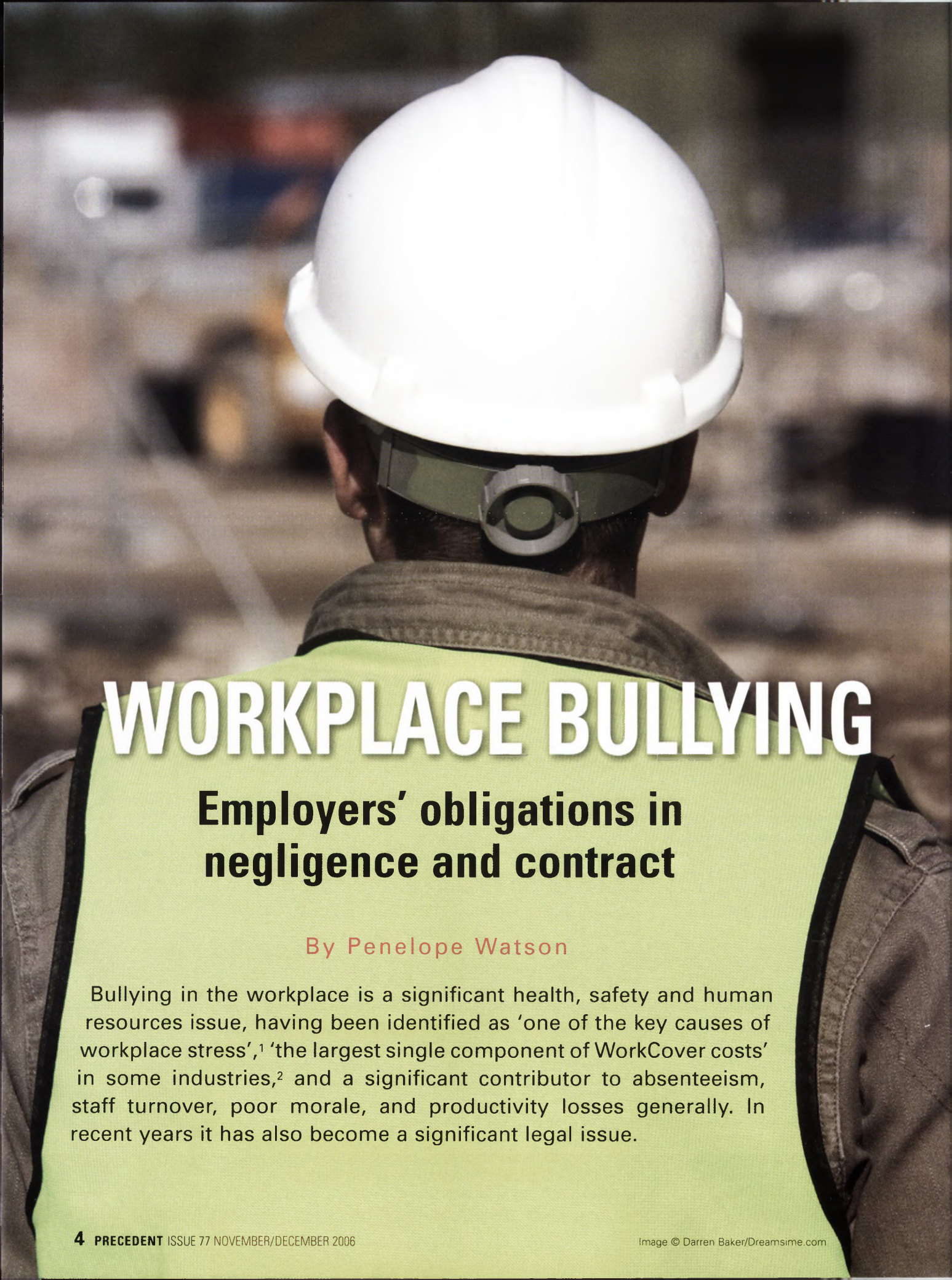

WORKPLACE BULLYING

Employers' obligations in negligence and contract

By Penelope Watson

Bullying in the workplace is a significant health, safety and human resources issue, having been identified as 'one of the key causes of workplace stress',[1] 'the largest single component of WorkCover costs' in some industries,[2] and a significant contributor to absenteeism, staff turnover, poor morale, and productivity losses generally. In recent years it has also become a significant legal issue.

