SUPREME COURT OF QUEENSLAND

CITATION:	*Eaton v TriCare (Country) Pty Ltd* [2016] QCA 139
PARTIES:	**ROBYN ELIZABETH EATON** (appellant) **v** **TRICARE (COUNTRY) PTY LTD** ACN 008 411 069 (respondent)
FILE NO/S:	Appeal No 7161 of 2015 DC No 4479 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 173
DELIVERED ON:	3 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2016
JUDGES:	Fraser and Philip McMurdo JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The judgment of 25 June 2015 and the order for costs of the proceedings in the District Court be set aside.** **3. There be judgment for the appellant against the respondent in the sum of $435,583.98.** **4. The respondent pay the appellant's costs of the appeal and of the proceedings in the District Court.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the appellant was employed in an administrative position at the respondent's nursing home at Point Vernon between June 2007 and March 2010 – where, from April 2009, the appellant worked under a Ms Harrison, the manager of the nursing home – where the appellant alleged that as a result of her excessive workload and Harrison's aggressive and belittling conduct she suffered a psychiatric illness – where the appellant commenced proceedings in the District Court alleging negligence by the respondent as vicariously liable for Harrison's conduct – where the appellant

contends the learned trial judge perceived the claim to be of an intentional tort by Harrison and negligence by the respondent, leading his Honour into error in determining the existence of a duty of care by the respondent – whether the learned trial judge misunderstood the appellant's case at trial – whether, consistent with the factual findings of the learned trial judge, the respondent owed the appellant a duty of care

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – where the appellant alleged numerous instances of Harrison acting towards her in a way that was aggressive, belittling, harassing or otherwise unreasonable – where the learned trial judge generally accepted the appellant's evidence and concluded that Ms Harrison regularly conducted herself in an unreasonable manner – whether, on the findings of the learned trial judge, the respondent breached its duty of care

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – where, based on the expert evidence of two psychiatrists, the learned trial judge accepted that the combination of the appellant's workload and the conduct of Harrison brought about the appellant's psychiatric illness – where the learned trial judge did not accept a submission from the respondent that the psychiatrists' evidence could not be relied upon because his Honour had not accepted all of the factual premises adopted by the psychiatrists – where the respondent filed a notice of contention asserting that the learned trial judge erred – whether the learned trial judge erred with respect to the finding of causation

DAMAGES – GENERAL PRINCIPLES – OTHER MATTERS – where the learned trial judge agreed with the respondent's schedule of damages, calculating loss of future earning capacity to age 65 and allowing a discount of 35 per cent for contingencies – where the appellant argues the discount was excessive – whether the trial judge's assessment of damages should be disturbed

Czatyrko v Edith Cowan University (2005) 79 ALJR 839; [2005] HCA 14, cited
Eaton v TriCare (Country) Pty Ltd [2015] QDC 173, overruled
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33, cited
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15, cited
Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705; [1914-15] All ER Rep 280, cited
Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471; [2007] NSWCA 377, cited

Northern Territory v Mengel (1995) 185 CLR 307; [1995] HCA 65, cited
Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, cited

COUNSEL: W Sofronoff QC, with S D Anderson, for the appellant
B W Walker SC, with R Morton, for the respondent

SOLICITORS: Shine Lawyers for the appellant
BT Lawyers for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Philip McMurdo JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **PHILIP McMURDO JA:** From June 2007 until March 2010, the appellant was employed by the respondent in an administrative position at the respondent's nursing home at Pt Vernon. By the time the appellant left this employment, she had developed a psychiatric illness, suffering from depression and anxiety. According to the evidence of two psychiatrists, which the trial judge accepted, the appellant's illness was caused by her employment. The trial judge found that her psychiatric condition was caused by her "consistently excessive" workload and the conduct of a fellow employee, Ms Jane Harrison, who was the manager of the nursing home from April 2009.

[3] The appellant has not worked since her resignation in March 2010. She was then aged 55 years. In July 2010 she attempted to return to work as an administrative assistant at a hospital but found after one day that she was unable to do so.

[4] The appellant sued the respondent in the District Court, claiming damages "as a result of the negligence of the defendant" in a sum of $587,869. Her pleaded case was that her illness had been caused by the defendant's negligence, or negligence for which it was responsible, in essentially two ways. The first was that the respondent was vicariously liable for the conduct of Ms Harrison, as her supervisor, who acted towards her in a bullying manner and who failed to address her excessive workload. The second was that the respondent had failed to put in place measures of internal control which would have prevented Ms Harrison from behaving, or continuing to behave, towards the appellant as she did and which would have addressed her workload.

[5] Although the trial judge found that the appellant's illness was caused by her experience in the workplace under the management of Ms Harrison, his Honour dismissed the claim, holding that there was no relevant duty of care and that in any case, had there been the duty which he understood was alleged in the appellant's case, that duty had not been breached. He held that had the appellant succeeded, the appropriate award for damages would have been $435,583.

[6] The appellant argues that her claim should have succeeded and that she should now be given a judgment against the respondent in a higher amount than that assessed by the trial judge.

The appellant's case at trial

[7] In her statement of claim, the appellant pleaded many facts about her employment at the Pt Vernon facility prior to the arrival of Ms Harrison in April 2009. They included allegations that the appellant had been given an excessive work load. But

by amendment to the statement of claim, the appellant maintained those allegations but abandoned a reliance upon them as incidents of negligence. Her case became confined to the period of 10 to 11 months in which she worked under Ms Harrison. In this court, counsel for the appellant suggested that the facts and circumstances which predated the arrival of Ms Harrison were relevant because consistently with the trial judge's finding that the appellant was overworked during this period, there was "potential for vulnerability". But it was not the appellant's case that she was especially vulnerable to the development of a psychiatric illness and, moreover, that this was known, or should have been known, by the respondent.

