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.

The facts

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

7 Before taking up the job as a part-time merchandising representative, the appellant had been employed full-time by the employer as a sales representative.

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

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 re-engagement as a part-time 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].

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 full-time, and the work expected of her when employed part-time. 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 full-time employee". It was on the basis of this evidence that the Commissioner found that the appellant's workload between 29 April 1996 and

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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).

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.

17 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.

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.

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3 cf *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

4 [2003] WASCA 322 at [75].

The proper starting point

19 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*[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.

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 anti-discrimination 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

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5 (1980) 146 CLR 40 at 47-48.

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 anti-discrimination 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.

24 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]. What other

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6 [2002] 2 All ER 1.

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

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].

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.

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

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

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 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 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.

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 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].

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

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13 *Sullivan v Moody* (2001) 207 CLR 562 at 580-581 [54]-[55].

14 (2002) 211 CLR 317. See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

15 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 332-333 [16], 343-344 [61]-[62], 385 [201].

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 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].

36 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.

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

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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].

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.

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 re-engaged as a part-time 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 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.
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> 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 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;
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> (b) failed to properly supervise the [appellant] in the performance of her duties;
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> (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:

"**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;

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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).

(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

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21 [2002] 2 All ER 1.

injury caused by stress in the workplace by the House of Lords in *Barber v Somerset County Council*[22].

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 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.

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

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

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.

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.

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

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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.

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.

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

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.