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PSYCHIATRIC INJURY LITIGATION UPDATE

Author: Campbell Hangay

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Psychiatric Injury Litigation Update

Campbell E. Hangay
Barrister

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Preamble

1. When I was asked by Legalwise to write this paper I set out to explore an area of interest of mine: psychiatric injuries at common law. As I explored it I found it really needed to be in two parts, because I found there was enough for two topics; two papers even.
2. So I have written this paper in two parts.
3. The first is the amount of general damages that psychiatric injuries have been recovering and why.
4. The second topic that this paper covers and which I found really interesting, was the development, and application of, the principles set down by High Court in the seminal case on psychiatric injury at common law: *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15; (2005) CLR 44 (“Koehler”).
5. I have set out an index to help readers find their way quickly through the paper and I have split that as well into two parts as most of the cases appear in both topics.
6. I learned a lot from researching and writing the paper and gained a better understanding of this fascinating area of law. I hope you find it helpful.

C.E. Hangay

Owen Dixon Chambers East

24 September 2018

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Part 1 - Damages trends in Psychiatric Injury Cases

Willett v State of Victoria [2013] VSCA 76 (“Willett”)

Tate, Osborn, and Priest JJA

1. This decision is the starting point for the assessment of general damages for psychiatric injury. It is authority for the proposition that the starting point for the assessment of damages for pain and suffering and loss of enjoyment of life must be that it was common ground that the plaintiff had suffered a serious mental disturbance of which the defendant’s conduct was a cause.¹
2. Willett’s case (a claim for general damages only) illustrates the sometimes variability of juries when faced with awarding damages for psychiatric injury. Karen Willett was a member of VicPol who was badly bullied and quite severely affected by what happened to her and the way she was treated by bullies in the workplace. She was 34 at the time of her injury and 39 at time of trial.
3. To give you an idea, Senior Counsel for the plaintiff at trial asked the jury to award \$380,000 to \$400,000 in general damages. The Jury awarded \$108,000. The award by the jury was overturned on appeal and the Court of Appeal (by a majority of 2 to 1) substituted it with an award of general damages of \$250,000.00.
4. The award could have been higher(ie \$300,000), but for a reduction based on the evidence of an expert psychiatrist, Dr Shan, the effect of which was that part of Ms Willett’s psychiatric

¹ [2013] VSCA 76 at [12].

condition was non-compensable, and the Court of Appeal took that into account in arriving at its award of damages.

Swan v Monash Law Book Co-operative [2013] VSC 326 (“Swan”)

Dixon J

5. The plaintiff was employed by the defendant as a shop assistant. The defendant operated a specialist law book co-operative from the basement of the law building at Monash University. She brought proceedings seeking damages for psychiatric injury as a result of bullying by her manager.
6. The trial judge assessed general damages in the sum of \$300,000. In doing so, the trial judge had regard to the principles set down by the Court of Appeal in *Willett*.
7. The trial judge took into account the consequences of the injury (summarised at [246] to [248]), which were that her injury had been extremely onerous and deleterious. In addition to the symptoms of her adjustment disorder/depressive condition, continuing anxiety and depression, she had somatic symptoms including temporomandibular joint dysfunction with bruxism and tinnitus, chronic insomnia, pain, including migraine and headache, anxiety, disabling sensitivity to antidepressants, high blood pressure, and debilitating rashes and skin irritations that have all required separate diagnosis and continue to require separate ongoing management and treatment.
8. The trial judge was satisfied that the plaintiff remained ‘substantially compromised’ in most aspects of her life which had been reduced to one of isolation and disconnection from her family and friends and from the world around her

9. At the trial there was exploration by the defendant of pre-existing matters. The trial judge rejected the proposition that there should be any allowance or deduction of damages for pre-existing constitutional factors, as the trial judge ruled that the defendant had not discharged its onus of proving that such constitutional factors existed and would have produced similar symptoms, but for the injury. The trial judge was satisfied that the plaintiff's natural character and personality made no contribution to her illness and was not a factor that warranted any reduction in the damages that were required to compensate her.

Doulis v State of Victoria [2014] VSC 395 (“Doulis”)

Ginnane J

10. The plaintiff was a teacher who was aged 48 at time of trial. The trial judge, Ginnane J, awarded \$300,000 for general damages. He was also awarded economic loss damages to 67.
11. The trial judge summarized at [587]-[591] the matters taken into account in arriving at the general damages figure. The contrast between his former life, in which he was an active, outdoor, bubbly person, and his present life, in which he was said to be a shell of his former self, with suicidal thoughts. His regular medication and treatment was of limited assistance. He cannot participate fully in his family life and this placed great strain on his marriage. He can barely cope with the most basic tasks at home. He cannot make decisions and is in a state of permanent fatigue. Ms Doulis' evidence supported that account of his present condition.
12. The trial judge considered that the first point to take into account was that Mr Doulis had suffered a serious mental disturbance of which the defendant's conduct was a cause.² Having

² *Willett v State of Victoria* [2013] VSCA 76 was referred.

set out the severity of Mr Doulis' illness, the trial judge was satisfied that the impact of his illness had been very significant. The trial judge considered the contrast with his previous outgoing life was marked.

Johnson v Box Hill Institute of TAFE [2014] VSC 626 (“Johnson v Box Hill”)

J Forrest J

13. The Plaintiff was a trade teacher employed by the defendant. He brought a claim alleging in the last six years of his employment he was required to engage in unreasonable manual handling resulting in injury to his neck and back. He also asserted he was bullied and harassed by his immediate supervisor resulting in psychiatric injury.
14. The trial judge (J Forrest J) found that the plaintiff and his supervisor had a difficult working relationship which was precipitated by a clash of personalities rather than any misconduct on the part of the supervisor. He found there that the conduct of the supervisor did not constitute bullying so the bullying claim failed.
15. The trial Judge found that the defendant had breached its duty to the plaintiff in that it was found that by mid 2005 the TAFE should have realized that the plaintiff was suffering from a depressive condition due to conflict between the two men and that their difficult relationship required intervention. The failure of the TAFE to take appropriate steps ultimately resulted in the plaintiff breaking down at work in a meeting in March 2006 (ie so 3 months after employer on notice) with a further injury to the plaintiff's fragile psyche.
16. The trial judge awarded general damages in the sum of \$110,000. Why? In part, because the judge applied the principles in *Malec v JC Hutton* (1990) 169 CLR 638, (“Malec”) at 642 – 643.

Malec is authority for the proposition that where a plaintiff is entitled to damages for pain and suffering on the basis that his injury is the direct result of the defendant's negligence, those damages must be reduced, however, to take account of the chance that factors unconnected with the defendant's negligence might've brought about the onset of a similar condition. NB Damages in the amount of \$110,000 also awarded for physical injury.

Box Hill Institute of TAFE v Johnson [2015] VSCA 245

Warren CJ, Hansen and Kaye JJA

17. The matter was taken on appeal. The Court of Appeal (Warren CJ, Hansen and Kaye JJA) found no error in the trial judge's reasoning. It was accepted by the Court of Appeal that it would have been open to the trial judge to conclude that within the next two years the plaintiff would have been significantly affected in his life, the trial judge's finding that the correct assessment of general damages was \$110,000 was not manifestly excessive.
18. The reasoning as to the assessment of general damages might be informed by the fact that the trial judge applied an 80% discount to damages for economic loss and loss of earning capacity to take into account the plaintiff's fragility and the likelihood that he would have suffered a significant impact on his life psychologically in any event.