[8] The alleged events and circumstances during the period of Ms Harrison's management were pleaded from paragraph 21 through paragraph 77 of the statement of claim. From paragraph 32 were pleaded the series of episodes in which Ms Harrison was said to have acted towards the appellant in a way which was summarised in the statement of claim as follows:

> "78. The general tone of Harrison's communications and behaviour particularised in paragraphs 32 to 77 herein was considered by the plaintiff to be offensive, intimidating, humiliating and threatening.
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> 79. The conduct of Harrison as particularised in paragraphs 32 to 77 herein was repeated, deliberate and constituted "workplace harassment", as that term is defined in the *Prevention of Workplace Harassment Code of Practice* 2004.
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> 80. In the further alternative, the said conduct was belligerent and obstructive and was known, or ought to have been known to Harrison, to be likely to increase the stress which the plaintiff was then feeling."

[9] The appellant alleged that Ms Harrison's conduct and the appellant's excessive workload had an effect upon her which was then apparent. She alleged:

> "81. Throughout the course of the plaintiff's employment and by reason of the allegations set forth in paragraphs 5 to 77 hereof, the plaintiff suffered from considerable stress which was characterised by a general negative change in her character and demeanour, appearing withdrawn, worried, pre-occupied and crying within the workplace."

She pleaded that in consequence of the "matters, facts and circumstances" particularised in the paragraphs which related to the Harrison period, she sustained a psychiatric injury.

[10] Under the heading "The defendant's breach of duty of care and breach of contract" the first of the allegations was as follows:

> "83. The defendant is in the premises vicariously liable for the conduct of Harrison as particularised in paragraphs 32 to 77 herein."

[11] In paragraph 84 of the pleading, she alleged that "In the further alternative [sic], the defendant, its servants or agents" failed to put in place practices and procedures and failed to act upon the appellant's complaints to reduce the stress which the appellant was suffering from her workload and Ms Harrison's conduct towards her. The pleading continued:

> "85. In committing the acts and omissions described in paragraph 84, the defendant was negligent and in breach of the duty of care owed to the plaintiff.
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> 86. Further or in the alternative, in committing the acts and omissions described in paragraph 84, the defendant breached the term of its contract of employment with the plaintiff pleaded in paragraph 4 herein."
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> (By paragraph 4 the appellant pleaded that it was an implied term of her contract of employment that the respondent would exercise reasonable care for her health and safety.)

[12] Two things should be noted about the pleaded case. The first is that there was no allegation that Ms Harrison acted with an intention to cause an injury, more specifically a psychiatric illness to the appellant, and nor was it alleged that she was recklessly indifferent to whether that occurred. In other words, there was no allegation of an intentional tort.[1] The second matter to be noted is that the alleged liability of the defendant for the conduct of Ms Harrison was a vicarious liability. There was no alternative case pleaded to the effect that the defendant was directly liable for Ms Harrison's acts because, for matters relating to the employment of the appellant at Pt Vernon, hers was the mind and will of the defendant. In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, Viscount Haldane LC said:[2]

> "… a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."

Citing that passage, Beazley JA (as she then was), in *Nationwide News Pty Ltd v Naidu*,[3] said that it was unnecessary that a person be a director in order that such a person's acts be considered the acts of the company.

The trial judge's understanding of the appellant's case

[13] In a lengthy judgment, the trial judge extensively discussed the evidence which was relevant to the alleged episodes involving Ms Harrison. Ultimately his Honour concluded as follows:[4]

> "It is not necessary to find that every interaction between Harrison and the plaintiff was harassing. I am satisfied Harrison regularly conducted herself in an unreasonable manner towards the plaintiff. I have generally accepted the plaintiff's evidence but stopped short of accepting that Harrison made the statement, 'nobody likes you anyway'."

[14] His Honour then discussed the respondent's duty of care. He began by saying that the appellant's claim "is in negligence and breach of the employment contract", adding that although the claim was "endorsed only for damages and loss consequent

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1 *Northern Territory v Mengel* (1995) 185 CLR 307, 347; [1995] HCA 65.
2 [1915] AC 705, 713.
3 (2007) 71 NSWLR 471, 504 [230].
4 *Eaton v TriCare (Country) Pty Ltd* [2015] QDC 173, [130].

on the negligence of the defendant", no point had been taken about the alternative allegation of a breach of the contract of employment because the content of the employer's duty was the same on each basis.[5]

[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]

[16] The trial judge then discussed the evidence of the apparent deterioration in the appellant's health over the period of Ms Harrison's management. He preceded this discussion by saying that "There was some evidence to the effect that the plaintiff visibly deteriorated over the term of Harrison's management"[9] and concluded it as follows:[10]

> "On balance, this evidence supports a finding that the plaintiff's apparent psychological state deteriorated during the period she was under the management of Harrison."

His Honour noted that there was no dispute that during the Harrison period, the appellant complained about her workload.[11] As to Ms Harrison's conduct, his Honour referred to the evidence of the appellant that she had complained to Ms Harrison and made these findings:[12]

> "Harrison denied these complaints were made to her and whereas I favour the view that the plaintiff made the complaints to her, it is likely Harrison did not hear them as the plaintiff meant them to be heard, or that Harrison simply has forgotten."

[17] The trial judge then discussed whether similar complaints had been made "to others in the defendant's management structure" and noted a submission by the appellant's counsel that "the plaintiff does not claim to have reported Harrison's behaviour to her superiors."[13] He then concluded that there was no relevant duty of care, reasoning as follows:

> "[149] I am not satisfied the plaintiff has proved that, in the circumstances that I have found, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable.
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> [150] It is insufficient for the plaintiff to rely on any notice that Harrison might have had of the plaintiff's distress. Harrison was not, even on the plaintiff's case, the mind of the defendant. I am not saying that I am satisfied Harrison personally appreciated or ought to have in the circumstances appreciated the reasonably foreseeable risk of the plaintiff sustaining a recognisable psychiatric illness. As I have recently noted, the plaintiff does not claim to have reported Harrison's conduct to Harrison's superiors. There may well be a case where that is not fatal to

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5 [2015] QDC 173, [131].
6 (2002) 211 CLR 317; [2002] HCA 35.
7 (2005) 222 CLR 44; [2005] HCA 15.
8 [2015] QDC 173, [132].
9 [2015] QDC 173, [142].
10 [2015] QDC 173, [143].
11 [2015] QDC 173, [144].
12 [2015] QDC 173, [145].
13 [2015] QDC 173, [146].

