Koehler v Cerebos (Australia) Ltd - [2005] HCA 15

HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

NUHA JAMIL KOEHLER APPELLANT

AND

CEREBOS (AUSTRALIA) LIMITED RESPONDENT

Koehler v Cerebos (Australia) Ltd

[2005] HCA 15
6 April 2005
P61/2004

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

A G Braddock SC with N J Mullany for the appellant (instructed by Marks & Sands)

B W Walker SC with D R Clyne for the respondent (instructed by Dibbs Barker Gosling)

CATCHWORDS

Koehler v Cerebos (Australia) Ltd

Negligence – Duty of care – Psychiatric injury – Content of an employer's duty to an employee to take reasonable care to avoid psychiatric injury – Whether employer breached its duty to provide employee with a safe system of work by failing to take the

steps identified by employee – Whether reasonable person in position of employer would have foreseen the risk of psychiatric injury to the employee – Relevance of employee's agreement to perform the work which brought about her injuries – Whether the law of negligence should be developed in such a way as to inhibit the making of agreements involving more work than an industry standard.

Contract – Contract of employment – Freedom of parties to stipulate that an employee will do more work than an industry standard – Whether the law of negligence should be developed in such a way as to inhibit the making of agreements involving more work than an industry standard.

McHUGH, GUMMOW, HAYNE AND HEYDON JJ.

The issue

1. The appellant was employed three days a week as a merchandising representative of the respondent (the employer). She could not perform the duties expected of her to her satisfaction. She repeatedly told management that changes had to be made. She said that the work expected of her had to be changed, or she should have more time in which to do it, or she should have help to do it. No changes were made.

2. Five months after starting this work the appellant fell ill. At first a physical disorder was suspected but further consideration revealed that the appellant was suffering a psychiatric illness. Her work was a cause of that illness.

3. Did the employer breach the duty of care it owed the appellant to provide her with a safe system of work?

4. In the District Court of Western Australia, Commissioner Greaves found that the appellant's workload was excessive, that the employer needed no particular expertise to foresee that there was a risk of injury to the appellant of the kind that ensued and that, by not increasing the appellant's hours of work or giving her assistance, the employer failed in its duty to ensure that all reasonable steps were taken to provide the appellant with a safe system of work.

5. On appeal to the Full Court of the Supreme Court of Western Australia (Malcolm CJ, McKechnie and Hasluck JJ) that Court held[1] that the employer could not reasonably have foreseen that the appellant was exposed to a risk of psychiatric injury as a consequence of her duties at work. That being so, the employer's appeal was allowed. The appellant now appeals to this Court. The Full Court was right. The appeal should be dismissed.

[1] *Cerebos (Australia) Ltd v Koehler* [2003] WASCA 322 at [75] .

The facts

6. It is desirable to say a little more about the facts.

7. Before taking up the job as a parttime merchandising representative, the appellant had been employed fulltime by the employer as a sales representative. She worked in that position between November 1994 and April 1996. As a sales representative the appellant negotiated sales of the employer's products to independent supermarkets. She was supported by a merchandiser who would set up the display of the goods in the supermarkets.

8. In March 1996, the employer, having lost the right to distribute an important range of products, retrenched the appellant. It offered her reengagement as a parttime merchandising representative from 29 April 1996 and she accepted the offer. The letter of engagement set out only the bare bones of her contract of employment. It stated her starting date, and that her working week was Monday to Wednesday (or 24 hours). The letter "confirmed" her salary structure at a particular hourly rate, a car allowance of a stated amount per kilometre and said that "[o]ut of pocket expenses to support incidental expenditure [would] apply". The appellant's letter of engagement said nothing about the duties she was expected to perform.

9. When she reported for work on the first day of her new job (29 April 1996) she was shown a "territory listing". When she saw the stores that were listed she said at once that there was "no way" she could "do this in 24 hours". Her supervisor told her to try it for one month and, if she felt that she could not cope, she should let him know. This she did.

10. It is not necessary to describe the appellant's complaints to management in any detail. It is enough to say that she complained orally and in writing on many occasions that she had too big an area, too many stores and very little time. Her weekly written reports sometimes recorded that she was working more than eight hour days. But all her complaints were directed to whether the work could be done; none suggested that the difficulties she was experiencing were affecting her health. She told management that there were two ways to solve the problems she was encountering: to reduce the number of stores she was to visit, or to have her work a fourth day. She nominated the stores that should be removed from her list and identified the representatives to whom they could be given. The employer took neither of the steps the appellant suggested and took no other action to alter the work expected of the appellant.

11. The appellant did not contend that the employer's failure to take these steps was a breach of an express or implied contractual stipulation regulating the work expected of her. In particular, she did not contend that her exchanges with her supervisors, when first shown a territory listing, gave rise to some relevant term of the employment agreement. She contended that the failure to take the steps she identified was a breach of the employer's common law duty to provide a safe system of work, a breach of an implied term of the employment contract that the employer would provide a safe system of work, and a breach of a statutory duty owed under the *Occupational Safety and Health Act* 1984 (WA) [2] .

[2] The Act was referred to in the appellant's Statement of Claim by its former title, the *Occupational Health, Safety and Welfare Act* 1984 (WA) . The title was changed by the *Occupational Safety and Health Legislation Amendment Act* 1995 (WA) (Act No 30 of 1995).

12. The appellant's work required her to lift cartons of product. On 2 October 1996, she reached the point where she felt she could not physically do that any longer, and she went to see her doctor, complaining of aches and pains and difficulty in moving. She thought that her aches and pains were caused by the physical demands of her job.

13. Her doctor first focused on her physical symptoms. Then she was diagnosed as suffering a "fibromyalgia syndrome", that is, a "psycho-physical disorder resulting in [p]ain [a] mplification". By January 1997, anxiety and depression were thought to be clouding the appellant's clinical picture and she was referred to a psychiatrist.

14. At trial, the Commissioner found that she had developed complex fibromyalgia syndrome and a major depressive illness. Her symptoms were found to be "entirely attributable to her conditions of employment between April and October 1996". Although in issue at trial, it is not now disputed that the appellant sustained and suffers from a recognised psychiatric illness of which her work was a cause.

15. Much attention was given at trial to the amount of work expected of the appellant. Comparisons were made between the work she had done when employed fulltime, and the work expected of her when employed parttime. No doubt such comparisons were made because the appellant's complaints to her supervisors, and to her doctors, had often been put in terms that she was expected to do the same amount of work in three days as she had previously been doing in five.

16. The Commissioner accepted the evidence given by persons familiar with work of the kind undertaken by the appellant in connection with supplying products to supermarkets to the effect that the appellant's workload "was too much to maintain in three days" and that her workload "was very similar to that of a fulltime employee". It was on the basis of this evidence that the Commissioner found that the appellant's workload between 29 April 1996 and 2 October 1996 was "excessive". Having made the finding about foreseeability noted earlier (that with its knowledge of the industry and the particular workload of the appellant the employer required no particular expertise to foresee a risk of injury to the appellant), the Commissioner found that it had been open to the employer to increase the appellant's hours or provide her with assistance. The Commissioner described the expense, difficulty, and inconvenience of such a course of action as "negligible" [3] . Judgment was entered for the appellant.

[3] cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 4748 per Mason J.

17. **Following paragraph cited by:**

Christos v Curtin University of Technology (21 June 2017) (Murphy, Mitchell and Beech JJA)

As noted earlier, the Full Court focused its attention upon the correctness of the Commissioner's finding about foreseeability. Justice Hasluck (with whom the other members of the Court agreed) said [4] that:

> "in the absence of external signs of distress or potential injury a reasonable person in the position of the [employer] could not have foreseen that the [appellant] was exposed to a risk of injury as a consequence of her duties as a merchandiser. The presence of complaints about the workload may have suggested to a reasonable employer that remedial action was required in order to avert an industrial dispute but on the evidence in this case the nature of the complaints was not enough to alert a reasonable employer to the possibility of injury."

That is, the question of foreseeability was treated in the Full Court as determinative, and as turning (at least in this case) upon whether there was any material available to the employer that should have alerted it to a specific risk of psychiatric injury to the appellant.

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[4] [2003] WASCA 322 at [75] .

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18. In this Court, the employer submitted that the Full Court was right to reach the conclusion which it did on this aspect of the matter but sought to go the further step of submitting that there had been no evidence before the Commissioner to support the conclusion that it required no particular expertise to foresee the risk of psychiatric injury. It will be necessary to return to this question. Before doing that, however, it is necessary to identify the proper point at which to begin consideration of the issues which arise when it is claimed, as in this case, that an employer's duty of care obliges the employer to avoid a risk of psychiatric injury to an employee by altering the work expected of the employee.

The proper starting point

19. **Following paragraph cited by:**

State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)

46. Only slight attention was given in either the reasons for judgment or the submissions on appeal to the statutory context against which content of the duty of care for breach of which the State was vicariously liable. But statute must be considered at the outset. McHugh, Gummow, Hayne and Heydon JJ said in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; [2005] HCA 15 at [19] and [21]-[22] :

> "*The proper starting point*
>
> Because the appellant's claim was framed in negligence, and because her claim was brought against her employer, it may be thought necessary to have regard only to the well-established proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work. From there it may be thought appropriate to proceed by discarding any asserted distinction between psychiatric and physical injury, and then focus only upon questions of breach of duty. Questions of breach of duty require examination of the foreseeability of the risk of injury and the reasonable response to that risk in the manner described in *Wyong Shire Council v Shirt* . But to begin the inquiry by focusing only upon questions of breach of duty invites error. It invites error because the assumption that is made about the content of the duty of care may fail to take fundamental aspects of the relationship between the parties into account.
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> ...
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> *The content of an employer's duty of care*
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> The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions.
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> ...
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> [Q]uestions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties."

Nepean Blue Mountains Local Health District v Starkey (25 July 2016) (McColl and Payne JJA, Garling J)
Schultz v McCormack (23 October 2015) (McColl and Macfarlan JJA, Beech-Jones J)
Larner v George Weston Foods Ltd (09 April 2014) (Redlich, Tate and Santamaria JJA)

204. The Court emphatically repudiated the view that there is 'only one question' [150] to ask where an employee claims damages from an employer for negligently inflicted psychiatric injury, namely, 'whether this kind of harm to this particular employee was reasonably foreseeable',

[151] stating: 'That proposition should be rejected.' [152] The initial question must lie in determining the content of the duty of care and 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.

via

[151] Ibid 54 [23].

Larner v George Weston Foods Ltd (09 April 2014) (Redlich, Tate and Santamaria JJA)
Larner v George Weston Foods Ltd (09 April 2014) (Redlich, Tate and Santamaria JJA)
Larner v George Weston Foods Ltd (09 April 2014) (Redlich, Tate and Santamaria JJA)
O'Donovan v Western Australian Alcohol and Drug Authority (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

64. Questions of breach of duty require examination of the foreseeability of the risk of injury, and the reasonable response to that risk in the manner described in ***Wyong Shire Council v Shirt*** [1980] HCA 12; (1980) 146 CLR 40, 47 48 ; ***Koehler*** [19] .

State of New South Wales v Burton (10 February 2006) (Spigelman CJ, Basten JA and Hunt AJA)

Because the appellant's claim was framed in negligence, and because her claim was brought against her employer, it may be thought necessary to have regard only to the wellestablished proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work. From there it may be thought appropriate to proceed by discarding any asserted distinction between psychiatric and physical injury, and then focus only upon questions of breach of duty. Questions of breach of duty require examination of the foreseeability of the risk of injury and the reasonable response to that risk in the manner described in *Wyong Shire Council v Shirt* [5] . But to begin the inquiry by focusing only upon questions of breach of duty invites error. It invites error because the assumption that is made about the content of the duty of care may fail to take fundamental aspects of the relationship between the parties into account.

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[5] (1980) 146 CLR 40 at 4748 .

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20. These reasons later show that this case may be decided, as it was by the Full Court, at the level of breach of duty, on the basis that the risk of psychiatric injury to the appellant was not reasonably foreseeable. It is, however, important to point out the nature of at least some of the issues that arise in connection with the content of an employer's duty of care.

The content of an employer's duty of care

21. The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions. (This last class may require particular reference not only to industrial instruments but also to statutes of general application such as antidiscrimination legislation.) Consideration of those obligations will reveal a number of questions that bear upon whether, as was the appellant's case here, an employer's duty of care to take reasonable care to avoid psychiatric injury requires the employer to modify the work to be performed by an employee. At least the following questions are raised by the contention that an employer's duty may require the employer to modify the employee's work. Is an employer bound to engage additional workers to help a distressed employee? If a contract of employment stipulates the work which an employee is to be paid to do, may the employee's pay be reduced if the employee's work is reduced in order to avoid the risk of psychiatric injury? What is the employer to do if the employee does not wish to vary the contract of employment? Do different questions arise in cases where an employee's duties are fixed in a contract of employment from those that arise where an employee's duties can be varied by mutual agreement or at the will of the employer? If an employee is known to be at risk of psychiatric injury, may the employer dismiss the employee rather than continue to run that risk? Would dismissing the employee contravene general antidiscrimination legislation?

22. No doubt other questions may arise. It is, however, neither necessary nor appropriate to attempt to identify all of the questions that could arise or to attempt to provide universal answers to them. What is important is that questions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties.

23. A deal of reference was made in argument to the decision of the English Court of Appeal in the several appeals heard together and reported as *Hatton v Sutherland* [6] . The appellant submitted that, consistent with what was said in *Hatton* , this Court should hold that where an employee claims damages from an employer for negligently inflicted psychiatric injury, only one question need be considered, namely, whether this kind of harm to this particular employee was reasonably foreseeable [7] . That proposition should be rejected.

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[6] [2002] 2 All ER 1 .

[7] [2002] 2 All ER 1 at 13 [23] .

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24. **Following paragraph cited by:**

Hayes v State of Queensland (29 July 2016) (Margaret McMurdo P and Mullins and Dalton JJ,)
Larner v George Weston Foods Ltd (09 April 2014) (Redlich, Tate and Santamaria JJA)

> 207. 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 duties:
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> [S]eeking to read an employer's obligations under a contract as subject to a qualification which would excuse performance, if performance is or may be injurious to psychiatric health, encounters two difficulties. First, the employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job. Implying some qualification upon what otherwise is expressly stipulated by the contract would contradict basic principle. Secondly, seeking to qualify the operation of the contract as a result of information the employer *later* acquires about the vulnerability of the employee to psychiatric harm would be no less contradictory of basic principle. The obligations of the parties are fixed at the time of the contract unless and until they are varied. [155]

via

[155] Ibid 57-8 [36] , citing *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347 ; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283.

Larner v George Weston Foods Ltd (09 April 2014) (Redlich, Tate and Santamaria JJA)
Commonwealth Bank of Australia v Barker (06 August 2013) (Jacobson, Lander and Jessup JJ)

> 48. The primary judge referred to the position in Australia. He said the existence of the term was assumed by McHugh, Gummow, Hayne and Heydon JJ in *Koehler v Cerebos* at [24] . He also referred to another High Court authority, *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312.

Shaw v State of New South Wales (19 April 2012) (Beazley JA at [1]; McColl JA at [2]; Macfarlan JA at [3]; Barrett JA at [4]; McClellan CJ at CL at [136])

No doubt, as was pointed out in *Hatton* [8] , there will be a number of factors which are likely to be relevant to answering the particular question identified in that case. Those factors would include both the nature and extent of the work being done by the employee [9] , and the signs

from the employee concerned [10] – whether in the form of express warnings or the implicit warning that may come from frequent or prolonged absences that are uncharacteristic [11] . W hat other matters might make the risk of psychiatric injury reasonably foreseeable was a question not explored in argument. It is a question that may require much deeper knowledge of the causes of psychiatric injury than whatever may be identified as common general knowledge. But neither the particular issues identified in *Hatton* nor the question from which they stem (was this kind of harm to this particular employee reasonably foreseeable?) should be treated as a comprehensive statement of relevant and applicable considerations. As Lord Rodger of Earlsferry pointed out in his speech in the House of Lords in the appeal in one of the cases considered in *Hatton v Sutherland* , *Barber v Somerset County Council* [12] , it is only when the contractual position between the parties (including the implied duty of trust and confidence between them) "is explored fully along with the relevant statutory framework" that it would be possible to give appropriate content to the duty of reasonable care upon which an employee claiming damages for negligent infliction of psychiatric injury at work would seek to rely.