Mathews v Winslow Constructors [2015] VSC 728

T Forrest J

19. The plaintiff brought a claim for injuries caused by bullying and sexual harassment in the workplace. The plaintiff was employed by the defendant as a labourer from August 2008. At the time of employment she was soon to turn 35 years of age. Up until the age of about 30 she had held down constant employment and sedentary jobs. She then did not work in paid employment for about five years during which time she had lived with her father and helped out intermittently in his tree lopping business. She then worked for the defendant for a little less than two years. The judge found she was an industrious worker in that period.
20. During that time she was subjected to some fairly nasty and graphic bullying behaviour by the defendant's employees who were in the main builders labourers. Possibly most disturbing was the threat by one of the employees that he was going to follow her home one lunchtime and rape her.
21. The defendant admitted liability. The matter proceeded as an assessment.
22. The plaintiff was diagnosed as suffering from severe depression, i.e. a major depressive disorder with anxiety. There was also a view held by psychiatric experts that the plaintiff was suffering from significant chronic post-traumatic stress disorder. She was also diagnosed as suffering from a bipolar two disorder which was consequential upon ECT treatment for her primary psychiatric disorder. She was under a prescribed regime of significant antidepressant and relaxant medication.
23. She also sustained a significant temporomandibular joint injury as a consequence of grinding her teeth which was consequential on her psychiatric condition.
24. The plaintiff's current circumstances included riding her bicycle and/or walks with her mother almost daily, and in summer went to the beach with her about three times a week. She had

lived with her partner, for about three and a half years. She drove her car, does the shopping and cooks and cleans her house. She worked in the garden. Every day she ruminated about what occurred at Winslow. She had difficulty sleeping and in fact slept better during the day. She often would not get out of bed in the morning unless her mother contacted her and instructed her to do so. She would often return to bed during the day.

25. Fluorescent jackets, road works, and white utility vehicles similar to the type used by the defendant's employees caused her to become upset. She did not like to leave the house on her own. When asked to describe her mood, she said 'I hate that I have woken up.' The Plaintiff said her jaw pain was getting worse and she had been eating soft food and chopping her meals up finely. She felt pain just in front of her right ear. She had been wearing a mouthpiece at night for the last seven months. She did not feel well enough to work.
26. The plaintiff's mother gave evidence as to the plaintiff's distress following the events at work, in particular when she was told by one of the defendant's employees that he would follow her home and rape her. She said she saw her daughter crying frequently, four times a week.
27. The plaintiff's partner gave evidence that she was previously an outgoing woman now has to plead with her to go to a shopping centre or similar because she has a fear of encountering the defendant's employees.
28. The trial judge awarded general damages in the sum of \$380,000 (including jaw injury which was a sequela of her psychiatric condition). On the facts it was considered there was no *Malec v Hutton* type reduction applicable. The trial judge accepted she enjoyed her work and but for the bullying she would have continued to perform that work. She was also awarded loss of earning capacity damages for the past and into the future from age 42 to age 65.

Rawlings v Rawlings [2015] VSC 171

John Dixon J

29. The trial judge ultimately dismissed the plaintiff's claim for psychiatric injury (see discussion below) but nevertheless thought it appropriate to give an assessment of damages. General Damages at [194] were assessed to be \$250,000 but reduced significantly to \$50,000 because of other matters on *Malec v Hutton* principles.

30. At [180] it was noted the plaintiff was suffering from a severe form of an adjustment disorder with chronic anxiety and depression and his prognosis was for only partial restoration. He had no current work capacity at such incapacity was likely to prevail for the foreseeable future. He continued to suffer from migraine headache, sexual dysfunction with loss of libido, sleep dysregulation with nightmares, hypervigilance, excessive rumination, chronic anxiety with panic episodes, and moody compensation with social withdrawal and isolation. He was taking a significant regime of medication including diazepam, lorazepam, serotonin, Xanax. His history over the past 20 years had been one of suffering the effects of anxiety, depression, left knee pain and the problems of social isolation and personal suffering that accompany such conditions.

31. He was found to remain substantially compromised most aspects of his life. He had little to no contact with former friends and was largely confined to the house aside from occasional golf trips or trips to the beach. He continued to suffer from debilitating depression and anxiety symptoms and suffered from headaches, tinnitus and Meniere's disease and was unlikely to return to work. The plaintiff described suffering from debilitating panic attacks. The proceeding and the stress associated with it had contributed to his psychiatric problems.

32. At [192] the trial judge found that it was probable that the plaintiff, absent the defendant's alleged breaches, would have suffered a similar psychiatric injury in any event. Hence a substantial reduction in damages was appropriate.

Erllich v Leifer [2015] VSC 499

Rush J

33. The trial judge assessed general damages to be in the sum of \$300,000.
34. Factors taken into account included her young age when the abuse began. She was 15. It involved touching inappropriately two to three times a week and sometimes not for a couple of weeks. It involved Leifer telling the Plaintiff she loved her. It frequently occurred in the offices of the school itself.
35. At home she was not accustomed to nakedness. She dressed and undressed privately in the bathroom. Her upbringing meant she was an extraordinarily vulnerable person to Leifer. [72] The abuse which spanned three years (2003-2006) continued into year 12 when it took on the guise of the Leifer teaching her about marriage.
36. The plaintiff was married in September 2006. Soon after she and her husband relocated to Israel. In November 2006 she started experiencing flashbacks, nightmares, anxiety and sleeplessness. The flashbacks were all about the abuse.
37. She returned to Australia in January 2009. She became pregnant at the end of 2009. During the pregnancy she self-harmed, cutting herself on her upper arm. The plaintiff described difficulties with her sexuality and depression. She exhibited signs of Post Traumatic Stress

Disorder (PTSD). She had trouble connecting with her child. Breast feeding brought back flashbacks of the abuse. There was psychiatric evidence that she had suffered depression.

38. The sexual abuse at school committed by Leifer when the plaintiff was a student was the pervading, recurrent experience that had, and continues to, negatively and severely impacted upon the plaintiff's health and well-being. The plaintiff's familial background may have exposed her to a higher level of vulnerability but it was Leifer who exploited that vulnerability significantly causing, contributing to and compounding the plaintiff's ongoing injury. She had continued to work but was limited to part-time work and the trial judge was satisfied the plaintiff had experienced financial strain as a result.

Wearne v State of Victoria [2017] VSC 25

John Dixon J

39. The Plaintiff was employed as a case manager responsible for assisting youth welfare within criminal justice system. She ceased working at age 54 when she suffered a breakdown. She was aged 62 at trial. The trial Judge, John Dixon J, awarded general damages in the sum of \$210,000. Why?
40. At [330] – [334] the trial judge set out the factors taken into account which included:
- She had previously enjoyed an outgoing, social nature and active social life with close relationships with her children and grandchildren;
 - She had been a happy and confident person;
 - She loved her role as youth justice worker
 - Her enjoyment of life significantly diminished post November 2008;

- She no longer enjoys socializing and finds it difficult to be amongst crowds of people
- She struggles to get up every day;
- She has more limited contact with her family and friends, tending to give excuses to avoid social contact;
- She struggles with routine domestic activities;
- She often becomes anxious and upset;
- She has limited activity outside her home;
- Shopping trips or visits to family leave her exhausted and have reduced in frequency over time;
- She continues to suffer panic attacks and episodes of hyperventilation;
- She describes feeling unable to attend most social occasions and she often cancels those
- Short term memory issues and difficulty concentrating;
- She feels unable to plan and organize events such as holidays and is wholly dependent on her children for this
- She also struggles with tasks that require a high level of responsibility
- She feels she cannot enjoy a normal life;
- She continues to derive satisfaction from caring for dogs, spending time with her children, interacting with people via linked in and facebook, gardening and reading;

41. At [374] *Willett was* followed and applied. The trial judge took into account the fact that he was assessing an exacerbation of a pre-existing condition and on the basis of an appropriate discount he arrived at the sum of \$210,000. The trial judge did not state what the original amount would have been but for the discount.