> a plaintiff's claim. But the plaintiff was in Hervey Bay with easy contact to Brisbane. The evidence shows the regularity with which staff from head office attended Point Vernon and the availability by email the plaintiff had with senior officers such as O'Brien and Clonan.
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> [151] The circumstances relevant to the assessment of the foreseeability of the reasonable risk of serious psychiatric injury also include the plaintiff's presentation of her qualifications and experience for the position, the requirements of the position, the putting in place of an apparently well qualified manager, and the plaintiff's complaints to anyone who would listen about the workload issues. In my view, the claim must fail because the relevant duty was not engaged by the reasonable foreseeability of psychiatric injury to the plaintiff."

[18] His Honour went on to say that "The plaintiff pleads the defendant has breached its duty of care in two ways", the first being "that the defendant is vicariously liable for Harrison's conduct."[14] After referring to a statement by Beazley JA in *Nationwide News Pty Ltd v Naidu*[15] that "an employer is vicariously liable for a tort or other actionable wrong committed by an employee in the course of employment", the trial judge said:[16]

> "The plaintiff has not pleaded what tort Harrison committed that the defendant is vicariously liable for. It is not pleaded, nor do I understand the plaintiff's argument to be, that Harrison was negligent. The plaintiff alleges, in paragraphs 77-80 of the amended statement of claim … that Harrison deliberately conducted herself in a way that would amount to workplace harassment. The claim against the defendant is brought in negligence. Harrison's intentional wrongdoing is relevant only if the plaintiff draws a clear connection between that conduct and the negligence of the defendant."

His Honour continued:[17]

> "The plaintiff, in written submissions, refers to *Nationwide News P/L v Naidu* as an example of a company held liable for the actions of its officer even when the actions breached the company's policies provided the acts were performed in the scope of employment. That is not controversial, but in my view, *Nationwide News Pty Ltd v Naidu* does not support the plaintiff's vicarious liability pleading and argument. In that case, the trial judge held *Nationwide News* 'liable in negligence' but the reasoning was directed to a finding of vicarious liability for an intentional tort."

[19] After some discussion of the case pleaded in paragraph 84, his Honour repeated his conclusion that a psychiatric illness was not reasonably foreseeable and added that "The plaintiff must fail on the question of breach on the same ground".[18] He then referred to the evidence "as to overt emotional behaviour of the plaintiff", about which he said this:[19]

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14 [2015] QDC 173, [154].
15 (2007) 71 NSWLR 471, 506 [240].
16 [2015] QDC 173, [155].
17 [2015] QDC 173, [156] (footnotes omitted).
18 [2015] QDC 173, [159].
19 [2015] QDC 173, [160].

> "Whereas these might have been signs suggesting an adverse effect on the plaintiff's mind, Harrison's evidence of the plaintiff's habit of asking whether she was in trouble and should resign rang true. What is required is foreseeability of a recognised psychiatric illness. This evidence does not, in my opinion, reach the level of possibility of psychiatric illness which would require the employer to intervene."

[20] His Honour continued with some discussion of parts of the appellant's case other than the complaint of the conduct of Ms Harrison before (again) stating his conclusion that if there had been a duty of care owed by the defendant, the defendant was not shown to have been negligent.[20]

[21] In my respectful view, the trial judge misunderstood the content of the appellant's case. The statement of claim unambiguously alleged that the respondent was vicariously liable for the conduct of Ms Harrison and did so under the heading "The defendant's breach of duty of care and breach of contract". The claim itself was expressed as one for damages for the respondent's negligence or breach of contract. Putting to one side that alternative contractual claim (which was not materially different from the claim in negligence), the pleaded case was that the respondent was liable in negligence by being vicariously liable for Ms Harrison's conduct and the appellant thereby alleged that Ms Harrison herself had been negligent.

[22] His Honour misunderstood the case to be that Ms Harrison had engaged in "intentional wrongdoing". He described the pleaded allegations as amounting to a case that "Harrison deliberately conducted herself in a way that would amount to workplace harassment".[21] As already noted, it was not the appellant's case that Harrison had committed an intentional tort. It is true that the case was that Ms Harrison had deliberately conducted herself in certain ways, but there was no allegation that she had done so intending to cause harm or being recklessly indifferent to whether harm occurred.

[23] Counsel for the respondent submitted that the trial judge did not misunderstand the plaintiff's case in this way, for otherwise the extensive discussion in the judgment of the alleged episodes of Ms Harrison's misconduct would have been irrelevant. That submission cannot be accepted. That discussion was relevant also for the case pleaded in paragraph 84, namely that the defendant should have had procedures and systems in place and taken other steps which would have prevented Ms Harrison from behaving as she did. The trial judge's perception of the content of the plaintiff's case is clear from his statement that the appellant had neither pleaded nor argued that Ms Harrison was negligent.[22] It is also clear from this statement:[23]

> "I am not saying that I am satisfied Harrison personally appreciated or ought to have in the circumstances appreciated the reasonably foreseeable risk of the plaintiff sustaining a recognisable psychiatric illness."

Counsel for the respondent submitted that this was a finding that Ms Harrison did not personally appreciate or ought to have appreciated the risk of a psychiatric illness. That submission cannot be accepted. This was not a statement of a factual finding but rather a statement that no finding had been made one way or the other.

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20 [2015] QDC 173, [165].
21 [2015] QDC 173, [155].
22 [2015] QDC 173, [155].
23 [2015] QDC 173, [150].

[24] This court does not have the transcript of the submissions made at the end of the trial. But it is not suggested here that the trial judge received no submission that Ms Harrison was negligent.

[25] Although there was no alternative plea that the respondent was *directly* liable for Ms Harrison's conduct, it was conceded by counsel for the respondent that this should be part of the appellant's case to be considered in this court. Indeed it was conceded in this court, correctly, that as the manager of this nursing home, Ms Harrison was the person whose mind was relevantly that of the respondent and the appeal was argued by each side upon that premise.

[26] It is evident that these misunderstandings of the appellant's case affected his Honour's consideration of the content of the respondent's duty of care as well as the question of whether such a duty was breached. His Honour's reasoning on these questions was in error at least for his misunderstanding of the appellant's case. It is then for the appellant to establish here that upon the evidence and consistently with the findings by the trial judge as to the primary facts, the respondent should have been found liable.