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[8] [2002] 2 All ER 1 at 14 [25] .

[9] [2002] 2 All ER 1 at 14 [26] .

[10] [2002] 2 All ER 1 at 14 [27] .

[11] [2002] 2 All ER 1 at 14 [28] .

[12] [2004] 1 WLR 1089 at 1101 [35]; [2004] 2 All ER 385 at 398.

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25. Issues about the content of the duty of care were not examined in any detail in the courts below. It was assumed that the relevant duty of care was sufficiently stated as a duty to take all reasonable steps to provide a safe system of work without examining what limits there might be on the kinds of steps required of an employer. Rather, attention was directed only to questions of breach of duty framed without any limitations that might flow from an examination of the content of the duty of care. As earlier indicated, the question of reasonable foreseeability is determinative.

The present case

26. The Full Court was right to conclude that a reasonable person in the position of the employer would not have foreseen the risk of psychiatric injury to the appellant. Because the appellant did not prove that the employer ought reasonably to have foreseen that she was at risk of suffering psychiatric injury as a result of performing her duties at work, her claim in negligence should have failed at trial. The appellant's alternative claims, in breach of contract and breach of statutory duty, have been treated at all stages of this litigation as raising no different issues from those raised by her claim in negligence. As is implicit in what has already been said about determining the content of the employer's duty of care, consideration of a claim in contract (founded on the breach of an implied term requiring reasonable care) would invite close attention to the other terms of the contract of employment, as well as the

relevant statutory framework. The claims in contract and breach of statutory duty having been treated as they were both in the courts below and in this Court, it is unnecessary to consider them further in these reasons.

27. **Following paragraph cited by:**

Shearer v iSelect Services Pty Ltd (01 December 2021) (Beach and Kaye JJA; Forbes AJA)

There are two reasons why the Full Court was right to reach the conclusion it did. First, the appellant agreed to perform the duties which were a cause of her injury. Secondly, the employer had no reason to suspect that the appellant was at risk of psychiatric injury.

28. **Following paragraph cited by:**

Woolworths Limited v Perrins (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)
O'Donovan v Western Australian Alcohol and Drug Authority (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

It is sufficient for the purposes of the present case to attribute only limited significance to the appellant's agreement to perform the duties which brought about her injuries. In this case it is enough to notice that her agreement to undertake the work runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to the appellant's psychiatric health. It runs contrary to that contention because agreement to undertake the work not only evinced a willingness to try but also was not consistent with harbouring, let alone expressing, a fear of danger to health. That is why the protests the appellant made (that performance of the work within the time available seemed impossible) did not *at the time* bear the significance which hindsight may now attribute to them. What was said did not convey at *that* time any reason to suspect the possibility of future psychiatric injury.

29. Although, in this case, the agreement to perform the work has only the limited significance we have indicated, that is not to say that, in another case, an employee's agreement to perform duties whose performance is later found to be a cause of psychiatric injury may not have greater significance. An employer may not be liable for psychiatric injury to an employee brought about by the employee's performance of the duties originally stipulated in the contract of employment. In such a case, notions of "overwork", "excessive work", or the like, have meaning only if they appeal to some external standard. (The industry evidence adduced by the appellant was, no doubt, intended to provide the basis for such a comparison and, as noted earlier, the Commissioner drew a comparison of that kind by concluding that the appellant's

workload was excessive.) Yet the parties have made a contract of employment that, by hypothesis, departs from that standard. Insistence upon performance of a contract cannot be in breach of a duty of care.

30. At first sight, it may appear to be easy to read an employee's obligations under a contract, and an employer's rights to performance of those obligations, as subject to some qualification to the effect that performance of the obligations is excused if performance would be beyond what is required by some external standard, or is or may be injurious to health, or both injurious and beyond an external standard. But further examination of the problem reveals that there are difficulties in resolving the issue in this way.

31. Giving content to what we have called an "external standard" by which work requirements would be judged may not be easy. Presumably, it would be some form of industry standard. Assuming, however, that content can be given to that concept, its application would invite attention to fundamental questions of legal coherence [13] . Within the bounds set by applicable statutory regulation, parties are free to contract as they choose about the work one will do for the other. In particular, within those bounds, parties are free to stipulate that an employee will do more work than may be the industry standard amount. Often the agreement to do that will attract greater rewards than the industry standard. Developing the common law of negligence in a way that inhibited the making of such agreements would be a large step to take.

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[13] *Sullivan v Moody* (2001) 207 CLR 562 at 580581 [54][55] .

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32. Adopting a qualification that hinges upon whether psychiatric injury is or may be sustained from performance of the work would require consideration of questions that are closely related to issues of foreseeability and it is convenient to turn to those issues.

33. **Following paragraph cited by:**

Christos v Curtin University of Technology (21 June 2017) (Murphy, Mitchell and Beech JJA)
Govier v The Uniting Church in Australia Property Trust (Q) (10 February 2017) (Fraser and Gotterson JJA and North J,)
Port Macquarie Hastings Council v Mooney (20 May 2014) (Emmett JA, Sackville AJA and Simpson J)
Wolters v The University of the Sunshine Coast (20 August 2013) (Margaret McMurdo P and Gotterson JA and A Lyons J)
Trustees of the Sydney Grammar School v Winch (27 February 2013) (Bathurst CJ, Allsop P, Beazley, McColl and Meagher JJA)
Mackinnon v BlueScope Steel (AIS) Pty Ltd (08 May 2009) (Ipp JA at 1; Macfarlan JA at 2; Hoeben J at 3)
Koehler v Cerebos (Australia) Limited [2005] HCA 15 ; (2005) 222 CLR 44 at [33]

Mackinnon v BlueScope Steel (AIS) Pty Ltd (08 May 2009) (Ipp JA at 1; Macfarlan JA at 2; Hoeben J at 3)
Nationwide News Pty Ltd v Naidu (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [14] , the Court held that "normal fortitude" was not a precondition to liability for negligently inflicting psychiatric injury. That concept is not now to be reintroduced into the field of liability as between employer and employee. The central inquiry remains whether, in all the circumstances, the risk of a plaintiff (in this case the appellant) sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful [15] .

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[14] (2002) 211 CLR 317 . See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (200 3) 214 CLR 269.

[15] *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 332333 [16], 343344 [61][62], 385 [201] .

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34. It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work. Yet it is that proposition, or one very like it, which must lie behind the Commissioner's conclusion that it required no particular expertise to foresee the risk of psychiatric injury to the appellant.

35. **Following paragraph cited by:**

State of Victoria v Zagi Kozarov (24 November 2020) (Beach, Kaye JJA and Macaulay AJA)
The Age Company Limited v YZ (a pseudonym) (19 December 2019) (Niall, T Forrest and Emerton JJA)
O'Donovan v Western Australian Alcohol and Drug Authority (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)
Patrech v State of New South Wales (22 May 2009) (Beazley JA at 1; Campbell JA at 152; Macfarlan JA at 153)
Leyden v Caboolture Shire Council (20 April 2007) (Jerrard JA, Mackenzie and Helman JJ,)

> 11. The learned judge observed that the content of the duty of care owed by the respondent Council would not be identical in all cases, citing the observations of Kirby J in *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at [123] , and *Koehler v Cerebos (Aust) Ltd* (2005) 214 ALR 355, at [35] . The learned judge held that

because of this plaintiff's knowledge of the modification, and of the risk, and because of his experience, no duty was owed by the Council to him to intercept the modification of the jump before he unsuccessfully attempted to execute it on a second occasion on 15 July 1999. Alternatively, the learned judge concluded that if a duty was otherwise owed and breached, the defendant had established a defence of *volenti*. The judge found that the plaintiff had the appropriate subjective appreciation of the risk.

Ducker v The State of Western Australia (31 May 2006) (Wheeler JA)
State of New South Wales v Fahy (04 April 2006) (Spigelman CJ; Basten JA; Campbell AJA)
State of New South Wales v Burton (10 February 2006) (Spigelman CJ, Basten JA and Hunt AJA)

> 2 I agree with Basten JA that the appeal with respect to the findings of foreseeability of risk should be dismissed. On the authority of *Koehler v Cerebos (Aust) Limited* [2005] HCA 15; (2005) 79 ALJR 845 esp at [35] , set out by Basten JA, the focus must be on the duty owed to the particular employee.

State of New South Wales v Burton (10 February 2006) (Spigelman CJ, Basten JA and Hunt AJA)

The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. That is why, in *Hatton* [16] , the relevant question was rightly found to be whether this kind of harm to this particular employee was reasonably foreseeable. And, as pointed out in that case, that invites attention to the nature and extent of the work being done by the particular employee [17] and signs given by the employee concerned [18] .

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[16] [2002] 2 All ER 1 at 13 [23] .

[17] [2002] 2 All ER 1 at 14 [26] .

[18] [2002] 2 All ER 1 at 14 [27] .

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36. **Following paragraph cited by:**

Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)

> 263. Hurex says that it was entitled to assume, in the absence of any warning signs, that Mr Hodson considered that he was able to do the job required for him under the contract, a job that he agreed to perform and enjoyed doing (referring to *Koehler* at [36]). (I note here that it is not clear to me

> that this addresses the circumstances of the present case. Whether or not Mr Hodson considered himself capable of doing the job does not address whether Hurex had a duty, as employer, to direct him how to respond if an emergency were to arise.)
>
> Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)

Because the inquiry about reasonable foreseeability takes the form it does, seeking to read an employer's obligations under a contract as subject to a qualification which would excuse performance, if performance is or may be injurious to psychiatric health, encounters two difficulties. First, the employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job. Implying some qualification upon what otherwise is expressly stipulated by the contract would contradict basic principle [19] . Secondly, seeking to qualify the operation of the contract as a result of information the employer *later* acquires about the vulnerability of the employee to psychiatric harm would be no less contradictory of basic principle. The obligations of the parties are fixed at the time of the contract unless and until they are varied.

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[19] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347 ; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

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37. Two caveats should be entered. First, hitherto we have referred only to the employer's performance of duties *originally* stipulated in a contract of employment. It may be that different considerations could be said to intrude when an employer is entitled to vary the duties to be performed by an employee and does so. The exercise of powers under a contract of employment may more readily be understood as subject to a qualification on their exercise than would the insistence upon performance of the work for which the parties stipulated when making the contract of employment.

38. Secondly, we are not to be understood as foreclosing questions about construction of the contract of employment. Identifying the duties to be performed under a contract of employment and, in particular, identifying whether performance of those duties is subject to some implied qualification or limitation, necessarily requires that full exploration of the contractual position of which Lord Rodger spoke in *Barber v Somerset County Council* , against the relevant statutory framework in which the contract was made.

39. In this case, it is not necessary to consider any issue that might be presented by variation of the duties for which parties originally stipulate in a contract of employment because, in this case, there was not said to have been any variation of the appellant's duties. The evidence revealed that the appellant was a very conscientious employee. She may well have done more than her contract of employment required of her but the employer did not vary her duties from

those originally stipulated when she was reengaged as a parttime merchandising representative. And, as the appellant's complaints to her employer revealed, it was the performance of those duties which she found to be more than she could cope with.

40. Nor is it necessary to decide this case on the basis that the appellant's agreement to perform the duties which were a cause of her injuries is conclusive against her claim. The identification of the duties for which the parties stipulated would require much closer attention to the content of the contractual relationship between them than was given in the evidence and argument in the courts below. For present purposes, it is sufficient to notice that her agreement to undertake the tasks stipulated (hesitant as that agreement was) runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed risks to the appellant's psychiatric health.

41. **Following paragraph cited by:**

Christos v Curtin University of Technology (21 June 2017) (Murphy, Mitchell and Beech JJA)

121. That suggestion is reinforced by the trial judge's comment [168] that the state of the evidence had parallels with ***Koehler v Cerebos (Aust) Ltd*** . [169] In ***Koehler*** , a claim in negligence, relating to a psychiatric injury of which the plaintiff's work was a cause, was dismissed on appeal to the Full Court of this court. It was dismissed on the basis that 'in the absence of external signs of distress or potential injury', the risk of psychiatric injury to the plaintiff was not reasonably foreseeable. [170] In the High Court, the plurality identified the central inquiry as whether, in all the circumstances, the risk of the employee sustaining recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not farfetched or fanciful. [171] The plurality noted:

> The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. … [T]hat invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned. [35] (citations omitted)

Koehler was decided on the basis that the employer had no reason to suspect risk to the plaintiff's psychiatric health in circumstances which included that, when the plaintiff became sick, she and her doctor thought that the illness was physical not psychiatric. [172] By contrast, in the present case Dr Terace's report put Curtin on notice that Dr Christos was suffering from psychiatric illness which had been triggered by events at work.

via
[172] ***Koehler*** [41] .

Woolworths Limited v Perrins (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)

> 67. In determining what may be "far-fetched or fanciful" the authorities make clear that the risk in question must not merely be "foreseeable" but must be "reasonably" so: see the various judgments in *Tame*. [42] Sight should not be lost of what is really in issue. The point of the enquiry is to determine whether it was reasonably foreseeable that the conduct complained of was likely to result "in mental anguish of a kind that could give rise to a recognised psychiatric illness" to adopt Gleeson CJ's words in his analysis of *Annetts v Australian Stations Pty Ltd* . [43]
>
> *via*
> [43] (2005) 222 CLR 44 at [41] .

Ducker v The State of Western Australia (31 May 2006) (Wheeler JA)

The conclusion that the employer had no reason to suspect that the appellant was at risk of psychiatric injury is the reason upon which the Full Court's conclusion hinged. Here there was no indication (explicit or implicit) of any particular vulnerability of the appellant. As noted earlier, she made many complaints to her superiors but none of them suggested (either expressly or impliedly) that her attempts to perform the duties required of her were putting, or would put, her health at risk. She did not suggest at any time that she was vulnerable to psychiatric injury or that the work was putting her at risk of such an injury. None of her many complaints suggested such a possibility. As the Full Court said, her complaints may have been understood as suggesting an industrial relations problem. They did not suggest danger to her psychiatric health. When she did go off sick, she (and her doctor) thought that the illness was physical, not psychiatric. There was, therefore, in these circumstances, no reason for the employer to suspect risk to the appellant's psychiatric health.

42. The Full Court was right to conclude that the employer was not shown to have breached a duty of care. The appeal to this Court should be dismissed with costs.

43. CALLINAN J. Is an employee, who finds the workload of a position that she has voluntarily accepted excessive to the point that she suffers a disabling psychiatric illness, entitled to recover damages for negligence from her employer? In particular, is the occurrence of such an illness without more, foreseeable? These are the questions to which this appeal gives rise.

The facts

44. The appellant who was then 40 years old and in good health began to work full time for the respondent in November 1994 as a sales representative. She was the most successful of the respondent's sales representatives during the year 1995. In March 1996 the respondent told her that she was to be retrenched. She was however offered another position as a part-time merchandiser working three days per week. It was also intimated to the appellant that she

would be restored to a full-time position within about 6 months . The terms upon which the part-time employment was offered and which she accepted were reduced to writing on 4 April 1996:

> "Employment conditions.
>
> A) Officially commence merchandising services from April 29th next.
>
> B) Working week will consist of Monday, Tuesday & Wednesday (24 hours).
>
> C) Salary structure is confirmed at $14.00 per hour.
>
> D) Car allowance of 47c per km.
>
> E) Out of pocket expenses to support incidental expenditure will apply and authorised by [the Manager]."

