IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S14 of 2017

BETWEEN: **RYAN BRIGGS**
Appellant
and
STATE OF NEW SOUTH WALES
Respondent

10 **APPELLANT'S ANNOTATED REPLY**

Part I: Certification

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Submissions in reply

2. ***Re RS[10], [14] to [16].*** These submissions, in their emphasis on the need to identify a general system that should have been postulated, or a general instruction that should have been given, but was not, do not come to grips with the appellant's case in this Court in relation to his disclosure to Detective Inspector Sipos. They
20 seek to apply the observations of Gummow and Hayne JJ in *State of New South Wales v. Fahy* (2007) 232 CLR 486 at 507, [62] to quite different circumstances.

3. Here it was recognized that there was relevant foreseeability and duty to take care: see RS[14] and the references at AS[11], [26]. It was also recognized that there were in being systems which, if implemented, could have presented or ameliorated the appellant's condition. See the discussion at J[373] to [386][1], J[431] to [437], [491], [530] (3AB 999.40, 1013.50, 1027.39, 1036.35).

4. As the primary Judge said at J[467] to [468] (3AB 1022.10) superior officers (i.e. officers in the position of Detective Inspector Sipos) in the ordinary course of their duties should have been aware of the possibility of psychological injury arising
30 from the type of work on which the applicant was engaged, and of the steps available to deal with it. As is also clear from J[489] to [491] (3AB 1027.10), the

[1] Notably J[379] (3AB 1000.30) and Ex "K" (1AB 320.50).

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appellant's complaint is not that there were not in place suitable policies etc, but that they were not implemented. There surely did not need to be detailed instructions given to such officers, who were responsible for "man management" (J[103], [487] to [490] – 3AB 931.40, 1026.43), as to *exactly* what they should do in circumstances where a police officer under their supervision made a request of the nature presently in question. As J[487] and [488] (3AB 1026.43) indicate the steps which ought reasonably to have been taken were really elementary.

5. The emphasis at RS[15] and RS[16] upon the suggested deficiency of particulars in the Statement of Claim also is based on the incorrect assumption as to the nature of the appellant's case in relation to the disclosure to Inspector Sipos. In any event it is difficult to see why at least particulars (a) and (e) do not cover his situation.

6. ***Re RS[3], [11], [17]-[22].*** The contention, at RS[3], that the appellant's "struggling disclosure" did not objectively convey to Inspector Sipos that the appellant was suffering psychological injury, and that it is "more properly characterised as a request for a break", should not be accepted.

7. As can be seen from the references at AS[18], the appellant's statement to Inspector Sipos was not just that he was "struggling" and "needed a break", as the RS suggest at RS[17]-[22]. The appellant also said that he needed to "get off the truck". This is an aspect not referred to in the RS and not referred to by the CA when dealing with this issue at CA[154] to [168] (3AB 1140.15). "Getting off the truck" related to the type of police work in which he was engaged. That part of the appellant's statement to Inspector Sipos cannot be separated out from the other two statements, and treated as if it had not been made.

8. The submissions at RS[22] reflect this error. They overlook the fact that, as the primary Judge said at J[487] (3AB 1026.45), a reasonable man manager would have "also looked at the plaintiff's rosters and considered why he had been seeking to roster himself off operational duties" but instead he was not asked "why he wanted to get 'off the truck'".

9. It is also to gloss over the primary Judge's findings to say, as is put at RS[19, last sentence], that the primary Judge "made no express finding as to exactly what was reasonably known to Detective Inspector Sipos at the time of the struggling disclosure". See too RS[213, last sentence]. That submission leaves out of account

that the Judge – in circumstances where Inspector Sipos had for practical purposes no useful recollection of the conversation (J[18], [103], [104])[2] (3AB 909.49, 931.41) – made specific findings as to what an officer in Inspector Sipos's position should know: see J[103], [109], [468], [481]-[483], [487], [495] to [497] (3AB 931.41, 933.35, 1022.22, 1025.35, 1026.45, 1028.30). These passages demonstrate that the primary Judge had answered the question posed in RS[20, first sentence].

