MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Michel v Broadlex Services Pty Ltd**
Citation:	**[2020] ACTMC 27**
Hearing Dates:	1 September 2020
Decision Date:	11 December 2020
Before:	**Magistrate Morrison**
Decision:	See paragraphs [98] and [99]
Catchwords:	**CIVIL LAW** – NEGLIGENCE – Personal injury – plaintiff was injured at work after rushing to answer phone – whether defendant breached its duty of care where foreseeability of risk conceded – whether risk of harm was insignificant – whether reasonable person would have taken precautions - relevance of circumstances giving rise to the risk of injury being recurring circumstances – factual causation
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT), ss 42, 43, 45
Cases Cited:	*Wyong Shire Council v Shirt* (1980) 146 CLR 40
Texts Cited:	*Review of the Law of Negligence* (Final Report, September 2002)
Parties:	Daina Michel (Plaintiff) Broadlex Services Pty Ltd (Defendant)
Representation:	**Counsel** T Crispin (Plaintiff) A Muller (Defendant) **Solicitors** Capital Lawyers (Plaintiff) MinterEllison (Defendant)
File Number:	CS 189 of 2018

MAGISTRATE MORRISON:

Introduction

1. These proceedings were remitted for rehearing following a successful appeal by the plaintiff against a finding that her injury was not reasonably foreseeable. That finding resulted in the plaintiff's claim being dismissed.

2. By agreement between the parties, the rehearing proceeded by way of admitting into evidence the transcript of the earlier hearing on the basis that it was to be treated as if the testimony transcribed had been given before me. An affidavit by the plaintiff (filed in connection with an interlocutory application but relied upon at the first hearing) was read in the rehearing by consent. In addition, further oral testimony was given by the plaintiff, and for the defendant by Mr Todoroski and Ms Guy. The report of Dr Le Leu was also received by consent.

3. The dispute between the parties is of relatively short compass.

4. The plaintiff was an office manager for a cleaning company. She was injured at her workplace in Fyshwick on 13 January 2015. She says that she 'rushed' to get back to her desk to answer the phone at a time when she had been working in a back room. She says that she rolled her ankle as she arrived at her desk and leaned over to pick up the phone. She says that her duties required her to be away from the reception desk which meant that she needed to rush to get back there whenever the phone rang. She says that she had sometimes missed calls and that they were diverted to the defendant's head office in Sydney, following which she had been reprimanded for missing them. She says that she had asked her manager Mr Todoroski for what I refer to in these reasons as a headset, but that her request had been refused. She says that she always tried to answer the phone within two rings, but that she had never been told that doing so was expected of her by her employer. No other person was present when the plaintiff was injured.

5. In the course of both the first hearing and the re-hearing, reference was variously made (by both Counsel and by the plaintiff) to the plaintiff's request having been for a cordless phone, a headset, a cordless headset and an answering machine. Mr Todoroski's testimony was that he did not think that an answering machine was mentioned. I refer in these reasons to what was requested as a headset. I do so for convenience only. I do not intend my doing so to be seen as a finding that the plaintiff's request was necessarily in those precise terms.

6. The plaintiff says that the defendant breached its duty of care to her and that she suffered loss and damage as a result.

7. She says that the evidence establishes a risk of injury to her when moving from some other place within the office to her desk to answer the phone and that a reasonable employer would have taken the precaution of providing her with a headset which enabled her to answer calls without returning to her desk.

8. She says in particular that for the purposes of considering what were reasonable precautions regard must be had to what she says she told Mr Todoroski and his refusal to acquire a headset.

9. Quantum has been agreed but the defendant denies having breached its duty to the plaintiff.

Findings of fact

10. Mr Todoroski was, and still is, the defendant's ACT branch manager at the Fyshwick premises. He was in that position when the plaintiff commenced her employment with the defendant.

11. Mr Todoroski says that he was present at the workplace about four days out of five when the plaintiff was present, but that he was not there for the whole of those days.

12. He gave evidence about the workplace layout and processes, some of it by reference to a plan which he had drawn (exhibit D1). His testimony was in these terms:

    (a) The reception desk was about eleven metres from the back room;

    (b) The incoming call could be answered from other workstations closer to the back room – about seven metres from it;

    (c) The plaintiff could have used any other closer phone to answer incoming calls;

    (d) He had never instructed the plaintiff to answer calls within a specified number of rings and had never reprimanded her for missing calls;

    (e) The plaintiff had asked him about having a headset supplied. He declined the request. He said the purchase would not have been approved by head office because 'we weren't getting enough phone calls to warrant a headset'.[1]

13. Mr Todoroski gave his evidence in a straightforward manner. He made appropriate concessions including that the plaintiff had approached him about supplying a headset. He was largely unshaken in cross examination.