She continued to work in her full-time position until late April 1996. When her superior outlined her new part-time duties to her, she claimed that she immediately informed him that she could not do the work within the time allotted of 3 working days, and that it involved the lifting of cartons that were too heavy for her. She claimed that she subsequently repeated her complaints to several others of the respondent's staff. Two of the complaints were specific, very detailed, and in writing.

45. **Following paragraph cited by:**

    Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)

The appellant said that by early October 1996, she could no longer do the work. After a time she made these assertions to the respondent. Mentally she was not the same. She was troubled by aches and pains. Her memory was deteriorating. She found it difficult to sleep. She was exhausted. It seemed to her that her ability to comprehend was reduced. She had become emotional. Her libido was markedly diminished. She consulted a doctor, Dr Hendry, and ceased to work in early October 1996. Initially the doctor's focus, as was her own, was upon her physical symptoms. Only later was the doctor to form the view that the appellant was stressed and depressed. He referred her first to a rheumatologist, Dr Hayes, who, on 11 December 1996 made this diagnosis of her condition:

> "... I believe this lady's symptoms are multifactorial, ie she demonstrates features of Depression combined with a CHRONIC PAIN SYNDROME consistent with Fibromyalgia Syndrome. The alleged pressure of her work appears to be the precipitating factor in the onset of this lady's symptoms, hence I have referred to this as being a 'work-related Fibromyalgia Syndrome'.

Fibromyalgia Syndrome is thought to be a psycho-physical disorder resulting in Pain Amplification in certain people predisposed to developing this type of condition. Hence the patient's psychological makeup in the first place is of significant importance in the development of this condition which in turn has been precipitated by the stress of her work."

46. In April 1997, Professor Burvill a consulting psychiatrist to whom Dr Hayes referred the appellant, diagnosed her as suffering a moderately severe, major depressive illness. He thought that there was a very clear association between her work and her depression. Soon afterwards, following a sighting for the first time of Dr Hayes's reports upon her, he formed the opinion that the symptoms of fibromyalgia and major depression were not directly related to her termination and reappointment in March and April 1996, but that they were related to her conditions of work. Professor Burvill saw the appellant many times over the ensuing years. She was, he thought, effectively unemployable.

The trial

47. In due course the appellant brought proceedings in the District Court of Western Australia. Her claim in substance was that the respondent so unreasonably overloaded her with work, that is to say, negligently so, that she became stressed to the point that she suffered a severe depressive injury disabling her from working. The particulars of negligence alleged were as follows:

"(a) failed to properly train the [appellant] in the performance of her duties;

(b) failed to properly supervise the [appellant] in the performance of her duties;

(c) failed to attend with the [appellant] on her round of duties to ascertain where adjustments could be made to assist her health and safety;

(d) failed to heed the concerns of the [appellant] regarding assistance, health and safety;

(e) failed to provide the [appellant] with suitable lifting devices;

(f) failed to tutor the [appellant] in suitable lifting techniques and to enforce these techniques;

(g) failed to provide for the [appellant], suitable assistance either mechanical or human to be able to mount her displays especially when requested by the [appellant];

(h) failed to not place unrealistic demands on the [appellant] to perform the role of both Merchandiser and Sales Representative when other employees of the defendant were not required to perform both roles;

(i) failed to respect and not abuse the [appellant's] conscientious nature; and

(j) failed to not place the [appellant] under psychological and physical stress and pressure."

It was part of the appellant's case that the respondent knew or must have known of the risk of psychological injury to her because of her repeated requests for relief, assistance and a reduction in her workload. The appellant also sought to mount a case of breach of contract and breach of s 19(1) of the *Occupational Safety and Health Act* 1984 [20] (WA) ("the Act") which provides as follows:

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[20] Prior to the enactment of the *Occupational Safety and Health Legislation Amendment Act* 1995 (WA) the Act was entitled the *Occupational Health, Safety and Welfare Act* 1984 (WA) .

"**19. Duties of employers**

(1) An employer shall, so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall –

(a) provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, his employees are not exposed to hazards;

(b) provide such information, instruction, and training to, and supervision of, his employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards;

(c) consult and co-operate with safety and health representatives, if any, and other employees at his workplace, regarding occupational safety and health at the workplace;

(d) where it is not practicable to avoid the presence of hazards at the workplace, provide his employees with, or otherwise provide for his employees to have, such

adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees; and

(e) make arrangements for ensuring, so far as is practicable, that –

(i) the use, cleaning, maintenance, transportation and disposal of plant; and

(ii) the use, handling, processing, storage, transportation and disposal of substances,

at the workplace is carried out in a manner such that his employees are not exposed to hazards."

The only arguable allegation in respect of the claim in contract was that the respondent failed to provide the appellant with a safe system of work, that is, one which did not make unrealistic demands upon her. The appellant did not suggest however, either at the trial, or on the appeal to the Full Court of the Supreme Court of Western Australia that the principles applicable to each of the claims were in any way different in this case, although, as will appear, contractual considerations should not be disregarded.

48. Evidence on behalf of the appellant was received at the trial from persons professing expertise in occupational health and related disciplines. The burden of this evidence was that relevant training should be given to staff and they should not be asked to do what it was beyond their capacities to do. The witnesses were unable to say however that the appellant's duties exceeded what was reasonable and that they caused her disabilities.

49. The appellant's action was tried by Commissioner Greaves. He concluded that the respondent did not need to possess any particular expertise to appreciate and foresee that if it did not review its operations and the appellant's workload, there would be a risk of injury to her of the kind that she suffered, even though some might think the risk an unlikely one. It was, nonetheless, not a far-fetched or fanciful one: it was, in summary, real and foreseeable, and the respondent as an employer should have foreseen it. It was his opinion that having regard to the magnitude of the risk, the degree of probability of its occurrence and the expense, difficulty and inconvenience of taking alleviating action, and any other conflicting responsibilities which the respondent may have had, a reasonable person in the position of the respondent faced with the appellant's complaints would have investigated and evaluated them, and made such changes to the system of work as the circumstances required. He rejected the respondent's contention that the appellant caused or contributed to her disabilities by her own negligence or any breach of contract on her part. (The respondent had alleged that the appellant had failed to exercise care for her own well-being in breach of an implied term of her contract of employment requiring her to do so). The Commissioner then assessed damages and gave judgment in favour of the appellant in the sum of $856,742.81.

The appeal to the Full Court of the Supreme Court of Western Australia

50. The respondent's appeal to the Full Court of the Supreme Court of Western Australia was heard by Malcolm CJ, McKechnie and Hasluck JJ. The only grounds of appeal argued were

those relating to negligence. No contention was advanced there which required any decision on the claim for breach of statutory duty or breach of contract. Hasluck J, with whom the other members of the Court agreed, was of the opinion that the respondent's appeal should be allowed on three grounds. First, his Honour was of the view that in the absence of external signs of distress or potential injury, a reasonable person in the position of the respondent could not have foreseen that the appellant would have been exposed to any risk of injury by reason of the performance of her duties as a part-time merchandiser. Complaints made by the appellant might have alerted a responsible employer to the need to take remedial steps to avert an industrial problem, but not to take measures to prevent the development of a psychiatric illness. Secondly, in the absence of changes in the appellant's demeanour, personality and behaviour, and of complaints of actual symptoms or illness by her, it was not reasonably foreseeable that the appellant would suffer an illness. Thirdly, in the absence of any evidence of psychiatric vulnerability, there was no basis for a finding of a foreseeable risk of a psychiatric injury.

51. His Honour was influenced in reaching his decision by the reasoning of the English Court of Appeal in *Hatton v Sutherland* [21] in which Hale LJ delivered the judgment of the Court. The principles stated by her Ladyship there were subsequently adopted as principles to be generally applied in cases of psychiatric injury caused by stress in the workplace by the House of Lords in *Barber v Somerset County Council* [22] .

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[21] [2002] 2 All ER 1 .

[22] [2004] 1 WLR 1089; [2004] 2 All ER 385.

The appeal to this Court

52. In my opinion the appeal to this Court must fail for these reasons.

53. The appellant has not shown the respondent to have been negligent. The respondent undoubtedly owed the appellant a duty to take reasonable care for her safety in doing her work. But that duty did not oblige the respondent to reduce the amount of part-time work that it was prepared to offer to the appellant, or to dismiss her. These were the only measures that could have prevented the appellant from becoming stressed to the point that she became psychiatrically injured, assuming, as does seem to be the case, that her concerns about, or the actual amount of work that she was doing were causative of such an injury.

54. **Following paragraph cited by:**

Macartney v The Queen (02 March 2006) (Steytler P)
CFMEU v State of Qld and Anglo Coal (27 April 2005) (McPherson JA, Fryberg and Mullins JJ,)

Three Justices of this Court in *Wyong Shire Council v Shirt* [23] held that any risk, however remote or even extremely unlikely its realization may be, that is not far-fetched or fanciful, is foreseeable [24] . I suppose that it is true that there is nothing new under the sun. With enough imagination and pessimism it is possible to foresee that practically any misadventure, from mishap to catastrophe is just around the corner. After all, Malthus in 1798 famously predicted that the population of the world would inevitably outstrip the capacity of the Earth to sustain it. The line between a risk that is remote or extremely unlikely to be realized, and one that is far-fetched or fanciful is a very difficult one to draw. The propounding of the rule relating to foreseeability in the terms that their Honours did in *Wyong* requires everyone to be a Jeremiah[25], and has produced the result that undue emphasis has come to be placed upon the next element for the establishment of tortious liability, the sorts of measures that a reasonable person should be expected or required to take to guard against the risk. *Wyong* has however been constantly applied throughout this country and in this Court since it was decided, and neither party sought to challenge it here. I am therefore bound to apply it.

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[23] (1980) 146 CLR 40 .

[24] (1980) 146 CLR 40 at 47 per Mason J, Stephen and Aickin JJ agreeing.

[25] The Judean prophet of doom circa 646 BC to about 580 BC, Old Testament, Ch 24.

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55. Even on the application of it however, the appellant must fail at the threshold, that is on the issue of foreseeability. In my opinion, it was far-fetched and not foreseeable that the appellant, a competent, seemingly well woman[26] would suffer within six months of taking up a part-time position, a disabling psychiatric injury, or indeed, any psychiatric injury by reason of the work that the position entailed. As I pointed out in *Tame v State of New South Wales* [27] psychiatric illness or injury is in some important respects a different kind of illness or injury than physical injury. The difference is one of the reasons why its development is less readily foreseeable than traumatically caused injury. That is not to say of course that it is a condition of liability that a particular kind of psychiatric injury must be foreseeable. And, as the majority of the judgments in *Tame* [28] also make clear, foreseeability is not to be assessed by reference to a notional person of normal fortitude, but on the basis of the impression created by, and the other overt or foreseeable sensitivities of the actual person affected. The fact however that a psychiatrist placed in the same position as an employer might have foreseen a risk of psychiatric injury, does not mean that a reasonable employer should be regarded as likely to form the same view.

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[26] One doctor, Dr Hendry, described the appellant's demeanour as "highly competent and efficient".

[27] (2002) 211 CLR 317 at 420 [308] .

[28] (2002) 211 CLR 317 at 333 [16] per Gleeson CJ, 384 [199] per Gummow and Kirby JJ.

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56. It is significant in this case that several witnesses in a position to observe the appellant on a regular basis discerned no changes in her personality, or symptoms of any kind before she became ill. And neither she nor the doctor she first consulted, believed that she was suffering a psychiatric illness. The latter did not contemplate the possibility of a need for a psychiatrist's assessment for some time, and the appellant herself was similarly unaware that she needed the assistance of a psychiatrist.

57. That is sufficient to dispose of the appeal, conducted as it was, as raising issues in tort only. In the context of the workplace however, when the claim is of an excessive workload as the cause of injury, the rights and liabilities of the parties (subject only to relevant industrial legislation, if any, and to none of which the Court was referred here) will usually be governed by the contract of employment. I doubt whether any term could have been implied in the contract, consisting as it did, of the letter of engagement only, that imposed upon the respondent a duty not to ask, or require the appellant to do the amount of work that she herself agreed to do. If asked to do more, or if what she agreed to do was more than she could do, then it was for her either to refuse to do it at all, or to relinquish her position. Every responsible position makes its demands upon the person occupying it. As Lord Scott of Foscote succinctly put it in his dissenting speech in *Barber v Somerset County Council* [29] :

> "Pressure and stress are part of the system of work under which [people] carry out their daily duties. But they are all adults. They choose their profession. They can, and sometimes do, complain about it to their employers."

That industrial legislation might alter the rights and obligations of the parties in those circumstances, has nothing to say about foreseeability of risk, or the appellant's claim for damages for personal injury.

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[29] [2004] 1 WLR 1089 at 1095 [14]; [2004] 2 All ER 385 at 392.

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58. The approach adopted by the Full Court in this appeal was in accordance with the principle stated in *Fox v Percy* [30] . In doing so their Honours made no errors. The appeal should be dismissed with costs.

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[30] (2003) 214 CLR 118 ; cf Lord Scott of Foscote in *Barber v Somerset County Council* [2004] 1 WLR 1089 at 1093-1094 [11]-[12]; [2004] 2 All ER 385 at 390-391 .

Cited by:

Tsiragakis v Mallet [2025] VSCA 134 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 (18 December 2024) (Ward P, Leeming JA and Basten AJA)

263. Hurex says that it was entitled to assume, in the absence of any warning signs, that Mr Hodson considered that he was able to do the job required for him under the contract, a job that he agreed to perform and enjoyed doing (referring to *Koehler* at [36]). (I note here that it is not clear to me that this addresses the circumstances of the present case. Whether or not Mr Hodson considered himself capable of doing the job does not address whether Hurex had a duty, as employer, to direct him how to respond if an emergency were to arise.)

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Robinson v Each Ltd [2024] VSCA 313 (12 November 2024) (MACAULAY JA, GORTON and J FORREST AJJA)

127. In *Bersee v State of Victoria (Department of Education and Training)* , this Court said:

> *Kozarov* reinforces the point that questions of foreseeability, which are relevant to the existence and scope of a duty of care, breach of duty, or remoteness of damage, are fact and context specific. In some cases, psychiatric injury will be a reasonably foreseeable consequence of the performance of work and in others it will not be. In *Koehler* , the High Court referred to what an employer might reasonably assume about the ability to perform the work safely, and in *Kozarov* the Court concluded that the assumption was irrelevant in the face of the incontrovertible evidence as to risk.
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> Properly understood, *Koehler* and *Kozarov* are at opposite ends of a single spectrum and do not represent a divergence in principle. In *Koehler* , the plaintiff was performing work of a relatively routine nature that she had agreed to perform. In order to establish that psychiatric injury was a reasonably foreseeable consequence of performing the work it was necessary to take into account what the parties had agreed under the contract of employment. A generalised understanding that workplace stress can lead to injury was insufficient, in the absence of 'evident signs' by the particular employee. In *Kozarov* , the employer had acknowledged that vicarious trauma and therefore psychiatric injury were an obvious consequence of exposure to trauma, and a search for evident signs in the plaintiff was unnecessary to establish the relevant duty of care.
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> *Kozarov* makes plain that evident signs of distress or vulnerability on the part of a plaintiff are not a precondition that must be satisfied before psychiatric injury can be found to be reasonably foreseeable and are not a legal criterion for liability. Rather, they provide a means by which reasonable foreseeability may be established on the facts, and in some cases, the absence of them may mean that the employer would have no reason to suspect that psychiatric injury is on the cards for the particular employee or class of employees. [33]

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Robinson v Each Ltd [2024] VSCA 313 (12 November 2024) (MACAULAY JA, GORTON and J FORREST AJJA)

128. Recently in the New South Wales decision of in *Karzi v Toll Pty Ltd* , Adamson JA (with whom Leeming JA and Basten AJA agreed) said:

> These three cases, *Koehler* , *Kozarov* and *Stevens* [[34]] illustrate how fact-specific torts cases are and how the principles operate in different factual situations. They highlight why the High Court in *Koehler* held that the nature and extent of the employee's work were significant when addressing whether the employer had been negligent when an employee suffers from work-related psychiatric injury. In *Kozarov* , the *nature* of the tasks required to be performed by K carried with them the risk of psychiatric injury such as was suffered by K because they exposed her to the significant trauma of others. However, in *Ko ehler* , the risk posed by the plaintiff's employment arose because the plaintiff adjudged that the task was too demanding for her working hours. In the former case, the employer's duty of care requires it to be alert to potential harm, whether the employee shows signs of harm. In the latter case, the employer will not be alerted to the risk of harm unless the employee indicates that harm is being suffered, or is likely to be suffered. [35]

Robinson v Each Ltd [2024] VSCA 313 -
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Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

218. At common law, a risk of damage which is not farfetched or fanciful, is real and therefore foreseeable. A risk of damage that is remote, in the sense that the probability of the damage occurring is extremely unlikely, may nevertheless be a foreseeable risk. See ***Wyong Shire***

Council v Shirt ;[53] *Hunter and New England Local Health District v McKenna* . [54] The common law test is undemanding. See *Koehler v Cerebos (Australia) Ltd* ; [55] *Vairy* [213] (Calli nan & Heydon JJ).

