per hour. She tried to get more work, but she said she could not because she was scared and depressed. Her tax records show that the cleaning job was from an unknown date in June 1995 until December of that year. During that period she had visited Kupang for a week and she went there two days after the expiry of that term of employment, returning in January 1996. The plaintiff spent a short term in hospital for reasons unrelated to the case.

(b) There is no evidence of her being employed between mid January 1996 until early June when she first saw Dr McLaren. In the meantime she had made two return journeys to Kupang, returning to Darwin from the last of them on 25 May 1996.

(c) Between 22 January 1997 and 1 February 1997 she was again in Kupang. In March 1997 she was employed at a bistro bar called Montego's under a CES job subsidy programme. There were other undefined periods of employment at Government House and the

Casino. The details are sketchy, but they seem to have been part time, not over an extended period, in the hospitality industry such as waitressing and as a bar attendant. There was a month working in a sandwich shop for Timorese friends from late April until early June 1997 for three or four hours a day.

(d) For three months, June to September 1997, the plaintiff was employed at a hotel in Daintree, Queensland. She said it was for work experience through CES, sometimes she was in the bar, sometimes in the bottle shop and other times in the kitchen.

(e) After returning to Darwin her employment appears to have reverted to part time jobs with caterers, and in early 1998 she returned to Kupang for a fortnight.

(f) With the help of a man she met at the casino on a social occasion she obtained a job with Toombridge commencing 23 February 1998 which lasted until 15 July 1998 when she left in the circumstances described above.

[107] The history of the plaintiff's work obtained by Dr McLaren was sorely deficient both as to her pattern of employment before and after May 1995. That deficiency causes me to call the doctor's opinion into question. Dr McLaren was reluctant to shift from the opinions based upon imperfect knowledge of the plaintiff's history, and in the light of the other psychiatrist evidence the value of his opinion is significantly diminished.

[108] The evidence of Dr Kalnins, psychiatrist, called by the first and second defendant was that he saw the plaintiff on one occasion, that is, on 3 December 1988. He took a history which is somewhat fuller than that taken by Dr McLaren, including as to her employment. She told him it had commenced in August 1995. He had the benefit of Dr McLaren's reports. He considered that for a period of two to three months after May 1995, the plaintiff would have been directly incapacitated for employment as a result of the psychological issues arising from the sexual assault. When informed in court that the plaintiff had undertaken part time work from June 1995, he thought that the impact of the assault would have been about a month or so.

[109] Dr Kalnins was aware of the circumstances surrounding the termination of the employment with PPI. He recorded that the plaintiff felt fearful and depressed and that her sleep was unsound with increasing dreams and nightmares. She told him those symptoms were continuing. Dr Kalnins also noted trauma in relation to marital relations which came to an end in 1993 with consequent depression and withdrawal from society. She told the doctor the Alice Springs job was the first one since the marriage break up.

[110] In cross-examination Dr Kalnins noted the plaintiff's persisting vulnerability and confirmed that the assault in May 1995 caused her an identifiable psychological injury. He accepted that the plaintiff could suffer emotional distress when reminded of the assault, such as during interviews and in preparation for this hearing. To that extent there was a residual

disability, but one which over time he thought settled and no longer troubled or interfered with daily life.

[111] Dr Kalnins opinion was that if the plaintiff was placed in the same setting as that prevailing in May 1995 "on a balance of probabilities, it is possible that that may cause some transient anxiety".

[112] Dr Kutlaca was called by the third defendant. He had seen the plaintiff for about one and a half hours in March 1999 and had initially been engaged to advise solicitors acting for the insurers of the employers of Toombridge in relation to the 1998 incident. That was in relation to a Work Health Claim made by the plaintiff arising from those events. In the preparation of his original report he was concentrating on that matter, but he had a history of the May 1995 event and noted particular detail of the sexual assault. He was later asked by the third defendant to consider the 1995 events in particular and was of the opinion that she suffered psychiatric injury.

[113] De Kutlaca said he experienced no problem with communication and did not need an interpreter. He conceded that in assessing a particular psychiatric condition seeing the patient as soon as possible after the event was an advantage as was seeing the patient on a number of occasions over a period of years as had Dr McLaren. The degree of disadvantage, however, did not cause a significant change in his opinion.

[114] He confirmed that for a person to take up a relationship after a sexual assault was normal. In general terms he agreed that a succession of events

such as those of 1993, 1995 and 1998 combine to place a person in a susceptible position.

Psychiatric Evidence Generally

[115] In this case the court was met with the usual difficulties arising from psychiatric, and other medical evidence sometimes, regarding the history obtained from the patient, the reliability and value of information received from others, different expert opinion, the length of time the medical practitioner had with the patient, how long after the events in question the patent was first seen and how often thereafter, the competing interpretation of various events in the life of the patient and their effect upon the patient's condition, and the differing weight to be placed on different events.