14. Ms Guy had been the plaintiff's replacement when she left her employment with the defendant and she remains in that position. She gave evidence about processes within the workplace and the like during the period of her employment. Mr Crispin makes the common-sense observation that her testimony is only about processes during the period of her employment which post-dated the plaintiff's accident. That is of course correct but, in context, it does not follow that her testimony is irrelevant. Mr Todoroski gave evidence that that the level of business activity in the period when the plaintiff suffered her injury was generally the same as the level of business activity in the period since.

15. Following the successful appeal, it was not pressed in submissions that the risk of harm to the plaintiff was not foreseeable for the purposes of s43(1)(a) of the *Civil Law (Wrongs) Act 2002.* I find that it was.

16. The defendant admits that it owes a duty of care to the plaintiff. The defendant's arguments can be summarised in this way:

    (a) The identified risk of injury to the plaintiff when moving from some other place within the office to her desk to answer the phone was insignificant; and

    (b) In any event, a reasonable person in the defendant's position would not have taken the precautions pressed by the plaintiff; and

    (c) In any event, given the circumstances of the injury, any negligence on the part of the defendant was not a necessary condition of the happening of the

[1] Transcript of proceedings, 26 September 2019, p 50.

harm for the purposes of section 45 of the *Civil Law (Wrongs) Act 2002*. I return to this submission in more detail later.

17. In the end result there was some, but not much, dispute about the number of phone calls which the plaintiff was required to answer in the course of her duties. The finding I make is that her duties required her to answer phone calls and that the number of such calls was, on average, about five per day. I am able to make that finding based on the ranges of estimates given in the oral evidence and submissions without making any findings about the credibility or reliability of any witness.

18. There are disputes about other matters of fact which do call for assessments of credibility and reliability.

19. I did not have the advantage of hearing the plaintiff give her testimony at the first hearing. I have however carefully read the transcript of that hearing. I was not invited by the parties to listen to the audio. I did have the advantage of seeing the plaintiff give her evidence in court at the re-hearing.

20. She presents as an intelligent and articulate young lady. She gave her answers in a straightforward manner.

21. Some aspects of her evidence do call for careful consideration.

22. The plaintiff had said that she was in the back room organising 'the uniform cupboard' when the phone rang. She went on to say '[t]hat was a frequent task within the position I held'.[2] In her testimony about how frequently she was required to perform those duties the following exchange took place:

> MR MULLER: How many times a year did you receive a delivery of uniforms?---Would - it would depend on, like, every season obviously we'd order the T-shirts or the jumpers and stuff so that was always quite a big one, but given that there was a couple of hundred cleaners we supplied uniforms for, it was maybe once every six weeks or maybe a little bit more, give or take what was going on.[3]

23. Questions were asked of both Mr Todoroski and Ms Guy about uniform deliveries. I had the benefit of an explanation from Ms Guy about the nature of the business and its supply of uniforms to employees and contractors. Mr Todoroski had said that he estimated there were uniform deliveries every six months. For her part Ms Guy said that there had only been two deliveries in the five years she had been in the job and that, on her check of the business records, the last delivery before the plaintiff's accident was in December and was invoiced on 15 December.

24. In submissions, the discrepancy between the testimony of Mr Todoroski and Ms Guy was attributed to the not unreasonable suggestion that it was Ms Guy's role to order the uniforms, such that her estimate is likely to be more accurate than Mr Todoroski's. The plaintiff's assertion of uniform deliveries taking place every six weeks does seem extraordinary. I prefer and accept the testimony of Ms Guy. Against the background of that testimony, and even accepting that there is a possibility of deliveries as frequently as every six months in accordance with the testimony of Mr Todoroski, the plaintiff's testimony that deliveries took place 'maybe once every six weeks or maybe a little bit more…' must be rejected. Having rejected

[2] Affidavit affirmed 9 May 2019, 1 [8].
[3] Transcript of proceedings, 26 September 2019, 24.

that testimony, there is no apparent basis for acceptance of what she goes on to say about the folding and organising of the uniform cupboard being a 'frequent task'.