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Griffin v Brisbane City Council [2024] QCA 157 (09 August 2024) (Bond, Flanagan and Boddice JJA)

46. Fourth, the primary judge appears to have thought that *Koehler* supported the general proposition that reasonable foreseeability of the particular psychiatric injury suffered by an employee is the *sine qua non* of any liability on the part of an employer for psychiatric injury. But that is not the law, either under the statute or at common law. Unfortunately, it seems that her Honour's attention was not drawn either to *Kozarov v Victoria* or to *Bersee v State of Victoria* in which that misunderstanding of the effect of *Koehler* is explained. It suffices to quote from the observations of the Court of Appeal in *Bersee v State of Victoria* (emp hasis added): [16]

> " *Kozarov* **reinforces the point that questions of foreseeability, which are relevant to the existence and scope of a duty of care, breach of duty, or remoteness of damage, are fact and context specific. In some cases, psychiatric injury will be a reasonably foreseeable consequence of the performance of work and in others it will not be. In** *Koehler* **, the High Court referred to what an employer might reasonably assume about the ability to perform the work safely, and in** *Kozarov* **the Court concluded that the assumption was irrelevant in the face of the incontrovertible evidence as to risk.**
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>
> *Kozarov* **makes plain that evident signs of distress or vulnerability on the part of a plaintiff are not a precondition that must be satisfied before psychiatric injury can be found to be reasonably foreseeable and are not a legal criterion for liability**. Rather, they provide a means by which reasonable foreseeability may be established on the facts, and in some cases, the absence of them may mean that the employer would have no reason to suspect that psychiatric injury is on the cards for the particular employee or class of employees."

Griffin v Brisbane City Council [2024] QCA 157 (09 August 2024) (Bond, Flanagan and Boddice JJA)

46. Fourth, the primary judge appears to have thought that *Koehler* supported the general proposition that reasonable foreseeability of the particular psychiatric injury suffered by an employee is the *sine qua non* of any liability on the part of an employer for psychiatric injury. But that is not the law, either under the statute or at common law. Unfortunately, it seems that her Honour's attention was not drawn either to *Kozarov v Victoria* or to *Bersee v*

State of Victoria in which that misunderstanding of the effect of *Koehler* is explained. It suffices to quote from the observations of the Court of Appeal in *Bersee v State of Victoria* (emp hasis added): [16]

> " *Kozarov* **reinforces the point that questions of foreseeability, which are relevant to the existence and scope of a duty of care, breach of duty, or remoteness of damage, are fact and context specific. In some cases, psychiatric injury will be a reasonably foreseeable consequence of the performance of work and in others it will not be. In *Koehler* , the High Court referred to what an employer might reasonably assume about the ability to perform the work safely, and in *Kozarov* the Court concluded that the assumption was irrelevant in the face of the incontrovertible evidence as to risk.**
>
> Properly understood, *Koehler* and *Kozarov* are at opposite ends of a single spectrum and do not represent a divergence in principle. In *Koehler* , the plaintiff was performing work of a relatively routine nature that she had agreed to perform. In order to establish that psychiatric injury was a reasonably foreseeable consequence of performing the work it was necessary to take into account what the parties had agreed under the contract of employment. A generalised understanding that workplace stress can lead to injury was insufficient, in the absence of 'evident signs' by the particular employee. In *Kozar ov* , the employer had acknowledged that vicarious trauma and therefore psychiatric injury were an obvious consequence of exposure to trauma, and a search for evident signs in the plaintiff was unnecessary to establish the relevant duty of care.
>
> *Kozarov* **makes plain that evident signs of distress or vulnerability on the part of a plaintiff are not a precondition that must be satisfied before psychiatric injury can be found to be reasonably foreseeable and are not a legal criterion for liability.** Rather, they provide a means by which reasonable foreseeability may be established on the facts, and in some cases, the absence of them may mean that the employer would have no reason to suspect that psychiatric injury is on the cards for the particular employee or class of employees."

Griffin v Brisbane City Council [2024] QCA 157 -
Griffin v Brisbane City Council [2024] QCA 157 -
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Griffin v Brisbane City Council [2024] QCA 157 -
Griffin v Brisbane City Council [2024] QCA 157 -
Griffin v Brisbane City Council [2024] QCA 157 -
Karzi v Toll Pty Ltd [2024] NSWCA 120 (22 May 2024) (Leeming and Adamson JJA, Basten AJA)

96. In his submissions (and in particular (a) to ground 2 in the notice of appeal), the appellant was critical of the primary judge for referring to the statements of principle in *Koehler v Cerebos (Australia) Pty Limited* (2005) 222 CLR 44; [2005] HCA 15 (*Koehler*) but not referring to what the High Court said in *Kozarov v State of Victoria* (2022) 273 CLR 115; [2022] HCA 12 (*Kozar ov*). Mr Parker also relied heavily on the decision of the Victorian Court of Appeal in *Stevens v DP World Melbourne Ltd* [2022] VSCA 285 (*Stevens*) (to which the primary judge was not referred), which he contended ought be followed by this Court.

Karzi v Toll Pty Ltd [2024] NSWCA 120 (22 May 2024) (Leeming and Adamson JJA, Basten AJA)

102. These three cases, *Koehler* , *Kozarov* and *Stevens* illustrate how fact-specific torts cases are and how the principles operate in different factual situations. They highlight why the High Court in *Koehler* held that the nature and extent of the employee's work were significant when addressing whether the employer had been negligent when an employee suffers from work-related psychiatric injury. In *Kozarov* , the *nature* of the tasks required to be performed by K carried with them the risk of psychiatric injury such as was suffered by K because they exposed her to the significant trauma of others. However, in *Koehler* , the risk posed by the plaintiff's employment arose because the plaintiff adjudged that the task was too demanding for her working hours. In the former case, the employer's duty of care requires it to be alert to potential harm, whether the employee shows signs of harm. In the latter case, the employer will not be alerted to the risk of harm unless the employee indicates that harm is being suffered, or is likely to be suffered.

Karzi v Toll Pty Ltd [2024] NSWCA 120 (22 May 2024) (Leeming and Adamson JJA, Basten AJA)

4. Were there any doubt about this, it is confirmed by what was said in *Bersee v State of Victoria* (2022) 70 VR 260; [2022] VSCA 231, where the Court said at [87] :

> *Kozarov* reinforces the point that questions of foreseeability, which are relevant to the existence and scope of a duty of care, breach of duty, or remoteness of damage, are fact and context specific. In some cases, psychiatric injury will be a reasonably foreseeable consequence of the performance of work and in others it will not be. In *K oehler* , the High Court referred to what an employer might reasonably assume about the ability to perform the work safely, and in *Kozarov* the Court concluded that the assumption was irrelevant in the face of the incontrovertible evidence as to risk. (Footnote omitted.)

Karzi v Toll Pty Ltd [2024] NSWCA 120 (22 May 2024) (Leeming and Adamson JJA, Basten AJA)

106. In these circumstances, the primary judge was correct to regard *Koehler* , rather than *Kozarov* , as providing guidance since there was nothing in the nature and extent of the work of itself which gave rise to a risk of psychiatric harm. Whether the respondent ought to have foreseen that that the actions of Mr Johnpulle or the TWU gave rise to a risk that the appellant would suffer psychiatric harm depended, as the primary judge found, on whether the appellant gave any indication that his response to these matters carried with it a risk of psychiatric harm to which the respondent was obliged to respond. The primary judge's reasons were sufficient to address the appellant's case. Her Honour was not required to recite all of the authorities referred to by the appellant as part of her obligation to give reasons for her decision.

Particulars (b), (c) and (f) to ground 2

Karzi v Toll Pty Ltd [2024] NSWCA 120 -
Karzi v Toll Pty Ltd [2024] NSWCA 120 -
Karzi v Toll Pty Ltd [2024] NSWCA 120 -
Karzi v Toll Pty Ltd [2024] NSWCA 120 -
Karzi v Toll Pty Ltd [2024] NSWCA 120 -
Karzi v Toll Pty Ltd [2024] NSWCA 120 -
Stevens v DP World Melbourne Ltd [2022] VSCA 285 (21 December 2022) (Beach and Macaulay JJA; J Forrest AJA)

58. His Honour's judgment was delivered prior to the High Court's decision in *Kozarov* and this Court's decision in *Bersee* . As *Kozarov* and *Bersee* explain, in a case where the risk of

psychiatric injury from the performance of work is acknowledged by the parties, evident signs of distress or vulnerability on the part of a particular employee are not a precondition that must be satisfied before psychiatric injury can be found to be reasonably foreseeable. [68]

via

[68] Ibid [89] .

Stevens v DP World Melbourne Ltd [2022] VSCA 285 -
Stevens v DP World Melbourne Ltd [2022] VSCA 285 -
Potter v Gympie Regional Council [2022] QCA 255 -
Potter v Gympie Regional Council [2022] QCA 255 -
Potter v Gympie Regional Council [2022] QCA 255 -
Potter v Gympie Regional Council [2022] QCA 255 -
Bersee v State of Victoria [2022] VSCA 231 (26 October 2022) (Beach, Niall and Macaulay JJA)

88. Properly understood, *Koehler* and *Kozarov* are at opposite ends of a single spectrum and do not represent a divergence in principle. In *Koehler* , the plaintiff was performing work of a relatively routine nature that she had agreed to perform. In order to establish that psychiatric injury was a reasonably foreseeable consequence of performing the work it was necessary to take into account what the parties had agreed under the contract of employment. A generalised understanding that workplace stress can lead to injury was insufficient, in the absence of 'evident signs' by the particular employee. In *Kozarov* , the employer had acknowledged that vicarious trauma and therefore psychiatric injury were an obvious consequence of exposure to trauma, and a search for evident signs in the plaintiff was unnecessary to establish the relevant duty of care.

Bersee v State of Victoria [2022] VSCA 231 (26 October 2022) (Beach, Niall and Macaulay JJA)

51. As already observed, the judge framed the questions in a way that focused on when psychiatric injury to the applicant became reasonably foreseeable to his employer. That approach accorded with the notion, expressed in *Koehler* , that because the duty of care is owed to particular employees the relevant duty of care may become 'engaged' at some point depending on, amongst other things whether there are 'evident signs warning of the possibility of psychiatric injury'. [23]

via

[23] *Koehler* (2005) 222 CLR 44, 57 [35]–[36] (McHugh, Gummow, Hayne and Heydon JJ) ; [2005] HCA 15 .

Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
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Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
Kozarov v Victoria [2022] HCA 12 (13 April 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

104. Because there is no negligence "in the air" [64] , the imposed duty to take reasonable steps to avoid allocating work, or creating a workplace, that causes or exacerbates psychiatric injury to an employee will only be "engaged" when there is a reasonably foreseeable risk of psychiatric injury to the employee of the general kind that occurred [65] . Whether a risk of psychiatric injury is reasonably foreseeable will depend upon (i) "the nature and extent of the work being done by the particular employee" and (ii) any "signs given by the employee concerned" [66] .

via

[66] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 57 [35] .

Kozarov v Victoria [2022] HCA 12 (13 April 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

2. It is apparent that the issues with which this Court is concerned would not have arisen but for what seems to have been a misunderstanding of the effect of this Court's decision in *Koehler v Cerebos (Australia) Ltd* [1] . It must be appreciated that *Koehler* was concerned with the extent to which reasonable care for the mental health of an employee may require the employer to be alert for signs that, by reason of the exigencies of the employee's work, the employee is at risk of mental illness. On the undisputed findings of fact in this case, no question truly arose as to whether the employer was dutybound to be alert in this regard.

Kozarov v Victoria [2022] HCA 12 (13 April 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

67. Victoria was on notice of the risk of psychiatric injury to Ms Kozarov by no later than 29 August 2011. A reasonable person in Victoria's position would have foreseen the risk of injury to Ms Kozarov by that date, a risk that was not farfetched or fanciful [46] . This view was correctly reached by the trial judge and by the Court of Appeal, and no sufficient reason has been shown for reaching a different conclusion [47] .

via

[46] *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48, cited in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 53 [19] .

Kozarov v Victoria [2022] HCA 12 (13 April 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

104. Because there is no negligence "in the air" [64] , the imposed duty to take reasonable steps to avoid allocating work, or creating a workplace, that causes or exacerbates psychiatric injury to an employee will only be "engaged" when there is a reasonably foreseeable risk of psychiatric injury to the employee of the general kind that occurred [65] . Whether a risk of psychiatric injury is reasonably foreseeable will depend upon (i) "the nature and extent of the work being done by the particular employee" and (ii) any "signs given by the employee concerned" [66] .

via

[65] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 57 [35] .

Kozarov v Victoria [2022] HCA 12 -
Kozarov v Victoria [2022] HCA 12 -
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Kozarov v Victoria [2022] HCA 12 -
Abdelkawy v ANL Container Line Pty Ltd [2021] VSCA 342 (09 December 2021) (Beach and Osborn JJA; Forbes AJA)

28. After summarising the evidence, the trial judge addressed relevant legal principles. In so doing, he identified the central need for the applicant to establish a relevant duty of care by reference to a risk of psychiatric injury to the applicant in particular which was reasonably foreseeable. [16] .

via

[16] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 57 [35] (McHugh, Gummow, Hayne and Heydon JJ) .

Shearer v iSelect Services Pty Ltd [2021] VSCA 328 (01 December 2021) (Beach and Kaye JJA; Forbes AJA)

21. Turning then to the scope or content of the duty, his Honour referred to *Koehler v Cerebos (Australia) Ltd* [13] and set out the need to consider the contractual obligations arising from the employment relationship and any relevant statutory framework. [14] He referred to the earlier contracts of employment and to the terms of the contract covering the work in Energy. It was necessary for him to construe at least the term of the contracts that covered performance pay as the plaintiff submitted that under the contract the performance based

commissions were said to require consultation and agreement in the setting of targets. He concluded that the setting of targets and payment of commission under the contract were matters for iSelect as it saw appropriate and not a step requiring consultation or negotiation. [15] That conclusion is not challenged.

via

[13] (2005) 222 CLR 44; [2005] HCA 15 ('*Koehler*').