[116] The expert opinion of the psychiatrists based upon what they had been told by the plaintiff was significantly impaired because they had not been told everything which might have had an impact upon their assessment of the plaintiff's medical state at various times.

[117] I need not go into detail, but in so far as the psychiatrist's assessment of her incapacity was based upon the effect of the assault as conveyed by her to them, it was seriously flawed. For example, she did not give any evidence concerning difficulties in eating or losing weight, problems with sleeping or having dreams and nightmares. Ms Davidson, having enquired about the nightmares, was told by the plaintiff that she had not had any.

[118] It may not assume any great significance, but the plaintiff had no difficulty socialising with men. The plaintiff's claims to have been fearful and distressed is not borne out by the evidence of observers such as Ms Davidson and an entirely independent witness, Mrs Sotheren, called by the Commission. Mrs Sotheren was an independent witness who knew the plaintiff well. I found her to be a credible witness notwithstanding some inconsistencies in her evidence in relation to the timing of particular events. She was not demonstrated to have had any motive for telling untruths or otherwise giving evidence designed to attack either the plaintiff's credibility or the plaintiff's claims. The plaintiff called no evidence of the observations of others about her.

[119] In 1995 Mrs Sotheren was an operations manager for a cleaning company which employed the plaintiff. There were other people employed at the same time doing the same sort of work, both male and female. Ms Sotheren went to the place where the plaintiff was working a minimum of three times a week, saw the plaintiff regularly and described the plaintiff's outward behaviour as "happy, jovial, always smiling, cracked a joke". The plaintiff often took food that she had cooked to the workplace for her fellow workers. She had also on occasion given some food to Ms Davidson. On an occasion when the plaintiff went to Indonesia she arranged for her then current boyfriend, Gino, to take her place and when she returned from Indonesia resumed her employment. That employment came to an end at about the time the plaintiff undertook unrelated medical treatment. The plaintiff

sought to be re-employed in the same job, but there was then no vacancy. That was during 1996.

[120] Mrs Sotheren also observed the plaintiff at social functions during 1996 on three or four occasions. Mrs Sotheren's husband was in the army and she attended the functions with him. She observed the plaintiff dancing and having a good time with a male friend acting flirtatiously. That was at a party in November 1995. There was another occasion on the lawns of the Sergeants' Mess when she was wearing a revealing dress. Given the cross-examination of the plaintiff, there was introduced into her evidence in re-examination a dress which she said she was wearing on the occasion. Mrs Sotheren said it was not the one, and described the differences. She observed the plaintiff drinking wine during the course of that function.

[121] Mrs Sotheren described another event at a private residence near the barracks where she observed the plaintiff dancing on a table, with others. She was wearing a bikini, and during the evening she removed the top and jumped into the swimming pool. On that occasion she observed the plaintiff to be drinking either bourbon or rum and coke. She described other functions at which she observed the plaintiff to be present and the plaintiff's relationship with others on those occasions.

[122] The effect of her evidence was that the plaintiff was freely socialising with different people on different occasions, obviously enjoying herself.

Mrs Sotheren had made a statement concerning those matters in 1997. She had refreshed her memory from the statement.

[123] Some of the details surrounding the events described by Mrs Sotheren were accepted by the plaintiff in the course of cross-examination, others were not. In so far as there are differences between the plaintiff and Mrs Sotheren, and some of them are quite significant, I prefer the evidence of Mrs Sotheren.

[124] I have made due allowance in my assessment of the credibility of the plaintiff for some difficulty in communication between her and the psychiatrists in the English language, as I have done in relation to her evidence. It is clear that the picture which she portrayed to the psychiatrists regarding the effect of the May 1995 assault is not borne out when viewed in the light of other evidence as to her employment and social activities after that event. There was other evidence touching upon her credibility which did not show her in a good light. There was introduced into the evidence, without objection, evidence in the Work Health Court in relation to the application for extension of time. There again, she had failed initially to disclose her employment in the period immediately following the assault of May 1995 and in fact said that she had not worked or earned any income since that time. I do not accept her explanations for those untruths. On the occasion she swore the affidavit in question its contents had been interpreted to her in the Indonesian language. She tried to overcome that difficulty by complaining as to the quality of the interpreting service, but I reject that.

Her evidence before that Court was the same as the history which she had given to Dr McLaren.

[125] I consider that the plaintiff's active knowing non-disclosure of her return to work shortly after coming to Darwin in May 1995 was brought about by a consciousness that to have revealed it would have done harm to her claim for compensation under the Work Health Act, either going to the question of her incapacity or as to the amount of compensation which might be awarded. Either way it does her no credit. Further, the plaintiff's fervent indignation in the witness box with anything suggesting improper behaviour on her part appeared to be put on and not genuine and that is reinforced by my findings regarding the observations of Mrs Sotheren. The plaintiff's behaviour may well have been brought about by a desire to shield her reputation or character from public exposure, but the evidence of others which I accept shows that she is not the demure person with high moral standards which she at times sought to portray. Nor was she fearful and distressed as she claimed. Her credibility in relation to largely irrelevant matters caused me to examine her evidence on important issues with great care.