25. The plaintiff was also questioned about using a phone closer than the one at her reception desk. The following exchange took place during the course of cross examination:

> MR MULLER: And what I also want to suggest to you is that there was another phone available to you about halfway along through that distance about 5 metres from the storeroom?---However, if you take into account that I would then have to turn to go to that desk to get to that phone, the distance ends up being roughly about the same.
>
> This was just an open plan office, though, wasn't it, as you've drawn it?---Yes, just, it's one big room but there's partitions and stuff around the other two desks on the right-hand side.
>
> Sure, but as you've drawn it, what I'm suggesting to you is that about where you've said the phone possibly here on Ebert's desk, there was in fact a phone on that desk and it was about 5 metres from the uniform storeroom?---Yes, but what I'm saying is that if I had to turn to go to that desk that's still going to be relatively the same distance.[4]

26. At the rehearing, a plan prepared by Mr Todoroski was put into evidence (exhibit D1). It included measurements. Its accuracy was not challenged in cross examination, although it was accepted that there had been some layout changes which are irrelevant for present purposes. That plan shows a distance of eleven metres from the back room to the reception desk and a distance of seven metres from that same point to the desk with the alternate phone. Witnesses' estimates of distance can be notoriously unreliable without necessarily reflecting on the reliability of other evidence from the same witness – but, of course, what is important in the present context is the estimate of the relativity between the distance to the reception phone and to the alternate phone. It is apparent that they are not accurately described by the plaintiff when she says they are 'relatively the same distance'.[5]

27. In the course of answering a question about her request for an answering machine or headset the following exchange took place:

> MR MULLER: You would agree with this proposition, wouldn't you, that two, three, four, five calls a day is not a phone load that would warrant an answering machine or a headset?---Well, again, I mean, there would be more than five calls a day, and if I'm expected to be out the back in the storeroom, quite often up a ladder, holding boxes, putting uniforms up there, also in the room where the - the storeroom where I've got chemicals and other things stored in there, I'd have to be in there, up ladders quite often. In the other storeroom, opening and closing the roller door for the supplies to deliver things, and that storeroom had boxes all over the joint, so to get in and out of that room was a bit of an obstacle course. So - and you know, I took pride in my job so I didn't want to miss phone calls.[6]

28. The topic of away-from-desk duties and the use of a ladder in the backroom was revisited in the course of cross examination at the rehearing. The plaintiff gave evidence of the occasions on which she needed to use the ladder but even she struggled to describe a level of use which would justify her earlier use of the expression 'up ladders quite often'. In addition, the plaintiff gave evidence of using

[4] Transcript of proceedings, 26 September 2019, 25.
[5] Transcript of proceedings, 26 September 2019, 25.
[6] Transcript of proceedings, 26 September 2019, 26.

the ladder to place items on the top shelf and also the second from top shelf of the storage shelves in the backroom. Ms Guy produced in evidence a photograph of the shelves with a tape measure. Its accuracy was not challenged. It is apparent that no ladder is required to access the second from top shelf.

29. I have already referred to my finding that the number of calls was, on average, about five per day. In her affidavit, the plaintiff referred to her request for a cordless phone or an answering machine. Her reason for doing so is expressed there in these terms:

> This was to avoid calls that would potentially go unanswered in the Canberra office, being transferred through to the head office in Sydney which would always result in me being reprimanded for not being at my desk to answer the frequent calls the office received.[7]

30. On the basis of the findings I have made, the plaintiff's description of the calls to the Canberra office as being 'frequent' cannot be accurate.

31. Against the background of the features of the plaintiff's evidence to which I have referred, I was left with the impression that she was at times exaggerating and to some extent tailoring her evidence in a way that she thought best suited her case.

32. I turn to consider the evidence about what was actually said by the plaintiff to Mr Todoroski at the time of the request for what I have referred to in these reasons as the headset.

33. The substance of the conversations was touched upon in the affidavit of Ms Michel,[8] her evidence in chief on 25 September 2019,[9] in cross examination and re-examination on 26 September 2019,[10] and in Mr Todoroski's evidence in chief and cross examination on 26 September 2019.[11] In addition, questions were asked of Mr Todoroski by his Honour Magistrate Lawton on 26 September 2019, which led to the following exchange:

> Okay, but why did she want a headset?---I think it was so she could continue working.
>
> Yes, as best as you recall, what did she say was the reason for her asking for the headset?---Well, it was so she could continue working at her desk while taking calls.
>
> All right. So nothing about, 'It'd be easier for me to answer the phone while I'm in the store - I could answer the phone in the storeroom instead of running to the phone to answer it'?---I don't believe that was her reason for asking.
>
> Well, do you recall her saying anything like that?---No, I don't.[12]

34. At the re-hearing the evidence received on the subject was limited to the following exchange in cross examination of Mr Todoroski:

> MR CRISPIN: And you accept, don't you, that she asked you, on I believe last time you said at least two occasions, **for a telephone headset to assist with answering the phone while she was moving around the office?**---Yes. [emphasis added][13]

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[7] Affidavit affirmed 9 May 2019, 2 [8].
[8] Affidavit affirmed 9 May 2019, 1-2 [8].
[9] Transcript of proceedings, 25 September 2019, 13.
[10] Transcript of proceedings, 26 September 2019, 26; 30.
[11] Transcript of proceedings, 26 September 2019, 50; 52; 53-56.
[12] Transcript of proceedings, 26 September 2019, 58.
[13] Transcript of proceedings, 1 September 2020, 40.