Hand v Morris & Anor [2017] VSC 437

Zammit J

42. The plaintiff was a 51-year-old man who claimed damages for sexual abuse inflicted upon him by a man who was his teacher when the plaintiff was in grade 4 (8 years old) in primary school. The abuse often took place in public in the classroom in front of other children. He brought a claim against both the teacher and the State of Victoria which operated the school and employed the teacher.
43. Liability was admitted. The matter proceeded as an assessment. The trial judge awarded general damages in the sum of \$260,000 (see [106]). The defendant referred to *Erllich v Leifer* [2015] VSC 499 (discussed above). It is not entirely clear why the defendant referred to this case. As the trial judge stated, each case turns on its own facts.
44. The Plaintiff had continued to work full-time up until his 55 years in the commonwealth public service. The trial judge considered it would be inaccurate to consider the plaintiff unaffected by the abuse because he is able to function on a day to day basis. Most of the activities that he was engaged in on a day to day basis were found to be “laced with” the damaging effects of the abuse on him.
45. The trial judge set out the matters taken into account in arriving at the assessment ([see 101 to [106]). These included:
- The impact of the abuse on his social skills, relationships and coping abilities. In particular the impact the abuse had had which was lifelong on the plaintiff and its effects were immediate at the age of eight;
 - The prolonged nature of the abuse, the fact that it was gross and took place in public;
 - It had a profoundly damaging effect on the plaintiff's self-esteem, confidence and relationships with others;
 - The fact that it inhibited his work performance and satisfaction and impaired all facets of general enjoyment of life up to this point in time;

- The effect of the abuse and the development of a generalised anxiety disorder which was found to be chronic and will endure his whole life;
 - The abuse had had a significant damaging effect on the plaintiff giving rise to an anxiety disorder which was chronic and which permeated his life. Expert psychiatric evidence was accepted of Dr Tagkalidis who characterised the generalised anxiety disorder as moderate to severe;
 - Further, the abuse had insidiously affected all aspects of the plaintiff's life. It had taken from him the capacity to derive full enjoyment from the activities of life. The trial judge accepted this was not a case where the plaintiff has no capacity for enjoyment or cannot form relationships or participate in a range of activities, including employment. It was accepted he had a good relationship with his children, his mother and was well regarded and able to work and engage in sporting activities.
 - Nevertheless, the trial judge found that the plaintiff will have a shortened working life to age 55. The trial judge found he was unlikely to retire and find a new social life or some the recover from his generalised anxiety disorder.
 - He has been he had been denied the benefit of the pleasures of being engaged in a workplace and the rewards of employment itself over and above the monetary rewards;
 - He had not been able to enjoy the social network that the workplace can provide or find satisfaction and stimulation that comes with progression and promotion in the workplace. At best it was found he had created a safe niche in which he can count the days until his retirement at age 55 years;
 - his social relationships had been few and even his relationship with his wife had to some extent been affected by the impact of the abuse on him (though it was noted that there were other matters affecting their relationship);
 - it was found the plaintiff's overwhelming and genuine expressions of distress, inadequacy, poor self-esteem, fears of what those around him were thinking of him and his belief that he was not up to the task were found to be compelling.
41. The trial judge concluded there was evidence of the plaintiff's intention to work until 67 but for his anxiety. The plaintiff will be 55 years of age when he retires. He has two young children and his wife does not work. In his evidence he said the bills are constantly going up and he would have wanted to provide a better quality of life for his children. The trial judge accepted his family's needs were real and significant. The trial judge accepted that evidence of his circumstances demonstrated he would have returned to work but for the abuse.

Sayer v Melsteel Pty Ltd.

Judge and Jury

42. This was a Supreme Court Jury Verdict handed down in June 2017. The Jury found for the Plaintiff and awarded damages in excess of \$1 million. The jury verdict on general damages was \$250,000.
43. The plaintiff was employed as a full-time boilermaker by the defendant. In 2009 he had lodged a claim for bullying by his supervisor, whom he alleged pushed him and verbally abused him. He had four days off work following which he returned to work full-time. He was required to under the same supervisor.
44. Throughout 2009 and early 2010, the plaintiff continued to complain of bullying by his co-workers and his supervisor. His case was that not much was done by the employer to address the behavior.
45. In August 2010 the plaintiff was again assaulted by the same supervisor whom he alleged previously assaulted him in 2009. The plaintiff was struck in the face three times and attended his doctor with a fat lip and complained of neck pain. Ultimately, the plaintiff developed a psychiatric injury and also a physical injury to his neck. He underwent six electroconvulsive therapy (ECT) treatments and neck surgery. He last worked in August 2010. At the time of trial he had continued to suffer from depression and physical pain and restriction resulting from his neck injury.

General Damages Trends – A Summary.

Year	Case name	Amount of General Damages	Comment
2011	Willett v State of Victoria	\$108,000	Jury (subsequently overturned as manifestly inadequate on appeal)
2013	Willett v State of Victoria [2013] VSCA 76	\$250,000	Court of Appeal overturned original jury verdict of \$108,000. Assessed at \$300,000 but reduced by \$50,000 for non-compensable matters.
2013	Swan v Monash Law Book Co-operative	\$300,000	Judge (John Dixon J)
2014	Doulis v State of Victoria [2014] VSC 395	\$300,000	Judge (Ginnane J)
2014	Johnson v Box Hill Institute of TAFE	\$110,000	Judge (J Forrest J). Note \$110,000 also awarded for physical injuries. Significant discount for <i>Malec v Hutton</i> . Upheld on Appeal.
2015	Mathews v Winslow Constructors [2015] VSC 728	\$380,000	Judge (T Forrest J). Amount included compensation for her jaw injury which was a sequela of her psychiatric injury. Very young plaintiff and nasty tortious conduct.

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2015	Rawlings v Rawlings VSC 171	\$50,000	Judge (John Dixon J) Reduced from \$250,000 because of <i>Malec v Hutton</i> . Also credit findings by trial Judge.
2015	Erlich v Leifer [2015] VSC 499	\$300,000	Judge (Rush J).
2017	Hand v Morris & Anor [2017] VSC 437	\$260,000	Judge (Zammit J). Note acceptance of significant mental injury despite having continued to work full-time up until age 55.
2017	Sayer v Melsteel Pty Ltd	\$250,000	Jury
2017	Wearne v State of Victoria [2017] VSC 25	\$210,000	Judge (Ginnane J) Slightly older Plaintiff; 62 at time of trial.

Part 2 - Developments in Common Law Liability for Psychiatric Injury

-The Application of *Koehler* – the last three years or so.

Swan v Monash Law Book Co-operative [2013] VSC 326 (“Swan”)

John Dixon J

46. The plaintiff was employed by the defendant as an assistant. The defendant operated a specialist law book co-operative from the basement of the law building at Monash University. She brought proceedings seeking damages for psychiatric injury as a result of bullying by her manager.
47. The plaintiff complained to her employer that she was experiencing conflict with her manager. She reported conduct including the manager throwing a book at her, and on another occasion three calculator. He was moody. She considered he was suspicious that she was trying to move into a managerial role in the bookshop. He appeared to treat the bookshop as his personal toy but he made mistakes in the operation such as forgetting to pay her uptime. She helped cover up these mistakes by not complaining. He neither acknowledged her assistance nor apologised for his mistakes. The plaintiff reported the temporary staff informed her they were surprised by comments that the manager had made to her. She enjoyed the job and want to continue to work at the bookshop.
48. The board was made aware of the problem but failed to act adequately.
49. Matters came to a head in July 2007 when the plaintiff, Swan, suffered a breakdown. On that occasion the manager publicly belittled her with sarcastic comments. This was just one of many such occasions.