A duty of care

[27] The respondent, as an employer, owed a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury.[24] The present question is one of the content of that duty. It is whether the respondent came under a duty to take reasonable care to avoid a psychiatric illness to the appellant from her employment.

[28] In *Koehler v Cerebos (Australia) Ltd*,[25] the plurality said that in this context the proper starting point is an account of the obligations of the parties under the contract of employment, any further obligations arising from that relationship and any applicable statutory provisions. The relevant contract of employment was contained in a letter dated 23 July 2008 addressed to the appellant, which was signed by Ms Harrison's predecessor as the facility manager, Ms Pointon. According to that document, the appellant was to be employed in the position of "Administration Assistant at Pt Vernon Nursing Centre", on a full time basis at a salary of approximately $47,000. The appellant was to report directly to the Facility Manager. The letter referred to a "detailed Position Description" as being attached to the letter, although such an attachment does not appear in the copy of the letter which was in evidence. As to the expected working hours for this position, the letter provided as follows:

> "Your standard working hours will be on the fulltime basis of 76 hours per fortnight. Your role will entail a need for flexibility in the planning and execution of your working hours, in line with the job demands. It is not the standard policy of TriCare to pay overtime, however arrangements for time in lieu, when appropriate, will be co-ordinated by me."

[29] The terms of the contract of employment are relevant but not decisive in this case. The appellant did not agree to perform a certain list of tasks, regardless of the time which was required to do so. Her excessive workload, as found by the trial judge, constituted work beyond the standard hours according to her contract.[26] And it could

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24 *Czatyrko v Edith Cowan University* (2005) 79 ALJR 839, 842; [2005] HCA 14, [12].
25 (2005) 222 CLR 44, 57; [2005] HCA 15, [19]-[21].
26 [2015] QDC 173, [65].

hardly be said that the other cause of her illness according to his Honour's findings, namely the conduct of Ms Harrison, was something to which the appellant had contractually agreed. There was no tension then between the duty of care for which the appellant contended and the terms of her contract of employment.

[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."

[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]

[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

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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].

28 (2005) 222 CLR 44, 57; [2005] HCA 15, [34], [35].

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

30 (2005) 222 CLR 44, 59; [2015] HCA 15, [41].

31 (2003) 214 CLR 269, 276; [2003] HCA 33, [9].

> 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."

[33] In the present case, it is argued that it was reasonable to require the respondent to have in contemplation the risk of psychiatric injury to the appellant, and to take reasonable care to guard against such injury, from the particular circumstances by which that risk was evident or ought to have been evident to the respondent. In particular, as the trial judge found, the appellant's "apparent psychological state deteriorated during the period she was under the management of Harrison."[35] On the evidence of Ms Harrison herself, the appellant was seen several times to be shaking with a tremor in her hands and was often "teary". Several witnesses had seen the appellant in that condition. Some fellow workers contrasted this condition with the appellant's state before the arrival of Ms Harrison, when she was said to have been "happy go lucky and very outgoing" and "bright and bubbly". Other witnesses were less favourable to the appellant's case: some said that they had not seen the appellant crying or unhappy and others said that she had always been of a nervous disposition. But the trial judge weighed all of the evidence and made the conclusion as to the evident deterioration in her psychological state which is the basis for the appellant's argument.

[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.

[35] Even on the evidence of Ms Harrison herself as to the appellant's psychological state, Ms Harrison ought to have foreseen that there was a particular vulnerability for this employee, such that there was a risk that she would develop a psychiatric illness.

[36] At paragraph [151] of the judgment, his Honour considered circumstances which he said were relevant to the existence or otherwise of a duty of care. I have set out that

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32 (2002) 211 CLR 317, 331; [2002] HCA 35, [12].
33 (2003) 214 CLR 269, 276; [2003] HCA 33, [8].
34 (2007) 71 NSWLR 471, 478 [23].
35 [2015] QDC 173, [143].
36 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 57 [33].

paragraph above, from which it appears that his Honour did not identify any fact or circumstance, other than his finding that the risk of a psychiatric illness was not reasonably foreseeable, which would explain why the alleged duty of care was not owed. There was no circumstance, such as the imposition of an undue burden upon the respondent, which made it unreasonable that a duty should be imposed in the case of a predictable risk. In my conclusion the respondent did become subject to a duty to take reasonable care to avoid the risk of a psychiatric injury to the appellant.

Breach of the duty of care

[37] There were many episodes of misconduct of which complaint was made in the appellant's case. Most were accepted by the trial judge. Neither side contends that his Honour's findings in this respect were, in any instance, incorrect. The argument is about whether the facts, as found, involved a failure to take reasonable care.

[38] Before going to these findings something should be said of the appellant's work history prior to the arrival of Ms Harrison. She had worked at public and private hospitals and retirement and rest homes from 1970. That included a period in 2002 and 2003 when she worked at a TriCare nursing centre at Mermaid Beach as a personal carer and then as an administration assistant. The appellant was employed as an administration assistant at the Pt Vernon centre in June 2007. The centre manager, who was thereby her direct supervisor, was then Ms Pointon. It appears that Ms Pointon was often absent from work. The role at Pt Vernon involved duties which the appellant had not been required to discharge as an administration assistant at the Mermaid Beach centre.[37] At Pt Vernon she was responsible for the payroll and the rostering of staff and she was also responsible for liaising with patients and relatives of patients.[38] The appellant enjoyed a good personal relationship with Ms Pointon but her absences and ultimate departure from the centre in December 2008 increased the appellant's workload. The appellant was working up to 50 hours per week before Ms Pointon left and longer than that following her departure.[39]

[39] Shortly after the departure of Ms Pointon and before the arrival of Ms Harrison, the Pt Vernon centre received what the trial judge described as an "unannounced accreditation visit" on which the centre failed on 17 of the 44 relevant criteria.[40]

[40] Under a heading "Conclusions about workload in the period before Harrison", the trial judge began by saying:[41]

> "For reasons which I will expand on below, I think the plaintiff was prone to exaggerate matters somewhat. Nonetheless, it is easy to infer that she was overworked during the period under discussion."