35. No explanation was offered for the apparent change in Mr Todoroski's recollection of the conversations and the topic was not revisited in re-examination.

36. The written submissions of Mr Muller at the rehearing include the following:

> To the extent that the plaintiff asserts, inter alia;-
>
> …
>
> > that her reason for requesting a headset or answering machine was because she was out the back on a regular basis;
> >
> > it is submitted that her evidence should not be accepted where it is in conflict with the evidence of Mr Todoroski and Ms Guy, and the evidence given on behalf of the defendant should be preferred.'

37. Expressed in those terms, the submissions suggest by implication a more fundamental contest about the evidence on the topic than what resulted, but they may have been prepared before the evidence at rehearing was completed.

38. In the end result, I accept the evidence to the effect that the plaintiff told Mr Todoroski on at least two occasions that she wanted a headset to assist with answering the phone while she was moving around the office.

39. I mention at this point an exchange between his Honour Magistrate Lawton and Mr Todoroski at the first hearing. It took place at the end of Mr Todoroski's evidence during the first hearing and appears at page 58 of the transcript:

> HIS HONOUR: 'In the incident form you filled out or the minor incident investigation manager's report you describe the injury as an 'inversion sprain, right ankle'. I take it that's something that was relayed to you by Daina from what the doctor had said?---That's correct.
>
> And the cause of injury you described as, 'Rushing to get telephone call', and again that was something Daina described to you because you weren't there?---That's right.
>
> When it happened. 'Action needed to be taken to prevent nature of incident in future. Daina advised not to rush to the phone' is what you've written in that report?---That's correct.
>
> In your time working with Daina prior to this incident did you ever see her rush to answer the phone?---Possibly on occasion, yes.
>
> All right. Rush from where to where?---Within a matter of metres from the back or in case she was out the front and heard the phone and has come in.
>
> All right?---But normally one - if I was in the office I would pick it up if I knew that she wasn't close to the phone.'[14]

40. The point was not pursued further in cross examination either at the time or at the re-hearing.

41. There is a dispute on the facts about the plaintiff being reprimanded for failing to answer calls promptly.

42. I have already referred to that part of the plaintiff's affidavit where she says about her request for a headset:

[14] Transcript of proceedings, 26 September 2019, 58.

> This was to avoid calls that would potentially go unanswered in the Canberra office being transferred through to the head office in Sydney which would always result in me being reprimanded for not being at my desk to answer the frequent calls the office received. [15]

43. I have found that on average the number of calls was about five each day. I have already referred to what I regard as exaggeration on the plaintiff's part in her reference to 'frequent calls' to the office. In addition, by the time of the re-hearing the plaintiff accepted that there was no call forwarding system which automatically redirected unanswered calls to the head office in Sydney.

44. As I understood the plaintiff's testimony, however, it was that she knew there had been complaints to the Sydney office about the Canberra phone going unanswered, and she presumed that to be because at least some of those unanswered callers subsequently made contact with the Sydney office. Despite that, against the background of the other evidence, her statement in her affidavit that unanswered calls 'would always result in me being reprimanded for not being at my desk'[16] is also likely to be an overstatement.

45. The plaintiff did assert that she had been reprimanded for not answering the phone, including by Mr Todoroski. He denied having done so. Against the background of my conclusions about the reliability of her evidence generally I do not accept that she was reprimanded as she says she was.

46. Having said that, the evidence does establish that answering the phone was an important part of the plaintiff's job. It is succinctly dealt with in the following exchange in cross examination at the re-hearing:

> And I believe, on the previous occasion, you gave evidence that you accepted that the efficient answering of phones was important to the running of the workplace?---Yes.
>
> You wouldn't have been particularly happy with Daina if she had been missing phone calls, would you?---No.
>
> And Daina was aware – I'm sorry, I withdraw that. As far as you know, Daina was aware that that was something that she was expected to be on top of?---Yes. [17]

47. The extent to which the plaintiff's duties required her to be away from the reception desk was another matter in dispute. The very modest number of incoming calls each day is a good indicator that she had extensive other duties – that is other than answering the phone.

48. In the course of cross examination of Mr Todoroski the following exchange took place:

> MR CRISPIN: Now, you accept, don't you, that Daina's duties required her to move around the office on a reasonably frequent basis?---Yes.[18]

49. That response is consistent with what were apparently the very broad range of the plaintiff's duties as office manager of a small office.