Psychological and physical consequences of bullying include high levels of distress, anxiety disorders including panic attacks, post-traumatic stress disorder, depression and insomnia, loss of self-esteem and confidence, feelings of social isolation, incapacity to work or reduced work performance, and deteriorating relationships outside work.[3] The Beyond Bullying Association[4] estimated in 2001 that between 400,000 and 2 million Australians would be harassed at work that year, while 2.5 million to 5 million would experience workplace harassment at some time in their career. Research from Griffith University found that 3.5% of the working population is bullied, and the average cost of serious 'bullying' is $20,000 per employee.[5] A recent impact and cost assessment calculated that workplace bullying costs employers between $6 – $36bn annually, taking into account hidden and opportunity costs,[6] while other sources[7] put the figure between $6bn and $13bn.

Until recently, the small volume of caselaw on the subject in NSW consisted largely of unfair dismissal claims pursued by employees under s84 of the *Industrial Relations Act* 1996 (NSW), which treats bullying as a component of the unfairness associated with termination of employment.[8] Although there is no specific offence or recognised wrong called 'bullying', the range of legal alternatives for redress is wide. Strategies can be aimed directly at the perpetrator, such as criminal actions for assault, battery, harassment or stalking, and various property offences; obtaining apprehended violence orders or possibly injunctions;[9] tort actions for assault and battery, trespass to goods where relevant, less commonly for intimidation or under *Wilkinson v Downton*; and discrimination claims pursuant to statute.[10] Strategies can also target the employer, most obviously in claims for compensation based on negligence, workers' compensation legislation,[11] or breach of contract, and sanctions imposed under occupational health and safety legislation.[12] Outside litigation, many workplaces provide formal internal grievance procedures and alternative dispute resolution mechanisms such as negotiation, which may obviate the need for legal action of any kind. Given the high level of awareness of workplace bullying as an issue, and availability of guidance for employers on how to address it,[13] failure to put in place and enforce such a policy may be negligent. This article examines and analyses recent developments in negligence and contract law relating to workplace bullying and psychiatric injury.

DEFINITION

According to Worksafe WA, workplace bullying is 'repeated, inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise… at the place of work and/or in the course of employment, which could be reasonably regarded as undermining the individual's right to dignity at work'.[14] Similar definitions are used by other organisations.[15] Certain common features recur, especially a focus on conduct or behaviour judged to be inappropriate or offensive by means of an external standard irrespective of intention; repetition of the behaviour; the emphasis on emotional consequences (offends, insults, humiliates, intimidates, undermines, degrades) and specific recognition of psychological injury as an aspect of workplace health and safety.

Bullying has been identified[16] as comprising one or more of the following: unreasonable demands and impossible targets; restrictive and petty work rules; constant intrusive surveillance or monitoring; being given no say in how the job is done; interference with personal belongings or sabotage of work; shouting or using abusive language; open or implied threat of the sack or demotion; oppressive unhappy work environment; compulsory overtime, and/or unfair rostering or allocation of work; being made to feel afraid to speak up about conditions, behaviours or health and safety; being required to perform tasks without adequate training, resulting in criticism of the task performed; and being forced to stay back to finish work or being given additional tasks.