50. (at [150]) In determining liability, reference was made by the trial judge to the Worksafe Victoria Guidance Note on bullying.
51. (at [153]) The trial judge was satisfied that the manager engaged in an established pattern of workplace bullying. This occurred from August 2002 till April 2003. The trial judge is satisfied that his behaviour during that period would be expected by reasonable person to humiliate, intimidate, undermine or threaten a person such as the plaintiff. The incidence of occupational violence were from 2003 intermittently reinforced with an expectation that such violence might be repeated, engendered by other conduct that did not involve an immediate apprehension of physical violence throughout the period of the plaintiff's employment by the defendant until August 2007. Of significance was the restricted and confined nature of the workplace environment in which such behaviours as were perpetrated by the manager imposed a substantial and significant emotional distress on the plaintiff.
52. The trial judge considered the authorities relating to claims for mental injury at [154] to [163]. At [163] it was recognised that such general principles as identified in those decisions which must be plainly applied in determining the content of the defendant's duty of care in circumstances where there are stressful situations that are the consequence of accepted working conditions or work overload are to be distinguished from those cases where a stressful situation is the result of unreasonable behaviour in the form of workplace bullying by work colleague.
53. As the trial judge (at [163]) observed, the plaintiff did not choose to work with a bully, or work in a stressful condition arising other than from the nature and extension of the tasks that she agreed to perform. The plaintiff's complaints to the board were not about the odorous nature of the tasks. Her complaints suggested, and were understood as suggesting, her psychiatric

health may have been at risk albeit that the complaints might also be suggesting an industrial relations type problem.

54. The trial judge concluded that the defendant breached its duty of care to the plaintiff in the circumstances. There were many things that could have been reasonably done, which were not done to have reduced or avoided the risk of mental injury to the plaintiff.

Doullis v State of Victoria [2014] VSC 395

Ginnane J

46. The employee was a teacher who had been assigned a number of foundation and low classes which contained students who were considered to be at the lowest levels of academic achievement many of whom exhibited difficult behaviours and attitudes. In 2003 the worker arranged a meeting with the Principal and two Assistant Principals in which he presented in a tearful, dishevelled and distraught state. He complained of the difficulties he was experiencing with his heavy load of foundation classes and requested that he not be given any of the classes the following year. A few days later he provided the Principal with a written letter which stated that he was suffering from high levels of stress due to teaching the foundation and low classes and requested a more even spread of classes. Despite the meeting and subsequent letter the school did not respond to the employees complaints and his load of foundation classes was not lightened. The employee ultimately left the school in 2004 after being diagnosed with acute depression.

47. The trial judge applied the principles set down by the High Court in *Koehler v Cerebos Australia (Ltd)*³ and found that the psychiatric injury suffered by the employee was negligently caused by the employer.
48. The trial judge found the defendant knew, by September 2003, that Mr Doulis was distraught, was in no condition to teach, was not coping and was unwell. He had to be sent home because he was not in a condition to teach. But nothing was done to assist him. After the meeting of 8 September 2003, the College did not monitor or mentor Mr Doulis.
49. The trial judge held that a reasonable person in the position of the Principal and/or Assistant Principal who attended the meeting and received the follow up letter would have realised that the employee was at risk of sustaining psychiatric injury due to the difficulties he was experiencing in teaching low and foundation classes.
50. The trial judge held that the employer had a duty to take steps to minimise the risk of the employee suffering psychiatric injury because from September 2003 the employer was on notice as to the risk of psychiatric injury to the plaintiff. Discharging that duty required taking such steps as such as lessening his load of low or foundation classes. It was held that the employer breached its duty by not taking those steps and this breach was the cause of the employee's chronic depressive condition.
51. The trial judge considered that the College did breach the duty of care that it owed to the plaintiff in September 2003, and thereafter whilst he worked at the College. It did not lessen

³ [2005] HCA 15 (2005) 222 CLR 44.

his low classes and foundation classes until 2004, and then not completely, and it did not monitor him or otherwise support him after his return to work.

52. The steps the employer took were inadequate. The College Principals directed that the plaintiff take two days of sick leave, but on his return they did not monitor him or speak with him about his medical condition or well-being. Nor did they put in place any support measures for him. Further, the requirement that the plaintiff take two days of sick leave to gain some sleep was not done to alleviate the risk that he might suffer a psychiatric illness. The trial judge found the College did reduce his low classes and foundation classes in 2004, but he still experienced considerable difficulty in teaching that allotment.

Johnson v Box Hill Institute of TAFE [2014] VSC 626 (“Johnson v Box Hill”)

J Forrest J

53. The Plaintiff was a trade teacher employed by the defendant. He brought a claim alleging in the last six years of his employment he was required to engage in unreasonable manual handling resulting in injury to his neck and back. He also asserted he was bullied and harassed by his immediate supervisor resulting in psychiatric injury.
54. The trial Judge found that the plaintiff and his supervisor had a difficult working relationship which was precipitated by a clash of personalities rather than any misconduct on the part of the supervisor. He found there that the conduct of the supervisor did not constitute bullying so the bullying claim failed.
55. The trial Judge found that the defendant breached its duty to the plaintiff in that it was found that by mid-2005 the TAFE should have realized that the plaintiff was suffering from a

depressive condition due to conflict between the two men and that their difficult relationship required intervention. The failure of the TAFE to take appropriate steps ultimately resulted in the plaintiff breaking down at work in a meeting in March 2006 (ie so 3 months after employer on notice) with a further injury to the plaintiff's fragile psyche.

56. The trial judge was satisfied that the provision of the five certificates of capacity met the *Koehler* requirement, as applied in *Larner*. The TAFE was held to have been placed on notice of the risk of a psychological injury arising out of the plaintiff's employment – the 'evident signs', as per the words in *Koehler*, of an identifiable and recognisable psychiatric condition (depression) related directly to the relationship between two of its employees.
57. After that the judge held the employer should have been alerted to the issue and should have responded to reduce risk of injury. As a result there was a foreseeable risk of injury to the plaintiff.
58. While it was acknowledged at [430] that determining what is reasonable in the circumstances in the context of an employer/ employee conflict is by no means an easy task, it was not reasonable for the TAFE to do nothing (which is what was found to have transpired).
59. At [433] – [438] the trial judge held an appropriate response would not only have been to endeavor to mediate the dispute but also to monitor the relationship between the two men over the following twelve months (if not beyond). It would certainly have fallen within the duties of a reasonable Human Resources office or manager to ensure that each of the men were counselled, and discussion took place with the supervisor in relation to his management of the plaintiff.

Box Hill Institute of TAFE v Johnson [2015] VSCA 245

Warren CJ, Hansen and Kaye JJA

60. The Court of Appeal (Warren CJ, Hansen and Kaye JJA) found no error in the trial Judge's (J Forrest J) reasoning.

61. The Court said at [69]:

“In our view, the judge was well justified in determining that the circumstances that had arisen called for intervention by the applicant, as a reasonable employer, of the kind specified by his Honour. As we have already pointed out, after the Good Friday incident, in March 2005, the respondent was off work for a period of time suffering from anxiety and depression. The initial certificates of capacity informed the employer that that psychological condition constituted a reaction by the respondent to the situation which had developed with his supervisor, and to what the respondent described as an ‘inappropriate attitude of people at work’. By mid-2005, the applicant was on notice that the respondent had suffered that psychological reaction, lasting for almost four months, because of that situation. The last two certificates did refer to the respondent’s condition as having settled, but, as earlier pointed out, the certificates attributed the resolution of the symptoms to the respondent keeping his distance from Williams.” (emphasis added)

62. At [72] the Court held that the trial judge was correct in concluding that a reasonable employer in the position of the TAFE would have taken appropriate steps to address the underlying

difficulties in the relationship between the plaintiff and his supervisor in discharge of its duty to take reasonable care against the risk of injury to the plaintiff.

63. Further, at [73] the Court held that it was an obvious solution to the problem and an appropriate response to the risk to intervene in the relationship between the two men by counselling them and mediating between them. Neither of those steps would have been particularly onerous. The employer was a large, well-resourced organisation with a human resources department. Such steps would have been neither burdensome nor complex. The trial judge was correct in finding that the underlying foundation of the risk was the fraught relationship between the two men and an exercise of reasonable care on behalf of the employer required taking such steps as identified by the trial judge to address it.
64. So the provision of medical certificates was the key to putting the employer on notice as to risk of psychiatric injury.