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[15] Affidavit affirmed 9 May 2019, 2 [8].
[16] Affidavit affirmed 9 May 2019, 2 [8].
[17] Transcript of proceedings, 1 September 2020, 39.
[18] Transcript of proceedings, 1 September 2020, 40.

50. Mr Crispin's question was framed only in terms of a requirement to 'move around the office'. Expressed in that way the answer is not particularly helpful. It would not be appropriate to read into the question that it necessarily meant, or to infer that the witness accepted in his response that it necessarily meant, a requirement to move around the office to a position materially distant from her usual desk or phone.

51. I have already recorded my conclusion about the frequency of uniform deliveries. The evidence did not explore in detail the period of time needed for away-from-desk work at the rear of the office for each delivery. I infer that the work involved sorting, folding and storing the uniforms. It is apparent that the office storage space is not vast – which limits the number of uniforms which could be stored. Mr Todoroski referred to two or three boxes of uniforms per delivery. The evidence supports a conclusion that the period of away-from-desk work required at the rear of the office for each uniform delivery was not great.

52. The plaintiff also gave evidence about the frequency of the need to access what I will call the front storage area. It is the part of the premises which was accessed from outside by a roller door. It could also be accessed from inside the premises and was not so distant from the reception desk.

53. As I understood the plaintiff's evidence, it was that she had to get up from her desk to unlock the roller door to allow persons to access that area, and also to tidy it up after others had been in there to return things or for other deliveries.

54. The plaintiff's testimony initially left the impression that the area was somewhat chaotic. She said that things were 'all over the place'. She did however go on to concede that she had, as part of her role, organised its layout and that what was eventually required of her was limited to tidying up on an as required basis.

55. As to the frequency of the need to enter the storage area, the plaintiff had at first said that she would do so on a daily basis. Ultimately the following exchange took place in cross examination:

> You're not suggesting that you were in there on a daily basis having to reorganise the room though, are you?---I wasn't reorganising on a daily basis but I would be probably tidying. I wouldn't say all the time on a daily basis, but yes.[19]

56. I take the plaintiff's response as agreeing that her need to enter the front storage area was not always on a daily basis. The overall thrust of her evidence was that, having organised the layout of the area, her need to enter there to arrange access for others or to tidy it up was for relatively modest periods of time.

57. In addition to those duties on which attention was focussed in the evidence, common sense dictates that there would have been other duties to be performed by the plaintiff requiring her, from time to time, (but again not for lengthy periods of time) to be away from her desk at reception and her usual phone.

58. I turn to deal with the evidence about the option of answering incoming calls at an alternate phone.

59. The plaintiff accepts that there were alternate phones but explained that she did not use them because of the possible need to access her computer for the purposes of answering any enquiry. The evidence in the defendant's case is that it is possible to

[19] Transcript of proceedings, 1 September 2020, 22.

access each of the computers where the alternate phones are situated. That proposition was never put to the plaintiff, and it does appear that the evidence in the defendant's case about that point relates to the present arrangements and not necessarily what was in existence at the time of the injury.

60. I have referred to the evidence about the number of calls per day and the requirement for the plaintiff to be away from her desk to perform her duties.

61. The number of calls per day is low. However, what is most relevant for present purposes is not so much simply the number of incoming calls, but rather the overlap of the occasion of the incoming calls and the requirement for the plaintiff to be away from her desk – that is, the frequency of the plaintiff needing to return to the desk at reception to answer an incoming call.

62. There is no direct evidence going to the number of occasions of that overlap per day. It cannot logically be more than, on average, five per day. Mr Todoroski's acceptance that the plaintiff's duties required her to move around the office 'on a reasonably frequent basis'[20] is, on its face, about the frequency of her absence from her usual desk at reception, and does not directly address the duration of her combined absences. That concession by Mr Todoroski does however affect the likelihood that the plaintiff would in fact be away from her usual desk at reception (that is - somewhere else in the office) on the occasions of incoming calls. Against that background, I am satisfied that the plaintiff's need to return to her desk at reception to answer incoming calls, whilst not frequent, was at least not uncommon. It was obviously not a one-off occurrence.

63. The evidence also supports a conclusion that, while the plaintiff would not have always been so far from her usual desk at reception that she needed to 'rush' back to it to answer the phone, clearly sometimes she did need to do so if it was to be answered within a reasonable time.

64. Against the background of the above, the findings of fact I make are as follows:

    (a) The plaintiff was injured when she rolled her ankle and foot immediately after moving quickly from the rear storage room to her desk at reception to answer her phone, and while in the process of answering that phone. That was a distance of a little over eleven metres.

    (b) She was at the time wearing flat sandals. Her footwear did not contribute to the cause of her injury.