NAIDU v GROUP 4 SECURITAS

The facts in *Naidu v Group 4 Securitas Pty Ltd and Anor*,[17] in which the plaintiff was recently awarded $1.9m for major depression and post-traumatic stress disorder arising out of a sustained course of bullying over four years by a work supervisor, included every one of these aspects, and more. Mr Naidu was a 30-year-old security guard, contracted by his employer, Group 4, to work at the premises of News Ltd (the second defendant), under the direct and exclusive supervision of a News Ltd manager, Mr Chaloner. The >>

plaintiff succeeded against both employers in negligence, and also against his own employer for breach of contract. The case touched on many of the areas listed above, including workers' compensation, racial discrimination, and *Wilkinson v Downton*. The major issues were causation, whether the supervisor's behaviour occurred in the course of his employment, and vicarious liability of either or both employers for the supervisor's intentional misconduct. The general substance of the plaintiff's allegations about Chaloner's behaviour was not in dispute, although some of the detail was contested. Even the second defendant conceded that their employee's conduct had been 'indefensible and outrageous', basing their defence on their immediate termination of his employment once they found out about his behaviour.[18]

Examples of the treatment to which Mr Naidu was subjected, many corroborated by fellow employees, included being shouted at and verbally abused on a daily basis, called names such as 'monkey face', 'black cunt', 'prick', 'coconut head', 'poofter', 'piker', 'black man'. According to Mr Naidu, his supervisor [27] 'always seemed very angry with me and he'll call me into his office as soon as he comes in... if he sees me in the foyer he'll say 'what are you doing over there, you black man, you coconut head? And he'll show his tantrum by throwing his file on the floor and asking me to pick it up for him... That's how – basically I started my day, every day.' When spoken to in this way he said 'I used to cry and say to him, why are you saying all that to me. His normal words were 'if you want a job you just do your job and fuck off'. [28] On many occasions the supervisor would deliberately humiliate Mr Naidu in front of others, telling them 'this is how you control your staff'. Petty rules and restrictions, such as being required to ask permission to go to the toilet, were the norm. Although his normal work hours were supposed to be 7am to 4pm, Mr Chaloner made him continue working until 10 or 11pm, and would call him from home at 10pm to check that he was still at the office. When the plaintiff moved to the Central Coast, these hours required him to catch his train to work at 4.30am, and not return home until 1am the following day, spending three hours per day at his home out of 24. This happened every night, Monday to Friday, and he was made to work a 12-hour shift on Sundays as well. He found it very difficult and would 'mostly cry, even on the train going home' and it also caused domestic arguments. The plaintiff complained about the 'extraordinary' hours and his treatment from Mr Chaloner many times to his supervisor at Group 4, but his hours were never reduced. In Mr Naidu's words: 'I was always very, very tired, extremely tired, but because of the threats I was getting that if I leave there I won't get a job anywhere, he'll make sure that I don't get a job. He will do me, that was his normal term to me and he'll make sure that I won't work and he'll hit the wall. He'll hold my shirt, kick the chair, throw the books at me ... I was very fearful.' [33]

The 'most extreme' behaviour occurred during a strike, when the plaintiff and other security staff were required to live on the premises for a week. Mr Chaloner would make the plaintiff get up at 5am to guard the showers which had no doors on them, and force him to watch while he masturbated. On leaving the shower he would grab or touch the plaintiff on the genitals through his clothes and taunt him. The plaintiff said 'I felt very sick, I felt like a numbness in me and I just didn't know what to do. I was just crying my head off because I just didn't know what to do because I didn't know who to turn to, who to talk to about it.' [41] On a number of occasions, Mr Chaloner forced the plaintiff to do labouring work at Chaloner's home during his holidays or weekends. He was never paid for any of the overtime and additional hours, either at work or elsewhere.

Adams J commented in his judgment that 'as the plaintiff's evidence unfolded, I found it difficult to accept the truthfulness of his account, so extraordinary did his description of Mr Chaloner's conduct seem, and so passive was the plaintiff's response'. He went on to conclude, however, that the plaintiff's evidence was 'not only truthful (in the sense that he believes it to be true) but by and large reliable'.[19] He continued with considerable compassion [16]: 'It is perhaps difficult for a judge chosen from a Bar known, if not notorious, for its robust attitude to adversarial confrontation, to understand how a person might be reduced to the plaintiff's profound sense of powerlessness – how and why he remained a victim for so long – [but] I do not have any real doubt that this is precisely what happened, or that his pitiable condition was both induced, and calculatedly induced, by the misconduct of Mr Chaloner towards him.' All the aspects of Mr Chaloner's conduct detailed above were 'part and parcel of the process of exercising control over and demeaning the plaintiff'. [203]