Larner v George Weston Foods Ltd [2014] VSCA 62

Redlich, Tate, and Santamaria JJA

65. This was an appeal by an injured worker against the dismissal of his claim by a county court judge. The worker alleged that he suffered injuries including major depression while in a permanent position with George Weston Foods Ltd (“GWF”). He had initially been employed there on a short-term contract basis from 30 November 2001 until 1 February 2002. Thereafter he was made a permanent employee.
66. A large part of the case turned on the contractual negotiations for his permanent position. At the time he was appointed permanently as logistics manager he was 35 years old.

67. His evidence at trial was that within a few weeks of taking up the permanent position he started to feel unwell. He began to experience a psychological breakdown.
68. At one point he asked for a 2IC role to assist him. He was then required to develop a position description for that role. A large part of the case then turned on what other support he had notwithstanding the 2IC position had not materialised.
69. The worker gave evidence that made a number of complaints about being under pressure in particular writing an email at one point describing himself as “drowning”.
70. On 25 April 2002 he developed an episode of feeling clammy and intense headache whilst working at home. On 6 May 2002 he received a visit home from GWF’s nurse and the manager. His evidence was they suggested he not lodge a WorkCover claim at that stage.
71. The trial judge dismissed the claim on the basis of the principles in *Keobler*. The injured worker had argued at trial that his employment contract contained express terms and an implied term which he relied upon in support of his claim. See [67] – [68]. He argued that GWF had breached those terms. At trial those terms were in dispute. The trial judge concluded that there was no express term of the contract to the effect that a 2IC would be provided immediately or shortly after the injured worker commenced a permanent position.
72. The trial judge also rejected the proposition that it was a term of the contract that the new logistics manager would have an inclusive style or would provide as much support to the injured worker as had the previous one. The trial judge accepted it was express term of the contract that the injured worker would be provided with a position description but he considered that the failure to provide the position description was of no consequence.

73. At [73] the trial judge in dismissing the claim found that the injured worker had been performing similar duties in his short-term position to that required of him in the permanent role and further the injured worker had not established that the duties and responsibilities associated with the permanent role were unduly onerous or exposed him to undue stress or strain. The trial judge identified as a critical gap in the evidence the failure by the injured worker to call evidence in respect of an external industry standard by reference to which it could be determined if the work he was required to perform was unduly onerous.
74. At [74] it was set out that the trial judge had rejected the evidence of the injured worker to the extent that it was in dispute with the evidence of the employer witnesses. Moreover, the trial judge had found that the injured worker was an unreliable witness prone to exaggeration at [75]. There were 30 grounds on appeal. Most of the grounds related to the way the trial was conducted and do not bear any relevance to this paper. In large part it turned on the trial judge's rejection of the plaintiff's evidence.
75. The court considered and discussed the principles in *Koehler* from [201] to [208].
76. Those principles can be summarized as follows:
- the parties obligations under a contract of employment will necessarily have a bearing on the content of the employer's duty of care and what may be required from the employer to discharge that duty;
 - there is no one question to ask where an employee claims damages from an employer for negligently inflicted psychiatric injury;

- the initial question must lie in determining the content of the duty of care on the kinds of steps required of an employer in the particular circumstances of the case, informed, in particular, by the terms of the contract of employment;
- the factors that are most likely to be relevant to determining the content of the duty of care, and what is required of an employer to satisfy the duty of care it owes, include both the nature and extent of the work being done by the particular employee; – and the signs from the employee concerned – whether in the form of express warnings or the implicit warning that may come from frequent or prolonged absences that are uncharacteristic;
- an employee’s agreement to perform those very duties which are later found to be a cause of psychiatric injury may be of considerable significance in determining whether an employer has breached its duty of care;
- in such cases, notions of “overwork”, “excessive work” or the like have meaning only if they appeal to some external standard. Insistence upon performance of a contract cannot be in breach of a duty of care;
- an employer’s obligations under a contract are not to be read subject to a duty to excuse performance if performance is injurious to psychological health, nor to be qualified by hindsight. In the absence of warning signs, an employer can assume that someone who enters into a contract of employment believes himself or herself to be capable of performing its duty.

77. At [211] the Court ultimately dismissed the appeal because it found that GWF was entitled, as is any employer, to assume that if an employee enters into a contract of employment that that

employee considered himself or herself able to do the job. On the facts, the injured worker gave no indication that he was vulnerable to psychiatric injury, and gave every appearance at the time he agreed to take on the permanent position, of being capable of carrying out the work required. Not only was there such an appearance, but the injured worker clearly considered himself capable of the job because he was already performing much the same job and queried why in those circumstances there was a need for him to formally apply for the permanent position believing that his providing his resume should be sufficient.

Rawlings v Rawlings [2015] VSC 171

John Dixon J

78. On reading this, it struck me as seemingly an attempt to create a psychiatric equivalent of *Pasqualotto v Pasqualotto* [2013] VSCA 21. The plaintiff brought a claim against his parents for physical and psychiatric injuries.
79. The plaintiff was 54 years of age at trial. He suffered from major depressive disorder which he claimed had destroyed his capacity for gainful employment and caused him pain and suffering. He was employed as a carpenter from the commencement of his apprenticeship of the till 1994 by the defendants, who were his parents, in a building business.
80. His father worked in the business on the tools and he also management manage the administration of the business. His mother had little practical involvement in the management of the business and no involvement in the building work.

81. The business collapsed financially in 1994 when the defendants each signed a deed of assignment under Part X of the Bankruptcy Act 1966.

82. In the first four paragraphs of the judgement the claim was summarised by the trial judge. The claim related to an allegation by the plaintiff that he was directed by his mother to perform work after his father broke down mentally as the business failed and further that the plaintiff had no training to undertake the work that he was directed to do and that there was significant stress that he was exposed to by doing what his mother asked which caused the plaintiff's psychiatric injury. Immediately following the failure of the parents business the plaintiff underwent a left knee construction. About six months later began experiencing anger and recurrent anxiety and depression that was exacerbated by alcohol and gambling addictions in following years. Following several suicide attempts, in 2001 the plaintiff completed alcohol rehabilitation and with the assistance of Alcoholics Anonymous has not since consumed alcohol. It was not until 2006 that the plaintiff was diagnosed with a permanent severe mental or behavioural disturbance said to have arisen out of or in the course of or due to the nature of his employment by his parents in their building business.

83. The judgement at [4] set out the history of the leave process which was also the subject of a decision by the Court of Appeal but in any event plaintiff was ultimately successful in obtaining leave to seek damages for personal injury sustained in 1994 resulting in a trial some 21 years after the injury was alleged to have been caused.

84. At [87] the trial judge rejected the proposition that the plaintiff's work in helping his mother with the administrative requirements of the accountants, or attending the creditors meeting was work in the course of employment. Further the trial judge found that by the plaintiff continuing to work as an employee of the business on the Brighton job to complete that

contract, he did so at his mother's request for his help and not by variation of his contract of employment with the defendants.

85. No contractual obligation was identified by the plaintiff. He agreed to help his mother as she asked because of her need for assistance with their own affairs in the affairs of the business and of her husband because his father was in serious medical trouble and needed to be assisted and because of his expectations about the business. The relevant relationship that governed the duty that drove the plaintiff to discharge the tasks asked of him by his mother was the familial relationship between them, not the employment relationship. The former, the trial judge found, did not, ipso facto, give rise to a duty of care to avoid a risk of inflicting psychiatric injury.
86. The trial judge concluded that there was no warning, and hence no reasonable foreseeability, of any injury or risk of psychiatric injury to the plaintiff prior to 1994. At [115] the trial judge concluded that to the defendants were not under any duty to minimise the risk of psychiatric injury in the circumstances such an injury was not reasonably foreseeable and an employer's general duty of care to employees did not in the circumstances impose any duty on the employer (the plaintiff's parents) not to ask the plaintiff for assistance, or more specifically not to require the plaintiff to assist in completing the supervision of a particular contract and the administrative tasks associated with the bankruptcy proceedings because there was no reasonably foreseeable risk of psychiatric injury to the plaintiff.