    (c) The plaintiff's duties required her to answer incoming telephone calls. The efficient answering of incoming calls was an important part of her job.

    (d) In performing her duties, the plaintiff was:

        (1) from time to time (but not frequently or for lengthy periods of time) in or about the rear storage room, which is some eleven metres from her desk at reception and usual phone;

        (2) from time to time (but something less than daily and again not for lengthy periods of time) in or about the front storage area the entry to which is adjacent to her desk at reception and usual phone.

[20] Transcript of proceedings, 1 September 2020, 40.

(e) The plaintiff had a broad range of duties as office manager in addition to those involving access to the front and rear storage rooms. In combination the performance of her duties required her to move around the office 'on a reasonably frequent basis'. [21] As a matter of logic, she was away from her reception desk and usual phone whenever she was moving around the office. She would not have always been so far from her usual desk at reception that that she needed to 'rush' back to it, but clearly sometimes she did need to do so if the phone was to be answered within a reasonable time.

(f) Those occasions when the plaintiff was away from her usual desk at reception and needed to rush back to answer calls were not frequent but were not uncommon.

(g) There were at times boxes or items of equipment which the plaintiff needed to move around to get back to her desk at reception from the front storage area, but they were not obstacles which interfered in a material way with her ability to do so.

(h) There was only an occasional need for the plaintiff to use a ladder in performing her duties.

(i) The plaintiff had never been instructed that it was necessary to answer calls within a certain period of time or within a specified 'number of rings'.

(j) The defendant chose to answer incoming calls by way of the phone at the reception desk because it permitted her to access her computer if that was necessary for the purpose of answering any query.

(k) Mr Todoroski had on occasions seen the plaintiff rush to answer the phone at her desk from elsewhere in the office.

(l) The plaintiff told Mr Todoroski on at least two occasions that she wanted a headset to assist with answering the phone while she was moving around the office.

(m) Mr Todoroski considered the plaintiff's request and decided that the number of incoming calls did not justify acquisition of a headset.

(n) The plaintiff had not been reprimanded for missing incoming calls.

Assessment of liability

65. I turn to the submissions on the law.

66. Mr Crispin for the plaintiff framed his submissions in terms of the duty of an employer to take all steps reasonably practicable to prevent workers from being injured.

[21] Transcript of proceedings, 1 September 2020, 40.

67. The duty may well be expressed in that shorthand fashion, but it is important not to lose sight of the language of Part 4.2 of the *Civil Law (Wrongs) Act 2002.* In summary:

    (a) The standard of care required is that of a reasonable employer in the defendant's position who was in possession of all of the information that the defendant either had, or ought reasonably to have had at the time.

    (b) If an employer has failed to take precautions against a risk of harm, they are not negligent unless:

        (1) the risk was foreseeable;

        (2) the risk was not insignificant; and

        (3) in the circumstances, a reasonable person in the defendant's position would have taken those precautions.

68. In deciding whether a reasonable person would have taken such precautions the Court is directed to consider a range of factors including:

    (a) the probability that the harm would happen if precautions were not taken;

    (b) the likely seriousness of the harm;

    (c) the burden of taking precautions to avoid the risk of harm;

    (d) the social utility of the activity creating the risk of harm.

69. The defendant does not contest that there was a foreseeable risk of the plaintiff being injured when moving from the backroom to the reception desk to answer the telephone.

70. The case has been conducted on the basis that the precautions against the risk of harm which the defendant failed to take comprise the supply to the plaintiff of what I have referred to as a headset.

71. What falls for determination is whether the risk of harm was insignificant and whether a reasonable person in the defendant's position would have taken the precautions against that risk of harm.

72. Some reference to the relationship between the requirement that the risk be not insignificant and that a reasonable person would have taken precautions is useful.

73. The expressions used in the *Civil Law (Wrongs) Act 2002* have their genesis in the recommendations of the *Review of the Law of Negligence: Final Report (2002)* ('the Ipp Report'). The relationship to which I refer is dealt with in the Ipp Report in the following terms:

> 'The fact that events of very low probability can be reasonably foreseeable creates a problem. While it seems acceptable to say that a person should not be liable for failure to take precautions against unforeseeable risks, it may not be reasonable to expect a person to take precautions against a risk of very low probability simply because it was foreseeable. In order to overcome this problem, the High Court in Wyong Shire Council v Shirt (1980) 146 CLR 40 held, in effect, that a person cannot be held liable for failure to take precautions against a risk that could be described as 'far-fetched or fanciful', even if it was foreseeable. What this amounts to saying is that there are some risks that are of such low probability that the reasonable person would ignore them, regardless of