His Honour noted that the appellant herself did not consider that her workload during this period was a cause of her illness and that there was "no medical evidence to the contrary".[42] Importantly, the appellant's experience before the arrival of Ms Harrison strongly indicates, as at least one of the psychiatrists said in evidence, that her psychiatric illness was not caused, at least solely, by overwork. Many witnesses described the appellant's apparently good psychological state in this period.

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37 [2015] QDC 173, [10].
38 Ibid.
39 [2015] QDC 173, [11].
40 [2015] QDC 173, [18].
41 [2015] QDC 173, [24].
42 Ibid.

[41] Prior to her arrival at Pt Vernon, Ms Harrison had an apparently impressive work history, holding several positions in health care administration both in the public and private sectors. Her academic qualifications included a Master of Business Administration from the University of Queensland. Her work history included a period as an officer in the Royal Australian Navy during the 1980s. But she had not managed a residential aged care facility. Clearly she arrived at a difficult time for the Pt Vernon facility and Ms Harrison described the result of the accreditation audit as appalling. She was intent upon making the Pt Vernon facility again compliant with all relevant regulations and standards. Her determination to remedy the standard of services provided by this facility was likely to lead to tension between Ms Harrison and those employed who, in her perception, had contributed to the situation as she found it.

[42] I go then to the findings about the conduct of Ms Harrison. Under a heading "Witnesses who saw Harrison behave aggressively towards Eaton - in contrast to Harrison's own evidence", the trial judge discussed four witnesses whose evidence he "found no reason to reject".[43] A Ms McKenzie gave evidence of Ms Harrison speaking to the appellant with a body language which was "I'm the boss and I'm telling you something". A Mr Carberry recalled an incident where, in response to the appellant raising the case of a staff member who wanted to take leave, Ms Harrison said with a raised voice "Tell that person we're not running a charity", after which Mr Carberry saw that the appellant was "crying again". He said that he was shocked by the incident. A Ms Morris, a personal carer at the centre, saw Ms Harrison speaking in a "very matter of fact, stern" manner to the appellant, leaning over the appellant's desk "and grilling her … pointing her finger at her", after which she saw that the appellant was very upset and "was rather shaky and … just wouldn't say anything".[44] And a Ms McDonald, a registered nurse at the facility, witnessed an incident in which Ms Harrison appeared to be belittling the appellant by using a raised voice and complaining about something which had not been done. Ms McDonald overheard Ms Harrison say: "I've never met anybody so stupid as you". Immediately after this incident, Ms McDonald asked the appellant whether she was "all right" and she recalled that the appellant "had tears in her eyes and just shook her head.[45] Referring to the evidence of these four witnesses, his Honour remarked:[46]

> "This is perhaps a small but still significant body of evidence directly in proof of one type of conduct by Harrison directed at the plaintiff which the plaintiff says caused her injury. It is relevant and I accept the above evidence."

[43] In May 2009 the appellant was absent from work having had a gall bladder operation. The appellant's evidence was that while she was recuperating at home, she was continually telephoned by Ms Harrison and a person who was acting in the appellant's position. Upon the appellant's return to work, she complained to Ms Harrison about the extent of the assistance this person had received when, according to the appellant, Ms Harrison responded nastily, telling her to "get over it".

[44] The appellant said that after this incident she asked for assistance for her work, which was denied by Ms Harrison. When the appellant complained about the way in which Ms Harrison was speaking to her, she said that Ms Harrison screamed at her: "I will

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43 [2015] QDC 173, [44].
44 [2015] QDC 173, [40].
45 [2015] QDC 173, [41].
46 [2015] QDC 173, [44].

speak however I like", telling the appellant to "get over herself". This evidence, like much of the appellant's evidence, was disputed by Ms Harrison (but who did admit that she may have telephoned the appellant on a few occasions when she was recuperating at home). This conflict in the evidence was apparently resolved by his Honour's general finding which I have set out above at [13].

[45] One cause of tension was Ms Harrison's moving to an office upstairs in the centre, leaving the appellant as the only administrative employee at the public entrance. The appellant complained that this was increasing her workload because she was sometimes "inundated with relatives and residents and potential clients". She said that when she complained to Ms Harrison, she was spoken to very harshly, Ms Harrison saying: "just get over it".

[46] The two argued about the procedure at the centre for the admission of patients. In early 2010, Ms Harrison asked to see the document in which the procedure was set out. The appellant says that Ms Harrison then said to her words to the effect "who do you think you are to be doing this?", telling her that she would not be involved in the process any further. Ms Harrison says that she did tell the appellant that she was not to do this work, but she had good reasons for doing so. At a relevant meeting, a Ms Reynolds was present. Ms Reynolds had no specific recollection of the discussion but gave evidence of her observations of the two women when they were together, saying that they "seemed to always be pleasant … professional". Ms Reynolds had not heard or seen Ms Harrison scream at the appellant. At one point in the judgment, the trial judge remarked that he found Ms Reynolds to be "a quite persuasive witness."[47] But he later seemed to find to the contrary. Immediately ahead of his conclusion that Ms Harrison regularly conducted herself in an unreasonable manner towards the plaintiff (in the passage set out above at [13]), the trial judge noted that there were witnesses called in the appellant's case "who confirmed various aspects of the alleged behaviour" and witnesses in the respondent's case "whose observations were quite different - Reynolds, Swann, Saltmer."[48] Ms Swann gave evidence that at no time did she see Ms Harrison yell or scream at the appellant during a meeting.

[47] Another subject of conflict between the women was the appellant's support for the personal carer staff at the centre, of whom Ms Harrison was strongly critical. Again there was a factual contest on this subject. The respondent's case was supported by the evidence of Ms Reynolds, Ms Swann and another witness, Ms Saltmer. The trial judge resolved this contest as follows:[49]

> "Whatever the psychology, I am persuaded by the plaintiff's evidence and that of Burgess and other witnesses that it is probable Harrison was disparaging of personal carer staff. It is not probable that Harrison yelled and screamed, although the plaintiff, particularly as her psychological state deteriorated, might have heard it so. It is highly likely Harrison, as she put it, counselled the plaintiff about the boundaries of her role and reminded her she was not a personal carer any more. But I am satisfied her manner of expressing this understandable view was in the harsh terms the plaintiff claims."