Johnson v Berry Street [2015] VSC 428

Rush J

87. The plaintiff was 55 years old at trial. He was employed by the defendant as an outreach worker by the defendant. He had a previous background of being a victim of sexual abuse. He was employed to work with a person, OJ. OJ had been a victim of sexual abuse. Working with OJ triggered previous trauma that the plaintiff had experienced from his own abuse.
88. The plaintiff brought a claim against the employer for psychiatric injury arising out of his employment.
89. At [38] the trial judge found the employer's response, which was to remove the plaintiff from working with a carer, OJ, occurred immediately upon the plaintiff indicating he could not cope with his work. The trial judge found the response was, upon that knowledge, entirely appropriate. There was no evidence that prior to this date the employer was on notice that the plaintiff was not coping with his work. At [40] the trial judge was not satisfied that the employer was negligent in allowing the plaintiff to continue to work with OJ after 17 April 2007.
90. The trial judge referred to *Koebler*. The trial judge also cited and applied *Hegarty v Queensland Ambulance Service* [2007] QCA 366 ("Hegarty") at [42] and [43]:
- (a) "The private and personal nature of psychological illness, and the consequential difficulties which attend the discharge of an employer's duty in this respect, must be acknowledged as important considerations...Issues of some complexity arise in relation to when and how intervention by an employer to prevent mental illness should occur, and the likelihood that such intervention would be successful in ameliorating the plaintiff's problems'."

- (b) 'An employee may not welcome an intrusion by a supervisor which suggests that the employee is manifesting signs of psychiatric problems to the extent that help should be sought, especially if those problems are having no adverse effect upon the employee's performance of his or her duties at work'.
 - (c) 'It is necessary to resist the inclination retrospectively to find fault by devising chains of causation involving risks which were not reasonably regarded as significant before a particular event has occurred'.
91. At [42] the trial judge held the 'issues of some complexity' presented to the employer in a conversation with the plaintiff on 17 April did not provide circumstances that necessarily require her to stand down the plaintiff from further work with OJ. The trial judge concluded the discussion disclosed the employer had great sympathy for the plaintiff's position and demonstrated a cautious approach in referring the plaintiff to counselling. The trial judge considered it was quite another matter to say that 'reasonable care' demanded a necessary intervention by the employer requiring standing down of the plaintiff from his employment or to make some investigation of his psychiatric background.
92. Further, the trial judge held as at the relevant period there was no suggestion that the incident with OJ was adversely affecting the plaintiff's work. The trial judge considered the employer's offer of counselling and support in my opinion was entirely appropriate. The trial judge considered this was a case where it might well be regarded as 'an intrusion, an invasion of privacy' to expect further enquiry, the opening up of psychiatric issues and issues of prior sexual abuse. The trial judge considered it was not reasonable to expect anything more of the employer than to recommend counselling. The plaintiff was not manifesting signs of psychiatric problems and his work was not being interfered with.

93. The trial judge considered that the plaintiff's claim amounted to an attempt to retrospectively fasten onto a risk which was not reasonably regarded as significant at the time. The trial judge considered it could not be expected that the employer would have appreciated the plaintiff's complex psychiatric background or understood the risk of psychiatric injury. The trial judge referred to *Koehler* and the point about the employer not being required to be in the same position as a psychiatrist in appreciating your understanding risk of psychiatric injury. The trial judge concluded that the plaintiff's presentation was not such at the relevant period of time that the employer should have anticipated the plaintiff was at risk of psychiatric injury.
94. In reaching this conclusion the trial judge observed that the perception of the risk may in the end depend on 'the vagaries and ambiguities of human expression', 'the dignity of employees' and their right to be free from any form of harassment, and the complexity of issues surrounding any form of intervention.

Wearne v State of Victoria [2017] VSC 25

John Dixon J

95. The Plaintiff was employed as a case manager responsible for assisting youth welfare within criminal justice system. She brought a claim for damages for bullying. The trial judge, at [157] referred to the Worksafe Victoria Guidance Note which provides the following definition of workplace bullying:

Workplace bullying is repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety. Within this definition 'unreasonable behaviour' means behaviour that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten; 'behaviour' includes actions of individuals or a group, and may involve using a system of work as a means of

victimising, humiliating, undermining or threatening; 'risk to health and safety' includes risk to the mental or physical health of the employee.

96. The trial judge said this definition recognised the relationship between conduct and the risk to health and safety, including to the risk of a psychiatric or psychological injury. The definition has been adopted in previous decisions of this court,⁴ and it had been accepted as an appropriate definition by the parties at trial.
97. The trial judge referred to *Swan v Monash Law Book Co-operative*⁵, which was an earlier decision of the same judge, in which he referred to the definition provided in the guidance note which he said in that decision emphasises the relevant features of aetiology of severe emotional distress leading to a lasting disorder of mind or body, some form of psycho neurosis or a psychosomatic illness.
98. The definition required that a reasonable person would expect the relevant behaviour (i.e. behaviour having the characteristic of victimising, humiliating, undermining or threatening the victim) in all the circumstances to have that effect. The essential characteristics of behaviour that may create a risk to the mental or physical health of an employee are that it is both repeated and unreasonable.
99. The trial judge referred to *Brown v Maurice Blackburn Cashman*,⁶ and said the test set out in the guidance note raised two threshold issues:

⁴ *Brown v Maurice Blackburn Cashman* (2013) 45 VR 22, 26 [14]; *Swan v Monash Law Book Co-operative* [2013] VSC 326, [150]; *Johnson v Box Hill Institute of TAFE* [2014] VSC 626, [211].

⁵ [2013] VSC 326, [189].

⁶ (2013) 45 VR 22, 26 [15].

- was there unreasonable behaviour directed towards the complainant, being behaviour that a reasonable person having regard to all the circumstances would expect to victimise, humiliate, undermine or threaten the complainant; and
 - if there was, did it occur repeatedly?
100. The trial judge reviewed the evidence regarding the conduct which was said to amount to bullying and ultimately found bullying was not made out at [209].
101. The trial judge then went on to consider whether there was a breach of duty by the defendant which resulted in reasonably foreseeable injury to the plaintiff.
102. The trial judge at [222] – [226] considered the evidence and found that the plaintiff's managers knew of, and understood in general terms the reasons for, the plaintiff's psychiatric vulnerability at the time she returned to work at the department's Preston office in early 2007. The trial judge was also satisfied that by mid-2007 at the latest, the relationship between the plaintiff and her immediate supervisor was problematic and that by April 2008 it had severely deteriorated, and was causing the plaintiff considerable anxiety and stress. The trial judge was also satisfied that by this time the managers knew the specific fact that the plaintiff's psychiatric vulnerability was being strained by a poor relationship with her immediate supervisor.
103. It was held the plaintiff had been demonstrating clear signs of repeated and consistent upset and psychological disturbance and that even if they had not understood the risk, the managers ought to have been in a position where they knew or ought to have known that the need for action to ameliorate the risk of damage to the plaintiff's health was immediate and pressing.
104. At [228] the trial judge summarized the factor going to reasonable foreseeability and duty in that by the relevant period the employer knew that:

- (a) The plaintiff was suffering from a psychological condition (characterised by stress, anxiety and occasional panic attacks) from her past experiences at the Sunshine office;
 - (b) The plaintiff was a person vulnerable to psychological injury through workplace stress;
 - (c) There was serious and ongoing interpersonal conflict between the plaintiff and her immediate supervisor;
 - (d) The plaintiff was experiencing elevated levels of stress and anxiety and informing her superiors of the fact;
 - (e) The aggravation of the plaintiff's psychological condition was related to her work and particularly to her relationship with her immediate supervisor but also to other factors as discussed above; and
 - (f) It was likely that any further interaction or confrontation with immediate supervisor would injure the plaintiff's mental health.
105. It was found the employer owed a duty because there was a foreseeable risk of injury to the plaintiff which was not farfetched or fanciful.
106. Turning to the question of breach of duty, the trial judge concluded that employer's response, best encapsulated in the suggestion that the two women should be left to work it out 'as professionals' was misconceived. The result was that the plaintiff was forced to internalise her distress and do her best to keep working in an increasingly untenable situation.
107. It was held that an appropriate and available response would have been moving the plaintiff to a different team, and could have readily been adopted at least six months earlier, that is, in

or around April 2008, than it ultimately belatedly was. The trial judge considered it was probable that such a move would have significantly reduced the stressors affecting the plaintiff's health. As it was, the belated decision caused a sudden release of pressure and a consequent letdown in the plaintiff's psychological defences that precipitated her breakdown.