10. At RS[20] much is sought to be made of the use by the primary Judge of the term "intimation": J[482] (3AB 1025.50). But it is clear that the Judge was using the expression in the sense of "conveying information". The primary Judge had what was in this case the very significant advantage of seeing and hearing the appellant give the evidence of the conversation with Inspector Sipos. This was a case where the appellant, in giving his evidence, had been subjected to a sustained attack on his credit – see J[475] and J[21] to [35] (3AB 1024.20 and 910.30) – which was found to be entirely without merit: J[36] (3AB 913.42).

11. ***Re RS[12], [23] to [26].*** In considering the application to the present circumstances of *Koehler v. Cerebos (Aust) Ltd* (2005) 222 CLR 44 at 57, [36] the RS rather leave out of account the qualification immediately following in *Koehler* at 58, [37], namely that different considerations could apply where (as here) an employer is entitled to vary the duties to be employed by an employee. Reference should also be made to the preceding observations in *Koehler* at 57, [33], namely that the "central inquiry" remains "whether, in all the circumstances, the risk of a plaintiff ... sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful". As noted earlier – see paragraph 3 above – the risk in the present case was well-recognized.

12. Further, the assumption referred to in RS[23] is subject to the giving of "evident signs warning of the possibility of psychological injury" and RS[24] speaks of the position "in the absence of disclosure by the employee". See too RS[25, fourth sentence]. But surely the content of the communication to Inspector Sipos was an "evident sign", and "a disclosure by" the appellant meriting further investigation.

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[2] The "inference" referred to in the last sentence of RS[18] could hardly be drawn in circumstances where Inspector Sipos's evidence (at 1AB 227.48-228.2) was that "I don't know what his request had to do with".

13. The respondent, at RS[25, third sentence] contends that the implication that Inspector Sipos should have expressly inquired as to the health "was expressly rejected by the Court of Appeal. That rejection, however, is the subject of this appeal; it was erroneous for the reasons at AS[28] to [48]. It should also be noted, in relation to RS[25] (and RS [22]), that the primary Judge had made specific findings to the contrary at J[126]-[128] (3AB 937.31).

14. ***Re RS [27] to [29].*** It was accepted that the respondent owed a common law duty of care equivalent to that of an employer CA [3] to [4] (3AB 1088.10). Whilst the legislative context may modify the content and scope of that duty, it does not absolve the respondent from acting reasonably within that context.

15. The respondent had the statutory authority referred to in RS [28] to carry out the test for steroid use. However, given the appellant's vulnerable psychological state whilst performing restricted duties: (J[198] to [202] (3AB 956.43)) it was unreasonable for the test to be conducted in the manner described at J[205] to [208] (3AB 958.15). The respondent adduced no evidence as to why the test could not have been conducted by a male officer in the male toilets.

16. The respondent does not take issue with the appellant 's submission that his Notice of Contention argument concerning the unreasonable manner in which the Professional Standards interview was conducted was not addressed by the Court of Appeal: AS[55].

17. The appellant had no choice about attending the interview. He had been "directed" to do so (J[220] (3AB 961.20)) and was obliged to obey RS [27]. Again, the appellant does not cavil with the respondent's statutory duty to conduct the enquiry in a "timely and effective" manner. However, the matters raised with the appellant were "without substance" and the interview was inexplicably long in duration J[225] (3AB 963.10). Furthermore, it was conducted with little expertise (J[230] to [231] (3AB 965.25)) and did *"not appear to reflect any consideration of the plaintiff's welfare as required by Exhibit N"* (the guidelines) (J[509] (3AB 1031.40)). In the context of the appellant's vulnerable circumstances the manner in which the interview was conducted demonstrated a breach of the respondent's duty of care.

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TAKE NOTICE: Before taking any step in the proceedings you must, within 14 DAYS after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the appellant.

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