Shearer v iSelect Services Pty Ltd [2021] VSCA 328 (01 December 2021) (Beach and Kaye JJA; Forbes AJA)

48. We do not accept the submission advanced by the applicant, that 'the power of the respondent to formulate targets etc, then [from November 2012] had to be exercised in the context of its overriding duty not to expose its employee, the Applicant, to unnecessary risk of harm'.[33] First, it does not accurately reflect the reasoning in *Koehler* which cautions against examining the content of any duty without regard for the limitations imposed by contractual or other obligations. The co-existence of contractual obligations and a duty of care are not balanced by each other, or one 'outweighed' by the other. Rather, contractual obligations are fixed when they arise or are subject to terms that permit agreed or unilateral variation. It is that contractual arrangement, and because of it the employer's right to control the workplace, that generally imposes the duty of care. The duty, when it is enlivened, remains consistently one to take reasonable care to avoid the risk of psychiatric injury, within the parameters of the employment relationship.

Shearer v iSelect Services Pty Ltd [2021] VSCA 328 (01 December 2021) (Beach and Kaye JJA; Forbes AJA)

21. Turning then to the scope or content of the duty, his Honour referred to *Koehler v Cerebos (Australia) Ltd* [13] and set out the need to consider the contractual obligations arising from the employment relationship and any relevant statutory framework. [14] He referred to the earlier contracts of employment and to the terms of the contract covering the work in Energy. It was necessary for him to construe at least the term of the contracts that covered performance pay as the plaintiff submitted that under the contract the performance based commissions were said to require consultation and agreement in the setting of targets. He concluded that the setting of targets and payment of commission under the contract were matters for iSelect as it saw appropriate and not a step requiring consultation or negotiation. [15] That conclusion is not challenged.

via

[14] Ibid [21]–[22] .

Shearer v iSelect Services Pty Ltd [2021] VSCA 328 (01 December 2021) (Beach and Kaye JJA; Forbes AJA)

43. Questions of the content and breach of duty are raised by grounds 1, 5, 7 and 8. Those matters are also informed by the contractual obligations and applicable statutory framework. At least some of the questions asked but not answered in *Koehler* needed an answer in this case because it was contended that the employer was obliged to modify the work to be performed. *Koehler* identified the following considerations that might arise:

> At least the following questions are raised by the contention that an employer's duty may require the employer to modify the employee's work. Is an employer bound to engage additional workers to help a distressed employee? If a contract of employment stipulates the work which an employee is to be paid to do, may the employee's pay be reduced if the employee's work is reduced in order to avoid the risk of psychiatric

injury? What is the employer to do if the employee does not wish to vary the contract of employment? Do different questions arise in cases where an employee's duties are fixed in the contract of employment from those that arise where an employee's duties can be varied by mutual agreement or at the will of the employer? If an employee is known to be at risk of psychiatric injury, may the employer dismiss the employee rather than continue to run that risk? Would dismissing the employee contravene general anti-discrimination legislation? [27]

via

[27] *Koehler* (2005) 222 CLR 44, [221] (McHugh. Gummow, Hayne and Heydon JJ); [2005] HCA 15 .

Shearer v iSelect Services Pty Ltd [2021] VSCA 328 -
Shearer v iSelect Services Pty Ltd [2021] VSCA 328 -
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Shearer v iSelect Services Pty Ltd [2021] VSCA 328 -
Shearer v iSelect Services Pty Ltd [2021] VSCA 328 -
Lloyd v Healthscope Operations Pty Ltd [2021] VSCA 327 (30 November 2021) (Beach and Osborn JJA; Forbes AJA)

64. The defendant also submitted that, even if the duty contended for by the plaintiff existed, any such duty was not engaged because it was not reasonably foreseeable at any relevant time that the plaintiff might suffer psychiatric injury. As was said in *Koehler v Cerebos (Australia) Limited* , [64] the duty of care which an employer owes an employee in respect of a risk that the employee might suffer psychiatric injury arising from his or her employment is only engaged if psychiatric injury to the *particular* employee is reasonably foreseeable.

via

[64] (2005) 222 CLR 44 ('*Koehler*'), see in particular 57[35] (McHugh, Gummow, Hayne and Heydon JJ).

Lloyd v Healthscope Operations Pty Ltd [2021] VSCA 327 -
Zaghloul v Bayly [2021] WASCA 125 -
Zaghloul v Bayly [2021] WASCA 125 -
Robertson v State of Queensland & Anor [2021] QCA 92 (07 May 2021) (Fraser and McMurdo JJA and Henry J)

112. The content of the duty was not the subject of any common ground. The duties pleaded at paragraph 2(e) of the amended statement of claim were recited above. In the main they variously refer to the duty to provide a safe system of work and provide some descriptions of what might be thought to be the consequential qualities of a safe system of work, however some are erroneously cast as absolute obligations. The defendants pleaded in response that any duties of care owed "were conditioned upon the exercise of reasonable care only". That

is correct. It is well settled that an employer's duty to take "reasonable care" to avoid injury to employees includes an obligation to take "reasonable steps" to provide a safe system of work. [34]

via

[34] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53.

Robertson v State of Queensland & Anor [2021] QCA 92 (07 May 2021) (Fraser and McMurdo JJA and Henry J)

3. In *Koehler v Cerebos (Australia) Ltd* , [1] McHugh, Gummow, Hayne and Heydon JJ said: [2]

> "It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work.
>
> ...
>
> The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. ... [T]hat invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned."
>
> (citations omitted)

via

[1] (2005) 222 CLR 44; [2005] HCA 15 .

Robertson v State of Queensland & Anor [2021] QCA 92 (07 May 2021) (Fraser and McMurdo JJA and Henry J)

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15 , considered

Robertson v State of Queensland & Anor [2021] QCA 92 -
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Robertson v State of Queensland & Anor [2021] QCA 92 -
State of Victoria v Zagi Kozarov [2020] VSCA 301 (24 November 2020) (Beach, Kaye JJA and Macaulay AJA)

62. As to the defendant's knowledge of a risk specific to the plaintiff, the judge summarised the plaintiff's case as being one that the defendant's duty of care to her, as an individual, was enlivened after signing the 2011 staff memorandum in April 2011, and 'when she was seen to be failing to cope in the SSOU towards the end of August 2011'. The judge analysed the

evidence as to the existence of any 'evident signs' warning of the possibility of psychiatric injury to the plaintiff. The judge's reference to 'evident signs', in quotation marks,[50] was no doubt a reference to the following passage in the judgment of the plurality[51] in *Koehler* :

> Because the inquiry about reasonable foreseeability takes the form it does, seeking to read an employer's obligations under a contract as subject to a qualification which would excuse performance, if performance is or may be injurious to psychiatric health, encounters two difficulties. First, the employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job. Implying some qualification upon what otherwise is expressly stipulated by the contract would contradict basic principle. Secondly, seeking to qualify the operation of the contract as a result of information the employer later acquires about the vulnerability of the employee to psychiatric harm would be no less contradictory of basic principle. The obligations of the parties are fixed at the time of the contract unless and until they are varied. [52]

Having analysed the evidence, the judge concluded that there were 'evident signs' at the end of August 2011 which disclosed 'heightened risks regarding the plaintiff's mental health in connection with her work'. [53] Her Honour also found that there were evident signs of the plaintiff's declining mental health'. [54]

via

[52] *Koehler* (2005) 222 CLR 44, 57–8 [36] (citations omitted).

State of Victoria v Zagi Kozarov [2020] VSCA 301 -
State of Victoria v Zagi Kozarov [2020] VSCA 301 -
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Billington v Sussan Corporation Australia Pty Ltd [2020] VSCA 12 (10 February 2020) (Beach, Kaye JJA and Croucher AJA)

37. Importantly, in order to establish that third proposition, the applicant was required to prove that the respondent ought to have reasonably foreseen that in the circumstances the applicant was at risk of sustaining psychiatric injury in consequence of his being required to participate in the entertainment at the conference when he returned to the stage on the second occasion. [8]

via

[8] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 55–57 [26]–[33] (McHugh, Gummow, Hayne and Heydon JJ) .

The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 (19 December 2019) (Niall, T Forrest and Emerton JJA)

102. Secondly, the content of the duty and whether it has been breached must be identified and addressed in each particular case. The case will provide the facts, legislative and legal context of the relationship between the parties. [36]

via

[36] *New South Wales v Fahy* (2007) 232 CLR 486, 494 [18] (Gummow and Hayne JJ) ('*Fahy*'); *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53 [21] (McHugh, Gummow, Hayne and Heydon JJ) ('*Koehler*').

The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 (19 December 2019) (Niall, T Forrest and Emerton JJA)

TORTS – Negligence – Duty of care – Psychological injury – Breach – Claim for damages by journalist against employer – Psychological injury resulting from exposure to traumatic events as reporter – Development of Post-Traumatic Stress Disorder – Whether trial judge imposed obligations that were too broadly defined in identifying scope and content of duty of care – Whether trial erred by finding that employer breached its duty and that breach caused injury – Whether trial judge failed to give adequate reasons – Judge did not err in formulation of duty of care – Content of duty not too vague or unworkable – Judge's findings regarding breach overturned in part –Appeal allowed in part – Matter remitted to trial judge for assessment of damages – *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 ; *Hegarty v Queensland Ambulance Service* [2007] QCA 366; *New South Wales v Fahy* (2007) 232 CLR 486; *State of New South Wales v Briggs* (2016) 95 NSWLR 467 considered.

The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 -
The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 -
The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 -
The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 -
The Age Company Limited v YZ (a pseudonym) [2019] VSCA 313 -
David Hingst v Construction Engineering (Aust) Pty Ltd (ABN 62 392 781 199) [2019] VSCA 67 (29 March 2019) (Priest AP and Beach JA)

17. In her reasons for judgment, the trial judge observed that to make out a 'bullying claim' at common law, a plaintiff must show on the balance of probabilities that there was an established pattern of behaviour in the workplace, which was repeated and unreasonable, and which a reasonable person in all the circumstances of the case would expect to give rise to a recognisable psychiatric illness. [11] She cited a number of authorities, including *Brown v Maurice Blackburn Cashman,* [12] *Swan v Monash Law Book Co-operative,* [13] *Johnston v Holland* ,[14] *Johnson v Box Hill Institute of TAFE,* [15] *Tame v New South Wales* [16] and *Koehler v Cerebos (Aust) Ltd* , [17] and observed: [18]

> The relevant principles to be drawn from *Koehler* have been usefully summarised by J Forrest J in *Johnson*. [19] Most significant, for present purposes, is the requirement—to use the language of the High Court in *Koehler* —that there be 'evident signs' of an employee's inability to carry out work activities associated with the risk of psychiatric injury. This will be an important consideration in the context of a bullying or harassment claim in which psychiatric injury is pleaded. As the High Court has said, again in *Koehler* , absent those evident signs 'warning of the possibility of psychiatric injury' an employer is entitled to assume that its employee is capable of performing his or her job. It should be said, however, that 'evident signs' have no role to play in circumstances where it has been established on the balance of probabilities that one employee bullied another employee and so gives rise to vicarious liability on the part of the employer.

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David Hingst v Construction Engineering (Aust) Pty Ltd (ABN 62 392 781 199) [2019] VSCA 67 -
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Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 -
Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205 -
CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 -
CGU Insurance Ltd v Coote (by his next friend Stephen Desmond Coote) [2018] WASCA 117 -
Hevilift Limited v Towers [2018] QCA 89 (11 May 2018) (Fraser and Philippides JJA and Flanagan J)

52. The trial judge thereafter referred to the appellant's argument at trial (which relied in particular upon *Koehler v Cerebos (Australia) Ltd*) [61] that the appellant could not be in breach of their duty of care by insisting that the respondent comply with his contractual obligations, including his obligation to comply with the Civil Aviation Rules. The trial judge concluded that those matters were not inconsistent with the appellant owing additional obligations, given its duty of care to its employee pilots, and did not result in a problem of coherence as between the law's requirements. [62] That was so "because the departure from VFR here occasioned was the unintended result of the foreseeable manifestation of a regional phenomenon and associated risk which [the appellant], in choosing to operate its flight business in that region, ought to have known of and taken steps to warn and safeguard its pilots against." [63] The trial judge cited observations by Edmund Davies LJ in *Bux v Slough Metals Ltd* ,[64] for the proposition that merely requiring compliance with statutory requirements does not per se absolve the employer from liability to its employee at common law, and concluded that the appellant was obliged to do more than merely provide helicopters equipped for VFR and expect compliance by its pilots with the Civil Aviation Rules.

via

[61] (2005) 222 CLR 44 , 46.

Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
Hevilift Limited v Towers [2018] QCA 89 -
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Brisbane Youth Service Inc v Beven [2017] QCA 211 (22 September 2017) (Sofronoff P and Gotterson and McMurdo JJA)

142. In my opinion it is not possible to read *Koehler* as standing for the proposition that the appellant would not be in breach of a duty of care by allowing or permitting the respondent to work with T because, as the appellant pleads, "the [respondent] agreed to do so"[16] or because she "knew, and agreed to work in circumstances where, many clients of the [appellant] had complex issues with drugs, alcohol and mental health".[17] Such a reading of *Koehler* would be inconsistent with the first two sentences of paragraph [40] of the reasons. It would be consistent, however, with the reasoning of Bowen LJ in *Thomas v Quartermaine* .[18]

Brisbane Youth Service Inc v Beven [2017] QCA 211 -
Brisbane Youth Service Inc v Beven [2017] QCA 211 -
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Christos v Curtin University of Technology [2017] WASCA 110 (21 June 2017) (Murphy, Mitchell and Beech JJA)

24. In particular, Dr Christos alleges that the judge erred in law:

(a) by applying a test of whether any injury was 'likely', with reference to certain evidence of Dr Terace;

(b) by finding that foreseeability was not established because he had found that Curtin's response to any risk was reasonable and that Curtin had not engaged in bullying;

(c) by failing to take into account that Curtin knew at least from about 26 June 2003 that Dr Christos had an adjustment disorder and that it was not remote or fanciful that his psychiatric condition would not improve or could deteriorate if reasonable care were not taken by Curtin; and

(d) by failing to consider the particular position of Dr Christos and instead addressing the question of foreseeability by reference to employees in general as a class, thereby misunderstanding or misapplying ***Koehler v Cerebos (Aust) Ltd*** . [37]

Ground 2

Christos v Curtin University of Technology [2017] WASCA 110 (21 June 2017) (Murphy, Mitchell and Beech JJA)

121. That suggestion is reinforced by the trial judge's comment [168] that the state of the evidence had parallels with ***Koehler v Cerebos (Aust) Ltd*** . [169] In ***Koehler*** , a claim in negligence, relating to a psychiatric injury of which the plaintiff's work was a cause, was dismissed on appeal to the Full Court of this court. It was dismissed on the basis that 'in the absence of external signs of distress or potential injury', the risk of psychiatric injury to the plaintiff was not reasonably foreseeable. [170] In the High Court, the plurality identified the central inquiry as whether, in all the circumstances, the risk of the employee sustaining recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not farfetched or fanciful. [171] The plurality noted:

> The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. ... [T]hat invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned. [35] (citations omitted)

Koehler was decided on the basis that the employer had no reason to suspect risk to the plaintiff's psychiatric health in circumstances which included that, when the plaintiff became sick, she and her doctor thought that the illness was physical not psychiatric. [172] By contrast, in the present case Dr Terace's report put Curtin on notice that Dr Christos was suffering from psychiatric illness which had been triggered by events at work.

via

[172] ***Koehler*** [41] .