Assessment of Damages

[126] I am satisfied the plaintiff has established that she suffered some loss entitling her to an award beyond nominal damages.

[127] The plaintiff submits that the assessment of damages should proceed upon the basis that the evidence available to the plaintiff at trial before the Work

Health Court and that the evidence which might have been available to PPI at that stage is not relevant. It is said that it only becomes relevant to the assessment of the degree of probability of the plaintiff succeeding as to her full claim. The submission proceeds to deal with the evidence leading to a formulation of quantum of her loss based upon incapacity for a period commencing on 3 May 1995 until about mid June when she commenced part time employment. It is submitted that partial incapacity then continued to a notional trial date and beyond. Detailed calculations are provided of the total value of the notional award for compensation for incapacity as at the notional trial date amounting to over $600,000.

[128] The Court is then invited to assess the degree of probability of the plaintiff achieving the notional award. A range of discounts is suggested by reference to cases in which the loss was a loss of a chance to pursue an action at common law for personal injury where issues such as contributory negligence and contingencies intrude.

[129] The first thing to be said is that the calculations predicated upon continuing incapacity to age 65 is a wholly unreliable way in which to approach the loss of assessing the value of the loss of chance in this case. Indeed, in closing address, counsel for the plaintiff said that her case was that as of February 1998, at the latest, she was in a condition to return to full time employment. But I would put the effective date at somewhat earlier. It was also submitted that the plaintiff still suffers from residual disability, but that

that did not affect her capacity to sell her labour on the open market. If by that it is suggested that there is any residual incapacity, I do not agree.

[130] In a relatively straightforward case on damages such as this, the broad brush approach which is urged is best applied by simply finding whether there would have been an award made in the Work Health Court in June 1996 for any period prior to that date and whether there would have been any order for continuing payments by way of compensation for incapacity thereafter. That course is proposed by the defendants.

[131] I consider that the plaintiff would have succeeded in demonstrating total incapacity for a period covered by the medical certificate, and after taking into account the evidence of Dr Kalnins, the period would have been extended by about a further month. Beyond that the evidence does not show, on the balance of probabilities, that the plaintiff was incapacitated. She was not employed full time or at all for many periods after that, but as of June 1996 the Court could not be satisfied that that was due to relevant incapacity. As at that date there was no basis upon which the Court could have made an order for continuing payment of compensation for incapacity.

[132] That a person injured at work may not be employed for periods thereafter is not proof that the person suffered incapacity arising from the injury. Obviously, there may be other reasons. On the other hand, the ability to engage in paid employment demonstrated by doing so is evidence going to incapacity. It may go so far as to show that there is none. That the

employment may have been wholly or in part job training under a government sponsored employment scheme does not seem to me to be to the point. It is the person's capacity to undertake the training and do the job which is material. There is no evidence in this case that the plaintiff received special treatment as a worker suffering from incapacity by any of her employers after May 1995.

[133] The following is my assessment of the plaintiff's loss:

- Her normal weekly earnings prior to 1 May 1995 amounted to $924.
- Allowing eight weeks for total incapacity to 28 June, amounts to $7,342.

[134] From that is to be deducted her earnings of $120 per week for approximately two weeks of $240, leading to an award of compensation for incapacity of $7,102.

[135] Medical expenses are agreed at $317.93

[136] The plaintiff claims the legal costs associated with her application to the Work Health Court and on appeal for an extension of time under the Work Health Act. In my opinion those costs are properly recoverable in these proceedings. Her own costs in the Work Health Court amounted to $10,000 and on appeal, $8,000, and there was ordered to be paid by her to PPI its costs in the Work Health Court of $6,515 and upon appeal, $7,564, amounting in all to $32,079.

[137] The plaintiff also claims the loss of the chance to obtain an award for permanent impairment (s 70 to s 72). "Permanent impairment" means an impairment assessed in accordance with the prescribed guides. There is no evidence as to what is prescribed. An award under this head is not made after assessment by the Work Health Court, but by a medical practitioner or a panel of three medical practitioners. For this Court to attempt to make an assessment under this heading would be entirely speculative. There is some evidence from Dr McLaren which might go to support such a claim, but the preponderance of evidence indicates that any ongoing impairment would only arise in particular circumstances and would then only be transitory.

[138] The plaintiff also seeks a moderate award for damages for disappointment and distress associated with the breach of contract (*Heywood v Wellers* (1976) 1 QB 446 referred to in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344). The plaintiff gave no evidence to support such a claim.

Interest

[139] Interest at the rate of 8% is to be paid as from June 1996 to date of judgment on the award for the loss of chance and from the date upon which she made payment of each item of costs outlayed by her.

[140] Judgment for the defendants