108. The trial judge concluded that if urgent action had been taken in the relevant period that could have avoided the plaintiff's breakdown. The failure by the employer to act responsively to the buildup of pressure that was occurring to the plaintiff in the last 10 to 18 months for employment constituted a breach of its duty of care to the plaintiff.
109. The employer acting at a glacial pace in response to the perceived danger fell short of obligation to discharge its duty.

Roussety v Castricum Brothers Pty Ltd [2016] VSC 466

Zammit J

110. The defendant operated an abattoir and meat processing business in Dandenong. The plaintiff was employed by the defendant as a rendering plant operator from 2000 to 2004 and then as manager of the rendering plant from 2004 to September 2007.
111. In the last three years of his employment with the defendant as manager the plaintiff claimed he was required to carry out long hours of work, including being on call 24 hours per day and undertaking stressful duties without appropriate assistance or support, resulting in psychiatric injury, including major depression.
112. At trial it was admitted that the plaintiff had suffered psychiatric injury but it was disputed that the injury was work related and was reasonably foreseeable.

113. The plaintiff last worked on 10 July 2007. He was made redundant on or about 5 September 2007. He subsequently lodged WorkCover claim. The plaintiff gave evidence that he had provided medical certificates and certificates of capacity on or about 19 or 20 July 2007. The trial judge found at [181] that the two WorkCover certificates or the WorkCover claim form were not received by the defendant until 5 September 2007.
114. It was found that he had previously experienced an episode of a collapse at work on 28 February 2007 and thereafter he had made ongoing complaints about the inadequacy of the maintenance support, staff shortages and long hours.
115. At [237] the trial judge found that following the plaintiff's collapse on 28 February 2007, there was sufficient evidence signs to give the defendant notice that the plaintiff was at risk of developing a psychiatric condition because of his workload. There are additional evidence signs when the plaintiff was away for three weeks in March 2007, when one of the employer witnesses made reference to the plaintiff being on "stress leave" and when the plaintiff told another employer witness on the morning of 10 July 2007 that he had worked all night and requested to go home.
116. This made it reasonably foreseeable that there was risk of injury to the plaintiff from 28 February 2007 onwards.
117. The trial judge at [241] in characterising the content of the defendant's duty considered that a reasonable person with the knowledge available to the employer on 28 February 2007 would have considered the plaintiff's complaints about his excessive hours and:
- modified his workload;
 - reduced or removed his on-call duty;

- monitored the hours he was required to work;
 - increase the staff in the rendering plant, as previously requested by the plaintiff; and
 - provided the plaintiff would support and directed that he take any sick leave he required or time off work if he had worked particularly long hours.
118. The trial judge concluded at [242] that a reasonable person would also have monitored the plaintiff's condition when he returned to work on 19 March 2007 and on 30 April 2007 and acquired from time to time about his well-being. The reasonable person in the defendant's position would also investigate the merits of the plaintiff's complaints and would not ignore those complaints will dismiss those complaints out of hand. The steps were considered by the trial judge to be matters of common sense.
119. There was no evidence called by the plaintiff to establish an external standard. The trial judge referred to the decision of Ginnane J in *Doullis* (supra) to the effect that there was no need for an external standard in circumstances where a reasonable person would perceive that there was a risk that the injured worker would develop a recognised psychiatric illness.
120. Turning to breach, the trial judge considered what was a reasonable response in the circumstances. The trial judge found that by the end of February 2007 the defendant had enough information about the state of the plaintiff's mental health to have responded in a more supportive manner and to have taken further measures to investigate the plaintiff's concerns and put support in place.
121. At [259] the trial judge found that the defendant did not adequately monitor the plaintiff's workload on his return to work in March 2007. While the sales role and management of maintenance were taken from the plaintiff at this time, the trial judge found there was no proper assessment of the plaintiff's workload, the hours he was keeping, or the demands of

the position. The evidence was that the defendant did not meaningfully reduce the plaintiff's hours are addressed the staff shortage on his return to work, despite his complaints to one of the managers about this. The plaintiff was required to come into work while on further sick leave in April 2007 to complete a report.

122. At [270] the trial judge found that on 10 July 2007 a reasonable person in the position of the manager would have taken the plaintiff's request to go home seriously and would have determined that the plaintiff was at risk of psychiatric injury. The trial judge considered telling an employee who has worked overnight to keep working was not a reasonable response to that risk. The trial judge found that a reasonable person in the position of the employer (an employer of approximately 400 employees) would have taken the plaintiff at his word and would have let him go home early. The trial judge felt it was worth reiterating that the plaintiff subsequently collapsed at work on that day.
123. At [272] the trial judge considered that the employer should have put into place measures to prevent the plaintiff from working excessive hours and, had that been done, the employer would have taken the plaintiff's complaint seriously on 10 July 2007 and sent him home. The trial judge concluded that the failure by the defendant to put such measures in place from 28 February 2007 to prevent the plaintiff working excessive hours and telling the plaintiff to keep working on 10 July 2007 was a breach of its duty to take reasonable care to avoid foreseeable risk of psychiatric injury to the plaintiff.

Taseska v MSS Security Pty Ltd [2016] VSC 252

J Forrest J

124. The plaintiff appeared in person. The Court of Appeal found no error in the trial judge's reasoning. See *Taseska v MSS Security* [2016] VSCA 193.
125. The plaintiff claimed psychological injuries resulting from two assaults by passengers. She claimed that her employer failed to intervene. The first assault involved a passenger in a spray can. The incident resulted in the plaintiff having three days off work. The employer did not dispute that some form of incident occurred however the consequences of the dispute were an issue.
126. At [161] the trial judge rejected the plaintiff's account of the incident with the passenger. The trial judge accepted that some sort of event occurred, but found that the event as described by the plaintiff was not really credible because if the if her version of the event had occurred, it would have amounted to a major security breach, one not easily forgotten, and would have required action by the AFP, closeout closure of the entire screening point or re-scanning of all passengers. The trial judge at [164] and [165] found significant that the plaintiff did not mention the incident to her general practitioner. The trial judge accepted that the plaintiff had ruminated on the event in the years subsequent and this had influenced her recounting of it.
127. There was a second incident relied upon by the plaintiff relating to an assault by a female passenger who became angry about being searched. The trial judge reviewed the evidence relating to the accountant found there were internal inconsistencies in the plaintiff's version of the incident. The trial judge found it was contradicted in detail by other sworn evidence and contemporaneous record of the events which the trial judge accepted.
128. At [199]-[202] the trial judge found ultimately there was no breach of duty and that this was a spontaneous incident which could not have been avoided by the exercise of reasonable care.