Christos v Curtin University of Technology [2017] WASCA 110 -
Christos v Curtin University of Technology [2017] WASCA 110 -
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Christos v Curtin University of Technology [2017] WASCA 110 -
Pateras v State of Victoria [2017] VSCA 31 (01 March 2017) (Santamaria and Beach JJA)

3. The applicant has applied for leave to appeal on several grounds. In particular, she has contended that the trial judge misstated the test in *Koehler v Cerebos (Australia) Ltd* [2] for the determination when the duty of care not to cause psychiatric injury is engaged. Next, she said that the Court should have found that ample indications had been given by her to her relevant colleagues that she was experiencing anxiety and stress such that the duty (properly understood) was, in fact, engaged. She also contended that the trial judge erred in assessing the conduct of her colleagues to her on an individual basis and not in assessing their conduct towards her 'as a whole'. It is uncontroversial that the case turned largely upon credit; the trial judge preferred the evidence of other witnesses to that of the applicant. The applicant has contended that she has fresh evidence that undermines the credibility of those witnesses, particularly that of Mr Newland. Finally, the applicant said that the trial judge denied her a fair trial insofar as he did not give her the assistance necessary to make up for the fact that she was not legally represented.

Pateras v State of Victoria [2017] VSCA 31 (01 March 2017) (Santamaria and Beach JJA)

26. Accordingly, it was necessary to take into account the 'fundamental aspects of the relationship between the parties'. [8] The Court said:

> The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from the relationship which equity would enforce and, of course, any applicable statutory provisions. ... Consideration of those obligations will reveal a number of questions that bear upon whether ... an employer's duty of care to take reasonable care to avoid psychiatric injury requires the employer to modify the work to be performed by an employee.
>
> ...
>
> What is important is that questions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties. [9]

The appellant had agreed to perform the duties assigned to her. In *Larner v George Weston Foods Ltd* [10] this Court discussed *Koehler* and said:

> The employer thus had a right to assume that Ms Koehler could perform the tasks she had agreed to perform without injury to her psychological health and it had no reason to suspect that she was at risk of psychiatric injury. Her complaints about the lack of time to cover the relevant territory did not, at the time they were made, give rise to any suspicion that her duties were putting her health at risk or the possibility of psychiatric injury. Rather,
>
> > [H]er complaints may have been understood as suggesting an industrial relations problem. They did not suggest danger to her psychiatric health. When she did go off sick, she (and her doctor) thought that the illness was physical, not psychiatric. [11]

via

[11] Ibid [208] . The quotation is from the joint judgment of McHugh, Gummow, Hayne and Heydon JJ in *Koehler* (2002) 222 CLR 44, 59 [41] .

Pateras v State of Victoria [2017] VSCA 31 (01 March 2017) (Santamaria and Beach JJA)

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Pateras v State of Victoria [2017] VSCA 31 (01 March 2017) (Santamaria and Beach JJA)

24. In *Koehler* the High Court considered when the duty not to cause psychological harm is engaged. In that case, the appellant was diagnosed with complex fibromyalgia syndrome and a major depressive illness. She alleged that the failure of her employer to take the steps she identified constituted both a breach of its common law duty and a breach of an implied term to provide a safe system of work. She had been a full time employee. After the loss of a major client, the employer had reviewed its operations and retrenched her. She was offered part time employment for 24 hours over three days a week. The letter of engagement did not set out the duties that she was expected to perform. When she started work, she realised that she could not do all the work that was required of her. She agreed to give it a try for a month. Later, she complained orally and in writing that her duties were too onerous. Her complaints related to whether the work would be completed; she did not suggest that the

problems that she had were affecting her health. She suggested that the work that she should do should be reduced or that she be allowed to work on a further day. Her employer took no action. Ultimately, she suffered psychiatric injury.

Pateras v State of Victoria [2017] VSCA 31 -
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Pateras v State of Victoria [2017] VSCA 31 -
Pateras v State of Victoria [2017] VSCA 31 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
State of New South Wales v Briggs [2016] NSWCA 344 (09 December 2016) (McColl, Ward and Leeming JJA)

46. Only slight attention was given in either the reasons for judgment or the submissions on appeal to the statutory context against which content of the duty of care for breach of which the State was vicariously liable. But statute must be considered at the outset. McHugh, Gummow, Hayne and Heydon JJ said in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44; [2005] HCA 15 at [19] and [21]-[22] :

> "*The proper starting point*
>
> Because the appellant's claim was framed in negligence, and because her claim was brought against her employer, it may be thought necessary to have regard only to the well-established proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work. From there it may be thought appropriate to proceed by discarding any asserted distinction between psychiatric and physical injury, and then focus only upon questions of breach of duty. Questions of breach of duty require examination of the foreseeability of the risk of injury and the reasonable response to that risk in the manner described in *Wyong Shire Council v Shirt* . But to begin the inquiry by focusing only upon questions of breach of duty invites error. It invites error because the assumption that is made about the content of the duty of care may fail to take fundamental aspects of the relationship between the parties into account.
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> ...
>
> *The content of an employer's duty of care*
>
> The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions.
>
> ...
>
> [Q]uestions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties."

State of New South Wales v Briggs [2016] NSWCA 344 (09 December 2016) (McColl, Ward and Leeming JJA)

57. But in any event, in the passage at [21]-[22] of *Koehler* reproduced above, the High Court insisted that regard be had to both the legal and equitable obligations arising out of the contract of employment "and, of course, any applicable statutory provisions". Save for the special cases of the Commissioner and the NSW Police Force Executive Service, there is no contract of employment to which a police officer is a party. Instead, the relation of service is constituted by a police officer taking the oath, in accordance with s 13 of the Act, in the form prescribed by (former) reg 12 of the Police Service Regulation 1990 (which was applicable to Mr Briggs when sworn in in December 1999). It has been said, of the position in the United Kingdom, that attestation "has always been the moment at which [constables] assume their powers and privileges": *Sheikh v Chief Constable of Greater Manchester Police* at 647. Thereafter, until his discharge, he was required "to serve wherever the officer [was] duly directed" and "to perform such police duty as may be duly directed, whether or not during the officer's rostered hours of duty": reg 13 of the Police Service Regulation 1990, reg 9(2) of the Police Service Regulation 2000 and reg 8(2) of the Police Regulation 2008 . In short, Mr Briggs' obligations were principally determined by the police duties which had been classified by the Commissioner (and the Commissioner's delegates), and the lawful orders and directions given to him to perform such duties, rather than by contract.

State of New South Wales v Briggs [2016] NSWCA 344 -
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State of New South Wales v Briggs [2016] NSWCA 344 -
Silvana Taseska v MSS Security Pty Ltd [2016] VSCA 193 (12 August 2016) (Weinberg, Hansen and Kaye JJA)

(5) Ground 5. The judge relied on the decision of the High Court in *Koehler v Cerebos (Aust)* Ltd, [14] which was distinguishable from the applicant's case in the first proceeding.

via

[14] (2005) 222 CLR 44 .

Silvana Taseska v MSS Security Pty Ltd [2016] VSCA 193 -
Silvana Taseska v MSS Security Pty Ltd [2016] VSCA 193 -
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Silvana Taseska v MSS Security Pty Ltd [2016] VSCA 193 -
Hayes v State of Queensland [2016] QCA 191 -
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Hayes v State of Queensland [2016] QCA 191 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
Prasad v Ingham's Enterprises Pty Ltd [2016] QCA 147 -
Prasad v Ingham's Enterprises Pty Ltd [2016] QCA 147 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

34. With this evident deterioration in the appellant's psychological state, there was more than a far-fetched or fanciful risk [36] that the appellant would suffer a psychiatric illness without the exercise of reasonable care by her employer to avoid or minimise her stressful

experiences in the workplace. It is now well known that although not everyone who is exposed to stress develops an illness, in an individual case that can occur. The manifest psychological state of the appellant, as found by the trial judge, made the risk of that occurrence in the appellant's case such that it was reasonably foreseeable. I therefore disagree with the trial judge's conclusion on that question.

via

[36] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 57 [33] .

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

15. His Honour referred to *Tame v New South Wales* [6] and *Koehler v Cerebos (Australia) Ltd* [7] and said that there was a "threshold issue [of] whether the relevant duty was engaged by the reasonable foreseeability of psychiatric injury to the plaintiff." [8]

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

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via

[7] (2005) 222 CLR 44; [2005] HCA 15 .

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

31. The joint judgment in *Koehler* referred to a number of factors which are likely to be relevant in assessing whether, in the case of a particular employee, there was a reasonably foreseeable risk of a psychiatric injury. They were said to include: [29]

> " ... the nature and extent of the work being done by the 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."

The critical factor in *Koehler* was that the employer had no reason to suspect that that employee was at risk of psychiatric injury. She had made many complaints to her superiors of being overworked but "none of them suggested (either expressly or impliedly) that her attempts to perform the duties required of her were putting, or would put, her health at risk." [30]

via

[29] (2005) 222 CLR 44 , 54. [2015] HCA 15, [24] (footnotes omitted).

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

32. As this question is to be answered for the purpose of assessing a liability for the tort of negligence, there is a constraint of reasonableness. In *Gifford v Strang Patrick Stevedoring Pty Ltd* , Gleeson CJ said that: [31]

> "In the context of a question of duty of care, reasonable foreseeability involves more than mere predictability. And advances in the predictability of harm to others, whether in the form of economic loss, or psychiatric injury, or in some other form, do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants."

Gleeson CJ there said, as he had said in *Tame v New South Wales* ,[32] that the central issue in this context is whether it was reasonable to require the defendant to have in contemplation the risk of psychiatric injury to the plaintiff, and to take reasonable care to guard against such injury. [33] Citing those passages, in *Nationwide News Pty Ltd v Naidu* , Spigelman CJ observed: [34]

> "The reasoning and result in *Koehler* confirms this analysis. It may well be the case that it is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough."

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

30. The appellant had to prove that the respondent became subject to a duty of care to avoid her developing a psychiatric injury, for which in *Koehler* , the plurality said that: [27]

> "The central inquiry remains whether, in all the circumstances, the risk of a plaintiff (in this case the appellant) sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful".

Their Honours continued: [28]

> "It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work...
>
> The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable."

via

[27] (2005) 222 CLR 44, 57 ; [2005] HCA 15 , [33] citing *Tame v New South Wales* (2002) 211 CLR 317, 332-333 [16], 343-344 [61]-[62], 385 [201] .

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

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Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
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Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Woolworths Limited v Perrins [2015] QCA 207 (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)

43. That point was made in *Koehler v Cerebos (Australia) Ltd* [29] where it was held that an employee could not succeed in a claim for damages against her employer for causing her psychiatric harm merely by insisting that she perform the duties that she had agreed to perform under her contract. The plurality there said:

> "[21] *The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment,* the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions. ...
>
> [22] No doubt other questions may arise. It is, however, neither necessary nor appropriate to attempt to identify all of the questions that could arise or to attempt to provide universal answers to them. *What is important is that questions of the content of the duty of care, and what satisfaction of that duty may require, are not to be examined without considering the other obligations which exist between the parties.*
>
> ...
>
> [25] Issues about the content of the duty of care were not examined in any detail in the courts below. It was assumed that the relevant duty of care was sufficiently stated as a duty to take all reasonable steps to provide a safe system of work *wi thout examining what limits there might be on the kinds of steps required of an employer*. Rather, attention was directed only to questions of breach of duty framed without any limitations that might flow from an examination of the content of the duty of care. As earlier indicated, the question of reasonable foreseeability is determinative.[30]

...

[34] It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work. Yet it is that proposition, or one very like it, which must lie behind the Commissioner's conclusion that it required no particular expertise to foresee the risk of psychiatric injury to the appellant.

[35] The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable. ... that invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned." [31]

Woolworths Limited v Perrins [2015] QCA 207 (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)

68. As Callinan J pointed out in *Koehler* [44] on which side of the line a particular case falls – far-fetched or not – is not always easy to say. At some level it could be said that any employee, if sufficiently vulnerable, might succumb to psychiatric injury or illness if disappointed in their ambition or in the performance of their colleague's duties when it impacts adversely on their hopes and ambitions. In that sense it is hardly far-fetched or fanciful to say that such decompensation might occur. But the reasoning and outcome in *Koehler* provides authority for the proposition that an employer need not guard against risks that are so generally expressed.

Woolworths Limited v Perrins [2015] QCA 207 (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)

67. In determining what may be "far-fetched or fanciful" the authorities make clear that the risk in question must not merely be "foreseeable" but must be "reasonably" so: see the various judgments in *Tame*. [42] Sight should not be lost of what is really in issue. The point of the enquiry is to determine whether it was reasonably foreseeable that the conduct complained of was likely to result "in mental anguish of a kind that could give rise to a recognised psychiatric illness" to adopt Gleeson CJ's words in his analysis of *Annetts v Australian Stations Pty Ltd* . [43]

via

[43] (2005) 222 CLR 44 at [41] .

Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
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Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -

Woolworths Limited v Perrins [2015] QCA 207 -
Schultz v McCormack [2015] NSWCA 330 -
Box Hill Institute of TAFE v Johnson [2015] VSCA 245 -
Box Hill Institute of TAFE v Johnson [2015] VSCA 245 -
Box Hill Institute of TAFE v Johnson [2015] VSCA 245 -
MJ Arthurs Pty Ltd v Portfolio Housing Pty Ltd [2015] QCA 86 -
MJ Arthurs Pty Ltd v Portfolio Housing Pty Ltd [2015] QCA 86 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 (12 November 2014) (French CJ, Hayne, Bell, Gageler and Keane JJ)

18. The examples given in *Sullivan* were all based on particular decisions of this Court. It is useful to amplify the references given in *Sullivan* in the way Gummow J did in *Vairy v Wyong Shire Council* [16] . In *Sullivan* , the Court referred to *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [17] as an example of the first problem (nature of harm). It referred to *Crimmins v Stevedoring Industry Finance Committee* [18] and *Brodie v Singleton Shire Council* [19] (to which may be added *Graham Barclay Oysters Pty Ltd v Ryan* [20]) as examples of the second problem (statutory power). It referred to *Perre v Apand Pty Ltd* [21] (to which may be added *W oolcock Street Investments Pty Ltd v CDG Pty Ltd* [22]) as an example of the third problem (indeterminacy of class). It referred to *Hill v Van Erp* [23] (to which may be added *Koehler v Cerebos (Australia) Ltd* [24]) as an example of the fourth problem (coherence). Each of those decisions demonstrates that questions of duty of care may present difficult issues.

Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 (10 September 2014) (French CJ, Kiefel, Bell, Gageler and Keane JJ)

36. There have been passing references to the duty in two decisions of this Court, neither of which constituted a determination that the duty should be implied [97] . In the end, while taking appropriate note of the decisions of State and federal courts, this Court must determine the existence of the implied duty by reference to the principles governing implications of terms in law in a class of contract. That requires this Court to determine whether the proposed implication is "necessary" in the sense that would justify the exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country. The broad concept of "necessity" discussed earlier in these reasons may be defined by reference to what "the nature of the contract itself implicitly requires" [98] . It may be demonstrated by the futility of the transaction absent the implication [99] . It is not satisfied by demonstrating the reasonableness of the implied term [100] .

via

[97] *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 322 [51] per Kirby J; 176 ALR 693 at 706 ; *Koehle r v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 55 [24] per McHugh, Gummow, Hayne and Heydon JJ .

Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Commonwealth Bank of Australia v Barker [2014] HCA 32 -
Port Macquarie Hastings Council v Mooney [2014] NSWCA 156 -
Port Macquarie Hastings Council v Mooney [2014] NSWCA 156 -
Larner v George Weston Foods Ltd [2014] VSCA 62 (09 April 2014) (Redlich, Tate and Santamaria JJA)

200. At the heart of Larner's case at trial was the allegation that GWF had breached its duty of care. On appeal, Larner submitted that the judge erred in interpreting, and applying to the evidence, the principles enunciated by the High Court in *Koehler v Cerebos.* Larner submitted

that his Honour misconstrued the submissions made on his behalf about those principles, in particular the content of GWF's duty of care; what the law required Larner to prove to demonstrate a reasonably foreseeable risk of psychiatric illness; the issue of whether stress constituted a recognisable psychiatric illness; and the judge's treatment of Larner's unchallenged evidence that Pascoe said to him 'you look like hell. They're killing you' and 'You can't work 12 hours plus without taking a break', which, it was argued, evidenced GWF's knowledge of the risk that Larner would sustain a recognisable psychiatric illness. Larner also attacked the judge's reasons as inadequate in rejecting his claim in negligence.