> the balance of the other considerations in the negligence calculus — that is, no matter how serious the harm was likely to be if the risk materialised, no matter how cheap or easy it would have been to take precautions that would have prevented the risk materialising, and no matter how socially worthless the risk-creating activity was.
>
> It is extremely important to note, however, that the mere fact that a foreseeable risk was not far-fetched or fanciful says nothing about whether precautions to prevent the risk materialising ought reasonably to have been taken, and if so, what precautions. These issues are resolved by asking what precautions the reasonable person would have taken, and this question is answered in terms of all four elements of the calculus. The probability of the risk — however low or high it might be — is only one element in the calculation.'[22]

74. The threshold that the risk of harm is not insignificant is a relatively low one, albeit higher than that expressed in the language employed in *Wyong Shire Council v Shirt.*[23] On any rational assessment the risk of harm to the plaintiff was not great, but, on balance, I am persuaded that it was not so low as to be properly described as insignificant.

75. However as explained above, the mere fact that the risk of harm was foreseeable and not insignificant says nothing about whether precautions ought reasonably to have been taken.

76. My findings include that the plaintiff told Mr Todoroski on at least two occasions that she wanted a headset to assist with answering the phone **"while she was moving around the office"** [my emphasis], and that Mr Todoroski had seen her on an unspecified number of occasions rush to answer the phone.

77. The plaintiff had not received any employer instruction (or reprimand) which obliged her to rush to answer the phone. Despite that, I accept that she reasonably felt the need to answer the phone promptly as part of the proper performance of her duties. She could have answered a phone which was materially closer (seven metres as against eleven metres), albeit in circumstances where she could not have accessed her computer if any enquiry required her to do so.

78. The defendant's submissions drew attention to what is the low number of incoming calls per day. Five calls per day, spread over the usual working day of, say, seven and a half hours, equates to one call every hour and a half or so. There is a perhaps superficial attraction in reasoning that such a low frequency of calls does not reasonably call for any action by an employer to discharge its obligations.

79. Proper consideration of the risk, however, calls for consideration of more than just the number of calls. I have concluded that the occasions when the plaintiff was away from her usual desk at reception and needed to move back to it to answer calls were not frequent but were not uncommon.

80. The plaintiff's desire not to miss incoming calls was not unreasonable. It was beneficial to the employer and was expected of the plaintiff, even though she had not been reprimanded for missing calls. Mr Todoroski's gave evidence that he had sometimes answered the phone, and that others could do so "if somebody calls while the receptionist is on the phone". That evidence did not address others answering the phone if the receptionist was away from her desk. The evidence

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[22] *Review of the Law of Negligence* (Final Report, September 2002) 104-105 [7.12-7.13] ('Ipp Report').
[23] (1980) 146 CLR 40.

does not establish that the duties of any other employee required them to answer incoming calls if the Plaintiff was away from her desk or that they ever did so. It is also apparent from the tenor of the evidence that the plaintiff being alone at the premises, as she was at the time of her injury was not a one-off occurrence.

81. I am not persuaded that there were usually any extraordinary trip or fall hazards in the plaintiff's path when she moved about the office.

82. Vast numbers of people move about offices every day without injury and without any special precautions being in place. In ordinary circumstances risks associated with doing so are minimal.

83. As a matter of common sense however the need to move quickly from one place to another in an office environment is likely to involve additional risk of injury. In most cases an employee's need to move quickly through an office environment would be a one-off requirement for some extraordinary reason.

84. But those are not the plaintiff's circumstances. I have concluded that the occasions when she was required to move through the office to get to her usual desk at reception to answer the phone were not frequent but were not uncommon. Mr Todoroski had seen her do so. She would not have always been so far from her usual desk at reception that that she needed to 'rush' back to it, but clearly sometimes she did need to do so. The risk of injury while doing so was therefore a recurring one – perhaps more precisely described in terms of the circumstances giving rise to the risk of injury (an incoming phone call while the plaintiff was away from her usual desk at reception) were recurring circumstances.

85. The recurring nature of those circumstances affects both the assessment of the significance of the risk and of the precautions a reasonable person in the employer's position would take.

86. The plaintiff had brought to Mr Todoroski's attention her desire to have a headset for the purpose of answering calls when she was away from her usual desk at reception. His negative response was based upon a simple assessment that the number of calls did not warrant the expenditure. However he (and ergo the defendant) knew or ought to have known that the circumstances giving rise to the risk of injury to the plaintiff were recurring circumstances, because he knew that the performance of her broad range of duties required her to move around the office 'on a reasonably frequent basis'.

87. There was obvious utility (and benefit to the employer) in the defendant answering the phone promptly.

88. The precaution identified by the plaintiff to avoid the risk of harm to her is the provision of a headset. I accept that there is limited evidence of the cost of a headset, but it is common knowledge in the current age that such commonplace electronic communication items are inexpensive. The burden on the employer of taking the precaution identified was minimal.