The trial judge considered that the employer acted reasonably and whilst it was foreseeable that there may be altercations between security staff and passengers, the employer could not prevent disagreements from occurring in an area where employees deal constantly with members of the public. In fact, the trial judge observed the law does not require the employer to do so. To mitigate against the possibility of altercations occurring between passengers and staff, the employer provided at least one management staff member on the floor to supervise security staff in their dealings with the public. The trial judge was satisfied that there was an appropriate amount of supervision in place and there was no lack of training of the defendant's employees.

129. The plaintiff brought a further claim in which she alleged that she was subjected to bullying and harassment upon her return to work following these two events. At [224] the trial judge found the allegations by the plaintiff concerning bullying and harassment were vague and unsubstantiated. He regarded the plaintiff's credibility as wanting on issues concerning her interaction with staff and passengers. Absent contemporaneous complaints and corroboration the trial judge was not prepared to accept account of these allegations. The trial judge concluded that the objective facts did not support and indeed disproved the plaintiff's case.

130. In referring to *Koehler* at [230] the trial judge concluded that the defendant had behaved in a totally reasonable fashion and endeavouring to look after the plaintiff. The defendant was faced with an employee who had become extraordinarily dissatisfied with the working environment and was suffering from considerable anxiety. He concluded that whatever the management did would have been the subject of complaint by the plaintiff. The trial judge considered the defendant's conduct exemplary. The trial judge ultimately concluded there was no bullying or harassment and therefore no breach of duty.

Pateras v State of Victoria [2017] VSCA 31

Santamaria and Beach JJA

131. Court of Appeal dismissed an appeal by the injured worker.
132. The injured worker was employed by the respondent as a careers teacher at Galvin Park secondary College. In 2007 she applied for a teaching position at the college. She attended two interviews with a selection panel. Following the second interview, the injured worker had a discussion with the school principal. The injured worker's claim was that in that discussion the principal breached his duty had not caused her psychological harm. She further alleged that the way in which a complaint was investigated was also a cause of psychological harm. Finally, she contended that she suffered further harm in the way in which her return to work was handled.
133. A County Court judge dismissed her claim. The trial judge held that, as at the date of the discussion, any duty not because of the applicant psychological harm had not been engaged, because no risk of psychiatric injury was reasonably foreseeable. Moreover, the trial judge found that there had been no breach of any such duty either in the discussion or in the management of the investigation or the return to work.
134. The case turned largely upon credit. The trial judge preferred the evidence of other witnesses to that of the injured worker. The injured worker argued on appeal that she had fresh evidence which would go to the credibility of the principal as a witness.
135. The injured worker's case was that the duty had been engaged as on 22 October 2007, the principal was well aware that she had several absences from school in the months before

- October 2007. She gave evidence that her absences were occasioned by the need to care her for her son who had glandular fever and her own gynaecological problems. She had told fellow staff members that these were the reasons for her absences. During July and August 2007 she had counselling sessions with a psychologist.
136. The evidence disclosed that the principal was aware that the injured worker had been stressed and nervous during the selection and interview process. He also understood that she had been physically unwell. His evidence was that he did not have any concerns about her mental state, as distinct from normal nervousness and anxiety. Although the applicant had left the second interview upset, the principal believed that he would be providing her with good news that she had been successful in her application.
137. The injured worker subsequently submitted a WorkCover claim on 10 December 2007 in which she said that her injury was in the form of “stress and anxiety” which was “in response to a meeting with the principal and the lack of action by the DEECD in my crisis situation”.
138. The trial judge concluded that the duty by the employer which is owed, does not require absolute and unremitting solicitude for an employee’s mental well-being, and should not be viewed with the convenience of hindsight.
139. Further, the trial judge reasoned the fact that a workplace issue is not handled as sensitively as it might otherwise have been does not necessarily give rise to a breach of duty. Disappointed ambition in a workplace is common. Psychiatric decompensation as a result is not.
140. At [56] the Court said it was plain how the trial judge considered the evidence and that all that was reasonably foreseeable was that the injured worker “might be disappointed, offended or

upset” and that the onus was on the injured worker to show that much more was reasonably foreseeable.

141. At [55], the Court noted the trial judge had concluded that the injured worker’s career as a teacher came to an end largely as a result of a misunderstanding with the principal and others at the college, following the events of 22 October 2007.

142. That result was considered by the trial judge to lie largely at the feet of the injured worker for failing to respond to the principal’s request for a sensible discussion about what occurred, her uncompromising attitude to the appointment to the LT1 position and her unassailable view that other teachers at the school and in the DEECD, rather than herself were responsible for the sad state of affairs. The court found there was no error in the trial judge’s conclusion that the duty had not been engaged, and hence no question of breach arose.

Hingst v Construction Engineering (Aust) Pty Ltd (No.3) [2018] VSC 136

Zammit J

143. The Plaintiff appeared in person and prepared his own case.

144. The plaintiff was employed by the defendant as a contract administrator from 13 May 2008 until 8 April 2009. The plaintiff claimed he was bullied in the workplace during the period of his employment and claimed as a result he developed psychiatric and physical injuries including fibromyalgia and irritable bowel syndrome. He claimed damages in the sum of \$1,805,138.

145. The defendant denied bullying and in particular relied on the fact that the plaintiff never complained of bullying nor gave notice directly or indirectly of his failing mental state.

146. At [9] the trial judge noted there is no statutory definition of what constitutes bullying in the workplace. The trial judge referred to the reasons for judgment of Osborn JA in *Brown v Maurice Blackburn Cashman*.⁷ (discussed above) The trial judge noted this definition had been cited with approval and cited those authorities at [11], in particular reference was made to the remarks of John Dixon J in *Swan v Monash LawBook Cooperative*⁸, including that an established pattern of behaviour is significant, as its persistent nature creates the foreseeable risk to health.
147. The trial judge reviewed the evidence as to the plaintiff's complaints of bullying and at [23] observed that the question of whether peripheral incidents amount to bullying or harassment must be assessed objectively. It is not a question of what the plaintiff perceived.
148. Relevantly, the plaintiff was found to be an unreliable witness, whose evidence did not substantiate any the alleged incidents at the defendant company. It was not the case that he was a poor historian, rather he lacked objectivity, which the trial judge found coloured his evidence. The trial judge found the plaintiff's conviction that he was the subject of a complex conspiracy dominated his evidence in chief, his cross examination of the liability witnesses, and this ultimately became the central focus of his claim.
149. At [29] the trial judge found the plaintiff was a man profoundly hurt by the loss of his employment. He reacted in an extreme and unreasonable way to the termination of his employment which led him to seek revenge against those whom he blamed for his loss.
150. There was an allegation of conspiracy brought by the plaintiff against the employer, which the trial judge rejected. At [57] the trial judge found that the way the plaintiff conducted the trial

⁷ [2013] VSCA 122; (2013) 45 VR 22.

⁸ [2013] VSC 326.

focused more on the loss of his employment rather than any bullying that was said to have taken place at his time at the defendant company.

151. Ultimately (see at [112]) the trial judge found there was no evidence that the defendant was aware that the plaintiff was at risk of developing a psychiatric injury because of (the alleged bully's) conduct. He continued to work. He never complained to his manager. His manager was therefore unaware of any distress arising from the plaintiff's relationship with the bully.
152. The manager was aware of the plaintiff's personal issues, but it would not have been reasonable for him to intervene in the circumstances since that would be tantamount interfering in an employee's private life. The manager's evidence was that when the alleged bully raised the plaintiff's poor performance with him, he told the alleged bully to be patient as the plaintiff had problems at home. The trial judge found there was no negligence on part of the defendant. The trial judge dismissed the claim.

Conclusion

153. The ways in which mental injury can arise seem to be almost infinitely variable. The law in Victoria in this area is growing as it grapples with these complex cases. The application of the principles set down by the High Court in *Koehler* would appear to have settled in Victoria into a system that seems to work fairly well. The judgments reveal a balance in results for both workers and employers. The jurisprudence is evolving, as we all become more accustomed to this post-*Koehler* landscape.

Campbell E. Hangay
Owen Dixon Chambers East
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