The trial judge added this:[50]

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47 [2015] QDC 173, [69].
48 [2015] QDC 173, [130].
49 [2015] QDC 173, [77].
50 [2015] QDC 173, [78].

> "I conclude that finding herself repeatedly in the position between Harrison and other staff would have added significantly to the stress the plaintiff experienced in her busy job."

[48] The appellant gave evidence that in mid 2009, Ms Harrison told her that she was the subject of a complaint from another employee, Ms Prendergast. When the appellant raised this with Ms Prendergast, she was told that the complaint was not about the appellant but another employee. The appellant said that when she reported this to Ms Harrison, she was told: "just get over yourself … nobody likes you here anyway". This response was denied by Ms Harrison who said also that Ms Prendergast had complained about the appellant. The trial judge was not satisfied that the complaint about the appellant had been fabricated by Ms Harrison. He found also that Ms Harrison had not said something "so deliberately demeaning as 'nobody likes you anyway'".[51]

[49] Another complaint in the appellant's case was of a discussion between the two women on what the trial judge called "the journey claim". The appellant suggested that a claim might be made by another employee arising out of her journey to work; Ms Harrison said that she was not so sure and that she would look into it. The appellant said that this was another occasion of aggressive conduct by Ms Harrison which reduced her self-esteem. The trial judge said that "both witnesses probably believe they related the incident accurately" and that "the truth lay somewhere in between, but closer to the plaintiff's account." He found that "Harrison spoke in a style the plaintiff found aggressive and upsetting", although Harrison had not actually yelled or "got quite loud".[52]

[50] Another episode involved what the trial judge described as "the anonymous letter". It is unnecessary to set out here the detail of the conflict in the evidence. Ultimately the trial judge did not accept the appellant's evidence as to her discussion with Ms Harrison on this subject.[53]

[51] The two women argued on the subject of the management of the payroll. The appellant's evidence was that Ms Harrison was intimidating and aggressive as to suggested errors by the appellant. The trial judge did not accept entirely the appellant's evidence but did find that Ms Harrison remarked upon errors made by the appellant "sharply" although she may not have spoken as aggressively as the appellant claimed.[54]

[52] A further episode involved the appointment of a person to act as the food supervisor at the centre. After a recruitment process, there were two candidates, between whom Ms Harrison was undecided. In Ms Harrison's absence, the appellant asked one of the candidates to come to the centre the next day to work in the kitchen and "to liaise with Jane Harrison about the position". For this the appellant was reprimanded by Ms Harrison to an extent that the appellant broke down and offered to resign. This complaint was rejected in Ms Harrison's evidence but the trial judge preferred the appellant's version. Ms Harrison agreed that in this instance the appellant had a tremor in her hands. The trial judge noted that the appellant conceded in her evidence that she should have spoken to Ms Harrison before inviting this candidate to the centre. He found also that Ms Harrison's response "seem[ed] like a strong over-reaction" and accepted the appellant's evidence that Ms Harrison had threatened some disciplinary process against the appellant from this incident. He found that it was likely

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51 [2015] QDC 173, [81].
52 [2015] QDC 173, [85].
53 [2015] QDC 173, [97].
54 [2015] QDC 173, [100].

Ms Harrison had used the words "how dare you?" and that the appellant's complaint about the manner of the response by Ms Harrison was well-founded. His Honour added the comment: "But it is difficult to process incidents such as this into a case of bullying or intimidation."[55] The ultimate question, of course, is not whether there was bullying or intimidation but whether the respondent, particularly Ms Harrison, failed to exercise reasonable care in her dealings with the appellant. His Honour's findings about this episode supported the appellant's case.

[53] Next there were the episodes of 11 and 12 March 2010 concluding with the appellant's resignation. On 11 March, before Ms Harrison had arrived at work, the appellant took a telephone call from a doctor whose patient was a resident of the centre. The doctor wanted to leave a message for the clinical manager, who was not at the centre at that time, that the patient's husband should not be permitted to remove his wife from the centre. About half an hour later, when Ms Harrison arrived, the appellant gave her this message. Ms Harrison, the appellant said, screamed at her and asked her: "who do you think you are to take that message?" The appellant then broke down and Ms Harrison told her to take the day off. Ms Harrison agreed that the appellant then sounded hysterical and that she suggested that the appellant see her doctor. The trial judge said this episode was for each of the contestants "the straw that broke the camel's back". He said that "for the plaintiff it marked the exhaustion of her capacity to cope with the manner in which Harrison had dealt with her."[56] The trial judge was satisfied that "Harrison's response was harsh and distressing to the plaintiff", although he added that Ms Harrison had reason to be exasperated with the plaintiff about the incident.[57] His Honour continued:[58]

> "The relevant question is whether the incident, alone or considered as part of a course of conduct, breached the employer's duty to the plaintiff and caused the plaintiff's serious mental illness.
>
> I find it very difficult to conclude so. The plaintiff does not complain, in this incident, of belittling conduct or personal abuse. The plaintiff pleads: 'Harrison became angry and then walked from the room without further acknowledging the plaintiff'."

[54] On the following day, 12 March 2010, the appellant went to see Ms Harrison, carrying a resignation letter which she had typed that morning. Ms Harrison had also written a letter, in the form of a series of directions which were to be given to the appellant. The trial judge said that it seemed to him that there was little in dispute as to what occurred. The appellant resigned at this meeting.

[55] After discussing these various episodes, the trial judge concluded as I have set out above at [13]. As his Honour there said, in general he accepted the appellant's evidence although he made the specific qualification that Ms Harrison had not made the statement "nobody likes you anyway". His Honour said:[59]

> "As to the 'belittling' comments, the plaintiff said they were constant. On several occasions the plaintiff said Harrison used the terms, 'get over it'. I have referred throughout this traversing of the evidence to

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55 [2015] QDC 173, [107].
56 [2015] QDC 173, [117].
57 [2015] QDC 173, [118].
58 [2015] QDC 173, [118]-[119].
59 [2015] QDC 173, [130].

> many such examples. And as set out above, the plaintiff called witnesses who confirmed various aspects of the alleged behaviour. On the other hand, the defendant called witnesses whose observations were quite different - Reynolds, Swann, Saltmer."