89. In all the circumstances, I am satisfied that the risk of harm to the plaintiff was not insignificant and that a reasonable person in the defendant's position would have taken the precaution of providing a headset to the plaintiff to enable her to answer the phone while away from her usual desk at reception.

90. I turn to consider the defence submission that any negligence on the part of the defendant was not a necessary condition of the happening of the harm for the purposes of section 45 of the *Civil Law (Wrongs) Act*. The concept is described in section 45 as 'factual causation' and requires that I address certain possible findings of fact.

91. The defence submission is couched in these terms:

> The observations about the mechanism of injury, the suggestion is made that it is false to draw a distinction between the process of rushing through the office to get to the telephone and then the action of reaching over the desk to answer the phone and in that motion the plaintiff rolling her ankle and suffering injury, but, your Honour, that is a distinction that was confirmed by the plaintiff herself in her evidence, and your Honour sees that at page 39 of the bundle when she is being asked some questions about the history that Dr Le Leu recorded, starting at the top of the page:
>
> > He took you through the circumstances leading to your injury and you recorded, as you have given in your evidence today, that you were in the back office folding uniforms on the day of the injury?---Correct.
> >
> > That the telephone rang in the front office?---Correct.
> >
> > You rushed to try and answer it?---Correct.
> >
> > You then recorded that the injury didn't happen while you were rushing on your way to the phone but as you quickly bent over the desk to pick up the telephone headset?---Correct.
> >
> > So do I understand your evidence is you have reached the desk, you were leaning over the desk to pick up the telephone – using my right hand to demonstrate but I don't know which hand you used – and it was in the course of that movement that your ankle rolled?---Yes, because of the awkward position where the phone was I couldn't just get to the desk and pick it up. I have to kind of get past my chair and get to the phone.
> >
> > So you were leaning around and in an awkward position picking up the phone and your ankle rolled?---Yes.[24]

92. And continue:

> That's the issue of factual causation, your Honour, and that is where the mechanism of injury here becomes enormously significant because the plaintiff's own evidence is that she wasn't injured in the course of rushing across the office. She was injured having reached a desk leaning over or around a chair to pick up a telephone headset. She could just as easily have been reaching over or around the chair to pick up a pen or to do something on a computer or to pick up a piece of paper but it was that simple act that was the act that led to her injury and that is not an act that could, on any view of the evidence, be described as an act that was productive of negligence. The provision of a headset or the failure to provide a headset was not a necessary condition of the happening of the harm.[25]

93. Mr Crispin for the plaintiff described the distinction sought to be drawn by Mr Muller as artificial. In his words, '[i]f someone is rushing to answer a phone they stop moving as they answer it. It's simply how these things work.'[26]

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[24] Transcript of proceedings, 1 September 2020, 66.
[25] Transcript of proceedings, 1 September 2020, 69.
[26] Transcript of proceedings, 1 September 2020, 59.

94. The plaintiff's testimony about 'the awkward position where the phone was' and having to 'get past my chair and get to the phone'[27] must be viewed in context. She was explaining what had happened at the conclusion of her 'rush' to get to the phone to answer it. I read her reference to the phone being in an awkward position as meaning it was in an awkward position to answer from the position she had needed to rush to in order to answer it as quickly as she could. I read her reference to getting past her chair and getting to the phone in the same light – that is to say that she was required to navigate those things quickly in order to answer the phone. I accept that she had come to a halt at the point in time when she then rolled her ankle while reaching for the phone, but in the circumstances her conduct in rushing to answer the phone is integrally connected with the position she then adopted to do so, and from which position she rolled her ankle.

95. In the circumstances I do not accept the defendant's submission that the negligence which I have found proven was not a necessary condition of the happening of the harm to the plaintiff.

96. S45 also raises the issue of the scope of liability but no defence submissions are made about that. For the sake of completeness I record my conclusion that it is appropriate for the scope of the defendant's liability to extend to the harm caused to the plaintiff.

97. Quantum has been agreed at $119,098.29.

98. I give judgment for the plaintiff against the defendant in an amount of $119,098.29.

Costs

99. I heard no argument on costs. The orders I make are as follows:

    (a) the defendant is to pay the plaintiff's costs; but

    (b) order (a) does not take effect if either party contacts my associate within 14 days to re-list the matter to seek some other costs order.

I certify that the preceding ninety-nine [99] numbered paragraphs are a true copy of the Reasons for Decision of his Honour Magistrate Morrison

Acting Associate: Eliza Wilson

Date: 11 December 2020

[27] Transcript of proceedings, 26 September 2019, 5.