Non-delegable duty and breach of contract

It is well-established at common law that an employer owes a non-delegable duty of care to its employees to ensure that reasonable care is taken to avoid exposing them to unnecessary risks of injury. The common element in the relationship between the parties which generates a non-delegable duty is that 'the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person ...as to assume a particular responsibility for his...safety, where the person affected might reasonably expect that due care will be exercised.'[20] The High Court has recently affirmed that 'if there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards.'[21] The obligation to provide a safe system of work and to protect an employee from reasonably foreseeable risks includes risks of psychological injury.[22] The duty 'rests on an employer personally...even though the actual fault be that of a servant or agent... to ensure that all reasonable steps are taken'.[23] Adams J found that both employers owed the plaintiff a non-delegable duty, based on *TNT Australia Pty Ltd v Christie & 2 Ors*.[24]

The central issue in relation to the plaintiff's own employer was whether it knew or ought to have known of the manner

in which the plaintiff was treated by Chaloner. As Lord Hutton explained in *Waters (AP) v Commissioner of Police for the Metropolis,*[25] 'It is not every course of victimisation or bullying by fellow employees which would give rise to a cause of action against the employer, and an employee may have to accept some degree of unpleasantness from fellow workers ...the employer will not be liable unless he knows or ought to know that the harassment is taking place and fails to take reasonable steps to prevent it.' Adams J stressed that general complaints that Chaloner was a demanding and unreasonable person to work with 'would not suggest the reasonable possibility of an ensuing psychiatric injury, although ...this must be a matter of degree... some information would need to be conveyed suggestive of serious distress as distinct... from indignation or irritation.' [190] His Honour considered that in the normal course general complaints about unreasonable or demanding behaviour by superiors would not make psychiatric illness foreseeable. Similarly, in *Koehler v Cerebos,*[26] the leading case on workplace stress injury, the High Court considered that foreseeability of psychiatric injury would depend on the employee having complained specifically about such health issues. That case concerned a merchandising representative who suffered a major depressive illness as a result of stress from overwork.[27] The High Court acknowledged that employers do have a duty 'to take reasonable care to avoid psychiatric injury' but stressed that the content of that duty 'cannot be considered without taking account of the obligations which the parties owe one another under the contract of employment... equity... and ... any applicable statutory provisions... The central inquiry remains whether, in all the circumstances, the risk of a plaintiff... sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful... The relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable... and... that invites attention to the nature and extent of the work being done by the particular employee and signs given by the employee concerned.'[28]

For pure mental harm to be compensable, it must constitute a 'recognised psychiatric illness',[29] although it is no longer necessary[30] to prove direct sensory perception of an event or its immediate aftermath, nor sudden shock. In *Tame* and *Annetts,* the High Court held that the 'normal fortitude' of the plaintiff was not a precondition to liability for negligently inflicting psychiatric injury, although it would be a relevant consideration. The *Civil Liability Act* 2002 (NSW)[31] expressly states that there is no duty not to cause the plaintiff mental harm unless the defendant 'ought to have foreseen that a person of normal fortitude might, in the circumstances... suffer a recognised psychiatric illness'. Thus it is not necessary for the plaintiff to demonstrate normal fortitude, only that the breach was such as might foreseeably cause injury to such a person. Once this has been shown, the 'eggshell skull' rule operates in relation to the extent of harm suffered. The plaintiff lost in *Koehler* because, although she had complained frequently about the impossibility of getting the amount of work done in the time allotted, none of the complaints related to her health, and when she did finally become sick, both she and her doctor initially considered the injury to be physical. On the facts, there was no reason for the employer to suspect risk to the plaintiff's psychiatric health, and no indication of any particular vulnerability to such injury. Much of the reasoning in *Koehler* turned on the contract of employment, explaining the High Court's criticisms of the approach to workplace stress adopted by the UK Court of Appeal in three cases reported together as *Sutherland v Hatton.*[32] Adams J noted the 'notoriously under-reported' nature of bullying even in the workplace, 'and the undoubted fact that many victims seem unable or unwilling to take action at least for a considerable period of time, [showing] that such responses are well within the range of ordinary human conduct.' [15] Thus he considered the plaintiff to be a person of normal fortitude. He attributed the plaintiff's failure to complain more vehemently to 'fear of reprisal, shame and embarrassment and a sense of subordination and overwhelming powerlessness' [15].