His Honour then resolved that conflict, in the appellant's favour, as I have set out at [13].

[56] The trial judge thereby accepted that there was a consistent course of conduct by Ms Harrison in which she acted in a belittling and harassing way towards the appellant. The appellant was subjected to personal abuse from Ms Harrison, often in the presence of other employees. The harmful nature of this conduct was likely to have been exacerbated by the appellant's excessive workload.

[57] In the passage which I have set out above at [13], his Honour said that Ms Harrison regularly conducted herself "in an unreasonable manner towards the plaintiff." At least at one point in the submissions for the appellant, this seemed to be treated as a finding of unreasonableness in the sense that the respondent failed to take reasonable care. But given the trial judge's conclusions on the subject of a duty of care, that finding could not be so understood. In context however, it was a finding that Ms Harrison had regularly behaved in a "harassing" manner towards the appellant.

[58] The trial judge found that the appellant "regularly worked well beyond the standard hours set out in the employment contract" but that "this was not all Harrison's (or more generally the defendant's) fault." He accepted that Ms Harrison counselled the appellant to be more disciplined with her time and that this counselling failed not only because it was impractical, but also because "it was in the plaintiff's nature to spend time with people."[60] His Honour concluded that the appellant was required to work these longer hours:[61]

> "because of the nature of her role at that facility in the circumstances which arose during Pointon's administration and upon the accreditation failure and under Harrison's administration given the difficult circumstances Harrison inherited and her inexperience in the position."

[59] Absent the conduct of Ms Harrison, I would not be persuaded that by requiring the appellant to work these long hours, the defendant breached its duty of care. In particular, there was not such a risk of the development of a psychiatric illness *only* from lengthy working hours that the exercise of reasonable care required these hours be reduced. The relevance of her excessive workload came from the conduct of Ms Harrison towards her. The burden of that workload must have made it more difficult for her to cope with the harassing and belittling behaviour towards her. And the failure by Ms Harrison to effectively reduce the appellant's workload is likely to have contributed to her sense of grievance and distress. Her excessive workload thereby contributed to the stress of which the essential cause was Ms Harrison's conduct.

[60] It was not the legal responsibility of the respondent to its employees to provide a happy workplace or one in which their productivity might have been enhanced by temperate and polite behaviour from those in managerial positions. The relevant legal responsibility was to take reasonable care to avoid a risk of a psychiatric injury to the appellant, in the circumstance that she was exhibiting a particular vulnerability. The difficult circumstances of this facility which confronted Ms Harrison must be kept in

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60 [2015] QDC 173 at [65].

61 Ibid.

mind. It was not Ms Harrison's task to avoid any conflict with staff at the centre. The circumstances were conducive to some tension between staff and the new manager. But this did not require Ms Harrison to behave towards the appellant as the trial judge found that she did.

[61] On the findings of the trial judge as to the behaviour of Ms Harrison towards the appellant, in my view the respondent, through Ms Harrison, breached its duty. Reasonable care required that Ms Harrison not behave towards the appellant in a harassing and belittling fashion. That had a real likelihood of causing such stress to the appellant that in her vulnerable condition, she would develop a psychiatric illness. The real likelihood of that occurring was well explained in the evidence of the psychiatrists.

Causation

[62] The trial judge said that he was satisfied that the combination of the two stressors, being "her workload during the time Harrison was manager and Harrison's conduct towards her" brought about her psychiatric illness.[62]

[63] His Honour considered a submission for the respondent that the evidence of the psychiatrists did not provide a sufficient support for the appellant's case because their opinions were premised upon facts which were not established. In particular they were premised upon facts as to the interaction between the appellant and Ms Harrison, according to the appellant's version of events. His Honour said that although he had not accepted the appellant's evidence in all respects as to the alleged incidents, he felt "comfortable drawing, from the psychiatric opinion, certain conclusions while taking into account the variations in base facts."[63] His Honour said:[64]

> "This is because of the nature of the findings I have made inconsistent with the plaintiff's account to the doctors. So, for example, although I am not satisfied Harrison said, 'well, nobody likes you anyway' that need not reduce the effect on the plaintiff of the incident during which she alleged Harrison said those words."

After discussing the evidence of each of the psychiatrists, the trial judge returned to this question of the factual premises for their opinions as follows:

> "[185] The remaining question is whether the facts upon which the opinions were given are so substantially different from the findings I have made in favour of the plaintiff that the doctors' opinions do not support a conclusion that the plaintiff's experience in the workplace under the management of Harrison caused her present condition. There are some facts referred to by Dr Whiteford in his first report, dated 5 November 2010, which I have not found. For example, I do not accept the plaintiff was telephoned 15 to 20 times a day by the facility while she was on sick leave for her gall bladder operation because the assertion is not supported by either Harrison or Saltmer. I have nonetheless found the plaintiff was working under excess demands. In the letters sent to Dr Byth, there are certain facts I have not found, for example that Harrison said to the plaintiff,

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62 [2015] QDC 173, [166].
63 [2015] QDC 173, [169].
64 Ibid.

> 'Nobody likes you.' I notice that in Exhibit 30 the plaintiff presents the view she still presented at trial with respect to giving a reference to a potential employer of an ex-employee. The particular episode as described in the letter does not include violent or intimidating language on the part of Harrison. That is, I think it reasonable to proceed on the basis that Dr Byth formed his opinion without particular reference to that incident.
>
> [186] With the benefit of the opinions of the doctors, filtered as I have discussed above, I am satisfied that it is safe to conclude the plaintiff's consistently excessive workload and the conduct of Harrison as I have found them to be caused the plaintiff's current psychiatric condition. In reaching this conclusion it take into account all of the evidence, particularly including the evidence of the course of the plaintiff's psychological state and its deterioration during the period of Harrison's management of the facility."

[64] By a notice of contention, the respondent says that his Honour erred in that:

> "(a) There was no finding that in requiring the plaintiff to perform the work she was required to perform the Defendant was in breach of any duty or obligation owed to the plaintiff;
>
> (b) There were no findings as to what, if any, parts of Harrison's conduct to the plaintiff amounted to a breach of any duty or obligation owed by the Defendant to the Plaintiff;
>
> (c) It was insufficient to support any finding of causation that his Honour find that the plaintiff's work (excessive or not), and/or Harrison's behaviour caused injury without finding what parts of those matter amounted to a breach of a duty or obligation."

