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Stickley, Amanda P. (2008) Police Service not Liable for Officer's Disappointment. *The Queensland Lawyer* 28(4):pp. 183-185.

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Police Service not Liable for Officer's Disappointment

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INTRODUCTION

In *State of New South Wales v Rogerson* [2007] NSWCA 346 (18 December 2007), the respondent appealed against the decision of the trial judge where the appellant sued the State of New South Wales for breaches of duty of care owed by the Police Service which allegedly had caused him psychiatric injury. The trial judge held that several breaches of duty had been proven by the respondent, awarding \$90,000.

The respondent claimed that he had been discriminated against and victimised because his brother was a disgraced former police officer. The alleged breaches included:

- Legal advice by the Police Service's solicitor that the respondent may be questioned about his association with his brother if called as a witness before the Wood Royal Commission in 1996;
- Failure by the Commander of Internal Affairs to respond or acting upon a formal complaint made by the respondent about the solicitor's comments;
- Rejection by the Casino Control Authority for the respondent's secondment as a senior officer from the Licensing Agency;
- Remarks made by an officer of lower rank to the respondent who was later promoted ahead of the respondent; and
- Rejection of the respondent's complaint based on the remarks of the other officer by Internal Affairs.

APPEAL COURT FINDS NO BREACH OF DUTY

The appellant appealed the decision of the trial judge successfully. Handley AJA delivered the judgment of the court, McColl JA and Hoeben J agreeing, finding that there had been no breaches of duty by the Police Service.

In respect of the solicitor's warning that the respondent may be asked about his association with his brother if called as a witness to a Royal Commission, the court held that it was in fact the duty of the solicitor to warn the respondent of such questions as there was a real chance that questions would be asked about the relationship (at [10]). The fact that the formal complaint received no reply or action was found not to be a breach of duty as the Commissioner has the power to decide that a complaint is trivial and need not be investigated under s 139(2) of the *Police Act 1990* (NSW). It was also pointed out that it was not reasonably foreseeable that remarks made by the solicitor and the decision not to respond to the complaint would cause mental harm to the respondent (at [11] and [15]). In respect of the solicitor's remarks, McColl AJA noted that the solicitor and respondent were strangers and as the solicitor was not aware of the respondent's sensitivity about his brother it was not reasonably foreseeable that the remarks were likely to cause psychiatric harm (at [11]).

Evidence had been provided that the respondent's secondment to the Casino Control Agency was rejected because of the respondent's association with his brother. However, the *Casino Control Act 1992* (NSW) requires that the staff of the Authority (including those on secondment) must be of the highest integrity. In light of this requirement it was held that the Police Commissioner could not force the secondment and no duty of care was owed to do so (at [19] and [21]) and 'courts have no power to substitute their own views on matters of management for those of the Commissioner', citing *Anns v Merton LBC* [1978] AC 728 at 754.

Comments made to the respondent by a fellow officer were held not to be a breach of the duty of care, as the appellant could not owe a duty to prevent hurtful comments being made by another officer of lower rank than the respondent (at [31]). The comments arose at a time when the respondent and other officer were competing for the same promotion and were made in private. McColl AJA stated at [31] that 'the Service can hardly have a legal duty to prevent gossip circulating within its ranks.' Again, the failure to investigate the respondent's complaint was found not to be a breach of duty. Reference was made to the High Court decision of *Sullivan v Moody* (2001) 207 CLR 562 at 581 where it was noted that police investigation into criminal conduct 'involves decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources.' Similar considerations apply in respect of a

complaint by one police officer against another and the court was influenced by the fact that the comments had been made by an officer who was of lower rank than the respondent at the time (at 34]).

CONCLUSION

This decision *Rogerson* highlights the importance of taking into account all of the evidence. The trial judge in this case appeared to focus on the ‘wrongs’ allegedly done to the respondent without sufficient consideration of the procedures provided for by statute. Even the transfer of the respondent, after the failed promotion, to a different unit that was done without consultation was found to be reasonable in the circumstances. Although lacking in sensitivity it did avoid a difficult situation of the respondent being subordinate to the officer who had been promoted ahead of him (at [38]). The Court of Appeal noted that throughout his career the respondent had enjoyed the ‘confidence of the Service at the highest level’ and his association with his brother had not influenced his superiors (at [17]). Although the respondent had been disappointed with his career, there is no common law duty to protect from disappointments (at [37]).