On the question of the employer's actual or constructive knowledge, Adams J said at [200]: 'the starting point is that Mr Blinkworth [the plaintiff's supervisor at Group 4] knew or ought to have known from his own relationship with Mr Chaloner that the latter was likely to use intimidation as one of his techniques of management and that the plaintiff would be the butt of this behaviour. It follows that Mr Blinkworth had a responsibility, under the plaintiff's contract of employment, to make reasonable enquiries of the >>

plaintiff and other co-workers at the site about its nature and extent... Permitting such conduct to continue for a significant period carried with it the reasonably foreseeable risk of causing a psychological illness of the kind ultimately suffered.' This was qualified by the recognition that the employer's obligation [192] 'cannot be an absolute one. It is plainly not only impossible but offensively invasive for an employer so to supervise the conduct of its employees as to make itself aware...of all possibly offensive conduct. Inevitably the question must be whether in the circumstances the employer ought to have known.' Even a single instance of serious misconduct, however, would impose an obligation on the employer to enquire into the truth and extent of the allegations, including enquiring about the victim's response to, and ability to cope with, the conduct. [193] 'Permitting intimidatory conduct to be inflicted on employees is a breach ... of an implicit term of every contract of employment that employees are not to be placed in fear of insult or physical harm. A fortiori, permitting a course of intimidation in the workplace is a substantial breach and will sound in damages.' In addition 'an employer has a duty by virtue of an implied term in the contract of employment to protect all employees from racial or personal vilification' independent of the *Anti-Discrimination Act* 1977 or similar legislation. The plaintiff's employer was found liable both in negligence and for breach of contract.

Vicarious liability

Vicarious liability for the acts of Chaloner was the crux of the plaintiff's case against the second defendant, since there was no contractual relationship. The first defendant was negligent because Mr Blinkworth's personal knowledge of the plaintiff's supervisor meant he had a contractual duty to investigate the circumstances surrounding Mr Naidu's position, and having failed to do so, psychiatric injury to the plaintiff was foreseeable over time. The knowledge of the first defendant was central to the finding against it of breach of its non-delegable duty of care. Vicarious liability for wrongful acts of employees is attributed to employers in the absence of fault, independent of the employer's knowledge. Although Adams J found that News Ltd owed the plaintiff a non-delegable duty of care, such duties are now qualified by s5Q of the *Civil Liability Act* 2002 (NSW), which states that liability for breach of a non-delegable duty 'is to be determined as if the liability were the vicarious liability of the defendant'. The key to vicarious liability is whether the wrongful act was committed 'in the course of employment', or within the scope of the employment, since 'not everything that an employee does at work, or during working hours, is sufficiently connected with the duties and responsibilities of the employee to be regarded as within the scope of employment. And the fact that wrongdoing occurs away from the workplace, or outside normal working hours, is not conclusive against liability.'[33] In the words of the Salmond test,[34] 'an employer is liable even for unauthorised acts if they are so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act'.[35] Clearly Mr Chaloner's bullying of the plaintiff was not authorised, but the issue was whether it constituted an unauthorised mode of performing the task of supervision which was authorised. In *Lepore*, the High Court refused to accept that sexual abuse of primary school children by teachers occurred within the course of employment, and considered that such matters should be determined in accordance with principles of vicarious liability rather than non-delegable duty. To hold schools liable for any injury, accidental or intentional, inflicted upon a pupil by a teacher, simply on the basis of non-delegable duty, was seen as 'too broad'. 'Course of employment' has been interpreted more liberally in Canada and the UK, in two similar cases, *Bazley v Curry*[36] and *Lister v Hesley Hall Ltd.*[37] As both dealt with sexual abuse of children in residential-care settings rather than day schools, the connection to the course of employment was more clearcut, but the Canadian court in particular posed a 'scope of the risk' test, which would hold employers liable for harmful consequences of their enterprise. Neither case considered non-delegable duty. In *Lepore,* Kirby J pointed to the difficulty of applying the Salmond test to intentional wrongs, proposing instead a test of 'sufficiently close connection,'[38] based on *Lister* and *Bazley*.