Larner v George Weston Foods Ltd [2014] VSCA 62 (09 April 2014) (Redlich, Tate and Santamaria JJA)

207. 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 duties:

> [S]eeking to read an employer's obligations under a contract as subject to a qualification which would excuse performance, if performance is or may be injurious to psychiatric health, encounters two difficulties. First, the employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job. Implying some qualification upon what otherwise is expressly stipulated by the contract would contradict basic principle. Secondly, seeking to qualify the operation of the contract as a result of information the employer *later* acquires about the vulnerability of the employee to psychiatric harm would be no less contradictory of basic principle. The obligations of the parties are fixed at the time of the contract unless and until they are varied. [155]

via

[155] Ibid 57-8 [36], citing *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283.

Larner v George Weston Foods Ltd [2014] VSCA 62 (09 April 2014) (Redlich, Tate and Santamaria JJA)

208. The employer thus had a right to assume that Ms Koehler could perform the tasks she had agreed to perform without injury to her psychological health and it had no reason to suspect that she was at risk of psychiatric injury. Her complaints about the lack of time to cover the relevant territory did not, at the time they were made, give rise to any suspicion that her duties were putting her health at risk or the possibility of psychiatric injury. Rather,

> [H]er complaints may have been understood as suggesting an industrial relations problem. They did not suggest danger to her psychiatric health. When she did go off sick, she (and her doctor) thought that the illness was physical, not psychiatric. [156]

via

[156] Ibid 59, [41].

Larner v George Weston Foods Ltd [2014] VSCA 62 (09 April 2014) (Redlich, Tate and Santamaria JJA)

204. The Court emphatically repudiated the view that there is 'only one question' [150] to ask where an employee claims damages from an employer for negligently inflicted psychiatric injury, namely, 'whether this kind of harm to this particular employee was reasonably foreseeable', [151] stating: 'That proposition should be rejected.' [152] The initial question must lie in determining the content of the duty of care and 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.

via

[151] Ibid 54 [23].

Larner v George Weston Foods Ltd [2014] VSCA 62 (09 April 2014) (Redlich, Tate and Santamaria JJA)

214. The absence of warning signs is reinforced by the fact that the initial diagnosis after the collapse was of a physical and not psychological collapse, just as in *Koehler v Cerebos*. Larner thought he was having a heart attack or a stroke. [184]

Larner v George Weston Foods Ltd [2014] VSCA 62 -
Larner v George Weston Foods Ltd [2014] VSCA 62 -
Larner v George Weston Foods Ltd [2014] VSCA 62 -
Larner v George Weston Foods Ltd [2014] VSCA 62 -
Larner v George Weston Foods Ltd [2014] VSCA 62 -
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Larner v George Weston Foods Ltd [2014] VSCA 62 -
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Larner v George Weston Foods Ltd [2014] VSCA 62 -
Larner v George Weston Foods Ltd [2014] VSCA 62 -
O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

64. Questions of breach of duty require examination of the foreseeability of the risk of injury, and the reasonable response to that risk in the manner described in ***Wyong Shire Council v Shirt*** [1980] HCA 12; (1980) 146 CLR 40, 47 48 ; ***Koehler*** [19].

O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

53. More generally, the judge found:

> I am not satisfied that a reasonable person in the position of the defendant would have foreseen that Ms O'Donovan's treatment by management over her complaints about the changes to the work roster, enforced leave, the Maxolon medication incident, the Valium dosage omission incident and the work environment may cause her psychiatric injury. The defendant could not reasonably have foreseen that Ms O'Donovan was exposed to a risk of psychiatric injury as a consequence of her being unfairly treated over changes to the work roster, being mistakenly directed to take more holidays than necessary, being properly disciplined in the form of a warning over the Maxolon medication incident, being properly required to complete an incident report form over the Valium dosage omission incident and her complaints about the

work environment. There was no material available to the defendant that should have alerted it to a specific risk of psychological or psychiatric injury to Ms O'Donovan (*Koehler* [***v Cerebos (Australia) Ltd*** (2005) 222 CLR 44] [17]). I am satisfied that there were no signs, express or implied, of the possibility of psychiatric injury.

Ms O'Donovan was coping with her duties. There was no reason for the defendant to suspect that Ms O'Donovan was at risk of psychiatric injury. It was far-fetched and not foreseeable that Ms O'Donovan would suffer a psychiatric injury by reason of her being unfairly treated over changes to the work roster, being mistakenly directed to take more holidays than necessary, being properly disciplined in the form of a warning over the Maxolon medication incident, being properly required to complete an incident report form over the Valium dosage omission incident and her complaints about the work environment.

I am not satisfied that the defendant ought reasonably to have foreseen that Ms O'Donovan was at risk of psychiatric injury by reason of her treatment by management over her complaints about the changes to the work roster, enforced leave, the Maxolon medication incident, the Valium dosage omission incident and the work environment. There was nothing to suggest the defendant ought to have known that Ms O'Donovan was at risk of suffering a psychiatric injury. The claim in negligence must be dismissed [399] [401].

O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

69. There is nothing to indicate that the judge in this case did not apply an objective test. The judge properly took into account whether there was any reason to suspect that the appellant was at risk of psychiatric injury. On the authority of *Koehler* , that inquiry was relevant to an objective determination of the issue, and no error is disclosed by his Honour undertaking that inquiry.

O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

68. Whilst endorsing these observations in *Hatton* , the High Court in *Koehler* at [23] [24] neverth eless rejected the proposition, said to be drawn from *Hatton* , that the only question which needed to be considered where an employee claimed damages from an employer for negligently inflicted psychiatric injury, was whether the kind of harm to the particular employee was reasonably foreseeable. The plurality rejected that proposition on the basis that attention must also be directed to the appropriate content of the duty in question, having regard to the relevant contractual position between the parties and the relevant statutory framework [24] [25], [38].

O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

79. As to the third point, that point of difference does not signify any error by the judge. Moreover, in *Koehler* , the plurality said that the fact that the employee in that case had agreed to perform the duties which were the cause of her injury was of 'limited significance' [28].

O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 (09 January 2014) (Pullin JA, Newnes JA, Murphy JA)

55. In relation to ground 1, the appellant did not seek to address grounds 1(a) and 1(b) distinctly or separately. In substance, the appellant's arguments with respect to grounds 1(a) and 1(b) involved the following contentions:

    (a) the judge did not apply an objective test in determining the issue of reasonable foreseeability, insofar as he considered the question of whether

individual members of management had express or implied notice of facts which would make them subjectively aware of the risk of psychiatric injury to the appellant;

(b) it was not open to his Honour to find at [397] that there was no occasion prior to 26 November 2004 when there was an indication to management of any particular problem or vulnerability of the appellant to psychiatric injury given the judge's findings to the effect that:

(i) the appellant was unfairly treated in relation to changes to her work roster;

(ii) she was sent off on enforced leave in a heavy handed manner;

(iii) she had made complaints about her work environment; and

(iv) she had informed Ms Zandvliet on 28 June 2004 that behaviour of management towards her was affecting her health and that she was very, very stressed; and

(c) the judge erred by finding that the appellant's ability to perform her work duties was itself determinative of the question of reasonable foreseeability of psychiatric injury; and

(d) the judge failed to distinguish the facts of this case from the facts in *Koehl er v Cerebos (Australia) Ltd* [2005] HCA 15; (2005) 222 CLR 44 .

O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 -
O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 -
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O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 -
O'Donovan v Western Australian Alcohol and Drug Authority [2014] WASCA 4 -
Wolters v The University of the Sunshine Coast [2013] QCA 228 -
Commonwealth Bank of Australia v Barker [2013] FCAFC 83 (06 August 2013) (Jacobson, Lander and Jessup JJ)

48. The primary judge referred to the position in Australia. He said the existence of the term was assumed by McHugh, Gummow, Hayne and Heydon JJ in *Koehler v Cerebos* at [24] . He also referred to another High Court authority, *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312.

Commonwealth Bank of Australia v Barker [2013] FCAFC 83 (06 August 2013) (Jacobson, Lander and Jessup JJ)

238. The House of Lords judgment to which their Honours referred in *Koehler* , *Barber v Somerset County Council* [2004] 1 WLR 1089 ("*Barber*"), was likewise concerned with an employer's duty of care in the context of the prospect of an employee suffering psychiatric injury. In the passage to which their Honours referred, Lord Rodger said ([2004] 1 WLR at 1101 [35]):

> When the contractual position, including the implied duty of trust and confidence, is explored fully along with the relevant statutory framework, your Lordships may be able to give appropriate content to the duty of reasonable care upon which

> employees, such as Mr Barber, seek to rely. But the interrelationship of any such tortious duty with the parties' duties under the contract of employment has not been examined in any depth in the cases to which we were referred and was not analysed in this appeal. For that reason I would not wish to express any view on the content of the council's duty of care in this case.

That is to say, the expression used parenthetically by their Honours in *Koehler* had in fact been part of the reasons of Lord Rodger. It is perhaps unsurprising that his Lordship would have included that passage – almost by way of aside though it was – in the light of what had become, by 2004, the position in England with respect to the implied term. Standing as a reference to the words of Lord Rodger as they were, I do not think that the reasons of their Honours in *Koehler* convey an assumption (the correctness of which had, on any view, not been investigated in *Koehler*) that the implied term was part of Australian law. For the sake of completeness, I would also note that the speech of Lord Rodger in *Barber* , though concurring, did not stand as the majority reasons of their Lordships.

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Commonwealth Bank of Australia v Barker [2013] FCAFC 83 (06 August 2013) (Jacobson, Lander and Jessup JJ)

207. The primary Judge then turned to the implied term, on which the respondent relied in the alternative. Here his Honour reached a number of conclusions. First, he held that the implied term was part of the respondent's contract of employment with the appellant. His Honour said:

> In my opinion, I should hold that there is an implied term of mutual trust and confidence in the contract of employment between [the respondent] and the [appellant]. That would be consistent with the approach taken in England and with the basis assumed by four Justices of the High Court in *Koehler v Cerebos* [(2005) 222 CLR 44 , 54-55 [24])]. Such a term does not interfere with the parties' freedom of contract as they are free to exclude the term if they wish. The term only operates where a party does not have reasonable and proper cause for his or her conduct and

> the conduct is likely to *destroy* or *seriously damage* the relationship of confidence and trust between employer and employee. Furthermore, in this case I am not deciding whether the term applies at the point of dismissal. On 2 March 2009, [the respondent] was advised that his position had been made redundant. On 9 April 2009, the [appellant] terminated the employment relationship between it and [the respondent]. As will become clear, the critical question in this case is whether the [appellant] breached its Redeployment Policy between those two dates, that is to say, before the purported termination on 9 April 2009. Put another way, the term is not being invoked to qualify the [appellant's] power of termination upon 4 weeks' written notice or payment in lieu. It is being invoked at the earlier stage. For these reasons, to hold that a serious breach of the Redeployment Policy amounts to a breach of the implied term is not inconsistent with the [appellant's] express power of termination under the written employment contract.

Commonwealth Bank of Australia v Barker [2013] FCAFC 83 (06 August 2013) (Jacobson, Lander and Jessup JJ)

237. The other occasion upon which the implied term was mentioned by Justices of the High Court was *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44 (" *Koehler*"). In that case, the employee alleged that the nature and quantity of the duties which she had been asked to perform had given rise to a psychiatric injury, and that the employer should be responsible in damages. Those claims were rejected, as was the proposition, said to be based on the decision of the English Court of Appeal in *Sutherland v Hatton* [2002] 2 All ER 1, that, where an employee claimed damages from an employer for negligently inflicted psychiatric injury, the only question which needed to be considered was whether harm of that kind to that employee was reasonably foreseeable. In rejecting that proposition, McHugh, Gummow, Hayne and Heydon JJ said (222 CLR at 54-55 [24]):

> But neither the particular issues identified in *Hatton* nor the question from which they stem (was this kind of harm to this particular employee reasonably foreseeable?) should be treated as a comprehensive statement of relevant and applicable considerations. As Lord Rodger of Earlsferry pointed out in his speech in the House of Lords in the appeal in one of the cases considered in *Sutherland v Hatton* , *Barber v Somerset County Council* [2004] 1 WLR 1089 at 1101 [35]; [2004] 2 All ER 385 at 398), it is only when the contractual position between the parties (including the implied duty of trust and confidence between them) "is explored fully along with the relevant statutory framework" that it would be possible to give appropriate content to the duty of reasonable care upon which an employee claiming damages for negligent infliction of psychiatric injury at work would seek to rely.

The parenthetical reference to "the implied duty of trust and confidence between them" in this passage was said by the primary Judge in the present case to amount to an assumption by their Honours that the implied term existed as such.

Commonwealth Bank of Australia v Barker [2013] FCAFC 83 -
Commonwealth Bank of Australia v Barker [2013] FCAFC 83 -
Commonwealth Bank of Australia v Barker [2013] FCAFC 83 -
Commonwealth Bank of Australia v Barker [2013] FCAFC 83 -
Commonwealth Bank of Australia v Barker [2013] FCAFC 83 -
Commonwealth Bank of Australia v Barker [2013] FCAFC 83 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 (22 May 2013) (Harper and Osborn JJA and Macaulay AJA)

165. In the present case the appellant accepts that the application of the *Koehler* 'template' was relevant to the assessment of the risk of psychiatric injury arising from work duties but submits that it could not be seriously disputed that a psychiatric illness was a 'reasonably foreseeable consequence of harassment which did not arise from the appellant's work duties

per se'. This submission begs the question of the nature and extent of the harassment which the appellant in fact suffered (if any). The trial judge did not accept that the appellant suffered harassment in any material sense.

Brown v Maurice Blackburn Cashman [2013] VSCA 122 (22 May 2013) (Harper and Osborn JJA and Macaulay AJA)

160. His Honour then addressed the application of the central notion of duty of care to cases involving psychiatric injury. He referred to the decisions of the High Court in *Tame v New South Wales* [38] and in *Koehler v Cerebos (Australia) Ltd* . [39]

Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
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Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Trustees of the Sydney Grammar School v Winch [2013] NSWCA 37 -
Pecenka v Minister for Health [2012] WASCA 250 (05 December 2012) (Pullin JA, Buss JA, Murphy JA)

67. The trial judge's finding, in effect, was that there was no evidence to suggest that there was any risk of the appellant suffering a psychiatric illness as at 18 September 2000 as a result of her conflict with Mrs Petrowsky. The appellant submits that it was clear that the appellant was suffering stress as a result of the disputation. The appellant referred to the fact that the appellant had taken stress leave in 1994 and the fact that she had made written complaints about Mrs Petrowsky, and contended that this should have led to a conclusion that it was reasonably foreseeable that the appellant was likely to suffer psychiatric injury. These submissions must be rejected. An employer's awareness that a person is suffering workplace stress does not automatically mean that it is reasonably foreseeable to an employer that this will cause a psychiatric illness: ***Koehler*** [34] [35] .

Pecenka v Minister for Health [2012] WASCA 250 (05 December 2012) (Pullin JA, Buss JA, Murphy JA)

64. The appellant contends that the trial judge erred in finding that it was not reasonably foreseeable to the respondent that the appellant would suffer a psychiatric injury as at 18 September 2000. The submissions contend that his Honour failed to consider 'properly or at all' the principles set out in ***Koehler's*** case. That submission cannot be sustained. His Honour did direct himself by reference to ***Koehler*** .