It is also contended that given what are said to be significant differences between the factual premises upon which the psychiatrists opined and the findings made by the trial judge, his Honour was wrong to find as he did on the question of causation.

[65] The respondent is correct in contending that any finding of causation must be made by reference to the particulars of an accepted breach of duty. The defendant's breach of duty was by the conduct of Ms Harrison which the trial judge accepted did occur. As I have discussed, the likelihood of that conduct causing a psychiatric illness to the appellant was enhanced by the circumstance that the defendant, through Ms Harrison, was requiring her to work excessive hours. The extent of that excess was as found by the trial judge. Because the primary facts by which the respondent was negligent were those employed by the trial judge in his conclusions on the subject of causation, a conclusion by this court of causation would be consistent with the reasoning and findings of the trial judge. The complaints in paragraphs (a), (b) and (c) of the notice of contention must be rejected.

[66] The question then is whether the trial judge was correct to reason that such differences as there were between the factual premises of the psychiatric opinions and the facts as found by his Honour, did not preclude reliance upon those opinions for a finding of causation.

[67] In his report dated 11 March 2013, Professor Whiteford, who was called in the respondent's case, adverted to the possibility that the facts were not as the appellant had related. He wrote:

> "5. If the harassment and bullying by Ms Harrison occurred as described by Ms Eaton then this would be a cause for the exacerbation in her anxiety disorder at the time she stopped work. If the harassment and bullying did not occur, I do not believe the increased workload would have caused the aggravation. Ms Eaton was clear that it was the harassment and bullying which caused her psychological distress.
>
> 6. The confrontation resulting in her resignation was not the sole or even a major cause of her psychiatric condition. It was the culmination of a multiple stressors over time which caused her to become so psychologically distressed that she ceased work.
>
> 7. It is reasonably foreseeable that a person would develop a transient adjustment disorder based on the facts alleged by the claimant. It is not reasonably foreseeable that a person would develop a transient adjustment disorder based on the facts alleged by Jane Harrison and Julia Swan."

[68] The facts found by the trial judge were largely as they were alleged by the appellant. The distinction made by Professor Whiteford was between the conduct as alleged and the absence of such conduct. In substance, the trial judge found that such conduct did occur. Although at one point, his Honour remarked, in relation to the so-called food supervisor incident, that it was difficult to "process incidents such as this into a case of bullying or intimidation", the effect of his Honour's findings was that the conduct was belittling and harassing. The probative value of the evidence of Professor Whiteford and Dr Byth, the psychiatrist called in the appellant's case, was not diminished by the fact that there were some relatively few instances where the trial judge found that the appellant had exaggerated the aggressive nature of Ms Harrison's conduct.

[69] As the trial judge discussed, there was some difference between the psychiatrists as to the origin of the appellant's illness. Professor Whiteford had at first diagnosed the appellant with a psychiatric illness in the nature of an adjustment disorder with mixed anxiety and depressed mood. In that original opinion, he said that the stressors in this workplace were significant in the onset of this disorder. Professor Whiteford changed that opinion on learning of what he described as "a significant past psychiatric history" of the appellant, with "fluctuating anxiety and depression documented in her medical records in 2002, 2004, 2005, 2008 and 2009 (prior to May 2009)". In his ultimate opinion, the appellant's pre-existing anxiety disorder was exacerbated by work stressors between May 2009 and March 2010, such that the appellant suffered an anxiety disorder and a depressive disorder. Dr Byth's diagnosis was that the appellant had developed major depression with prominent anxiety and depression along with post-traumatic stress disorder, all as a result of her work during the Harrison period.

[70] The trial judge found it unnecessary to determine which opinion was to be preferred as to the appellant's mental state prior to the relevant period. According to the evidence of each psychiatrist, the stressors in the appellant's workplace during the Harrison period were causative of her condition at the time of the trial. In the opinion of each psychiatrist, it was unlikely that the appellant would work again. Although Professor Whiteford thought that the appellant had a pre-existing anxiety disorder, he wrote that it was unlikely that that was at a level of more than five per cent. It had not affected her work prior to this period.

[71] In summary, the matters raised by the respondent's notice of contention do not provide a basis for disagreeing with the reasoning of the trial judge on this question of causation. On the facts found by his Honour about Ms Harrison's conduct, it constituted a breach of the respondent's duty of care. That conduct, in the context of the appellant's excessive workload, caused the development of the appellant's psychiatric illness.

Damages

[72] The trial judge agreed with a schedule of damages which had been provided by the respondent. He held that had the appellant succeeded, the appropriate award of damages would have been $435,583.98. He noted that the component of her claim for the loss of a future earning capacity was quantified by lost earnings over six years, that is until the appellant was aged 67, but with an allowance of a discount of 15 per cent for contingencies which might have reduced the length of that period. His Honour accepted that a more realistic period was until the appellant was aged 65 years and that the level of discount should be 35 per cent.

[73] The appellant argues that the discount of 35 per cent was excessive. The discount was applied apparently not to allow for a chance that the appellant would return to work, but instead for the prospect that other circumstances might have caused the appellant to cease work before the age of 65. The effect of the discount was to assess this component of loss on the premise that the appellant would have certainly worked to, but not beyond, a point near her 64th birthday. The appellant was not in perfect physical health. Of course there was no single correct rate of discount: this was a discretionary judgment. I am not persuaded that the trial judge's assessment was affected by error and should be disturbed.

Conclusion and orders

[74] The trial judge erred in dismissing the claim. The appellant should have been awarded damages in (at least) the amount which he assessed. I would order as follows:

(1) Appeal allowed.

(2) The judgment of 25 June 2015 and the order for costs of the proceedings in the District Court be set aside.

(3) There be judgment for the appellant against the respondent in the sum of $435,583.98.

(4) The respondent pay the appellant's costs of the appeal and of the proceedings in the District Court.

[75] **BODDICE J:** I have read the reasons for judgment of Philip McMurdo JA. I agree with those reasons and with the proposed orders.