Negligence by employees in the performance of authorised acts is more likely to be attributed to employers, but intentional wrongs and even criminal acts may fall within the course of employment. In *Deatons v Flew,* a hotel customer was seriously injured when a barmaid threw a glass into his face. Her case was that she intended to throw only the contents, as the customer was drunk and unruly, and it was part of her position as barmaid to keep order in the bar. The court held that her conduct was 'an act of passion and resentment done neither in furtherance of the master's interests, nor under his express or implied authority, nor as an incident to or in consequence of anything the barmaid was employed to do'.[39] On the other hand, an employer was held liable in *Lloyd v Grace Smith & Co*[40] for the unauthorised fraud of a managing clerk in a solicitor's firm perpetrated on a client of the firm, because the workplace arrangements had given the employee 'ostensible authority' to act on the firm's behalf. Lord MacNaughten (at 733) said that the employer, having put the employee in the place of the employer to do a certain class of acts, must be answerable for the manner in which that agent has conducted himself in doing the business of the employer. Similarly, in *Morris v CW Martin & Sons Ltd*,[41] an employer in a cleaning business was held liable for theft of a fur by his employee who had been given the task of cleaning it. Acts that may have been interpreted as assaults have led to findings of vicarious liability in many cases, including *Canterbury Bankstown Rugby League Football Club v Rogers,*[42] and *McDonald v State of NSW.*[43] In *State of NSW v Jeffery,*[44] the bullying of an employee of a police club by his supervising police officer was held to be an 'unauthorised mode of performing an authorised role'. In *Waters v Commissioner of Police,*[45] a female police officer sued her employer for breach of contract, breach of statutory duty and negligence in failing to deal properly with her complaints

of being raped by a fellow officer, and subsequent hostile treatment and bullying resulting from her having 'broken the team rules' by complaining. Alternatively, she alleged that the employer was vicariously liable. Her statement of claim was struck out by the lower court as disclosing no cause of action, but the House of Lords disagreed, and sent the matter back for re-hearing. According to Lord Slynn of Hadley, 'Generically many of the acts alleged can be seen as a form of bullying. The employer, or those to whom he delegated the responsibilities for running his organisation, should have taken steps to stop it, to protect the employee from it. They failed to do so.'

In *Naidu*, the sexual incidents complained of by the plaintiff were specifically excluded, but the second defendant, Mr Chaloner's employer, was held vicariously liable for the remaining at-work misconduct of its employee. Despite the conduct being deliberate,[46] it occurred within the course of employment, either constituting an unauthorised mode of performing the task of supervision, or falling within Chaloner's ostensible authority. The case is the first in which such a substantial sum of damages has been awarded for workplace bullying, and makes it abundantly clear to employers that their obligations in relation to a safe workplace are to be taken seriously, including those relating to stress and psychological injury. ■