Pecenka v Minister for Health [2012] WASCA 250 -
Pecenka v Minister for Health [2012] WASCA 250 -
Pecenka v Minister for Health [2012] WASCA 250 -
MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 -
MR & RC Smith Pty Ltd t/as Ultra Tune (Osborne Park) v Wyatt [No 2] [2012] WASCA 110 -
Shaw v State of New South Wales [2012] NSWCA 102 -
Shaw v State of New South Wales [2012] NSWCA 102 -
Miskovic v Stryke Corporation Pty Ltd t/as KSS Security [2011] NSWCA 369 (30 November 2011) (Giles and Macfarlan JJA, Handley AJA)

Koehler v Cerebos (Aust) Ltd (2005) 222 CLR 44
McAllister v Richmond Brewing Co (NSW) Pty Ltd

Miskovic v Stryke Corporation Pty Ltd t/as KSS Security [2011] NSWCA 369 -
Miskovic v Stryke Corporation Pty Ltd t/as KSS Security [2011] NSWCA 369 -
Rees v Lumen Christi Primary School [2011] VSCA 361 -
Rees v Lumen Christi Primary School [2011] VSCA 361 -
Harmer v Hare [2011] NSWCA 229 -
Harmer v Hare [2011] NSWCA 229 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 -
Burns v Pearce [2010] WASCA 214 -
Burns v Pearce [2010] WASCA 214 -
DAVIES v Tomkins [2009] WASCA 228 -
DAVIES v Tomkins [2009] WASCA 228 -
Jasmina Investments Pty Ltd v Vlahos [2009] WASCA 190 (03 November 2009) (Wheeler, Buss and Newnes JJA)

Koehler v Cerebos (Australia) Ltd [2005] HCA 15 ; (2005) 222 CLR 44

Jasmina Investments Pty Ltd v Vlahos [2009] WASCA 190 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
The Quadriplegic Centre Board of Management v McMurtrie [2009] WASCA 173 -
S v State of New South Wales [2009] NSWCA 164 (17 July 2009) (Beazley JA at 1; Giles JA at 2; Macfarlan JA at 3)

38 His Honour found that at all relevant times there was in fact a risk, foreseeable to the respondent, that the appellant would suffer psychiatric injury by performing undercover work (Judgment [144]). The substance of his reasons was as follows:

(a) As a general proposition the risks to the health of undercover operatives were known to the respondent.

(b) The ongoing problems associated with the need to lead a double life and to alternate between two, or among multiple, identities and personalities were clearly distinguishable from the stresses that confronted the plaintiff in *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15; (2005) 222 CLR 44 .

(c) The respondent was "in possession of, or had access to, literature and expert opinions that warned of the risk of psychiatric injury as the result of the exposure to the stresses of undercover police work" (Judgment [143]).

S v State of New South Wales [2009] NSWCA 164 (17 July 2009) (Beazley JA at 1; Giles JA at 2; Macfarlan JA at 3)
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 ; (2005) 222 CLR 44
March v E and M H Stramare Pty Ltd

S v State of New South Wales [2009] NSWCA 164 -
Patrech v State of New South Wales [2009] NSWCA 118 -
Patrech v State of New South Wales [2009] NSWCA 118 -
Mackinnon v BlueScope Steel (AIS) Pty Ltd [2009] NSWCA 94 (08 May 2009) (Ipp JA at 1; Macfarlan JA at 2; Hoeben J at 3)
Koehler v Cerebos (Australia) Limited [2005] HCA 15 ; (2005) 222 CLR 44 at [33]

Mackinnon v BlueScope Steel (AIS) Pty Ltd [2009] NSWCA 94 -
Mackinnon v BlueScope Steel (AIS) Pty Ltd [2009] NSWCA 94 -
Mackinnon v BlueScope Steel (AIS) Pty Ltd [2009] NSWCA 94 -
Mackinnon v BlueScope Steel (AIS) Pty Ltd [2009] NSWCA 94 -
Talbot-Price v Jacobs [2008] NSWCA 189 -
Talbot-Price v Jacobs [2008] NSWCA 189 -
J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 -
J Blackwood & Son v Skilled Engineering [2008] NSWCA 142 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

23. The reasoning and result in *Koehler* confirms this analysis. It may well be the case that it is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough.

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

14. The joint judgment in *Koehler* also stated:

"[35] The duty which an employer owes is owed to each employee. The relevant duty of care is engaged if psychiatric injury to the particular employee is reasonably foreseeable … [T]hat invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned."

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

300. ISS Security next contended, and it should be said that this was the main focus of the appeal, that it was not reasonably foreseeable that Mr Naidu would suffer psychiatric injury, so that no duty of care arose in the circumstances. ISS Security submits that the whole tenor of the decision in *Koehler v Cerebos (Australia) Limited* is to make knowledge, through complaints or obvious signs, the touchstone of liability in this area. It contends that it had no knowledge of Mr Chaloner's misconduct and there was no evidence to establish that it ought to have known: see *Tame v State of New South Wales* , *Koehler v Cerebos (Australia) Limited* , *New South Wales v Fahy* [2007] HCA 20; (2007) 81 ALJR 1021 .

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
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Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
New South Wales v Rogerson [2007] NSWCA 346 -
New South Wales v Rogerson [2007] NSWCA 346 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 (26 October 2007) (Jerrard and Keane JJA and Douglas J,)

47. In the joint judgment of McHugh, Gummow, Hayne and Heydon JJ in the recent decision of the High Court in *Koehler v Cerebos (Australia) Ltd* , [12] it was said that a stable appreciation of the content of the employer's duty to take reasonable care is essential; and that it is erroneous to proceed on the assumption that "the relevant duty of care [is] sufficiently stated as a duty to take all reasonable steps to provide a safe system of work without examining what limits there might be on the kind of steps required of an employer." Further, "litigious hindsight" must not prevent or obscure recognition that there are good reasons, apart from expense to the employer, why the law's insistence that an employer must take reasonable care for the safety of employees at work does not extend to absolute and unremitting solicitude for an employee's mental health even in the most stressful of occupations. A statement of what reasonable care involves in a particular situation which does not recognise these considerations is a travesty of that standard.

via

[12] (2005) 222 CLR 44 esp at 53 – 55 [19] – [25] .

Hegarty v Queensland Ambulance Service [2007] QCA 366 (26 October 2007) (Jerrard and Keane JJA and Douglas J,)

95. In *Koehler v Cerebos (Australia) Ltd* , [29] it was said of the unsuccessful claimant that:

> "her complaints may have been understood as suggesting an industrial relations problem. They did not suggest danger to her psychiatric health. When she did go off sick, she (and her doctor) thought that the illness was physical, not psychiatric. There was, therefore, in these circumstances, no reason for the employer to suspect risk to the appellant's psychiatric health."

The same observations are appropriate in this case. While the special nature of the work of ambulance officers must make line commanders alert for signs of dysfunction, a complaint which is readily understood as "an industrial relations problem" is not apt to warrant a response appropriate to a perceptible psychiatric problem.

via

[29] (2005) 222 CLR 44 at 59 [41] .

Hegarty v Queensland Ambulance Service [2007] QCA 366 (26 October 2007) (Jerrard and Keane JJA and Douglas J,)

47. In the joint judgment of McHugh, Gummow, Hayne and Heydon JJ in the recent decision of the High Court in *Koehler v Cerebos (Australia) Ltd* , [12] it was said that a stable appreciation of the content of the employer's duty to take reasonable care is essential; and that it is erroneous to proceed on the assumption that "the relevant duty of care [is] sufficiently stated as a duty to take all reasonable steps to provide a safe system of work without examining what limits there might be on the kind of steps required of an employer." Further, "litigious hindsight" must not prevent or obscure recognition that there are good reasons, apart from expense to the employer, why the law's insistence that an employer must take reasonable care for the safety of employees at work does not extend to absolute and unremitting solicitude for an employee's mental health even in the most stressful of occupations. A statement of what reasonable care involves in a particular situation which does not recognise these considerations is a travesty of that standard.

Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hegarty v Queensland Ambulance Service [2007] QCA 366 -
Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 (22 August 2007) (Wheeler JA)

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

Hanna-Pauley v AMP Shopping Centres Pty Ltd [2007] WASCA 174 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120 -
Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
Alinta Gas Networks Pty Ltd v James [2007] WASCA 155 -
New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

116. Equally, or more, insistent about the need to revisit the *Shirt* formulation have been successive opinions of Callinan J in *Tame* [144] and *Koehler* [145] , and Callinan and Heydon JJ in *Vairy v Wyong Shire Council* [146] . That view is repeated in this case in the reasons of Callinan and Heydon JJ (although their Honours say that it is not necessary for the decision of this case that *Shirt* be overruled) [147] .

via

[145] (2005) 222 CLR 44 at 64 [54] .

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

250. A claim in respect of a psychiatric injury which is reasonably foreseeable is limited only by reference to general considerations: the compatibility of a duty of care with any conflicting professional responsibilities [249] , whether imposed by statute [250] or contract [251] , and considerations of legal coherence [252] . Likewise, the question of what a reasonable employer should do as a response to a foreseeable risk of psychiatric injury to employees as a class or individually is subject to those general considerations.

via

[251] *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 .

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

54. In that regard, this case may be contrasted with *Koehler v Cerebos (Australia) Ltd* [48] where attention focused upon the content of the employer's duty to an employee to take reasonable care to avoid psychiatric injury. That case concerned an allegation that the work expected of the employee was too great and that nothing had been done to modify her duties. As was pointed out in the joint reasons in *Koehler* [49] , the content of the duty owed by an employer to an employee must take account of the obligations which the parties owe one another

under the contract of employment, the obligations arising from that relationship which equity would enforce and any applicable statutory provisions. Considering those obligations reveals questions that bear upon whether the employer must modify the work an employee is to do.

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

107. With *Koehler* fresh in mind, the Court of Appeal therefore approached the task before it by asking the questions mandated in the familiar passage in the reasons of Mason J in *Shirt* , which Callinan J in *Koehler* had ruefully observed had "been constantly applied throughout this country and in this Court since it was decided" [125] .

via

[125] (2005) 222 CLR 44 at 64 [54] .

New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
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New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
Leyden v Caboolture Shire Council [2007] QCA 134 (20 April 2007) (Jerrard JA, Mackenzie and Helman JJ,)

11. The learned judge observed that the content of the duty of care owed by the respondent Council would not be identical in all cases, citing the observations of Kirby J in *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 at [123] , and *Koehler v Cerebos (Aust) Ltd* (2005) 214 ALR 355, at [35] . The learned judge held that because of this plaintiff's knowledge of the modification, and of the risk, and because of his experience, no duty was owed by the Council to him to intercept the modification of the jump before he unsuccessfully attempted to execute it on a second occasion on 15 July 1999. Alternatively, the learned judge concluded that if a duty was otherwise owed and breached, the defendant had established a defence of *volenti*. The judge found that the plaintiff had the appropriate subjective appreciation of the risk.

Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Homestyle Pty Ltd v Perrozzi [2007] WASCA 16 -
Ducker v The State of Western Australia [2006] WASCA 93 (31 May 2006) (Wheeler JA)

Koehler v Cerebos (Australia) Limited (2005) 79 ALJR 845

Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
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Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
State of New South Wales v Fahy [2006] NSWCA 64 -
State of New South Wales v Fahy [2006] NSWCA 64 -
State of New South Wales v Fahy [2006] NSWCA 64 -
State of New South Wales v Fahy [2006] NSWCA 64 -
State of New South Wales v Fahy [2006] NSWCA 64 -
Macartney v The Queen [2006] WASCA 29 -
State of New South Wales v Burton [2006] NSWCA 12 (10 February 2006) (Spigelman CJ, Basten JA and Hunt AJA)

Koehler v Cerebos (Aust) Limited [2005] HCA 15 ; (2005) 79 ALJR 845
Malec v J C Hutton Pty Ltd

State of New South Wales v Burton [2006] NSWCA 12 (10 February 2006) (Spigelman CJ, Basten JA and Hunt AJA)

2 I agree with Basten JA that the appeal with respect to the findings of foreseeability of risk should be dismissed. On the authority of *Koehler v Cerebos (Aust) Limited* [2005] HCA 15; (2005) 79 ALJR 845 esp at [35] , set out by Basten JA, the focus must be on the duty owed to the particular employee.

State of New South Wales v Burton [2006] NSWCA 12 -
State of New South Wales v Burton [2006] NSWCA 12 -
State of New South Wales v Burton [2006] NSWCA 12 -
State of New South Wales v Burton [2006] NSWCA 12 -
State of New South Wales v Burton [2006] NSWCA 12 -
State of New South Wales v Burton [2006] NSWCA 12 -
Illawarra Area Health Service v Dell [2005] NSWCA 381 (09 November 2005) (Mason P, Handley JA and Young CJ in Eq)

86 What is reasonable in the employment context must not lose sight of the contractual arrangements (cf ***Koehler v Cerebos (Aust) Ltd*** [2005] HCA 15, 214 ALR 355). This does not, however, mean that an employer is freed of tortious responsibility merely by pointing to the injury or illness being a product of the employee's contracted workplace tasks.

Illawarra Area Health Service v Dell [2005] NSWCA 381 (09 November 2005) (Mason P, Handley JA and Young CJ in Eq)

Koehler v Cerebos (Aust) Ltd [2005] HCA 15 , 214 ALR 355
Laybutt v Glover Gibbs Pty Ltd

New South Wales v Mannall [2005] NSWCA 367 -
New South Wales v Mannall [2005] NSWCA 367 -
New South Wales v Mannall [2005] NSWCA 367 -
New South Wales v Mannall [2005] NSWCA 367 -
Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

213. As Callinan J recently pointed out in *Koehler v Cerebos (Australia) Ltd* [176] , the fact that the test of foreseeability as stated in *Wyong Shire Council v Shirt* is so undemanding has the consequence that too much emphasis has come to be placed upon some of the other elements of liability for negligence. Having concluded that an event is foreseeable, as almost every occurrence can be, a court then has to consider as a related matter "the reasonable

man's response" to it, having regard to the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of alleviating action, and other competing demands upon a potential defendant [177] . These are all matters in respect of which the maintenance of absolute objectivity and the statement of norms or standards are very difficult. Included in those matters is an assessment of, in effect, the extent of the non-fancifulness of the occurrence, or, as is put, "the degree of probability of the occurrence" [178] . It might have been better to retain the law as it was stated to be in *Caterson* [179] by Barwick CJ and before *Wagon Mound (No 2)* [180] was decided, the case which was very influential in the reasoning of the majority in *Wyong Shire Council v Shirt* [181] . On the basis of the law as it was propounded in *Shirt* , which was not challenged in this appeal, there could be no doubt that an injury of the kind, and the circumstances in which he might sustain it, here were foreseeable.

Vairy v Wyong Shire Council [2005] HCA 62 (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

78. For the first example (nature of harm), the Court referred to *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [91] ; for the second (statutory powers) to *Crimmins v Stevedoring Industry Finance Committee* [92] and *Brodie v Singleton Shire Council* [93] (to which may be added *Graham Barclay Oysters Pty Ltd v Ryan* [94]); for the third (class indeterminacy) to *Perre v Apand Pty Ltd* [95] (to which may be added *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [96]); and for the fourth (coherence) to *Hill v Van Erp* [97] (to which may be added *Koehler v Cerebos (Australia) Ltd* [98]).

via

[98] (2005) 79 ALJR 845 ; 214 ALR 355 .

Stevens v The Queen [2005] HCA 65 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Stevens v The Queen [2005] HCA 65 -
Wynne v Pilbeam [2005] WASCA 200 -
Hurwood v State of Victoria [2005] VSCA 176 -
CFMEU v State of Qld and Anglo Coal [2005] QCA 127 -