Notes: **1** AW Needham, *Workplace Bullying*, (Penguin Books, New Zealand, 2003) p16. **2** Victorian police force, 'New Workplace Bullying Rules: How Do They Affect You?' *Victoria Police Association Journal*, August 2005, p10. **3** 'Preventing Workplace Bullying: A Guide for Employers and Employees', ACT WorkCover, July 2004, p4. **4** ' Fact Sheet: Workplace Bullying', Human Rights and Equal Opportunity Commission Website: Information for Employers, http://www.hreoc.gov.au/info_for_employers/fact/workplace.html. **5** ACT WorkCover, above n3, p1. **6** HREOC website, above n4. **7** ACT WorkCover, above n3, p1. **8** V Hiley 'No room for bullying in the legal workplace', (Sept 2004) *Law Society Journal*, p22. **9** Difficult to obtain in relation to personal injury, available in relation to physical space. See *Egan v Egan* [1975] Ch 218; *Zimitat v Douglas* [1979] Qd R 454; *Gouriet v Union of Postal Workers* [1978] AC 435; *Corvisy v Corvisey* [1982] 2 NSWLR 557; *Parry v Crooks* (1981) 27 SASR 1; Penelope Watson, 'Vi et Armis: Law of Trespass to the Person' (2003) 58 *Plaintiff* 13. **10** Under, for example, *Anti-Discrimination Act* 1977 (NSW); *Racial Discrimination Act* 1975 (NSW); *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth); *Race Discrimination Act* 1975 (Cth). The NSW *Anti-Discrimination Act* is wide-ranging, relating to race, sex, marital status, sexual preference, carers' duties, disability, harassment and age discrimination. **11** For example, *Workers Compensation Act* 1987 (NSW). **12** For example, *Occupational Health and Safety Act* 2000 (NSW), s12. **13** For example, ACT WorkCover, above n3. **14** Worksafe WA. **15** For example, the Law Society Council of NSW defines bullying as 'behaviour that intimidates, offends, degrades, insults or humiliates a worker... and which includes physical or psychological behaviour', and the Victorian Police Association states that: 'Workplace bullying is repeated unreasonable behaviour directed towards an employee, or group of employees, that intimidates, humiliates or undermines others, and creates a risk to health or safety.' See above n2. **16** Mental Health Association of NSW, quoted in P Blazey, 'Dignity at Work' (2003) 60 *Plaintiff* 27. **17** [2005] NSWSC 618 (liability) and [2006] NSWSC 144 (damages). **18** *Naidu*, 2005, above n17, [4]. **19** *Naidu*, 2005 [12]. **20** *Burnie Port v General Jones* (1994) 179 CLR 520 (Mason CJ, Deane, Dawson, Toohey, Gaudron JJ) quoting *Kondis v State Transport Authority* (1984) 154 CLR 672 (Mason J). **21** *Czatyrko v Edith Cowan University* (2005) 214 ALR 349, Gleeson CJ, McHugh, Callinan, Hayne, Heydon JJ; *Hamilton v Nuroof (WA) Pty Ltd*, (1956) 96 CLR 18, Dixon CJ and Kitto J. **22** *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; see also *Occupational Health and Safety Act* 2000 (NSW); *Civil Liability Act* 2002 (NSW) Pt 3. **23** *Hamilton v Nuroof*, above n21, Fullagar J, [32]. **24** [2003] NSWCA 47. **25** [2000] UKHL 50. **26** (2005) 214 ALR 355. **27** See article by Kylie Burns in this edition of *Precedent*. **28** *Koehler*, n26, p10 (McHugh, Gummow, Hayne, Heydon JJ). **29** *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Civil Liability Act* 2002 (NSW) s31. **30** *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317. **31** Section 32 (1). **32** [2002] EWCA Civ 76. **33** *NSW v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511, 522 (Gleeson CJ). **34** Salmond, *Law of Torts*, first edition 1907 and subsequent editions. **35** As stated by Gleeson CJ, *NSW v Lepore*, above n33. **36** [1999] 2 SCR 534. **37** [2001] UKHL 22. **38** *Lepore*, above n33, 610. **39** (1949) 79 CLR 370 (Dixon J). **40** [1912] AC 716. **41** [1966] 1 QB 716. **42** [1993] Aust Torts Reps 81-246 (NSW CA). Improper mode of performing authorised act of tackling opponent. **43** [1999] NSWSC 350 (unreported, Grove J, 20 April 1999); nurse acting in course of employment in assaulting mentally disabled patient. **44** (2000) Aust Torts Reps 81-580 (NSWCA). **45** Above n25. **46** The High Court made it plain in *Gray v Motor Accident Commission* (1998) 196 CLR 1 that negligence can include intentional conduct.

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